

SUPREME COURT OF THE STATE OF WASHINGTON

Douglass v. Shamrock Paving, Inc.

No. 94087-8 (Wash. Dec. 21, 2017) · No. No. 94087-8 · Decided December 21, 2017

SUMMARY

The Washington Supreme Court held that investigative soil testing may constitute a recoverable remedial action under the Model Toxics Control Act, while soil removal was not recoverable because the contamination did not pose a threat or potential threat under applicable cleanup levels. The court explained that recovery remains subject to an equitable assessment and is not automatic. It reversed the premature prevailing-party designation and remanded for determination of any recovery, prevailing-party status, and attorney fees.

CASE DETAILS

COURT	Supreme Court of the State of Washington
WRITING FOR THE COURT	Fairhurst, C.J.
JURISDICTION	Washington
DECIDED	December 21, 2017
DOCKET	No. 94087-8
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Shamrock sought review of a Court of Appeals decision reversing the trial court's denial of the Douglasses' private right of action under Washington's Model Toxics Control Act (MTCA). The Douglasses cross-petitioned regarding recovery of cleanup costs. The Washington Supreme Court granted review of both petitions.
STANDARD OF REVIEW	Statutory interpretation is reviewed de novo. The court deferred to the Department of Ecology on technical issues based on its specialized expertise, particularly the technical determination of contamination levels that threaten human health or the environment.
PRECEDENTIAL VALUE	published
PARTIES	Shamrock Paving, Inc. v. Harlan D. Douglass, Maxine H. Douglass

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether investigative soil testing is a remedial action for which costs may be recovered under the MTCA private right of action when contamination meets but does not exceed Ecology's cleanup level.
2. Whether lube-oil contamination that meets but does not exceed Ecology's published cleanup level poses a threat or potential threat to human health or the environment.
3. Whether a party may be designated the MTCA prevailing party and awarded attorney fees before the court determines the amount of remedial-action-cost recovery through an equitable assessment.

HOLDINGS

1. The MTCA's definition of remedial action expressly includes investigative and monitoring activities concerning a release or threatened release of a hazardous substance. Therefore, the Douglasses' soil testing was a remedial action even though the investigation did not establish contamination exceeding Ecology's cleanup level.
2. Classification of an activity as a remedial action does not automatically entitle a claimant to recover all associated costs. Recovery is limited to costs for actions substantially equivalent to a department-conducted or department-supervised remedial action and is subject to an equitable assessment.
3. On the record presented, lube-oil contamination at or below Ecology's published cleanup level did not constitute a threat or potential threat to human health or the environment, so the Douglasses could not recover cleanup or soil-removal costs as remedial-action costs.
4. A party cannot be designated the prevailing party under the MTCA before the trial court completes the equitable assessment and determines whether any remedial-action costs will be recovered. If the court awards recovery of at least some costs, the Douglasses will be the prevailing party and entitled to attorney fees.

KEY QUOTATIONS

““Remedial action” includes investigative activities because it is plainly stated within the definition —‘remedial action’ means ‘any action . . . including any investigative and monitoring activities.’” (at 8)

“This equitable assessment prevents absurd or unfair results.” (at 10)

“We remand the case to the trial court to conduct an equitable assessment, determine the amount of Douglass’ remedial action cost recovery (if any), designate a prevailing party, and award attorney fees.” (at 14)

FACTUAL BACKGROUND

Shamrock fueled equipment, cleaned machines, and stored materials on the Douglasses' vacant property while performing a paving project, and the trial court found that Shamrock spilled unknown amounts of lube oil there. The Douglasses hired an environmental consultant, which collected soil samples showing lube-oil

concentrations ranging from 400 to 2,000 mg/kg, then removed 68 tons of soil and conducted additional testing. Ecology's published cleanup level for lube oil on unrestricted properties was 2,000 mg/kg, and the expert testimony supported the conclusion that the contamination did not pose a threat or potential threat to human health or the environment.

PROCEDURAL HISTORY

The Douglasses initially sued Shamrock for trespass and nuisance after Shamrock's paving activities allegedly caused lube-oil contamination on their property. A jury found for the Douglasses on those claims but denied cleanup costs. The trial court, sitting as fact finder on the MTCA claim, found that Shamrock contributed to a hazardous-substance release but denied MTCA recovery because the contamination was not a threat to human health or the environment, and designated Shamrock the prevailing party. The Court of Appeals held that soil testing was a remedial action but soil removal was not, designated the Douglasses the prevailing party, and remanded for an equitable assessment. The Supreme Court affirmed in part, reversed the prevailing-party designation, and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The trial court must conduct an equitable assessment, determine the amount of the Douglasses' remedial-action-cost recovery, if any, designate the prevailing party after that determination, and award attorney fees to the prevailing party. The Supreme Court declined to award attorney fees for the cross-petition because prevailing-party status had not yet been determined.

CASES CITED

- Douglass v. Shamrock Paving, Inc., 196 Wn. App. 849, 384 P.3d 673 (2016)
- Seattle City Light v. Department of Transportation, 98 Wn. App. 165, 989 P.2d 1164 (1999)
- Department of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002)
- State v. Breazeale, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001)
- State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001)
- Citizens Alliance for Property Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 435, 359 P.3d 753 (2015)
- In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 838-839, 215 P.3d 166 (2009)
- Cockle v. Department of Labor & Industries, 142 Wn.2d 801, 808, 16 P.3d 583 (2001)
- Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc., 125 Wn.2d 305, 312, 884 P.2d 920 (1994)
- Bird-Johnson Corp. v. Dana Corp., 119 Wn.2d 423, 427, 833 P.2d 375 (1992)
- Draper Machine Works, Inc. v. Department of Natural Resources, 117 Wn.2d 306, 315, 815 P.2d 770 (1991)
- Queets Band of Indians v. State, 102 Wn.2d 1, 4, 682 P.2d 909 (1984)

- PacifiCorp Environmental Remediation Co. v. Department of Transportation, 162 Wn. App. 627, 666, 259 P.3d 1115 (2011)
- Dash Point Village Associates v. Exxon Corp., 86 Wn. App. 596, 607, 937 P.2d 1148, 971 P.2d 57 (1997)
- Port of Seattle v. Pollution Control Hearings Board, 151 Wn.2d 568, 595, 90 P.3d 659 (2004)
- Hillis v. Department of Ecology, 131 Wn.2d 373, 396, 932 P.2d 139 (1997)
- Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997)
- Schmidt v. Cornerstone Investments, Inc., 115 Wn.2d 148, 164, 795 P.2d 1143 (1990)
- AllianceOne Receivables Management, Inc. v. Lewis, 180 Wn.2d 389, 399, 325 P.3d 904 (2014)
- Guillen v. Contreras, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010)
- Ennis v. Ring, 56 Wn.2d 465, 473, 341 P.2d 885, 353 P.2d 950 (1959)

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