

63790-8

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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

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

Respondent,

v.

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

Appellants,

BRIEF OF APPELLANT DONN ETHERINGTON, JR.

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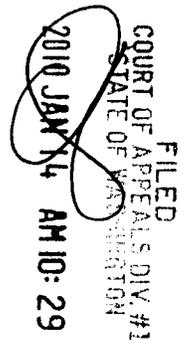


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INTRODUCTION

Donn Etherington, Jr. files this Brief of Appellant limited to the issues directly affecting his personal liability. Cornish College of the Arts sued both 1000 Virginia Limited Partnership (“Virginia Limited”) and Etherington, treating them collectively as “Defendant Property Owners” and alleging all claims against both Virginia Limited and Etherington. CP 5, 21.

Etherington does not own the subject property, but leased a portion of the property from Virginia Limited. All claims against Etherington personally were dismissed, except for a claim for damages for wrongful eviction. Nonetheless, the trial court awarded judgment to Cornish against both Virginia Limited and Etherington for all attorney fees incurred in this action.

The trial court’s award of all of Cornish’s fees against Etherington was erroneous on multiple grounds: the court failed to distinguish between Etherington and Virginia Limited; the court awarded almost \$300,000 against Etherington for fees incurred before Cornish even pled the one claim on which it prevailed against Etherington, as well as \$55,000 in fees incurred by Cornish in opposing Virginia Limited’s bankruptcy; the court rejected this Court’s *Marassi* decision, which adopted a proportionality approach

to awarding fees when distinct and severable contract claims are at issue; and even under the trial court's substantially prevailing party rule, Etherington was the substantially prevailing party where he defeated all of the seven claims brought against him by Cornish except for wrongful eviction, resulting in a damage judgment against Etherington for 2.8% of the damages sought by Cornish. The Court should reverse and remand for a proper fee determination.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting partial summary judgment that Etherington is liable for wrongful eviction. CP 417-19.¹

2. The trial court erred in concluding that, "Defendants Virginia Limited and Etherington did not honor the obligation to the low-income tenants, to the commercial tenant Cornish, to the Washington State Housing Finance Commission or to Cornish as purchaser under the Option Agreement." CP 1035-36. (Copies of the findings of fact and conclusions of law on the damages trial and on attorney fees are appended to this brief.)

¹ The Clerk's Papers were designated in several batches and are not in chronological order. The appendix to this brief lists the Clerk's Papers chronologically for the Court's convenience.

3. The trial court erred in entering FF 2 that Etherington was the general contractor for construction of the low-income apartments. CP 1030.

4. The court erred in entering FF 18 that, "Defendants Virginia Limited and Etherington did not honor the obligation to the commercial tenant Cornish." CP 1033.

5. The court erred in entering judgment against Etherington in the amount of \$69,600 as damages for wrongful eviction. CP 1039.

6. The court erred in entering Findings of Fact and Conclusions of Law awarding a total of \$645,466.85 against Etherington jointly with Virginia Limited as attorney fees under the prevailing party clause of the contract. CP 1160-63.

7. The court erred in entering judgment against Etherington for the attorney fees and costs. CP 1164.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in entering judgment against Etherington for Cornish's attorney fees and costs incurred in pursuing Cornish's claims against Virginia Limited, claims which were dismissed against Etherington?

2. Did Virginia Limited and Etherington wrongfully evict Cornish where the condition of the building was caused by defective construction, Cornish assumed the risk with full knowledge of the disastrous condition of the building, Cornish waived any claim for wrongful eviction by remaining in the building, and genuine issues of material fact precluded partial summary judgment?

3. Are the findings challenged by Etherington supported by substantial evidence?

4. Is Etherington entitled to recover attorney fees incurred in this appeal?

STATEMENT OF THE CASE

A. Introduction.

This statement of the case focuses on the issues specific to Etherington with the intent of avoiding unnecessary duplication of facts discussed in the opening brief of Virginia Limited.

The record in this case is an unusual mix of partial summary judgment orders followed by trial for damages. The Court entered the following partial summary judgments:

- ◆ Partial summary judgment that Cornish's late payment of \$50,000 to extend the option period "is subject to an equitable 'period of grace,' and that the delay in payment

does not invalidate Cornish's option to purchase the 1000 Virginia property." (8/29/08) (CP 1921).

- ◆ Order granting specific performance of Cornish's option to purchase the property. (9/22/08) (CP 2028).
- ◆ Order granting partial summary judgment of liability for wrongful eviction (3/27/09) (CP 417).

The Court then conducted a trial on damages. CP 1028. At the beginning of trial, the parties stipulated, while reserving all rights to appeal, that if a jury were convened, it would arrive at \$69,600 in damages for wrongful eviction. RP 22.² Trial then proceeded on the issue of damages for the delay in specific performance.

At the conclusion of trial, the Court entered findings of fact not only on damages, but also critical of Etherington's interpretation of the Extended Use Agreement, finding Etherington's testimony not credible. The Court also revisited issues on which the Court had granted partial summary judgment and changed one of its summary judgment orders. FF 8-13, 15-18, CP 1031-33.

Given this unique blend of summary judgment pleadings and trial testimony, this statement of facts incorporates both the

² The transcripts of April 21, 22 and 23 are paginated consecutively, and are referred to in this brief by page number without a parenthetical date. The transcripts for March 27 and May 6 each begin with page 1, and references to these transcripts include a parenthetical date.

pleadings and the testimony, but whether any particular partial summary judgment should have been granted must be evaluated based on the summary judgment pleadings without recourse to the trial testimony.

B. Etherington formed Virginia Limited in 1989 to develop a mixed-use building that included four floors of apartments of low-income housing in return for federal income tax credits.

Donn Etherington has lived in Wenatchee since 1992, CP 1724, where he grows cherries. CP 1847. Before 1992, Etherington owned a construction and development company. CP 1715. In the late 80's Etherington developed two low-income housing projects, the Vine Court Apartments and the Ellis Court Apartments, both in downtown Seattle. *Id.* Etherington acquired an interest in the property in this case in 1989. CP 1722. Virginia Limited was formed to take ownership of the property.

At the time, the only structure on the property was a two-story storage facility. CP 1754. Virginia Limited contracted to build four floors of low-income apartments above the two floor ground level storage facility. The trial court found that Etherington was the general contractor for the project. FF 2, CP 1030. No evidence supports this finding. Vicki Clayton, Chief operations officer for

Cornish, did not know who was the general contractor. RP 37-38. Etherington testified that there was no general contractor and that he was not the general contractor. RP 246-47.

In order to obtain federal income tax credits, Virginia Limited entered into an agreement labeled "Regulatory Agreement (Extended Use Agreement)," referred to in this brief as the Extended Use Agreement. CP 296. The agreement was between Virginia Limited and the Washington State Housing Finance Commission ("Commission"), which is the housing agency within the State of Washington that allocates and manages tax credits for low-income housing under Internal Revenue Code Section 42. *Id.*

Virginia Limited agreed to operate the apartments as a qualified low-income project for the "Compliance Period," CP 304, which is defined in the agreement as "a period of fifteen (15) Years beginning with the first Year of the Credit Period for such Building." CP 298. The "Credit Period" is a ten year period beginning with the year in which the building is placed in service. CP 298. The Extended Use Agreement remains in effect until the end of the latest of the following periods (CP 308):

- (i) the Compliance Period for any Building; (ii) the Extended Use Period for any Building; (iii) the Project Compliance

Period; (iv) the Additional Low Income Use Period; or (v) the Three-Year Period for any Building.

The “Extended Use Period” is defined (CP 298):

“Extended Use Period” for a Building means the period beginning in the first day in the Compliance Period on which such Building is part of a qualified low-income housing Project (within the meaning, and as determined under, section 42 of the Code), and ending on the date which is fifteen (15) years after the close of the Compliance Period (unless terminated earlier under paragraph 4.3 of this Agreement).³

The Extended Use Agreement could be terminated at an earlier date through foreclosure. CP 308. A second mechanism for early termination was the Qualified Contract Provision (“QCP”), under which Virginia Limited could ask the Commission to find a person to purchase the property. CP 308-09. The request could be made after the fourteenth year of the Compliance Period, here, December 31, 2006. CP 308. If the Commission could not find a qualified purchaser within one year, the property would be released from the agreement. CP 309.

³ Etherington’s prior low-income housing projects were constructed before 1989. In 1989, Congress added the additional 15-year extended use period as a requirement to obtain tax credits (together with the three-year period after the tax payer asks the Commission to find a qualified buyer for the property). J. Delaney, *Annual Report: Important Developments During The Year, Tax Lawyer* 1357 (1990). Thus, the Virginia Limited project was subject to the Extended Use Period while Etherington’s prior projects were only subject to the initial 15-year period.

The Agreement provided that it would be a recorded restrictive covenant on the land, building and project and would run with the land. CP 307. The Agreement also required Virginia Limited to record the Agreement in the County Auditor's office. CP 311.

The Agreement was signed in December 1992, and became effective December 31. CP 314.

C. Before leasing the property to Cornish, Etherington gave Cornish a copy of the Extended Use Agreement to operate low income housing and explained to Cornish his understanding of the Agreement.

Etherington testified without contradiction that he gave a copy of the Extended Use Agreement to Jeff Riddell, Cornish's chief financial officer, in 2002, before Cornish ever entered into the lease/option. CP 2348-49. Etherington's hand-written notes list documents delivered to "Jeff," and include the Extended Use Agreement. CP 1573. The document is dated October 23, 2002. CP 1573.

CP 1798-1800 is an e-mail string between Etherington and Riddell in April, 2004. Etherington states that he and Riddell had been discussing the prospect of Cornish purchasing the property for over a year (CP 1799):

Previously we had talked about the obligation to maintain the property as low income housing through Dec 2007. However, there is a mechanism to opt out early. I will take the necessary steps to accomplish that if we can come to terms on a sale.

Riddell responded that he needed to gain a better understanding of the low-income housing commitment and of the deteriorating condition of the building, which Etherington had previously described. *Id.*

Etherington responded (CP 1798):

My commitments are to provide affordable housing for 15 years in exchange for tax credits for 10 years. That obligation began on Jan. 1, 1993 and will end on Dec. 31, 2007. At any time during that period if the property is sold or the use is changed a penalty or recapture of tax credits is assessed on one's tax return. That penalty reduces each year.

Etherington explained that a building analysis performed by a specialist on the building "envelope" and a structural engineer concluded that the building has been 40-60% compromised. *Id.*

Etherington considered it preferable and probably cheaper to tear the building down and reconstruct. *Id.* He added (CP1798-99):

I don't have the resources to reconstruct and even if I did I'm anxious to fulfill the affordable housing obligation and convert to market rate housing or another higher and better use. In the mean time, I'm faced with balancing the expense of the recapture vs. nursing the habitability of the building for the next several years. Hence the desire for an option to purchase. The idea was for you to lock up a property for

your long term needs while I get as close as I can to fulfilling my obligation and create an out.

Riddell responded that Cornish was “very interested in the building,” but needed copies of reports on the condition of the building. CP 1798.

Etherington explained by declaration that he “personally informed Mr. Riddell of the defective construction throughout the premises and the fact of ongoing defective construction litigation and the fact that as a result of the defective construction, the building was in a degenerative deterioration process.” CP 2349. Before the lease/option agreement was signed, Etherington “advised Jeff Riddell of the extensive defects and failures of the structural components of the building and provided him engineers’ reports and information explaining these conditions.” *Id.* Specifically, Etherington faxed to Riddell a summary of the findings from the initial analysis of the building defects and the proposed scope of repair. CP 2649. Etherington added, “based upon these reports, I believe there isn’t much to salvage in the top 4 floors.” *Id.*

Etherington sent to Riddell two letters/reports from Building Envelope Consulting Services regarding their research on the condition of the building due to water penetration caused by faulty

stucco siding installation. CP 2386. Riddell forwarded the reports to Cornish's architects. *Id.* The record includes the two letters. CP 320, 2591, 2589. The January 31, 2003, letter reports "profound problems with all envelope elements," concluding, "[i]n short, the building is in a truly disastrous condition." CP 2591. The second letter is a December 29, 2003, cover letter for a video documentation of inspection of the building, characterized in the letter as a "two-hour documentary on rotten wood." CP 2589. The letter continues, "the video merely confirms what I said on my first visit to the building, namely that it is in exceedingly bad shape." *Id.*

Based on the evidence, Cornish was well aware that the building was in a disastrous condition. As a result, the lease/option made provision for destruction of the leased premises in paragraph 3.11. CP 249-50. If the damage to the leased premises was substantial, either party could terminate the lease (CP 250):

(b) 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.

The condition of the building was also reflected in paragraph 4.10 of the option, in which Cornish agreed to accept the property in its condition, "AS IS, WHERE IS", with all faults, defects and deficiencies. CP 257. Furthermore, under paragraph 4.1, if Virginia Limited provided Cornish with notice that vacation of the property above the second floor was required, the date for exercising the option would be accelerated. CP 255.

Etherington's belief that the Extended Use Agreement would terminate on December 31, 2007 was reflected in the closing date for the option, which was to be the first business day in July, 2008. CP 256. The closing date would be accelerated, however, if Virginia Limited gave Cornish an acceleration notice that vacation of the property above the second floor was required. CP 255.

D. Procedure at trial.

The procedural history is described in Virginia Limited's opening brief.

ARGUMENT

A. 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. Standards of Review.

The substantially prevailing party may recover attorney fees when authorized by contract, statute, or recognized equitable ground. Whether a party is entitled to attorney fees is an issue of law this Court reviews *de novo*. ***Boguch v. Landover Corp.***, ___ Wn. App. ___, ___, ¶ 34, ___ P.3 ___ (2009). Whether a party is a prevailing party is a mixed question of law and fact that this Court reviews under an error of law standard. ***Kyle v. Williams***, 139 Wn. App. 348, 356, 161 P.3d 1036 (2007), *rev. denied*, 163 Wn.2d 1028 (2008). This Court will “closely” review the trial court’s determination of whether a party is a prevailing party. ***Eagle Point Condo. Owners Ass’n v. Coy***, 102 Wn. App. 697, 706, 9 P.3d 898 (2000).

2. Etherington successfully defended against all of Cornish's claims except wrongful eviction, as the result of which he is liable on only 2.8% of the total judgment.

Cornish's Amended Complaint asserted claims against Etherington and Virginia Limited, whom Cornish referred to

collectively as “Defendant Property Owners.” CP 1189-90. Cornish asserted seven causes of action against “Defendant Property Owners”: (1) specific performance for the breach of contract regarding the option; (2) alternative relief/damages for the breach of contract regarding the option; (3) declaratory judgment; (4) injunction; (5) breach of contract regarding the duty to maintain the building; (6) breach of the covenant of quiet enjoyment; and (7) nuisance. CP 1198-1207.

Cornish moved for an accelerated trial date, claiming that the only issues remaining for trial were the wrongful eviction claim and damages. CP 2056-57. When Etherington correctly responded that Cornish had not plead wrongful eviction (CP 2065, 2117), the trial court permitted Cornish to file a Second Amended Complaint adding the allegation that the eviction of Cornish from the premises breached the covenant of quiet enjoyment. CP 20. The seven claims identified in the original Complaint were also included. CP 3-23.

The trial court subsequently found that Etherington and Virginia Limited were liable as a matter of law for wrongful eviction. CP 417-19. Following a ruling *in limine* defining the measure of

damages for wrongful eviction, the parties stipulated to damages for wrongful eviction. RP 22-23.

At the beginning of trial, Virginia Limited and Etherington moved to dismiss Cornish's claim for damages for breach of the option agreement on the ground that the Court was awarding specific performance. RP 5-6. Cornish agreed to dismissal of its second cause of action. RP 11. At the conclusion of trial, Virginia Limited and Etherington moved to dismiss the fifth, sixth and seventh causes of action, for duty to maintain the property, the covenant of quiet enjoyment, and nuisance, on the ground that no evidence was presented on these claims. RP 427-28. Cornish did not resist dismissal of these claims. RP 430.

Etherington moved to dismiss Cornish's first cause of action for specific performance on the ground that Etherington does not own the property and was not a party to granting the option. RP 428-29. Cornish disputed Etherington's motion. RP 430-31. The trial court granted the motion. RP 434. The Court subsequently denied Cornish's motion for reconsideration of the dismissal of Etherington. CP 772-73.

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, CP 1921, which ran against Virginia Limited, not against Etherington. The fourth claim for a preliminary injunction to preserve Cornish's rights under the option agreement became moot because Cornish never moved for a preliminary injunction.

As a result of these rulings, Cornish's claims against Etherington were all resolved before trial. The trial court found Etherington liable on the wrongful eviction claim as a matter of law, and the parties stipulated to damages. CP 417-19; RP 22-23. Cornish's remaining causes of action were dismissed, mooted, or resolved as a matter of law in Etherington's favor. Following trial, the court entered a \$2,425,474.64 judgment against Virginia Limited for the option claim, and entered a \$69,600 judgment jointly and severally against Virginia Limited and Etherington on the wrongful eviction claim. CP 1039.

Cornish, Etherington, and Virginia Limited all sought fees after trial. CP 774-82, 1004-27. Although Cornish brought seven causes of action, it claimed that there were only two issues, both of which Cornish prevailed upon – specific performance/breach of option and wrongful eviction. CP 775-76, 1044. The trial court

agreed. CP 1161-62. But Cornish cannot tally up the claims it prevailed upon by omitting the ones it lost or abandoned. And even if Cornish is correct, Cornish did not spend anywhere near the time – or accrue anywhere near the fees – pursuing the wrongful eviction claim.

Cornish claimed that it substantially prevailed, where it was awarded the “full measure of damages that it sought.” CP 775. But Cornish failed to distinguish between Virginia Limited and Etherington, claiming without any argument or authority that Etherington and Virginia Limited were jointly and severally liable for fees. CP 777. Of the “full measure of damages [Cornish] sought” it was awarded only \$69,600 – 2.8% of the total damages award – against Etherington (jointly and severally). CP 1039.

3. The trial court erred in failing to treat Virginia Limited and Etherington separately to determine attorney fees.

Etherington argued that the trial court must treat Virginia Limited and Etherington separately to properly determine attorney fees. CP 1005. The Court failed to do so, simply lumping together Virginia Limited and Etherington and awarding all of Cornish’s claimed fees and costs jointly and severally against Virginia Limited and Etherington. CP 1162. This was error.

The option agreement clearly identifies three separate parties: Virginia Limited, Etherington, and Cornish. CP 247. Each party has different rights and different obligations under the lease/option. Etherington and Cornish each have obligations under the lease, including Cornish's obligation to pay rent to Etherington, as well as many other obligations under the lease. Paragraphs 3.1-3.29, CP 248-55. Virginia Limited granted the option to purchase and the obligations under the option run between Cornish and Virginia Limited. Paragraph 4.1-4.23, CP 254-58. The lease/option includes the following attorney fee clause (Paragraph 5.9, CP 259-60):

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.

Where multiple parties are sued under a contract, the Court must determine attorney fees separately for each defending party. ***Grayson v. Platis***, 95 Wn. App. 824, 838, 978 P.2d 1105, *rev. denied*, 138 Wn.2d 1020 (1999); ***Klaas v. Haueter***, 49 Wn. App. 697, 708, 745 P.2d 870 (1987). In both of these cases, the plaintiff sued both spouses and the marital community, and in both cases

the husband was found separately liable, but the marital community was found not liable. Each court carefully distinguished between the liable spouse and the marital community, awarding attorney fees to the spouse who successfully defended the marital community. This Court held in **Grayson**, “[t]he spouse representing a marital community is entitled to attorney’s fees where the community prevailed in an action to enforce a contract providing for attorney fees, even though their spouse’s separate estate is found liable.” **Grayson v. Platis**, 95 Wn. App. at 838. The Court similarly awarded fees to the marital community in **Klaas v. Haueter**, 49 Wn. App. 697. The Court stated the same rule more recently in **G.W. Equip. Leasing, Inc. v. Mt. McKinley Fence Co.**, 97 Wn. App. 191, 982 P.2d 114 (1999). This Court cited approvingly from **Klaas v. Haueter** for an award of fees to the marital community even though one spouse is separately liable, but denied a request for fees because the husband had not properly requested fees. 97 Wn. App. 200.

Similarly, here the Court was required to separately calculate attorney fees as to Virginia Limited and Etherington. Just as it would have been inappropriate to lump together a separately liable spouse and the marital community, it was inappropriate to lump

together Virginia Limited and Etherington. Etherington's liability for attorney fees must be assessed based on the success or failure of the claims alleged against Etherington, not the claims alleged against Virginia Limited. As we now show, Etherington could not possibly be liable for all fees incurred by Cornish by both Etherington and Virginia Limited.

4. **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.**

The trial court's error in failing to treat Virginia Limited and Etherington separately is blatantly obvious in several places. As discussed above, Etherington was only held liable for wrongful eviction, which was not even pled by Cornish until its second amended complaint, filed November 7, 2008. CP 3. It should go without saying that Etherington cannot be liable for attorney fees and costs incurred by Cornish before Cornish even thought to allege the sole claim against Etherington on which Cornish ultimately prevailed. Cornish incurred \$298,405.17 in attorney fees and costs prior to filing the second amended complaint. CP 3059-3094. But all of these fees, with a slight reduction of \$2,975, were

awarded to Cornish against Etherington and Virginia Limited. CP 1072. This anachronism alone demonstrates part of the error in the fee award.

Another demonstrable error in the fee award was holding Etherington liable for attorney fees and costs incurred by Cornish in resisting Virginia Limited's bankruptcy appeal. CP 3117-20, 777, 1072. Etherington was not a part of the bankruptcy and Cornish's efforts to chase Virginia Limited are not attorney fees incurred in pursuing claims against Etherington.

Even after Cornish amended its complaint to allege wrongful eviction, most of the subsequent proceedings related to Cornish's claim for specific performance damages, not to the wrongful eviction claim. The Court should reverse the attorney fees award for this reason alone.

5. 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 trial court may only award attorney fees when authorized by contract, statute, or a recognized equitable ground. *Kinnebrew v. CM Trucking & Constr., Inc.*, 102 Wn. App. 226, 231, 6 P.3d 1235 (2000). Where authorized, fees are awardable to the

prevailing party. **Marassi v. Lau**, 71 Wn. App. 912, 916, 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).

In **Marassi**, this Court listed principles that govern the award of attorney fees:

1. The affirmative judgment rule: "In general, a prevailing party is one who receives an affirmative judgment in its favor." *Id.* at 915.
2. The substantially prevailing party rule: "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.
3. The no prevailing party rule: "However, if both parties prevail on major issues, an attorney fee award is not appropriate." *Id.* at 916.

This Court found that none of these rules was fair or just in **Marassi** because even though the plaintiff received an affirmative judgment in its favor, it prevailed on only 2 of the 12 claims it brought. *Id.* at 916-17. The Court was also dissatisfied with the substantially prevailing party rule where multiple and distinct contract claims are at issue (*id.* at 917):

Although appropriate in some cases, it fails on facts such as these where multiple distinct and severable contract claims are at issue. In such a situation, the question of which party has substantially prevailed becomes extremely subjective and difficult to assess.

Since none of the normal rules was satisfactory, the **Marassi** decision adopted a proportionality rule (*id*):

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.

The trial court refused to follow **Marassi** on the ground that the fee provision in the parties' lease states that the "substantially prevailing party shall be entitled to costs and reasonable attorney's fees." CP 1160-61. Based on this boilerplate language, the trial court ruled that by selecting the substantially prevailing party rule, the parties opted out of this Court's **Marassi** proportionality rule. CP 1161. This Court should reverse.

The trial court's decision that the lease actually selects the substantially prevailing party rule is at odds with this Court's decision in **Marassi**, and **Marassi's** progeny including **Transpac** and **International Raceway**. **Transpac Dev. Inc. v. Oh**, 132 Wn. App. 212, 130 P.3d 892 (2006); **Int'l Raceway, Inc. v. JDFJ Corp.**, 97 Wn. App. 1, 970 P.2d 343 (1999). These cases all involved contract fee provisions allowing for fees to the substantially prevailing party. Despite these boilerplate provisions, in each of

these cases this Court ruled that a fee award must be determined based on a proportionality approach where, as here, both parties prevailed on some claims or defenses such that applying the net affirmative judgment rule or substantially prevailing rule does not obtain a fair or just result.

The contract at issue in *Marassi* provided that the “successful party” was entitled to attorney fees. 71 Wn. App. at 913. This could only be interpreted to be the prevailing party or the substantially prevailing party if no party wholly prevailed. *Marassi* at 916 (citing *Rowe v. Floyd*, 29 Wn. App. 532, 535 n.4, 629 P.2d 925 (1981)). Fully aware of the contract’s plain language, this Court fashioned the proportionality approach because it could not fairly be said that either party substantially prevailed, where the plaintiff had an affirmative judgment, but the defendant successfully defended ten of the plaintiff’s twelve claims. 71 Wn. App. at 916-17. The Court recognized that applying the substantially prevailing party rule would work an injustice. *Id.*

In *International Raceway*, there were two distinct and severable issues – the lessor’s (JDFJ’s) claim for timber trespass and the lessee’s (IRI’s) claim for a lease extension. 97 Wn. App. at 4. The parties both sued and the claims were consolidated. *Id.*

The trial court found that neither party prevailed on the timber trespass and that IRI prevailed on the lease issue. *Id.* at 7. The trial court determined that IRI was the substantially prevailing party because the lease extension issue “constituted two-thirds of the consolidated action,” and awarded IRI two-thirds of its attorney fees. *Id.*

On appeal in ***International Raceway***, JDFJ asked this Court to overturn IRI’s fee award and apply the substantially prevailing party standard under ***Hertz v. Riebe***, in which Division 3 refused to apply ***Marassi***’s proportionality approach where each party recovered on a substantial theory. ***Int’l Raceway***, 97 Wn. App. at 7 (citing ***Hertz v. Riebe***, 86 Wn. App. 102, 105, 936 P.2d 24 (1997)). This Court refused, declining to follow ***Hertz*** “because it adds confusion to an issue clarified in ***Marassi v. Lau***.” 97 Wn. App. at 7. This Court vacated and remanded the fee award. *Id.* at 9.

Finally, this Court recently reaffirmed ***Marassi*** and ***International Raceway*** in ***Transpac***, 132 Wn. App. at 219. There, the trial court refused to award either party fees under the “prevailing party” attorney fee provision in their lease, where the plaintiff (“Transpac”) lost its claims and the defendant (“Oh”) lost his counterclaims. 132 Wn. App. at 216-217. On appeal, Oh argued

that the trial court erroneously failed to apply **Marassi**, and Transpac argued that the trial court's award was correct where both parties prevailed on major issues. *Id.* at 217-18. This Court reversed and remanded for fees to be determined under the proportionality rule (*id.* at 220), reaffirming **Marassi** and **International Raceway** (*id.* at 219):

Following **Marassi** and **Int'l Raceway**, we conclude that when distinct and severable claims are involved, an order that leaves both parties to bear their own costs is not adequately supported by a bare conclusion that each party recovered on a substantial theory. As stated in **Marassi**, the question as to which party substantially prevailed is too subjective and difficult to assess without a more detailed consideration of what actually happened in the litigation.

The fee provision in the parties' lease is boilerplate language giving the parties a right to recover fees. Absent the fee provision, the parties would have no right to recover fees, absent a statute or equitable ground. Many, if not most, contract provisions allowing for fees refer to the prevailing party or substantially prevailing party, or use synonymous language. Such provisions do not purport to dictate how fees will be calculated, but are intended to satisfy the "American Rule," which provides that absent a fee provision in a contract, an applicable statute, or recognized equitable ground, parties must pay their own fees regardless of who prevails.

There is no indication that the parties used the term “substantially prevailing party” in the lease to select the net affirmative judgment or “substantially prevailing party rule.” This boilerplate language simply permits a fee award.

At a minimum, if the parties had intended to contract around applicable common law to select the substantially prevailing party rule to calculate fees, then the lease would have to clearly indicate the parties’ intent to do so. As discussed above, the fee provision in the parties’ lease used boilerplate language. Absent an indication that the parties intended this language to select the substantially prevailing party rule and reject the proportionality rule, the Court should hold that the fee provision simply allows for a fee award that would not otherwise be permitted.

6. The only authority Cornish relied on to support its claim that the lease selects the substantially prevailing party rule actually contradicts Cornish’s position that it substantially prevailed.

Cornish relied on *Marine Enterprises* to support its argument that the lease selected the substantially prevailing party rule. CP 1045 (citing *Marine Enterprises, Inc. v. Security Pac. Trading Corp.*, 50 Wn. App. 768, 773, 750 P.2d 1290, *rev. denied*, 111 Wn.2d 1013 (1988)). The trial court relied on *Marine*

Enterprises in concluding that “Pursuant to the ‘plain and unambiguous’ language of [the attorney fee provision] of the Agreement, the ‘substantially prevailing party’ rule, and not the ‘proportionality rule,’ applies to a motion for attorneys’ fees in this case.” CP 1161. **Marine Enterprises** does not support this conclusion and actually contradicts Cornish’s claim that it substantially prevailed (against Etherington).

The trial court erred in following the analysis of **Marine Enterprises**, which was decided before **Marassi**. In **Marassi**, this Court cited **Marine Enterprises** for the substantially prevailing party rule, 71 Wn. App. 916, then rejected the application of the prevailing party rule in cases like this, where “the alleged contract breaches at issue consist of several distinct and severable claims . . .” *Id.* at 917. Ever since **Marassi**, the proportionality rule, not the substantially prevailing party rule, governs cases like this.

The contract at issue in **Marine Enterprises** was for the purchasing and processing of salmon in Bristol Bay, Alaska. 50 Wn. App. at 770. Marine Enterprises, Inc. (“MEI”) agreed to process a minimum of 30,000 lbs of salmon per day, and Security Pacific Trading Corporation (“SPTC”) agreed to purchase and store enough salmon to provide to MEI to meet the 30,000 lb minimum.

Id. Both parties breached and their claims were submitted to arbitration. *Id.* at 770-71.

Both parties prevailed to some extent – the arbitrator found that MEI was entitled to \$10,000 for services performed under the contract and found that SPTC was entitled to \$5,424 for the loss SPTC incurred from fish which were inadequately refrigerated. *Id.* at 771. MEI originally requested \$600,000, but was awarded only \$5,701. *Id.* MEI's major claims were denied. *Id.*

MEI appealed and the superior court affirmed the arbitration award. *Id.* The court found that MEI was the prevailing party and awarded MEI \$33,000 attorney fees under the contract term providing that the substantially prevailing party was entitled to fees in the event that neither party wholly prevailed. *Id.* at 771-73.

On appeal, this Court reversed the fee award to MEI, holding that although MEI prevailed in that it had a net affirmative judgment, it did not “substantially” prevail. *Id.* at 774. The Court awarded appellate fees to SPTC. *Id.* at 776.

Marine Enterprises does not support Cornish's argument that the lease selects the substantially prevailing party rule to govern an attorney fee award. CP 1045. ***Marine Enterprises*** simply holds that the trial court's fee award ignored the contract

provision authorizing a fee award to the substantially prevailing party where neither party wholly prevailed. 50 Wn. App. at 773. The attorney fee clause here does not purport to adopt the substantially prevailing party rule just because neither party wholly prevailed.

Even if the substantially prevailing party rule applied here, the trial court erred because Cornish did not substantially prevail against Etherington. Like MEI, Cornish lost its major issues against Etherington. And of the nearly \$2.5 million Cornish sought, it was awarded only \$69,000 – 2.8% of the judgment – jointly and severally against Etherington and Virginia Limited. Thus, even if Cornish is correct that the substantially prevailing party rule applies, under *Marine Enterprises*, Cornish did not substantially prevail against Etherington.

7. The trial court also incorrectly ruled that the substantially prevailing party rule would govern the fee award regardless of the lease language.

The trial court ruled that the substantially prevailing party rule – not the proportionality rule – would govern the fee award in this case regardless of the lease language, reasoning that Cornish “sought and was granted relief based on only two distinct claims” – wrongful eviction and enforcement of its right to extend the option

to purchase the leasehold and for specific performance. CP 1161. Thus, the trial court found that it was not subjective or difficult to determine that Cornish had substantially prevailed. CP 1161-62 (citing *Marassi, supra*).

The trial court could find that Cornish substantially prevailed only because it refused to treat Virginia Limited and Etherington as independent parties. But as discussed above, the Court must evaluate each party separately. In that case, the proportionality rule would undeniably apply, where Etherington successfully defended every claim except for wrongful eviction, avoiding 97% of the recovery Cornish sought. Under *Marassi*, the starting point for calculating the fee award would be to award Cornish its fees incurred on the wrongful eviction claim “as if there were two separate lawsuits.” *Transpac*, 132 Wn. App. at 220; see also *Marassi*, 71 Wn. App. at 917. The court would then award Etherington his fees incurred in successfully defending Cornish’s seven remaining claims. *Id.* These two awards would then offset. *Id.*

Instead, the trial court held Etherington jointly and severally liable on a \$645,466.85 attorney fee award, even though the vast majority of these fees were incurred prosecuting claims that

Cornish lost against Etherington – and even though Etherington is not liable on 97% of Cornish's total judgment.⁴ The fee award against Etherington is almost 10 times the judgment against Etherington.

The fact that Cornish prevailed against Virginia Limited on the breach claim does not justify a fee award against Etherington, where Etherington successfully defended that claim. Etherington's right to attorney fees for the defenses upon which he prevailed deserves just as much protection as Cornish's right to attorney fees for the claims upon which it prevailed. But the trial court's award not only ignores Etherington's right to a proportional fee award, it also makes him responsible for fees on claims Cornish lost against Etherington.

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

The Court should reverse the award of attorney fees against Etherington for all of the reasons discussed above. In addition, should Virginia Limited or Etherington prevail on any of their issues, the Court should reverse the attorney fee award and remand for

⁴ Cornish did not attempt to segregate its fees, but Etherington estimated that Cornish incurred \$16,750.44 prosecuting the wrongful eviction claim. CP 1015. This is only 2.6% of the total fees Cornish was awarded.

that reason as well. In any event, the trial court should be required to follow the *Marassi* proportionality approach on remand, treating each defendant separately.

B. Virginia Limited and Etherington did not wrongfully evict Cornish where the condition of the building was caused by defective construction, Cornish assumed the risk with full knowledge of the disastrous condition of the building, Cornish waived any claim for wrongful eviction by remaining in the building, and genuine issues of material fact precluded partial summary judgment.

Etherington adopts the arguments of Virginia Limited regarding wrongful eviction.

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

The Court reviews findings of fact for substantial evidence. *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 587, 220 P.3d 191 (2009). As discussed above, no substantial evidence supports FF 2 and 18. Accordingly, the findings are error and the Court should not rely on any of these findings.

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

The primary issue in Etherington's appeal is the attorney fees awarded by the trial court. If Etherington prevails on the attorney fee issue, he will be the substantially prevailing party on

appeal and should be awarded attorney fees for the appeal itself. *Marassi, supra*, 71 Wn. App. at 920. Indeed, the fee clause in the lease/option expressly applies to all fees, “including those for appeal.” Paragraph 5.9, CP 260. Etherington will comply with the requirements of RAP 18.1.

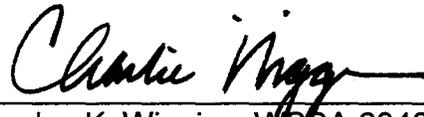
CONCLUSION

The purpose of a contractual attorney fee clause is to shift to the losing party the attorney fees and costs incurred by the prevailing party. But that is not what happened here. Instead, the trial court accepted Cornish’s invitation to impose on Etherington fees Cornish incurred in pursuing its claims against Virginia Limited, despite the fact that Cornish lost those claims against Etherington. This attorney fee award was tantamount to punitive damages against Etherington. Washington does not allow punitive damages even in tort cases, and certainly not in contract cases. The 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.

RESPECTFULLY SUBMITTED this 13th day of January, 2010.

WIGGINS & MASTERS, P.L.L.C.

A handwritten signature in black ink, appearing to read "Charles K. Wiggins", written over a horizontal line.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF APPELLANT** postage prepaid, via U.S. mail on the 13 day of January 2010, to the following counsel of record at the following addresses:

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1923 Order Denying Defendants' Motion for Partial Summary Judgment on 8/29/08.

1926 Order Denying Defendants' Motion for Summary Judgment on 09/05/08.

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1934 Declaration of Richard Yarmuth in Support of Plaintiff's Motion for Orders (1) of Specific Performance of Plaintiff's Option to Purchase Property and (2) that Defendants' Not Commit Waste of the Property

1964 Plaintiff's Motion for Orders of (1) Specific Performance of Plaintiff's Option to Purchase Property and (2) that Defendants Not Commit Waste of the Property

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2418 Declaration of Jo Flannery in Support of Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment on Breach of Contract [Counterclaims?]

2436 Defendants' Opposition to Plaintiff's Motion for Summary Judgment re: Implied Covenant of Quiet Enjoyment and Wrongful Eviction

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1117 Notice of Appeal by Defendant Donn Etherington Jr. to the Court of Appeals, Division I

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1164 Judgment for Attorney Fees and Costs Awarded to Plaintiff

1167 Amended Notice of Appeal by Defendant, 1000 Virginia L.P.

1177 Amended Notice of Appeal by Defendant Donn Etherington, Jr. to the Court of Appeals, Division I