

No. 35521-3-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
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IN RE: THE PORT OF TAHUYA,

A Washington Port District

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BRIEF OF RESPONDENT PORT OF TAHUYA

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## **I. ASSIGNMENTS OF ERROR AND ISSUES**

### **Assignments of Error**

No error was made by the trial court in this case.

### **Issue**

Did the trial court properly find the Port of Tahuya to be solvent and order the dissolution of the Port pursuant to RCW 53.48.040?

## **II. STATEMENT OF THE CASE**

### **A. Statutory Background**

This case involves the dissolution of the Port of Tahuya. The dissolution of a port district is governed by RCW 53.48.<sup>1</sup> Pursuant to that statute, dissolution is commenced by a petition for dissolution signed by a majority of the acting commissioners and filed in the superior court of the county in which the port district is located. RCW 53.48.020. Upon filing of the petition, the superior court shall set a hearing on the petition, and notice of the hearing shall be given by publication and posting. RCW 53.48.030. After the hearing, if the court finds that the best interests of all persons concerned will be served by the proposed dissolution, then the court shall enter an order dissolving the port district. RCW 53.49.040.

If the court finds that the port district is solvent, then the court shall order the sale of the port's assets by the county sheriff in the same manner as a sale of property on execution. RCW 53.48.040. After payment of all

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<sup>1</sup> A copy of RCW 53.48 is contained in the Appendix to this Brief of Respondent.

costs and expenses, the proceeds of the sale, together with the money of the port, shall be paid to the county treasurer for the benefit of the school district or districts in which the port district is located. RCW 53.48.050.

If the court finds that the port district is insolvent, then the court shall determine the creditors of the port, the creditors' claims, and the indebtedness of the port with respect to such claims. RCW 53.48.060. The court shall also set a second hearing, not less than 60 days nor more than 120 days from the initial hearing on the petition, to consider means of retiring the established indebtedness and the costs and expenses of the proceedings, which may include the court-ordered sale of port property, and may also include the levy of assessments against property in the port district. RCW 53.48.060; RCW 53.48.080. Any property owner in the district may appear and be heard for or against a levy. RCW 53.48.080. The court shall then determine whether the best interests of all persons concerned will be served by the proposed dissolution, and shall enter an order dissolving or refusing to dissolve the port district. RCW 53.48.090.

## **B. Facts and Procedural Background**

The *Petition For Dissolution Of Port District* for the dissolution of the Port of Tahuya (“Petition”) was filed in Mason County Superior Court, Case No. 05-2-01083-9, on November 14, 2005. CP 567-576. The basis for the Petition was the absence of any revenue-generating business or real property other than Menard’s Landing park, or any significant assets other than approximately \$180,000 in cash or cash equivalents, the inability to obtain insurance for Port Commissioners, and the contentiousness and dysfunction of the Port and its Commission. The Petition is supported by the *Declaration Of Jim Christen In Support Of Petition For Dissolution Of Port District*, CP 807-815, and the *Declaration of Brad Smith In Support Of Petition For Dissolution Of Port District*. CP 800-806.

The dissolution of the Port had been approved by the unanimous decision of the Commissioners on August 31, 2005, following numerous public meetings. Pursuant to that decision, counsel for the Port was directed to prepare the Petition, which was then reviewed, approved, and signed in subsequent meetings by Commissioners Jim Christen and Brad Smith.<sup>2</sup> Brad Carey, an intervenor in the dissolution and appellant here, became a Port of Tahuya Commissioner on or about December 21, 2005.

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<sup>2</sup> Dan McPhee, the third Commissioner who had voted in favor of the dissolution of the Port, resigned on September 20, 2005, and was not involved in the actual preparation of the Petition filed with the Court.

The Port prepared and caused notice of the hearing on the Petition to be given pursuant to RCW 53.48.030. CP 549. The Port also prepared and caused to be given a *Notice Of Filing Of Petition For Dissolution Of Port Of Tahuya Port District; And Notice To Creditors And All Other Parties In Interest*, requesting any person having any claim against the Port to file such claim by December 31, 2005. CP 799. An additional *Notice To Creditors And All Parties In Interest* was given pursuant to the court's order establishing a claims bar date of May 9, 2006. CP 517.

The hearing on the Petition was held on January 9, 2006. Based on the Petition and other evidence submitted to the court for that hearing, the Port of Tahuya was solvent. No evidence was submitted that questioned the solvency of the Port. Pursuant to an agreement of all parties (including Brad Carey) reached at the hearing, an *Order On Hearing January 9, 2006* was entered by the court on January 23, 2006. CP 518-524. Paragraph 2.2 of that Order states that "The Court hereby . . . finds that the best interests of all persons concerned will be served by the proposed dissolution of the Port of Tahuya under the conditions set forth herein, and that an order dissolving the Port of Tahuya port district should be entered by this Court". Paragraph 3.1 of that Order directs that "The Port of Tahuya port district shall be dissolved".

The court would have entered an order finding solvency and directing the immediate dissolution of the Port, *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 with a hand-carry boat launch and parking facility on property leased by the Port, in accordance with the Menard's Landing aquatic lands enhancement account program grant agreement and the Deed of Right to use land for public aquatic lands access purposes. *Order On Hearing January 9, 2006*, CP 518-524, at ¶ 2.3. It was agreed by all parties and found by the court that the Port should transfer such facilities to Mason County or another qualified entity that would maintain such facilities in accordance with such grant agreement and Deed of Right to use land, prior to the dissolution of the port district. *Id.* If a finding of solvency and order of dissolution were entered immediately, the Port would no longer have the authority to make such a transfer. The court therefore directed that:

An order of dissolution shall not be entered in this case until the expiration of one hundred twenty (120) days from the date of this Order or until the Menard's Landing facilities have been transferred to Mason County or another qualified entity for maintenance in accordance with the Menard's Landing aquatic lands enhancement account program grant agreement and the Deed of Right to use land for public aquatic lands access purposes, whichever should be the latter. During the one hundred twenty (120) days from the date of this Order, the Port shall commence the winding-up of its other affairs pursuant to the provisions of paragraph 3.3 below.

*Order On Hearing January 9, 2006*, CP 518-524, at ¶ 3.2.

The sole reason for not immediately entering an order dissolving the Port was to permit the Port to transfer Menard's Landing to the County or another qualified entity to preserve the park pursuant to its existing agreements, which the Port would not be able to do if an order dissolving the Port were entered at the January 9, 2006 hearing. *But for* the need to preserve the authority of the Port for the limited purpose of transferring Menard's Landing to the County, an order finding solvency and dissolving the Port would have been entered on January 9, 2006.

The Port completed the transfer of Menard's Landing to Mason County effective April 1, 2006, pursuant to an Interlocal Agreement, Quit Claim Deed, and other documents recorded on April 12, 2006. *Order On Hearing May 1, 2006* at ¶ 3.1, CP 504-506.

On May 1, 2006, a hearing was held on Brad Carey's motion to compel compliance with the January 9, 2006 Order by requiring, *inter alia*, mandatory "meetings twice each week, to last for at least three hours, to finish the business of the Port", and on the Port's request for the Court to enter an order of dissolution and assume control over the final winding-up of the Port, effective immediately. *Memorandum In Opposition To Motion Of Brad Carey Re: Compliance With January 2006 Order*, CP 783-798; *Declaration Of Jim Christen In Opposition To Motion Of Brad Carey Re: Compliance With January 2006 Order*, CP 699-782; *Declaration Of Brad Smith In Opposition To Motion Of Brad Carey Re:*

*Compliance With January 2006 Order*, CP 697-698; *Declaration Of Jean Gall And Others To Motion For Order Directing Compliance With Court Order*, CP 695-696. The court denied Brad Carey's motion in all respects except to make provision for Brad Carey's access to Port records, for the purpose of Carey responding to outstanding records requests, and the court set a hearing for May 24, 2006 (120 days after entry of the January 9, 2006 Order), for the entry of an order of dissolution. *Order On Hearing May 1, 2006*, CP 504-506.

On or about May 9, 2006, a lawsuit was filed against the Port by Brad Carey, Harold Carey (Brad Carey's father), and Residents For Preserving Quality Of Life On Hood Canal (an association controlled by Brad Carey and Harold Carey) (collectively "Carey"), alleging unspecified violations of the Washington Public Disclosure Act, and claiming damages in an unspecified amount. CP 320-333. The Port filed an answer denying the allegations of the complaint and asserting affirmative defenses and counterclaims, *Id.*, and is vigorously defending the lawsuit.

At the May 24, 2006 hearing, the court determined that the Port of Tahuya should be dissolved at that time. The court's order, which was entered on June 19, 2006 after two subsequent hearings, confirmed the solvency of the Port and dissolved the Port, effective as of May 24, 2006, pursuant to the January 9, 2006 and May 1, 2006 hearings and Orders, and the May 24, 2006 hearing. *Order On Hearing May 24, 2006*, CP 334-336.

Pursuant to the court's *Order On Hearing May 24, 2006*, former commissioners Jim Christen and Brad Smith filed written statements, signed under penalty of perjury, describing what has been done to wind up the affairs of the Port, and what still needs to be completed to wind up the affairs of the Port. *Statement Of Former Commissioner Jim Christen Regarding Status, Etc.*, CP 679-694; *Statement of Brad Smith, Former Commissioner And Treasurer, Port of Tahuya, Regarding Status*, CP 677-678.

Carey filed a motion for partial reconsideration of the court's decision regarding solvency, based on the unspecified allegations and damages claimed in the Carey lawsuit. The Port opposed Carey's motion on several grounds, including Financial Accounting Standards Board ("FASB") Statement of Financial Accounting Standards No. 5 ("FAS 5"), which provides that a claim affects the solvency of an entity only if it is probable that a liability was incurred and the amount of the loss can be reasonably estimated, neither of which are satisfied here. *Memorandum In Opposition To Motion Of Brad Carey For Partial Reconsideration*, CP 620-665; *Declaration Of Jim Christen In Opposition To Motion Of Brad Carey For Partial Reconsideration*, CP 666-676; *Declaration Of George Fox Re: Motion Of Brad Carey For Partial Reconsideration Regarding Solvency*, CP 581-619. Carey's motion for partial reconsideration was heard and denied by the court on September 25, 2006.

### **III. ARGUMENT**

#### **Introduction and Summary of Argument**

Carey argues that the trial court never found whether the Port was solvent or insolvent, and that the trial court can not make a finding of solvency or insolvency when claims against the Port remain unliquidated. Each of these arguments is incorrect.

In entering the agreed *Order On Hearing January 9, 2006*, CP 518-524, the parties agreed, and the trial court found, that the Port was solvent and would be dissolved pursuant to RCW 53.48.040; the parties and the trial court would have pursued a different procedure under RCW 53.48.060 if the Port had been found to be insolvent.

An order dissolving the Port would have been entered on January 9, 2006, but for a desire to postpone the entry of the order to permit the Port to transfer the Menard's Landing park facility to Mason County or another appropriate entity to preserve the park. Menard's Landing was subsequently transferred to Mason County, and the trial court confirmed the solvency of the Port and entered an order dissolving the Port effective May 24, 2006. *Order On Hearing May 24, 2006*, CP 334-336.

The presence of unliquidated claims against the Port does not make the Port insolvent, nor does it preclude the trial court from finding solvency. Pursuant to Financial Accounting Standards Board ("FASB") Statement of Financial Accounting Standards No. 5 ("FAS 5"), a claim

affects the solvency of an entity only if it is probable that a liability was incurred and the amount of the loss can be reasonably estimated. In addition, the contention that all claims must be resolved before a finding of solvency or insolvency can be made is contrary to the plain language of the statute. Further, all claims against the Port are believed to be without merit, and do not affect the solvency of the Port in any event.

**A. The trial court found that the Port was solvent.**

Carey argues that the trial court never made a finding of solvency or insolvency. On the contrary, the trial court's January 9, 2006 order necessarily finds the Port to be solvent, and the trial court's May 24, 2006 order confirms the finding of solvency.

The *Order On Hearing January 9, 2006*, CP 518-524, necessarily found that the Port of Tahuya was solvent. Paragraph 2.2 of that Order states that:

The Court hereby . . . finds that the best interests of all persons concerned will be served by the proposed dissolution of the Port of Tahuya under the conditions set forth herein, and that an order dissolving the Port of Tahuya port district should be entered by this Court.

Paragraph 3.1 of that Order directs that:

The Port of Tahuya port district shall be dissolved.

Paragraph 3.2 of that Order further directs that:

An order of dissolution shall not be entered in this case until the expiration of one hundred twenty (120) days from the date of this Order or until the Menard's Landing

facilities have been transferred to Mason County or another qualified entity for maintenance in accordance with the Menard's Landing aquatic lands enhancement account program grant agreement and the Deed of Right to use land for public aquatic lands access purposes, whichever should be the latter. During the one hundred twenty (120) days from the date of this Order, the Port shall commence the winding-up of its other affairs pursuant to the provisions of paragraph 3.3 below.

The trial court would have immediately entered an order finding solvency and directing the immediate dissolution of the Port, *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 with a hand-carry boat launch and parking on property leased by the Port, in accordance with the Menard's Landing aquatic lands enhancement account program grant agreement and the Deed of Right to use land for public aquatic lands access purposes.

*Order On Hearing January 9, 2006, CP 518-524, at ¶ 2.3.*

It was agreed by all parties and found by the court that the Port should transfer such facilities to Mason County or another qualified entity that would maintain such facilities in accordance with such grant agreement and Deed of Right to use land, prior to the dissolution of the port district. *Id.* If a finding of solvency and order of dissolution were entered immediately, the Port would no longer have the authority to make such a transfer. Therefore, the entry of the finding of solvency and order of dissolution was postponed for 120 days.

The trial court explained its reasoning in its oral decision as follows:

Well it sounds like what we have is a general statement of agreement. Certainly not a uniform agreement, but a general statement of agreement. And basically what I have to work with, or course, is the declaration that have been filed to date. And I am perfectly satisfied with indicating to the parties that having reviewed the statements that were made available to me, that I was strongly leaning toward the dissolution based upon the interest of all parties concerned from the standpoint that you have a Port authority that essentially has no insurance, has very limited business that they've been able to accomplish, if it has any. And I think a very legitimate concern regarding the continued availability of Menard's or Menard's Landing, whichever the pronunciation is. I don't know.

And given the recitation that I received, I think that the primary issues are being addressed by the general statement of agreement of the parties that is before the Court. I will indicate, and the Court will sign an order dissolving the Port of Tahuya. However that will be done only upon completion of the 120 day period, which will be open for the claim period for processing of continued claims.

...  
However we also have the need to facilitate the exchange with the county. And for those of you who are here and want to know a concern that I had in preparing for this case, I in reviewing it thought to myself, it seems fairly obvious on its face that dissolution is going to occur. If that occurs and the transfer hasn't occurred, the Statute is absolutely clear on what happens. And that is that there would have to be some method of sale, which of course would have resulted in a litigation, which just didn't work. And that's one reason that I'm very pleased to have taken an hour this morning and allow the parties to talk about this because it does allow for an orderly transfer of this to an entity that has a Parks Department, that has hopefully the same interests or very similar interests of the people that have been in support of Menard's Landing otherwise in maintaining that as a public access point.

RP January 9, 2006, at p.9, lines 1-21, and p.10, line 15 to p.11, line 9.

The trial court's oral decision may be used to further explain, support, and supplement its formal written decision. *Lang v. Hougan*, 136 Wn.App. 708, 716, 150 P.3d 622 (2007); *Wallace Real Estate Investment, Inc. v. Groves*, 72 Wn.App. 759, 770, 868 P.2d 149 (1994), affirmed at 124 Wn.2d 881 (1994); *Johnson v. Department of Licensing*, 71 Wn.App. 326, 332, 858 P.2d 1112 (1993).

As noted by the trial court, there was no evidence before the court at the January 9, 2006 hearing that indicated that the Port of Tahuya should not or could not be dissolved. Neither Carey nor any other person at the January 9, 2006 hearing claimed that the Port was insolvent, and neither Carey nor any other person at the January 9, 2006 hearing requested the court to set any further hearing pursuant to RCW 53.48.060 based on the claimed insolvency of the Port.<sup>3</sup>

The sole reason for not immediately entering an order dissolving the Port was to permit the Port to transfer Menard's Landing to the County or another qualified entity to preserve the park pursuant to its existing agreements, which the Port would not be able to do if an order dissolving

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<sup>3</sup> Brad Carey filed a *Request Of Brad Carey For Orderly Dissolution, With Supporting Declaration* at the January 9, 2006 hearing, in which he states that "I expect to file a lawsuit for access to the documents if they are not provided to me reasonably promptly". CP 547-548. However, Carey did not raise any issue regarding solvency at that hearing, and was a party to the agreed *Order On Hearing January 9, 2006*. By not raising the issue of solvency at the January 9, 2006 hearing, Carey should be held to have waived that issue.

the Port were entered at the January 9, 2006 hearing. *But for* the need to preserve the authority of the Port for the limited purpose of transferring Menard's Landing to the County, an order finding solvency and dissolving the Port would have been entered on January 9, 2006.

If the trial court at the January 9, 2006 hearing had found that the Port was insolvent, then the trial court would have followed a different procedure. The trial court would have proceeded to determine the indebtedness of the Port, and set a second hearing to consider means of retiring the established indebtedness of the Port, pursuant to RCW 53.48.060. The fact that the trial court did not do so is further evidence that the trial court found that the Port was solvent on January 9, 2006.

The trial court's *Order On Hearing May 24, 2006*, CP 334-336, confirms the trial court's earlier finding regarding solvency. A different judge from the same court handled this matter after the January 9, 2006 hearing, and relied on the first judge's decision. The *Order On Hearing May 24, 2006* states in material part as follows:

2.1 The best interests of all persons concerned will be served by the dissolution of the Port of Tahuya.

2.2 By the agreed findings entered 1-23-06 from the 1-9-06 hearing, the Port of Tahuya was found to be solvent.

2.3 The Port of Tahuya port district is dissolved, and the Port of Tahuya commissioners are discharged, effective as of the Court's oral ruling in this case on May 24, 2006.

...

2.6 The Menard's Landing facilities formerly owned or operated by the Port have been transferred to Mason County, the Port of Tahuya has no remaining assets of any

significant value, and there are no assets to be sold by the sheriff at this time.

2.7 The winding up of the Port of Tahuya shall be completed pursuant to and under the supervision of this Court.

Since there was no competent evidence submitted at any time after the January 9, 2006 hearing to demonstrate any material change in the solvency of the Port, and since the 120-day claims-filing period under the January 9, 2006 order had expired and the transfer of the Menard's Landing facility to Mason County had been completed, the trial court properly entered an order finding solvency and dissolving the Port.

**B. Substantial evidence supports the finding of solvency.**

Substantial evidence supports the trial court's finding of solvency in this case. The evidence supporting solvency includes the following:

- The verified Petition (CP 567-576), and the declarations of Jim Christen and Brad Smith filed in support of the Petition (CP 807-815 and CP 800-806), identify the assets of the Port as approximately \$180,000 in cash and Menard's Landing, and state that the Port is solvent.
- No evidence submitted prior to or at the January 9, 2006 hearing, by Carey or any other person or entity, state any established liabilities that make the Port insolvent.
- Neither Carey nor any other person at the January 9, 2006 hearing claimed that the Port was insolvent, and neither Carey nor any other person at the January 9, 2006 hearing requested the court to set a further hearing pursuant to RCW 53.48.060 based on the claimed insolvency of the Port.
- The Order on the January 9, 2006 hearing, which was agreed to by Carey, necessarily finds that the Port is solvent, since otherwise

Carey would have requested, and the court would have ordered, a second hearing pursuant to RCW 53.48.060.

- The statements of former Commissioners Jim Christen and Brad Smith filed June 7, 2006 pursuant to the *Order On Hearing May 24, 2006*, identify and discuss the assets and liabilities of the Port, and re-affirm that the Port is solvent. (CP 679-694 and 677-78).
- The declaration of George Fox, a CPA and attorney, states that under the applicable Statement of Financial Accounting Standards No. 5, the Carey lawsuit does *not* make the Port insolvent. (CP 581-619).
- The amounts sought in the claims filed against the Port, other than claims to be decided in the Carey lawsuit where amounts claimed are not stated, do not exceed the assets of the Port. *Claims Filed Re: Port of Tahuya*, CP 113-333; *see also* argument in Section D. below.

No issue was raised by Carey or any other person prior to or at the January 9, 2006 hearing regarding the solvency of the Port. As stated in the Petition and supporting declarations, the Port is solvent. *But for* the need to transfer Menard's Landing to the County prior to dissolution, the finding of solvency and order of dissolution would have been entered on January 9, 2006. The trial court properly found the Port solvent and ordered the dissolution of the Port.

**C. Pending claims do not preclude a finding of solvency.**

Carey also argues that pending claims against the Port, including a lawsuit filed by Carey against the Port on or about May 9, 2006, make the Port insolvent, or makes it impossible to enter a finding of solvency or insolvency until the claims are resolved. That argument is also incorrect.

In the absence of a definition of solvency in RCW 53.48, the court may look to other sources for the meaning to be applied to that term.

*Superior Asphalt & Concrete Co. v. Department of Labor & Indus.*, 84 Wn.App. 401, 406, 929 P.2d 1120 (1997).

The accounting profession uses Financial Accounting Standards Board (“FASB”) Statement of Financial Accounting Standards No. 5 (“FAS 5”) to determine how to report loss contingencies (claims) in the financial statements of an enterprise.<sup>4</sup> Under FAS 5, a claim is accrued on an entity’s financial statements only if *both* of the following conditions are met: (1) it is probable that a liability had been incurred at the date of the financial statements; *and* (2) the amount of the loss can be reasonably estimated (FAS 5, Paragraph 8).

FAS 5 defines “probable” as a future event that is “likely to occur” (FAS 5, Paragraph 3a). Appendix A to FAS 5 gives the following guidance regarding lawsuits:

*The filing of a suit or formal assertion of a claim or assessment does not automatically indicate that accrual of a loss may be appropriate. The degree of probability of an unfavorable outcome must be assessed. The condition for accrual in paragraph 8(a) would be met if an unfavorable outcome is determined to be probable. If an unfavorable outcome is determined to be reasonably possible but not probable, or if the amount of loss cannot be reasonably*

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<sup>4</sup> A copy of FAS 5 is attached to the *Declaration Of George Fox Re: Motion Of Brad Carey For Partial Reconsideration Regarding Solvency*, at CP 591-619.

*estimated, accrual would be inappropriate*, but disclosure would be required by paragraph 10 of this Statement.

FAS 5 Appendix A, at ¶ 37, CP 602 (emphasis added). The determination whether a future event is probable and can be reasonably estimated rests in the professional judgment of the financial statement preparer.

Carey agrees with the other former commissioners that all claims filed against the Port, other than claims to be decided in the Carey lawsuit, are without merit and should be denied in full. *Response/Submittal of Carey Re: Claims*, CP 1-112; *Statement Of Former Commissioner Jim Christen Regarding Status, Etc.*, CP 679-694; *Statement of Brad Smith, Former Commissioner And Treasurer, Port of Tahuya, Regarding Status*, CP 677-678. Thus, the existence of these claims does not affect the solvency or dissolution of the Port.

In addition, in the opinion of George Fox, a CPA and attorney, based on a review of the Complaint, Answer, and other pleadings and documents filed in the dissolution action that relate to the Carey lawsuit and the issue of the Port's solvency, the claim alleged in the Carey lawsuit is not probable, and the amount can not be reasonably estimated. *Declaration Of George Fox*, at CP 581-584. Thus, the Carey lawsuit also does not affect the solvency or dissolution of the Port.

The pending claims against the Port, including the Carey lawsuit, are just that – merely claims. A mere claim is not the same as a liability,

since a claim may be overstated, or may be entirely without merit. Until a final decision has been rendered on a claim, a claim does not affect the solvency of the entity against which the claim is made.<sup>5</sup>

Carey's argument leads to the conclusion that the trial court can not make a finding of solvency or insolvency until after *all* claims against the Port have been finally determined. This conclusion is directly contrary to RCW 53.48.060 which states that: "*Upon* a finding of insolvency the court shall *then* determine the indebtedness of the district" – i.e., claims are decided *after* a finding of solvency or insolvency is made (emphasis added). Similarly, RCW 53.48.050 provides that debts and costs are to be paid *after* an order of solvency and dissolution is entered and the port's assets are sold. The court should not apply an interpretation of a statute that results in a conclusion contrary to the plain language of the statute. *Berrocal v. Fernandez*, 155 Wn.2d 585, 594-595, 121 P.3d 82 (2005); *Blueshield v. State Office of Insurance Commissioner*, 131 Wn.App. 639, 648, 128 P.3d 640 (2006).

Further, Carey's argument that a finding of solvency prior to the resolution of all claims may result in the court having to recover assets from a party to whom payment was made if subsequent claims prove to

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<sup>5</sup> *Cf.* RCW 53.48.060, which requires a court to *determine* the indebtedness of the port, and then consider methods of retiring the *established indebtedness* of the port. Until a claim has been adjudicated and liability has been established, it does not affect solvency.

exceed the assets of the Port, is also without merit. Every claim that has been considered by the trial court to date has been rejected in full, and it is anticipated that all remaining claims will also be rejected in full, or that any award will not exceed the assets of the Port. The trial court has not entered any order for payment on any claim against the Port to date, and that issue is not presently before this Court.

**D. The claims do not exceed Port assets.**

Carey's argument that the trial court cannot make a finding of solvency prior to the resolution of all claims is also incorrect because the total amount of the claims stated does not exceed the assets of the Port.

The total amount sought by the claims filed against the Port other than claims to be decided in the Carey lawsuit (which are unspecified as to amount) is substantially less than the assets of the Port. *Submittal of Claims Filed Re: Port of Tahuya*, CP 113-333; *Petition For Dissolution of Port District*, CP 567-576. In addition, Carey himself agrees that all claims (other than his own claims) should be denied. *Response/Submittal of Carey Re: Claims*, CP 1-112. Further, all claims that have been decided by the trial court have been denied in full, and the Port expects that all other claims will also be denied. Thus, these claims do not affect a finding of solvency or order for dissolution of the Port.

**E. The Carey lawsuit is without merit.**

The claims to be decided in the Carey lawsuit are also believed to be without merit and do not affect the solvency of the Port. First, the lawsuit filed by Carey does not specify any amount claimed as damages, and does not specify particular violations from which damages might be calculated. CP 320-325. Carey's argument assumes that the superior court will find that the Port acted in bad faith and that the court will impose the maximum penalty under RCW 42.17.340 for every violation claimed in the lawsuit. However, the claim of bad faith (as well as the claim of any violation) is strongly disputed. The Port has filed an Answer, Affirmative Defenses, and Counterclaims to the lawsuit, and is vigorously defending the lawsuit. CP 327-333. Even if violations are established, the imposition of the minimum penalty under RCW 42.17.340 would result in an award of damages that would be less than the present assets of the Port. Any determination by this Court that any liability of the Port resulting from the Carey lawsuit will exceed the assets of the Port would require this Court to engage in unfounded assumptions and speculation, which would be wholly inappropriate.

This Court should note that statements made in support of the Carey lawsuit in the declarations filed in support of Brad Carey's motion for reconsideration regarding solvency are false or materially misleading, and that the purpose of Carey's records requests and lawsuit appears to be

to collect money from the Port for the personal benefit of Carey at the expense of taxpayers and schools within the district, rather than obtain copies of any documents. For example:

- Brad Carey and his father Harold Carey, who is the author of the great majority of the public disclosure requests, refused to review the Port documents when they were produced at a meeting in January 2006.
- Commissioner Carey failed to forward any requests received by him for handling by Commissioner Christen; those requests that were directed to the Port at its Post Office Box have been timely responded to by Commissioner Christen.
- Commissioner Carey told the other commissioners in open meeting that he had prepared responses to all records requests received by him; however, it appears that this statement may be untrue, since Brad Carey has produced only 3 responses to the approximately 76 requests, and those responses may fail to meet requirements of applicable law.
- Special meetings were called for April 26, 27, and 28, 2006 for the purpose of providing access to the Port's records and responding to records requests. However, instead of responding to records requests, Commissioner Carey attempted to re-organize the documents and questioned the integrity of the files, and on April 27, 2006 Commissioner Carey requested that the files be picked up by the Port's attorney for safekeeping in their present condition pending further instructions. Contrary to the statement in Brad Carey's declaration that "Port attorney Ralph Klose impounded [the Port's files] in the trunk of his car", the documents were in fact picked up and held by Port counsel *at Brad Carey's request*.
- Brad Carey obtained custody of the Port's records on May 8, 2006, yet filed a lawsuit on May 9, 2006 claiming denial of access to Port records.

- Brad Carey had custody of the Port's records for the purpose of satisfying outstanding records requests from May 8, 2006 until on or about June 5, 2006 when the records were turned over to the State archivist, and it appears that *no* records requests were satisfied during that period of time, although an index of most or all of the documents was prepared, which Brad Carey claims to be his personal property.
- Brad Carey was offered a complete copy of the Port's files on several occasions, but that offer has never been acted on.

*See, e.g., Declaration Of Jim Christen In Opposition To Motion Of Brad Carey For Partial Reconsideration, CP 666-676; Statement Of Former Commissioner Jim Christen Regarding Status, Etc., CP 679-694; Statement of Brad Smith, Former Commissioner And Treasurer, Port of Tahuya, Regarding Status, CP 677-78.* It is believed that the Port will ultimately prevail on the Carey lawsuit, and that even if the Port does not entirely prevail, any award to Carey will not exceed the assets of the Port. Thus, the Carey lawsuit also does not affect the solvency of the Port.

#### **IV. CONCLUSION**

The trial court's *Order On Hearing January 9, 2006* and *Order On Hearing May 24, 2006* properly found the Port solvent and ordered the dissolution of the Port pursuant to RCW 53.48.040, and those findings and orders are not in error and are supported by substantial evidence. The trial court's orders should be affirmed, and this appeal should be dismissed.

Dated: June 18, 2007.

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\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I certify that on June 18, 2007, I caused the document to which this certificate is attached and the accompanying Appendix to be served on counsel as follows:

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APPENDIX

Copy of RCW 53.48

West's RCWA 53.48.001

West's Revised Code of Washington Annotated Currentness

Title 53. Port Districts (Refs & Annos)

▣ Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)

→ **53.48.001. Dissolution of certain districts subject to review by boundary review board**

The dissolution of a metropolitan park district, fire protection district, water-sewer district, or flood control zone district under chapter 53.48 RCW may be subject to potential review by a boundary review board under chapter 36.93 RCW.

CREDIT(S)

[1999 c 153 § 62; 1989 c 84 § 46.]

HISTORICAL AND STATUTORY NOTES

**Part headings not law--1999 c 153:** See note following RCW 57.04.050.

LIBRARY REFERENCES

2004 Main Volume

Counties ↪18.

Municipal Corporations ↪51.

Westlaw Topic Nos. 104, 268.

C.J.S. Counties §§ 31 to 33.

C.J.S. Municipal Corporations §§ 99 to 103.

West's RCWA 53.48.001, WA ST 53.48.001

Current with all 2006 legislation and Initiative Measure No. 937  
(Laws 2007, ch. 1).

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West's RCWA 53.48.010

**C**West's Revised Code of Washington Annotated CurrentnessTitle 53. Port Districts (Refs & Annos)■ Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)**→ 53.48.010. Definitions**

The following words and terms shall, whenever used in this chapter, have the meaning set forth in this section:

(1) The term "district" as used herein, shall include all municipal and quasi-municipal corporations having a governing body, other than cities, towns, counties, and townships, such as port districts, school districts, water-sewer districts, fire protection districts, and all other special districts of similar organization, but shall not include local improvement districts, diking, drainage and irrigation districts, special districts as defined in RCW 85.38.010, nor public utility districts.

(2) The words "board of commissioners," as used herein, shall mean the governing authority of any district as defined in subdivision (1) of this section.

## CREDIT(S)

[1999 c 153 § 63; 1986 c 278 § 17; 1979 ex.s. c 30 § 10; 1941 c 87 § 1; Rem. Supp. 1941 § 8931-11.]

## HISTORICAL AND STATUTORY NOTES

**Part headings not law--1999 c 153:** See note following RCW 57.04.050.

**Severability--1986 c 278:** See note following RCW 36.01.010.

**Purpose--1941 c 87:** "This act is intended to authorize the dissolution of all types of municipal corporations having governing bodies, other than those excepted from the application of this act, in cases where the occasion or reason for continued existence of such corporation has ceased, or where the best interests of all persons concerned would be served by such dissolution, and shall be liberally construed to effect such intent." [1941 c 87 § 12.]

**Severability--1941 c 87:** "If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable." [1941 c 87 § 11.]

**Source:**

RRS § 8931-11.

## LIBRARY REFERENCES

2004 Main Volume

Counties  18.

Municipal Corporations  51.

Navigable Waters  14(1).

Westlaw Topic Nos. 104, 268, 270.

West's RCWA 53.48.010

C.J.S. Counties §§ 31 to 33.

C.J.S. Municipal Corporations §§ 99 to 103.

C.J.S. Navigable Waters § 37.

## NOTES OF DECISIONS

### **In general 1**

#### 1. In general

RRS § 11602, Laws 1929, ch. 114, § 25 (see, now, § 57.04.100), providing for dissolution of water districts in proceedings initiated by individual voters with the final decision being made by voters at an election, was not repealed by implication through the enactment of RRS § 8931-11 et seq., Laws 1941, ch. 87, § 1 (see, now, § 53.48.010 et seq.), providing for such dissolution in proceedings initiated by majority of board of water district commissioners with the final decision being made by the superior court. State ex rel. Reed v. Spanaway Water Dist. (1951) 38 Wash.2d 393, 229 P.2d 532. Waters And Water Courses ↪ 183.5

West's RCWA 53.48.010, WA ST 53.48.010

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West's RCWA 53.48.020

**C**

West's Revised Code of Washington Annotated Currentness

Title 53. Port Districts (Refs & Annos)

▣ Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)

→ **53.48.020. Petition**

For the purpose of dissolution of a district, a petition for an order of dissolution signed by the majority of the board of commissioners, or other governing authority of such district shall be presented to the superior court of the county in which the board of commissioners is situated.

CREDIT(S)

[1941 c 87 § 2; Rem. Supp. 1941 § 8931-12.]

HISTORICAL AND STATUTORY NOTES

**Source:**

RRS § 8931-12.

LIBRARY REFERENCES

2004 Main Volume

Counties ↪ 18.

Municipal Corporations ↪ 51.

Westlaw Topic Nos. 104, 268.

C.J.S. Counties §§ 31 to 33.

C.J.S. Municipal Corporations §§ 99 to 103.

NOTES OF DECISIONS

**In general 1**

1. In general

RRS §§ 8931-11 et seq. (now § 53.48.010 et seq.) did not repeal by implication RRS § 11602 (see, now, § 57.04.100), whereunder proceeding for dissolution of water district could be initiated by petition signed by not less than 25 percent of voters within district, final decisions to be determined by voters themselves at special election, and such procedure was available and could be used to dissolve water district. State ex rel. Reed v. Spanaway Water Dist. (1951) 38 Wash.2d 393, 229 P.2d 532.

West's RCWA 53.48.020, WA ST 53.48.020

Current with all 2006 legislation and Initiative Measure No. 937 (Laws 2007, ch. 1).

West's RCWA 53.48.020

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West's RCWA 53.48.030

West's Revised Code of Washington Annotated Currentness

Title 53. Port Districts (Refs & Annos)

Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)

→ **53.48.030. Order for hearing--Notice**

Upon the filing of such petition for an order of dissolution, the superior court shall enter an order setting the same for hearing at a date not less than thirty days from the date of filing, and the clerk of the court of said county shall give notice of such hearing by publication in a newspaper of general circulation in the county in which the district is located once a week for three successive weeks, and by posting in three public places in the county in which the district is located at least twenty-one days before said hearing. At least one notice shall be posted in the district. The notices shall set forth the filing of the petition, its purpose and the date and place of the hearing thereon.

CREDIT(S)

[1941 c 87 § 3; Rem. Supp. 1941 § 8931-13.]

HISTORICAL AND STATUTORY NOTES

**Source:**

RRS § 8931-13.

LIBRARY REFERENCES

2004 Main Volume

Counties ↪ 18.

Municipal Corporations ↪ 51.

Westlaw Topic Nos. 104, 268.

C.J.S. Counties §§ 31 to 33.

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Title 53. Port Districts (Refs & Annos)

■ Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)

→ **53.48.040. Order of dissolution--Sale of assets**

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.

CREDIT(S)

[1941 c 87 § 4; Rem. Supp. 1941 § 8931-14.]

HISTORICAL AND STATUTORY NOTES

**Source:**

RRS § 8931-14.

CROSS REFERENCES

Execution, see § 6.17.010 et seq.

LIBRARY REFERENCES

2004 Main Volume

Counties  18.

Municipal Corporations  51.

Westlaw Topic Nos. 104, 268.

C.J.S. Counties §§ 31 to 33.

C.J.S. Municipal Corporations §§ 99 to 103.

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Title 53. Port Districts (Refs & Annos)

Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)

**→ 53.48.050. Payment of debts and costs--Balance to school district**

The proceeds of the sale, together with moneys on hand in the treasury of the district, shall after payment of all costs and expenses, be paid to the treasurer of the same county and placed to the credit of the school district, or districts, in which such district is situated.

CREDIT(S)

[1941 c 87 § 5; Rem. Supp. 1941 § 8931-15.]

HISTORICAL AND STATUTORY NOTES

**Source:**

RRS § 8931-15.

CROSS REFERENCES

Port districts in counties of sixth class, disposition of funds, see § 53.49.010 et seq.

LIBRARY REFERENCES

2004 Main Volume

Counties  18.

Municipal Corporations  51.

Westlaw Topic Nos. 104, 268.

C.J.S. Counties §§ 31 to 33.

C.J.S. Municipal Corporations §§ 99 to 103.

West's RCWA 53.48.050, WA ST 53.48.050

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West's RCWA 53.48.060

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Title 53. Port Districts (Refs & Annos)

▣ Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)

→ **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.

CREDIT(S)

[1941 c 87 § 6; Rem. Supp. 1941 § 8931-16.]

HISTORICAL AND STATUTORY NOTES

**Source:**

RRS § 8931-16.

LIBRARY REFERENCES

2004 Main Volume

Counties  18.

Municipal Corporations  51.

Westlaw Topic Nos. 104, 268.

C.J.S. Counties §§ 31 to 33.

C.J.S. Municipal Corporations §§ 99 to 103.

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Title 53. Port Districts (Refs & Annos)

Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)

→ **53.48.070. Notice of second hearing**

The clerk shall give notice of the second hearing by publication in a newspaper of general circulation in the county in which the district is located once a week for three successive weeks, and by posting in three public places in the county in which the district is located at least twenty-one days before the hearing, and shall give such other notice to creditors and other interested parties as the court may deem necessary or advisable. At least one notice shall be posted in the district. The notices shall set forth the filing of the petition, its purpose, the finding of the court on the petition, the date and place of the second hearing and the purpose of the hearing as stated in RCW 53.48.060.

CREDIT(S)

[1941 c 87 § 7; Rem. Supp. 1941 § 8931-17.]

HISTORICAL AND STATUTORY NOTES

**Source:**

RRS § 8931-17.

LIBRARY REFERENCES

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Municipal Corporations  51.

Westlaw Topic Nos. 104, 268.

C.J.S. Counties §§ 31 to 33.

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Title 53. Port Districts (Refs & Annos)

▣ Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)

**→ 53.48.080. Sale of property--Levy to pay deficit**

At the second hearing the court shall have authority to order the sale of any district property. If the proceeds of such sale together with any cash remaining on hand to the credit of the district are insufficient to retire such indebtedness together with all costs and expenses, the court shall have authority to order the board of commissioners to levy assessments in the manner provided by law against the property in the district in amounts sufficient to retire said indebtedness and pay the costs and expenses. At such hearing any property owner within the district may appear and be heard for or against such levy.

CREDIT(S)

[1941 c 87 § 8; Rem. Supp. 1941 § 8931-18.]

HISTORICAL AND STATUTORY NOTES

**Source:**

RRS § 8931-18.

LIBRARY REFERENCES

2004 Main Volume

Counties ↪ 18.

Municipal Corporations ↪ 51.

Westlaw Topic Nos. 104, 268.

C.J.S. Counties §§ 31 to 33.

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West's RCWA 53.48.090

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Title 53. Port Districts (Refs & Annos)

Chapter 53.48. Dissolution of Port and Other Districts (Refs & Annos)

→ **53.48.090. Order of dissolution or refusal**

After the indebtedness of the district has been settled or paid, the court shall determine whether the best interests of all persons concerned will be served by the proposed dissolution and shall make a finding thereon. The court shall then enter its order dissolving or refusing to dissolve said district.

CREDIT(S)

[1941 c 87 § 9; Rem. Supp. 1941 § 8931-19.]

HISTORICAL AND STATUTORY NOTES

**Source:**

RRS § 8931-19.

LIBRARY REFERENCES

2004 Main Volume

Counties  18.

Municipal Corporations  51.

Westlaw Topic Nos. 104, 268.

C.J.S. Counties §§ 31 to 33.

C.J.S. Municipal Corporations §§ 99 to 103.

West's RCWA 53.48.090, WA ST 53.48.090

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