

No. 35694-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LABCO, INC.,

Appellant

v.

WESLEY E. NEWBURY SR., et ux,

Respondents.

07 JUN 26 11:55
STATE OF WASHINGTON
BY DEPUTY
COURT OF APPEALS II

BRIEF OF RESPONDENTS NEWBURY

BENJAMIN R. WINKELMAN
WSBA# 33539
Attorney for Appellant
P.O. Box 700
813 Levee Street
Hoquiam, Washington 98550
Telephone (360) 532-5780

PM 6/25/07

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I. COUNTERSTATEMENT OF THE CASE

RAP 10.3(a)(4) states that a brief should contain “a fair statement of the facts and procedure relevant to the issues presented for review, without argument.” Respondent objects to the following portions of the Statement of the Case that are contained in Brief of Appellant as either not being supported by the citation to the Clerk's Papers to which the statement is attributed, or as argument which should not be included in the Statement of the Case.

1. *Objection, Brief of Appellant, Page 4.*

On page 4 of the Brief of Appellant, the following statement is made:

“Labco did not pay the balloon payment, but continued to make monthly payment after April 3, 2003, with no objection from Newbury. (CP 100-101)” (*Underlined Emphasis Added.*)

The Declaration of William Bennett referenced in the above-quoted section of the Brief of Appellant alleges Labco did not object to receipt of payment after April 3, 2003 however ignores subsequent pages of the same declaration wherein Mr. Bennett declares and attaches to his Declaration Exhibit D showing Newbury's were not accepting payments and were insisting on payment in full. (CP 135-145) The underlined portion of the above-quoted statement is not supported by the record that

is submitted to the Court of Appeals on review. This statement is not a fair statement of the facts and constitutes argument. The record submitted on appeal provides evidence Newbury objected to payments after April 3, 2003. Respondent asks the Court to disregard the underlined section of the above-quoted portion of the Brief of Appellant, pursuant to RAP 10.7.

2. Objection, Brief of Appellant, Page 7.

On page 7 of the Brief of Appellant, the following statement is made:

“William Morgan commenced a second lawsuit under cause No. 06-2-00234-9 on February 28, 2006, and served the Summons and Complaint on the Newburys’ attorney, who filed a Notice of Appearance that same day. (CP 19)”

The Notice of Appearance referenced in the above-quoted section of the Brief of Appellant is dated March 22, 2006 and file stamped by the Clerk of the Court at 9:59 a.m. on March 23, 2006. While Brief of Appellant footnotes relating to the Clerk’s Papers citation above admit confusion as to the date Newbury’s attorney appeared, the evidence cannot support the statement of the case in the above quoted section of the Brief of Appellant. There does not appear to be an error in the filing date as the Appellant contends, as the date on the document and the filing time and date stamp of the clerk coincide chronologically. The statement is not supported by the record that is submitted to the Court of Appeals on review. This

statement is not a fair statement of the facts and constitutes argument.

Respondent asks the Court to disregard the above-quoted portion of the Brief of Appellant, pursuant to RAP 10.7.

3. Objection, Brief of Appellant, Page 7.

On page 7 of the Brief of Appellant, the following statement is made:

Newbury failed to provide an accurate accounting, and claimed there was more than \$160,000.00 owing on the contract. (CP101)

The Declaration of William Bennett referenced in the above-quoted section of the Brief of Appellant alleges a failure to provide an accurate accounting however ignores the Declaration of Counsel filed August 16, 2005 with attached detailed accounting. Labco failed to designate said Declaration as clerk's papers on appeal and Newbury intends to designate said Declaration as clerk's papers on appeal. While Brief of Appellant relies solely on the allegations set forth in the Declaration of William Bennett it ignores documents providing contrary evidence which Labco should have designated as clerk's papers on appeal. There is no failure by Newbury to provide an accounting as Labco contends, but rather an effort by Labco to avoid recognizing the accounting provided as a matter of record to the Trial Court. The above quoted statement is directly contradicted by Respondent's supplemental designation of the Declaration

of Counsel filed August 16, 2005 as clerks papers on appeal submitted to this Court on review. This statement is not a fair statement of the facts and constitutes argument. Respondent asks the Court to disregard the above-quoted portion of the Brief of Appellant, pursuant to RAP 10.7 and consider the contradictory evidence contained in the Declaration of Counsel Filed August 16, 2005 under Superior Court Cause No. 05-2-00936-1 as part of Newbury's supplemental designated clerk's papers on appeal.

4. Objection, Brief of Appellant, Page 9.

The following language is contained on page 9 of the Brief of Appellant.

“Thus, which Judge McCauley was aware of Labco's motion to pay funds, he did not fully and fairly consider it.”

The above quoted statement is not supported by the record submitted to the Court of Appeals on review. Labco provides no citation to the record submitted on appeal and ignores contradictory evidence of record on appeal. The court considered the motion to pay funds, yet found it was not timely. (RP Pg.22 Ln. 13 through Pg. 23. Ln. 3) Labco's above-noted statement is not a fair statement of the facts and constitutes argument. Respondent asks the Court to disregard the above-quoted portion of the Brief of Appellant, pursuant to RAP 10.7

Respondent Newbury provides the following counterstatement of the case:

Labco's general manager, William Bennett, claims to have instructed Labco's attorney to take all actions necessary to pay off the Real Estate Contract and further that Labco, at all times material, was willing and able to pay the full contract balance in to the registry of the court (CP 102), however provided the Trial Court with no evidence of either allegation. The Trial Court considered Labco's argument of gross and extreme negligence by William Morgan, attorney for Labco (RP 31-37) and found Labco failed to provide evidence to support the allegations, but for limited affidavits from Mr. Bennett, which would not justify the court summarily finding Mr. William Morgan was grossly negligent to the very extreme situations necessary to follow case law provided by Labco to the Trial Court. (RP 37, Lns 8-24 and Pg. 53, Ln 21 to Pg 54, Ln. 11) The Trial court had no evidence of the extreme and obvious gross negligence in front of the court, as was being alleged by Labco, nor proof of insurance to avoid the default at anytime prior to the entry of the Order of Summary Judgment. (RP Pg. 52, Ln. 21 to Pg. 53. Ln 11)

Newbury initiated multiple contract forfeitures against Labco. (CP 123-127; CP 168-171; Appendix A1; Appendix A2) In a prior 2005 Real Estate Contract Forfeiture proceeding Labco filed a lawsuit and obtained

restraints against the Newburys' filing of a Declaration of Forfeiture. (CP 276-277) The Trial Court ordered the July 22, 2005 restraints against recording the Declaration of Forfeiture were dismissed and Newbury's were entitled to commence a new contract forfeiture proceeding. (CP 294-295) Newbury recommenced a forfeiture of the real estate contract in late 2005 by service of a Notice of Intent to Forfeit (CP 81 Trial Court Ruling). Newbury served Labco with a new Notice of Intent to Forfeit the real estate contract on December 1, 2005. The Notice of Intent to Forfeit set forth the breaches for failure to pay the balance of the contract and to provide proof of property insurance and the rights of Labco to cure the breaches before March 1, 2006. (CP 168-171; Appendix A1) Labco concedes the Notice of Intent to Forfeit was given pursuant to RCW 61.30 on or about December 1, 2005. (CP 2) Labco failed to cure the defaults and/ or to otherwise tender monies due and owing. (CP 82 Trial Court Ruling) On the final day of the cure period Labco filed a lawsuit to restrain Newbury from recording the Declaration of Forfeiture, however failed to obtain such an order before the cure period expired. (CP 82 Trial Court Ruling) Newbury recorded the Declaration of Forfeiture under Grays Harbor Auditor's number 2006-03020092 on March 2, 2006. (CP 51-55; Appendix A3) Labco's registered agent was sent by certified mail copies of the recorded Declaration of Forfeiture. (CP 56-58) Labco failed

to cure the defaults; obtain a restraining order against filing the Declaration of Forfeiture; to bring a timely motion for sale of the property in lieu of forfeiture; or to properly commence an action to set aside the forfeiture. (CP 81-84 Trial Court Ruling) Only after the time frames allowing these remedies had passed did Labco make any such motions or efforts to cure and otherwise avoid forfeiture. The Trial Court entered findings and ordered Summary Judgment against Labco and Newbury obtained possession of the property. (CP 230-234; Appendix A4)

Labco did not make the balloon payment and has not paid on the contract since July 2005. Labco never denied the default for failure to have insurance on the subject property and the default was not cured during the cure period. Neither Labco nor its attorneys addressed the default for failure to provide proof of insurance until after the Order Granting Summary Judgment was entered more than seven (7) months after the cure period expired. The Trial Court heard argument on Newbury's Motion for Summary Judgment on July 6, 2006. Labco brought several motions to the Trial Court as soon as Newbury set a hearing for presentation of Order Granting Summary Judgment. (CP 181-195) Labco alleges its attorney never sent Bennett copies of any pleadings and that Bill Bennett found out about the November 21, 2005 order dissolving the Order Restraining Forfeiture in the 2005 Real Estate

Forfeiture action (CP 294) for the first time nearly one year later on October 11, 2006. (CP 103) On June 22, 2006 Bill Bennett signed a declaration under penalty of perjury, which was filed with the court on June 26, 2006 stating:

“That I am familiar with the underlying contract between Plaintiff and Defendants for the purchase of the contract. I am familiar with the notice of intent to forfeit and the declaration of forfeiture submitted by the Defendants and their attorneys, Parker, Johnson & Parker.”

(CP 297)

On June 29, 2006 Bill Bennett signed a supplemental declaration under penalty of perjury, which was filed with the court on June 30, 2006 acknowledging Labco’s registered agent received the notices rather than the notice having been sent to him like in the past. (CP 312) Bill Bennett declared under penalty of perjury he had knowledge of the Notice of Intent to Forfeit and the Notices being received by Labco’s registered agent in June 2006. (CP 297 and 312)

Other than the noted objections and counterstatements made above, the Appellant’s Statement of the Case is accepted.

II. QUESTIONS PRESENTED

1. Whether the trial court erred in denying and/or failing to properly consider Labco’s motion for an order to pay the contract balance into the registry of the court after the cure period had passed and

when the motion was not properly filed, served or set for hearing by Labco? (Labco's Assignment of Error Nos. 1, 2, 3, 4, 5, 6 and 8.)

2. Whether the trial court erred in finding Newbury gave a copy of the Declaration of Forfeiture in compliance with the Real Estate Contract Forfeiture Act, when such notice was sent certified mail to Labco's registered agent within three business days of recording the Declaration of Forfeiture? (Labco's Assignment of Error Nos. 1, 2, 3, 4, 5, 6, and 8.)
3. Whether the trial court abused its discretion by not applying equitable principles to deny Newbury's motion for summary judgment, when Labco failed to exercise any of the multiple statutory remedies available to it? (Labco's Assignment of Error Nos. 1-8, inclusive.)
4. Whether the trial court erred in denying the motion for reconsideration pursuant to Rule 59(a)(6) based upon allegations of erroneous assessment of an excessive windfall to Newbury, when Labco failed to file the motion for reconsideration within 10 days of the court's decision and Labco had multiple opportunities to avoid the judgment but failed to do so? (Labco's Assignment of Error No. 4)

5. Whether the trial court erred in refusing to reconsider its summary judgment ruling based upon Rule 59(a)(7), when Labco failed to file its motion within 10 days of the court's decision and the trial court carefully considered the evidence and ordered summary judgment in compliance with the law? (Labco's Assignment of Error No. 4)
6. Whether the trial court erred in not reconsidering its summary judgment ruling based upon 59(a)(9), when Labco failed to file its motion within 10 days of the court's decision and the Washington Real Estate Forfeiture Act provides multiple opportunities to avoid inequitable results and Labco failed to prove the property was insured to cure the breach? (Labco's Assignment of Error Nos. 1-8, inclusive.)
7. Whether Labco's prior attorney's was negligent and failed to follow Labco's instructions to such an extreme as to require the trial court to set precedence in Washington State by allowing a client to claim legal malpractice and receive relief of judgment, where little, if any, evidence of malpractice exists and Labco failed to follow the procedural requirements of bringing the CR 60 motion? (Labco's Assignment of Error Nos. 1-8, inclusive)

- a. Whether the court must grant a Rule 60 motion based upon mistake, inadvertence, surprise, or excusable neglect and/or irregularity in the proceedings when there was no evidence beyond a declaration of Labco's general manager and Labco failed to comply with the procedural rules necessary to bring a CR 60 motion to the Trial Court?
 - b. Whether the Trial Court must grant a Rule 60(b)(9) motion when Labco failed to bring the motion before the court and had multiple opportunities to avoid the casualty or misfortune, if any?
 - c. Whether the trial court must grant a Rule 60(b)(11) motion when Labco failed to bring the motion before the court and had multiple opportunities to pay monies to the court and/or otherwise cure the defaults to avoid forfeiture of the real estate contract?
8. Whether the trial court erred in refusing an order restraining or enjoining the forfeiture pursuant to RCW 61.30.110, and authorizing it to pay the contract balance in to the registry of the court when Labco failed to obtain a restraining order prior to Newbury recording the Declaration of Forfeiture and Labco failed

to set a hearing on motion for restraints or to pay into the registry?

(Labco's Assignment of Error Nos. 1, 2, 4, 5, 6, and 8.)

9. Whether the trial court erred in refusing to set aside the Declaration of Forfeiture pursuant to RCW 61.30.140 when Labco failed to bring the motion within 60 days of the recording of the Declaration of Forfeiture? (Labco's Assignment of Error Nos. 1, 6, and 8.)
10. Whether the trial court erred in refusing an order authorizing sale of the property pursuant to RCW 61.30.120, when Labco failed to comply with the Statute by not filing and serving such a summons and petition before the Declaration of Forfeiture was recorded, but rather brought a motion 249 days after the Declaration of Forfeiture was filed? (Labco's Assignment of Error Nos. 7 and 8.)
11. Whether the trial court erred in refusing to grant Labco an order allowing it to amend its pleadings, when the motion to amend was made many months after the entry of summary judgment orders. (Labco's Assignment of Error No. 8)
12. Whether the prevailing party on appeal is entitled to attorney fees and costs?

III. STANDARD OF REVIEW

1. Summary Judgment.

This court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court. Keith v. Allstate Indem. Co., 105 Wn.App. 251, 19 P.3d 1077 (2001). Summary judgment is proper if viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine material fact issue exists and the movant is entitled to judgment as a matter of law. Tortes v. King County, 119 Wn.App. 1, 84 P.3d 252 (2003). In appellate review of an order granting summary judgment, this court may review only those matters which have been presented to trial court for its consideration before entry of judgment. Lewis v. Bell, 45 Wn.App. 192, 724 P.2d 425 (1986).

2. CR 59 Motions; CR 60 Motions and Motions for Equitable Remedies.

Motions to vacate or for relief from judgment are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a clear or manifest abuse of that discretion. Hope v. Larry's Markets, 108 Wash.App. 185, 29 P.3d 1268 (2001). A court abuses its discretion in deciding a motion for relief from judgment only when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons. Vance v. Offices of Thurston County

Com'rs, 117 Wash.App. 660, (2003), 71 P.3d 680, *reconsideration denied*, *review denied* 151 Wash.2d 1013, 88 P.3d 965. The Court of Appeals will not overturn a trial court's decision on a motion to vacate a judgment for mistake, inadvertence, excusable neglect or fraud unless it plainly appears that the trial court abused its discretion. Scanlon v. Witrak, 110 Wash.App. 682, (2002) 42 P.3d 447, *reconsideration denied*, *review denied* 147 Wash.2d 1024, 60 P.3d 92. This court reviews a trial court's denial of a CR 59 motion and a CR 60 motion under the abuse of discretion standard. Showalter v. Wild Oats, 124 Wn.App. 506, 510, 101 P.3d 867 (2004); Aluminum Co. of Am. V. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

IV. ARGUMENT

1. Where Labco failed to exercise any of the multiple statutory remedies available to it under the Washington State Real Estate Contract Forfeiture Act the trial court must deny Labco's requests to apply equitable principles to its analysis and refuse to vacate or provide other relief from the order granting Newbury's motion for summary judgment.
(Re Labco's Assignment of Error Nos. 1-8, inclusive.)

Labco assigns multiple errors of the Trial Court to a failure to provide equitable remedies and ignore Labco's statutory obligations. The Real Estate Contract Forfeiture Act provides at least "three bites at the

apple” in order to prevent inequitable results. Hume, *Washington Real Estate Forfeiture Act*, 61 Wash. L. Rev. 803 (1986). The Act first allows the buyer an opportunity to cure the defaults, RCW 61.30.090; second, an opportunity to restrain the recording of the Declaration of Forfeiture, RCW 61.30.110; then the buyer can bring an action seeking orders to sell the property in lieu of forfeiture, RCW 61.30.120; and finally may bring an action to set aside the Declaration of Forfeiture RCW 61.30.140. Labco failed to take any action until long after the time periods to do so pass. The deadline to cure the defaults was March 1, 2006 and labco failed to cure at any time. Labco elected not to make a motion to restrain the recording of the Declaration of Forfeiture. Labco had until the recording of the Declaration of Forfeiture of March 2, 2006 to file and serve a petition seeking sale of the property in lieu of forfeiture, however failed to file and serve a petition at all, but rather made a motion 249 days *after* the Declaration of Forfeiture was recorded. Labco had sixty days after the recording of the Declaration of Forfeiture to file and serve a petition to set aside the forfeiture; however Labco failed to file and serve a summons and petition at any time, but rather filed a motion on June 26, 2006, more than 115 days *after* the Declaration of Forfeiture had been recorded by Newbury. The Real Estate Contract Forfeiture Act provides plain, adequate, simple, and speedy remedies for purchasers and give the

purchaser at least as much relief as prior equity cases would have provided. RCW 61.30.010 et seq. Labco cites authorities providing equitable analysis used by the courts prior to legislation providing the Washington Real Estate Contract Forfeiture Act. Only where there is not a complete and adequate remedy at law should the court look to equity. Galladora v. Richter, 52 Wash. App. 778, 786, 764 P.2d 647 (1988) "[E]quity does not intervene when there is a complete and adequate remedy at law." Id.; *see also* Orwick v. Seattle, 103 Wn.2d 249, 252, 692 P.2d 793 (1984); Tyler Pipe Indus., Inc. v. Department of Revenue, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982). The Supreme Court has held the Legislature "can never totally deprive the courts of their constitutional equity power" . Id. at 789. However, equity does not intervene where there is a complete and adequate remedy at law. Roon v. King Cy., 24 Wash.2d 519, 526, 166 P.2d 165 (1946). In Roon, a landowner sued to set aside a tax foreclosure, claiming earlier cases, in equity, permitted her to assert constructive fraud. In the interim, however, the Legislature had adopted a statute establishing a procedure for recovery of illegal taxes.

"We believe that the appellant had a remedy that was plain, simple, speedy, adequate, and complete; and, had she pursued it, all that she now seeks to accomplish would have been realized by her. By her own failure to avail herself of that remedy, she has permitted the situation to develop to its present climax. Under such circumstances, we see no occasion for the intervention by a court

of equity or for the exercise of its inherent powers with respect to matters involving the legality of a tax.”

Roon, at 528, 166 P.2d 165.

In, Galladora the court found the Real Estate Contract Forfeiture Act provided a plain, adequate, simple and speedy remedy for Mr. Galladora and gave him at least as much relief as pre-act equity cases would have given, stating, “There is no reason to allow equity to intervene.”

Galladora at 787. This court should not intervene with application of equitable remedies where legislation by way of the Real Estate Contract Forfeiture Act provides a plain, adequate, simple and speedy remedy for Labco.

2. Newbury gave a copy of the Declaration of Forfeiture in compliance with the Real Estate Contract Forfeiture Act, when such notice was sent certified mail to Labco’s registered agent within three business days of recording the Declaration of Forfeiture and Labco was not prejudiced by any delay that may have existed. (Re Labco’s Assignment of Error Nos. 1, 2, 3, 4, 5, 6, and 8.)

RCW 61.30 requires mailing the Declaration of Forfeiture within three days of recording. In Galladora, the Court of Appeals addressed this mailing issue under similar facts to the present case. The court of appeals stated:

“Even if the mailing was a technical violation, however the act itself limits the consequences. It penalizes untimely notice only if it is “material.”...Here, Mr. Galladora actually received the declaration of forfeiture on April 2, 1987, and then timely initiated action as required by former RCW 61.30.140(2). The failure, if any, did not significantly affect any of Mr. Galladora’s rights and thus was not material.”

Id. at 784.

Newbury mailed the copy of the Declaration of Forfeiture the day following the date of recording; it was returned undeliverable and sent again Monday, March 6, 2006 and Labco was not prejudiced by the fact the mailing was received March 7, 2006. RCW 61.30.140 provides a sixty days after the filing of the declaration of forfeiture, during which a party may file an action to set aside the forfeiture. In this case Labco did not file an action to set aside the forfeiture at all and therefore any delay that may have existed was immaterial as it did not significantly affect any of Labco’s rights.

RCW 61.30.060 provides:

“The notice of intent to forfeit shall be given not later than ten days after it is recorded. **The declaration of forfeiture shall be given not later than three days after it is recorded.** Either required notice may be given before it is recorded, but the declaration of forfeiture may not be given before the time for cure has expired. **Notices which are served or mailed are given for the purposes of this section when served or mailed.** Notices which must be posted and published as provided in RCW 61.30.050(2)(b) are given for the purposes of this section when both posted and first published.” (Emphasis Added.)

A plain reading of RCW 61.30.060 finds Newbury's Declaration of Forfeiture was given when *mailed* March 3, 2006 or March 6, 2006 and not when it was received by Labco March 7, 2006. Finally, the Declaration of Forfeiture was recorded on Thursday, March 2, 2006. CR 6 provides in pertinent part:

"Time:

(a) Computation.

In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. ... When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

Pursuant to RCW 61.30.060 and CR 6 regarding computation of time, the Declaration of Forfeiture had to be **mailed** on or before Tuesday, March 7, 2006. The Thursday March 2nd day of the recording is excluded from the computation of time as are the days of the weekend, March 4th and 5th.

The Declaration of Forfeiture was postmarked March 6, 2006 and received by Labco's registered agent on March 7, 2006. (CP 57) Newbury complied with the statute and court rules in providing the documents in a timely manner to Labco and/or its agents and since Labco failed to file an action to set aside the forfeiture any delay in the receipt of the Declaration of Forfeiture would have been immaterial. The Trial Court did not err in

finding the Declaration of Forfeiture was given in compliance with RCW 61.30.060.

3. The Trial Court must deny Labco's motion to extend the cure period and for an order to pay the contract balance into the registry of the court when the motion was filed long after the cure period expired; was not properly filed, served or set for hearing by Labco. (Re Labco's Assignment of Error Nos. 1, 2, 3, 4, 5, 6 and 8.)

The cure period is set forth in the Notice of Intent to Forfeit and set by statute. RCW 61.30.090. Pursuant to the Act and the Notice of Intent to Forfeit, Labco had until March 1, 2006 to cure the multiple defaults set forth in the Notice of Intent to Forfeit. (CP 169) RCW 61.30.070. It is undisputed Labco failed to cure any of the defaults listed in the Notice of Intent to Forfeit. Labco failed to provide proof of insurance and failed or refused to pay the balance necessary to cure the default on the contract. Labco made no effort to pay until bringing the motion to pay monies in to the registry of the court 116 days after the cure period expired and assigns error to the Trial Court as if Labco was somehow denied the ability to cure the default for nonpayment of the contract. Labco's motion to pay monies into the registry of the court was filed on June 26, 2006; nearly four months after the cure period had expired and six months after the Notice of Intent to Forfeit was served on Labco's registered agent. Labco

could have simply paid the money necessary to cure the default anytime during the cure period. There is no evidence the Trial Court or Newbury prevented Labco from curing the default for nonpayment. In addition, Labco failed to set its untimely motion for hearing or to provide copies of the motion to Newbury or Newburys' counsel. The court did not err in failing to consider the motion where the motion was filed nearly four months after the cure period expired and Labco failed to serve its motion on Newbury or to set the motion for hearing.

Labco's motion to pay monies in to the trial court registry was never properly before the court during the time frame that would allow this type of resolution. The motion was barred as a matter of law by the time it was brought to the court and even had the motion been timely filed and heard, Labco failed to prove there was no default, or make a prima facie showing for a permanent injunction to extend the cure period.

RCW 61.30.110 provides in part:

- (1) The forfeiture may be restrained or enjoined or the time for cure may be extended **by court order only as provided in this section. ...**
- (2)...A court may preliminarily enjoin the giving and recording of the declaration of forfeiture **upon a prima facie showing of the grounds set forth in this section for a permanent injunction. If the court issues an order** restraining or enjoining the forfeiture **then** until such order expires or is vacated or the court otherwise permits the seller to proceed with the forfeiture, the declaration of forfeiture shall not be given or recorded. However, **the**

commencement of the action shall not of itself extend the time for cure.

(3) The forfeiture may be permanently enjoined only when the person bringing the action **proves** that there is no default as claimed in the notice of intent to forfeit or that the purchaser has a claim against the seller which releases, discharges, or excuses the default claimed in the notice of intent to forfeit, including by offset, or that there exists any material noncompliance with this chapter. The time for cure may be extended only when the default alleged is other than the failure to pay money, the nature of the default is such that it cannot practically be cured within the time stated in the notice of intent to forfeit, action has been taken and is diligently being pursued which would cure the default, and any person entitled to cure is ready, willing, and able to timely perform all of the purchaser's other contract obligations. (Emphasis added.)

Labco failed to obtain a court order restraining or enjoining the forfeiture prior to Newbury recording the Declaration of Forfeiture. Labco failed to make a prima facie showing there was no default or other grounds set forth by statute. The mailing of the declaration of forfeiture was in compliance with the Act. RCW 61.30 et seq, infra. Labco relies solely upon the Declaration of Bill Bennett to provide substantial evidence that Labco was not in default as Newbury set forth in the Notice of Intent to Forfeit and/or that Labco had claims against the seller which would release, discharge, or excuse the claimed defaults; however the Declaration of Bill Bennett fails to address the breach for failure to insure the property even though it was set forth as a breach in the Notice of Intent to Forfeit and the Trial court did not err by refusing to apply equitable principles under the circumstances. *See also supra pgs. 14-22.*

4. The Trial Court must deny Labco's motion for an order for sale of the property in lieu of forfeiture when Labco failed to bring such an action within the time period set forth by statute and the Act requires service of a summons and petition. (Re Labco's Assignment of Error Nos. 2-8, inclusive)

RCW 61.30.120 provides any person entitled to cure a default the opportunity to bring an action seeking public sale in lieu of forfeiture.

RCW 61.30.120 provides in relevant part:

(2) An action under this section shall be commenced by filing and serving the summons and complaint before the declaration of forfeiture is recorded.

Labco failed to file and serve a summons and complaint seeking an order for sale in lieu of forfeiture, and rather made an effort to circumvent the statute by initiating action by filing a motion long after the time period to serve the summons and complaint had passed. RCW 61.30.120 requires Labco to file and serve a summons and complaint seeking such an order before the declaration was filed on March 2, 2006. The only effort to pursue such a remedy was made by motion filed November 6, 2006; 249 days after the Declaration of Forfeiture was recorded. This a gross abuse of the Act and Labco's lackluster effort to comply with the Act fails under

any analysis and provides no basis for the Trial Court to consider Labco's motion.

The decision to order a sale under the forfeiture act is discretionary with the trial court. Powell v. Rinne, 71 Wash.App. 297, 301, 857 P.2d 1090 (1993). Newbury would have prevailed in equity even if Labco had filed this action. In Powell it was determined that even if the court had determined the fair market value of the property substantially exceeded the obligations, the Real Estate Contract Forfeiture Act does not mandate an order for public sale of the property in lieu of forfeiture, where the purchaser has an abysmal payment history, there were multiple prior forfeiture actions, the purchaser has not paid taxes and delayed the statutory forfeiture proceedings. Powell, at 303. Here, the Trial Court record provides there were at least two prior forfeiture actions against Labco (CP 168-171; Appendix A1; CP 123-127; Appendix A2); Labco failed to pay the balloon payment due on contract three years before the commencement of the last forfeiture action (CP 81 Trial Court Ruling); had independent breaches for failure to insure the property for which no evidence to prove evidence was presented to the Trial Court (CP 82 Trial Court Ruling; CP 168-171); and had delayed the proceedings beyond the statutory period.(RP Pg 55. Ln. 14 through Pg. 56 Ln. 2) As a matter of equity the request for sale of the property in lieu of foreclosure should be

denied, however the inquiry is never made as Labco failed to file and serve a summons and complaint prior to the recording of the Declaration of Forfeiture.

5. The Trial Court must deny Labco's motion to set aside the Declaration of Forfeiture when the motion was brought long after the time period for doing so had expired and Labco failed to serve a summons and petition and otherwise comply with the requirements of the Real Estate Contract Forfeiture Act. (Re Labco's Assignment of Error Nos. 3, 4, 5, 6, and 8.)

RCW 61.30.140 provides in relevant part:

(1) An action to set aside a forfeiture... may be commenced only after the declaration of forfeiture has been recorded and only as provided in this section...

(2) ... For all persons given the required notices in accordance with this chapter, such an action shall be commenced by filing and serving the summons and complaint **not later than sixty days after the declaration of forfeiture is recorded.**

Labco failed to commence an action within 60 days following the date the Declaration of Forfeiture was recorded. Labco's only effort to set aside the forfeiture was not service of a summons and complaint within 60 days, but rather filing a motion to set aside the forfeiture on June 26, 2006; more than 115 days after the Declaration of Forfeiture had been recorded. Labco failed to bring this action within the time period allowed or to file and serve a summons and complaint as required by statute and therefore

the Trial Court did not abuse its discretion in denying Labco's motion to set aside the Declaration of Forfeiture.

6. The Trial Court must deny Labco's Motion for Reconsideration where Labco's motion was filed more than ten days after the entry of the Trial Court decision of which Labco seeks reconsideration. (Re Labco's Assignment of Error No. 4)

The Trial Court issued its decision on Newbury's Motion For Summary Judgment on October 6, 2006. Labco filed its motion for reconsideration on October 20, 2006. CR 59 provides in pertinent part as follows:

“...(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. ...”

Labco failed to file its motion for reconsideration until 14 days after entry of the Trial Court's decision. The ten-day period under civil rules for serving and filing a motion for new trial or for reconsideration begins to run upon entry of the decision, not upon receipt of the decision by the movant. Metz v. Sarandos, 91 Wash.App. 357, 360, 957 P.2d 795 (1998). The Trial Court has no discretionary authority to extend the time period for filing a motion for reconsideration. Id. at 360.

In addition, Labco failed and made no effort to move for reconsideration in accordance with the local court rule and therefore failed to bring the motion properly before the trial court. Grays Harbor County LCR 7 (G) provides:

“Reconsideration. A motion for reconsideration shall be submitted on briefs and affidavits only, without oral argument, unless the trial judge requests oral argument. The moving party shall file the motion and all supporting affidavits, documents and briefs at the same time, and on the date of filing serve on or mail a copy thereof to opposing counsel, and deliver a copy thereof to the trial judge which copy shall show the date of filing. The trial judge shall either deny the motion and advise counsel of the ruling or request responding briefs and direct the movant to note the motion for hearing.”

Labco failed to comply with CR 59 time requirements by bringing the motion after the time allowed by court rule and additionally failed to comply with any provisions of LCR 7 (G). The court lacks the discretion to consider the motion under these circumstances and therefore did not err by denying Labco’s Motion for Reconsideration.

7. Even if the Trial Court had the discretion to hear Labco’s Motion for Reconsideration the Trial Court would have denied the motion.
(Re Labco’s Assignment of Error Nos. 1-8, inclusive.)

The court found Labco breached the contract by failing to have insurance on the property. RP Pg 50, Lns. 14-25. Labco failed to produce any evidence whatsoever that the property was insured and therefore not

in default in addition to the failure to pay monies on the contract, both breaches having been set forth in the Notice of Intent to Forfeit. (CP168-171; Appendix A1) The court found Labco paid no money into the court registry and the motion to pay monies into the registry was brought months after the cure period ended. (CP 82 Trial Court Ruling) and that the balance of the contract was due in full in 2003. (RP Pg 52 Lns. 23-24.) Even if the Trial Court had the discretion to consider Labco's motion for Reconsideration the Trial Court would deny the motion. Labco failed to comply with the procedural requirements set forth by local court rules and failed to set a hearing for the motion. The Trial Court found Labco was in default for failure to cure either breach set forth in the Notice of Intent to Forfeit. (CP 81-84 Trial Court's Ruling) The court found no genuine issue of material fact exists on Labco's claim against Newbury and Newbury was entitled to judgment as a matter of law dismissing Labco's claim and there are no grounds for the court to exercise equity powers. (CP 81-84 Trial Court Ruling; CP 230-234) Labco failed to provide any evidence whatsoever to show the property was insured and therefore even if it prevailed on any and all arguments relating to the breach for failure to make payments, the legal consequence of the independent breach finds the same ultimate conclusions resulting in forfeiture of the real estate contract. Labco's arguments on appeal ignore

the refusal and/or inability of Labco to perform on its obligations and the independent breach for failure to insure the property. Substantial justice was done by the trial court's findings in this case and the court properly exercised its discretion in not considering the motion and otherwise would have denied the motion due to the evidence presented to the Trial Court.

8. The Trial Court must deny Labco's CR 60 motions when Labco failed to comply with procedural requirements of CR 60 and there is insufficient, if any, evidence of extreme and obvious gross negligence in the presence of the court by Labco's attorney and evidence of such would not provide CR 60 relief to the party. (Re Labco's Assignment of Error Nos. 1-8, Inclusive.)

CR 60 has certain procedural requirements with which Labco failed to comply. Both parties refused to waive the procedural requirements of the other and the motion was therefore not properly before the court.

CR 60 provides in part:

“ (e) Procedure on Vacation of Judgment....

...(3) *Service.* The motion, affidavit, and the order to show cause shall be served upon all parties affected in the same manner as in the case of summons in a civil action at such time before the date fixed for the hearing as the order shall provide;...”

Labco failed to serve the CR 60 motion, affidavit and order to show cause upon Newbury. The court was not presented with a motion served upon the respondents and there was no order to show cause issued by the court on the motion. The court ultimately considered Labco's motion and denied the relief from judgment.

Labco argued to the Trial Court the court should follow a line of cases in the federal court system; ignore the division between the different jurisdictions of the Federal Court and set precedence in Washington State courts by allowing such a remedy based upon an attorney's negligence. The Trial Court lacked evidence of extreme and obvious gross negligence in the presence of the court and made numerous distinction between the case at hand and the cases cited by Labco. The Court found Labco lacked evidence showing the extreme and obvious gross negligence in the presence of the court to allow relief from summary judgment as in Labco's cited federal cases. (RP Pg. 52, Lns. 21- 25) The court carefully read the statute and case law surrounding the standards and purpose of the Real Estate Contract Forfeiture Act before issuing a memorandum decision on summary judgment. (RP Pg 50, Lns 12-21.) The court considered the evidence through affidavit supporting Labco's motion and denied the CR 60 motion. Had the trial court granted Labco's motion it would be the first time a Washington Court decided an attorney's gross neglect justifies

setting aside a judgment on order per rule 60(b). Several Washington cases held that attorney negligence or incompetence is insufficient grounds to justify relief from judgment against the client. *See Lane v. Brown & Haley*, 81 Wash.App. 102, 912 P.2d 1040 (1996) and *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wash.App. 819, 970 P.2d 803 (1999), *aff'd*, 140 Wash.2d 568, 998 P.2d 305 (2000) (rejecting arguments that attorney negligence constitutes a "mistake" or "irregularity" under CR 60(b)(1).) Labco argues it's manager had no knowledge of the July 6, 2006 summary judgment hearing, however presents no evidence or authority requiring Labco's manager is required to receive any notice. Labco's registered agent had been served with the Notice of Intent to Forfeit and failed to participate in the lawsuit in any fashion whatsoever. The manager submitted declarations to the trial court acknowledging notice was sent to Labco's registered agent and that he was familiar with the Notice of Intent to Forfeit filed by Newbury. (CP 297, 312) Labco claims the lack of notice to the manager was a "procedural irregularity" working extreme prejudice to Labco. In *Lane v. Brown & Haley* the appellate court analysis on the exercise of trial court discretion relating to a CR 60 motion for a party's lack of notice for the summary judgment hearing was as follows:

“Mosbrucker v. Greenfield Implement, Inc., 54 Wash.App. 647, 652, 774 P.2d 1267 (1989), defines the type of “irregularity” that CR 60(b)(1) concerns: “Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unreasonable time or in an improper manner.” Client notice is not a court requirement.“ *Citing* Haller v. Wallis, 89 Wash.2d 539, 547, 573 P.2d 1302 (1978). Accordingly, relief pursuant to CR 60(b)(1) is not available here.”

Lane at 106.

Case law in Washington has clearly established a judgment will not be vacated for irregularity without a showing of meritorious defense.

Chehalis Coal Co. v. Laisure, 97 Wash. 422, 166 P. 1158 (1917); Hurby v.

Kwapil, 156 Wash. 225, 286 P. 664 (1930); Yeck v. Department of Labor

& Industries, 27 Wash.2d 92, 176 P.2d 359 (1947). In the case at hand,

Labco failed to present any defense for failure to cure the breaches set

forth in the Notice of Intent to Forfeit other than the allegations of

negligence by Labco’s attorney, which was merely set forth in a single

declaration by William Bennett. (RP Pg. 37 Lns. 15-24) In determining a

motion to vacate a default judgment, the trial court does not make factual

determinations; rather, the court evaluates whether the movant has

established substantial evidence of a prima facie defense. Gutz v. Johnson,

128 Wash.App. 901, 117 P.3d 390, (2005) review granted 156 Wash.2d

1017, 132 P.3d 734. A defendant seeking to vacate a judgment against

him must show by affidavit at least a prima facie defense to the claim. Crossman v. Will, 10 Wash.App. 141, 516 P.2d 1063 (1973). Labco failed to show a prima facie defense to the summary judgment. The Trial Court granted summary judgment to Newbury finding no genuine issues of material fact in the present case. There is no evidence to suggest Labco cured the breach for failure to provide proof of insurance on the property and Labco never denied this breach of the Real Estate Contract and therefore never suggested they had not breached the contract and failed to cure. Cure is defined as: perform [ing] the obligations under the contract which are described in the notice of intent to forfeit and which are in default, to pay the costs and attorneys' fees prescribed in the contract, and, subject to RCW 61.30.090(1), to make all payments of money required of the purchaser by the contract which first become due after the notice of intent to forfeit is given and are due when cure is tendered. RCW 61.30.010(2). Even if Labco prevails on every argument relating to its failure to cure for past due payments the contract would forfeit due to the independent breach for failure to provide proof of insurance on the subject property. *Supra*.

Labco failed to show any meritorious defense in this case and failed to provide substantial evidence of a prima facie defense, but rather argues Labco's attorney provides the defense due to his failure to follow

directions. The trial court found this argument had no merit and the Trial Court lacked sufficient evidence coming from Mr. Bennet's limited affidavit to support his allegations. (RP Pg. 37 Lns. 8-24)

Labco failed to comply with the procedural requirements of bringing a CR 60 motion properly before the court; however the court ultimately considered the motion. Washington courts have held the vacation of a judgment without observing the procedural requirements of CR 60(e) violates procedural due process. Allen v. Allen, 12 Wash.App. 795, 532 P.2d 623 (1975). Labco failed to observe the procedural requirements of CR 60 and therefore the court would have violated Newbury's procedural due process rights had it granted Labco's motion.

Service upon a party's attorney of record is insufficient under this statute to confer jurisdiction. State ex rel. Hibler v. Superior Court, 164 Wash. 618, 3 P.2d 1098 (1931). This court lacked jurisdiction to consider Labco's CR 60 motion because Labco failed to serve the motion in compliance with the procedures set forth in CR 60 (e). Statutory procedure for modification of judgment or orders of the superior court must be followed. Betz v. Tower Sav. Bank, 185 Wash. 314, 55 P.2d 338 (1936).

Labco failed to provide any grounds for the Trial Court to grant the CR 60 motion. There is no evidence of gross negligence by Labco's

attorney William Morgan, and the court therefore found William Morgan's acts or omissions do not rise to the level necessary to follow the line of federal authorities set forth by Labco and to otherwise set precedence by being the first Washington Court to vacate a summary judgment order based upon lawyer negligence pursuant to CR 60(b). Labco presents no authority to require Newbury to show undue prejudice would result from having the case heard on its merits. The Trial Court did not err by denying Labco's CR 60 motion.

9. Paragraph 20(c) of the real estate contract should not be considered for the first time on appeal, as it was not before the Trial Court for interpretation, nor was it argued at the trial court level and in no way constitutes an independent basis to set aside the summary judgment on equitable grounds.

Only certain errors may be raised for the first time on appeal. RAP 2.5(a). The real estate contract provisions were never raised at the trial court level and do not fall under any of those errors set forth in RAP 2.5 which may be raised for the first time on appeal. Second, any and all contractual rights and obligations of the parties were terminated at the time the Declaration of Forfeiture was filed. Newbury initiated forfeiture action pursuant to Ch. 61.30 RCW and did not rely upon contractual rights eventually terminated by the recording of the Declaration of Forfeiture.

Ch. 61.30 RCW provides the remedies relating to contract forfeiture, including any interests of the parties and the effect of recording the Declaration of Forfeiture. RCW 61.30 et seq. The real estate contract was not before the trial court for interpretation and is not before this court on appeal. Finally, legislation by way of the Washington Real Estate Contract Forfeiture Act provides the remedies available to the parties in this matter. The Act incorporates multiple opportunities for a buyer to avoid inequitable resolutions in a contract forfeiture case. Galladora at 787; *infra*. No Washington cases have interpreted real estate forfeiture provisions as liquidated damages clauses and the statutes compensate for and provide multiple opportunities to buyers and seller to avoid inequities.

10. The prevailing party on appeal is entitled to attorney fees.

The real estate contract between the parties provides in part:

“...The prevailing party in any suit instituted arising out of this Contract and in any forfeiture proceedings arising out of this Contract shall be entitled to receive reasonable attorneys’ fees and costs incurred in such suit or proceedings....” (CP 78)

Contractual authority as a basis for an award of attorney's fees at trial also supports such an award on appeal. RAP 18.1; West Coast Stationary Eng'rs Welfare Fund v. Kennewick, 39 Wn. App. 466, 694 P.2d 1101 (1985). A contract that provides for attorney's fees to enforce a provision of the contract necessarily provides for attorney's fees on appeal.

Granite Equip. Leasing Corp. v. Hutton, 84 Wn.2d 320, 525 P.2d 223

(1974). This appeal is directly relating to and thereby arises from the Real Estate Contract between the parties and was specifically contemplated as evidenced by the plain language of the contract. (CP 78) The prevailing party on appeal is entitled to attorneys' fees and costs.

V. CONCLUSION

Here the trial court record supports all trial court findings and orders. Labco failed to exercise any of the multiple statutory remedies available to it under the Washington Real Estate Contract Forfeiture Act. Labco alleges an inequitable result has occurred and that Labco is entitled to relief from the judgment due to the negligence of Labco's attorney, however any evidence of negligence by Labco's attorney is not sufficient to cause the court to set precedence in Washington State and grant relief to a party due to attorney negligence pursuant to a CR 60 motion or other request for relief. The legislature has provided equitable remedies for sellers and buyers and incorporated the concern for equitable results into the Act. Washington Court's have declared the Act to provide equitable remedies that are adequate and speedy for buyers and sellers. This court should not modify any of the orders of the Trial Court based upon alleged inequities. The court must refuse to vacate or provide other relief from the Summary Judgment Order. New bury complied in giving the required

notices to Labco in compliance with the Act and Labco failed to exercise any buyers rights set forth by statute. Labco's motion to extend the cure period and for an order to pay the contract balance into the registry of the court was filed long after the cure period expired; was not properly filed, served or set for hearing by Labco. Labco's motion for an order for sale of the property in lieu of forfeiture must be denied because Labco failed to bring such an action within the time period set forth by statute and the Act requires service of a summons and petition. It was proper for the Trial Court to deny the motion for sale of property in lieu of forfeiture.

Labco's motion to set aside the Declaration of Forfeiture was brought long after the time period for doing so had expired and Labco failed to serve a summons and petition and otherwise comply with the requirements of the Real Estate Contract Forfeiture Act. The motion to set aside the Declaration was properly denied. The Trial Court must deny Labco's Motion for Reconsideration where Labco's motion was filed more than ten days after the entry of the Trial Court decision of which Labco seeks reconsideration because it lacks the discretion to do otherwise. Even if the Trial Court had the discretion to hear Labco's Motion for Reconsideration the Trial Court would have denied the motion. The Trial Court must deny Labco's CR 60 motions because Labco failed to comply with procedural requirements of CR 60 and there is insufficient, if any, evidence of

extreme and obvious gross negligence in the presence of the court by Labco's attorney and evidence of such would not provide CR 60 relief to the party. Paragraph 20(c) of the real estate contract should not be considered for the first time on appeal, as it was not before the Trial Court for interpretation, nor was it argued at the trial court level and in no way constitutes an independent basis to set aside the summary judgment on equitable grounds. The prevailing party on appeal is entitled to attorney fees. Labco breached and failed to cure or otherwise pursue the equitable legal remedies available to it. The Trial Court did not abuse its discretion and its judgments should be affirmed.

Dated: June 25, 2007.

Respectfully Submitted,



Benjamin R. Winkelman, #33539
Attorney for Respondent Newbury
P. O. Box 700, 813 Levee Street
Hoquiam, WA 98550 360-532-5780

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NOTICE OF INTENT TO FORFEIT

PURSUANT TO REVISED CODE OF WASHINGTON
CHAPTER 61.30

TO: Labco Inc. State of Washington
P. O. Box 24 Dept. of Revenue
Ocean Shores, WA 98569 0024 2101 4th Ave. Suite 1400
Seattle, WA 98121 2300

You are hereby notified that the Real Estate Contract described below is in default and you are provided the following information with respect thereto:

(a) The name, address and telephone number of the seller and the seller's agent or attorney giving the notice:

Seller's name and address:
Wesley E. Newbury, Sr.
Rose Newbury
80 Newbury Rd.
Humptulips, WA 98552 9715
(360) 987-2258

Attorneys for Seller:
Arlis W. Johnson
Parker, Johnson & Parker, P.S.
813 Levee St.
P. O. Box 700
Hoquiam, WA 98550
(360) 532-5780

(b) Description of the contract: Real Estate Contract dated March 3, 1993, recorded March 9, 1993, executed by Estate of Harry Loomis, deceased, as seller, and Labco, Inc., a Washington corporation, as purchaser, recorded under Auditor's File No. 930309082, records of Grays Harbor County, Washington. Seller's interest in said Contract was assigned by instrument dated September 1, 2002, recorded September 13, 2002 under Auditor's

File No. 2002-09130048 to Wesley E. Newbury and Rose Newbury, husband and wife.

(c) Legal description of the property:

See attached Exhibit A;

(d) Description of each default under the contract on which the notice is based:

1. Failure to pay the following past due items, the amounts and an itemization for which are given in (g) and (h) below:

Balance Due on Real Estate Contract

Failure to provide proof of insurance

(e) Failure to cure all of the defaults listed in (g) and (h) on or before March 1, 2006 will result in the forfeiture of the Contract.

(f) The forfeiture of the Contract will result in the following:

1. All right, title and interest in the property of the purchaser and of all persons claiming through the purchaser given this notice shall be terminated;
2. The purchasers' rights under the Contract shall be cancelled;
3. All sums previously paid under the Contract shall belong to and be retained by the seller or other person to whom paid and entitled thereto;
4. All improvements made to and unharvested crops on the property shall belong to the seller; and
5. The purchaser and all persons claiming through the purchaser given this notice shall be required to surrender possession of the property, improvements and unharvested crops to the seller on March 1, 2006.

(g) The following is a statement of payments of money in default (or, where indicated, an estimate thereof) and for any defaults not involving the failure to pay money the action required to cure the default:

1. Monetary Delinquencies:

<u>Item</u>	<u>Amount</u>
Principal Balance Due	\$134,621.05
Interest to 11/28/05	14,269.83
Late charges	5,625.00
Total Balance Due	\$154,515.88

2. Action required to cure any non-monetary default:

Proof of payment of insurance;

(h) The following is a statement of other payments, charges, fees and costs to cure the default:

<u>Item</u>	<u>Amount</u>
1. Costs of Title Report	\$ 638.97
2. Attorney's Fees	5,000.00
3. Recording fees	37.00
Total:	\$5,675.97

The total amount necessary to cure the default is in the sum of the amounts in (g)(1) and (h) which is \$160,191.85 plus the amount of any payments, interest, late charges and insurance which fall due after the date of this Notice of Intent to Forfeit and on or prior to the date the default is cured. Monies required to cure the default may be tendered to Parker, Johnson & Parker, P.S., at the following address:

813 Levee St.
P. O. Box 700
Hoquiam, WA 98550

(i) The purchaser or any personal claiming through the purchaser has the right to contest the forfeiture or to seek an extension of time to cure the default, or both, by commencing a court action prior to March 1, 2006.

(j) The purchaser or any person claiming through the purchaser has the right to request a court to order a public sale of the property; That such public sale will be ordered only if the court finds that the fair market value of the property substantially exceeds the debt owed under the contract and any other liens having priority over the sellers interest in the property; That the excess, if any, of the highest bid at the sale of the debt owed under the contract will be applied to the liens eliminated by the sale and the balance, if any, paid to the

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NOTICE OF INTENT TO FORFEIT

PURSUANT TO REVISED CODE OF WASHINGTON
CHAPTER 61.30

TO: Labco Inc.
P. O. Box 24
Ocean Shores, WA 98569 0024

You are hereby notified that the Real Estate Contract described below is in default and you are provided the following information with respect thereto:

(a) The name, address and telephone number of the seller and the seller's agent or attorney giving the notice:

Seller's name and address:
Wesley E. Newbury, Sr.
Rose Newbury
80 Newbury Rd.
Humptulips, WA 98552 9715

Attorneys for Seller:
Arlis W. Johnson
Parker, Johnson & Parker, P.S.
813 Levee St.
P. O. Box 700
Hoquiam, WA 98550
(360) 532-5780

(b) Description of the contract: Real Estate Contract dated March 3, 1993, recorded March 9, 1993, executed by Estate of Harry Loomis, deceased, as seller, and Labco, Inc., a Washington corporation, as purchaser, recorded under Auditor's File No. 930309082, records of Grays Harbor County, Washington. Seller's interest in said Contract was assigned by instrument dated September 1, 2002, recorded September 13, 2002 under Auditor's File No. 2002-09130048 to Wesley E. Newbury and Rose Newbury, husband and wife.

NOTICE OF INTENT TO FORFEIT-1

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(c) Legal description of the property:

See attached Exhibit A;

(d) Description of each default under the contract on which the notice is based:

1. Failure to pay the following past due items, the amounts and an itemization for which are given in (g) and (h) below:

Balance Due on Real Estate Contract

Delinquent real estate taxes

(e) Failure to cure all of the defaults listed in (g) and (h) on or before July 25, 2005 will result in the forfeiture of the Contract.

(f) The forfeiture of the Contract will result in the following:

1. All right, title and interest in the property of the purchaser and of all persons claiming through the purchaser given this notice shall be terminated;
2. The purchasers' rights under the Contract shall be cancelled;
3. All sums previously paid under the Contract shall belong to and be retained by the seller or other person to whom paid and entitled thereto;
4. All improvements made to and unharvested crops on the property shall belong to the seller; and
5. The purchaser and all persons claiming through the purchaser given this notice shall be required to surrender possession of the property, improvements and unharvested crops to the seller on July 25, 2005.

(g) The following is a statement of payments of money in default (or, where indicated, an estimate thereof) and for any defaults not involving the failure to pay money the action required to cure the default:

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1. Monetary Delinquencies:

<u>Item</u>	<u>Amount</u>
Real Estate Contract Balance Due	\$135,814.16

2. Action required to cure any non-monetary default:

Proof of payment of delinquent real estate taxes;

(h) The following is a statement of other payments, charges, fees and costs to cure the default:

<u>Item</u>	<u>Amount</u>
1. Costs of Title Report	\$ 638.97
2. Attorney's Fees	1,500.00
3. Recording fees	15.00
Total:	\$2,153.97

The total amount necessary to cure the default is in the sum of the amounts in (g) (1) and (h) which is \$8,178.20 plus the amount of any payments and late charges which fall due after the date of this Notice of Intent to Forfeit and on or prior to the date the default is cured. Monies required to cure the default may be tendered to Parker, Johnson & Parker, P.S., at the following address:

813 Levee St.
P. O. Box 700
Hoquiam, WA 98550

(i) The purchaser or any personal claiming through the purchaser has the right to contest the forfeiture or to seek an extension of time to cure the default, or both, by commencing a court action prior to July 25, 2005.

(j) The purchaser or any person claiming through the purchaser has the right to request a court to order a public sale of the property; That such public sale will be ordered only if the court finds that the fair market value of the property substantially exceeds the debt owed under the contract and any other liens having priority over the sellers interest in the property; That the excess, if any, of the highest bid at the sale of the debt owed under the contract will be applied to the liens eliminated by the sale and the balance, if any, paid to the purchaser; That the court will require the person who requests the sale to deposit the anticipated sale costs with the clerk of the court; Any action to obtain an order for public sale must be

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Exhibit A

PARCEL A:

A part of the Southeast Quarter of the Southeast Quarter of Section 15, Township 18 North, Range 12 West of the Willamette Meridian, described as follows:

Beginning at the intersection of the Southwesterly line of the existing State Highway No. 109 with the Southeasterly line of a proposed State Highway intersection with the Oyehut County Road as shown on the Washington State Highway Department drawing identified as "Intersection Plan-State Road No. 9-Oyehut Road Intersection," dated June, 1965, Grays Harbor County, Washington;

Thence Southeasterly along existing State Road No. 109 a distance of 70 feet;
Thence South 2° 15' East a distance of 227 feet;
Thence South 87° 45' West 180 feet, more or less, to an intersection with the Easterly line of the proposed State Highway intersection with the Oyehut County Road (as more fully set out above);

Thence Northerly and Easterly along the Easterly line of said intersection a distance of 360 feet, more or less, to the point of beginning;

EXCEPT any portion of the above that is situated in the Southwest Quarter of the Southeast Quarter of said Section 15;
AND EXCEPT all minerals of every kind and nature, including but not limited to all oil, gas, and other hydrocarbons, together with the right of ingress and egress for the purpose of exploring for, developing, and removing the same.
Situate in the County of Grays Harbor, State of Washington.

PARCEL B:

A portion of the Southeast Quarter of the Southeast Quarter of Section 15, Township 18 North, Range 12 West of the Willamette Meridian, described as follows:

Beginning at the intersection of the Southwesterly line of the existing State Highway No. 109 with the Southeasterly line of a proposed State Highway intersection with the Oyehut County Road as shown on the Washington State Highway Department drawing identified as "Intersection Plan-State Road No. 9-Oyehut Road Intersection," dated June, 1965, Grays Harbor County, Washington;

PARCEL B CONTINUED

~~Exhibit C~~

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ARLIS W. JOHNSON
Attorney at Law
P. O. Box 700
Hoquiam, WA 98550

REAL ESTATE EXCISE TAX
EXEMPT TRANSACTION
RONALD A. STRABBING, TREASURER
Grays Harbor County, Montesano, WA
By J. Merrick Date 3/2/06

Grantee: Wesley E. Newbury Sr and Rose Newbury
Grantor: Labco Inc.
Parcel #181215440100; Ptn SE ¼ SE ¼ Sec 15 Tn 18 N Rg 12 WWM

DECLARATION OF FORFEITURE

PURSUANT TO THE REVISED CODE OF WASHINGTON
CHAPTER 61.30

TO: Labco Inc.
P. O. Box 24
Ocean Shores, WA 98569 0024

(a) The name, address and telephone number of the seller:

Wesley Newbury, Sr.
Rose Newbury
80 Newbury Rd.
Humptulips, WA 98552 9715
360 987 2258

(b) Description of Contract:

Real Estate Contract dated March 3, 1993, executed by Estate of Harry Loomis, deceased, as seller and Labco, Inc., as purchaser, which contract or a memorandum thereof was recorded under number 930309082, records of Grays Harbor County, Washington. Seller's interest in said Contract was assigned by instrument dated September 1, 2002, recorded September 13, 2002 under Auditor's File No. 2002-09130048 to Wesley E. Newbury and Rose Newbury, husband and wife.

(c) Legal description of the property:

Parcel #181215440100
Legal description on the attached Exhibit A.

DECLARATION OF FORFEITURE-1



PARKER JOHNSON PARKER

36.00 FCREC

2006-03020092

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Grays Harbor Co

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(d) Forfeiture:

The Contract described above is forfeited, the purchaser's rights under the Contract are cancelled and all right, title and interest in the property of the purchaser and of all persons claiming an interest in the Contract, the property, or any portion of either through the purchaser, are terminated.

(e) Surrender of possession:

All persons whose rights in the property have been terminated and who are in or come into possession of any portion of the property (including improvements and unharvested crops) are required to surrender such possession to the seller not later than March 1, 2006.

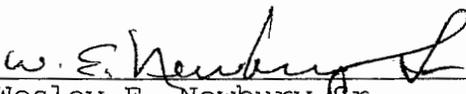
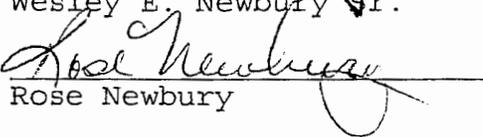
(f) Compliance with statutory procedure:

The Contract forfeiture was conducted in compliance with all requirements of RCW Chapter 61.30 and the applicable provisions of the Contract described above.

(g) Action to set aside:

The purchaser and any person claiming any interest in the purchaser's rights under the Contract or in the property who were given the Notice of Intent to Forfeit and the Declaration of Forfeiture have the right to commence a court action to set the forfeiture aside by filing and serving the summons and complaint within sixty days after the date the declaration of forfeiture is recorded if the seller did not have the right to forfeit the contract or fails to comply with this chapter in any material respect.

DATED March 1, 2006.


Wesley E. Newbury Sr.

Rose Newbury

DECLARATION OF FORFEITURE-1



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Grays Harbor Co

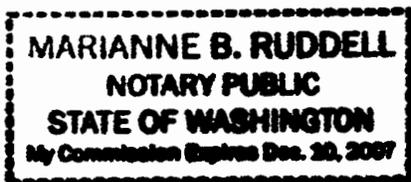
52

STATE OF WASHINGTON)
)
) :SS
COUNTY OF GRAYS HARBOR)

I certify that I know or have satisfactory evidence that WESLEY E. NEWBURY and ROSE NEWBURY are the persons who appeared before me, and said persons acknowledged that they signed this instrument and acknowledged it to be their free and voluntary act for the uses and purposes mentioned in this instrument.

DATED: March 1, 2006.

Marianne B. Ruddell
NOTARY PUBLIC in and for the
State of Washington
Residing at *Elma*
My appointment expires: *12/10/07*



DECLARATION OF FORFEITURE-1

Exhibit A

PARCEL A:

A part of the Southeast Quarter of the Southeast Quarter of Section 15, Township 18 North, Range 12 West of the Willamette Meridian, described as follows:

Beginning at the intersection of the Southwesterly line of the existing State Highway No. 109 with the Southeasterly line of a proposed State Highway intersection with the Oyehut County Road as shown on the Washington State Highway Department drawing identified as "Intersection Plan-State Road No. 9-Oyehut Road Intersection," dated June, 1965, Grays Harbor County, Washington;

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Thence South 2° 15' East a distance of 227 feet;
Thence South 87° 45' West 180 feet, more or less, to an intersection with the Easterly line of the proposed State Highway intersection with the Oyehut County Road (as more fully set out above);

Thence Northerly and Easterly along the Easterly line of said intersection a distance of 360 feet, more or less, to the point of beginning;

EXCEPT any portion of the above that is situated in the Southwest Quarter of the Southeast Quarter of said Section 15;
AND EXCEPT all minerals of every kind and nature, including but not limited to all oil, gas, and other hydrocarbons, together with the right of ingress and egress for the purpose of exploring for, developing, and removing the same.
Situate in the County of Grays Harbor, State of Washington.

PARCEL B:

A portion of the Southeast Quarter of the Southeast Quarter of Section 15, Township 18 North, Range 12 West of the Willamette Meridian, described as follows:

Beginning at the intersection of the Southwesterly line of the existing State Highway No. 109 with the Southeasterly line of a proposed State Highway intersection with the Oyehut County Road as shown on the Washington State Highway Department drawing identified as "Intersection Plan-State Road No. 9-Oyehut Road Intersection," dated June, 1965, Grays Harbor County, Washington;

PARCEL B CONTINUED

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PARKER JOHNSON PARKER

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Grays Harbor Co

Thence Southeasterly along existing State Road No. 109 a distance of 70 feet;
Thence South 2° 15' East a distance of 227 feet to the true point of beginning of the tract herein described;

Thence continuing South 2° 15' East a distance of 50 feet;
Thence South 87° 45' West 180 feet, more or less, to the West line of the Southeast Quarter of the Southeast Quarter of said Section 15;

Thence North along the said West line of said Southeast Quarter of the Southeast Quarter a distance of 50 feet, more or less, to the South line of that certain tract conveyed by Deed recorded June 7, 1966, under Auditor's File No. 169497, records of Grays Harbor County;

Thence Easterly along the South line of said tract a distance of 180 feet, more or less, to the true point of beginning of the tract herein described;
EXCEPT all oil, gas and mineral rights;
Situate in the County of Grays Harbor, State of Washington.

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PARKER JOHNSON PARKER

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FILED
IN THE SUPERIOR COURT
OF GRAYS HARBOR
COUNTY WASHINGTON
NOV 13 12:53

COURT CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF GRAYS HARBOR

LABCO, INC.

Plaintiff,

Vs.

NO. 06-2-234-9

WESLEY E. NEWBURY, SR.
and ROSE NEWBURY and the
marital community composed
thereof,

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

Defendants.

This matter came before the Court for hearing on the Defendants' motion for summary judgment seeking the following relief:

1. Dismissing Plaintiff LABCO, INC.'s complaint for restraint of forfeiture of real estate contract.
2. Dismissing Plaintiff LABCO, INC.'s prayer for an order determining the balance owing on the contract, which is the subject of Plaintiff's claim.
3. Dismissing Plaintiff's claim for costs and disbursements.
4. Dismissing Plaintiff's claim for reasonable attorney fees in prosecuting this matter.

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT-1

PARKER, JOHNSON & PARKER, P.S.
A PROFESSIONAL SERVICE CORPORATION
813 LEVEE STREET
P.O. BOX 700
HOQUIAM, WA 98550
FAX (360) 532-5788
TEL (360) 532-5780

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- 1 5. Ordering cancellation of the Lis Pendens recorded by Plaintiff in this matter.
- 2 6. Ordering Plaintiffs to immediately surrender to Defendants possession of the real
- 3 property and improvements that are subject of this action without causing harm
- 4 thereto.
- 5 7. Ordering judgment against Plaintiff for Defendants' costs;
- 6 8. Ordering judgment against Plaintiff for Defendants' reasonable attorney fees
- 7 expended to defend this matter.

8 The Court heard the oral argument of counsel for the Defendant, Newbury, and counsel

9 for the Plaintiff, Labco, Inc. The Court considered the pleadings filed in the action. The

10 Court also considered the following documents and evidence which was brought to the

11 Court's attention before the order on summary judgment was entered, all having been filed

12 under this cause number with the clerk of court:

- 13 A. The Summons and Complaint for Restraint of Forfeiture of Real Estate Contract
- 14 and all exhibits attached thereto;
- 15 B. The Notice of Appearance of Parker, Johnson & Parker;
- 16 C. The Affidavit of Service filed March 29, 2006;
- 17 D. The Answer Affirmative Defenses and Counterclaim and all exhibits attached
- 18 thereto, including a copy of the Declaration of Forfeiture;
- 19 E. The Defendant's Motion for Summary Judgment;
- 20 F. The Declaration of Defense Counsel in Support of Summary Judgment and all
- 21

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT-2

PARKER, JOHNSON & PARKER, PS
A PROFESSIONAL SERVICE CORPORATION
813 LEVEE STREET
P.O. BOX 700
HOQUIAM, WA 98550
FAX (360) 532-5788
TEL (360) 532-5780

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1 exhibits and attachments thereto;

2 G. The Notice of Hearing on Motion for Summary Judgment;

3 H. The temporary order dated June 26, 2006;

4 I. Clerks Notes dated July 6, 2006;

5 J. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary
6 Judgment;

7 K. The Declaration of Bill Bennett dated June 22, 2006 and all attachments thereto;

8 L. The Declaration Of William Morgan Dated June 22, 2006;

9 M. The Declaration of Jerry Nootenboom dated June 22, 2006;

10 N. The Declaration of Gayle Moody dated June 22, 2006;

11 O. The Motion to Pay Monies in the Registry of the Court and Set Aside and or
12 Restrain the Declaration of Forfeiture filed June 26, 2006;

13 P. The Supplemental Declaration of Bill Bennett dated June 29, 2006;

14 Q. The Court's memorandum decision letter to counsel dated October 5, 2006.

15 R. Declaration of Counsel Re: Attorney Fees and Costs.

16 Based on the argument of counsel and the evidence presented, the Court finds:

17 A. The Plaintiff received the Notice of Intent to Forfeit, which was given in
18 compliance with the provisions of RCW 61.30.

19 B. The Plaintiff failed to cure defaults set forth in the Notice of Intent to Forfeit.
20
21

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT-3

PARKER, JOHNSON & PARKER, PS
A PROFESSIONAL SERVICE CORPORATION
813 LEVEE STREET
P.O. BOX 700
HOQUIAM, WA 98550
FAX (360) 532-5788
TEL. (360) 532-5780

6(A)

The Motions under "O" above were not set for hearing. No notice of hearing was filed or served.

*am
BRW*

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- 1 C. The Plaintiff failed to ^{request temporary orders or obtain injunctive relief} ~~properly commence this action~~ before the Defendant
2 recorded the Declaration of Forfeiture.
- 3 D. The Plaintiff did not commence an action to set aside the forfeiture and the time
4 period allowing such action is set forth by statute and has expired.
- 5 E. The Plaintiff no longer has contractual rights or obligations arising from the Real
6 Estate Contract which is the subject of Plaintiff's complaint.
- 7 F. The Lis Pendens filed by Plaintiff in this matter shall be cancelled.
- 8 G. The Declaration of Forfeiture shall not be set aside.
- 9 H. Defendant is entitled to judgment against Plaintiff for reasonable attorney fees and
10 costs as Defendant prevailed in this matter.

11 The undisputed factual record establishes that:

- 12 1. The Plaintiff received the Notice of Intent to Forfeit, which was served in
13 accordance with the provisions of RCW 61.30.
- 14 2. The Plaintiff failed to cure defaults set forth in the Notice of Intent to Forfeit.
- 15 3. The Plaintiff failed to ^{request a temporary order} ~~properly commence this action~~ before the Defendant
16 recorded the Declaration of Forfeiture.
- 17 4. The Declaration of Forfeiture was properly recorded and sent by certified mail
18 to the Plaintiff.
- 19 5. The Plaintiff did not commence an action to set aside the forfeiture and the
20 time period allowing such action is set forth by statute and has expired.
- 21

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT-4

PARKER, JOHNSON & PARKER, PS
A PROFESSIONAL SERVICE CORPORATION
813 LEVIE STREET
P.O. BOX 700
HOQUIAM, WA 98550
FAX (360) 532-5788
TEL (360) 532-5780

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1 No genuine issue of material fact exists on plaintiff's claim against defendant Newbury
2 and defendant Newbury is entitled to judgment as a matter of law dismissing the claim and as
3 follows.

4 Based upon argument of counsel, the pleadings and filings in this matter and the October
5, 2006 memorandum decision by letter to counsel, It Is Ordered:

- 6 1. Defendant Newbury's motion for summary judgment is granted.
- 7 2. Judgment is hereby entered in favor of defendant Newbury, dismissing Plaintiff Labco
8 Inc.'s Complaint for Restraint of Forfeiture of Real Estate Contract.
- 9 3. The Lis Pendens filed by Plaintiff is cancelled.
- 10 4. Defendants' attorneys, Parker, Johnson & Parker, are awarded Judgment for attorney

11 fees and costs in the amount of \$3,887.50. *BRW*

12 5. Plaintiff is ~~ordered to immediately surrender possession of the real property and~~ *may retain possession of the property for 30 days, conditioned*
13 ~~improvements that are the subject of this action.~~ *on proof to defendants counsel no later than 5:00 pm Fri Nov. 17, 2006*
Issue of insurance/possession is cont'd until Mon 11/20 unless stricken by
agreement. Upon failure of plff to
comply with ins. requirements, defendant
may proceed with available legal remedies.

14 Dated this 13th day of ~~October~~ *BRW* 2006. *g*
15 ~~November~~

16 *J. Paul McAuley*
17 JUDGE

18 Presented by:
19 Parker, Johnson & Parker, P.S.

20 Copy Received,
21 Approved for Entry:

20 *Benjamin R. Winkelman*
21 Benjamin R. Winkelman
WSBA#33539

20 *William E. Morgan* J. MICHAEL MORGAN
21 WSBA # WSBA # 18404

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT-5

PARKER, JOHNSON & PARKER, P.S.
A PROFESSIONAL SERVICE CORPORATION
813 LEVEL STREET
P.O. BOX 700
HOQUIAM, WA 98550
FAX (360) 532-5788
TEL (360) 532-5780

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PROOF OF SERVICE

On June 25, 2007, I served a complete and true copy of the original of this document to:

Mr. J. Michael Morgan
1800 Cooper Point Rd. SW Bldg.11
Olympia, WA 98502

by deposit into the United States Mail, first class, postage prepaid.

I declare under penalty of perjury under Washington law that the foregoing is true and correct.

Executed this 25th day of June, 2007.



Benjamin R. Winkelman