

66401-8

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Case No. 66401-8

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

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SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION,

Appellant,

v.

PORT OF SEATTLE, *et al.*,

Respondents.

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**APPELLANT'S REPLY BRIEF**

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## REPLY ARGUMENT

### **A. The Standard of Review is DeNovo.**

The issues presented are legal questions, subject to *de novo* review. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 73 P.2d 369 (2003). The Port suggests an abuse of discretion standard, but concedes there is no authority to support that claim. (Port Brief, p. 10). The Port argues that in setting a bond the Court has discretion, so by analogy, a similar standard should apply to the Trial Court's decisions at issue. But the issues here are not about the Trial Court's discretion. Rather, whether the Trial Court's dismissal of the Complaint was proper under Civil Rule 54, whether the claims in the related case extinguish any right to the bond proceeds, and whether the Trial Court properly disbursed the bond proceeds for a supersedes bond issued under RAP 8.3 are all legal issues subject to *de novo* review.

### **B. The Trial Court Erred in Dismissing the Action without a Proper Motion.**

The Port contends that the Trial Court did not err when it simply entered judgment under Civil Rule 54, with no motion to dismiss or summary judgment motion filed. (Port Brief p. 27).

The Port first argues that the appeal of the entry of judgment was

not timely. But the Port concedes that the Trial Court first entered an order disbursing the bond proceeds. Then, on a bare notice of presentation, and without any motion to dismiss or motion for summary judgment, the Trial Court entered a “Judgment” that purported to dismiss STITA’s claims. (CP 1344). Meanwhile, a Motion for Reconsideration was filed concerning the bond proceeds. STITA filed its Notice of Appeal within 30 days of the denial that the motion to reconsider. (CP 1397); *see also* (Port Brief, p. 27). STITA’s appeal was therefore timely. RAP 5.2(a) and (e).

Next the Port argues that the earlier appellate process disposed of all claims in the case so that dismissal was proper without any motion. But the Port is wrong. The appellate court affirmed the denial of an injunction. But the underlying claims remained, and, moreover, STITA had a right to seek to amend or consolidate with the companion case. As the Port was well aware, in the companion case substantial discovery occurred, and there were reasons for STITA to amend in this action or seek consolidation with the other case. And, in fact, there was a pending motion to consolidate with the companion case. (CP 1097).

The Port filed its presentation of judgment as a tactic to attempt to bring an end to this matter before the Complaint could be amended or consolidated with the companion case. The Port’s tactic was successful only because it did not note a proper motion. The Trial Court entered

judgment here on October 12, 2010. (CP 1344). The Motion to Consolidate was denied on October 14, 2010. (CP 1346). In denying consolidation, the Court noted that “consolidation of the above captioned cases is not warranted under CR42(a) particularly given the different status of the 2 cases.” (CP 1347).

Finally, as a legal matter, the Port relied on Civil Rule 54 as the only basis for entry of judgment. (CP 1033). But nothing in Civil Rule 54, and no case cited by the Port on appeal indicates that Civil Rule 54, standing alone, can be the basis for deciding to enter judgment.<sup>1</sup>

**C. The Trial Court Erred In Disbursing the Bond Proceeds and in Denying Reconsideration.**

The Port’s attempt to justify the Trial Court’s disbursement of the bond proceeds is similarly without merit. (*See* Port Brief, p. 12). The Trial Court disbursed the bond proceeds prematurely, without evidence that the Port had sustained any injury, without permitting discovery, and without properly considering whether the Port was even entitled to the bond proceeds given that the bond was issued under RAP 8.3.

First, the Trial Court should not have disbursed the bond proceeds

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<sup>1</sup> The Port’s Judgment is also noteworthy because it only addresses the claims of STITA against the Port. However, the Complaint named a number of other defendants, and the Judgment does not address the disposition of those parties, even though Yellow Taxi purported to join. (CP 1345).

because in a related action, claims were (and still are) pending that would have yielded the underlying contract *ultra vires* and void. In the companion case, the Trial Court denied cross-motions for summary judgment, and determined that the issue of whether the underlying contract between Yellow Taxi and the Port was void is an issue for trial. (CP 1373). At the time the Trial Court in this matter disbursed the bond proceeds, there was at least the possibility that the underlying contract would be set aside as void.

The Port's claim to the bond proceeds is entirely based on the claim that the Port was delayed because the stay imposed by the Court of Appeals delayed the Port in signing the underlying contract. (*See* Port Brief at 17).

But if the underlying contract is void to begin with, the Port had no right to sign it, and accordingly cannot seriously contend that it is entitled to compensation for delays it claims to have suffered because it was restrained from signing a contract that was void. In other words, until the Trial Court knew whether the underlying contract is void or not, it could not determine whether the Port has suffered any compensable injury at all. Therefore, disbursement of the bond proceeds was premature, an issue that was plainly pointed out to, but ignored by the Trial Court. (CP 1374).

Moreover, because a bond was posted with the Court, the Port's

legitimate interests, if any, were fully protected. But just as it did in seeking premature entry of judgment, the Port's purpose was tactical, to try and put as much pressure on a smaller and less financially able litigant as it could.

The Port does not dispute the basic rule that it must show actual damage before it can recover against the bond. Here, until the issue of whether the underlying contract is void is decided, there can be no determination that the Port sustained any actual damages. The Port's only response (Port's Brief p. 25-26) is its request that this Court put on blinders and ignore the question of whether the contract is void because that issue is pending in another case and not this one.

But the Port's argument makes no sense. Even the Port would concede that if earlier in this case, the contract had been declared void in the other case, then it would have no claim for the bond proceeds here. Instead, the Port exalts form over substance when it argues that the fact that the decision about whether the contract is void will occur in a related case somehow means that the Trial Court here could ignore that issue, and proceed as if it was conclusively established that the Port had sustained injury. In other words, just because the issue of whether the contract is void had not yet been decided in the companion case should not change the ultimate conclusion, which is that the Port has sustained no legal

damage if the contract is void, and until that issue is decided, the bond proceeds should not have been disbursed.

Second, the Trial Court erred by misapplying the legal standard to determine whether the stay was “wrongful.” The Port concedes that the stay was issued pursuant to RAP 8.3, and that the stay was not a trial court injunction. Rather, the Commissioner entered a stay as a procedural device to preserve the status quo because under *Dick Enterprises, Inc. v. King County*, 83 Wn.App. 566, 922 P.2d 184 (1996), STITA would lose some or all of the fruits of its appeal unless signing of the contract was stayed. (CP 1066). Accordingly, the Port correctly admits that “the stay was entered to preserve the status quo and not because of the merits of STITA’s appeal.” (Port Brief, p. 13).

The Port’s claim now is that it is entitled to the bond proceeds because the injunction was “wrongful.” *See* Port Brief at p. 13. (“The test for whether an injunction is wrongful ‘is not whether the injunction was erroneous on its face, but whether it is later determined that the restraint was erroneous in the sense that it would not have been ordered had the court been presented with all of the facts.’ *Knappet v. Locke*, 92 Wn2d 643, 647, 600 P.2d 1257 (1979)”).

But here, the Port falls short of establishing the element that the stay was in fact “wrongful.” The issue before the Commissioner was

simply whether a stay was necessary to preserve the fruits of appeal. No later ruling has disturbed that determination, and, to the contrary, even after full briefing before this Court, the stay order was not dissolved when this Court denied relief to STITA on the underlying claims. (CP 1084). Rather, even while ruling against STITA on the merits, the Court of Appeals kept the stay in place for the reasons articulated by the Commissioner. The Port's argument that the stay order itself was "wrongful" is simply not supported.

Third, the Trial Court erred by disbursing the bond proceeds without a hearing or discovery to determine whether the Port sustained any compensable damages from the alleged delay in signing the contract, and if so, in what amount.

The Port goes to great lengths in its brief to argue that the Port sustained injury. (*See* Port Brief at 17-20) However, the Port concedes that any claim of actual damages must be "proximately caused by the stay" and not caused by some other reason. *Id* at 17. While the Port argues that its alleged damages were caused by the stay, the Port does not address in its brief the evidence submitted by STITA in the opening brief, where the Port admitted below that "**Yellow Cab was not in a position to commence services as of September 1, 2010.**" (CP 558)(emphasis added). In other words, if Yellow Cab was not in a position to commence

services for reasons of its own, then the Port could not properly attempt to blame STITA for the delay. STITA should have been given the opportunity to take discovery on that issue before the Court accepted as fact the claim that the Port's alleged injury was caused by the stay, and not for other reasons.

To begin with, the Port concedes that the stay was lifted on August 5, 2010, and that Yellow Taxi and the Port signed a contract the next day. That was three weeks before the start date. STITA was entitled to show that the reason Yellow Cab was not in a position to perform three weeks after the contract was signed had to do with decisions made by Yellow Cab, and not the stay entered by the Court of Appeals.

Similarly, the Port must admit that Yellow Taxi bid the contract with a September 1, 2010 start date. Nonetheless, the Port continues to assert, without evidence, that Yellow Taxi was not able to commence work under the contract on the original contract start date and needed more time. But the Port and Yellow Taxi were stayed only from signing the contract. Nothing in the stay precluded either the Port or Yellow Taxi from engaging in contract preparations, and there is nothing presently before the Court that would allow the Court to determine whether the inability of Yellow Taxi to commence on the start date was caused by the stay or was caused by other decisions that Yellow Taxi made.

The Trial Court was specifically advised of this issue, and was asked to allow discovery and to conduct a hearing before disbursing the bond proceeds. (CP 1421). The Trial Court should have inquired (and allowed discovery) into why Yellow Taxi was not in a position to perform on the start date. And the Trial Court should not have accepted at face value the factual claims of the Port that it sustained actual injury that was proximately caused by the issuance of the stay. Those are classic fact questions.

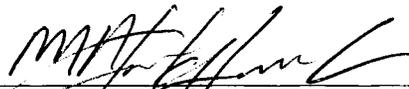
Finally, the Port's argument that STITA somehow did not adequately preserve this issue below, is even less convincing. (*See* Port Brief, p. 22, fn. 11, suggesting that STITA failed to "make specific objection to the trial court" as required by RAP 2.5(a)). The Port's argument ignores the fact that STITA in its opposition to the disbursement of the bond proceeds made a specific request for discovery. (CP 1046 and CP 1421).

**CONCLUSION**

The Trial Court's entry of judgment should be set aside and the order disbursing the bond proceeds should also be set aside. This matter should be remanded to the Trial Court with direction to order the bond proceeds returned to the registry of the Trial Court.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of June, 2011.

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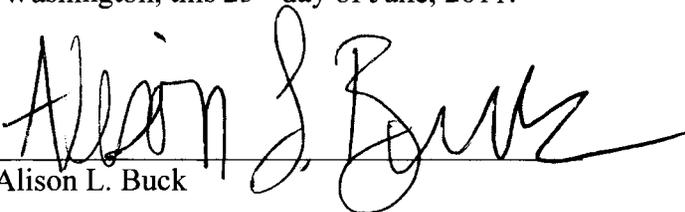
The undersigned hereby certifies a true and complete copy of the foregoing **APPELLANT’S REPLY BRIEF** was caused to be served on counsel of record for Respondents at the address and in the manner shown below.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 23<sup>rd</sup> day of June, 2011.

  
Alison L. Buck