**No. 439409**

**COURT OF APPEALS**
**STATE OF WASHINGTON**
**DIVISION II**

**C. P. B. & L. TRUST**

Appellant,

vs.

**PORT OF TACOMA**

Respondent.

# REPLY BRIEF OF APPELLANT

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## BACKGROUND AND CONTRAST ON FACTS

In 1991 William Fjetland died leaving all his property to his widow, Camille Fjetland, the beneficiary of the C.P.B.&L. Trust. That property included the land subject to the current action and a corporation that was allowed to go out of business during the court appointed guardianship of Camille Fjetland which took up much of the time between 1991 and 1996 when the sale of the property from Marine View to the Port of Tacoma (the Port hereinafter). took place.

Late in 1995 and early in 1996, with Pierce County Superior Court approval, and in order to close the guardianship, the C. P. B. & L. Trust was created as a spendthrift trust to take control of the net proceeds of the property sale to Marine View. Much of that was represented by promissory notes for the balance of the purchase price secured by deeds of trust. Beginning in 2005 with extensive hazardous waste and environmental clean up required by the Port including petroleum products cleanup, Marine View

prepared to sell the property to the Port. The Port accepted this clean up but required that Marine View either put up $500,000.00 to cover costs of further clean up, or that the secured creditors each put into escrow $500,000.00 for five years to be released on the fifth anniversary of closing (May 26, 2011), to guarantee this performance. Foran, the other secured creditor, had been a long time owner other property and thus had a long time exposure to MTCA and other environmental claims.

These facts, except for describing the escrow accounts as funded guarantee securities, are undisputed. Under these facts the Trust never had any MTCA or other liability for the condition of the property. Its beneficiary, Camile Fjetland, only had environmental concerns from 1991 to the sale closing in January, 1996. Her concerns, if any, were well after the discovered Asarco Slag was deposited before 1988. These are undisputed facts.

No determination of when or how the other petroleum deposits were made, from ground water seepage, or deposited

during the time the Port owned the property or otherwise. The Port destroyed all the evidence in building a tidal fish pond and wildlife habitat. In any event, Mrs. Fjetland was completely released from any potential environmental liabilities to the Port in the Purchase and Sale Agreement, as was the Trust.

Marine View operated on the property for mostly commercial, light industrial property and gravel pit purposes for a little over ten years until sold in 2006 to the Port.

When the property was sold to the Port, there was still a considerable balance owing to the Trust on its note secured by deeds of trust. It was necessary for Marine View to pay off that balance to receive trustees releases of the deeds of trust on the property, thus providing the Port with a clean, clear title as required in the Purchase and Sale Agreement. That was done as part of the closing. At that point all of that money in the hands of the closing escrow agent owing to the Trust belonged to the Trust. At that point, the trust funded its guarantee. Each account, Foran

and the Trust, was designated by their separate names, with interest to be paid separately to them as earned from those accounts. There was no commingling of accounts. These individual guarantors were responsible for taxes owed on any income from these accounts. No fixed interest was guaranteed by the Port. The Port did not assume any liability to pay these funds in case of failure of the Escrow agent or the bank, the "Too Big to Fail." Bank of America. The Port did not assume any liability for payment of interest on these funds nor any tax liability arising from earned interest. It had no interest in the escrow accounts outside of a contingent interest dependant upon timely presenting a valid claim against the funds for certain specific remediation problems specifically covered by the Purchase and Sale and Escrow Agreements.

**PORT'S CONTENTION OF ESCROW OWNERSHIP**

But the Port insinuates that these escrow funds were merely delayed payment of purchase money, still belonging to the Port

(Respondent's brief p. 1). In effect it argues that the Trust was merely an unsecured creditor with no right to receive the funds if the Port gave notice of any environmental contamination or hazardous waste or conducted any remediation on the property within five years of the sale, *i.e*: before May 26, 2011, the date specified that the funds were to be paid by the Escrow agent to the Trust and Foran. It bases this assumption on some sort of vague environmental concern of the parties to the Purchase and sale Agreement. That argument is not expressed and totally irrelevant as the Trust was never such a party, merely a third party beneficiary of that agreement The Port makes this argument to support its argument that the notice requirements in the contracts have no force or effect and if ignored by the Port, that inaction cannot bar its claims to the funds.

The fact is that the Trust was not an unsecured creditor of the Port, and its funds in escrow were not available to the Port's creditors, including receivers or trustees in bankruptcy should the

Port go into receivership or bankruptcy. This was not an idle possibility for the Trust's consideration as the Trust had the evidence in its possession, the business record map (CP 396 - 407), that the Port had at least five hundred and fifty to six hundred acres or more of land filled with Asarco slag even forming a foundation for the Port's own office. If the Port can rely on mere hearsay as to the use of the Marine View property before the sale (respondents brief pg. 1), then the Trust should be able to rely on an at least 20 year old map of the historical use of Port property before the sale.

The map was presented by Mr. Campbell, as a trustee and even named as a party, as part of the Trust's business records remaining from its predecessor clearly identifying the information of what it sought to convey and covering the history of the property and surrounding areas prior to 1991. It is immaterial whether the map proves or disproves the ultimate fact of existence of slag on the Marine View property. What id does support is the

existence of five hundred and fifty to over six hundred acres of slag filled sites on other Port Property that the Port has not reported or treated as environmental contaminants or hazardous waste. The Port has not denied the existence of these sites or their treatment. Of course, removing and replacing the slag deposits on all of these sites could cost over a billion dollars (according to the Port's claims in this case) to remediate. We certainly are entitled to use comparable sites in our defense, and this is competent business records evidence of the existence of such sites, prepared probably over fifteen years before the Port's current claims.

The Port was required to prove that hazardous waste and environmental contamination existed at the time it purchased the property, in the form of the driveway and house foundation on the Marine View property. If that argument is accepted then it might well be argued that many home and business foundations and driveways in Pierce and surrounding counties are notorious for having been filled with Asarco slag as cheap fill and though not

shown on the map (CP 396 - 407), are also superfund sites in need of immediate environmental cleanup. Is the Court ready to support such an argument?

It is undisputed that the Port' claims to the funds was based upon discoveries that it claims were made in 2009, and remediation action not taken until 2010; that it gave notice of to the Trust for the first time by letter of May 26, 2011. The Trust was never afforded any rights of prior inspection or comment that were required by both the Purchase and Sale Agreement and the Escrow Agreement. The on-sight critical evidence had been destroyed well before any notice was given of who or what might have caused of the environmental contamination and hazardous waste.

It is one thing to point out that the Trust had no duty to comment as the Port states on Page 2 and elsewhere in its brief. It is a far leap from that to say that the non-binding duty to comment translates into the abolition of the right to comment.

There is no evidence to support this. The Trust did nothing to abandon this in its right to prior notice.

It is reasonable to assume that the cause of any environmental pollution was the Port's actions of changing the character of this property from a basically industrial site to an environmental habitat and tidal fish pond and reforming the entire topography of the affected lands by massive excavations releasing otherwise stable materials to the environment. We presented evidence that the Port had and still has at least 550 to 600 acres of land fill with Asarco slag in place.

The Port relies on the Trial Court's refusal to consider this evidence CP991:18-21. It states on page 48 of it brief:

> The trial court properly struck this statement as unfounded opinion and irrelevant to the determination of any material fact. CP 1222-1224 many acres; CR 56(e); ER 401. The determination of what materials are categorized as hazardous substances and need to be removed is to be made only by statute and by the Department of Ecology. RCW 70.105D.020(10); RCW 70.105D.030. The Port's opinion regarding whether certain materials must be removed from various properties or how similar materials were treated in

> other areas is irrelevant to the Port's contract claims. The trial court's decision to strike certain statements as inadmissible and irrelevant was proper.

Now that is a pregnant statement. Does the Port contend that the Department of Ecology examined every truck load of material removed from the site to determine whether or not it was toxic? Was there evidence submitted from the Department of Ecology that any material taken from the Marine View site was hazardous and had to be removed. So any evidence of such toxicity from its own employees, engineers or experts must be considered irrelevant.

In any event, we believe that if the Statute sets forth standards, any competent witness may comment and offer any relevant evidence, including historical comparative evidence, of whether or not the standards apply. And we believe the business records map of the defunct corporation, B & L Trucking and Construction, Inc can be a valuable source of the history and evidence of at least where it deposited Asarco slag.

The map was introduced to help identify parcels of Port Property with Asarco slag fill as legitimate evidence for price and policy remediation considerations. Such evidence goes to the heart of the Port claims. It was admissible under a number of exceptions to the hearsay rule. The map was prepared by a deceased potential witness, William Fjetland who died in 1991. ER 804(a)(4). The map is an ancient document prepared more than twenty years before offered, ER 803(a)(16), Allen v. Asbestos Corp., Ltd, 138 Wn.App. 564. 157 P.3d 406 (Div. 1 2007).The map is a business record, RCW 5.45.020, ER 803(a)(20), Kay Corp. V. Anderson, 72 Wn. 2d 879, 436 P.3d 459 (1967).

It appears the Port never considered many other slag deposits on its property as hazardous waste or environmental contamination needing clan up. The evidence is clear that materials found only became hazardous or contaminants to the environment when they were released into the environment.

The Port's actions destroyed any opportunity for on site

inspection of what and when alleged contaminants and waste were deposited. This violated the express terms of the Purchase and Sale Agreement and the reasonable interpretation of the Escrow Agreements. This destroyed or damaged any claims the Trust might make against Marine View, Parsons and Brooks, for losses under their guarantees as well as other possible defenses.

The Port argues that it notified the Trust of its claims on May 23, 2011, but presented no evidence of that in the court below. The evidence was clear that the Trust was not notified until May 26, 2013 by letter of the same date. The Foran interests under its separate guarantee was notified on May 23, and the Title Company, as the escrow agent for those Foran interests was notified on the same date. No Attempt to notify the Trust or the Title Company acting as its escrow agent was made until May 26. The claim that there was an earlier notice on Page 2 of Respondent's brief is a deliberate lie to the court. The reason for this lie is clear because the claim period required by Escrow

Agreement terminated at midnight, May 25, 2011. The plain language of the Escrow Agreement required the Trust to be paid the escrow funds on May 26, 2011, the "the fifth anniversary of the Closing Date..." May 26 may or may not have been within the five years according case law guided by the intent of the parties. With payment being designated on May 26, the fifth anniversary, notice given on that date was clearly not within the five year period as contemplated by the parties.

The Port's own evidence of discovery of the alleged potential contamination a year before it did any remediation clearly disputes its current contentions that it did not provide notice because of "economic necessity and regulatory deadlines," page 4 Respondent's brief. Its own witness testified that the failure to provide notice was, at best, through oversight on the part of the Port (page 7 Leslee Conner's declaration of June 15, 2012, paragraph 14 [CP 867, 860-922]). It now contends that neither it nor the Trust has authority to determine what may be toxic waste

(Respondent's brief p. 48).

The Port repeatedly refers to the Trial Court's findings. This was a summary judgment and the Trial Court made no findings. Unless the respondent is a mind reader, for which no evidence is advanced, then neither this court nor the Port can assume any findings made by the Trial Court. As Lord Selden was reported to have remarked, in Table Talk, I believe, the decision appears to have been a more of piece of ancient equity influenced by the famous Plaintiff's argument of the size of the claim and more the result of size of the Chancellor's foot.[1]

The supposed background described by respondent beginning on page 3 of its brief is pure interpretive nonsense. For about a year prior to the closing of the sale, Marine View, with

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1. Equity is a Roguish thing: for law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure we call a Foot, a Chancellor's Foot; what an uncertain Measure would be this. One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: 'Tis the same thing in the Chancellor's Conscience.
John Selden, Table Talk (2nd Ed. 1689) 43-44.

inspections for the Port, conducted extensive clean up on the property, including cleaning up of petroleum in areas later claimed to be involved herein, and successfully cleaned up the property as specified by the Port before the sale closed. The $500,000 agreed limit of any further claim against Marine View for further clean up was money that Marine View was to pledge. But the Port agreed to take the funded guarantees of two of the secured creditors in lieu of Marine View's pledge. The creditors found some security in doing this because of the extensive clean ups approved by the Port before the sale closed and because of the protections afforded in the Purchase and Sale Agreement and the Escrow guarantee Agreement. Also so long as the money was recognized as theirs and they could receive the income from the funds.

The secured parties never agreed to the reduction of payment of the full purchase price on closing before they released their secured interests in the property. In fact, there was never any provision for recapture of any of the sales tax on the transfer of the

property because to any reduction caused by any hold-back.

The Port could not release the Trust from any environmental claims as it was exposed to none. Even its beneficiary, Camille Fjetland, because of her rather short ownership of the property, (1991-1996) was probably not exposed to any Port environmental claims as her interest in the properties came well after any of the metals claimed appeared to have been deposited on the property. By contrast, Foran had owned his property for many years well predating the Fjetland interest. While the release may have meant something to Foran, it meant nothing to the Trust or its beneficiary.

It is reasonable to assume that the Port did not give any notice of metals contamination because when discovered, it realized that it would not be an environmental hazard or contaminant until exposed and removed. To claim otherwise, the Port would have to clean up the other 550 to 600 acres of metals contaminated soils in its back yard. It probably realized that it

would the cause of any contamination. The Port also discovered some petroleum deposits close to or at the ground water line, but did not discover the cause of this contamination or when it was deposited. So it could have been deposited by the Port from bunker oil from Hylebos Creek through ground water seepage. In any event, the Port made no claim until well after the Plaintiff's attorneys it specially hired for this case were retained, had started to make the metals claims and until well after the five year period had expired and the Trust's denials of all claims as being time barred.

The slag in the roadway would have been visible at the time of purchase, especially to a buyer who owned so many acres of slag filled property, and presumably accepted by it.

## SUMMARY JUDGMENT STANDARD

It should be noted that much of the Trust's defense actually depends upon evidence produced by the Port. But the trial court ignored that evidence and the Trust's interpretation

The trial court's strained interpretation of the guarantee escrow agreement clearly fails all ambiguity tests. There is no ambiguity, the Trust was a guarantor.

## THE FACT THAT THE PORT SPENT A LOT OF MONEY DOES NOT JUSTIFY RECOVERY

The Port spending two and a half million or thirty million dollars in changing the character of the property from a commercial-light industrial-mining property to a wildlife and fish habitat has no effect on the Port's claims. They fail on the Port's failure to properly present them, and on their own weakness which was further exposed by the Port's own silence in 2009 and 2010. It is difficult to believe the Port's witness when she says that the Port merely misplaced supposed rights to half a million dollars to help pay for these conditions. Who was fired?

The Port conveniently overlooks the Purchase and Sale agreement which further explains the rights of the Trust in the twenty one days after notice is given (Ex. 1 CP 179-350):

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

This was obviously very important because the Port's duties were not merely limited to giving some notice of the claim. The

Port was required to give more information and to possibly interact with the Trust before any remediation work could begin. Objective manifestation of what was required is expressly clear. There is no need of extensive evidence to find that the contracts require specific forms of notices to be made before remediation.

The notice provisions of the contracts did not become immaterial provisions of the contracts until after the Port failed to perform its obligations under the contracts and had hired a Seattle plaintiff's law firm to pursue money from the Trust and Foran. Then, the notice requirements became inconsequential, at least to the Port. But where did it become inconsequential to the Trust, and what did the Trust do wrong that made these maters inconsequential? There is no fault shown in the Trust's actions to cause it to be denied any protection it might have sought as afforded by the notice provisions. It is inappropriate for the Port to now attempt to construe these clauses inconsequential to the Trust. They were, plain, unambiguous and specifically bargained

for and the Port accepted them. It is in no position now to argue they are inconsequential after the Port failed to comply with them.

While the Trust might only make non-binding comments on the Port's work, it could begin investigation of the Port's claims before the Port had totally destroyed and removed the evidence. It could have counted the actual truck loads. It could have viewed the actual claimed contamination, perhaps arranged independent tests of it. It could have gathered competitive bids for the work. It might have determined the petroleum was bunker oil and was as capable of being deposited during the Port's tenure as any other time. No time for the placement of the oil was ever established. The Trust could have determined if the supposed slag presented any environmental threat where it lay. The Trust could have, perhaps publically, challenged the need and authority for the Port to expend tax payer's money to change the nature of its commercial and industrial property by excavating it to build a non industrial-commercial tidal fish pond and wildlife habitat that

would expose material that could become environmental wastes and contaminants when so exposed and removed.

There were many things that the Trust could have done with prior notices. We could well presume the Port confirms by its silence that it did not want to risk any of these reactions. Prior notice of governmental actions supports public disclosure laws Chapter 42.56 RCW, Public Records Act and is well recognized to be a vital safeguard from inappropriate and unwarranted governmental action. Are we now to say our Public Disclosure laws are inconsequential? Do we not, for example, have a Public Disclosure Commission http://www.pdc.wa.gov/? The people and the legislature of this state have already spoken and determined that notice is vital to the government of this state. It is inappropriate to suggest it is an inconsequential clause repeated in two contracts with the Port. Unless a public authority in this state can show clear, exigent reasons, it should be held, as a matter of law and public policy, to the letter of its commitment where it has

promised to give prior notice of its actions to another party to the contract and failed to do so.

The Trust could reasonably expect to be able to examine the property as the lands are owned by the public. The Trust could have inspected the prior conditions and the work, even if it had to get a court order. Indeed some of the work in progress is or was recently available for inspection on the Internet and the Port had reported after its work no prior contamination of the ground water http://www.tacomaweekly.com/news/view/legacy_of_contamination/. Building a fish pond and wildlife refuge hardly arises to any matters of national security to bar inspection and require secrecy.

Because of the trial courts occlusion of evidence of other Port property with slag, the Trust was denied discovery evidence of comparative costs.

The Port continues to misinform this court. It says on page 23 of its brief: "This would be contrary to the purpose of the

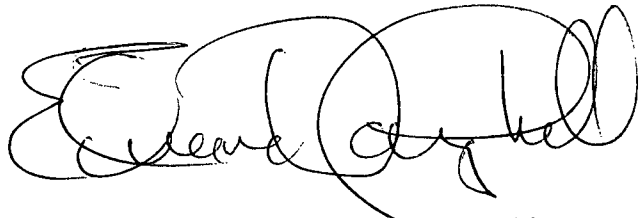
contract, which absolved the Trust of its statutory environmental liabilities to the Port...." The Trust never had any statutory liabilities to the Port. It became a secured creditor on the property more than ten years before the property was sold to the Port and never owned nor operated any activity on the property. Under the guaranty agreements, The Port got the right to claim much more against single parties than it could have ever enforced under the environmental protection laws.

In any event, any other liability of the Trust and Camille Fjetland was released in the Purchase and Sale agreement, unaffected by who put up or guaranteed the half million dollar fund. The obligation of the Trust is that of a guarantor of the contractual obligations of Marine View. As a guarantor, it is entitled to its contract being strictly construed and enforced. The Trust has done nothing to waive its contractual rights that are clearly within the Public Policy of this state.

## ATTORNEY FEES AND CONCLUSIONS

While the Trust maintains it should be awarded attorney fees here and below, it points out under the facts in this case taking the body the Trust estate was and is a matter that the Trustees are bound by their fiduciary duties to defend to the fullest extent of the law. It is the Port's allegations, actions and omissions, not the Trust's, that created the need for this defense. The mere fact that the Port spent millions of taxpayer's dollars building a wildlife habitat and tidal fish pond and changed the character of the land does not support any claim or any late claim against the Trust's escrow funds.

April 5, 2013



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## APPENDIX
## State Statutes

RCW 5.45.020 Business records as evidence. Page 11

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Chapter 42.56 RCW, Public Records Act, Page 11

This act is cited no for specific statutory authority but in recognition of the existence of a general public policy of the State of Washington when it comes to public notice and prior information of the actions of governmental authorities.

### State Cases



### State Rules



(a) Specific Exceptions. The following are not excluded by the

hearsay rule, even though the declarant is available as a witness:

(16) Statements in Ancient Documents. Statements in a document in existence 20 years or more whose authenticity is established.



(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.