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WARREN & DUGGAN, PLLC

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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DIVISION II
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STATE OF WASHINGTON
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IN RE:

No. 35521-3-II

THE PORT OF TAHUYA, a
Washington port district.

RULING GRANTING REVIEW

Brad Carey seeks discretionary review of a trial court order that dissolved the Port of Tahuya. He contends that the court erred in dissolving the Port without first making a finding of solvency. Concluding that the trial court committed probable error and that the order substantially altered the status quo, this court grants review.

In November 2005, the Port Commissioners filed a petition to dissolve the port district under Chapter 53.48 RCW. The petition alleged that the Port was solvent. Judge Sawyer held a hearing on January 9, 2006, as required by RCW 53.48.030. On January 23, 2006, the court entered an order that declared that the Port should be dissolved, but that an order of dissolution would not be entered until the Port's affairs had been wound up. The order established a 120-

day claims period and directed the Port to take certain steps to wind up its affairs. The deadline for claims was May 9, 2006.

On April 18, 2006, Carey, who became a Port Commissioner after the petition to dissolve the port district had been filed, moved for an order directing compliance with the January 23 order. Specifically, he asked the court to order the Port to schedule a hearing on pending claims, to comply with public disclosure requests, to marshal its assets and to prepare documents for archiving. The Port opposed the motion and asked the court to enter an order of dissolution. Judge Sheldon denied Carey's motion, except for granting him access to the Port's files in the presence of a neutral third party, and scheduled a hearing for May 24, 2006, to enter an order of dissolution.

On May 8, 2006, Carey, along with a citizens' group and his father, sued the Port, alleging that it had failed to comply with their public disclosure requests. On May 24, 2006, Judge Sheldon held a hearing on the Port's request for an order of dissolution. Carey argued that an order of dissolution required a finding of solvency, and in light of his pending public disclosure requests and the lawsuit he had filed against the Port, the court could not yet find whether the Port was solvent. The Port responded that it had assets of about \$125,000, that it had previously denied most of the claims, and that the amount of the remaining claims, even if deemed appropriate, was about \$30,000. It argued that it was solvent, so the court could enter an order of dissolution.

Judge Sheldon ruled that she would enter an order dissolving the Port, subject to a number of tasks being completed. On June 17, 2006, the court

entered an order dissolving the Port. It made a finding that "By the agreed findings entered 1-23-06 from the 1-9-06 hearing, the Port of Tahuya was found to be solvent."¹ It ordered the Port to deposit its assets in the court's registry. Carey moved for reconsideration, arguing that the evidence did not support a finding that the Port was solvent. The court denied Carey's motion, and he seeks discretionary review.

This court may grant discretionary review when:

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act; . . .

RAP 2.3(b)(2).

Carey argues that the trial court committed probable error when it entered its finding that "[b]y the agreed findings entered 1-23-06 from the 1-9-06 hearing, the Port of Tahuya was found to be solvent." He contends there were no such agreed findings, and that the court erred by failing to make an express finding in May 2006 regarding the Port's solvency. The Port responds that the record supports a finding that the Port was solvent in May 2006 because the Port's assets exceeded the Port's liabilities. It contends that Carey's public disclosure lawsuit is too speculative to be considered a liability that could render the Port insolvent.

Chapter 53.48 RCW, which regulates the dissolution of a port district, contains different provisions for solvent and insolvent port districts. RCW

¹ Motion for Disc. Rev., Exhibit F at 2.

53.48.040 provides that for a solvent port district, all assets remaining after payments of costs and expenses shall be paid to the county treasurer for the benefit of the school districts in which the port district was situated. RCW 53.48.060 through RCW 53.48.080 provide that for an insolvent port district, the court may order the port commissioners to levy assessments against residents within the port district to retire the port district's indebtedness.

Here, the trial court did not make a finding of solvency when it dissolved the Port in May 2006. It found that another judge had found, implicitly, in January 2006, that the Port was solvent. But that judge's order also set the deadline for claims for May 9, 2006. While the Port may have been solvent in January 2006, that does not necessarily mean that the Port was solvent in May 2006. The trial court committed probable error in entering its order dissolving the Port without having made an express finding that the Port was solvent in May 2006. And while the record may support a finding of solvency, such a finding should be made by the trial court, not by this court.

The Port contends that even if the trial court committed probable error, the order dissolving the Port did not substantially alter the status quo or substantially limit Carey's freedom to act. But the order placed the Port's assets in the court's registry and put them under the court's administration. Claims allowed by the court, and paid to claimants, might not be recoverable should the court find the Port insolvent. Thus, the order substantially alters the status quo.

This court concludes that Carey has demonstrated that discretionary review of the trial court's decision is appropriate under RAP 2.3(b)(2). Accordingly, it is hereby

ORDERED that Carey's motion for discretionary review is granted. The Clerk shall issue a perfection schedule.

DATED this 5th day of March, 2007.

Eric B. Schmidt
Eric B. Schmidt
Court Commissioner

cc: Michael J. Warren
Susan Rae Sampson
Blair B. Burroughs
Robert I. Goodstein
Ralph U. Klose
Hon. Toni Sheldon