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STATE OF WASHINGTON  
*all*

DOCKET NO.  
SUPREME COURT OF THE STATE OF WASHINGTON

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GARY PARDEE, a single person

Respondent/Petitioner below

v.

WILLIS JOLLY and "JANE DOE" JOLLY and the marital community  
composed thereof,

Appellant/Respondent below

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PETITION FOR DISCRETIONARY REVIEW

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### **I. IDENTITY OF PETITIONER**

The petitioner is Gary Pardee (“Pardee”). Pardee was the Plaintiff and prevailing party in the Superior Court and the Respondent in the Court of Appeals. Pardee asks this court to accept review of the Court of Appeals’ decisions of January 30, 2007 and March 20, 2007.

### **II. CITATION TO COURT OF APPEALS DECISIONS**

Pardee appeals the Court of Appeals Decision Number 34006-2-II, filed January 30, 2007 (See Appendix “A”) and the Order on Reconsideration and Amending Opinion, filed on March 20, 2007 (See Appendix “B”).

### **III. ISSUES PRESENTED FOR REVIEW**

Pardee hereby requests discretionary review of the following holdings of the Court of Appeals:

1. Failing to consider the equities of the case despite argument of Pardee and the trial court’s clear concerns about the inequities that Jolly was trying to foist upon Pardee. Court of Appeals Decision Number 34006-2-II, filed January 30, 2007 (See Appendix “A”) and the Order on Reconsideration and Amending Opinion, filed on March 20, 2007 (See Appendix “B”).
2. Overruling the trial court’s factual finding that the last payment was made a “couple of weeks” after December 21, 2004 and

substituting its own finding that: “Pardee made his final payment on November 10, 2004.” Court of Appeals Decision Number 34006-2-II, filed January 30, 2007, pg. 4.

3. Overruling the trial court’s factual finding that Pardee’s notice to exercise the option was given contemporaneously with the final payment. Court of Appeals Decision Number 34006-2-II, filed January 30, 2007, pg.4 as amended in Order on Reconsideration and Amending Opinion, filed on March 20, 2007.

4. Reversing the trial court’s order directing Jolly to sell the property to Pardee.

This case presents the following issues:

1. Can a trial court apply equitable principles to allow a grace period for an option holder to exercise his option when, in expectation of exercising the option, the option holder has made substantial, extensive and expensive improvements to the property and the delay does not prejudice the owner?

2. Is a decision of the trial court that is based upon equity be reviewed under the abuse of discretion standard?

3. Should the findings of fact of the trial court be upheld when

they are supported by the evidence presented at trial?

4. Does the act of issuing a check only suspend the underlying obligation of the maker of the check so that when the check is dishonored the obligation is reinstated?

5. Should the Supreme Court accept review of a decision of the Court of Appeals when that decision is in direct conflict with decisions of the Supreme Court and Court of Appeals?

#### **IV. STATEMENT OF THE CASE**

Plaintiff Gary Pardee (respondent in the Court of Appeals - hereafter “Pardee”) makes his living repairing homes. He is a self-employed handyman. RP 18, ln. 1-2; 63, ln. 3-21. Defendant Willis Jolly (appellant in the Court of Appeals - hereafter “Jolly”) previously held a real estate license. RP 133, ln. 21-3. Prior to the transaction that is the subject of this litigation he had considerable prior experience buying, remodeling, and then reselling houses. RP 133, ln. 24-5; 134, ln. 1-4.

Jolly purchased the subject property in the late 1980s for One Hundred Forty-Eight Thousand Dollars (\$148,000.00). Before Pardee agreed to purchase the home, Jolly had sold an option to purchase the house to a Mr. Peter McMann for the price of Sixteen Thousand Dollars

(\$16,000.00). RP 134, ln. 23-5; RP 135, ln. 6-13. After paying Jolly the full Sixteen Thousand Dollars (\$16,000.00), Mr. McMann, facing medical problems, abandoned his interest in the property. RP 139, ln. 2-21.

In January, 2004 Pardee agreed to purchase the property from Jolly. The agreed purchase price was Three Hundred Thousand Dollars (\$300,000.00). RP 21, ln. 9-16; Ex. 1, para. 4.

At the time of the agreement the house was in a horrible state of disrepair. It had been vacant, indeed uninhabitable, for several years. A real estate agent testified that he noticed the house slowly deteriorating over several years to the point where blackberries were growing into the house. RP 87. Doors (both interior and exterior) were missing. Many of the windows were stolen. The roof leaked profusely; it was partially covered by a wind and weather tattered tarp. There was fire damage. Studs were rotten. Appliances were missing. The kitchen cabinets were gone. Plumbing fixtures were missing. The electrical system was shattered. The dry wall had to be replaced. RP 29, ln. 7-11; 30, ln. 6-25; 31, ln. 1-6; 33, ln. 3-24; 34, 8-22; 35, ln. 3-6. The furnace was demolished and vandalized. RP 108, ln. 8-12. There was no water flow to the house as the pump had failed. RP 55. ln. 1-6.

After hearing all the testimony and reviewing pictures of the home the trial court described the home as a “burned out hulk.” RP 174, ln. 16.

Pardee could not pay the full Three Hundred Thousand Dollar (\$300,000.00) purchase price without a loan. Due to the dilapidated condition of the home the parties understood that conventional financing was not feasible. Pardee thought he would need about a year to put the property in the condition necessary to be used as security for a bank loan. RP 20, ln. 17-21; 71, ln. 5-18.

With all this in mind, Jolly offered an alternative to conventional financing. Jolly offered Pardee a twelve month contract with Ten Thousand Dollars (\$10,000.00) down and monthly installment payments of Five Hundred Dollars (\$500.00). RP 20, ln. 17-21; Ex.1, para. 2. After the first twelve months, the full purchase price was to be paid and closing was to take place a reasonable time thereafter. Ex. 1, para. 2, 4, 11, 12, 13. The Sixteen Thousand Dollars (\$16,000.00) to be paid by Pardee pursuant to the twelve month installment payment agreement was to be applied to reduce the purchase price. Ex. 1, para. 2.

During this twelve-month period of time, Pardee had the right to occupy the premise and make the repairs he deemed necessary and

sufficient for conventional financing. Ex. 1, para 18. The parties agreed that Jolly would continue to hold title during that twelve-month period. Ex. 1, para 13. The agreement provided that in the event that Pardee failed to timely make the monthly installment payments to Jolly, the “agreement immediately terminated” and all payments made by Pardee would be forfeited to Jolly. Ex. 1, para 10. The parties did not reach any agreement as to who would have the rights to any of the anticipated extensive improvements to be made by Pardee in the event of default.

The parties entered into a written contract on January 18, 2004. Ex. 1. The document used was the same one used by Jolly and Mr. McMann in the previous transaction referenced above. Jolly and Pardee just took that contract and “whited out” certain portions and filled in the blanks. RP 25, ln. 4-22. Jolly added the handwritten language at paragraph 18 that gave Pardee the right to occupy and improve the property. RP 77, ln. 11-15.

After the contract was signed Pardee immediately went about preparing the home for a conventional mortgage. RP 59, ln. 10-13. He started by replacing the missing exterior windows and doors. He then began working on the repairing the roof. Because of water damage, roof

sheeting had to be removed and replaced and new shingles attached.

Pardee repaired the frames of all of the skylights which were broken and had been leaking. He then replaced the broken skylights with new ones.

He further framed in, purchased and installed four new additional skylights. Pardee removed the damaged exterior siding, replaced it and trimmed around the exterior windows and doors. He fixed the water system and rebuilt the pump house.

Pardee bought and installed new oak kitchen cabinets. He installed new bathroom fixtures, toilet, sink, vanity and mirrors. He rebuilt, re-sheetrocked, taped, textured and repainted nearly every interior wall in the house. Pardee purchased and installed all new interior doors and replaced all of the molding and primed and painted the same with two coats of paint. He installed a gas fireplace. Pardee installed hardwood floors in the living room, dining room and adjoining hallway. He put in carpet in the master bedroom. In the master bathroom, he removed the broken shower stall and, after modifying the walls, installed a new Jacuzzi tub complete with ceramic tiles. RP 53-57.

Pardee put in over two thousand five hundred (2,500) hours of his own labor into repairing and improving the house. RP 61, ln. 5-16. In

addition to the payments Pardee made to Jolly pursuant to the installment contract, Pardee's out-of-pocket expenses for the improvements to the house exceeded Twenty Thousand Six Hundred Dollars (\$20,600.00). RP 53, ln. 7-18.

Pardee paid Jolly the agreed Ten Thousand Dollars (\$10,000.00) when the contract was signed. He paid all the agreed remaining installment payments on or before they were due. RP 27, ln. 13; RP 29, ln. 3. The contract term was for one twelve-month period ending January 18, 2005. It is undisputed that all of the required installment payments were made at least a week before that date.

In a letter postmarked January 14, 2005 Pardee sent Jolly written notice that he intended to pay the balance of the purchase price. Ex. 5. Subsequently, Pardee asked Jolly to provide a preliminary title insurance commitment as Jolly had agreed to in the contract. Ex. 1, para. 12. Jolly refused. Instead, Jolly maintained that Pardee no longer had the right to title to the property because Pardee's above written notice was not sent *with* the last payment. RP 45, ln 13; RP 49, ln. 17. Jolly bases this conclusion on paragraph 3 of the contract. Brief of Respondent, pg 13-16.

After attempting to resolve the matter unsuccessfully on his own,

Pardee filed suit for specific performance and later amended his complaint to add an alternate claim based upon a quantum meruit for the improvements and repairs made to the house. CP 85. Trial was to the court. The Honorable Katherine Stoltz found that Pardee had complied with the contract, CP 104, and then ordered Jolly to proceed to sell the property to Pardee on the agreed terms. CP 106-7. The trial court also awarded Pardee Ten Thousand Dollars (\$10,000.00) for attorney fees and costs. CP 107. The court added Five Hundred Dollars (\$500.00) to the attorney fee award after denying Jolly's Motion for Reconsideration. RP 175.

The trial court made particular note of the inequity of allowing Jolly to keep the home after all the extensive work and money Pardee had invested in the home. At the hearing on Jolly's Motion for Reconsideration (the motion was denied), based upon the evidence produced at trial, the court said: "In December when the payments for November and December are tendered he [Jolly] decides at that point that the contract is now complete and that he has not had written notice so that he's basically going to have the house, which has been fixed up considerably from a burnt out hulk to a liveable [sp] residence by Mr.

Pardee, he's [Jolly] going to have his cake and eat it too." RP 174-5.

Jolly appealed after his Motion for Reconsideration was denied. The Court of Appeals reversed the trial court. The Court of Appeals first determined that Pardee made his last installment payment on November 10, 2005. The Court of Appeals therefore concluded that the January 14, 2005 notice Pardee sent was not sent contemporaneously as required by the contract. Court of Appeals Decision Number 34006-2-II, filed January 30, 2007, pg 4.

On Motion for Reconsideration the Court of Appeals held that even if the final payment was made in early January, 2005 the notice was not given on the same day the that payment was made. Therefore, the Court of Appeals concluded, the trial court erred in finding that the notice was provided contemporaneously with the last payment. Order on Reconsideration and Amending Opinion, March 20, 2007, pg 1.

## V. ARGUMENT

### A. **Equity Abhors Forfeiture.**

The Court of Appeals' decision deprives Pardee of both the Sixteen Thousand Dollars (\$16,000.00) he paid Jolly and all of the cost and labor of the extensive repairs and improvements Pardee made to

house. The result is a dramatic forfeiture. It is a forfeiture that is totally inconsistent with basic principles of law and equity set forth in several years of decisions of both the Washington Supreme Court and Court of Appeals.

The equity and the injustice of applying a narrow reading and absolute strict compliance with the notification provisions of the contract were raised by Pardee both at trial and at the Court of Appeals. RP 147, ln. 16; RP 149, ln. 10. Brief of Appellant pg. 22. Equitable principles were clearly a matter of persuasive concern to the trial court. RP 174-5. Yet the Court of Appeals decision does not address equity at all.<sup>1</sup>

“It is a longstanding principle in this state that forfeitures are not favored in law or equity.” *McLanahan v. Farmers Ins. Co. of Washington*, 66 Wn. App. 36, 44, 831 P.2d 160, 165 (1992) citing *E.g., Rocha v. McClure Motors, Inc.*, 64 Wn.2d 942, 947, 395 P.2d 191

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<sup>1</sup> . Even if the equity issue had not been raised earlier proceedings; “A reviewing court may consider questions raised for the first time on appeal if necessary to serve the ends of substantial justice or prevent the denial of fundamental rights.” *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 621-3, 465 P.2d 657,660 - 1 (1970) quoting 5 Am.Jur.2d Appeal and Error sec. 548-49, 551 (1962); *Kruse v. Hemp*, 121 Wn.2d 715, 721, 853 P.2d 1373, 1377 (1993) (holding: “In addition, the court may waive the rules of appellate procedure when necessary to “serve the ends of justice.”). RAP 1.2(c).

(1964); *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 782, 215 P.2d 425 (1950); *Shirley v. American Auto. Ins. Co.*, 163 Wn. 136, 144, 300 P. 155 (1931) see also *Ryker v. Stidham*, 17 Wn. App. 83, 89, 561 P.2d 1103 (1977).

Indeed, our courts are extraordinarily reluctant to enforce forfeiture.

But it is the settled rule in this state that forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit of no denial. In order to avoid the harshness of forfeitures and the hardship that often results from strict enforcement thereof, the courts have frequently granted a 'period of grace' to a purchaser before a forfeiture will be decreed. Such procedure is not a denial of the right to forfeit the contract, but is a condition imposed upon that right when the equities of a particular case warrant it.

*Moeller v. Good Hope Farms*, 35 Wn.2d at 783.

In a standard option contract, strict compliance with any agreement regarding how to provide notice of intent to exercise the option is often required. *Kaufman Bros. Const., Inc. v. Olney's Estate*, 29 W. App. 296, 300, 628 P.2d 838, 841 (1981). However, in pure option cases the option holder does not have any equity in the property. Instead, the option holder has only agreed to pay a price for the right to purchase property at a

future date. Conversely, because the contract here is not a standard option contract, Pardee does have equity in the property.

Here, the parties intended that, in addition to the Sixteen Thousand Dollars (\$16,000.00) he agreed to pay Jolly, Pardee would make substantial improvements to the property so that it could be used to secure a bank loan. The parties agreed that Pardee had twelve months to make these improvements. At great expense Pardee made the repairs and improvements that were anticipated. Indeed, he converted a “burnt out hulk” into house in livable condition.

There is no evidence that the parties ever discussed or agreed who would be entitled to these repairs and improvement should Pardee be unable to purchase after the twelve-month period had lapsed. It appears that the parties just did not reach any related agreement or that they even addressed this issue.

Further, unlike a pure option contract, the contract here provided for monthly installment payments and gave Pardee the right to occupy the property throughout the term of the contract. Jolly retained title to the property with the stated contractual right to terminate the contract should Pardee default. Thus, as opposed to a pure option contract, this contract

has many of the characteristics of a real estate installment contract with a one year call provision. See RCW 61.30.010(1). Today, real estate installment contracts, like all similar real estate financing contracts, have statutorily imposed grace (or redemption) periods. RCW 61.30.070(1)(e); 61.24.030-040; 6.23.020. When such statutory protection did not exist, our courts, for many years, applied its equitable powers to avoid forfeitures even where the contract specifically provided that time was of the essence.

We are cognizant of the well established rule in this state that, where time is made of the essence of a contract of sale, the vendor may declare a forfeiture of the contract for the nonpayment of the purchase price or any installment thereof.

It is equally well established, however, that forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit of no denial.

Recognizing the hardship that often attends a strict enforcement of a forfeiture provision, and confronted with a situation where such enforcement would do violence to the principle of substantial justice between the parties concerned, under the particular facts of a case, the courts of this state have frequently relieved a party from default of payment on an executory contract involving real estate by extending to such person a 'period of grace' within which to make such payments

*Dill v. Zielke*, 26 Wn.2d 246, 252, 173 P.2d 977, 979 (1946).

The contract at bar also shares many characteristics with a lease option contract. In general a tenant with an option must strictly comply with giving any required notice to exercise an option in the manner and at the time stipulated to in the contract. *Jones v. Dexter*, 48 Wn.2d 224, 292 P.2d 369 (1956). However, where the tenant has made valuable permanent improvements and intended to exercise the option, it has long been the law that the trial court has the discretion to apply its equitable powers and allow a grace period in order to avoid forfeiture. *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 610-12, 605 P.2d 334, 340-1 (1979).

In *Wharf Restaurant* the option holder inadvertently failed to provide the landlord any notice of its intent to exercise its option until two months after the option deadline had passed. *Id.* at 603-4. The failure was purely inadvertent. The landlord did not suffer any damage, was not prejudiced by the late notification, nor did it change its position in any way as a result of the late notice. *Id.* at 612-13. Therefore, the court held, there were special equitable circumstances justifying the trial court's decision to grant specific performance requiring the Port of Seattle to extend the lease according to the option right despite the Wharf's late

notice. *Id.* at 612. In reaching its decision the *Wharf Restaurant* court quoted *Corbin on Contracts* as follows:

Thus, it was held that the power of the holder of an option to *buy or renew*, contained in a lease, is not necessarily terminated by failure to give notice within the specified time. If, in expectation of exercising the power, the lessee has made valuable improvements, and the delay is short without any change of position by the lessor, the lessee will be given specific performance of the contract to sell or to renew. This is for the purpose of avoiding an inequitable forfeiture.

*Id.* at 611-12 quoting from: *1 A. Corbin, Corbin on Contracts 35*, at 146-47 (1963). (Italic added.)

The Jolly/Pardee contract here was for a twelve-month term ending January 18, 2005. Pardee gave the necessary notice before the end of that term. However, the contract provides that the notice to exercise the option was to be given with the last payment. The last payment would have been due in January, 2005. However, Pardee gratuitously paid all of the installment payments early. The Court of Appeals holding as modified is that even if the last installment payment was made in early January 2005, before the twelve month term had lapsed, Pardee's notice was not postmarked until shortly after that payment was made. Therefore, Pardee's option rights had been forfeited.

Pardee made substantial, extensive and expensive permanent improvements to the property. There is absolutely no evidence that Jolly changed his position or was prejudiced in any way by the timing of the notice - even assuming it was late. In fact, from Jolly's testimony it is clear that he thought Pardee's option rights still existed well after the November 10, 2004 "last payment." Indeed, Jolly was still participating in negotiations regarding holding a long term financing contract on the property late as early January, 2005. RP 117, ln. 5-8; RP 121 ln. 14 - RP 123 ln. 7; RP 138, ln.11-16.

Thus, the Court of Appeals' decision is in direct conflict with the holding of *Wharf Restaurant*. Instead, despite recognizing the incredibly harsh results of its decision, the Court of Appeals did not consider the equities of the case and held that the trial court erred in ordering Jolly to specifically perform and sell Pardee the property under the terms of the contract. Court of Appeals' Decision Number 34006-2-II, filed January 30, 2007, pg. 5, footnote 1.

In overruling the trial court here, the Court of Appeals' decision is in direct conflict with its own holding in *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 87, 867 P.2d 683,684-5 (1994). There the Court

stated:

Thus, it was held that the power of the holder of an option to buy or renew, contained in a lease, is not necessarily terminated by failure to give notice within the specified time. If, in expectation of exercising the power, the lessee has made valuable improvements, and the delay is short without any change of position by the lessor, the lessee will be given specific performance of the contract to sell or renew. This is for the purpose of avoiding an inequitable forfeiture.

*Id.* at 87.

In that same case the court reaffirmed that: “Whether equity requires it 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.” *Id.* at 88. Nevertheless, the Court of Appeal’s ruling here does not consider the trial court’s discretion to apply equitable considerations.

**B. Final Payment.**

The trial court found: “That Mr. Jolly held a One Thousand Dollar (\$1,000.00) check which represented two (2) months worth of payments tendered by Mr. Party [sp] which could not be cashed because Mr. Jolly held it for too long a period of time.” CP 103, para.1.13. This is an unchallenged finding. See Brief of Appellant, pg 1-3. The trial court

went on to hold that “a couple of weeks” after December 21, 2004 Pardee assisted Jolly to enable Jolly to negotiate the above referenced stale \$1,000.00 check by re-issuing the check. CP 103, para. 1.13; CP 103-4 para. 1.14. The trial court did not make a specific finding regarding the exact date that Pardee re-issued Jolly a replacement for the stale \$1,000.00 check; only that it was a “couple of weeks” after December 21, 2005. CP 130, para. 1.13. At trial neither Pardee nor Jolly presented evidence of the exact date when the check was re-issued. Based upon the evidence that was presented, the trial court found that the Pardee’s notice, post marked January 14, 2005 was sent to Jolly “...contemporaneous with the re-issuance of the \$1,000.00 check had occurred [sp].” CP 104, ln. 1-2. See Brief of Respondent pg. 10.

In holding that the notice was not given contemporaneously with the last installment payment, the Court of Appeals made its own finding that contradicts the trial court. In doing so the Court of Appeals’ decision is in direct conflict with many years of case law of this state.

It is the trial court, sitting as the finder of fact, that “must determine disputed facts by weighing the credibility of witnesses’ testimony.” “As an appellate tribunal, we are not entitled to weigh either the evidence or the credibility of witnesses even though we may disagree with the trial court in either regard.” “Even where the evidence is conflicting,

we need determine only whether the evidence most favorable to the respondent supports the challenged findings.”

*Bartel v. Zuckriegel*, 112 Wn. App. 55, 62, 47 P.3d 581, 584 (2002); quoting in order *Johnson v. Dep't of Licensing*, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993); *In re Welfare of Seago*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973), and; *Miller v. Badgley*, 51 Wn. App. 285, 290, 753 P.2d 530 (1988) (citing *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wn. App. 208, 212, 716 P.2d 911 (1986)).

The trial court found that the final payment that was made in early January was the re-issuance of a One Thousand Dollar (\$1000.00) check that had been issued and tendered by Pardee in May of 2004. The Court of Appeals seemed be persuaded that the re-issuance of a stale check is not a “payment” under the contract. Order on Reconsideration and Amending Opinion, March 20, 2007, pg 1. However, the act of issuing a check to pay an obligation, by itself, does not eliminate the underlying obligation of the maker. The effect of the issuing a check is only to suspend the obligation until the check is negotiated. If a check is dishonored, as occurred in this case, the holder may either enforce the instrument or the underlying original obligation. RCW 62A.3-310 (b)(3); see *Rains v.*

*Lewis*, 20 Wn. App. 117, 123, 579 P.2d 980, 984 (1978) (holding that the act of tendering a check is only a conditional payment and if the check is later dishonored the underlying obligation is revived. (Decided under former RCW 62A.3-802(1)(b) repealed and replaced by RCW 62A.3-310 (b)(3))).

Thus, when the bank refused to honor the One Thousand Dollar (\$1,000.00) stale check, Pardee continued to owe that installment payment obligation until the check was re-issued in early January. Consequently, the trial court correctly concluded that when Pardee re-issued the stale May check in early January, that act was the final payment under the party's contract.

## VI. CONCLUSION

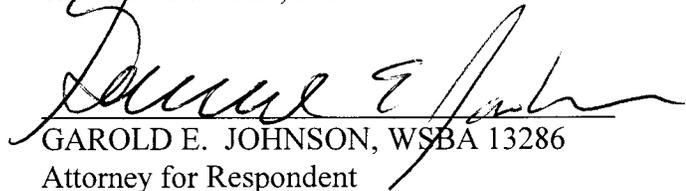
The Court of Appeals' failure to apply equitable principles directly conflicts with the long standing holdings in *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 610-12, 605 P.2d 334, 340-1 (1979) and *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 87, 867 P.2d 683,684-5 (1994). In overruling the trial courts factual findings the Court of Appeals' decision is in direct conflict with the well settled law set forth in *Bartel v. Zuckriegel*, 112 Wn. App. 55, 62, 47 P.3d 581, 584 (2002);

*Johnson v. Dep't of Licensing*, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993); *In re Welfare of Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973); *Miller v. Badgley*, 51 Wn. App. 285, 290, 753 P.2d 530 (1988); and, *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wn. App. 208, 212, 716 P.2d 911 (1986)). In refusing to accept that the last payment was the replacement check issued by Pardee in early January, 2005 the Court of Appeals' decision fails to consider or apply RCW 62A.3-310.

For all the above reasons Pardee respectfully requests that this court accept review of this case pursuant to RAP 13.4(b). Pardee further request that the decisions of the Court of Appeals be reversed and that the holdings and orders of the trial court be affirmed.

Respectfully submitted this 19<sup>th</sup> day of April, 2007.

MANN, JOHNSON, WOOSTER  
& McLAUGHLIN, P.S.

  
GAROLD E. JOHNSON, WSBA 13286  
Attorney for Respondent

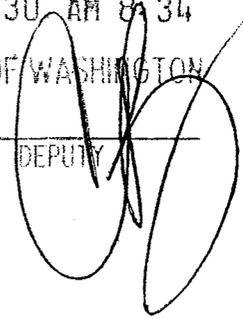
# APPENDIX A

FILED  
COURT OF APPEALS  
DIVISION II

07 JAN 30 AM 8:34

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

GARY PARDEE, a single person,  
Respondent,

v.

WILLIS JOLLY, a single person,  
Appellant.

No. 34006-2-II

UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — Willis Jolly sold Gary Pardee an option to purchase some property in Buckley, Washington. When Pardee tried to buy the property, Jolly refused to sell it. Jolly claimed that the option had lapsed when Pardee failed to notify Jolly of his intent to exercise the option in writing at the same time he made the final option payment as the Option to Purchase Real Estate contract required. Pardee sued Jolly for specific performance or, in the alternative, reimbursement for the improvements he made to the property.

The trial court ruled that Pardee's January 14, 2005 notice was contemporaneous with the last option payment tendered on November 10, 2004, because Jolly did not cash the last check

until about that time. It then ordered Jolly to sell Pardee the property and rejected Jolly's request for damages for the lost reasonable rental value of the property for the time that Pardee occupied the property after the option had expired. The trial court did not address Pardee's alternate request that Jolly reimburse him for improvements he made to the residence. Jolly appeals.

Because we hold that Pardee failed to comply with the option contract's contemporaneous written notice provision, we reverse and remand.

#### ANALYSIS

Following a bench trial, the trial court found that Pardee timely notified Jolly of his intent to exercise his option to purchase Jolly's Buckley property. Pardee had tendered all of his option money payments to Jolly by November, 2004, and did not notify Jolly in writing of his intent to exercise his option until January 14, 2005. But Jolly had delayed cashing two of the earlier option payments, the \$10,000 down payment check dated January 18, 2004, and the \$1,000 bi-monthly payment tendered in May. Due to the age of the checks, the bank would not honor them without Pardee's assistance and renewed approval, which Pardee honorably provided. Thus, the trial court reasoned, Pardee did not make his final option payment until the checks were actually deposited in late December or early January, making Pardee's January 14, 2005 written notice of intent to purchase contemporaneous with the last option payment. Although the trial court's ruling was fair, it was erroneous.

In its ruling, the trial court addressed both legal and factual issues which we now review. Whether the option to purchase expired under the terms of the contract is an issue of law. When

No. 34006-2-II

the various checks were tendered and cashed and whether Pardee gave Jolly written notice of his intent to exercise the option to purchase are factual issues.

We review findings of fact for substantial evidence. Under this standard the evidence in the record must be sufficient to persuade a reasonable person “that the declared premise is true.” *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If a trial court’s finding is supported by substantial evidence, we will not substitute our judgment for that of the trial court even though we may have resolved a factual dispute differently in the first instance. *Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 314 P.2d 622 (1957).

We review conclusions of law de novo. See *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003); *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

We construe a contract to reflect the parties’ intent at the time of signing and give the language its ordinary meaning. *Forest Mktg. Enters., Inc. v. Dep’t of Natural Res.*, 125 Wn. App. 126, 132, 104 P.3d 40 (2005). “Words should be given their ordinary meaning . . . ; contracts should be construed to reflect the intent of the parties . . . ; and courts, under the guise of construction or interpretation, should not make another or different contract for the parties.” *Corbray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982) (citing *Poggi v. Tool Research & Eng’g Corp.*, 75 Wn.2d 356, 451 P.2d 296 (1969); *Ames v. Baker*, 68 Wn.2d 713, 415 P.2d 74 (1966); *Fancher Cattle Co. v. Cascade Packing, Inc.*, 26 Wn. App. 407, 613 P.2d 178 (1980)). Where interpretation is required, we adopt the interpretation that best reflects the parties’ reasonable expectations. See *Balfour, Guthrie & Co. Ltd. v. Commercial Metals Co.*, 93 Wn.2d 199, 202, 607 P.2d 856 (1980).

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The relevant portion of the contract at issue here reads:

Once the purchaser has paid the full amount of option money, the option shall terminate unless the Purchaser notifies the Seller in writing at the time the Purchaser makes the last option payment that the Purchaser is exercising its option to purchase. . . . At any time during the term of the option, the Purchaser may pay the full amount of the option money due and must, at the same time, exercise its option to purchase the Property by giving written notice to the Seller.

Ex. 1.

We agree with the trial court that “at the same time” means “contemporaneous.”

But under this plain reading, the record does not support the trial court’s conclusion that Pardee’s January 14, 2005 notice was “contemporaneous” with his final option payment. Pardee made his final payment on November 10, 2004. It is undisputed that he did not provide Jolly with written notice of his intent to exercise his option to purchase on that date, although the two had discussed Pardee’s desire to purchase the property if Jolly would carry the contract.

Even if we were to construe the May check as the final payment because it was the final check Jolly cashed, Pardee still did not meet the contract’s contemporaneous written notice requirement. The option contract clearly stated that the written notice and the final payment are to be made “at the same time.” Ex. 1. Substantial evidence in the record shows that Jolly cashed the check sometime in December, and that Pardee mailed his written notice of intent to exercise the option to purchase around January 14, 2005. Thus, even under this strained and overly broad reading of the contract, Pardee did not comply with the provision requiring him to provide the written notice “at the same time” or “contemporaneous” with the final payment. Pardee did not exercise his option as required by the agreement and it expired.

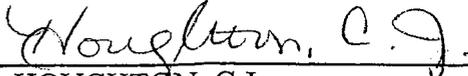
No. 34006-2-II

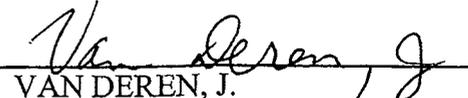
We reverse the trial court's order directing that Jolly sell Pardee the property and remand for further proceedings consistent with this opinion.<sup>1</sup>

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
QUINN-BRINTNALL, J.

We concur:

  
\_\_\_\_\_  
HOUGHTON, C.J.

  
\_\_\_\_\_  
VAN DEREN, J.

<sup>1</sup> We are mindful of the harsh result the law requires in this case, but courts lack the legal authority to dictate that people conduct their business dealings with honor and integrity or to alter contracts, even when to do so would avoid an unjust result. *See Findlay v. United Pac. Ins. Co.*, 129 Wn.2d 368, 380, 917 P.2d 116 (1996) (holding appellate courts will not, “under the guise of public policy, rewrite a clear contract between the parties”); *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 483, 687 P.2d 1139 (1984) (holding appellate courts “shall not invoke public policy to override an otherwise proper contract even though its terms may be harsh and its necessity doubtful”).

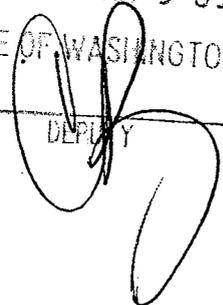
## APPENDIX B

FILED  
COURT OF APPEALS  
DIVISION II

07 MAR 20 AM 9:39

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY



**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

GARY PARDEE, a single person,  
  
Respondent,

v.

WILLIS JOLLY, a single person,  
  
Appellant.

No. 34006-2-II

ORDER ON RECONSIDERATION AND  
AMENDING OPINION

The respondent has moved for reconsideration of the court's unpublished opinion filed January 30, 2007. The court now rules as follows:

(1) The last paragraph on page 4 of the court's opinion is modified to read as follows:

Even if we were to construe the May "check" as the final payment because it was the final check Jolly cashed, Pardee still did not meet the contract's contemporaneous written notice requirement. The option contract clearly stated that the written notice and the final payment are to be made "at the same time." Ex. 1. Substantial evidence in the trial record<sup>1</sup> shows that Jolly cashed the "check" sometime in early January, and that Pardee did not write the notice of intent to exercise the option to purchase until after that instrument was cashed. The written notice was dated January 13, 2005, and post marked January 14, 2005. Ex. 5. Thus, even under this strained and overly broad reading of the contract, Pardee did not comply with the provision requiring him to provide written notice "at the same time" or "contemporaneous" with the final payment. Pardee did not exercise his option as required by the agreement and it expired.

<sup>1</sup> A copy of the cancelled instrument at issue was provided to the trial court, post-verdict, as an attachment to Jolly's motion for reconsideration. The copy shows the "check" Pardee tendered in May was actually a money order issued on March 8, 2004, and cashed on January 11, 2005.

(2) In all other respects, the motion for reconsideration is denied.

**IT IS SO ORDERED**

DATED this 20<sup>TH</sup> day of MARCH, 2007.

Quinn-Brintnall, J.  
QUINN-BRINTNALL, J.

We concur:

Houghton, C.J.  
HOUGHTON, C.J.

Van Deren, J.  
VAN DEREN, J.

# STATUTES

**RCW 6.23.020****Time for redemption from purchaser — Amount to be paid.**

(1) Unless redemption rights have been precluded pursuant to RCW 61.12.093 et seq., the judgment debtor or any redemptioner may redeem the property from the purchaser at any time (a) within eight months after the date of the sale if the sale is pursuant to judgment and decree of foreclosure of any mortgage executed after June 30, 1961, which mortgage declares in its terms that the mortgaged property is not used principally for agricultural or farming purposes, and in which complaint the judgment creditor has expressly waived any right to a deficiency judgment, or (b) otherwise within one year after the date of the sale.

(2) The person who redeems from the purchaser must pay: (a) The amount of the bid, with interest thereon at the rate provided in the judgment to the time of redemption, together with (b) the amount of any assessment or taxes which the purchaser has paid thereon after purchase, and like interest on such amount from time of payment to time of redemption, together with (c) any sum paid by the purchaser on a prior lien or obligation secured by an interest in the property to the extent the payment was necessary for the protection of the interest of the judgment debtor or a redemptioner, and like interest upon every payment made from the date of payment to the time of redemption, and (d) if the redemption is by a redemptioner and if the purchaser is also a creditor having a lien, by judgment, decree, deed of trust, or mortgage, prior to that of the redemptioner, other than the judgment under which such purchase was made, the redemptioner shall also pay the amount of such lien with like interest: PROVIDED, HOWEVER, That a purchaser who makes any payment as mentioned in (c) of this subsection shall submit to the sheriff the affidavit required by RCW 6.23.080, and any purchaser who pays any taxes or assessments or has or acquires any such lien as mentioned in (d) of this subsection must file the statement required in RCW 6.23.050 and provide evidence of the lien as required by RCW 6.23.080.

[1987 c 442 § 702; 1984 c 276 § 4; 1965 c 80 § 4; 1961 c 196 § 1; 1899 c 53 § 8; RRS § 595. Formerly RCW 6.24.140.]

**Notes:**

**Application — 1984 c 276:** See note following RCW 6.21.020.

## RCW 61.24.030

### Requisites to trustee's sale.

It shall be requisite to a trustee's sale:

(1) That the deed of trust contains a power of sale;

(2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;

(3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;

(4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;

(5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated;

(6) That prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must have a street address in this state where personal service of process may be made; and

(7) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor at their last known addresses by both first class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information:

(a) A description of the property which is then subject to the deed of trust;

(b) Each county in which the deed of trust is recorded and the document number given to the deed of trust upon recording by each county auditor or recording officer;

(c) That the beneficiary has declared the borrower or grantor to be in default, and a concise statement of the default alleged;

(d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;

(e) An itemized account of all other specific charges, costs, or fees that the borrower, grantor, or any guarantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;

(f) The total of (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;

(g) That failure to cure the alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal, and publication of a notice of sale, and that the property described in (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future;

(h) That the effect of the recordation, transmittal, and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;

(i) That the effect of the sale of the grantor's property by the trustee will be to deprive the grantor of all their interest in the property described in (a) of this subsection; and

(j) That the borrower, grantor, and any guarantor has recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground.

[1998 c 295 § 4; 1990 c 111 § 1; 1987 c 352 § 2; 1985 c 193 § 3; 1975 1st ex.s. c 129 § 3; 1965 c 74 § 3.]

**Notes:**

**Application -- 1985 c 193:** See note following RCW 61.24.020.

**RCW 61.24.040  
Foreclosure and sale — Notice of sale.**

A deed of trust foreclosed under this chapter shall be foreclosed as follows:

(1) At least ninety days before the sale, the trustee shall:

(a) Record a notice in the form described in RCW 61.24.040(1)(f) in the office of the auditor in each county in which the deed of trust is recorded;

(b) To the extent the trustee elects to foreclose its lien or interest, or the beneficiary elects to preserve its right to seek a deficiency judgment against a borrower or grantor under RCW 61.24.100(3)(a), and if their addresses are stated in a recorded instrument evidencing their interest, lien, or claim of lien, or an amendment thereto, or are otherwise known to the trustee, cause a copy of the notice of sale described in RCW 61.24.040(1)(f) to be transmitted by both first class and either certified or registered mail, return receipt requested, to the following persons or their legal representatives, if any, at such address:

(i) The borrower and grantor;

(ii) The beneficiary of any deed of trust or mortgagee of any mortgage, or any person who has a lien or claim of lien against the property, that was recorded subsequent to the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;

(iii) The vendee in any real estate contract, the lessee in any lease, or the holder of any conveyances of any interest or estate in any portion or all of the property described in such notice, if that contract, lease, or conveyance of such interest or estate, or a memorandum or other notice thereof, was recorded after the recordation of the deed of trust being foreclosed and before the recordation of the notice of sale;

(iv) The last holder of record of any other lien against or interest in the property that is subject to a subordination to the deed of trust being foreclosed that was recorded before the recordation of the notice of sale;

(v) The last holder of record of the lien of any judgment subordinate to the deed of trust being foreclosed; and

(vi) The occupants of property consisting solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, whether or not the occupant's rental agreement is recorded, which notice may be a single notice addressed to "occupants" for each unit known to the trustee or beneficiary;

(c) Cause a copy of the notice of sale described in RCW 61.24.040(1)(f) to be transmitted by both first class and either certified or registered mail, return receipt requested, to the plaintiff or the plaintiff's attorney of record, in any court action to foreclose a lien or other encumbrance on all or any part of the property, provided a court action is pending and a lis pendens in connection therewith is recorded in the office of the auditor of any county in which all or part of the property is located on the date the notice is recorded;

(d) Cause a copy of the notice of sale described in RCW 61.24.040(1)(f) to be transmitted by both first class and either certified or registered mail, return receipt requested, to any person who has recorded a request for notice in accordance with RCW 61.24.045, at the address specified in such person's most recently recorded request for notice;

(e) Cause a copy of the notice of sale described in RCW 61.24.040(1)(f) to be posted in a conspicuous place on the property, or in lieu of posting, cause a copy of said notice to be served upon any occupant of the property;

(f) The notice shall be in substantially the following form:

NOTICE OF TRUSTEE'S SALE

I.

NOTICE IS HEREBY GIVEN that the undersigned Trustee will on the . . . . day of . . . . ., . . . , at the hour of . . . . o'clock . . . . M. at . . . . . [street address and location if inside a building] in the City of . . . . .

., State of Washington, sell at public auction to the highest and best bidder, payable at the time of sale, the following described real property, situated in the County(ies) of . . . . ., State of Washington, to-wit:

[If any personal property is to be included in the trustee's sale, include a description that reasonably identifies such personal property]

which is subject to that certain Deed of Trust dated . . . . ., recorded . . . . ., under Auditor's File No. . . . ., records of . . . . . County, Washington, from . . . . ., as Grantor, to . . . . ., as Trustee, to secure an obligation in favor of . . . . ., as Beneficiary, the beneficial interest in which was assigned by . . . . ., under an Assignment recorded under Auditor's File No. . . . . [Include recording information for all counties if the Deed of Trust is recorded in more than one county.]

II.

No action commenced by the Beneficiary of the Deed of Trust is now pending to seek satisfaction of the obligation in any Court by reason of the Borrower's or Grantor's default on the obligation secured by the Deed of Trust.

[If there is another action pending to foreclose other security for all or part of the same debt, qualify the statement and identify the action.]

III.

The default(s) for which this foreclosure is made is/are as follows:

[If default is for other than payment of money, set forth the particulars]

Failure to pay when due the following amounts which are now in arrears:

IV.

The sum owing on the obligation secured by the Deed of Trust is: Principal \$ . . . . ., together with interest as provided in the note or other instrument secured from the . . . . day of . . . . ., and such other costs and fees as are due under the note or other instrument secured, and as are provided by statute.

V.

The above-described real property will be sold to satisfy the expense of sale and the obligation secured by the Deed of Trust as provided by statute. The sale will be made without warranty, express or implied, regarding title, possession, or encumbrances on the . . . . day of . . . . ., . . . . The default(s) referred to in paragraph III must be cured by the . . . . day of . . . . ., . . . . (11 days before the sale date), to cause a discontinuance of the sale. The sale will be discontinued and terminated if at any time on or before the . . . . day of . . . . ., . . . . (11 days before the sale date), the default(s) as set forth in paragraph III is/are cured and the Trustee's fees and costs are paid. The sale may be terminated any time after the . . . . day of . . . . ., . . . . (11 days before the sale date), and before the sale by the Borrower, Grantor, any Guarantor, or the holder of any recorded junior lien or encumbrance paying the entire principal and interest secured by the Deed of Trust, plus costs, fees, and advances, if any, made pursuant to the terms of the obligation and/or Deed of Trust, and curing all other defaults.

VI.

A written notice of default was transmitted by the Beneficiary or Trustee to the Borrower and Grantor at the following addresses:

.....  
.....  
.....

by both first class and certified mail on the . . . . day of . . . . ., . . . ., proof of which is in the possession of the Trustee; and the Borrower and Grantor were personally served on the . . . . day of . . . . ., . . . ., with said written notice of default or the written notice of default was posted in a conspicuous place on the real property described in paragraph I above, and the Trustee has possession of proof of such service or posting.

VII.

The Trustee whose name and address are set forth below will provide in writing to anyone requesting it, a statement of all costs and fees due at any time prior to the sale.

VIII.

The effect of the sale will be to deprive the Grantor and all those who hold by, through or under the Grantor of all their interest in the above-described property.

IX.

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

[Add Part X to this notice if applicable under RCW 61.24.040(9)]

.....

....., Trustee  
 ..... |  
 .. |  
 ..... > Address  
 .. |  
 ..... |  
 ..... } Phone  
 ..

[Acknowledgment]

(2) In addition to providing the borrower and grantor the notice of sale described in RCW 61.24.040(1)(f), the trustee shall include with the copy of the notice which is mailed to the grantor, a statement to the grantor in substantially the following form:

NOTICE OF FORECLOSURE

Pursuant to the Revised Code of Washington,

Chapter 61.24 RCW

The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to . . . . ., the Beneficiary of your Deed of Trust and owner of the obligation secured thereby. Unless the default(s) is/are cured, your property will be sold at auction on the . . . . day of . . . . .

To cure the default(s), you must bring the payments current, cure any other defaults, and pay accrued late charges and other costs, advances, and attorneys' fees as set forth below by the . . . . day of . . . . . [11 days before the sale date]. To date, these arrears and costs are as follows:

	Currently due to reinstate on. . . . . . . . . .	Estimated amount that will be due to reinstate on. . . . . . . . . . (11 days before the date set for sale)
Delinquent payments from. . . . ., . . . . , in the amount of \$. . . . /mo.:	\$ . . . .	\$ . . . .
Late charges in the total amount of:	\$ . . . .	\$ . . . . Estimated

		Amounts
Attorneys' fees:	\$. . . .	\$. . . .
Trustee's fee:	\$. . . .	\$. . . .
Trustee's expenses: (Itemization)		
Title report	\$. . . .	\$. . . .
Recording fees	\$. . . .	\$. . . .
Service/Posting		
of Notices	\$. . . .	\$. . . .
Postage/Copying		
expense	\$. . . .	\$. . . .
Publication	\$. . . .	\$. . . .
Telephone		\$. . . .
charges	\$. . . .	
Inspection fees	\$. . . .	\$. . . .
.....	\$. . . .	\$. . . .
.....	\$. . . .	\$. . . .
<b>TOTALS</b>	<b>\$. . . .</b>	<b>\$. . . .</b>

As to the defaults which do not involve payment of money to the Beneficiary of your Deed of Trust, you must cure each such default. Listed below are the defaults which do not involve payment of money to the Beneficiary of your Deed of Trust. Opposite each such listed default is a brief description of the action necessary to cure the default and a description of the documentation necessary to show that the default has been cured.

Default	Description of Action Required to Cure and Documentation Necessary to Show Cure
.....	.....
..	
	.....
	.....
.....	.....
..	
	.....
	.....

You may reinstate your Deed of Trust and the obligation secured thereby at any time up to and including the . . . day of . . . . ., . . . [11 days before the sale date], by paying the amount set forth or estimated above and by curing any other defaults described above. Of course, as time passes other payments may become due, and any further payments coming due and any additional late charges must be added to your reinstating payment. Any new defaults not involving payment of money that occur after the date of this notice must also be cured in order to effect reinstatement. In addition, because some of the charges can only be estimated at this time, and because the amount necessary to reinstate may include presently unknown expenditures required to preserve the property or to comply with state or local law, it will be necessary for you to contact the Trustee before the time you tender reinstatement so that you may be advised of the exact amount you will be required to pay. Tender of payment or performance must be made to: . . . . ., whose address is . . . . ., telephone ( ) . . . . . AFTER THE . . . . DAY OF . . . . ., . . . ., YOU MAY NOT REINSTATE YOUR DEED OF TRUST BY PAYING THE BACK PAYMENTS AND COSTS AND FEES AND CURING THE OTHER DEFAULTS AS OUTLINED ABOVE. In such a case, you will only be able to stop the sale by paying, before the sale, the total principal balance (\$ . . . . .) plus accrued interest, costs and advances, if any, made pursuant to the terms of the documents and by curing the other defaults as outlined above.

You may contest this default by initiating court action in the Superior Court of the county in which the sale is to be held. In such action, you may raise any legitimate defenses you have to this default. A copy of your Deed of Trust and

documents evidencing the obligation secured thereby are enclosed. You may wish to consult a lawyer. Legal action on your part may prevent or restrain the sale, but only if you persuade the court of the merits of your defense.

The court may grant a restraining order or injunction to restrain a trustee's sale pursuant to RCW 61.24.130 upon five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. Notice and other process may be served on the trustee at:

NAME: .....  
ADDRESS: .....  
TELEPHONE NUMBER: .....

If you do not reinstate the secured obligation and your Deed of Trust in the manner set forth above, or if you do not succeed in restraining the sale by court action, your property will be sold. The effect of such sale will be to deprive you and all those who hold by, through or under you of all interest in the property;

(3) In addition, the trustee shall cause a copy of the notice of sale described in RCW 61.24.040(1)(f) (excluding the acknowledgment) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once on or between the thirty-fifth and twenty-eighth day before the date of sale, and once on or between the fourteenth and seventh day before the date of sale;

(4) On the date and at the time designated in the notice of sale, the trustee or its authorized agent shall sell the property at public auction to the highest bidder. The trustee may sell the property in gross or in parcels as the trustee shall deem most advantageous;

(5) The place of sale shall be at any designated public place within the county where the property is located and if the property is in more than one county, the sale may be in any of the counties where the property is located. The sale shall be on Friday, or if Friday is a legal holiday on the following Monday, and during the hours set by statute for the conduct of sales of real estate at execution;

(6) The trustee may for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days by a public proclamation at the time and place fixed for sale in the notice of sale or, alternatively, by giving notice of the time and place of the postponed sale in the manner and to the persons specified in RCW 61.24.040(1) (b), (c), (d), and (e) and publishing a copy of such notice once in the newspaper(s) described in RCW 61.24.040(3), more than seven days before the date fixed for sale in the notice of sale. No other notice of the postponed sale need be given;

(7) The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value, except that these recitals shall not affect the lien or interest of any person entitled to notice under RCW 61.24.040(1), if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;

(8) The sale as authorized under this chapter shall not take place less than one hundred ninety days from the date of default in any of the obligations secured.

(9) If the trustee elects to foreclose the interest of any occupant or tenant of property comprised solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, the following notice shall be included as Part X of the Notice of Trustee's Sale:

X.

NOTICE TO OCCUPANTS OR TENANTS

The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against the grantor under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants and tenants. After the 20th day following the sale the purchaser has the right to evict occupants and tenants by summary proceedings under the unlawful detainer act, chapter 59.12 RCW.

(10) Only one copy of all notices required by this chapter need be given to a person who is both the borrower and the grantor. All notices required by this chapter that are given to a general partnership are deemed given to each of its general partners, unless otherwise agreed by the parties.

[1998 c 295 § 5; 1989 c 361 § 1; 1987 c 352 § 3; 1985 c 193 § 4; 1981 c 161 § 3; 1975 1st ex.s. c 129 § 4; 1967 c 30 § 1; 1965 c 74 § 4.]

**Notes:**

**Application — 1985 c 193:** See note following RCW 61.24.020.

## **RCW 61.30.010 Definitions.**

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Contract" or "real estate contract" means any written agreement for the sale of real property in which legal title to the property is retained by the seller as security for payment of the purchase price. "Contract" or "real estate contract" does not include earnest money agreements and options to purchase.

(2) "Cure the default" or "cure" means to perform 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.

(3) "Declaration of forfeiture" means the notice described in RCW 61.30.070(2).

(4) "Forfeit" or "forfeiture" means to cancel the purchaser's rights under a real estate contract and to terminate all right, title, and interest in the property of the purchaser and of persons claiming by or through the purchaser, all to the extent provided in this chapter, because of a breach of one or more of the purchaser's obligations under the contract. A judicial foreclosure of a real estate contract as a mortgage shall not be considered a forfeiture under this chapter.

(5) "Notice of intent to forfeit" means the notice described in RCW 61.30.070(1).

(6) "Property" means that portion of the real property which is the subject of a real estate contract, legal title to which has not been conveyed to the purchaser.

(7) "Purchaser" means the person denominated in a real estate contract as the purchaser of the property or an interest therein or, if applicable, the purchaser's successors or assigns in interest to all or any part of the property, whether by voluntary or involuntary transfer or transfer by operation of law. If the purchaser's interest in the property is subject to a proceeding in probate, a receivership, a guardianship, or a proceeding under the federal bankruptcy laws, "purchaser" means the personal representative, the receiver, the guardian, the trustee in bankruptcy, or the debtor in possession, as applicable. However, "purchaser" does not include an assignee or any other person whose only interest or claim is in the nature of a lien or other security interest.

(8) "Required notices" means the notice of intent to forfeit and the declaration of forfeiture.

(9) "Seller" means the person denominated in a real estate contract as the seller of the property or an interest therein or, if applicable, the seller's successors or assigns in interest to all or any part of the property or the contract, whether by voluntary or involuntary transfer or transfer by operation of law. If the seller's interest in the property is subject to a proceeding in probate, a receivership, a guardianship, or a proceeding under the federal bankruptcy laws, "seller" means the personal representative, the receiver, the guardian, the trustee in bankruptcy, or the debtor in possession, as applicable. However, "seller" does not include an assignee or any other person whose only interest or claim is in the nature of a lien or other security interest and does not include an assignee who has not been conveyed legal title to any portion of the property.

(10) "Time for cure" means the time provided in RCW 61.30.070(1)(e) as it may be extended as provided in this chapter or any longer period agreed to by the seller.

[1988 c 86 § 1; 1985 c 237 § 1.]

**RCW 61.30.070****Notice of intent to forfeit — Declaration of forfeiture — Contents.**

(1) The notice of intent to forfeit shall contain the following:

- (a) The name, address, and telephone number of the seller and, if any, the seller's agent or attorney giving the notice;
- (b) A description of the contract, including the names of the original parties to the contract, the date of the contract, and the recording number of the contract or memorandum thereof;
- (c) A legal description of the property;
- (d) A description of each default under the contract on which the notice is based;
- (e) A statement that the contract will be forfeited if all defaults are not cured by a date stated in the notice which is not less than ninety days after the notice of intent to forfeit is recorded or any longer period specified in the contract or other agreement with the seller;
- (f) A statement of the effect of forfeiture, including, to the extent applicable that: (i) All right, title, and interest in the property of the purchaser and, to the extent elected by the seller, of all persons claiming through the purchaser or whose interests are otherwise subordinate to the seller's interest in the property shall be terminated; (ii) the purchaser's rights under the contract shall be canceled; (iii) 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; (iv) all of the purchaser's rights in all improvements made to the property and in unharvested crops and timber thereon shall belong to the seller; and (v) the purchaser and all other persons occupying the property whose interests are forfeited shall be required to surrender possession of the property, improvements, and unharvested crops and timber to the seller ten days after the declaration of forfeiture is recorded;
- (g) An itemized statement or, to the extent not known at the time the notice of intent to forfeit is given or recorded, a reasonable estimate of all payments of money in default and, for defaults not involving the failure to pay money, a statement of the action required to cure the default;
- (h) An itemized statement of all other payments, charges, fees, and costs, if any, or, to the extent not known at the time the notice of intent is given or recorded, a reasonable estimate thereof, that are or may be required to cure the defaults;
- (i) A statement that the person to whom the notice is given may have the right to contest the forfeiture, or to seek an extension of time to cure the default if the default does not involve a failure to pay money, or both, by commencing a court action by filing and serving the summons and complaint before the declaration of forfeiture is recorded;
- (j) A statement that the person to whom the notice is given may have 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 seller's interest in the property; that the excess, if any, of the highest bid at the sale over 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; and that any action to obtain an order for public sale must be commenced by filing and serving the summons and complaint before the declaration of forfeiture is recorded;
- (k) A statement that the seller is not required to give any person any other notice of default before the declaration which completes the forfeiture is given, or, if the contract or other agreement requires such notice, the identification of such notice and a statement of to whom, when, and how it is required to be given; and

(l) Any additional information required by the contract or other agreement with the seller.

(2) If the default is not cured before the time for cure has expired, the seller may forfeit the contract by giving and recording a declaration of forfeiture which contains the following:

- (a) The name, address, and telephone number of the seller;
- (b) A description of the contract, including the names of the original parties to the contract, the date of the contract, and the recording number of the contract or memorandum thereof;
- (c) A legal description of the property;

(d) To the extent applicable, a statement that all the purchaser's rights under the contract are canceled and all right, title, and interest in the property of the purchaser and of all persons claiming an interest in all or any portion of the property through the purchaser or which is otherwise subordinate to the seller's interest in the property are terminated except to the extent otherwise stated in the declaration of forfeiture as to persons or claims named, identified, or described;

(e) To the extent applicable, a statement that 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 and timber) are required to surrender such possession to the seller not later than a specified date, which shall not be less than ten days after the declaration of forfeiture is recorded or such longer period provided in the contract or other agreement with the seller;

(f) A statement that the forfeiture was conducted in compliance with all requirements of this chapter in all material respects and applicable provisions of the contract;

(g) A statement that the purchaser and any person claiming any interest in the purchaser's rights under the contract or in the property who are 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; and

(h) Any additional information required by the contract or other agreement with the seller.

(3) The seller may include in either or both required notices any additional information the seller elects to include which is consistent with this chapter and with the contract or other agreement with the seller.

[1988 c 86 § 7; 1985 c 237 § 7.]

WASHINGTON STATE SUPREME COURT

GARY PARDEE, a single,  
person,

Respondent,

v.

WILLIS JOLLY and "JANE  
DOE" JOLLY, and the marital  
community composed thereof,

Appellants.

) Court of Appeals  
) Cause No. 34006-2-II

) CERTIFICATE OF  
) SERVICE

I certify that on the 19 day of April, 2007, I caused a  
true and correct copy of the Petition for Discretionary Review to  
be served on the following in the manner indicated below:

By personal service:

David Hammermaster  
1207 Main Street  
Sumner, WA 98390

I certify that the foregoing is true and correct.

DATED this 19 day of April, 2007, at <sup>Bonney Lake</sup> ~~Facema~~, Washington.

  
Printed name: Penny Sobolewski

CERTIFICATE OF SERVICE - 1

DOCKET NO.  
SUPREME COURT OF THE STATE OF WASHINGTON

---

GARY PARDEE, a single person

Respondent/Petitioner below

v.

WILLIS JOLLY and "JANE DOE" JOLLY and the marital community  
composed thereof,

Appellant/Respondent below

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PETITION FOR DISCRETIONARY REVIEW

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Garold E. Johnson, WSBA #13286  
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RECEIVED

APR 19 2007

HAMMERMASTER  
LAW OFFICES, PLLC