

No. 49640-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

ANTONE PRYOR, individually, and the marital community composed of  
ANTONE PRYOR and KIM YOUNG OAK, husband and wife,

Defendants & Third Party Plaintiffs/Appellants,

vs.

DOUGLAS C. NELSON and KARINA NELSON, husband and wife;  
LANDMARK, LLC, a Washington limited liability company,

Plaintiffs and Third Party Defendants/Respondents.

And

DOUGLAS C. NELSON and KARINA NELSON, husband and wife;  
LANDMARK, LLC, a Washington limited liability company,

Cross-Appellants,

vs.

ANTONE PRYOR, individually, and the marital community composed of  
ANTONE PRYOR and KIM YOUNG OAK, husband and wife,

Cross-Respondents.

---

REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS

---

William A. Kinsel, WSBA #18077  
Attorney for Antone Pryor and Kim Young Oak  
Defendants & Third-Party Plaintiffs/Appellants  
Kinsel Law Offices, PLLC  
2401 Fourth Avenue, Suite 850  
Seattle, WA 98121  
(206) 706-8148

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ASSIGNMENTS OF ERROR ON CROSS APPEAL .....	1
A.	ASSIGNMENTS OF ERROR ON APPEAL .....	1
B.	ASSIGNMENTS OF ERROR ON CROSS APPEAL .....	2
C.	ISSUES RELATED TO ASSIGNMENTS OF ERROR ON CROSS APPEAL .....	3
III.	SUPPLEMENTAL STATEMENT OF THE CASE .....	3
IV.	ARGUMENT.....	4
A.	STANDARD OF REVIEW.....	4
B.	RESPONDENTS HAD NO RIGHT TO RECOVER \$105,999.05 IN FEES OR EXPENSES UNDER THE 2006 REDEMPTION AGREEMENT .....	6
1.	Relevant Assignments of Error .....	6
2.	Respondents Made a Pre-Trial Admission that All Legal Expenses for Sakai I Had Been Paid.....	6
3.	The Integration Clause of the 2012 Purchase and Sale Agreement Eliminated All of Respondents' Rights of Recovery Under the 2006 Redemption Agreement .....	8
C.	THE NELSONS AND THEIR ENTITIES ARE ENTITLED TO NOTHING UNDER THE 2012 PURCHASE AGREEMENT .....	11
1.	Relevant Assignments of Error .....	11

2.	¶7 of the 2012 Purchase Agreement Extinguished Nelson’s Rights to Recover Any Settlement Expense from Pryor and Limited His Rights to Recover Fees at Most to Attorney Bruce Johnston .....	11
3.	The 2012 Purchase Agreement Contains No Attorney Fee and Cost Provision for the Pending Lawsuit .....	17
4.	Respondents Failed to Prove Any Damages in Their Case-In-Chief for the Fees and Costs They Allegedly Spent on the “New,” or Sakai II, Suit .....	17
5.	Appellants Qualify for Equitable Indemnity, Including for Respondents’ New Suit Fee Award, if it is Sustained .....	24
6.	Respondents Confuse the Damages Caused to Appellants by the 2009 Apex Fraud With The Separate Damages Caused By the 2008 “Debt Swap” .....	28
D.	RESPONDENTS ARE LIABLE FOR THE 2008 “DEBT SWAP”, AND FOR THE FALSE CAPITAL CONTRIBUTIONS .....	29
1.	Relevant Assignments of Error .....	29
2.	The Statute of Limitations Does Not Bar the Pryors’ Fraud and Fiduciary Duty Claims .....	29
3.	The Appellants Were Defrauded in the 2008 Debt Swap .....	32
a.	FF # 27A Erroneously Found that Sportsman Park owed Landmark \$746,330.66 .....	32
b.	Substantial Evidence Supports the Remaining Elements of Appellants’ Breach of Fiduciary Duties Claim and Resulting Damages .....	37
c.	Substantial Evidence Exists Proving the Remaining Elements of Appellants’ Fraud Claim .....	39

4.	The Nelsons Defrauded The Pryors Through False Capital Contributions As Part Of The 2012 Purchase Agreement .....	41
5.	The Business Judgment Rule Provides No Protection To The Nelsons.....	43
6.	The 2012 Release Is Not Valid .....	43
E.	THE APPELLATE COURT SHOULD SUSTAIN THE TRIAL COURT’S DISMISSAL OF LANDMARK’S CLAIM ON THE \$60,000 PROMISSORY NOTE .....	44
1.	The Trial Court Correctly Applied The Notice Requirements.....	44
2.	The Trial Court Erred When It Failed To Find That Landmark Had Not Proven Non-Payment .....	46
a.	The Trial Court Erred at CL #1 by Misapplying the Burden of Proof on Landmark’s Claim for Breach of Promissory Note .....	46
b.	Stevenson, and Landmark’s Financial Records, Prove that the \$60,000 Note was Paid.....	46
c.	Landmark’s Promissory Note Claim was Barred by the Statute of Limitations Because Respondents Have Had Notice Since 2004 that Dr. Pryor Considered the Note Paid .....	47
d.	Possession of the Original Promissory Note Is Not By Itself “Substantial Evidence” of Non-Payment .....	48
3.	The Trial Court’s Companion Error in FF #7 .....	49
F.	APPELLANTS ARE ENTITLED TO THEIR FEES AND EXPENSES ON APPEAL.....	50
V.	CONCLUSION.....	50

## TABLE OF AUTHORITIES

### Cases

<u>Absher Constr. Co. v. Kent Sch. Dist. No. 415,</u> 79 Wn. App. 841, 848, 917 P.2d 1086 (1995).....	19
<u>Am. Med. Transp. Group v. Glo-An, Inc.,</u> 235 Ga. App. 464, 466, 509 SE2d 738 (1998) .....	19
<u>Matter of Det. of Belcher,</u> 196 Wn.App. 596, 612-3, 385 P.3d 174 (2016) .....	26
<u>Bellevue Sch. Dist. v. Lee,</u> 70 Wn.2d 947, 950, 425 P.2d 902 (1967).....	25
<u>Blueberry Place Homeowners Ass’n v. Northward Homes,</u> 126 Wn.App. 352, 358-9, 110 P.3d 1145 (Div. I, 2005).....	4, 27
<u>Bowers v. Transamerica Title Ins. Co.,</u> 100 Wn.2d at 581, 675.P.2d 193 (1983).....	19, 20
<u>City of Spokane v. Beck,</u> 130 Wn. App. 481, 486 (Div. 3, 2005).....	5
<u>Denny's Rests., Inc. v. Sec. Union Title Ins. Co.,</u> 71 Wn.App. 194, 203, 859 P.2d 619 (1993).....	14
<u>Dodge v. Stencil,</u> 48 Wn.2d 619, 623, 296 P.2d 312 (1956).....	8
<u>Dole v. Gear,</u> 14 Haw.554 (1903) .....	23
<u>Douglass v. Stanger,</u> 101 Wn.App. 243, 254-5, 2 P.3d 998 (2000) .....	32
<u>Emrich v. Connell,</u> 105 Wn.2d 551, 556, 716 P.2d 863 (1986).....	14

<u>Hamden Lodge, I.O.O.F v. Ohio Fuel Gas Co.,</u> 189 N.E. 246, 251, 127 Ohio St. 469 (1934).....	6
<u>Hollis v. Garwall, Inc.,</u> 137 Wn.2d 683, 695, 974 P.2d 836 (1999).....	13
<u>Hovial v. Barteck,</u> 48 Wn.2d 238, 241, 292 P.2d 877 (1956).....	5
<u>Irvin Water Dist. v. Jackson Partnership,</u> 109 Wn.App. 113, 119, 34 P.3d 840 (2001).....	4, 17
<u>J.R. Simplot Co. v. Vogt,</u> 93 Wash.2d 122, 126, 605 P.2d 1267 (1980) .....	30
<u>Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC,</u> 139 Wn.App. 743, 761-2, 162 P.3d 1151 (2007) .....	18
<u>Kelley v. Tonda,</u> 198 Wn.App. 303, 393 P.3d 824 (2017).....	13
<u>King v. Rice,</u> 146 Wn.App. 662 191 P.3d 946 (Div. I, 2008), .....	14
<u>Lesikar v. Rapeport,</u> 33 S.W.3d 282, 307 (Tex., 2000) .....	19
<u>Mahler v. Szucs,</u> 135 Wn.2d 398, 957 P.2d 632 (1998) .....	20
<u>Martin v. Miller,</u> 24 Wn.App. 306, 308, 600 P.2d 698 (1979).....	40
<u>Morgan v. King,</u> 30 Barb. 9 (1858).....	23
<u>State v. Guloy,</u> 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	25
<u>State v. Kirkman,</u> 159 Wn.2d 918, 155 .3d 125 (2007).....	26

<u>State v. Wheeler,</u> 93 Wash. 538, 541, 161 Pac. 373 (1916).....	8
<u>Sunnyside Valley Irrigation Dist. v. Dickie,</u> 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003) .....	4, 5
<u>Territory v. Alford,</u> 39 Haw.460 (1952) .....	23
<u>Welsh v. Campbell,</u> 41 Haw. 106, 118 (Haw. June 23, 1955) .....	23
<u>224 Westlake, LLC v. Engstrom Props., LLC,</u> 169 Wn.App. 700, 281 P.3d 693 (2012).....	Passim
<b>Statutes</b>	
RCW 19.40.041 .....	34
RCW 19.40.051 .....	34
<b>Other Authorities</b>	
<u>Black’s Law Dictionary, Abridged Fifth Ed</u> .....	34
<b>Rules</b>	
RAP 10.3.....	1, 2
RAP 10.3(a) .....	2
RAP 10.3(g) .....	2
RAP 2.5(a) .....	26
RPC 1.5(a).....	18

**TABLE OF ASSIGNMENT OF ERRORS  
FOR FINDINGS OF FACT  
IN BRIEF OF APPELLANTS**

FINDING OF FACT NO. 16.....	20
FINDING OF FACT NO. 27A.....	7, 41
FINDING OF FACT NO. 28.....	7
FINDING OF FACT NO. 29.....	7
FINDING OF FACT NO. 30.....	7
FINDING OF FACT NO. 31.....	7
FINDING OF FACT NO. 32.....	7
FINDING OF FACT NO. 33.....	7, 41
FINDING OF FACT NO. 34.....	7
FINDING OF FACT NO. 44.....	44
FINDING OF FACT NO. 57.....	11
FINDING OF FACT NO. 80.....	11
FINDING OF FACT NO. 81.....	11
FINDING OF FACT NO. 82.....	11
FINDING OF FACT NO. 92.....	11, 20
FINDING OF FACT NO. 93.....	11, 20
FINDING OF FACT NO. 95.....	12
FINDING OF FACT NO. 96.....	12
FINDING OF FACT NO. 102.....	13, 20
FINDING OF FACT NO. 103.....	13, 20, 36

FINDING OF FACT NO. 104 .....	13, 20, 39
FINDING OF FACT NO. 106 .....	20, 36
FINDING OF FACT SUPP NO. 3 .....	49

**TABLE OF ASSIGNMENT OF ERRORS FOR CONCLUSIONS  
OF LAW IN BRIEF OF APPELLANTS**

CONCLUSION OF LAW NO. 1.....	5, n. 4, 50
CONCLUSION OF LAW NO. 2.....	13, 34, 36, 39, 49, 51
CONCLUSION OF LAW NO. 3.....	34, 36, 39, 49
CONCLUSION OF LAW NO. 4.....	22, 28
CONCLUSION OF LAW NO. 6.....	11, 20, 41
CONCLUSION OF LAW NO. 7.....	25, 26
CONCLUSION OF LAW NO. 10.....	26
CONCLUSION OF LAW NO. 12.....	8, 45
CONCLUSION OF LAW NO. 13.....	8
CONCLUSION OF LAW NO. 14.....	40
CONCLUSION OF LAW NO. 16.....	47, 48
CONCLUSION OF LAW NO. 18.....	47, 48
CONCLUSION OF LAW NO. 19.....	47, 48
CONCLUSION OF LAW NO. 20.....	28
CONCLUSION OF LAW NO. 21.....	32
EVIDENTIARY RULING ON BROUGHTON’S TESTIMONY..	35, n. 10

## **I. INTRODUCTION**

Appellants submit this brief to finish the job of revealing the lack of substantial evidence supporting the trial court's challenged findings of fact. Appellants further intend to demonstrate the underlying logical and legal errors in the trial court's challenged conclusions of law. Quite simply, it is time to put to an end the Nelsons' decade's long course of fraudulent conduct, and to provide some measure of relief to their erstwhile business partners, Dr. Pryor and his wife Kim Young Oak.

## **II. ASSIGNMENTS OF ERROR ON CROSS APPEAL**

### **A. ASSIGNMENTS OF ERROR ON APPEAL**

At p. 3, n. 1 of the Amended Brief of Respondents ("ABR"), the respondents argue that appellants failed to make a separate assignment of error for each finding of fact to which they objected, yet, respondents then list nine separate errors that they identified, specifically FF #s 16, 27A, 33, 44, 92, 93, 96, 104 and 106.<sup>1</sup> Oddly, respondents ignore the other assignments that appear, for instance, in the same sentence or line as other assignments of error they do acknowledge.

Despite respondents' contention, appellants identified each finding of fact to which they assign error in compliance with RAP 10.3 in general

---

<sup>1</sup> For instance, respondents acknowledge the assignment of error to FF #104 on page 20 of the Brief of Appellants, but somehow miss the assignments of error to FF #s 102 & 103 that appear together in the same sentence with the assignment of error to FF# 104.

and RAP 10.3(g) in particular.<sup>2</sup> In order to reduce the number of pages in what was already in an over-length Brief of Appellants, appellants identified the erroneous findings of fact in the context where each assigned error makes the most sense for understanding the overall appeal. For the sake of convenience for the Court and the parties, appellants have included in this Reply Brief, in the general tables, “Tables of Assignments of Error” that identifies where each assignment of error is asserted in the Brief of Appellants for a finding of fact or conclusion of law. This provides both a complete and easy reference tool and allows respondents and the Court to verify that no new assignments of error are asserted in the Reply. Briefly, the assignments of error to the Findings and Conclusions are as follows: FF #s 16, 27A, 28-34, 44, 57, 80-82, 92, 93, 95, 96, 102-104, 106; Supp. FF #3; CL #s 1-4, 6, 7, 10, 12-14, 16, 18-21.

**B. ASSIGNMENTS OF ERROR ON CROSS APPEAL**

**Assignment of Error 7:** Findings of Fact #s 1 to 8 relate to Landmark’s claim for payment of the \$60,000 promissory note at T.Ex. 1. Appellants are in general agreement with those Findings of Fact, except for the second and third sentence of FF #7 (“The Note is not a claim or a

---

<sup>2</sup> Respondents read RAP 10.3 too strictly. RAP 10.3(a) identifies what the Brief of Appellant should contain and what that order should be, while RAP 10.3(g) specifies that each assignment of error is to be clearly disclosed with its associated issues. All of appellants’ assignments of error meet those basic rule requirements.

lien. Nelson is still in possession of the original Note.”), and the first sentence of FF #8 (“In totality, there is insufficient evidence that the Note has been paid.”) (CP 427.) Each of those specific findings is in error. Likewise, CL #1, at CP 450, is in error by concluding that “there is insufficient evidence establishing that Pryor paid the Note.”

**C. ISSUES RELATED TO ASSIGNMENTS OF ERROR ON CROSS APPEAL**

**Issue # 14:** Did the trial court err by not finding that respondents failed to prove nonpayment of the July 2000 promissory note? Answer: Yes.

**Issue # 15:** Did the trial court err by not awarding the Pryors their fees and costs under the July 2000 promissory note? Answer: Yes.

**III. SUPPLEMENTAL STATEMENT OF THE CASE**

After filing the Brief of Appellant, appellants became aware of a numbering error in the Verbatim Report of Proceedings (“RP). Specifically, Vol. II of the proceedings from March 16, 2016, begins at RP 206 and ends at RP 395. By comparison, Vol. III of the proceedings from March 17, 2016, begins at RP 336 and ends at RP 546. In other words, each of these volumes in the RP contains a document range from RP 336 to 395. Therefore, if any party’s source citation appears not to be related to the point at hand, and it falls within that number range, appellants suggest looking at both Volumes II and III of the RP.

## IV. ARGUMENT

### A. STANDARD OF REVIEW

The parties appear to agree on the standard of review. Except with respect to the theory of equitable indemnity (as argued for instance at CP 2003, 2016, 2026-27) where *de novo* review applies<sup>3</sup>, the appellate court first asks whether substantial evidence supports the trial court's challenged findings of fact. Then, the appellate court asks whether those findings of fact support the trial court's conclusions of law. Irvin Water Dist. v. Jackson Partnership, 109 Wn.App. 113, 119, 34 P.3d 840 (2001). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. If this standard is satisfied, the appellate court will not substitute its judgment for the trial court's. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). By comparison, the appellate court reviews questions of law and conclusions of law *de novo*. Id.

While there appears to be agreement between the parties on these standards, appellants think it necessary to highlight the additional subtleties in the review of a decision from a bench trial. Specifically, when the appellate court reviews such a decision, as is the case at bar, the

---

<sup>3</sup> Blueberry Place Homeowners Ass'n v. Northward Homes, 126 Wn.App. 352, 358-9, 110 P.3d 1145 (Div. I, 2005).

“scope of review is confined to a determination as to whether or not the evidence *preponderates* against the findings of the trial court.” Hovial v. Barteck, 48 Wn.2d 238, 241, 292 P.2d 877 (1956) (emphasis added). *See also City of Spokane v. Beck*, 130 Wn. App. 481, 486 (Div. 3, 2005) (“Proof of a defense by a preponderance of the evidence merely means the greater weight of the evidence.”)

Despite this judicial explanation, it can be difficult to measure meaningfully what exactly constitutes “substantial evidence.” In terms of measuring what is or is not substantial evidence, it is useful to zero in on the observation that substantial evidence is that measure of evidence which is sufficient to persuade a rational fair-minded person that the premise is true. Sunnyside Valley Irrigation, 149 Wn.2d at 879-80. Appellants underline “rational” and “premise” because they inherently relate to the fundamental logical nature of the law, and thus, to the relationship of logic to what is and is not “substantial evidence.”

As is nicely stated about Ohio’s substantial evidence standard:

To permit the court to direct a verdict in every case where he would set aside a contrary verdict would, in our opinion, be an unwarranted invasion of the jury's province. That the weight of the evidence is at least primarily a question for the jury has long been recognized in Ohio . . . .

But to say that the court must send the case to the jury whenever there is any evidence, no matter how slight, which tends to support a party's claim, is, in

extreme cases, to permit the jury to play with shadowy and elusive inferences which the logical mind rejects. Before the judge is required to send the case to the jury, there should be in evidence something substantial from which a reasonable mind can draw a logical deduction. If reasonable minds may draw different inferences, or reach different conclusions, a jury question is presented. But, if reasonable minds can reach only one conclusion, the jury should not be allowed to speculate upon the matter. To do so is to allow them the opportunity of returning a wholly unreasonable verdict.

Hamden Lodge, I.O.O.F v. Ohio Fuel Gas Co., 189 N.E. 246, 251, 127 Ohio St. 469 (1934). In other words, if a finding of fact is illogical or unreasonable, it is not supported by substantial evidence.

**B. RESPONDENTS HAD NO RIGHT TO RECOVER \$105,999.05 IN FEES OR EXPENSES UNDER THE 2006 REDEMPTION AGREEMENT**

**1. Relevant Assignments of Error**

This section relates to Assignments of Error #s 1, 2, 3, and 4, along with Issue #s 4, 6, 7, and 9. It further relates to disputed Findings of Fact #s 16, 27A, 28-31, 33, 44, 57, 80-82, 92, 93, 95, 96, 102-104, 106, and disputed Conclusions of Law #s 2, 3.

**2. Respondents Made a Pre-Trial Admission that All Legal Expenses for Sakai I Had Been Paid**

On page 45 of the original (as opposed to the Amended) Brief of Respondents/Cross-Appellants, respondents assert that:

The trial court correctly held that Pryor breached both the 2006 Redemption Agreement and 2012 Purchase and Sale Agreement by not paying any share of Sakai litigation expenses. Pryor's argument that he should not have to pay any portion of the expenses incurred in resolving the Sakai litigation ignores his repeated agreements.

In their Amended Brief of Respondent ("ABR"), at p. 47, the respondents change this argument slightly by, most notably, dropping the words "any share of" the Sakai litigation expenses from the relevant paragraph. While respondents do not highlight this change, it is significant because respondents' trial counsel Kevin Cure unequivocally and explicitly conceded and admitted to the trial court that the Pryors fully paid all legal expenses owed by them with respect to the Sakai I lawsuit:

In 2006, when Dr. Pryor entered the redemption agreement, the first lawsuit with Sakai had not even gone to trial at that point. Dr. Pryor paid for half of those fees at trial – that were incurred at trial by Landmark.

Then there was the appeal process following the Court's ruling, which ultimately didn't conclude until 2010, March of 2010, and Pryor paid the fees incurred by Landmark and the costs of the appeal. There's no allegation that it didn't happen.

(RP dated November 6, 2015, filed 7/3/17, at p. 11, l. 21 to p. 12, l. 5.)

This admission against interest, i.e., that all legal expenses for the Sakai I litigation were paid, is significant, as it cuts across many of the issues on appeal. Our courts have long held that a distinct and formal admission of a fact by an attorney, made for the express purpose of

dispensing with the formal proof of said fact at trial, is binding upon his client. State v. Wheeler, 93 Wash. 538, 541, 161 Pac. 373 (1916); Dodge v. Stencil, 48 Wn.2d 619, 623, 296 P.2d 312 (1956). Most importantly, the respondents' erroneous claim here and at trial that the Pryors did not pay their share of the legal expenses for Sakai I was used to create an otherwise nonexistent contractual basis upon which to request a recovery by Landmark of the expenses in both the instant litigation and in the Sakai II case under the 2006 Redemption Agreement and 2012 Purchase Agreement. Unfortunately, the trial court erroneously agreed to the same at FF #s 102-104 and CL #s 2-3.

**3. The Integration Clause of the 2012 Purchase and Sale Agreement Eliminated All of Respondents' Rights of Recovery Under the 2006 Redemption Agreement**

As discussed at length in the opening Brief of Appellants, the trial court correctly found at FF # 97, CP 446-7, that the integration clause of the 2012 Purchase Agreement was "bargained for and agreed upon by the parties," making the "2012 Purchase Agreement . . . the final agreement of the parties. . . ." That provision specifically reads:

c. Entire Agreement. This Agreement constitutes the entire Agreement between the parties with respect to the subject matter of this Agreement. There are no other commitments or agreements between the parties with respect to such matters. This Agreement may be amended only by a written instrument executed by the parties.

(FF # 97, CP 446; App. Ex. 3, ¶10.c, CP 738.) The trial court then incorrectly—and illogically—failed in CL #2 to apply that integration clause to prevent respondents from recovering fees and costs under the terms of the 2006 Redemption Agreement.

As discussed above, the respondents attempted to get around this problem by arguing in their original Brief of Respondents that the Pryors had paid none of the legal expenses related to the Sakai I litigation. That may have been a mere “error of logic” on the part of the respondents’ new appellate counsel, for how else can one make logically consistent the trial court’s FF # 97 on the integration clause, and then, the trial court’s award of \$105,999.05 for fees and costs to Landmark under the 2006 Redemption Agreement, given that Landmark had gone insolvent in 2009 following the Apex fraudulent transfers and, thus, could not have spent a dime on Sakai II? (FF #15, CP 428.)

While respondents’ appellate counsel may have been puzzled by this logical inconsistency in the trial court’s findings and conclusions of law, respondents’ trial counsel was not, which is why he also argued that:

in 2012, the second Sakai lawsuit began, which was promptly consolidated by court order with the first lawsuit, and that’s when Dr. Pryor began failing to meet his contractual obligations under the 2006 redemption agreement by paying half of those fees.

(RP, dated 11/6/15, filed 7/3/17, at p. 12, ll. 6-10.) Here, then, we see respondents' effort to evade the integration clause of the 2012 Redemption Agreement—for which they bargained and to which they agreed—through reference to a simple procedural order of consolidation that was entered on June 15, 2012, a mere eight days after the 2012 Purchase and Sale Agreement had been signed. It is true that the trial court entered FF #99, which references that consolidation order at T.Ex. 435 (CP 1264-66), and it is also true that appellants have not objected to that finding of fact—for the simple reason that the “fact” of the order's entry is indisputable.

There is, however, simply no logical connection between FF #99, which makes a factual observation about the order of consolidation at T.Ex. 435, CP 1264-6, and CL #2, which ignored the 2012 integration clause (found enforceable at FF #97) in order to impose liability on the Pryors under the 2006 Redemption Agreement. Furthermore, the trial court made that legal and logical error while ignoring the unequivocal requirement in the 2012 Purchase Agreement at T.Ex. 3, ¶10.c (CP 738) for a writing signed by Nelson *and by Pryor* before that contract's meaning, intent and application could be changed.

Even more remarkably, respondents argue that this fundamental amendment to the 2012 Purchase Agreement could occur a mere 8 days after the June 7, 2012 Purchase Agreement was signed, with no evidence

of any notice to Dr. Pryor of that supposed effect. Needless to say, such an argument, along with CL #2 that is necessarily based upon it, is illogical, in direct violation of the parties' written June 2012 agreement, unsupported by any legal authority, and wrong as a matter of law.

**C. THE NELSONS AND THEIR ENTITIES ARE ENTITLED TO NOTHING UNDER THE 2012 PURCHASE AGREEMENT**

In addition to having no right of recovery under the 2006 Redemption Agreement, Landmark, Douglas Nelson and Karina Nelson have no right to recovery anything under the 2012 Purchase Agreement.

**1. Relevant Assignments of Error**

This section relates to Assignments of Error #s 1, 2, 3, and 4, along with Issue #s 4, 6, 7, 9, and 11. It further relates to disputed Findings of Fact #s 16, 27A, 28-31, 33, 44, 57, 80-82, 92, 93, 95, 96, 102-104, 106, and disputed Conclusions of Law #s 2, 3, 20.

**2. ¶7 of the 2012 Purchase Agreement Extinguished Nelson's Rights to Recover Any Settlement Expense from Pryor and Limited His Rights to Recover Fees at Most to Attorney Bruce Johnston**

In the ABR, at pp. 13-14, 47-49, respondents do not even attempt to defend the trial court's mangling in FF #96 of the language of ¶7.a & b. of the 2012 Purchase Agreement, nor do they directly attempt to defend the resulting, incorrect introductory finding of fact in FF #96. To wit, the trial court found that "Pryor restated [in the 2012 contract] his earlier

agreement to remain liable for 50% of the Sakai Litigation.” (FF #96, CP 446.) Instead, respondents play off and magnify that error by continuing to argue a misleading and incorrect interpretation of the 2012 Purchase Agreement that set forth the parties’ new and substantially different cost-sharing agreement for the Sakai II Lawsuit. (T.Ex. 3, ¶7.a & b.).

Respondents admit that, with respect to the 2012 Purchase Agreement, “Pryor wanted to sell his interest in Sportsman Park and Central Plaza, and execute an agreement that would limit Pryor’s exposure to the Sakais.” (ABR, p. 12.) But, at ABR pp. 48-49, respondents then incorrectly argue that the trial court should be permitted to modify the express language of that contract by applying what respondents call “context evidence” from what is really just a one line quote from a May 8, 2012 email written by Doug Nelson to Dr. Pryor, in which Mr. Nelson asserted his unilateral intent about what he wanted that agreement to include. Clearly Doug Nelson did not get all he wanted in this regard, as is visibly displayed by the struck-out ¶7.c of the agreement at T.Ex. 3, CP 736. Under such circumstances, neither Mr. Nelson nor the trial court is

permitted to re-write the express language of the parties' integrated, signed agreement through the importation of Nelson's month-old email.<sup>4</sup> The cases cited at pp. 47-48 of the ABR do not support Nelson's contention that he should be allowed to use the unilateral language of his own email, expressing his hoped-for outcome in contract negotiations that would not conclude for another month, to alter the contract he actually signed. For instance, Kelley v. Tonda, 198 Wn.App. 303, 393 P.3d 824 (2017), involved questions about the bilateral intent of the parties to a conveyance that occurred more than one hundred years ago, in 1907. In reviewing the common law rules for considering context evidence, the Kelly court reaffirms that:

admissible extrinsic evidence does not include (1) "[e]vidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;" (2) "[e]vidence that would show an intention independent of the instrument; or" (3) "[e]vidence that would vary, contradict or modify the written word." Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

Kelley, 198 Wn.App. 303, 312 (Div. I, Mar. 27, 2017). Furthermore, respondents fail to point this Court to anywhere in the record for supporting evidence that they either argued that that May 8, 2012 email

---

<sup>4</sup> That is especially the case when Dr. Pryor wrote in his response that "I just don't feel like a partner at times but someone who is being bullied." (T.Ex. 346, CP 1198.) There is no sound basis for holding that the May 2012 emails in T.Ex. 346 are valid context evidence for purposes of re-writing ¶7 of the June 7, 2012 Purchase Agreement.

constituted valid “context evidence”, or that the trial court considered it as such. (*See* ABR 48.)

Respondents’ reliance on King v. Rice, 146 Wn.App. 662 191 P.3d 946 (Div. I, 2008), to try to argue that an integration clause is of no import is also of no avail in the case at bar. As observed in King,

An integrated contract is one where the parties intend a written document to be a final expression of their agreement. Whether the parties intended an integrated contract is generally a question of fact. Emrich v. Connell, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). While boilerplate integration clauses are strong evidence of integration, they are not operative if they are factually incorrect. Denny's Rests., Inc. v. Sec. Union Title Ins. Co., 71 Wn.App. 194, 203, 859 P.2d 619 (1993). A court may consider evidence of negotiations and circumstances surrounding the formation of the contract, and **if the agreement is not completely integrated**, additional terms may be proved to the extent they are consistent with the written terms. Denny's, 71 Wn.App. at 202; Emrich, 105 Wn.2d at 556.

King, 146 Wn.App. at 670 (bold emphasis added). Respondents have not assigned error to the trial court’s FF #97 that the agreement was fully integrated, and they cannot now challenge that finding through the back door in an effort to support an unsustainable conclusion of law (CL #2).

Even if one were to give some passing credence to respondents’ efforts to revise an integrated agreement with Nelson’s month-old email masquerading as “context evidence”, logic still leads the way to the irrefutable conclusion that the trial court erred in awarding anything to the Nelsons under the 2006 Redemption Agreement. To begin, one must look

at the actual language of the June 7, 2012 Purchase Agreement, at T.Ex. 3, CP 735, with the knowledge that the Sakai I case was over, that Pryor had paid all of his obligations related thereto,<sup>5</sup> and that Sakai II had been filed nearly 4 months before, on February 17, 2012. (FF #74.) With that simple, and quite literally temporal “context” of the June 7, 2012 contract, the illogic of the trial court’s judgment becomes clear. First, one looks at ¶7.a of that agreement. It states in relevant part:

- a. Selling Member and Purchasing Member are subject to a lawsuit involving Sportsman Park, SP Phase I, Landmark, LLC, the Sakai QTIP Trust, Kimiko R. Sakai, John D. Sakai, Paul D. Sakai, Mary Ann R. Arnone and others, currently pending in Kitsap County Superior Court under Cause No. 12 2 00372 8 (the “New Suit”). They have retained Bruce Johnston to represent them in that action. The Court has previously entered judgment against Landmark, LLC in favor of the Sakai Parties in the principal amount of \$77,702.70 in Cause No. 04-2-005950-4 (the “Landmark Judgment”). In the New Suit the Sakai Parties are alleging that the Selling Member and the Purchasing Member engaged in fraudulent conveyances and are seeking to “pierce the corporate veil” of Landmark to hold Selling Member and Purchasing Member personally liable for the Landmark Judgment.

(T.Ex. 3, CP 735.) Three main points need be made initially: (1) the litigation that was the subject of ¶7 of the 2012 Purchase Agreement was the specifically-defined “New Suit”; (2), the parties were distinguishing between the old, Sakai I litigation, now complete and defined as the

---

<sup>5</sup> RP, dated November 6, 2015, filed 7/3/17, at page 11, line 21 to page 12, line 5.

“Landmark Judgment,” and the Sakai II “New Suit,” and (3), the bases for the alleged liability were fraudulent conveyances.

When one examines the argument of respondents in the ABR, one sees a subtle yet material mistake in how respondents incorporate the provisions of ¶7.a into their presentation of ¶7.b. Specifically, at both page 13 and 47 of the ABR, respondents materially change the meaning of ¶7.b by changing the phrase “that litigation”—which in context unambiguously means the “New Suit”—to read “[the Sakai] litigation.” And, as is seen in the BR and ABR, respondents have actively and erroneously conflated the “New Suit” with the “Landmark Judgment” in order to defeat the unambiguous meaning of the 2012 integration clause and their limited recovery rights of T.Ex. 3, ¶7.b. (FF# 97.)

Next, no matter how many times respondents say it, there simply is no logic to their interpretation of ¶7.b of the 2012 Purchase Agreement because their reading permits *Doug Nelson* to impose 50% of the responsibility for *his and his wife’s fraud* (FF #15) on Dr. Pryor and his wife when the parties’ agreement requires a very specific third party to exercise his or her state authority to enter judgments determining liability:

If the *Court* in the *New Suit* holds Selling Member and Purchasing Member personally liable for the Landmark Judgment, . . . .

(T. Ex. 3, CP 735, ¶7.b (emphasis added).) Again, Nelson was not the “Court” in the New Suit, and there is no conceivable need for context evidence to explain to this appellate court what the word “court” means in the 2012 Purchase Agreement. To be blunt, it is galling and utterly illogical to deny Dr. Pryor and his wife the benefits of a contract that they negotiated to limit their exposure to the Sakais, as both respondents themselves admit at ABR, p. 12, and as Dr. Pryor testified at RP 1237, l. 4 to RP 1238, l.15, just so the Nelsons can shift 50% of the expenses that they incurred as a result of their own orchestration of the 2009 Apex fraud.

**3. The 2012 Purchase Agreement Contains No Attorney Fee and Cost Provision for the Pending Lawsuit**

As explained at pages 52 and 53 of the Brief of Appellant, the 2012 Purchase Agreement contains no prevailing party attorney fee provision. Respondents do not dispute this. Thus, there is no legal basis upon which to sustain the trial court’s judgment of \$104,399.86 in fees and \$10,443.08 in costs to the respondents, requiring reversal of the same.

**4. Respondents Failed to Prove Any Damages in Their Case-In-Chief for the Fees and Costs They Allegedly Spent on the “New,” or Sakai II, Suit**

Again, to sustain a judgment in their favor, respondents must provide substantial evidence to support the trial court’s findings of fact, which then must logically lead to the related conclusions of law, and ultimately, the judgment. Irvin, 109 Wn.App. at 119. Here, respondents

fail to meet that first requirement—the identification of substantial supporting evidence admitted into the record—in favor of the principal damage award of \$105,999.05, because not one invoice was admitted as evidence, and because no qualified witness testified to the reasonableness, necessity or relationship of those expenses to the New Suit. Finally, respondents acknowledge the trial court’s rulings excluding those invoices were appropriate, as they have assigned no error to the same.

Respondents try to duck the requirement to identify the substantial evidence supporting the judgment by claiming that the 2012 Purchase Agreement did not include a requirement of reasonableness. (ABR, p. 51, last 4 lines.) Attorney’s fees always have to be reasonable, however. RPC 1.5(a). That requirement of reasonableness applies both to the attorneys charging those fees directly to their clients, again RPC 1.5(a), and to any agreement for the recovery or payment of the same by an opposing party.

These principals were discussed at length by Division I in 224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn.App. 700, 281 P.3d 693 (2012), in conjunction with a prevailing-party fee application, which again carries with it a *lesser burden of proof* than that which applies to the judgment the Nelsons seek to sustain for their principal damage award. Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC, 139 Wn.App. 743, 761-2, 162 P.3d 1151 (2007) (claimant bears burden of proving necessity

and reasonableness of litigation expenses through expert testimony); Am. Med. Transp. Group v. Glo-An, Inc., 235 Ga. App. 464, 466, 509 SE2d 738 (1998) (“reasonableness and necessity of the expenses of litigation and attorney fees are matters for expert opinion”); Lesikar v. Rapeport, 33 S.W.3d 282, 307 (Tex., 2000) (“Generally, the issue of reasonableness and necessity of attorneys' fees requires expert testimony.”)

In Westlake, the prevailing party (Westlake) had presented its detailed fee records for an *in camera* review, with only one-page summaries provided to the opposing party.

¶96 Engstrom contends the court abused its discretion by conducting an *in camera* review of Westlake's detailed attorney fees invoices without ordering Westlake to produce detailed fee records for Engstrom's review. Engstrom objects that the one-page summaries provided by Westlake's counsel do not provide the detail required by Bowers, without which Engstrom did not have a foundation from which to argue that the claimed hours should be discounted because of time “spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.” Bowers, 100 Wn.2d at 597.

¶97 Westlake responds that Engstrom was not entitled to review the Detail Fee Transaction File because the information therein was protected by the attorney-client privilege and the work product doctrine. . . .

¶98 The determination of a fee award should not become an unduly burdensome proceeding for the court or the parties. Absher Constr. Co. v. Kent Sch. Dist. No. 415, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995). Documentation “need not be exhaustive or in minute detail, but must inform the court, in addition

to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.).” Bowers, 100 Wn.2d at 597. Westlake's list of the total hours expended by each timekeeper does not come up to the standard set in Bowers because it does not distinguish among the tasks accomplished during the hours claimed. Without access to such basic information, Engstrom had no hope of critiquing the request in a meaningful way. . . .

¶99 The rule is well settled that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. Mahler, 135 Wn.2d at 435. The appellate courts exercise a supervisory role to ensure that discretion is exercised on articulable grounds. Mahler, 135 Wn.2d at 434-35. The burden of demonstrating that a fee is reasonable always remains on the fee applicant. [Cite omitted.]

¶100 Westlake has not carried its burden of demonstrating that the lodestar fee was reasonable.

Westlake, 169 Wn.App. at 740-41. Westlake was fortunate. Because it was merely a post-trial fee petition at issue on appeal, the matter could be remanded for a recalculation in order to save some sort of award.

Here, the matter at issue was a trial on the merits, the respondents have assigned no error to the trial court’s evidentiary rulings excluding the allegedly-relevant invoices, respondents made no offer of proof, and they have no opportunity for a remand for a new trial. Furthermore, Nelson admitted that he had spent a million dollars on attorney’s fees in the last ten years. (RP 151, ll. 5-12; RP 152, ll.1-17.) Yet, he failed to provide any documentation upon which the trial court could reasonably determine as

the finder of fact that the fees he sought were related to the New Suit or to something else, or if they were reasonable and necessary.

Indeed, Nelson provided vastly less than what Westlake provided in support of its reversed fee award, including a failure to provide even the most basic of information regarding his request. As an example, in FF #102 the trial court simply lists total amounts paid to three law firms and divides those sums in half to determine “Pryor’s Share.” (CP 448.) There is no identification of the personnel who provided the services, how many hours were spent, what the billing rates were, and no finding of reasonableness for the tasks being completed. Of course, Nelson provided none of that information to the trial court to justify such a finding.

For instance, with respect to the Smith & Hennessy firm, Nelson testified (a) that he *sometimes* reviewed each entry on the invoices (thus establishing a lack of personal knowledge for assigning charges to Sakai II), (b) that an unidentified attorney “charges a lot per hour” without actually stating the time frame during which the legal services were provided, what hourly rate was charged or the number of hours spent, (c) that he wanted to be sure that the charges were related to legal advice he requested—without actually stating that that “legal advice” was in part or whole even related to the New Suit, and (d), that he paid (not that *Landmark* paid) “\$33,125 or more” to that firm. (RP 149-150.) Based on

that completely inadequate testimony, the trial court then somehow found that \$33,125.36 (not the \$33,125 flat testified to by Nelson) was paid to that firm, and that the Pryors were liable for half of the same. Such testimony, with no designation of each attorney's hourly rates, of each attorney's experience and position with his/her firm, of his/her number of hours, and no description of tasks performed, is utterly inadequate to establish to this Court that substantial evidence exists to sustain the trial court's award of \$70,999.05 in FF #s 102 and 104.<sup>6</sup>

These critical failings in the nature and substance of Doug Nelson's testimony highlight the equally critical failure of the Nelsons to present as witnesses at least the attorneys who had performed those services (as the Pryors did with Mr. Broughton).<sup>7</sup> Through this failure of proof, respondents denied both the trial court and the Pryors the opportunity to assess the credibility of the assignment of every dollar requested by Mr. Nelson as being both reasonable (in time spent and rates charged, etc.), and also, of the necessity of that work to the New Suit.

---

<sup>6</sup> The same types of fundamental problems permeate Mr. Nelson's testimony regarding all of the other fee and cost amounts as well, so it is no wonder that respondents gloss right over this testimony at ABR 50. *See* Vol. I, RP 151 to 163 for the further litany of inadequate oral testimony from Doug Nelson.

<sup>7</sup> Broughton's testimony appears at Vol. III 3/17/16 RP 344-393. The Nelsons likely would not have had to hire a separate expert witness, as the attorneys (like Broughton) who allegedly provided the services recorded would likely have qualified to testify, and to be cross-examined, regarding the reasonableness of their time spent and hourly fees, and of the necessity of that work to protecting the Pryors' interests in the New Suit.

Again, logic must prevail to sustain the common law:

In *Dole v. Gear*, as well as in *Territory v. Alford*, *supra*, the following quotation from *Morgan v. King*, 30 Barb. 9, appears: "\* \* \* 'when it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules, or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the *unwritten law* of England; and we have adopted it as a constantly improving *science*, rather than as an *art*; as a system of *legal logic*, rather than as a *code of rules*. In short, in adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed.'"

Welsh v. Campbell, 41 Haw. 106, 118 (Haw. June 23, 1955). Given these dictates of logic, it simply cannot be that a party (here the Nelsons) can be allowed to prove entitlement in their case in chief to a principal damage award of \$70,999.05 for legal fees and costs by presenting *less* evidence than is required of them to sustain an award on a fee petition post-trial. Westlake, 169 Wn.App. at 740-41. Thus, as a matter of legal logic, without the admission of the underlying invoices supporting their claim, and without the testimony of either the professionals who provided (or supervised) that service, or of attorneys identified to opine as experts<sup>8</sup>, to justify the reasonableness of the hourly rates and hours spent, and of the

---

<sup>8</sup> Respondents have no basis to contend that they were surprised by the need to provide such evidence, as it was mentioned in the Pryors' 12/4/15 trial brief, months before the trial of this matter actually occurred. (CP 314, ll. 15-24).

necessity of the same to the New Suit, the principal judgment lacks substantial evidence and must be reversed. Indeed, the trial court itself saw the speculative nature of any award: “Well, I don’t know how much weight I am going to give to the rough estimate of legal fees because some of that litigation may be completely unrelated to what we are talking about here.” (RP 152.)

**5. Appellants Qualify for Equitable Indemnity, Including for Respondents’ New Suit Fee Award, if it is Sustained**

Respondents incorrectly contend that the appellants did not present to the trial court, first, the evidence required to establish a right to recovery under the theory of equitable indemnity (as a result of the 2009 Apex fraudulent conveyance, FF #15), and secondly, appropriate legal argument on that theory. First, the presentation of evidence on the 2009 Apex fraud was one of the constants in the parties’ ten day trial, with appellants examining their very first witness (Karina Nelson) about Apex on the second day of trial, March 16, 2016, at Vol. II RP 343. Appellants continued to ask witnesses about that company through March 24, 2016, the seventh day of trial, at RP 1239. And, it was last discussed during appellants’ closing argument on April 15, 2016 at RP 1772, ll. 16-25, and referencing T. Exs. 49, 50, 51, 171, 172, 173, 176 and 631. Based on an

Adobe Acrobat search function,<sup>9</sup> the word “Apex” appears 171 times in the RP. If respondents thought that evidence was unrelated to appellants’ legal theories, the time to object was when that testimony was elicited. State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *quoting* Bellevue Sch. Dist. v. Lee, 70 Wn.2d 947, 950, 425 P.2d 902 (1967).

Second, respondents contend that appellants did not preserve the theory of equitable indemnity because they supposedly did not argue it to the trial court. But, appellants’ complaint covered both equitable and contractual indemnity, CP 73, and their proposed findings of fact and conclusions of law unequivocally do present that theory of recovery to the trial court, and further, lay out the grounds for recovery. (CP 2003, 2016, 2026-27.) Before the trial court erroneously awarded respondents a recovery for the Sakai II legal expenses, the items subject to an equitable indemnity claim were limited to \$1,333 for the mediation fee payable to Bertram Dispute Resolution and \$8,586 for the Broughton Law Group invoice. (RP 1795, ll. 8-12; T. Ex. 6 & RP 377-378 (Bertram invoice); T.Ex. 7 & 3/17/16 RP 364-366 (Broughton invoice). Now that the trial court has (erroneously) awarded respondents \$105,999.05 in settlement

---

<sup>9</sup> Control-Shift-F opens a dialogue box that will perform this word count. If the Court has a combined RP file, this 171 count can be easily confirmed by typing the word “Apex” into the search window, by then checking the “whole word only” box and then by clicking the “search” button. Otherwise, repeat the search in each volume.

expense, fees and costs for Sakai II, the equitable indemnity claim extends to those sums as well. (FF #s 102-104; CL #s 2-3, 20.)

Third, respondents claim they were somehow prejudiced by the parties' failure to exchange their proposed findings of fact and conclusions of law; yet, during an extended discussion with Judge Hull on the matter, it was the respondents who controlled whether that occurred, with appellants suggesting that the parties make the exchange, and with the respondents refusing. (Vol, VII of RP at RP 1094 to RP 1100.) Any burden of this supposed prejudice must accordingly fall on respondents:

¶46 Because Belcher did not object at trial, he has not properly preserved the issue for appeal, and we do not consider it. Issues raised for the first time on appeal need not be considered unless they are manifest constitutional errors. Kirkman, 159 Wn.2d at 926; RAP 2.5(a). Washington courts have “steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” [Cites omitted.]

Matter of Det. of Belcher, 196 Wn.App. 596, 612-3, 385 P.3d 174 (2016).

Again, it was the Pryors who suggested exchanging the parties' proposed findings of fact and conclusions of law, and the Nelson who objected to that exchange. Furthermore, the Nelsons did not express any change of heart on this subject by objecting, during closing arguments, to their “failure” to receive a copy of the Pryors' proposals.

In addition to being self-invited error, respondents' argument at ABR 44 that they suffered prejudice from an allegedly "stealth equitable indemnity claim" is like much of their case—illogical and fatally flawed. The logical flaw in this argument is apparent when one considers that respondents claim that they should have been given appellants' proposed findings of fact and conclusions of law at closing argument so that they could then have shaped the presentation of their evidence to the issues and theories presented during the just-concluded trial. The submission of evidence, of course, was over by the time of closing arguments, with no opportunity for the respondents to elicit further testimony from anyone in response to the extensive testimony presented by the Pryors between trial days 2 and 7 on the subject of the Nelsons' 2009 Apex fraud.

Finally, at ABR 45, respondents misstate the doctrine of equitable indemnity. The Blueberry Place ABC Rule is properly applied as follows:

(1) a wrongful act or omission by A [the 2009 Apex fraud by Nelson, et al.] toward B [the Sakais]; (2) such act or omission exposes or involves B [the Sakais] in litigation with C [the Pryors]; and (3) C [the Pryors] were not connected with the initial transaction or event [the 2009 Apex Fraud], viz., the wrongful act or omission of A toward B.

*See* Blueberry Place, 126 Wn.App. at 358-359. Under this proper analysis, the Pryors are entitled to equitable indemnity.

**6. Respondents Confuse the Damages Caused to Appellants by the 2009 Apex Fraud With The Separate Damages Caused By the 2008 “Debt Swap”**

Respondents profess confusion as to how the 2009 Apex fraudulent conveyances, which are the subject of the unchallenged FF #15, could have caused the damages flowing from the 2008 “Debt Swap”. *See* ABR, p. 21. This is a straw-man argument. To state what should be obvious, the Nelsons’ fraudulent conveyance in 2009 of Landmark’s accounts receivable owed to it by Sportsman Park to the Nelsons’ closely-held entity Apex Construction rendered Landmark insolvent and unable to pay the judgment owed to the Sakais. (FF #15.) Landmark’s insolvency caused the Sakais to mistakenly conclude that the 2008 Debt Swap was the cause of the same, which led them to sue both the Nelsons and Pryors.

The Nelsons then showed no shame by demanding in this litigation that the Pryors reimburse them for the expenses resulting solely from the Nelsons’ 2009 Apex fraud. The damage suffered by the Pryors from this was just reviewed: \$1,333 for the mediation fee payable to Bertram Dispute Resolution; \$8,586 for the Broughton Law Group invoice, and \$105,999.05 for the New Suit and its settlement expenses, assuming the latter amount is not thrown out on one of the alternative bases already reviewed herein. (T. Ex. 6; T.Ex. 7; judgment). By contrast, the 2008 Debt Swap resulted in the loss of a \$412,678 promissory note receivable.

**D. RESPONDENTS ARE LIABLE FOR THE 2008 “DEBT SWAP”, AND FOR THE FALSE CAPITAL CONTRIBUTIONS**

**1. Relevant Assignments of Error**

This section relates to Assignments of Error #s 5 and 6, along with Issue #s 1, 2, 5, 6, 7, 9, 10, 12, 13. It further relates to disputed Findings of Fact #s 16, 27A, 28-31, 33, 44, 57, 80-82, 92, 93, 95, 96, 102-104, 106, and disputed Conclusions of Law #s 4, 6, 7, 10, 12-14, 16, & 18-20.

**2. The Statute of Limitations Does Not Bar the Pryors’ Fraud and Fiduciary Duty Claims**

Respondents incorrectly argue that the three year statute of limitations bars appellants’ causes of action for fraud and for breach of fiduciary duty. (ABR, pp. 29-31, 40.) First, as a “gut check” of respondents’ argument, appellants observe that the trial court in fact nowhere entered a finding of fact or conclusion of law to the effect that the Pryors’ fraud and fiduciary duty claims were barred by the statute of limitations. Instead, the trial court dealt with the claims on the merits, for instance, in its CL #s 4 - 13, CP 450-453. The trial court would not need to enter such conclusions of law if it were ruling that those claims were barred by the statute of limitations. Given that the respondents have not objected to the trial court’s failure to include a finding of fact or conclusion of law to the effect that the claims were barred by the 3 year statute of limitations, respondents waived this argument.

Respondents also fail to provide this Court with the nitty-gritty of when the three-year statute was tolled, and how that tolling ties into the specific facts of the case. For purposes of calculating the statute of limitations on counterclaims, the rule is that all applicable statutes are tolled from the filing of the underlying complaint, which here was filed by the Nelsons on January 9, 2014. CP 1; J.R. Simplot Co. v. Vogt, 93 Wash.2d 122, 126, 605 P.2d 1267 (1980). Thus, to prevail on their statute of limitations affirmative defense, the Nelsons would have had to have proven the Pryors had inquiry notice before January 9, 2011, that the Nelsons were defrauding them. Mr. Pryor testified that because of his long standing, fiduciary relationship with Mr. Nelson, he first discovered Mr. Nelsons' fraud only in September 2013, when he read the declaration filed by Douglas Nelson in the second Sakai lawsuit. RP 1238-48.

Furthermore, the issue of when the statute of limitations was tolled, and what evidence exists to demonstrate that the Pryors "should have known" about the Nelsons' fraud before that date, was discussed during arguments over respondents' motion to dismiss at the close of appellants' case, which motion was denied. *See* RP 1661 to RP 1672 (argument on respondents' motion to dismiss); RP 1682-85, (trial court's denial of the same). Respondents were simply unable to provide substantial evidence to sustain a finding of fact for such notice, and the trial court entered none.

In their briefing, respondents do try to present the image that the “trial court’s unchallenged findings establish that Pryor’s fraud claim was untimely”, ABR, p. 30, but the reality of those citations does not match the hype. For instance, FF #s 41 to 43 cover the general opportunity of Dr. Pryor to speak with Stevenson, the opportunity to audit and review the books, and the fact that Dr. Pryor did not read the majority of documents he signed. None of those findings states anything, however, that even implies that the documents Dr. Pryor signed put him on notice that his right to rely on his fiduciary, Doug Nelson, was somehow compromised, and that the three year statute of limitations had thus begun to run. Indeed, the trial court specifically found that Dr. Pryor’s failure to read everything he signed “was not fatal to his claims as a matter of law,” and that the “accountings are complicated and somewhat confusing.” (FF#43, CP434.)

The same is the case for the trial court’s CL # 18, as that conclusion speaks with broad-brush generalities “at to what the expectations are of the parties,” (CP 454), rather than to any knowledge gained from the mere act of signing documents that triggered the statute of limitations. Likewise, respondents’ argument that Dr. Pryor could have discovered a Landmark meeting minute (T.Ex. 43) that Doug Nelson prepared at some unknown date for his signature alone makes no sense, given the complete absence of any evidence that Dr. Pryor should have

been put on inquiry notice to request anything like it before January 9, 2011. Douglass v. Stanger, 101 Wn.App. 243, 254-5, 2 P.3d 998 (2000), relied on by the respondents, is therefore distinguishable.

**3. The Appellants Were Defrauded In The 2008 Debt Swap**

**a. FF # 27A Erroneously Found that Sportsman Park owed Landmark \$746,330.66**

Appellants have assigned error to FF #27A, which found against the centerpiece of the fraud claim of what became known as the 2008 Debt Swap. (RP 1201, ll. 19-24.) FF #27A reads as follows:

Beginning in 2006, Landmark, acting as the general contractor for the Sportsman Park development, began accruing expenses on behalf of Sportsman Park. By the end of 2007, Sportsman Park owed Landmark approximately \$746,330.66.

(CP 430.) Again, the appellate court first asks whether substantial evidence supports the trial court's challenged findings of fact. So, did Sportsman Park actually owe Landmark \$746,330.66?

At pp. 40 to 45 of the Brief of Appellants, appellants point the Court to substantial evidence proving that at least \$431,139.61 of that amount was actually owed by third parties—again meaning the tenants of Sportsman Park commercial buildings—for which debt Sportsman Park had no contractual payment obligation.<sup>10</sup> The Pryors further proved,

---

<sup>10</sup> See Ex. 408, CP1220 (“This entry is to record the shortfall due from SPLLC for their WIP balances as compared to the amounts received for deposits”—meaning TI deposits);

through their examination of respondents' forensic expert Jason Newman, that those tenants in fact paid off those TI obligations between 2007 and 2012 following the 2008 Debt Swap, even though Dr. Pryor was told he would have to pay half of that sum. (Exs 575, 577, 578, 579, 580, & 581, CP 1586-1604; RP 1571-9.) How, then, do the respondents defend FF #27A? Have they pointed this Court to substantial evidence that logically supports that critical finding of fact, thereby permitting this Court to defer to the trial court's finding?

One way that respondents seek to support FF #27A is through a self-referential referral back to that same finding of fact. For instance, on the first four lines of page 8 of the ABR, respondents assert as fact that "Sportsman Park owed Landmark approximately \$746,330.66", but then simply refer back to that finding of fact at its Clerk's Paper cite at CP 430. Such self-referential "support" cannot constitute substantial evidence.

Respondents next cite on p. 8 of the ABR to FF #s 35 to 38, which appellants have not challenged, but which merely discuss Stevenson's extensive involvement in keeping the books of the entities associated with Nelson. It is important to consider, however, the final sentence of FF #37 in conjunction with the undisputed FF #15 on the Nelsons' Apex fraud:

---

Ex. 409, 410, 412, CP 1221-26; *compare* Ex. 560, CP 1558, GL 11505 "SPLLC Construction Receivable" to the "Landmark Balance Sheet" GL 11505 Recv Related Party Jobs," Ex. 527, CP1455.)

Stevenson is not alleged to be **complicit**<sup>11</sup> in any questionable transactions and she would not have participated in any transactions that she felt were fraudulent, inaccurate or misleading.

(Emphasis added.) It is true that the Pryors do not think that Helen Stevenson was an intentional accomplice in the Nelsons' fraud. But it is also true that she admitted to completing the "Landmark" side of the transactions that the trial court found to be part of the 2009 Apex fraudulent conveyances.<sup>12</sup> In other words, respondents took advantage of Stevenson and used her—without her knowledge—to complete that Apex fraud. Logically, therefore, FF #s 35-38 do not constitute substantial evidence of the accuracy of FF #27A.

Next, respondents refer at ABR p. 8 to Stevenson's testimony at RP 916, 995, 1003-07, none of which actually provides direct evidence to support FF #27A, namely that Sportsman Park was legally obligated to pay Landmark \$746,330.66.<sup>13</sup> The same goes for Exhibits 126, 136, 142

---

<sup>11</sup> "Complicity" means "A state of being an accomplice; participation in guilt. Involvement in crime as principal or as accessory before fact. May also refer to activities of conspirators." Black's Law Dictionary, Abridged Fifth Ed.

<sup>12</sup> See Ex. 631, CP1782-3 (9/13/09 Stevenson email confirming transfer to Apex); Exs 172, 173, & 176; RP 982, 1.10 – 984, 1.19, where Stevenson's evident confusion about the fraudulent nature of the 2009 Apex transfers comes through, and Karina Nelson did the Apex side of these fraudulent conveyances. RP 681, 1.25–RP685, 1.11; Ex. 172, CP1007-11 (CP1008: "Apex should accrue a fee of \$124,131.87. This represents the unpaid construction fee on the SPLLC jobs."); RP687, 1.21–RP688, 1.20; Ex. 173, CP1012-4 (Apex side of transfer). Both under RCW 19.40.041 & RCW 19.40.051, and FF#15, CP428, those transactions were fraudulent, and Stevenson's work directly contributed to them.) FF #37, with its finding that Stevenson was not complicit, in no way changes that.

<sup>13</sup> For instance, respondents presented not one invoice from Landmark to Sportsman Park to justify any of the amounts alleged to be due.

and 145, which largely consist of emails that evidence no debt obligations that Sportsman Park could be forced to pay, but do reflect at Exhibit 125, CP 935-7 the substantial liabilities of Sportsman Park tenants.

The most direct effort by respondents to substantiate the supposed debt of Sportsman Park to Landmark in the amount of \$746,330.66 appears on page 27 of the ABR, where respondents cite to Mr. Cure's examination of Ms. Stevenson at RP 1007-09, 1013, to support the assertion that "Stevenson debunked Pryor's charge that Nelson inflated the debt owed by Sportsman Park to Landmark in an attempt to defraud him and defended her calculation of that debt." Stevenson's actual testimony, however, is all generalities, with Stevenson professing that she was not "pulling these number[s] from thin air"<sup>14</sup>, and that she would not want to be involved in any efforts to "influence the numbers," despite the fact that she was so used by the Nelsons during the 2009 Apex fraud. (RP 1007, RP 1009; FF #15.) Respondents cite, however, to no testimony about the line items that went into the key account labeled 11505 SPLLC Const. Recv, Ex. 408, and she acknowledged relying on other people to input the underlying data. (RP 1007-8, T.Ex. 145.)

By contrast, the appellants did elicit testimony from Ms. Stevenson that constitutes substantial evidence that the "SPLLC Construction

---

<sup>14</sup> The tenants' obligations were real, after all, since those tenants ultimately paid them.

Receivable” held by Landmark, and which formed the basis of the 2008 Debt Swap, contained obligations that Doug Nelson knew were not the legal obligations of Sportsman Park. Stevenson’s testimony is found in two volumes of the RP and spans pp. 804-1025. Early in her testimony, Ms. Stevenson made a point of bringing up, unsolicited by counsel, that she “was operating as a bookkeeper, not as a CPA,” and that that was important to her because “I wasn’t in a position – it wasn’t like I was ever attesting to the validity of the financial statements or rendering an opinion on them.” (RP 822, ll. 8-14.)

A key document that shows Doug Nelson’s knowledge of the intermingling of these tenant debts with Sportsman Park debts in Landmark’s SPLLC Construction Receivable Account #11505 is an email chain dated August 31 and September 1, 2006, between Stevenson and Nelson that was discussed at RP 823 to 829 and admitted as Ex. 87. As Mr. Nelson states in that email, “Landmark should bill Sportsman Park for TI costs.” (CP 898.) Stevenson, acting as bookkeeper and not a CPA, then did so *without regard as to who actually owed that debt* because it was not her job to review the contracts with the tenants. (RP 826-7.) She believed, however, that the tenants entered into their contracts directly with Landmark. (RP 827, ll.5-6.) Despite the commingling of these funds

and debt obligations, she never discussed this matter with Dr. Pryor, and did not know if Mr. Nelson had either. (RP 828.)

Just like the 2009 Apex fraud, Stevenson was primed to be an unwitting accomplice in the 2008 Debt Swap fraud. As a result, i.e., as a matter of logic, **if** it was not her job to know what entity was actually liable for a debt included in Landmark’s Sportsman Park receivable account, **then** Stevenson lacked the personal knowledge needed to provide testimony that constitutes substantial evidence in support of FF #27A.

In the face of this evidence, and in order to sustain FF #27A, respondents are required to point to countervailing, substantial evidence in order to trigger this Court’s obligation to defer to the trial court. Respondents have utterly failed in that task.<sup>15</sup> Accordingly, this Court should reject FF #27A and all conclusions of law that rely on it.

**b. Substantial Evidence Supports the Remaining Elements of Appellants’ Breach of Fiduciary Duties Claim and Resulting Damages**

Appellants briefed the fiduciary duty claim at pp. 23-5 of the Brief of Appellant and will not repeat it here. Respondents defended by arguing that Nelson “only” owed fiduciary duties with respect to Sportsman Park,

---

<sup>15</sup> Regarding respondents’ failure to cite substantial evidence, *see, e.g.*, RP 836-847, RP 857-858, 861-865, Ex. 102, Ex. 110, Ex. 111 Ex. 408; Ex. 640, Ex. 641 (Landmark invoice to tenant, proving tenant improvement obligations by the tenant, not Sportsman Park); Ex. 658.

and not Landmark or Green Rock. That argument asserts a troubling legal position—i.e., that on the day after Pryor sold his interest in Landmark, Nelson could without liability do things to Pryor that the day before he could not—that need not be analyzed here. Instead, Nelson’s breach of the fiduciary duties he owed to Pryor as a member of Sportsman Park are more than sufficient to hold him liable for the \$412,678 note balance.

To explain, as the managing member of Sportsman Park, Doug Nelson had a fiduciary duty to Dr. Pryor to not assume on behalf of Sportsman Park the debts of third parties, namely tenants of that commercial complex. Instead, Nelson charged Pryor for half of the same, while also continuing to collect those debts from the tenants.<sup>16</sup> The preceding review of Stevenson’s testimony and related exhibits presents more than substantial evidence, on a clear, cogent and convincing basis, that that is exactly what happened, and that Nelson knowingly and intentionally instructed Stevenson to book those liabilities in that manner.<sup>17</sup> Nelson then used the misleadingly titled “SPLLC Construction Receivables” account to mislead and trick Dr. Pryor into “swapping” his

---

<sup>16</sup> Jason Newman, respondents’ forensic CPA, testified to the accounting records recording the receipt of the income from substantial tenant payments between 2007 and 2012 that were included in the SPLCC Const. Recv. Account. (Exs 575, 577, 578, 579, 580, & 581, CP 1586-1604; RP 1571-9.)

<sup>17</sup> Ms. Stevenson testified that she never informed Dr. Pryor that tenant liabilities were included in the SPLLC Construction Receivables account. (RP 828.)

false obligation to contribute more capital to Sportsman Park (so it could supposedly pay what were actually its tenants' obligation) for the \$412,678 balance owed on the Green Rock note following Pryor's sale of his interests in Landmark. As the trial court correctly held at CL #5:

. . . once that initial burden has been met, the Nelsons have the burden to prove (a) that Doug Nelson at all times acted in good faith and (2) to provide a sufficient accounting to disprove, for instance, that he did not wrongly profit from his activities, in violation of his fiduciary obligations.

(CL#5, CP 451-2.) Following the Pryors' showing as described above, respondents failed to comply with their burden to show that respondents acted at all times in good faith, and did not wrongly profit from these activities. Respondents are as a result of the 2008 Debt Swap, liable for the unpaid balance on the promissory note, plus prejudgment interest. (CP 2023.)

**c. Substantial Evidence Exists Proving the Remaining Elements of Appellants' Fraud Claim**

The trial court rejected the Pryors' fraud claim in its CL #s 11-13. CL #11 is simply a restatement of the burden of proof for a fraud claim. CL #12 is another story, however, as it focuses on the factual question of whether Nelson promised to pay "his half" of the false \$746,330.66 in cash, (RP 1201-4, T. Ex. 141, 151), which for immediate purposes is not

material.<sup>18</sup> Rather, what is material, and what in 2008 was a misrepresentation of material existing fact, was Nelson's contention that Sportsman Park owed Landmark that \$746,330.66, when that is proven to be false on the required clear, cogent and convincing basis. CL #12 is, accordingly, not supported by substantial evidence.

CL #13 is, on its face, also not supported by substantial evidence. Also, it fails to state the trial court's conclusions on all of the nine elements of a fraud claim, to wit: (1) A representation of an existing fact; (2) Its materiality; (3) Its falsity; (4) The speaker's knowledge of its falsity or ignorance of its truth; (5) His intent that it should be acted on by the person to whom it is made; (6) Ignorance of its falsity on the part of the person to whom it is made; (7) The latter's reliance on the truth of the representation; (8) His right to rely upon it; (9) His consequent damage. Martin v. Miller, 24 Wn.App. 306, 308, 600 P.2d 698 (1979).

Elements 1 to 5 were proven on a clear, cogent and convincing basis with respect to Nelson and his representation of the then supposedly-existing but false fact of a \$746,330.66 liability owed by Sportsman Park to Landmark. Element 6, namely Dr. Pryor's ignorance of this misrepresentation, was established by Stevenson, who admitted to never

---

<sup>18</sup> FF #33 is in error, however, in its conclusion that "[t]he record is void of any documentation" about Nelson's representation that he had paid cash. See, e.g., *infra*, p. 42 and T.Exs. 253, 628 and 720, last page.

having discussed these critical issues with him or Kim Young Oak. (RP 828.) The Pryors' reliance on these representations, i.e., element 7, was established by their testimony (e.g., RP 1201-4, 1208-23; T. Ex. 44, 141, 151, 161), and by the fact that the Pryors agreed to proceed with the transaction. On element 8, i.e., the right to rely, that is established by Nelson's fiduciary duties as the managing member of Sportsman Park. Finally, the damages are the lost \$412,678 on the note.

In opposition to this evidence, and in "fulfillment" of their obligation to point to substantial evidence to support the trial court's findings of fact and conclusions of law, respondents have relied entirely on the now-disproven FF #27A. Having put all of their eggs in one basket, and having dropped the same, respondents have failed to establish the conditions that would result in this Court needing to defer to the trial court. As a result, this Court should find CL #s 4, 6, 7, 10, 12, 13, 14 & 19 to be not supported by substantial evidence.

**4. The Nelsons Defrauded The Pryors Through False Capital Contributions As Part Of The 2012 Purchase Agreement**

Respondents both breached fiduciary duties owed to, and defrauded, the Pryors in conjunction with the 2012 Purchase Agreement. This matter was briefed in detail at pp. 45-47 of the Brief of Appellants. Simply stated, Nelsons' objective in misrepresenting their capital

contribution in Sportsman Park was either to force the Pryors to contribute more than they were actually obligated to contribute, or, to induce them to sell for less than they should have received. This intent is seen in Nelson's email of September 20, 2011, to Dr. Pryor at Ex. 696:

To meet these capital needs, I want to see the capital accounts brought even and then a 50/50 contribution to each of the partners.

Pryor explained the importance of Nelson's demands for contributions, and his reliance thereon, until he learned in 2013 that Nelson had in fact not put in cash for the 2008 debt swap, at RP 1223-30; RP 1237-1248.

As explained in the Brief of Appellant, at p. 47, the Pryors seek \$225,744.87 as a recovery for the falsified capital contributions of the Nelsons, and the understated capital contributions of the Pryors, under both the breach of fiduciary duty and fraud claims. However, as seen in Ex 253, Ex. 628 and Ex. 720, last page, the Nelsons falsely represented in their capital contribution account that they had added \$373,165.33 in cash to Sportsman Park as a part of the 2008 Debt Swap. Regardless of whether Nelson actually orally promised Pryor to pay cash *in 2008*, those exhibits were "present" representations in 2012<sup>19</sup> that such a cash contribution had been made in that amount by Nelson to Sportsman Park, and that Nelson was entitled to a cash credit in that amount as the parties

---

<sup>19</sup> See, e.g., the footer date of the first page of Ex. 253, which reads "1/2/12 12:56pm".

were negotiating the terms and conditions of the 2012 Purchase Agreement. That representation was false. (Newman: No cash actually flowed. RP 1552.) As a result, if this Court does not reverse the trial court's CL 19 and its denial of recovery on the Green Rock promissory note, then the capital contribution damages should be increased by \$373,165.33 to \$598,910.20. (RP 1793-94.)

**5. The Business Judgment Rule Provides No Protection To The Nelsons**

The Brief of Appellants reviews why the Business Judgment Rule does not apply. The testimony of Helen Stevenson supports the conclusion that Doug Nelson was ultimately responsible for the false presentation of tenant debts as Sportsman Park debts. He, accordingly, is responsible for the same, he is not entitled to the protection of the Business Judgment Rule, and CL #s 6-10 were in error as applied.

**6. The 2012 Release Is Not Valid**

As explained in the Brief of Appellants, the Nelsons induced the Pryors to agree to the 2012 Purchase Agreement through false capital contributions, rendering invalid the release from liability found at T.Ex. 3, ¶5, in that contract. CL #14 is not supported by substantial evidence.

**E. THE APPELLATE COURT SHOULD SUSTAIN THE TRIAL COURT'S DISMISSAL OF LANDMARK'S CLAIM ON THE \$60,000 PROMISSORY NOTE**

**1. The Trial Court Correctly Applied The Notice Requirements**

T. Ex. 1 is the three-page contract containing the \$60,000 promissory note. That contract contains specific provisions for how demands were to be made thereunder, and how and where any suits were to be brought. Those provisions include:

- F. Notices. All demands and notices given hereunder shall be sent by registered mail addressed to the respective parties at the addresses hereafter set forth. . . .
- K. Entire Agreement. This Agreement constitutes the entire agreement between the parties without reference to the subject matter and may not be changed or modified orally.

FOR VALUE RECEIVED, Antone Pryor "Buyer" agree(s) to pay to the order of Retirement Ventures LLC "Seller" the sum of Sixty Thousand Dollars (\$60,000) as needed to the company in whole or in part. When needed the company shall give a minimum of seven days notice to Buyer in which event Buyer shall have to deposit said amount in the company account. The amount deposited shall reduce this note by an equal amount.

This Note is evidence of the obligation to pay for units of ownership in Retirement Ventures LLC between Buyer and Seller dated 7<sup>th</sup> July, 2000. Buyer's failure to pay the Promissory Note strictly as above shall constitute default on said purchase of units as well as on this note.

(T.Ex. 1, CP 713-715.) In their cross-appeal, at ABR 58, respondents want to divide that which is the “Entire Agreement” of the parties so that they can avoid the explicit, written notice requirements of that complete agreement. Respondents fail, however, to explain what mistake the trial court made by interpreting all three pages of T.Ex. 1 as one, unitary agreement when Doug Nelson testified about it in that manner (RP 41-43), and when it was admitted into evidence without objection as the single agreement it is. For instance, the last quoted paragraph from page 3 of the agreement states that a failure to pay is a default not only on the promise to pay, but also on the purchase of 200 units on page 1 of said agreement. Likewise, ¶F on the first page of the agreement (CP 713) states that it relates to all demands and notices given hereunder, not just to some of them, as respondents would now have the trial court, and this Court, conclude. In short, the trial court’s findings and conclusions regarding respondents’ failure to comply with the notice requirements, at FF #s 4 and 5, and CL #1, are correct and supported by substantial evidence. (*See* RP 1163-65.) The judgment in this regard should be sustained.

**2. The Trial Court Erred When It Failed To Find That Landmark Had Not Proven Non-Payment**

**a. The Trial Court Erred at CL #1 by Misapplying the Burden of Proof on Landmark's Claim for Breach of Promissory Note**

When a party brings a cause of action for damages alleging breach of contract, as Landmark did here in claiming that Dr. Pryor failed to pay the \$60,000 purchase price for his 200 units in the company, the burden of proving nonpayment is on the party seeking damages. Westlake, 169 Wn.App. 700, 729. Here, the party seeking damages under the promissory note was Landmark. Thus, the trial court erred by imposing that burden on the Pryors in its FF #s 7, 8, and in its CL #1.

**b. Stevenson, and Landmark's Financial Records, Prove that the \$60,000 Note was Paid**

Regardless of which party bore the burden of proof, the testimony of Helen Stevenson, and the exhibits authenticated and explained by her, prove beyond any shadow of a doubt that the \$60,000 promissory note was paid in full. As previously observed, Ms. Stevenson spent a substantial amount of time on the stand during this case, with a large part of her testimony focused on proving that Dr. Pryor paid the \$60,000 promissory note before the 2006 Redemption Agreement was signed. (*See* RP 813 to RP 815; RP 829, l. 17 to RP 835; RP 868-872; RP 876- 879; Exs. 1, 57, 115, 119, 121, 507, 515.) As she testified, if that note was

unpaid for over a year, she would have expected that she would have recorded it as a long-term note payable. (RP 814.) That promissory note was not reflected as a long term asset of Landmark, thus it was paid. (See RP 878) Furthermore, Landmark's financial statements, admitted at trial, demonstrate that Pryor's capital account was substantially greater than both \$60,000, and the amount that Nelson had contributed to the company. (T.Ex. 57, Pryor contributions of \$442,183.46, Nelson contributions of \$125,256.86 as of 9/12/06.) And, as specified by T.Ex. 1, CP 715, "[t]he amount deposited [by Pryor] shall reduce this note by an equal amount." To state the obvious, T.Ex 57 proves that Pryor paid at least \$382,183.46 more than he was obligated to pay under the promissory note. The trial court according erred in its FF #8 and CL #1 has indicated previously.

**c. Landmark's Promissory Note Claim was Barred by the Statute of Limitations Because Respondents Have Had Notice Since 2004 that Dr. Pryor Considered the Note Paid**

Dr. Pryor testified that he had paid the \$60,000 promissory note within 3 months of signing in July 7, 2000. (T.Ex. 1; 3/24/16 RP 1159-1161.) Respondents attempted to create an issue with respect to Dr. Pryor's recollection on the timing of his payment of that note by harking back to the transcript of when Dr. Pryor was deposed in Sakai I on

November 12, 2004. (RP 1254-1255.) As he stated on p. 13 of his deposition transcript, which was read into the record:

I'm not exactly sure how it was paid, but it was paid.  
I paid it.

(RP 1776, ll. 7-8.) In other words, not only did Landmark's financial statements record no existing, long-term asset in the form of a \$60,000 promissory note, but Landmark and Mr. Nelson were on notice from that November 12, 2004 deposition that Dr. Pryor considered it paid in full. That notice was sufficient to trigger the six year statute of limitations on that written agreement, which expired no later than November 12, 2010.

**d. Possession of the Original Note Is Not By Itself  
"Substantial Evidence" of Non-Payment**

Finding of Fact #7 contains the following statement: "Nelson is still in possession of the original Note." As a matter of legal logic, that simple statement of fact that Nelson had kept the original promissory note in no way made more or less likely the premise that Landmark was obligated to prove, namely, that Dr. Pryor had not paid the \$60,000. Likewise, the mere existence of that original promissory note, in Nelson's possession, in no way undermines the undisputed testimony by Helen Stevenson that Pryor had a positive capital account in Landmark as of 9/12/06 in the amount of \$442,183.46, which wipes out that \$60,000 debt under the express terms of that (original or not) promissory note.

### **3. The Trial Court's Companion Error in FF #7**

FF #7 contains what may appear to this Court to be an odd statement: "The Note is not a claim or a lien." This finding of fact is erroneous if, as appellants believe, the trial court was referring to the appellants' argument and testimony that the 2006 Redemption Agreement amounted to a waiver of any claims that the \$60,000 promissory note was not paid because Pryor represented that his "Redeemed Interest" was "free and clear of all liens, claims, options, charges, encumbrances and commitments of any nature." (T.Ex. 2, CP 718; RP 1161-62.)

Appellants' point was that the promissory note was such a lien or claim by Landmark, as is reflected by this provision of the note declaring Dr. Pryor's ownership of his units to be in default if the note was not paid:

Buyer's failure to pay the Promissory Note strictly as above shall constitute default on said purchase of units as well as on this note.

(T.Ex. 1, CP 715.) Simply put, if the note were truly unpaid, that would be a classic "claim" by Landmark, constitute grounds for declaring the transfer of 200 units to be in default, and for claiming a lien in the same. Given the large size of Pryors' capital account as of September 2006, however, such a scenario was a fantasy.

**F. APPELLANTS ARE ENTITLED TO THEIR FEES AND EXPENSES ON APPEAL**

The Pryors request an award of their fees and expenses on appeal as the prevailing party under the July 2000 promissory note (Ex. 1), under the 2006 Redemption Agreement (Ex. 2), and pursuant to the principals of equitable indemnity, all as previously briefed.

**V. CONCLUSION**

The 2009 Apex fraud engineered by the Nelsons was a high wattage strobe light firing off a warning that the respondents' behavior in this case was entirely reprehensible. That warning should have caused the trial court to stop and examine closely the logic of the judgment it was about to enter. If the trial court had done that, appellants are certain that the trial court would have seen the logical inconsistencies and scant evidence that are the only things supporting respondents' judgment. The Pryors therefore ask this Court to grant their appeal by reversing that judgment and awarding them \$652,592.45 plus prejudgment interest, fees and costs on appeal. The case should then be remanded to the trial court for a new determination of the fees and costs.

DATED this 5th day of September, 2017.

KINSEL LAW OFFICES, PLLC  
By: /s/ William A. Kinsel  
William A. Kinsel, WSBA #18077  
Attorney for Antone Pryor and Kim Young Oak

**CERTIFICATE OF SERVICE**

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that he caused to be delivered on or before September 5th 2017, copies of Plaintiffs' Brief of Appellants to the following:

Kevin W. Cure

*via email and US Mail*

Howard M. Goodfriend

*via email and legal messenger*

DATED this 5th day of September, 2017.

s/William A. Kinsel  
WILLIAM A. KINSEL

**KINSEL LAW OFFICES, PLLC**

**September 05, 2017 - 3:41 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49640-2  
**Appellate Court Case Title:** Douglas C. Nelson, et ux, et al., Res./Cross-Apps. v. Antone Pryor, et ux,  
Apps./Cross-Res  
**Superior Court Case Number:** 14-2-00059-8

**The following documents have been uploaded:**

- 1-496402\_Briefs\_20170905153343D2414771\_7174.pdf  
This File Contains:  
Briefs - Appellants/Cross Respondents  
*The Original File Name was Reply Brief of Appellant.pdf*

**A copy of the uploaded files will be sent to:**

- cate@washingtonappeals.com
- howard@washingtonappeals.com
- ian@washingtonappeals.com
- kwc@spinnakerbldg.com

**Comments:**

---

Sender Name: Lori Peters - Email: lori@kinsellaw.com

**Filing on Behalf of:** William Alan Kinsel - Email: wak@KinselLaw.com (Alternate Email: )

Address:  
2401 4th Ave  
Suite 850  
Seattle, WA, 98121  
Phone: (206) 706-8148

**Note: The Filing Id is 20170905153343D2414771**