Supreme Court No. 93864-4

Court of Appeals No. 331148

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RICK A. HOLMAN, individually, and on behalf of WOLF CREEK HOLDINGS OF SPOKANE LLC, a Washington Limited Liability Company,

Respondent,

vs.

BRIAN W. BRADY and MOUNTAIN BROADCASTING, LLC, a Washington Limited Liability Company,

Petitioners.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Rick Holman and Petitioner Brian Brady are the sole members and equal owners of Respondent Wolf Creek LLC. This action was brought by Holman individually and derivatively on behalf of Wolf Creek. The action was brought to set aside a "new" lease agreement involving the LLC's only asset that Brady entered into with his other company Mountain Broadcasting without Holman's knowledge or consent. Both the trial court and the Court of Appeals found that Brady's action violated the express terms of the LLC Agreement. The decision from which Petitioners seek review contains no rulings that conflict with this Court's prior decisions nor does it involve any issues of substantial public import. Discretionary review should be denied.

II. RESPONDENT'S IDENTITY

Respondent Rick Holman is a member of Wolf Creek LLC, a Washington limited liability company. Wolf Creek and Holman were the Respondents on appeal to the Washington State Court of Appeals, Division III ("Court of Appeals").

III. RESPONDENT'S COUNTER STATEMENT OF ISSUES

A. Whether the Court of Appeals' ruling that CR 23.1 does not apply to LLC derivative actions conflicts with any Supreme Court

decision or presents an issue of substantial public interest warranting review.

B. Whether the Court of Appeals' ruling that the LLC Agreement required both members' consent to bind the LLC to a lease agreement is in conflict with a decision of the Supreme Court or otherwise presents an issue of substantial public interest warranting review.

C. Whether the Court of Appeals' ruling that Respondent was entitled to attorney fees on appeal is in conflict with this Court's decision in Clark County v. Western Washington Growth Management Hearings Review Board, 177 Wn.2d 136, 298 P.3d 704 (2013).

D. If this Court accepts review of any of Petitioners' issues, whether the Court of Appeals' holding that notice was properly given to terminate the January 12, 1998 Lease Agreement is in conflict with a decision of this Court or presents an issue of substantial public interest.

E. Whether Respondent is entitled to Attorney Fees.

IV. RESPONDENT'S STATEMENT OF THE CASE

Wolf Creek's two members, Brian Brady and Rick Holman each own a 50% interest in the Company. (CP 38) Wolf Creek had no "managing member", and its LLC agreement required joint decision making, expressly prohibiting either member from exercising exclusive authority to make independent management decisions. (CP 16-38) Wolf

Creek's sole asset is a commercial building uniquely suited and established as a television station, which Mountain leased from Wolf Creek in January of 1998. (CP 490-517) (the "Original Lease"). Mountain is owned and controlled by Brian Brady. (Petitioners' Brief, p. 4) The Original Lease term was for 15 years with annual rental increases. Automatic renewal was called for unless a Notice of Non-Renewal was properly given. (CP 490)

Jon Rand was the Vice President/COO of all Brady entities including Mountain. (CP 432) He reported directly to Brady and had to obtain Brady's approval to terminate the Original Lease. (CP 436, 441-442) Rand knew that Holman was a member of Wolf Creek (CP 444). It is undisputed that prior lease related communications were regularly sent by Mountain and its agents to **both** Brady and Holman (at his known address in California) (CP 215-220), and in turn, lease communications were sent by Holman to Mountain. (CP 522-524)

In a calculated departure from the past practice of communicating with Brady **and** Holman on matters relating to the Original Lease, Rand sent a Notice of Termination letter dated September 21, 2012, only to Brady as "President of Northwest Broadcasting" (Rand's employer), informing Brady that Mountain was electing not to renew the Original Lease. (CP 577) Brady did not inform Holman of the letter or provide Holman with a copy of the notice until November 30, 2012, after he had

unilaterally "negotiated" new lease terms with his own company Mountain at substantially reduced rent. (CP 127) Holman immediately and vehemently objected and informed both Brady and Rand, that Brady lacked authority to unilaterally negotiate and enter into a new lease agreement with Mountain. (CP 598)

Brady conceded he was engaging in a "related party transaction," but ignored Holman's objections and Mountain and Brady signed the new lease on January 10, 2013. The new lease reduced rent expenses of his company Mountain by about 40% while at the same time causing a loss of revenue to Wolf Creek, (and ultimately Holman). Nevertheless, Brady opined the new lease was "fair" based upon alleged "surveys" he conducted and he was only informing Holman of the new lease as a "courtesy." (CP 135, CP 583-597)

Brady continues to assert that it is undisputed the new lease is fair and that a unilateral determination of fairness by the self-interested party complies with the LLC Agreement. He is wrong on both points. Holman has challenged the "factual underpinnings" for Brady's fairness argument at every turn (Plaintiffs' Summary Judgment Memorandum, CP 317-320, 329-334) (Respondent's Response Brief, pp. 44-48) and as addressed in Section B. 2, *infra,* the LLC Agreement did not authorize Brady's self dealing transaction.

The illusion of fairness that Brady hoped to create for the new lease transaction is well evidenced by the so-called negotiations leading up to the new lease agreement. On September 21, 2012, Rand opined in his "negotiations" with Brady that "market rent" was $6 to $14 per square foot and that $9 per square foot was "at the very high end of the rental market." (CP 128) On November 30, 2012, Brady sent Holman a memo informing him for the first time of his receipt of the termination notice from Rand and his "negotiations" with his employee Rand on a new lease. (CP 576) Brady claimed, he had conducted a "rent survey" that demonstrated that the projected rent under the Original Lease was substantially over market and in the "best interest" of Wolf Creek he had "negotiated" a new lease with Mountain. He claimed that the new, (drastically reduced) rental rate was 150% of the "average market rate of approximately $8.30/sq. ft. which is reflected in the market surveys." (CP 576)[1] The rental rate ultimately included in the New Lease was $14 per square foot for a period of three years (with the possibility of earlier termination). (CP 583-587) However, in reality these rates were even

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[1] As discussed at length in Respondent's Summary Judgment Memorandum, the "Rent Comparable Grid" relied upon by Brady as his alleged "survey" was in fact derived from a secret appraisal of the Wolf Creek property commissioned by Brady in January of 2012. The appraisal results were skewed by Brady's insistence that the property valuation disregard its current unique use as a television station and that the existing Wolf Creek lease not be considered by the appraiser. (CP 319)

lower than the $14-$16 and $15-$17 rates Rand had discussed in 2005 and 2009 (CP 518-520). Of note, it was Brady, not Holman that rejected Mountain's request for a rent adjustment in 2009 (CP 548).

Casting aside Brady's claim of "fairness" neither the trial court nor the Court of Appeals attributed any legal significance to Brady's argument that the new lease transaction was fair to Wolf Creek and Holman. (12/05/2014 RP 35) (Opinion at 17) Instead, the trial court granted Holman's Motion for Summary Judgment holding that the Original Lease remained in effect because Rand failed to give proper termination notice and the new lease was invalid because Brady lacked authority under the LLC Agreement to unilaterally bind Wolf Creek. (12/05/2014 RP 36)

The Court of Appeals reversed the trial court on the issue of notice (Opinion, at 15-24) but found the management provisions of the LLC Agreement did not grant unilateral authority to Brady to bind the LLC to the new lease. (Opinion at 24-31) The Court of Appeals also held that CR 23.1 does not apply to LLC derivative actions and concluded that as Holman was successful on his claim that Mountain has to pay additional rent as a holdover tenant, he was entitled to attorney fees. (Opinion at 33) The Court of Appeals' opinion is well reasoned and Petitioners have failed to raise any issues that satisfy this Court's narrow standards for discretionary review.

V. ARGUMENT

A. The Court of Appeals' Decision That CR 23.1 Does Not Apply To LLC Derivative Actions Was Correct And Does Not Conflict With A Decision Of This Court Or Present An Issue Of Substantial Public Interest.

At the outset, Brady moved to dismiss the claims against him for lack of personal jurisdiction. (CP 79-92) Brady and Mountain also moved to dismiss the Complaint arguing that Holman had failed to comply with the pleading requirements applicable to corporate and unincorporated association derivative actions set out in CR 23.1. He also asserted that dismissal was appropriate because the Wolf Creek's derivative claims were combined with Holman's individual claims. (CP 79-89) The trial court denied these motions. (CP 153-155)

Brady did not appeal the trial court's personal jurisdiction ruling. The Court of Appeals rejected Brady's argument that Holman had inappropriately joined personal and derivative claims. (Opinion at 12-15) Petitioners have abandoned their improper joinder argument such that the only remnant of their original Motion to Dismiss is their argument that CR 23.1 applies to LLC derivative claims.

1. The Court of Appeals' decision does not conflict with a prior decision of this Court.

The Court of Appeals correctly held that CR 23.1 applies only to actions brought "to enforce a right of a corporation or of an

unincorporated association" and by definition, that does **not** include LLC's. (Opinion at 10) The only Supreme Court case cited by Petitioners allegedly at odds with the Court of Appeals' opinion is City of Fircrest v. Jensen, 158 Wn.2d 384, 393-94, 143 P.3d 776 (2006), cert. denied, 549 U.S. 1254 (2007). Fircrest is apparently cited for the proposition that **if** Court Rules and statutory provisions conflict, they should be harmonized and both given effect if possible. The Court of Appeals was faithful to this rule of contractual interpretation engaging in an extensive analysis of the origins of both CR 23.1 and RCW 25.15.380 to conclude that when no conflict exits: "the plain language of a court rule does not require construction." (Opinion at 7-12) citing, State v. Punsalan, 156 Wn.2d 875, 879, 133 P.3d 934 (2006). Thus, for purposes of RAP 13.4(b)(1), there is no conflict that would justify accepting review of this issue.

2. There is no substantial public interest that will be served by review of the Court of Appeals' Opinion.

The only public interest Petitioners advance is that future LLC derivative actions may be commenced without the protections afforded by CR 23.1. However, former RCW 25.15.380 which set forth the pleading requirements in LLC derivative actions at the time this action was filed has been repealed. Laws of 2015, ch. 188 §108. Although its replacement statute, (RCW 25.15.396), is similar, it is clear that going forward, there is

little or no likelihood that another case will arise that involves former RCW 25.15.380. Indeed, in the 21 years that RCW 25.15.380 was in effect, there has been **no** published opinion addressing the application of CR 23.1 to LLC derivative claims. If the Court deems it appropriate to "clarify" CR 23.1's relationship, if any, to LLC derivative actions, there is no urgency or public interest in doing so based upon a repealed statute.

In addition, the practicalities of accepting review should not be overlooked. It is undisputed that Respondent complied with the pleading requirements of former RCW 25.15.380 governing LLC derivative claims. While expressly holding that CR 23.1 did not apply, the trial court nonetheless considered each of the additional requirements that would be imposed by CR 23.1 and found them either unnecessary or satisfied under the facts presented. The trial judge stated a legitimate issue was raised by the Complaint; she presumed Holman would verify it; and she refused to require Respondent to engage in this meaningless formality. (6/28/2013 RP 18, 29-30) See generally, RCL N.W., Inc. v. Colorado Res., Inc., 72 Wn.App. 265, 271, 864 P.2d 12 (1993) (verification under CR 23.1 developed out of the desire to avoid baseless claims.)

The trial court also held that personal jurisdiction over Brady was appropriate independent of the derivative nature of the lawsuit. (12/05/2014 RP 25) Brady did not appeal the trial court's personal

jurisdiction ruling. It has been waived. Milligan v. Thompson, 110 Wn.App. 628, 635, 42 P.3d 418 (2002). Finally, Brady's argument that Holman has not demonstrated how he could fairly and adequately represent Brady misconstrues the requirements of CR 23.1 (see, Halsted Video, Inc. v. Guttillo, 115 F.R.D. 177 (N.D. Ill. 1987) (inquiry focuses on whether the plaintiff can represent the other non-defendant "similarly situated" members). In any event, the trial court specifically found that both Holman's and Brady's goals as members of Wolf Creek were to maximize the LLC's profits. (12/05/2014 RP 26-28)

Even if CR 23.1 were applied to this case, remanding to the trial court to require amendment of the Complaint to allege matters upon which the trial court has already ruled, smacks of the same "mere formalism" that the court in RCL N.W. and the Civil Rules counsel against. Id. at 271, CR 1 ("These rules... shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

B. The Court of Appeals' Ruling That Brady Lacked Authority To Unilaterally Bind Wolf Creek To A New Lease Does Not Conflict With A Decision Of This Court Or Present An Issue Of Substantial Public Interest.

The Court of Appeals applied well established rules of contract interpretation in reaching the correct conclusion that the LLC Agreement required both members to bind Wolf Creek to a new lease agreement. Far

from demonstrating how the Court of Appeals' decision is at odds with other decisions of this Court as required by RAP 13.4(b)(1), Petitioners simply present their same, flawed interpretation of the LLC Agreement and equate that with a conflict. To accept their position as a basis for discretionary review would open the floodgates to discretionary review in all cases involving contract interpretation and undermine the "certainty of contracts" that Petitioners claim their request for review would advance.

1. The Court of Appeals' decision is not contrary to any prior decision of this Court.

The starting point for the Court of Appeals' interpretation of the LLC Agreement was former RCW 25.15.150(1) which the Court observed allowed members to contractually define the management rights and duties of any member or group of members. (Opinion at 25) The Court of Appeals correctly found that the parties had done just that in Article V, Section 2 of the LLC Agreement which provides:

> ARTICLE V
> Management
>
> Section 2. Authority of members to bind company. All members of the Company shall have the authority to obligate or bind the Company in connection with any matter.

(CP 369) Petitioners urged reading the term "all" to mean "each". Both the trial court and the Court of Appeals rejected this reading and held that the term "all" should be given its plain and ordinary meaning namely, "the

entire or total number of members". (Opinion at 26) (citations omitted) This holding is entirely consistent with this Court's established precedent that words used in contracts be given their ordinary meaning whenever possible. See, Storti v. University of Washington, 181 Wn.2d 28, 39, 330 P.3d 159 (2014).

Mindful of its obligation to examine all of the contract provisions, the Court of Appeals also considered Petitioners' argument that the authority of *any* member to bind the company was evidenced by Article XIII ("General Provisions"), Section 1 ("Execution of Documents") which provides that "[a]ny member...shall have the power to execute and deliver...leases...for and in the name of the Company." (CP 542) The Court of Appeals found the authority to execute an agreement is not equivalent to the authority to approve it. (Opinion at 29) (citation omitted). The Court of Appeals also found that use of the term **"all members"** in the management clause and **"any member"** in the execution clause implied that the parties intended different meanings. (Opinion at 26) This too is in accord with well established rules of contractual interpretation. (Id.)

Petitioners' remaining attempts to coax ambiguity out of the plain language of the LLC Agreement rest on its arguments that Respondent's

interpretation of the Agreement render other clauses of the Agreement superfluous. They are incorrect.

2. Article VI (Interested Members), Section 1(b).

According to Petitioners, Article VI, Section 1 of the LLC Agreement allows Brady to unilaterally engage in a related party transaction provided it is fair and thus, if unanimous consent were required to bind the LLC, this provision would not be necessary.[2] This argument rests on Petitioners' flawed interpretation of this provision. The Court of Appeals correctly noted this provision adds an additional approval requirement to interested party transactions. (Opinion at 29-31) Thus, if Brady had obtained Holman's consent to this transaction after full disclosure, it could have been upheld under Article VI, Section 1(a). If the transaction was **approved** without full disclosure, it could also have been upheld if it was fair. Of course, there was **no** approval by Holman of this transaction and thus, Article VI, Section 1(b) was never satisfied.

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[2] Petitioners' bald assertion that this provision was "negotiated specifically by Brady and Holman to address the precise situation at issue here" is wholly unsupported by the record. No evidence of any such "negotiation" exists. Indeed, if Brady believed that he had unilateral authority to enter into a new lease or adjust the existing lease at any time, one has to wonder why he did not do it sooner in response to Rand's previous requests.

3. Article IV (Voting), Section 2(b).

Next, Petitioners argue that Article IV, Section 2(b) providing for majority vote to deal with certain ownership issues would be wholly unnecessary if all decisions already required unanimous consent by virtue of Article V, Section 2. This argument rests entirely on Petitioners' mischaracterization of the Court of Appeals' holding as being that "unanimous member consent was required for all decisions." What the Court of Appeals did hold was that the authority to **obligate** the LLC is a management matter dealt with in Article V. (Opinion at 27-28) In contrast, Article IV, Section 2(b) relates to "ownership" matters and is not at issue when a member binds the LLC to a **lease**. (Id. at 28) Petitioners offer no cogent reason for disregarding this management/ownership distinction.

4. Article V (Management), Section 1.

Contrary to Petitioners' argument, Article V, Section 1 is not superfluous to Section 2 as interpreted. The management provisions in the LLC Agreement provide two things: no member has the "continuing exclusive authority to make independent management decisions" (Section 1); and "all members shall have the authority to obligate or bind the Company" in relation to transactions with others. (Section 2) These are neither redundant to one another, nor superfluous when read together.

As the Court of Appeals correctly held, Section 1 deals with operation and management decisions generally while Section 2 is a more specific clause dealing with authority to bind the company. (Opinion at 25)

5. Article III (Members).

Petitioners' final attempt to create redundancy focuses on "portions" of Article III and in particular Section 5 of that Article. Although this argument was not raised at either the trial court or the Court of Appeals, it can be easily disposed of here. It is clear from reading the entirety of Article III that it is a corporate governance section unrelated to obligating the company to a lease agreement. Further, it is clear from even a cursory review of Article III that the LLC Agreement was never written to limit the LLC to two members. Section 10 for example contemplated that new members could be added. Section 3 addresses special meetings when there are less than 3 members and Section 12 addresses removal of members when there are more than 3.

In this context, it makes complete sense to say that the majority vote controls. However, Section 5 also says the majority vote controls unless "the question is one upon which by express provision...of this LLC Agreement, a different vote is required." Of course, Article V, Section 2 requiring "all members" to consent is just such a provision.

6. Non-Superfluous Interpretation.

Petitioners argue that Article XIII, Section 1 provided Brady the authority to bind the company. The Court of Appeals rejected this argument properly finding this clause delegates ministerial authority to *execute* documents only-not *managerial* authority. The Court of Appeals stated that to hold otherwise, would render Article V, (Management) superfluous. (Opinion at 28-29) (citing, Nishikawa v. U.S. Eagle High, LLC, 138 Wn.App. 841, 849, 158 P.3d 1265 (2007))

Recognizing the incongruity of their prior argument, Petitioners now agree that Article XIII, Section 1 relates only to the authority to sign. This "new interpretation" they say, removes the redundancy noted by the Court of Appeals and makes Article XIII consistent with (and not superfluous to) their interpretation of the Management clause. This adds nothing to their position-it is also consistent with the Court of Appeals' interpretation.

7. Reasonableness.

In finding that unanimous consent to bind the LLC to a lease agreement was a more reasonable interpretation of the LLC Agreement, it is obvious that the Court of Appeals was mindful of the chaos that could follow if both members had the authority to enter into potentially inconsistent agreements. The Court of Appeals followed this Court's

directive to the letter, to avoid reading contracts in a manner that would produce absurd or unreasonable results. (Opinion at 26-27)

C. The Court of Appeals' Decision That Holman Was Entitled To Attorney Fees Does Not Conflict With Any Decision Of This Court.

Petitioners argue that the Court of Appeals' decision in "adjudicating" its holdover status contravenes this Court's opinion in Clark County v. Western Washington Growth Management Hearings Rev. Board, 177 Wn.2d 136, 139, 298 P.3d 704 (2013). In Clark, the question presented was whether the Court of Appeals erred when it *sua sponte* decided issues that were resolved at the trial court level and not appealed. This case presents completely different issues. Here, the Court of Appeals affirmed the trial court's ruling that the new lease was not valid due to Brady's lack of authority. (Opinion at 31) Yet, Mountain remains on the leased premises. Mountain is the very definition of a holdover tenant and no express "finding" by the trial court was required to establish that status. See e.g., 49 Am. Jur. 2d, Landlord and Tenant, §124 (a tenancy at sufferance arises when one who had rightful possession continues in possession after the right to possession has ended); RCW 59.04.050 ([w]henever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he or she shall be deemed a tenant by sufferance…)

Article XXII of the Original Lease expressly provides that if Mountain remains in possession after termination, the tenancy is month-to-month with monthly rent established in the lease. It also specifically provided that the tenancy is subject to all other terms of the lease, which of course includes attorney fees pursuant to Article XXIV. (CP 59-61) see also, Marsh-McLennan Building, Inc. v. Clapp, 96 Wn.App. 636, 646-647, 980 P.2d 311 (1999) (attorney fee provision of expired lease applies to holdover tenant). The Court of Appeals' opinion is in accord with, not in conflict with any opinion of this Court.

Petitioners' argument that a question exists as to whether Holman is the prevailing party is similarly without merit. Whether Respondent's claims are denominated as Counts 1 or 2, they arrive out of the same core of facts, enforcement of the Original lease and not the "new" lease. Accord, Riss v. Angel, 131 Wn.2d. 612, 633-635, 934 P.2d 669 (1997) (plaintiffs who were unsuccessful on claim to hold covenants invalid nevertheless "prevailed" where court found covenants violated because plaintiffs still got to build their house.) Petitioners' final argument that the amount of fees should be segregated was raised in the Court of Appeals and has not yet been ruled upon. (Appellants' Objection to Respondent's Cost Bill; Respondent's Reply to Appellants' Objection). It therefore does not provide a basis for discretionary review.

D. If This Court Grants Petitioners' Request for Review, The Court of Appeals' Holding That Notice To Terminate The Original Lease Agreement Was Properly Given Conflicts With Decisions Of The Supreme Court Or Presents An Issue Of Substantial Public Interest.

As addressed above, Petitioners request for review of the "authority" issue rests merely on disagreement with how the Court of Appeals applied well established principles of contract interpretation. If this Court were to accept review of the authority issue based on Petitioners' arguments, it is submitted that the same arguments would apply to Respondent's notice issue. The Court of Appeals must interpret contract clauses based upon the parties' intent drawn from the "reasonable meaning of the words used" and giving terms their "ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." Hearst Comm., Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

Further, a notice of intent to exercise an option contained in a lease must be definite, and given strictly in conformance with the terms of the lease. Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn.App. 601, 605 P.2d 334 (1979). The trial court properly held that Mountain failed to properly exercise its option to terminate the Original Lease because the Notice of Termination was not sent via certified or registered mail, not addressed to Wolf Creek and under these unique facts and circumstances,

was never intended to be received by the "Landlord" as required by the plain language of Article XXIII of the Original Lease. (CP 178) (CP 490-517) (12/5/2014 RP 31-34) The trial court's ruling was correct and should Petitioners' request for discretionary review be granted, Respondent asks that discretionary review be granted as to the Notice issue as well.

E. Homan Is Entitled To Attorney Fees.

Attorney fees were awarded to Respondent on appeal. Pursuant to RAP 18.1(j), Holman requests an award of his attorney fees on appeal here.

DATED this 19th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of December, 2016, the foregoing was caused to be served on the following person(s) in the manner indicated:

Bryce J. Wilcox Lee & Hayes, PLLC 601 W. Riverside, Suite 1400 Spokane, WA 99201 Attorney for Petitioners	**VIA REGULAR MAIL** ☐ **VIA CERTIFIED MAIL** ☐ **HAND DELIVERED** ☒ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐

DATED at Spokane, Washington, this 19th day of December, 2016.

Janel Martindale