NO. 97690-2

SUPREME COURT
OF THE STATE OF WASHINGTON

BORTON & SONS, INC.,
a Washington state corporation

Plaintiff / Respondent

v.

BURBANK PROPERTIES, LLC,
a Washington state limited liability company

Defendant / Petitioner

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Borton & Sons, Inc. (Borton) submits this Answer to the Petition for Review filed by Burbank Properties, LLC (Burbank).

II. INTRODUCTION

This case is a contract dispute between two commercial parties over Burbank's failure to timely exercise an option to repurchase approximately 160 acres of agricultural land in Walla Walla County. Burbank sold the land to Borton for $1,550,000 and leased the land for 3 years after its sale. The lease had an option for Burbank to repurchase the land by paying Borton $1,800,000, but only if it exercised that option in writing, no later than December 31, 2017.

Burbank had 674 days (anytime during the lease until December 31, 2017) in which to provide written notice to Borton of its unconditional exercise of the option to repurchase the property. It is undisputed that Burbank failed to do so.

Burbank knew of the repurchase deadline and Borton did nothing to deceive Burbank or change the contract requirements. Burbank admitted it was aware of the contractual deadline. Burbank simply failed to timely exercise its option, and unsuccessfully argued before the Court

of Appeals that its admitted negligence (trying to exercise an expired option 8 days late) should be excused in equity.

The Court of Appeals correctly held that the applicable standard of review from the trial court's summary judgment determination was de novo. The Court of Appeals also correctly held that this case should be resolved by the long-standing rule that real estate options expire unless exercised in strict accordance with their terms. The Court of Appeals correctly found that no equitable grace period should have been extended to Burbank because it made no substantial or valuable improvement to the property and thus would not suffer an inequitable forfeiture under established equitable principles. The Court of Appeals' decision is entirely consistent (and not in conflict) with existing Supreme Court or other Court of Appeals' decisions and thus, review of this decision is not warranted.

III. COUNTER STATEMENT OF ISSUES PRESENTED

The Court of Appeals correctly decided that Borton was entitled to judgment, as a matter of law, to uphold the unambiguous contract that the parties freely negotiated and entered into in this case. Properly framed, the issues presented to this Court for consideration are as follows:

1. Whether the Court of Appeals erred in applying the age-old and recognized de novo standard of review in reviewing a summary judgment decision of the trial court.
2. Where a commercial lease freely entered into by the parties provides a clear and unambiguous deadline to exercise an option to purchase property, whether the option holder should be allowed to escape its failure to comply with the contractual deadline without having made substantial permanent improvements to the property.
3. Whether there is any evidence in the record to support a finding of an inequitable forfeiture in connection with Burbank's use of the property.

IV. STATEMENT OF FACTS

This case involves the right to purchase 163.78 acres of farmland located in Walla Walla County near Pasco, Washington. (CP 112). Of that land, 153 acres are irrigable, and approximately 135 acres were actually irrigated. (CP 119). The irrigable property was previously utilized to grow various row crops, on a rotational basis which would include potatoes, corn, grass seed and timothy grass hay. (CP 119,128). Burbank leased this land from a previous owner/landlord in the years

2000-2012. (CP 104). It purchased the land from that landlord in March 2012. (CP 104).

In 2014-2015, Burbank's farming operations faced serious cash flow issues. This resulted in Burbank's lender filing several different lawsuits against related Burbank farming entities. These lawsuits were able to be resolved, but one of the conditions was to sell the Burbank land at issue in this case in order to generate cash. (CP 104)

The property was listed for sale at a sales price of $1,575,000. (CP 154). Borton purchased the property and paid Burbank $1,550,000 for the property. (CP 68). Borton also agreed to a three year lease of the property to Burbank for a rental rate of $78,775 per year. The lease expired on December 31, 2018. (CP 10). Borton also agreed to an option for Burbank to repurchase the property. This option is the reason for this lawsuit.

The option states that Burbank has the option to re-purchase the property for $1,800,000. (CP 12). These terms are not ambiguous.

> Lessee [Burbank] may exercise its option to purchase the Property **at any time prior to December 31, 2017**. Lessee's election to exercise this option must be evidenced by a written notice addressed to Lessor [Borton], sent by registered or certified mail to Lessor to Lessor's last known address. (emphasis added)

(CP 12)(emphasis added).

The property at issue in this case is located immediately adjacent to existing orchard land owned by Borton. (CP 67, 135). Borton's primary reason to purchase the property was to expand its existing orchard operations. It provided a cost effective way to expand because Borton owned 500 acres of orchard adjacent to this property. (CP 135-36).

Borton intended to develop the property into new orchard land. This would require a significant modification of the existing irrigation system. (CP 68). Borton would also have to order the fruit trees to plant at least a year before they were planted. (CP 138). This is why Borton insisted on (and Burbank agreed to) a one-year advance notice to exercise the option, even though the transaction may not close until the end of the lease, one year later. (CP 68).

The sale of the property from Burbank to Borton for the purchase price of $1,550,000 closed on February 25, 2016. (CP 68). That was also the beginning of the lease between the parties. (CP 15). The record does not contain evidence of what Burbank grew on the land for crop year 2016. However, for crop year 2017, Burbank Properties planted the land to potatoes. (CP 159). The record on summary judgment does not contain evidence of what Burbank grew on the land for crop year 2018.

The record contains no evidence that during its lease, Burbank made any improvements to the property.

From the time that the lease containing the option to purchase agreement was signed on February 25, 2016 until the time the option expired on December 31, 2017, Burbank had 674 days to exercise the option to purchase. It is undisputed that it did not do so.

Eight days after the contractual option period expired, on January 8, 2018, Borton received a written "notice" from Burbank attempting to exercise the option. The "notice" was mailed via regular mail on January 4, 2018. (CP 69, 72). Burbank admits that the notice was late. (CP 129). There is no dispute that the option to purchase was not timely or properly exercised by certified mail.

V. APPLICABLE STANDARDS

RAP 13.4(b) provides that a petition for review will only be granted by the Supreme Court if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition

involves an issue of substantial public interest that should be determined by the Supreme Court.

None of the issues presented by Burbank meet the requirements as set forth in RAP 13.4(b). The decision of the Court of Appeals in this case does not conflict with any Supreme Court or Court of Appeals' decision. No Constitutional question nor any issue of substantial public interest is presented. The Court of Appeals correctly decided the issues presented and there is no basis for this Court to accept review.

VI. ARGUMENT

A. The Court of Appeals Correctly Used the De Novo Standard of Review when Reviewing the Summary Judgment Decision in the Case.

This proposed issue is not really an issue at all. This is the appeal from a trial court decision on cross motions for summary judgment. There is no question that the appellate court reviews a summary judgment determination by the trial court on a de novo standard. *See Strauss v. Premera Blue Cross*, No. 95449-6, 2019 WL 4871448, at *2 (Wash. S.Ct., Oct. 3, 2019).

Burbank argues that this Court should accept review to change the applicable standard of review in this case to an abuse of discretion as

opposed to the normal de novo standard of review following summary judgment.

The abuse of discretion standard can only be applied in an appeal from the decision of a trial court, **after an actual trial**, on decisions related to the exercise of equitable determinations. There was no trial in this case and the lower court simply made legal determinations based on an undisputed record on summary judgment.

There are six cases in Washington that specifically deal with the issue of whether it could be appropriate to grant a party an equitable grace period. Five of the cases were decided after a trial on the merits. In fact, Burbank cites one of those cases, *Recreational Equipment, Inc. v. World Wraps Northwest, Inc.,* 165 Wn. App. 553, 266 P.3d 924 (2011) as supporting its position that the applicable standard in this case should be "abuse of discretion." It is important to note that *Recreational Equipment* was decided and discussed after a trial on the merits, not on summary judgment. *Recreational Equipment,* 165 Wn. App. at 550. The case does not support Burbank's argument.

The remaining, sixth case, decided the issue of whether to grant an equitable grace period at the summary judgment stage. That is the

exact situation faced here. On appeal, the Court was crystal clear to set forth the standard of review as being the usual, de novo, review standard:

> "The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." *Folsom v. Burger King,* 135 Wash.2d 658, 663, 958 P.2d 301 (1998). In reviewing an order for summary judgment, we engage in the same inquiry as the trial court. *Folsom,* 135 Wash.2d at 663, 958 P.2d 301. Summary judgment is properly granted where the pleadings, affidavits, depositions, and admissions on file demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A material fact " 'is a fact upon which the outcome of the litigation depends, in whole or in part.' " *Lamon v. McDonnell Douglas Corp.,* 91 Wash.2d 345, 349, 588 P.2d 1346 (1979) (quoting *Morris v. McNicol,* 83 Wash.2d 491, 494–95, 519 P.2d 7 (1974)). All evidence must be considered in the light most favorable to the nonmoving party, and summary judgment may be granted only where there is but one conclusion that could be reached by a reasonable person. *Lamon,* 91 Wash.2d at 349–50, 588 P.2d 1346 (quoting *Morris,* 83 Wash.2d at 494–95, 519 P.2d 7).

Cornish College of the Arts v. 1000 Virginia Ltd. Partnership, 158 Wn. App. 203, 215-216, 242 P.3d 215-16 (2010).

Cornish is directly on point for the proper review standard. The *Cornish* court was clear that the standard of review is the usual standard employed after summary judgment, and it is de novo when reviewing the granting (or failure to grant) of an equitable grace period following a

summary judgment motion. The Court even went on further to address whether the trial court could grant such relief on summary judgment and held, that such relief could be appropriate if the trial court could rule as such as a matter of law under normal summary judgment rules. *Cornish*, 158 Wn. App. at 220-21.

Burbank only cites general cases dealing with the granting of equitable relief in other contexts. There is one case directly on point on the standard of review when considering whether to grant an equitable grace period at the summary judgment stage. *Cornish* is unambiguous that the standard of review is de novo and not an abuse of discretion. The Court of Appeals' decision in this case is not in conflict with any other Court of Appeals or Supreme Court decision. In fact, it is directly on point with the Court of Appeals' decision in *Cornish*. Review of this aspect of the case is not appropriate.

B. The Court of Appeals' Decision Requiring a Showing of Substantial Permanent Improvements to Qualify for Equitable Relief is Entirely Consistent with Existing Law. Burbank Made no such Showing Entitling Borton to Summary Judgment

The essential facts of this case are undisputed. Burbank sold the property to Borton and leased the property back for three crop years. The lease gave Burbank an option to re-purchase the property for $1,800,000,

but the option had to be exercised, in writing, no later than December 31, 2017. Burbank missed the contractually agreed upon deadline and Borton received the **late** notice on January 8, 2018.

As the Court of Appeals accurately noted, under the "normal" and well-established rule of law, the failure of a party to timely exercise an option terminates the option because the giving of such notice is a condition precedent to availing itself of the option. *See Wharf Restaurant, Inc. v. Port of Seattle,* 24 Wn. App. 601, 610, 605 P.2d 334 (1979). That is normally the end of the discussion.

However, in 1979, Division I of the Washington Court of Appeals set forth a very narrow and limited exception to this general rule that permitted a court to consider the granting of an "equitable grace period" if certain conditions were met. *Wharf,* 24 Wn. App. at 610-11. Since then, there have been five other cases to discuss the issue: *Lenci v. Owner*, 30 Wn. App. 800, 638 P.2d 598 (1981); *Cornish College of the Arts v. 1000 v. Virginia Ltd. Partnership*, 158 Wn. App. 203, 242 P.3d 1 (2010); *Recreational Equipment, Inc. v. World Wraps Northwest, Inc.*, 165 Wn. App. 553, 266 P.3d 924 (2011); *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 867 P.2d 683 (1994); *Pardee v. Jolly,* 163 Wn.2d 558, 577, 182 P.3d 967 (2008).

Only three of the cases cited above affirmed the granting of an equitable grace period based on the facts and the special circumstances presented in each case: *See Wharf*, 24 Wn. App. at 612-13; *Cornish*, 158 Wn. App. at 219-21; *Recreational Equipment*, 165 Wn. App. at 562-64. Two decisions refused to do so, and the Supreme Court remanded the decision in that regard back to the trial court.

However, as the Court of Appeals' opinion in this case noted, every single one of those courts acknowledged the fact that the relief was only appropriate, or not, because the party seeking the grace period demonstrated that substantial permanent improvements had been made on the property that would be lost to the owner thus creating an inequitable forfeiture. *See Wharf*, 24 Wn. App. at 612; *Cornish* 158 Wn. App. at 219; *Recreational Equipment*, 165 Wn. App. at 563. In contrast, the courts in *Lenci*, 30 Wn. App. at 803, and *Heckman*, 73 Wn. App. at 88, both held that because no substantial valuable permanent improvements were made, no grace period would be granted.

The common denominator in all of these opinions, whether relief was granted or denied, is that there must be valuable permanent improvements done on the property that would be forfeited to the property owner in order to justify (or even consider) the imposition of

the grace period. This is consistent with the original declaration in *Wharf* which set forth the rationale for the limited exception to the rule in the first place: "equity's abhorrence of a forfeiture." *Wharf*, 24 Wn. App. at 610.

When Washington first considered an equitable grace period in *Wharf*, the Court was clear that the basis of such a doctrine was the avoidance of an inequitable forfeiture of valuable, permanent improvements made by the option holder.

> Professor Corbin in his treatise on the law of contracts in our opinion best expresses this rule and its limitations:
>
> > There is one sort of case in which it has been held that the power of acceptance continues to exist for a short time after the expiration of a time limit expressly set by the offeror and known to the offeree. **The only cases known to the writer, in which it has been so held, were cases of option contracts creating an irrevocable power, and in which the holder of the option neglected to give notice of acceptance within the time fixed although he had made valuable permanent improvements with intention to give the notice.**
> >
> > 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. Where no inequitable forfeiture will occur, the same rule is applicable to an option contract as to a revocable offer; a time limit, expressly stated, is controlling. The mere fact that a price was paid for the option does not result in forfeiture.** If one pays five hundred dollars for a thirty day option to buy land for twenty thousand dollars, the power to accept for thirty days is the exact agreed equivalent of five hundred dollars. An extension of the power, even for a moment of time, by action of a court, is compelling the offeror to give something for nothing. (Footnotes omitted.) 1 A. Corbin, Corbin on Contracts s 35, at 146-47 (1963).

Wharf, 24 Wn. App. at 611–12 (emphasis added).

The Court of Appeals in this case correctly applied this rule, as first set forth in *Wharf,* and its decision is perfectly consistent with *Wharf* and its progeny. There is no conflict that could be used to justify review by this Court of the Court of Appeals' decision.

As the Court of Appeals correctly noted, Burbank did not seriously argue and did not put forth any evidence in the record that it installed substantial, or valuable permanent improvements that would be subject to forfeiture. The first argument Burbank raised was that it "lost

equity" in the property. The Court of Appeals correctly dismissed this argument because it is not relevant to the analysis. The cost of an option is not a component of an inequitable forfeiture. (Court of Appeals' Decision, pg. 12).

> Turning to this case, **we agree with the trial court that Heckman Motors had not made, and would not forfeit, substantial valuable improvements of the sort present in *Wharf.*** According to Heckman Motors' brief on appeal, it spent about $18,000 to find the lot and improve it with paving, landscaping and a sales building. According to the trial court, Gunn spent about $23,000 for materials. According to James Heckman's testimony and the trial court's findings, Heckman Motors "had basically amortized out all ... expenses in the improvement of that lot" during the initial 5–year term of the lease.

Heckman, 73 Wn. App. at 88 (emphasis added)(footnotes omitted).

The more telling pronouncement from the Court was that Heckman's loss of the ability to collect the excess rent of $1,500 per month for five years was not a "substantial improvement" that would justify the equitable grace period.

> When all the circumstances of this case are viewed in combination, it appears that **the real economic issue was not the possibility that Heckman Motors would forfeit valuable improvements previously made, or that Gunn would or would not be prejudiced by Heckman Motors' delay in exercising its option to renew. Rather, the real issue was whether Heckman Motors would be**

> **able to continue collecting rent from Ruddell in an amount greater than the rent it was paying Gunn.**

Heckman, 73 Wn. App. at 89 (emphasis added).

Burbank's potential or unsupported "loss of equity" is not an improvement to the property. Just as in *Heckman*, it may be an economic loss arising out of Burbank's own negligence. However, it is not a substantial improvement to the property that would justify the ignoring the contractual deadline and granting an equitable grace period. The Court of Appeals' decision correctly determined this issue and is not in conflict with other case law.

Burbank's only other argument that it made improvements on the property is an assertion that it planted timothy hay on the property in 2017, with no evidence on how long it would last or what it was worth. Just so this record is clear and not an interpretation of the facts, here is the quote from CP 128 (Deposition of Eric Rogers) dealing with the use of the property at issue in this case:

> Q: And the current property, I'm just going to refer to it as the subject property; is that all right?
>
> A: Okay.
>
> Q: What is it currently being used for?
>
> A: Row crops.

Q: What kind of crops?

A: Potatoes, timothy hay, we've had grass seed in there.

Q: And prior to selling it to Borton in 2016, what was it used for?

A: The same.

Q: Are potatoes, are those annual, perennial, how often do you—

A: Potatoes, we do them every third year we grow potatoes.

Q: Okay.

A: Typically. It can be every other year.

Q: What about hay?

A: Hay is usually kept in for two to three years.

Q: So properties have been the same use the entire time before and after the sale and when you entered into the lease?

A: For row crops, yes. Rotation has changed over the years.

Q: Okay. And what does that mean?

A: We, we've changed the—we grew grass seed in it prior, and potatoes, and now we transitioned it to potatoes, three years of hay, and then back to potatoes.

Q: Okay. So—

A: We had problems with some potatoes in there so we've tried to lengthen our rotation out on that property.

Q: Is that a soil thing?

A: Potatoes, disease gets in there so we have to lengthen our rotation to break the disease cycle.

(CP 128).

Burbank's legal argument based solely on this deposition testimony (that hay planted was a valuable, permanent improvement) is not even remotely supported. The lease agreement between the parties started in February 2016 and ended on December 31, 2018 and encompassed three crop years. (CP 10 & 16). Mr. Rogers's deposition which is the basis for CP 128 was taken on April 18, 2018. (CP 126).

First, Burbank cites this quoted material for the proposition that the property was planted to potatoes in 2017. The Court can read for itself. There is nothing in CP 128 that even remotely says that the property was planted to potatoes in 2017.

The more problematic factual citation is Burbank's assertion that it planted hay on the property. The Court of Appeals correctly noted that there is nothing in the record to support this assertion and that, even if there were, there was nothing in the record as to value or yields. The planting of an annual or temporary crop cannot be a substantial

permanent improvement and the Court of Appeals was correct in so holding.

VII. ADDITIONAL ISSUES

Should this Court grant review, it has discretion to specify the issues it will review. RAP 13.7(b). Borton does not suggest or advocate that review be accepted in this case, but, if it is, there were several issues that that Court of Appeals did not have to address due to the manner it decided the case. These issues include: (1) whether Burbank was "ready, willing and able" to exercise the option and purchase the property; the record clearly shows it was not; and (2) if an equitable grace period is allowed, is there a basis to award fees to Burbank since the claim is based solely on equity and not the contract. Again, there should be no such amount. The Court of Appeals did not have to address these issues and if review is accepted, this Court should address those issues.

VIII. ATTORNEYS FEES ON APPEAL

Pursuant to RAP 18.1, Borton requests an award of attorney's fees in this case. The Lease and Option Agreement signed by the parties has an attorney's fee provision that states that the unsuccessful party in an action will pay the successful party's attorney's fees. If the Petition

for Review is not granted, Borton is entitled to such an award and will comply with RAP rules as to submitting documentation.

IX. CONCLUSION

Burbank failed to demonstrate that the Court of Appeals' decision is in conflict with any Washington court decision. To the contrary, the Washington cases were discussed and properly applied. There is no evidence of any substantial or permanent improvement by Burbank that would or could be forfeited in this case. There is no basis for granting review in this case and the parties should be held to the terms of the contract that they negotiated and executed.

DATED this 18 day of October, 2019.

HALVERSON | NORTHWEST Law Group P.C.
Attorneys for Appellant Borton & Sons, Inc.

By: _____
J. Jay Carroll, WSBA No. 17424
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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on the date stated below I served a copy of this document in the manner indicated:

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DATED at Yakima, Washington, this 18th day of October, 2019.

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