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NO. 63790-8-I, consolidated with 63792-4-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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CORNISH COLLEGE OF THE ARTS, a Washington public benefit  
corporation,

Respondent,

v.

1000 VIRGINIA LIMITED PARTNERSHIP; a Washington limited  
partnership; DONN ETHERINGTON, JR., an individual,

Appellants,

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REPLY BRIEF OF APPELLANT DONN ETHERINGTON, JR.

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## **SUMMARY OF REPLY**

Cornish's 50 page brief can be summarized in two phrases: Etherington should be held liable for the fees attributable to Cornish's case against Virginia Limited, even though Etherington prevailed in his personal defense of those claims: and, Etherington should be held liable because he is a bad person. The trial court rejected the first argument, refusing to pierce the veil of the Virginia Limited Partnership, and Cornish has not cross-appealed from that ruling. The second argument is a sophomoric *ad hominem* attack unworthy of notice by this Court, except insofar as it demonstrates the emptiness of Cornish's arguments. This Court should reverse.

## **REPLY TO CORNISH'S INTRODUCTION**

Without citing anything in Etherington's brief, Cornish claims that Etherington's only issue on appeal is "entitlement to fees under the *Marassi* proportionality rule." BRC/E 3 n.1. Cornish also falsely claims that Etherington has "not requested that this Court find either Virginia Limited or Etherington are entitled to an award of fees incurred below . . . ." *Id.*

To the contrary, Etherington argued:

- “even under the trial court’s substantially prevailing party rule, Etherington was the substantially prevailing party. . . .”, Brief of Appellant Etherington (“BAE”) 2;
- “[e]ven if the substantially prevailing party rule applied here, the trial court erred because Cornish did not substantially prevail against Etherington.” *Id.* at 31;
- “[t]he Court should reverse the award of attorney fees against Etherington for all of the reasons discussed above.” *Id.* at 33;
- “[t]he Court should reverse this overbearing attorney fee award and remand for an appropriate allocation of attorney fees under the principles consistently announced and followed by this court.” *Id.* at 35-36.

The Court should unequivocally reject Cornish’s clumsy attempt to limit Etherington’s appeal.

## REPLY TO ARGUMENT

- A. Cornish cannot ask this Court to hold Etherington personally liable for an attorney fee award against Virginia Limited because the trial court refused to pierce the veil of the limited partnership and Cornish never appealed from that ruling.**

A major theme of Cornish’s brief is that the Court should disregard the separate existence of Virginia Limited and hold Etherington liable for attorney fees assessed against Virginia Limited:

- The Court should hold Etherington liable for fees assessed against Virginia Limited because “[h]e is the managing agent, beneficial owner, and the sole member of the sole partner of Virginia Limited.” Brief Of

Respondent Cornish In Answer To Etherington (“BRC/E”) at 2;

- Assessing attorney fees against Etherington is “fair and just” because Virginia Limited “will in all probability not be able to satisfy the fee award assessed against it.” *Id.* at 3;
- “The [trial] court also heard first-hand testimony regarding the degree of control Etherington exercised over Virginia Limited . . .” *id.* at 22;
- “As Virginia Limited’s only managing agent, [Etherington] was intimately involved at every step, possessing sole control over Virginia Limited on every decision the company made affecting Cornish.” *Id.* at 33;

Cornish asks this Court to ignore the structure of Virginia Limited. Virginia Limited is called “Limited” because it is a limited partnership. The partners of a limited partnership are not liable for the debts of the LP unless the court pierces the veil, and are then liable only “to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances.” RCW 25.15.060. Etherington is not even a partner in Virginia Limited – he is a member of Virginia-Terry LLC, the general partner of Virginia Limited (CP 2359).

Etherington could only be held personally liable for Cornish’s attorney fees incurred in litigating against Virginia Limited if the trial court had pierced the veil of Virginia Limited and then pierced the

veil of Virginia-Terry. The trial court rejected Cornish's request to do exactly that.

After the trial court dismissed Cornish's claim for specific performance as to Etherington, Cornish moved for reconsideration, arguing that the court should pierce the veil and hold Etherington personally liable. RP 2-6 (5/6/09). The trial court heard oral argument on the motion. Etherington argued: Virginia Limited owns the property; throughout several summary judgments and trial, Cornish had failed to produce evidence that the limited partnership forms were used to evade legal duties or that Cornish was harmed by the LP form; the parties were represented by counsel during negotiation of the option and lease and everyone knew the form of ownership; and there is no basis to impose personal liability on Etherington. *Id.* at 6-13.

The trial court denied reconsideration, refusing to impose personal liability on Etherington. CP 772-73. Cornish neither appealed nor cross-appealed. The trial court's refusal to pierce the veil of Virginia Limited is now the law of the case and Cornish cannot justify the attorney fee award based on Etherington's personal liability for Virginia Limited's liability.

Etherington clearly disclosed Virginia Limited's ownership structure to Cornish. Etherington delivered a copy of the Extended Use Agreement to Cornish before the parties ever entered into the lease/option. CP 2348, 1573. The Extended Use Agreement is signed by Etherington as general partner for another limited partnership, which was in turn general partner for Virginia Limited. CP 314. The lease/option similarly discloses that Etherington is not the same as Virginia Limited. Etherington signed the lease/option for Virginia-Terry LLC, general partner, by Etherington, member. CP 260. Cornish could not possibly have been misled into believing that anyone other than Virginia Limited was granting the option.

Cornish argues repeatedly that it was fair or equitable to impose personal liability on Etherington. BRC/E 2-3, 21-22, 33-35. There is nothing fair or equitable about ignoring the deliberate business structure of a limited partnership, one purpose of which is to shield the partners from liability. Virginia Limited had owned this property for over 15 years by the time Cornish filed this lawsuit. If Cornish did not want to rely on the limited partnership, it could and should have insisted on a different contract.

Cornish also argues that the court should pierce the veil and hold Etherington liable for attorney fees because Virginia Limited will not be able to pay Cornish's fees. BRC/E 3. Our Supreme Court has rejected this argument:

Separate corporate entities should not be disregarded solely because one cannot meet its obligations. ***Morgan [v. Burks]***, 93 Wn.2d 580] at 582 [611 P.2d 751 (1980)]. The absence of an adequate remedy alone does not establish corporate misconduct. The purpose of a corporation is to limit liability. Unless we are willing to say fulfilling that purpose is misconduct, Meisel is hard put to argue a theory of corporate disregard.

***Meisel v. M & N Modern Hydraulic Press Co.***, 97 Wn.2d 403, 411, 645 P.2d 689 (1982). Cornish knew that it was contracting with a limited partnership. If Cornish had wanted to reach into any deeper pocket, they should have contracted for that right.

Cornish's plea to pierce the limited partnership veil is not properly before the Court and is absolutely meritless. It is included in this brief because Cornish has no viable theory to justify the fee award against Etherington. The Court should honor the limited partnership structure in this case and reverse the fee award.

**B. The trial court erred in awarding judgment against Etherington for all fees and costs incurred by Cornish in pursuing Cornish's claims against Virginia Limited, claims which were dismissed against Etherington.**

**1. Cornish did not substantially prevail, where Etherington successfully defended against all of Cornish's claims except wrongful eviction, the result of which is that he is liable on only 2.8% of the total judgment.**

Cornish cannot and does not dispute that it was awarded only 2.8% of the damages it sought against Etherington. Instead, it offers a barrage of irrelevant arguments, all centered around the incorrect notion that it substantially prevailed against Etherington if it substantially prevailed against Virginia Limited.

Cornish argues that it prevailed against Etherington because "Cornish was awarded all of the substantive relief it sought." BRC/E 18. Wrong. The trial court denied Cornish's persistent efforts to obtain an order of specific performance or damages against Etherington based on Virginia Limited's refusal to perform. Cornish's argument is simply one more example of its stubborn refusal to recognize that Virginia Limited and Etherington are two distinct litigants and entities.

Cornish again refuses to acknowledge the difference between Etherington and Virginia Limited when it argues that Etherington cannot have prevailed when Virginia Limited was found

liable. BRC/E 22. This is just another frivolous refusal by Cornish to admit that Etherington is not the same as Virginia Limited.

Cornish asks the Court to ignore the fact that it failed in its effort to obtain specific performance against Etherington because it obtained specific performance against Virginia Limited. BRC/E 24. This is but one more iteration of Cornish's failure to admit that Etherington and Cornish are distinct legal entities.

Cornish's arguments all collapse into a refusal to distinguish between Etherington and Virginia Limited. Cornish has offered no coherent argument for considering it to be the substantially prevailing party when it recovered only 2.8% of its claim against Etherington.

In still another iteration of the agreement that Etherington and Virginia Limited are one in the same, Cornish repeatedly relies on *Riss v. Angel* for the proposition that it substantially prevailed, so should be awarded fees against both Virginia Limited and Etherington. BRC/E 18, 24, 25 (citing *Riss v. Angel*, 131 Wn.2d 612, 633-34, 934 P.2d 669 (1997)). This argument ignores the fundamental question: Where Etherington is jointly and severally liable for only 2.8% of the judgment, should he be liable for all

attorney fees? The answer is “no” – **Riss** actually supports Etherington’s arguments on this point.

In **Riss**, members of an unincorporated neighborhood homeowners association appealed from a judgment against all homeowners, arguing that only those homeowners who ratified the association Board’s wrongful rejection of the plaintiff’s building proposal should be jointly and severally liable for damages and attorney fees. 131 Wn.2d at 637. The Court agreed, holding that only those homeowners who participated in or ratified the Board’s wrongful decision (by voting to approve it) could be jointly and severally liable. *Id.* The Court remanded for further fact-finding to determine which homeowners were jointly and severally liable. *Id.*

**Riss** does not stop at determining who substantially prevailed (BRC/E 18, 24, 25, 32) but goes on to consider who is jointly and severally liable for the underlying judgment. 131 Wn.2d at 637-38. Unfortunately the trial court determined that Cornish prevailed without answering the next question – against whom? Etherington is not liable for over 97% of the judgment and there is no reason – under **Riss** or any other authority – that he should be liable for fees attributed to the claims for which he is not liable.

Cornish even argues against comparing Cornish's \$69,600 recovery against Etherington with Cornish's failure to obtain judgment against Etherington for \$2.4 million, claiming that the comparison would be arbitrary. BRC/E 23. Cornish's argument is absurd. How can the Court determine whether Cornish is the substantially prevailing party without comparing what Cornish was awarded against Etherington – \$69,600 – to what it was denied against Etherington – \$2.4 million?

In a final attempt to muddy the waters, Cornish argues that the Court should affirm the fee award because a trial court has discretion to award fees in an amount exceeding the substantive recovery. BRC/E 23-24. The important comparison here is not between the fees of \$624,000 and the eviction damages of \$69,600, but between what Cornish sought to recover from Etherington – \$2.4 million – and what it actually recovered – \$69,600. The attorney fees are so high because Cornish is trying to recover attorney fees for litigating specific performance damages, a claim it lost against Etherington.

**2. The trial court erred in concluding that the attorney fee clause compels the conclusion that Cornish was the sole substantially prevailing party.**

Etherington has shown in Argument A, *supra*, that lumping him together with Virginia Limited is error.

Cornish persists in arguing that the fee clause in the lease/option should be interpreted to mean that there can be only one “substantially prevailing party” and that this one party is entitled to a fee award jointly and severally against the other two parties. BRC/E 17-24. This interpretation of the contract leads to absurd results. Suppose, for example, that Cornish had prevailed against Virginia Limited and that all of its claims against Etherington had been dismissed. Under Cornish’s interpretation, Cornish would be entitled to recover all of its fees against Etherington because Cornish was the prevailing party in the entire lawsuit even if Etherington had completely prevailed against Cornish. No one would consider that a reasonable interpretation and no one would believe that the words of the attorney fee clause require such a result.

To avoid such an absurd outcome, the fee clause must be interpreted to mean that the court determines who is substantially

prevailing as to each pair of parties: Cornish/Virginia Limited, Cornish/Etherington, and Etherington/Virginia Limited. But once the parties are considered separately, Etherington substantially prevailed by defeating 97% of Cornish's claims against him.

Any contract must be interpreted reasonably. Cornish has failed to produce any evidence of discussion of negotiation leading to Cornish's interpretation, and the Court should reject it.<sup>1</sup>

**3. Etherington was only held liable for wrongful eviction and cannot be held liable for attorney fees and costs incurred by Cornish before Cornish even pled wrongful eviction, or for fees incurred by Cornish in defending against Virginia Limited's bankruptcy.**

Cornish argues that it was appropriate to roll together the fees attributable to the option agreement with the fees attributable to the lease and eviction because the two are "related." BRC/E 29. Cornish ignores the obvious: the option was an obligation of Virginia Limited, and the lease was an obligation of Etherington; different events triggered Cornish's claims under each clause; the

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<sup>1</sup> Cornish notes that Etherington's opening brief referred to the attorney fee clause as "boilerplate," claiming that Etherington is arguing that the provision is "therefore less worthy of enforcement." BRC/E 18 n.7. Cornish misses the obvious point that a boilerplate provision has generally not been discussed or negotiated, and should be interpreted as a reasonable person would interpret it. There is no evidence that these parties or any other parties ever intended to avoid the *Marassi* proportionality rule by using this boilerplate language.

eviction did not even occur until months after Cornish filed its complaint; different damages resulted under each clause; damages for the eviction were established at the outset of trial and the entire trial dealt with breach of the option agreement, not with eviction. Cornish does not dispute these facts because it cannot.

Cornish argues that the attorney fees attributable to the option agreement cannot be segregated from the fees attributable to the wrongful eviction. BRC/E 36-37. Again, Cornish closes its eyes to the obvious – most of this case, and certainly the entire trial, dealt with the option, not with eviction. Cornish filed separate motions for summary judgment on the option agreement and for the eviction. Only children think that bad things cease to exist when they hide their eyes.

**4. The proportionality rule governs attorney fees where, as here, there are multiple distinct and severable claims, such that using the substantially prevailing party rule is unworkable and unjust.**

**a. The *Marassi* rule is not merely a matter of labeling.**

Etherington showed in his opening brief that this Court developed a proportionality rule to handle attorney fee awards “where multiple distinct and severable contract claims are at issue.” *Marassi v. Lau*, 71 Wn. App. 912, 917, 859 P.2d 605 (1993),

*abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009).

Cornish fundamentally misunderstands and completely misstates the *Marassi* case and the proportionality rule. Cornish simplistically interprets *Marassi* as a case about mere labeling. In Cornish's view, if the parties contract for an award of fees to the "substantially prevailing party", the result is different than if parties contract for an award of fees to the "prevailing party," or an award based on "proportionality." BR 26-28.

Cornish is looking through the wrong end of the telescope. The rule to be applied does not depend upon labeling, but upon the nature of the claims and the outcome of the trial. In the simplest cases, the affirmative judgment rule applies allowing fees to the party receiving an affirmative judgment in its favor. *Marassi*, 71 Wn. App. at 915. A more complex rule applies to a more complex case: "If neither party wholly prevails then the party who substantially prevails is the prevailing party, a determination that turns on the extent of the relief afforded the parties." *Id.* at 916. If both prevail on major issues, neither receives attorney fees: "however, if both parties prevail on major issues, an attorney fee award is not appropriate." *Id.* at 916.

But a proportionality approach is appropriate if the defendant has not counter-claimed, but has successfully defended on significant issues: “These general principles [described in the preceding paragraph], however, do not address situations in which a defendant has not made a counterclaim for affirmative relief, but merely defends against the plaintiff’s claims.” *Id.* at 916. In such a case, the Court follows a proportionality approach (*id.* at 917):

We hold that when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate. A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon. The fee awards are then offset.

Under *Marassi*, the Court does not employ a “substantially prevailing” rule because the parties used that term in their contract, or a “proportionality” rule because the parties used that term. Rather, the Court employs a substantially prevailing party approach if neither party wholly prevails, and a proportionality approach where multiple and distinct contract claims are at issue, especially where the defendant successfully defeats some, but not all, of the plaintiff’s claims. This is apparent from *Marassi* itself. The parties in *Marassi* did not contract for a “proportionality rule.” Rather, they contracted for an award of attorney fees to “the successful party.”

*Id.* at 913. Obviously, this Court defined “success” for attorney fee purposes in terms of proportionality. This Court subsequently applied the **Marassi** proportionality approach to litigation under a lease providing that “the prevailing party is entitled to reasonable attorney fees.” **Transpac Dev. Inc. v. Oh**, 132 Wn. App. 212, 217, 130 P.3d 892 (2006).

The fact that this Court applied the proportionality rule to a “successful party” attorney fee clause in **Marassi** and a “prevailing party” clause in **Transpac** shows that Cornish is wrong when it argues that the Court should not apply a proportionality approach unless the contract expressly calls for a proportionality approach. An unpublished decision by a federal trial judge (BRC/E 26) is not persuasive authority for departing from this Court’s decisions in **Marrasi** and **Transpac**.

**b. The *Marassi* proportionality rule applies here.**

The actual holding of **Marassi** is at 71 Wn. App. 917:

We hold that when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate. A proportionality approach awards the plaintiff attorney fees for the claims it prevails upon, and likewise awards fees to the defendant for the claims it has prevailed upon.

The fee awards are then offset.

Cornish seizes upon the word “several”, arguing that it means more than two:

*See The American Heritage Dictionary of the English Language* (4<sup>th</sup> ed.) 2009 (defining “several” to mean “being of a number **more than two or three** but not many”) (emphasis added).

BRC/E 31. Cornish has quoted the definition of “several” when used as a plural pronoun:

an indefinite number more than two and fewer than many <  
~ of the alumni have served on the board of trustees . . . . >  
< goes to the store for oranges and purchases ~ >.

**Webster’s Third New International Dictionary** p. 2080 (1993).

When used as an adjective, several can mean “more than one” or “consisting of an indefinite number more than two and fewer than many usu. of the same class or group < were around 75 . . . men present but only ~ women . . . >. *Id.*

The **Marassi** case refers to “several distinct and severable claims,” clearly calling for claims of a different or distinct class, which rules out Cornish’s proposed definition of “several” and points to Webster’s definition of “more than one.”

More to the point, the issue is whether the contract breaches are sufficiently distinct that they should be treated separately. That is certainly the case here, since the sublease was between Etherington and Cornish, and involved totally distinct obligations

from the option to purchase, which was between Cornish and Virginia Limited. This Court applied the proportionality rule in **Marassi**, which involved two claims, the landlord's claim for rent due and the tenant's claim for wrongful eviction. This was "more than one" claim, but certainly not "more than two or three", as Cornish argues.

In addition to arguing that its two claims are not "several" claims, Cornish seems to argue that they are not "distinct." BRC/E 31-32 (citing **Silverdale Hotel Assocs. v. Lomas & Nettleton Co.**, 36 Wn. App. 762, 677 P.2d 773 (1984), which it characterizes as a suit "on a single breach of contract with several damages theories . . ." (quoting **Marassi**, 71 Wn. App. at 917). *Id.* at 31 n.11.) To the contrary, Cornish has previously argued in its motion to change the trial date that its two claims are distinct: "Plaintiff Cornish College brought this lawsuit in pursuit of two distinct but related claims, both arising from the defendants' breach of the parties' Commercial Sublease with Option to Purchase." CP 2055. The Court should reject Cornish's flip flop of convenience.

**c. Unfairness or injustice is not an element of the *Marassi* rule.**

Cornish falls into a classic error when it ignores the stated holding of the Court and seizes upon language that led to the holding. This Court said, “[w]e hold that when the alleged contract breaches at issue consist of several distinct and severable claims, a proportionality approach is more appropriate.” 71 Wn. App. at 917. That is the holding of *Marassi*.

Cornish seizes upon language specific to the *Marassi* case, misinterpreting it as a holding (71 Wn. App. at 916):

In the case at hand, the Marassi’s did receive an affirmative judgment, but only on 2 of the original 12 claims. In this circumstance, we believe that application of the net affirmative judgment rule or “substantially prevailing” standard does not obtain a fair or just result.

This was a general observation by the Court, explaining why the proportionality approach applies in a case like *Marassi*. It is not part of the holding of *Marassi* and it is not part of the test.

Moreover, Cornish’s entire argument is just another variation of its effort to pierce the veil of the limited partnership. Cornish argues here, as it argues over and over in its brief, that Etherington should be held liable merely because he was the managing partner of the limited partnership that was the member of Virginia Limited.

Cornish's misdirected argument does not become any more persuasive by repetition.

Cornish repeats its error when it argues that the proportionality rule is only used in "extreme" situations." BRC/E 35. This was not a holding of *Marassi* and it is not a requirement.

Cornish argues that the Court should not use a proportionality approach because some of the attorney fees incurred by Cornish's attorneys cannot clearly be assigned to one claim or the other. BRC/E 35-41. Perhaps there are some fee entries that would be difficult to segregate, but the fact that some fees overlap does not mean that the Court should throw everything together in one big slush bucket. Cornish made no effort whatsoever to segregate its fees and there is no finding that the fees cannot be segregated.

**5. The Court should reverse the fee award and remand for recalculation of attorney fees under the *Marassi* proportionality rule.**

Cornish argues that the Court should ignore the trial judge's error in refusing to follow the *Marassi* approach because, "[o]nce a parties' [sic] entitlement to fees is established, the trial court's finding of the correct *amount* of fees to award is highly discretionary, entitled to great reference." BRC/E 42 (emphasis in

original). This argument is not only incorrect, it is contrary to the standard of review stated earlier in Cornish's brief: "A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." BRC/E 16 (quoting *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009)). There are no findings that justify the award of fees. CP 1160-61. The conclusions of law erroneously refuse to apply the proportionality analysis of *Marassi* and erroneously conclude that Cornish substantially prevailed against Etherington. CP 1161-62. These legal errors were an abuse of discretion and require reversal.

**C. Etherington again adopts the arguments of Virginia Limited regarding wrongful eviction.**

Etherington's opening brief simply adopted Virginia Limited's arguments regarding wrongful eviction without offering any additional argument. Cornish has chosen to devote seven pages of its response to Etherington to argue against Virginia Limited. BRC/E 42-49. Etherington again adopts Virginia Limited's reply.

**D. The Court should not rely on any finding of fact unsupported by substantial evidence.**

Cornish has failed to identify any substantial evidence supporting FF2 and 18, to which Etherington assigned error and argued the lack of evidence.

**E. Etherington is entitled to recover attorney fees incurred in this appeal.**

Cornish argues that if the Court finds that Etherington is entitled to an award of fees on appeal, the trial court should determine the proper amount of such award. BRC/E 49-50. The argument is unsupported and illogical. If Etherington prevails on appeal, this Court is in the best position to determine fees on appeal, to which Etherington will be entitled.

### **CONCLUSION**

Cornish cannot defend this judgment on any logical or legal ground. The Court should reject Cornish's resort to insupportable argument and misapplication of precedent. The Court should reverse, award and determine fees to Etherington on appeal, and remand for a redetermination of Etherington's fees for the prior proceedings in the trial court. The Court should also reverse the award of wrongful eviction damages against Etherington.

RESPECTFULLY SUBMITTED this 15 day of April, 2010.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 15 day of April 2010, to the following counsel of record at the following addresses:

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