NO. 36663-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

LANDMARK LLC,

Appellant,

v.

THE SAKAI QTIP TRUST; THE GRANDCHILDREN OF KIMIKO R. SAKAI TRUST; KIMIKO R. SAKAI, individually and as co-trustee of the SAKAI QTIP TRUST; J. ANTHONY HOARE, as co-trustee of the SAKAI QTIP TRUST and as trustee of THE GRANDCHILDREN OF KIMIKO R. SAKAI TRUST; JOHN D. SAKAI, PAUL D. SAKAI; MARY ANN R. ARNONE; JOHN DOES 1 through 20,

Respondents.

REPLY AND CROSS-RESPONSE BRIEF OF LANDMARK LLC
CORRECTED

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INTRODUCTION

The trial court's dismissal of Landmark's claims for specific performance, equitable estoppel, and breach of the covenant of good faith and fair dealing on partial summary judgment was procedurally improper because the trial court made factual rulings on disputed material facts, and because it failed to give Landmark the benefit of all factual inferences as it was required to do. Equally important to this appeal – the trial court's dismissal of these claims on partial summary judgment was legally improper because it was based on a misstatement of the law. The trial court erroneously ruled that Washington law does not recognize real estate purchase and sale agreements with open terms. These improper factual and legal rulings, made by the trial court on partial summary judgment, then carried over to the trial.

In responding to this appeal, Sakai does not directly address the factual and legal errors made by the trial court on partial summary judgment. Instead, Sakai attempts to justify the trial court's partial summary judgment ruling based on a new factual argument, made for the first time on appeal. Sakai does so by basing its factual argument largely on improper evidence – the evidence presented at trial – where these dismissed claims were no longer at issue.

The trial court's partial summary judgment ruling must be reviewed *de novo* based only on the evidentiary record that was before the trial court at the time it ruled. Landmark's claims for specific performance, equitable estoppel, and breach of the covenant of good faith and fair dealing, were not re-litigated at trial. As such, Landmark did not present evidence or argument in support of these claims at trial. For example, key evidence on the specific performance claim, such as the testimony of Kimiko Sakai, was not presented at trial. The "Findings of Fact" entered by the trial court at the conclusion of trial included the factual determinations the trial court had already improperly made prior to trial on partial summary judgment. These findings of fact from the summary judgment proceedings were not properly included by the trial court as findings of fact, and are not properly relied upon by Sakai on appeal to justify the trial court's partial summary judgment ruling.

Moreover, Landmark was forced to accept the trial court's improper factual and legal rulings as the "law of the case" – as a factual and legal foundation that served as the starting point at trial. This tainted the trial proceedings.

In its brief, Sakai now synthesizes a contrived and misleading statement of facts based on a very selective cherry picking of evidence. Sakai ignores the wealth of evidence discussed in Landmark's opening brief – evidence that supports Landmark and is unfavorable to Sakai. And, Sakai completely ignores those relevant findings of fact made by the trial court in favor of Landmark following the bench trial. The parties' respective recitation of evidentiary facts, and the factual inferences each party draws, are as different as night and day and are highly disputed. This emphasizes the impropriety of the trial court making any ruling on partial summary judgment.

Sakai admits for the first time on appeal that Sakai and Landmark entered into an "agreement to negotiate a new contract." Reply Brief at 20. This represents a significant and legally important change in position by Sakai, who, throughout the trial court proceedings, refused to acknowledge such an agreement. As discussed more fully below, the Washington Supreme Court has not yet addressed how an "agreement to negotiate in good faith" is to be enforced. *Keystone Land & Development Company v. Xerox*

Corp., 152 Wn.2d 171, 176 (2004). Landmark believes the intent of the contracting parties, as evidenced by Sakai's testimonial admissions under oath, email correspondence, and objectively manifested conduct, goes much further than an "agreement to negotiate." However, Sakai's concession that there was an agreement to negotiate in good faith, coupled with the trial court's factual finding (amply supported by the evidence) that Sakai did not act in good faith, begs the court to step in to supervise completion of the real estate purchase and sale transaction – to specifically enforce what Sakai had agreed to do: sell the property to Landmark for fair market value.

Every case presents unique factual circumstances. Sakai made promises to Landmark, ratifying the contract and waiving the "time of the essence" clause with the understanding that the "price" would be "fair market value." "Fair market value" is an objective standard, and, in the context of real estate transactions, is within the sole purview of real estate appraisers. All of the contract terms were in writing, with the exception of price, which Sakai agreed and as Sakai testified under oath would be "fair market value." It became an enforceable contract with an open term. Both John Sakai and Kimiko Sakai testified under oath that this was their understanding of their agreement with Landmark and that this was what they represented to Landmark. The trial court likewise found that this was what Sakai represented to Landmark. CP 1271 at ¶ 1.17.

DISCUSSION

1. The trial court erred in dismissing Landmark's claims for specific performance, equitable estoppel, and breach of the covenant of good faith and fair dealing on partial summary judgment.

As discussed in Landmark's opening brief, the trial court dismissed Landmark's claims for specific performance, equitable estoppel[1] and breach of the covenant of good faith and fair dealing based on an erroneous legal ruling that a real estate contract with an open term is not enforceable under Washington law. VRP (March 25, 2005) at pp. 4, 5. Washington does recognize enforceable agreements with open terms, including agreements to purchase real property where the open term is price. Under an agreement with open terms, the parties intend to be bound by the key points agreed upon with the remaining terms supplied by a

[1] "[E]ven if I held the Sakais to honor their agreement because of equitable estoppel, which is the plaintiff's claim, I am again left with the question: What is the agreement? The agreement to sell at fair market value, which I have already held as a matter of law is not enforceable in the state, and, therefore, to hold them to an enforceable agreement would be a travesty. Therefore, the claim of equitable estoppel is also dismissed on summary judgment." VRP (March 25, 2005) at 4:11-19.

court or another authoritative source. *Keystone Land & Development Company v. Xerox Corp.,* 152 Wn.2d 171, 176 (2004). *McCadam v. Hoshor*, 7 Wn. App. 913 (1972) is cited by Landmark as an example where the "contract with an open term" doctrine was applied to a real property purchase and sale transaction. In *McCadam*, as here, the open term was "price," which the parties understood would be "fair market value." In responding to this issue, Sakai cites no authority contrary to *Keystone* or *McCadam.*

Sakai attempts to distinguish the facts in *McCadam* from those here, arguing primarily that "the issue in *McCadam* was <u>not</u> whether or not there was an enforceable agreement, but whether the purchase option had been validly exercised." *Reply Brief at 19.* Sakai is wrong about the issue in *McCadam*, wherein the parties had in fact stipulated that the option was validly exercised. That was not the issue in *McCadam* as Sakai suggests. Rather, *McCadam* focused on whether the seller could enforce a forfeiture provision of the parties' agreement. The Washington Supreme Court refused to enforce the forfeiture provision on three grounds, primarily on the ground that "*the forfeiture should not have been* *effected without granting plaintiffs a reasonable opportunity to cure the defect."* The Court wrote:

> This brings us to the third, and real, reason for reversal. Assuming, for the sake of argument, that the defendants' affidavit is not defective and further that their theory of piecemeal closings is correct, it is elementary law in this jurisdiction that forfeitures are not favored and never enforced in equity unless the right thereto is so clear as to permit no denial. *Hansen, Inc. v. Pacific Int'l Corp.*, 76 Wash.2d 220, 455 P.2d 946 (1969); *Shoemaker v. Shaug*, 5 Wash.App. 700, 490 P.2d 439 (1971). When forfeiture is sought, courts attempt to provide substantial justice to both contracting parties. The pertinent search usually centers about whether or not a substantial financial loss will result to the purchaser with no corresponding loss to the seller if a period of grace is allowed. *Shoemaker v. Shaug, Supra.*

McCadam at 917.

Not only does *McCadam* serve as a valid example of a real estate "agreement with an open term" where the open term is "price," *McCadam* also supports Landmark's argument that forfeiture provisions, such as the "time of the essence" clause in this case, are not rigidly enforced – they are not enforced in a vacuum without consideration of the surrounding circumstances. Here, the overwhelming evidence, which includes the sworn testimony of the sellers – John Sakai, the family spokesperson, and Kimiko Sakai, the family matriarch – is that they committed to follow through on the purchase and sale transaction on the basis of "fair market value," rather than enforcing the "time of the essence" clause. John Sakai freely admitted that the only thing left to be determined was the fair market value (*CP 124 at 39:23-40:6; CP 126 at 46:6-9);* that "fair market value" was based on value with<u>out</u> development rights (*CP 143 at 42:11-17);* and that fair market value was to be established by appraisal.[2] *VRP Volume I (March 29, 2007) at 52:3-13.*[3] Kimiko Sakai likewise testified at her deposition that the family was still in agreement after March 2000 to sell the property to Landmark for "fair market value":

> Q. Okay. You were still willing at that point in time -- after you thought it expired, you were still willing to sell the property to Doug, correct?
>
> A. Yes, because he -- that's what we started and so -- so naturally.
>
> Q. Okay. And the only thing left to be determined was the fair market value to be paid to the family by Doug and his partners, correct?
>
> A. I believe so.

CP 227 at 38:15-23.

After making these representations to Landmark, Sakai left the Owner Applicant Agreement in place, allowing Landmark to

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[2] This testimony belies Sakai's argument on appeal that there was no evidence Sakai understood "fair market value" was to be establish by appraisal.

[3] This testimony was solicited at trial. We recognize that Landmark is critical of Sakai's use of trial testimony in addressing the issues arising from the partial summary judgment ruling, however use of this trial testimony is justified to demonstrate what the evidence would have been had the trial court allowed the "specific performance" claim to be decided at trial, as it should have.

continue processing the Site Plan Application with the City of Bainbridge Island. Sakai silently watched Landmark invest significant time and money on Site Plan Approval. Sakai silently watched Landmark purchase an adjacent parcel to expand the development of "Sakai Village."

This was the evidence before the Court on summary judgment. Sakai's conclusory argument that the contract expired and all communication thereafter represented "new negotiations" wholly ignores this evidence.

As described in Landmark's Brief of Appellant, Sakai hired local real estate consultant Jack Maher in June 2001 to value the Sakai property and review the 1998 Purchase and Sale Agreement. *CP 93 -94; CP 158 at 104:8-24; CP 166 at 134:11-17.* It was in response to Jack Maher's recommendation to the Sakai Family that they "execute a new Addendum" to the 1998 Purchase and Sale Agreement reducing the acreage sold to Landmark to only one of the two parcels (*CP 94*), that John Sakai told Doug Nelson a year later the family had a change of heart and now wished to sell only one parcel to Landmark. *CP 80; CP 158 at 10:2-21; 14:22-15:4.*

In protest, Doug Nelson wrote to Sakai in August 2001 describing the significant adverse financial impact this change would have on Landmark. *CP 82.* Ultimately, in an attempt to mitigate its damages, Landmark agreed to purchase a reduced amount of acreage if it received an option to purchase the remainder. *CP 427-8.* The parties negotiated in an attempt to reach a new written agreement, and the parties agreed to a price of $1.7 million based on $28,000 per buildable unit (50 units) on the reduced acreage – the value as determined by Jack Maher. *CP 143 at 42:2-10; CP 167 at 140:16-18; CP 430.* John Sakai testified:

> *A. We agreed on a scaled back purchase, we agreed on a* price. The price at that time was not an issue.
>
> Q. What was the price at that time [referring to December 2001]?
>
> A. $1.7 [million].
>
> Q. For...?
>
> A. The north parcel plus about 107 feet of the middle parcel, the northern 107 feet.
>
> Q. And that was enough to accommodate about 50 units; is that your understanding?
>
> A. Somewhere in that vicinity, correct.
>
> Q. Okay. So there's no issue as to the price or the -- the price was based on 50 units times $28,000 per unit?
>
> A. I believe so.

CP 136 at 15:23-16:10. However, the Sakai Family then refused to sign a new written agreement. *CP 139 at 18:23-25; CP 168 at 142:8-21.*

Sakai now suggests on appeal these failed negotiations in 2001 to "scale back" the property to be sold somehow erased Sakai's obligation to follow through with its March 2000 commitment to sell both parcels (as provided under the 1998 Agreement) for fair market value (as agreed to in March 2000).

Sakai's ratification of the 1998 Agreement, Sakai's non-enforcement of the "time of the essence" clause, and Sakai's agreement to sell for "fair market value" also find compelling support in the trial court's findings of fact at trial:

> **1.17 John Sakai, anticipating the imminent expiration of the [1998] Vacant Land Purchase and Sale Agreement had discussed with the other family members whether the family wished to end the relationship with Landmark. It was agreed by the family to allow Landmark to proceed with efforts to secure development rights and then sell the property to Landmark for fair market value. John Sakai and Doug Nelson met in person in late spring 2000. During this meeting, John Sakai communicated this to Doug Nelson.**

CP 1217 (Finding of Fact at 1.17). Given this Finding of Fact, and Washington's recognition of enforceable real estate purchase and sale agreements where "price" is an open term which the parties agree will be "fair market value," Landmark seeks enforcement of the parties' agreement to complete the transaction at "fair market value."

Finally, Sakai acknowledges for the first time that the commitment made by Sakai in March 2000 was an "Agreement to negotiate a new contract." *Brief of Respondents* at 20. The trial court found that Sakai allowed Landmark to see the Site Plan Approval process through to completion, and only *after* Site Plan Approval was secured by Landmark in early 2004 did Sakai then refuse to negotiate with Landmark, believing they now had "far superior bargaining power" over Landmark:

> 1.66 [In October 2003] The Sakai Family determined to leave the Owner Applicant Agreement in place and further decided to continue their dealings with Nelson and Landmark. Their distrust and lack of confidence was not communicated to Nelson by the Sakai Family.
>
> 1.67 [In November 2003] John Sakai communicated to Landmark that he needed time to discuss [Landmark's Comparable Sales Analysis] with the family. John Sakai also communicated to Landmark that he would recommend the price to his family if he thought it was fair. He did not think the price was fair and had no intention of recommending that price, but [John Sakai] never communicated that to Landmark.
>
> 1.74 In January and February 2004, Dean Sakai undertook his own comparable market analysis and concluded the value of the Sakai North and Middle parcels was not less than $4.2 million. However, this information was never communicated

to Nelson; nor did the Sakai Family ever attempt to counter Landmark's $2.6 million offer.

1.79 On March 30, 2004, Pryor [another Landmark principal] asked for a meeting with the Sakai Family to "conclude negotiations" for the purchase of the Sakai North and Middle Parcels. During a subsequent phone conversation between Pryor and John Sakai, John Sakai for the first time expressed reservations about having further dealings with Nelson. During this period of time, John and Dean Sakai continued to recognize that the Sakai Family held a far superior bargaining position based on non-economic considerations.

4.1 The Sakai Family shares some of the blame for the problematic negotiations. While they did not engage in explicit fraud or deceit, they completely failed to communicate to Nelson that they no longer wanted a business relationship with Landmark and allowed him to continue to devote time, energy, and money to the process.

4.2 Even after the Purchase and Sale Agreement expired in March 2000 [a "fact" which Landmark contends the trial court erroneously decided by partial summary judgment], they [Sakai] requested that the name of the development be changed [to "Sakai Village"], provided family names for the streets, and made requests (which were honored [by Landmark]) to have the wetlands exclude and fenced. They renegotiated the purchase price on more than one occasion and allowed the Owner Application [the Owner Applicant Agreement] to remain in place, giving Nelson the firm impression that he was still their agent on these efforts.

4.3 While the storm tanks were being installed, the Sakai Family could see the enormity of the tanks and the difficulties that would ensue if removal were required.

4.4 The Sakai Family indicated through testimony that after the March 2000 family meeting, they affirmatively decided to allow Nelson to proceed. Although the decision was difficult, they wanted to retain their liquidity. E-mail evidence also indicates that they were aware Nelson was

> continuing development plans despite their [uncommunicated] reticence.
>
> 4.5 Although the Sakai Family may have failed to communicate their reluctance to proceed further due to a family code, Nelson was not privy to the family code and could only interpret [Sakai's] actions as encouragement and tacit approval to proceed further.
>
> 4.6 The Sakai Family's failure to formally and directly terminate the relationship, or in any way affirmatively communicate resulted in circumstances in which it is just to require the Sakai Family to reimburse Landmark for any benefit conferred.

Findings of Fact (emphasis added).

Although Landmark believes the parties' agreement in March 2000 went well beyond an "Agreement to Negotiate in good faith," this new concession by Sakai on appeal provides an alternative basis to specifically enforce the purchase and sale transaction.

Washington law distinguishes between "agreements to agree," "agreements to negotiate," and "agreements with open terms." The distinctions are described in *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171 (2004):

> We begin by distinguishing between three different but similar types of agreements. The first type of agreement is an agreement to agree. 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." *Sandeman v. Sayres,* 50 Wn.2d 539, 541-42 (1957). Agreements to agree are unenforceable in Washington. *Id.* (citing cases). [FN8]
>
> FN8. We note, however, that this line of cases has

> been distinguished from another line of cases in which the enforceability of contract terms to agree upon future rental rates contained within renewal options of completed lease agreements was established. *See, e.g., Family Med. Bldg., Inc. v. Dep't of Soc. & Health Servs.,* 104 Wash.2d 105, 110, 702 P.2d 459 (1985).

> The second type of agreement is an agreement with open terms. Under an agreement with open terms, the parties intend to be bound by the key points agreed upon with the remaining terms supplied by a court or another authoritative source, such as the Uniform Commercial Code. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L.REV. 217, 253 (1987).
>
> The third type of agreement is a contract to negotiate. In a contract to negotiate, the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. Under a contract to negotiate, the parties do not intend to be bound if negotiations fail to reach ultimate agreement on the substantive deal. *Preliminary Agreements*, 87 COLUM. L.REV., at 263. In contrast to an agreement to agree, under a contract to negotiate, no breach occurs if the parties fail to reach agreement on the substantive deal. The contract to negotiate is breached only when one party fails to conform to the specific course of conduct agreed upon. No Washington court has directly addressed whether a contract to negotiate is independently enforceable.

Landmark seeks specific performance of the parties' agreement to complete the transaction at "fair market value" based on 1) Sakai's concession on appeal that there was an agreement to negotiate, 2) the covenant of good faith and fair dealing implied in this agreement to negotiate;[4] and 3) the trial court's findings of fact (discussed above) that Sakai did not negotiate in good faith supported by compelling evidence that Sakai did not negotiate in good faith (*see discussion, Brief of Appellant* at 16-19). The only way to enforce the agreement to negotiate in good faith under the present circumstances is to do so judicially. As John Sakai and Kimiko Sakai both stated under oath, the only thing left to be determined was fair market value. Landmark asks the Court to step in to complete the negotiation that Sakai refused to complete in good faith, by specifically enforcing the purchase and sale transaction – sale of the property as provided under the 1998 Purchase and Sale Agreement for a price of "fair market value" as Sakai represented and agreed to in March 2000. This valuation should be determined as of the time of the breach – March 2004, when Sakai refused to sell to Landmark.

In its brief, Sakai points to two emails authored by Doug Nelson that refer to the parties being "out of contract," and argues that the only inference that can be drawn is that John Sakai 's representations in March 2000 were not binding. This is contrary to

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[4] Landmark pled a separate cause of action for breach of the implied covenant of good faith and fair dealing, which the trial court improperly dismissed on partial summary judgment.

the trial court's findings of fact at trial. Viewed in the context of a chronology wherein Sakai was at the time ignoring Nelson's written requests to close right away, these "out of contract" statements are consistent with Nelson's testimony that it was Sakai who was backing out of his March 2000 promise. Virtually everything Nelson said and did showed his reliance on the March 2000 promise made by John Sakai.

2. The trial court erred in granting any attorney's fees to Sakai and failing to grant attorney's fees to Landmark. Judgment was entered in favor of Landmark and against Sakai, Landmark was the prevailing party pursuant to RCW 4.84.330, and Landmark was entitled to attorney's fees and costs.

Where the meaning of an attorney fee statute is at issue, the trial court's decision to award or not award attorney fees is reviewed de novo as a question of law. *Wachovia SBA Lending v. Kraft,* 138 Wn. App. 854, 859, 158 P.3d 1271 (2007).

In addressing the issue of "prevailing party" attorney's fees, Sakai argues that Landmark is not the "prevailing party" because 1) "specific performance" was Landmark's "principal" claim and Landmark did not prevail on this claim; 2) Landmark's "unjust enrichment claim (on which it prevailed) is a "quasi contractual claim" and, as a matter of law, such claims never "arise from a contract;" 3) Landmark's "unjust enrichment" claim is an "implied in law" claim and, as a matter of law, such claims never "arise from a contract;" 4) Landmark's unjust enrichment claim is an "equitable" claim and as a matter of law such claims never "arise from a contract;" and 5) the fact that the trial court found the purchase and sale agreement unenforceable is dispositive in preventing application of RCW 4.84.330. The facts and authority cited by Sakai do not support Sakai's arguments.

Sakai suggests that although Landmark pled alternative theories of recovery and alternative remedies, Landmark's request for "specific performance" was "primary" to all others. Sakai cites nothing from the record to support this factual assertion. Moreover, and more important on appeal, there is no "primary claim" doctrine in Washington, and none of the cases cited by Sakai establish such a doctrine.

Ultimately, Washington courts look to the final judgment at the conclusion of the case to make the "prevailing party" determination. This is fully discussed in Landmark's opening brief and that discussion is not repeated here.

Sakai simply cannot avoid the fact that a significant Judgment for money damages was entered in favor of Landmark at the end of the case, and that Sakai failed to prevail at all on its counterclaim which did, according to Sakai, "arise from the contract."

Sakai next argues that "unjust enrichment" is an "equitable remedy," and, as a matter of law, equitable remedies never "arise from a contract." Again, the cases cited by Sakai do not support this proposition. Indeed, Sakai argues elsewhere in its brief that "specific performance" is an "equitable remedy" (discussing the "unclean hands" doctrine), and later argues that "specific performance" (an equitable remedy according to Sakai) does "arise from the contract," concluding that the trial court correctly awarded attorney's fees to Sakai on the "specific performance" claim. Sakai cannot have it both ways. Sakai cannot credibly argue that equitable claims "arise from a contract" where the equitable claim is one on which Sakai prevailed, and that equitable claims do not "arise from a contract" where the equitable claim is one on which Landmark prevailed and was awarded Judgment for money damages.

Nor does Washington law focus on the characterization of a claim as "implied in law" or "quasi contractual" in determining whether the claim "arises from the contract." Nor does Washington law focus on whether the contract is ultimately deemed enforceable or unenforceable in determining where the claim “arises from the contract.” The cases cited by Sakai do not provide support for these arguments.

Sakai acknowledges in its brief that “an action is founded on a contract if the action arose out of the contract and if the contract is central to the dispute,” citing *Sea-First v. Insurance Guaranty Assn.,* 116 Wn.2d 398, 804 P.2d 1263 (1991). Central to the trial court's ruling in favor of Landmark on the theory of “unjust enrichment” is the fact that Sakai left the Owner Applicant Agreement in place, as required by the 1998 Purchase and Sale Agreement. *See, CP 1269, 1281, 1282 and 1290 (Findings of Fact ¶¶ 1.9, 1.64, and 1.66; Conclusion of Law ¶ 1.6.*[5] The Owner Applicant Agreement, under which Landmark obtained Site Plan Approval for the benefit of Sakai's property, was central to this case and the trial court's ruling in favor of Landmark. The Owner Applicant Agreement was required under the 1998 Purchase and Sale Agreement, and the two are inextricably intertwined. Thus, Landmark's unjust enrichment claim action “arose out of the

[5] 1.6 The failure to rescind the Owner Applicant [Agreement] is equivalent to a request that Nelson continue to proceed to procure Site Plan Review approval for the Sakai Property. Accordingly, within the context of the "Volunteer Rule,"

contract" and the contract was "central to the dispute" as contemplated under RCW 4.84.330.

A prevailing party is one who receives an affirmative judgment in his or her favor. RCW 4.84.330; *Schmidt v. Cornerstone Invs., Inc.,* 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties. *Marassi v. Lau,* 71 Wn. App. 912, 916, 859 P.2d 605 (1993); *Rowe v. Floyd,* 29 Wn. App. 532, 535 n. 4, 629 P.2d 925 (1981).

Here, Judgment was entered in favor of Landmark on one of its several alternative theories of recovery and alternative requests for relief, and Sakai failed on its cross-claim. From Landmark's perspective, **Landmark was <u>the solely</u> prevailing party; because Landmark pled alternative theories of recovery and alternative remedies, Landmark was entitled to only one of the alternative remedies it pled; Landmark prevailed and was granted relief under one of these alternative remedies; and Sakai did not prevail on its counterclaim.** Given this result, where there is

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Nelson was not a volunteer.

entry of a substantial money judgment in favor of Landmark at the conclusion of trial and Sakai failed to prove its counterclaim, Landmark is the substantially prevailing party. The trial court was wrong to award any attorney's fees to Sakai. The trial court was wrong in failing to award attorney's fees to Landmark as the substantially prevailing party on a claim that arose from a contract and contractual relationship, where the subject matter of the claim and the subject matter of the contract were identical.

For the sake of avoiding redundancy, we refer the Court to Landmark's opening brief, which anticipated and addressed the attorney's fees issues raised by Sakai on appeal, and discusses the relevant case law.

3. The Clean Hands Doctrine does not apply to preclude Landmark's claims.

Sakai first argues that the unclean hands doctrine applies because the trial court found certain testimony at trial was not credible. Sakai cites no authority for this proposition. To whatever extent the trial court challenged the credibility of certain testimony by Landmark's Doug Nelson at trial, this has nothing to do with application of the "unclean hands" doctrine.

To the extent the trial court was critical of Landmark's conduct in dealing with Sakai, the conduct drawing criticism had no relation whatsoever with any of Landmark's claims, equitable or otherwise, and does not bar Landmark's right to equitable relief. The trial court properly refused to apply Sakai's affirmative defense of unclean hands.

Under Sakai's analysis of the doctrine, any misconduct on the part of a party seeking equitable relief, however slight or substantively meaningless, invokes the doctrine. This is not the law in Washington. The unclean hands doctrine is not applied in a vacuum. There is a qualitative evaluation that must be made in applying the doctrine, and the party asserting the defense must show a causal relationship between the conduct and the substance of the equitable claim at issue.

Under Washington law, for the unclean hands defense to apply "[i]t is fundamental to [the] operation of the doctrine that the **alleged misconduct by the plaintiff relate directly to the transaction** [emphasis added] concerning which the complaint is made." *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc.,* 890 F.2d 165 (9th Cir.1989), quoting *Arthur v. Davis,* 126 Cal. App. 3d 684, 693-94, 178 Cal. Rptr. 920, 925 (1981). The doctrine is not one that is absolute in its application. *See also, McKelvie v. Hackney*, 58 Wn.2d 23, 360 P.2d 746 (1961); *J.L. Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 113 P.2d 845, 858 (1941).

Sakai made no attempt to present evidence or argument at trial to explain how the criticized conduct in any way related to the claims asserted by Landmark in this lawsuit, nor does Sakai offer any such explanation on appeal.[6] The trial court considered and properly rejected Sakai's request to apply the doctrine.

4. <u>In awarding unjust enrichment damages to Landmark, the trial court properly ruled that the Site Plan Approval conferred a benefit, even if the Site Plan Approval eventually expired</u>.

In its attempt to derail Landmark's unjust enrichment claim, Sakai argued during trial court proceedings and again on appeal that the Site Plan Approval secured by Landmark on behalf of Sakai did not "confer a benefit" because it eventually expired. Sakai sites no legal authority whatsoever in support of this proposition.

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[6] In its Reply Brief, Sakai mentions several examples of misconduct by Landmark in connection with the failed attempt to reach a new "scaled back" agreement, but as discussed above, Sakai ultimately refused to sign that agreement for reasons wholly unrelated to the conduct. The criticized conduct was de minimus and of no consequence whatsoever.

The eventual expiration of the Site Plan Approval is irrelevant to the "benefit conferred" analysis. Comment (a) to RESTATEMENT OF RESTITUTION § 370 explains, in relevant part:

> A benefit may also be conferred if the party seeking restitution relies on the contract in some other way, as where he makes improvements on property that does not ultimately become his.
>
> * * *
>
> The requirement of this Section is generally satisfied if a benefit has been conferred, and it is immaterial that it was later lost, destroyed or squandered.

Sakai does not discuss this authority or offer any other authority on this issue. The trial court correctly ruled that a benefit conferred and wasted is still a benefit.

5. <u>Sakai raises a number of issues on appeal that were not decided by the trial court</u>.

Sakai argues on appeal that Landmark's claim of an "Open Term" Contract was contrary to Landmark's Pleadings and Initial Claims. This is the first time Sakai has made this argument. Sakai never raised this issue during the trial court proceedings. The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). *State v. Boss*, 184 P.2d 1264 (2008); *State v. Tolias,* 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland,* 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). A claim of error may be raised for the first time on appeal only where there is manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Walsh,* 143 Wn.2d 1, 7, 17 P.3d 591 (2001); *Tolias,* 135 Wash.2d at 140, 954 P.2d 907. There are no constitutional issues raised on appeal in this case.

Sakai could have, but did not raise this issue at the time the trial court considered the parties' respective summary judgment motions. Sakai could have, but did not raise this issue before or during trial. Had Sakai raised this issue during the trial court proceedings, Landmark would have moved to amend its pleadings to conform to the evidence developed during discovery.

Sakai also argues that there are several details on which the parties never reached agreement, making the "agreement with open terms" unenforceable. Although the trial court never directly addressed this issue, at no time does the trial court suggest that "essential" terms of the agreement were missing, or that this was the basis for its partial summary judgment ruling.

In *Hubbell v. Ward*, 40 Wn.2d 779 (1952), the court ruled that an earnest money receipt and agreement to enter into a future purchase and sale agreement was not sufficiently definite and certain to specifically enforce under traditional principles of contract law, since there were terms and conditions upon which the parties had not yet had a meeting of minds. However, on the basis of equity, the court specifically enforced the sale of the property. The Court stated:

> The question remains: Are respondents then entitled to any relief at the hands of a court of equity?
>
> An answer to this question necessarily entails examination of appellant's argument that the agreement is wholly nugatory in that it was not intended to create immediate legal rights and duties.
>
> The agreement contains within itself the essential elements of a binding contract for the purchase and sale of the real and personal property described therein. Respondents are given an option to pay the entire consideration at any time. The subject matter of the agreement, the consideration and terms of payment are all set forth and it is evident from a consideration of all the terms of the agreement that it was not intended merely as a preliminary negotiation. It was intended as, and is, a valid contract, enforceable except insofar as it involves the making of a future contract.
>
> Equity having taken jurisdiction of the controversy, we are of the opinion that respondents are entitled to a decree of specific performance directing appellant to execute and deliver a deed and bill of sale conditioned upon respondents' tendering payment of the balance of the full contract price of $29,000 within a reasonable period of time.
>
> In directing the entry of the decree hereinafter described, we are not thrusting upon the parties a new contract. Appellant and respondents by executing the earnest money agreement bound themselves . . . .
>
> * * *
>
> The court hereby retains jurisdiction of the cause for the purpose of making such orders from time to time as the court

may deem necessary and proper to make effective and to complete the specific performance of any and all acts required by this decree.

Hubbard at 787–89.

The lack of a firm closing date does not render the purchase and sale agreement indefinite. Sakai cites no legal authority suggesting that this is an "essential term." Few real estate purchase and sale agreements have such a provision.

The fact that a Boundary Line Adjustment, to carve out the wetlands from the sale, has not yet been completed does not render the purchase and sale agreement indefinite, or suggest that this cannot, should not, or will not be accomplished in connection with specific enforcement of the transaction.

Nor does the lack of a legal description for the "wetlands" make the legal description indefinite, as Sakai suggests. In *Ontario Land Co. v. Yordy*, 44 Wash. 239 (1906), the Supreme Court explained that the requirement for a description of the land to be sold is fully satisfied if the agreement provides a means to identify the land:

> It is a well-established principle of law that a description in a deed or other instrument affecting title to real estate is sufficient if it affords an intelligent means for identifying the property and does not mislead. In other words, if a person of ordinary intelligence and understanding can successfully use

> the description in an attempt to locate and identify the particular property sought to be conveyed, the description answers its purpose and must be held sufficient. Mr. Jones, at section 323 of his treatise on the Law of Real Property in Conveyancing, says: 'The first requisite of an adequate description is that the land shall be identified with reasonable certainty, but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain. A deed will not be declared void for uncertainty if it is possible by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey. The office of a description is not to identify the land, but to furnish the means of identification. The description will be liberally construed to afford the basis of a valid grant. It is **only when it remains a matter of conjecture what property was intended to be conveyed**, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels.'

Ontario Land Co. v. Yordy, 44 Wash. 239, 243 (1906).

Wetland delineations are routinely done by wetland biologists based on objective criteria. The development of every property that contains wetlands on Bainbridge Island requires wetland delineation as part of the development process.

Where, as here, the Purchase and Sale Agreement itself contains the legal description of the lots to be sold, an agreement by the parties to carve out wetlands does not give rise to "a matter of conjecture what property was intended to be conveyed." Nor did the trial court ever address or rule on this issue.

Sakai argues on appeal that Landmark did not tender certain required deposits. However, Sakai then goes on to present the facts, with citations to the record below, demonstrating that the deposits were, in fact, made. *Reply Brief* at 28.

Sakai argues on appeal that Landmark was obliged to demonstrate that it had the financial ability to complete the transaction and failed to do so. Sakai cites no legal authority or contract provision to support this proposition. "Proof of financing" was never an express or implied contingency of the agreement.

In *Kreger v. Hall*, 70 Wn.2d 1002 (1967), the Court specifically enforced an earnest money agreement and held that the buyers were relieved of actual tender of a down payment because of the sellers' anticipatory breach of the agreement. The Court explained:

> It is the law that one who is ready, able and willing to tender performance of a contract is relieved of his duty to tender when the other contracting party has by word or act indicated that he will not perform his duties under the contract. *McCormick v. Tappendorf*, 51 Wash. 312 (1909).

Kreger at 1009.

In this case, Sakai's refusal to do business with Landmark in April 2004 made it unnecessary for Landmark to tender the purchase price as a condition precedent or prerequisite to seeking specific performance or equitable relief. The trial court never ruled on this issue.

6. <u>The trial court properly denied Sakai's claim for trespass</u>.

Sakai filed a "trespass" counterclaim seeking "abatement" of a trespass – removal of large underground water retention tanks that Sakai had permitted Landmark to place on the Sakai property. Notably, Sakai did not seek money damages in asserting this trespass claim.

Sakai points out in its Reply Brief that one of the elements of proof to assert a claim for trespass is "actual and substantial damages," citing *Wallace v. Lewis County*, 134 Wn. App. 1, 137 P.3d 101 (2006). Sakai then argues that since it sought injunctive relief vs. money damages, it was excused from proving this fourth element – "actual and substantial damages." Sakai cites no legal authority to support this proposition.

The trial court ruled that whatever inconvenience is caused by the presence of the underground storage tanks, it does not rise to the level of "actual and substantial damages." The trial court found that "no testimony was provided regarding the alleged damage resulting from the trespass. For example, no developers testified that, as a result of the trespass, their development plans would be stymied." *CP 1288 (Findings of Fact at ¶ 5.3).* The trial court noted the difficulties and expense of removing the underground tanks and installing substitute tanks, and, most importantly, Sakai's failure to name the Sakai Village homeowners or Sakai Village Homeowners' association, who now own, operate and rely on the tanks as part of their storm water system. CP 1288 *(Findings of Fact at ¶ 5.4).* The trial court concluded that "The removal of the tanks, on balance, is not required. The damage to non-parties and innocent homeowners far outweighs the uncertain benefit of removal to the Sakai Family." CP 1288 *(Findings of Fact at ¶ 5.5).*

Nonetheless, Sakai argues that "[e]ven if the Sakai Family failed to prove damages, the law simply cannot allow someone to place improvements on, or appropriate another's land, with impunity." *Reply Brief at 48.* Sakai also argues that "[i]n denying injunctive relief the trial court wrongly applied the doctrine of "balancing the equities," a doctrine used by courts to compare the measure of relief sought by the plaintiff against the hardship imposed on the defendant. *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 847, 999 P.2d 54 (2000)." *Reply Brief at 48.* Sakai then asks this court to substitute its judgment for that of the trial court in "balancing the equities."

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 176, 4 P.3d 123. If the standard is satisfied, the Court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *See Croton Chem. Corp. v. Birkenwald, Inc.*, 50 Wn.2d 684, 686, 314 P.2d 622 (1957). There is ample evidence in the record to support the result reached by the trial court in denying Sakai's "trespass" claim seeking to compel Landmark to remove underground storage tanks that Landmark no longer owns, which would, in turn, require Landmark to install replacement tanks on property Landmark no longer owns. Sakai failed to name the Sakai Village homeowners or the Sakai Village Homeowners Association, who now own and use the tanks. They were necessary parties with respect to the trespass claim, and Sakai failed to name them. This, standing alone, was a sufficient basis for the trial court's denial of Sakai's "trespass" claim seeking only removal of the tanks.

Notably, as already discussed in Landmark's opening brief, at the time the tanks were placed on the Sakai property by Landmark, this was done with the permission of Sakai, and the initial placement of the tanks was not a trespass. *CP153 at 83:18 – 84:20.* It was Sakai's refusal to sell, rather than Landmark's refusal to purchase, that prevented completion of the transaction. And, Sakai never revoked this permission. Instead, it lodged a "trespass" claim for the first time after Landmark brought this action.

Under these circumstances, there is a sufficient evidence and legal justification for the trial court's denial of Sakai's "trespass" claim.

7. <u>There was sufficient basis for the Trial Court's Findings of Fact and Conclusions of Law relevant to the Trial Court's unjust enrichment analysis</u>.

Sakai challenges several of the trial court's Findings of Fact and Conclusions of Law regarding the trial court's ultimate judgment in favor of Landmark on unjust enrichment (1.4, 1.5, 1.6, 1.7, 1.66, 4.2, 4.5, and 4.6). In substance, Sakai attempts to reargue the factual part of its case with respect to certain findings of fact that served as the basis for the trial court's ruling in favor of Landmark on its unjust enrichment claim.

As mentioned above, findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee* Sportsmen Ass'n, 141 Wn.2d at 176, 4 P.3d 123. If the standard is satisfied, the Court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *See Croton Chem. Corp. v. Birkenwald, Inc.,* 50 Wn.2d 684, 686, 314 P.2d 622 (1957). There is ample evidence in the record to support the result reached by the trial court in entering judgment in favor of Landmark on the theory of unjust enrichment. Those facts are amply described, with citations to the record, in Landmark's opening brief, and need not be repeated here in their entirety. We do mention a few of the more compelling evidence.

It is undisputed that the 1998 Purchase and Sale Agreement required Sakai to sign an Owner Applicant Agreement, stating:

> Seller agrees to sign an owner applicant agreement . . . . Seller agrees to permit Purchaser . . . to work with the City on this proposed development and have access to the site.

CP 62 at ¶1.

It is undisputed that Sakai signed an Owner Applicant Agreement, which authorized Landmark to deal directly with the

City of Bainbridge Island in procuring development rights. It is undisputed that Sakai left this Owner Applicant Agreement in place after meeting with Nelson in March 2000 and representing to Nelson that the family would maintain its relationship with Landmark and sell to Landmark for fair market value when development rights were secured by Landmark.

It is undisputed that in late 2003, Sakai considered termination of the Owner Applicant Agreement, asked the City to explain the procedure to effect the termination, learned that Site Plan Approval was imminent, understood the value the Site Plan Approval would add to the Sakai parcels, and made a conscious decision to leave the Owner Applicant Agreement in place. CP 72, 73 (*email exchange between Sakai and the City planner).*

Based on the 6-year relationship between Landmark and Sakai, which included the Owner Applicant Agreement, the trial court properly found that Sakai had a "duty to speak," and breached this duty by remaining silent, allowing Landmark and its principals to believe Sakai would honor its agreement to sell for fair market value, knowing that Landmark was investing its time and money on obtaining development rights that would benefit Sakai.

Sakai's conduct also supported these challenged Findings of Fact and Conclusions of Law. John Sakai knew in spring 2000 that Landmark was considering the purchase of the neighboring Madison Glen property to start Phase I of the Sakai Village development, with Phase II to follow on the Sakai parcels. *CP 971; CP 151 at 74:14-17; 75:25-76:9.* In reliance on Sakai's ratification of the Agreement, Landmark went forward with the purchase of the Madison Glen parcel. John Sakai knew Landmark did so in reliance on their agreement. *CP 126 at 47:8-48:8; CP 151 at 75:25-76:9.* And, John Sakai knew Landmark was advertising Sakai Village Phase I as part of a larger project that included the development of Sakai Village Phase II on the Sakai property. *CP 126 at 49:5-8.*

Sakai permitted Landmark to use the Sakai family surname to name the development "Sakai Village," and Sakai Family members supplied the street names used for the streets in both Phase I and Phase II. *CP 134 at 8:17-23; CP 144 at 87:11- 88:20; CP 155 at 90:8-10.*

On May 31, 2000, John Sakai wrote to Doug Nelson about the placement of the sewer lift station on the Sakai property to serve both the Madison Glen and Sakai properties and refers to "our deal."

> Doug, a few thoughts. If you recall correctly, the logical place for a single lift station to serve both properties lies on our property. I do have some concerns over encumbering our property with the lift station and its easement before our deal is done.

CP 87.

In June 2000, Doug Nelson contacted John Sakai asking to close the transaction without waiting for Site Plan Approval from the City.[7] He wrote to John Sakai on June 27, 2000 and proposed closing the transaction within 50-60 days:

> How would you like to close in 50-60 days? We may be ready.

CP 76. John Sakai responded affirmatively:

> Sounds pretty good. I need to file a quit claim with the county in order to straighten out interests with respect to [the] trust. I'll get right on that.

CP 76. John Sakai then contacted the title insurance company about recording these quit claim documents. *CP 112, 113; CP 150 at 71:20-73:10.*

In July 2000, Doug Nelson advised John Sakai that he had ordered an appraisal on the property. *CP 77.* In August 2000,

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[7]This had been a buyer's contingency.

Doug Nelson contacted John Sakai indicating that Landmark wanted to "close" as soon a possible:

> We have closed on the Madison Glen purchase and would like to close on your property as soon as possible.

CP 78; CP 153 at 82:11-18. In September 2000, Doug Nelson again contacted John Sakai in an attempt to close the transaction. *CP 79.* There was no response from John Sakai, although he confirmed at his deposition that during this period and through mid-2001, the Sakai Family was still in agreement to sell both lots at fair market value to Landmark. *CP 135 at 10:6-13; CP 138 at 22:5-8.*

In May 2001, attorney Anthony Hoare, co-trustee of the Sakai Family QTIP Trust, visited Phase I and then wrote to the Sakai Family members:

> The development there [on Phase I] might . . . delay the closing of the sale of your property [emphasis added]."

CP 91. In writing this, it is implicit that Mr. Hoare understood the Purchase and Sale Agreement was still in place.

In June 2001, Sakai received a Notice from the City confirming that Landmark was still actively pursuing a Site Plan Application to build 93 units on the 18 acres. *CP100.* Sakai left the owner/applicant agreement in place.

Sakai hired local real estate consultant Jack Maher to value the Sakai property (*CP 93; CP 158 at 104:8-24; CP 166 at 134:11-17)* and review the 1998 written Purchase and Sale Agreement. *CP 94.*

In March 2002, Doug Nelson asked the Sakai Family for permission to install an underground water retention tank on the Sakai property, which Landmark was to purchase, to service both Phases I and II. Sakai gave its permission. *CP 153 at 83:18 – 84:20.*

In August 2002, Sakai refused to talk to other prospective purchasers who were interested in their property. On August 22, 2002, John Sakai communicated this to Doug Nelson stating:

> Doug: We have not heard from you for a considerable period of time and do not know whether you are on hold indefinitely or have decided not to move forward on mom's property. We have been contacted by another developer who desires to start discussions. I thought that I would provide you the courtesy of this notice so that you can let us know where you are at before we talk to the other party.

CP 552.

Later in 2002, Sakai granted Landmark an easement for ingress/egress/utilities on the Sakai property, which Landmark was to purchase, allowing Landmark to install an entrance to serve both Phases I and II. Sakai charged nothing for this easement, as the easement was located on the property Sakai had agreed to sell to Landmark.

In fall 2003, Sakai was willing to sell both parcels to Landmark for fair market value, as contemplated under the 1998 agreement. Doug Nelson and John Sakai met on October 23, 2003. John Sakai asked Doug Nelson to research and provide "comparable" information about recent sales of similar property. *CP 104.* Doug Nelson wrote to John Sakai on November 4, 2003: *"I almost have all my research done and should have something for you very soon. * * * Yesterday, I paid all the fees at the City and that is all caught up too." CP 105.* John Sakai wrote back to Doug on November 7, 2003: "*You are taking too long. I do not want to lose our other prospect if you are going to string this out." CP 105.* Doug responded later that same day: *"Give me a buzz and we can go over it. I am ready to go and so is the bank." CP 105.* John responded*: "I just want a ballpark number to think about over the weekend, nothing more." CP 105.* Doug responded with a list of comparables: *"Here you go. We are ready when you are. Of course we need a final price though. This is just my analysis to date." CP 106.* On November 14, 2003, John Sakai wrote to Doug Nelson: *"I am still waiting for some input from an advisor before I* *discuss this with mom. I'll get back to you early next week." CP 109.* Sakai then gathered its own "comparable" information but did not share it with Landmark. *CP 445-47.* On December 1, 2003, John Sakai wrote to Doug Nelson: *"If I think that the $2.6 [million] is a fair deal for her, I'll recommend that she do the deal, otherwise I won't."*[8] *CP 110.* Doug Nelson never heard from John Sakai again.

Site Plan Approval was issued by the City on January 17, 2004. (Trial Exhibit 186). After a 30-day appeal period, the Site Plan Approval became fully vested. On March 26, 2004 – having received no communication from John Sakai, Doug Nelson wrote to him saying: *"I am writing you to request a time to meet and discuss the sale of the land. The approval was received more than a month ago and the money is in place." CP 111.* Landmark principal Antone Pryor wrote to the Sakai Family on March 30, 2004 asking Sakai to meet by a date certain. *CP 85.* Antone Pryor followed up with a phone call to John Sakai. John Sakai said he would no longer do business with Doug Nelson. *CP 143 at 45:1-15.* This lawsuit was filed in April 2004.

The documents produced by the Sakai Family during written discovery revealed the Sakais were not dealing with Landmark in

[8] It is unclear where John Sakai got the $2.6 million number.

good faith. Behind the scenes, they were attempting to exploit the fact that Landmark had started Phase I – to gain unfair leverage in obtaining a "premium" price for the Sakai parcels – that is, a price greater than the agreed "fair market value." For example, in October 2001, Dean Sakai wrote to his brother John:

> I applaud you portraying mom in a position of strength – that she has lots of money, is healthy and we did not bring up any tax increase issues. This strengthens our position and was good. * * * We are very close to having what we would be happy with – as long as we stay firm. Recall some of our goals for holding the Middle piece without an option. * * * Because we are holding the middle parcel, Doug is already working harder to make us happy.

CP 829.

In December 2001, Dean Sakai wrote to brother John:

> Hopefully, them pushing us to sign this [referring to the easement for egress/ingress] isn't just to lessen our leverage.

CP 828.

In March 2004, Dean Sakai wrote to brother John:

> I met with Nelson and it reconfirmed my feeling about the market and where he would prefer to lead us regarding price discussions. It's important not to bite at anything if he were to contact you. * * * He is naturally worried that we won't sell him anything.

CP 830. In April 2004, just after the Sakai Family received the letter from Landmark's Antone Pryor asking for a meeting, Dean Sakai wrote to brother John:

> All non-market advantages that we hold would be lost by simply allowing an appraiser to have power over the price decision. * * * If it came to the point to use an appraiser, it might be an idea to quietly hire one ourselves to add to the mix. We could have that in the bag if we needed.

CP 831.

John responded:

> I gave some thought to that after we talked & I agree. We should have a price per unit . . . that we are prepared to throw out. If they don't buy our property I would expect them to get sued by every Phase I buyer. If they seek $50,000 to $100,000 each, their exposure runs $2 million to $4 million.

CP 831.

In writing this, John Sakai was referring to Landmark's potential liability to Phase I homeowners if Phase II was not completed. This perceived leverage was part of the "non-market advantage" Dean Sakai had mentioned in his email – "*All non-market advantages that we hold would be lost by simply allowing an appraiser.*" *CP 831.*

Sakai's strategy to keep the "fair market value price" decision out of the hands of an "appraiser" reflected their attempt to obtain a "premium" based on this "non-market advantage" leverage. Sakai was no longer dealing with Landmark in good faith.

This substantial evidence supports the trial court's ruling in favor of Landmark on unjust enrichment.

8. Landmark was much more than a "volunteer."

Sakai argues that Landmark was not entitled to unjust enrichment damages because it was a mere volunteer, citing *Bank of America v. Wells Fargo Bank*, 126 Wn. App. 710, 723, 109 P.3d 863 (2005), which enumerates the "elements" necessary to establish this "volunteer" affirmative defense.

The benefit conferred to Sakai (development rights) was "at the request" of Sakai by virtue of the Owner Applicant Agreement, which Sakai left in place throughout their relationship.

Sakai knew Landmark was working on the Site Plan Approval throughout their relationship. Sakai knew the Site Plan Approval added value to their land and left the Owner Applicant Agreement in place to allow Landmark to complete the Site Plan Application process.

Although Landmark put this application on hold for a period of time, it ultimately completed what it started so as not to lose the benefit of the money and time investment Landmark had already invested in the development.

Under no circumstance can Sakai credibly argue that Landmark was a mere volunteer.

9. The Trial Court should not have made $100,000 of the damage award contingent on actual use.

In awarding unjust enrichment damages, the trial court awarded damages of $100,000 for the value of a lift station improvement constructed by Landmark, but it made this award "conditional" on actual use. If Sakai (or its successor(s)) do not take advantage of the lift station, thereby "wasting" this available asset, Landmark gets nothing. As argued by Landmark in its opening brief, this "contingent award" violates the principles of the RESTATEMENT OF RESTITUTION § 370, which explains that a "wasted" benefit is still a benefit for purposes of unjust enrichment.

In addressing this issue, Sakai argues that it is speculative whether the Sewer Lift Station will be used in the future to serve the Sakai property and that speculative damages are not recoverable, citing *Layman v. Swanson*, 3 Wn.2d 370, 1012 P.2d 304 (1940). The trial court, however, placed an exact value on the benefit, which is now available for use. The value of the improvement itself is not speculative at all. The only unknown is whether Sakai or its successor(s) will waste this benefit. Under the RESTATEMENT OF RESTITUTION § 370, this does not void the benefit or make the benefit itself "speculative" as contemplated under *Layman v. Swanson, infra.*

And, as Landmark has argued in its opening brief, the "right" to hook up to the lift station, standing alone, adds real present value to the Sakai property, allowing Sakai to market the property to a developer with this right in place.

CONCLUSION

Sakai Village today remains an incomplete development, with roads that simply stop at the Sakai property line. Specific performance is frequently the only adequate remedy for a breach of a contract regarding real property, because land is unique. *Pardee v. Jolly*, 2005 WL 5957423 & 2005 WL 5957425, 182 P.3d 967 (2008). When a party breaches a contract to convey real property, the presumptive remedy is specific performance. *Crafts v. Pitts*, 161 Wn.2d 16, 25-27, 162 P.3d 382 (2007). For the reasons discussed by Landmark on appeal, the trial court improperly dismissed Landmark's claim for specific performance by partial summary judgment. Landmark believes the undisputed evidence requires specific performance as a matter of law, but, at a minimum, Landmark is entitled to have the issue decided at trial. Had the trial court allowed the dismissed claims to proceed to trial, Landmark would have been entitled to a jury trial and would have requested one. Since the only claim remaining for trial was purely equitable in nature, Landmark did not have the right to a jury trial and did not, therefore, request one.

Landmark is entitled to attorney's fees as the prevailing party under RCW 4.84.330; attorney's fees were improperly awarded to Sakai, and that award should be reversed.

The "contingency" component of the award of $100,000 for the benefit conferred by the construction of the lift station should be stricken. The benefit is conferred whether or not wasted by Sakai or its successors.

RESPECTFULLY SUBMITTED this 5TH day of August, 2008.

CARNEY BADLEY SPELLMAN, P.S.

By ______________________________
Jeffrey D. Laveson, WSBA No. 16351
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on August 6, 2008, I delivered the original of the foregoing document to:

Court of Appeals, Division II
950 Broadway, Room 300 - MS TB-06
Tacoma, WA 98402

and I served a true copy of the same **via U.S. mail** on the attorneys of record for Respondents as follows:

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