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No. 97690-2

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

BORTON & SONS, INC. a Washington State corporation,
Appellant-Plaintiff,

v.

BURBANK PROPERTIES, LLC, a Washington State limited liability
company,
Respondent-Defendant

CORRECTED BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR..... 1

 1. Whether the trial court erred in granting Burbank’s Motion for Summary Judgment and entering Judgment against Borton.

 2. Whether the trial court erred in failing to grant Borton’s cross Motion for Summary Judgment.

 3. Whether the trial court erred in failing to grant Borton’s Motion for Reconsideration.

III. COUNTERSTATEMENT OF THE CASE..... 1

 A. Facts..... 1

 B. Procedural Background..... 5

IV. ARGUMENT..... 7

 A. Summary Judgment..... 7

 1. Standard of Review..... 7

 2. Abuse of Discretion..... 9

 3. Summary Judgment Standard..... 12

 4. Summary judgment was properly granted for Burbank and denied for Borton as Burbank is entitled to an equitable grace period 13

 5. The factors for an equitable grace period favor Burbank 16

 a. Burbank’s delay in mailing the option notice was inadvertent, and there was no undue delay 16

| | |
|--|----|
| b. Burbank will suffer an inequitable forfeiture without an equitable grace period | 18 |
| c. There was no prejudice to Borton caused by the delay | 21 |
| 6. An equitable grace period does not <i>require</i> “substantial valuable improvements” to the Subject Property | 22 |
| 7. The fact that Burbank does not have immediate funds available to close does not preempt an equitable grace period | 24 |
| 8. The Court can consider extrinsic evidence to analyze whether equitable relief is appropriate | 25 |
| B. Burbank was entitled to attorney’s fees and costs and is entitled to another award of attorney’s fees from this Court | 25 |
| V. CONCLUSION..... | 28 |

TABLE OF AUTHORITIES

Washington Cases

| | |
|--|----|
| <i>Amend v. Bell</i> , 89 Wn.2d 124, 570 P.2d 138 (1997)..... | 13 |
| <i>Berg v. Hudesman</i> ,, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)..... | 25 |
| <i>Coggle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (1990)..... | 9 |
| <i>Cole v. Laverty</i> , 122 Wn. App. 180, 79 P.3d 924 (2002)..... | 12 |

| | |
|--|----------------------------------|
| <i>Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship</i> , 158 Wn. App. 203, 242 P.3d 1 (2010) | 7, 8, 14, 16, 18, 21, 23, 26, 27 |
| <i>Crafts v. Pitts</i> , 161 Wn.2d 16, 162 P.3d 382 (2007)..... | 8 |
| <i>Doe v. Department of Transportation</i> , 85 Wn. App. 143, 931 P.2d 196 (1999)..... | 13 |
| <i>Dunlap v. Wayne</i> , 105 Wn.2d 529, 716 P.2d 842 (1986)..... | 13 |
| <i>Eagle Point Condo. Owners Ass'n v. Coy</i> , 102 Wn. App. 697, 9 P.3d 898 (2000)..... | 26 |
| <i>Emerick v. Cardiac Study Ctr., Inc.</i> , 189 Wn. App. 711, 357 P.3d 696 (2015)..... | 7 |
| <i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998)..... | 8, 12 |
| <i>Gilmore v. Jefferson Cty. Pub. Transportation Benefit Area</i> , 190 Wn.2d 483, 415 P.3d 212 (2018)..... | 10 |
| <i>Heckman Motors, Inc. v. Gunn</i> , 73 Wn. App. 84, 88, 867 P.2d 683 (1994)..... | 11, 15 |
| <i>Hoffman v. Kittitas Cty.</i> , 4 Wn. App. 2d 489, 422 P.3d 466 (2018)..... | 10 |
| <i>J.W. Seaven Hop Corp. v. Pollack</i> , 20 Wn.2d 337, 348-349, 147 P.2d 310 (1944)..... | 25 |
| <i>Kave v. McIntosh Ridge Primary Rd. Ass'n</i> , 198 Wn. App. 812, 394 P.3d 446 (2017)..... | 9 |
| <i>Kaufman Bros. Const., Inc. v. Olney's Estate</i> , 29 Wn. App. 296, 628 P.2d 638 (1981)..... | 24 |

| | |
|---|----------------------------|
| <i>Marassi v. Lau,</i> 71 Wn. App. 912, 859 P.2d 605 (1993)..... | 26-27 |
| <i>Marine Enterprises, Inc. v. Sec. Pac. Trading Corp.,</i> 50 Wn. App. 768, 750 P.2d 1290 (1988)..... | 26 |
| <i>Mayer v. Sto Indus., Inc.,</i> 156 Wn.2d 677, 132 P.3d 115 (2006)..... | 10 |
| <i>Niemann v. Vaughn Cmty. Church,</i> 154 Wn.2d 365, 113 P.3d 463 (2005)..... | 9 |
| <i>Pardee v. Jolly,</i> 163 Wn.2d 558, 182 P.3d 967 (2008)..... | 11, 13, 22 |
| <i>Paris v. Allbaugh,</i> 41 Wn. App. 717, 704 P.2d 660 (1985)..... | 7 |
| <i>Recreational Equip., Inc. v. World Wrapps Nw., Inc.,</i> 165 Wn. App. 553, 266 P.3d 924 (2011)..... | 10, 11 |
| <i>Sac Downtown Ltd. P'ship v. Kahn,</i> 123 Wn.2d 197, 867 P.2d 605 (1994)..... | 7 |
| <i>Seybold v. Neu,</i> 105 Wn. App. 666, 19 P.3d 1068 (2001)..... | 7 |
| <i>State v. Salgado-Mendoza,</i> 189 Wn.2d 420, 403 P.3d 45 (2017)..... | 10 |
| <i>Tiffany Family Trust Corp. v. City of Kent,</i> 155 Wn.2d 225, 119 P.3d 325 (2005)..... | 7 |
| <i>Tradewell Group, Inc. v. Mavis,</i> 71 Wash. App. 120, 857 P.2d 1053 (1993)..... | 27 |
| <i>Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.,</i> 185 Wn.2d 270, 372 P.3d 97 (2016)..... | 9 |
| <i>Wharf Restaurant, Inc. v. Port of Seattle,</i> 24 Wn. App. 601, 605 P.2d 334 (1979).... | 11, 13, 14, 16, 18, 21, 23 |

Court Rules

RAP 2.5.....9
RAP 18.1.....28

Statutes

RCW 4.84.330.....26

Secondary Sources

2A Wash. Prac., Rules Practice RAP 2.5, Circumstances Which May
Affect Scope Of Review, (8th ed.).....9

I. INTRODUCTION

The Respondent is Burbank Properties, LLC (hereinafter, Burbank). The Appellant, Borton & Sons, Inc. (hereinafter, Borton), seeks reversal of the Trial Court's order granting summary judgment and entry of judgment in favor of the Respondent, and against the Appellant.

II. ASSIGNMENT OF ERRORS

1. Whether the trial court erred in granting Burbank's Motion for Summary Judgment and entering Judgment against Borton.

2. Whether the trial court erred in failing to grant Borton's cross Motion for Summary Judgment.

3. Whether the trial court erred in failing to grant Borton's Motion for Reconsideration.

III. COUNTERSTATEMENT OF THE CASE

A. Facts.

The Respondent, Burbank, is a single-member LLC owned by Eric Rogers. CP 103. In addition to Burbank, Rogers owns multiple other limited liability companies that are engaged in farming and agricultural endeavors, which combined, comprise Rogers' farming operation. *Id.* The property at issue in this case, located at 243 Flat Top Road, in Burbank,

Washington (the “Subject Property”) has been farmed by Rogers since 2000. CP 104. Between 2002 and 2012, it was farmed under a lease. *Id.* Rogers formed Burbank Properties, LLC to purchase the Subject Property from the landlord, and completed the purchase in 2012. *Id.* Between 2012 and 2016, Burbank owned the Subject Property. During these years, potato prices were low which caused financial strain to Rogers’ entities. *Id.*

In June 2015, Rogers’ lender, Rabo Agrifinance, commenced a lawsuit against Rogers and his related entities to recover an operating loan that went into default because of the financial strain. CP 104. Shortly thereafter, Rogers and Rabo were able to reach an agreement to forbear collection of the loan, but as part of that agreement Rabo demanded that Rogers sell the Subject Property to generate cash. *Id.* The Subject Property, however, was a key part of Rogers farming operation because of its importance in producing early season potatoes, as Rogers has agreements with buyers to supply early potatoes. *Id.* For this reason, Rogers did not want to sell the Subject Property. *Id.*

Rogers conferred with Neal Goplen, of Goplen Ag Services to discuss his options to preserve the Subject Property. CP 104. Goplen recommended that they market the property to sell for less than fair market value, with a lease-back of the property by Burbank, and with an option to repurchase the property at the end of the lease. CP 145. Despite having an

appraised value of \$1,875,000 in 2014, the property was listed for sale at \$1,575,000 to accomplish this. CP 104-105. Rogers and Goplen viewed the transaction as more akin to a loan secured by the subject property than an actual sale. CP 105. Goplen presented this as an investment opportunity at a marketing session through the Real Estate Land Institute. CP 145. Tracy Lybbert, a real estate broker for Borton, was in attendance at the marketing session. *Id.* Within approximately one day, Borton, through Lybbert, made an offer of \$1,550,000. *Id.* Lybbert viewed it as an attractive opportunity because of the purchase price, the lease rate, and the return on investment when the option was exercised. CP 147.

Burbank sold the Subject Property to Borton in February 2016 for \$1,550,000, subject to a Lease and Option Agreement (the “Lease Agreement”). CP 8-23. The Lease Agreement leased the Subject Property back to Burbank for three years (through 2018), with rent of \$78,775.00 per year. *Id.* It also contained an option for Burbank to repurchase the Subject Property for \$1,800,000. *Id.* It required Burbank to exercise the option by December 31, 2017, but with closing not to occur until December 31, 2018. *Id.*

Sometime in late 2016 or early 2017, Byron Borton, the Chief Visionary Officer for Borton, directed Tracy Lybbert to see if Burbank would sell its option to purchase, back to Borton, so they “would have

clarity on whether [they] were going to own the property or not.” CP 139; CP 171. Lybbert was advised that Burbank was not interested in relinquishing the option, and Lybbert reported this back to Borton. *Id.*

In March 2017, Dan Bowton, the farm manager for some of Borton’s property in the Burbank area, contacted Eric Rogers to see if Burbank Properties would agree to allow Borton to put a nursery on a portion of the Subject Property. CP 159; CP 128. Rogers told Bowton that he would want a lease from Borton because he intended to exercise the option to purchase the property back. CP 129; CP 160. Bowton, in turn, reported this back to Bill Borton, the president of Borton. CP 160. Ultimately, Borton declined to put the nursery on the Subject Property. CP 129. Later that summer, Rogers and Bowton spoke again, and according to Rogers he reiterated that they planned to buy back the Subject Property. CP 129. After the potatoes were harvested in 2017, Rogers planted timothy hay, which is a two to three year crop, meaning that the crop is harvested over a two to three year period. CP 128.

On December 28, 2017, Rogers drafted a Notice of Exercise of Option to Purchase the Subject Property. CP 129; CP 30-32. He put it in an envelope, put it on his desk, and intended to mail it the following day. *Id.* Through an inadvertent oversight, the Notice was not mailed, which Rogers discovered the following week. *Id.* On January 4, 2018, he realized the

error, and immediately sent the Notice out. *Id.* The Notice was received by Borton on January 8, 2018. CP 4.

Three days later, counsel for Borton sent Burbank Properties a letter advising Burbank that their notice was untimely, and demanding that Burbank sign a notice acknowledging that the option was terminated. CP 78-83. Counsel for Burbank responded on January 29, 2018, advising that Burbank intended to close the sale on or before December 31, 2018 and reminded Borton's counsel that forfeitures are not favored in law, and that he believed under the circumstances an equitable grace period would apply. CP 85-86.

B. Procedural Background.

On February 5, 2018, within days of receiving Burbank's letter advising of their intention to close the sale, Borton filed this lawsuit seeking a declaratory judgment that Burbank's option to purchase expired. CP 3-39. On March 20, 2018 Burbank filed its Answer, Affirmative Defenses and Counterclaim, seeking its own declaratory judgment from the Court that it had indeed timely exercised the option to purchase or in the alternative was entitled to an equitable grace period to do so. CP 40-49. Discovery was conducted by both parties thereafter, including a number of depositions. *See* CP 121-122.

On March 26, 2018, Borton filed its Motion for Summary Judgment. CP 55-56. On May 1, 2018 Burbank filed its Motion for Summary Judgment. CP 87-88. The cross-motions were heard on May 29, 2018 by the Honorable M. Scott Wolfram. RP 1. Judge Wolfram reviewed the pleadings “[s]everal times” then heard oral argument from both sides. RP 2. After hearing oral argument and reviewing the pleadings, Judge Wolfram found that based on the loss of Burbank’s crop and their loss in equity in the property, that Burbank was entitled to an equitable grace period and granted thier motion for summary judgment. RP 16; CP 311-314.

Thereafter Burbank moved for fees and costs. CP 197-200. On June 18, 2018 Borton filed its Motion for Reconsideration with the trial court judge. CP 231-232. That motion was denied via order entered on July 6, 2018. CP 319-320. The Order granting Burbank’s Motion for Summary Judgment and Denying Borton’s Motion for Summary Judgment was entered June 25, 2018. CP 311-314. Judgment was also entered in favor of Burbank, and against Borton, for Burbank’s attorney’s fees and costs. CP 315-318. Borton filed its Notice of Appeal on July 11, 2018. CP 321-335.

IV. ARGUMENT

A. Summary Judgment.

1. Standard of Review.

Courts typically review an order regarding summary judgment de novo. *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). However, the standard of review regarding a trial court's exercise of equitable authority is abuse of discretion. *Emerick v. Cardiac Study Ctr., Inc.*, 189 Wn. App. 711, 730, 357 P.3d 696 (2015), *review denied*, 185 Wn.2d 1004, 366 P.3d 1244 (2016). This is because the trial court has broad discretionary authority to fashion equitable remedies. *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 228–29, 242 P.3d 1 (2010); *SAC Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 867 P.2d 605 (1994). Appellate Courts do not disturb an exercise of such discretion absent a clear showing of abuse of discretion—that is, “discretion that is manifestly unreasonable or exercised on untenable grounds.” *Id. quoting Paris v. Allbaugh*, 41 Wn. App. 717, 720, 704 P.2d 660 (1985).

Borton relies on *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 230, 119 P.3d 325 (2005) for the proposition that this case is subject to de novo review. *Tiffany* spends exactly one sentence discussing the review standard. *Tiffany* states that “[t]his court reviews a grant or denial of summary judgment de novo.” *Id.* at 230, 328. However, *Tiffany* is an

unconstitutional taking case that did not prescribe an equitable remedy and shares no similarities with the case at hand, aside from being decided at the trial court level on summary judgment.

In reviewing a recent case decided on summary judgment, *Crafts v. Pitts*, 161 Wn.2d 16, 29-30, 162 P.3d 382 (2007), the Washington Supreme Court acknowledged that “a decree of specific performance rests within the sound discretion of the trial court,” and therefore reviewed the trial court’s decision to grant specific performance for an abuse of that discretion. This is noted by the court in *Cornish*, supra, which states the court did not explain how this approach was consistent with its earlier pronouncement in *Folsom v. Burger King* that de novo review is used by an appellate court when reviewing trial court rulings made in conjunction with a summary judgment motion. 135 Wn.2d 658, 663, 958 P.2d 301 (1998). As a result, the Court in *Cornish* found that “[b]ecause the *Crafts* decision is more recent than *Folsom* and, unlike *Folsom*, deals with a dispute precisely of the type presented here, we follow the court’s method of analysis set forth in *Crafts*.” *Cornish*, 158 Wn. App. at 221. That standard is abuse of discretion, which is the standard of review that governs this case.

Some courts have made a distinction between whether the trial court *had authority* to exercise its equitable powers, versus whether it *properly exercised* said powers. In the former, there is authority that the standard of

review is de novo, but in the latter the review standard is clearly abuse of discretion. *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005); *Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 819, 394 P.3d 446 (2017). This case falls squarely in the latter situation because it has never been asserted by Borton that the trial court did not have the authority to exercise its equitable powers. Borton's argument is not whether a trial court has equitable powers to find an equitable grace period. Instead, their argument is that "Defendant Cannot Make a Threshold Showing that it is Entitled to Equitable Relief." As such, the standard of review here is abuse of discretion, not de novo, as Borton would like the Court to believe.

2. Abuse of Discretion.

Although the term abuse of discretion has been defined in various ways, perhaps the most familiar test is to ask whether the trial court's discretion was "exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion." RAP 2.5.; *See also* 2A Wash. Prac., Rules Practice RAP 2.5, Circumstances Which May Affect Scope Of Review, (8th ed.) *quoting Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554 (1990).

The abuse of discretion standard is extremely deferential. *Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus.*, 185 Wn.2d 270, 279,

372 P.3d 97 (2016). Appellate courts will reverse a trial court decision under this standard only if the decision applies the wrong legal standard, relies on unsupported facts, or adopts a view that no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Hoffman v. Kittitas Cty.*, 4 Wn. App. 2d 489, 495, 422 P.3d 466 (2018).

Rulings that are manifestly unreasonable or based on untenable grounds include those that are unsupported by the record or result from applying the wrong legal standard. *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017). Furthermore, “[a] reviewing court may not find abuse of discretion simply because it would have decided the case differently.” *Id.*; *Gilmore v. Jefferson Cty. Pub. Transportation Benefit Area*, 190 Wn.2d 483, 494, 415 P.3d 212 (2018).

In *Recreational Equip., Inc. v. World Wrapps Nw., Inc.*, 165 Wash. App. 553, 565, 266 P.3d 924 (2011) the court granted an equitable grace period under legally and factually similar circumstances to the case at hand.

There the Court stated:

it is not a function of this appellate court to reweigh the trial court's equitable considerations and determine whether we would have decided the case differently. Rather, the proper review standard of this court is to decide whether the trial court's findings are supported by substantial evidence and whether those findings support the court's discretionary determination that it should grant equitable relief.

Id. at 565.

A trial court has discretion to decide whether equity requires an equitable grace period. This discretion is to be exercised in light of the particular case's facts and circumstances. Because the trial court has broad discretionary authority to fashion equitable remedies, such remedies are reviewed for an abuse of discretion.

Id. at 559 (Internal citations omitted).

It should be noted that *Recreational Equipment, Inc.* was heavily relied upon by Borton in their initial Response to Burbank's Motion for Summary Judgment. CP 174-190. Oddly, it is not cited to at all in their appeal brief, most likely due to its holding regarding the standard of review. Instead, and based on its Brief to this Court, Borton would like the court to think that the history of this jurisprudence is limited to *Wharf (infra)*, then *Heckman (infra)*, then *Pardee (infra)*, and nothing else. This obviously is not the case.

As to applying the standard of review in this case, it is important to note that Borton only applies a de novo review standard in its briefing, and has not, even *arguendo*, analyzed the case under the more stringent abuse of discretion standard that actually applies. Thus, Borton's points of emphasis are not that the trial court applied the wrong legal standard, or relied on unsupported facts, and Borton does not suggest that the trial court adopted a view that no reasonable person would take. Instead, Borton asks this Court to reweigh the trial court's equitable considerations and determine whether

it would have decided the case differently than the trial court. This is exactly what this higher standard of review prevents, and for that reason alone, the trial court's decision should be affirmed.

3. Summary Judgment Standard.

If this Court determines that the standard of review is de novo, or finds that Borton preserved an argument that the wrong legal standard was applied, or that the court relied on unsupported facts, the summary judgment standard must be addressed.

Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Folsom*, 135 Wn.2d at 663, 958 P.2d at 304. The moving party has the burden to demonstrate that there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. *Id.* In other words, the evidence is viewed in the light most favorable to the non-moving party. *Cole v. Laverty*, 122 Wn. App. 180, 79 P.3d 924 (2002).

Summary judgment should only be granted if, from all the evidence, a reasonable person could reach only one conclusion. *Folsom*, 135 Wn.2d at 663. Conversely, when the court determines there is a dispute as to any material fact, summary judgment is improper. A material fact is one upon

which the outcome of the litigation depends. *Doe v. Department of Transportation*, 85 Wn. App. 143, 147, 931 P.2d 196 (1999).

A court should not resolve any issue of credibility at a summary judgment hearing. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1997). An issue of credibility is present if the party opposing the summary judgment motion comes forward with evidence which contradicts or impeaches the movants evidence on a material issue. *Dunlap v. Wayne*, 105 Wn.2d 529, 536-37, 716 P.2d 842 (1986).

4. Summary judgment was properly granted for Burbank and denied for Borton as Burbank is entitled to an equitable grace period.

In this case it cannot be disputed that the correct legal standard was applied as there is significant jurisprudence allowing for equitable relief when a tenant fails to timely exercise an option agreement. *See Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 610-611, 605 P.2d 334 (1979); *see also Cornish*, 158 Wn. App. at 217. A “period of grace” is “frequently granted” to avoid the “harshness of forfeitures.” *Pardee v. Jolly*, 163 Wn.2d 558, 574, 182 P.3d 967 (2008). Forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial. *Id.* at 574. There are five factors bearing on whether such relief is appropriate:

- 1) The failure to give notice was purely inadvertent;

- 2) An inequitable forfeiture would have resulted had equity not intervened;
- 3) As a result of the [lessee's] failure to give timely notice, the [lessor] did not change its position in any way and was not prejudiced thereby;
- 4) The lease was for a long term, not a short term;
- 5) There was no undue delay in the giving of notice by the [lessee];

Wharf, 24 Wn. App. at 612-13; *Cornish*, 158 Wn. App. at 218. However, **not all five factors must be present**, because “such an inflexible approach would be inconsistent with the trial court's broad discretion to fashion equitable remedies.” *Cornish*, 158 Wn. App. at 218. (**Emphasis added**).

Borton acknowledges, to a degree, the above line of cases, but argues that an equitable grace period is a very narrow exception to the rule that contracts are strictly construed, and that this case does not meet the above factors. Borton pins its hopes on this Court reversing the trial court based on an argument that one or two of the above factors are not present here. This reasoning, however, completely ignores the holding in *Cornish* that an equitable grace period does not require a party to establish all five factors. A reversal requires a finding that the trial court abused its discretion in making this equitable remedy, and there is nothing on the record to support that finding. Instead, this case plays out like many of the cases before it which provided for equitable relief.

Borton, at times even inadvertently concedes this. For instance, they rely upon *Heckman Motors, Inc. v. Gunn*, and cite the following quotation in their brief:

Under *Corbin* and *Wharf*, there is an exception only when equity requires it. **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 circumstance of the particular case.**

73 Wn. App. 84, 88, 867 P.2d 683 (1994) (*emphasis added*).

Borton also argues that the equitable exception was enlarged by the trial court to the point that the exception is “swallowing the rule”. This is disingenuous, and fails to acknowledge the specific facts and circumstances unique to this case, to wit: the property was sold by Burbank to Borton for \$1,550,000 (\$325,000 less than its appraised value) with a leaseback and an option to repurchase it from Borton for \$1,800,000; Burbank refused to sell its option to Borton during the term of the lease; Burbank planted a multi-year crop in 2017 anticipating that they were exercising the option; Burbank drafted their notice to exercise the option prior to the deadline to give notice; Borton actually received the notice a mere eight days after the deadline; and, even with the late notice, closing was not required for 357 more days. The truth of the matter is there are certain narrowly tailored facts in this case that substantially support granting equitable relief in this particular case. The trial court did not say that a party can exercise an option at *any time*, and

under *any circumstances*. That would be a case of the exception swallowing the rule. Instead, the circumstances of this case meet the factors outlined in the case law and directly call for the equitable relief that was granted. There is simply no evidence that the trial court abused its discretion in so finding.

5. The factors for an equitable grace period favor Burbank.

a. Burbank's delay in mailing the option notice was inadvertent, and there was no undue delay.

One factor the courts consider in assessing the propriety of granting an equitable grace period is whether the failure to give notice was purely inadvertent. *Wharf*, 24 Wn. App. at 612-13; *Cornish*, 158 Wn. App. at 218. In this case it is undisputed that the failure was inadvertent. Borton spends no time in its brief suggesting otherwise.

Burbank's owner, Eric Rogers, testified that his delay in mailing the notice exercising the option was inadvertent. CP 129. He drafted the notice on December 28, 2017, put it in an envelope on his desk, and it was supposed to go out in the mail the following day. He wasn't aware until the next week that it didn't get mailed out, and when he realized the error he mailed it on January 4, 2018. *Id.*

Rogers also testified that prior to December 31, 2017, he had multiple discussions with Borton's farm manager, Dan Bowton, advising of

Burbank's intent to exercise the option. In March 2017, Bowton approached Rogers asking if Borton could lease back some of the property to put a nursery in. CP 128-129. Rogers told Bowton that they would need a lease in place because they intended to exercise the option to purchase. CP 129. Rogers also testified that they had another discussion during potato harvest in 2017, and Rogers told Bowton that they planned on exercising the option. *Id.* Mr. Bowton acknowledges that he spoke with Rogers on these two occasions, and he acknowledged that Rogers indicated a desire to exercise the option in their first discussion in March 2017. CP 160. Bowton also reported back to Bill Borton, the president of Borton, that Rogers had told him that he intended to buy it back. *Id.*

Borton also attempted to buy the option back from Burbank. Both Byron Borton and Tracy Lybbert testified that in either late 2016 or early 2017, Mr. Borton told Tracy Lybbert to inquire whether they could buy the option out "so [they] could have clarity on whether [they] were going to own the property or not." CP 139. Mr. Lybbert contacted Burbank's real estate agent, Neal Goplen, about purchasing the option, and Goplen reported back to Lybbert that Burbank was not interested in selling the option. CP 171.

Burbank's affirmative representations to Borton that they intended to exercise the option, as well as Burbank's refusal to sell the option back

to Borton, coupled with Burbank's almost immediate correction of their error, supports that the mailing of the notice to exercise the option after December 31, 2017, was a mere oversight, and was inadvertent error on the part of Rogers. In sum, the first factor is present in this case and favors Burbank.

b. Burbank will suffer an inequitable forfeiture without an equitable grace period.

A second factor Courts consider in assessing the need for an equitable grace period is whether an inequitable forfeiture would result if equity does not intervene. *Wharf*, 24 Wn. App. at 612-13; *Cornish*, 158 Wn. App. at 218. Here, that answer is undoubtedly yes.

The record is clear that Burbank never desired to sell the subject property because it is a key piece of Eric Rogers' farming operation that produces early season potatoes, which he has agreements with many of his buyers to supply. CP 129. Unfortunately, as a result of low potato prices, Rogers' farming operation (including Burbank), was not profitable in 2014 and 2015. CP 104. This resulted in a lawsuit in June 2015 by his lender to collect on loans due to the lender. *Id.* Subsequently Rogers was able to reach an agreement with the lender to forbear collection of the loan, but the agreement required that the Burbank property be sold to generate cash. *Id.*

Rogers conferred with Neal Goplen to discuss options to allow him to keep the property. CP 104. Neal Goplen testified that Rogers advised that he had potential buyers, but that he did not want to sell the property. CP 150. Mr. Goplen suggested that Rogers sell it with a lease and an option to buy back the property. *Id.* According to Goplen, he and Rogers were looking at it as a “quasi-financing” deal. *Id.* They had an appraisal of the property that was done in 2014. *Id.* The appraisal valued the property at \$1,875,000 at that time. CP 104. However, given the intention to repurchase the property, Rogers and Goplen marketed the property as an investment instead of seeking the fair market value of the property. CP 104-105. Burbank Properties ultimately sold the property in February 2016 to Borton for \$1,550,000, over \$300,000 less than the 2014 appraised value, along with a lease that paid Borton over \$78,000 per year, and an agreement that Burbank would buy the property back for \$1,800,000. Had he intended to sell the property outright, Rogers would have sought the full fair market value of the property when Burbank sold to Borton. CP 105. Had the trial court ruled against Burbank, they stood to lose over \$300,000 in equity considering the sale price as compared to the appraised value of the property. This was repeatedly inquired into, and relied upon by the trial court judge in making his ruling herein. RP 3, 15, 16. If the trial court did not grant an equitable grace period, Burbank would have suffered a

substantial forfeiture from the standpoint that the property was sold for well under market value.

The trial court also recognized that Burbank would suffer a forfeiture of its timothy hay crop that was planted in 2017 if an equitable grace period was not granted. Eric Rogers testified in his deposition, the entirety of which was made part of the record on summary judgment, that they harvested potatoes in 2017, and that after the potatoes were harvested, timothy hay was planted which was intended to be harvested for two to three years. CP 128. If the option agreement is enforced, Burbank will not lose the substantial investment in its crop, and Borton will net \$250,000 in capital gains, plus \$236,325 in lease payments over three years, precisely what they bargained for. Conversely, if the equitable grace period is not granted, Burbank would minimally lose their timothy hay crop in 2019 (which was planted in 2017), as well as the difference between the appraised value, and what they “sold” it for in 2015.

Despite the vast amount of argument devoted to the hay issue, at no time does Borton address the loss of equity that Burbank has in the subject property after selling it substantially below market value, with the clear intention to repurchase it, and the inequitable forfeiture that would occur. The loss of equity and the loss of the hay crop were two of the bases on which the trial court found that Burbank would suffer an inequitable

forfeiture, and relied upon to grant equitable relief. The trial court did not abuse its discretion in so finding.

c. There was no prejudice to Borton caused by the delay.

A third factor considered by the trial court was whether the untimely notice caused Borton to change its position in any way, and whether Borton was prejudiced thereby. *Wharf*, 24 Wn. App. at 612-13; *Cornish*, 158 Wn. App. at 218. The answer to that question is a resounding no. Under the Lease and Option Agreement, although *notice* of intent to exercise the option was due by December 31, 2017, Burbank was not required to *close* the re-purchase until December 31, 2018 – an entire year. CP 13. Borton received the notice on January 8, 2017, so instead of having 365 days’ notice, they had 357 days’ notice. CP 4. Byron Borton testified that the only activity that Borton & Sons engaged in between January 1, 2018, and January 8, 2018 was a strategy discussion regarding what trees they might plant on the property. CP 140. They did not order any trees, nor did they incur any expenses during that time. *Id.* Borton’s position did not change in any meaningful way between January 1st and January 8th.

Borton misleadingly implies that they were prejudiced because they ordered orchard trees for the property. This was not prejudice caused by the late notice, but rather was a poor and risky business decision. Byron Borton clearly testified in his deposition that the trees they planned to put on the

property had been ordered a year or two prior to Burbank's deadline to give *notice* of their intent to exercise the option. CP 140. By purchasing trees before the deadline to give notice on the option, Borton caused its own risk and prejudice. The sworn testimony before this Court is that no trees were purchased between January 1 and January 8, the day notice was received. CP 140. Borton made its decision to order trees before Burbank was even obligated to exercise the option, and any prejudice was of their own making.

6. An equitable grace period does not *require* “substantial valuable improvements” to the Subject Property.

Borton's remaining principal argument on appeal can be boiled down to the claim that Burbank does not qualify for an equitable grace period because it has not made any substantial valuable improvements to the property. The problem with this argument is that it is not an absolute requirement.

Again, whether or not an equitable grace period is appropriate depends on the facts and circumstances of each case, and is largely within the discretion of the trial court. *Pardee*, 163 Wn.2d at 575. In *Pardee*, the court remanded the case back to the trial court, and directed the trial court to consider whether or not an equitable grace period should be imposed based upon the considerations applied in *Wharf*, 24 Wn. App. at 605. As previously noted, those considerations include:

- 1) The failure to give notice was purely inadvertent;
- 2) An inequitable forfeiture would have resulted had equity not intervened;
- 3) As a result of the [lessee's] failure to give timely notice, the [lessor] did not change its position in any way and was not prejudiced thereby;
- 4) The lease was for a long term, not a short term;
- 5) There was no undue delay in the giving of notice by the [lessee]

Id; *Wharf*, 24 Wn. App. at 612-13; *Cornish*, 158 Wash.App at 218.

In *Cornish*, however the court held that not “all five of these circumstances need be present in every case in which an equitable grace period is granted.” 158 Wn. App. at 218. Thus, it is not necessary to even show that an inequitable forfeiture would result, let alone that substantial valuable improvements were made to the property, which is not even a factor listed in *Wharf*. Notwithstanding, as noted above, Burbank would have an inequitable forfeiture by virtue of the substantial loss of equity in the Subject Property. Additionally, Burbank would also forfeit at least a year or more of its timothy hay harvest. Although it is not necessary that Burbank show an inequitable forfeiture if other considerations merit granting an equitable grace period, the evidence shows Burbank would suffer an inequitable forfeiture, which is exactly what the trial court found.

Furthermore, the other considerations set forth in *Wharf* justified the trial court granting a grace period here – notably that the 1) exercise of the option was inadvertently mailed four days late, 2) there is not prejudice to

Borton given that they did not incur any cost or expense or other loss as a result of the late notice, 3) Burbank is not even required to close the sale until December 31, 2018 and 4) in addition to receiving over \$230,000 in lease payments, Borton will be paid \$250,000 more than they purchased the property for.

7. The fact that Burbank does not have immediate funds available to close does not preempt an equitable grace period.

Borton contends that the court cannot grant an equitable grace period and specific performance because Burbank does not presently have funds available to close. Borton relies exclusively on *Kaufman Bros. Const., Inc. v. Olney's Estate*, 29 Wn. App. 296, 628 P.2d 638 (1981) for this proposition. However, that case also states that “[i]t is not necessary the buyer have funds immediately available when the option is exercised. The law only requires payment be made under the terms of the option.” *Id.* at 301. Here, closing is not required under the option agreement until December 31, 2018. There is no evidence before the court that Burbank would have been unable to procure appropriate financing by the closing date had Borton not commenced this litigation.

8. The Court can consider extrinsic evidence to analyze whether equitable relief is appropriate.

Although it is true that extrinsic evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, it is admissible “to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing.” *Berg v. Hudesman*, 115, Wn.2d 657, 669, 801 P.2d 222 (1990) (citing *J.W. Seaven Hop Corp. v. Pollack*, 20 Wn.2d 337, 348-349, 147 P.2d 310 (1944)).

Here, Burbank has not offered the context in which it sold the property and entered into the Lease and Option Agreement for the purpose of modifying the contract. It simply offers the context for the purpose of determining whether equity should side with the Respondent under these circumstances. To be sure, every single case cited by the parties concerning equitable grace periods considered extrinsic evidence in determining whether or not a grace period should be granted.

B. Burbank was entitled to attorney’s fees and costs and is entitled to another award of attorney’s fees from this Court.

In this case, the parties’ Lease and Option Agreement provides “[i]n the event that any action is filed in relation to this lease agreement, the

unsuccessful party in the action shall pay to the successful party...a reasonable sum for the successful party's attorney fees." CP 15. Pursuant to RCW 4.84.330, an award of reasonable attorney's fees is required:

In any action on a contract or lease ...where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party...shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

RCW 4.84.330

Furthermore, attorneys' fees are properly awarded under a contract, even when the court grants an equitable remedy to enforce the contract. *See, e.g. Cornish*, 158 Wn. App. at 234-235.

As a general rule, a prevailing party is one who receives an affirmative judgment in its favor. *Marassi v. Lau*, 71 Wn. App. 912, 915, 859 P.2d 605 (1993). Whether a party is a "prevailing party" is a mixed question of law and fact that is reviewed under an error of law standard. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 706, 9 P.3d 898 (2000). A successful defendant can also recover as a prevailing party. *Marine Enterprises, Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 772, 750 P.2d 1290 (1988). Such a defendant need not have made a counterclaim for affirmative relief, as the defendant can recover as a prevailing party for successfully defending against the plaintiff's

claims. *See, Marassi*, 71 Wn. App. at 916. In this case, Burbank was not only successful on their affirmative claims against Borton, but also successfully defended against Borton's claims.

While it is true that this court held that Burbank was entitled to an equitable grace period to exercise the option to purchase, the fact of the matter is that Burbank's claim was made "on the contract" to enforce its right to contractual performance from Borton. The action arose out of the contract between the parties, and the contract was central to the parties' dispute. *See, e.g. Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 130, 857 P.2d 1053 (1993). Borton argues, without support, that Burbank's claim for an equitable grace period was not "on the contract." This argument was specifically rejected by the court in *Cornish*:

Virginia Limited also contends that Cornish is not entitled to attorney fees and costs because the contract provides for such an award only to enforce rights under the Agreement, and Cornish's action, Virginia Limited argues, was brought in order to excuse it from the requirements of the contract. However, the trial court's grant to Cornish of an equitable grace period established Cornish's right to extend and exercise the option. Thus, Cornish had a right to receive contractual performance from Virginia Limited and brought the action on the contract in order to enforce that right.

158 Wn. App. 203, 235 n. 19, 242 P.3d 1, 18 (2010). Burbank was granted the same relief, for the same reason here, and is the substantially prevailing party entitled to an award of fees.

Borton argues that it would be unfair, and that the Court should not allow Burbank to benefit from its failure to timely exercise its option in the lease by granting an award of attorney's fees. However, it was Borton who chose to initiate this litigation, despite having actually received Burbank's notice of intent to exercise the option, and after receiving a letter from Burbank's counsel pointing out that forfeitures are not favored in law, and that considering the circumstances Burbank was entitled to an equitable grace period. CP 265-271. Borton could have simply conceded at that point, and the parties would have closed the sale, and Borton would have received \$1,800,000. However, despite these warnings, Borton elected to pursue litigation against Burbank. Burbank has successfully defended against Borton's claims, and was granted summary judgment in its favor. As the prevailing party, Burbank was and is entitled to an award of its attorney's fees and costs.

Additionally, pursuant to RAP 18.1, Burbank is entitled to an award of attorney's fees and costs for successfully defending against this appeal. Burbank respectfully requests that this Court award Burbank its fees and costs on appeal.

V. CONCLUSION

Through an inadvertent error, Burbank failed to exercise its option to purchase the Subject Property on time. The delay, however, was short

and caused no prejudice to Borton. On the other hand, given the nature of the transaction, and the character of the Subject Property, Burbank will suffer substantial losses if the option to purchase is not enforced, including their loss of equity in the property, and loss of crops. Burbank is entitled to an equitable grace period through the court's inherent power.

The decisions of the trial court are to be reviewed under an abuse of discretion standard, which is highly deferential to the trial court. The record before this Court provides no evidence that the trial court abused its discretion. Summary Judgment was properly granted to Burbank, and denied as to Borton, and must be upheld. Accordingly, Burbank respectfully requests that this Court affirm the trial court's Judgment, and further requests an award for their attorney's fees and costs on appeal.

DATED this 20th day of November, 2018.

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CERTIFICATE OF SERVICE

I certify that on the 20th day of November, 2018, I caused a true and correct copy of the foregoing document to be served electronically on the clerk of the above entitled court and on the following in the manner indicated below:

| | | |
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