No. 439409

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

C. P. B. & L. TRUST

Appellant,

vs.

PORT OF TACOMA

Respondent.

BRIEF OF APPELLANT

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THE APPEAL

This is an appeal from the granting of summary judgment in favor of the Port of Tacoma (Port hereinafter) against the C.P.B.& L Trust (Trust hereinafter) that included $490,000 in funds held by Chicago Title Insurance Company and an award to the Port of attorney fees in the sum of $144,479.37 against the Trust. Appeals and amended notice of appeals are filed at CP 1418-1420, and CP 1424-1426. These orders in favor of the Port of Tacoma covered by this appeal are found at: CPs 424-426; 1217-1219; 1220-1221; 1222-1224; 1225-1227; 1228-1230; 1411-1412; 1413-1415; 1416-1417.

ASSIGNMENTS OF ERROR and ISSUES

(1) The Trial Court erred in granting summary judgment of $490,000 to the Port by ignoring prior notice and other contractual action requirements and permitting the Port to recover without compliance. The issue is: Was the Port of Tacoma barred from recovery by failing to timely file claims for metals contamination?

(2) The Trial Court erred in granting summary judgment of $490,000 to the Port by ignoring prior notice and other contractual action requirements and permitting the Port to recover without compliance. The issue is: Was the Port of Tacoma barred from recovery by failing to timely file claims for petroleum

deposits?

(3) The Trial Court erred in granting summary judgment of $490,000 to the Port by ignoring prior notice and other contractual action requirements and permitting the Port to recover without compliance. The issue is: Was the Port of Tacoma barred from recovery by failing to provide the Trust with prior notice of proposed remediation, estimates of costs and fixed bids as required by the Purchase and Sale agreement?

(4) The Trial Court erred in granting summary judgment of $490,000 to the Port by ignoring prior notice and other contractual action requirements and permitting the Port to recover without compliance. The issue is; Was the Port of Tacoma barred from recovery by failing to provide the Trust with prior notice of proposed remediation as required by the Escrow contract?

(5) The Trial Court erred in granting summary judgment to the Port by misinterpreting the contractual requirement between the parties. The issue for review is: Did the court misinterpret the escrow agreement as something other than a guarantee requiring strict interpretation?

(6) The Trial Court erred in granting summary judgment of $490,000 to the Port in accepting the Port's accounting for losses without consideration of causes or the Port's culpability in the losses. The issue for review is: If the

court accepts the Port's arguments that the Trust would be liable under the Model Toxics Control Act (MTCA) for the remediation claims, and thus not entitled to protection of the prior notice requirements of both the Purchase and Sale Agreement as well as the Escrow Agreement, then isn't the trust entitled to the Port's proportionate share of contribution for remediation as the primary cause of the release of the Toxins?

(7) The Trial Court erred in granting summary judgment of $490,000 to the Port in computing the Ports calculation of losses. The issue is: Where the contract called for notice prior to remediation, and even cost estimates and potential fixed bids for removal before the remediation, and none of this was provided, can the trial court accept the Port's figures for the costs of remediation where the entire contour of the land has been changed and all materials removed?

(8) The Trial Court erred in granting summary judgment of $490,000 to the Port in computing the Ports calculation of losses. The issue is: Where the contract called for notice prior to remediation and related contracts call for the Trust's rights of actions against third parties for potential remediation, where the port destroyed all evidence of the way the land was by changing the entire contour and character of the land before any notice of remediation was ever

given?

(9) The Trial Court erred in granting summary judgment of $490,000 to the Port in accepting perjured testimony of the Port's losses. The issue is: Can the Trial Court accept false testimony on summary judgment to establish damages without at least requiring the witness to testify in open court at trial?

(10) The Trial Court erred in granting summary judgment of $490,000 to the Port by excluding evidence of the Trust on the law and facts. The issue is: Can the trial court determine what can be considered MTCA materials while excluding evidence that the Port has dealt differently with the same materials, in much larger quantities, in a fashion that would indicate it does not consider them MTCA materials in need of remediation almost across the street and in other nearby locations belonging to the Port?

(11) The Trial Court erred in granting summary judgment of $490,000 to the Port by excluding evidence of the Trust on the law and facts. The issue is: Can the trail court consider the existence of MTCA materials that did not become MTCA materials until exposed and released by the Port after the Port became the owner of the property and decided to completely change the profile and use of the property?

(12) The Trial Court erred in granting the Port of Tacoma Summary Judgment

by clearly favoring the Port on all issues in fact and at law while giving the Trust the least favorable position where the Trust has done nothing to deserve such treatment. The issue is: Does the Trust have a right to be treated equally with the Port of Tacoma anywhere in the state and in any court of the State under the laws of the State and the United States?

(13) The Trial Court erred in awarding attorney fees to the Port in the sum of $143,479.27 as being totally outrageous and unconscionable. The issue is: Can the Trial Court award this or any amount of attorney fees to the Port where the Trust was only defending its rights to its own funds on the basis of the contractual languages to which the Port helped to draft that were clearly for the benefit of the Trust and the Port admitted it just failed to follow or overlooked?

(14) The Trial Court erred in awarding attorney fees to the Port in the sum of $143,479.27 as being totally outrageous and unconscionable. The issue here is: Where the amount of fees awarded that were clearly more than twice the amount of the Trust's fees and given the legal work that is shown in the file (an not the reams of papers developed by the Port's witnesses) the Trust did as much or more in legal work than the Port and its attorney is as qualified as that those of the Port to advocate in this case is the Trial Court justified in awarding such fees?

(15) The Trial Court erred in barring evidence of the Port's actions on similarly situated property throughout the Port of Tacoma. The issue is: Was the trial court justified in barring evidence and discovery into the Port's remediation practices throughout other parts of the Port of Tacoma in remediating or not remediating Asarco slag materials wherein MTCA substances such as arsenic and mercury might be released?

(16) The Trial Court erred in granting the Port summary judgment by finding that the Trust was liable for MTCA remediation in the absence of the Purchase and Sale Agreement and Escrow Agreement because it was a secured creditor under a deed of trust for payment of part of the purchase price received by the seller. Issue to consider on review: Do all purchase money secured real property creditors, whether beneficiaries of mortgages or deeds of trust, assume the MTCA liabilities of the sellers of real estate in the State of Washington as a result of their interests in the real property, and if so, what is the duration of their liability for acts and omissions on the property, the length of the sellers interest, the length of the security interest, both, forever?

ARGUMENT

STANDARDS OF REVIEW

This court reviews the trial court's granting of summary judgments de

novo, *Washington Imaging Services, L.L.C. v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011).

Judicial review of question of law is always *de novo*. *Pierce v. Underwood*, 487 U.S. 558 (1988); *Rasmussen v. Employment Sec.*, 98 Wn.2d 846, 849-50, 658 P.2d 1240, 1242 9 (1983).

Where all relevant evidence is in documentary or deposition form, the appellate court should be able to substitute its judgment for that of t he trial court about facts as well as application of law; *Southwest Wash. Prod. Credit Ass'n v Seatle First Nat'l Bank*, 19 Wn.App. 397,406, 577 P.2d 589, 594 (1978) *rev'd on other grounds*, 92 Wn.2d 30, 593 P.2d 167 (1979).

The Port argues that statutory descriptions of hazardous waste and contaminants may control its claims in this matter. "Whether a statute applies to a factual situation is a question of law," which we review de novo. *Quality Rock Products, Inc. v. Thurston County*, 139 Wn.App. 125, 133, 159 P.3d 1 (2007).

The Port has had the benefit of all rulings in is favor on fact and law to the total exclusion of the Trusts legal and factual arguments even in contravention of the literal words of the contracts involved showing a distinct bias against the Trust in violations of the equal protections of the laws under

both the federal and state constitutions and such factual maters are reviewed *de novo*: *State v. Byers,* 85 Wn2d 783, 786, 539 P.2d 833, 835 (1975) (probable cause) *rev'd on other grounds, State v Byers,* 88 Wn2d 1, 554 P.2d 1334 (1977); *Bose Corp v. Consumers Union of the United States*, 466 U.S. 485, 508 n.27 (1984) (quoting *Rosenbloom v.Metromedia, Inc.*, 403 U.S. 54 (1971) (plurality opinion); *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3d Cir. 1986)

The Port argues that it has produced sufficient uncontroverted evidence to support the full amount of its claims in this case. Washington State trial courts exercise broad discretion when deciding evidentiary matters, but those decisions are subject to an abuse of discretion standard. *Cox* v. *Spangler,* 141 Wn.2d 431,439, 5 P.3d 1265 (2000). A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons. *State ex rel. Carroll* v. *Junker, 79* Wn.2d 12,26, 482 P.2d 775 (1971).

In reviewing a trial court's order on a motion for new trial, an appellate court also applies an abuse of discretion standard. *Wooldridge* v. *Woolett,* 96 Wn.2d 659, 668, 638 P.2d 566 (1981), *See also, Gestson* v. *Scott,* 116 Wn.App. 616, 620, 67 P.3d 496 (2003). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Kohfeld* v. *United*

Pac. Ins. Co., 85 Wn. App. 34, 40, 931 P.2d 911 (Div. 1, 1997).

Whether storm water, rather than coal tar, contributed exclusively to the change in Waterway PAH levels, or in this case, whether the mere existence of a potential MTCA contaminant arose to being properly described as a currently existing MTCA waste for which the Trust might have any liability, is a question of fact, which the court should review under the substantial evidence standard. Substantial evidence is "evidence that would persuade a fair-minded person of the truth of the statement asserted." *Cingular Wireless, LLC v. Thurston County,* 131 Wn.App. 756, 768, 129 P.3d 300 (2006).

One of the standards of review of attorney fee awards is if the award shocks the conscience, sense f justice and sound judgment of the appellate court, *Curtiss v. Y.M.C.A.*, 7 Wn.App. 98, 498 P.2d 330 (1972) *aff'd*, 82 Wn.2d 455, 511 P.2d 991 (1973), see also *Rasor v. Retail Credit*, 87 Wn.2d 516, 554 P.2d 1041 (1976).

UNCONTROVERTED FACTS

The C.P.B. & L Trust was formed as a spendthrift trust in the winding up of the Camille M. Fjetland guardianship Pierce Court Superior Court Cause No. 93-4-00307-5 to collect the balance owing of a sale price of property from Camille M. Fjetland and the B & L Trucking and Construction Company To

1621 Marine view Drive, Inc (subsequently Marine View, Inc.) that closed on January 25, 1996 and to hold the security interest in the property sold to the Marine View, Inc., interests. (CP 8, 7-49) The Trust never owned any interest in the property, other than a security interest, never operated any business or physical operations on said property nor assumed any obligations for prior owners or operators of said property and does not appear in the chain of title to said property except as a security holder. This is clear from the Port's own evidence, the title report as exhibited in the Declaration of Liberty Waters of January 23, 2012, Exhibit 4 as well as other uncontroverted evidence herein. (CP 179-350)

After considerable cleanup for almost a year prior to closing of the sale, pursuant to agreements between the Port of Tacoma and the Marine View companies (Ex. 1 CP 179-350), a sale of the Marine View Property along with adjacent property formerly belonging to the Foran interests (Marine View North) was closed on May 26, 2006. This was over ten years after the original sale from Fjetland to Marine View. That Port of Tacoma Purchase and Sale Agreement provided that part of the Purchase price, $500,000 from the Trust and $500,000 from the Foran interests, the designated Seller's Creditors, or a similar amount from the proceeds due Marine View and Marine View North,

could be held in escrow subject to a later possible claim by the Port not to exceed $500,000 in the aggregated, for certain work: That Purchase and Sale agreement (to which the Trust was not a party), after clearly describing that Trust and Richard C. Foran as "Seller Creditors" provided specifically §3(c)(2) that (Ex. 1 CP 179-350):

> "If within five (5) years of the Closing Date, Buyer discovers any construction debris or other material on the Marine View Property or the Marine View North Property which was not deposited pursuant to a valid permit, or any hazardous substances (as defined by any federal, state or local law) on the Marine View Inc., property or the Marine View North property which were not deposited on such property after Closing, then Buyer shall give notice to Seller and Seller Creditors of such discovery, which notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the costs to Buyer to remove such debris or other material or remediate such hazardous substances. Where practical, Buyer shall attempt to obtain a fixed bid for such removal, remediation or resolution."

This provision of the purchase and sale agreement was ignored and never complied with as admitted in the declaration of Leslee Conner, Project manager for Port remediation dated June 15, 2012 (CP 867, 860-922). The Port ignored this clear requirement despite having almost a year prior notice of existence of the substances it wanted to remediate (from 2009 to 2010) (CP 860-922).

While the Trust was not a party to the Purchase and Sale Agreement, it

was an obvious third party beneficiary of said contract. The Port further limited is rights to make claims under its Environmental Indemnity Agreement as set forth in §5© where the Port agreed:

> Buyer agrees to look solely to the Special Escrow under Section 3© of this Agreement for satisfaction of indemnity claims under this Section 5©. In addition, Seller's obligations under Section 5© are limited to claims as to which Buyer has given written notice to Seller within five (5) years of Closing.

On May 23, 2011, three days before the escrow funds were to be paid to the Trust and the Forans, the Port sent a letter addressed to the Foran interests making claim against that escrow. While the Port mentioned many things in its letter of May 23, 2011, it only made claim for metal contaminations to the seller within five years of closing.

The Trust was not a party to the Purchase and Sale Agreement but a beneficiary of Section §3(c)(2). The Trust was a party to a separate special escrow agreement which provided holding $500,000 of the funds it was entitled to in satisfaction of the Marine View Debt to it. Under that agreement those funds were clearly recognized as belonging to the Trust. The language of the Escrow Agreement on this point is very clear, Paragraph 10 (Ex. 2 CP 179-350):

> **Funds in Escrow**. Except as provided in Sections 3 and 4 above, the Escrow Funds shall be the property of the Trust.

> Accordingly, the Trust (and not the Escrow Agent) shall be obligated to pay any income taxes on the income of the funds held in Escrow. The Escrow Agent shall be obligated to issue or cause to be issued to the Trust all Forms 1099 and other forms reporting taxable income of the Escrow.

At most, all the Port had was a contingent claim of up to $500,000.00 against the million dollars in funds belonging to Foran and the Trust. To make any claim, it had to not only meet section 3 of the Purchase and Sale Agreement but the added provisions of the Escrow Agreement. Those added provisions were as follows, Section 4 (Ex. 1 CP 179-350):

> If within five (5) years of the "Closing Date" under the Purchase Agreement, the Port discovers any construction debris or other material on the Property which was not deposited pursuant to a valid permit, or discovers any hazardous substances (as defined by any federal, state or local law) on the Property which was not deposited or released onto the Property after the Closing Date, and such materials or condition are not within the scope of the Negotiated Cleanup Obligations, **the Port shall give notice to Marine View Inc. and the Trust (with a copy to Escrow Agent) of such discovery on the Property, which notice shall include a detailed estimate prepared by a qualified independent contractor qualified to contract with the Port of the cost to the Port to remove such debris or other material or remediate such hazardous substances. Where practical, the Port shall attempt to obtain a fixed bid for such removal, remediation or resolution. After the Port furnishes the Trust and Marine View Inc., with notice of such discovery, Marine View, Inc. and the Trust shall each have a reasonable period of not less than 21 days with respect to hazardous substances, and 5 days with respect to debris or materials which are not hazardous substances, after receipt of notice from the Port (such 21- or 5- day periods to run concurrently) to comment upon the proposed remediation before work on said remediation shall commence, except in case of**

emergency threatening life or limb of persons on the Property or immediate destruction of the Property. (Emphasis added)

Under §5©, the Port further agreed:

"Buyer agrees to look solely to the Special escrow in Section 3© of this agreement for satisfaction of (Environmental) indemnity claims under Section 5©. In addition, Seller's obligations under this Section 5© are limited to claims as to which Buyer has given notice to Seller within 5 (5) years after closing."

The fact that this prior notice was never given is admitted by the Port in the declaration of its manager, Leslee Conner (CP 867, 860-922). Was it overlooked because of an emergency? No. Was it overlooked because of some action taken by the Trust? No. Was it even overlooked because, as the Port's counsel has argued, it really was not necessary? No. Leslie Conner has given the only evidence of why the Port failed to give the Trust the notice (page 7 her declaration of June 15, 2012, paragraph 14):

> Port Failed to Provide Remediation 21-day Notice to Trust. The Trust has correctly asserted that the Port failed to provide the Trust with 21-day prior notice of the remediation, which would have allowed the Trust an opportunity to comment on the planned remediation. That failure was the result of an unintentional human error. For unknown reasons, the Port's files did not contain a copy of the Trusts's Escrow Agreement, which is the only place the 21day notice is identified. The omission was compounded by prior departures of Port staff that had managed the purchase of the property.

The five year period in which the claim had to be served on the Trust ended at midnight, May 25, 2011, because the Escrow agreement clearly stated

that if no claim had been made by then, the Trust was to be paid on May 26, 2011. Chicago Title Insurance Company was directed to pay the Trust $500,000.00 by the express terms of Trust's escrow agreement on **"the fifth anniversary of the Closing Date..."** of that agreement (Escrow Agreement ¶ 7 emphasis added) if no claim had been filed within the preceding five years. May 26, 2011, was that fifth anniversary and the Port did not serve the Trust with any claim or notice of claim or any other document until May 26, 2011.

After providing all of these notice requirement to perfect any claims against the Sellers and the Seller's Creditors, The Buyer Port, in the Purchase and Sale agreement gave this rather complete release of the Trust and All other interest parties §5(d):

> (d) **Release of Sellers and Seller Creditors.** Buyer and its subsidiaries, officers, directors, managers, members, agents, affiliates, and their successors and assigns, each agree that Sellers, their members, shareholders, managers, employees, agents, contractors and their successors and assigns, and the Seller Creditors, and their trustees, officers, shareholders, employees, agents, contractors and their successors and assigns (collectively, the .."Seller Released Parties"), are hereby released from any and all actions, suits, liabilities, damages, losses, costs, and claims which Buyer may now have or may hereafter have against the Seller Released Parties by reason of any matter relating to or arising from Sellers' or the Seller Creditors' ownership, operation or *use* of the Property; or the physical or environmental condition of the property; provided, however, that the foregoing release shall not. extend to, or provide a release from, any representations, warranties, covenants: indemnifications made by Sellers in this Agreement or in the documents to be delivered at Closing; and provided farther, that the

> foregoing release shall not limit or impair claims against the Special Escrow pursuant to Sections 3© and/or 5© of this Agreement. Buyer hereby agrees and acknowledges that factual matters now unknown to it may have given or may hereafter give rise to actions, suits, liabilities, damages, losses, costs, or claims, which are presently unknown unanticipated and unsuspected, and Buyer further agrees, represents and warrants that this Agreement has been negotiated and agreed upon in light of such acknowledgment and that, except *as* otherwise expressly provided in the preceding sentence, Buyer nevertheless hereby agrees to release the Seller Released Parties as provided in this Section 5(d).

The Port has sought to imply that the Trust bargained for some release of some MTCA liability in the Escrow Agreement, but such a release is not provided in that agreement. It merely recognizes the release already given. The Port argues that in consideration for that supposed release, the Trust agreed to pay up to $500,000 for any environmental clean up costs and this somehow relieved the Port from giving the Trust prior notice of the potential claims (CP 745-859).

Obviously the Trust was released from MTCA claims in the Purchase and Sale Agreement so is not liable to the Port for any MTCA claims. In other words, there was no agreement in the subsequent Escrow agreement by the Trust to pay $500,000.00 in lieu of some agreement from the Port to release it from some potential future environmental claims including MTCA claims, were any ever found to have existed.

MTCA VERSES ESCROW CLAIMS

The Port argues for relief from the prior notice requirements, that the Trust has somehow limited its liability for MTCA contributions by agreeing to post its guarantee of $500,000.00. This is a highly speculative claim even if it could be based upon fact.

For a party (the Port) to obtain contribution from another party (the Trust) under the MTCA, the trial court must find the losing party liable under the MTCA and equitably allocate remediation costs against the losing party in favor of the prevailing party. The court mus answer two questions: "First, is [the party] liable under RCW 70.105D.040? If the answer is yes, then what portion of the cleanup costs should be allocated to [that party]?" *Seattle City Light, et al. v. Wash. State Dep't of Transp.*, 98 Wn.App. 165, 170, 989 P.2d 1164 (1999); *Pacificorp Envt'l V. Dept. Of Transp.* 259 P.3d 1115, 1127 (2011). So even if the Trust had some liability for the MTCA loss, there is no assurance of what that liability might be 1% or lessor up to 99%. Until that equitable apportionment is conducted, no one can conclude that the Trust had any liability for the amount of claimed losses. Any testimony to the contrary is clearly a misstatement of fact and law.

Taliesen Corp. v. Razore Land Co., 135 Wn.App. 106, 127, 144 P.3d 1185 (2006). Each liable party "is strictly liable, jointly and severally, for all

remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances." There really was no evidence that the Trust released or threatened to release any hazardous substances. What ever was there, had apparently been sitting there for decades bothering no one and there is no evidence that the Trust or Mrs. Fjetland, the Trust's beneficiary, ever put any of it there. We don't even know when the complained of materials were deposited.

Under RCW 70.105D.040, there are at least five ways a party can be liable under the MTCA:

(1) as an "owner or operator" of a "facility," under RCW 70.105D.040(1)(a) (current owner liability);

(2) as a "person who owned or operated the facility at the time of disposal or release of the hazardous substances," under RCW 70.105D.040(1)(b) (past owner liability);

(3) as a "person who owned or possessed a hazardous substance and who . . . arranged for disposal or treatment of the hazardous substances at the facility," under) RCW 70.105D.040(1)© (arranger liability);

(4) as a "person[ ] who accepts or accepted any hazardous substance for transport to a disposal, treatment, or other facility. . . unless such facility . . .

could legally receive such substance," under RCW 70.105D.040(1)(d)(l) (transporter liability);

(5) as a "person who both sells a hazardous substance and is responsible for written instructions for its use," under RCW 70.105D.040(1)(e) (seller liability). Notably, "[l]ike CERCLA, no minimum level of `hazardous substances' is required to trigger MTCA liability." *Seattle City Light,* 98 Wash.App. at 172, 989 P.2d 1164 (citing *A & W Smelter & Refiners, Inc. v. Clinton,* 146 F.3d 1107, 1110-11 (9th Cir.1998)). We affirm the trial court's partial summary judgment ruling that DOT is liable to the Utilities as an "arrang[er]" under RCW 70.105D.040(1)©. Under the MTCA, an "arrang[er]" is:

> Any person who owned or possessed a hazardous substance ***and***[:] [1] who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, ***or*** [2] arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, ***or*** [3] otherwise generated hazardous wastes disposed of or treated at the facility.
> RCW 70.105D.040(1)© (emphasis added). DOT reads the United States Supreme Court's decision in *Burlington Northern and Santa Fe Railway v. United States*1as imputing an intent element into MTCA "arranger" liability and then argues that, because the Utilities did not establish that DOT "intended" to dispose of hazardous substances, it is not liable as an "arranger" under RCW 70.105D.040(1)© The Utilities respond that "arranger" liability under the MTCA does not include an intent element and, even if it did, DOT had sufficient intent. Br. of Resp't at 27.

> DOT's reliance on *Burlington Northern* is misplaced. Although *Burlington Northern* requires an intent element for "arranger" liability under 42 U.S.C.A. § 9607, [259 P.3d 1132]see 129 S.Ct. at 1880, our state courts have interpreted "arranger" liability under the state MTCA not to require this element. The United States Supreme Court's interpretation of CERCLA does not trump our state courts' interpretation of Washington's comparable Act. "[O]ur interpretation of our statutes is binding on the federal courts, not theirs on us." *Von Herberg v. City of Seattle,* 157 Wn. 141, 160, 288 P. 646 (1930). As the Utilities correctly point out, both we and Division One of our court have held that the MTCA's "arranger" liability provision "does not require a plaintiff to prove that the defendant had the specific intent to dispose of a hazardous substance." *Seattle City Light,* 98 Wash.App. at 173, 989 P.2d 1164.

Here the evidence is that the Trust neither owned or possessed the hazardous waste, or in fact ever owned any interest in the property except a beneficial interest as the beneficiary of a deed of trust to Chicago Title Insurance Company after Marine View bought the property. Furthermore, there is no showing that it either had any input into the Port's proposed uses of the property planned ten or more years later or even knew of the intended uses during the sale to the Port. It stood in the same position to the property as any bank or mortgage company of a secured lender who has made a secure loan as part of the purchase price of the property. Even if the Trust were somehow to be imputed with some as yet unproved liability of Camille Fjetland, it was minimal when considering potential contributions.

The Escrow Agreement denied the Trust any defenses it had under the

MTCA. Furthermore "in order to impose remedial costs for cleanup of a defendant, a plaintiff must prove that the hazardous substance poses a threat or potential threat to human health or environment." *Seattle City Light v. Dep't of Transportation*, 98 Wn.App. 165, 989 P.2d 1164 (1999) This could be very difficult to do as the supposed materials has been sitting there for at least decades posing no threat to the health or environment, just as some five to six hundred acres we pointed out of the Port's property or within its jurisdiction has existed for decades and continues to exist and has not apparently required any MTCA environmental cleanup (CP 988-1016). But even if some liability on the part of the Trust could be proved the MTCA provides for equitable apportionment between the responsible parties, something the escrow agreement does not. It was the Port's action of changing this commercial, gravel pit property to environmental tide pools and fish ponds that released any environmental toxic wastes and is the primary culprit. Who would have guessed that the Port would be spending Tax money purchasing perfectly good commercial property to build some 27 acres of environmental haven for the fishes.

At most under MTCAs the Trust might only be facing one or two percent of the costs of releasing these stable deposits if anything that were not

being deposited into the environment before the Port's actions. The Port's own evidence is that no release was anticipated until the Port sought to change the condition of he property and the remediation was only necessary to comply with the Port's desire for a Wildlife Habitat (Conner's declaration June 15, 2012 (CP 865, 860-922). The Trust's potential liability, if any, under the MTCA, would have been substantially less under the MTCA measured by its standards. The Trust was certainly entitled to its notices and potential losses because of Asarco slag would have been greatly reduced had this driveway and foundation materials removal been put up for sealed bids when first discovered in 2009 as it was considered a minor irritant at the time. (Dagel Declaration CP 928-929, 923-942)

There was no MTCA Toxic waste until the Port sought to release it to build a Wildlife Babitat. It was being well contained by the property as it was and bought by the Port. As we showed, the Port is sitting on far larger deposits of Asarco waste than the little driveway and foundation deposits notoriously common in homes, foundations, parking lots and rail lines throughout King, Pierce and Thurston counties. We identified where the Port is sitting on 550 to 600+ acres of Asarco Deposits building up the tide flats areas and apparently plans to do nothing about them. The Port's own best evidence is that it thereby

considered them stable and not a hazard to the environment or human health or safety. It is disingenuous for the Port to now argue otherwise.

These deposits only became MTCA contaminants, in the present claim, when the Port decided to disturb them. So until 2009 or 2010, according to the Port's own action, there were no Asarco MTCA rated hazardous waste deposits on the property and even then it was the port that released them. The same can be said for the petroleum deposits buried under thirty feet or more of overburden and dating from who knows when or how they got there? This is especially important as the Port has destroyed all of the archeological evidence before ever giving notice, and the Trust had rights to reimbursement from Marine View for any deposits made between 1996 and 2006 (Ex. 3 CP 179-350), and no liability for any deposits made by the Port. MTCA deposits did not exist until the Port released them.

ESCROW MONEY BELONGED TO THE TRUST SUBJECT TO PORT'S TIMELY CLAIMS

Besides arguing that the 21 day comment period requirement is immaterial (CP 416-423), the Port has argued that until the money was paid to the Trust by the Title Company, the Port continued to have control over it and could do what it wanted with it for any remediation. (CP 416-423). In fact this

brief may be highy inaccurate as it contradicts the admission of counsel in the plain language presented by the Port on the Declaration of Waters (Ex. 1, §3(c)(2) 179-350) that the Sellers and the Seler's creditors were also entitled to notice and cost estimates and perhaps even bids for the proposed work before it was undertaken.

The Port's argument included the argument that the $500,000 was in effect, a delayed purchase price payment, that it could tke back at will as it felt the need arose. This does not follow the law. Once the $500,000 was deposited in escrow, it passed beyond the control of the depositor. The Port could not recall it, and upon performance of the condition named, the depositary, Chicago Title, must deliver it to the grantee. *Lechner v. Halling*, 35 Wn.2d 903, 216 P.2d 179 (1950). In fact the Escrow Agreement recognized that except for the Port's contingent claims, the money belonged to the Trust.

CONSIDERATION FOR CLAIMS AGAINST THE ESCROW FUNDS

Washington appears to follow standard western commercial practice that a contract requires an offer, acceptance and consideration, *In re Marriage of Obaidi and Qatoum*, 154 Wn.App. 609,226 P.3d 787, *reconsideration denied, review denied* 169 Wn.2d 1024, 238 P.3D 503 (Div. 3 2010); *Central*

Puget Sound Regional Transit Authority v. Heirs and Devisees of Eastey, 135 Wn.App. 446, 144 P.3d 322 (Div. 1, 2005); *Michak v. Transnation Title Ins. Co.*, 108 Wn.App. 412, 31 P.3d 20 *review granted* 145 Wn.2d 1033, 43 P.3d 20, *reversed* 148 Wn.2d 788, 64 P.3d 22 (Div. 2, 2001). So clearly in Washington there must be consideration for a contract to be enforceable, *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 95, *answer to certified question conformed to* 378 F.3d 949, *certiorari denied* 544 U.S. 905, 125 S.Ct. 1596, 161 L.Ed.2d 279 (2004).

There was no consideration for the Trust to commit $500,000 of the funds owing it by Marine View, Inc., to be placed in escrow to pay claims of the Port of Tacoma, except for the potential debts of Marine View, Inc., which clearly makes this a guarantee contract. *Waren v. Washington Trust Bank*, 19 Wn.App. 348 575 P.2d 1077, *review granted* 90 Wn.2d.1022, *modified* 92 Wn.2d 381, 598 P.2d 701 (Div. 3, 1978)

NO CONSIDERATION FOR A SEPARATE CONTRACT

The Port tried to make the Escrow Agreement a separate contract based upon some alleged additional consideration, but that does not exist, as the Trust and the Trustees were released in the primary contract, Purchase Agreement, ¶ 6 (d), Waters Declaration, January 23, 2012 exhibit 1 (CP 179-350). Camille

M. Fjetland was and is one of the Trustees and as such was specifically released in the Purchase and Sale Agreement, as was the Trust.. A contract must be supported by consideration to be enforceable: *Keystone Land & Development Co. V. Xerox Corp.* 152 Wn.2d 171, 94 P.3d 945 *answer to certified question conformed to* 378 F.3d 949, *certiorari denied* 544 U.S. 905, 125 S.Ct. 1596, 1611 L.Ed, 2d 279 (2004). The Escrow Agreement only exists as a guarantee agreement.

GUARANTEE LAW APPLIES

The escrow agreement is nothing more than a contract to answer for the debts, the guarantee of certain specific obligations of Marine View, Inc. The Trust never had any obligation to perform any remediation on the property nor did it have any independent liability for such needs or actions because any independent liability it might have had was released in the Purchase and Sale agreement. The Escrow Agreement is specific in its nature and must be strictly construed according to its terms, *Wilson Court, Ltd., Partnership v. Toni Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 540 (1998), *Hansen Service v. Lunn,* 155 Wash. 42, 283 P.695 (1930). C.P.B. & L. Trust has the right not to have its guarantee enlarged, *Old National Bank of Washington v. Seattle Smashers Corp*, 36 Wn.App. 688, 676 P.2d 1034 (1984 Div. 1). Where the guarantee is

conditional, the guarantor's obligation may not be enforced unless the conditional event has occurred or conditional act has been performed. *Bellevue Square Managers v. Granbery*, 2 Wn.App. 760, 469 P.2d 969, review denied 78 Wn.2d 994 (1970).

APPLY CLEAR CONTRACT LANGUAGE

Even if the Escrow Agreement were not considered a guarantee agreement, still contract language should be given its ordinary meaning. *Cambridge Townhome, LLC v. Pacific Star Roofing, Inc.* 166 Wn2d 475, 209vp.3D 863 (2009). The 21 and 5 day notice provisions of the escrow agreement before commencing work are conditions precedent to the Port having the right to make any claim under the escrow agreement. Even the Port's own attorney, Ralph Klose (Declaration January 23, 2012 (CP 88-178) clearly indicates this is so. In any case, that language was clearly the Port's so any ambiguity that the Port now argues must be interpreted most strongly against the Port as the drafter of that language. *Dirk v. Amerco Marketing Co. of Spokane*, 88 Wn.2d 607, 565 P.2d 90 (1977). Ambiguous language in written instruments should be construed against the party using the language. *Gaylord v. Tacoma School Dist. Nol 10*, 88 Wn.2d 286, 559 P.2d 1340, *certiorari denied* 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977). Clearly

the preliminary notice was required before the Port could make any claim. Division 2 of the Court of Appeals agrees *Pierce County v. State* 144 Wn.App. 783, 185 P.3d 594 (2008) *as am on denial of reconsideration.* Furthermore, the Purchase and Sale Agreement that provides for the escrow agreement and the liabilities in the escrow agreement, required cost estimates, even fixed bids before commencing any remediation work. Documents relating to the same subject matter that are executed as part of the same transaction are to be construed as part of the same instrument, *Parker v. BankAmerica, Corp.*, 50 F.3d 757 (C.A, 9[Wash] 1995); *Matter of Estates of Whal*, 99 Wn,2d 828, 664 P.2d 1250 (1983). Again Division 2 agrees with this statement, *Dennis v. Southworth*, 2 Wn.App 115, 467 P.2d 330 (1970). Before the Port could do any remediation and claim any contribution it was required to give prior notice, costs estimates and possibly even fixed bids for the proposed work. Given the fact that the first discovery of Asarco slag was considered of little consequence, (CP 923-942 supra) a fixed bid at that point could really have held the costs down.

FAILURE TO PERFORM PRECONDITIONS BARS RECOVERY

C.P.B. & L. Trust can only be held to answer for this claim provided

that the Port of Tacoma has followed the explicit terms of the escrow agreement and those terms are to be strictly construed, *Seattle First National Bank v. Hawk*, 17 Wn.App. 251, 562 P.2d 260 (1977 Div. 3). In this case, following the common law, C.P.B.& L. Trust is entitled to have the particular conditions specified in the escrow agreement occur before it faces any liability; that is the prior notice of potential claim of the Port that must be given. *Amick v. Baugh*, 66 Wn.@d 298, 402 P.2d 342 (1965). Chicago Title must act in strict accordance with the escrow instructions, *National Bank of Washington v. Equity Investors* 81 Wn.2d 886 (1973) [*appeals after remands* 83 Wn.2d 435, 86 Wn.2d 545]. The Port of Tacoma has no legitimate claim to the remaining escrow funds.

TIME OF ESSENCE ALSO BARS RECOVERY

The Escrow Agreement ¶ 11 specifically provides: "Time is of essence of each and every provision of this Agreement." (Ex 2, CP 179-350) All parties agreed to that. Time being of the essence, this clause bars Port recovery even if the contract were not considered a guarantee contract. Generally where the time within which an option may be exercised is fixed by a contract, that time is of the essence of the contract, unless waived or performance within that time is prevented by the other party. *Olsen v. Northern S. & S. Co.*,70 Wash

493, 127 P.2d 112 (1912). Provision in agreement making time of the essence is generally treated as evidence of mutual intent that specified times of performance be strictly construed. *Mid-Town Ltd. Partnership v. Preston*, 69 Wn.App 227, 848 P.2d 1268, *reconsideration denied, review denied*, 122 Wn.2d 1006, 859 P.2d 1006 (Div. 1 1993). Where agreement makes time of essence and fixes termination date and no conduct gives rise to estoppel or waiver, the agreement becomes legally defunct upon stated termination date if prior performance is not tendered. *Vacova Co. v. Farrell*, 62 Wn.App. 386, 814 P.2d 255 (Div. 1, 1991).

FAILURE TO TIMELY CLAIM BARS RECOVERY

The Port's right to make any claim against the C.P.B. & L Trust Escrow and the Title Company's right to recognize any such claim both became defunct at midnight, May 25, 2011. A contract which by its terms has expired is legally defunct. *Thayer v. Damiano*, 9 Wn.App. 207, 511 P.2d 84 (Div. 3, 1973). The Trust's contract to reimburse the Port for any claimed losses expired at midnight, May 25, 2011. On May 26, 2011, the only right the Title Company had left was the right and obligation to pay the $500,000 to the Trust, ¶ 10 Escrow Agreement.

EQUITABLE ESTOPPEL BARS RECOVERY

The Port's failure to give any notice of any of its claims until May 26, 2011, and even later of the petroleum conditions, all of which it had ben aware since 2009 and to never provide the Trust with any cost estimates and fixed bids for remediation and removal as required before work, would further bar its claim under theories of Estoppel, especially as all work was performed in 2010, many months before any claim was made. Under both the Escrow Agreement and the Purchase and Sale Agreement it is clear that the Port had a duty to advise the Trust before any action was take for remediation for which the Port might make a claim (if indeed there was any room to make a claim under the Purchase and Sale Agreement). Equitable estoppel can arise by silence when one has a duty to speak. *Sounders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989). Silence will compel equitable estoppel where a party knows what is occurring and would be expected to speak. *Ticor Title Ins. Co of California v. Niassel,* 73 Wn.App. 818, 871 P.2d 652 (Div. 2 1994); see also *Peckman v. Milroy*, 104 Wn.App. 887, 17 P,3d 1256 (Div. 3 2001) as amended 144 Wn. 2d 1010, 31 P.3d 1184.

We further note that it is reasonable to assume, before the evidence was removed, that the Port authorities had concluded it had no real claim under the

escrow agreement. But upon later consideration, after the evidence had been removed, someone raised the possibility of the Port being reimbursed for part of a habitat improvement project it undertook. In any event, it manufactured or otherwise procured the Hart Crowser reports and cost estimates of 2011 that it used in these proceedings to support its claims and the court has observed some of them over our objections.

EVIDENCE OF REMEDIATION COSTS WAS INADMISSABLE FOR SUMMARY JUDGMENT

The entire cases of Port based upon findings of petroleum and other deposits and Asarco slag depend upon spoiled evidence, evidenced the Port of Tacoma destroyed when it was under a contractual duty to disclose it to the Trust and Chicago Title prior to removal. As early as 1977 the Washington State Supreme Court was treating the inference of such spoliation as substantive evidence and excluding the evidence offered by the party that destroyed the evidence. *Pier 67, Inc. V. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977), see also Brown, McCormic on Evidence § 265 (two Volume 6th ed.) Citing cases and Wright & Miller, Federal Practice and Procedure: Evidence § 5178, citing cases.

EQUAL PROTECTION

The court, as we have previously pointed out, has failed to give the Trust the benefit of its bargain, has failed to enforce the contract and guarantee rules that apply to this case by ignoring the contract defenses against the Port's claims, by ignoring that the Port never properly served or perfected its claim against the Trust's guaranteed escrow, and by jumping directly to the question of whether the Port could have had a claim for damages. This is clearly treating the parties unequally before the law. As such the court is in violation of the equal protection clause of the fourteenth amendment and with impartiality, Article IV § 28 of the Washington State Constitution and Article I §12.

While the Port may be highly respected in Pierce County and have sway in its political counsels, at law it is just another party, no better or worse than any other party.

> WPI 1.07 Corporations and Similar Parties: The law treats all parties equally whether they are *[corporations] [government entities] [partnerships]* or individuals. This means that *[corporations] [government entities] [partnerships]* and individuals are to be treated in the same fair and unprejudiced manner.

See also *Shanks v. Oregon-Washington R. & Nav. Co.*, 98 Wash. 509, 167 P. 1074 (1917). The finding in this case that the Port could make some claim against the Trust's escrow account, without consideration of the Trust's defenses against the making of such a claim under both the Purchase and Sale

Agreement and the Escrow Agreement is a clear indication that in Pierce County, the Port of Tacoma is being treated as a superior to other litigants in the county. The court could only rule in favor of the Port by ignoring the rights of the Trust as expressed in the Purchase and Sale Agreement and the Escrow Agreement.

> "The aim and purpose of the special privileges and immunities provision of Art. 1 § 12 of the state constitution and the equal protection clause of the fourteenth amendment of the Federal constitution is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other.

State ex rel Bacish v. Huse, 187 Wash. 75, 59 P.2d 1101 (1936) cited in *Alton v. Philips Co. V. State*, 65 Wn. 2d 19, 202, 396 P.2d 537 (1964) holding that one person cannot be granted "recourse in the courts of our state which is not afforded another. 65 Wn.2d @ 204. In the present case the Port is granted rights to unrestricted use of Trust escrow funds under the Purchase and Sale agreement and the Trust escrow agreement whereas the Trust is granted no protections under the terms of either agreement.

IGNORING SUMMARY JUDGMENT FORM REQUIREMENTS ILLUSTRATES COURT PREJUDICE

CR 56 (h) requires that:

> (h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence

called to the attention of the trial court before the order on summary judgment was entered.

The court admonished both counsel for the Port and the Trust in its oral opinion of February 10, 2012 (page 20 line 20) that when it came to summary judgment orders "I need an order, but the order does have to list every document." The court went on to insist that an order would be sufficient "As long as you've listed all the documents. Lets don't forget the rule." (Verbatim report page 21 line 5) But apparently when it comes to orders and judgments that are in favor of the Port of Tacoma, the court is at liberty to forget the rule and clearly has applied a different standard. So it is clear on the face of these proceedings that all litigants are not equal before the court..

There were over 60 documents called to the attention of the court, as reflected in the Trust's own proposed order orders and Summary Judgment, annexed, and the docket of this court. The Court only designated that it considered 14 of these documents in its order denying the Trust's motion for summary Judgment and the court only designated that it considered nine such documents in its granting of the Port's morion for summary judgment. The court has thus stated that it virtually ignored the vast majority of documents filed in this case in considering either order. Either the Court did not consider those documents and had made up its mind based upon preconceived notions

of justice not fully related to the case, or if it did consider the other documents, the form of the order and summary judgment are faulty and should be stricken.

The Port's order form completely omits reference to the Declaration of Liberty Waters, one of the Port's own attorneys (CP 179-350). She set forth copies of all the key contracts and claims including the Purchase and Sale Agreement, the Escrow Agreement, documents relating to the pre-sale cleanup, and the Settlement Agreement, providing reimbursement to the Trust by the sellers and owners of the sellers of any claims for materials and substances deposited between January 1996 and May 26, 2006. She provides in January, 2012, the Chicago Title Insurance Company report that clearly confirms that the Trust has no independent liability for any substance or materials found on the property, and the May 26 claim against the Trust that shows the Port's letter of May 23, 2011, only address the Foran escrow account and the only mater in that letter that were later addressed any issues related to the Trust's escrow were those identified with Asarco Slag allegedly found on former Fjetland and B & L Trucking properties. There was no designation in that letter of any other materials or substances that were even loosely describe to be found on that property subject to the Trust escrow account, also referred to the Marine View, Inc., property, The Trial Court sought largely to omit any of this evidence but

it is in the record from the Port so it cannot be denied..

No claim was made for any other substances or materials found on that property subject to the Trust escrow until the letter of July 28, 2011, also an exhibit attached to the Waters' declaration. Perhaps the omission of these documents and that Declaration of the Plaintiff's own attorney can explain how the Court could ignore all of those documents and grant judgment to the Port of Tacoma.

LESLEE CONNER'S PERJURY

The Court relies upon the testimony of Leslee Conner of June 15, 2012, to establish the costs and necessity of remediation and removal and the lack of alternatives (CP 860-922). Yet Ms. Conner committed perjury in her declaration, even months after the Port's own evidence established that the Trust never had any independent liability for any claims of the Port outside of the requirements in the Escrow Agreement. She stated that the Trust would qualify as an otherwise liable party "under any other legal cost recovery mechanisms, including the private rights of action in MTCA which has no monetary limits." This is a bold face lie and the Port has presented no evidence of such liability other than this assertion and the fabrication in the complaint, which was denied in the Trust's answer. This follows her opnion stated in her

earlier declaration of January 23, 1012 that the escrow Agreement limited the Trust's potential liability to much less that would have been incurred under the MTCA (70-87). It is clear from the evidence of the Port, that the Trust never owned or operated the property, assumed no liability for the ownership or operations of the property but merely existed for the ten years preceding the sale as the instrument for the collection of the sale proceeds from Marine View, Inc, and finally, had already been released from any other claims of liability by the Purchase and Sale agreement.. It never had any independent liability for any claims for cleanup or remediation on the property.

The Port's complaint had alleged (CP 1-6):

> The Trust assumed duties pursuant to the Trust Escrow Agreement to pay the Port for the cleanup of construction debris, the remediation of certain hazardous materials, and the remediation of certain other conditions relating to the property. The Trust has breached these duties.

The Port compounded this statement by its own counsel in Mr. Nadler's first response to the Trust first motion for Summary Judgment on January 23, 2012 (CP 60, 56-59)

So whether the Trust has an independent duty to pay for the cleanup is a material fact under Port's complaint, and showing that the allegation and supporting evidence is false, is proper impeachment under the rules of evidence. ER 607. See Tegland, 5A Washington Practice §§607.17-20. The

Port's lie has been compounded by Ms. Conners when she says (CP 870, 860-922):

> It is my opinion that had the Port understood the extent of contamination actually present on the property and the associated future cleanup costs that the Port would face within the area planned for habitat construction, it would certainly not have agreed to cap the Trust's liability ... at a combined maximum of $500,000.00.

Ms. Conner is testifying as an expert witness and her opinion misstatements of fact or fact and law must be considered not as just idel misstatements of opinion but of material facts which she has been asked to testify to.

Considering that it was the Port that released the hazardous waste according to plans made well after it purchased the property, and this was a known fabrication or deliberate exaggeration for well over four months even when it was submitted as evidence to the court by the Port, this further indicates how the Port sought to mislead the Trial Court on the facts to prevail on it to ignore the law and the written agreements and obligations of the parties.. The Campbell declaration of February 1, 2012 put the Port and its witnesses on notice that the Port has no direct claim against the Trust when it says Page 2 line 7, "Third: The Trust never owned, used or occupied the land....." (CP 396-407) This was confirmed by the Port's own evidence in the Title Report Exhibit 4 to the Liberty Wasters Declaration of January 23, 2012

(CP 179-350).

The Trust has never been liable for any clean up outside of the guarantee given in the closing of the sale. The Trust was set up pursuant to court orders in the closing of the Camille Fjetland Guardianship in 1995 -1996 (Pierce County Superior Court Cause No. No. 93-4-00307-5) (CP 8, 7-49) to collect the proceeds of the sale of the Fjetland, B & L Property of about 57 acres to Marine View, the Parsons' interests, and to administer the proceeds of that sale. As such it became the note and security holder of the liability of Marine View with guarantees of Parsons and later Books. It never operated any business on the property nor conducted any activity on the property. It has never assumed any general liability for environmental conditions of the property outside of the specific assumptions in the Escrow guarantee agreement that it signed ten years after the sale of the property to Marine View, Inc., the Parsons and Books interest. The Port's own title report shows that Camille M. Fjetland and B & L Trucking and Construction Co, Inc., conveyed the property to Marine View on January 25, 1996 and that the Trust was merely the beneficiary of the deed of trust for the balance of the sales price (Declaration of Liberty Waters, Exhibit 4 (CP 179-350). The Trust cannot be described to have any personal liability for the condition of the property.

As we pointed out in C.P.B. & L. Trust's Response to Port's Summary Judgment Motions, those facts cannot be disputed, and are supported by the records of this court in the guardianship of Camille Fjetland. This was confirmed by the declaration of Edward D, Campbell, the same date, June 26, 2012 (CP 7-49). The Trust applied for its Federal Tax Employer Identification Number on April 29, 1996, so that it could report earned interest income from the note given by Marine View for the balance due in the sale. The moneys received in the sale of 2006 from Marine View to the Port allocated to the Trust were to satisfy the then underlying agreed debt on the secured notes of Marine View, Inc, guaranteed by the Books and Parsons. The Trust agreed to place $500,000 those funds in a guaranteed account to avoid having to pay off a prior lien creditor threatening to foreclose. The Trust could not pay of the prior lien holder. This was the option facing the Trust at the time if it were to protect any rights it had to payment from the sellers, any rights to its sole asset. In any claim against the guarantee funds the Port must first prove that it had a claim under PSA and then that such claim was proper and also properly made under the Escrow Agreement. It is clear from the Escrow Agreement that the Trust never assumed any duty to make any such payment set forth above. The Trust never assumed any positive duties towards the property or the Port of Tacoma.

It placed $500,000.00 in an escrow account to guarantee certain payments that might be owed according to the original Purchase and Sale Agreement (PSA) of the property from Marine View, Inc., to the Port that closed on May 26, 2006, and according to the express terms of said guaranteed escrow account.

The implication that the Trust had some independent duty under the MTCA was clearly given to sway the emotions of the court, to play upon the prejudices of the court to punish "bad people" and taints Ms. Conners' entire testimony so that none of the claims she makes need to be take seriously. Her testimony on the necessity and value of the Port's claims should be discarded and cannot support a motion by the Port for Summary Judgment nor oppose a motion by the Trust for summary judgment. One could speculate on why Port counsel, knowing that there was no independent Trust liability for the claims made herein, allowed the Port to continue this argument, which Port counsel started to spread in its complaint (not listed as a document referred to in the order entered by the court). This was the same counsel who could send a letter to the Foran interests on May 23, 2011 but could not address one to the Trust until May 26, 2011, when the addresses of both persons were listed in their respective Escrow Agreements. Well there is plenty of blame to pass around for the Port losing any legitimate claim it might have had against the Trust if

the Port were not able to rely on the Court's powers to correct the Port's errors and omissions at the Trust's expense.

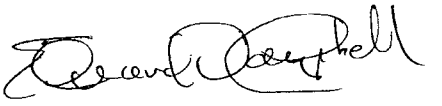
ATTORNEY FEES

Awarding the Port any attorney fees in this case is clearly unconscionable. The Trust, as a result of the Port's actions and omissions in not giving prior notice, providing costs estimates and bid contracts, forced the Trust into bringing suit to meet its fiduciary duties to protect the assets of the Trust estate. The Trust had no choice because of the Port's action. It was bound to test the Ports contractual interpretations and any claims for damages and normally should be awarded its own fees just on the basis of the Ports actions and omissions, no matter what the final outcome of the case might be. Awarding attorney fees to the Port is unconscionable under all circumstances herein, especially on a summary judgment. Furthermore The Port's request is were completely out of line with any requested by the Trust for comparable legal work.

CONCLUSION

We have cited a dozen reasons for the Trust to prevail in this action on its motion for Summary Judgment. The only reason that the :Trial Court appears to have relied upon is that somehow the Trust is just liable for the

Port's losses. Fortunately for the Trial Court, it does not have to cite any reasons for allowing the Port to recover and can leave it up to Division 2 of the Court of Appeals to find some reason, or just bury the case in an unpublished opinion. That is sad commentary.

We request the Trail Court's  decisions be reversed and it be instructed to enter judgment in favor of the Trust to the $490,000 together with appropriate interest thereon from May 26, 2011, and award attorney fees to the Trust including those on appeal.

January 5, 2013

Edward D. Campbell, WSBA No. 439
Attorney for C.P.B.& L. Trust, Appellant

APPENDIX

RCW 70.105D.040 Standard of liability — Settlement.

(1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:

(a) The owner or operator of the facility;

(b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;

(c) Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility;

(d) Any person (i) who accepts or accepted any hazardous substance for transport to a disposal, treatment, or other facility selected by such person from which there is a release or a threatened release for which remedial action is required, unless such facility, at the time of disposal or treatment, could legally receive such substance; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is not operated in accordance with chapter 70.105 RCW; and

(e) Any person who both sells a hazardous substance and is responsible for written instructions for its use if (i) the substance is used according to the instructions and (ii) the use constitutes a release for which remedial action is required at the facility.

(2) Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to

recover all costs and damages from persons liable therefor.

(3) The following persons are not liable under this section:

(a) Any person who can establish that the release or threatened release of a hazardous substance for which the person would be otherwise responsible was caused solely by:

(i) An act of God;

(ii) An act of war; or

(iii) An act or omission of a third party (including but not limited to a trespasser) other than (A) an employee or agent of the person asserting the defense, or (B) any person whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the person asserting this defense to liability. This defense only applies where the person asserting the defense has exercised the utmost care with respect to the hazardous substance, the foreseeable acts or omissions of the third party, and the foreseeable consequences of those acts or omissions;

(b) Any person who is an owner, past owner, or purchaser of a facility and who can establish by a preponderance of the evidence that at the time the facility was acquired by the person, the person had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for the remedial action, was released or disposed of on, in, or at the facility. This subsection (b) is limited as follows:

(i) To establish that a person had no reason to know, the person must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice in an effort to minimize liability. Any court interpreting this subsection (b) shall take into account any specialized knowledge or experience on the part of the person, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the

property, and the ability to detect such contamination by appropriate inspection;

(ii) The defense contained in this subsection (b) is not available to any person who had actual knowledge of the release or threatened release of a hazardous substance when the person owned the real property and who subsequently transferred ownership of the property without first disclosing such knowledge to the transferee;

(iii) The defense contained in this subsection (b) is not available to any person who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance at the facility;

(c) Any natural person who uses a hazardous substance lawfully and without negligence for any personal or domestic purpose in or near a dwelling or accessory structure when that person is: (i) A resident of the dwelling; (ii) a person who, without compensation, assists the resident in the use of the substance; or (iii) a person who is employed by the resident, but who is not an independent contractor;

(d) Any person who, for the purpose of growing food crops, applies pesticides or fertilizers without negligence and in accordance with all applicable laws and regulations.

(4) There may be no settlement by the state with any person potentially liable under this chapter except in accordance with this section.

(a) The attorney general may agree to a settlement with any potentially liable person only if the department finds, after public notice and any required hearing, that the proposed settlement would lead to a more expeditious cleanup of hazardous substances in compliance with cleanup standards under RCW 70.105D.030(2)(e) and with any remedial orders issued by the department. Whenever practicable and in the public interest, the attorney general may expedite such a settlement with persons whose contribution is insignificant in amount and toxicity. A hearing shall be required only if at least ten persons request one or if the department determines a hearing is necessary.

(b) A settlement agreement under this section shall be entered as a consent decree issued by a court of competent jurisdiction.

(5)(a) In addition to the settlement authority provided under subsection (4) of this section, the attorney general may agree to a settlement with a person not currently liable for remedial action at a facility who proposes to purchase, redevelop, or reuse the facility, provided that:

(i) The settlement will yield substantial new resources to facilitate cleanup;

(ii) The settlement will expedite remedial action consistent with the rules adopted under this chapter; and

(iii) Based on available information, the department determines that the redevelopment or reuse of the facility is not likely to contribute to the existing release or threatened release, interfere with remedial actions that may be needed at the site, or increase health risks to persons at or in the vicinity of the site.

(b) The legislature recognizes that the state does not have adequate resources to participate in all property transactions involving contaminated property. The primary purpose of this subsection (5) is to promote the cleanup and reuse of vacant or abandoned commercial or industrial contaminated property. The attorney general and the department may give priority to settlements that will provide a substantial public benefit, including, but not limited to the reuse of a vacant or abandoned manufacturing or industrial facility, or the development of a facility by a governmental entity to address an important public purpose.

(6) Nothing in this chapter affects or modifies in any way any person's right to seek or obtain relief under other statutes or under common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a hazardous substance. No settlement by the department or remedial action ordered by a court or the department affects any person's right to obtain a remedy under common law or other statutes.

RULE ER 607

WHO MAY IMPEACH The credibility of a witness may be attacked by any party, including the party calling the witness.
[Amended effective September 1, 1992.]

CR 56(h)

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

No. 439409

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

C. P. B. & L. TRUST

Appellant,

vs.

PORT OF TACOMA

Respondents.

SERVICE CERTIFICATION

I certify that today I have served one copy of the Appellant's Brief and one copy of the revised Statement of Arrangements on:

Mr. Mark S. Nadler, P.E.
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✔ by **mailing** full, true, and correct copies thereof in a sealed, first-class postage prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Seattle, Washington, Priority Mail postage prepaid, on the date set forth below.

January 7, 2013

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