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No. 69039-6

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

MUKILTEO RETIREMENT APARTMENTS, L.L.C.,
a Washington limited liability company,

Plaintiff/Respondent,

v.

MUKILTEO INVESTORS, L.P., a Washington limited partnership,
CAMPBELL HOMES CONSTRUCTION, INC., a Washington
corporation,

Defendants/Appellants.

ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
(Hon. George N. Bowden)

APPELLANTS' REPLY BRIEF

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I. SUMMARY OF REPLY

The fundamental problems for MRA's case are of its own creation. Seeking to enforce the Option Agreement against Mukilteo Investors, MRA instead proceeded to prove the Agreement's unenforceability through the testimony of its principal witness, Ronald Struthers. His evidence, given under direct examination during MRA's case-in-chief, undergirds the trial court's findings of no meeting of the minds on the Agreement's price term. And those findings render the Option Agreement an unenforceable "agreement to agree" -- an issue that Mukilteo Investors is entitled to raise for the first time on appeal under RAP 2.5(a)(2).

Nor can Equity be employed to avoid the required reversal. The Chancellor cannot enforce a contract that is unenforceable as a matter of law because the parties failed to agree on a material term (here, price). And even if the Chancellor could do so in theory, the uncontradicted evidence shows MRA forfeited Equity's protections when it asserted the right to exercise its option as of November 2007 -- eight months before MRA *knew* it was actually entitled to do so -- and thereby delayed for several *years* the parties' ability to determine a purchase price under the Option Agreement's price formula. Such are the wages of yielding to the siren song of counsel.

II. ARGUMENT IN REPLY

A. The Trial Court Found No Meeting of the Minds on the Option Agreement's Price Term. The Court Erred in Failing to Draw the Correct Legal Conclusion From Those Findings -- That the Option Agreement Was an Unenforceable Agreement to Agree.

1. MRA Misreads the Findings and Ignores the Evidence From Its Own Witnesses Showing No Meeting of the Minds on the Price Term.

MRA asserts the trial court did not find there was no meeting of the minds on the Option Agreement's price term, but instead merely chose not to resolve a conflict over how to calculate replacement cost after deciding to disregard Appraiser Brown's replacement cost opinion. *See* MRA Brief at 36. This assertion misreads the findings and ignores the testimony of MRA principal Ronald Struthers.

First, MRA misreads the findings. The trial court rejected Appraiser Brown's evidence in Finding of Fact 74 (CP 61). But this rejection comes four findings *after* the court's express determination that it need not find a replacement cost value because the parties never had a meeting of the minds on the components of that determination:

> At a minimum, *there was never a meeting of minds with respect to what was to be included in determining replacement cost for the facility.* ***It is therefore*** impossible to give effect to that pricing method and ***unnecessary for the court to sort out the differences of opinion of the different appraisers or their calculations.***

CP 60 (FOF 70) (emphasis added); *see also* CP 5324 (Amended FOF/COL) (FOF 70, unchanged). The trial court did not decline to

determine replacement cost because of Brown; the court declined to determine replacement cost because it found the parties never had a meeting of the minds on how to do so.[1]

Second, MRA ignores the testimony of MRA principal Ronald Struthers, who, under direct examination during MRA's case-in-chief, described precisely how the parties ended up entering into the Option Agreement without a meeting of the minds on price. Struthers testified that MRA was dissatisfied with the proposed price term, particularly the "replacement cost" element, which MRA wanted either defined or deleted. RP I 134:2-137:20. He described how he raised the issue with Gene Hiner, testifying that Hiner responded only by insisting that MRA needed to sign the proposed Lease and Option Agreement so work on the project could get underway, while also assuring Struthers that MRA would be treated fairly when it came time to determine the price MRA would pay, if and when MRA exercised its option. RP I 135:8-139:7; RP II 15:16-18:12.

In sum, MRA, during its case-in-chief and through its principal witness, introduced evidence showing there was no meeting of the minds on price, and that the parties instead entered into the Option Agreement knowing they would have to resolve the issue if and when MRA exercised

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[1] MRA also ignores that, just two findings later (and again before its decision to disregard Brown's testimony), the court also found no meeting of the minds on how to determine fair market value. *See* CP 60 (FOF 72).

its option.[2] Mr. Struthers also hit the proverbial nail on the head when he said there could be a "big mess" if the parties did not either get rid of replacement cost or define it, and instead entered into the Option Agreement leaving the issue unresolved. RP II 18:7-12. For a big mess is exactly what happened here, because of the decision to leave the issue of price to be worked out if and when MRA exercised its option. And given the testimony of Mr. Struthers, the trial court's ensuing finding of no meeting of the minds on price should have come as no surprise to MRA.

2. MRA's Primary Legal Defense of the Trial Court's Conclusions of Law Confuses Indefiniteness With the Separate Issue of Mutual Assent.

MRA sets forth a veritable "mini-treatise" on the law of indefiniteness, to show that the Option Agreement's price term is sufficiently definite to be enforceable. *See* MRA Brief at 28-36. Mukilteo Investors, however, is not arguing that the Option Agreement fails because the price term is insufficiently definite. Mukilteo Investors is arguing that the Option Agreement is unenforceable because there was no meeting of the minds on

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[2] Ignoring this testimony, MRA claims the only basis for Mukilteo Investors' contention that the parties disputed the meaning to be given replacement cost is Exhibit 221, a "red-line" version of the Option Agreement dated October 12, 1999. *See* MRA Brief at 6, n.2. MRA is correct that Mr. Struthers denied ever seeing the redline. MRA seems not to understand, however, that (1) Mukilteo Investors' statement, that the red-line struck out a proposed definition of replacement cost supplied by MRA (specifically, by MRA's outside counsel, Ed Beeksma), is an inference consistent with the trial court's Finding of Fact 70 (that the parties had no meeting of the minds on how to determine replacement cost), *and* (2) Mukilteo Investors is entitled to the benefit of such an inference -- especially as MRA has not assigned error to Finding of Fact 70, making it a verity for this appeal. For additional discussion, see footnote 15, *infra*.

what the price term *meant* -- in modern contract law parlance, because there was no "mutual assent" to the price term. As Professor Farnsworth points out, indefiniteness and lack of mutual assent are different requirements, and each must be satisfied for a contract to be enforceable:

> It is essential to distinguish one other cause of incompleteness of agreement -- a failure to agree. If the seller and the buyer of apples ... discuss the matter of the seller's responsibility for their quality and are unable to agree on how that matter is to be resolved, the incompleteness of their agreement in that respect will be fatal to the enforceability of their agreement -- *not because of lack of definiteness, **but because of lack of assent**.*

E. Farnsworth, FARNSWORTH ON CONTRACTS 419 (3d. ed. 2004) (emphasis added).

MRA has almost nothing to say about lack of mutual assent. MRA cites numerous cases involving the issue of indefiniteness but none about lack of mutual assent,[3] and MRA ignores the Washington Supreme Court's two most recent decisions about lack of mutual assent: *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 175, 94 P.3d 945 (2004), and *P.E. Systems, LLC v. CPI Corp.*, __ Wn.2d __, 289 P.3d 638 (2012) (the latter decided between the filing of Mukilteo Investors' opening brief and MRA's answering brief). Both written by Justice Tom Chambers, these decisions leave no doubt that definiteness and mutual assent are

[3] In its discussion of indefiniteness, MRA cites (in primary text and footnotes over an eight page span) ten Washington decisions and seven non-Washington decisions. *See* MRA's Brief at 28-35. *None* of these decisions supports upholding the trial court's decision to enforce the Option Agreement, given no mutual assent to the Agreement's price term.

distinct requirements for the enforceability of a contract in Washington:

> Contract formation requires an objective manifestation of mutual assent of both parties. [*Keystone*] at 177–78, 94 P.3d 945 (citing *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 388, 858 P.2d 245 (1993)). "Moreover, the terms assented to must be sufficiently definite." *Id.* at 178, 94 P.3d 945 (citing *Sandeman v. Sayres,* 50 Wn.2d 539, 541, 314 P.2d 428 (1957)).

P.E. Systems, 289 P.3d at 643. And where mutual assent on a material term is lacking, the affected agreement is deemed an "agreement to agree" *and therefore unenforceable*:

> "An agreement to agree is 'an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete.' Agreements to agree are unenforceable in Washington." *Keystone,* 152 Wn.2d at 175–76 (quoting and citing *Sandeman,* 50 Wn.2d at 541–42).

P.E. Systems, 289 P.3d at 644.

Here, the trial court found a lack of mutual assent -- no meeting of the minds -- on the Option Agreement's price term; this finding is supported by substantial evidence (*e.g.*, Struthers' testimony), and it renders the Option Agreement an unenforceable agreement to agree. MRA says the trial court can't have meant to make such a finding, because the court went on to enforce the Option Agreement. *See* MRA Brief at 35 n.15.[4] But all that proves is the trial court thought its equitable powers

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[4] MRA also says that the Option Agreement price term provided a method for determining price through the use of "possibly three, different pricing alternatives[.]" *See* MRA Brief at 33. If MRA is suggesting by this statement that the price term granted discretion to the appraisers to disregard one of the values, MRA is wrong. The price term

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entitled it to rewrite the parties' agreement (by supplying a price the court felt was fair) and then enforce *that* agreement against Mukilteo Investors, instead of dismissing MRA's complaint because the Option Agreement had turned out -- based on the evidence introduced at trial by MRA -- to be an unenforceable agreement to agree.[5] The trial court is not the first in Washington to overestimate its equitable powers,[6] nor is it likely to be the last to do so.

3. The Issue of the Unenforceability of the Option Agreement Fits Squarely Within RAP 2.5(a)(2), and MRA Waived Any Challenge to the Defendants' Right to Raise the Issue Based on Admissions Made in the Pleadings.

All but conceding that the issue of enforceability qualifies for

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plainly and unambiguously provided that the price would be the highest of replacement cost, fair market value, and Schedule D, and nothing in the agreement allowed any of these value to be disregarded (a point Mukilteo Investors will address again, when discussing MRA's "severance clause" claim, in Section II.B.4 of this brief).

[5] It is telling that MRA does not argue, even in the alternative, that the Option Agreement was a binding contract to negotiate a price at which MRA could exercise its option. Of course, such a claim would fail here as a matter of law because it would require proof of an "exchange [of] promises to conform to a specific course of conduct," *see P.E. Systems*, 289 P.3d at 644 (quoting *Keystone*), and Mr. Struthers' testimony establishes that no such exchange occurred. According to Struthers, Hiner only promised that the Campbells would treat MRA "fairly," and such a promise, untethered to anything more specific, is not enforceable. *See Badgett v. Security State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991) (rejecting the enforceability of a "free-floating" duty of good faith).

[6] *See* Opening Brief at 38-39, citing and quoting *Haire v. Patterson*, 63 Wn.2d 282, 286, 386 P.3d 953 (1963) (modifying in relevant part a decree of specific performance enforcing a contract for the sale of a ranch, because the parties did not reach agreement on all material terms) ("Where the parties have not reached agreement, *there is nothing for equity to enforce*" (emphasis added)). Here, the trial court declared there to be no meeting of the minds on what the Option Agreement price term meant, then disregarded the Agreement's three pricing formulas and set a price based on a fourth formula that *it* chose. MRA may be willing to agree after-the-fact to a court setting the price, but Mukilteo Investors did not and has not agreed to a court doing so.

consideration under RAP 2.5(a)(2),[7] MRA argues that Mukilteo Investors waived its right to raise the issue because its answer admitted the enforceability of the Option Agreement. *See* MRA Brief at 25-28. MRA is correct that Mukilteo Investors' answer admitted MRA's allegation that the Option Agreement was a "valid and binding" contract, and Mukilteo Investors agrees that this constituted a judicial admission of a fact[8] that *could* have foreclosed its right to raise the issue of enforceability under RAP 2.5(a)(2). But that is not the case here, for two reasons.

First, MRA waived any judicial admission when it introduced evidence contradicting its own claim of a valid and binding agreement. Judicial admissions arising out of the pleadings are waived by a plaintiff who introduces evidence at trial that contradicts the allegations of the complaint,

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[7] In footnote 12 of its brief, MRA asserts that RAP 2.5(a)(2) "has no application [here] because the undisputed facts show the parties had a valid contract." *See* MRA Brief at 27, n.12. This assertion both ignores MRA's evidence at trial showing no meeting of the minds on the Option Agreement's price term, and begs the question of whether the issue of unenforceability, raised by the trial court's finding of no meeting of the minds, qualifies for consideration under RAP 2.5(a)(2). On the latter point, MRA offers no analysis as to why the issue does not qualify for consideration under the rule, and (as Mukilteo Investors will show) its case authorities do not support such a holding.

[8] Whether there is mutual assent to a contract's material terms is a question of fact, *see, e.g.*, *P.E. Systems*, 289 P.3d at 643 (citations omitted), and the trial court's finding of no mutual assent (no "meeting of the minds") is supported by substantial evidence (e.g., the testimony of MRA principal Ronald Struthers) and therefore binding in this proceeding. *See generally Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959) (an appellate court lacks authority to substitute its findings for the trial court's on any disputed fact question if the trial court's findings are supported by substantial evidence). It is telling that MRA has taken no steps (e.g., cross appeal; assignment of error) to challenge the validity of the trial court's finding.

even though the defendant admitted them in its answer.[9] Here, Mr. Struthers testified under direct examination during MRA's case-in-chief that the parties entered into the Option Agreement without agreement on the meaning of the agreement's price term, leaving that to be worked out if and when MRA exercised its option to purchase the facility. This is a *classic* example of a plaintiff waiving a defendant's admission by introducing evidence contradicting the plaintiff's original allegation.

Second, even assuming that the binding effect of Mukilteo Investors' pleadings admission somehow survived the introduction of MRA's evidence contradicting it, MRA waived the admission by not raising the issue before the trial court. It is a long established principle of Washington appellate review that a trial court's findings of fact must support its conclusions of law,[10] and MRA should have recognized that the

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[9] *See, e.g., Cortez-Pineda v. Holder*, 610 F.3d 1118, 1123 (9th Cir. 2010) (citing and quoting with approval 32 C.J.S. EVIDENCE § 626 (2008): "When a party does not rely on the judicial admission of his adversary, but introduces evidence that has the effect of disproving his case, the party making the admission is not bound by it"); *Plemmons v. Pevely Dairy Co.*, 241 Mo. App. 659, 233 S.W.2d 426, 434 (1950) ("It is a well established principle of law that where a party does not rely upon a judicial admission of his adversary, but introduces evidence which has the effect of disproving his case, the party making the admission is not bound by his admission"), citing in part *Dressner v. Manhattan Delivery Co.*, 92 N.Y.S. 800 (App. Div. 1905) ("While the answer admits the allegation of ownership in the plaintiffs, plaintiffs' counsel nevertheless brought out testimony which had the effect of disproving it. In such a case an admission in the pleadings is not binding where the party fails to rely upon it, and introduces evidence to controvert his own allegations." (citations omitted)).

[10] *See, e.g., State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994), citing *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Penchos v. Ranta*, 22 Wn.2d 198, 205, 155 P.2d 277 (1945); *Brainard v. Miser*,

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"no meeting of the minds" findings did not support the trial court's enforceability conclusions. When MRA subsequently failed to move for reconsideration of those findings based on Mukilteo Investors' answer, it waived any controlling effect of Mukilteo Investors' judicial admission which might have survived MRA's trial proof establishing no meeting of the minds on the Option Agreement's price term.[11]

MRA's case authorities cannot save MRA's judicial admission claim, and also do not support a holding that the enforceability issue falls outside the scope of RAP 2.5(a)(2):

- In *Neiffer v. Flaming*, 17 Wn. App. 443, 563 P.2d 1300 (1977), Division Three stated that it need not address a claim that an option agreement was unenforceable because it supposedly lacked terms

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165 Wash. 244, 246, 4 P.2d 1097 (1931) (all holding that the trial court's judgment must be reversed because the findings of fact did not support the conclusions of law).

[11] *See, e.g.*, *Hawley Ave. Assocs., LLC v. Russo*, 130 Conn. App. 823, 25 A.3d 707, 712-13 (2011) (refusing to consider claim that defendant admitted enforceability of lease in answer to complaint, because the plaintiff could have but failed to first raise the issue by a motion for reconsideration of the trial court's ruling that the lease was unenforceable because the parties had no meeting of the minds on a material term); *Ray v. Frasure*, 146 Idaho 625, 200 P.3d 1174, 1177 (2009) (refusing to consider judicial admission claim raised for first time on appeal); *Wood v. Roy Lapidus, Inc.*, 10 Mass. App. Ct. 761, 413 N.E.2d 345, 348 (1980) (same). It is important to understand the very different positions of MRA and Mukilteo Investors, with respect to any obligation to respond to the trial court's finding of no meeting of the minds. Mukilteo Investors had no obligation to respond, because RAP 2.5(a)(2) gave Mukilteo Investors the right to raise the resulting conflict between the court's findings and conclusions on appeal without first bringing the issue to the trial court's attention. MRA, on the other hand, confronted with the same conflict, *was* obligated to bring any claim of judicial admission to the trial court's attention, as part of a motion under CR 59 asking the court to recede from its finding of no meeting of the minds on price. (Of course, MRA would then have had to address the conflict between the allegation in its complaint that the Option Agreement was a valid and binding contract, and its proof at trial establishing no meeting of the minds on the Agreement's price term.)

necessary to carry out a sale of property, because that issue was being raised for the first time on appeal. The court did so, however, based solely on the authority of a single pre-RAP decision of the Supreme Court, and without addressing whether the issue was properly before it under RAP 2.5(a)(2). *See* 17 Wn. App. at 446, citing *Talps v. Arreola*, 83 Wn.2d 655, 521 P.2d 206 (1974). The court went on to reject the claim on the merits, holding the agreement was sufficiently complete to support enforcement of the cash sale ordered by the trial court. *See id.* ("Furthermore, the option provision is not so ambiguous as to prevent a cash sale of the property"). Nothing in the court's merits discussion indicates it confronted a circumstance comparable to this case, in which (1) the party objecting to the court reaching the issue of enforceability introduced the evidence establishing unenforceability, after which (2) the trial court made a specific finding of fact supported by that evidence which does not support its decision to enforce the contract.[12]

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[12] MRA's reliance on *Neiffer* underscores the need to be wary of decisions stating when issues may be raised for the first time on appeal, which were issued within the first few years following the adoption of the RAPs. As Mukilteo Investors pointed out in its opening brief, although some Court of Appeals panels after the 1976 adoption of the RAPs initially characterized application of the exceptions in RAP 2.5(a) as discretionary, *see, e.g., State v. Scott*, 48 Wn. App. 561, 568-69, 739 P.2d 742 (1987), the Supreme Court subsequently clarified in *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999), that only the first part of the rule is discretionary, and the exceptions are mandatory. *See* Opening Brief at 40, n.22 (discussing *Scott*, *WWJ*, and related authorities). *Neiffer*, decided just one year after the adoption of the RAPs, relied solely on pre-RAP case law to support what ended up being only a generalized *dictum* about raising issues for the first time on appeal.

- In *Hemenway v. Miller*, 55 Wn. App. 86, 776 P.2d 710 (1989), this Court refused to consider an issue that the appellant claimed he could raise for the first time on appeal under RAP 2.5(a)(2). In challenging the trial court's grant of a partial summary judgment holding the appellant liable for impairing the value of collateral securing a promissory note (specifically, by failing to renew a security interest in certain business assets), the appellant contended he could not be held liable because the respondent supposedly caused the security interest to terminate when he sold the business to a third party whose subsequent default gave rise to the case at hand. 55 Wn. App. at 715-16. This Court held that RAP 2.5(a)(2) did not apply because the appellant's claim of termination due to the sale of the business was an affirmative defense for which the appellant bore the burden of proof. *Id.* at 716. With the mandatory exception of RAP 2.5(a)(2) thus ruled out, this Court then exercised its general discretion not to consider the issue.

Hemenway is inapposite. Here, MRA contradicted its own allegation of a valid and binding agreement when it put on proof that the parties had no meeting of the minds on price, and based on that proof the trial court found no meeting of the minds on price. It is hornbook Washington contract law that MRA had the burden to prove --- in the words of its complaint -- a "valid and binding" (in other words,

enforceable) option agreement, to be entitled to *any* of the relief it received under the trial court's final judgment. The trial court's finding of no meeting of the minds on price means MRA "fail[ed] to establish facts upon which [that] relief c[ould] be granted" (RAP 2.5(a)(2)) -- specifically, MRA failed to establish the fact of mutual assent to the Agreement's price term. Mukilteo Investors therefore is entitled to raise that issue on appeal without first raising it in the trial court.

4. MRA's Severance Claim is Meritless.

MRA asserts that the severance clause of the Option Agreement means the Agreement can be enforced even if the price term is held invalid. *See* MRA Brief at 36-38.

If MRA is arguing that the mere presence of a severance clause means a contract can be enforced by "severing" a material term that fails for lack of mutual assent, the proposition should be summarily rejected. MRA cites no authority supporting the notion that the mere presence of a severance clause can somehow transform what is otherwise a mere agreement to agree into an enforceable contract, by the prestidigitation of excising the ineffective term. Price is a material term, and severing the Option Agreement's ineffective price term would leave the Agreement without any price term -- and a price term is required for the Agreement to be an enforceable contract. *See* Opening Brief at 29 & 34 (citing *Valley Garage v. Nyseth*, 4 Wn. App. 316, 318, 481 P.2d 17 (1971)).

If MRA instead is arguing that the parties intended to allow a price to be based on just one or two of the three measures set forth in the agreement (e.g., based on Schedule D alone, or the greater of Schedule D and fair market value), the proposition should be rejected because it is contradicted by the plain language of the Option Agreement's price term, and unsupported by any extrinsic evidence. The price term says the price shall be the highest of Schedule D, fair market value, and replacement cost; nothing in the agreement allows any of these values to be disregarded, and no witness so much as suggested that the parties intended this could be done. MRA's own evidence shows instead that the parties reached an impasse over the price term, and decided to leave that issue to be resolved should MRA exercise its option.

B. Undisputed Evidence Established That MRA Had Unclean Hands, Which Should Have Precluded Any Equitable Relief.

Assuming the Option Agreement was enforceable, MRA does not deny it would have been ineligible for equitable relief had the trial court found it had unclean hands. *See Cornish College of the Arts v. 1000 Virginia Ltd. P-ship*, 158 Wn. App. 203, 216, 242 P.3d 1 (2010), *rev. denied*, 171 Wn.2d 1014, 249 P.3d 1029 (2011). Although the trial court did not find unclean hands, the absence of a finding is not treated as a negative finding where uncontroverted evidence compels the opposite conclusion. *Martin v. City of Seattle*, 111 Wn.2d 727, 731-32, 765 P.2d

257 (1988) (concluding that the undisputed evidence required reversal even though the trial court made no finding on issue).[13] Furthermore, the implied finding that MRA acted in good faith (FOF 82), to which Mukilteo Investors assigned error, is not supported by substantial evidence and cannot be sustained. That MRA had unclean hands was established by uncontroverted evidence, in two ways.

First, although MRA now refuses to recognize that the purchase price depended on the exercise date, until at least November 2010 MRA used an invalid exercise date to insist upon a deflated purchase price. Worse, MRA accuses Mukilteo Investors of frustrating its attempt to exercise the option by refusing to discuss price, when it was MRA's insistence upon an invalid exercise date that for at least two and a half years precluded ***any*** meaningful discussion of price, thereby making it *impossible* to close a sale. The only tenable finding was that MRA had unclean hands and must not benefit from its machinations.[14] For the trial

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[13] *See also Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 910, 823 P.2d 1116 (1992) (declining to apply the presumption that the absence of finding is a negative finding where the result would have been contrary to uncontroverted evidence); *State v. McDaniels*, 39 Wn. App. 236, 239, 692 P.2d 894 (1984) (holding that the trial court's findings may be supplemented by undisputed evidence).

[14] The relevant contract language shows there was no reasonable basis for concluding anything other than that MRA had no reasonable basis for claiming the right to exercise the option before June 15, 2008. *See* Exh. 225 at 3-4 (Option Agreement stating it would be "exercisable by MRA only during the period commencing on the...eighth (8th) anniversary of the commencement date of the Facility Lease Agreement"); Exh. C to Exh. 225 at 2 (Lease Agreement providing its commencement date was the earlier of (1) the issuance of a certificate of occupancy or (2) the lessee taking possession); Exh. 229 at 1 (certificate of occupancy issued on June 15, 2000, which as the earlier of the two

(Footnote continued on next page.)

court to find that MRA acted in good faith in the face of this uncontroverted evidence was manifestly an abuse of discretion. Yet MRA says *nothing* about this issue, even though it was fully developed in Mukilteo Investors' Opening Brief. *See* Opening Brief at 42.

Second, the evidence was also uncontroverted that, when MRA directed the Tellatin appraisers to exclude land value from their analysis of the Facility's replacement cost (RP III 26-29; Exh. 281), challenged Brown's replacement-cost figure on the basis that it included the land (RP III 28-29; RP IV 81-82; RP VI 38; Exh. 311), and pointed to the Tellatin appraisal as a more accurate valuation because it excluded the land (*id.*), MRA knew that Mukilteo Investors had refused to define the "replacement cost" of the Facility as the cost to replace only the building, and *further* knew that its position was contrary to the plain language of the Option Agreement's definition of the Facility as including the land. Exh. 225 at 1 (¶¶ 1-2). Ed Beeksma insisted that "replacement cost" be defined or deleted, proposing a definition -- rejected by Therrien -- that excluded the land.[15] Therrien discussed the issue with Beeksma and explained

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possible dates became the commencement date and which made June 15, 2008, the earliest option exercise date). That MRA's litigation counsel evidently advised MRA to assert such a baseless right is no excuse, either. *See* RP II 68 (Struthers testifying he agreed with Mukilteo Investors' interpretation of the option-period commencement date until counsel advised the agreement could "possibly" be interpreted another way).

[15] MRA claims that Beeksma never proposed the definition, but his having done so is a reasonable inference to which Mukilteo Investors is entitled because it is consistent with FOF 70. *See* footnote 2, *supra*; *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72,

(Footnote continued on next page.)

Mukilteo Investors' understanding that "replacement cost" included the land, RP VIII 120; RP IX 8-9, 41-42, and Beeksma's knowledge of that understanding is imputed to MRA. *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) ("The attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on his behalf.").

The notion that Beeksma was merely an informal advisor to MRA and not its legal representative is contrary to the record and the law. Struthers testified MRA was represented by Beeksma. RP III 152. Furthermore, the trial court found that Beeksma corresponded with Therrien on MRA's behalf. CP 53 (FOF 8). Beeksma sent multiple communications addressed directly to Therrien in which Beeksma made demands regarding various contract terms, including replacement cost.

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859 P.2d 610 (1993) (holding that review for substantial evidence "entails acceptance of the factfinder's views regarding...the weight to be given reasonable but competing inferences"). That Beeksma proposed the definition is a reasonable inference for four reasons. ***First***, replacement cost was undefined in the versions of the Option Agreement that Therrien sent Beeksma on September 1 and September 21, 1999; in response to those drafts, Beeksma repeatedly requested, both orally and in writing, that "replacement cost" be defined or deleted. Exh. 211 at 2; Exh. 216 at 5-6; RP VIII 102-04. On October 12, 1999, Therrien sent Beeksma a redline copy of the agreement in which a definition of "replacement cost" was *stricken* and replaced with other language. Exh. 219 at 3-4; Exh. 221 at 2. The only reasonable explanation is that Therrien was striking language authored by someone else, and there is no one else the record suggests could have authored it save Beeksma. ***Second***, the stricken definition was consistent with the understanding of "replacement cost" held by Struthers (RP I 139; RP II 21-22) -- and *inconsistent* with that held by Therrien (RP VIII 120; RP IX 8-9, 41-42) -- in that it referred only to the cost to replace the building and not the land. *See* Exh. 221 at 2. Why would Therrien draft a definition inconsistent with Mukilteo Investors' intent? ***Third***, Struthers admitted that Beeksma not only asked to have "replacement cost" defined but "might have made some suggestions" regarding how to define it. RP II 18. ***Fourth***, Therrien testified that Beeksma proposed the definition, RP VIII 111-12; RP IX 8-9, and MRA did not call Beeksma as a witness (a telling indication that Beeksma would have confirmed Therrien's testimony).

RP VIII 98-99; *see* Exhs. 5, 7, 10, 11. As Struthers summarized, "[W]e could go through letter to letter to letter from Mr. Beeksma [to Therrien] and he was always hammering away [that replacement cost] needs to be defined" and "[i]f it's not going to be defined, remove it." RP II 171-72. Beeksma also had numerous conversations with Therrien in which they negotiated contract terms. RP VIII 96-97, 101-04, 110-11, 121. Beeksma manifested actual or apparent authority to negotiate on behalf of MRA and must be presumed to have acted on its behalf. *See Clay v. Portik*, 84 Wn. App. 553, 561, 929 P.2d 1132 (1997) (holding that an attorney is presumed to speak and act on behalf of his client).

In sum, MRA knew that Mukilteo Investors had refused to define "replacement cost" as MRA wanted, yet it still sought to unilaterally impose that definition by instructing Tellatin to exclude the land value from its replacement cost analysis, and challenging Brown's appraisal on the basis that it included the land. MRA also hid the Tellatin appraisal while it waited to see if the Brown appraisal would come in lower, contrary to the Option Agreement's simultaneous appraisal process. RP IV 93; 95-97; RP IX 34. A party seeking equitable relief must be without fault in the transaction at issue and must not have engaged in conduct that was "unconscientious, unjust, or marked by the want of good faith." *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 170, 265 P.2d 1045 (1954). In

the face of the uncontroverted evidence of MRA's unclean hands, it was an abuse of discretion to grant equitable relief.

C. The Trial Court Abused Its Discretion in Awarding Consequential Damages and in Denying Mukilteo Investors Offsets to Which It Was Entitled.

1. It Was Error to Award Consequential Damages at All.

The trial court abused its discretion in awarding consequential damages for the period June 15, 2008, through November 2010, when MRA was advocating an invalid option exercise date. MRA's only response is that the parties had a concurrent dispute about price. *See* MRA Brief at 41. This response ignores that the price depended on the exercise date, *see* Exh. 225 at 1-2; so long as MRA continued to pursue an invalid exercise date, no progress could be made regarding price, and without such progress closing a sale was literally impossible.

The court further erred in awarding consequential damages from November 2010 through trial because MRA continued to delay the proceedings through unproductive discovery and related motions, which supposedly would unearth evidence that appraiser Brown was biased toward Campbell Homes due to his prior involvement in appraising Campbell Homes properties. MRA pursued this theory even though Campbell Homes had no interest in Mukilteo Investors after May 2008. Exh. 89.

The bias theory had nothing to do with the basis on which the trial

court disregarded Brown's testimony -- that Keith Therrien exerted improper influence over Brown. *See* CP 60-61 (FOF 68, 69, 74). MRA's post-hoc attempt to lump these issues together is not borne out by the record.[16] And although the trial court found, in awarding attorney's fees, that "[t]he efforts that MRA's counsel undertook to obtain these records [from Brown] contributed greatly to the determination to disregard the testimony of defendant's appraiser at trial," this finding was not supported by substantial evidence. *See* Opening Brief at 46, 58. MRA abandoned the bias theory at trial and presented no evidence on it (quite logically, having found none), and the grounds on which the trial court disregarded Brown's testimony were unrelated to it. *See* CP 60-61 (FOF 68, 69, 74).

2. It Was Error to Fail to Account Either for Payments MRA Would Have Been Making on Its Mortgage Or Interest Due Mukilteo Investors on the Purchase Price.

MRA misses the point regarding the trial court's failure to deduct the cost of a mortgage from the credit for rents paid from June 15, 2008, through the trial. The period at issue is that for which the trial court awarded consequential damages, not the full term of a loan. *See* MRA

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[16] MRA's related assertion that Therrien "increased James Brown's valuation of 'replacement cost' by $3 million" (MRA Brief at 17) misstates the record. Therrien merely inserted the undepreciated replacement cost figure -- detailed elsewhere in the 180-page report -- to the summary on the first page. Exhs. 132, 135. Furthermore, MRA does not deny that using an undepreciated value was consistent with the parties' intent (*see* Opening Brief 24 n.14) or that Therrien's correction of clerical errors by Brown, if anything, had the effect of *reducing* the replacement cost figure by $500,000. *See* Opening Brief 42.

Brief at 43.

Consequential damages are supposed to put the plaintiff in the position it would have been in had the seller performed -- and no better. *Rekhi v. Olason*, 28 Wn. App. 751, 757, 626 P.2d 513 (1981). MRA can only be entitled to the difference in cost between owning and leasing. MRA admits that, to own the facility, it would have had to finance most of the purchase price and make mortgage payments. Exhibit 148, prepared by MRA's appraiser expert, Anthony Gibbons, states that MRA would have borrowed 75% of the price with interest at 6% payable over 25 years. *See* RP VI 62-70. Under the methodology of exhibit 148, and given the purchase price of $18,725,000 determined by the court and the total rents paid from June 15, 2008, through July 15, 2012 of $6,033,805, the rent payments exceed the hypothetical mortgage payments by $1,600,085. That *difference* is *all* the consequential damages MRA can claim as an offset against the price, and crediting MRA the total rents paid therefore gave MRA a windfall of over $4.4 million.

MRA also misses the point with respect to interest on the price. While MRA may have wanted to purchase the property in June 2008, and was deemed to have exercised the option as of June 15, 2008, the sale still has not closed and Mukilteo Investors will not receive the sale proceeds until sometime in the future. A seller that defaults is still entitled to

interest as an offset against its liability for any rents and profits received during the period of delayed performance, *Paris v. Allbaugh*, 41 Wn. App. 717, 719, 704 P.2d 660 (1985), and simple interest on the $18,725,000 purchase price at the 6% rate used by MRA would be $4,587,625 for June 15, 2008, through July 15, 2012. As stated, the court determined the rents during that period totaled $6,033,805. The net consequential damages for MRA therefore could not exceed $1,446,180 -- the court-determined purchase price offset, less the interest to which Mukilteo Investors would have been entitled under applicable law.[17]

D. Campbell Homes May Not Be Held Liable Because MRA Did Not Timely Move to Undo the Trial Court's Dismissal, and Because Campbell Homes Was Not the General Partner of Mukilteo Investors When the Obligation for Which It Is Being Held Liable Arose.

Entry of final judgment occurred on July 2, 2012, because that is the date the trial court filed with the clerk[18] a signed document -- entitled "Findings of Fact and Conclusions of Law" -- that finally determined the

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[17] These two issues (mortgage cost; interest) are two sides of a single coin. Either one assumes a closing years earlier, in which case one must adjust the offset for the cost MRA would have incurred from financing the purchase of the Facility, or one assumes a closing under the terms of the trial court's judgment, in which case one must adjust for the interest to which Mukilteo Investors is entitled. In any event, the trial court's offset of $6,000,000 is legally untenable, and must be vacated and the appropriate adjustment made.

[18] The trial court did not merely "issu[e]" its findings and conclusions on July 2, as MRA contends. *See* MRA Brief at 44. Instead, the July 2 findings and conclusions were delivered to the clerk for filing under CR 58(b), at which point they were "deemed entered for all procedural purposes[.]" *See* CP 52 (reflecting that the findings and conclusions were filed with the clerk).

rights of the parties in the action; after they were entered, no claims remained to be resolved.[19] MRA does not dispute that the Findings and Conclusions resolved all claims, and its formalistic approach to determining finality was rejected four decades ago in *Nestegard v. Investment Exchange Corporation*, which held that the determination of finality is one of substance, not form. 5 Wn. App. 618, 623, 489 P.2d 1142 (1971) ("substance controls over form"; for the purpose of determining finality, "the court looks ***not to the title of the instrument but to its content***" (emphasis added)).

No case supports allowing the objectively manifested finality of a trial court's written decision to be "undone" by after-the-fact, post-entry statements about trial court "intent," and this Court should take the opportunity to reject their relevance to Washington finality law. CR 6(b)(2) prohibits enlargement of CR 52(b)'s ten-day time limit for post-judgment revisions, and allowing a trial court to change, through an after-the-fact expression of intent, the final quality of a judgment, would undermine the structure for post-judgment motions established by the interplay between CR 6 and CR 52. CR 6(b)(2)'s bar on enlarging the

[19] *See* CR 54(a)(1) (a "judgment is the final determination of the rights of the parties in the action. ... A judgment shall be in writing and signed by a judge and filed forthwith as provided in Rule 58."); *Purse Seine Vessel Owners Ass'n v. State*, 92 Wn. App. 381, 387-88, 966 P.2d 928 (1998) (finality for purposes of appeal occurs when action is concluded through resolution of entitlement to the requested relief); CR 58(b) ("Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing[.]").

time for revisions also means that the trial court's July 2 letter cannot be taken as permission for MRA to move for additional findings or conclusions outside of the ten-day window provided in CR 52(b). *See* CP 51.[20]

In any event, there is no basis for holding Campbell Homes liable, as it was not Mukilteo Investors' general partner on June 15, 2008, the earliest date when any enforceable obligation to sell the facility could have arisen.[21] *See Harrison v. Puga*, 4 Wn. App. 52, 59, 480 P.2d 247 (1971) (until exercised, an option agreement "creates ***no obligation*** to … perform in accordance with the option terms[]") (emphasis added); *Turner v. Gunderson*, 60 Wn. App. 696, 701, 807 P.2d 370 (1991) (obligation to sell under "new contract" of purchase and sale created upon exercise of option).

E. Attorney's Fees.

MRA does not dispute that its efforts to unearth evidence of Brown's supposed bias toward Campbell Homes were completely

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[20] Nothing in the July 2 letter itself actually supports MRA's contention that the findings and conclusions were not intended to be final. Instead, the letter shows that the trial court intended the findings to resolve all claims between the parties, thus preventing "further disagreement[.]" CP 51.

[21] The trial court's findings foreclose MRA's argument that Mukilteo Investors, and by extension Campbell Homes, incurred a continuing obligation dating back to 1999 to determine the price of the facility. The trial court found that "defendant MILP [Mukilteo Investors] was under ***no duty*** to negotiate a purchase price or set a closing date until after [June 15, 2008]" because that is when the court ruled the option commenced. *See* CP 58 (FOF 58) (emphasis added).

fruitless. MRA made no effort at trial to prove such a bias, and the trial court's finding that the fruitless discovery efforts "contributed greatly" to the court's decision to disregard Brown's testimony therefore is not supported by substantial evidence. CP 5332 (FOF 10).

III. CONCLUSION

This Court should reverse and dismiss MRA's claims with prejudice.

RESPECTFULLY SUBMITTED this 24th day of January, 2013.

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No. 69039-6-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

MUKILTEO RETIREMENT APARTMENTS, L.L.C., a Washington limited liability company, Respondent, vs. MUKILTEO INVESTORS, L.P., a Washington limited partnership; CAMPBELL HOMES CONSTRUCTION, INC., a Washington corporation, Appellants.	DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, not a party hereto and competent to be a witness herein. I certify that on November 2, 2012 I served a copy of the following documents:

- *Correspondence of Michael B. King dated January 24, 2013 to the Clerk of the Court;*
- *Appellants' Reply Brief; and,*
- D*eclaration of Service* on counsel of record as follows:

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

DATED this 24th day of January, 2013.

Patti Saiden, Legal Assistant