

No. 63790-1, consolidated with 63792-4-1

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

---

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

Petitioner/Appellants,

v.

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

Respondent.

BRIEF OF RESPONDENT CORNISH COLLEGE IN RESPONSE TO  
BRIEF OF APPELLANT DONN ETHERINGTON, JR.

---

YARMUTH WILSDON CALFO PLLC

Richard C. Yarmuth, WSBA No. 4990  
Rachel L. Hong, WSBA No. 33675  
818 Stewart Street, Suite 1400  
Seattle, Washington, 98101

Attorneys for Respondent Cornish  
College

**ORIGINAL**

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. COUNTER-STATEMENT OF THE CASE.....	4
A.    Cornish, Virginia Limited and Donn Etherington Execute the Commercial Sublease and Option Agreement.....	4
B.    Breach of the Option Agreement and Sublease and the Filing of this Lawsuit.....	6
III. AUTHORITY .....	16
A.    The Trial Court’s Award of Attorneys’ Fees and Costs Against Appellants Virginia Limited and Donn Etherington, Jr. Should Be Affirmed .....	16
1.    Standard of Review.....	16
2.    Cornish is the Only “Substantially Prevailing Party” in this Litigation and Therefore is Entitled to an Award of Attorneys’ Fees Against Virginia Limited and Etherington.....	17
3.    The Proportionality Rule Does not Apply to Award of Fees .....	25
a.    The Parties Explicitly Selected the “Substantially Prevailing Party” Rule.....	25
b.    The Proportionality Rule is Applicable only Where There are Several Distinct and Severable Claims and the Substantially Prevailing Party Rule is Unjust.....	28
(1)    This case does not involve “several distinct and severable claims” .....	29

**TABLE OF CONTENTS (cont'd)**

	<b><u>Page</u></b>
(2) Application of the substantially prevailing party rule does not produce an unfair or unjust result.....	33
c. The Proportionality Rule Should be Used Only in “Extreme” Situations.....	35
4. The Award Against Both Appellants Was Also Proper Because Once Entitlement to Fees is Found, the Amount Awarded Is Highly Discretionary.....	41
B. Appellants’ Eviction of Cornish Was Wrongful.....	42
C. Cornish Requests that the Court Award It All Attorneys’ Fees Incurred on Appeal; and Deny Etherington’s Request for the Same .....	49
IV. CONCLUSION.....	50

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<i>Blair v. Washington State University</i> , 108 Wn. 2d 558, 740 P.2d 1379 (1987).....	34
<i>Cherberg v. Peoples Nat. Bank of Washington</i> , 88 Wn. 2d 595, 564 P.2d 1137 (1977).....	45
<i>City of Blaine v. Golder Associates, Inc.</i> , 2006 WL 3000131 (W.D. Wash. 2006).....	26, 27, 31, 32
<i>Dugan v. R.J. Corman R. Co.</i> , 344 F.3d 662 (7th Cir. 2003) .....	17
<i>Eagle Point Condo. Owners Ass'n v. Coy</i> , 102 Wn. App. 697, 9 P.3d 898 (2000).....	19
<i>Grayson v. Platis</i> , 95 Wn. App. 824 , 978 P. 2d 1105 (1999).....	19
<i>Guillen v. Contreras</i> , 147 Wn. App. 326 , 195 P.3d 90 (2000).....	16, 20
<i>Klaas v. Haueter</i> , 49 Wn. App. 697 , 745 P.2d 870 (1987).....	19
<i>Klontz v. Puget Sound Power &amp; Light Co.</i> , 90 Wn. App. 186, 951 P.2d 280 (1998).....	48
<i>Marassi v. Lau</i> , 71 Wn. App. 912 , 859 P. 2d 605 (1993).....	passim
<i>Marine Enterprises, Inc. v. Security Pacific Trading Corp.</i> , 50 Wn. App. 768 , 750 P.2d 1290 (1988).....	19, 26, 27
<i>Noble v. Safe Harbor Family Preservation Trust</i> , 167 Wn. 2d 11, 216 P.3d 1007 (2009).....	16

**TABLE OF AUTHORITIES (cont'd)**

	<u>Page</u>
<i>Owners Ass'n v. Coy</i> , 102 Wn. App. 697 , 9 P.3d 898 (2000) .....	17
<i>Riss v. Angel</i> , 131 Wn. 2d 612 (1997) .....	18, 24, 25, 32
<i>S.L. Rowland Const. Co. v. Beall Pipe &amp; Tank Corp.</i> , 14 Wn. App. 297, 540 P.2d 912 (1975) .....	47
<i>Silverdale Hotel Assocs. v. Lomas &amp; Nettleton Co.</i> , 36 Wn. App. 762, 677 P.2d 773 (1984) .....	31
<i>Taliesen Corp. v. Razore Land Co.</i> , 135 Wn. App. 106, 144 P.3d 1185 (2006) .....	passim
<i>Transpac Dev., Inc. v. Oh</i> , 132 Wn. App. 212 130 P.3d 892 (2006) .....	27
<i>U.S. Bancorp Community Dev. v. 1000 Virginia Limited Partnership</i> , <i>et al.</i> , King County Superior Court No. 09-2-21115-9 .....	5
 <b>Rules</b>	
RAP 2.5 .....	49
RAP 18.1 .....	49
 <b>Other</b>	
<i>The American Heritage Dictionary of the English Language</i> (4 <sup>th</sup> ed.) 2009 .....	31

## I. INTRODUCTION

At the conclusion of 17 months of litigation, which included multiple motions and a two-and-a-half-day trial, the trial court awarded Cornish College of the Arts (“Cornish”), the substantially prevailing party, the full measure of its attorneys’ fees and costs against Appellants 1000 Virginia Limited Partnership (“Virginia Limited”) and Donn Etherington, Jr. Appellants now seek reversal of this award—the only award that would make Cornish whole—and remand to the trial court for a recalculation of fees under a rule that the parties did not bargain for, and that is unnecessary, unjust and unworkable under these circumstances.

The Commercial Sublease with Option to Purchase (“Sublease,” “Option Agreement,” or “Agreement”) on which this lawsuit is predicted contains an attorneys’ fees provision providing for an award of fees to the “substantially prevailing party” in any action brought to enforce that Agreement. Notwithstanding the parties’ explicit selection of the “substantially prevailing party” rule, Appellants Virginia Limited and Etherington ask the Court to apply the so-called “proportionality rule,” crafted by this Court for use in exceptional cases in which the “substantially prevailing party” is “extremely subjective and difficult to assess,” and where application of the “substantially prevailing party” rule

would be unfair and unjust. *See Marassi v. Lau*, 71 Wn. App. 912, 916-17, 859 P. 2d 605 (1993).

This is not such a case. As Cornish has repeated again and again, this case was brought to enforce two related rights in the parties' Agreement: to purchase property located at 1000 Virginia Street in Seattle, Washington ("Property") in accordance with the terms of the Option Agreement; and to occupy the Leased Premises (the bottom two floors of the Property) in accordance with the terms of the Sublease. The Court's final "Judgment for Plaintiff" awarded Cornish victory on both counts. If and when Appellants comply with the judgment entered, and if Cornish collects the full amount of attorneys' fees it seeks, Cornish will be made 100% whole. Which party "substantially prevailed" is not subjective or difficult to assess, let alone "extremely" so.

Nor does application of the "substantially prevailing party" rule produce an unfair or unjust result. Although the trial court held that Etherington personally did not possess an ownership interest in the Property and thus was not liable to Cornish for its sale, the disastrous consequences of Etherington's reckless and cavalier actions on behalf of himself and Virginia Limited, the owner of the Property, permeate this lawsuit. He is the managing agent, beneficial owner, and the sole member of the sole partner of Virginia Limited. *See infra* § II.A. Cornish's

dealings with Virginia Limited have been exclusively through Etherington. Throughout the parties' relationship, Etherington repeatedly referred to the Property and to the actions of Virginia Limited as his own. And Virginia Limited, which the trial court found acted in bad faith in its dealings with Cornish, is now insolvent, and will in all probability not be able to satisfy the fee award assessed against it. Under these circumstances, the trial court was correct in finding that application of the parties' chosen "substantially prevailing party" rule was fair and just.

While application of the proportionality rule may be required in some cases to ensure a just result, its use in all but the most exceptional cases is unnecessary, unfair, and unduly burdensome. In this case in particular, in which the "substantially prevailing party" rule was chosen by the parties and adequately takes into account less-than-total victory; where Etherington's deliberate actions on his own behalf and on behalf of his company caused Cornish massive harm; and where a fair and accurate apportionment of fees between the two claims would be impossible, Appellants' request for remand to the trial court for an evaluation of the parties' fee request under the proportionality rule should be rejected, and the trial court's award of fees should be affirmed.<sup>1</sup>

---

<sup>1</sup> Appellants seek only remand with instructions to the trial court to evaluate each party's entitlement to fees under the *Marassi* proportionality rule. They have not requested that

## II. COUNTER-STATEMENT OF THE CASE<sup>2</sup>

### A. **Cornish, Virginia Limited and Donn Etherington Execute the Commercial Sublease and Option Agreement**

Appellant Donn Etherington, Jr. is, and/or at all times relevant to this lawsuit was, the sole member of Virginia-Terry, LLC, which is the sole partner in Virginia Limited, the owner of the property located at 1000 Virginia Street in Seattle, Washington (“Property”). CP 1377; RP 303:14-21; RP 241:25-242:7; Supp. CP\_\_\_\_.<sup>3</sup> Although Etherington has stated that he has occasionally consulted with his wife regarding the Property, he is the only representative of Virginia Limited with whom Cornish has dealt in connection with the matters giving rise to this lawsuit. Supp. CP\_\_\_\_; *See, e.g.*, RP 236:19-236:6; 240:19-20; CP 1248.

Appellants have repeatedly claimed that Virginia Limited is insolvent or on the brink of insolvency, and that the Property is the

---

this Court reverse the trial court’s finding that Cornish was the substantially prevailing party against Virginia Limited, and have not requested that this Court find either Virginia Limited or Etherington are entitled to an award of fees incurred below, or in what amount. They have also not challenged the reasonableness of Cornish’s attorneys’ rates or the number of hours billed or, apart from fees attributable to Virginia Limited’s foray into bankruptcy court, of the amount awarded to Cornish under the “substantially prevailing party” standard.

<sup>2</sup> A complete Counter-Statement of the Case, incorporated herein by reference, is included in Cornish’s Brief of Respondent filed in response to Brief of Appellant 1000 Virginia Limited Partnership. To minimize duplication, this Counter-Statement of the Case is a broad overview and contains such additional facts as are directly relevant to Etherington’s appeal.

partnership's sole asset. CP 1377; RP 303:14-21. In fact, after this lawsuit was filed, Virginia Limited, by and through its managing agent Etherington, bought out Virginia-Terry LLC's limited (and only) partner, U.S. Bancorp Community Development ("USBCD"), for \$900,000, paid half in cash and half by a \$450,000 promissory note secured by the Property. RP 306:14-25. On June 1, 2009, USBCD filed a lawsuit against Virginia Limited and Etherington, alleging that that promissory note is in default. *See U.S. Bancorp Community Dev. v. 1000 Virginia Limited Partnership et al.*, King County Superior Court No. 09-2-21115-9.<sup>4</sup>

Etherington is an experienced real estate developer, specializing in low-income housing; 1000 Virginia—a mixed-use building comprised of two lower floors of commercial space and four upper floors of apartments—is his third low-income housing project in the Seattle area. CP 1715-18; 1722-26; Supp. CP \_\_\_\_\_. He has testified that he acquired an interest in 1000 Virginia in 1989, for development as low-income housing. Supp. CP \_\_\_\_\_. He continues "as of today to have an interest in, either

---

<sup>3</sup> Unless otherwise noted, all references to the Report of Proceedings are to the trial, April 21-23, 2009.

<sup>4</sup> Cornish was also named as a defendant in that lawsuit, and has counter/cross-claimed against USBCDC, Virginia Limited and Etherington that Virginia Limited's \$900,000 purchase of USBCD's partnership interest was a fraudulent transfer that should be voided.

directly or through entities that [he] own[s] or control[s], in 1000 Virginia.” Supp. CP \_\_\_.

In 2004, Etherington emailed Cornish College “I have decided to sell my property.” CP 1248. On April 29, 2005, Etherington, Virginia Limited and Cornish executed the “Commercial Sublease with Option to Purchase” (“Sublease,” “Option Agreement” or “Agreement”), which granted Cornish an option to purchase the Property from Virginia Limited for \$3 million, with a closing date of July 1, 2008. CP 1208-21. Under the Sublease portion of the Agreement, Etherington also granted Cornish the right to occupy the bottom two floors of the Property (“Leased Premises”) through December 2008. CP 1252-53. The Sublease is structured such that Cornish subleased the Leased Premises from Etherington, who in turn was leasing the Property from Virginia Limited. Etherington signed the Agreement twice, on behalf of Virginia Limited as owner, and on his own behalf, as landlord. CP 1221.

**B. Breach of the Option Agreement and Sublease and the Filing of this Lawsuit**

It became clear throughout the course of 2006 and 2007 that the value of the Property had increased beyond \$3 million. *See, e.g.*, CP 1626. At the same time, Etherington claims to have discovered certain costs and complications associated with clearing title to the Property (a

prerequisite to sale under the Option Agreement), the true extent of which he had grossly misrepresented to Cornish prior to execution of the Agreement. *See* CP 1342:7-11; 1343; 1217, ¶ 4.6; 1249. Specifically, since 1992 the Property had been subject to certain restrictions whereby the owner was required to provide 61 units of low-income housing at the Property over a period of years, in exchange for which Virginia Limited received approximately \$400,000 in IRS tax credits per year for ten years. Supp. CP \_\_\_\_\_. During negotiations over the Option Agreement, Etherington had expressly represented to Cornish that the obligation to provide low-income housing would end December 31, 2007, the year before closing. CP 1249. But as Cornish discovered sometime in 2006, the low-income housing restrictions would in fact run for an additional fifteen years, through 2022. CP 1342:7-11; 1343.

In January 2007, Etherington, on behalf of Virginia Limited, rejected Cornish's attempt to extend the option period as provided in the Option Agreement; one year later, Etherington's attorney rejected Cornish's tender of payment attempting to exercise the option. CP 1382, ¶ 21; 1637.

In the meantime, in late 2007 and early 2008, just as the fifteen-year period related to the IRS tax credits was set to expire, Etherington indicated that he intended to empty the building of tenants, including the

61 units of low-income residents and Cornish. CP 2290-91; RP 59:2-10. In a letter dated January 31, 2008, Virginia Limited advised the residential tenants that the building was in poor condition and ordered the them to vacate their homes immediately. CP 1757. Those residents living at 50% or less of the area median income were entitled to a relocation payment; half was paid by Etherington, and the other half by the City of Seattle. RP: 13-17. Those who did not qualify for such payment (*i.e.* were living above 50% of the median income), in Etherington's words, "were left to fend for themselves." RP 302:19.

And on April 3, 2008, Etherington as landlord delivered to Cornish a "Notice of Lease Termination," ordering Cornish to vacate the Leased Premises, nine months before the end of its lease term. CP 2152. As set forth more fully in the Brief of Respondent Cornish College in Response to Brief of Appellant 1000 Virginia Limited Partnership ("Cornish Brief in Response to Virginia Limited"), § II.A.5.a., Etherington's decision to evict Cornish before the end of its lease term caused massive disruption of its academic programs. Cornish incurred millions of dollars in damages in identifying, leasing and building out space necessary to replace 1000 Virginia on an extremely short timeline. *See* Cornish Brief in Response to Virginia Limited at 17.

The reason Etherington gave for Cornish's eviction was that the building had become unsafe for occupancy; despite having received over \$2.5 million in settlement of a defective construction lawsuit, Virginia Limited spent almost none of it on repairs, and the building had continued to deteriorate.<sup>5</sup> Supp. CP \_\_\_\_\_. But Virginia Limited's own expert testified that he "did not feel the building was near collapse," and Cornish's structural engineer opined "there did not appear to be any significant sign of deterioration and it appears that the two-story base structure has the required elements for a complete gravity system." CP 2174; 2180. In fact, at various times Etherington himself has admitted that **"There was never any questions about habitability of the units themselves."** Supp. CP \_\_\_\_\_. As he stated in deposition just months after the eviction:

Q. What did you believe was the danger, then, to Cornish?

A. The report from the structural engineer believed that the danger was that the stucco may peel off the exterior of the building and strike somebody in and around the structure.

---

<sup>5</sup> Etherington has claimed that Virginia Limited did not have the funds to repair the building. The evidence demonstrates, however, that Etherington failed to investigate any remediation or mitigation option that would have been within Virginia Limited's budget. Supp. CP \_\_\_\_ ("Q. After you received the sums from settlement of the construction litigation, did you follow up with [demolition contractor] Western Exteriors . . . to determine whether the work that's described in this estimate was work that could have been done to repair 1000 Virginia? A. No.").

**Q. Were you ever concerned of the danger that the top four floors would implode on the bottom two and create a problem?**

**A. No.**

Supp. CP \_\_\_\_.

Even if there had been a threat that the upper four floors could collapse, Etherington testified he could have eliminated that danger by demolishing the top four floors of rotten wood-frame housing, which the Option Agreement required in any event. Supp. CP \_\_\_\_ (“Q. Tell me what, in your mind, demolition of the top four floors would have accomplished. A. It would have removed the uncertainty of the deterioration of the structure, and the uncertainty of the safety for the public.”); CP 1219, ¶ 4.22 (“If the Purchase Option is exercised, Virginia Limited shall commence . . . demolition of the Property above the second floor, all at Virginia Limited’s sole cost and expense.”). In fact, Cornish proposed to Etherington that he undertake such demolition as an alternative to evicting Cornish. Supp. CP \_\_\_\_\_. Etherington rejected this proposal.<sup>6</sup> CP 1745-46. Had he agreed to demolish the upper four floors and allowed Cornish to continue to occupy the Leased Premises until resolution of this lawsuit, he and Virginia Limited could have avoided

causing Cornish over \$2.4 million in damages resulting from the wrongful eviction and the failure to meet the Option Agreement obligations, and could have continued to collect rent from Cornish. *See* RP 15-23. Instead, Etherington forced Cornish to surrender the Leased Premises.

On January 20, 2008, Cornish filed this lawsuit against both Etherington and Virginia Limited to enforce the two distinct but related rights granted under the Agreement: to purchase the Property and to occupy the Leased Premises. The complaint, as amended, set forth seven claims. The first three (for specific performance, damages, and declaratory judgment) were alternative theories of recovery related to Cornish's right to purchase the Property in accordance with the Option Agreement. CP 1198-1200. The last three claims (for breach of contract and the covenant of quiet enjoyment, and for nuisance) were alternative theories of recovery related to Cornish's right to occupy the Leased Premises through December 2008 in accordance with the Sublease. CP 1202-05. Cornish also sought a preliminary injunction related to enforcement of both of its rights under the Option Agreement and the Sublease. CP 1200-02. Cornish later amended the Complaint to add

---

<sup>6</sup> Etherington apparently did consider the demolition option during this time, obtaining his own estimate for the project. He decided not to demolish after conducting his own "cost-benefit analysis." Supp. CP \_\_\_.

allegations related to Etherington's actual eviction of Cornish from 1000 Virginia. CP 12-13, ¶¶ 26-28.

In a series of motions before trial, Cornish moved for and was granted summary judgment affirming its right to purchase the Property in accordance with the terms of the Option Agreement, and specific performance of the option. Cornish was also granted summary judgment on its claim for wrongful eviction against both Virginia Limited and Etherington, and won summary judgment dismissal of Virginia Limited's counterclaims against it. In addition, Cornish prevailed on nearly every motion that was filed in this case. *See, inter alia*, Order Granting Cornish's Motion for Change of Trial Date (CP 2130-31); Order Denying defendants' Motion for Change of Trial Date and Amendment of Case Schedule (CP 98-99); Order Denying Defendants' Motion for Stay and Accept Property as Security (CP 2353-54); Order Granting Cornish's Motion to Strike Answer to Second Amended Complaint & Counterclaims, and Order Denying defendants' Motion for Leave to Amend (CP 409-11).

Cornish also won unequivocal victories before both this Court of Appeals and the U.S. Bankruptcy Court, in detours Appellants forced this lawsuit to take. On October 2, 2008, Etherington and Virginia Limited filed a "Notice of Appeal" of the Court's Order of Specific Performance.

CP 2058. After voluminous briefing and oral argument on cross-motions, the Court of Appeals rejected the putative appeal and denied the motion for discretionary review on November 20, 2008. CP 66-67. And Cornish incurred substantial fees in connection with Appellants' failed and frivolous efforts to avoid enforcement of the Agreement by filing a petition for bankruptcy in U.S. Bankruptcy Court, which U.S. Bankruptcy Judge Samuel Steiner found had been filed in bad faith. CP 3056. These efforts required Cornish to retain bankruptcy counsel with the law firm of Lane Powell at a cost of \$55,559.30, and included multiple court appearances and motions, on all of which Cornish prevailed, and an eventual voluntary dismissal. CP 3117-37.

On April 24, 2009, following the two-and-a-half-day bench trial, the trial court rendered its decision on the amount of damages resulting from Appellants' breaches of the Option Agreement and the Sublease, awarding Cornish over \$2.4 million, the entire amount—in addition to specific performance and except for attorneys' fees—necessary to make Cornish whole. CP 1039-41.

At the conclusion of trial, Appellants moved for dismissal of Cornish's fifth, sixth and seventh causes of action, asserting that no evidence was adduced and no damages were claimed therefor. RP 428-29. Cornish did not object, and the court granted the motion. Cornish has not

appealed dismissal of these causes of action. Etherington then moved for dismissal of the first cause of action, for specific performance, “on the ground that they did not own the property that is the subject of the option to sell.” RP 428:19-25. Etherington argued that since he personally had “no interest in the real property, they cannot be subject to a specific performance order to convey. They have nothing they can convey.” RP 432:16-19. The court dismissed the first cause of action for specific performance against Etherington, finding he lacked a personal ownership interest in the 1000 Virginia Property. Cornish has not appealed this ruling either.

The court did not “absolve” Etherington of responsibility for his actions, and in its Findings of Fact and Conclusions of Law repeatedly referred to Etherington’s actions and inactions giving rise to his and his company’s liability:

- “In 2005 the defendant, that is the defendant partnership, but also through its managing agent, Mr. Etherington, solicited Cornish as a buyer and proposed a price.” April 24, 2009, RP 5.
- “defendants developed subsidized housing in exchange for certain tax benefits and the subject property.” *Id.* at 3.
- “those proceeds [from the insurance settlement] were not used by the defendants to repair the structure.” *Id.* at 4.
- “defendants did not intend to repair the residential portion.” *Id.*

- “the defendants appeared to have been planning to escape the low income housing obligations and to obtain market value for the real estate.” *Id.* at 4-5.
- “the defendants wish[ed] to sell at market rate.” *Id.* at 8
- “the defendants did not honor the obligation to the low [income] tenants, to the commercial tenant Cornish, to the Washington State Housing and Finance Commission or Cornish as purchaser under the option agreement.” *Id.* at 9.

The court entered the “Judge for Plaintiff” in this matter on June 18, 2009. CP 1039-41. The Judgment summarized and reaffirmed Cornish’s pretrial and trial victories on the granting of a period of grace, on specific performance, on wrongful eviction, on Virginia Limited’s counterclaims, and on Cornish’s equitable damages. CP 1040-41. In accomplishing these results, Cornish through trial incurred approximately \$624,427.60 in attorneys’ fees and costs, including \$568,868.30 to the law firm of Yarmuth Wilsdon Calfo PLLC, and \$55,559.30 to the law firm of Lane Powell in connection with 1000 Virginia’s bankruptcy petition. *See* CP 3044-47. These figures include a 15% and 10% discount given by the law firms, respectively, in recognition of Cornish’s nonprofit status. CP 3046; 3119-20.

At all times prior to this appeal, Etherington and his company were represented by the same attorneys at the law firm of Ryan, Swanson & Cleveland, and were not billed separately. CP 788. In early 2009, due to

the “financial straits of Virginia Limited,” Etherington entered into a fee arrangement with Ryan Swanson by which he agreed to be personally liable for all litigation costs of Virginia Limited. CP 790. Appellants have repeatedly claimed Virginia Limited is insolvent or on the brink of insolvency. *See, e.g.*, RP 303:14-21.

### III. AUTHORITY

#### A. **The Trial Court’s Award of Attorneys’ Fees and Costs Against Appellants Virginia Limited and Donn Etherington, Jr. Should Be Affirmed**

##### 1. **Standard of Review**

“In order to reverse an attorney fee award made pursuant to a statute or contract, an appellate court must find the trial court manifestly abused its discretion. A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.” *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn. 2d 11, 17, 216 P.3d 1007, 1010 (2009).

Whether a party is a “prevailing party” is a mixed question of law and fact, to be reviewed under an error-of-law standard. *Eagle Point Condo. Owners Ass’n v. Coy*, 102 Wn. App. 697, 713, 9 P.3d 898 (2000). In addition, “the use of the word ‘substantially’ to modify ‘prevailing’ implies that the trial judge has some discretion in deciding whether a party

prevailed significantly enough to become entitled to the mandatory attorney fee award.” *Guillen v. Contreras*, 147 Wn. App. 326, 335, 195 P.3d 90 (2000). Once entitlement to fees is established, the amount of the court’s award will be disturbed only on a finding of abuse of discretion. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 141, 144 P.3d 1185, 1204 (2006).

As set forth in the Cornish Brief in Response to Virginia Limited, this Court may take into account all proceedings below, whether before or at trial, in its evaluation of all matters raised in this appeal. Cornish explicitly incorporates herein Section III.A.1.b. of that brief by reference.

**2. Cornish is the Only “Substantially Prevailing Party” in this Litigation and Therefore is Entitled to an Award of Attorneys’ Fees Against Virginia Limited and Etherington**

Cornish seeks an award of fees and costs pursuant to a provision in the Agreement, which states:

In the event that Cornish College, Etherington, or Virginia Limited shall commence proceedings or institute action to enforce any rights hereunder, the venue for any such proceeding or action shall be in King County, Washington, and the substantially prevailing party shall be entitled to costs and reasonable attorney’s fees, including those for appeal.

CP 1220-21, ¶5.9 (“Fees Provision”).<sup>7</sup> On June 18, 2009, this Court entered its “Judgment for Plaintiff,” confirming that:

[A]t the conclusion of the trial, the Court rendered an oral decision in favor of Plaintiff Cornish College of the Arts on its claims for damages resulting from defendants’ failure to honor obligations contained in the parties’ Commercial Sublease with Option to Purchase.

CP 1040. The Judgment also reiterated that “defendant Virginia Limited shall honor Cornish’s right to exercise the option and purchase the 1000 Virginia property.” *Id.* The second, fifth, sixth and seventh causes of action were dismissed against both defendants, as was the cause of action for specific performance, against Etherington. CP 1041.

Which party “substantially prevails” is “a determination that turns on the extent of the relief afforded the parties.” *Marassi*, 71 Wn. App. at 916. This Judgment represents the culmination of 17 months of litigation, during which Cornish was awarded all of the substantive relief it sought. Based upon the extent of relief afforded Cornish, the trial court correctly deemed it the substantially prevailing party in this lawsuit, and properly held it was entitled to an award of its attorneys’ fees. *See Riss v. Angel*, 131 Wn.2d 612, 633-34 (1997) (“Plaintiffs will essentially be able to build

---

<sup>7</sup> Etherington repeatedly refers to the attorneys’ fees provision here as “boilerplate,” implying that it is therefore less worthy of enforcement. This of course is not the law. *See, e.g., Dugan v. R.J. Corman R. Co.*, 344 F.3d 662, 667 (7<sup>th</sup> Cir. 2003) (“[A] person is bound by all provisions in a contract, including standard provisions colloquially described as ‘boilerplate.’”).

the house they sought to have approved. The trial court correctly concluded that the Plaintiffs are prevailing parties.”). Indeed, Cornish has not appealed any of the trial court’s rulings; Appellants have appealed nearly all.

Etherington argues that Cornish’s status as the substantially prevailing party must be evaluated against each defending party separately. This is not the rule the Fees Provision prescribes; the provision names all three parties in a single breath and makes no distinction between or among them, though it easily could have. The only question presented by ¶ 5.9 of the Agreement is which of the three parties is the “substantially prevailing party.” Given the lack of ambiguity, it would be improper and unnecessary for the court to read an additional step into the evaluation of fees entitlement. *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 773, 750 P.2d 1290 (1988) (“Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed.”). Neither of the cases Etherington cites in support of his argument on this point involves interpretation of an unambiguous (or any) attorneys’ fees provision, and they are thus not on point. *See* Brief of Appellant Donn Etherington, Jr. (“DE App. Br.”) at 19, *citing Grayson v.*

*Platis*, 95 Wn. App. 824, 838, 978 P. 2d 1105 (1999); *Klaas v. Haueter*, 49 Wn. App. 697, 708, 745 P.2d 870 (1987).

And even if Cornish's entitlement to fees is assessed against each party separately, Cornish substantially prevailed against both Virginia Limited and Etherington, and thus is entitled to collect fees against both. As noted above, use of the word "substantial" "implies that the trial judge has some discretion in deciding whether a party prevailed significantly enough to become entitled to the mandatory attorney fee award." *Guillen*, 147 Wn. App. at 335. It was not an abuse of this discretion (or an error of law) for the court to determine that Cornish substantially prevailed over Virginia Limited *and* Etherington. The court was familiar with the claims Cornish brought, and the factual, legal and equitable issues and relative importance of each. The court was advised, for example, that for the first half of 2008, Cornish was intensely focused on remaining at 1000 Virginia through the end of its academic year: that Cornish had good reason to believe the building was safe, but as a school, had no choice but to defer to Etherington's having played the "safety card;" and that Cornish had suggested demolition, which would have drastically reduced Cornish's damages by allowing Cornish to remain in the Leased Premises—an offer that Etherington rejected. *See supra* § II.B.; RP 65:14-66:7; 66:8-13; CP 1745-46. The court heard, through the undisputed testimony of Cornish

COO Vicki Clayton, about the intensely disruptive impact of Etherington's actions on the College; about the burden of scrambling to find 28,000 square feet of replacement space in an extremely short amount of time; and about all of the intangible consequences of the wrongful eviction. CP 238-39, ¶ 3; RP 67:8-68:2; 70:10-71:6; 85:15-87:15; 91:15-92:24.

And the court was familiar with the equities of this case: of Etherington's decision, on behalf of Virginia Limited, not to use any of the \$2.5 million received in settlement of the defective construction lawsuit to repair the defects in the building, which ultimately led to Cornish's eviction; and of the impact of Etherington's decision, on behalf of Virginia Limited, to evict 61 units of low-income housing, leaving many tenants with nowhere to go. CP 1030; *see* RP 59:13-20 ("Cornish was receiving physical visits in my office by some of the tenants asking, 'Can you please help me with the landlord? I don't know what I'm going to do. I don't know where to move to.'"). As the court found, "[d]efendants did not repair the building, and it appears defendants had no intention of doing so, as part of planned obsolescence for the units." *Id.* And the trial court was witness to Etherington's disrespect for the residents at 1000 Virginia, and

found that he had failed to meet his obligations not just to Cornish, but to those resident as well.<sup>8</sup> CP 1030, 1033.

The court also heard first-hand testimony regarding the degree of control Etherington exercised over Virginia Limited, and had access to all of the facts necessary to determine whether Etherington could truly be said to have “prevailed” in any meaningful sense when the company over which he maintains sole control and ownership was found liable for millions of dollars of damages. Having presided over multiple pretrial motions and oral arguments and the trial itself, the trial court was well-informed in its evaluation of the relative values of “the extent of the relief afforded the parties,” and its finding that “Cornish College, and no other party, was the substantially prevailing party in this lawsuit” was amply supported by the record and the law. CP 1162.

---

<sup>8</sup> This disrespect was apparent in Etherington’s testimony. *See, e.g.*, Supp CP \_\_\_\_\_. Regarding the common areas of the Property, he testified:

Q: Is [pest control] a routine service?

A. For this kind of occupancy, yes.

Q. Meaning?

A. Affordable housing, low income tenants, yes.

Q. And why would that be?

A. They’re – generally their sanitation habits are less than ideal.

Etherington urges this Court to assess whether Cornish substantially prevailed based upon (1) what percentage the dollar value of Cornish's recovery against him was of its total recovery, or (2) the number of theories of recovery brought compared to the number prevailed upon. DE App Br. at 17-18. But Etherington cites no legal support requiring adoption of either of these measures, and neither is compelling. Under the first measure, whether Cornish prevailed against Etherington would be evaluated according to how much his co-defendant lost; presumably, if the court had not awarded Cornish any damages against Virginia Limited, the \$69,600 award against Etherington would have unequivocally rendered Cornish the "substantially prevailing party" entitled to fees assessed against him. Such measure is arbitrary and has nothing to do with "the relief afforded the parties," and would produce unfair and inconsistent results. Under the second, a "substantially prevailing" party would be evaluated according to the number of theories of recovery stated in the complaint, not the substance of the parties' victories, ignoring the varying importance of the claims and the extent to which each was litigated (if at all), and a plaintiff's right to bring claims in the alternative would be unduly hindered.

Etherington's argument that the fees award is disproportionate to the judgment against him will not support reversal of the fees award. As

this Court acknowledged in *Taliesen Corp. v. Razore Land Co.*, “it is within the scope of the trial court’s discretion to award [a party] fees in an amount that greatly exceeds the underlying judgment.” 136 Wn. App. at 144. In *Taliesen*, this Court affirmed the trial court’s fees awards, where one defendant was assessed \$537,000 in attorneys’ fees on a \$3,400 judgment, and another was assessed \$500,000 in fees on a \$34,000 judgment. *Id.* at 118. The fact that Cornish’s fee award against Etherington was “10 times” the judgment against him will not support reversal of that award, particularly where Etherington’s “egregious [actions] permeated the history of” this case. *Id.* at 145.<sup>9</sup>

For these reasons, a party’s entitlement to fees is determined by the *substance* of the overall relief sought and received, not by a bean-counting of victories on individual theories of recovery. *Riss v. Angel*, 131 Wn.2d at 633-34 (awarding fees to plaintiffs, though defendants prevailed on some claims, because “Plaintiffs will essentially be able to build the house they sought to have approved”). Cornish was awarded all relief it sought in this lawsuit, and was limited only in which party it could seek some of that relief from. By contrast, the court merely found that Etherington did not have an ownership interest in the Property; he did not “prevail” when the

---

<sup>9</sup> *Taliesen* involved attorneys’ fees awarded under a statute, and is thus not in all ways on point. There is no reason, however, to limit its holding that the disproportionate size of

court found he was not bound to sell Cornish the Property, because that is not something he possessed in the first place. And the court unequivocally found Etherington liable for wrongful eviction, both on summary judgment and again at trial. CP 414-19; 1033, ¶ 18.7.

Having overseen the entire course of this lawsuit, including over a dozen motions and trial, the court evaluated Cornish's success according to the final judgment entered and the overall relief it was afforded. CP 1161-62 ("Cornish sought and was granted relief based on only two distinct claims. . . . Cornish College, and no other party, was the substantially prevailing party in this lawsuit."). This was well within its discretion and was correct as a matter of law. *See Riss*, 131 Wn. 2d at 633 (who is the "substantially prevailing party . . . depends upon the extent of relief afforded the parties.").

**3. The Proportionality Rule Does not Apply to Award of Fees**

**a. The Parties Explicitly Selected the "Substantially Prevailing Party" Rule**

The court in *Marassi* articulated three alternative rules for awarding attorneys' fees – the affirmative judgment rule, the substantially prevailing party rule, and the no prevailing party rule – and added a fourth, the proportionality rule. 71 Wn. App. at 915-17. As set forth above, the

---

the fees award and the judgment is not conclusive evidence of abuse of discretion.

Fees Provision in this case explicitly provided for an award of fees to the “substantially prevailing party.” CP 1220-21, ¶5.9. The plain terms of the Fees Provision are unambiguous, and under Washington law, “[w]here the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed,” and reliance on cases interpreting other fees provisions under other circumstances is not necessary or appropriate. *Marine Enterprises*, 50 Wn. App. at 774, citation omitted.

Nevertheless, Virginia Limited and Etherington ask the court to supplant the parties’ chosen attorneys’ fees provision with the “proportionality rule” set forth in *Marassi v. Lau*, 71 Wn. App at 916-17. Under that rule, each party is awarded fees related to the claims on which that party prevailed. *Id.* But application of this alternative rule is inappropriate in this case given the parties’ explicit selection of the substantially prevailing party rule in the Fees Provision. *See City of Blaine v. Golder Associates, Inc.*, 2006 WL 3000131, \* 3 (W.D. Wash. 2006) (“**[H]ad the parties intended to apply the proportionality approach from *Marassi v. Lau* to determine the prevailing party for purposes of an attorney’s fee award, they could have incorporated it into their 1998 agreement.** But, they did not. Instead, the parties expressly included a ‘substantially prevailing party’ standard, the meaning

of which is defined by the Washington Supreme Court in *Riss v. Angel*.”) (emphasis added, citations omitted); see also *Marine Enterprises*, 50 Wn. App. at 773. In *Marine Enterprises*, the parties had “contracted that if neither wholly prevailed, then the substantially prevailing party would be awarded attorney’s fees.” 50 Wn. App. at 773. The Court of Appeals concluded that “the court should have determined which party was the ‘substantially prevailing party’ since neither party wholly prevailed,” and reversed the trial court’s award, which had “ignored the parties’ specific contract language regarding attorney’s fees.” *Id.* None of the cases on which Appellants rely for application of the proportionality rule involved parties who had, as here, explicitly provided for an award of fees to the “substantially prevailing” party.<sup>10</sup> See, e.g., *Marassi*, 71 Wn. App. at 915 (fees award to “successful party”); *Transpac Dev., Inc. v. Oh*, 132 Wn. App. 212, 217 130 P.3d 892 (2006) (fees to “prevailing party”); cf. *City of Blaine*, 2006 WL 3000131 at \*2-3 (awarding fees to substantially prevailing party where parties had chosen “substantially prevailing party” rule).

As Etherington states in his opening brief, “if the parties had intended to contract around applicable common law to select the

---

<sup>10</sup> Etherington’s assertion that these cases “all involved contract fee provisions allowing for fees to the substantially prevailing party” is unsupported and inaccurate. DE App. Br.

substantially prevailing party rule to calculate fees, then the lease would have to clearly indicated the parties' intent to do so." DE App. Br. at 28. In this case, it did. It would be improper for the Court to alter the plain terms of the parties' attorneys' fees provision, and the "substantially prevailing party" standard should be applied.

**b. The Proportionality Rule is Applicable only Where There are Several Distinct and Severable Claims and the Substantially Prevailing Party Rule is Unjust**

Even if the parties had not explicitly selected the substantially prevailing party rule (which they did), the general rule in Washington is that the prevailing party is the one for whom an affirmative judgment is entered; and where neither party wholly prevails, the party who substantially prevails – as determined by the extent of the relief afforded the parties – is considered the prevailing party. *Marassi v. Lau*, 71 Wn. App. 912, 915 (1993). The proportionality rule exception is applicable only where (1) "the question of which party has substantially prevailed becomes extremely subjective and difficult to assess" because "several distinct and severable" claims are at issue, and (2) the substantially prevailing party standard "does not obtain a fair or just result." *Id.* Neither situation is presented here.

---

at 24.

**(1) This case does not involve “several distinct and severable claims”**

First, this case does not involve “several distinct and severable claims,” as did *Marassi*. In that case, plaintiffs had brought twelve legally and factually independent claims for (among other things) monetary relief for damage done to two distinct areas of the property at issue, for failure to properly hydroseed the property, and for failure to extend a water line; and distinct claims for specific performance of placement of underground utilities, replacement of culverts, reconstruction of an access road, and improvement of a security gate. 71 Wn. App. at 913-14. There was no argument that these claims were merely alternative theories of recovery for the same claim. Before trial, plaintiffs voluntarily dismissed five of the specific performance claims and the parties settled defendants’ single counterclaim and plaintiffs’ damages claim for failure to extend the water line. Of the seven claims remaining for trial, plaintiffs prevailed on two, but were awarded only \$15,000 of the \$88,450 they sought. Under these circumstances, the court held that determining the prevailing party “becomes extremely subjective and difficult to assess.” *Id.*

By contrast, as Cornish repeatedly asserted throughout this litigation, Cornish brought this lawsuit to enforce two related rights under the Agreement: (1) to purchase the Property; and (2) to occupy the Leased

Premises through December 2008. *See, e.g.*, CP 227, Motion for Partial Summary Judgment Re: Wrongful Eviction (“As Cornish has set forth in other pleadings before this Court, this case involves essentially two claims: (1) for enforcement of defendants’ obligations to sell the 1000 Virginia Property to Cornish under the Commercial Sublease with Option to Purchase; and (2) for Cornish’s wrongful eviction from the 1000 Virginia property, prior to the end of the term of tenancy.”). The claims articulated in Cornish’s complaint were not distinct and severable; they were alternative avenues of relief for breach of these two obligations in the Agreement. *See* Amended Complaint ¶ 35, CP 1199 (“In the event the Court finds that specific performance of the Option Agreement is not possible, Cornish seeks an award of damages.”); *see also* DE App. Br. at 16-17 (“Cornish’s third claim for a declaratory judgment affirming Cornish’s right to enforce the terms of the option agreement was presumably subsumed in the partial summary judgment extending the option to purchase the property.”). Appellants moved for dismissal of the fifth, sixth and seventh causes of action, repeating that “no evidence was adduced” and that there were “no damages claimed as a result” of those causes of action, and Cornish expended no fees exclusively on the alternative theories on which it did not recover. CP 427:10-428:9. Cornish did not appeal this dismissal.

Thus, this case does not involve “several” distinct claims, but 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). The operative principles are therefore set forth not in *Marassi*, but in *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 677 P.2d 773 (1984). In *Silverdale Hotel*, the plaintiff proved that the defendant had breached a contract between the parties and was awarded damages as a result. However, the trial court found that the plaintiff was not entitled to consequential damages from the breach in the form of costs, expenses, and potential liabilities. *Id.* at 772. The contract at issue provided for recovery of attorneys’ fees, but because the defendant prevailed on significant issues in the litigation relating to damages, the trial court declined to award attorneys’ fees to the plaintiff. The Court of Appeals reversed, holding that the plaintiff was entitled to fees even though the plaintiff recovered far less than it had sought. *Id.* at 774. “A party need not recover its entire claim in order to be considered the prevailing party.” *Id.*<sup>11</sup> See also *City of Blaine*, 2006 WL 3000131 at \* 3, citing *Marassi*, 71 Wn. App. at 917

---

<sup>11</sup> In carving out the proportionality rule exception to the general prevailing party rule, the *Marassi* opinion explicitly left undisturbed the holding of *Silverdale Hotel*, noting that in that case “plaintiff was suing on a single breach of contract with several damages theories; it did not seek recovery for multiple distinct and severable breaches, as did the *Marassis*.” 71 Wn. App. at 917.

(awarding fees to plaintiff under parties' chosen "substantially prevailing party" rule because "[t]he five causes of action that were dismissed arose under the same set of facts as the two causes of action that went to trial" on which plaintiff prevailed).

To paraphrase *Riss*, Cornish "will essentially be able" to acquire the property it sought to purchase, and will receive the damages it sought as compensation for its wrongful eviction. As the trial court was in a perfect position to judge, it is not "extremely subjective" or "difficult to assess" which of the three parties to this lawsuit substantially prevailed. The trial court's ruling that Cornish had not brought several distinct and severable claims was not in error.

Furthermore, even the two distinct claims asserted in this lawsuit are not "severable." As discussed in more detail below, Cornish's claims brought on the Option Agreement and the Sublease are factually and legally conjoined, and fairly and accurately apportioning fees to the work done on each would be an impossible task. *See infra* § III.A.3.c. *Marassi* requires application of the proportionality rule only when claims are distinct *and* severable. Even if the two claims in this case are distinct, as a practical matter, they are inextricably intertwined, not severable.

**(2) Application of the substantially prevailing party rule does not produce an unfair or unjust result**

Second, the proportionality rule is also not appropriate or necessary in this case because application of the substantially prevailing party rule would not produce an unfair or unjust result. *Marassi*, 71 Wn. App. at 916. Etherington does not explain in what way the fees award against him is unfair or unjust. It is not. The “substantially prevailing party” standard is the one the parties chose. CP 1220-21. Furthermore, as the history of this case makes clear, Etherington was not an unrelated party or even a passive owner, unable or unwilling to control decisions made by his company. As Virginia Limited’s only managing agent, he was intimately involved at every step, possessing sole control over Virginia Limited on every decision the company made affecting Cornish. CP 1031. Although the court determined he did not have an ownership interest in the Property, the court nevertheless decided that holding Etherington liable for Cornish’s fees was appropriate given the degree to which Etherington’s actions on Virginia Limited’s behalf caused Cornish harm.

Indeed, Virginia Limited has already once attempted to file for bankruptcy and has repeatedly represented that it is insolvent. CP 1377; RP 303:14-21. It is likely that Cornish will not recover against Virginia

Limited the fees (by now hundreds of thousand of dollars in excess of \$600,000) it has incurred in enforcing the Agreement, and that Etherington will escape entirely the consequences of the irresponsible and bad-faith actions he took both on behalf of himself and on behalf of Virginia Limited. Under these circumstances, applying the “substantially prevailing party” rule is hardly unfair or unjust.

Finally, application of the “substantially prevailing party” rule is not unjust because even if the proportionality rule were to apply here, Etherington would still be liable for all or nearly all of the fees Cornish incurred in this case. *See infra* § III.A.3.c. Even under a proportionality analysis, Cornish should be awarded all fees sought against Virginia Limited and Etherington because as outlined below, the work performed in pursuit of the claim on which Cornish prevailed against Etherington cannot be segregated from the work performed in pursuit of the claim on which it did not. Because “no reasonable means exist for segregating the non-recoverable costs from the recoverable costs,” Cornish should be awarded the full measure of its fees. *See Blair v. Washington State University*, 108 Wn. 2d 558, 740 P.2d 1379 (1987) (affirming full award of fees to plaintiffs under civil rights statute where “plaintiffs had prevailed on many significant issues, and the evidence presented and

attorney fees incurred for the successful and unsuccessful claims were inseparable”).

**c. The Proportionality Rule Should be Used Only in “Extreme” Situations**

As *Marassi* made clear, courts should make use of the proportionality rule only in “extreme” cases, where determining the substantially prevailing party is “*extremely* subjective and difficult to assess,” and where doing otherwise would produce unjust results. 71 Wn. App. at 917 (emphasis added). As outlined above, this is not such a case. The “substantially prevailing party” rule—the one the parties chose to apply to this case—is more than adequate to address the circumstances presented, where Cornish so clearly substantially prevailed, albeit with some qualification. This rule, providing that where “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,” acknowledges that victories will not always be total and absolute, and makes provision for an award of all fees in the case of *substantial* victories. *Id.* at 916.

Broadening the applicability of the proportionality rule to more than only the most exceptional cases would further complicate the already-burdensome secondary litigation that occurs over parties’ entitlement to

fees. Inevitably, courts would be asked to parse out each individual “claim,” making a determination as to whether each was truly a distinct and severable claim, an alternative theory of relief, or a hybrid of both. A court would then have to assign the degree to which each party succeeded on each distinct claim, deciding first how to measure that success: by dollar value of the award (as measured against the total award sought in the litigation, or on that claim alone); by number of claims won; by number of “major” claims won; by percentage of a partial success in relation to the total relief requested; by total fees or time expended on an individual claim, either in prosecution or defense of it; or by some other measure. The court would then have to ascribe the proper amount of fees to each claim on which a party prevailed, assessing, among other things, whether (and at what percentage) a particular deposition or discovery request pertained to a prevailing claim, or whether a motion (say, to compel discovery) was related to one claim or another.

That is what Appellants are asking this Court to instruct the trial court to do. In this case in particular, where the totality of the indivisible circumstances necessarily informed all of the court’s equitable rulings, and where most of the facts related to the two claims are inextricable, such process would be all but impossible. Which of Cornish’s fees are attributable to enforcement of the Option Agreement, and which to the

Sublease, cannot accurately be parsed out; the division of fees proposed in Etherington's opening brief is just one possibility, and one that Cornish rigorously disputes. For example, Etherington claims he should not be liable for any fees incurred before the filing of the Second Amended Complaint on November 7, 2008, claiming that only then was the wrongful eviction claim pled in this case. DE App. Br. at 21. But Etherington delivered the Notice of Lease Termination seven months earlier, on April 3, 2008. CP 2152-54. In addition, Cornish's counsel spent myriad (and ultimately fruitless) hours in the spring of 2008 attempting to negotiate a means by which Cornish might be allowed to stay in the Leased Premises. *See, e.g.*, Supp. CP \_\_\_; CP 3062. And the wrongful eviction claim was anticipated (and in Cornish's view, adequately pled) in Cornish's Amended Complaint, filed February 20, 2008. *See, e.g.*, CP 1202, Am. Comp. ¶ 45.b. (seeking injunction to prohibit defendants from "initiating proceedings to evict Cornish from the premises"); *see also* CP 2057, Plaintiff's Motion for Change of Trial Date, filed September 30, 2008 (seeking earlier trial date for "resolution of the wrongful eviction claims."). The Second Amended Complaint merely added allegations related to events taking place after filing of the Amended Complaint. *See* CP 13, ¶¶ 27-28. Starting the fee clock only after the administrative step had been taken of adding those allegations to

the Complaint would arbitrarily and unfairly deprive Cornish of the substantial fees associated with the wrongful eviction work conducted prior to the amendment.

In another illustration of the impossible task Etherington is asking the trial court to undertake, Etherington argues that he should not be liable for fees associated with Virginia Limited's bad-faith petition for bankruptcy. DE App. Br. at 1, 22. While only Virginia Limited filed for bankruptcy, it is clear under the circumstances that the filing was not a *bona fide* attempt to seek the protections of bankruptcy court, but a tactical move designed to avoid the trial court's ruling on, among other things, the wrongful eviction summary judgment motion, the very claim on which Cornish prevailed against Etherington. CP 3054-55, 56. Cornish (and the trial court) received notice of the filing of the petition (and the consequent automatic removal of the lawsuit to U.S. Bankruptcy Court) literally minutes before oral argument in the trial court on Cornish's motions for summary judgment on (1) Virginia Limited's counterclaims and (2) wrongful eviction, which argument was abruptly canceled. CP 1043. And as U.S. Bankruptcy Judge Samuel Steiner found, the petition for bankruptcy was filed in bad faith, in an effort to escape the jurisdiction of the trial court and the terms of the Agreement. CP 3054-56. Cornish's fees associated with the bankruptcy petition were, in other words, incurred

at least in part in pursuit of the claim on which it prevailed against Etherington – enforcement of its right to occupy the Property. Furthermore, it was Etherington alone who controlled Virginia Limited’s decision to file the petition for bankruptcy, and who ultimately agreed to its voluntary dismissal (a fact, incidentally, that Etherington testifying on the stand deliberately attempted to obscure from the trial court). RP 396:14-16; *see also* RP 393:21-22 (Etherington testimony stating “we filed for bankruptcy and part of *our* bankruptcy petition was a declaratory action...”). It was not unfair or improper for the trial court to assess fees associated with the bankruptcy petition to Etherington as well as Virginia Limited.

Etherington also asserts that the “vast majority” of the fee award in this case was incurred prosecuting claims that Cornish lost against Etherington. DE App. Br. at 32. This assertion is unsupported and inaccurate, and the degree to which it is inaccurate illustrates the morass into which this Court and the trial court are being invited to wade. The challenge of allocating fees between the two claims in this case would be immense (in addition to unfair and unnecessary). To which claim should the court ascribe fees incurred in drafting the motion to amend the complaint, and in drafting the Second Amended Complaint – or for that matter, the Complaint itself? Cornish sent a letter to Appellants’ counsel

in April 2008, seeking cooperation in mitigating its damages associated with leaving the building, and another in September, 2008, reminding Appellants of Cornish's mounting damages associated with both the premature eviction, and Virginia Limited's refusal to sell Cornish the Property. Supp. CP \_\_\_; CP 611-12. Which defending party, under a proportionality analysis, would be liable for fees attributable to those (and similar) letters? Which party is liable for fees associated with discovery requests and depositions related to eviction damages, which produced evidence supporting an award of equitable damages for breach of the Option Agreement? To which claim should the following billing entries, among hundreds of similar entries, be allocated?

- "Review project documents; meetings with [client]; . . . work on draft complaint" (CP 3059);
- "Telephone with [Appellants' attorney] J. Hadley re: filing of lawsuit; letter to Hadley re: demolition issues; review and revise final complaint and related documents – file lawsuit" (CP 3062);
- "Review engineer's report, documents; revise subpoena to U.S. Bank; email with M. Segal re: [Washington State Housing Finance Commission] records request" (CP 3068);
- "Work on trial motion and damages letter" (CP 3090);
- "Draft update memo and agenda for conference call" (CP 3093);
- "Review and revise opposition to Stay motion; prepare for and take depositions of defendant experts Lukes and Perbix" (CP 3103);

- “Prepare stipulation and order re: deadlines; draft reply on summary judgment motions [on wrongful eviction and Virginia Limited’s counterclaims” (CP 3107).

Cornish submitted 60 pages of similar entries through April 2009 alone. CP 3059-3116. And when, after hearing testimony at trial the court explicitly reaffirmed its earlier summary judgment ruling on wrongful eviction, at least some percentage of fees incurred at trial should also be ascribed to success on the wrongful eviction claim. *See* CP 1033, Findings of Fact and Conclusions of Law (“Etherington did not honor the obligation to the commercial tenant Cornish.”). Clearly, Etherington’s arbitrary and careless estimate that Cornish incurred some \$16,750 in fees prosecuting the wrongful eviction claim is incorrect. DE App. Br. at 33, citing CP 1015. Under these circumstances, parsing out entitlement to fees at a proportional level is unnecessary, unfair, and impossible. Given the parties’ explicit choice of the substantially prevailing party rule, the inapplicability of the proportionality rule where Cornish pursued and prevailed on only two claims, and the equities of this case, this Court should decline Appellants’ request for remand to the trial court to do so.

**4. The Award Against Both Appellants Was Also Proper Because Once Entitlement to Fees is Found, the Amount Awarded Is Highly Discretionary**

The trial court's award of fees against Etherington should also be affirmed because even on appeal, Etherington does not challenge Cornish's entitlement to *some* fee award against him. Once a parties' entitlement to fees is established, the trial court's finding of the correct *amount* of fees to award is highly discretionary, entitled to great deference. *Taliesen Corp.*, 135 Wn. App. at 141. Given the relative equities and the other circumstances of this case as described above, the trial court's award of fees in the entire amount sought was not a manifest abuse of discretion.

**B. Appellants' Eviction of Cornish Was Wrongful**

Both Appellants have appealed the trial court's ruling that they are jointly and severally liable for damages associated with Cornish's wrongful eviction from the Leased Premises. There is no dispute that Virginia Limited and Donn Etherington evicted Cornish from 1000 Virginia before the end of its lease term. The only question, then, is whether this eviction was justified. As a matter of law, it was not.

The Sublease provided Cornish with a term of tenancy through December 2008. CP 1209. Less than three months after Cornish filed suit against the Appellants in this case for enforcement of its purchase option, they evicted Cornish from 1000 Virginia in a letter and Notice of Lease

Termination dated April 3, 2008, nearly nine months before the end of that term. CP 2152-54.

In his Notice of Lease Termination, Mr. Etherington stated that the cause of the eviction was “the rapid acceleration of deterioration noted by our engineer in late December [2007]” in a letter known as the “Perbix Memo,” which was a report on the condition of 1000 Virginia by Virginia Limited’s structural engineer, Todd Perbix. CP 2153. The Perbix Memo opined that certain portions of the building “have exceeded limits established as ‘Dangerous’” under relevant building codes. CP 1744. But Perbix has since testified that what was “dangerous” about the building was the potential for stucco to flake off, a problem that Etherington testified was largely remedied when Virginia Limited erected scaffolding around the building’s perimeter. CP 2173; RP 258:13-16 (“Q. Was the scaffolding sufficient then to solve the problem? A. The immediate problem, according to my structural engineer.”). As outlined above, the evidence below did not demonstrate that the building had become uninhabitable. *See supra* § II.B. As also set forth above, even if the upper four floors of residential units had to be vacated, demolition of those floors above the Leased Premises would have allowed Cornish to remain in the Property. *Id.*

Nevertheless, in the eviction notice, Etherington invoked § 3.11(b) of the parties' Sublease. *Id.* That section provides:

Substantial Destruction. If the damage to the Leased Premises is so substantial that repair of such damage will require more than 180 days to complete (or will require more than 90 days to complete if such casualty occurs after January 1, 2008), then *either Etherington or Lessee may elect, by written notice given to the other not later than thirty (30) days after the date of such casualty, to terminate this Lease effective as of the date of such casualty.*

CP 1210-11 (emphasis added). As the notice makes clear, and as Mr. Etherington confirmed in his deposition, the "casualty" on which he relied in invoking §3.11(b) was that referenced in the Perbix Memo:

Q. What caused you to send Cornish that [eviction] letter?

A. I was concerned about the safety, their safety, and their tenants' safety, the people that come and go out of the Cornish facility's safety.

Q. And when did you become concerned about that safety?

A. I became concerned about it upon the receipt of Perbix's letter.

CP 2159:4-12. But the Perbix Memo was written on December 20, 2007, *more than three months* before Mr. Etherington sent Cornish the April 3, 2008 Notice of Lease Termination. Thus, Appellants did not evict Cornish in accord with the lease provision they invoked in the eviction

notice, which was the sole provision in the Sublease authorizing them to do so. The eviction was therefore wrongful.<sup>12</sup>

On appeal, Virginia Limited and Etherington offer four reasons that the trial court erred in holding the eviction was wrongful: (1) that the deterioration of the building was caused by third parties; (2) that Cornish assumed the risks by leasing a building it knew was in a state of disrepair; (3) that Cornish remained on the premises even after eviction; and (4) that genuine issues of material fact remained as to when the “substantial destruction” occurred. All four arguments should be rejected.

First, the fact that third-party builders may have defectively constructed the building is irrelevant to whether Appellants are liable for wrongfully evicting Cornish. Obviously, landlords have a responsibility to maintain a property suitable for its intended use as reflected in the lease, regardless of who constructed the leased premises. *Cherberg v. Peoples Nat. Bank of Washington*, 88 Wn. 2d 595, 601, 564 P.2d 1137, 1142 (1977) (“A landlord has a duty to maintain, control and preserve retained portions of the premises subject to a leasehold in a manner rendering the

---

<sup>12</sup> Appellants state that the trial court’s treatment of the parties was inconsistent and unfair, as it relieved Cornish, but not Virginia Limited, of the consequences of a missed deadline. VL App. Br. at n. 30. The obvious distinction – that Cornish’s missed deadline posed the threat of inequitable forfeiture, while Appellants’ did not – is well-supported in the law; and Virginia Limited has never argued that equity requires forgiveness of its mistake.

demised premises adequate for the tenant's use and safe for occupancy.”). In fact, such covenant was expressly included in the parties’ Sublease here. See CP 1213, ¶ 3.18 (“Etherington shall be responsible for maintaining . . . the structural integrity of the Building to the extent it affects the Leased Premises.”).

The proposition that “[t]here can be no constructive eviction unless the landlord is at fault” is not relevant to this case; Cornish was not *constructively* evicted – it was *actually* evicted, by the landlord himself. See Brief of Appellant Virginia Limited (“VL App. Br.”) at 38; CP 2152. Appellants cite no law supporting the proposition that a landlord is not liable for wrongful eviction necessitated by a building’s deterioration just because third parties were responsible for construction.

Second, Cornish does not deny that it knew that the upper four floors of the building were in poor condition before it entered into the parties’ Agreement. Indeed, the parties’ mutual understanding of that condition was *the very reason* that the parties included in the Sublease the specific remedy and rules of lease termination in the event of further deterioration and “substantial destruction.” Cornish is now entitled to enforcement of those rules; “when parties to a contract foresee a condition which may develop and provide in their contract a remedy for the happening of that condition, the presumption is that the parties intended

the prescribed remedy as the sole remedy for the condition.” *S.L. Rowland Const. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 309, 540 P.2d 912, 920 (1975). Cornish’s knowledge of the condition of the residential portion of the building underscores – not diminishes – the importance of enforcing the parties’ expectations memorialized in the specific lease-termination provisions of the Sublease.

Third, it is not relevant that Cornish was unable to vacate the building immediately. Every case defendants cite for the proposition otherwise refers to *constructive* eviction, the occurrence of which may be questionable where the lessee on the one hand claims it was evicted but on the other chooses to remain in the leased premises. Here, of course, Cornish was not constructively evicted; it was, without dispute, actually evicted. CP 2152. And the evidence is undisputed that Cornish vacated the Leased Premises with all due expediency under the circumstances. RP 67:8-71:6.

And fourth, Cornish conclusively established the absence of a genuine issue of material fact as to when “substantial destruction” took place at the Property. Cornish demonstrated that (1) the “substantial destruction” was diagnosed on December 20, 2007 (and therefore must have occurred earlier); (2) an eviction notice was delivered three and a half months later on April 3, 2008; and (3) the Sublease explicitly

provided that one party may terminate the Sublease *only* “by written notice given to the other **not later than thirty (30) days after the date of such casualty.**” CP 2169-70; 2152-54; 1211.

Appellants attempt now to create an issue of fact regarding when the substantial destruction took place, relying on the declaration of Donn Etherington, whose testimony the trial court found to be not credible. CP 1032-33. And even that testimony does not create a genuine issue of material fact. Etherington stated in a declaration that “[b]y March 2008, the framing of the building was so deteriorated that the protective wire mesh could not even be attached to the building. That discovery is what triggered the Termination Notice.” CP 2356. This self-serving testimony is in direct contravention to Etherington’s earlier deposition testimony that it was the December 20, 2007 letter from Todd Perbix that caused him to send Cornish the eviction notice, and that the subsequent failure of the wire mesh solution was not “different from what [Perbix’s] diagnosis had been in December 07,” but “more of a confirmation.” CP 2943:10-12. Etherington’s declaration testimony should be rejected because self-serving affidavits contradicting prior deposition testimony cannot be used to create an issue of material fact. *See Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 192, 951 P.2d 280, 283 (1998).

Finally, the trial court's wrongful eviction ruling on summary judgment was reaffirmed and further bolstered by the evidence presented at trial. After two and a half days of testimony, the court found that "[t]he evidence does not support defendants' position that Cornish's eviction was justified by the circumstances," and that "Defendant Virginia Limited acted in bad faith in evicting Cornish and . . . Defendants Virginia Limited and Etherington did not honor the obligation to the commercial tenant Cornish." CP 1036, 1033. Thus, even if there had been a genuine issue of material fact at the time the summary judgment on wrongful eviction was decided (which there was not), at trial the court confirmed its ruling that Cornish's eviction had been wrongful. Remand for a trial on this issue would therefore be futile, and the summary judgment ruling should be affirmed on this basis as well. RAP 2.5.

**C. Cornish Requests that the Court Award It All Attorneys' Fees Incurred on Appeal; and Deny Etherington's Request for the Same**

Pursuant to RAP 18.1 and the attorneys' fees provision in the parties' Agreement, Cornish requests an award of all attorneys' fees and expenses incurred in this appeal, to be assessed against both Virginia Limited and Donn Etherington, jointly and severally.

Cornish also requests that the Court deny Etherington his request for the same. In the alternative, if the Court finds that Etherington is

entitled to an award of fees incurred on appeal, Cornish requests remand to the trial court for determination as to the proper amount of such award.

#### IV. CONCLUSION

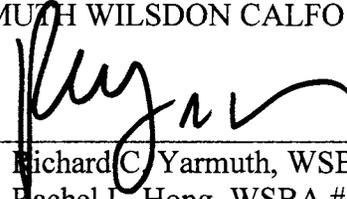
For the foregoing reasons, Respondent Cornish College of the Arts respectfully requests that the Court affirm the judgments entered below and each and every ruling of the trial court, including that court's (1) summary judgment on Etherington's liability for wrongful eviction; and (2) award of Cornish's attorneys' fees and costs against both Virginia Limited and Etherington.

Dated this 15<sup>th</sup> day of March, 2010.

Respectfully submitted,

YARMUTH WILSDON CALFO PLLC

By

  
Richard C. Yarmuth, WSBA #4990

Rachel L. Hong, WSBA #33675

Attorneys for Respondent Cornish College