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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

Case No. 45667-2-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

Grays Harbor Superior Court Cause No. 08-2-00254-0

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JERRY MULDER and SALLY MULDER

Plaintiffs/Respondents,

v.

CABINET DISTRIBUTORS, INC.

Defendant/Appellant.

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**APPELLANT'S REPLY BRIEF**

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**TABLE OF CONTENTS**

	<u>Page</u>
I. REBUTTAL ARGUMENT .....	1
A. Standard of Review .....	2
B. Contract Provision Applies Only to Collection Actions.....	3
C. Plaintiffs are Not the Substantially Prevailing Party .....	5
1. Plaintiffs Have not Substantially Prevailed and CDI Has.....	6
2. Trial Court’s “Ball Game” Analysis is Not the Standard for Determination of the Substantially Prevailing Party.....	7
3. Even if Plaintiff is Found To Be the Prevailing Party – Which Plaintiff Is Not – The Required Proportionality Approach Mandates Only a Nominal Award to Plaintiff.....	9
II. Procedural Deficiencies.....	9
A. Plaintiffs Misrepresent Underlying Facts.....	9
B. Plaintiffs Failed to Comply with RAP 10.3.....	10
1. Plaintiffs’ “facts” are irrelevant and argumentative.....	10
2. Plaintiffs’ factual assertions not supported by designated record.....	11
III. ATTORNEY’S FEES.....	11
III. CONCLUSION.....	12

**TABLE OF AUTHORITIES**

**Cases**

Cornelius Apartment Hotel Corp. v. Alabaster  
1 Wash.App. 242, 247, 460 P.2d 312, 315 (1969).....5

Hindquarter Corp. v. Property Development Corp.  
95 Wash. 2d 809, 816, 631 P.2d 923, 926 (1981).....3, 4

Marassi v. Lau  
71 Wash.App. 912, 917, 859 P.2d 605 (1993), *overruled on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash.2d 481, 200 P.3d 683 (2009).....7, 8

Phillips Bldg. Co., Inc. v. An  
81 Wash.App. 696, 915 P.2d 1146 (1996).....7

Riss v. Angel  
31 Wash. 2d 612, 615, 934 P.2d 669, 672 (1997).....6

Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton  
158 Wash. 2d 506, 145 P.3d 371 (2006).....4

Wright v. Dave Johnson Ins. Inc.  
167 Wash. App. 758, 275 P.3d 339, *review denied*, 175 Wash. 2d 1008, 285 P.3d 885 (2012).....2

**Rules**

RAP 9.6.....11

RAP 10.3.....10

RAP 10.7.....11

RAP 18.1.....11

RAP 18.9.....11

**Other Authorities**

17A Corpus Juris Secundum Contracts § 399.....5

## I. REBUTTAL ARGUMENT

Petitioner Cabinet Distributors, Inc. (hereinafter “CDI”) provides the following reply to the Brief of Respondents, Jerry and Sally Mulder (hereinafter “plaintiffs”).

The plaintiffs made a proverbial “mountain out of a mole hill” as highlighted by the fact they demanded \$95,000.00 for a claim worth \$5,200.00 – per the jury’s verdict (which included the jury rejecting all but one of plaintiffs’ claims and finding in favor of CDI on its single claim). Plaintiffs’ unreasonable and untenable position made this case impossible to resolve without a jury trial (and it should be noted, the jury actually found the plaintiffs unreasonable in that they found plaintiffs interfered with CDI’s performance of the subject contract).

Notwithstanding, plaintiffs’ position is that if they have a net award in their favor – no matter how nominal – they are entitled to all their attorney fees and costs no matter how unreasonable their claims and demands forcing the parties to trial. To reward a plaintiff and their attorney for such conduct guarantees that plaintiffs will refuse to reasonably resolve a case – thereby encouraging lengthy and scorched earth litigation and trial – because if plaintiff can obtain any net award, even where that award is as nominal as it is here, plaintiff can recover all

attorney fees/costs. That cannot be, and is not, the law or judicial policy of our courts.

As highlighted herein, plaintiffs have largely failed to address, let alone rebut, CDI's position that the trial court erred by awarding attorney's fees to plaintiffs as the substantially prevailing party.<sup>1</sup>

**A. Standard of Review**

The initial issue on appeal is the trial court's determination that plaintiffs were deemed to be the substantially prevailing party. As set forth in CDI's opening brief, the standard of review for this issue is a mixed question of law and fact that is reviewed under an error of law standard. *See Wright v. Dave Johnson Ins. Inc.*, 167 Wash. App. 758, 783, 275 P.3d 339, 353 *review denied*, 175 Wash. 2d 1008, 285 P.3d 885 (2012). The error of law standard also is applicable to the issue of the amount to be awarded. That is, even if plaintiff is found to be nominally the substantially prevailing party, it is an error of law under the circumstances for the trial court to award \$48,594.96. To the degree plaintiff's brief suggests a different standard of review for these issues, they are wrong.

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<sup>1</sup> In addition, plaintiffs' brief contains multiple procedural deficiencies including: misrepresentation of underlying facts, argumentative and irrelevant facts, and facts that have not been designated for appeal. These issues will be discussed later herein.

**B. Contract Provision Applies Only to Collection Actions**

Plaintiffs' response brief attempts to put before the court only one portion of the subject contract provision. By doing so, plaintiffs' argue that the subject contract provision is a broad spectrum attorney's fees clause. This is an incorrect reading of the contract provision.

The provision, as quoted in CDI's opening brief, relates to the costs incurred in a collection action. Brief of Appellant, Page 11. That is, attorney's fees would only be awarded in pursuit of a collection action for monies due under the contract, not for a breach of contract action where the allegation is faulty or substandard performance under the contract. The attorney's fee in the subject contract is limited to specific instances of collection activities.<sup>2</sup> The courts have upheld and enforced limited attorney's fee provisions. *See e.g. Hindquarter Corp. v. Prop. Dev. Corp.*, 95 Wash. 2d 809, 631 P.2d 923 (1981).

In Hindquarter, the court reversed that portion of a trial court decision awarding attorney fees to a landlord incurred defending against a declaratory judgment action initiated by the tenant. The court held that, "the terms of the lease authorized attorney's fees **only** for curing defaults,

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<sup>2</sup> Had plaintiffs obtained a defense verdict on the collection action counter-claim by CDI, then plaintiffs would be entitled to their fees/costs on that single claim because it is well settled such a clause must be read to be bilateral. However, CDI prevailed and was awarded \$2,400.00.

and the award of fees should reflect only those services rendered toward that end.” Id. at 815, 631 P.2d, 923, 926 (1981)(emphasis added). As the subject provision applies to collection actions, the trial court erred by expanding the provision to encompass claims for breach of contract.

Plaintiffs rely upon Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton, 158 Wash. 2d 506, 145 P.3d 371 (2006). Scoccolo addresses a dispute where the attorney’s fee provision is factually different than the one at issue here. The contract provision in Scoccolo stated, “contractor agrees to pay all costs, expenses, and reasonable attorney’s fees that may be incurred or paid by the City in the enforcement of any of the covenants, provisions and agreements hereunder.” Id. at 520, 145 P.3d 371, 377-78 (2006). The Scoccolo attorney’s fee provision is a broad base provision that allows for recovery in a breach of contract action.

Plaintiffs assert that because the subject contract provision uses the term “court proceedings” that this converts the attorney fee provision into a prevailing party attorney fee provision that permits plaintiffs to recover in this action. This argument is unsupported by authority. Plaintiffs have not provided any authority that addresses limited fee provisions as we have here.

Furthermore, plaintiffs attempt to disregard a basic tenant of contract interpretation, which is that contract provisions are to be

interpreted as a whole and not in a piecemeal fashion. Cornelius Apartment Hotel Corp. v. Alabaster, 1 Wash.App. 242, 247, 460 P.2d 312, 315 (1969); *see also* 17A C.J.S. Contracts § 399 (A contract must be construed as a whole, and emphasis not given to particular provisions). By focusing their argument on the term “court proceeding,” plaintiffs seek to have this Court ignore the fact that the provision is limited to collection actions and proceedings. In fact, the subject contract provision uses the term “collection” or “collections” three separate times in the provision. CP 15. To argue that the subject provision is an attorney’s fee clause for any and all contract disputes fails to interpret the provision as a whole.

**C. Plaintiffs are Not the Substantially Prevailing Party**

Even if the Court determines that the subject contract provision allows for attorney’s fees in a breach of contract claim, plaintiffs’ argument that they are the substantially prevailing party must fail. Though plaintiffs’ response brief cites to the same authority raised by CDI, plaintiffs fail to apply the law to the facts of this matter.

There is no dispute that the determination of the substantially prevailing party turns on the extent of relief awarded to the parties. Brief of Respondents, Page 8. Plaintiffs fail, however, to provide any authority – let alone facts – that supports their contention that they are the substantially prevailing party.

**1. Plaintiffs Have Not Substantially Prevailed and CDI Has**

Plaintiffs rely on Riss v. Angel, 131 Wash. 2d 612, 615, 934 P.2d 669, 672 (1997). The facts and holding in Riss, however, does not support that plaintiffs are the prevailing party. In Riss, the Court determined that the plaintiff was the prevailing party due to the fact that, notwithstanding a minor change to the exterior of the proposed home, plaintiff would be allowed to build the house they sought to have approved. Id. at 634. The net benefit, therefore, was weighed against the objectives of the defendant homeowner's association, which was to prevent the house from being built. Obviously the crux of the lawsuit in Riss was whether plaintiff would be allowed to build their house, and plaintiff won – a huge net benefit. Here, that is not the case.

Plaintiffs opening statement at trial included a request to the jury of \$95,000.00 in damages. CP 131. The damages award to plaintiffs was 5% of that amount. The jury found in favor of CDI regarding four separate claims. CP 123-124. This includes CDI's counter-claim, and the jury awarded \$2,400.00 to CDI. Id. The jury also found in favor of CDI on plaintiffs' fraud claim and on plaintiffs' breach of contract claim alleging mold infestation. Id.

The jury verdict alone establishes that CDI is the substantially prevailing party, based upon the extent of relief awarded to the parties. To further support this position is the fact that CDI also prevailed on summary judgment as to the plaintiffs' CPA claim. In total, **CDI prevailed on five claims** to plaintiffs' one.

**2. Trial Court's "Ball Game" Analysis is Not the Standard for Determination of Substantially Prevailing Party**

Plaintiffs' cite to Phillips Bldg. Co., Inc. v. An, 81 Wash. App. 696, 915 P.2d 1146 (1996), to support their argument that where both parties are awarded relief, the net affirmative judgment is used to determine the prevailing party. However, plaintiffs' analysis did not address the authority upon which the court in Phillips Bldg. Co. was making its determination. Specifically, plaintiffs fail to analyze or address Marassi v. Lau, 71 Wash.App. 912, 859 P.2d 605 (1993), *overruled on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash.2d 481, 200 P.3d 683 (2009).

CDI, in its opening brief, did advise and analyze the holding set forth in Marassi. Brief of Appellant, Page 17. In Marassi, the plaintiff prevailed on only two of the original 12 separate and distinct claims. Marassi at 916, 859 P.2d 605. The court, therefore, developed a proportionality approach for such situations. The Marassi court held that

the plaintiff should be awarded attorney fees for the claims it prevails upon, the defendant should be awarded attorney fees for those claims it successfully defends, and the awards should offset. Id. at 918, 859 P.2d 605. In addition to creating the “proportionality approach,” the key issue from Marassi is that a trial court **must consider the claims that a defendant successfully defends and award attorneys’ fees accordingly.** Id. As a result, CDI should recover its fees for successfully prosecuting its counter-claim and for defending plaintiffs’ fraud and mold infestation claims.

Without directly stating as such, plaintiffs seek to have this court accept and adopt the “ball game” analysis utilized by the trial court. RP 8-9. This is seen by plaintiffs’ focus of the net judgment of \$5,200.00. CDI addressed the net judgment in its opening brief. *See* Opening Brief of Appellant, Page 1. However, what plaintiffs failed to address is the fact that this judgment was 5% of the amount requested at the start of the trial and that ultimately CDI prevailed on five out of six claims. As a result, even if the “ball game” analysis were to be adopted by this Court, CDI would still prevail.

**3. Even if Plaintiff is Found To Be the Prevailing Party – Which Plaintiff Is Not – The Required Proportionality Approach Mandates Only a Nominal Award to Plaintiff**

Plaintiffs are not the prevailing party. Notwithstanding, if plaintiffs are found to be the prevailing party, for all the same reasons stated herein, the proportionality approach mandates that the attorneys' fees award be as nominal as the jury's nominal net award to plaintiff.

**II. PROCEDURAL DEFICIENCIES**

**A. Plaintiffs Misrepresent Underlying Facts**

Plaintiffs' brief misconstrues the record and presents this Court with an inaccurate version of the events leading to this appeal. As such, CDI clarifies the record as follows.

Plaintiffs' recitation of the facts regarding the jury verdict could be construed as meaning that there were only two questions on the special verdict form and that the parties split the decision. Brief of Respondents, Page 2. The special verdict form had a total of seven substantive questions. CP 123-124. The jury found in favor of CDI in five of those questions, including four specific questions regarding the **plaintiffs' breach of contract**. *Id.* When combining the jury verdict with the pre-trial summary judgment rulings, **CDI prevailed on five separate claims** to plaintiffs' one. Plaintiffs' version of the facts attempts to convey a

different underlying trial and outcome by failing to reference the claims where CDI prevailed. Brief of Respondents, Pages 1-3.

**B. Plaintiffs Failed to Comply with RAP 10.3**

In addition to the selective recitation of facts, plaintiffs failed to comply with the obligations of RAP 10.3 to properly reference the record for each factual statement. Plaintiffs' Statement of the Case contained two citations to the record. Brief of Respondents, Pages 1 and 3. The rules dictate that a response brief should include, "**a fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.**" RAP 10.3(a)(5).

**1. Plaintiffs' "facts" are irrelevant and argumentative**

Plaintiffs' brief includes argumentative facts regarding the original installation and underlying claims. Brief of Respondents, Page 2. The issues on appeal relate to the determination by the trial court that attorney's fees were permissible to plaintiffs and that plaintiffs were the substantially prevailing party of the underlying litigation. Nothing on appeal relates to the factual issues regarding the original jury verdict or underlying facts that were resolved through trial.

**2. Plaintiffs' factual assertions not supported by the designated record**

In addition to being irrelevant, there are no designated Clerk's Papers or Record of Proceedings that includes some of the facts asserted by plaintiffs' brief. The record before the Court includes all of the pleadings and supporting declarations filed with the trial court after the Mandate issued on March 18, 2013. CP 1. As such, the "facts" regarding the underlying dispute are not properly before the Court. Brief of Respondents, Pages 2-3. The rules set forth procedures that plaintiffs could have followed to designate additional documents for the record on appeal. RAP 9.6. No such supplemental designation has been received.

**III. ATTORNEY'S FEES AND SANCTIONS**

CDI previously sought an award of attorney's fee pursuant to RAP 18.1. The request was made based on the subject contract between plaintiffs and CDI, and plaintiffs' continued assertions of their right to recover the same.

In addition to the request for attorney's fees, CDI requests that the Court issue sanctions for the violations of the procedural rules outlined above. RAP 18.9 and 10.7. Specifically, the Court should compensate CDI for the additional time and effort that was required to adequately review and analyze plaintiffs' response for submitting factual statements

that have were not designated for appeal and for failing to cite to the record for the facts that were designated for appeal.

#### **IV. CONCLUSION**

For all the foregoing reasons, and those contained in CDI's opening brief, CDI respectfully requests this Court reverse the trial court's order and vacate the judgment that was entered. Furthermore, CDI respectfully requests that this Court find that CDI is the substantially prevailing party and award CDI attorney's fees in the amount of \$82,354.50, and remand this matter for entry of judgment in accordance with that finding.

In the alternative, CDI requests that this Court vacate the trial court's order and judgment and find that neither party is entitled to an award of attorney's fees given the neither party meets the standard for being the substantially prevailing party.

Finally, if the Court finds that CDI is not the sole prevailing party and attorney's fees are warranted in this matter the award of fees should be based upon the proportionality approach resulting in an offset of fees.

DATED this 4th day of June, 2014.

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STATE OF WASHINGTON  
BY \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

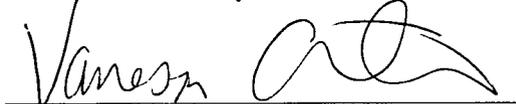
I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
<p><b><u>CO/ Plaintiffs Jerry &amp; Sally Mulder</u></b>            Allen Miller, WSBA #12936            Law Offices of Allen T. Miller, PLLC            1801 West Bay Drive NW, Suite 205            Olympia, WA 98502            P: (360) 754-9156            F: (360) 754-9472  <a href="mailto:allen@atmlawoffice.com">allen@atmlawoffice.com</a></p>	<p><input checked="" type="checkbox"/> Via U.S. Mail  <input type="checkbox"/> Via Legal Messenger  <input type="checkbox"/> Via Facsimile  <input checked="" type="checkbox"/> Via E-Mail</p>

DATED this 4th day of June, 2014 at Seattle, Washington.



Vanessa Acierio, Legal Secretary