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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EXPERIMENTAL AIRCRAFT ASSOCIATION, CHAPTER 79,
Appellant,

v.

SPOKANE AIRPORT BOARD,
Respondent

ANSWERING BRIEF OF RESPONDENT SPOKANE AIRPORT
BOARD

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I. INTRODUCTION

Respondent, Spokane Airport Board (“Airport”), by and through counsel, submits this brief in response to the opening brief filed by the Appellant, Experimental Aircraft Association, Chapter 79 (“EAA”).

The Airport leased a hangar known as Building No. 7 to EAA at Felts Field Airport. While the term was for five years, the lease explicitly allowed either party to cancel before expiration of the term at any time with 180 days advanced written notice.

There was no dispute at the trial court level (or here on appeal) that the Airport provided that written notice and EAA refused to vacate. Once the notice of cancellation was sent, the parties engaged in negotiations for a possible new lease of a separate space known as Building No. 17. The Airport sent drafts of that new lease to EAA and added additional space to the proposed draft lease at the request of EAA, but EAA chose not to sign the proposed lease for Building No. 17. EAA incorrectly characterizes these negotiations as either a contractual right or promise to relocate which completely contradicts the plain language of the lease and the actual (and undisputed) record at the trial court.

Because the lease had been cancelled by written notice, EAA no longer had the right to possess Building No. 7. The Airport filed an

unlawful detainer action pursuant to RCW 59.12.030(1) once EAA refused to vacate. The trial court properly granted summary judgment in favor of the Airport based on the unambiguous terms of the lease agreement between the parties and the Airport's adherence to those terms. EAA's assignments of error have no basis, this Court should affirm, and the Airport should be awarded its attorney fees and costs on appeal.

II. RESTATEMENT OF THE ISSUES

1. Did the trial court correctly apply RCW 59.12.030(1) once the Airport elected to cancel the lease agreement pursuant to Article 1, provided EAA advanced written notice of cancellation notice as required by Article 1, and EAA refused to vacate?
2. Did the trial court correctly conclude that the Airport did not have a contractual duty to relocate EAA under Article 38 because the Airport cancelled the lease pursuant to Article 1, the Airport had sole discretion to relocate or not relocate under this provision, and the Airport did not elect or agree to relocate EAA under this provision?
3. Did the trial court properly interpret and apply the unambiguous terms of the lease agreement?
4. Is the Airport entitled to an award of attorney fees and costs on appeal?

III. RESTATEMENT OF THE CASE

The following facts were not disputed at the trial court. For purposes of summary judgment (and review of the trial court's order here on appeal) these facts are deemed admitted.

A. **Article 1 allowed either party to cancel the Lease prior to the end of the 5-year term with 180 days advanced written notice.**

EAA leased Building No. 7 at Felts Field Airport from the Airport pursuant to a written Lease Agreement ("Lease") dated February 16, 2011. CP 9, CP 34-54; CP 332. The term of the Lease was five years. CP 9; CP 332.

On February 17, 2016, the parties executed a First Amendment to the Lease Agreement ("First Amendment") extending the term until February 28, 2021. CP 10; CP 56-58; CP 333. The First Amendment provided that unless specifically revised, all other terms and conditions of the original Lease remained in full force and effect. CP 10; CP 56-57; CP 333.

The Lease and the First Amendment contain identical language regarding cancellation prior to expiration of the lease term. Article 1 allowed either the Airport or EAA to cancel the Lease before 2021 with

180 days advanced written notice. The relevant language of Article 1 is as follows:

1. Term

The term of this Agreement shall be five (5) years commencing March 1, 2016 and ending February 28, 2021 *unless sooner terminated or canceled as provided herein. Either party may cancel this Agreement upon one hundred eighty (180) days advance written notice.* (Emphasis added) CP 34, CP 56.

B. Article 23 and 24 provide separate grounds for cancellation of the Lease.

Article 23 and Article 24 contain *separate and distinct* grounds for cancellation of the Lease. Article 23 outlines additional grounds available to the Airport to cancel and Article 24 outlines EAA's rights of cancellation. CP 46-48. The parties agree that Article 24 does not apply to this case.

Article 23 allowed the Airport to cancel if certain conditions arose independent of Article 1. The Airport had the right to cancel if EAA declared bankruptcy or if EAA failed to meet any covenant or condition of the Lease and failed to cure that defect after notice from the Airport. CP 46-47. Contrary to EAA's position at the trial court (and here on appeal) the plain language of Article 23 and Article 24 *do not* contain the sole grounds to cancel the Lease prior to the end of the term. Article 23 explicitly states that the Airport's rights of cancellation under that

provision are “In addition to any conditions as specified herein *and all other remedies available to the Airport.*”. CP 47. This necessarily includes Article 1.

C. The Airport cancelled the Lease and provided proper notice to EAA.

The Airport entered into a contract to have Building No. 7 demolished and replaced with a new hangar. CP 100; CP 449; CP 452. The contract to demolish Building No. 7 and construct the new hangar was to commence August 20, 2018. CP 100. Because Building No. 7 was to be demolished, the Lease needed to be cancelled. On November 25, 2017 Lawrence Krauter, Chief Executive Officer of the Airport, e-mailed Jack Hohner (at that time the President of EAA) and advised EAA of the status of Building No. 7, that it would be demolished, and advised EAA that notice cancelling the Lease for Building No. 7 would be forthcoming. CP 448-449. EAA was notified that it had the opportunity to lease a portion of Building No. 17 under a new agreement. CP 449.

On November 28, 2017, the Airport exercised its right of cancellation under Article 1 and provided EAA with 180 days advanced written notice. CP 60; CP 138, CP 169. Pursuant to that notice, EAA was required to vacate Building No. 7 no later than May 29, 2018. CP 138, CP 169. EAA concedes that the notice of cancellation was sent and received.

CP 333. Again, the Airport notified EAA that, while the Lease for Building No. 7 was cancelled, EAA had the opportunity to enter into a new and separate lease for Building No. 17. As discussed below, while the parties attempted to negotiate a new lease for Building No. 17 over a period of several months, EAA did not sign it.

On May 8, 2018, the Airport provided EAA with written notification that, while the Lease had been cancelled, it was extending EAA's occupancy to June 30, 2018 and EAA was required to vacate Building No. 7 no later than June 30, 2018. CP 62; CP 528.

On June 22, 2018, the Airport provided EAA with written notification that while the Lease had been cancelled, it was extending EAA's occupancy to July 31, 2018 and EAA was to vacate Building No. 7 no later than July 31, 2018. CP 64.

On July 17, 2018, the Airport provided EAA with written notification that while the Lease had been cancelled, it was extending EAA's occupancy to August 17, 2018 and EAA was required to vacate Building No. 7 no later than Friday, August 17, 2018. CP 66.

EAA concedes that the letters dated May 8, June 22 and July 17 were sent and received by EAA. CP 334. However, EAA refused to vacate

on Friday, August 17, 2018 and the lawsuit pursuant to RCW 59.12.030(1) was commenced on Monday, August 20, 2018.

D. The Airport did not exercise its option to relocate EAA to Building No. 17 pursuant to Article 38 or agree to relocate EAA pursuant to Article 38.

At the trial court, and here on appeal, EAA asserts that that the record provides either a contractual right to relocation under Article 38 or that the Airport agreed to relocate EAA. The undisputed record below states the exact opposite. Simply put, EAA's argument directly contradicts the explicit language of the Lease and the actual (and undisputed) facts in the record.

1. The Airport was not contractually obligated to relocate EAA pursuant to Article 38.

Article 38 provides that whether relocation and substitution of the leased premises will take place is limited to the following circumstances: (1) the Airport, *in its sole opinion* determines relocation and substitution of the leased premises is necessary for the orderly expansion and development of Felts Field; or (2) the Airport receives an order or notice from the Federal Aviation Administration ("FAA") which determines that relocation and substitution is necessary. CP 161. The undisputed record shows that the Airport never determined in its sole opinion that relocation was necessary. The notice of cancellation specifically invoked Article 1.

CP 169. None of the Airport's subsequent notices to EAA invoked Article 38. CP 172-174.¹ In fact, other than EAA's flawed interpretation of the facts (addressed below) the record establishes that the Airport never invoked Article 38 and relocation under that provision was not mandatory as contended here. EAA has provided absolutely no evidence in the record to the contrary.

2. *The Airport did not agree to relocate EAA pursuant to Article 38. The parties attempted to negotiate a new lease for Building No. 17, which EAA never signed.*

Undeterred by the plain language of Article 38, EAA contends that the record below shows that the Airport *agreed* to relocate EAA once the notice of cancellation was sent. The undisputed record before the trial court states the complete opposite. There was no agreement to relocate EAA under Article 38. Instead, the Airport cancelled the Lease under Article 1 and attempted to negotiate a new lease for Building No. 17 with EAA, sent drafts of that proposed lease to EAA, added terms at the request of EAA, but EAA ultimately did not sign the proposed lease. EAA incorrectly attempts to equate "lease negotiations" with an "agreement" to relocate under Article 38.

¹ It is undisputed that the FAA never made any determination that EAA should be relocated and never issued any order to require relocation.

EAA's entire appeal and the sole "evidence" for this alleged "agreement" is based on two paragraphs of Jack Hohner's Declaration. CP 406. Mr. Hohner baldly stated that the Airport "promised", "acknowledged" and "reiterated" an "obligation and intent to relocate EAA" by engaging in "numerous discussions" regarding EAA's relocation. CP 405-406. This is the sum total of EAA's "evidence" of an "obligation" or "agreement" to relocate EAA. EAA provided absolutely no objective evidence in the record of any acknowledgement, promise, agreement, or intent that the Airport agreed to relocate EAA under Article 38 beyond this conclusory declaration and provides no citation to the record supporting this claim.² The actual record before the trial court establishes the following facts, none of which have been disputed (let alone addressed) at the trial court or here on appeal.

First, Mr. Hohner was not *involved* in any discussions or negotiations and therefore has no personal knowledge of a potential new lease of Building No. 17. When the Airport advised Mr. Hohner that EAA

² The trial court correctly disregarded Ms. Hohner's "evidence" at summary judgment and it should be disregarded here on appeal for two reasons. First, Mr. Hohner explicitly advised the Airport that he would not be involved in any discussions regarding a potential new lease agreement and his lack of personal knowledge cannot be given any consideration at summary judgment. *Loss v. DeBord*, 67 Wn.2d 318, 321, 407 P.2d 421 (1965). Second, at summary judgment, the opposing party must set forth **specific** facts showing a genuine issue of material fact, and cannot avoid summary judgment based on bare assertions, conclusory statements, or speculation. *Iwai v. State*, 129 Wn.2d 84, 95-96, 915 P.2d 1089 (1996). Mr. Hohner's declaration is nothing more than an improper attempt to create a genuine issue of material fact out of thin air.

would be receiving a notice to cancel the Lease for Building No. 7 and that EAA had the opportunity to lease Building No. 17, Mr. Hohner told the Airport that he was *no longer* the President of EAA. CP 448-449; CP 452; CP 450, 454. Mr. Hohner then directed the Airport to negotiate with EAA's new President Dale MacLachlan. CP 450, 454. As such, Mr. Hohner's "evidence" of an "obligation" or "agreement" to relocate EAA under Article 38 was properly disregarded by the trial court and should be disregarded on appeal because Mr. Hohner was never **involved** in any discussions with the Airport and has no personal knowledge of any such discussions.

Second, Mr. Hohner's Declaration is completely contrary to the record below. That record shows the Airport and EAA's actual President, Mr. MacLachlan, engaged in *negotiations* for a potential new lease agreement for Building No. 17 not relocation. The undisputed record below further establishes that EAA *never signed* a new lease agreement after these negotiations took place between November 2017 to August 2018. The record establishes the following:

- Once the Airport was advised that Mr. MacLachlan was the actual President of EAA and was the designee to negotiate a new lease agreement, Judy Gifford (the Director of Properties and Contracts)

contacted him to discuss a potential new lease of Building No. 17. CP 506-508.

- Ms. Gifford contacted Mr. MacLachlan to set up a time to tour Building Number 17 and to see which areas would work for a new lease. CP 508; CP 522-523 and CP 525.
- Ms. Gifford met with Mr. MacLachlan and EAA members in February 2018 and July 2018. EAA was informed at these meetings that any new lease for Building No. 17 would only include a portion of that space. CP 508.
- On June 30, 2018, Mr. MacLachlan asked whether EAA could move into Building No. 17. Ms. Gifford stated that EAA needed to let the Airport know what portion of the areas in Building No. 17 it proposed to lease. CP 508; CP 529.
- On July 17, 2018, Ms. Gifford e-mailed EAA a draft of a new lease for Building No. 17. The draft included a one-year term with options to renew for two additional years. CP 512; CP 533; CP 576.
- On July 18, 2018, Ms. Gifford sent yet another e-mail and requested that Mr. MacLachlan verify the square footage EAA wished to lease so the draft lease could be finalized. CP 509; CP 533.

- On July 23, 2018, Mr. MacLachlan e-mailed Ms. Gifford that EAA wanted a new lease **for all** of Building No. 17. CP 538. Ms. Gifford responded that, as discussed at the February 2018 and July 2018 meetings, the new lease could not encompass all of Building No. 17 because the Airport intended to lease or provide space to other non-profits. CP 509; CP 537. Ms. Gifford reiterated that EAA needed to suggest proposed square footage to finalize a new lease and asked to meet with Mr. MacLachlan to review. CP 509; CP 537.
- On August 1, 2018, Ms. Gifford met with Mr. MacLachlan at Building No. 17 and informed him that because there was no lease for Building No. 17 EAA would need to sign an Indemnity Agreement to store property in Building No. 17 on an interim basis from August 6, 2018 to August 31, 2018. CP 509-510; CP 543; CP 545. Mr. MacLachlan eventually signed the Indemnity Agreement to store EAA's property in Building No. 17 on an interim basis for this time period. CP 511; CP 568.
- At a meeting on August 14, 2018 Mr. MacLachlan requested that the new proposed lease include an additional 686 square feet. CP 512; CP 571.

- On August 15, 2018, Ms. Gifford informed Mr. MacLachlan that the Airport would agree to add another 686 square feet to the draft of the proposed lease and would provide an updated draft reflecting that change. CP 512; CP 576.
- On August 16, 2018, Ms. Gifford e-mailed a letter to Mr. MacLachlan outlining the proposed lease terms and a draft of the new lease for Building No. 17 which included the additional 686 square feet as requested by EAA and a three-year lease term commencing September 1, 2018 and ending August 31, 2021. CP 513; CP 583-584.
- On August 17, 2018, Ms. Gifford e-mailed Mr. MacLachlan asking for the signed lease agreement. Mr. MacLachlan advised Ms. Gifford that EAA would not sign the new lease until an attorney looked it over, and, once the attorney had it reviewed, he would sign it. CP 514; CP 590.
- The Airport received no further communications from EAA and never received a signed lease agreement. CP 514.

None of these facts were disputed by EAA at summary judgment and they are deemed admitted on appeal.³ Mr. Hohner's Declaration submitted in response to summary judgment is not supported by any factual evidence of any kind, is in direct conflict with the undisputed record, and was not sufficient to avoid summary judgment.⁴ The record establishes the Airport never raised, discussed, or promised to relocate EAA under Article 38. Instead, the record establishes that the parties negotiated a potential new lease, the Airport agreed to add terms and conditions requested by EAA to that proposed lease, and EAA ultimately decided not to sign that proposed lease.

IV. ARGUMENT

A. Standard of Review

The Court of Appeals reviews a summary judgment order *de novo*, engaging in the same inquiry as the trial court. *Brown v. State Department of Corrections*, 198 Wn.App. 1, 11, 392 P.3d 1081 (2016). Summary judgment is proper when the record demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Munich v. Skagit Emergency Commc'ns Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012). The party moving for summary judgment

³ *Parrott Mech., Inc. v. Rude*, 118 Wn.App. 859, 864, 78 P.3d 1026 (2003).

⁴ *Lane v. Harborview Med. Ctr.*, 154 Wn.App. 279, 288, 227 P.3d 297 (2010).

bears the initial burden to show the absence of a genuine issue of material fact. *Parrott Mech., Inc. v. Rude*, 118 Wn.App. 859, 864, 78 P.3d 1026 (2003). Uncontroverted relevant facts offered in support of summary judgment are deemed established. *Id.*; *Central Washington Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989).

While the moving party must initially show that there is no dispute as to any issue of material fact, once the burden is met, the burden shifts to the non-moving party. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). The non-moving party must set forth specific facts showing a genuine issue of material fact for trial. *Iwai v. State Emp't Sec. Dep't*, 129 Wn.2d 84, 95-96, 915 P.2d 1089 (1996). A material fact is one that affects the outcome of the litigation. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). The non-moving party must respond with more than conclusory allegations, speculative statements or argumentative assertions. *Boyd v. Sunflower Properties, LLC*, 197 Wn.App. 137, 142, 389 P.3d 626 (2016). A declaration that contains nothing more than conclusory statements without adequate factual support cannot create a genuine issue of material fact to avoid summary judgment. *Lane v. Harborview Med. Ctr.*, 154 Wn.App. 279, 288, 227 P.3d 297 (2010).

B. The trial court correctly applied RCW 59.12.030(1) because the Lease was cancelled by written notice, the tenancy ended, and EAA refused to vacate.

This case begins and ends with application of the plain language of the Lease. Leases are both contracts and conveyances and the rules of construction applied to contracts are also applied to leases. *Watkins v. Restorative Care Ctr., Inc.*, 66 Wn.App. 178, 191, 831 P.2d 1085 (1992). A Court must enforce the contract as written if the language in that contract is clear and unambiguous. *Harwood v. Group Health NW*, 93 Wn.App. 569, 574, 970 P.2d 760 (1999) citing *Washington Pub. Util. Districts' Utilities Sys. v. Pub. Util. Dist. No. 1 of Clallam Cty.* 112 Wn.2d 1, 771 P.2d 701 (1989). The interpretation of a contract is a question of law for the Court. If the only dispute relates to the legal effect of language in a written contract, summary judgment is proper. *Allstate Insurance Co. v. Neel*, 25 Wn.App. 722, 724, 612 P.2d 6 (1980). See also *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn.App. 73, 83, 60 P.3d 1245 (2003).

In construing a written contract, the intent of the parties controls. The intent of the parties is determined by reading the contract as a whole. The Court must read the entire document with force and effect given to each provision. *Port of Seattle v. Lexington Ins. Co.*, 111 Wn.App. 901,

907-908, 48 P.3d 334 (2002). The language of a contract is given its plain and ordinary meaning and the Court's interpretation of contract language must avoid an interpretation that leads to absurd results. *Allstate Ins. Co. v. Hammonds*, 72 Wn.App. 664, 667, 865 P.2d 560 (1994):

...when a court examines a contract, it must read it as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results.

After viewing a contract, if the intent of the parties can be determined from its plain language, the contract must be enforced as written. If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a specific provision. *State v. Brown*, 92 Wn.App. 586, 594, 965 P.2d 1102 (1998).

An ambiguity exists only "...if the language on its face is fairly susceptible to two different but reasonable interpretations." *Kish v. Ins. Co. of N. Am.*, 125 Wn.2d 164, 171, 883 P.2d 308 (1994) quoting *Washington Pub. Util. Districts'*, 112 Wn.2d 1, 11, 771 P.2d 701 (1989). A court may not read an ambiguity into the contract that is otherwise clear and unambiguous. *State v. Brown*, 92 Wn.App. at 594 and *Washington Pub. Util. Districts'*, 112 Wn.2d at 10. A Court cannot rewrite a contract or create a new one if it is plain and unambiguous. *S.L. Rowland Const. Co. v. Beall Pipe & Tank Corp.*, 14 Wn.App. 297, 306, 540 P.2d 912

(1975). See also *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 758, 748 P.2d 621 (1988):

Courts must give effect to unambiguous contract terms to promote stability, certainty and fairness in contract enforcement. What the parties expressed as their intent in the contract, the court will not rewrite.

In this case, Article 1 unambiguously states that the term of the Lease was five years ending on 2021 “...unless sooner terminated or canceled as provided herein.” The very next sentence allowed either party to cancel the Lease upon 180 days written notice. The Lease specifically provides that the term could end before 2021 should either party provide written notice to cancel. The Airport provided that notice, specifically invoking Article 1. The Airport did not (as EAA contends on appeal) “unilaterally” attempt to change the term. Either party had the explicit right to end it before 2021. Once the Lease was cancelled, the “term” ended, EAA no longer had the right to possession, and the Airport correctly asserted its right to possession under RCW 59.12.030(1).

It is well settled in Washington that expiration of the lease term results in termination of the tenancy. *Western Union Telegraph Co. v. Hansen & Rowland Corp.*, 166 F.2d 258, 262 (9th Cir. 1948) (“While recognizing the distinction between the lease-term and the tenancy itself, the law of Washington holds that the expiration of the former results in

termination of the latter.”); see also *State v. Sheets*, 48 Wn.2d 65, 68, 290 P.2d 974 (1955). (When a written lease contains a cancellation provision before the end of the term, and that option is exercised, the term expires, and no unexpired leasehold remains.) Pursuant to RCW 59.12.030(1), a tenant is guilty of unlawful detainer if it continues in possession after expiration of the term. *FPA Crescent Associates, LLC v. Jamie’s LLC* 190 Wn.App. 666, 677 360 P.3d 934 (2015). (RCW 59.12.030(1) applies after expiration of the lease term *as specified in the lease agreement.*) Here, the Lease specified that it could be cancelled prior to the end of the term at the option of either party. Once notice was provided by the Airport that term expired. *State v. Sheets*, 48 Wn.2d at 68; *Thayer v. Damiano*, 9 Wn.App. 207, 210, 511 P.2d 84 (1973) (“A contract which by its terms has expired is legally defunct.”). The trial court correctly granted summary judgment in favor of the Airport because the Lease was cancelled by written notice, the term of the Lease expired, EAA no longer had the right to possession, and its refusal to vacate after the expiration of the term was in violation of RCW 59.12.030(1).⁵

⁵ EAA’s contention that the Airport was required to file an ejectment claim rather than an unlawful detainer action is without merit. An action for ejectment, like an unlawful detainer action, is to determine the right of possession. RCW 7.28.010. A landlord may bring an unlawful detainer action or, at its election, bring an action for ejectment to determine that right of possession. *Petsch v. Willman*, 29 Wn.2d 136, 137-138, 185 P.2d 992 (1947). There is no requirement that a landlord elect one over the other.

C. **This Court’s decision in *FPA Crescent Associates* has no application to this case.**

EAA’s primary argument on appeal is that the Lease term did not “expire” when the Airport sent notice under Article 1 cancelling the Lease, and, therefore, the Lease “term” does not expire until 2021.⁶ EAA relies exclusively on this Court’s opinion, *FPA Crescent Associates, LLC v. Jamie’s LLC*, 190 Wn.App. 666, 360 P.3d 934 (2015). *FPA* has no application because it did not address a situation where the lease (as in this case) allowed either party to cancel prior to the end of the term with written notice. Instead, *FPA* dealt with the landlord’s incorrect attempt to terminate the lease and bypass a tenant’s right to cure a default when it failed to pay *rent* under RCW 59.12.030(3).

In *FPA*, the lease provided that failure to pay rent constituted a “default” allowing the landlord to terminate the lease at its option and without notice to the tenant. *Id.* at 669 and 677. The tenant failed to pay rent and the landlord terminated the lease based on that non-payment. *Id.* at 669-670. When the tenant didn’t pay rent, the landlord did not (1) issue a three-day notice to pay or quit as required by RCW 59.12.030(3); (2) serve that notice as required by RCW 59.12.040 when rent was not received; and (3) refused to accept payment from the tenant when it

⁶ *Appellant’s Opening Brief*, pg. 9.

attempted to cure the default. Instead, the landlord instituted an action for unlawful detainer under RCW 59.12.030(1). *Id.* at 670. The landlord argued that since the lease had been terminated for non-payment of rent, no pre-litigation notice under RCW 59.12.030(3) was required, the landlord could proceed under RCW 59.12.030(1) and the tenant did not have the right to cure. *Id.* at 670. This Court narrowly framed the issue in *FPA* as follows:

This case presents the issue of whether a landlord may bypass the notice and right to cure provisions of RCW 59.12.030(3) by declaring a tenant in default for nonpayment of rent, then terminating the tenancy, and then arguing that the tenant is a holdover tenant unlawfully detaining under RCW 59.12.030(1). *FPA* at 666.

This Court ultimately answered the question presented as follows:

We thus hold that a landlord must comply with RCW 59.12.030(3) notice and opportunity to cure procedures prior to bringing an unlawful detainer action against a tenant whose lease is unilaterally terminated for the nonpayment of rent. *Id.* at 676.

FPA has no application to this matter for four reasons.

First, the lease in *FPA* did not contain a provision allowing either party to cancel with advanced written notice prior to expiration of the lease term. As set forth below, such lease provisions are valid and enforceable. EAA's entire appeal is based on the erroneous conclusion that RCW 59.12.030(1) only applies after expiration of the fixed term of a

lease and can never apply when one party cancels a lease pursuant to a clear and unambiguous contract provision. As set forth above, when the Lease was cancelled, the term ended and EAA no longer had the right to possession.

Second, the Lease was not cancelled pursuant to RCW 59.12.030(3) due to a failure to pay rent or breach of a covenant in the Lease. The Lease was cancelled pursuant to Article 1, which allowed either party to cancel the remaining term with advanced written notice.

Third, there was no attempt by the Airport to bypass any right to cure as required by RCW 59.12.030(3). Unlike *FPA*, the Airport cancelled the Lease pursuant to a specific lease term, not because EAA failed to pay rent or breached a lease covenant. Once the Lease was cancelled by written notice, EAA simply refused to vacate. In *FPA*, the eviction was improper because the landlord did not give the tenant notice of the default when rent was not paid, did not serve the tenant with prelitigation notice, and did not give the tenant opportunity to cure that default as required by RCW 59.12.030(3) and RCW 59.12.040. In this case, the Airport was not required to serve pre-litigation notice of a default because EAA had no right to “cure” anything. Once the notice of cancellation was served and

the cancellation date passed, the Lease term ended and EAA no longer had the right to possession.

Fourth, EAA's claim that the "term" won't expire until 2021 would require the Court to completely ignore the plain language of Article 1, which is contrary to basic rules of contract construction and interpretation. A court will not re-write a contract where the intent of the parties is clearly expressed by its terms. *Willis v. Champlain Cable Corp.*, 109 Wn.2d at 758, 748 P.2d 621 (1988).

D. Article 39 has no application to this case.

EAA contends that it "automatically" became a month to month tenant under Article 39 and the Airport was required to provide an *additional* 20-day notice under RCW 59.12.030(3) to quit the premises prior to the end of some unspecified month to month period.⁷ This argument fails for six reasons.

First, EAA's argument directly contradicts the plain language of the Lease and would require this Court to add terms and conditions that are simply not present. EAA's interpretation is, essentially, that at 12:01 a.m., August 18, 2018, it *automatically* became a month to month tenant requiring an *additional* 20-day notice under RCW 59.12.030(3). EAA's

⁷ *Opening Brief*, pg. 11, fn. 3.

interpretation would require the Court to add a term and condition that is simply not present. A month-to-month tenancy occurs “[w]hen premises are rented for an indefinite time, with monthly or periodic rent reserved.” RCW 59.04.020. *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn.App. 636, 643–44, 980 P.2d 311 (1999). EAA’s occupancy ended on August 17, 2018, after several written extensions. Once the Lease was cancelled at the option of the Airport, the term expired. *State v. Sheets*, 48 Wn.2d at 68. When EAA refused to vacate, it was in violation of RCW 59.12.030(1). Adding a requirement that the Airport had to give yet another 20-day notice to a “month to month” tenant is in direct conflict with the plain language of the Lease.

Second, EAA’s interpretation would completely nullify Article 1, RCW 59.12.030(1) and lead to an absurd result. Even *if* EAA was somehow a month-to-month tenant after the Airport provided 180 days’ notice of cancellation, and the Airport provided yet another 20-day notice to terminate a month-to-to month tenancy EAA could simply refuse to vacate at the end of that period and claim *yet another* month to month tenancy automatically commenced under Article 39. Similarly, if EAA occupied the premises until 2021, the Airport could never file an unlawful detainer action because a month-to month tenancy would “automatically”

commence the very second the term expired and EAA refused to vacate. EAA's interpretation would *never* allow the Airport to evict under either RCW 59.12.030(1). EAA was required to vacate by Friday, August 18, 2018. The Airport filed an unlawful detainer action as soon as permissible on Monday, August 20, 2018. EAA's interpretation is completely nonsensical, not supported by the plain language of the Lease, contrary to Washington law, and would lead to an absurd result.

Third, Article 39 provides that if a month-to-month tenancy exists, it is subject to all terms and conditions of the Lease. CP 19. That includes the payment of rent. At summary judgment EAA (1) never took the position it was a "hold-over" tenant under Article 39 once the Lease was cancelled and the very second it refused to vacate; (2) never argued that it was entitled to possession as a month-to month-tenant once the Lease was cancelled; and (3) never attempted at any time to pay rent if it was, in fact, a month-to-month tenant.

Fourth, EAA has conceded it was **not** a month-to-month tenant at every stage of these proceedings. It has, instead, asserted both at the trial court and on appeal that the Lease term does not expire until 2021.

Fifth, under common law, a tenancy for a stated period is not transformed into a tenancy at will where a provision of the lease gives a

party the right to terminate the lease prior to expiration of the term. *Peoples Park & Amusement Ass'n v. Anrooney*, 200 Wash. 51, 56, 93 P.2d 362 (1939).

Finally, even if Article 38 is somehow applicable, EAA was given more than 20 days' notice of cancellation. EAA was notified on November 28, 2017 that the Lease was cancelled and that it had to vacate no later than May 29, 2018. That period of occupancy was extended to August 17, 2018. The sum total of these extensions far exceeded any 20 day notice now demanded by EAA.

E. **The Lease is not illusory because early cancellation provisions are valid and enforceable under Washington law.**

EAA contends that reversal is appropriate because Article 1, which allows either party to cancel before 2021, renders the entire Lease “illusory” (and presumably unenforceable) because the Airport had “total control” over EAA’s “occupancy rights.”⁸ This argument fails for three reasons.

First, EAA cites no legal authority to support this argument and it should be disregarded on review. RAP 10.3(a)(6) and *In Re Disciplinary Proceeding Against Behrman*, 165 Wn.2d 414, 422, 197 P.3d 1177 (2008) (Assignments of error must be accompanied with supporting legal

⁸ *Opening Brief*, pg. 14

authority and references to the record and the Court may decline to consider issues presented without supporting argument). See also *Beal v. City of Seattle*, 134 Wn.2d 769, 777, n. 2, 954 P.2d 237 (1998) (Washington Supreme Court declined to hear an issue raised on appeal without citation to legal authority.)

Second, EAA's contention directly contradicts the specific language of the contract. The Lease gave both the Airport and EAA the right to cancel at any time upon advanced written notice. The Lease explicitly contemplated that either party could elect this option and did not require any "cause" to do so.

Third, Washington law has consistently held that early cancellation provisions in a lease agreement are valid, do not render the agreement "illusory" and are enforceable. In fact, Washington law provides that a *unilateral* cancellation provision allowing one party to cancel for any reason prior to expiration of the lease term is valid and enforceable. In *Lane v. Wahl*, 101 Wn.App. 878, 6 P.3d 621 (2000), the parties executed a ten (10) year lease. *Id* at 880-881. The landlord retained the unrestricted right to cancel the lease at any time by giving written notice to the tenant. *Id.* at 881. The tenant argued (as in this case) that the unrestricted right to cancel rendered the lease illusory, unenforceable, and without adequate

consideration. *Id.* at 882-883. The Court stated that the tenant failed to acknowledge that a lease is not a typical contract. “Leases are conveyances whose covenants are interpreted under contract law.” *Id.* citing *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990) and *Preugschat v. Hedges*, 41 Wn.2d 660, 251 P.2d 168 (1952). In upholding the cancellation provision, the Court in *Lane* relied on the Washington Supreme Court opinion *Peoples Park & Amusement Ass’n v. Anrooney*, 200 Wash. 51, 93 P.2d 362 (1939), which also addressed the validity of an early cancellation provision. That Court stated the following:

The authorities uniformly hold that a lease for a definite term which contains a provision for its termination before the expiration of the fixed term at the option of either of the parties is not invalid, although it gives the lessor or the lessee alone the right to terminate the lease. *Peoples Park* 200 Wash. At 56.

Reversal is not appropriate here because early cancellation provisions are valid, enforceable and do not render the Lease “illusory”.

F. The Lease is not ambiguous and EAA cannot create an ambiguity to contradict the plain language of the Lease.

EAA contends that Article 1 is “ambiguous” for two reasons. First, EAA argues that Article 23 and 24 contain the *only* procedures to cancel the Lease before 2021. Second, EAA argues that Article 1 is ambiguous because, while it allows either party to cancel the Lease with written

notice, it doesn't say the Lease can be cancelled without just cause.⁹ EAA then asserts that if the Airport wanted to end the Lease but had no "cause" to do so, it was required to relocate EAA under Article 38. EAA's tortured interpretation of the Lease has no basis in the actual (and clear) provisions of this Lease, would require the Court to re-write the Lease, and would render provisions completely meaningless.

Article 23 clearly states that the Airport's rights of cancellation specified in that provision are "*In addition* to any conditions specified herein and all other remedies available to the Airport..." CP 46-47 (emphasis added). This necessarily includes Article 1. The Lease provides three alternate grounds for cancellation (1) written notice by either party under Article 1; (2) at the option of the Airport, should EAA file a bankruptcy petition or fail to perform a covenant and neglect to cure after written notice under Article 23; and (3) at the option of EAA if certain circumstances arise under Article 24. Article 23 and Article 24 provide separate, independent bases for cancellation from Article 1. On one hand EAA demands that the Court enforce the Lease according to its plain terms then asks the Court to ignore those plain terms. EAA's attempt pick

⁹ *Opening Brief*, pg. 13.

and choose which provision of the Lease should be enforced is not permitted under basic rules of contract interpretation and enforcement.

Similarly, EAA argues that because Article 1 *doesn't* say the Lease can be cancelled by advanced written notice *without cause* there **must** be some implied requirement that an Article 1 cancellation notice must be combined with *actual cause* to cancel. EAA then takes another giant step (wholly unsupported by the record) and summarily concludes that if the Airport wanted to cancel the Lease under Article 1 and no cause existed, Article 38 explicitly controls and required relocation.¹⁰ EAA's contention is nothing more than an attempt to add terms and conditions to a plain and ambiguous contract that are simply not there. Article 1 allowed either party to cancel with written notice. Cancellation under Article 1 did not require "cause". Article 38 only applied if the Airport decided to relocate EAA. It chose not to do so and (as addressed below) was free to select this option.

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¹⁰ *Opening Brief*, pg. 13.

- G. **Article 38 did not contractually require the Airport to relocate EAA and the undisputed facts at summary judgment establish that the Airport did not agree to relocate EAA. The parties attempted to negotiate a new lease and EAA would not to sign it.**

EAA contends that summary judgment should not have been granted because Article 38 imposed a contractual duty to relocate or the Airport promised to relocate under this provision. EAA additionally contends that the trial court's ruling would render Article 38 superfluous. Neither of these arguments have any merit.

First, the Airport had no obligation under Article 38 to relocate EAA. The plain language of the Lease specifically provided that the option to relocate EAA was in the sole option of the Airport. CP 52. The Lease also provided that either party could elect to cancel the Lease prior to 2021 with advanced written notice. CP 34. The Airport had the option to either cancel the Lease or relocate EAA. Optional provisions in a contract are valid under Washington law and EAA cannot compel the Airport to choose one over the other.

An alternative contract allows one party to render one of two or more alternative performances, either one of which is mutually agreed upon as the bargained-for exchange. *Minnick v. Clearwire, U.S. LLC*, 174 Wn.2d 443, 449, 275 P.3d 1127 (2012). An alternative contract exists

when it contains an option, where either option may prove more desirable and one party is free to choose either one. *Id.* at 450. One party to a contract cannot compel performance of one alternative if the other party properly elects another. *Bellevue School Dist. No. 405 v. Bentley*, 38 Wn.App. 152, 155, 684 P.2d 793 (1984) citing *Chandler v. Doran Co.*, 44 Wn.2d 396, 267 P.2d 907 (1954). The record clearly demonstrates that the Airport selected the option to cancel the Lease under Article 1. CP 60. The record is devoid of any election by the Airport to relocate EAA under Article 38. There was no “contractual duty” of relocation and EAA cannot force the Airport to choose one option over another.

Second, the undisputed record reflects that the Airport never promised to relocate EAA. As set forth above, the only support for this argument is the factually unsupported and conclusory Declaration of Mr. Hohner, filed in response to summary judgment. CP 416-418. The actual record is devoid of any actual evidence to support Mr. Hohner’s generalized statements and was properly disregarded by the trial court and must be disregarded here. Mr. Krauter’s Declaration, also cited by EAA for this alleged “promise” clearly shows the exact opposite: the Lease for Building No. 7 was cancelled, EAA was informed it would have the opportunity to lease a new space in Building No. 17, and the parties

attempted to negotiate a new lease. CP 448-452. The undisputed record shows that, while the parties attempted to negotiate a new lease of Building No. 17, EAA never signed it.¹¹

Finally, the trial court's ruling does not render Article 38 "superfluous". Simply put, EAA incorrectly argues that the Airport had a contractual duty to relocate it under Article 38. As set forth above, there was no contractual right to relocation. Whether relocation would take place was within the Airport's discretion, it elected not to relocate under Article 38, and, instead chose to cancel the Lease under Article 1. The trial court correctly applied the plain terms of the contract.

H. The duty of good faith does not apply and cannot be used to add terms and conditions to a contract.

EAA claims that, even if there was not a specific contract provision *requiring* the Airport to relocate EAA, the Airport nevertheless breached the implied duty of good faith because it *elected* not to relocate EAA.¹² This is incorrect for two reasons.

First, EAA never raised the implied duty of good faith in its Motion for Summary Judgment or in response to the Airport's Motion for

¹¹ CP 506-514, CP 522-523, CP 525, CP 529, CP 533, CP 537-538, CP 543, CP 545, CP 568, CP 571, CP 576, CP 583-584, CP 590.

¹² *Opening Brief*, pg. 11-12.

Summary Judgment. Since this argument was never raised with the trial court, it is not subject to review. RAP 9.12.

The order granting or denying a summary judgment motion must designate the documents and other evidence called to the attention of the trial court and the Appellate court will only consider that evidence RAP 9.12. *Johnson v. Lake Cushman Maint. Co.*, 5 Wn.App.2d. 765, 780, 425 P.3d 560 (2018) and RAP 9.12. See also *Green v. Normandy Park*, 137 Wn.App. 665, 678, 151 P.3d 1038 (2007). In *Green*, the Court stated:

Pursuant to RAP 9.12, there are three ways—and only three ways—for a document or evidentiary item to properly be made part of the record on review: (1) the document or evidentiary item may be designated in the order granting or denying the motion for summary judgment; (2) the document or evidentiary item may be designated in a “supplemental order of the trial court; or (3) counsel for all parties may stipulate that the document or evidentiary item was “called to the attention of the trial court”. *Green v. Normandy Park*, 137 Wn.App. at 679 quoting RAP 9.12.

In this case, the only reference to the implied duty of good faith is a single allegation in EAA’s counterclaim. CP 343-344. This single allegation was never argued, briefed, or referenced in any of the material filed in response to the Airport’s Motion for Summary Judgment, or in support of EAA’s Motion for Summary Judgment. The Order granting the Airport’s Motion and denying EAA’s Motion contains no reference to any

document or evidence regarding the alleged implied duty of good faith. CP 601-604. As such, this argument is not before this Court on review.

Second, even if this issue were properly before this Court, the implied duty of good faith cannot compel a party to choose one option in a contract over another option. The implied duty of good faith only arises when the contract gives one party discretionary authority to determine a contract term such as quantity, price or time. *Rekhter v. State Dep't. of Social and Health Servs.*, 180 Wn.2d 102, 113, 323 P.3d 1036 (2014), See also *Aventa Learning, Inc. v. K12, Inc.*, 830 F.Supp.2d 1083, 1101 (W.D. Wash. 2011). (Under Washington law, the implied duty of good faith applies when one party has discretion to select the formula or method used to calculate a particular value in the contract. However, it does not apply to contradict terms.) The duty of good faith does not obligate a party to accept a material change in contract terms or inject substantive terms into a contract. *Badgett v. Security State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991). “As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms.” *Id.* The duty of good faith will not trump express terms or unambiguous rights in a contract. *Myers v. State*, 152 Wn.App. 823, 828-829, 218 P.3d 241 (2009) (Contract provision

authorizing DSHS to terminate a contract for convenience at its discretion was valid, enforceable, did not implicate the duty of good faith and summary judgment was properly granted.) See also *Johnson v. Yousoofian*, 84 Wn.App. 755, 762-763, 930 P.2d 921 (1996) (Duty of good faith did not apply to a landlord's refusal to consent to a lease assignment when the contract gave the landlord the unconditional right to do so.) If the contract does not impose a duty, there is no duty of good faith. *Spokane School Dist. No. 81 v. Spokane Educ. Ass'n*, 182 Wn.App. 291, 310-311, 331 P.3d 60 (2014).

In *Spokane School District*, the union argued that the School District's notice of non-renewal was used to avoid arbitration grievances and, therefore, violated the duty of good faith. *Id.* at 310. The Court held that the contract did not obligate (and therefore the District had no duty) to arbitrate matters that it had not agreed to arbitrate under the collective bargaining agreement. *Id.* Since there was no duty to arbitrate, the Court held that the District did not breach the implied duty of good faith by standing by its contractual rights. *Id.* at 311.

In this case, Article 38 did not require the Airport to relocate EAA. The Lease unambiguously gave the Airport sole discretion to do so. The record demonstrates that the Airport did not select this option. EAA

improperly asks this Court to use the implied duty of good faith to create a contractual obligation *requiring* the Airport to relocate EAA. This is not allowed under Washington law:

By urging this court to find that the Bank had a good faith duty to affirmatively cooperate in their efforts to restructure the loan agreement, in effect the Badgetts ask us to expand the existing duty of good faith to create obligations on the parties in addition to those contained in the contract—a free floating duty of good faith unattached to the underlying legal document. This we will not do. The duty to cooperate exists only in relation to performance of a specific contract term. As a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms. *Badgett* at 570 (citations omitted).

EAA cannot utilize the implied duty of good faith to force the Airport to choose one option over another.

I. The Airport is entitled to an award of attorney fees and costs on appeal.

The Airport is entitled to an award of attorney fees and costs on appeal. Washington follows the American Rule in awarding attorney fees. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876.P.2d 896 (1994). Under the American Rule, “a court has no power to award attorney fees as a cost of litigation in the absence of contract, statute, or recognized ground of equity providing for fee recovery.” *Id.* “An award of attorney fees based on a contractual provision is appropriate when the action arose out of the contract and the contract is central to the dispute.” *Mehlenbacher v.*

DeMont, 103 Wn.App. 240, 244, 11 P.3d 871 (2000) (citing *Seattle-First Nat'l Bank v. Washington Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991)). Article 26 of the Lease provides for the following:

If any legal action is instituted by the parties hereto to enforce this Agreement, or any part thereof, the prevailing party shall be entitled to recover reasonable attorney's fees and court costs. *Complaint*, Ex. C.

A contractual provision for an award of attorney fees at the trial court supports an award of attorney fees on appeal. RAP 18.1; *Umpqua Bank v. Shastat Apartments, LLC*, 194 Wn.App. 685, 699-700, 378 P.3d 585 (2016). Under the clear terms of the Lease, if either party commences legal action to enforce its terms, the prevailing party is entitled to reasonable attorneys' fees and court costs. As such, the Airport should be awarded its attorneys fees and cost as the prevailing party in this appeal.

V. CONCLUSION

The terms of the Lease are clear and unambiguous. Article 1 allowed either party to cancel the Lease with advanced written notice before 2021. The Airport elected that option and issued that notice. Once the notice of cancellation was sent and 180 days passed, EAA no longer had the right to possession because the Lease term expired. RCW 59.12.030(1) explicitly allowed the Airport to commence unlawful detainer proceedings once the term ended and EAA refused to vacate. The

Airport did not have a contractual duty to relocate EAA and never agreed to relocate EAA under this contract. EAA's response to the summary judgment motion on this point is based on nothing but conclusory statements, bare assertions, no factual evidence in the record and was properly disregarded by the trial court.

Based on the foregoing, the trial court decision should be affirmed, and the Spokane Airport Board should be awarded its attorneys fees and costs on appeal.

RESPECTFULLY SUBMITTED this 18th day of November, 2019.

WITHERSPOON BRAJCICH McPHEE, PLLC

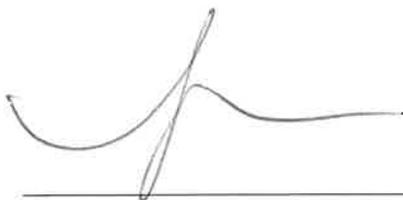
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CERTIFICATE OF SERVICE

I, Lawrence W. Garvin, hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 18th day of November, 2019.

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