

NO. 35521-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE: THE PORT OF TAHUYA

A Washington Port District.

PETITIONER'S REPLY BRIEF

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BY *[Signature]*
DEPUTY

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I. PETITIONER'S RESPONSE TO STATEMENT OF FACTS.

The Port's counsel continues to perpetuate his misrepresentations of Judge Sawyer's ruling at the January 9, 2006 hearing on the Port's Petition for Dissolution. In the Port's Brief, it states:

The court would have entered an order finding solvency and directing the immediate dissolution of the Port [at the January 9, 2006 hearing], *but for* the fact that several individuals within the Port of Tahuya port district were interested in maintaining the existence of Menard's Landing, a small park located on property owned by the Port [emphasis original]. Respondent's Brief, pages 4-5.

This is the precise misrepresentation made to Judge Sheldon on May 24, 2006 when she dissolved the Port without a finding one way or another on the solvency of the Port. It was also the precise mindset which the Port counsel and two of the three commissioners (excluding Petitioner Carey) operated with which caused the Port to be dissolved prior to completing the items required by Judge Sawyer to be completed prior to dissolution of the Port. Based on the briefs filed by the Port in this action, one might conclude the Port was operating in bad faith when it negotiated and agreed to the January 9, 2006 Order. Judge Sawyer in reality withheld dissolution and a finding of solvency, until several actions could be taken, only one of which involved the Menard's Landing Park.

These actions included, *inter alia*, setting of a claims period after notice to creditors, consideration of said claims and additional claims, the

addressing of outstanding public records requests, close out of leases, marshalling of assets and the assembly, organization and preparation of the Port's records for archiving. [CP 520-521]. These are for the most part actions that had to be completed before solvency could be determined. The January 9, 2006 Order¹ was entered after oral argument wherein Robert Goodstein, counsel for the Port, represented to the Court as follows:

And in addition, Mr. Carey has filed an order [sic] requiring systematic winding up prior to dissolution in which he asks certain tasks be accomplished. We believe that these are tasks that would be accomplished in the ordinary course of a wind up anyway. The difference here is that what Mr. Carey had asked for, as I understand it, is that the wind up occur prior to the dissolution. I believe we're accomplishing that task by having the Court indicate that it will dissolve the Port upon the completion of those tasks that he has called out. Those tasks include taking action on open claims, completing action on open lawsuits, gathering and archiving public documents consistent with rules of the State Archivist, responding to pending requests for public disclosure, closing out of any leases, and gathering and properly archiving or terminating existing policies of insurance.

[RP 3]. In response to Goodstein's statements, the Court ruled from the bench as follows:

So, that having been said, I will sign an order. I'm indicating that the Court will order the Port to be dissolved upon completion of the business as set forth, **which means the processing of any open claims, the processing of any open lawsuits**, the proper preparation for and completion of the archiving of the records of

¹ The Order was actually signed by the Court on January 23, 2006.

the Port of Tahuya, and any public disclosure requirements that may still be pending . . . [emphasis supplied].

[RP 8]. The Court did not make a finding of solvency or dissolve the Port on January 9, 2006, or at any other time. Indeed, what Judge Sawyer was indicating is the Port would not be dissolved *until completion* of these tasks. The actions identified above were to occur *prior to* the dissolution of the Port [CP 520-521; RP 8]. The issue of solvency was not raised at the January 9, 2006 hearing [RP 1-14].² Indeed, because of the numerous outstanding claims [CP 113-333] against the Port, most of which are unliquidated *even today*, no finding of solvency could be possible. Without a finding of solvency, a Port District can not be dissolved. RCW 53.48.030.

This appeal arises because on May 24, 2006, Robert Goodstein misrepresented to the Court what happened in connection with the January 9, 2006 hearing. The May 24, 2006 hearing was conducted not by Judge Sawyer, but by Judge Toni A. Sheldon. Notwithstanding Judge Sawyer's January 9, 2006 Order and ruling from the bench, and the lack of accomplishment of the directed actions, on May 24, 2006, Goodstein represented to Judge Sheldon:

² Petitioner did raise the issue of solvency *prior to* the January 9, 2006 hearing [CP 528-546; 547-548]. However, it was not raised at the hearing because Judge Sawyer did not rule on solvency.

So we don't believe there is any impediment to entering the dissolution order. The dissolution order, as you can see from the January 9th ruling of the Court, **was simply held in abeyance as a convenience to allow this Court to transfer Menard's Landing, which has occurred.** [emphasis supplied].

[RP 48].

Based upon Goodstein's misrepresentation of Judge Sawyer's ruling, and notwithstanding the lack of a finding of solvency and the **numerous outstanding, unresolved and unliquidated claims against the Port**, Judge Sheldon entered an Order [CP 504-506] dissolving the Port. This appeal is of that Order.

II. ARGUMENT.

A. The Statutory Scheme for Dissolution of Port Districts has been disregarded.

RCW 53.48.040 states:

After said hearing the court shall enter its order dissolving or refusing to dissolve said district. A finding that the best interests of all persons concerned will be served by the proposed dissolution shall be essential to an order of dissolution. If the court find that such district is solvent, the court shall order the sale of such assets, other than cash, by the sheriff of the county in which the board is situated, in the manner provided by law for the sale of property on execution.

If the Port District is found to be solvent, its debts shall be paid, with any surplus paid to the local school district. RCW 43.48.050. If the Port District is found to be insolvent, there shall be a second hearing, to "determine ways and means of retiring the established indebtedness of the

district and paying all costs and expenses of proceedings hereunder. Such ways and means may include the levy of assessments against the property in the district as provided in RCW 53.48.080.” RCW 53.48.060.

If there had been a finding of solvency, one of the above events would have occurred. But *neither* have occurred . . . debts of the Port have not been paid, no funds have been remitted to the local school district; and there was never a second hearing to determined means of retiring the Port’s indebtedness. If there was a finding of solvency *or* insolvency, one of the above would have happened.

The Port’s argument in its brief is internally inconsistent, because the Port can not match up what actually happened, with the statutory scheme for dissolution of Port Districts. The Port states “The trial court would have immediately entered an order finding solvency . . . but for the [Menard’s Landing issue] . . . [t]herefore the entry of the finding of solvency . . . was postponed for 120 days.” Responsive Brief, Page 11. The Port is thus conceding that there was not a finding of solvency on January 9, 2006, a concession that is directly contrary to its arguments to Judge Sheldon on May 24, 2006, and other arguments in its Responsive Brief, that a finding of solvency *was* made on January 9, 2006!

B. The January 9, 2006 Order by its terms does not find solvency.

The Port argues Judge Sawyer's finding that dissolution is in "in the best interests of all persons" is akin to a finding of solvency. "Best interests" is a finding required by RCW 53.48.040. Solvency or insolvency is also a finding required by RCW 53.48.040. The January 9, 2006 Order [CP 518-524] contains no finding one way or another of solvency. Solvency was neither raised nor addressed at the January 9, 2006 hearing [RP 1-14].³ Without an express finding of solvency or insolvency, a Port District can not be dissolved. RCW 53.48.030.

The January 9, 2006 Order itself also required a new claims period; the consideration of pending claims (which are still pending!); the Port addressing outstanding records requests (which are still outstanding!); closing out of leases; collection and marshalling of assets; and the assembly, organization and preparation for archiving of the Port's record (which has not been completed!). These are actions needed to be taken before solvency is even ripe for decision. Clearly the Court was not ready to address the issue of solvency on January 9, 2006.

The January 9, 2006 Order delays entry of an Order of Dissolution 120 days (to allow winding up actions to occur, which incidentally have

³ Petitioner did raise the issue of solvency *prior to* the January 9, 2006 hearing [CP 528-546; 547-548]. However, it was not raised at the hearing because Judge Sawyer did not rule on solvency.

not yet been completed!). The Order does not say an order of solvency shall be entered in 120 days – if the tasks had not been completed within the 120 day period, an extension would have been appropriate. The Order is silent altogether on the issue of solvency. If Judge Sawyer had intended upon ruling on solvency at the January 9, 2006 hearing, he would have done so in the Order.

C. Solvency was raised by Carey prior to the January 9, 2006 hearing.

The Port argues that Petitioner Carey did not introduce evidence of insolvency at the January 9, 2006 hearing.⁴ This is false as counsel is aware, and misleads this Court. The Order that arose out of the January 9, 2006 hearing was an *agreed* order. It arose out of discussions between Robert Goodstein, the Port's counsel, and Petitioner Carey after Carey submitted his response to the Petition for Dissolution [CP 528-546].

Carey's response objects to the dissolution of the Port on several grounds. The objection was filed because Carey did not want the Port dissolved haphazardly, without meeting its obligations under the Public Records Act, or its duty to pay its creditors (of which he was one).

⁴ Part of the problem is that the January 9, 2006 hearing was conducted by Mason County Superior Court Judge Sawyer, but the May 24, 2006 hearing, and the June 19, 2006 order, was entered by Judge Sheldon without the benefit of the Verbatim Report of Proceedings of the January 9, 2006 hearing. Judge Sheldon even stated she felt "blindsided" by the issues in this case because she was not the judge at the January 9, 2006 hearing. [RP 1-14].

Carey's response also objects to dissolution on the grounds that "No analysis was ever done in public for determining POT solvency." [CP 529].

D. There is insufficient evidence to make a finding of solvency or insolvency, regardless of the Port's "Substantial Evidence" argument.

The Trial Court is required to make a finding of solvency or insolvency of the Port of Tahuya. Without a finding of solvency, a Port District can not be dissolved. RCW 53.48.030.

The Port argues that there is "substantial evidence" to support a finding of solvency. This argument is disingenuous when there are numerous outstanding claims [CP 113-333] against the Port, many of which are unliquidated *even today*. In other words, if the Port does not know the value of a claim, how can it say it is solvent? It can not.

The Port argues the declarations of Christian and Smith [CP 699-782; CP 697-697] establish solvency. These declarations merely make conclusory allegations that the Port is solvent, and do not take into account the pending lawsuit and other claims against the Port, or even detail the assets and liabilities of the Port. A declaration may not be based upon conclusory allegations, speculative statements or argumentative assertions. *See, e.g., Las v. Yellow Front Stores, Inc.*, 66 Wash.App. 196, 198 (1992). The declarations are self-serving and ignore the potential liabilities of the

Port. Further, Christian's declaration is inconsistent with other declarations he has filed with the Court [CP 679-694, and specifically CP 693], where Christian states:

"It is not understood at this time what if any liability the Port has for the current or any future law suits. Perhaps the court could help with an understanding of this liability."

The Port also argues that Christian's and Smith's later letters [CP 679-694 and 677-678] to the Court enable the Court to make a finding of solvency. These letters were sent to the Court after the May 24, 2006 hearing, and thus could not be a basis for a finding of solvency. Further, the letters are in essence biased recommendations of former Port Commissioners as to how the Court should handle the dissolution [this Court can see the dangers and confusions that have arisen in these proceedings by the mixing of the legislative and judicial branches of the government. The Mason County Superior Court is now running the day to day affairs of the Port of Tahuya!]. Also, the letters contain a single conclusory allegation that "The Port of Tahuya as of May 31, 2006 is solvent." [CP 682], and sets forth biased arguments as to the merits of claims that will ultimately be decided by the Court. The letters address the Public Records claim of Petitioner Carey, saying "This matter will be settled as part of the suit if it moves forward." [CP 689]. These letters do not substitute for the Court's statutory mandate to determine the solvency

of the Port based upon evidence of assets and liabilities of the Port. RCW 53.48.040.

With such confusion reigning, and no evidence of assets or liabilities, how could this Court make a finding of solvency or insolvency? This answer is it has not, and has not complied with its obligations under RCW 53.48.040.

The Port argument that the January 9, 2006 order contains an “implied” ruling of solvency is also inconsistent with the statutory scheme for dissolution of Port Districts. This argument misstates the agreement as seen in the Verbatim Report of Proceedings of the January 9, 2006 hearing [RP 1-14], which the Port’s counsel misrepresented to Judge Sheldon at the May 24, 2006 hearing upon which the order of dissolution was based. Judge Sheldon’s mistake was believing the representations of Port’s counsel in entering the June 19, 2006 Order, which is the subject of this appeal. She “implied” solvency from the January 9, 2006 hearing, without there being any evidence whatsoever of assets or liabilities of the Port being presented at that hearing!⁵ Judge Sheldon should have heard evidence of the Port’s assets and liabilities, and made a finding of solvency or insolvency, prior to dissolution of this Port district.

⁵ She also did so without benefit of the Verbatim Report of Proceedings of the January 9, 2006 hearing.

Even the Port's argument of "substantial evidence" is inconsistent with the statutory scheme for dissolution of Port Districts. There must still be an express finding of solvency or insolvency by the Trial Court. By arguing "substantial evidence," the Port is in essence asking the Court of Appeals to make the finding of solvency that was never made by the Trial Court.

E. The Port misreads the statute as to a timing of a hearing under RCW 53.48.060.

The Port argues that neither Petitioner nor any third party "requested the court to set a further hearing pursuant to RCW 53.48.060 based on the claimed insolvency of the Port." Respondent's Brief, Page

15. RCW 53.48.060 states:

53.48.060. Insolvency--Second hearing

Upon a finding of insolvency the court shall then determine the indebtedness of the district, the creditors thereof and their claims. The court shall then set a date and a place for a second hearing, which hearing shall be not less than sixty days nor more than one hundred twenty days from the hearing as provided in RCW 53.48.030.

The purpose of such hearing shall be to determine ways and means of retiring the established indebtedness of the district and paying all costs and expenses of proceedings hereunder. Such ways and means may include the levy of assessments against the property in the district as provided in RCW 53.48.080.

RCW 53.48.060 is applicable only after the Court makes a finding of insolvency. Such a finding was not made, or even addressed by the Trial Court. Similarly, the alternative to RCW 53.48.060, the payment of

the debts of the Port, with remittance of the balance to the local school district, also did not occur. *See* RCW 53.48.050. This is because neither solvency nor insolvency was found at the Trial Court level.

F. Accountant Fox' claim that the Port can ignore the claims of Petitioner Carey [and other creditors] in determining solvency is nonsensical.

The Port and its accountant George Fox propose a sham solution that can be summarized as *allowing the "fox" to determine the fate of the chicken!* Fox argues application of an obscure accounting rule, FAS 5, suggesting that if the Port's attorney claims there is no merit to Petitioner Carey's public disclosure lawsuit, it can simply be ignored! But the Port's attorney has obvious conflicts of interest: not only is he hired to argue the Port's case, but this attorney was the person who advised the Port in the production (or lack thereof) of the records (leading to the pending PRA lawsuits)! The Fox declaration lacks credibility and shows naiveté towards what was happening with respect to the records requests.

Solvency is defined as:

"Present ability of debtor to pay out of his estate all his debts. Excess of assets over liabilities. . . . 'Solvency' within Bankruptcy Act presupposes ability to make ultimate payment of obligations then owed from assets then owned."

Black's Law Dictionary, 5th ed. This is not a complicated concept.

In light of the lack of pertinent reported cases under RCW Ch. 53.48, it is incumbent upon the Court to review the plain wording of the statute, and make a ruling consistent therewith. Berrocal v. Fernandez, 155 Wash.2d 585, 599 (2005). Strained meanings and absurd results in interpreting statutes should be avoided. State v. Neher, 112 Wn.2d 347, 351 (1989). When interpreting statutes, courts are not required to abandon their common sense. Allison v. Housing Authority, 118 Wn.2d 79, 86 (1991) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). A court must “give meaning to every word the legislature includes in a statute, and we must avoid rendering any language superfluous.” Fernandez, 155 Wash.2d at 599-600.

We know from this statutory scheme, the Trial Court *must* make a finding of solvency or insolvency. RCW 53.48.040. Of course, this was never done, “impliedly” or otherwise. [RP 1-14].

But why must such a finding be made? So the Court can decide how the Port pays its creditors, and how it distributes its assets. RCW 53.48.050 and .060. It either pays all of its debts, or comes up with a plan on how to do so which may include a “levy of assessments against the property in the district.” RCW 53.48.060.

If the Court were to distribute the Port’s assets *before* all claims are known and resolved, it would be left with the unenviable task of having to

recover the assets from the party to whom payment was made, if the subsequent claims proved to exceed the assets of the Port. It is possible, even likely, that any distributions of Port assets may be unrecoverable.

After all claims are liquidated, it should be easy to enter a claim of solvency *or* insolvency, and proceed under either RCW 53.48.050 or .060.

This Court can thus see that by proceeding under the plan suggested by accountant Fox, i.e., ignoring claims that the opposing counsel deems without merit, simply does not work.⁶ If the claims are subsequently deemed to be meritorious, those creditors would be greatly prejudiced by likely nonpayment.

Indeed, this was recognized by the Port's own attorney, who advised the Court on April 27, 2006 as to the outstanding claims:

“Clearly, the Court’s Order [of January 9, 2006] simply establishes May 9, 2006 as the claims bar date. In addition, claims received on that date would necessarily have to be resolved after that date, and other matters may also be resolved after that date. . . . In all likelihood, they will have to be resolved by the Court in evidentiary hearings, as contemplated by the Court’s January 9, 2006 Order, and by the Court’s April 10, 2006 order concerning the claim and lawsuit by former commissioner Cynthia Olsen.”

[CP 785-786].

⁶ Perhaps this works in the corporate world in auditing financial statements, but not where there is an ongoing liquidation of a Port in the midst of litigation.

G. The Port's creative reading of RCW 53.48.060 is contrary to the wording of the statute and common sense.

The Port argues that RCW 53.48.060 requires resolution of claims *after* a determination of solvency! This nonsensical argument is contrary of the statute: "*Upon* a finding of insolvency the court shall *then* determine the indebtedness of the district." This statute requires first a determination of solvency, which can be made only when all debts are known. *Then* the Court must add up all of the debts of the Port, to determine its indebtedness, and thus solvency, and determine whether to proceed under RCW 53.48.050 or .060.

H. This is not the time or place to try the Carey PDA lawsuit. That should be done at the Trial Court level.

The Port argues that the Carey lawsuit under the Public Disclosure Act is without merit. Such argument is consistent with the Port's efforts to resolve issues without there being a hearing on the issue. **This is how the Port treated the solvency issue.** The Carey lawsuit should be determined at the trial court level. Until such time, this Court should know:

- Petitioner Carey and others made a total of 72 records requests under RCW Ch. 42.17 (since recodified under RCW Ch. 42.56). The vast majority of these records requests were ignored. The ones that were not ignored were only partially met.

- This is the second lawsuit filed by Petitioner Carey against the Port of Tahuya under the Public Records Act. The first lawsuit, tried in 2003, resulted in the Port being penalized for failure to produce public records, and being compelled to pay Petitioner's attorneys fees, costs, and

a daily penalty for not completely filling Petitioner' PRA request for 208 days beyond what is allowed by the Public Records Act.

- Despite a Port resolution directing that public records be provided within *one day* of request, public records were at times stored at the offices of its counsel (Robert Goodstein!) for *weeks at a time*, with direction that no one was to have access to the public records. This is a blatant violation of RCW 42.56 regarding the requirement of reasonable access of the public to the records and writings of the agency.

- The Port has conceded that it failed to comply with RCW 42.17.260 (now RCW 42.56.070) in maintaining an index of its public records. When it asked Petitioner to prepare such an index, it refused to pay for his costs in so producing the index. The Port also violated the law by failing to provide in writing, as approved by its Commission, the reasons as to why such index was not practical for the POT to produce and maintain.

- Where the Port states in its brief that documents were produced in 2006, in reality 35,000 un-indexed documents were made available for a period of a few hours (on a federal holiday, which violates RCW 42.17.280. This is further not consistent with the intent of the statute, which is to be liberally construed in favor of the taxpayer. Public Animal Welfare Society v. The University of Washington, 125 Wn.2d 243, 251 (1994)(RCW Ch. 42.17 “is a strongly worded mandate for broad disclosure of public records”). Further, the date and time the records were supposedly made available, and how they were supposedly made available was not in compliance with the law.

- The Court *must* impose a statutory penalty of between \$5 and \$100 for each day that a records request is not met. RCW 42.17.340 (now RCW 42.56.550). Statutory penalties are required regardless of the reason for the violation. Daines v. Spokane County, 111 Wn.App. 342 (2002). A principal factor in setting the amount of the penalty is the agencies bad faith. Yousoufarian v. Office of Ron Sims, 114 Wash.App. 836 (2003). Because of the prior violation, Commissioner Christian's admission that he destroyed public documents, the intentional refusal to allow access to public records, the storage of records at counsel's office for weeks at a time, the penalties in this instance should be well in excess of \$5 per day.

- If appropriate penalties are assessed, they should total well in excess of \$200,000. In addition, the Port will be responsible to reimburse Petitioner Carey for his attorneys fees and costs, RCW 42.17.340 (now RCW 42.56.550), and presumably for its own costs of defense.

If the Port is so certain that this claim is not meritorious, it should file a summary judgment motion. It has not done so, and Petitioner/Plaintiff Carey will seek maximum relief in the case.

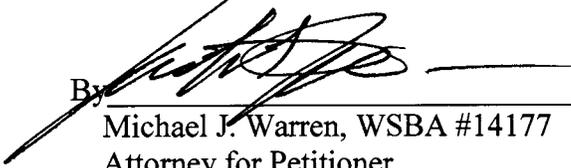
III. CONCLUSION.

Petitioner respectfully requests this Court remand these proceedings to the Mason County Superior Court with instructions to conduct a hearing on the solvency of the Port of Tahuya after resolution of all claims against the Port (including without limitation the claims of Petitioner Carey).

DATED this 12th day of July, 2007.

Respectfully Submitted,

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By 

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Attorney for Petitioner

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DECLARATION OF SERVICE

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Michael J. Warren hereby declares as follows: On July 12, , 2007,

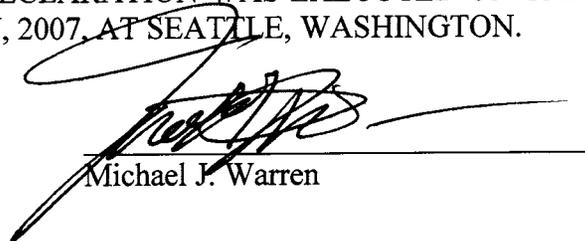
I caused to be served via ABC regular messenger a copy of Petitioner's

Reply Brief upon:

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I DECLARE UNDER PENALTY OF PERJURY THAT
THAT THE FOREGOING IS TRUE AND CORRECT AND
THAT THIS DECLARATION WAS EXECUTED ON THE 12TH
DAY OF JULY, 2007, AT SEATTLE, WASHINGTON.



A handwritten signature in black ink, appearing to read 'Michael J. Warren', is written over a horizontal line. The signature is stylized and cursive.

Michael J. Warren