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APR 29 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 29411-1-III

COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION III

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P.E. SYSTEMS, LLC, a Delaware limited liability company,

Appellant,

v.

CPI Corp., a Missouri corporation,

Respondent.

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APPEALED FROM SPOKANE COUNTY SUPERIOR COURT  
CAUSE NO. 10-2-02351-2

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**APPELLANT P.E. SYSTEMS, LLC'S REPLY BRIEF**

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## **I. INTRODUCTION**

CPI Corp. (“CPI”) attempts to twist the facts of this case by selectively quoting from the contract at issue, completely mischaracterizing the nature of the relationship between the parties, ignoring the fact that no discovery has been done, the summary judgment standard was not followed and that no disputed facts have been resolved. The fact is CPI convinced the Trial Court to commit procedural and substantive errors which justify reversal. Procedurally, the Trial Court failed to properly apply the correct legal standard when deciding CPI’s motion. It further erred by not granting PES leave to amend its complaint to assert additional causes of action that could not have been alleged in the initial Complaint. Substantively, the contract at issue simply is not an unenforceable agreement to agree. Recognizing any one of these errors requires reversal of the Trial Court’s ruling so the matter may be adjudicated on the merits.

## **II. RE-STATEMENT OF RELEVANT FACTS**

On September 10, 2010, the Trial Court heard oral argument on CPI’s Motion to Dismiss. (R.P. 1, 3) (C.P. 102). PES pointed

out to the Court that the July 10, 2009 Consulting Agreement is not an unenforceable agreement to agree, because the contract provides a mathematical formula to determine the historic cost baseline which the parties agreed upon. This is the very term CPI argued needed to be agreed upon later. (R.P. 9-18). The reason behind this open term, but yet having the contract provide the mathematical calculation, is because, at the time of signing the contract, PES did not know CPI's credit card volume or its credit card fees. (R.P. 9-18). Ignoring the fact of the Consulting Agreement being based on a formula, the Trial Court incorrectly granted CPI's CR 12(c) motion to dismiss. (C.P. 117-18).

In granting CPI's CR 12(c) motion to dismiss, the Trial Court refused to consider PES's Presentation that was attached as Exhibit B to the Declaration of Nicholas D. Kovarik. (R.P. 31-32). The Presentation was extrinsic evidence of the intent of the parties and contained the result of the mathematical formula listed in the Consulting Agreement. (R.P. 45-75). Importantly, the Trial Court did not find the Presentation was inadmissible based upon evidentiary reasons. Instead, the Court refused to consider it based on the erroneous belief that CR 12(c) prohibited consideration of information not in the pleadings.

(R.P. 31-32). CPI did not file an appeal seeking review of the Trial Court's finding decision.

### III. ARGUMENT

#### A. The Trial Court Erred By Not Considering The PES Presentation.

*After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion **shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.***

CR 12(c) (emphasis added).

Here, CPI's motion should have been treated as a motion for summary judgment, because material outside the pleadings was presented to and not excluded by the Trial Court as inadmissible. Specifically, PES submitted the Declaration<sup>1</sup> of Nicholas D. Kovarik in opposition to CPI's motion for judgment on the pleadings. (C.P. 45-75). CPI convinced the Trial Court to not consider Exhibit B to the Kovarik Declaration, not because it was inadmissible, but

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<sup>1</sup> This declaration contained two exhibits. (C.P. 45-75). Exhibit A was a copy of the July 2009 consulting contract. (C.P. 45-75). Exhibit B was a copy of the August 2009 presentation that showed CPI the historic cost calculation referred to in the Consulting Agreement. (C.P. 45-75).

rather, because it argued the Trial Court could only consider the pleadings under CR 12(c). (R.P. 31-33).

**1. The Trial Court Did Not Find The Presentation Inadmissible.**

Importantly, the Trial Court never ruled that the declaration or the exhibits were inadmissible. (R.P. 31-32). Instead, the Trial Court erroneously believed it could not consider Exhibit B because of CR 12(c). The Trial Court stated:

*When counsel [CPI's attorney] indicated on the record that this was they're asking for Judgment on the pleadings, that's all the Court can consider at that. So it was a Judgment on the pleadings, and that's what I ruled on.*

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*So you pled breach of contract and covenant of good faith. They made a motion under CR 12, which is the Court can only basically look at the pleadings and the ruling on the pleadings, and this was not a contract.*

*So that's all the Court considered at that time, which is one of the reasons I granted their Judgment. ...So, therefore, under CR 12 that's all the Court can consider. Your [PES] exhibit that you added and stuff was more for a Summary Judgment.*

(R.P. 31-32) (emphasis added).

CPI erroneously led the Trial Court to believe that it could not consider any evidence that was not attached the pleadings. Id. However, under the plain language of CR 12(c), the Trial Court should have considered the documents and applied the CR 56 summary judgment standard.

Despite the Trial Court's express ruling, CPI now attempts to argue that the material contained in the Declaration is inadmissible because it is unauthenticated, is hearsay and is immaterial. Yet, CPI did not appeal the Trial Court's ruling. Thus, this Court should not consider CPI's argument. If CPI desired to preserve its argument that Exhibit B was inadmissible for evidentiary reasons, it needed to appeal the Trial Court's ruling. RAP 4.1; 5.1; 5.2. It failed to do so and correspondingly failed to properly seek review of this issue. Id.

However, even if CPI's argument is considered, a review of the record confirms the Presentation is admissible and should have been considered by the Trial Court.

**2. The PES Presentation Was Admissible.**

**a. The Document Was Properly Authenticated.**

The Declaration of Nicholas D. Kovarik in paragraph 3 states Exhibit B is what it was claimed to be. ER 901. Furthermore, CPI has not and cannot dispute that it received this Presentation. Exhibit B was the subject of an hour-long presentation during which PES employees explained Exhibit B's contents to CPI and told CPI how to use Exhibit B to achieve savings. (C.P. 4-5; 50-75). CPI cannot challenge Exhibit B as not being what PES claims it to be; it was properly authenticated and is admissible. See ER 901.

In addition, if the Trial Court had properly converted the motion to one for summary judgment as required by CR 12(c), pursuant to CR 56(f), PES would have had the opportunity to request time to depose CPI to address any such argument. Discovery would have also conclusively proved that CPI received the Presentation and understood it to contain the result of the mathematical formula described in the July 10, 2009 contract. In any event, the Declaration of Nicholas D. Kovarik sufficiently authenticated the document such that it was admissible, and the Trial Court should

have considered it when ruling on CPI's Motion for Judgment on the Pleadings.

**b. The Presentation Is Not Hearsay, Because It Was Not Being Offered For The Truth Of The Matter Asserted And Is A Business Record.**

CPI's claim the presentation was hearsay fails. First, the Presentation (Exhibit B) was not offered for the truth of the matter asserted. Instead, it was simply offered as extrinsic evidence surrounding the interpretation of the contract and intent of the parties. Thus, by definition, it is not hearsay. (C.P. 45-75). See ER 801. The Presentation (Exhibit B) was not offered to prove historic cost for the purposes of this motion, but to demonstrate the conceivable facts that the Trial Court was required to consider in deciding the Motion for Judgment on the Pleadings. See *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 102 (2010). Because the Presentation (Exhibit B) was not offered for the truth of the matter asserted in it, it does not constitute hearsay.

Second, even if the Presentation (Exhibit B) were being offered for the truth, it is a business record of both PES and of CPI.

Therefore, it falls into an exception to the hearsay rule. ER 803(a)(6); RCW 5.45.020. As such, it is admissible.

**c. The Presentation Was Material To The Issue Before The Trial Court.**

The Presentation (Exhibit B) is extrinsic evidence which, under Washington law, must be considered when interpreting a contract. Berg v. Hudesman, 115 Wn.2d 657, 667 (1990). As such, it was relevant and material to the issue presented to the Trial Court. The Presentation (Exhibit B) also served as a demonstration of the set of conceivable facts that PES could prove to show breach of contract. Based upon the pleadings and the Presentation (Exhibit B), it is conceivable that PES entered into a contract with CPI, a contract where CPI knew and agreed that historic cost was going to be determined by the mathematical formula provided in the contract. PES then performed the analysis, including the mathematical formula contained in the contract, and provided those results to CPI. CPI then took that information and realized savings but refused to pay PES for the services it provided, this despite the fact it agreed to do so under the terms of the contract. These facts are conceivable, were pled and confirm a breach of contract.<sup>2</sup> Therefore, the Presentation (Exhibit B) is relevant to the inquiry of conceivable facts. However, because the Trial

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<sup>2</sup> Indeed, the Presentation confirms these facts.

Court was misled by CPI and did not consider this set of conceivable facts, it erred by granting of judgment on the pleadings.

**B. The July 10, 2009 Contract Was An Enforceable Contract.**

CPI claims that the July 10, 2009 Consulting Agreement was an unenforceable “agreement to agree.” CPI argues that because the language of the July 10, 2009 contract states that historic cost will be set forth in Addendum A and mutually agreed upon that the contract itself is unenforceable because Addendum A was never signed. This argument misunderstands and misapplies the facts and basic contract principles.

Just because a term in the contract must be agreed upon in the future does not make the contract an unenforceable agreement to agree. Syrov v. Alpine Resources, Inc., 68 Wn. App. 35, 39-42, 841 P.2d 1279 (1993) (holding a valid contract existed where quantity term was left open but defined by how many merchantable trees existed on a plot of land); City of Tacoma v. United States, 28 Fed. Cl. 637, 645-46 (1993). In City of Tacoma, the City sued for monies allegedly owed under a 1972 contract for electrical services the City supplied, which was modified by mutual agreement. City

of Tacoma, 28 Fed. Cl. at 639. The contract, as modified, stated that the government would pay at the new rates only after those rates were renegotiated and mutually agreed. Id. at 644. The City argued that this Change of Rate provision, which made the new rates not effective until they were renegotiated and mutually agreed to was illusory as an agreement to agree. Id. at 645. Applying Washington law, the Court of Claims held the contract, as modified, was not illusory. Id. The Court reasoned that times may change and the fixed terms of some contracts might require adjustment. Id. Thus, provisions that recognize “*such contingencies, as well as contract clauses designed to address future events, are well known and respectable concepts.*” Id.

A contract is valid and enforceable so long as there is a manifestation of assent, and there is reasonable certainty of terms that allow the court to provide a basis for determining breach and the appropriate remedy. See 16th Street Investors, LLC v. Morrison, 153 Wn. App. 44, 55 (2009); see also Morris v. Maks, 69 Wn. App. 865 (1993) (a valid and enforceable contract exists so long as the subject matter is agreed upon, the terms are stated in informal

writings, and the parties intended to have a binding agreement). The court may test the contract based on the surrounding circumstances to determine if it is complete and therefore valid. Bloom v. Christensen, 18 Wn.2d 137 (1943).

In Washington, extrinsic evidence is admissible to explain the context surrounding the formation of an agreement and to determine the intended meaning of what is written. Berg, 115 Wn.2d at 667 (adopting the “context rule”). Extrinsic evidence may be used regardless of whether the contract language is ambiguous. Berg, 115 Wn.2d at 669.

Here, the July 10, 2009 contract is not like the agreement found in Keystone, infra. This was not an exchange of letters, and the agreement did not require a further meeting of the minds to be complete. See Keystone Land & Development Co. v. Xerox Corp., 152 Wn.2d 171, 174-175 (2004). Instead, the July 10, 2009 contract provides a specific mathematical formula to determine the historic cost. Thus, it is valid and enforceable. There are no facts to support the conclusion that any future meeting of the minds was necessary

between the parties for the Consulting Agreement to be complete.

The Consulting Agreement stated:

*(3) Client's Historic Cost will be determined, based upon the data provided by Client, by taking Client's total Visa and MasterCard credit and debit card costs divided by Client's total Visa and MasterCard credit and debit card revenue which reflects Client's accurate Historic Cost. Once Historic Cost is calculated PES will analyze the specific Merchant Processing services cost and create a proprietary Cost Savings Program. Client's Historic Cost will be set forth and mutually agreed to by the parties in Addendum "A" which is incorporated by reference herein.*

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*Should Client decide to go forward and implement any part of PES Cost Savings Program, either by itself, by a third party or by using PES services, this Historic Cost becomes the baseline which the parties will use to measure "Program Cost Savings". [PES receives 50% of all Program Cost Savings as a consulting fee].*

(C.P. 48) (emphasis added).

This provision, which CPI relies upon in support of the proposition it entered into just an "agreement to agree," merely provided CPI with the opportunity to verify PES's calculations based on the contractually agreed upon formula. (C.P. 48, at ¶¶ 3-4). In other words, the parties agreed CPI had the right to check PES's math. The sole purpose of Addendum A was to provide a

mechanism for the client to verify PES's mathematical calculations. It did not provide for any future "agreement" or negotiation. Neither party could change the formula used.

As a result, there was no "blank check," as argued by CPI. PES was bound to the same mathematical formula as CPI. If the mathematical formula would have resulted in a lower historic cost, PES would be required to measure the savings and its consulting fee against the lower historic cost. PES did not and could not pick and choose a historic cost. It was bound to the contract terms. PES performed the calculation and provided it in PES's Cost Savings Presentation on August 12, 2009. (C.P. 50-75). This presentation demonstrated that the historic cost was 1.655998%. (C.P. 50-75).

The fact is, CPI and PES made a fully binding agreement and agreed upon the material terms. (C.P. 48). The Consulting Agreement is sufficiently definite such that, under the most basic contract interpretation principles, CPI's acceptance resulted in an enforceable contract and the ability of a court to fix exactly the legal liability of the parties.

If CPI's argument were accepted, it could obtain PES's proprietary and confidential recommendations on how CPI could save hundreds of thousands of dollars on debit and credit card processing and then simply refuse to sign Addendum A. This would allow CPI to obtain the benefit of PES's consulting services and not have to pay for them. As shown by the Consulting Agreement, that was never the intent of the parties. This alone illustrates why Addendum A was simply a math check with no ability by either side to negotiate further.

The Trial Court erred when it failed to consider PES's Presentation, extrinsic evidence and any set of conceivable facts that could justify relief. McCurry, 169 Wn.2d at 102. If the Trial Court would have considered all conceivable facts, then it necessarily would have considered the extrinsic evidence surrounding the July 10, 2009 Consulting Agreement. The extrinsic evidence would establish that the Consulting Agreement between PES and CPI is an enforceable contract and that CPI fully understood all terms, including that Addendum A was merely to verify PES's historic cost

calculations, and that CPI intended to form a binding agreement with PES. Thus, the Trial Court should be reversed.

C. **PES Should Have Been Afforded An Opportunity To Present All Relevant Material Under CR 12(c).**

CPI argues that PES failed to adequately request a CR 56(f) continuance. While PES made a CR 56(f) request in its response brief at the Trial Court level, it was not allowed to obtain a CR 56(f) continuance, because the Trial Court refused to consider the issue a CR 56 issue. Instead, it erroneously refused to consider PES's argument that a CR 56 standard applied and refused to consider additional materials, refused to provide PES an opportunity to present all pertinent materials as required by CR 12(c) and refused any opportunity for discovery. Had the Trial Court properly converted CPI's motion to a summary judgment motion, because matters outside the pleadings were presented to the Trial Court, then PES would have had an opportunity to present all materials made pertinent to the motion under CR 56 and to have its CR 56(f) motion considered. The Trial Court refused to do so and was in error.

**D. PES's Motion For Leave To Amend Its Complaint Should Have Been Granted.**

Finally, the Trial Court erred by denying PES's Motion to Amend. Leave to amend should be freely given except where it would result in prejudice to the other party. CR 15(a). The Trial Court considers "*undue delay, unfair surprise, and jury confusion*" when deciding whether justice requires an amendment. Wilson v. Horsley, 137 Wn.2d 500, 505-506, 974 P.2d 316 (1999). Where the opposing party is prepared to meet the new issue, amendment should be allowed. Quackenbush v. State, 72 Wn.2d 670, 672, 434 P.2d 736 (1967) (citing Bowers v. Good, 52 Wash. 384, 386-387, 100 P. 848 (1909)).

PES requested leave to amend the Complaint to allege causes of action for quantum meruit/unjust enrichment, Consumer Protection Act Violations and tort theories. (R.P. 22). These causes of action were not included in the original Complaint. They also were an attempt to further pursue the damages caused by CPI.

Justice required PES to be given the opportunity to amend its Complaint to assert claims for quantum meruit/unjust enrichment, CPA violations and other tort theories. There was no prejudice to

CPI in allowing the amendment. The case was only 94 days old. No discovery had taken place, and the facts that supported the proposed amended claims were known by the defendant. Thus, the Trial Court abused its discretion when it did not allow this amendment.

CPI argues that because the Trial Court stated that PES could file a new lawsuit, it did not abuse its discretion. However, this argument ignores the mandate of CR 15(a) that states leave shall be freely given. Under CPI's argument, no complaint would ever need to be amended because the plaintiff could simply file a new complaint. This not only costs the plaintiff an extra filing fee, but undermines the long standing legal principle that all claims between parties that arise out of the same transaction or occurrence be decided in one suit on the merits. See generally CR 13; 14; Morris v. Palouse River and Coulee City R.R., Inc., 149 Wn. App. 366, 370, 203 P.3d 1069 (2009).

CPI further argues that PES should have pled these claims in the alternative. However, PES never expected for the Trial Court to find the July 10, 2009 contract unenforceable. To adopt CPI's reasoning would punish a client for the lawyer following his or her

CR 11 responsibilities. CPI suggests that even if the lawyer knows that a valid contract exists, he or she should nonetheless spend the client's money to assert claims in the alternative despite the lack of legal basis at the time. This approach simply is not allowed. CR 8 (e)(2).

The fact remains that CPI received the benefit of PES's consulting services and has not paid PES. There is a contract that obligates the parties. When the Trial Court found the contract unenforceable, it was necessary to assert the additional claims, as it is wholly unjust for one party to retain the benefits of another party's work without paying for them. Thus, the Trial Court's refusal to allow the amendment was in error and should be reversed.

#### **IV. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS**

Based on RAP 18.1 and the valid and enforceable contract between PES and CPI, PES respectfully renews its request for an award of reasonable attorney fees and costs incurred below and on Appeal.

V. CONCLUSION

Pursuant to the foregoing, PES respectfully requests the opportunity to have its day in court. Therefore, it requests the Trial Court be reversed and this matter remanded.

DATED this 29<sup>th</sup> day of April, 2011.

DUNN & BLACK, P.S.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 29<sup>th</sup> day of April, 2011,  
I caused to be served a true and correct copy of the foregoing  
document to the following:

- |                                     |                  |                                 |
|-------------------------------------|------------------|---------------------------------|
| <input checked="" type="checkbox"/> | HAND DELIVERY    | J. Michael Keyes                |
| <input type="checkbox"/>            | U.S. MAIL        | Whitney J. Baran                |
| <input type="checkbox"/>            | OVERNIGHT MAIL   | K&L Gates, LLP                  |
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