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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

WASHINGTON STATE COURT OF APPEALS
DIVISION III

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

Respondent/Plaintiff,

vs.

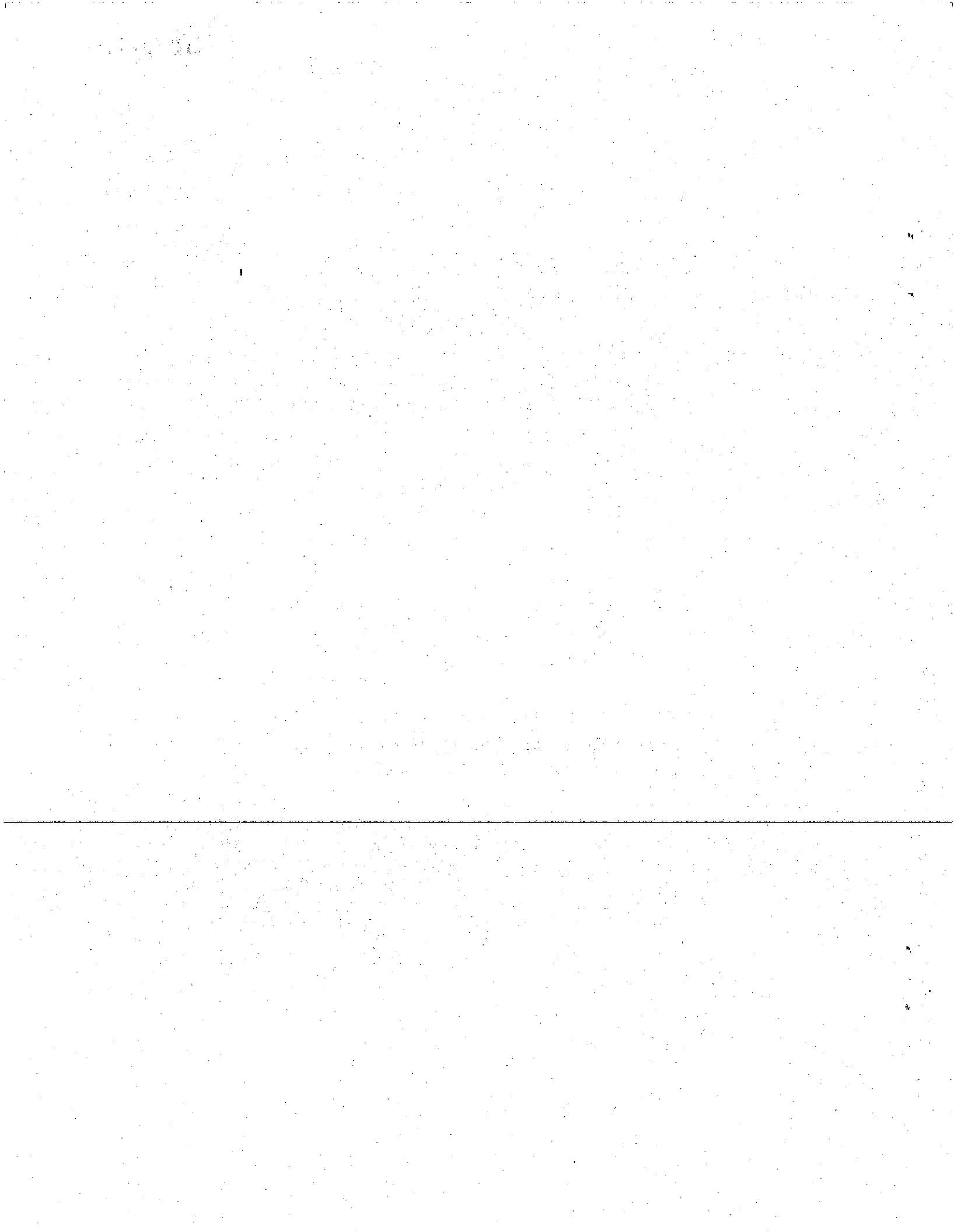
BRIAN W. BRADY and MOUNTAIN BROADCASTING, LLC,
a Washington Limited Liability Company,

Appellants/Defendants.

RESPONDENT'S SUPPLEMENTAL BRIEF

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Respondent Rick Holman, individually and on behalf of Wolf Creek Holdings of Spokane, LLC ("Holman") responds as requested to the Court's questions outlined in its letter dated March 28, 2016.

1. **While the trial court's Order Denying the Motion to Dismiss may or may not "prejudicially affect" the current review of the summary judgment, Holman does not object to the Court's inclusion of the Order on review.**

The trial court denied appellant Brian W. Brady's ("Brady's") Motion to Dismiss below, which was based primarily on issues of lack of personal jurisdiction, and a claim that the plaintiff's derivative action was improperly brought. The trial court ruled that personal jurisdiction over Brady existed independently, and not as a "bootstrap" from the derivative action, based on Brady's undisputed contacts with Washington. (VRP dated June 28, 2013, pp. 11, 22-24) Because the derivative action was not brought for the purposes of creating jurisdiction, the trial court recognized the derivative action was properly pursued on behalf of Wolf Creek LLC, and properly joined with Holman's individual claims. (VRP dated June 28, 2013, pp. 25-28) The trial court further recognized that as to claims of technical defects such as the verification of the derivative claim, the remedy (if any were necessary) would simply be to allow the plaintiff to amend and cure, stating:

...so I wouldn't hold up the process to send it back to Mr. Holman, he signs it, and we go through the process all over again. Because, presumably, he will sign it...

(VRP dated June 28, 2013, p. 29)

The trial court noted that no law existed requiring an LLC to verify a derivative action, recognized the waste of resources to require amendment, and denied Brady's Motion to Dismiss in its entirety. (VRP dated June 28, 2013, pp. 29-30; CP 153-155) The issue is whether the court's order denying Brady's Motion to Dismiss is properly included in review here under RAP 2.4(b).

In Respondent's brief, Holman objected to review of the Motion to Dismiss because it had not been specifically identified in Brady's appeal, and because it was somewhat unclear whether the denial actually "affected" the summary judgment order. An order or ruling "prejudicially affects" the decision designated in the Notice of Appeal if the order appealed from "would not have happened but for the first order." Right-Price Recreation, LLC v. Connells Prairie Community Council, 110 Wn.2d 370, 46 P.3d 789 (2002) (order denying motion to dismiss affected subsequent orders, because if it had been granted, case would have ended). The "twist" to the Order Denying the Motion to Dismiss here, however, is that the trial court very apparently would have simply allowed certain

"curing" amendment as to the claimed technical defects in the derivative claims, and the case would have continued to this same posture.

Irrespective of that, Holman recognizes the efficacy of including the denial of Brady's Motion to Dismiss now, instead of after entry of the money judgment below, and does not object to consideration of that order within this appeal.¹ However, it is important to note that Brady has **not** included his claims of lack of personal jurisdiction in this appeal; no assignment of error addressed personal jurisdiction, although claims relative to the derivative action were challenged. Thus, any claim relative to the denial of Brady's Motion to Dismiss based on personal jurisdiction has been waived or abandoned, and cannot be challenged later on a piecemeal basis. An appellate court will not generally consider a claimed error to which no assignment of error has been made. Painting & Decorating Contractors of America, Inc. v. Ellensburg Sch. Dist., 96 Wn.2d 806, 638 P.2d 1220 (1982). If an assignment of error is not argued in the brief, it is in fact abandoned or waived. See, Milligan v. Thompson, 110 Wn.App. 628, 635, 42 P.3d 418 (2002).

¹ Holman's brief fully addressed the issues raised by Brady regarding the propriety of the derivative action, and no further briefing is necessary.

Thus, the trial court's denial of Brady's Motion to Dismiss is reviewable here, but only in its entirety, and only as to the errors claimed; Brady has waived the personal jurisdiction portion of the argument and it cannot be "re-appealed" after money judgment is finally entered below.

2. Based on the nature of the trial court's denial of Brady's Motion to Dismiss, Holman's "motion to amend" as the appropriate remedy must similarly be reviewed.

In response to Brady's Motion to Dismiss the derivative action for alleged technical deficiencies, Holman argued and briefed that an LLC is not required to verify the Complaint, and that the matter was properly pled and brought as a derivative action; the trial court agreed, denying Brady's Motion to Dismiss. However, Holman also argued that to the extent there were technical deficiencies, the legal remedy would simply be an amendment to the Complaint to allow any necessary additional pleadings or verification. (CP 118, n. 1) At the oral argument, Holman's counsel also noted that the verification issue could be easily remedied by "starting over," but did not formally so move because it was unnecessary under the applicable law, and the trial court's denial of the Motion to Dismiss. (VRP dated June 28, 2013, p. 18)

While the trial court also agreed that requiring amendment would be a waste of time, as outlined above, she did not need to reach the issue of amendment, because she denied the Motion to Dismiss. However, this

is the apparent "denial" of the motion to amend to which the Court of Appeals refers; because the trial court's ruling denied Brady's Motion to Dismiss, it did not include a specific finding that amendment was unnecessary, or that it was "denied." Yet, this was the legal remedy Holman presented and argued, and which the trial court considered, so to the extent the denial of the Motion to Dismiss is before the court on review, the finding on the necessity of the amendment is also on review.

3. It is unnecessary to reach the issues of whether Holman will be prejudiced by the Court's review of the Motion to Dismiss, or the propriety of the court's 54(b) certification.

Because Holman agrees that the denial of Brady's Motion to Dismiss is properly before this court for review, it is unnecessary to address any prejudice to him, or the trial court's entry of CR 54(b) certification without considering the impact of her denial of the Motion to Dismiss. All necessary issues have been briefed in Holman's Response Brief, and there is no prejudice or abuse of discretion in proceeding on appeal to include Brady's claim that the Motion to Dismiss was improperly denied, based only on his claims of error as to the propriety of the derivative action.

4. **Conclusion.**

For the foregoing reasons, Holman agrees that the denial of the motion to dismiss is properly reviewed under RAP 2.4(b), as to those errors of law and argument advanced by Brady.

DATED this 22nd day of April, 2016.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of April, 2016, the foregoing was caused to be served on the following person(s) in the manner indicated:

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