

No. 70854-6-I

COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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DIMENSION FUNDING, LLC ,

Respondent/Plaintiff,

vs.

CALL-O-CALL, INC., a New York corporation, ANDREY  
TOVSTASHY, and DOES 1 TO 10,

Appellants/Defendants.

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OPENING BRIEF OF APPELLANTS  
CALL-O-CALL, INC. and ANDREY TOVSTASHY

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## I. INTRODUCTION

Appellants consist of equipment lessee Call-O-Call Inc., and its President and individuals lease guarantor Andrey Tovstashy. For ease in reference both appellants are referred to as Call-O-Call.

This appeal flows from a dispute regarding an equipment lease agreement (the "Lease"), pursuant to which Plaintiff/Respondent Dimension Funding LLC ("Dimension") leased two specific components of a telephony communications system to Call-O-Call in 2003. The Lease was part of a much larger and complex lease and purchase transaction, in which Call-O-Call purchased an entire STX Gateway System (i.e., a telecommunications switching system) for well over \$100,000 from a non-party corporation known as NACT Solutions LLC ("NACT"). The two specific components leased by Dimension to Call-O-Call included a circuit board, and a metal cabinet designed to hold the circuit board. Call-O-Call dutifully made all payments required under the lease, totaling over \$50,000. At the end of the lease term, Dimension Funding gave Call-O-Call a lease option price of \$8,995 for the purchase of the two components, which far exceeded what had previously been discussed between the parties at the time that the Lease was signed. Call-O-Call in good faith, subsequently attempted to resolve its differences

with Dimension regarding the depreciated value of the equipment at that time.

In an effort to resolve their differences, Call-O-Call offered to return the circuit board and to pay Dimension the additional sum of \$400, which was the fair market value for the metal cabinet at that time. Dimension subsequently refused to allow Call-O-Call to purchase only one item of the equipment (a low-tech metal cabinet) and return the rest. Dimension then demanded that Call-O-Call either: (i) return to Dimension all of the leased equipment *plus* certain additional equipment that *was never leased* to Call-O-Call, or (ii) in the alternative, pay Dimension's exorbitant price of \$8,995 for all the equipment it mistakenly claimed had been leased. Call-O-Call rejected Dimension's alternative demands, since both were premised on a misunderstanding of what had been leased, and constituted a repudiation of its own Lease terms. Dimension subsequently commenced this litigation in the Superior Court for King County, now demanding over \$41,000 from Call-O-Call.

The Trial Court subsequently granted summary judgment in favor of Dimension, and awarded Dimension \$38,835.67 in damages, and further ordered Call-O-Call to return the equipment in its possession to Dimension. The Trial Court also denied Call-O-Call's motion for reconsideration, in which Call-O-Call highlighted the Court's error in not

finding that Dimension repudiated the Lease when it specifically told Call-O-Call that it would not accept *anything less* than the return of the equipment *plus* additional equipment that it had never leased to Call-O-Call. This appeal followed.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments**

1. The trial court erred when it granted Dimension's Motion for Summary Judgment, because there is a genuine issue of material fact as to whether or not Dimension repudiated the lease agreement from which this action arises.
  
2. The trial court erred when it granted Dimension's Motion for Summary Judgment, because there is a genuine issue of material fact as to the quantity of equipment leased by Dimension to Call-O-Call.
  
3. The trial court erred when it granted Dimension's Motion for Summary Judgment, asserting that Call-O-Call was required to perform the futile act of returning two pieces of leased equipment at the end of the Lease in 2007, despite the fact that Dimension had mistakenly asserted that three pieces of equipment had been leased

and it (Dimension) would only accept the return of three (not two) pieces of equipment).

B. Issues Pertaining to the Assignments of Error

Whether or not a party anticipatorily repudiated a contract is a question of fact. As set forth in detail below, and in the record, the parties' relationship broke down during a dispute as to how many pieces of equipment were actually leased to Call-O-Call under the Lease, which was also, inherently, a question of fact<sup>1</sup>. Specifically, when Dimension's representative, Mr. Michael Wagner, stated that he would not accept the return of anything less than the return of the leased components *plus* additional components that Dimension never leased to Call-O-Call, he repudiated the Lease, and placed Call-O-Call in the impossible position of having to return more equipment than what was actually owed to Dimension. The Trial Court rejected any argument that Dimension's acts were evidence of anticipatory repudiation, and also held that the dispute regarding the quantity of equipment actually leased by Dimension to Call-O-Call, was not a material issue of fact. Did the Trial Court erroneously grant summary judgment in favor of Dimension when there were issues of

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<sup>1</sup> As set forth in the record, Dimension leased two pieces of equipment to Call-O-Call, and then erroneously, due its own misunderstanding of the nomenclature regarding this equipment, demanded that Call-O-Call return three pieces of equipment to Dimension. This is described in the record and brief herein as the "two versus three" argument.

fact regarding: (1) the quantity of equipment leased by Dimension to Call-O-Call, and (2) whether or not Dimension repudiated the Lease? Did the Trial Court error as a matter of law in requiring that Call-O-Call perform the futile act of attempting to return two pieces of equipment in 2007 (in the face of Dimensions' rejection of the return of only two pieces), and then penalizing Call-O-Call with damages under the Lease for failing to do so.

### **III. STATEMENT OF THE CASE**

#### ***The Background Regarding Dimension's Demand for the Return of Equipment that it Never Leased to Call-O-Call***

In December of 2003, the parties to this lawsuit entered into an agreement for the lease of two (2) items of telephony equipment to defendant Call-O-Call (the "Lease" herein). (CP 202-203; 212-216) The Lease pertained to two items of equipment specifically identified on its Schedule A: (i) a low-tech cabinet for mounting electronic and electrical components, identified as a "STX Gateway System Gateway Switch Bay - 19" Rack Mount Enclosure", which consisted of essentially a metal box; and (ii) a circuit board identified in the Lease as "E1/T1, 155 Board". (Id; CP 275-277; 278-280) At the time of the Lease execution, Call-O-Call was orally promised an option to purchase the two items of equipment for

10% of their original purchase, i.e., 10% of \$34,995. (CP 203-205), and Dimension's website promoted a 10% residual purchase price.

The Lease at issue was part of a much larger lease and purchase transaction between Dimension, Call-O-Call, and non-party NACT, involving a number of leases of equipment for various components of the STX Gateway System. Call-O-Call had purchased an entire STX Gateway System from NACT, which was sold to Call-O-Call for well over \$100,000. Half of the STX Gateway System was paid for up front, directly to NACT, and the other half was subject to a series of separate lease agreements (only one in issue on appeal) pursuant to which Dimension purchased the equipment items from NACT as a supplier, who then turned around and leased the equipment to the defendants. The Lease in dispute in this lawsuit was a small part of the overall transaction. (CP 203-205). Subsequently, there was an apparent assignment of the Lease by Dimension Funding to assignee Financial Pacific Leasing, LLC, and re-assignment at the end of the Lease term. (Id.)

Call-O-Call made all lease payments due under the Lease, totaling approximately \$54,000. (CP 204) In early January 2007, near Lease termination, Call-O-Call received a letter from Dimension, offering a lease option purchase price of \$8,925. (CP 205; 247-249) Notwithstanding the fact that the Lease does not provide for the defendants to have the option

to purchase the equipment, the \$8,925 figure proposed by Dimension was almost 3 times the value of the equipment in 2007 that was actually leased, which was valued at that time to be worth no more than \$3200. (CP 251; 262) In addition, Dimension's offer of \$8,925 for the purchase option was, based on the equipment actually leased, an exorbitant 26% of the original purchase price between Dimension and NACT, not the 10% purchase option originally promised to Call-O-Call and advertised on Dimension's website. As a result of the foregoing, Call-O-Call subsequently notified Dimension that it would prefer to return the equipment but for the metal cabinet/rack mount enclosure, for which Call-O-Call proposed a purchase option price of \$400.

What followed was a series of e-mail exchanges with Dimension Funding in early 2007 between the two companies to the effect that:

- a. Dimension Funding refused to provide an option price for the metal cabinet alone, even though it was well aware that the metal cabinet could not be separated from the remainder of the STX Gateway System purchased from NACT in 2003 without violating the existing contract terms with NACT;
- b. Dimension also claimed that the terms of the Lease agreement prohibited Dimension from accepting the return

- of E1/T1 155 Board without the rack mount enclosure, although this prohibition is nowhere to be found in the the Lease, despite multiple requests from the defendants;
- c. Dimension Funding's very high initial option price of \$8,925 was apparently based upon its completely new position that it had leased three equipment items to Call-O-Call and not two items as originally stated under the Lease, the third item consisting of an entire (and far more expensive) Gateway STX System;
  - d. Dimension Funding refused to accept the return of any items from Call-O-Call without the return of the new Gateway STX System (which it had never leased to Call-O-Call under the Lease in dispute);
  - e. Dimension Funding never provided an option price based solely upon the two items that were actually leased under the Lease; and,
  - f. When an impasse in resolving the parties' dispute was reached with Michael Wagner, the representative of Dimension Funding, Mr. Wagner threatened to turn the matter over to the company's collection attorneys.

(CP 205-206; 251-263; 279-280) Call-O-Call refused to succumb to Dimension Funding's almost extortionate demands based upon equipment not subject to the Lease, and a stalemate was soon reached.

Notably, and contrary to the assertions made by Dimension in its motion papers in support of its motion for summary judgment before the Trial Court, it was Dimension that breached its contract with Call-O-Call when it refused to accept anything less than the return of equipment that it never leased to defendants. Specifically, on February 5, 2007, at the request and direction of Call-O-Call's president Andrey Tovstashy, Call-O-Call emailed Michael Wagner, in a final attempt to resolve their differences regarding the quantity of equipment to be returned under the lease. Dimension's response is contained in an email to Call-O-Call, dated February 5, 2007, (CP 168). This email states as follows:

"I have supplied you with copies of the lease indicating 3 items were leased numerous times. They are as follows:

1-Gateway Switch for the Stx Gateway System including  
19" Rack Mount Enclosure;

1-E I/T1 Board;

1-155 Board.

These items were also confirmed by the physical inspection report. Nothing less will be accepted as satisfaction per paragraph 16 of the lease agreement regarding return of the equipment." (Emphasis added).

Dimension Funding then turned this matter over to a collection agency, with a new damage claim of \$41,393.31. (CP 205-207; 265-266) It then commenced a lawsuit in California in violation of the venue provisions of the Lease, which has since been dismissed. Dimension then commenced this lawsuit in King County Superior Court.

In an effort to resolve the situation and to illustrate to Dimension that they were demanding the return of equipment that was never leased by them, Call-O-Call contacted non-party Mr. John Minert, who was the NACT sales representative that actually handled the entire transaction for the partial purchase and lease of the entire NACT STX Gateway System, including the Lease at issue. (CP 207) On Call-O-Call's behalf, Mr. Minert wrote a letter stating that the equipment listed under Schedule "A" of the Lease provides for only one (1) E1/T1, 155 BOARD, which was one item, and not two as apparently claimed by Dimension. (CP 268) As set forth in Mr. Minert's declaration, the following facts stand in stark and marked contrast to the assertions of fact made by Dimension in support of its motion for summary judgment before the Trial Court, which Call-O-Call respectfully submits establishes the existence of a genuine issue of material fact, warranting the denial of Dimension's motion:

- a. Call-O-Call acquired an entire NACT STX System, (i.e., a telephone switching system), which was in part financed

and in part leased by Dimension Funding LLC. Four separate agreements for payment arrangements were entered into, including lease agreement 25851AM03, which is the subject of the present lawsuit.

- b. Mr. Minert sold these components to Call-O-Call Inc., and can say with exactness which parts were sold under this specific lease agreement - 25851AM03.
- c. Although four payment arrangements were established to satisfy the total investment in the system, this lease covered only a small part of it – specifically two items as stated on the Schedule A of lease agreement:
  1. Item # 1 is an STX GATEWAY SYSTEM GATEWAY SWITCH BAY - 19" RACK MOUNT ENCLOSURE, which is a stand-alone low-tech cabinet for mounting/holding hi-tech electronic and electrical components that combine to create a functional "telecom switch", including electrical shock prevention components. This cabinet is a required component, but is merely a physical box made of metal.

2. Item #2 is an "E1/T1, 155 BOARD" or a circuit board designed and produced by NACT for use exclusively as a part within an STX/IPAX switch. The complete name of this part is E1/T1, 155 BOARD and is defined as one (1) piece of hardware capable of handling two (E1 and T1) telecom software protocols. There should be no confusion as to whether this part describes two pieces of equipment. This board is one individual item.

d. In order to ensure the integrity and functionality of the entire system, NACT placed restrictions on removing certain system components, including the enclosure element. Dimension Funding was well aware of this restriction and, in [Mr. Minert's] opinion, when the parties entered the subject lease, everyone understood that the certain equipment cannot be removed from the system as it will compromise it entirely, which would also result in significant loss to Call-O-Call. (CP 278-281)

Call-O-Call also sent a letter dated March 2, 2007 to Dimension, the purpose of which was to voice Call-O-Call's objections to the heavy handed and unfair tactics of Dimension. (CP 207-208; 270). In Call-O-

Call 's letter, Mr. Tovstashy again reiterated Call-O-Call's right to purchase the two items of equipment for 10% of the original purchase price (based on Dimension's oral promise and website), which for the El/T1 155 Board circuit board should be no more than \$3,150, and no more than \$349.50 for the rack mount enclosure cabinet. Call-O-Call was not able to dissuade Dimension from proceeding with what defendants submitted was a frivolous action. Despite the fact that Dimension was demanding return of equipment that was never leased and certain other equipment, the return of which was prohibited under a separate agreement, litigation proceedings were commenced.

***Proceedings in the Court Below and the Trial Court's Error in Granting Summary Judgment in Favor of Dimension***

Dimension initially moved for summary judgment in 2011, and then withdrew its motion after receipt of Call-O-Call's answering papers, including the declaration of NACT representative John Minert. (CP 25-26; 101-104)

In 2013, Dimension tried a different approach when it moved for summary judgment, arguing, *inter alia*, that Call-O-Call had an obligation to return the two pieces of equipment Call-O-Call claimed it had in its possession at the end of the Lease term, regardless of the statement by Dimension in 2007 that it would not accept these two pieces without the

return of a third piece of equipment (i.e., the third piece asserted by Dimension, but never leased to Call-O-Call) It also disingenuously argued, on its second motion for summary judgment, that the dispute regarding whether Dimension leased two pieces of equipment or three pieces of equipment (the "two versus three" argument), was not a material issue of fact. (CP 105-175; 307-322).

In opposition to Dimension's motion, Call-O-Call argued that there were multiple material issues of fact which precluded summary judgment on the merits of Dimension's claims, including, but not limited to: (1) The terms of the lease agreement entered into between the parties, and the amount guaranteed to Call-O-Call as part of the purchase option described above; (2) the value of the equipment at the time that the lease agreement was coming to an end; (3) the quantity of the equipment items which Dimension claims that it leased to Call-O-Call ("two versus three"), and which is disputed, not only by Call-O-Call, but by the NACT representative that handled the entire transaction from which this action arises; and (4) whether or not Dimension repudiated the Lease when it refused to accept the return of the equipment unless Call-O-Call returned additional equipment never provided for under the Lease. (CP 282-306; 201-274) For this Court's reference, the specific language in the Lease which was discussed before the Trial Court regarding the parties'

respective obligations at the end of the Lease term (hereinafter referred to as "Paragraph 16") is as follows:

16. REDELIVERY OF EQUIPMENT; RENEWAL: By this Lease, Lessee acquires no ownership rights in the Equipment and has no option to purchase it. Upon the expiration, or earlier termination or cancelation of this Lease, or in the event of default hereunder, Lessee at its expense, shall return the Equipment in good repair, ordinary wear and tear resulting from proper use thereof, alone excepted, by delivering it carefully crated, shipped freight prepaid and properly insured to such place or carrier as Lessor may specify. At the expiration of the Lease, Lessee shall return the Equipment in accordance with the terms hereof. If the Equipment is not returned within 10 days, Lessor shall have the option of renewing the Lease for an additional twelve month period, and Lessee shall pay to Lessor rentals in the same periodic amounts indicated under "Amount of Rental Payments", above. (CP 213)

At oral argument, and in its motion papers, Dimension represented to the Trial Court that the above stated Lease paragraph made Dimension's express refusal to accept anything *less than three* pieces of equipment irrelevant, and that Call-O-Call's sole obligation, instead of merely *offering* to return the equipment, was to take the extra step and actually *return* the equipment. (CP 315-316) (Report of Proceedings, hereinafter "RP" 6:8 - 6:23; 24:8 - 24:19; 28:4 - 28:15) On this specific point, during oral argument, the Court asked:

"But why didn't your client then just return what your client believes it leased from Dimension Funding?" (RP 16:4 - 16:6)

In response to the Trial Court's inquiry, counsel for Call-O-Call explained:

"Mr. Wagner said they wouldn't accept anything else; nothing less would be accepted. So the issue was do they box up everything and send it as basically a futile act....to accomplish that. And it is interesting that Dimension Funding cites to no case law to say that the lessee has to do something which would be futile or useless based on the expressed representations made by the lessor." (RP 16:7 - 16:14)

Counsel for Call-O-Call then further explained to the Trial Court that on the issue of anticipatory repudiation, that it is was ironic that Dimension relied upon Paragraph 16 of the Lease to justify all of the actions that Dimension took when the parties' relationship soured (such as unilaterally renewing the Lease for a second term), when it was in fact Dimension that repudiated this very Lease paragraph. (RP 17:19 - 18:4) During oral argument and in its opposition papers on Dimension's motion for summary judgment, Call-O-Call also explained that the dispute over whether Dimension leased two versus three pieces of equipment was inherently an issue of fact warranting denial of Dimension's motion.

After oral argument, the Trial Court noted that Call-O-Call never returned what it believed it leased from Dimension Funding, and further stated that there was no evidence of anticipatory repudiation so as to excuse performance under the lease, and awarded Dimension \$38,835.67

in damages, and further ordered Call-O-Call to return the equipment in its possession to Dimension.<sup>2</sup>

#### IV. ARGUMENT

**A. The Trial Court Erred When It Granted Dimension's Motion For Summary Judgment, Because There Was A Genuine Issue Of Material Fact As To: (1) The Quantity Of Equipment Leased By Dimension To Call-O-Call; And (2) Whether Or Not Dimension Repudiated The Lease.**

*Standard of Review*

Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact. Green v. Am. Pharm. Co., 136 Wash.2d 87, 100, 960 P.2d 912 (1998). “A material fact is one upon which the outcome of the litigation depends, in whole or in part.” Barrie v. Hosts of Am., Inc., 94 Wash.2d 640, 642, 618 P.2d 96 (1980). Only when reasonable minds could reach but one conclusion on the evidence should the court grant summary judgment. Smith v. Safeco Ins. Co., 150 Wash.2d 478, 485, 78 P.3d 1274 (2003); Morris v. McNicol, 83 Wash.2d 491, 494–95, 519 P.2d 7 (1974).

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<sup>2</sup> The equipment was subsequently returned to Dimension, and the parties have filed a stipulation with the Court to that effect. (CP 380-381).

In conducting this inquiry, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. City of Lakewood v. Pierce County, 144 Wash.2d 118, 125, 30 P.3d 446 (2001). Where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact. Hudesman v. Foley, 73 Wash.2d 880, 889, 441 P.2d 532 (1968); Kuyper v. State Dept. of Wildlife, 79 Wash.App. 732, 739, 904 P.2d 793 (Div. One, 1995).

It is further well settled that the appellate court reviews the trial court's decision, on a motion for summary judgment, *de novo*. Tollycraft Yachts, Corp. v. McCoy, 122 Wash.2d 426, 431, 858 P.2d 503 (1993). In light of the foregoing standard of review, it is submitted that the trial court erred when it granted Dimension's Motion for Summary Judgment, because there was a genuine issue of material fact as to: (1) the quantity of equipment leased by Dimension to Call-O-Call; and (2) whether or not Dimension repudiated the lease.

Here, in utter disregard of the underlying, ongoing dispute since 2007 over how many pieces of equipment Dimension had leased, and the related question of how many pieces it had the right to demand back (both inherent issues of fact of "two versus three") the Trial Court, in rendering its decision, incongruously stated that: (i) "The equipment is also accurately described in the Declaration of John Minert...." and that (ii)

Call-O-Call was wrong in not returning the 2 pieces of equipment actually leased, despite the fact Dimension had declared it would only accept the return of 3 pieces of equipment. (CP 326) In making this statement, the Court in effect made a finding of fact that Call-O-Call (and the NACT manufacturer's representative) *were correct* in their position that Dimension had only leased two pieces of equipment to Call-O-Call, but at the same time Call-O-Call was wrong in accepting at face value the statement of Dimension's President that it would only accept the return of three pieces of equipment. With these two inconsistent rulings, the Trial Court ordered Call-O-Call to return the two pieces of equipment to Dimension, and further awarded Dimension \$38,835.67, which represented \$17,377.08 for amounts allegedly due and owing under the Lease, plus \$17,854.59 in interest, and additional amounts for various fees, for not returning the two pieces of equipment Dimension had refused to accept in 2007!

In essence, the Trial Court granted Dimension a windfall by forcing Call-O-Call to pay Dimension not once, but *three times* for the equipment, as Call-O-Call had already paid for the equipment once as originally agreed under the Lease. The windfall to Dimension is a result of the award in the amount of \$38,835.67, which represented a second "payment" for the same equipment, and the third "payment" by Call-O-

Call was the Trial Court's order which directed Call-O-Call to return the equipment to Dimension, which it did. (CP 380-381)

Notwithstanding the foregoing, the Trial Court's finding of fact that Dimension leased two pieces of equipment, rather than three, implicitly supports Call-O-Call's position that Dimension was incorrect when it mandated that Call-O-Call return more than what was actually leased to it. *A fortiori*, this finding of fact supports the sole conclusion that Dimension repudiated the Lease when Michael Wagner told Call-O-Call that nothing less than three pieces of equipment would be accepted in satisfaction of Call-O-Call's obligations under the Lease.

It is well settled that repudiation of a contract before there has been a breach by nonperformance is called an anticipatory breach or (the more precise form) anticipatory repudiation. Wallace v. Kuehner, 111 Wn.App. 809, 816, 46 P.3d 823 (Div. Two, 2002). Whether a party anticipatorily repudiated a contract is a question of fact, and can be decided on summary judgment only "if, taking all evidence in the light most favorable to the non-moving party, reasonable minds can reach only one conclusion." VersusLaw, Inc. v. Stoel Rives, L.L.P., 127 Wn.App. 309, 321, 111 P.3d 866 (Div. One, 2005), review denied, 156 Wn.2d 1008 (2006). "An intent to repudiate may be expressly asserted or circumstantially manifested by conduct." Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc., 85

Wn.App. 354, 365, 933 P.2d 417 (Div. One, 1997) (quoting CKP, Inc. v. GRS Constr. Co., 63 Wn.App. 601, 620, 821 P.2d 63 (Div. One, 1991)). Anticipatory repudiation by a contracting party requires a clear and positive statement or action that expresses an intention not to perform the contract. Wallace Real Estate Inv., Inc. v. Groves, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994). A party's performance is further generally excused when the other party repudiates the contract. Turner v. Gunderson, 60 Wn.App. 696, 703, 807 P.2d 370 (Div. Three, 1991).

With specific regard to Michael Wagner's express statement that "nothing less will be accepted as satisfaction per paragraph 16 of the lease agreement regarding return of the equipment" (CP 168), it is submitted that statements such as these have been held to be a clear examples of repudiation, which obviated the necessity for Call-O-Call to engage in a futile effort to return the equipment. This rule is one of the foundations of well established contract law, and can be seen in the early cases to address the issues of anticipatory repudiation. See, e.g., Walker v. Herke, 20 Wash. 2d 239, 240, 147 P.2d 255, 256 (1944), which was an action brought by plaintiff to recover the value of thirty-six steers which it is alleged were sold by defendants to plaintiff for immediate delivery, and which defendants refused to deliver. At trial, the Court granted judgment in favor of the defendants, finding that the plaintiff had refused to accept

the cattle when offered to him, unless defendants would pay certain attorney's fees and trucking costs. Id. As a result of the plaintiff's refusal to accept delivery when offered, the Court concluded that the plaintiff had anticipatorily breached the agreement and declined to award damages to the plaintiff. Id. See, also, Kilgas v. Mother's Grandma Cookie Co., 156 Wash. 8, 285 P. 1118, 1119 (1930), which was an action by plaintiff to recover damages from the defendant for an alleged breach of a contract, whereby plaintiff agreed to sell and ship, and the defendant agreed to purchase and receive 1,000 cases of raisins. The Court determined that as a result of the defendant's express statement that it would not receive or pay for any more of the raisins, "[s]uch repudiation of the contract on the part of [defendant] clearly absolved [plaintiff] from any further duty [regarding] the shipment and delivery of the raisins to [defendant] in Seattle." Id. A third example of this classic rule can be seen in the matter of Jones-Scott Co. v. Ellensburg Mill. Co., 116 Wash. 266, 199 P. 238 (1921), which was a dispute over the contract for the sale of the 10,000 bushels of wheat, wherein plaintiff sued for damages due to defendant's failure to receive and pay for the wheat. On appeal, the defendant argued that plaintiff never performed its contract, and could not recover monetary damages. The Court specifically held that the "evidence is clear and satisfactory that in December or January the respondent refused to accept

the wheat...and repudiated all obligation to pay the contract price; such refusal, of course, obviated the necessity of making a delivery." Id.

Therefore, it is respectfully submitted that Call-O-Call has, at the very least, established a genuine issue of material fact on whether Mr. Wagner's statements constituted an express repudiation of Paragraph 16 of the Lease, which excused Call-O-Call's failure to deliver the equipment until such time that Dimension retracted its repudiation. In the alternative, Call-O-Call would have been placed in the unreasonable position of having to incur the expense of returning the equipment<sup>3</sup> and risk the possibility of incurring further expense if delivery were to be refused by Dimension.<sup>4</sup>

**B. The Trial Court's Erred When It Granted Dimension's Motion For Summary Judgment, In Asserting That Call-O-Call Was Required To Perform The Futile Act Of Returning Two Pieces Of Leased Equipment At The End Of The Lease, Despite The Fact Dimension Had Mistakenly Asserted That Three Pieces Of Equipment Had Been Leased, And That It Would Only Accept The Return Of Nothing Less Than Three Pieces Of Equipment.**

The Trial Court further erred when it held that Call-O-Call was obligated in 2007 to disregard Dimension's undisputed statement that it

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<sup>3</sup> For the Court's reference, the equipment was not something that could simply be boxed up and returned to Dimension via UPS or Federal Express. This was a large and heavy system that required it to be palletized and delivered via ground freight at great expense.

<sup>4</sup> This specific argument was made in opposition to Dimension's motion for summary judgment, when it was explained to the court that an attempted return of the equipment, in light of Dimension's repudiation, would be "futile". (RP 16:7 - 16:18)

would only accept the return of not less than three (not the two leased) pieces of equipment (and Dimensions' related clear repudiation of the Lease), and that Call-O-Call was in breach for failing to return the two pieces of leased equipment. Dimension failed to cite to any law, authority, or equitable argument, in favor of this novel position argued on its second CR 56 motion. This determination flew in the face of longstanding common law to the contrary. See Turner v. Gunderson, 60 Wn.App. 696, 703, 807 P.2d 370 (Div. Three, 1991) (performance by non-repudiating party excused); Walker v. Herke, 20 Wash. 2d 239, 240, 147 P.2d 255, 256 (1944) (breach by repudiating party precludes a claim for damages); Kilgas v. Mother's Grandma Cookie Co., 156 Wash. 8, 285 P. 1118, 1119 (1930) (repudiation by one party absolved the other of a duty to perform under a contract); Jones-Scott Co. v. Ellensburg Mill. Co., 116 Wash. 266, 199 P. 238 (1921) (repudiation by one party absolved the other of the necessity of performance).

### **CONCLUSION**

For the reasons set forth above, it is respectfully submitted that the Trial Court erred in granting summary judgment in favor of Dimension when (i) there were genuine triable issues of fact regarding the quantity of equipment leased by Dimension to Call-O-Call under the Lease, and whether or not Dimension repudiated the Lease, and (ii) Dimension's

actions and demand for more equipment than had been leased absolved  
Call-O-Call of further performance under the Lease.

The summary judgment should be reversed, and this matter  
remanded to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of January 2014.

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**CERTIFICATE OF SERVICE**

The undersigned counsel of record for appellants certifies that on January 21, 2014, he caused the original of Appellants' Opening Brief on Appeal to be filed with the Clerk of the Court of Appeals, Division One, and a true and correct copy to be served on Roy Stegena, Esq., counsel for respondent/plaintiff, by mailing the same by First Class Mail, postage prepaid to his business address of 720 Olive Way, Suite 1201, Seattle, WA 98101.

Dated: January 21, 2014



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