No. 331148

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellants.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Holman does not dispute that Mountain timely sent the required Notice of Non-Renewal, that it was timely received by Brady, and that Brady, a member of Wolf Creek, is its agent and authorized to act on its behalf. Based on these undisputed facts, delivery of the Non-Renewal Notice via Federal Express satisfied Mountain's contractual notice duty and the 1998 Lease expired at the end of its 15-year term.

Ignoring the plain meaning of the 1998 Lease, the trial court agreed with Holman's derivative claim against Mountain – that its Notice of Non-Renewal had to be delivered to Holman personally (instead of to the "Landlord," Wolf Creek) via registered or certified mail. Not only does Holman's derivative claim fail to satisfy CR 23.1, which sets forth the requirements for asserting derivative claims on behalf of a limited liability company, but the 1998 Lease only required notice to the Landlord, not Holman, and did not require a specific form of delivery.

Holman also misconstrues the Wolf Creek, LLC Agreement in support of his assertion that Brady lacked authority to enter into the New Lease. As Wolf Creek is a member-managed LLC, "all members" possess the "authority to obligate or bind the Company in connection with any matter."[1] This broad grant of authority is limited in two ways. First, no single member has "***continuing exclusive*** authority to make independent management decisions."[2] Second, to the extent a member is an

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[1] CP 20.
[2] *Id.* (emphasis added).

"interested" party to a Wolf Creek transaction, unless the transaction is approved by a majority of the disinterested members (here, Holman), the transaction must be "fair" to the LLC.[3] Because the New Lease is fair to Wolf Creek, Holman need not have consented to its terms, and the trial court's holding to the contrary should be reversed.

At Holman's invitation, the trial court focused on the parties' prior course of dealings and Brady's claimed motive underlying his contractually compliant actions. In doing so, the trial court engaged in irrelevant, impermissible fact finding on summary judgment that altered the express terms of the parties' contracts. In Washington, courts must make inferences in favor of the non-moving party on motions for summary judgment, and in any event, cannot re-write contracts. *Clements v. Olsen,* 46 Wn.2d 445, 448, 282 P.2d 266 (1955). This Court should reverse the trial court and enter judgment in favor of Brady or, alternatively, remand for trial to resolve the factual questions.

II. REPLY STATEMENT OF FACTS

Holman misstates and mischaracterizes the facts.

Misstatement #1: Holman repeatedly asserts that the Notice of Non-Renewal was "purposefully" and "secretly" sent by Mountain to Brady "to deprive Holman of the notice" and to negotiate a new, more favorable lease with Wolf Creek.[4] This assertion is factually incorrect and legally irrelevant.

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[3] CP 20-21.
[4] Holman Resp. Brief at 1-2, 4, 28-29, and 32.

It is undisputed that the Notice of Non-Renewal was sent to Wolf Creek as "Landlord."[5] The 1998 Lease did not mandate individual notice to both owners of Wolf Creek.[6] The Notice did not trigger any action by Wolf Creek, and was the mechanism by which Mountain could exercise its unilateral legal right to decline to renew the Lease for another term. Once the Notice of Non-Renewal was delivered, the lease was over. There was no action Wolf Creek could take, whether through Brady or Holman, which would have resurrected the terminated lease. Mountain's motivation in not sending a copy of the notice to Holman is therefore irrelevant. However, to the extent the Court deems Mountain's motivation relevant, the facts conflict with Holman's characterization.

As Holman admits, Mountain's Vice President, John Rand, testified he did not send a copy of the Notice of Non-Renewal to Holman because Holman had "never chosen to respond or communicate" with him on any level in the past and therefore communicating with him was "pointless."[7] There is no evidence that Rand's decision to not send a copy of the Notice of Non-Renewal to Holman was for any nefarious purpose.

Holman claims Rand "secretly" sent the Notice of Non-Renewal only to Brady in order to facilitate negotiating a new lease under more favorable terms.[8] First, by linking the Notice of Non-Renewal with the negotiation of a new lease, Holman conflates two distinct legal and factual

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[5] CP 178.
[6] CP 39, 60.
[7] Holman Resp. Brief at 12.
[8] Holman Resp. Brief at 1-2, 4, 28-29, and 32.

issues. Once the 1998 Lease was terminated by delivery of the Notice of Non-Renewal, Wolf Creek's rights thereunder ceased and there was nothing it or Holman could do to resurrect the lease. Mountain was then free to either vacate the Property or enter into a new lease. Brady's ability to enter into a new lease on behalf of Wolf Creek presents a distinctively different question than whether the 1998 Lease was terminated.

Holman argues that he was forced to bring suit, on behalf of Wolf Creek, to block Mountain from enforcing the New Lease, "which drastically reduced the rent."[9] This is another example of confusion created by Holman conflating the notice and new lease issues. The notice terminated the 1998 Lease, and the rent previously charged thereunder is nothing more than a historical fact. The question is not whether the New Lease rate is lower than the 1998 Lease rate, but whether the new rate was fair to Wolf Creek under current market conditions.

Misstatement #2: Holman argues that "there exists no evidence in the record of the fairness of the rent in the new Lease" and that "no evidence exists that [the old lease rate] is 'over-market' or 'unfair.'"[10] In fact, such evidence was discussed at pages 11-12 of Brady's opening brief and stands as unrefuted. Holman has never questioned the fairness of the New Lease, nor could he, as the New Lease rate is more than 150% above market. Rather, Holman wants to continue under the expired 1998 Lease,

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[9] Holman Resp. Brief at 6, 11, and 13.
[10] Holman Resp. Brief at 2, 24, and 47.

which would have been more than 300% above market if extended.

The undisputed facts show that Mountain originally proposed a new lease rate of $9/square foot.[11] In response, Brady (on behalf of Wolf Creek), indicated that $9/square foot was not acceptable and countered with $15/square foot for a three-year term.[12] Rand (on behalf of Mountain) asserted that the proposed $15/square foot rate was still 200% of the comparable market properties, but to "put these negotiations to bed," Rand countered by proposing a three-year lease at $14/square foot.[13] As Brady notified Holman in November 2012, the $14/square foot rate "is more than 150% of the average market rate of approximately $8.30/sq. ft. which is reflected in the market survey."[14] Contrary to Holman's Misstatement #2, there is unrefuted evidence that the New Lease is more than fair to Wolf Creek.

Misstatement #3: Holman claims that "as a member of Wolf Creek, [he] was required to be communicated with regarding the Lease Agreement."[15] This claimed "undisputed fact" was made without any cite to the record, and is in direct conflict with the parties' agreement. In his zeal to endorse the trial court's re-writing of the 1998 Lease, Holman ignores the operative language, which only requires notice to the "Landlord," which is Wolf Creek, and which specifies Brian Brady as the

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[11] CP 178.
[12] CP 131-133.
[13] CP 134.
[14] CP 124, 127.
[15] Holman Resp. Brief at 9.

agent to whom notices should be given.[16] There is nothing in the 1998 Lease that remotely required individual notice to Holman.

What is more, if Holman is referring to a right as a member of Wolf Creek to be advised of company affairs, including the status of the lease, he was. For example, in November 2012, Brady notified Holman that under the New Lease, Wolf Creek would receive $14/square foot, which was more than 150% of the average market rate of approximately $8.30/sq. ft.[17] Holman's complaint is not that he was uniformed, but that Brady made the decision without his advance consent. The 1998 Lease did not compel Mountain to provide Holman with individual notice, nor did the Wolf Creek LLC Agreement require Holman's consent on company business deals.

Misstatement #4: Holman next falsely asserts that the Notice of Non- Renewal was not sent to the "Landlord."[18] While the physical delivery address on the notice letter was to Brady's office (as Wolf Creek has no office address) Holman fails to tell the Court that the letter was delivered to Brady in his "position as a member of Wolf Creek Holdings of Spokane LLC."[19]

Misstatement #5: Finally, Holman falsely claims (without support) that Rand "admitted that he was avoiding notice to Holman to ensure Mountain obtained the reduced rent . . . ."[20] As discussed above,

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[16] CP 39, 60, 63.
[17] CP 124, 127.
[18] Holman Resp. Brief at 28-29.
[19] CP 227.
[20] Holman Resp. Brief at 19.

Rand provided undisputed testimony as to why Mountain did not also copy Holman with the Notice of Non-Renewal. There is NO evidence that Rand's decision had any nefarious purpose. Once Mountain provided notice to Wolf Creek, the 1998 Lease was terminated and there was nothing Holman could do to prevent it. Sending notice to Holman would not have enabled him to preserve Wolf Creek's above-market lease rate.

III. REPLY ARGUMENT

A. The trial court's findings are superfluous.

Holman relies on factual findings made by the trial court. Summary judgment motions are reviewed *de novo*. Thus, these findings are erroneous to the extent they fail to credit Mountain's evidence in opposition, are superfluous, and should not be considered. *Duckworth v. City of Bonney Lake,* 91 Wn.2d 19, 21–22, 586 P.2d 860 (1978).

B. Holman's derivative claim is fatally deficient.

Holman's derivative action is flawed in several key respects

1. The derivative issue is properly before this Court.

Holman sought certification under CR 54(b) and entry of final judgment on claims against Mountain.[21] Holman, individually and derivatively on behalf of Wolf Creek, claimed prevailing party status against Mountain and requested that a final judgment be entered because the claims against Mountain had been fully adjudicated. The trial court certified a final monetary judgment against Mountain in favor of Holman

[21] *See* CP 379.

individually and on behalf of Wolf Creek under CR 54(b) and thereafter entered judgment against Mountain.[22]

Holman's only basis to assert claims against Mountain is derivatively on behalf of Wolf Creek, as he has no direct claims. Brady disputes Holman's right to assert a derivative claim, and also challenges the propriety of Holman joining personal claims against Brady with his derivative claim against Mountain. Holman's failure to assert a valid derivative claim mandates dismissal of Mountain from the lawsuit.[23]

Holman states that the appeal of the derivative issue is not timely or proper, arguing that the trial court's denial of the motion to dismiss concerning the question was not expressly referenced in Brady's Notice of Appeal. But, as Holman acknowledges, Brady appealed the final judgment against Mountain, "and all Orders that inhere in that Judgment."[24] CR 54(b) permits an immediate appeal when it would be unjust to delay entering a judgment on a distinctly separate claim until the entire case has been finally adjudicated. *Nelbro Packing Co. v. Baypack Fisheries, L.L.C.*, 101 Wn. App. 517, 522, 6 P.3d 22, 25 (2000).

Here, it would be unjust not to review all issues pertaining to the final judgment against Mountain. The parties agree that the claim against Mountain was resolved on summary judgment. Whether Holman had the

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[22] CP 379-384, 385-387.
[23] Since Holman is a citizen of California, and Brady is a citizen of Michigan, the assertion of jurisdiction over Brady fails with dismissal of Wolf Creek.
[24] CP 388-392.

right, on a derivative basis, to bring the claim in the first instance is appropriate for review because it is merged into the judgment. The sole case cited by Holman confirms the propriety of this Court reviewing the derivative claim.[25] In *Ballard v. Popp*, 142 Wn. App. 307, 311, 174 P.3d 681, 683 (2007), after CR 54(b) certification, the parties sought to include review of another, related order. The court held that "all issues should be before the court in the interest of judicial economy." *Id.* The same outcome is warranted here.[26]

Holman argues that Brady raises new issues on appeal, including the necessity that he plead the derivative claim was not collusive to confer jurisdiction and that the derivative claim raised a conflict of interest. However, in his Motion to Dismiss, Brady argued that Holman's derivative claim was deficient because "it does not contain a verified statement that Holman did not bring the complaint collusively for the sake of obtaining jurisdiction in Washington."[27] The conflict issue was addressed at pages 9-10 of the same brief. Holman's assertion that these issues were not raised below is false.

2. CR 23.1 governs Holman's derivative claim.

Holman continues to assert that RCW 25.15 governs his derivative

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[25] Holman Resp. Brief at 18.
[26] Holman accuses Brady of selectively picking issues to appeal, citing his failure to challenge the personal jurisdiction ruling. But there is no final judgment on claims against Brady (the trial court's CR 54(b) certification pertained to the judgment against Mountain). If a final judgment is entered against Brady, he will contest personal jurisdiction by appeal. Brady Brief at 25, n. 65.
[27] CP 86-88.

claim rather than CR 23.1. He must do so, because his derivative Complaint fails to satisfy the court rule.

While there are some similarities between CR 23.1 and RCW 25.15, they are in conflict. Unlike RCW 25.15, CR 23.1 requires a derivative complaint to be verified and the plaintiff must attest that the derivative claims are not asserted in a collusive fashion to confer jurisdiction. Under R 23.1, Holman was also required to articulate how he could fairly and adequately represent Brady's interests in enforcing the rights of Wolf Creek. Holman concedes these differences exist between RCW 25.15 and CR 23.1, and that he has not satisfied the requirements of CR 23.1. Despite this, he asserts no conflicts exist between the two. The gap in his reasoning cannot be bridged. On their face, RCW 25.15 and CR 23.1 conflict, and under binding Washington Supreme Court precedent, court rules trump. *See City of Fircrest v. Jensen,* 158 Wn.2d 384, 393–94, 143 P.3d 776 (2006). Holman does not challenge this statement of law.

In attempt to persuade this Court that CR 23.1 does not apply, Holman proclaims that it has never been amended to include limited liability companies. No amendment was necessary, as CR 23.1 states it applies to unincorporated associations and pursuant to RCW 1.16.080, an "unincorporated association" includes a limited liability company.

In an attempt to save his defective derivative claim, Holman cites two unpublished Washington Court of Appeals' decisions.[28] GR 14.1(a)

[28] Holman Resp. Brief at 21.

prohibits a party from citing an unpublished opinion of the Washington Court of Appeals. "Unpublished opinions have no precedential value and should not be cited or relied upon in any manner." *Skamania County v. Woodall,* 104 Wn. App. 525, 536 n. 11, 16 P.3d 701. Of note, Courts have imposed sanctions for such actions. *See, e.g., Kenneth W. Brooks Trust v. Pac. Media, LLC,* 111 Wn. App. 393, 401, 44 P .3d 938 (2002). Brady does not seek sanctions for Holman's violation of GR 14.1(a), but asks that the Court disregard the unpublished cases and bar any discussion of them at oral argument.

3. Holman's derivative claim fails because he did not verify it was not collusive to confer jurisdiction over Brady.

This dispute is between Holman and Brady. Under CR 23.1, Holman was bound to swear, under penalty of perjury, that his derivative claim was not collusive to confer jurisdiction over Brady and he failed to do so. Holman's *argument* that this was not his intention does not satisfy CR 23.1. The derivative claim should be dismissed for this jurisdiction reason alone.

4. Holman's derivative claim fails because it is not in the best interest of Wolf Creek and his joinder of individual claims against Brady presents a conflict.

Holman's Complaint is also deficient under CR 23.1 because (1) his derivative claim, which is really a restatement of his personal claim against Brady, cannot be in the best interest of Wolf Creek, and (2) by also asserting personal claims against Brady, Holman created an impermissible

conflict, for the underlying purpose of his claim is to benefit himself at the expense of the other member of Wolf Creek LLC – Brady.

To proceed under CR 23.1, the Complaint needed to show that a conflict would not be created by Holman joining derivative and personal claims. 3A Tegland, Wash. Prac.: Rules Practice at 518 (5th Ed. 2006) (*citing Hames v. Spokane-Benton Cnty. Nat. Gas Co.*, 118 Wash. 156 (1922)). Ignoring the strict standard in scrutinizing simultaneous direct and derivative actions for signs of conflict, Holman claims *Hames* does not apply to LLCs because it is a "very old rule."[29]

Holman also claims the *Hames* non-joinder rule does not apply to minority shareholders of a closely-held corporation, although the case he cites (*Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 519-520, 728 P.2d 597 (1986)) does not stand for that proposition. Nor is Holman's attempt at distinguishing *Hames* persuasive. The factual nuances in *Hames* referenced by Holmes do not render the conflict concerns embodied in *Hames* inapplicable here.

This case presents what in reality is a personal financial dispute between the two owners of Wolf Creek. The purpose of this lawsuit is for Holman to gain advantage over Brady, not to advocate for both members' interests on a common footing. From the allegations in Holman's complaint, this action is in the best interest of Holman, not in the best

[29] Holman claims the *Hames* rule is "outdated" and no longer applies, but cites no Washington case supporting this position, only a treatise that does not specifically address Washington law. Holman Resp. Brief at 25.

interests of Wolf Creek and all members of Wolf Creek.

5. Standard of review for derivative actions

Assuming CR 23.1 applies, Holman argues that an abuse of discretion standard governs this Court's review. Holman cites *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 153, 744 P.2d 1032, 1063 (1987) for this sweeping proposition. But the holding in *Haberman* is much narrower than what Holman asserts. In discussing one specific aspect of a derivative claim (the need to make a pre-suit demand upon the entity), the court held that "whether **the demand requirement** is excused is within the trial court's discretion." *Id.* (emphasis added). The court did not mention the other procedural aspects of CR 23.1, including those at issue here. It is worth noting that the Washington Supreme Court cautioned that "derivative suits are disfavored and may be brought only in exceptional circumstances." *Id.* at 147.

Holman also claims that other aspects of CR 23.1 are reviewed under an abuse of discretion standard. However, at the urging of Holman, the trial court did not analyze the derivative issue under CR 23.1, so it made no findings concerning the CR 23.1 requirements to which deference could be applied.[30] This Court should review the issue *de novo.*

C. Mountain's Non-Renewal Notice complied with the 1998 Lease.

Holman contends that the Non-Renewal Notice was deficient both because it was not sent via certified or registered mail and because it was

[30] CP 153-155.

not sent to him. The trial court erroneously agreed with both contentions, in contravention of the unambiguous language in the 1998 Lease.

1. Mountain's performance of the notice requirement is measured under a substantial compliance standard.

The notice requirement in 1998 Lease is a contractual provision that must be interpreted in accordance with the objectively expressed intent of the parties. The issue is whether Mountain substantially complied with the notice provision. *See Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889, 891 (N.Y. 1921).

Citing *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 605 P.2d 334 (1979), Holman erroneously claims that a strict compliance standard applies. Unlike here, *Wharf* addressed the requirements to exercise an option, a materially different situation than a non-renewal notice. The reference in *Wharf* to a heightened level of compliance in the option setting was explained in *Jones v. Dexter*, 48 Wn.2d 224, 292 P.2d 369 (1956), the case relied upon by *Wharf*. In *Jones*, the court held that "[t]he notice of election to take advantage of an option to extend or renew a lease must indicate a definite, unequivocal, and unqualified determination on the part of the lessee to exercise his option." 48 Wn.2d. at 226. So even if there exists a heightened standard here, it would be to show that the Non- Renewal Notice expressed "a definite, unequivocal, and unqualified determination" not to renew the 1998 Lease, which it unquestionably did. Whether analyzed under a substantial or strict compliance standard, Mountain's Notice of Non-Renewal met the notice

requirement.

2. The 1998 Lease required notice to Wolf Creek as "Landlord" – not Holman personally.

The parties agreed that the initial term of the 1998 Lease would be extended "unless the Tenant shall give notice to the **Landlord** at least ninety (90) days prior to the Extension Date that the Tenant elects that the term of this Lease not be extended."[31] It is undisputed that the Landlord is Wolf Creek. It is also undisputed that Brady is a member of Wolf Creek and is an authorized agent and representative of the company.[32] It is also undisputed that the Non-Renewal Notice was sent to Brady in his "position as a member of Wolf Creek Holdings of Spokane LLC."[33] Notice to Brady therefore constituted notice to the Landlord.

Further, Article XXIII of the 1998 Lease expressly provided that notices should be "addressed to the Landlord or Tenant respectively at the addresses set forth after their signature at the end of this Lease."[34] Holman recognizes that there are no addresses identified following the signature blocks at the end of the 1998 Lease and that Brady was identified under the "Landlord" signature block as the person to sign on behalf of Wolf Creek.[35] Thus, notice to Brady at his address was *exactly* compliant with the notice requirements. Holman's arguments contradict the plain terms of the 1998 Lease and should be rejected.

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[31] CP 39 (emphasis added).
[32] CP 38.
[33] CP 128.
[34] CP 60.
[35] CP 63.

Holman relies heavily on prior course of conduct, claiming that personal notice was required because Mountain had at times communicated with both Holman and Brady and this modified the 1998 Lease, creating a contractual requirement to do so in all instances. This position is not supported by the 1998 Lease or Washington law.

Article XXVI provides that the 1998 Lease reflected the entire agreement between the parties and that it could only be amended or altered "by an instrument in writing signed by both Landlord and Tenant."[36] If a contract is fully integrated, extrinsic evidence can be used only to understand or explain the context of the agreement and what the parties intended. But extrinsic evidence cannot be used to add or subtract language in the agreement and is not admissible to show intention independent of the contract. *Hollis v. Garwall, Inc.,* 137 Wn.2d 683, 695, 974 P.2d 836 (1999); *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990).

Citing *Eagle Insurance Co. v. Albright,* 3 Wn. App. 256, 266, 474 P.2d 920, 927 (1970), Holman claims the parties' prior course of conduct "is relevant" in construing the lease terms.[37] What Holman fails to state, however, is that this rule of construction only applies when a term is unclear or susceptible to more than one meaning; course of conduct cannot be used to modify an express contract term. 3 Wn. App. at 266.

The 1998 Lease required notice to Wolf Creek as "Landlord." The

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[36] CP 61-62.
[37] Holman Resp. Brief at 31.

Non-Renewal Notice was, in fact, sent to Wolf Creek care of Brady as a member of Wolf Creek, thus complying with the 1998 Lease. Courts do not have the power, under the guise of interpretation, to rewrite contracts parties have deliberately made for themselves. *Clements,* 46 Wn.2d at 448. Holman's attempt to re-write the 1998 Lease to also require notice to Holman should be rejected.

3. The Non-Renewal Notice was not "secretly" or "surreptitiously" delivered to Wolf Creek.

Holman steadfastly argues that the Notice of Non-Renewal was "purposefully" and "secretly" sent by Mountain to Brady "to deprive Holman of the notice."[38] As discussed above, this assertion is both factually inaccurate and legally irrelevant.

There is NO evidence that Mountain sent the Non-Renewal Notice to Brady in an "intentionally secretive" manner. Indeed, the evidence cited by Holman shows Mountain did not copy Holman with the notice because he never responded in the past: "I was more inclined to not send it to him because he had never chosen to respond or communicate with me on any level, including sending notices and it seemed pointless to me."[39] There is no evidence that the decision not to send the notice also to Holman was "secretive."

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[38] Holman Resp. Brief at 2, 32-34.
[39] Holman Resp. Brief at 12; CP 274.

4. It is irrelevant whether Wolf Creek "accepted" the Notice of Non-Renewal.

Holman argues the trial court found that Brady unilaterally "accepted" a deficient notice. This reflects a fundamentally flawed understanding of the parties' agreement; the Notice of Non-Renewal was triggered by sending it, not by "accepting" it. Under the 1998 Lease, once Mountain sent the Notice of Non-Renewal there was **nothing** Wolf Creek could do to reinstate the 1998 Lease. Whether notice was sent to Brady, Holman or both, the result would have been exactly the same – the lease was at an end, and not renewed.

5. The method used to send the Notice of Non-Renewal (Federal Express) was proper.

Article XXIII of the 1998 Lease states that written notice is required and ***if*** it is effectuated by certified or registered mail, it is "deemed delivered 48 hours after depositing the notice or demand in the United States mail."[40] Therefore, if notice was sent by registered or certified mail, the sender would be afforded a presumption that the notice was delivered 48 hours after it was sent. But this delivery presumption was not required in instances (like here) where the sender uses an alternative form of delivery and independently proves actual delivery.

Holman maintains that not only was written notice required, but it had to be delivered by registered or certified mail. Holman asserts that use of the mandatory "shall" in the notice provision compels delivery by

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[40] CP 60.

registered or certified mail to the exclusion of all other means of delivery. However, "shall" applies only to the effect of delivery by the prescribed methods: "shall be ***deemed delivered*** 48 hours after depositing the notice."[41] "Shall" reflects a presumptive consequence of delivery by registered or certified mail, not that either of these methods were required. Here, if timely delivery was required and the prescribed method was not used, timely delivery needed to be independently established, and it was.

Holman cites a single case in support – *In re Clubhouse Investments, Inc.*, 451 B.R. 626, 629 (Bnkr. S.D. Ga. 2010). The notice provision in this Georgia bankruptcy case was significantly different than the provision here. The notice provision in the Georgia case said:

> such notice . . . shall be in writing, signed by the party serving the same, deposited in registered or certified United States Mail, return receipt requested and postage prepaid.

In re Clubhouse Investments, 451 B.R. at 629. The argument advanced by Holman would actually apply in *Clubhouse* given the notice language there. That is, the "shall" in the *Clubhouse* notice provision clearly applies both to the type of notice (signed and written) and the manner and method of delivery (registered or certified U.S. Mail). Here, the 1998 Lease states:

> All notices . . . shall be in writing and shall be deemed delivered 48 hours after depositing the notice or demand in the United States mail, certified or registered, postage prepaid. . . .[42]

Here, equally clearly, "shall" only applies to the presumption created by

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[41] *Id.*.
[42] *Id.*

delivery via the prescribed method (e.g., deemed delivered after 48 hours of sending via registered/certified mail).

Curiously, Holman asserts that Brady does "not cite any case in which similar language is interpreted under similar facts." Holman ignores both *Korey v. Sheff*, 3 Mass.App.Ct. 266, 327 N.E.2d 896 (1975) and *Fleisher Engineering & Construction Co. v. United States,* 311 U.S. 15, 19 (1940), which were cited in Brady's opening brief.[43]

6. At a minimum, questions of fact preclude entry of summary judgment.

Holman seemingly acknowledges that the trial court made factual rulings in his favor on summary judgment and did not provide Brady - as the non-moving party – with the required inferences on summary judgment. For example, Holman states that "trial court was correct in finding that the Notice was in fact sent only to Brady to prevent Wolf Creek (Brady **and Holman**) from receiving the Notice."[44] This factual finding by the trial court was improper on summary judgment. While the trial court should have ruled in favor of Brady as a matter of law, at a minimum, questions of fact existed, precluding entry of summary judgment in favor of Holman.

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[43] Holman asserts that there was no "arm's length dealing" here so Holman deserved personal notice, but fails to explain why this is relevant to the question of delivery method. The fact that Brady actually received notice resolves the delivery issue. Whether Holman also needed personal notice is a separate question, addressed above.
[44] Holman Resp. Brief at 33 (emphasis in original).

D. The Wolf Creek LLC Agreement authorized Brady (as a member of Wolf Creek) to execute the New Lease.

Holman does not allege that the terms of the New Lease are unfair to Wolf Creek. Rather, he claims whether the New Lease is fair is irrelevant and that Brady lacked authority to enter the New Lease, despite the fact that the LLC Agreement expressly grants either member of the LLC authority to enter a lease on behalf of the LLC, so long as it is fair.

1. Both Holman and Brady could enter contracts on behalf of Wolf Creek, including the New Lease.

Per the LLC Agreement, Wolf Creek is a member-managed LLC and "[a]ll members of the Company shall have the authority to obligate or bind the Company in connection with any matter."[45] This authority is expressly extended to executing leases: "**any member** . . . shall have the power to execute and deliver proxies, stock powers, deeds, **leases**, contracts . . . for an in the name of the Company . . . ."[46] The LLC Agreement tracks Washington's statute governing limited liability companies. RCW 25.15.151(2) provides that "if the limited liability company is member-managed, each member is an agent of the limited liability company and has the authority to bind the limited liability company with regard to matters in the ordinary course of its activities."

> Indeed, it has long been held to be "the universal law that the statutes and laws governing citizens in a state are presumed to be incorporated in contracts made by such citizens, because the presumption is that the contracting parties know the law." This principle applies both to "statutes and the settled law of the land

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[45] CP 20.
[46] CP 33 (emphasis added).

at the time the contract is made."

Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 223-24, 242 P.3d 1, 12 (2010) (internal citations omitted).

Holman claims that both members must agree on all managerial decisions, relying exclusively on Article V, Section 1. However, this section merely confirms that no individual member "shall have ***continuing exclusive authority*** to make independent management decisions."[47] That is to say, neither Holman nor Brady could continue to manage Wolf Creek to the exclusion of the other member.

Holman contends that the phrase "all members" does not confer management authority to each member individually. But instead means that all members, acting collectively, must reach unanimous agreement to execute any managerial decision. This is an impractical construction, and one that is at odds with other provisions of the LLC Agreement. If every member of the LLC agreed on a management decision, they collectively would have the power to act. Holman's construction would render Section 2 superfluous and should be rejected. The import of Section 2 is that each member, individually, is empowered to bind the company, subject to the exclusivity restriction imposed in Section 1 and the "fairness" requirement found elsewhere in the LLC Agreement (discussed below).

Requiring "each member" to approve all managerial decisions would also conflict with Article IV, Section 2(b), which sets forth 5

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[47] CP 20 (emphasis added).

enumerated company acts ***requiring*** approval of both Holman and Brady.[48] This section does not reference general managerial decisions, nor does it limit the authority of members to execute contracts or leases. Rather, it requires majority approval to perform various company acts.[49] Holman misapprehends the relevance of this section, claiming that Holman and Brady could have, but did not, vote to give Brady sole managerial authority. Article IV, Section 2(b) is important, as it shows those actions **requiring** joint decision making in running Wolf Creek. As construed by Holman, this section would not be necessary.

Holman argues that Article XIII did not empower Brady to enter into the New Lease, asserting it only granted him the right to "execute" the lease, meaning the right to sign the lease. The Court should also reject this strained interpretation. Article XIII grants members the "power" to execute leases "for and in the name of the Company."[50] Consistent with Washington law, this is an unambiguous grant of authority to Brady to enter into the New Lease (subject to the exclusivity limitation in Article V, Section 1 and the fairness requirements in Article VI).

2. Course of conduct cannot alter the LLC Agreement.

Holman urges the Court to examine the parties' past practices in determining their decision making authority. Holman asserts that because

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[48] CP 19-20. Holman asserts this section "allows" members to vote. But the section is not permissive. It ***requires*** a majority vote on the enumerated items.
[49] CP 19-20.
[50] CP 33.

of claimed (but unspecified) historical joint decision making, such was contractually required in relation to the New Lease. However, the LLC Agreement is a fully integrated contract.[51] As such, extrinsic evidence cannot be used to add or subtract language from it. *Berg*, 115 Wn.2d at 670. Extrinsic evidence is not admissible to show intention independent of the contract. *Hollis,* 137 Wn.2d at 695. The Court should decline Holman's invitation to modify the managerial authority granted under the LLC Agreement.

3. The fairness requirement in the LLC Agreement protects both Holman and Brady.

The Wolf Creek, LLC Agreement contemplates transactions between Wolf Creek and another entity in which a Wolf Creek member has a financial interest.[52] Article VI, section 1(b) states that such transactions are not invalid so long as "the contract or transaction is fair as to the Company as of the time it is authorized, approved or ratified by the members or the committee thereof."[53] This section compliments Article V, Section 2, (granting all members the power to bind the company), and ensures that in doing so, the transaction must be fair to the Company.[54] Article V1, Section 1(b) does not grant decision-making authority to a member, but acts as a check on the exercise of that authority, subject to court review, ensuring that the decision was fair to the Company.[55]

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[51] CP 34.
[52] CP 20-21.
[53] CP 20-21.
[54] CP 20.
[55] CP 20-21.

Holman argues that in order to trigger the "fairness" analysis under Section 1(b), all members must authorize the transaction. This construction is flawed, as it would render Section 1(b) superfluous. If Brady and Holman were required to jointly pre-approve all contracts, there would never be a need for a fairness analysis.[56] As Courts will not construe agreements that render sections wholly superfluous, Holman's proposed construction must be rejected.

E. The trial court erred in entering judgment in favor of Holman on Wolf Creek's claims.

Holman has no personal claim against Mountain and there is no justification for any judgment to run in his favor against Mountain. Holman claims only a right to indemnification from Wolf Creek, but this does not justify a judgment against Mountain. Assuming a judgment is entered against Mountain, it must run in favor of Wolf Creek. Holman's avenue of redress is to the LLC, not Mountain.

IV. ATTORNEY FEES

Holman's request for attorneys' fees should be denied.

V. CONCLUSION

For the reasons stated, the trial court should be reversed and the matter remanded, with instructions to grant Brady and Mountain Broadcasting's Motion for Summary Judgment, and enter judgment in their favor.

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[56] Holman's claim that Section 1(b) would have prevented him from later "crying foul" is unpersuasive. Evaluating the fairness of a contract only makes sense if it was not already agreed to by all members.

DATED this 30th day of December, 2015.

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By _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of December, 2015, I caused to be served a true and correct copy of the foregoing document as follows:

Kammi Mencke-Smith Kevin J. Curtis Winston & Cashatt, Lawyers, PS 601 W. Riverside Ave., Ste 1900 Spokane, WA 99201	___ Hand Delivery ✓ U.S. Mail ___ Overnight Delivery ___ Fax Transmission
Division III Court of Appeals State of Washington 500 N Cedar St Spokane, WA 99201	___ Hand Delivery ✓ U.S. Mail ___ Overnight Delivery ___ Fax Transmission

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