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**NO. 36663-1-II**

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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**LANDMARK, LLC,**

Appellant,

v.

**THE SAKAI QTIP TRUST, et al.**

Respondents.

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**REPLY BRIEF OF RESPONDENTS**

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## I.

### INTRODUCTION

**A. Organization Of Brief.** This Reply is submitted in response to Landmark's *Reply And Cross-Response Brief (Corrected)*, ("Landmark's Reply Brief"). In Paragraphs 1, 2 and 9 of its Reply Brief, Landmark re-addresses the assignments of error it raised in its Opening Brief. Although the Sakai Family believes those arguments lack merit, in conformance with RAP 10.1(f), the Sakai Family does not respond to those arguments in Part II of this Reply.<sup>1</sup>

Paragraphs 3-8 of Landmark's Reply Brief appear addressed to the assignment of errors set forth in the Sakai Family's Opening Brief.

Accordingly, the Responsive Argument set forth in Part II of this Brief addresses those arguments in chronological order. A concise summary of the Sakai Family's contentions are set forth in Paragraph B of this Part I.

**B. Summary Of The Sakai Family's Contentions.** The sole relief sought by Landmark is equitable relief. It's principal claim, specific performance, arises from it's claim that the parties reached an oral agreement with a single open term, i.e. the establishment of a purchase

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<sup>1</sup> Additional authorities that pertain to the claims set forth in Paragraph 1 of Landmark's Reply Brief are set forth in Part III of this Brief.

price. Aside from the fact that the trial evidence and unchallenged findings of the trial court established several unagreed essential terms, even if one were to ignore that fact, Landmark's argument is fatally flawed because (i) there is absolutely no evidence in the record to suggest the parties ever agreed that the price or (any other remaining open term) would be "supplied by a court or another authoritative source"; and (ii) the alleged oral agreement Landmark seeks to enforce does not comply with the statute of frauds and is unenforceable under RCW 64.04.010.

Landmark's principal fall back position is its "unjust enrichment claim" based on site plan approval which Landmark continued to pursue after the parties 1998 purchase and sale agreement expired. Landmark's principal, Doug Nelson, continued to pursue that approval based on his unreasonable belief he would be successful in inducing the Sakai Family to negotiate a new agreement. That site plan approval which has since expired never conferred a benefit on the Sakai Family. Because the specific performance claim which Landmark continues to pursue in this litigation creates a cloud on the Sakai Family property, the Sakai Family never had an opportunity to use or enjoy any benefit that site plan approval might have conferred in the absence of that cloud.

In findings that Landmark has not challenged, the trial court found

that Landmark, by virtue of Nelson's deceitful, dishonest and fraudulent conduct had unclean hands. This conduct was central to the dispute. Nelson's conduct was designed to induce the Sakai Family to sell their property to Nelson which is the central claim Landmark makes in this case. Nelson's subsequent false trial testimony was designed to induce the trial court to make an "unjust" enrichment determination and award resultant damages. Accordingly, Landmark was not and is not entitled to any equitable relief.

Ignoring the fact that it was Landmark that filed the first Motion for Summary Judgment seeking specific performance, Landmark claims that there were disputed facts and that Landmark was entitled to a jury trial (that it never requested) to resolve those disputed facts. But those arguments are moot for two reasons. First, at trial, Landmark voluntarily raised all the so-called disputed issues of fact for which the trial court made adverse factual findings fatal to Landmark's claims; Landmark has not challenged those findings and they have now become verities on

appeal. Second and equally significant, Landmark's claims are barred by the clean hands doctrine.<sup>2</sup>

The trial court improperly dismissed the Sakai Family's trespass claim. Arguing that the trial court properly dismissed that claim, Landmark shrugs off the fact that it installed storm detention tanks on the Sakai Property under false pretenses and subject to the understanding that Landmark would be obligated to remove those tanks if the Sakai Family failed to sell their property to Landmark. Instead, Landmark claims the trial court's dismissal was justified by the Sakai Family's failure to join the adjoining Homeowner's Association as party Defendants. But the trial court had previously denied that very motion brought by Landmark. The Association is not an indispensable party under CR 19 because the Sakai Family sought the affirmative abatement of a continuing trespass of the encroaching detention tanks and drain lines requiring Landmark to remove them in a way that would avoid any loss to the Association and its members.

Finally, the trial court properly awarded the Sakai Family the

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<sup>2</sup> Interestingly, Landmark argues that in reviewing the trial court's Summary Judgment rulings, this court must ignore the trial testimony and the trial court's findings. yet, Landmark nevertheless relies on testimony adduced at trial when it sues Landmark's purposes. See pp. 7-8 of Appellant's Opening Brief and p. 8 of its Reply Brief for examples.

attorney fees it incurred in the successful defense of Landmark's contractual claims and properly denied Landmark's claim for attorney fees.

## II.

### RESPONSIVE ARGUMENT

**A. Paragraph 3 Reply: Landmark's Analysis Of The Clean Hands Doctrine Is Erroneous; Landmark's Claims Are Barred By Its Unclean Hands.** In its Reply, Landmark makes the astonishing argument that Landmark's "criticized conduct" was not "in any way related to the claims asserted by Landmark" and in any event was "de minimus and of no consequence whatsoever". Landmark's claims are contrary to the facts and Washington law.<sup>3</sup>

The most extensive treatment of the applicability of the clean hands doctrine is set forth in *Cooper v. Anchor Securities*, 9 Wn. 2d 45, 113 P.2d 845 (1941). The doctrine applies where the complainant has been guilty of "misconduct in or about the matter in respect to which he seeks relief". *Id.* @ 9 Wn. 2d 73. The rule "has reference only to [the] relation between parties, and arising out of [the] transaction". *Id.* The

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<sup>3</sup> See p. 23 of Appellant's Reply Brief. Curiously, Landmark begins its examination of Washington law by citing California authorities.

misconduct “must relate directly to the very transaction concerning which [the] complaint is made...” *Id.* @ p. 74. “The inequitable conduct must have a direct relation...with the very transaction concerning which the plaintiff complains.” *Id.* Finally, the plaintiff must be “frank and fair with the court”. *Id.* @ p. 72.

In *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 602 101 P.2d 973 (1940) the court refused to provide relief to a plaintiff who, like Nelson, was guilty of “willfully concealing, withholding and falsifying books and records” holding

“Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford him any remedy.”

Here, Landmark’s central claim centers on Landmark’s efforts to negotiate a new contract with the Sakai family. Landmark’s alternative claim is an unjust enrichment claim based on expenditures it claimed it expended in pursuing site plan approval in reliance on Nelson’s belief he would be successful in inducing the Sakai Family to sell their property to Landmark.

The unchallenged findings of fact made by the trial court demonstrate that the inequitable conduct of which Nelson was guilty arose

directly from Landmark's central claims. Indeed, Nelson's doctored site plan, coupled with the lies and false representations he made to the Sakai family were all designed to induce the Sakai family to sell their property to Landmark. Nelson's attempts to "slip in" provisions in new drafts of a purchase and sale agreement that had either not been discussed or that were contrary to oral discussions were designed to result in a purchase contract that was more favorable to Landmark. Nelson's false trial testimony, his attempt to deceive the trial court and his false claim of lost evidence, all were designed to induce the trial court to find that the Sakai Family had been "unjustly" enriched and to award resultant damages to Landmark. Because Landmark was not frank and fair with the court regarding the very relief Landmark sought from the court, the court was obligated to refuse its aide.

In its Reply Brief, Landmark asserts that in the Sakai Family's opening brief, the Sakai Family, for the first time, acknowledged the existence of an agreement to negotiate a new agreement. John Sakai has always acknowledged that during their March, 2000 meeting following the expiration of the Purchase and Sale Agreement, John Sakai told Nelson that the Sakai family was willing to attempt to negotiate a new agreement. (Sakai IV: 239: 20-23) But Landmark ignores two central facts. First, as

the trial court found in an unchallenged finding, despite numerous attempts to negotiate a new Agreement, the parties were never able to come to terms on a number of essential terms, including price, based in large part on the fact that Landmark never made a firm offer. (CP 1273, 1278) Moreover, in their final two rounds of negotiations in the fall of 2001 and again in the fall of 2003, further negotiations came to an end based on the Sakai family's "disgust" with Nelson and his on-going inequitable conduct in his dealings with the Sakai family.

A review of John Sakai's trial testimony clearly demonstrates that a central reason negotiations ultimately broke down was John Sakai's disgust with Nelson's deceitful behavior. See Ex. 297; VRP Sakai II at pp. 122, 129-130, 146-147, 158-159, 161-162, 169; Sakai III at pp. 180, 185-188, 194, 206; Sakai IV at p. 267; Sakai D at pp. 54, 58; and, in particular, the following:

"I was disgusted [with Nelson]. I was at the end of my rope."

(VRP Sakai II, @ p. 162: 22-23)

"Well, I think [Nelson's] trying to deceive me at this point. I didn't want to talk any more.\*\*\*I didn't want to do business any more."

(VRP Sakai III @ p. 206: 18-21)

“I told him...[Nelson’s Partner] that I was very upset with Nelson. I had serious reservations about having the family associated in a project with him...and I told Mr. Pryor also that I think you should be very careful in your evaluation of the information that Mr. Nelson is providing to you because...he may not be telling you all the facts correctly.”

(VRP: Sakai III at p. 194: 3-13)

Neither perjury or dishonest, deceitful and fraudulent conduct is *de minimus*. Because Nelson’s misconduct was central to the dispute, the trial court was obligated to deny any equitable relief to Landmark.

**B. Paragraph 4 Reply: The Trial Court Improperly Concluded That An Expired Site Plan Approval Conferred A “Benefit”.**

Landmark’s “benefit conferred” analysis is plainly wrong. In findings Landmark has not challenged, the trial court properly found that Nelson’s testimony regarding the costs Landmark incurred in procuring site plan approval were not proven, false or exaggerated:

“Nelson’s cost and expense claim was not proven, his hours spent claim was not proven, his credibility on many of the claims is questionable and, in some instances, his testimony was outright false....Other expense claims asserted by Nelson were proven to be false...[or] exaggerated.\*\*\*Mr. Nelson’s claim regarding engineering fees expended was contrary to the testimony of his own engineer.”

(CP 1285)

The trial court nevertheless picked a figure out of the air in setting

a value of Site Plan Approval. Even if the trial court was correct in its determination of value, such value was not conferred on, nor could it be enjoyed by the Sakai Family. From April, 2004 when this action was commenced to the present time, Landmark has been seeking specific performance of a long expired Purchase and Sale Agreement to compel the sale to Landmark of some unidentified portion of the Sakai Property for which site plan approval was granted. This attempt to force specific performance (the sale) constitutes an encumbrance on the property precluding financing, sale or meaningful use. As stated in *Wilson v. Korte*, 91 Wash. 30, 157 Pac. 47 (1916), a “marketable title” means title reasonably free of reasonable doubt or free from hostile claims and possible litigation, citing *Hoffman v. Titlow*, 48 Wash. 80, 92 Pac. 888 (1907).

For the theory of “unjust enrichment” to apply there must be a benefit conferred on the property owner (the Sakai Family) in order to determine the value that is “unjustly” retained or held. In *Brader v. Minute Muffler Installation, Ltd.*, 81 Wn. App. 532, 537, 914 P.2d 1220 (1996) the court defined the necessary elements of restitution as follows:

“The major underlying objective of restitution is to prevent unjust enrichment to either party. Therefore, a party is entitled only to the extent that he or she has conferred a

benefit to the other party...”

In this case there can be no benefit in a site plan approval that no longer exists. Landmark relies on a single statement in the *Restatement of Restitution* (p. 25 of Appellant’s Reply Brief), that where a benefit has been conferred “it is immaterial that it was later lost, destroyed or squandered”. The statement follows an explanation that a benefit may be conferred where one makes improvements on property that ultimately does not become his. That would be reasonable if the property owner retained the benefit and it was later lost, destroyed or squandered by the property owner or some third party or an act of God. The only example of a lost benefit given in the Restatement was that A hired B to perform services for A and pursuant to the agreement A deposited \$100,000.00 in a bank account designated by B. The bank failed and the \$100,000.00 was lost. B never performed the services. A is entitled to restitution as a benefit was conferred on B even though it was lost by B when the bank failed. It should be noted that A did nothing to cause the loss.

It is inconceivable to believe that Landmark can seriously argue that there is any benefit to the Sakai Family where the actions of Landmark, which is seeking restitution, caused the waste of whatever benefit there might have been. It is Landmark that has been seeking

specific performance which is a cloud on title. Thus, it is Landmark alone that has prevented use of the now expired site plan approval. See *Wilson v. Korte* and *Hoffman v. Titlow*, supra.

**C. Paragraph 5 Reply: Landmark Wrongly Claims The Sakai Family Is Raising New Issues In Violation Of RP 2.5(a).** Citing RAP 2.5(a) and a number of criminal cases in which criminal Defendants claimed error for the first time on appeal, Landmark claims the Sakai Family is improperly raising issues it “never raised” below.

Landmark is plainly wrong. Landmark opens its claim by conceding that its claim of an “Open Term” Contract is contrary to its initial pleadings and the sworn testimony of its principals, but complains that the Sakai Family failed to raise this as a defense in their opposition to Landmark’s first Summary Judgment motion.<sup>4</sup>

Landmark simply misses the point. As the trial court properly found throughout its detailed findings, Landmark’s principal, Doug Nelson is, to characterize it truthfully, a proven liar whose testimony is not entitled to any consideration.

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<sup>4</sup> See Landmark’s Complaint @ CP 7; Nelson’s Chronology of events at Ex. 339 and CP 486 and the Deposition Testimony of Nelson and Pryor, in which they both contended Landmark was entitled to enforce the original Purchase & Sale Agreement for the original purchase price (CP 1518, 1520, 521, 1553, 1557-58 and 1379).

Landmark's shifting story that later evolved into an "Open Term Contract" legal theory at odds with the sworn testimony of its principals, is simply another example of the lengths to which Landmark will go to achieve a judicial result to which it is not entitled.

Contrary to Landmark's Reply Brief, the Sakai Family did raise, in either its opposition to Landmark's Motion for Summary Judgment, or its own responsive Motion for Summary Judgment, every other issue Landmark now claims are "new issues".

The Sakai Family did in fact argue that "there are several details on which the parties never reached agreement". (See CP 281-282; 289-290; 393-396) Similarly, the Sakai family argued (a) the time of the essence clause coupled with the expiration of the stated closing date rendered any agreement unenforceable (CP 280-288; 392); (b) the lack of a proper legal description rendered the agreement unenforceable (CP 229-281; 290; 395); (c) that the required deposits were not made (CP 279; 389-391); and (d) that Landmark never tendered proper performance (CP 289; 389-391).<sup>5</sup>

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<sup>5</sup> Landmark argues that the lack of a description of the wetlands to be excluded could be cured by retaining a wetland consultant to map the wetlands. According to Landmark, a surveyor could then develop an adequate legal description for the remaining land. But Landmark never adduced any testimony, expert or otherwise, that wetland experts would universally adopt and agree to the exact same wetland delineations. In point of fact, a comparison of the Critical Areas Ordinances of Bainbridge Island at BIMC 16.20 et seq. and of Kitsap County at KCC 19.200 et seq., for example, establishes

Not only are Landmark's arguments factually incorrect, but its legal analysis is plainly wrong. RAP 2.5(a) and the cases cited by Landmark provide that "an appellate court may refuse to review any *claim of error* which was not raised in the trial court". Clearly then, the rule applies to a party who challenges a trial court ruling. Here, the so-called "new issues" raised by the Sakai family to which Landmark objects do not in any way relate to a claim of error asserted by the Sakai Family. Rather, they are arguments made to *support* the trial court's summary judgment orders.

"Where a judgment or order is correct it will not be reversed merely because the trial court gave wrong or insufficient reason for its rendition."

*Pannell v. Thompson*, 91 Wn.2d 591, 603, 590 P.2d 1235 (1979)<sup>6</sup>

An appellate court is entitled to affirm a trial court decision on any grounds supported by the record, including those not considered by the trial court. *Kwiatkowski v. Drews*, 142 Wn. App. 463 (2008).

**D. Paragraph 6 Reply: The Trial Court Erred In Dismissing The Sakai Family's Trespass Claim.**

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that there can be substantial differences of opinion and controlling legal definitions involved in the delineation of wetlands and their buffers.

<sup>6</sup> In citing this case the Sakai Family is not suggesting the trial court gave improper reasons for dismissing Landmark's contractual claims.

1. *Landmark's Legal Analysis Is Flawed.* Landmark claims this court may not “substitute its judgment for that of the trial court in ‘balancing the equities’”. Landmark also claims that the trial court’s “factual findings” are supported by the record. Landmark misses the mark. The Sakai Family is challenging the trial court’s *legal* conclusions.

The trial court made the following single legal conclusion:

“The Sakais are not entitled to the entry of an order compelling Landmark to remove the encroaching Detention Tanks. Although the tanks were installed over the property line, the Sakai family failed to prove actual and substantial damages.”

(CP 1292: 1.15)

As pointed out in the Sakai family’s opening Brief, the undisputed testimony demonstrated there was actual and substantial damage.

The trial court made no underlying factual findings. In the trial court’s oral ruling, the trial court cited the following two reasons for the denial of injunctive relief: (i) the uncertain costs associated with removal; and (ii) the fact that the homeowner’s association was not a party.

The former is clearly an invocation of the ‘balancing of equities’ doctrine which is a legal doctrine. But that doctrine is not available to Landmark because Landmark is not an innocent party. *See Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 999 P.2d 54 (2000). Rather, Landmark

intentionally installed the storm tanks on the Sakai property under false pretenses! (Finding 1.35 @ CP 1274.) And, with the explicit knowledge that if the Sakai Family refused to sell their property, Landmark would have to remove the encroaching storm tanks.<sup>7</sup> (CP 1622; 1-9)

The trial court's observation regarding ownership of the tanks is also erroneous. The abutting Homeowner's Association was not an indispensable party because the Sakai Family clearly argued and requested that injunctive relief be fashioned in a way to avoid damage or loss to the Association and the innocent homeowners as the testimony demonstrated was readily achievable. Under CR 19(a), the Association was simply not an indispensable party.<sup>8</sup>

2. *The Sakai Family Was Entitled To Injunctive Relief.*

Undisputed testimony established the fact that Landmark had made a substantial installation of storm water detention tanks and storm drain

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<sup>7</sup> In findings Landmark does not challenge (or mention), the trial court found Nelson falsely represented that the encroaching storm tanks were designed to serve the Sakai Property and presented a doctored site plan to the Sakai Family (and later, the court) to conceal a plan to appropriate additional areas of the Sakai Property to Landmark's use without paying for it. (CP 1273-76; Exs. 24, 297:4)

<sup>8</sup> Curiously, the trial court had previously denied a motion in limine brought some two months prior to trial by Landmark in which Landmark argued that the Sakai Family's trespass claim should be dismissed based on a failure to join the Association which Landmark contended was an indispensable party. Landmark's motion is being transmitted to the Court in response to Respondent's Fifth Supplemental Designation of Clerk's Papers. The motion to dismiss was denied orally, no written Orders were entered and the matter proceeded to trial.

lines on the Sakai Property. (CP 1288; 1622: 1-9) It was also established that the property was impacted and that the area of impact was sufficient to affect the number of residences that could be constructed on the Sakai property. (VRP Katai @ pp. 57-58) Testimony also showed that it was possible to remove the encroachments from the property. (CP 1622: 1-9; VRP Oien pp. 29-33; Witt p. 5) The court neither ordered the removal of the storm tanks and drain lines nor awarded damages. This is clearly a taking of property belonging to the Sakai family for the benefit of others without just compensation, contrary to *Article 1, Section 16* of the Constitution of the State of Washington, which provides in part as follows:

“Private property shall not be taken for private use, except for drains, flumes, or ditches...No private property shall be taken or damaged for...private use without just compensation having been first made, or paid into court for the owner...”

RCW 8.24 et seq provides for private condemnation for private ways of necessity but contains in 8.24.030 the same requirement as the constitutional provision that a payment amount must be determined and paid to the condemnee.

In the early case of *Carlson v. Superior Court For Kitsap County*, 107 Wash. 228, 233, 181 P. 689 (1919), our Supreme Court considered the Constitution and statute and opined as follows:

“So it may be said that, notwithstanding a statute gives a landlocked owner the right to condemn a way of necessity over the lands of a stranger, it is not a favored statute, and the taking will not be tolerated unless the necessity is paramount in the sense that there is no other way out or that the cost is prohibitive, for it must be borne in mind that, after all, this is a condemnation proceeding. We are taking the property of one man and giving it to another. Const. Art. 1 Sec. 16. There is a constitutional right involved, and such rights should not be so lightly regarded that they may be swept away to serve convenience and advantage merely.

There is a difference between necessity and mere convenience. A man having a present right-of-way may find a more convenient way over the land of another, but he may not take it under a claim that it is necessary to the proper use and enjoyment of his land to save expense, unless there is no other passable way or the expense would be prohibitive.”

If this Court does not order abatement of the trespass, then it should remand to the trial court for determination of the value of the property taken by Landmark for private use.

**E. Paragraph 7 Reply: The Trial Court’s Unjust Enrichment**

**Analysis Was Flawed.** As argued in the Sakai family’s opening brief, the trial court’s analysis of the “unjust” element of unjust enrichment was clearly erroneous. Landmark’s reply, like much of its Opening Brief, is based on significant misstatements of fact, coupled with a flawed legal analysis.

Contrary to Landmark's claims, there is no evidence John made a conscious decision to leave the Owner Applicant Agreement in place; instead, John testified he had "completely forgotten" about the agreement and "hadn't thought about it as having an indefinite life". (VRP Sakai II; 147-148; Sakai D: 60) Similarly, there was no evidence that the Sakai Family "understood the value the Site Plan Approval would add to the Sakai parcels" or that following the expiration of the purchase and sale agreement the Sakai Family would sell the property for "fair market value when development rights were secured by Landmark".

The claims that John knew that Nelson was considering acquiring the Madison Glen Property in the spring of 2000 is expressly contrary to John's testimony. (See VRP Sakai I: 58-59; Sakai II: 102-103; Sakai D:6; Exs. 13, 279:1) and its claim that Landmark acquired the Madison Glen Property in "reliance on Sakai's ratification of the expired Purchase & Sale Agreement" is contrary to the trial court's findings and John's testimony. (See ID; CP 1270 & 1272).<sup>9</sup> The trial court, having found the purchase and sale agreement expired also found that Nelson's contrary claims "were

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<sup>9</sup> Landmark's reference to a May 31, 2000 email conclusively demonstrates the Sakai Family did not know of Nelson's interest in abutting property because the email is written in response to an email Nelson wrote regarding a third-party developer's request to procure easements from the Sakai Family. (CP 87)

not credible”. (CP 1270: 1.14)

Landmark’s references to Nelson’s apparent willingness to try to purchase the property in the summer of 2000 ignores the trial court’s finding that the parties “never came to terms, due in large part to Nelson’s inexplicable withholding of a firm offer”. (CP 1273: 1.28)

Similarly, Landmark’s reference to subsequent correspondence from Mr. Hoare ignores the trial court’s express finding that the original purchase & sale agreement had expired and the parties could never come to terms on a number of essential terms in connection with their efforts to negotiate a new agreement. (CP 1278: 1.49-1.50)

Incredibly, Landmark points to Nelson’s March, 2001<sup>10</sup> request to install underground water detention tanks which Landmark continues to claim were designed “to service both Phase I & II”. As the trial court properly found, this is an outright falsehood. (*See* CP 1274: 1.35.)

Equally astounding is Landmark’s claim that in 2003 after the Sakai Family learned Nelson had renewed its efforts to see site plan approval that Nelson had abandoned almost 2 years earlier, the “Sakais were willing to sell both parcels to Landmark for fair market value” and

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<sup>10</sup> Landmark continues to use the wrong year in which this request was made and the wrong year in which the Sakai Family granted an access easement to Landmark.

that John asked Nelson for comparable sales information. This is contrary to John Sakai's testimony and the trial court's Findings 1.65, 1.67 and 1.68. (VRP Sakai II pp. 46-148, 158-159, 161, 163; Sakai D pp. 58, 60; Ex. 297:10; CP 1281).

Landmark's claim that the Sakai Family agreed to sell their property for fair market value to be determined by appraisal is not even a claim it asserted in its Summary Judgment Motion *and* is contrary to John Sakai's testimony. (CP 22-46; VRP Sakai III 181: 20-23)

Because the Sakai Family believes it has otherwise fully addressed the trial court's erroneous legal conclusions and underlying mixed findings and conclusions in its Opening Brief, the Sakai Family otherwise sees no need to spend any further significant time responding to Landmark's flawed legal analysis other than to point out that the trial court's entire analysis was centered on its *legal conclusions* that the Sakai family had a "duty to speak" and that Landmark was not a "volunteer"; legal conclusions that are plainly wrong under Washington law. *See Oates v. Taylor*, 31 Wn.2d 898, 199 P.2d 924 (1949) and Part F below.

**F. Paragraph 8 Reply: Landmark's Claim That Landmark Conferred A Benefit "At The Request" Of The Sakai Family Is Plainly Wrong.** In Paragraph 8 of its Reply Brief, Landmark makes the

incredible argument that the so-called benefit (i.e. the expired Site Plan approval) was conferred “at the request of Sakai by virtue of the Owner Applicant Agreement”.

The Owner Applicant Agreement arises from Addendum No. 1 to the expired 1998 Purchase & Sale Agreement, which was prepared by Nelson, and provides in part as follows:

“1. *Feasibility Study*. This offer is contingent on a feasibility study to purchaser’s satisfaction....During [the feasibility] period Purchaser will have a pre-application meeting with the City of Bainbridge Island with regard to the construction of a retirement community. *Seller agrees to sign an owner application agreement **benefiting purchaser.**\*\*\**” [Emphasis added.]

In no way could this language possibly be construed to result in a benefit to be conferred on anyone other than the purchaser, Landmark.

Nelson filed Landmark’s Site Plan Review application for the sole and exclusive benefit of Landmark and continued to process that application following expiration of the Purchase & Sale Agreement in the hope Nelson would be successful in negotiating a new agreement for Landmark’s benefit. The Site Plan Review application was of no interest to the Sakai Family and was designed to advance Landmark’s development proposals if Landmark purchased the Sakai Property. (VRP

Sakai D. @ pp. 39-41.)

“Q. (By Templeton): Okay. Did you --- at any time during your negotiations with Mr. Nelson, did you care about site plan approval?

A. (John Sakai): No, I didn't care about Site Plan Approval.”

(Id. @ p. 40: 11-13)

Because Nelson filed and processed the Site Plan Review application for the sole and exclusive benefit of Landmark, Landmark was a “Volunteer” and the court’s contrary analysis is a clearly erroneous application of the law. *See Lynch v. Deaconess Medical Center*, 113 Wn.2d 162, 776 P.2d 681 (1989) and *Bank of America v. Wells Fargo Bank*, 126 Wn. App. 710, 109 P.3d 863 (2005).

**G. Conclusion.** The trial court properly dismissed Landmark’s specific performance claim and alternative contractual claims; this Court should affirm that dismissal.

The trial court erred in awarding Landmark judgment for the reputed value of an expired Site Plan Review approval Landmark procured for its own benefit. Because of the cloud on title created by Landmark’s pursuit of this litigation, the Sakai Family could not use or enjoy that approval and it, therefore, conferred no benefit on the Sakai Family.

Moreover, given Landmark's unclean hands, the trial erred in awarding judgment. Accordingly, the trial court's unjust enrichment award must be reversed.

In findings Landmark has not challenged, the trial court found a failure of proof as to whether a sewer lift station Landmark installed on abutting property confers any benefit on the Sakai Family. Even if either the clean hands doctrine or the volunteer rule have no applicability to Landmark's claims, the trial court committed no error in refusing to enter an unconditional judgment for the unknown and speculative benefit that may some day inure, if it somehow proves possible to procure connections to the sewer lift station Landmark installed on its own property to serve another development.

The trial court erred in dismissing the Sakai Family's trespass claim and that dismissal should be reversed.

The trial court properly awarded the Sakai Family the attorney fees it incurred in the defense of Landmark's contractual claims. Because Landmark's unjust enrichment claims were not based on the parties' written contract, the trial court properly denied Landmark's request for attorney fees. Those rulings should be affirmed and this Court should award the Sakai Family the attorney fees it incurs in the defense of the

contractual claims and the trial court's Orders regarding attorney fees.

### III.

#### ADDITIONAL AUTHORITIES

##### A. Re: Paragraph 1:

1. *State v. Labor Ready*, 103 Wn. App. 775, 14 P.2d 828 (2000). [When one issue is dispositive of a case on appeal, principles of judicial restraint dictate that no other issues need be considered.]
2. *Kwiatkowski v. Drews*, 142 Wn. App. 463 (2008). [The implied duty of good faith and fair dealing applies only in relation to performance under the contract.]
3. *Pardee v. Jolly*, 163 Wn. 2d 358 (2007). [Contracts for the sale or conveyance of real property must include a legal description of the property: Applicability of grace periods to option contracts.]
4. *Crafts v. Pitts*, 161 Wn.2d 16. [Specific performance is a proper remedy only if there is a valid binding contract, the contract has definite and certain terms, and the contract is free from unfairness, fraud and over-reaching.]

Respectfully submitted this 25<sup>th</sup> day of September, 2008.

  
RONALD C. TEMPLETON, WSBA #8684  
Co-Counsel for Respondents

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DIVISION II

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NO. 36663-1-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

LANDMARK LLC, )

Appellant, )

vs. )

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. )

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on September 25, 2008, I sent via overnight mail service a copy of the Reply Brief Of Respondents to:

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Jeffrey D. Laveson  
Carney Badley  
701 Fifth Avenue, Suite 3600  
Seattle, WA 98104

DATED this 25th day of September, 2008.

  
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