

No. 35694-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LABCO, INC.,

Appellant,

v.

WESLEY E. NEWBURY SR., et ux,

Respondents.

BRIEF OF APPELLANT LABCO, INC.

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10. Whether the trial court erred in refusing an order authorizing sale of the property pursuant to RCW 61.30.120? (Assignments of Error 7 and 8.)

11. Whether the trial court erred in refusing to grant Labco an order allowing it to amend its pleadings? (Assignment of Error 8.)

III. STATEMENT OF THE CASE

Labco, Inc. (hereinafter “Labco”), the Appellant and Plaintiff below, bought commercial real property known as “Sea Breeze at Hogan’s Corner” in Ocean Shores, Washington, pursuant to a Real Estate Contract dated March 3, 1993. (CP 106) Respondents/Defendants below are Leslie E. and Rose Newbury (hereinafter “Newbury”), successors in interest to the original contract seller, Estate of Harry Loomis. (CP 25)

The sales price was \$262,500.00, less a \$75,000.00 down payment, leaving a financed obligation of \$187,500.00 and a balloon payment of the contract balance due on or before April 3, 2003. Labco did not pay the balloon payment, but continued to make the monthly payments after April 3, 2003, with no objection from Newbury. (CP 100-101)

Labco has disputed the contract balance since December 2004 on the bases that it did not receive credit for a \$6,000.00 payment in 2001, or for a \$1,500.00 check in May 2003. Newbury failed to provide an accurate accounting, and claimed there was more than \$160,000.00 owing on the contract. (CP 101) Labco withheld the monthly contract payments for January through April 2005, in an attempt to force Newbury to provide an accurate accounting. However, this method of getting Newbury’s attention

proved fruitless, so on April 19, 2005, Labco made the payments for January through April 2005. Labco made the regular payments for May, June, and July, 2005. Newbury's collection agent cashed all of these checks. All along, Labco denied it was in default on the contract. (CP 101)

Newbury served a Notice of Intent to Forfeit the contract dated April 19, 2005. (CP 125) On April 19, 2005, Labco made the January through April 2005 payments. In May, June, and July 2005, Labco made all the regular payments. The Newburys' collection agent, Timberland Bank, cashed all the above checks. (CP 101) Newbury subsequently instructed Timberland Bank to refund Labco's payments and not to accept any more payments on the contract collection. In April 2005 Timberland returned \$6,000 worth of payments. (CP 101-102; 142-43) In May, Timberland returned another \$1,500.00 worth of payments. (CP 139-40)

In July 2005, Labco retained attorney William Morgan, who filed a lawsuit on July 22, 2005¹ and obtained an order restraining forfeiture of the Real Estate Contract. (CP 276) Labco's general manager, Bill Bennett, instructed the attorney to take all actions necessary to pay off the Real Estate Contract. At all times material, Labco was ready, willing, and able to pay the full contract balance into the registry of the court. (CP 102)

Newbury filed an Answer to the Complaint in Cause No. 05-2-00936-1, claiming "a correct balance due to cure the default is \$140,684.66". (CP 151) On June 26, 2006, William Morgan filed on

¹ Grays Harbor Superior Court Cause No. 05-2-00936-1.

behalf of Labco a Motion to Pay Monies in the Registry of the Court and Set Aside and/or to Restrain the Declaration of Forfeiture (CP 311), accompanied by Declarations of Bill Bennett (CP 297), Gayle Moody (CP 309) and William Morgan (CP 305). Bennett assumed Labco's attorney would negotiate or litigate for a payoff balance as instructed. (CP 102-03)

Labco's attorney never sent Bennett copies of any pleadings, and never apprised Bennett of the status of the court action. Without telling Bennett and without obtaining his authorization, William Morgan signed an agreed order filed November 21, 2005 dissolving the July 22, 2005 Order Restraining Forfeiture, and authorizing Newbury to commence a new contract forfeiture. (CP 294) Labco was never informed of or sent a copy of the dismissal order. Bill Bennett found out about such dismissal order for the first time on October 11, 2006. (CP 103)

Newbury served a new Notice of Intent to Forfeit dated November 28, 2005, recorded November 29, 2005, requiring cure of all defaults no later than March 1, 2006. (CP 169) A total amount listed as necessary to cure all defaults is \$160,191.80, plus proof of payment of insurance.² Newbury recorded and mailed the Declaration of Forfeiture on March 2, 2006. However, the notice was returned as undeliverable. The Newburys did not re-mail the Declaration of Forfeiture until March 6, 2006, four days after recording. (CP 103-04)

² Labco has never denied it failed to get insurance prior to the Notice of Intent to Forfeit, but was of the position that payoff of the contract balance would have rendered the insurance issue moot.

Bill Bennett was still under the impression that the lawsuit filed under cause no. 05-2-936-1 and restraining order were still in effect. Labco had the funds in its bank account to tender, and simply awaited word from its attorney to do so. If another restraining order motion needed to be filed, Labco depended on William Morgan to do so. (CP 104)

William Morgan commenced a second lawsuit under Cause No. 06-2-00234-9 on February 28, 2006, and served the Summons and Complaint on the Newburys' attorney, who filed a Notice of Appearance that same day. (CP 19)³ Defendants filed a motion for summary judgment, seeking dismissal of Labco's Complaint and related relief. (CP 30) On June 26, 2006, Labco filed a Motion in Opposition to Defendant's Motion for Contract Forfeiture and an Order for Payment of Funds into the Registry of the Court, requesting the court to allow Labco "to pay what it believes to be the balance due on the contract between the parties into the registry of the court and to have the court rule on the issues before the court in regard to the balance due, interest owing and attorney's fees." (CP 311) That motion was supported by a Declaration of Bill Bennett, (CP 297) containing a detailed description, including an amortization table proving that as of January 2005, only \$128, 661.72 was owing on the contract, detailing the Newbury's tactics of returning payments after

³ Item no. 3 of Appellant's Designation of Clerk's Papers on Appeal was designated the Notice of Appearance of Benjamin Winkelman, docketed February 28, 2006. The Clerk's Papers Index labeled "Notice of Appearance filed 3-23-06" appears to be in error as to the filing date. Labco intends to ascertain with the Superior Court Clerk what happened, and supplement the record accordingly as soon as possible.

having cashed multiple checks, and requesting that Labco be allowed to pay the principal balance owing into the registry of the court. (CP 297-304)

Attorney Morgan erroneously filed this motion and declaration under Cause No. 05-2-00936-1, the previous suit between the parties, failing to properly calendar it for the court's July 6, 2005 docket with the Motion for Summary Judgment. However, the court's docket reflects that these papers did end up in the 06-2-00234-9 file, and in the July 6, 2006 Report of Proceedings the Court stated:

Now, my understanding is that this time there's a motion to pay some amount into the Court Registry, which is not timely. In addition to that, the amount suggested isn't sufficient if it were timely. And finally, it's not a remedy that's available at this time.⁴

The November 13, 2006 Order Granting Defendants' Motion for Summary Judgment further indicates that Labco's motion was among the "documents and evidence which was brought to the court's attention before the order on summary judgment was entered, all having been filed under this cause no. with the clerk of the court..." (CP 231) However, the Order goes on to say, "The Motions under "O" above were not set for hearing. No notice of hearing was filed or served." (CP 232)

The summary judgment motion was argued July 6, 2006. Judge McCauley's October 5, 2006 letter opinion (CP 81) makes no reference to Labco's Motion to Deposit Funds. At the November 26, 2006 hearing on Labco's various motions including reconsideration, Labco's present

⁴ RP 6.

counsel pointed out to the court the absence of any mention of plaintiff's motion to deposit funds in the court's letter opinion, notwithstanding the order stating that the court considered Labco's motion. The court responded:

"...I think we realized he had filed his responding documents, including the motion to pay into the registry of the court in the '05 cause number. . . . I think I took a few minutes to read them and review them, but it didn't change my opinion of how I was going to rule on the case. . . . I didn't even put it in my letter because I think it was clear in my letter that the time to cure was long passed, and so I wasn't about to start some paying into the registry of the court process at that time."⁵

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

IV. ARGUMENT

*Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made.*⁶

1. Standard of review for summary judgment.

This Court reviews summary judgment orders de novo, engaging in the same inquiry as the trial court.⁷ Summary judgment is proper if, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine material fact issue exists and the movant is entitled to judgment as a matter of law.⁸

⁵ RP 22-23

⁶ *Knickerbocker Life Ins. Co. v. Norton*, 96 U.S. 234, 242, 1877 WL 18429, 24 L. Ed. 689 (1877).

⁷ *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).

⁸ CR 56(c); *Ellis*, 142 Wn.2d at 458.

2. The court erred in not reconsidering its findings per Civil Rule 59(a)(6), (7) or (9).

Labco moved for reconsideration per Rule 59(a)(6), (7), and (9), which give a court discretion to vacate and grant reconsideration of an order “for any one of the following causes materially affecting the substantial rights of such parties . . .

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(9) That substantial justice has not been done.

This Court reviews a trial court’s denial of a CR 59 motion and a CR 60 motion under the abuse of discretion standard,⁹ meaning that it will uphold the decision below unless the trial court based its decision on untenable grounds or reasons; or the decision is manifestly unreasonable.¹⁰ While reported decisions construing Rule 59(a)(6) and (7) frequently involve requests to set aside excessive or inadequate jury verdicts in personal injury cases,¹¹ subsections (6) and (7) are broad enough to apply to the summary judgment order in the present case. Labco produced substantial evidence that it was not in default on the real estate contract. It

⁹ *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004); *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

¹⁰ *Lian v. Stallick*, 106 Wn. App. 811, 824, 25 P.3d 467 (2001).

¹¹ See e.g., *Nord v. Shoreline Sav. Ass’n*, 116 Wn.2d 477, 486, 805 P.2d 800 (1991); *Balandzich v. Demeroto*, 10 Wn. App. 718, 519 P.2d 994 (1974).

commenced its suit to enjoin the forfeiture in substantial compliance with RCW 61.30.110 and made a proper request to the court to fully pay off the real estate contract. However, but for the procedural irregularities including but not limited to the trial court's refusal to consider the motion to pay funds into the registry of the court and/or the other relief sought by Labco, a catastrophic forfeiture could have been avoided. These actions on the part of the trial court amounted to "error in the assessment in the amount of recovery",¹² and demonstrate a lack of "evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law"¹³

Perhaps most importantly, the record is clear "[t]hat substantial justice has not been done".¹⁴ CR 59(a)(9), the "catchall" provision, recognizes the Court's inherent equitable power to grant a new trial or hearing on the other listed grounds.¹⁵ In this regard, Labco hereby incorporates its argument and citation of authority regarding Rule 60(b)(11), *infra*.

3. The court erred in not granting Labco relief from the summary judgment order per CR 60(b)(1), (9), and/or (11).

Rule 60(b) provides in pertinent part:

¹² CR 59(a)(6).

¹³ CR 59(a)(7).

¹⁴ CR 59(a)(9).

¹⁵ See *Marvik v. Winkelman*, 126 Wn. App. 655, 663, 109 P.3d 47 (2005). (Defendant entitled to new trial under CR 59(a)(9) where juror's error on verdict form resulted in double damages, even if error did not amount to "irregularity in proceedings" under CR 59(a)(1)).

(b) ... On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

...

(9) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

...

(11) Any other reason justifying relief from the operation of the judgment.

In exercising its discretion over whether to grant a motion for relief under Rule 60(b), the Court should “exercise its authority liberally and equitably to preserve the parties’ substantial rights”.

Here, the attorney’s failure to properly note Labco’s motion for payment of funds in to the registry of the court and Judge McCauley’s obvious refusal to give such motion a full and fair consideration amounted to “mistake, inadvertence, surprise, excusable neglect or irregularity in the proceedings” and “[u]navoidable casualty or misfortune preventing the party from prosecuting or defending” meeting the requirements of CR 60(b)(1) and (b)(9). Labco’s manager had no knowledge of the July 6, 2006 summary judgment hearing, and did not contribute in any way to the filing of its papers under the wrong cause number. This procedural irregularity clearly worked to the extreme prejudice of Labco.

CR 60(b)(11) applies “to situations involving extraordinary circumstances not covered by any other section of the rule.”¹⁶ Those circumstances must relate to “irregularities extraneous to the action of the court or questions concerning the regularity of the court’s proceedings”.¹⁷ Subsection (11) operates ‘in unusual situations which typically involve reliance on mistaken information.’¹⁸ This reflects the policy goals of preserving the finality of judgments while pursuing justice “in light of *all* the facts.”¹⁹

By signing the November 21, 2005 Agreed Order Dismissing Labco’s lawsuit and restraining order, Labco’s attorney clearly surrendered a substantial right without his client’s authorization and against its instructions. Washington Courts uphold vacation of judgments per Rule 60(b)(11) in cases where an attorney surrenders a “substantial right” of his or her client through unauthorized stipulations or compromises. *See, e.g., Graves v. P.J. Taggares Co.*²⁰ and *Morgan v.*

¹⁶ *In re Marriage of Tang*, 57 Wn. App. 648, 655, 789 P.2d 118 (1990), quoting *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 702 P.2d 1367 (1985).

¹⁷ *See, Barr v. MacGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003); *In re Marriage of Yearout*, 41 Wn. App. at 902.

¹⁸ *In re Marriage of Tang*, *supra* at 655 (citing *In re Henderson*, 97 Wn.2d 356, 359-60, 644 P.2d 1178 (1982)).

¹⁹ *Cessna Fin. Corp. v. Bilenberg Masonry Contracting, Inc.*, 715 F.2d 1442, 1444 (10th Cir. 1983) (construing FRCP 60(b)(6), the Federal “catchall” equivalent of Washington CR 60(b)(11).

²⁰ 25 Wn. App. 118, 126, 605 P.2d 348, *aff’d in part, rev’d in part*, 94 Wn.2d 298, 616 P.2d 1223 (1980) (trial judgment vacated where defense attorney withdrew jury demand and stipulated to liability without client’s consent).

Burks.²¹ *Graves* and *Morgan* are cited in conjunction with the other authorities *infra* to demonstrate the recognition by Washington Courts of the justice-promoting policy of Rule 60(b) in granting relief from judgments where attorneys commit acts and omissions compromising the substantial rights of a blameless client without the client's knowledge or consent.

William Morgan's acts and omissions amounted to gross negligence, fulfilling the "extraordinary circumstances" requirement of CR 60(b)(11), and requiring reversal of, and relief from, the trial court's summary judgment order. To date, no Washington cases have decided whether an attorney's gross negligence support a set-aside of a judgment on order per Rule 60(b). However, a lawyer's extreme neglect due to medical disability does constitute "extraordinary circumstances" under CR 60(b)(11) under Washington law warranting relief from a judgment dismissing a plaintiff's cause of action. In *Barr v. MacGugan*,²² Barr's attorney gave Barr, a plaintiff in a personal injury case, no notice of defense motions to compel and to dismiss, and her case was dismissed after the attorney failed to comply with a discovery order. Unbeknownst to Barr and the court, the attorney was suffering from severe clinical depression. Ms. Barr hired another attorney, who successfully obtained an

²¹ 17 Wn. App. 193, 199-200, 563 P.2d 1260 (1977)(post-settlement order vacating dismissal upheld as proper to avoid manifest injustice where settlement figure was out of proportion to just compensation for injuries).

²² 119 Wn. App. 43, 78 P.3d 660 (2003).

order vacating the dismissal from the trial court, from which the defendants appealed.²³

The Court of Appeals, Division 1, acknowledged the general rule in Washington stated in *Haller v. Wallace*,²⁴ *Lane v. Brown & Haley*²⁵ and *M. A. Mortenson Co. v. Timberline Software Corp*²⁶ that an attorney's mere negligence in the handling of a case does not constitute grounds for vacating a judgment under CR 60(b). However, no relevant Washington cases had ever addressed an attorney's physical condition as grounds for relief under CR 60(b).²⁷ The court turned to federal cases cited under FRCP 60(b)(6), the federal "catch-all" counterpart to CR 60(b)(11).²⁸ Noting that under *Cnty. Dental Servs. v. Tani*,²⁹ that the Ninth Circuit Court of Appeals granted relief where an attorney's gross negligence was so extreme that it essentially "vitat[es] the agency relationship that underlies our general policy of attributing to the client the acts of the attorney",³⁰ the Court of Appeals affirmed the trial court's decision, holding that the disability of Ms. Barr's attorney, *i.e.* extreme depression, constituted "extraordinary circumstances" bearing directly on the regularity of the proceedings.³¹

²³ *Barr*, 119 Wn. App. at 45.

²⁴ 89 Wn.2d 539, 547, 573 P.2d 1302 (1978).

²⁵ 81 Wn. App. 102, 107, 912 P.2d 1040 (1996).

²⁶ 93 Wn. App. 819, 970 P.2d 803 (1999), *aff'd* 140 Wn.2d 568, 998 P.2d 305 (2000).

²⁷ *Id.*, 119 Wn. App. at 46-47.

²⁸ Washington CR 60(b)(11) is worded identically to FRCP 60(b)(6).

²⁹ 282 F.3d 1164 (9th Cir. 2002).

³⁰ *Id.*, at 1171.

³¹ *Barr*, 119 Wn. App. at 47-48.

The *Barr* court explicitly left open the issue of whether an attorney's *gross negligence* would constitute valid grounds to vacate a judgment under CR 60(b)(11) in Washington:

In deciding this case, it is not necessary to consider whether gross negligence could constitute valid grounds to vacate a judgment under CR 60 (b)(11). The point discussed in *Tani*, that is most pertinent here is that there is no basis for attributing the attorney's 'acts' to the client when the agency relationship is disintegrated to the point where as a practical matter there is no representation. Accordingly, in recognizing this exception, we limit it to situations where an attorney's condition effectively deprives a diligent but unknowing client of representation. Because *Barr* proved that the situation existed here, the trial court had valid grounds to vacate the judgment.³²

Fairness and logic compel this Court to apply the *Barr* holding and the Ninth Circuit rule to the extreme facts of the present case and to set aside the summary judgment order against Labco.

There is a division of authority in the federal circuits as to whether an attorney's gross negligence is a basis for relief under Rule 60(b)(6). For example, the Third, Sixth and Ninth Circuits have held that it is,³³ and in the Second and Seventh Circuits, it is not.³⁴ Labco urges this court to adopt the better-reasoned approach of the Ninth Circuit.

³² *Barr*, 119 Wn. App. at 48.

³³ See, e.g., *Cnty Dental, supra*; *Bonneau v. Clifton*, 215 F.R.D. 596, 599, 600 (D. Or. 2003) (9th Circuit Rule recognized); *Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 978 (3d Cir. 1978); and *Shepard Claims Service Inc. v. William Darrah & Assoc.*, 796 F.2d 190, 195 (6th Cir. 1986) ("although a party who chooses an attorney takes the risk of suffering from the attorney's incompetence, we do not believe that this record exhibits circumstances in which a client should suffer the ultimate sanction of losing his case without any consideration of the merits because of his attorney's neglect and inattention.")

³⁴ See, e.g., *Nurani v. Marissa*, 151 F.R.D. 32 (S.D.N.Y. 1993); *United States v. 7108 West Grand Ave., Chicago, Illinois*, 15 F.3d 632 (7th Cir. 1994).

Comty. Dental Servs. is on point. There, after the parties orally agreed to an extension of time for filing an Answer to the Complaint, Tani's counsel failed to file the stipulation and also failed to file a timely answer. He falsely represented to the opposing attorney that an answer had been served, and then failed to obey a subsequent court order directing him to serve the Answer. Tani's attorney appeared at a hearing on the plaintiff's default motion, but filed no opposition, resulting in dismissal of Tani's case. During the course of these events, the attorney – like attorney William Morgan in the present case – falsely represented to his client on several occasions that the litigation was proceeding smoothly.

The District Court denied Tani's Motion to set aside the default judgment under FRCP 60(b)(6).³⁵ However, the Ninth Circuit reversed this ruling, rejecting the approach of the Seventh and Eighth Circuits as being the “the harsh and inequitable minority view”.³⁶ The court held:

We join the Third, Sixth, and Federal Circuits in holding that where the client has demonstrated **gross negligence** on the part of his counsel, a default judgment against the client may be set aside pursuant to Rule 60(b)(6). Our holding is consistent with the well-established policy considerations that we have recognized as underlying default judgments and Rule 60(b). **First, the rule is remedial in nature and thus must be liberally applied.** [Citation omitted.] Second, judgment by default is an extreme measure and **a case should, “whenever possible, be decided on the merits.”** *Id.* Additionally, our holding makes common sense, as is evident from the facts in the case before us. **When an attorney is grossly negligent, as counsel was here, the judicial system loses credibility as**

³⁵ *Comm'y Dental Svcs.*, 282 F.3d at 1167.

³⁶ *Id.*, at 1169.

well as the appearance of fairness, if the result is that an innocent party is forced to suffer drastic consequences.³⁷

Many other cases illustrate this principle. *Boughner v. Secretary of Health, Education and Welfare*³⁸ involved the vacating of summary judgments entered against six claimants represented by the same attorney in Federal District Court lawsuits against HEW. In each case, HEW filed a motion for summary judgment, which went unopposed and were granted, due to the attorney's neglect which came about as a result of various factors, including his campaign for the office of judge, his backload of cases and loss of his secretary. The Third Circuit found that "[t]his egregious conduct amounted to nothing short of leaving his clients unrepresented,"³⁹ and determined that "extraordinary circumstances" existed, warranting relief from judgment under Rule 60 (b)(6).⁴⁰ In *United States v. Cirami*,⁴¹ the Court set aside a summary judgment against a taxpayer, whose attorney failed to oppose the motion.⁴²

In the decisions which have set aside judgments and orders for gross negligence on the part of the attorney, two typically critical points of inquiry are (1) whether the client lacked acquiescence or complicity in the attorney's conduct and (2) whether the attorney actively misled the client. For example, *L.P. Steuart Inc. v. Matthews*,⁴³ the D.C. Circuit Court of

³⁷ *Id.*, at 1169-70. (Emphasis added.)

³⁸ 572 F.2d 976 (3d Cir. 1978).

³⁹ *Id.*, at 977.

⁴⁰ *Id.*, at 978.

⁴¹ 563 F.2d 26 (2d Cir. 1977).

⁴² *Id.*, 563 F.2d at 29.

⁴³ 329 F.2d 234 (D.C. Cir. 1964).

Appeals upheld the District Court's vacation of an order dismissing the plaintiff's personal injury case for want of prosecution, which had been solely caused by his attorney's neglect of the case due to personal problems. Critical to the inquiry were the facts that (1) the client did not acquiesce in the attorney's grossly negligent conduct, and (2) that he was actively misled by the attorney into believing that the case was proceeding satisfactorily.⁴⁴

As the Court stated in *Jackson v. Washington Monthly Co.*:⁴⁵

When a client does not knowingly and freely acquiesce in his attorney's neglectful conduct, but instead is misled into believing that the attorney is industrious, dismissal is not only a harsh step but one for which the circumstances provide little support for an agency theory as a rationale. Cf. *Thane Lumber Co. v. J. L. Metz Furniture Co.*, 12 F.2d 701, 703 (8th Cir. 1926); *Chamberlain v. Amalgamated Sugar Co.*, 42 Idaho 604, 247 P. 12, 14 (1926).⁴⁶

In *Fuller v. Quire*,⁴⁷ the Sixth Circuit upheld the District Court's setting aside an order dismissing plaintiff's personal injury lawsuit where the attorney failed to appear at a docket call, never proceeded with discovery despite a discovery order, suggested to the client that a settlement was pending, and then ceased all contact with him. In determining that the equities warranted the set-aside in the interests of justice, the Court gave consideration to the fact that the plaintiff lived some distance from the jurisdiction and displayed reasonable diligence in

⁴⁴ *Id.*, 329 F.2d at 235-36.

⁴⁵ 569 F.2d 119, 123 (D.C. Cir. 1977).

⁴⁶ *Id.*, footnote 18.

⁴⁷ 916 F.2d 358, 361 (C.A. 6 (Ky.) 1990).

attempting to discover the status of his case, together with the fact that there was no showing of undue prejudice to the defendant.⁴⁸

In *Brown v. Eastman Kodak Co.*,⁴⁹ the Supreme Court of the Territory of Guam sustained the lower court's set-aside of a summary judgment dismissing the plaintiff's wrongful termination suit, where the attorney failed to defend against the motion for summary judgment, while repeatedly and falsely assured the client that his case was proceeding forward. The Court concluded:

Our conclusion that there was sufficient reason for the trial court to exercise its discretion to set aside the judgment is further supported by cases where that extraordinary circumstances exist when counsel inexcusably neglects prosecution or defense of a case and the client's conduct does not constitute neglect within rule 60(b). *Accord Fuller*, 916 F.2d 358; *L.P. Steuart, Inc. v. Matthews*, 329 F.2d 234 (D.C.Cir.1964); *King v. Mordowanec*; *Lucas*, 20 F.R.D. 407; *Benhil* 87 B.R. 275; *see also Pioneer Inv. Serv., Inc. v. Brunswick Assoc.*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1497-98, 123 L.Ed.2d 74 (1993) (“[A] party's failure to file on time for reasons beyond his or her control is not considered to constitute ‘neglect’ ” within rule 60(b)). We likewise find gross negligence on the part of Perez and diligence on the part of Brown.

What occurred in the present case was not a matter of a single blown deadline, or isolated instance of neglect or defiance of a court's order. Labco's attorney not only stipulated to a Dismissal With Prejudice of Labco's lawsuit without telling Labco about this, but gave the client false assurances that the matter was proceeding satisfactorily, all the

⁴⁸ *Id.*, 916 F.2d at 361.

⁴⁹ 2000 W L 1732522 Guam Terr. 2000.

while, countermanding his client's explicit instructions. When the contract vendors commenced a new forfeiture proceeding in November 2005, Labco delivered a copy of the new Notice of Intent to Forfeit to Morgan, still believing that its prior lawsuit and restraining order was in effect. Bennett again asked Morgan how the matter was proceeding, who again told him things were proceeding satisfactorily and falsely told him that he was in the process of arranging with the vendors' attorney for payment of the contract balance into the registry of the court. The attorney allowed the matter to get to the recordation of a Declaration of Forfeiture, further compounding the disaster by neglecting to plead and pursue in a timely manner other remedies Labco would have had under the Real Estate Contract Forfeiture Act, such as an order restraining the forfeiture; payment of the contract balance into the registry of the court; an order authorizing sale of the property in lieu of forfeiture; and/or an order per RCW 61.30.140 to set aside the forfeiture. In summary, the facts of this case fit squarely within the holdings of *Cnty. Dental Servs., L.P. Steuart, Inc., Boughner*, and other cases cited *supra*, requiring a set-aside of the summary judgment order pursuant to Rule 60. The Court should also give great weight to the fact that the Newburys cannot show any undue prejudice that would result from setting aside the judgment and having the case decided on its merits.

4. **Paragraph 20(c) meets all of the requirements of a liquidated damages clause, and the forfeiture that occurred in this case must be set aside on equitable grounds as an unenforceable penalty.**

Paragraph 20 of the Real Estate Contract lists the seller's remedies in the event of the buyer's default.

20. DEFAULT. If the Buyer fails to observe or perform any term, covenant or condition of this Contract, Seller may:

(a) Sue for installments. Sue for any delinquent periodic payment; or

(b) Specific Performance. Sue for specific performance of any of Buyer's obligations pursuant to this Contract; or

(c) Forfeit Buyer's Interest. Forfeit this Contract pursuant to Ch. 61.30 RCW as it is presently enacted and may hereafter be amended. **The effect of such forfeiture includes: (i) all right, title and interest in the property of the Buyer and all persons claiming through the Buyer shall be terminated; (ii) the Buyer's rights under the contract shall be cancelled; (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 improvements made to and unharvested crops on the property shall belong to the Seller; and (v) Buyer shall be required to surrender possession of the property, improvements, and unharvested crops to the Seller 10 days after the forfeiture.**

(d) Acceleration of Balance Due. Give Buyer written notice demanding payment of said delinquencies and payment of a late charge of 5% of the amount of such delinquent payments and payment of Seller's reasonable attorney's fees and costs incurred for services in preparing and sending such Notice and stating that if payment pursuant to said Notice is not received within thirty (30) days after the date said Notice is either deposited in the mail addressed to the Buyer or personally delivered to the Buyer, the entire balance owing, including interest, will become immediately due and payable. Seller may thereupon institute suit for payment of such balance, interest, late charge and reasonable attorneys' fees and costs.

(e) Judicial Foreclosure. Sue to foreclose this contract as a mortgage, in which event buyer may be liable for a deficiency.⁵⁰

⁵⁰ CP 118 (Emphasis added.)

The nature of the forfeiture remedy specified in paragraph 20(c) is such that the seller can waive the right to sue for specific performance, back payments, other damages, or costs and attorney's fees by canceling the contract and retaining the property as satisfaction in full for the contract. By its very nature, this provision amounts to a liquidated damages clause. As such, it is subject to the legal principles governing liquidated damages clauses.

By using a liquidated damages clause, the parties can decide by contract on a reasonable estimate of harm that a breach of the contract would cause.⁵¹ Whether or not the parties choose to call the sum so stipulated in case of breach "liquidated damages" is by no means controlling or conclusive. Rather, whether the provision is a liquidated damages clause versus a penalty is a question of law for the court, to be determined from the language and subject matter of the contract, the evident intent of the parties, and all the facts and circumstances under which the contract was made. A liquidated damages clause "must be a reasonable forecast of just compensation for the harm that is caused by the breach," and "the harm must be such that it is incapable or very difficult of ascertainment".⁵² A provision that bears no reasonable relation to the actual damages will be construed as a penalty.⁵³ Whereas liquidated damages clauses provide compensation for anticipated loss, a penalty

⁵¹ See, *Walter Implement Inc. v. Focht*, 107 Wn.2d 553, 559, 730 P.2d 1340 (1987).

⁵² *Id.*, at 559.

⁵³ *Id.*

exists when there is an attempt to punish a party for failure to fulfill its obligations under a contract.⁵⁴ A penalty clause is unenforceable.⁵⁵

It is an almost universally recognized rule that where the payment of a smaller sum is secured by an agreement to pay a larger sum, the larger sum will be held a penalty, and not liquidated damages.⁵⁶ In doubtful cases, the courts will consider that the payment of a penalty is intended.⁵⁷ This is consistent with the economic waste doctrine, which holds that a contractual term that rewards a defaulting party by placing it in a better pecuniary position than it would have been had it performed its promise defeats common sense and encourages unreasonable economic waste.⁵⁸

As the Supreme Court of California stated:

‘A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty.’ *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496, 499, 2 P.2d 776, 777. Such penalties cannot reasonably be justified as punishment for one who willfully breaches his contract. Not only does section 3294 of the Civil Code express the policy of the law against the allowance of exemplary damages for breach of contract regardless of the nature of the breach, *Chelini v. Nieri*, 32 Cal.2d 480, 486, 196 P.2d 915, but if a penalty were to be imposed it should bear some rational relationship to its purpose. A penalty equal to the net benefits conferred by part performance bears no such relationship. It not only fails to take into consideration the degree of culpability, but its severity increases as the seriousness of the breach decreases. Thus a vendee who breaches his contract

⁵⁴ *Mahoney v. Tingley*, 85 Wn.2d 95, 98, 529 P.2d 1068 (1975).

⁵⁵ *Id.*, 107 Wn.2d at 562.

⁵⁶ *Brewster Coop. Growers v. Brewster Orchards Corp.*, 21 Wn.2d 288, 309, 150 P.2d 847 (1944).

⁵⁷ *Id.*, 21 Wn.2d at 310.

⁵⁸ See, *Saxon Const. and Mgmt. Corp. v. Masterclean of North Carolina, Inc.*, 641 A.2d 1056, 1059 (N.J. App. 1994).

before he has benefited the vendor by part performance suffers no penalty, whereas one who has almost completely performed his contract suffers the maximum penalty.⁵⁹

While no Washington cases have interpreted real estate forfeiture provisions as liquidated damages clauses, the courts of many other jurisdictions have refused to enforce estate contract if the proportion of the purchase price paid is so substantial that the amount forfeited would be an invalid “penalty”. For example, in *Madsen v. Anderson*,⁶⁰ the Supreme Court of Utah held that where the default provision of a Real Estate Contract provided alternative remedies for the seller, with forfeiture releasing the seller from his obligation to convey the property and the buyer forfeiting his purchase payments as liquidated damages, such forfeiture clause constituted a liquidated damages provision. As the court observed,

As a general rule in Utah, parties to a contract may agree to liquidated damages in the case of breach, and such agreements are enforceable if the amount of the liquidated damages agreed to is not disproportionate to the damages actually sustained. . . . Thus, this Court has generally upheld forfeiture clauses in uniform real estate contracts and other land installment-purchase contracts, except that it has modified the amount forfeited in cases where that amount is so excessive and grossly disproportionate as to be unconscionable or ‘shock the conscience of the Court.’ . . .

However, even in cases where the amount forfeited is not grossly disproportionate, excessive, or unconscionable, the enforcement of a forfeiture provision in a uniform real estate contract can work harsh results on the buyer. Unlike a foreclosure of a mortgage or a trust deed, which gives the buyer a statutory right of redemption . . . a

⁵⁹ *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 37 Cal.2d 16, 22, 230 P.2d 629 (Cal. 1951).

⁶⁰ 667 P.2d 44 (Ut. 1983).

forfeiture under a uniform real estate contract completely forecloses the buyer's rights in the property. The undesirability of such a result is well-stated by the legal maxim that 'the law abhors forfeiture.'⁶¹

*See also, Russell v. Richards,*⁶² (forfeiture provisions of this type in Real estate contracts are enforceable absent unfairness which shocks the conscience of the court); *Huckins v. Ritter,*⁶³ (forfeiture not enforced); *Soffe v. Ridd,*⁶⁴ (liquidated damages clause in Real Estate Contract unenforceable where enforcement would have resulted in an arbitrary penalty against purchasers which would have been grossly excessive and disproportionate to loss sustained by vendor).

One compelling reason to treat forfeiture clauses such as Paragraph 20(c) in the present instance as liquidated damages clauses is the fact that unlike mortgagors, real estate contract purchasers do not have statutory rights of redemption. As the court stated in , *Soffe v. Ridd, supra*:

[W]hen property is sold on a trust deed or mortgage and is foreclosed by the seller, the buyer has the right to appear at the sale and bid to protect his investment in the property. In the case of a mortgage foreclosure he is granted a statutory six-month right of redemption. Since the forfeiture of a Real Estate Contract does not afford the buyer these protections, courts of equity are fully justified in protecting buyers against unconscionable forfeitures.⁶⁵

Courts of many other jurisdictions have evaluated the enforceability of real estate contract forfeiture clauses, applying the critical test of whether the proportion of the purchase price paid was so

⁶¹ *Id.*, 667 P.2d at 47. (citations omitted.)

⁶² 702 P.2d 993, 995-996 (N.M. 1985).

⁶³ 661 P.2d 52 (N.M. 1983).

⁶⁴ 659 P.2d 1082 (Ut. 1983).

⁶⁵ 659 P.2d at 1084.

substantial that the amount forfeited would be an invalid “penalty”. *See, e.g., Hook v. Bomar*, 320 F.2d 536 (5th Cir. 1963) (under Florida law, forfeiture to vendor of \$30,000 for default in contract purchased realty for \$95,000 “constitutes such a penalty as to shock judicial conscience”); *Rothenberg v. Follman*, 172 N.W.2d 845 (Mich. App. 1969) (forfeiture set aside and specific performance decreed where short delay in making payment, small amount in default and large amount of forfeiture); *Morris v. Sykes*, 624 P.2d 681 (Utah 1981); (forfeiture clause held unenforceable, and retention by vendor for amounts paid under contract held unconscionable, where vendor’s actual damages are significantly less than amount paid under contract); *Land Development, Inc. v. Padgett*, 369 P.2d 888 (Ak. 1962) (forfeiture provision unenforceable where buyers had been in possession of property for more than 3 years, having paid approximately two-thirds of total purchase price, and only default was relatively small amount of interest); *Heikkila v. Carver*, 378 N.W.2d 214 (S.D. 1985)(forfeiture clause held not to constitute a penalty, where record showed no clear evidence of substantial disparity between the relative detriment sustained by parties); *Prentice v. Classen*, 355 N.W.2d 352 (S.D. 1984) (forfeiture clause upheld where it did not work an unconscionable forfeiture upon purchaser); *Moran v. Holman*, 501 P.2d 769 (Ak. 1972) (forfeiture clause held unenforceable, and 90 day extension of time to pay balance due under contract upheld); *Randall v. Riel*, 465 A.2d 505 (1983) (forfeiture clause held to be unenforceable penalty, without a determination of whether images retained by vendors

upon default were reasonable); *Howard v. Bar Bell Land & Cattle Co.*, 340 P.2d 103 (Id. 1959) (forfeiture provision upheld, but case remanded to grant defendants trial on the issue as to whether forfeiture of payment would constitute penalty, and if found to be excessive, to determine relief by way of restitution).

In summary, Newbury chose to forfeit the contract pursuant to RCW 61.30, and keep the property as liquidated damages per Paragraph 20(c) of the Real Estate Contract. By any fair reading of the contract, this provision is, and should be held to the legal standards of, a liquidated damages clause. From the standpoint of the parties at the time of contracting, it was impractical or extremely difficult to fix actual damages, and the provision gives the sellers the option of foregoing the right to sue for specific performance, back payments, other damages, and/or costs and attorney's fees. By definition they have elected to retain the property and all sums paid by Labco as their sole right to the buyers' default. The fact that a sum of less than \$130,000.00 was secured with property worth more than \$1.3 million clearly shows that the forfeiture remedy has functioned as an unenforceable penalty.

5. The Trial Court erred by failing to exercise its equity jurisdiction to allow payment of the contract balance into the Registry of the Court.

RCW 61.30.110 provides in pertinent part:

(2) Any person entitled to cure the default may bring or join in an action under this section. ... Any such action shall be commenced by filing and serving the summons and complaint before the declaration of forfeiture is recorded. Service shall be made upon

the seller or the seller's agent or attorney, if any, who gave the notice of intent to forfeit. ... A court may preliminarily enjoin the giving and recording of the declaration of forfeiture upon a prima facie showing of the grounds set forth in this section for a permanent injunction. ...

The Newburys did not mail the Declaration of Forfeiture until March 6, 2006: 4 days after the recording date of March 2, 2006. This violated RCW 61.30.060, which requires the notice to be given not later than 3 days after it is recorded. The trial court excused this violation of the 3-day mailing rule of RCW 61.30.060 as being nonmaterial. Labco properly commenced its lawsuit and served the Summons and Complaint on the seller's attorney on February 28, 2006, which was before the recording date of the Declaration of Forfeiture. The Complaint specifically prays for an Order permanently enjoining the forfeiture and determining the balance owing on the contract, and for other relief.

A Court may preliminarily enjoin the giving and recording of the Declaration of Forfeiture upon a prima facie showing of the grounds set forth for a permanent injunction. RCW 61.30.110(3) provides:

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

The trial court erroneously assumed it had no basis to grant equitable relief because legal remedies were available to Labco under RCW 61.30. Even if a statutory remedy provides a speedy and adequate remedy, the courts retain to the full all of the equitable powers inherent in them, with only lessened occasion for the exercise of such powers.⁶⁶ Options (a), (d), and (e) of Paragraph 20 of the Real Estate Contract are remedies at law. Option (b), specific performance, is a proceeding in equity.⁶⁷ Real estate contract forfeiture proceedings, option (c), are brought in equity as well.⁶⁸ However, the Court failed to recognize the critical fact that (1) even if Labco had statutory remedies – be they legal or equitable – it had been deprived through the inaction of its attorney of any meaningful opportunity to exercise those remedies, and (2) the court could have and should have extending its equitable jurisdiction to the entire controversy.

Both quiet title and contract forfeiture proceedings are brought in equity, and **when equity jurisdiction attaches, it extends to the entire controversy and whatever relief the facts warrant will be granted.** *Haueter v. Rancich*, 39 Wash. App. 328, 331, 693 P.2d 168 (1984). When sitting in equity, the trial court may fashion broad remedies to do substantial justice to the parties and to put an end to litigation. *Carpenter v. Folkerts*, 29 Wash. App. 73, 627 P.2d 559 (1981). Appellate courts have frequently deferred to the trial court's judgment in tailoring a decree which balances both parties' interests and reaches an equitable solution to the controversy. *See, Clausing v. DeHart*, 83 Wn.2d 70, 77-78, 515 P.2d 982 (1973)⁶⁹

⁶⁶ *Roon v. King Co.*, 24 Wn.2d 519, 526, 166 P.2d 165.

⁶⁷ *McAlpine v. Miller*, 51 Wn.2d 536, 541, 319 P.2d 1093 (1950).

⁶⁸ *Eichorn v. Lunn*, 63 Wn. App. 73, 80, 816 P.2d 1226 (1991).

⁶⁹ *Id.*, (Emphasis added.)

The courts of this state have long applied equitable principles to real estate contract forfeitures. In *Whiting v. Doughton*,⁷⁰ which predated the 1980 Real Estate Contract Forfeiture Act, our Supreme Court held that before the contract seller could take advantage of the forfeiture clause in the contract, he was required to first demand payment of the unpaid contract balance and to give the buyers a reasonable time thereafter in which to perform, where the seller had a history of accepting irregular payments, and where he had verbally assured the buyers that no advantage would be taken of the forfeiture clause of the contract without prior notice.⁷¹ In *Dill v. Zielke*,⁷² the Supreme Court upheld the trial court's refusal to strictly enforce the forfeiture provision of a Real Estate Contract, where the purchasers' agent delivered the final contract payment three days after the deadline stated in the seller's notice of forfeiture on equitable grounds, stating:

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 principal 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. [Citations omitted.] ... In our opinion, the facts of this case call for the application of this principal and the extension of such relief.⁷³

⁷⁰ 31 Wn. 327, 71, P. 1026 (1903).

⁷¹ *Id.*, 31 Wn. at 330-31.

⁷² 26 Wn.2d 246, 173 P.2d 977 (1946) (also decided prior to Forfeiture Act).

⁷³ *Id.*, 26 Wn.2d at 252.

The Declaration of Bill Bennett provides substantial evidence that Labco was not in default as claimed in the Notice of Intent to Forfeit and/or that Labco had claims against the seller which would release, discharge, or excuse the claimed defaults. “Cure the default” means to perform the obligations under the contract which are described in the Notice of Intent to Forfeit and which are in default, along with costs and fees.⁷⁴ Per RCW 61.30.090(2) a purchaser may cure a default before expiration of the time for cure. In the present case, at a minimum there were issues of material fact as to (1) the contract balance, and (2) the fact of a default that require a trial on the merits. Labco attempted to cure the default by paying the disputed funds into the Registry of the Court, but was prevented from doing so.

The trial court had more than an adequate basis to find that Labco substantially met the statutory requirements to restrain or enjoin the forfeiture. The Summons and Complaint in the 06-2-00234-9 lawsuit were filed on February 28, 2006, two days before the recording of the Declaration of Forfeiture, which was March 2, 2006. While the Newburys were not served until March 9, 2006, RCW 61.30.110(2) allowed service on the attorney for the seller, which was done, and their attorney filed a Notice of Appearance on February 28, 2006. This Court excused as nonmaterial the defendants’ failure to serve the Declaration of Forfeiture within three days of recording as was required by RCW 61.30.060, based

⁷⁴ RCW 61.30.010(2).

upon *Galladora v. Richter*, 52 Wn. App. 778, 764 P.2d 647 (1988), because it found Labco was not prejudiced.

This Court should apply the same fundamental rule of fairness to Labco that it applied to Newbury. While substantial compliance with the Forfeiture Act is required of vendors, the same standard also applies to purchasers, because one of the goals of the Act is to clarify the rights of both purchasers and sellers. *Shultze v. Werelius*, 60 Wn. App. 450, 452-53, 803 P.2d 1334 (1991), citing Hume, *Washington Real Estate Forfeiture Act*, 61 Wash. L. Rev. 803, 804 (1986).

Labco moved the Court for an order restraining or enjoining the forfeiture pursuant to RCW 61.30.110, or alternatively to set aside the forfeiture based on RCW 61.30.140. The Court denied this remedy to Labco on the basis that it had not obtained an order restraining the forfeiture prior to the recordation of the Declaration of Forfeiture. Labco does not deny that the statute contemplates the obtaining of a restraining order or preliminary injunction prior to service of the Declaration of Forfeiture. However, Labco did make the motion, albeit untimely, and there was more than adequate grounds for the court to find that plaintiff substantially complied with the statutory requirements, or on equitable grounds, conclude that plaintiff had been deprived of a meaningful opportunity to do so.

It would have been well within the equitable jurisdiction of the court to either treat the complaint as the substantial equivalent of a motion for preliminary injunction, or alternatively to consider the motion to pay

funds as substantially timely. This approach would have been justified, because the sellers, being required to accept payment in full of the contract balance, with costs, interest and attorneys fees, would have been getting the benefit of their bargain, and thus would have suffered no prejudice. To the extent an amendment of the pleadings would have been required to accomplish this objective, the trial Court should have granted such an order.

6. The Trial Court erred in refusing to grant Labco an order setting aside the declaration of forfeiture.

Labco further moved for an Order Setting Aside the Declaration of Forfeiture. Pursuant to RCW 61.30.140, a buyer may bring an action to set aside a real estate contract forfeiture. Such an action may be commenced only after the Declaration of Forfeiture has been recorded and is otherwise provided for in RCW 61.30.140.⁷⁵ Labco claimed substantial offsets for payments previously made but not credited. Allegations of the right of offset can be raised in action to set aside a Declaration of Forfeiture, and do not have to be raised in an action commenced before the Declaration of Forfeiture. *McLean v. McLean*, 51 Wn. App. 635, 754, P.2d 1033 (1988). The action must be commenced by filing and serving the Summons and Complaint not later than 60 days after the Declaration of Forfeiture is recorded.⁷⁶ The Court may require that all payments specified in the Notice of Intent to Forfeit shall be paid to the clerk as a

⁷⁵ RCW 61.30.140(1).

⁷⁶ RCW 61.30.140(2).

condition to maintaining the action to set aside the forfeiture.⁷⁷ RCW

61.30.140(4) provides:

(4) The forfeiture shall not be set aside unless (a) the rights of bona fide purchasers for value and of bona fide encumbrancers for value of the property would not thereby be adversely affected and (b) the person bringing the action establishes that the seller was not entitled to forfeit the contract at the time the seller purported to do so or that the seller did not materially comply with the requirements of this chapter.

RCW 61.30.140(6) provides that the seller is entitled to possession of the property and to the rents, etc. thereof during the pendency of the action to set aside the forfeiture; however, the Court may allow the purchaser to retain possession of the property during the pendency of the action.

Labco moved to amend its pleadings as necessary to allow the cause of action to set aside the forfeiture. Good cause was shown to set aside the forfeiture by the Declaration of Bill Bennett, which proved that the seller was not entitled to forfeit the contract at the time seller purported to do so. As with the motion to enjoin the forfeiture and to pay funds into the registry of the court, it was well within the court's equitable jurisdiction to permit an amendment of the pleadings to permit this form of relief. The court abused its discretion in refusing to do so.

7. The trial court erred in refusing to order a public sale of the property in lieu of forfeiture, pursuant to RCW 61.30.120.

Any person entitled to cure the default may bring an action seeking an order of public sale in lieu of forfeiture.⁷⁸ The action must be

⁷⁷ RCW 61.30.140(3).

commenced by filing and serving the Summons and Complaint before the Declaration of Forfeiture is recorded, with service made upon the seller or the seller's agent or attorney, if any, who gave the Notice of Intent to Forfeit.⁷⁹ The decision to order a sale under the forfeiture act is discretionary with the trial court.⁸⁰ If the Court finds that the fair market value of the property substantially exceeds the unpaid and unperformed obligations secured by the contract and other priority liens, the Court may require that the property be sold.⁸¹

Here, the present action substantially complied with the statute. Suit was commenced by filing and serving the Summons and Complaint, and by serving it on the attorney for the seller, before the Declaration of Forfeiture was given. The Declaration of Bill Bennett verified that the fair market value of the property (in the \$1.3 million range) substantially exceeded the unpaid and allegedly unperformed obligations secured by the contract. There was no evidence of any other priority liens affecting this determination. Labco moved the trial court for leave to amend its pleadings to the extent necessary to request an order allowing the public sale of the property. This approach would have provided yet another means by which the trial court could have applied equity to avoid the extreme forfeiture of Labco's equity and the corresponding unreasonable windfall to the Newburys.

⁷⁸ RCW 61.30.120(1).

⁷⁹ RCW 61.30.120(2).

⁸⁰ *Powell v. Rinne*, 71 Wash. App. 297, 301, 857 P.2d 1090 (1993).

⁸¹ RCW 61.30.120(3).

In the present instance, it would have been a simple matter for the trial court to exercise its discretion and equitable power to allow the requested amendment of the pleadings and order a sale of the property to prevent the forfeiture that occurred in this case. No prejudice would have resulted to the Newburys, who simply would have ended up receiving the benefit of their bargain. Such failure of the court to exercise discretion was improper.

V. CONCLUSION

The law favors resolution of cases on their merits. The merits of Labco's case have never been addressed. Fairness, logic and the inherent equity jurisdiction of the court require that Labco have its day in Court, to give both parties the benefit of their bargain, to avoid the catastrophic forfeiture of Labco's equity in the subject property, and to prevent the unjust windfall to the Newburys.

The Trial Court abused its discretion in refusing to reconsider its decision based upon CR 59, and/or to grant relief from the summary judgment order per CR 60. The repeated instances of counsel's gross neglect in this case constitute the "extraordinary circumstances" of precisely the type in which courts have granted relief under Rule 60(b)(6). The record is compelling that Labco's manager (1) had given Labco's attorney explicit instructions to take the steps necessary to secure payoff of the contract; (2) had the funds ready to do so; (3) proceeded under the good faith belief that its lawsuit was still viable, its restraining order was still in place enjoining the forfeiture and that that attorney would take

whatever steps were necessary to implement Labco's instructions; and (4) but for the attorney's multiple instances of gross negligence and misleading the client of what was going on Labco could have taken appropriate steps to protect its interests, and avoid the oppressive result that occurred in this case.

Paragraph 20(c) of the Real Estate Contract is a liquidated damages clause. Liquidated damages fixed by such a clause must bear a reasonable relation to the actual damages. In the present case, the forfeiture or damage fixed by the contract, under the reality of the facts before this court is arbitrary and bears no reasonable relation to the anticipated damage. Forfeiture of the buyer's interest worth more than \$1,300,000.00 over a contract balance of less than \$130,000.00. It is exorbitant, unconscionable, and must be set aside as an unenforceable penalty.

Labco, Inc. should have its day in court in a trial to determine the amount of the contract balance, and to determine whether it is in default, which it has established it is not. The only way for justice to be done in this case is to give the parties the benefit of their bargain under the real estate contract, so that payment of the contract and costs, if appropriate, becomes Newburys' remedy. Labco requests that this Court reverse the trial court's summary judgment order, with instructions on remand to either set aside or enjoin the forfeiture, with Labco ordered to pay the full contract price, plus costs and fees as set by the Court, into the Registry of the Court. Alternatively, the Superior Court should be directed to order a sale of the property in the manner specified in RCW 61.30.120, in lieu of

forfeiture. This disposition is appropriate, given the fact that the fair market value of the property substantially exceeds the unpaid and allegedly unperformed obligations secured by the contract.

DATED this 27th day of April, 2007.



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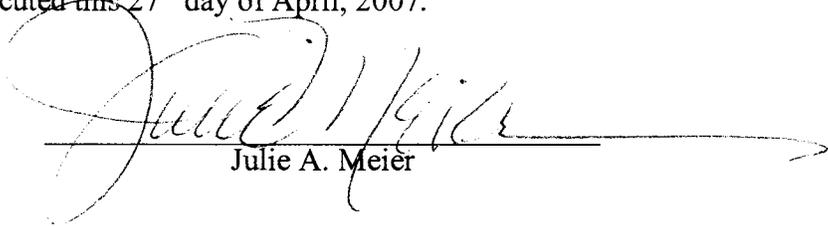
On April 27, 2007, I served a complete and true copy of the original of this document to:

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Hoquiam, WA 98550

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

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

Executed this 27th day of April, 2007.


Julie A. Meier