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SUPREME COURT OF THE STATE OF WASHINGTON

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GARY PARDEE, a single person

Respondent/Petitioner below

v.

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

Appellant/Respondent below

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REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR  
DISCRETIONARY REVIEW

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**TABLE OF CONTENTS**

I. IDENTITY OF PETITIONER.....1

II. ISSUES IN REPLY TO RESPONSE TO PETITION FOR REVIEW ...1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT.....4

    A. Ownership/forfeiture.....4

    B. Adequate remedy at Law.....5

V. CONCLUSION.....7

**TABLE OF AUTHORITIES**

**Cases**

***Bartel v. Zuckriegel***, 112 Wn. App. 55, 62, 47 P.3d 581, 584 (2002); ..... 8

***Bartlett v. Betlach***, 136 Wn. App. 8, 15, 146 P.3d 1235, 1238 (2006). ..... 7

***Chatterton v. Business Valuation Research, Inc.*** 90 W. App. 150, 156, 951 P.2d 353, 356 (1998). ..... 4

***Heckman Motors, Inc. v. Gunn***, 73 Wn. App. 84, 87, 867 P.2d 683,684-5 (1994). ..... 6, 9

***In re Welfare of Sego***, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973). ..... 8

***Johnson v. Dep't of Licensing***, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993). ..... 8

***Litho Color, Inc. v. Pacific Employers Ins. Co.*** 98 W. App. 286, 305, 991 P.2d 638, 648 (1999) ..... 2

***Thomas v. Ruddell Lease-Sales, Inc.***, 43 Wn. App. 208, 212, 716 P.2d 911 (1986)) ..... 8

***Wharf Restaurant, Inc. v. Port of Seattle***, 24 Wn. App. 601, 612, 605 P.2d 334, 340-1 (1979). ..... 5, 6, 9

***Zink v. City of Mesa***, 137 W. App. 271, 278, 152 P.3d 1044, 1048 (2007) ..... 5

**Statutes**

RCW 62A.3-310 ..... 8

**Rules**

RAP 13.4(d) ..... 1

RAP 10.3(a)(6) ..... 7

RAP 10.3(b)(6). ..... 2

RAP 13.4(b) ..... 9

RAP10.3(a)(6) ..... 5

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

The petitioner is Gary Pardee ("Pardee"). Pardee was the Plaintiff and prevailing party in the Superior Court and the Respondent in the Court of Appeals. Pardee herein replies to Respondent's Response to Petition for Discretionary Review, dated May 21, 2007.

### **II. ISSUES IN REPLY TO RESPONSE TO PETITION FOR REVIEW**

In Jolly's Response to Petition for Discretionary Review (hereafter "Jolly's Response") he raises two new issues that were not raised in Pardee's Petition for Discretionary review. He first questions if there can be a forfeiture if Pardee was "...never the "owner of the subject property." Jolly then asserts that equitable principles do not apply in this case because there was adequate remedy at law. Jolly's Response pg. 1. Pursuant to RAP 13.4(d) Pardee strictly limits this Reply to those issues.

### **III. STATEMENT OF THE CASE**

Jolly's "Statement of the Case" is, in part, misleading. He states that "[T]he Plaintiff made some improvements to the property." Response

to Petition for Discretionary Review, pg. 5.<sup>1</sup> This assertion is a gross understatement and, thereby, deceptive. When Pardee took possession of the property the house was in a terrible state of disrepair. Pardee's improvements and investment were both extensive and expensive. Petition for Discretionary Review pg. 6-8. As the trial court noted Pardee improved the property "from a burnt out hulk to a liveable [sp] residence" RP 174-5.

Jolly also states that: "The contract expressly stated that any improvements he [Pardee] chose to make would remain on the property." Response to Petition for Discretionary Review, pg. 5. This assertion is not supported by any citation to the record. Subsequently it may be ignored. RAP 10.3(b)(6). More importantly, this assertion is false. There is no evidence in the record that the parties ever discussed or contractually agreed as to whom would own the extensive improvements Pardee made to the property should he not exercise the option to purchase.

Jolly's reference to language in paragraph 8 of the contract is not

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<sup>1</sup> Jolly fails to provide any reference to the record to support this assertion. He thereby violates RAP 10.3(b)(6) which requires that reference to the relevant parts of the record must be included for each factual statement contained in the sections of the parties' briefs devoted to the statement of the case. *Litho Color, Inc. v. Pacific Employers Ins. Co.* 98 W. App. 286, 305, 991 P.2d 638, 648 (1999)

pertinent to this issue. Response to Petition for Discretionary Review, pg. 7. The contract there discusses a loss of rights in the “property.” Ex. 1, para 8. However, there is no indication that the parties intended that if Pardee lost his rights to the “property” that would included both property in the condition it was at the time of entering into the contract and the massive improvements Pardee made to the property so that it could be used to secure a conventional.

Jolly further contends that there is no evidence to support the trial court’s finding that the final payment, the reissued \$1,000.00 dollar check, was made “a couple of weeks after December 21, 2004” (Finding 1.11 & 1.13; CP 103). Response to Petition for Discretionary Review, pg. 4. This statement is incorrect.

Q: Now again, a few weeks later [after December 21st] you [Pardee and Jolly] met again right after the holidays.

A: Yes, sir.

Given the time of the year, the “holidays” referred to were the Christmas and New Years. Thus the evidence supports a finding that the parties met sometime after the 1<sup>st</sup> of the year. It was at this meeting that the dishonored \$1,000.00 check was negotiated. RP 41, ln.17 – RP 43, ln.14. See CP 103 findings 1.11-1.13.

Finally, Jolly states that “The Appellant<sup>2</sup> did not and has not sought relief from the court based on equitable grounds....” Response to Petition for Discretionary Review, pg. 9. This assertion is wrong. From the beginning of this case Pardee sought the equitable relief of specific performance. CP 4, 9, 85. A great portion of the trial testimony was devoted to facts that supported the application of equity. RP 29-35; RP 53-57; RP 85-89.

In closing argument Pardee argued that “...we ask in equity that Mr. Pardee be allowed to purchase the property....” RP 149. And, the trial court orally supported its judgment for specific performance with this comment: “In December when the payments for November and December are tendered he [Jolly] decides at that point that the contract is now complete and that he has not had written notice so that he’s basically going to have the house, which has been fixed up considerably from a burnt out hulk to a liveable [sp] residence by Mr. Pardee, he’s [Jolly] going to have his cake and eat it too.” RP 174-5<sup>3</sup>. Therefore, equity was initially requested, supported by testimony, argued for in closing argument and a

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<sup>2</sup> The Appellant was Jolly. However, from the context of this portion of Jolly’s Response it appears that he intended to refer to Pardee.

<sup>3</sup> A trial court’s findings may be supplemented or clarified by its oral opinion. *Chatterton v. Business Valuation Research, Inc.* 90 Wn.App. 150, 156, 951 P.2d 353, 356 (1998).

basis for the trial court's decision.

#### IV. ARGUMENT

##### A. Ownership/forfeiture.

Jolly maintains that "Simply put all forfeiture cases involve the ownership of the asset that is to be forfeited." Response to Petition for Discretionary Review, pg. 6. Jolly then concludes that equity should not apply because Pardee did not have any "ownership" to "forfeit." Response to Petition for Discretionary Review, pg. 5-6. However, here Pardee purchased and installed extensive improvements in the property as did the plaintiff in *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 612, 605 P.2d 334, 340-1 (1979). And, a key fact supporting application of equity in *Wharf* is more persuasive here. Pardee's option was for outright ownership as opposed to the tenant in *Wharf* who only had a right to a five year term on a lease renewal. *Id.* at 603. Thus, *Wharf's* forfeiture was only short term where Pardee would suffer permanent long term loss.

##### B. Adequate remedy at law.

Without any citation to authority Jolly argues that: "[W]here legal remedy is available, the equitable principles are not relevant." Response

to Petition for Discretionary Review, pg. 8. It is respectfully submitted that because of a lack of any citation to authority this argument should not be considered. RAP10.3(a)(6); *Zink v. City of Mesa*, 137 W. App. 271, 278, 152 P.3d 1044, 1048 (2007) (“arguments not supported by citation to legal authority will not be considered on appeal”).

In any event, in part because of the extensive improvements made to the property by Pardee, this case presents a basis for a trial court’s finding that special circumstances exist which warrant a court in granting equitable relief. *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. at 610-11. Whether the facts in a particular case establishes the presence of such “special circumstance” is a matter left to the sound discretion of the trial court. “Whether equity requires it is in large part a matter addressed to the discretion of the trial court, with discretion to be exercised in light of the facts and circumstances of the particular case.” *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 88, 867 P.2d 683(1994). However, here the Court of Appeals’ holding, based strictly upon law (timing of delivery of the notice to exercise the option), reverses the trial court’s decision without allowing the trial court to fully articulate equitable findings that would support the trial court’s judgment.

Jolly also argues that specific performance cannot be granted in this case because of a lack of a legal description in the contract. Response to Petition for Discretionary Review, pg. 6. This argument is not supported by any citation to the record and therefore should not be considered. RAP 10.3(a)(6). In any event, Pardee's partial performance here would override Jolly's statute of frauds argument.

Application of the doctrine requires consideration of three factors: (1) possession; (2) payment or tender of consideration; and (3) permanent, substantial, and valuable improvements. Generally the party asserting part performance must show two of these three factors. [Citations omitted.]

*Bartlett v. Bellach*, 136 Wn. App. 8, 15, 146 P.3d 1235, 1238 (2006).

Pardee took possession, paid Jolly sixteen thousand dollars and made permanent, substantial and valuable improvements to the property.

Therefore, Jolly's argument based on the statute of frauds is without merit.

## V. CONCLUSION

Jolly argues that the trial court did not enter findings to support the application of equity. Response to Petition for Discretionary Review, pg. 9. However, the trial court resolved the facts regarding the timeliness of Pardee providing the necessary notice in Pardee's favor. Therefore, the trial court concluded that Pardee was entitled to enforce the transfer of

ownership pursuant to the terms of the contract. CP 104, para 2.1; CP 106, para 1. Subsequently, the trial court reached a judgment based upon “legal” grounds which is also the equitable result. Therefore the entry of the trial court’s written findings regarding application of equitable principles was not necessary.

The Court of Appeals first errs by overruling the trial court’s factual findings that the notice to exercise the option was timely provided when that determination is supported by the record. Even if the Court of Appeals had not erred on that issue it still erred by not returning the matter to the trial court to allow the court to enter written findings regarding application of equity.

Again, in overruling the trial court’s factual findings the Court of Appeals’ decision is in direct conflict with the well settled law set forth in *Bartel v. Zuckriegel*, 112 Wn. App. 55, 62, 47 P.3d 581, 584 (2002); *Johnson v. Dep’t of Licensing*, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993); *In re Welfare of Sego*, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973); *Miller v. Badgley*, 51 Wn. App. 285, 290, 753 P.2d 530 (1988); and, *Thomas v. Ruddell Lease-Sales, Inc*, 43 Wn. App. 208, 212, 716 P.2d 911 (1986)).

In refusing to accept that the last payment was the replacement check issued by Pardee in early January, 2005 the Court of Appeals' decision fails to consider or apply RCW 62A.3-310.

Finally, the Court of Appeals' failure to apply equitable principles, or to allow the trial court to even enter relevant written findings, directly conflicts with the long standing holdings in *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 610-12, 605 P.2d 334, 340-1 (1979) and *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 87, 867 P.2d 683,684-5 (1994).

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

Respectfully submitted this 5<sup>th</sup> day of June, 2007.

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