

COURT OF APPEALS
STATE OF WASHINGTON
BY
CLERK

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.

REPLY BRIEF OF APPELLANT

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1. Labco's Motion for Reconsideration was timely filed.

Newburys make the argument for the first time on appeal that Labco's motion for reconsideration was not timely filed. The motion was briefed, argued, and decided below, without this objection being raised. A summary judgment argument not pled or argued to the trial court may not be raised for the first time on appeal.¹ Under RAP 2.5(a) this Court may refuse to review any claim of error not raised in the trial court. Since the Newburys did not raise this issue at the trial court, they may not make the argument for the first time on appeal.

In any event, Labco's motion was timely per CR 59. The trial court issued an oral opinion on October 5, 2006. While Labco originally filed its Motion for Reconsideration on October 20, 2006, the Order Granting Defendant's Motion for Summary Judgment from which reconsideration was sought² was not entered until after a presentation hearing November 13, 2006.

CR 59(b) provides that a motion for reconsideration "shall be filed not later than 10 days after the entry of the judgment, order or other decision." On November 6, 2006, Labco filed several motions, along with a request for an Order Shortening Time, asking the Court among other things to "reconsider its ruling per Rule 59".³ This motion incorporated the earlier filed motion for reconsideration. On November 9, 2006, Labco

¹ *Westway Const., Inc. v. Benton Co.*, 136 Wn. App. 859, 864, 151 P.3d 1005 (2006), *rev. den.* 151 Wn.2d 1023, 91 P.3d 95 (2004).

² CP 230.

³ CP 185.

filed a Notice of Hearing, placing these several motions on the docket for November 27, 2006. On November 27, 2006, the trial court heard argument and specifically denied Labco's motion for reconsideration.

While CR 6(b) does not permit enlargement of the time for filing a motion to reconsider, there is nothing in Rule 59 that would prevent a motion for reconsideration from being filed after a written letter opinion but *before* the final written order or decision from which reconsideration is sought, then argued after, as was the case here.

In any event, any technical error in the timing of the Rule 59 motion would have been harmless, where Newbury never raised the argument below, and fully responded to and argued the motion. *See e.g. Carpenter v. Elway*,⁴ where this Court held that it was harmless error for a party attacking a judgment on an mandatory arbitration award to file a Rule 59 motion for reconsideration instead of a Rule 60(b) motion per MAR 6.3, where the two motions would have sought analogous relief, and where the opposing party had received notice of, submitted a vigorous response to, and thoroughly argued the motion.⁵ Here, Newbury had notice of the motion, failed to object, and responded. Any technical error on the part of Labco under Rule 59 was either waived by Newbury or inconsequential and not prejudicial.

⁴ 97 Wn. App. 977, 988 P.2d 1009 (1999), *rev. den.* 141 Wn.2d 1005, 10 P.3d 403 (2000).

⁵ *Id.*, 97 Wn. App. at 985-986.

2. Rule 60 procedural issues.

Newbury's argument that Labco failed to meet the procedural requirements of Rule 60 lacks merit. Labco was not required to obtain a show cause order or personally serve Newbury with the motion because the court already had jurisdiction over Newbury, whose attorney had adequate notice and a full opportunity to respond. Any technical failure to obtain a show cause order and/or serve Newbury with the motion is harmless and should be disregarded by this Court.

Lindgren v. Lindgren,⁶ is on point. There, a third party defendant moved under CR 60 to set aside a default judgment, serving the moving papers on the third-party plaintiff's attorney, but not the party. Also, there is nothing in the opinion to suggest that a show cause order was ever obtained. Division One of the Court of Appeals rejected the third-party plaintiff's argument that failure to strictly comply with the service requirements of CR 60(e) deprived the court of jurisdiction. Noting the purpose of the rule – to provide adequate notice to the opposing party – the court held that a technical failure to follow the service requirements of CR 60(e) was inconsequential:

. . . CR 60(e)(3) imposed a duty on Kimzey to serve the motion to vacate upon Demopolis, if service was possible. The apparent purpose of the rule is purely to provide notice to an opposing party. . . . However, when a copy of the motion is received by the attorney for the adversary party, who has recently filed papers relating to the same action, and the party appears and defends the motion, as was the case here, it is clear that the party had adequate notice of the motion to vacate. . . . Demopolis's lawyer received a

⁶ 58 Wn. App. 588, 794 P.2d 526 (1990), *rev. den.* 116 Wn.2d 1009 (1991).

copy of the motion more than a week before the scheduled hearing date and never argued that he had insufficient time to prepare. The length and thoroughness of his memorandum filed in opposition to the motion indicated that he had ample time. Thus, we believe any irregularity occasioned by Kimzey's failure to serve Demopolis personally with the motion did not affect his ability to respond. . . . **As long as the party has a meaningful opportunity to be heard and adequate time to prepare, this technical deviation from proper procedure is inconsequential.** . . . Under these facts, Kimzey's failure to serve him is a harmless deviation from CR 60(e)(3).⁷

Lindgren is directly applicable to the facts here. Newburys' attorney received adequate notice of the motion, and fully responded to and argued the motion. Respondents did not raise any argument below that they did not have adequate notice of the motion or that they had inadequate opportunity to respond. Under these circumstances, any failure of Labco to note a show cause hearing or to personally serve Newburys with the motion is inconsequential.

3. Newburys offer no authority or argument to rebut Labco's basic equity arguments.

Newburys cite no authority and offer no persuasive legal argument to rebut Labco's position that the conduct of Labco's attorney was so egregious as to warrant a set aside under Rule 60(b)(11). Nor do they present any rebuttal to Labco's arguments⁸ that it was within the trial court's equitable jurisdiction to permit payment of the contract balance into the registry of the Court, to restrain or enjoin the forfeiture, to set aside the forfeiture and/or to order a public sale of the property, and to permit amendments of the pleadings accordingly. The Newburys offer no

⁷ *Id.*, at 594-594.

⁸ *See*, Brief of Appellant Labco, Inc., Argument Sections 5, 6, and 7.

reasons: (1) why the trial court would not have had the equitable power to award such relief, (2) why Newburys deserved a disproportionate windfall at the cost of a catastrophic forfeiture by Labco, or perhaps most importantly, (3) why justice does not compel the Newburys to be made whole by allowing them to receive the benefit of their bargain under the contract, *i.e.*, contract balance, interest and costs.

Respondents sidestep these issues, simply repeating through most of their brief the same statutory arguments they made in the summary judgment record below: that because the RCW 61.30 statutory scheme offered Labco relief, and because Labco failed to avail itself of the statutory relief, Labco had a complete legal remedy, foreclosing this Court's equitable jurisdiction. Respondents avoid the key point: it matters little that Labco had remedies under the Real Estate Contract Forfeiture Act, if it was deprived of a meaningful opportunity to exercise such remedies through the actions of its attorney and through no fault of its own.

4. It is proper for this Court to consider the Real Estate Contract, including Paragraph 20 thereof, because the document was a part of the record below, and because the liquidated damages clause/penalty arguments are part and parcel of the equity arguments Labco made in the summary judgment record below.

Labco preserved all equitable arguments in the record below, urging the trial court to exercise its equity jurisdiction to avoid forfeiture by Labco of more than a million dollars in equity, where it stood ready, and willing and able to pay the contested amounts into the registry of the

Court.⁹ The Newburys offer no rebuttal to Labco’s position with regard to liquidated damages clauses, or to the argument that Paragraph 20 operates as one. Rather, their entire position on this issue rests on the premise that per RAP 2.5(a) this Court may not consider the issue at all.

This position fails because Labco’s discussion of Paragraph 20 of the Real Estate Contract and its argument concerning liquidated damages clauses raises no new issues or arguments on appeal; rather it merely further illustrates Labco’s argument that Labco’s forfeiture of equity in the property and Newbury’s obtaining an excessive windfall was inequitable.

This Court may certainly consider the substantive provisions of the Real Estate Contract on appeal. While RAP 2.5(a) provides that the appellate court “may refuse” to review errors that have not been properly preserved, this language is permissive, and this Court’s application of the rule is discretionary.¹⁰ If an issue raised for the first time on appeal is “arguably related” to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal. *Lunsford v. Saberhagen Holdings, Inc.*,¹¹ RAP 2.5(a) even allows

⁹ CP 194.

¹⁰ *Obert v. Env’tl. Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989) (“The rule precluding consideration of issues not previously raised operates only at the discretion of this court.”).

¹¹ _____ Wn. App. _____, 160 P.3d 1089, 1091 (Wn. App. Div. 1, 2007), citing *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872 n. 1, 751 P.2d 329 (1988) *rev. den.* 111 Wn.2d 113 (1988), . (“Although appellants did not argue Sullivan to the trial court, they did argue the basic reasoning that the parties to the arbitration determined the scope of the arbitration which corresponded to the policy limits and that the arbitrator exceeded his authority. This court can review these issues despite lack of citation to the crucial case law and treatises.”). See also, *Benton v. Hardy*, 113 Wn.2d 912, 917-18, 784 P.2d 1258 (1990): “Plaintiffs may have framed their argument more clearly at this stage,

the appellate court in its discretion to consider an issue raised for the first time on review. For example, this Court may consider an issue not raised in the trial court to provide guidance to the trial court on remand.¹²

Washington Courts have allowed issues to be considered for the first time on appeal when fundamental justice so requires.¹³ Appellate Courts have considered issues of “fundamental justice,” even when raised for the first time on review, for the reasons set forth in a pre-RAP decision *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970), quoted in *Greer v. Northwestern Nat. Ins. Co.*, 36 Wn. App. 330, 339, 674 P.2d 1257 (1984)¹⁴:

Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it.

In summary, this Court should reject Newbury’s argument that this Court may not consider the Real Estate Contract provisions for the first

but as long as they advance the issue below, thus giving the trial court an opportunity to consider and rule on the relevant authority, the purpose of RAP 2.5(a) is served and the issue is properly before this Court.”

¹² *In re Marriage of Hurd*, 69 Wn. App. 38, 47, 848 P.2d 185 (1993), *rev. den.*, 122 Wn.2d 1020 (1993) (Though error was not preserved for appellant review, Court addressed issue “because we are remanding for a new trial.”).

¹³ *State v. Card*, 48 Wn. App. 781, 784, 741 P.2d 65 (1987); *See also, State v. Lee*, 96 Wn. App. 336, 338 n. 4, 979 P.2d 458 (1999) (Courts may consider issues for first time on appeal in interests of justice); *Greer v. Northwestern Nat’l Ins. Co.*, 36 Wn. App. 330, 338-39, 674 P.2d 1257 (1984) (Fundamental justice required review of insurance policy clause to determine whether it violated public policy, though issue was not raised until oral argument).

¹⁴ *Aff’d/rev’d in part*, 109 Wn.2d 191, 743 P.2d 1244 (1987).

time on appeal. Labco has not raised any new issue on appeal, but rather invokes new authority in support of the claim of error that was raised below. The Real Estate Contract was part of the summary judgment record,¹⁵ and the nature and amount of the claimed defaults was discussed throughout the record. The specific terms of the Real Estate Contract are the very source of rights claimed by the respondents, form the basis of the claimed defaults, and form the basis of the respondents' claims for attorney's fees in this case.

CONCLUSION

In conclusion, Labco's Motion for Reconsideration was timely filed under CR 59. Newburys waived any technical objection to the timing of this motion by their failing to raise the issue below, and by the fact that this motion was argued as part of the motions filed by Labco on November 6, 2006 and argued on November 27, 2006.

Labco's motion under CR 60 met the notice requirements of that rule. Any technical failure to note a show cause hearing and/or serve the Newburys personally with the motion is inconsequential, because (1) the trial court already had jurisdiction over the Newburys, (2) their attorney had adequate notice, (3) their attorney never raised the objection of inadequate time to respond and (4) Newburys' attorney actually did fully respond to and argue against Labco's CR 60 motion.

¹⁵ CP 106.

The Newburys have failed to rebut Labco's basic arguments regarding an equitable set aside of the summary judgment order and forfeiture.

It is entirely proper for this Court to consider paragraph 20 of the Real Estate Contract in light of the out of state authorities presented by Labco in its brief of appellant because no new "claim of error" was raised within the preview of RAP 2.5(a). RAP 2.5(a) does not preclude this Court from reviewing the Real Estate Contract, or from considering the authorities cited by Labco relating to liquidated damages clauses, because this authority and argument was part and parcel of the basic equity arguments Labco made to the trial court.

In summary, the catastrophic forfeiture suffered by Labco, Inc. – loss of over a million dollars in real estate equity over a contract balance of under \$160,000.00 – presents a case where the trial court erred by not exercising its equity jurisdiction. This situation came about through no fault of Labco. It would be illogical and unjust for Newburys to be allowed to retain such an unjust windfall when there is no dispute that they can be made whole through payment of the contract balance, costs, and interest. This Court should reverse the decision of the trial court, and remand the case with instructions to permit payment of the contract balance into the registry of the Court, to restrain or enjoin the forfeiture, to set aside the forfeiture and/or to order a public sale of the subject property.

DATED this 25th day of July, 2007.

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PROOF OF SERVICE

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

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

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

Executed this 25th day of July, 2007.



Julie A. Meier