93864-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

331148

IN THE 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,

Respondent,

v.

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

Petitioners.

REPLY IN SUPPORT OF PETITION FOR REVIEW

Bryce J. Wilcox, WSBA No. 21728
LEE & HAYES, PLLC
601 W. Riverside Avenue, Suite 1400
Spokane, WA 99201
Phone: (509) 324-9256

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

I. INTRODUCTION

On December 19, 2016, Respondent filed an Answer to Petition for Review, which raised a new issue. Respondent asserts that if this Court grants Petitioner's Request for Review, review should also be granted concerning the Court of Appeals' holding that Mountain Broadcasting LLC's notice to Wolf Creek Holdings of Spokane, LLC that it would not be renewing its lease ("Non-Renewal Notice") was properly given. Petitioners' file this Reply pursuant to RAP 13.4 to address this new issue.

In its cursory argument advanced to support this Court's review of the notice issue, Respondent failed to explain how or why the Court of Appeals' decision conflicts with prior decisions of this Court or presents an issue of substantial public interest. For these reasons alone, review should not be granted on the notice issue raised in Respondent's answer.

Respondent claims that the Non-Renewal Notice had to be sent to Wolf Creek via certified or registered mail. The lease, however, required only timely written notice; it is not disputed this was sent to and received by Wolf Creek via Federal Express. The lease provided that written notices, if sent via certified or registered United States mail, would be conclusively "deemed" delivered. It did not preclude other methods of delivery. The undisputed evidence established actual delivery to Wolf Creek. Because the Non-Renewal Notice was effective, the lease did not automatically renew, and the Court of Appeals properly reversed the trial court on this issue.

Respondent next argues that the Non-Renewal Notice "was not addressed to Wolf Creek" and was never intended to be received by the Landlord (Wolf Creek). Disregarding the language of the lease, Respondent claims that Mountain Broadcasting was obliged to provide him with personal notice that it was not renewing the lease. The lease required notice to the Landlord (Wolf Creek), not any individual member. Petitioner Brian Brady is a member of Wolf Creek, authorized to act on its behalf, and actual delivery of the Non-Renewal Notice to him satisfied Mountain Broadcasting's contractual notice duty. The Court of Appeals also correctly reversed the trial court on this issue.

II. ASSINGMENT OF ERROR

Whether the Court of Appeals' holding that the Non-Renewal Notice was properly given conflicts with prior decisions of this Court or presents an issue of substantial public interest.

III. STATEMENT OF THE CASE

The following Statement of the Case addresses the new issue raised by Respondent in his Answer relating to the Non-Renewal Notice and supplements the Statement of the Case set forth in the Petition.

Holman and Brady each own a 50%-member interest in Wolf Creek.[1] Wolf Creek owns a building in Spokane, which it leases to

[1] CP 5-66 (Complaint at ¶¶ 1.2, 1.3, and 3.2).

Mountain Broadcasting, owner of Spokane's KAYU-TV.[2] Mountain Broadcasting is owned and controlled by Brady.[3]

The initial term of the lease between Wolf Creek and Mountain Broadcasting was 15 years, commencing January 12, 1998.[4] The original lease ("1998 Lease") was to be automatically extended for successive 5-year terms "unless 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."[5]

To prevent automatic renewal of the 1998 Lease, Mountain Broadcasting needed to give written notice of its intent not to extend the lease at least 90 days before the 15th anniversary of the Lease, which was on or before October 12, 2012. On September 20, 2012, Mountain Broadcasting sent Wolf Creek the Non-Renewal Notice via overnight delivery.[6]

Article XXIII of the 1998 Lease specified how notice was to be provided, stating that "[a]ll notices or demands of any kind required or desired to be given by the Landlord or Tenant hereunder 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

---

[2] *Id. (*Complaint at ¶¶ 3.5 and 3.6).

[3] *Id*. (Complaint at ¶¶ 3.6 and 3.7).

[4] CP 187 (1998 Lease, Article II).

[5] *Id.*

[6] CP 227.

prepaid, addressed to landlord or tenant respectively at the addresses set forth after their signature at the end of this Lease."[7] Of note, there is no address listed under the Landlord's name at the end of the 1998 Lease.[8] Brady was identified in the 1998 Lease under the "Landlord" signature block as the person to sign on behalf of Wolf Creek LLC; Respondent was not.[9]

It is undisputed that for years prior to the expiration of the original Lease term, Mountain Broadcasting had advised Wolf Creek that the lease rent (which under the 1998 Lease was increased each year without reference to local real estate market conditions) had reached an amount that was far in excess of market. For example, in a letter dated November 8, 2005, Wolf Creek was advised that the lease rate "is completely out of step with comparable office rents on Spokane's South Hill."[10] Again on March 19, 2009, more than three years before the 1998 Lease was set to expire, Mountain Broadcasting notified Wolf Creek that the lease rate was "completely out of sync with the current commercial market on Spokane's South Hill.[11] In response, as it did every year, Wolf Creek, acting through Respondent, responded by raising the rent.[12]

---

[7] CP 208 (1998 Lease, Article XXIII).

[8] CP 211.

[9] *Id.*

[10] CP 216 – 170 (November 8, 2005, letter).

[11] CP 219-220 (March 19, 2009, letter).

[12] CP 222 (December 9, 2008, letter); CP 223 (December 14, 2009, letter); CP 224 (December 6, 2010, letter); and CP 225 (December 2, 2011 letter). Of note, there is no

As a consequence of these serial lease rate increases, by September 2012, Mountain Broadcasting was paying $23.52/square foot on a triple net basis, and the lease rate was scheduled to increase to $24.35/square foot if the 1998 Lease was extended in 2013.[13] Based on Mountain Broadcasting's market surveys in 2012, the market for similar property was a fraction of this price.[14] Had Mountain Broadcasting elected to renew the 1998 Lease in 2013, the lease rate would have been about 300% above market.[15] Not surprisingly, Mountain Broadcasting was not interested in extending the lease at this rate.

To prevent the automatic renewal of the 1998 Lease, Mountain Broadcasting was required to give written notice of its intent not to extend the lease at least 90 days before the 15th anniversary of the Lease.[16] As the lease commenced on January 12, 1998, written notice of non-renewal was required on or before October 12, 2012. Given Mountain Broadcasting's dissatisfaction with the lease terms, it was not surprising that on September 20, 2012, well within the time period for notice non-renewal set forth in the 1998 Lease, Mountain Broadcasting sent Brady of Wolf Creek a Non-Renewal Notice via overnight delivery.[17] The Non-Renewal

---

evidence that Respondent sent any of these rent increase notices via registered or certified U.S. Mail.

[13] CP 178.

[14] *Id.*

[15] *Id.*, CP 178.

[16] CP 39

[17] CP 227

Notice was sent to Brady in his "position as a member of Wolf Creek Holdings of Spokane LLC," and stated: "This letter shall constitute notice that Mountain is electing that the term of the Lease not be extended as provided in said Article II."[18]

It is not disputed that Wolf Creek timely received the Non-Renewal Notice through Brady: Jon Rand, General Manager of Mountain Broadcasting, testified that he authorized and directed Mountain Broadcasting's counsel (Fred Levy of Brown Rudnick in Washington, D.C.) to send the Non-Renewal Notice to Brady over a facsimile of his (Mr. Rand's) signature.[19] Diane M. Palacios, legal assistant to Mr. Levy, testified that on September 20, 2012,[20] she sent the Non-Renewal Notice via Federal Express overnight delivery to Brady.[21] Ms. Palacios received written confirmation from Federal Express that the envelope containing the Non-Renewal Notice was, in fact, delivered to Brady on September 21, 2012, at 1:58 p.m., and had been signed for by "P Billingsley."[22]

Pamela Billingsley, Brady's administrative assistant, confirmed she received a copy of the Non-Renewal Notice on behalf of Brady via

---

[18] CP 227 (September 21, 2012, letter); CP 172-176, and CP 178; and CP 284-291.

[19] CP 268-283 and CP 254-264 (Deposition of Jon D. Rand, pages 96, 97, 125).

[20] While the Non-Renewal Notice was sent on September 20, 2012, it is dated September 21, 2012. Ms. Palacios testified that the letter was dated September 21, 2012, but was ready to be sent mid-day on September 20, 2012. CP 285 (Palacios Decl. at ¶ 4).

[21] CP 285 (Palacios Decl. at ¶¶ 3-5).

[22] CP 285-286 (Palacios Decl. at ¶¶ 6-7).

overnight delivery on or about September 24, 2012.[23] Brady testified that he received the Non-Renewal Notice shortly after it was sent.[24] What is more, Brady contemporaneously confirmed receipt of the Non-Renewal Notice via a return letter dated October 4, 2012, acknowledging, on behalf of Wolf Creek, that Mountain Broadcasting "was electing not to extend the terms of its Lease with Wolf Creek Holdings of Spokane, LLC."[25]

IV. ARGUMENT

It is undisputed that Mountain Broadcasting timely sent a written Non-Renewal Notice to Wolf Creek via Federal Express, and it was received by Brady, an authorized agent of Wolf Creek. It is also undisputed that if this notice was effective, the 1998 Lease was terminated.

Respondent summarily claims that review should be granted because the Non-Renewal Notice was deficient both because it was not sent via certified or registered mail and because it was not sent to him. The Court of Appeals properly reversed the trial court on both issues and Respondent has offered no reason why this Court should reexamine them.

---

[23] CP 172 and 178. It should be noted that September 21, 2012, was a Friday and September 24, 2012, was a Monday.

[24] CP 182 (Brady Decl. at ¶ 7).

[25] CP 229 (October 4, 2012, letter) and CP 131.

A. Respondent has failed to explain why review of the Non-Renewal Notice Issue Should be Granted under RAP 13.4(b).

Respondent failed to explain how or why the Court of Appeals' decision conflicts with prior decisions of this Court or presents an issue of substantial public interest under RAP 13.4. For this reason alone, review should not be granted on the notice issue raised in Respondent's answer.

B. 1998 Lease did not *Require* Notice be Sent via Registered or Certified Mail.

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 Broadcasting substantially complied with the notice provision. *See Jacob & Youngs, Inc. 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), Respondent 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*, this 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, the

Non- Renewal Notice expressed Mountain Broadcasting's "definite, unequivocal, and unqualified determination" not to renew the 1998 Lease. Whether analyzed under a substantial or strict compliance standard, Mountain Broadcasting's Notice of Non-Renewal met the notice requirement.

The 1998 Lease requires written notices, but does not mandate delivery of notices by registered or certified mail. Rather, under the 1998 Lease, written notice was required and ***if*** the required written notice was effectuated by certified or registered mail, it would be "deemed delivered 48 hours after depositing the notice or demand in the United States mail."[26] Thus, 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 therefore must independently establish proof of actual delivery.

The parties are in accord that the notice requirement is a contractual provision that must be interpreted in accordance with the objectively expressed intent of the parties.[27] The question is whether Mountain Broadcasting complied with the notice provision by using

---

[26] CP 208 -- Article XXIII of the 1998 Lease provided:

All notices or demands of any kind required or desired to be given by the Landlord or Tenant hereunder **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, addressed to landlord or tenant respectively at the addresses set forth after their signature at the end of this Lease. (Emphasis added).

[27] CP 321.

Federal Express as a delivery mechanism. The Non-Renewal Notice provided by Mountain Broadcasting was in writing, as required, and the undisputed evidence shows it was timely delivered via Federal Express to Wolf Creek. Mountain Broadcasting does not seek the delivery presumption afforded by notice delivered by registered or certified mail, as timely delivery was independently established.

In *Fleisher Engineering & Construction Co. v. United States*, 311 U.S. 15 (1940), the United States Supreme Court examined the adequacy of notice required by statute. The statute (40 U.S.C. § 270b) addressed a materialman's right to sue, granting such a right "upon giving written notice" and (unlike the 1998 Lease) further mandated that such "notice shall be served by mailing the same by registered mail, postage prepaid or in any manner in which the U.S. marshal is authorized to serve summons." *Fleisher Eng'g*, at 19. It was admitted that the notice at issue was in writing and was sent by mail to the correct persons, who actually received the notice. *Id.* at 18. Thus, the sole issue was whether the notice was deficient because it was not sent via registered mail, even though it was actually received.

In resolving the issue, the Court held that "a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice." *Id*. The Court found that the first proviso, which defined the condition precedent to suit, was "fully met" by confirmed receipt of the written notice by the designated persons. *Id*. at 19. The Court then turned to the

mode of service of the notice, which was required by registered mail, holding:

> We think that the purpose of this provision as to the manner of service was to assure the receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received. **In the face of such receipt, the reason for a particular mode of service fails**. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown.

Id. at 19 (emphasis added).

Like the statute in *Fleisher Engineering*, here the 1998 Lease contained two provisos in the notice section (though unlike the statute, the 1998 Lease contained no language – "shall" – mandating a specific mode of delivery).[28] The first requires that all notices be in writing to either the Landlord or Tenant.[29] The notice provision in the statute then indicates the effect of a specific mode of service, stating that notice "shall be deemed delivered 48 hours after depositing the notice or demand in the United States mail, certified or registered, postage prepaid . . . ."[30] Even though the statute made the specified mode of delivery mandatory (which the 1998 Lease did not), the Supreme Court rejected the argument that notice failed where the specified mode of delivery was not employed. *Fleisher Eng'g*, 311 U.S. 15. Thus, even if the 1998 Lease *did require* a specified

[28] CP 60.
[29] CP 60.
[30] CP 60.

mode of delivery (it does not), the reasoning employed by the Supreme Court would apply squarely here. The purpose of the notice provision in the 1998 Lease "was to assure the receipt of the notice, not to make the described method mandatory." In *Fleisher Engineering*, and in this case, the required written notice was unquestionably received in a timely fashion, supporting in both instances the logical holding that "[i]n the face of such receipt, the reason for a particular mode of service fails." *Id.* at 18.

Korey v. Sheff, 3 Mass.App.Ct. 266, 327 N.E.2d 896 (1975), presented an issue of whether a lease could only be renewed if notice was served by registered mail. The lease in question (which unlike the statute in *Fleischer*, was similar to the language of the 1998 Lease) provided, in part, that "the lessee shall have the option to renew this lease if notice is given in writing to the lessor . . . and . . . any such notice to the Lessor shall be deemed duly given if and when mailed by registered mail . . . ." *Korey*, 327 N.E.2d at 897. In construing the lease, the *Korey* Court held that "[t]hese provisions do not require that written notice be sent by registered mail, to the exclusion of other modes of transmission, in order effectively to exercise the option to renew." *Id.* Actual receipt of written notice would fulfill the notice requirement of the renewal provision of the lease . . . ." *Id*.

Here, both members of Wolf Creek (Holman and Brady) knew Mountain Broadcasting was unhappy with the lease rate and intended to provide notice of non-renewal. Well before the 90-day deadline, Mountain

Broadcasting provided written notice to Wolf Creek (via letter to Brady) that it intended to terminate the 1998 Lease. The Non-Renewal Notice was sent by Mountain Broadcasting's attorney to Brady on September 20, 2012, via overnight Federal Express delivery.[31] There is no dispute that the Non-Renewal Notice was received the next day, as established by a written delivery confirmation from Federal Express.[32] Moreover, Brady's administrative assistant confirmed she received the Non-Renewal Notice, on behalf of Brady, via overnight delivery.[33] Brady also testified that he received the Non-Renewal Notice, and sent a response letter to Mountain Broadcasting on or about October 4, 2012.[34]

Respondent claims that despite this undisputed evidence that Wolf Creek actually received the Non-Renewal Notice, it was nonetheless deficient because it was not sent by registered or certified mail. However, as the United States Supreme Court held, in the face of actual receipt of notice "the reason for a particular mode of service fails." *Fleisher Eng'g*, 311 U.S. at 19. Additionally, accepting Respondent's position would produce an absurd result of finding non-compliance with the notice provision when actual notice was unquestionably provided. Such an absurdity must be avoided. "The contract must be read as the average person would read it; it should be given a practical and reasonable rather

---

[31] CP 285 (Palacios Decl. at ¶¶ 5-6).

[32] CP 286 (Palacios Decl. at ¶ 7).

[33] CP 172 (Billingsley Decl. at ¶ 3).

[34] CP 182 (Brady Decl. at ¶¶ 7-9).

than a literal interpretation, and not a strained or forced construction leading to absurd results." *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 341, 738 P.2d 251 (1987) (internal quotations and citation omitted).

The undisputed evidence is that Wolf Creek actually received Mountain Broadcasting's non-renewal notice within the time period prescribed in the 1998 Lease. No evidence to the contrary exists. The Non-Renewal Notice sent to Brady as a member of Wolf Creek served the intended purpose of the notice requirement in the 1998 Lease.

C. 1998 Lease Required Notice to the "Landlord" (Wolf Creek), not Respondent.

Respondent also claims that he was entitled to personal notice from Mountain Broadcasting concerning its intent not to renew the lease. However, the 1998 Lease required only that notice be provided to the "Landlord" (Wolf Creek) and not to Respondent individually as a member of Wolf Creek.

In Article II of the 1998 Lease, entitled "Lease Term," the parties agreed that the initial term of the 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."[35] 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."[36] While

[35] CP 181 (Brady Decl. at ¶ 3) and CP 187.

[36] CP 208.

there are no addresses identified following the1998 Lease signature blocks, Brady was identified under the "Landlord" signature block as the person to sign on behalf of Wolf Creek LLC; Respondent was not.[37] This makes sense, as Wolf Creek is a member-managed LLC: "The Company will be operated by its members and no manager will be appointed."[38] As a member-managed LLC, "All members of the Company shall have the authority to obligate or bind the Company in connection with any matter."[39]

Because Wolf Creek is a member-managed LLC, notice to Brady unquestionably constituted notice to Wolf Creek (the "Landlord"). Thus, notice to Brady at his address was *exactly* compliant with the notice requirements of the 1998 Lease.

The 1998 Lease required that the Non-Renewal Notice be sent to Wolf Creek as "Landlord." The undisputed facts establish that the Non-Renewal Notice was sent by Mountain Broadcasting to Brady within the 90-day non-renewal notice period. The undisputed evidence also proved that Brady received and responded to this letter within the 90-day non-renewal notice period. The 1998 Lease only required notice to Wolf Creek, which occurred. The fact that notice was not also sent to Respondent is irrelevant. The Court of Appeals properly reversed the trial court's contrary ruling on this question.

---

[37] CP 211.

[38] CP 235 (Article V, Section 1, Wolf Creek, LLC Agreement).

[39] CP 235 (Article V, Section 2, Wolf Creek, LLC Agreement).

V. CONCLUSION

For these reasons, Mountain Broadcasting and Brady respectfully request the Court deny Respondent's request to review the Non-Renewal Notice issue.

DATED this 3rd day of January, 2017.

LEE & HAYES, PLLC

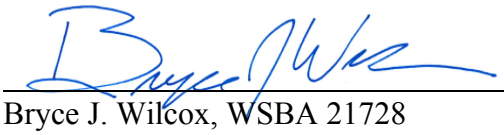
By 

Bryce J. Wilcox, WSBA No. 21728
601 W. Riverside Avenue, Suite 1400
Spokane, WA 99201
Phone: (509) 324-9256
Fax: (509) 323-8979
Attorneys for Petitioners Brian Brady and Mountain Broadcasting, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of January, 2017, 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	_X_ Hand Delivery ___ U.S. Mail ___ Overnight Delivery ___ Fax Transmission



Bryce J. Wilcox, WSBA 21728
Attorney for Petitioner Brian W. Brady and Mountain, LLC