SUPREME COURT OF THE STATE OF WASHINGTON

No. 97690-2

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

No. 361896

BORTON & SONS, INC. a Washington State corporation,
Appellant-Plaintiff,

v.

BURBANK PROPERTIES, LLC, a Washington State limited liability company,
Respondent-Defendant

PETITION FOR REVIEW

Joel R. Comfort, WSBA #31477
Miller, Mertens & Comfort, PLLC
1020 North Center Parkway, Suite B
Kennewick, WA 99336
(509) 374-4200 (phone)
(509) 374-4229 (fax)
jcomfort@mmclegal.net
Attorneys for Respondent

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I. IDENTITY OF PETITIONER

The Petitioner is Burbank Properties, LLC (hereinafter, Burbank), which was the Respondent in the underlying Division III proceeding, and asks this Court to accept review of the decision of Division III.

II. COURT OF APPEALS DECISION

Petitioner seeks review of *Borton & Sons, Inc. v. Burbank Prop. LLC*, __ Wn.App. ____, LLC, 444 P.3d 1201 (2019), which was filed and published July 16, 2019. An Order denying Petitioner's Motion for Reconsideration was entered August 22, 2019.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in using a De Novo review standard on a case decided in equity.

2. Whether the Court of Appeals erred in holding that significant improvements to the subject property are required to grant an equitable grace period.

3. Whether the Court of Appeals erred in holding that the loss of Burbank's hay crop was not an inequitable forfeiture and does not support granting an equitable grace period.

IV. STATEMENT OF THE CASE

A. Facts.

The Petitioner, Burbank, is a single-member LLC owned by Eric Rogers. CP 103. In addition to Burbank, Rogers owns multiple other limited liability companies that are engaged in farming and agricultural endeavors, which combined, comprise Rogers' farming operation. *Id*. The property at issue in this case, located at 243 Flat Top Road, in Burbank, Washington (the "Subject Property") has been farmed by Rogers since 2000. CP 104. Between 2002 and 2012, it was farmed under a lease. *Id.* Rogers formed Burbank to purchase the Subject Property from the landlord, and completed the purchase in 2012. *Id*. Between 2012 and 2016, Burbank owned the Subject Property. During these years, potato prices were low which caused financial strain to Rogers' entities. *Id*.

In June 2015, Rogers' lender, Rabo Agrifinance, commenced a lawsuit against Rogers and his related entities to recover an operating loan that went into default because of the financial strain. CP 104. Shortly thereafter, Rogers and Rabo were able to reach an agreement to forbear collection of the loan, but as part of that agreement Rabo demanded that Rogers sell the Subject Property to generate cash. *Id*. The Subject Property, however, was a key part of Rogers farming operation because of its

importance in producing early season potatoes, as Rogers had agreements with buyers to supply early potatoes. *Id*. For this reason, Rogers did not want to sell the Subject Property. *Id*.

Rogers conferred with Neal Goplen, of Goplen Ag Services to discuss his options to preserve the Subject Property. CP 104. Goplen recommended that they market the property to sell for less than fair market value, with a lease-back of the property by Burbank, and with an option to repurchase the property at the end of the lease. CP 145. Despite having an appraised value of $1,875,000 in 2014, the property was listed for sale at $1,575,000 to accomplish this. CP 104-105. Rogers and Goplen viewed the transaction as more akin to a loan secured by the subject property than an actual sale. CP 105. Goplen presented this as an investment opportunity at a marketing session through the Real Estate Land Institute. CP 145. Tracy Lybbert, a real estate broker for Borton, was in attendance at the marketing session. *Id*. Within approximately one day, Borton, through Lybbert, made an offer of $1,550,000. *Id*. Lybbert viewed it as an attractive opportunity because of the purchase price, the lease rate, and the return on investment when the option was exercised. CP 147.

Burbank sold the Subject Property to Borton in February 2016 for $1,550,000, subject to a Lease and Option Agreement (the "Lease Agreement"). CP 8-23. The Lease Agreement leased the Subject Property

back to Burbank for three years (through 2018), with rent of $78,775.00 per year. *Id.* It also contained an option for Burbank to repurchase the Subject Property for $1,800,000. *Id.* It required Burbank to exercise the option by December 31, 2017, but with closing not to occur until December 31, 2018. *Id.*

Sometime in late 2016 or early 2017, Byron Borton, the Chief Visionary Officer for Borton, directed Tracy Lybbert to see if Burbank would sell its option to purchase, back to Borton, so they "would have clarity on whether [they] were going to own the property or not." CP 139; CP 171. Lybbert was advised that Burbank was not interested in relinquishing the option, and Lybbert reported this back to Borton. *Id*.

In March 2017, Dan Bowton, the farm manager for some of Borton's property in the Burbank area, contacted Eric Rogers to see if Burbank Properties would agree to allow Borton to put a nursery on a portion of the Subject Property. CP 159; CP 128. Rogers told Bowton that he would want a lease from Borton because he intended to exercise the option to purchase the property back. CP 129; CP 160. Bowton, in turn, reported this back to Bill Borton, the president of Borton. CP 160. Ultimately, Borton declined to put the nursery on the Subject Property. CP 129. Later that summer, Rogers and Bowton spoke again, and according to Rogers he reiterated that Burbank planned to buy back the Subject Property. CP 129. After the

potatoes were harvested in the fall of 2017, Rogers planted timothy hay on the Subject Property, which is a two to three year crop, meaning that the crop is harvested over a two to three year period. CP 128. This was done only months before Burbank's deadline to exercise the option.

On December 28, 2017, Rogers drafted a Notice of Exercise of Option to Purchase the Subject Property. CP 129; CP 30-32. He put it in an envelope, put it on his desk, and intended to mail it the following day. *Id.* Through an inadvertent oversight, the Notice was not mailed, which Rogers discovered the following week. *Id.* On January 4, 2018, he realized the error, and immediately sent the Notice out. *Id.* The Notice was received by Borton on January 8, 2018. CP 4.

Three days later, counsel for Borton sent Burbank Properties a letter advising Burbank that their notice was untimely, and demanding that Burbank sign a notice acknowledging that the option was terminated. CP 78-83. Counsel for Burbank responded on January 29, 2018, advising that Burbank intended to close the sale on or before December 31, 2018 and reminded Borton's counsel that forfeitures are not favored in law, and that he believed under the circumstances an equitable grace period would apply. CP 85-86.

B. Procedural Background.

On February 5, 2018, within days of receiving Burbank's letter advising of their intention to close the sale, Borton filed this lawsuit seeking a declaratory judgment that Burbank's option to purchase expired. CP 3-39. On March 20, 2018, Burbank filed its Answer, Affirmative Defenses and Counterclaim, seeking its own declaratory judgment from the Court that it had indeed timely exercised the option to purchase or in the alternative was entitled to an equitable grace period to do so. CP 40-49. Some discovery was conducted by both parties thereafter, including a few depositions. *See* CP 121-122.

On March 26, 2018, Borton filed its Motion for Summary Judgment. CP 55-56. On May 1, 2018, Burbank filed its Motion for Summary Judgment. CP 87-88. The cross-motions were heard on May 29, 2018 by the Honorable M. Scott Wolfram. RP 1. Judge Wolfram reviewed the pleadings "[s]everal times" then heard oral argument from both sides. RP 2. After hearing oral argument and reviewing the pleadings, Judge Wolfram found that based on the loss of Burbank's crop and their loss in equity in the property, that Burbank was entitled to an equitable grace period and granted Burbank's motion for summary judgment. RP 16; CP 311-314.

Thereafter Burbank moved for fees and costs. CP 197-200. On June 18, 2018, Borton filed its Motion for Reconsideration with the trial court

judge. CP 231-232. That motion was denied via order entered on July 6, 2018. CP 319-320. The Order granting Burbank's Motion for Summary Judgment and Denying Borton's Motion for Summary Judgment was entered June 25, 2018. CP 311-314. Judgment was also entered in favor of Burbank, and against Borton, for Burbank's attorney's fees and costs. CP 315-318. Borton filed its Notice of Appeal on July 11, 2018. CP 321-335.

Oral argument of the case took place on May 2, 2019 and a published opinion was issued by Division III of the Court of Appeals on July 16, 2019, which reversed the trial court's granting of Burbank's summary judgment motion and denial of Borton's summary judgment motion. The Court, instead, reversed the trial court and denied Burbank's summary judgment motion and granted Borton's summary judgment motion. Burbank now seeks review by the Washington State Supreme Court for the following reasons.

V. ARGUMENT

A. The Court of Appeals Erred in not using an Abuse of Discretion Standard of Review.

The first error alleged in this matter is regarding the Standard of Review used on appeal. Here, Division III of the Court of Appeals, in review of the trial court's decision, chose de novo review. In so ordering, they relied on the basic premise that courts typically review an order regarding summary judgment de novo. *Seybold v. Neu,* 105 Wn. App. 666,

675, 19 P.3d 1068 (2001). However, in doing so, the fact that the trial court was sitting in equity was simply ignored. The standard of review regarding a trial court's exercise of equitable authority is abuse of discretion. *Emerick v. Cardiac Study Ctr., Inc.*, 189 Wn. App. 711, 730, 357 P.3d 696 (2015), *review denied*, 185 Wn.2d 1004, 366 P.3d 1244 (2016). Abuse of discretion was also the proper standard for this case as the policy reasons behind the standard in equity clearly outweigh the policy reasons for de novo review on summary judgment.

This is because the trial court has broad discretionary authority to fashion equitable remedies. *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 228–29, 242 P.3d 1 (2010); *SAC Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 867 P.2d 605 (1994). Appellate Courts do not disturb an exercise of such discretion absent a clear showing of abuse of discretion—that is, "discretion that is manifestly unreasonable or exercised on untenable grounds." *Id. quoting Paris v. Allbaugh*, 41 Wn. App. 717, 720, 704 P.2d 660 (1985).

In fact, the Court of Appeals recognized that "[w]hether a party is entitled to equitable relief 'is in large part a matter addressed to the discretion of the trial court, with discretion to be exercised in light of the facts and circumstances of the particular case.'" *Borton & Sons, Inc.*, 444 P.3d at 1205 (quoting *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 88,

867 P.2d 683 (1994)). Despite this, the Court of Appeals chose to ignore the application of the foregoing to the review standard.

In reviewing a recent case decided on summary judgment, *Crafts v. Pitts,* 161 Wn.2d 16, 29-30, 162 P.3d 382 (2007), the Washington Supreme Court acknowledged that "a decree of specific performance rests within the sound discretion of the trial court," and therefore reviewed the trial court's decision to grant specific performance for an abuse of that discretion. This is noted by the court in *Cornish*, supra, which states that the court did not explain how this approach was consistent with its earlier pronouncement in *Folsom v. Burger King* that de novo review is used by an appellate court when reviewing trial court rulings made in conjunction with a summary judgment motion. 135 Wn.2d 658, 663, 958 P.2d 301 (1998). As a result, the Court in *Cornish* found that "[b]ecause the *Crafts* decision is more recent than *Folsom* and, unlike *Folsom,* deals with a dispute precisely of the type presented here, we follow the court's method of analysis set forth in *Crafts." Cornish*, 158 Wn. App. at 221. That standard is abuse of discretion, which is the standard of review that should have governed this case.

In *Recreational Equip., Inc.*, 165 Wn. App. 553, 565, 266 P.3d 924, the court upheld an equitable grace period under legally and factually similar circumstances to the case at hand. There the Court stated:

> it is not a function of this appellate court to reweigh the trial court's equitable considerations and determine whether we would have decided the case differently. Rather, the proper review standard of this court is to decide whether the trial court's findings are supported by substantial evidence and whether those findings support the court's discretionary determination that it should grant equitable relief.

Id. at 565.

> A trial court has discretion to decide whether equity requires an equitable grace period. This discretion is to be exercised in light of the particular case's facts and circumstances. Because the trial court has broad discretionary authority to fashion equitable remedies, such remedies are reviewed for an abuse of discretion.

Id. at 559 (Internal citations omitted).

Some courts have made a distinction between whether the trial court *had authority* to exercise its equitable powers, versus whether it *properly exercised* said powers. In the former, there is authority that the standard of review is de novo, but in the latter the review standard is clearly abuse of discretion. *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005); *Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 819, 394 P.3d 446 (2017). This case falls squarely in the latter situation because it has never been asserted by Borton that the trial court did not have the authority to exercise its equitable powers. Borton's argument was not whether a trial court has equitable powers to find an equitable grace period. Instead, their argument was that "Defendant Cannot Make a Threshold

Showing that it is Entitled to Equitable Relief." As such, the standard of review here should have been abuse of discretion, not de novo.

B. The Court of Appeals Erred by Holding Significant Improvements are required to grant an Equitable Grace Period.

Division III of the Court of Appeals holds that "[e]quity will permit an option to purchase property to be exercised late in order to avoid a forfeiture when significant improvements have been made to the property." *Borton & Sons, Inc. v. Burbank Properties, LLC*, 444 P.3d 1201, 1203 (2019). By holding that "significant improvements" to the subject property are a requirement to being awarded an equitable grace period, the decision of the Court of Appeals is now in conflict with decisions of the other divisions of the Courts of Appeal as well as the Washington State Supreme Court.

To reach their holding, the Court cites to and relies on a decision from Division I of the Court of Appeals, *Wharf Rest., Inc. v. Port of Seattle*, 24 Wn. App. 601, 605 P.2d 334 (1979), which is the first published case on this subject matter in the State, for the general proposition that equitable relief is available where an inequitable forfeiture would result. However, the Court erroneously relies on *Wharf* to reach their conclusion that the holder of an option to purchase must make "valuable permanent improvements to the property" to be entitled to an equitable period of grace.

In support thereof, the Court of Appeals argues that all Washington cases on this subject rely on *Wharf* and *Wharf* requires "valuable permanent improvements". However, in their reliance on *Wharf*, the Court of Appeals ignores that the *Wharf* Court announced that there are only five factors bearing on whether such relief is appropriate and valuable permanent improvement is not one of the factors. Those factors are:

> 1) The failure to give notice was purely inadvertent;
> 2) An inequitable forfeiture would have resulted had equity not intervened;
> 3) As a result of the [lessee's] failure to give timely notice, the [lessor] did not change its position in any way and was not prejudiced thereby;
> 4) The lease was for a long term, not a short term;
> 5) There was no undue delay in the giving of notice by the [lessee];

Wharf, 24 Wn. App. at 612-13.

Since *Wharf* was decided, five other cases, aside from the case at hand, have resulted in published opinions on this legal doctrine of equitable grace periods. Those cases are *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 867 P.2d 683 (Div. II, 1994); *Pardee v. Jolly*, 163 Wn.2d 558, 182 P.3d 967 (2008); *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 242 P.3d 1 (Div. I, 2010); and *Recreational Equip., Inc. v. World Wrapps Nw., Inc.*, 165 Wn. App. 553, 266 P.3d 924 (Div. I, 2011). An analysis of those cases will show that not one of said cases specifically

requires substantial permanent improvements to support an equitable grace period.

Chief among those cases, *Pardee*, a Washington State Supreme Court decision, specifically refers to and upholds the five factors outlined in *Wharf*. 163 Wn.2d at 575, 182 P.3d at 976. There, the Court did not make substantial permanent improvements an additional factor in the analysis. *Id*. Instead, the Court, in remanding to the trial court, stated "[t]he trial court should consider whether Pardee is entitled to an equitable grace period using the *Wharf Restaurant* considerations." *Id*. at 576, 977. No additional considerations were advised aside from stating that whether or not an equitable grace period is appropriate depends on the facts and circumstances of each case, and is largely within the discretion of the trial court. *Id.* at 575.

The Court in *Cornish*, thereafter, was also quick to accept the *Wharf* factors as the determinative factors on equitable grace periods. 158 Wn. App. at 218, 242 P.3d 9. *Cornish* also distinctly places substantial permanent improvements under the second *Wharf* factor, equating the loss of such improvements with an inequitable forfeiture. *Id*. at 219, 10. In further support of the fact that substantial permanent improvements are not required, *Cornish* held that not all of the factors must be present for an equitable grace period to be granted. *Id*. at 218, 9. They recognized that

"such an inflexible approach would be inconsistent with the trial court's broad discretion to fashion equitable remedies." *Id*. at 218, 10.

While *Heckman* does not directly cite to the *Wharf* factors, it does place valuable improvements in with the inequitable forfeiture prong. 73 Wn. App. at 88, 867 P.2d at 685. The Court there held that there was no inequitable forfeiture because the lessor paid for a greater percentage of the improvements and the lessee had already amortized out all of the expenses incurred. *Id*. However, the Court there did not hold that the lack of substantial improvement alone precludes an equitable grace period. *Id*.

Recreational Equipment, on the other hand, directly discusses the five *Wharf* factors, and then immediately thereafter commences into a paragraph with the same title as the second factor, inequitable forfeiture. Within the paragraph is a lengthy discussion of whether there were substantial improvements, thus again placing such improvements within the factor and not a requirement on their own.165 Wn. App. at 560, 266 P.3d at 928.

The foregoing did not go unnoticed by the dissenting opinion in this matter, which noted that Washington Courts discuss the addition of improvements to the land or building when analyzing whether the optionee fulfills element two of the test. *Borton*, 444 P.3d at 1212 (Fearing, J., dissenting). The dissent noted that inequity may result regardless of whether

the optionee improves the real property, and that is the real issue here. *Id*. In line therewith, no Washington court has specifically held that substantial permanent improvement to the property is essential to an equitable grace period, and the decision by Division III is thus a substantial departure from the law on the subject, both by prior Supreme Court and Court of Appeals precedent.

The reasoning as to why the decision herein should be overruled is properly outlined in the dissenting opinion, which states in pertinent part that:

> Applying a rigid rule that precludes a grace period under one particular circumstance is anathema to equity. To repeat, whether a grace period is warranted depends on the equities in each particular case. *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d at 783 (1950). Whether or not an equitable grace period is appropriate depends on the facts and circumstances of a case and is largely within the discretion of the trial court. *Pardee v. Jolly*, 163 Wn.2d at 575 (2008). An inflexible approach would be inconsistent with the trial court's broad discretion to fashion equitable remedies. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. at 218. Thus, the court must review all relevant circumstances, not simply whether the optionee improved the real property. If one factor controlled, the law would hamstring the trial court's discretion.

Borton, 444 P.3d at 1212 (Fearing, J., dissenting).

In sum, permanent valuable improvements fall within the second *Wharf* factor of inequitable forfeiture. Nevertheless, not all five factors must be present, because "such an inflexible approach would be inconsistent with

the trial court's broad discretion to fashion equitable remedies." *Cornish*, 158 Wn. App. at 218. Therefore, *Wharf* element two, which has included substantial improvements in some of the prior published cases, is not indispensable to granting an equitable grace period here. Should the Court deny review, such improvements will heretoforth be considered indispensable, and the analysis and availability of such equitable grace periods will substantially change.

C. Application of the actual *Wharf* factors for an equitable grace period favor Burbank.

1. Burbank's delay in mailing the option notice was inadvertent, and there was no undue delay.

The first factor the Courts consider in assessing the propriety of granting an equitable grace period is whether the failure to give notice was purely inadvertent. *Wharf*, 24 Wn. App. at 612-13; *Cornish*, 158 Wn. App. at 218. In this case it is undisputed that the failure was inadvertent.

2. The loss of the Hay Crop was an Inequitable Forfeiture and supports granting an Equitable Grace Period.

Despite holding that permanent improvement to the land is required to seek relief in equity, the decision of the Court of Appeals still stated that they do not disagree with the argument that the loss of the hay crop was an inequitable forfeiture, but instead, declared that this argument "was unproved." *Borton*, 444 P.3d at 1206.

This seemingly contradictory statement further supports Burbank's request for review by the Supreme Court to determine exactly what is required of a party seeking an equitable grace period. By seemingly holding the door open to a non-permanent improvement to be sufficient for an equitable grace period, the Court of Appeals has only further confused the issue. In one instance they have affirmatively stated that a permanent improvement is essentially the sixth *Wharf* element, and in the same breath appear to align with all of the prior published cases in stating that permanent improvement falls within the inequitable forfeiture *Wharf* element, recognizing that an inequitable forfeiture can occur even where the loss is not a permanent improvement. As a published opinion, this case does not square well with any of the previous opinions on the matter and only further confuses the issue for future practitioners. As such, Burbank respectfully requests that the Supreme Court review this matter and decide once and for all the elements to be analyzed in assessing whether a party is entitled to an equitable grace period.

Further, in going back to the door that was left open by the Court of Appeals, by finding that Burbank did not prove that they suffered an inequitable forfeiture for the loss of the hay they planted just months before notice was due to exercise the option, the Court has implicitly declared that there is a factual issue as to the question of inequitable forfeiture. Because this matter came to the court on cross summary judgment motions, the presence of

a remaining factual issue prevents the Court of Appeals from making a full reversal and finding that on summary judgment Borton was the one entitled to relief. Instead, the proper outcome should have been a remand to the Superior Court and Burbank respectfully requests that, at a minimum, occur.

3. There was no prejudice to Borton caused by the delay.

The third factor to be considered was whether the untimely notice caused Borton to change its position in any way, and whether Borton was prejudiced thereby. *Wharf*, 24 Wn. App. at 612-13; *Cornish*, 158 Wn. App. at 218. The answer to that question is a resounding no. Under the Lease and Option Agreement, although *notice* of intent to exercise the option was due by December 31, 2017, Burbank was not required to *close* the re-purchase until December 31, 2018 – an entire year later. CP 13. Borton received the notice on January 8, 2017, so instead of having 365 days' notice, they had 357 days' notice. CP 4. Byron Borton testified that the only activity that Borton & Sons engaged in between January 1, 2018, and January 8, 2018 was a strategy discussion regarding what trees they might plant on the property. CP 140. They did not order any trees, nor did they incur any expenses during that time. *Id*. Borton's position did not change in any meaningful way between January 1st and January 8th.

D. Burbank was entitled to attorney's fees and costs and is entitled to another award of attorney's fees from this Court.

In this case, the parties' Lease and Option Agreement provides "[i]n the event that any action is filed in relation to this lease agreement, the unsuccessful party in the action shall pay to the successful party…a reasonable sum for the successful party's attorney fees." CP 15. Pursuant to RCW 4.84.330, an award of reasonable attorney's fees is required:

> In any action on a contract or lease …where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party…shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

RCW 4.84.330

Furthermore, attorneys' fees are properly awarded under a contract, even when the court grants an equitable remedy to enforce the contract. *See, e.g. Cornish,* 158 Wn. App. at 234-235.

Additionally, pursuant to RAP 18.1, Burbank is entitled to an award of attorney's fees and costs for prevailing on appeal. Burbank respectfully requests that this Court award Burbank its fees and costs on appeal.

VI. CONCLUSION

Through an inadvertent error, Burbank failed to timely exercise its option to purchase the Subject Property. The delay, however, was short and caused no prejudice to Borton. On the other hand, given the nature of the

transaction, and the character of the Subject Property, Burbank will suffer substantial losses if the option to purchase is not enforced, including their loss of a hay crop. Burbank is entitled to an equitable grace period through the court's inherent power.

The decisions of the trial court are to be reviewed under an abuse of discretion standard, which is highly deferential to the trial court. The Court of Appeals erred in not doing so. It further erred by creating an absolute requirement that a party must make permanent improvements to the land before being entitled to equitable relief, and by failing to remand the case back to the trial court due to a factual issue that remains regarding the hay crop. Accordingly, Burbank respectfully requests that this Court grant review of the appellate court's opinion, overturns such opinion, and further requests an award for their attorney's fees and costs on appeal.

DATED this 13th day of September, 2019.

MILLER, MERTENS & COMFORT, PLLC

By: *s/Joel R. Comfort*

JOEL R. COMFORT
State Bar Number #31477
Miller, Mertens & Comfort, PLLC
1020 N. Center Parkway, Suite B
Kennewick, WA 99336
Telephone: (509) 374-4200
Fax: (509) 374-4229
Email: jcomfort@mmclegal.net
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 2019, I caused a true and correct copy of the foregoing document to be served electronically on the clerk of the above entitled court and on the following in the manner indicated below:

Mark E. Fickes mfickes@hnw.law J. Jay Carroll jcarroll@hnw.law Joyce Kling jkling@hnw.law Jennifer Fitzsimmons jfitzsimmons@hnwlaw Halverson Northwest, P.C. 405 E. Lincoln Ave. Yakima, WA 98907	VIA REGULAR MAIL [ ] VIA E-MAIL (by agreement): [X] VIA FACSIMILE: [ ] LEGAL MESSENGER [ ] HAND DELIVERED [ ]

DATED this 19th day of September, 2019 in Kennewick, Washington.

Joel R. Comfort
JOEL R. COMFORT WSBA #31477
Attorney for Respondent

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APPENDIX

I. Court of Appeals Decision

II. Motion for Reconsideration

III. Order Denying Motion for Reconsideration

APPX. I

COURT OF APPEALS DECISION

FILED
JULY 16, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

BORTON & SONS, INC., a Washington State corporation, Appellant, v. BURBANK PROPERTIES, LLC, a Washington State limited liability company, Respondent.	)	No. 36189-6-III PUBLISHED OPINION

KORSMO, J. — Equity will permit an option to purchase property to be exercised late in order to avoid a forfeiture when significant improvements have been made to the property. The trial court ruled that respondent Burbank Properties satisfied this condition and allowed the option to be exercised a mere eight days late. We disagree and reverse.

FACTS

Burbank farmed approximately 164 acres it owned in Walla Walla County adjacent to orchards owned by appellant Borton & Sons. Burbank, whose sole owner is Eric Rogers, purchased the property in 2012 after having leased the land for farming since 2000. Burbank used the land to grow early season potatoes. Potatoes deplete the soil of nutrients and are subject to diseases that require strict crop rotation. Potatoes are

grown one year and then the land is given over to other crops for at least one to two years. Historically, Burbank had followed one year of potato planting with two years of grass or hay planting.

After years of depressed potato prices, Burbank faced financial difficulties that threatened its operation. A settlement with one of its lenders required Burbank to sell the potato farm land. However, Burbank's early season potato contracts were a significant component of its operations. Accordingly, it settled on a plan to sell the land at a reduced rate, farm the land on lease terms during the interim, and repurchase the property at a reasonable sum. In essence, the land was being used to secure a short-term loan.

An appraisal valued the land at $1,875,000 and Burbank offered the land for sale for $300,000 less. The following day, desiring to purchase the land that bordered its apple orchards, Borton offered $1,550,000 for the land. The parties rapidly reached an agreement that included the following terms relevant to this appeal: Burbank could repurchase the land for $1,800,000 by December 31, 2018; Burbank had to exercise its repurchase option prior to December 31, 2017, by sending notice to Borton by certified or registered mail; Burbank would lease and farm the land during 2016, 2017, and 2018 at an annual rent of $78,775. Borton required the one year notice because it needed to order trees for its orchard one year in advance of its need for the trees.

In 2017, Burbank harvested a potato crop and thereafter planted Timothy hay that it expected to harvest in 2018 and 2019. At least twice during 2017, Burbank advised

Borton representatives that it intended to exercise the repurchase option. On December 28, 2017, Eric Rogers prepared a written notice to Borton that Burbank would exercise its offer to repurchase the land. However, he did not mail the notice until January 4, 2018, and sent it by regular mail instead of by registered mail. Borton received the notice January 8, 2018. Believing the notice ineffectual, Borton wrote Burbank and demanded that it sign a notice that the option was terminated. Burbank responded that it had exercised the option and was planning to close on the property by December 31, 2018.

Borton initiated a declaratory judgment action to determine the status of the purchase option. Burbank answered and counterclaimed for its own declaratory judgment, arguing both that it properly exercised its option and that it was entitled to an equitable grace period to do so. Discovery was rapidly conducted and both parties soon sought summary judgment. The competing motions then were argued to the trial court. Burbank contended that it would lose the value of the Timothy hay and the equity it would obtain by repurchasing the property. Borton argued that Burbank had failed to timely or properly give notice, was unable to perform the purchase, and had not made any improvements justifying equitable relief.

The trial court concluded that an equitable grace period was called for due to the potential loss of hay and equity. Report of Proceedings at 16. An order was entered granting summary judgment for Burbank and authorizing it to close on the property by December 31, 2018. Burbank was also awarded its attorney fees based on the lease

agreement. Borton's motion for summary judgment was denied, as was its subsequent motion for reconsideration.

Borton then timely appealed to this court. A panel heard oral argument of this case at Whitman College in Walla Walla.

ANALYSIS

The dispositive issue is whether the trial court erred in its respective summary judgment rulings by awarding equitable relief. We address that issue before briefly turning to the question of attorney fees.

Equitable Relief

The traditional interplay of law and equity provides a complicated puzzle on these facts. Principles of summary judgment and contract law inform our approach to this appeal.[1]

[1] Although this case comes to us from summary judgment, this author has grave reservations about whether an equitable remedy can be granted in that setting. *But see Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 242 P.3d 1 (2010). Judges do not weigh evidence or decide facts at summary judgment, but a weighing of equities and an assessment of the existence of damages both factor significantly in determining whether an inequitable forfeiture might have occurred. Findings of fact and conclusions of law are required in equity cases just as they are required in nonjury cases at law. CR 52(a)(1). With the exception of *Cornish*, the other cases applying this remedy in Washington did so after a trial. We appreciate that time was of the essence to both parties here and that declaratory judgment actions typically are heard in a brief bench trial, but it is difficult to justify the necessary fact-finding at summary judgment. However, neither party challenged the court's ability to apply the equitable remedy at summary judgment or on appeal.

This court reviews declaratory judgment actions the same as it does any other civil case. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001). Summary judgment rulings are reviewed de novo since an appellate court sits in the same position as the trial court. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706-07, 50 P.3d 602 (2002). Summary judgment is proper when, after viewing the evidence in a light most favorable to the opposing party, there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000). All facts and reasonable inferences are construed in the light most favorable to the nonmoving party. *Id.* Summary judgment should be granted if reasonable persons could reach but one conclusion based on all of the evidence. *Id.*

An option contract is "a complete, valid and binding agreement" to which general contract principles apply. *Bennett Veneer Factors, Inc. v. Brewer*, 73 Wn.2d 849, 853, 441 P.2d 128 (1968). "In applying these general contract principles, our primary goal in interpreting the option contract is to ascertain the parties' mutual intent." *Chevalier v. Woempner*, 172 Wn. App. 467, 476, 290 P.3d 1031 (2012). Under the "objective manifestation" theory of contracts, we determine the parties' intent by focusing on the objective manifestations expressed in their contract rather than focusing on unexpressed subjective intentions. *Hearst Commc'n, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Thus, courts will "impute an intention corresponding to the reasonable meaning of the words used" in the contract. *Id.* The parties' subjective intent

"is generally irrelevant if the intent can be determined from the actual words used" in the contract. *Id*. at 504. Courts will interpret what was "written instead of what was intended to be written." *Id*. "Accordingly, we give language in the option contract its ordinary, usual, and popular meaning unless the contract clearly demonstrates a contrary intent." *Woempner*, 172 Wn. App. at 476. Ambiguities in a contract typically[2] are construed against the drafter. *Rouse v. Glascam Builders, Inc.*, 101 Wn.2d 127, 135, 677 P.2d 125 (1984).

The option holder may exercise an option by complying with the terms of acceptance set forth in the option agreement. *Whitworth v. Enitai Lumber Co.*, 36 Wn.2d 767, 770, 220 P.2d 328 (1950). If the option is exercised unconditionally in accordance with the terms of the contract, the seller must sell the property in accordance with the terms of the option. *Id.* If the option is not exercised within the time or manner specified, all rights under the contract, along with any consideration given, are forfeited. *Id.* at 770-71. A court may order specific performance of the contract if the option is properly exercised and the seller refuses to convey the property. 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 11.13, at 570 (rev. ed. 1996). The terms of an option contract

[2] However, an ambiguous contract will not be construed against the drafter when the intent of the parties is clearly expressed in the record. *See Forest Mktg. Enters. v. Dep't of Nat. Res.*, 125 Wn. App. 126, 132-33, 104 P.3d 40 (2005).

are to be strictly construed and, generally, time is of the essence. *Pardee v. Jolly*, 163 Wn.2d 558, 572, 182 P.3d 967 (2008).

On the basis of this hornbook law, Borton correctly claims that it should have prevailed at summary judgment because Burbank did not exercise the option at the proper time and in the proper manner. However, Washington recognizes that in some instances equity will excuse the untimely exercise of an option to purchase real estate. An equitable remedy is an extraordinary, not ordinary, form of relief. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006). A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate. *Orwick v. City of Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984). Whether a party is entitled to equitable relief "is in large part a matter addressed to the discretion of the trial court, with discretion to be exercised in light of the facts and circumstances of the particular case." *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 88, 867 P.2d 683 (1994).

Burbank argues that it is entitled to equitable relief in order to avoid an inequitable forfeiture. Washington recognizes that equitable relief may be warranted in limited circumstances where an inequitable forfeiture would otherwise result. *Wharf Rest., Inc. v. Port of Seattle*, 24 Wn. App. 601, 611, 605 P.2d 334 (1979). This is because forfeitures "are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial." *Pardee*, 163 Wn.2d at 574. When the holder

of an option makes *valuable permanent improvements* to the property with the intention to give its notice to exercise or extend the option, but then fails to timely give such notice, an equitable period of grace may be appropriate. *Wharf*, 24 Wn. App. at 611 (emphasis added) (citing 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 35, at 146-47 (1963)). *Wharf* astutely noted:

> The courts which have considered this problem have not found the solution simple. On the one hand is equity's abhorrence of a forfeiture. On the other hand is the general reluctance of courts to relieve a party from its own negligent failure to timely exercise an option, when to do so might tend to introduce instability into business transactions and disregard commercial realities.

Id. at 610.

A forfeiture is:

> 1. The divestiture of property without compensation. 2. The loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty. . . . 3. A destruction or deprivation of some estate or right because of the failure to perform some contractual obligation or condition.

BLACK'S LAW DICTIONARY 765 (10th ed. 2014).

Burbank argues that it did not have to make a permanent improvement to the land in order to seek relief in equity and that it would constitute an inequitable forfeiture to forego the value it would have gained by selling the property at market value in 2016 and the value of the hay it had planted but could not harvest in 2019. We disagree with his first two arguments and conclude the other was unproved.

Planting an annual crop as one has been doing for years does not constitute a permanent improvement in the land. Burbank has provided no authority to the contrary and tacitly seems to agree by, instead, arguing it had no need to establish permanent improvement. We disagree. All four of the Washington cases on this topic begin with, and continue to rely on, *Wharf*. And *Wharf* was very clear in its reliance on Professor Corbin's hornbook that the only cases in which equity might relieve a party from its negligent mistake was when "he had made valuable permanent improvements with intention to give the notice." 24 Wn. App. at 611 (quoting *Corbin*).

The leaseholder in *Wharf* had an agreement with Port of Seattle and had exercised options to renew its prior lease agreements. *Id*. at 603. In 1977, after 25 years as leaseholder, Wharf inadvertently failed to exercise its option and had to sue to regain its lease after Port of Seattle found a new lessee. *Id*. at 604. After a trial, the court awarded an equitable grace period and ordered specific performance of the option to renew. *Id.* at 604-05. The court found that Wharf had made permanent improvements to the property "with the intention of exercising its option and remaining on the premises." *Id.* at 612. On appeal, Division One of this Court held that equitable relief period was proper under the special circumstances. *Id.* at 609. It summarized those circumstances: (1) failure to give notice was inadvertent, (2) an inequitable forfeiture would result, (3) the lessor had not changed its position in reliance on the failure to timely exercise the option, (4) the lease was long-term, having existed 25 years, and (5) there was no undue delay. *Id*. at

612-13. There was evidence that the restaurant was making improvements at the very time the option was supposed to be exercised. *Id*. at 612.

The cases following *Wharf* similarly have involved significant levels of permanent improvements. In *Heckman*, the parties had jointly cleared land and built a building to house an automobile dealership. 73 Wn. App. at 85.[3] Like *Wharf*, the *Heckman* court relied on the same passage from *Corbin* indicating that equity stepped in only when a substantial permanent improvement might be forfeited. *Id*. at 87.

Substantial permanent improvements also were at issue in *Pardee*. There, the trial court found that the plaintiff who had failed to timely exercise its option had put in 2,500 hours of work and spent $20,669.58 for repairs in order to build up equity as collateral for purchasing the property. 163 Wn.2d at 576. The court considered these figures "a significant forfeiture." *Id*. Since the trial court erroneously had granted relief on a different basis, the Supreme Court reversed and remanded for the trial court to consider whether plaintiff was entitled to an equitable grace period in which to exercise the option. *Id*. at 576-77.

The final case is *Cornish*. Cornish College entered into an agreement to sublease a portion of a six-story building with 1000 Virginia Ltd. that included an option to

[3] The lessee failed to timely exercise its option at the end of the five year period and the trial court declined to grant an equitable extension as both parties had significantly contributed to the development. 73 Wn. App. at 86, 88.

purchase the building and the land. 158 Wn. App. at 212. Cornish renovated a portion of the property. *Id.* at 213. The superior court determined that Cornish would forfeit approximately $600,000 if the option were not exercised. *Id.* at 219. The court then awarded an equitable grace period and granted specific performance. *Id.* at 214. On appeal, Division One of this court upheld the equitable relief. *Id.* at 219.

In all four of these instances, the option holder had expended significant funds making permanent improvements to the land it hoped to purchase. Here, Burbank simply continued its normal farming operation in expectation that it would continue to work the land. This is not the significant investment in the property that Professor Corbin viewed as the foundation for seeking equitable relief.

Even if Burbank is correct that significant permanent improvements were not necessary in order to obtain equitable relief, it still failed to show than an inequitable forfeiture occurred because it did not demonstrate that it would lose any significant value. It cites first to the fact that the land was sold for $300,000 below its market value and that it could have realized that sum if it had sold the land for fair market value in 2016. Even assuming that it could have realized full value from a forced sale in 2016, Burbank has not argued, and has not demonstrated, that it could have sold the land for any greater sum and still obtained an option to repurchase. The discounted sale price was the cost of the option in order to find someone willing to invest in the property for the short term.

The cost of an option is not a component of an inequitable forfeiture. On point here is *Pardee*. There the option holder paid $16,000 to obtain the purchase option. In its assessment of the forfeiture possibility, the court excluded the option cost, noting that it was "an acceptable result for the termination of an option." 163 Wn.2d at 576. While the potential $300,000 discount here is a significant figure, it was the cost of enticing a fellow farmer to become an investor. Both parties wanted the land, and both were willing to enter into this deal in the hopes that they would ultimately own it. The discounted sale price was not a forfeiture.

The remaining possibility is the value of the second year of the hay crop. No evidence was produced suggesting the potential value of this crop in 2019 despite the fact that Burbank had planted hay on the property in earlier years and should have had records from which to suggest a value. Whether there was any profit to be had from the hay is simply unknown.

Burbank did not establish that it suffered an inequitable forfeiture. There was no relevant evidence before the trial court to suggest otherwise. Accordingly, the court had no basis for finding that an inequitable forfeiture would occur that required the late exercise of the purchase option.

Attorney Fees

The trial court awarded Burbank its attorney fees in the trial court under the terms of the lease agreement. Burbank seeks to defend that award here and both parties seek attorney fees on appeal.

Because we reverse the trial court, we also reverse the superior court fee award. Attorney fees are available on appeal when there is a contractual or statutory basis for doing so. RAP 18.1(a). As prevailing party, we award Borton its attorney fees under the lease agreement subject to timely compliance with RAP 18.1(d).

Reversed.

Korsmo, J.

I CONCUR:

Lawrence-Berrey, C.J.
Lawrence, Berrey, C.J.

NO. 36189-6-III

LAWRENCE-BERREY, C.J. (concurring in part) — A trial court may grant equitable relief on summary judgment. But here, the facts do not warrant equitable relief. For these reasons, I write separately.

The parties invited the trial court to grant or deny equitable relief on summary judgment. The parties knew the facts, put those facts in front of the trial court, and, as their right, chose to forego the expense and delay of a trial. "Waiver is the intentional and voluntary relinquishment of a known right; it may be either express or implied." *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 711, 24 P.3d 390 (2001), *rev'd on other grounds by* 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002). "To constitute implied waiver, there must be unequivocal acts or conduct evidencing an intent to waive; intent will not be inferred from doubtful or ambiguous factors." *Id.* Both parties impliedly waived their right to a trial by requesting the trial court to decide the appropriateness of an equitable remedy on summary judgment. At a minimum, both parties invited the error, and it would be improper for us to review it. *See In re Det. of Rushton*, 190 Wn. App. 358, 372, 359 P.3d 935 (2015) (An appellate court will not review a trial court error if the party requesting review helped create the error.).

At the outset, it is important to clarify the appropriate standard of review. Our jurisprudence is inconsistent on the appropriate standard when reviewing a trial court's discretionary decision on summary judgment. Relying on *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998), we have held that a de novo standard of review applies when reviewing a trial court's discretionary decision to grant or deny equitable relief on summary judgment. *See Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 215-16, 242 P.3d 1 (2010). More recently, our Supreme Court unanimously held that abuse of discretion is the appropriate standard when reviewing a trial court's discretionary decision on summary judgment. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015); *id.* at 375 (González, J., concurring) (trial court abused its discretion when striking an untimely affidavit opposing summary judgment). Because the granting of equitable remedies is the province of trial courts, not appellate courts, abuse of discretion is the appropriate standard of review here.

Having addressed the procedural issues, I now address why my vote is against Burbank Properties, LLC (Burbank) and for Borton & Sons, Inc. (Borton).

An equitable extension of time to purchase land may be warranted where an inequitable forfeiture would otherwise result. *Wharf Rest., Inc. v. Port of Seattle*, 24 Wn. App. 601, 612-13, 605 P.2d 334 (1979); *Cornish Coll.*, 158 Wn. App. at 218. Here, Burbank has failed to establish that equitable relief is warranted because it has failed to establish that the forfeiture would be inequitable.

Burbank's lender sued Burbank and its owner for defaulting on a loan agreement. The lender agreed to settle in exchange for Burbank selling the farm to generate short-term cash. But Burbank wanted to keep the farm. It found a way to do both.

Burbank agreed to sell the farm to Borton, and Borton agreed to lease the farm back to Burbank for three years and to grant Burbank an option to repurchase it. A lease with an option to purchase is an encumbrance against property that reduces its value to a purchaser. To induce Borton into the encumbrance, Burbank had to give Borton a deal. Burbank sold its farm to Borton for approximately 15 percent less than fair market value. Burbank agreed to the deal, which was necessary to resolve its lender's lawsuit against it and its owner. There was nothing inequitable about Burbank receiving 15 percent less than fair market value for the encumbered farm.

"The goal of equity is to do substantial justice. Equity exists to protect the interests of deserving parties from the 'harshness of strict legal rules.'" *Columbia Cmty. Bank v. Newman Park*, 177 Wn.2d 566, 569, 304 P.3d 472 (2013) (internal quotation marks omitted) (quoting *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 953, 540 P.2d 1359 (1975)). But what seems substantially just to one party often seems substantially unjust to the other. It is, therefore, reasonable to *require* the party seeking equity to first establish that an inequity has occurred or will occur. In these types of cases, a party requesting an equitable grace period will seek to establish that forfeiture will result in an unjust loss to it and an unjust benefit to the opposing party.

Burbank argued to the trial court that it would suffer an unjust loss and Borton would receive an unjust benefit if Borton was permitted to retain the farm it purchased at a discount. But as explained above, there was nothing unjust about Borton acquiring the encumbered farm at a discount. Burbank has failed to show that the forfeiture would be inequitable. The trial court, therefore, abused its discretion by granting Burbank an equitable remedy.

Lawrence-Berrey, C.J.

No. 36189-6-III

FEARING, J. (dissenting) — For a civil practitioner, this appeal presents absorbing questions entailing the overlay of summary judgment jurisprudence, appellate review, and equity. Burbank Properties, LLC (Burbank Properties) seeks a grace period by which to exercise an option to purchase farmland owned by Borton & Sons, Inc. (Borton). In the superior court, both parties filed summary judgment motions. The superior court granted Burbank Properties' motion and afforded it an equitable grace period to exercise the right to purchase despite its failure to send timely notice to Borton. The granting of summary judgment when a party invokes equity conflicts with legal principles. In turn, principles of appellate review clash with our evaluation of a summary judgment order granted in equity.

As already mentioned, without a trial and on summary judgment, the superior court issued equitable relief to Burbank Properties. When reviewing a summary judgment motion, a trial court or appellate court must not "weigh the evidence." *American Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, 292 P.3d 128 (2012); *Arreygue v. Lutz*, 116 Wn. App. 938, 940-41, 69 P.3d 881 (2003). Nevertheless, when a party seeks equitable relief, the court must "weigh and balance the equities of the parties," which inevitably entails weighing numerous facts. *Credit Bureau Corp. v. Beckstead*, 63 Wn.2d 183, 187, 385 P.2d 864 (1963).

On appeal, this court reverses the superior court's ruling and grants Borton summary judgment dismissing as a matter of law Burbank Properties' request for equitable relief. The lead opinion refuses to remand for a trial. Our state high court has held that a reviewing court cannot weigh the preponderance of conflicting oral evidence when considering equity cases. *Darnell v. Noel*, 34 Wn.2d 428, 431, 208 P.2d 1194 (1949). Summary judgment declaration testimony equates to oral testimony at trial.

In *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203, 242 P.3d 1 (2010), this court affirmed a summary judgment ruling by the superior court that granted the tenant a grace period in which to exercise an option to purchase despite late notice. This court noted that, due to the discretionary nature of decisions issued in equity, granting equitable relief on summary judgment may be inappropriate in many cases. The *Cornish College* court, nonetheless, affirmed the summary judgment order while characterizing the evidence as strongly supporting an equitable grace period. Like the lead opinion, I question the suitability of granting summary judgment in an equity case.

Despite the anomalous manner in which the parties and the respective courts have handled this suit in equity, I would not remand for trial since both parties waived the right to demand a trial. I would further rule that the superior court committed no error and affirm its summary judgment order favoring Burbank Properties.

Neither party before the superior court argued that, assuming the court denied its motion for summary judgment, the court should also deny the opposing party's motion because of a dispute of fact or that weighing of equitable factors always demands a trial. To the contrary, at page three of its opening summary judgment motion memorandum, Borton wrote: "In the present case, there are no disputed material facts, and both parties simply disagree on the legal effect of Burbank's admitted late exercise of its option to purchase." Clerk's Papers (CP) at 59. In a motion for reconsideration after the superior court granted Burbank Properties' motion, Borton never suggested that the superior court deny each party's motion or conduct a trial.

In its opening appellate brief, Borton argues for the first time that, since the superior court denied its summary judgment motion, the superior court should have at least denied Burbank Properties' summary judgment motion. This contention comes too late.

Generally, issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a); *State v. Nitsch*, 100 Wn. App. 512, 519, 997 P.2d 1000 (2000). Good sense lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates

appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that it had no opportunity to address. *State v. Strine*, 176 Wn.2d at 749-50 (2013); *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). I conclude that both parties waived any requirement that the superior court conduct a trial before weighing the evidence and the equities. In fairness to the trial court, this court should not reverse its ruling on a ground never presented it except in rare circumstances.

This appellate court must next determine the standard of review of the trial court's decision to exercise its equitable authority, a risky determination because of the anomalous nature of a summary judgment in a suit in equity. On appeal, Burbank Properties, on the one hand, argues that this court should defer to the superior court's ruling. Generally, we employ an abuse of discretion standard of review for a trial court's exercise of equitable authority. *Emerick v. Cardiac Study Center, Inc.*, 189 Wn. App. 711, 730, 357 P.3d 696 (2015); *Recreational Equipment, Inc. v. World Wrapps Northwest, Inc.*, 165 Wn. App. 553, 559, 266 P.3d 924 (2011). On the other hand, Borton asks that we review the trial court's ruling de novo. After all, we review summary judgment orders de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

I would avoid the question of the standard of review in addition to the query about the wisdom of granting summary judgment in an equitable suit. Regardless of whether

this court defers to the superior court or weighs anew the evidence, I would affirm the superior court.

I move now to the merits. The lease between Burbank Properties and Borton reads, in relevant part:

> SECTION EIGHT OPTION TO PURCHASE
>
> In consideration of Lessee agreeing to sell the property to Lessor and to execute this Lease, Lessor hereby gives and grants to the Lessee an option to purchase the property for the sum of One Million Eight Hundred Thousand and NO/100 DOLLARS ($1,800,000.00) which shall be paid on closing. *Lessee may exercise its option to purchase the Property at any time prior to December 31, 2017.* Lessee's election to exercise this option must be evidenced by a *written notice addressed to Lessor, sent by registered or certified mail to Lessor to Lessor's last known address*. If the option is timely exercised, the term of the Lease shall be extended until closing.
>
> . . . .
>
> Closing shall occur no later than December 31, 2018. . . .

CP at 12-13. Burbank Properties prepared its notice to exercise the option on December 27, but due to inadvertence did not mail the notice until January 4.

> SECTION TEN DEFAULT
>
> . . . Termination and forfeiture of the lease shall not result if within thirty days of the receipt of such notice, Lessee has corrected the default or breach, or has taken action reasonably likely to affect such correction within a reasonable time. If any rent shall be due and unpaid, or if default shall be made in any of the covenants here contained, or should the Lessee fail to pay any of the obligations herein mentioned, the Lessor or his attorneys shall give the Lessee proper written notices, commence with lawful eviction, and have all persons and property removed therefrom as provided in the Landlord-Tenant Act (RCW 59.18).

CP at 14.

SECTION THIRTEEN TIME OF THE ESSENCE

It is specifically declared and agreed that time is of the essence of this lease agreement.

CP at 15.

This appeal raises important policy questions about parties' freedom to contract and the court's role in upholding contract provisions or modifying contract terms to serve fairness. On the one hand looms equity's abhorrence of a forfeiture. *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 611, 605 P.2d 334 (1979). Courts wish not to forfeit one's rights when one inadvertently makes a mistake and a forfeiture would cause one hardship and no harm to the other contracting party. *Bekins Moving & Storage Co. v. Prudential Insurance Co.*, 176 Cal. App. 3d 245, 251-52, 221 Cal. Rptr. 738 (1985). If there is no harm, why call a foul?

On the other hand, the law favors definiteness of contracts. *United Properties Co. v. Walgreen Properties, Inc.*, 2003-NMCA-140, 134 N.M. 725, 82 P.3d 535, 538-39. A court should not interfere with the bargain reached by the parties. *United Properties Co. v. Walgreen Properties, Inc.*, 82 P.3d at 539. Courts may not rewrite obligations that the parties have freely bargained for themselves. *United Properties Co. v. Walgreen Properties, Inc.*, 82 P.3d at 539 (2003). Equity jurisdiction has never given the judiciary a roving commission to do whatever it wishes in the name of fairness or public welfare.

United Properties Co. v. Walgreen Properties, Inc., 82 P.3d at 541 (2003). The decision of which of two profit-seeking parties is more deserving to prevail is not within the province of the courts. *United Properties Co. v. Walgreen Properties, Inc.*, 82 P.3d at 544 (2003).

A majority of courts that have dealt with the issue on appeal conclude that special circumstances may warrant a court in granting equitable relief against a lessee's failure or delay in giving notice to renew an option in its lease. *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. at 610-11 (1979); 49 AM. JUR. 2D *Landlord and Tenant* § 154 (2018). Washington courts apply the same rules with regard to an option to renew a lease and an option to purchase the property. *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601 (1979); *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203 (2010).

Washington law follows the rule allowing some relief from strictly applying contract terms. Forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial. *Hyrkas v. Knight*, 64 Wn.2d 733, 734, 393 P.2d 943 (1964). In order to avoid the harshness of forfeitures and the hardship that often results from strict enforcement of contract terms, courts frequently grant a period of grace to a purchaser before a forfeiture will be decreed. *Pardee v. Jolly*, 163 Wn.2d 558, 574, 182 P.3d 967 (2008). Whether a grace period is warranted depends on the equities in each particular case. *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 783, 215 P.2d

425 (1950). Whether or not an equitable grace period is appropriate depends on the facts and circumstances of a case, and is largely within the discretion of the trial court. *Pardee v. Jolly*, 163 Wn.2d at 575 (2008); *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 88, 867 P.2d 683 (1994).

In determining whether to grant a grace period, Washington courts review five factors identified and applied in *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601 (1979). Those elements are:

> (1) the failure to give notice was purely inadvertent, (2) an inequitable forfeiture would have resulted without the equitable relief, (3) the failure to give timely notice did not prejudice or change the position of the other party, (4) the lease was for a long term and (5) there was no undue delay in giving notice.

Cornish College of the Arts v. 1000 Virginia Ltd. Partnership, 158 Wn. App. at 218 (2010). Not all five of these circumstances need be present in every case in which an equitable grace period is granted. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. at 218. Indeed, such an inflexible approach would be inconsistent with the trial court's broad discretion to fashion equitable remedies. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. at 218.

Borton relies on a passage in *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601 (1979), that cites Professor Corbin in his treatise on the law of contracts. Corbin writes that courts have only granted an equitable graced period in cases wherein the holder of the option made valuable permanent improvements to the property. *Wharf*

Restaurant, Inc. v. Port of Seattle, 24 Wn. App. at 611, citing 1 A. Corbin, Corbin on Contracts § 35, at 146-47 (1963). In turn, I recognize that the four Washington decisions, in which courts have granted a grace period, entail the tenant fashioning permanent improvements to the real property. *Pardee v. Jolly*, 163 Wn.2d 558 (2008); *Recreational Equipment, Inc. v. World Wrapps Northwest, Inc.*, 165 Wn. App. 553 (2011); *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. 203 (2010); *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601 (1979). I disagree, however, that, based on reference to Professor Corbin and the presence of improvements in the Washington decisions, Washington law always demands valuable permanent improvements as a precondition to an equitable grace period.

I note that the five factors adopted in *Wharf Restaurant, Inc. v. Port of Seattle* do not include the optionee adding significant improvements to the property. Some of the Washington courts discuss the addition of improvements to the land or building when analyzing whether the optionee fulfills element two of the test, an inequitable forfeiture resulting if equity does not intervene. Nevertheless, inequity may result regardless of whether the optionee improves the real property. Also, if my predecessors on this court deemed an improvement as a necessary factor, the prior decisions could have and should have expressly placed the element in the list of factors. If earlier courts deemed valuable improvements to be a qualifier outside the five element factors, the courts would not have discussed improvements within the context of element two.

No Washington court has specifically held that substantial permanent improvements to the property is essential to a grace period. Instead Washington courts observe that all five circumstances need not be present in every case in which an equitable grace period is granted. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. at 218. Therefore, element two, which sometimes includes substantial improvements, cannot be an indispensable circumstance.

Applying a rigid rule that precludes a grace period under one particular circumstance is anathema to equity. To repeat, whether a grace period is warranted depends on the equities in each particular case. *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d at 783 (1950). Whether or not an equitable grace period is appropriate depends on the facts and circumstances of a case and is largely within the discretion of the trial court. *Pardee v. Jolly*, 163 Wn.2d at 575 (2008). An inflexible approach would be inconsistent with the trial court's broad discretion to fashion equitable remedies. *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 158 Wn. App. at 218. Thus, the court must review all relevant circumstances, not simply whether the optionee improved the real property. If one factor controlled, the law would hamstring the trial court's discretion.

No case announces any reason behind adopting a rule necessitating an improvement to the land for a grace period. Presumably, such a rule deems expenditures as the only acceptable form of prejudice to the optionee, and the rule does not wish the optionor to receive a windfall by gaining possession of the improvements. But the

opposite side of the prejudice coin is lack of prejudice to the optionor. No decision explains why prejudice to the optionee is more important than lack of prejudice to the optionor.

A contractual deadline for the exercise of the option allows the optionor to plan and act based on a firm understanding of whether the optionee will buy the land. Burbank Properties' delay was so short that Borton changed no plans. Instead, Borton wants the rigid application of a rule in order to gain a windfall. Since the common era, grace has superseded the application of rigid rules.

Part performance, an equitable doctrine, includes three elements: (1) delivery and assumption of actual and exclusive possession, (2) payment or tender of consideration, and (3) the making of permanent, substantial and valuable improvements, referable to the contract. *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995). Despite improvements constituting an element, equity does not deem improvements to be a necessary element, if a party fulfills the other two elements. *Berg v. Ting*, 125 Wn.2d at 558 (involving consideration as the missing element). In the context of part performance, equity also wishes the trial court to weigh the particular facts and circumstances of each discrete case rather than apply a rigid, formulaic rules. *Berg v. Ting*, 125 Wn.2d at 557.

Now the facts. One might ponder if exercising the option was so important to Burbank Properties, why Eric Rogers failed to plant in advance numerous prompts and reminders to insure timely exercise of the option. An astute and cautious businessperson

would forgo other tasks, mail several notices by certified mail a week or more in advance, and personally deliver the notice days before the option expired on December 31. But people make mistakes and equity sometimes aids the forgetful when the forgetfulness does not harm another.

I agree with Borton that Burbank Properties installed no substantial improvements. Still it planted a hay crop and would not benefit from the crop's presence in 2019 if it could not exercise the option. More importantly, Burbank Properties suffers other inequities as a result of forfeiture of the option. Burbank Properties loses equity of $75,000 in the land. It loses land it has farmed since 2000. At the same time, Borton reaps a profit of at least $250,000 if Burbank Properties buys the land.

The other four factors weigh heavily in favor of Burbank Properties. Burbank Properties had a long term lease with Borton. Eric Rogers, or Burbank Properties, repeatedly told Borton that Burbank Properties intended to exercise the option. The failure to send notice by December 31 was inadvertent. Eric Rogers prepared the notice on December 28 and then left it on his desk.

Burbank Properties exercised the option only four days late. It mailed the notice on January 4, rather than December 31. Borton took no steps between December 31 and January 4 as a result of an untimely exercise of the option. Borton did not even take any steps by January 8, the day of receipt of the notice. Borton suffered no iota, scintilla, mite, or tittle of prejudice from the late exercise.

I note that the option paragraph in the Borton-Burbank Properties lease does not indicate whether Burbank Properties needed to mail the notice by December 31 or whether Borton needed to receive the notice by December 31. Generally, notice by mail is considered complete on mailing, not on receipt. 58 AM. JUR. 2D *Notice* § 29 (2012). Let us assume that Burbank Properties mailed the notice of exercise on December 31, but, because of delays in the mail, Borton did not receive the notice until January 8. Borton would have been in no different position than that which actually occurred.

This appeal also holds a unique factor. Closing of the sale was not to occur until December 2018. A delayed closing bolsters the lack of any prejudice to Borton.

On appeal, Borton also argues that Burbank Properties provided no evidence that it could pay the purchase price at closing. Nevertheless, closing would occur one year later. Borton provided no evidence or analysis as to Burbank Properties being unable to purchase at that later date.

I DISSENT:

Fearing, J.

APPX. II

MOTION FOR RECONSIDERATION

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BORTON & SONS, INC. a Washington State corporation, Appellant, vs. BURBANK PROPERTIES, LLC, a Washington State limited liability company, Respondent.	No. 361896 RESPONDENT'S MOTION FOR RECONSIDERATION

I. IDENTITY OF MOVING PARTY

Respondent, Burbank Properties, LLC, by and through their attorneys, Miller, Mertens & Comfort, PLLC, and Joel R. Comfort, hereby requests the relief designated in Section II.

II. STATEMENT OF RELIEF SOUGHT

Respondent respectfully requests that the Court reconsider its Opinion issued July 16, 2019 in this matter, and remand this case to the trial court for further proceedings.

III. FACTS RELEVANT TO MOTION

This litigation was commenced by the Appellant, Borton & Sons, Inc., who sought a declaratory judgment that the Respondent, Burbank Properties, LLC's, exercise of their option to purchase property from Borton had expired. (CP 1-39). Burbank counterclaimed, also seeking a declaratory judgment that the late exercise of the option was valid on the basis that they were entitled to an equitable grace period. (CP 40-49). Burbank asserted the equitable grace period as both a counterclaim, and as an affirmative defense.

Borton filed a Motion for Summary Judgment approximately six weeks after filing suit, and before any discovery was conducted in the matter. (CP 55). In response, Burbank opposed Borton's Motion for Summary Judgment, and also filed a cross-Motion for Summary Judgment. (CP 87-102). Therein, Burbank argued that the equitable grace period served to both defend against Borton's Motion for Summary Judgment, and supported granting Burbank's Motion for Summary Judgment. *Id*.

Borton never argued to the trial court that Burbank failed to establish the value of the hay crop, nor that Burbank had such an obligation to establish an equitable grace period. (CP 57-66, 174-190). Moreover, the trial court did not raise the value of the hay crop as an issue. The trial court accepted the undisputed fact that Burbank would lose their hay crop as a

sufficient basis to establish that Burbank would suffer an "inequitable forfeiture" of property, justifying an equitable grace period. (RP 16). Neither the case law, Borton, nor the trial court raised the lack of evidence of the value of the crop as an issue that needed proof. Thus, Burbank had no reason to know that evidence of the value of the hay crop was necessary and it was not made part of the record.

On June 25, 2018, the trial court granted Burbank's Motion for Summary Judgment, denied Borton's Motion for Summary Judgment, and entered judgment in favor of Burbank. (CP 311-318). The trial court granted an equitable grace period to Burbank, and granted Burbank the right to purchase the property per the terms of the parties' Agreement. *Id.*

Borton subsequently filed a Notice of Appeal. (CP 321-335). On July 16, 2019, the Court issued its Opinion herein, reversing the trial court's order granting Burbank's Motion for Summary Judgment. Furthermore, this Court granted Borton's Motion for Summary Judgment, and granted Borton their attorney's fees and costs. In part, the Court's reasoning was that "Burbank did not establish that it suffered an inequitable forfeiture," because "no evidence was produced suggesting the potential value of [the hay crop]. (Published Opinion, pg. 12). If anything, this lack of evidence creates a material issue of fact, and this Court should remand the case to the trial court to hear evidence

on the value of the hay crop, and whether its loss results in an inequitable forfeiture, justifying an equitable grace period.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. Based on the Findings of this Court a Remand is Proper.

Under RAP 12.4, a party may file a motion for reconsideration of a decision by the judges terminating review within twenty days of the issuance of the opinion. Burbank respectfully requests that the Court reconsider its Opinion, and remand this case to the trial court for further proceedings.

As the Court is aware, this appeal resulted from cross summary judgment motions. Burbank was therefore both a "moving party" and a "non-moving party." Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Folsom*, 135 Wn.2d at 663, 958 P.2d at 304. The moving party has the burden to demonstrate that there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. *Id.* As the Court has noted in its Opinion here, the evidence is viewed in the light most favorable to the non-moving party.

Summary judgment should only be granted if, from all the evidence, a reasonable person could reach only one conclusion. *Folsom,* 135 Wn.2d at 663. Conversely, when the court determines there is a dispute as to any

material fact, summary judgment is improper. A material fact is one upon which the outcome of the litigation depends. *Doe v. Department of Transportation*, 85 Wn. App. 143, 147, 931 P.2d 196 (1999).

Here, the Court's decision to reverse the trial court and to *also grant* the Appellant's (Borton's) Motion for Summary Judgment, does not comport with the above case law. Because the decision being reviewed was made after a summary judgment hearing, the issue of what facts were undisputed and what facts were disputed is of great importance. To the extent that Borton sought an order granting summary judgment, Burbank's response was that an equitable grace period should be granted, in part, on the fact that it would lose its hay crop. (CP 89-102). As the non-moving party to Borton's motion for summary judgment, Burbank is entitled to have the evidence, and all inferences therefrom, viewed in the light most favorable to it. Viewed in the light most favorable to Burbank, the Court should minimally assume that the undisputed loss of the hay crop would constitute an "inequitable forfeiture".

It is understandable that the Court could hold that the lack of evidence of the value of the hay crop undermines Burbank's burden, as a moving party, to show that it is entitled to summary judgment. In that instance, Burbank has the burden to demonstrate that there is no genuine issue of material fact, and Borton is entitled to have the evidence viewed in

the light most favorable to it. However, when analyzing whether Borton is entitled to having its motion for summary judgment granted, the opposite is true. In that instance, Borton must likewise show that there is no genuine issue of material fact, and Burbank is entitled to have the evidence viewed in the light most favorable to them. In part, the Court's opinion held that because the value of the hay crop was not established, it is unknown whether Burbank suffered an inequitable forfeiture. This, then, is a material issue of fact, and from the standpoint of Borton's motion for summary judgment, Burbank was entitled to a reasonable inference that the hay loss would be an inequitable forfeiture. Borton's motion for summary judgment should therefore have been denied on the same basis.

Burbank had no reason to know that evidence of the value of the hay crop was a necessary element. None of the case law cited by the parties requires proof of the value of the forfeiture. Furthermore, neither Borton nor the trial court raised the lack of evidence of the value of the crop as an issue. If it is this Court's holding that evidence of the value of the forfeiture is required, then there is a material issue of fact that needs to be resolved. Burbank could readily produce such evidence, as even the Court presumes it has access to this information.

Although the court has reversed the trial court's decision to grant summary judgment to Respondent, it should not simply reciprocally grant

Appellant's motion for summary judgment on the basis that there is no evidence of the value of the hay crop in the record. The fact of loss itself is undisputed. The value of the crop, then, is a material issue of fact that needs to be determined at trial. Accordingly, this case should be remanded back to Walla Walla County Superior Court for further proceedings.

Finally, should the Court agree remand this matter to the trial court, the Respondent respectfully requests the Court reverse its order granting the Appellant's attorney's fees and costs, as they would no longer be the prevailing party. The prevailing party would be determined later, by the trial court.

DATED this 2nd day of August, 2019.

MILLER, MERTENS & COMFORT, PLLC

By: *s/Joel R. Comfort*

JOEL R. COMFORT
State Bar Number #31477
Miller, Mertens & Comfort, PLLC
1020 N. Center Parkway, Suite B
Kennewick, WA 99336
Telephone: (509) 374-4200
Fax: (509) 374-4229
Email: jcomfort@mmclegal.net
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on the 2nd day of August, 2019, I caused a true and correct copy of the foregoing document to be served electronically on the clerk of the above entitled court and on the following in the manner indicated below:

Mark E. Fickes mfickes@hnw.law J. Jay Carroll jcarroll@hnw.law Joyce Kling jkling@hnw.law Jennifer Fitzsimmons jfitzsimmons@hnw.law Halverson Northwest, P.C. 405 E. Lincoln Ave. Yakima, WA 98907	VIA REGULAR MAIL [ ] VIA E-MAIL (by agreement): [X] VIA FACSIMILE: [ ] LEGAL MESSENGER [ ] HAND DELIVERED [ ]

DATED this 2nd day of August, 2019 in Kennewick, Washington.

Joel R. Comfort

JOEL R. COMFORT WSBA #31477
Attorney for Respondent

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APPX. III

ORDER DENYING MOTION FOR RECONSIDERATION

FILED
AUGUST 22, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

BORTON & SONS, INC., a Washington State corporation, Appellant, v. BURBANK PROPERTIES, LLC, a Washington State limited liability company, Respondent.	)	No. 36189-6-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of July 16, 2019, is denied.

PANEL: Judges Korsmo, Lawrence-Berrey, Fearing

BY A MAJORITY:

Lawrence-Berrey, C.J.
ROBERT LAWRENCE-BERREY
Chief Judge

MILLER MERTENS & COMFORT PLLC

September 19, 2019 - 3:58 PM

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