No. 96699-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BluZEBRA TECHNOLOGIES, a division of
COPIERS NORTHWEST, INC., a Washington corporation,

Respondent,

v.

YATES WOOD & MacDONALD, INC., a Washington corporation,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent BluZebra Technologies, Inc. ("BZ") provided various goods and services to Petitioner Yates Wood & MacDonald, Inc. ("Yates") for many years without complaint. After Yates was sold, the new owner sought to receive the benefit of those goods and services without paying for them.

The sophistical and often bizarre arguments manufactured by Yates below were not supported by competent evidence. Indeed, Yates asks this Court to accept review of a case with **no admissible evidence offered in opposition to summary judgment.** Any reversal would require this Court to either be the first to address and resolve the defects in Yates' declarations or it would have to remand for their consideration. This case merits neither.

There is no conflict between the Court of Appeals' Opinion ("Opinion") and any existing authority. This Court should decline review and award BZ the fees and costs incurred in opposing the instant petition.

II. ISSUES PRESENTED FOR REVIEW

Though Petitioner's Petition ("Petition") is not completely clear, and contains pasted portions of its earlier briefing addressing other issues, it appears that the Petition claims that the Opinion conflicts with a

decision of this Court or a published decision of the Court of Appeals as to the following two issues:

1. Does the fact that BZ (the party seeking its enforcement) did not sign the Copier Program Agreement ("CPA") nullify the contract and thus compel the parties to abide by an antecedent sales order, notwithstanding several years of performance of the CPA?

2. Does a purported contractual duty to provide "written notice", without evidence that notice was provided, invalidate BZ's right to enforce those agreements or otherwise maintain an action, when the issue was raised for the first time on appeal, the breaching party communicated an unequivocal intent to abandon its obligations under the agreements and Yates retained the goods at issue?

III. STATEMENT OF THE CASE

A. BZ and Yates Do Business Pursuant to Numerous Agreements.

BZ is engaged in the sale, lease, and maintenance of copy machines, telecommunications equipment, and related products and services. (CP 79.) Yates is a property management company and commercial real estate firm. (Id.)

BZ was first retained by Yates' principal Nancy Darlington decades ago. (CP 80.) Various components of their ongoing dealings were memorialized by different agreements for the various goods and

services provided. (Id.) Here is a delineation of the four agreements at issue, the goods and services to which they relate, and the course of performance with respect to each:

1. Copier Program Agreement.

On December 6, 2011, BZ provided Yates a sales order for a 60 month lease of a Canon copier. (CP 94-95.) Ms. Darlington signed the document. (Id.) It provided for 17,500 black and white pages per month and 1,800 color pages per month. (CP 94.)

The parties entered into a Copier Program Agreement ("CPA") that same day. (CP 80; CP 97-98.) The CPA contains a distinct "Excess Per Copy Charge", to be invoiced quarterly. (CP 97.)

The parties agreed to an initial rental rate of $605.06 per month and an excess copy charge for black and white copies of $.0079 and color copies of $.059. (Id.) These prices were subject to annual increases. (CP 98.) The CPA also provides: "You will be in default under this Agreement if . . . we do not receive any Monthly Minimum Payment and Excess Per Copy Charges or other payment due hereunder within 10 days after its due date." (CP 90; CP 98.)

Yates paid these excess copy charges **and the annual increases** without complaint for at least five years. (CP 244.)

2. Master Client Services Agreement.

On September 25, 2012, BZ proposed to provide Yates with managed network services; which included desktop remote monitoring, server remote care, anti-virus, anti-malware, and patch management. (CP 81; CP 100.) The quoted price was $1,795 per month. Ms. Darlington executed this sales order. (CP 100-01.)

Three days later, the parties entered into a "Master Client Services Agreement" ("Agreement") to govern the provision of these services, and also "and as set forth in one or more statements of work. . . that may be executed from time to time[.]" (CP 103.) The Agreement required payment within 30 calendar days of receipt of an invoice. (Id.) Schedule 1 to this Agreement is the Statement of Work referenced in the sales order and dated three days earlier. (CP 107-120.)

3. Telephone Lease.

Yates asked BZ to provide it with a telephone system. (CP 82.) On March 28, 2013, the parties executed a 60 month agreement for such a system, including 33 phones ("Telephone Lease"). (Id.; CP 122-23.) The parties agreed to rent of $665 per month plus tax. (CP 83, CP 122.) The Telephone Lease is "Attachment A" to supplement the Agreement. (CP 83, CP 122.)

Paragraph 12 of the Telephone Lease provides that "YOU are in default of this Agreement if any of the following occurs: (a) YOU fail to pay any Rental Payment or other sum when due . . . ." (CP 123.)

Paragraph 13 provides BZ with the following default remedies:

> (a) **Upon written notice**, declare the entire balance of the unpaid Rental Payments for the **full term immediately due and payable, sue for and receive all Rental Payments and any other payments then accrued or accelerated under this Agreement**[.]
>
> (b) Charge YOU interest on all monies due at the rate of eighteen percent (18%) per year from the date of default until paid[.]

(CP 123, emphasis added.)

Thus, one of the remedies purports to require "written notice", while the other remedies do not. (Id.)

4. Server Lease.

On September 4, 2013, BZ prepared a proposal to upgrade Yates' servers. (CP 84; CP 127-36.) Yates chose a 48 month lease with a purchase option ("Server Lease") with a fee of $542.25 per month, as memorialized by a sales order. (CP 84; CP 138-39.) The Server Lease contains the same default and remedies provisions as those found in the Telephone Lease. (CP 142; CP 123.)

B. Yates Is Sold to Mark Holmes, Who Terminates BZ But Still Demands That BZ Perform Its Obligations.

In February 2016, Darlington sold Yates to Mark Holmes. (CP 159.) Holmes had extensive experience operating entities that manage real property; including the purchase of many such companies. (Id.)

The next month, as was his usual practice, Holmes began to move the management of Yates' network in-house. (CP 160.) This required terminating the Master Client Services Agreement, which he notified BZ of his intent to do verbally, as later memorialized in an email dated March 18, 2016. (CP 185.) That Agreement, by its terms, also governs the remaining agreements between the parties. (CP 103, Section 1 ("Scope of Services").)

C. Yates Refuses to Pay BZ for Goods and Services Provided.

In March 2016, Yates stopped paying BZ's invoices. (CP 85.) The nonpayment of these invoices is not in dispute. (CP 162.)

1. Unpaid Copier Invoice.

On March 22, 2016, BZ invoiced Yates for excess copy charges of $508.22 for the period of December 21, 2015 to March 20, 2016 ("Copier Invoice"). (CP 175.) The Copier Invoice delineated that excess black and white copies were charged at a rate of $.0010350 and excess color copies were charged at a rate of $.077340. (Id.) This amount was due on April

21, 2016. (Id.) Yates refused to pay BZ the Copier Invoice in breach of the Copier Program Agreement. (CP 86.)

2. Master Client Services Agreement Invoices.

On March 31, 2016, BZ provided Yates an invoice for services such as "Backup Disaster Recovery" and "Email Hosting" for the period between February 28 and March 27, 2016 in the amount of $1,965.68 ($1,793.50 pre-tax). (CP 177.) This work was authorized and performed pursuant to Section 1 of the Agreement. (CP 103.) On April 28, 2016, BZ provided Yates an invoice for these same backup and email hosting services for the period between March 28, 2016 and April 27, 2016 in the amount of $1,942.10 ($1,771.90 pre-tax). (CP 179.) Yates never paid the foregoing Invoices. (CP 87.)

Yates does not dispute that the services were provided. (CP 87.) While Yates could not speak to specific invoices, when presented with BZ's evidence of unpaid invoices, Holmes admitted that the work was done. (CP 163.)

3. Breach of Telephone Lease.

BZ billed Yates $728.83 per month pursuant to the Telephone Lease. (CP 122-23.) In April 2016, with 27 months remaining, Yates refused to make further payments, but did not return the equipment. (CP 87.) Proof of this invoice was provided to the trial court. (CP 183.)

4. Breach of Server Lease.

BZ billed Yates $594.31 per month ($542.25 pre-tax) pursuant to the Server Lease. (See Server Lease, CP 141; invoice, CP 183.) With 27 months remaining, Yates refused to make further payments, but did not return the equipment. (CP 88.) BZ's damages were calculated with precision. (CP 88-89.)

D. Yates' Answer and Counterclaims Do Not Allege the Materiality of the Absence of a Notice of Default.

BZ sued on August 18, 2016. On October 21, 2016, Yates alleged the following three affirmative defenses:

1. "Accord and Satisfaction"
2. "Lack of an Enforceable contract"; and
3. "Laches."

(CP 8.)

Yates alleged various defenses and counterclaims, but did not allege that it was entitled to a notice of default or that the lack of one was material in any respect. (CP 8-13.)

E. Yates Opposes Summary Judgment with Inadmissible Declarations, Misattribution to Declarations, Hearsay, and Declaration Testimony Contradicted by Deposition Testimony.

On April 14, 2017, BZ moved for summary judgment. (CP 49-78.) Yates offered four declarations in response: from Mark Holmes, Nancy Darlington, Jamie Emerson and counsel (Mark Passannante). (CP 442-

605.) None of them indicated the place of signing or asserted that they were made under penalty of perjury under the laws of the State of Washington. (Id.) Nowhere in the summary judgment briefing does Yates allege that BZ failed to provide notice of default or an opportunity to cure. (Id.)

After the deadline to submit evidence, Yates filed "corrected" declarations. (CP 225; CP 369; CP 376; CP 383.) BZ timely objected and moved to strike. (CP 390.) The trial court only considered the timely filed (deficient) declarations. (CP 401.)

F. The Court of Appeals Affirms in an Unpublished Decision; Also Relying Solely on the Deficient Declarations.

The Court of Appeals affirmed on December 3, 2018. (Opinion.) The court stated explicitly: "We do not consider the untimely corrected declarations." (Id., p. 8.)

IV. ARGUMENT

A. Standard of Review – Petition.

RAP 13.4(b) provides four criteria by which this Court decides whether to accept review:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves

an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Yates purports to rely on the first two criteria. (Petition, p. 5.)

B. The Utter Lack of Admissible Evidence Constitutes a Sufficient Basis to Deny Review.

As explained above, Yates submitted no admissible evidence in opposition to summary judgment. (CP 401.) To defeat summary judgment, a party must submit **admissible** evidence showing a genuine issue for trial. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). An appellate court may only consider such evidence. *Dunlap v. Wayne*, 105 Wn.2d 529, 535-36, 719 P.2d 842 (1986). Both courts below only considered the evidence because it did not create a genuine issue of material fact. (Id.; Opinion, p. 8.) Whether this consideration was error or a courtesy, in neither event must this Court repeat the practice.

C. The Enforcement of the Copier Rate Increase Does Not Create Conflict with Any Authority; Indeed, Petitioner's Theory Is Novel under Washington Law.

Yates argues that the Court of Appeals erred in allowing BZ to increase the rate charged for copies pursuant to the Copier Program Agreement. (CP 97.) Yates argues that since the agreement was never signed by BZ, it is unenforceable. And **further**, that the unenforceability of the agreement results in the enforcement of an antecedent writing – a

sales order. And as that document does not provide for rate increases, presumably it would then entitle Yates to static rates in perpetuity.

Yates cites *Pacific Food Prods. Co. v. Mukai*, 196 Wash. 656, 94 P.2d 131 (1938) for the proposition that "CNW's failure to execute the agreement means the parties reached no agreement on terms outside of the purchase order." (Petition, p. 12.) In *Pacific,* a broker prepared an agreement to sell strawberries. The agreement was cancelled by the seller prior to signature, citing insufficient supply. *Pacific*, 196 Wash. at 660.

The case does not create a conflict with the Opinion. Indeed, ironically, the Court declined Appellant's request to enforce an antecedent writing (a sales order). Instead, it held: "[u]ntil it became a binding contract, either could withdraw." *Id.* at 663. Thus, the Court ruled that no contract was formed.

The case does not hold that when one party does not sign an agreement that is then performed for several years, that the agreement remains ineffective and the antecedent writing (in this case, a purchase order) remains or becomes binding. Indeed, the case vitiates Yates' position: "The fact that the parties do intend a subsequent agreement to be made is strong evidence to show that they do not intend the previous negotiations to amount to any proposal or acceptance." *Id.* at 665.

Yates then cites *Badgett v. Security State Bank,* 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991) for the proposition that "CNW had no right to increase the minimum monthly payments and has demonstrated no contractual right to charge for excess copies[.]" (Petition, p. 12.)

The legal proposition contained at that citation is:

> However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. Nor does it inject substantive terms into the parties' contract. Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement. Thus, the duty arises only in connection with terms agreed to by the parties.

Badgett, 116 Wn.2d at 569-570 (internal quotation and citations omitted).

Nothing in the Opinion conflicts with this unremarkable proposition. Ironically, Yates seems to be arguing that the Court of Appeals inserted a provision into the parties' agreement. The opposite is true; it enforced the agreement as written and performed for several years.

Next, Yates cites *Black v. Evergreen Land Developers*, 75 Wn.2d 241, 450 P.2d 470 (1969) (with no pinpoint cite) for the proposition that "[Integration clauses] will not be given effect if it appears the provision is factually false. In such cases, parol evidence can be used to show whether denial of the existence of any other agreement is controlling." (Petition, p. 13.)

Here, the Court of Appeals did not cite an integration clause to preclude consideration of an earlier writing. To the contrary: it looked to parol evidence to discern the meaning of the parties' agreement. As the CPA was signed and performed by Yates for several years, the trial court and Court of Appeals could (and did) reasonably conclude that it – not the antecedent writing -- formed the agreement between the parties.

None of the cases cited by Yates create a basis for review. More fundamentally, Yates is simply incorrect in its proposition that a party seeking enforcement of an agreement must execute it. "A valid written agreement can exist without one party's signature; acceptance of a written contract may be implied from conduct as well as words." *Shelcon Constr. Grp., LLC v. Haymond*, 187 Wn. App. 878, 894-95, 351 P.3d 895, 904 (2015) (quoting *Sanwick v. Puget Sound Title Ins. Co.,* 70 Wn.2d 438, 443, 423 P.2d 624 (1967)).

Finally, even the foregoing otherwise demonstrated an issue for review, Yates clearly waived its right to object to the increases by paying them for several years. Waiver is the intentional and voluntarily relinquishment of a known right. *224*

Westlake, LLC v. Engstrom Props., LLC, 169 Wn. App. 700, 281 P.3d 693 (2012).

The conclusion is as legally sound as it is factually inescapable: Yates agreed to pay annual increases in the cost of copies. This makes sense, as BZ's costs associated with these copies also increase over time. Yates paid those increases for years. None of the Yates' arguments undermine this fact; let alone create a basis for review by this Court.

D. The Opinion Does Not Conflict with Any Authority, Despite the Lack of a Notice of Default in the Record, Where The Notice Issue Was Not Raised Below and Is Resolved By Undisputed Factual Findings.

Finally, Yates argues that "this action cannot be maintained" because "the phones and master client services agreement both require written notice as a perquisite to an action and termination." (Petition, p. 17.) This proposition is factually incorrect, legally incorrect and was not timely raised.

No formal notice of default is in the record. There is nothing in the trial court record on this issue because it was not raised in either Yates' Answer or in its response to summary judgment. (CP 6-14; CP 211-223.) It was raised for the first time in Yates' Opening Brief at the Court of Appeals.

Pursuant to RAP 2.5(a), "[a] failure to preserve a claim of error by presenting it first to the trial court generally means the issue is waived." *Karlberg v. Otten*, 167 Wn.App. 522, 531, 280 P.3d 1123 (2012) (citing *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)).

"While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised." *Karlberg*, 167 Wn.App. at 531 (citing *Smith v. Shannon*, 100 Wn.2d 26, 38, 666 P.2d 351 (1983)). RAP 2.5(a) "reflects a policy of encouraging the efficient use of judicial resources and refusing to sanction a party's failure to point out an error that the trial court, if given the opportunity, might have been able to correct to avoid an appeal." *In re Guardianship of Cornelius*, 181 Wn. App. 513, 533, 326 P.3d 718 (2014).

The purposes behind this rule are particularly important here. Had Yates raised this issue to the trial court, BZ would have had the opportunity to present evidence that it did provide written notice of default. Assuming *arguendo* that there was no such evidence, the trial court could have determined the appropriate remedy when there was no dispute that Yates retained the benefit of the telephones and the server for which BZ sued for payment. It would be grossly unfair to BZ to accept

review – and potentially remand – on an issue ignored by Yates until appeal.

Furthermore, neither agreement makes "written notice" mandatory in order to maintain an action. The Telephone Lease (and Server Lease) each purport to require written notice (with no opportunity to cure) if BZ wishes to pursue the remedy of acceleration. (CP 123; CP 142.) No written notice is required for the other remedies. (Id.)

The Master Client Services Agreement generally delegates remedies to the statements of work and other documents, but also clearly makes notice optional:

> In the event that Client commits a material breach. . . Company shall have the right, **but not the obligation**, to terminate immediately this Agreement. . . provided that (i) the Company has notified Client of the specific details of the breach in writing, and (ii) Client has not cured the default within ten (10) days following receipt of written notice from the Company."

(CP 104, emphasis added.)

Yates cites two cases on this issue: *DC Farms, LLC v. Conagra Foods Lam Weston, Inc.*, 179 Wn. App. 205, 317 P.3d 543 (2014) and *Republic Investment Company v. Naches Hotel Co.*, 190 Wash. 176, 67 P.2d 858 (1937). Yates cites the former to posit the virtually axiomatic proposition that "A party that bargains for notice, has a right to such notice." (Petition, p. 18.)

In *DC Farms*, a contract required notice and an opportunity to cure prior to rejecting potatoes. *DC Farms*, 179. Wn. App. 218. Pursuant to the agreement, the term "default" was defined as an event "that remains uncured after receipt of seven (7) days written notice of default..." (Id.)

The purchaser purported to reject the goods without providing the opportunity to replace the goods. (Id.) As such, the court ruled that there was no default as defined the contract. (Id.)

Similarly, in *Republic*, a real property lease contained a 60 day right to cure a monetary breach prior to the commencement of litigation. 179-180. Thus, there was no default until the cure period had lapsed and the commencement of litigation prior to a default vitiated the right to the requested relief. (Id.)

Even if Yates had raised this issue timely, the Opinion does not conflict with any existing authority as necessary to authorize review. Neither of the agreements conditions the finding of default or breach on the issuance of a notice or opportunity to cure. "YOU are in default of this Agreement if any of the following occurs: (a) you fail to pay..." (CP 123, Section 12.) "Company shall have the right, but not the obligation, to terminate..." (CP 104.) There is no requirement of notice prior to the existence of a default. The default exists pursuant to the contracts independent of notice.

This is a critical distinction that obviates any conflict between the Opinion and the cited authority. The authority holds that where a condition to a contractual default is not met, there is no default. That authority is wholly inapplicable to the agreements at issue.

Further, as explained by the Court of Appeals, in this case Holmes unambiguously terminated the Master Client Services Agreement in writing. (Opinion p. 21.) The telephone and server leases are incorporated into that agreement by reference. (Id.) As such, Yates did not need and was not entitled to notice of a termination that Holmes himself initiated.

Holmes may well have not intended to terminate those agreements, but rather to simply keep the goods and not pay for them. Because he did not raise this issue below, there is no basis in the record to know. But as the record stands, the Holmes email constitutes an anticipatory repudiation of the agreements. See *CKP, Inc., v. GRS Constr. Co.*, 63 Wn. App. 601, 620, 821 P.2d 63 (1991), *review denied*, 120 Wn.2d 1010, 841 P.2d 47 (1992).

Finally, as is not disputed, Yates retained the server and phones. It posits that the lack of notice strips BZ of all right of recovery, but this would create a patently unjust result. "A person who is unjustly enriched at the expense of another is liable in restitution to the other." *Mazon v.*

Krafchick, 158 Wn.2d 440, 458, 144 P.3d 1168 (2006). An appellate court can affirm on any basis presented in the pleadings and record. *LaMon v. Butler,* 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). There is no legal theory under which Yates gets to keep the equipment and not pay for it. As such, there is simply no reason for this Court to accept review.

V. CONCLUSION

Yates received the benefit of BZ's goods and services. To avoid paying for them, Yates invented factual excuses that were wholly unsupported below (indeed, no admissible evidence was offered in opposition to summary judgment and the briefing attributed facts to declarations that were not in them). As those excuses failed at the trial court and before the Court of Appeals, what remains are bizarre legal propositions that purport to strip BZ of the right to increase the charge for copies on an annual basis and to pursue remedies in the event of an undisputed default -- despite not raising the issue below.

The Opinion is not in conflict with any existing authority. This Court should deny review and award BZ its attorney fees and costs incurred in opposing review.

RESPECTFULLY SUBMITTED this 16th day of January, 2019.

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/s/ Brian M. Muchinsky

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DECLARATION OF SERVICE

On said day below, I served a true and correct copy of Respondent's Answer to Petition for Review in Supreme Court Cause No. 96699-1 to the following parties:

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Original E-Filed with:
SUPREME COURT, OLYMPIA

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of January, 2019 at Bellevue, Washington.

/s/ Natalie Quarnstrom

Natalie Quarnstrom

NOLD MUCHINSKY PLLC

January 16, 2019 - 4:01 PM

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