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No. 64012-6-1

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

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.

BRIEF OF APPELLANTS

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I. Introduction

Almost twenty years ago in 1991, three individual members of the Hulbert family and the William Hulbert Mill Company Limited Partnership (“Hulbert Mill LP”) sold thirty acres of property (“Thirty Acres”) in Everett, Washington to the Port of Everett (“the Port”) pursuant to an Agreement of Purchase and Sale (“Agreement”). In anticipation of the sale, the Port conducted an environmental assessment of the Thirty Acres which concluded that there was some risk of environmental liability to the Port if it purchased the property. The assessment report recommended that the Port perform additional investigation at the property.

After months of negotiations, the parties agreed that the Hulberts would fund all additional environmental investigation and remediation for a period of three years after the closing date of the sale. Notwithstanding the Port’s prior disposal of dredging soils onto the Hulbert property, the negotiations and final language of the Agreement manifested the parties’ intent that the Hulberts indemnify the Port for all costs relating to the investigation and clean-up, regardless of fault, for the three-year period. A necessary component of the Agreement was the parties’ intent that the Hulberts’ obligation to indemnify the Port would end in 1994 at the conclusion of the three-year period and the Port would thereafter be precluded from seeking indemnification for any environmental liabilities

arising thereafter regardless of the origination time of such liabilities. In addition to the limitations period, the Agreement also imposed notice and process obligations on the Port in the event it sought indemnification under the Agreement.

Escrow was established for the Hulbert's sale obligations; the Hulberts performed the clean-up activities required of them in the Agreement and the Port did not seek indemnity for additional costs. Fifteen years later, long after the Hulberts' indemnification period had ended, the Port came back to the Hulberts, and notified them of its intent to seek contribution under the Model Toxics Control Act, RCW 70.105D ("MTCA") for the very same environmental liabilities covered by the Agreement. By the express terms of the indemnification provision in the Agreement, the Port's request for contribution was twelve years too late. As envisioned by the parties upon execution, the Agreement is a complete defense to the Port's claims for contribution under MTCA.

This lawsuit arose from the Port's May 23, 2006 notifications to the Hulberts alleging that the Hulberts are potentially liable for costs incurred in the further investigation and remediation of the Thirty Acres. In response, the Hulberts sought a declaratory judgment in the trial court that the indemnity termination clause in the Agreement barred MTCA liability. Ignoring the clear evidence of the parties' intent and the language of the Agreement, the trial court erroneously concluded that the

Agreement did not serve as a bar to MTCA contribution. The trial court disregarded the context and language of the Agreement and interpreted the Agreement in a manner that rendered the three-year limitation on liability meaningless. The trial court's decision does not comport with Washington law on contract interpretation or on the allocation of MTCA liability. The Agreement clearly precludes MTCA contribution on behalf of the Hulberts. In the alternative, the trial court should be reversed because disputed factual issues preclude the entry of summary judgment in this case.

The trial court also improperly certified its ruling on the Agreement pursuant to CR 54(b), despite the fact that the Hulberts' indemnity defense based on the Agreement was not segregable from the Port's MTCA claims.

Finally, the trial court improperly awarded attorneys' fees to the Port. The trial court should be reversed as to all three decisions.

II. Assignments of Error and Issues on Appeal

1. The trial court erred when it disregarded the express terms of the Agreement and the context in which the Agreement was written, including the evidence of negotiations between the parties, to conclude that the Agreement did not bar a MTCA contribution claim by the Port against the Hulberts for environmental clean-up at the property.

2. The trial court erred when it certified its ruling on the Agreement pursuant to CR 54(b) where the Hulberts' indemnity defense against the Port's contribution claims was not a segregable issue subject to certification.

3. The trial court erred when it awarded \$111,101.87 in attorneys' fees to the Port where the fees were not properly segregated and the award included substantial amounts for claims unrelated to the Hulberts' indemnity defense.

III. Statement of the Case

A. Parties

Appellants in this action are William G. Hulbert, III, Tanauan Hulbert Martin, and David Francis Hulbert, three individual residents of the State of Washington; the William Hulbert Mill Company Limited Partnership ("Hulbert Mill LP"), a Washington limited partnership; and William G. Hulbert, III and Tanauan Hulbert Martin in their capacity as Trustees for the William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust ("Trustees") (collectively "Hulberts"). Respondent is the Port of Everett ("the Port"), a Port District headquartered in Everett, Washington.

This dispute arises from the Port's May 23, 2006 notifications to the Hulberts alleging that the Hulberts are potentially liable for remedial action costs at the Thirty Acres and alleging that the Hulberts have a duty

to indemnify the Port for a portion of the Port's liability at that site.

CP 1756-59.

B. The Thirty Acres

The Thirty Acres are located between 11th and 13th Streets off West Marine View Drive, Everett, Snohomish County, Washington. CP 1573. The site has been used for a variety of commercial and industrial operations since the early 1900's. *Id.* The William Hulbert Mill Company Inc., ("Mill Company") a non-party to this case, began milling operations on the Thirty Acres in the early 1920's. *Id.* at 1512. The mill was partly destroyed in a fire in 1956, and ended operations around 1960. *Id.* Following the cessation of milling operations, the Mill Company leased portions of the Thirty Acres to various industrial operations until 1986 when the Mill Company dissolved. CP 1515. As a part of the winding up of the Mill Company's affairs, it transferred the Thirty Acres to Hulbert Mill LP. *Id.* From 1986-1990, Hulbert Mill LP leased the Thirty Acres to various commercial and industrial tenants. *See id.* at 1466. In 1990, one portion of the Thirty Acres was transferred to William G. Hulbert, Tanauan Hulbert Martin and David Francis Hulbert, who owned the property as Tenants in Common. *Id.* at 1462. Hulbert Mill LP retained ownership of the remaining portion of the property. In 1991, the entire Thirty Acres were sold to the Port. *Id.*

C. The Sale of the Thirty Acres to the Port

On March 8, 1991, Hulbert Mill LP and the Hulbert Tenants in Common (collectively “Hulberts”) executed an Agreement of Purchase and Sale conveying the Thirty Acres to the Port. CP 1462-1503. At the time of the sale, approximately eleven tenants operated on the Thirty Acres, and the Hulberts assigned those leases to the Port as a part of the sale. CP 1465-66. The Agreement resulted from months of negotiations between the parties. In conjunction with those negotiations, the Port engaged Kleinfelder, Inc., an environmental consultant, to perform a Phase I Environmental Site Assessment of the Thirty Acres.¹ On February 13, 1991, nearly one month before the parties signed the Agreement, Kleinfelder delivered to the Port its Phase I Report (“Kleinfelder Report”), which recorded visits to each of the leaseholds on the Thirty Acres and concluded that there was some risk of environmental liability to the Port if it purchased the Thirty Acres. CP 1814. The Kleinfelder Report recommended that the Port perform additional investigation at the Thirty Acres. CP 1467-68.

In response to the conclusions in the Kleinfelder Report, the parties negotiated provisions to allocate responsibility for necessary present and future clean-up activities on the Thirty Acres. As a result of these negotiations, the Agreement contains three key components to address

¹ A Phase I Environmental Site Assessment is a report which identifies historical uses of a given property and the potential for environmental liabilities.

potential environmental contamination: 1) Article Four of the Agreement, in which the Port accepted the Thirty Acres with full knowledge of ongoing environmental liabilities; 2) an addendum entitled “Additional Environmental Testing and Clean Up Activities” attached to the Agreement as Exhibit C (“Exhibit C”); and 3) the “Certificate and Indemnity Regarding Hazardous Substances” attached to the Agreement at Exhibit D (“Certificate”). CP 1466-70, 1481-88.

Article Four details the “environmental audit” that took place on the Thirty Acres, acknowledges that the Port and the Hulberts “agreed to take certain actions based on the Kleinfelder Report” and outlines the procedure for completing further investigation and clean-up of possible hazardous materials, if required. *Id.* at 1467. Article Four also conditions the Port’s acceptance of the Property on the terms of the Agreement and the attached Certificate. *Id.* The Certificate expressly provides that the Hulberts will indemnify the Port for the cost of all environmental investigation and remediation activities on the Thirty Acres but only for a period of three years. Both the Exhibit C clean up activities and the Certificate are repeatedly referenced and incorporated into the Agreement via Article Four. CP 1467. Article Four, Exhibit C and the Certificate evidence the parties’ intent that the Hulberts’ obligation to fund any environmental clean-up of the Thirty Acres would cease after March 8, 1994.

1. The Parties Negotiate for the Three-Year Limitations Period

The parties engaged in several months of negotiations before executing the final Agreement. The negotiations and the parties' conduct demonstrate that the Agreement was meant to preclude any environmental liability on the part of the Hulberts after March 8, 1994. During the negotiations, the Port attempted to secure a 25-year indemnity period, but ultimately agreed to the three-year limit. Supp. CP² 1908. Throughout the negotiations, the Hulberts understood that the Agreement would serve as a bar to all future contribution actions against them by the Port after March 8, 1994. Supp. CP 1900-02, 1904-05, 1907-09. The Hulberts and their lawyer understood that in exchange for immediately undertaking certain specified actions listed in Exhibit C and for agreeing to indemnify the Port for three years after the sale, the Port would not seek any future contribution action from them for environmental liabilities. *Id.* at 1901-02, 1908. The Hulberts would not have signed the Agreement if the Port retained the right to seek contribution for environmental liabilities beyond the expiration of the three-year indemnity period. *Id.* at 1905.

² On November 4, 2009, the Hulberts filed a Supplemental Designation of Clerk's Papers pursuant to RAP 9.6. Accordingly, those documents have not been assigned a CP page number by the Court. Documents contained in the supplemental designation will be cited in this brief as Supp. CP and numbered from 1896-1917.

2. The Certificate and Indemnity Regarding Hazardous Substances Imposes a Three-Year Indemnification Period

The Certificate was an essential part of the Hulberts' agreement with the Port, executed "in connection with and as partial consideration for the purchase of" the Thirty Acres. CP 1495. The Certificate expressly established a three-year indemnity period, during which the Hulberts (as sellers and indemnitors) would indemnify the Port (as buyer and indemnitee) for any claims and liabilities arising directly or indirectly from 1) activities conducted on the Thirty Acres during the Hulberts' ownership that contaminated the property; or 2) the discovery and clean-up of hazardous substances emanating from the Thirty Acres that were caused by contamination occurring during the Hulberts' ownership. CP 1496. Specifically, in the Certificate, the Hulberts "acknowledge[d] that [they] will be solely responsible for all costs and expenses relating to the clean-up of Hazardous Substances from the Property or from any other properties which become contaminated with Hazardous Substances as a result of activities on or the contamination of the Property during Seller's ownership of the Property." *Id.* The far-reaching indemnity protected the Port from "claims, demands, damages, losses, liens, liabilities, penalties, fines, lawsuits and other proceedings and costs and expenses" arising directly or indirectly from contamination that occurred prior to the sale. CP 1496.

However, the Certificate was not without limitation. The “blank check” indemnity provided by the Certificate was expressly limited to a three-year period, beginning on March 8, 1991, the date the sale closed. The Certificate states: “[t]he representations, warranties and covenants of [the Hulberts] set forth in this Certificate (including without limitation the indemnity provided for in paragraph 5 [sic] 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. During the parties’ negotiations, the Port originally sought a 25-year indemnity period, but the parties ultimately agreed on the three-year limitation. Supp. CP 1907-09.

The Certificate, as incorporated into the Agreement, was intended to serve as a contractual allocation and limitation of liability for environmental cleanup under MTCA and under any other environmental statute that might require contribution from the Hulberts. CP 1497-98. The Certificate comprehensively addressed all possible environmental liability by expressly incorporating 15 environmental statutes to define the term “hazardous substances.” *Id.* MTCA is one of the seven state statutes expressly included in this section of the Certificate, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq. (“CERCLA”) is one of the eight federal statutes also expressly incorporated. CP 1486-87. The intended

breadth of the Certificate is also evidenced by Sections One and Two of the Certificate, which confirm that the Hulberts had not received any notice from a governmental agency or other party (except the Kleinfelder Report), of the presence of hazardous substances on the Thirty Acres, nor received notice of any failure to comply with “all applicable local, state and federal environmental laws, regulations, ordinances and administrative and judicial orders relating to the generation, recycling, reuse, sale, storage, handling, transport and disposal of any Hazardous Substances.” CP 1484.

In addition to the limitations period, the Certificate also imposed notice and process obligations on the Port in the event it sought indemnification under the Agreement. CP 1496. The Certificate required the Port to promptly notify the Hulberts of any alleged environmental liability or potential liability and 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.”

Id.

During the indemnity period, the Port never provided the notice required by the Certificate nor informed the Hulberts in any manner of a claim for indemnity pursuant to the Agreement. CP 1815.

3. Article Four Incorporates the Three-Year Liability Period in the Certificate

The Port's acceptance of the property was expressly conditioned upon the three-year limitation on the Hulberts' liability set forth in the Certificate. CP 1467. Article Four of the Agreement is entitled "Feasibility, Physical Condition and Environmental Audit." 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.

Subject to the limitations in the Certificate, Article Four then sets forth the parties' plan for implementing the necessary clean-up actions identified in the Kleinfelder Report. Part 4.03 states that "Buyer and Seller have agreed to take certain actions based upon the Kleinfelder Report. These actions include follow-up testing as well as certain clean-up activities with respect to the Property, and are set forth on the attached Exhibit C." CP 1467. The activities enumerated in Exhibit C include specific testing, mitigation, and clean-up actions pertaining to specified areas of the Thirty Acres. *Id.* at 1481-83. Article Four further provides that most of these activities would occur after the closing on the sale of the Thirty Acres, and establishes that \$50,000 of the purchase price would be set aside in a money market account to fund their completion. *Id.* at 1467.

The escrowed account funds were released back to the Hulberts upon completion of the identified clean-up commitments and upon approval by the Port.

Article Four also establishes a scheme to resolve any additional testing or remediation proposed by Kleinfelder for the Thirty Acres as a result of the activities identified in Exhibit C. CP 1469-70. In such instance, the Port was to contact the Hulberts and provide the Hulberts with the opportunity to engage their own environmental consultant to advise on the appropriate course of action for future testing and remediation. *Id.* If the Hulberts chose to obtain their own consultant, then the Port's and the Hulberts' consultants would attempt to agree on a course of action. *Id.* In the event the consultants could not agree, the Agreement required the consultants to mutually select a third consultant to decide on the appropriate course of action. *Id.* The Agreement required the Hulberts to pay for the cost of undertaking any additional testing and remediation. *Id.*

Finally, Article Four expressly limited the Hulberts' obligations under the Certificate to the limitations set forth in Article Four, namely, the notice and dispute resolution process for any further clean-up activities set forth above. CP 1470.

D. The Hulberts Fulfill Their Obligations and the Escrowed Funds are Released

After the sale closed in March 1991, the Hulberts undertook the “Additional Environmental Testing and Clean Up Activities” listed in Exhibit C of the Agreement. The Port never asked the Hulberts to perform any additional activities or notified them of any deficiency in their performance. CP 1815. To the contrary, in 1992, the Port released the \$50,000 held in escrow back to the Hulberts, indicating that the Port was satisfied that the Hulberts had fulfilled all of their environmental obligations relating to the Thirty Acres.

E. The Port Notifies the Hulberts of Potential MTCA Liability

The Port did not contact the Hulberts for reimbursement under the Certificate during the indemnity period. Rather, fifteen years later, on May 23, 2006, the Port sent letters to the Hulberts indicating that they were “potentially liable persons” (“PLP”) under MTCA and subject to contribution for the cost of environmental investigation and remediation of the Thirty Acres. CP 1756-59. Without the notice to the Hulberts required by the Agreement, on or about 2001, the Port had commenced analysis and preparation for remedying contamination on the Thirty Acres and a larger parcel owned by the Port. CP 1815. Again, without notice, on April 20, 2004, the Port initiated a Voluntary Cleanup Program

application with the Washington State Department of Ecology for the 65-acre North Marina Redevelopment Site that includes the Thirty Acres. *Id.*

On May 23, 2006, approximately five years after the Port commenced analysis and preparation for remedial action, and for the very first time since the execution of the Agreement, it delivered two notice letters to the Hulberts (“PLP letters”). CP 1756-59. In the first PLP letter, the Port alleged that the Hulberts are potentially liable for remedial action costs at the Thirty Acres pursuant to MTCA. CP 1816. In the second PLP letter, the Port asserted that the notice was sent pursuant to the Agreement and the requirements of the Certificate, and claimed that it was entitled to indemnification for liability. The Port has since abandoned its claim for indemnity based on the Agreement, but maintains it is entitled to contribution under MTCA. CP 1817.

F. The Proceedings Below

On September 8, 2006, in response to the receipt of the PLP letters, the Hulberts filed a complaint for injunction, declaratory and other relief, primarily seeking a declaration that the Agreement barred the Port’s claim for MTCA contribution. CP 1885-90. Specifically, the Hulberts sought a declaratory judgment that the three-year indemnity period established in the Certificate and incorporated into the Agreement terminated the Hulberts’ obligation to indemnify the Port for all environmental liabilities as of March 8, 1994 and accordingly barred the Port’s contribution action.

CP 1890. The Hulberts also sought to enjoin the Port's investigation and remediation at the Thirty Acres until the court determined the Hulberts' liability based on the Agreement or MTCA. Because the Port began its investigation and remediation at the Thirty Acres five years before even providing notice to the Hulberts, the Hulberts argued in the alternative that they were deprived of their contractual right to challenge and/or control the clean-up as required in the Agreement and the Certificate.³ CP 1891. The trial court orally denied the Hulberts' request for temporary injunctive relief. The parties then engaged in written discovery.

In August and September 2007, the parties cross-moved for partial summary judgment on the issue of whether the Agreement is a bar to the Port's MTCA contribution claims. On December 10, 2007, the trial court entered an order granting the Port's motion and denying the Hulberts' motion, concluding that the Agreement did not bar the Port's claims for MTCA contribution. CP 1050. On May 12, 2009, the Port moved for "bifurcation" of the "contract claims" pursuant to CR 42 and for an award of attorneys' fees. CP 374. The Port asked the trial court to enter final judgment on its summary judgment ruling so that the Port could

³ Specifically, while the Hulberts maintained that all of their obligations relating to the property ended on March 8, 1994, they argued in the alternative that if the Port was going to read the three-year limitation on liability out of the contract, then the control requirements should be equally extended.

immediately collect attorneys' fees as the prevailing party at summary judgment. CP 380-88.

In the alternative to bifurcation, the Port sought certification of the court's December 10, 2007 order pursuant to CR 54(b). The Hulberts opposed the motion, contending that the Port failed to meet the standard for certification under CR 54(b) because the Hulberts' defense to contribution based on the Agreement was not segregable from the larger MTCA case as a whole. CP 199-216. The Hulberts further contended that there was just cause for delay and that the Port's only ground for seeking certification was its impermissible desire to immediately recover attorneys' fees. *Id.* The Hulberts also objected to the Port's request for attorneys' fees on the grounds that it was unreasonable, not properly segregated and sought fees for matters unrelated to the dispute over the Agreement. *Id.* at 209-216. At a hearing on June 3, 2009, the trial court refused to certify its summary judgment order because the Port had failed to provide the requisite findings for entry of a CR 54(b) order. The court ordered the Port to prepare proposed findings and to resubmit its request for attorneys' fees to eliminate certain unreasonable fees. *See* CP 92. The Hulberts objected to the Port's proposed findings and its second request for attorneys' fees. CP 61-72.

On July 27, 2009, the trial court granted the Port's motion and certified its December 10, 2007 order interpreting the Agreement, though

it struck several of the Port's proposed findings of fact as requested by the Hulberts. CP 23-26. On the same day, the trial court entered a final judgment against the Hulberts in the amount of \$111,101.87, which represented a reduced fee award from the Port's original demand, but was nonetheless unreasonable. This appeal followed.

IV. Summary of Argument

The Agreement for the Port's purchase of the Thirty Acres contains a quid pro quo with respect to environmental liabilities. 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. The environmental liabilities addressed in the Agreement were broad and included specific reference to both MTCA and CERCLA, along with 13 other environmental statutes. The three-year period was the subject of express negotiations between the parties, as an earlier draft of the contract proposed by the Port would have extended that period to 25 years. The Hulberts fulfilled each of their obligations under the Agreement, the three-year indemnity period passed, and the Port approved release of the Hulberts' escrowed funds. The Port cannot now - 15 years after the termination of the indemnity period- assert claims against the Hulberts for environmental liabilities that were expressly addressed in the Agreement.

It is well established that parties can contractually allocate their environmental liabilities under MTCA. *Car Wash Enterprises v. Kampanos*, 74 Wn. App. 537, 874 P.2d 868 (1994); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986) (upholding contractual indemnification agreement in private suit for contribution under CERCLA). It is equally well established that “a party may indemnify another party for liability arising out of a law not in existence at the time of contracting.” *Kerr McGhee v. Lefton Iron & Metal Co.*, 14 F.3d 321, 327 (7th Cir. 1994) (holding that broad indemnity provision in purchase and sale agreement transferred CERCLA liability from seller to buyer of property, prior to CERCLA’s enactment). The Port and the Hulberts intended to contractually allocate MTCA liability. They further intended that the Agreement serve as a bar to MTCA liability after March 8, 1994. Their Agreement should be enforced and the trial court should be reversed.

In the alternative, the trial court should be reversed because the Port failed to carry its burden on summary judgment. The declarations submitted in support of the Port’s motion created factual disputes such that summary judgment was inappropriate in this case.

V. Argument

A. Standard of Review

When reviewing an order on summary judgment, the standard of review is *de novo*. *Hearst Comm'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). The appellate court engages in the same inquiry as the trial court. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999) (citations omitted). Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, if any, show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c).

B. The Purchase and Sale Agreement Precludes MTCA Liability

There is nothing in MTCA that prohibits the contractual allocation of MTCA liability between private parties. *Car Wash Enterprises*, 74 Wn. App. at 545. As this Court has noted, the allocation of environmental risks and liabilities in real estate contracts is “an established and effective business practice.” *Id.* at 544. “In fact, such agreements may further the MTCA’s underlying purpose.” *Id.* at 545 (citations omitted). As the *Car Wash Enterprises* court explained, “MTCA expressly provides that it does not affect or modify in any way any person’s right to seek or obtain relief under other statutes or under common law, thereby recognizing implicitly that it does not impair the common law right to contract.” *Id.* at 544 (internal quotations omitted) (citing 70.105D.040(6)). Numerous courts

have reached the same conclusion in the CERCLA context, holding that potentially liable parties can contractually shift responsibility for their response costs via indemnity agreements similar to the one at issue here. *See Purolator Products Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124, 129 (W.D. N.Y. 1991) (collecting cases upholding contracts that preclude contribution actions). The key inquiry in each of these cases is whether the parties intended to allocate environmental liability.

As demonstrated below, the Hulberts and the Port intended to contractually allocate MTCA liability in the Agreement and limit the Hulberts' duty to indemnify the Port to a three-year period. The Agreement bars the Port's present MTCA contribution action and the trial court should be reversed.

1. The Express Terms of the Agreement Preclude Environmental Liability after March 8, 1994

The plain language of the Agreement bars the Port's MTCA contribution claim. By its terms, the Certificate establishes an indemnity period of three years in which the Hulberts would indemnify the Port for any and all environmental claims arising out of the Hulberts' ownership of the Thirty Acres. Specifically, part five of the Certificate states: "[t]he representations, warranties and covenants of [the Hulberts] set forth in this Certificate (including without limitation the indemnity provided for in paragraph 5 [sic] 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].” *Id.*

The bargained-for indemnity was extraordinarily broad, as it required the Hulberts to indemnify the Port for any and all liability in any way related to the presence of hazardous substances on the Thirty Acres. It is unfathomable that the Hulberts would have agreed to the indemnity provision if a later MTCA contribution action by the Port was a possibility. The Port’s assertion that the indemnity does not prevent its MTCA claim is the functional equivalent of removing the three-year limitation altogether. As the language of the Agreement and Certificate makes clear, the Hulberts and the Port explicitly agreed that the Hulberts would accept this expansive liability for a period of three years only, and after that point, the Hulberts’ obligations to the Port for any environmental liabilities would be terminated. The Superior Court decision notwithstanding, there is simply no other reasonable interpretation of the parties’ intent at the time of contract.

The trial court erred when it failed to consider two key terms of the Agreement that evidence the intent of the parties that the Agreement would preclude all future environmental liability as between the Hulberts and the Port after March 8, 1994. Specifically, the court failed to consider that 1) Article Four incorporates the Certificate into the Agreement and Conditions the Port’s acceptance of the property upon the terms in the

Certificate; and 2) The Certificate expressly encompasses environmental liability under MTCA and 14 other environmental statutes. CP 1467-98. The trial court's interpretation of the Agreement renders the above provisions meaningless and is accordingly in error.

a) Article Four Conditions the Port's Acceptance of the Property on the Limitations in the Certificate

The trial court erred when it failed to consider that Article Four of the Agreement expressly conditions the Port's acceptance of the Thirty Acres on the limitations in the Certificate. CP 1467. 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. This provision is not an "As Is" clause, which would be insufficient to contractually allocate MTCA liability. *See Car Wash Enterprises*, 74 Wn. App. at 546-47. To the contrary, this provision expressly acknowledged the Port's inspection of the Thirty Acres, its knowledge of potential environmental liabilities, and its acceptance of the parties' plan to address those potential liabilities based on the explicit terms and conditions in the Certificate. CP 1467.

In *Car Wash Enterprises*, the court found that the standard "AS IS" clause in a real estate contract was insufficient to transfer the risk of future

environmental liability from the seller to the buyer of the property at issue. 74 Wn. App. at 547. The court based this decision on the fact that both the existence of the pollution and the legal liability for such pollution did not exist when the parties executed the agreement. *Id.* at 546. The court considered the fact that the seller did not even learn of the environmental contamination until four years *after* the sale. *Id.* at 547. This case could not be more different.

Here, the parties conditioned the entire sale of the Thirty Acres on a deliberate and detailed process for resolution of potential environmental liabilities. As memorialized in the Agreement, the Port commissioned the Kleinfelder Report for the precise purpose of determining the nature and extent of any pollution on the Thirty Acres and the parties coordinated the necessary clean-up activities (listed in Exhibit C to the Agreement) to take place before and after the closing of the sale. CP 1467. As Part 4.02 of the Agreement makes clear, the Port's acceptance of the property and the sale itself were conditioned upon dealing with the potential contamination on the Thirty Acres as explicitly provided in the Certificate. Accordingly, the Port's acceptance of the property meant that the Port agreed to be bound by the Certificate, which limited the Hulberts' comprehensive environmental liability to three years.

b) The Inclusion of 15 Environmental Statutes Evidences the Parties' Intent to Allocate all Future Environmental Liability and Preclude a Future MTCA Contribution Action

The broad scope of the indemnity and the parties' intentions to allocate *all* present and future environmental liabilities is made clear by the inclusion of 15 environmental statutes in the Certificate. CP 1497-98. The Certificate expressly incorporates seven federal environmental statutes and eight state environmental statutes, including MTCA. The trial court erroneously failed to consider this explicit evidence of the parties' intent to encompass all of the Hulberts' present and future environmental liabilities in the Agreement.

In the trial court, the Port argued that despite its express inclusion, the Agreement meant to exclude MTCA liability from the three-year indemnity limitation. The Port argued that even though the parties expressly included MTCA in the Certificate, the Agreement did not serve as a bar to a later contribution action. This argument is unsupported by the record and the statutory history of MTCA. The Port claimed that it only agreed to the three-year limitation because it knew it had other statutory rights that would survive it, including MTCA. Specifically, Brad Cattle, the Port's general counsel, stated in his declaration, "[T]he Port knew that other legal rights and protections were the subject of MTCA and pre-existed the creation of the [Agreement]. Because the Certificate and

Indemnity did not terminate these pre-existing rights and protections, the Port presumed that they would continue on after the expiration of the contractual indemnity period.” CP 1334-35. This argument makes no sense. At the time of the Agreement, there was no express private right of action for contribution under MTCA. *See* RCW 70.105D.080 (1993). Accordingly, the Port could not have agreed to the three-year limit on liability in reliance on having a MTCA contribution action available beyond that point. Furthermore, the Hulberts would not have negotiated for a three-year indemnity period (versus the 25-year period sought by the Port) had they believed that a future MTCA contribution action was a possibility. *See* Supp. CP 1908.

The inclusion of MTCA in Section Six of the Certificate evidenced the parties’ intent to end the Hulberts’ obligation to fund “MTCA-like” liabilities when the indemnity period expired. The absence of an express private right of contribution under MTCA in 1991 does not alter this fact. In the CERCLA context, numerous courts have upheld indemnity agreements precluding contribution actions even when the agreements were written prior to CERCLA’s passage. *See, e.g., Bowen Engineering v. Estate of Ralph T. Reeve*, 799 F. Supp. 467, 448 (D. N.J. 1992) (explicit reference to environmental claims is not required where agreement references “types of legal proceedings in which CERCLA-like claims would arise.”); *Purolator*, 772 F. Supp. at 132 (holding that general

indemnity agreement pertaining to “all claims” arising out of transferred property was broad enough to include CERCLA liability, even though CERCLA had not yet been enacted): *FMC Corp. v. Northern Pump Co.*, 668 F. Supp. 1285, 1292 (D. Minn. 1987) (a release from “all claims, demands and causes of action” was held to encompass CERCLA claims without explicit reference to the statute); *cf. Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994, 1002 (D. N.J. 1988) (contract could have allocated CERCLA liability even before passage of CERCLA had it specified the transfer of “CERCLA-like” liabilities). Similarly, numerous courts have found that private parties can contract away their CERCLA liability even where the contract fails to expressly mention CERCLA. *See e.g., Mardan*, 804 F.2d at 1459.

Here, the parties expressly enumerated MTCA and fourteen other environmental statutes in Section Six of the Certificate to define the broad scope of their Agreement. It defies logic and reason to read Section Six identifying liability under 15 environmental statutes and conclude that, *sub silentio*, the intent of the Agreement was to except a right of contribution under one of the statutes.

In sum, the trial court misconstrued the language of the Agreement and should be reversed.

2. The Context in which the Agreement was made Establishes that the Port's Contribution Rights Expired March 8, 1994

In addition to the clear language of the Agreement, the context in which the Agreement was executed demonstrates that it was meant to preclude any future environmental liability for the Hulberts, including a MTCA contribution action by the Port. Though the trial court noted its reliance on *Hearst Communications*, 154 Wn.2d 493, presumably for the proposition that extrinsic evidence of the parties' intent is not admissible,⁴ that case does not support the court's order, nor preclude consideration of the context in which the Agreement was made. There is no requirement under Washington law that a contract be "ambiguous" before a court may consider extrinsic evidence. *Brogan & Anensen LLC v. Lamphier*, 165 Wn.2d 773, 775 202 P.3d 960 (2009) (citing *Berg*, 115 Wn.2d at 667-69). Rather, as the Supreme Court made clear in *Hearst*, where extrinsic evidence sheds light on the meaning of the terms used in a contract, then it is admissible to determine the parties' intent. *Hearst*, 154 Wn.2d at 503. The meaning of a writing "can almost never be plain except in a context." *Id.* at 502 (quoting *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990)). Accordingly, if relevant for determining mutual

⁴ The entirety of the substantive portion of the court's order reads as follows: "This result reached upon review of the Agreement of Purchase and Sale, and especially Article 4 and the attached Certificate and Indemnity, and particularly paragraphs 4, 5, & 6, the rules of contract interpretation, *Hearst Communications Inc. v. Seattle Times*, 154 Wn.2d 493, 503 (2005) and *The Southland Corp v. Ashland Oil*, 696 F. Supp. 994 (1988)" [sic].

intent, courts may consider extrinsic evidence including “(1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties.” *Id.* The declarations submitted in support of the Hulberts’ cross-motion for partial summary judgment were precisely the type of “context” evidence that the court should have considered when interpreting the terms of the Agreement. CP 1397, 1403.

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.

As the *Hearst* Court explained, in order to interpret the above terms consistently with the parties’ intent, this Court should consider “(1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent

acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties.” *Hearst*, 154 Wn.2d at 502 (quoting *Berg*, 115 Wn.2d at 668). Evidence concerning the parties’ negotiations is also admissible if it aids in the determination of the parties’ intent.

Lynnot v. National Union Fire Ins. Co., 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

a) The Subject Matter and Objective of the Agreement Demonstrate the Parties’ Intent to Preclude a Future MTCA Contribution Action by the Port

The subject matter of the Agreement pertains to the environmental liabilities then known on the Thirty Acres as well as to any liabilities that may arise in the future. The express inclusion of 15 environmental statutes to define “hazardous substances” demonstrates the intended breadth of the Agreement. Unlike in *Car Wash Enterprises*, where the parties did not even mention environmental liabilities in their contract, the subject of Article Four, Exhibit C and the Certificate all deal with the resolution of environmental liabilities. Similarly, as demonstrated in the Hulbert, Pierce, and Martin declarations, the objective of the Agreement was to facilitate the sale to the Port by providing the Port with an expansive, but time-limited, indemnity period in which the Hulberts would be responsible for any and all environmental liabilities. CP 1397, 1403. After that point, the parties intended that the entirety of the Hulberts’ obligations concerning the Thirty Acres would be terminated. *Id.* The

court should have considered that the goal of the Agreement was to both facilitate the sale and resolve all outstanding and future environmental claims between the parties.

b) The Circumstances at Execution and Subsequent Acts of the Parties Demonstrate the Parties' Intent to Preclude Future Contribution Actions by the Port

The circumstances surrounding the Agreement and the subsequent acts of the parties also demonstrate that the parties intended that the Agreement would preclude future environmental contribution by the Hulberts. 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 4. *Id.* at 1467-70; 1484-86. The parties specifically contemplated that the Hulberts' duty to contribute to any remedial action on the Thirty Acres would end when the Port released the

escrowed funds. The Port released those funds in 1992 demonstrating that they were satisfied that the Hulberts had fulfilled all of their environmental obligations concerning the Thirty Acres and were releasing them from any further environmental liabilities.

Moreover, the court should have considered the evidence regarding the parties' negotiations. *Lynnot*, 123 Wn.2d at 684. The Port's attempts during the parties' negotiations to extend the indemnity period to 25 years is also evidence that the Port recognized that the Hulberts' environmental liability was limited in time. Supp. CP 1908. Had the Port believed it could simply come back to the Hulberts 15 years later and demand contribution for the same potential contamination addressed in the Agreement, it would not have attempted to extend the indemnity period to 25 years.

Finally, the court should have considered that at the time of contracting, the parties were fully aware of the potentially applicable environmental statutes and expressly enumerated them in Section Seven of the Certificate. The parties defined "hazardous substances" by incorporating every known environmental statute that could be applicable to the Thirty Acres at the time so that there could be no mistake about the extent of—and limitations on—the indemnity provision. By reference to the enumerated statutes, the parties intended to wrap up all of the Hulberts' known and unknown environmental liabilities into the

Certificate and preclude statutory actions after the indemnity period expired, including the Port's MTCA contribution action.⁵

c) The Hulberts' Interpretation of the Agreement is Reasonable; the Port's is Not

The Hulberts' interpretation of the Agreement is the only reasonable interpretation of the parties' intent at the time of the Agreement's execution. As the declarations in support of their cross-motion made clear, the Hulberts simply would not have agreed to such an expansive indemnity provision for three years had they believed that any future environmental liability to the Port would remain. CP 1397, 1403 Supp. CP 1908. Given the extremely broad scope of the Agreement, it is simply not reasonable to conclude that the Hulberts intended to let their liability continue in any respect after March 8, 1994.

The Port's interpretation of the Agreement is unreasonable. The Port insists that the parties intended for the indemnity to provide *additional* contractual remedies to the Port on top of its statutory rights under MTCA. CP 1334-36. The Port's interpretation renders meaningless the three-year limitation on the indemnity period. It also completely disregards the context in the which the Agreement was executed, namely

⁵ As the Ninth Circuit has observed, this is a common goal of such indemnity provisions. *Mardan Corp.*, 804 F.2d at 1460 ("A seller will normally wish to wipe its slate clean, making some general release a condition of the sale so that the seller can relieve itself of the headaches as well as the benefits of the old business and move on to new ventures.").

that the parties jointly identified potential environmental liabilities on the site, they agreed on a course of action to address them, and they provided additional assurance that any necessary remediation would be addressed in the form of the three-year indemnity period and the escrowed funds. When the Port released the escrowed funds in 1992, it acknowledged that the Hulberts had satisfied their obligations under the Agreement. For the Port to now argue that the parties meant to extend the Hulberts' liability beyond 1994 is patently unreasonable.

In sum, the trial court erred in disregarding the admissible evidence of the context in which the Agreement was executed. The trial court should be reversed.

3. The Trial Court's Reliance on *Southland Corp v. Ashland Oil* is Misplaced

The trial court expressly relied on *Southland Corp. v. Ashland Oil, Inc.*, 696 F. Supp. 994 (D. N.J. 1988), but *Southland* does not control this case. There, the court found that the parties' generic purchase and sale agreement did not serve as a bar to a later contribution action under CERCLA. The Hulberts do not dispute the propriety of that decision; rather they contend that it is simply inapplicable to the present case. In *Southland*, the purchaser of a chemical plant sued the seller seeking a declaration that the seller was strictly liable under CERCLA for groundwater contamination discovered a few years after the date of the

sale. The seller asserted that the language of the purchase and sale agreement prevented CERCLA liability. The court rejected this argument, finding that (in contrast to the Hulberts' agreement), the *Southland* purchase and sale contract had no language evidencing the parties' intent to transfer environmental liability.

Defendant Ashland Oil attempted to rely on four different provisions of its purchase agreement with Southland, none of which contained any reference to statutory environmental liability. *Southland*, 696 F. Supp. at 1001-02. Unlike the present case, the *Southland* contract's indemnity provision did not mention environmental liability at all. Rather, it used only generic "acts and omissions" language indemnifying Southland for any claims arising during Ashland's ownership. Here, the Certificate expressly incorporates 15 environmental statutes, sets forth a process for resolving the contamination issues identified in the Kleinfelder Report, and requires the Hulberts to conduct additional investigation and remediation measures if necessary. The Certificate then expressly terminates all of the Hulberts' liabilities, including the duties laid out in the indemnity provision, within three years. Both the language of the Agreement and the context in which it was written demonstrate that the parties intended for **all** of the Hulberts' environmental liabilities to cease on March 8, 1994. In contrast, the *Southland* contract did not cite to a single environmental statute nor did it contain the explicit allocation of

duties concerning ongoing investigation and remediation at the site contained in the Hulbert-Port Agreement.⁶ Moreover, unlike the Hulberts' Agreement with the Port, the *Southland* agreement did not require an escrow account to secure the contemplated environmental remediation actions. Given the extraordinary difference in the agreements and the evidence of the parties' intent, the court's reliance on *Southland* was in error.

4. There is no Evidence the Port Intended to "Reserve" a MTCA Contribution Right

In the trial court, the Port contended that the Agreement did not preclude an independent MTCA cause of action, but rather worked only to prevent contract-based claims for indemnification, even where the environmental liabilities covered by the Agreement are the same the Port now seeks to address via MTCA. To the contrary, as evidenced by both the language and the context of the Agreement, the parties did not intend that the Agreement would "reserve" for the Port a separate statutory right of contribution on top of the limited indemnification provided by the Hulberts. Rather, the parties intended that the Hulberts' duty to provide

⁶ *Southland* has also been distinguished by *Bowen Engineering*, 799 F. Supp. 467, a case from the same district court. In *Bowen*, the court clarified that "*Southland* does not require explicit reference to environmental claims... but rather requires explicit reference to the types of legal proceedings in which CERCLA-like claims would arise." *Id.* at 484. The Agreement between the Hulberts and the Port enumerated 15 environmental statutes, which is more than sufficient under *Southland* and its progeny to indicate an intention to preclude future environmental liability.

contribution for any environmental liabilities ended when the indemnification period expired.

Mardan v. CGC Music LTD illustrates the fallacy in the Port's claim. In that case, the Mardan Corporation ("Mardan") purchased an industrial property from MacMillan, Inc. ("MacMillan"). In 1981, after the purchase closed, the parties entered into a settlement agreement for all claims "based on or arising out of the Purchase Agreement," including claims of former plant employees for vacation and severance pay, various accounts receivable and "other claims" based on the Purchase Agreement. *Id.* at 1456. In 1983, the Environmental Protection Agency ("EPA") brought an administrative enforcement action against Mardan for violation of its permit issued pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901-6987 (1982). Mardan then brought a contribution action pursuant to CERCLA against MacMillan. Affirming the district court, the Ninth Circuit held that the prior settlement agreement precluded Mardan's contribution action. *Id.* at 1461. The district court reasoned that the broad language in the settlement agreement releasing MacMillan from liability for "all claims arising out of or in any way related to the Purchase Agreement" encompassed contribution under CERCLA. As here, the parties knew of the environmental contamination on the property when they entered into the settlement and they specifically addressed the possibility that environmental corrective action would be

required under RCRA. *Id.* Even though CERCLA did not expressly provide a private right of action for contribution until it was amended in 1986, the court noted that as of 1981, CERCLA had been in effect for a year at the time the settlement agreement was executed. *Id.* Accordingly, the court concluded that based on the statutory back drop and the broad language in the agreement, Mardan had intended to give up all claims “which it had or might have someday” even though CERCLA was not specifically addressed in the agreement. *Id.*

In so holding, the Ninth Circuit rejected an argument nearly identical to the one pressed by the Port in the trial court. Mardan argued that the settlement agreement and release barred only claims brought pursuant to the Purchase Agreement and did not preclude an independent CERCLA action for response or removal costs. *Id.* at 1462 n.8. As the Port argued below, Mardan claimed that the CERCLA action did not rest on the existence of any contract and could not therefore be precluded by the settlement agreement. *Id.* The court found that this argument lacked merit, concluding that the CERCLA claim “arose” out of the Purchase Agreement because the Purchase Agreement is what gave Mardan ownership of the facility in the first place. *Id.* (“If Mardan had not acquired an ownership interest in the property by virtue of the Purchase Agreement, it would not have incurred response costs...”). Similarly, the Port cannot claim it intended to reserve a MTCA statutory right separate

and apart from the environmental liabilities spelled out in the Agreement and specifically contemplated by the inclusion of the 15 enumerated environmental statutes. The parties clearly intended that by limiting the Hulberts' liability to a period of three years, all possible environmental claims between the parties would be resolved during that time. The Port's release of the escrowed funds is further evidence that it believed the Hulberts had fully satisfied their obligations related to the Thirty Acres. As in *Mardan*, the Port's claim that it somehow "reserved" a separate statutory right independent of the limitations in the Agreement should be rejected.

C. The Trial Court Erred Because Material Facts Remain in Dispute

In the trial court, the Hulberts argued in the alternative that the Port's motion should be denied because it raised a factual dispute. CP 1414. Specifically, declarations submitted in support of the Port's motion raised the issue of whether the Agreement was intended to encompass statutory environmental liability. The Hulberts submitted declarations from William G. Hulbert, in his capacity as Trustee of the Trust; Jack Martin, in his capacity as the real estate developer who assisted with negotiating the Agreement; and Vicki Pierce, in her capacity as the Hulberts' attorney who drafted the Agreement. Each of the declarations demonstrated the parties' intent that the Agreement would

preclude all future environmental liability as between the Hulberts and the Port. CP 1397, 1403; Supp CP 1907-09. In response, the Port submitted a declaration from its general counsel, Brad Cattle, averring that he never intended for the Agreement to cover any statutory environmental claims, despite the direct statutory references in the Certificate. CP 1334-35. The Hulberts averred that they never would have entered into an agreement without such limitations, while the Port claimed that it never would have agreed to provide them. CP 1334-35, 1397, 1403. The parties' conflicting declarations regarding their intent raise 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 had no basis upon which to grant the Port's motion.

D. The Court Improperly Certified the Summary Judgment Order

The trial court further erred when it certified its December 10, 2007 summary judgment order and entered final judgment against the Hulberts. The Port failed to meet the standard for certification under CR 54(b). Washington courts require four elements for entry of a CR 54(b) final judgment: "(1) more than one claim for relief or more than

one party against whom relief is sought; (2) an express determination that there is no just reason for delay; (3) written findings supporting the determination that there is no just reason for delay; and (4) an express direction for entry of the judgment.” *Fluor Enter., Inc. v. Walter Constr., Ltd.*, 141 Wn. App. 761, 766-67, 172 P.3d 368 (2007) (citations omitted).

Here, a final judgment was premature because the parties will have claims for fees under MTCA at the end of this litigation that may offset each other, as both the Hulberts and the Port have prevailed on motions seeking to declare the other party liable. Moreover, the proceedings in the trial court in this case are ongoing, and certification of the order has forced the Hulberts to appeal this issue while simultaneously litigating the underlying action in the trial court. Finally, as in *Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now*, 119 Wn. App. 665, 694, 82 P.3d 1199, *review denied*, 152 Wn.2d 1023, 101 P.3d 107 (2004), the Port sought final judgment only so that it could immediately recover attorneys’ fees. The *Loeffelholz* court held that certification for this purpose is inappropriate. 119 Wn. App. at 693-694. The trial court’s certification order was improper and should be reversed.

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

At the June 3, 2009 hearing, the trial court ordered the Port to resubmit its fee request to eliminate certain types of unreasonable fees.

While the Port's revised fee request sought less in total payment than its original, it was still unreasonable. Nonetheless, on July 27, 2009, the trial court granted the Port's revised request in full and awarded the Port \$111,101.87 in attorneys' fees for prevailing on the indemnity issue. CP 20-21.

The trial court erred by granting the Port's revised fee request in full. While the Agreement provides attorneys' fees for the prevailing party in a dispute arising under the Agreement, the court improperly awarded the Port fees for matters wholly unrelated to 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. Furthermore, the court should not have awarded fees where the Port failed to properly segregate its recoverable fees from unrecoverable ones. Simply stated, fees and costs should not be awarded for work unrelated to the legal claims adjudicated by motion before the trial court. It is not sanctioned by court rules nor by case law. What follows articulates those fees and costs which were impermissibly awarded contrary to law and contrary to fundamental fairness.

1. The Port is Not Entitled to Full Recovery of Fees Incurred Responding to the Hulberts' Discovery Requests, Where Those Fees are Unrelated to the Contested Indemnity Issue

Fees should be awarded only for services related to the contested indemnity issue. *See Absher Const. Co. v. Kent School Dist.*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995) (citing *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987)). Courts should discount fees incurred for work which could be useful in ancillary or parallel litigation. *Id.* (citations omitted). Here, the trial court improperly awarded the Port over \$23,000 for responding to discovery requests when only four of those requests related to whether the Agreement barred the Port's MTCA contribution claim. Plaintiffs' first discovery requests to the Port consisted of 21 interrogatories and nine requests for production. Two of each of those (or 13.3% of the total) related to the indemnity issue. The remainder of the discovery requests related to the MTCA liability issues that remain undecided in this case. The Port is not entitled to attorneys' fees for discovery unrelated to the dispute regarding the Agreement, particularly when that discovery is central to the as of yet unresolved MTCA litigation ongoing between the parties. *See Absher*, 79 Wn. App. At 841; *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151-53, 859 P.2d 1210 (1993).

Only 13.3% of the Port's discovery requests related to the contested Agreement and indemnity issue. Accordingly, the Port's fee

award for discovery should have been reduced by 87.7% to fairly allocate the time spent on discovery with the percentage of discovery requests related to the Agreement. CP 68. This would have reduced the Port's fee award by \$20,563.01. The trial court erred when it rejected this argument and awarded the Port's full request for discovery related fees. The court should not have awarded the Port fees for discovery concerning other ongoing aspects of this case.

2. The Port Cannot Recover Fees for Work Unrelated to the Indemnity Claims

The trial court improperly granted the Port's fee request for work unrelated to the indemnity claims originally brought by Plaintiffs in this case. Fees should not be awarded for work unrelated to the cause of action which allows for fees. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987). "Allowing recovery of fees for actions which do not authorize attorney fees [gives] the prevailing party an unfair and unbargained for benefit." *North Coast Electric Co. v. Selig*, 136 Wn. App. 636, 648, 151 P.3d 211 (2007). Similarly, the court should discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time. *Absher*, 79 Wn. App. at 847 (citations omitted). The Agreement provides only for attorneys' fees for disputes arising under the Agreement. CP 1473. However, the Port recovered fees for the preparation of motions never filed, work associated with preparing the

Port's discovery requests propounded on the Hulberts, evaluating the Hulberts' responses to those requests and for tasks that were unrelated to litigation or too vague to determine the relation. Examples of these entries on the Port's revised fee request include: recovery of fees for Robin McPherson to "Review strategy"; recovery of fees for Robin McPherson to "Review Public Disclosure Request re North Marina"; and recovery of fees for Mark Nadler to conduct "Legal research re effect of condemnation on condemnee's environmental liability." CP 103, 105, 110.

In the trial court, Plaintiffs identified the time entries that should have been disallowed as seeking recovery of fees for work not related to the indemnity claims. CP 74-91. Had the court excluded the tasks not related to the indemnity claims, as it was required to do, the Port's fee award would have been reduced by \$5,274.08. The court erred when it required the Hulberts to pay for the Port's legal work that was unrelated to the dispute over the indemnity Agreement. The award should be reversed.

3. The Port Cannot Recover for Purely Administrative Tasks

The Port included in its revised request numerous purely administrative tasks (and meetings regarding said tasks) for which recovery is inappropriate. *See, e.g.*, CP 108, 110, 113, 115; *North Coast*, 136 Wn. App. at 644-45 (citing *Absher*, 79 Wn. App. at 846) (compensable services must be legal in nature, recovery for administrative

and secretarial work is inappropriate). In the trial court, Plaintiffs identified the time entries that should have been disallowed because they sought fees for purely administrative tasks. CP 74-91. The exclusion of this portion of the fee request would have reduced the Port's award by \$2,385.41.

Examples of purely administrative tasks for which the Port should not recover fees include: recovery of fees for Liberty Waters to "Update to do list" and recovery of fees for Amber Schneider to "Print cases from LexisNexis." *See, e.g.*, CP 108, 110, 113, 115. The Hulberts should not be required to pay for the Port's administrative housekeeping. The trial court erred.

4. The Port Failed to Properly Segregate its Fees Request

Despite its obligations to do so, in several instances, the Port failed to properly segregate recoverable fees from non-recoverable ones. *Mayer v. City of Seattle*, 102 Wn. App. 66, 80, 10 P.3d 408, 415 (2000) (If attorney fees are recoverable for only some of a party's claims, the award must properly reflect a segregation of the time spent on issues for which fees are authorized from time spent on other issues.). The Hulberts identified for the trial court the places in which the Port failed to properly segregate its time entries. CP 74-91. The Hulberts asked the trial court to conduct its own segregation of those fees or require the Port to meet its

obligations to do so, but the trial court improperly rejected this request.

The trial court should be reversed and the Port's award of attorneys' fees should be vacated.

VI. Attorney's 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. As a result of the Port's improper attempt to seek MTCA contribution, the Hulberts have incurred significant legal fees attempting to enforce their Agreement with the Port. As provided in the Agreement, the Hulberts are entitled to reimbursement from the Port. *Id.*

VII. Conclusion

In exchange for immediate remediation action on the Thirty Acres and a broad three-year environmental indemnity, the Hulberts and the Port agreed that after three years, the Port would lose the ability to seek contribution from the Hulberts for any environmental liabilities on the Thirty Acres. The language of the Agreement and the context in which it was executed demonstrate that the parties intended to terminate all of the Hulberts' environmental obligations concerning the Thirty Acres in 1994.

The trial court erred in holding that the Agreement did not preclude the Port's MTCA contribution claims. Moreover, the trial court's certification of its order was improper and the award of attorneys' fees to the Port was unreasonable. The trial court should be reversed and the Hulberts should be awarded their attorneys' fees.

Dated this 6th day of November, 2009.

Respectfully Submitted,

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