

No. 36829-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
BY [Signature]

CONTINUANT INC, a Washington corporation,

Appellant,

v.

BUCK INSTITUE FOR AGE RESEARCH, a California corporation,

Respondent.

CONTINUANT INC.'S OPENING BRIEF

ORIGINAL

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INTRODUCTION

Continuant Inc. is a telecommunications maintenance company with its home offices in the City of Fife, Pierce County, Washington. Along with its sister company, Telecom Labs, it employs about 100 people in Pierce County. Defendant Buck Institute for Age Research is located on a 488-acre campus in Marin County, California.

In September 2006, Continuant Inc. and Buck Institute entered into a two-year contract to maintain telephone equipment owned by Buck (the "Maintenance Contract"). Within weeks of executing the Maintenance Contract, Buck terminated the contract without giving Continuant the contractually required notice and an opportunity to cure. A week later, after being reminded of the notice and cure requirement and an early termination fee, Buck confirmed its termination of the Maintenance Contract.

Continuant filed this suit to collect the early-termination charge of \$13,372.62. Continuant filed suit in Pierce County Superior Court, across the freeway from its home office. Buck did not answer the complaint. Two months before trial Buck moved to

dismiss under the doctrine of *forum non conveniens* arguing that Marin County, CA. was a more convenient and cost-effective forum.

Under Washington law, plaintiff's choice of forum is entitled to substantial deference. In order for a defendant to obtain a dismissal under the doctrine of *forum non conveniens*, defendant has the burden to prove that the convenience factors (the *Gulf Oil* Factors) are "strongly in favor of the defendant." The factors include

The desirability of trying the case in a jurisdiction familiar with the state law that governs the case;

The relative ease of access to sources of proof;

Availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;

Possibility of view of premises, if view would be appropriate to the action;

And all other practical problems that make trial of a case easy, expeditious and inexpensive

It is an abuse of discretion to dismiss a case where these factors do not "strongly" favor the defendant.

In this case, the trial court, the Honorable Rosanne Buckner, found that (1) there will be "more" witnesses in California than in Washington and (2) it will be necessary to view the telephone

equipment in California. She, therefore, found Marin County, California to be a more convenient forum, and she then dismissed the case.

The trial court's ruling was an abuse of discretion because (1) she failed to give substantial deference to plaintiff's choice of forum; (2) per the Maintenance Contract, Washington law applies to this case; (3) simply counting the witnesses in each state is the wrong legal standard, and, in any event, the evidence in the record proved that there will actually be more witnesses who reside in Washington than in California; (4) the convenience of and cost for willing and unwilling witnesses favors Washington; (5) Buck admitted that it breached the Maintenance Contract and failed to present even a *prima facie* defense to this lawsuit that would require any defense witnesses to attend a trial; (6) there is no evidence in the record supporting the trial court's finding that it will be necessary to view the telephone equipment in California in a breach of contract suit; and (7) Pierce County is a less expensive and more efficient forum than Marin County, California.

In sum, the trial court relied on unsupported allegations, ignored evidence, and failed to apply the correct legal standards. When applying the proper *Gulf Oil* convenience factors to the

evidence before the trial court, the factors strongly favor Pierce County as a more convenient forum. They did not “strongly favor” Marin County, CA. Therefore, the trial court abused its discretion.

The trial court committed another error of law when it granted prevailing-party attorneys’ fees to Buck, contrary to this Court’s decision in *Wachovia v. Kraft*.¹ In *Wachovia*, this Court held that a dismissal without prejudice is not a “final judgment” under RCW 4.84.330, and such dismissal does not allow the court to award prevailing party attorneys’ fees. Here, the trial court dismissed this case without prejudice, yet still found that Buck had a “final judgment” and was entitled to prevailing-party fees under RCW 4.84.330.

The trial court must be reversed on the *forum non conveniens* issue, which would mean a corresponding reversal on the fees issue. If this Court does not reverse on the *forum non conveniens* issue, then it must reverse on the fee issue under *Wachovia v. Kraft*.

ASSIGNMENTS OF ERROR

A. The trial court erred in dismissing this case under the doctrine of *forum non conveniens*.

¹ *Wachovia SBA Lending v. Kraft*, 138 Wn.App. 854, 158 P.3d 1271 (2007).

B. The trial court erred in awarding prevailing-party attorneys' fees to Buck.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in applying the wrong legal standard and relying upon unsupported allegations to find that "it appears that we will have witnesses, as well, from California, more from California than we will have in Washington?"

(R. 12)

2. Did the evidence show that Pierce County, Washington, is a more convenient forum than Marin County, California, for unwilling and willing witnesses?

3. Did the trial court abuse its discretion in dismissing this case where defendant admitted that it failed to give Continuant the contractually required 30-day notice and an opportunity to cure, and then further failed to present evidence of a *prima facie* defense that would require defense witnesses to attend a trial?

4. Did the trial court rely on unsupported allegations when finding that it will be necessary to view Buck's telephone equipment in California in this breach of contract case?

5. Considering the evidence as a whole, did the trial court abuse its discretion by dismissing this case where the evidence did not strongly favor Marin County as a more convenient forum?

6. Did the trial court abuse its discretion by not according substantial deference to Continuant's choice of forum?

7. If Continuant prevails on this appeal on the *forum non conveniens* issue, and then prevails on the merits before the trial court, is Continuant entitled to its attorneys' fees incurred to prevail on this appeal?

8. Did the trial court err in finding Buck was a prevailing party and awarding attorneys' fees to Buck under RCW 4.84.330?

STATEMENT OF THE CASE

The Parties

Continuant is a telecommunications maintenance company based in the City of Fife, in Pierce County Washington. Continuant is a sister company of Telecom Labs Inc., a telecom equipment company, which is also based in Fife, Washington. Together, the two companies employ about 100 people in Pierce County, Washington. (CP 53)

Defendant Buck is located on a 488-acre campus in Marin County, California. (<http://www.buckinstitute.org/site>)

The Maintenance Contract

In August of 2006, Buck contacted Continuant regarding maintenance of Buck's communications equipment. Continuant assigned sales representative Gabe Grossman in its Portland, Oregon, office to try to earn Buck's business. Mr. Grossman negotiated with Alan Lees of Buck in California. (CP 53-54)

On September 18, 2006, Buck and Continuant entered into the Master Maintenance Advantage Plan Agreement (the "Maintenance Contract"). The Maintenance Contract had a two-year term, and was signed by Alan Lees, the Chief Information Officer for Buck, and Doug Graham, the president of Continuant. (CP 54, 56-59)

The Maintenance Contract, section 3(D) states that the Contract only covers the options listed on the attached Schedule A. (CP 56) Schedule A, lists each type of equipment that is covered by the Maintenance Contract, and states the monthly contract price for maintaining that particular equipment. As stated in Schedule A, this Maintenance Contract covered the Nortel Meridian 11C telephone equipment and Meridian voicemail. It did not cover the Avotus call-accounting equipment owned and operated by Buck. (CP 54 & 59)

The Maintenance Contract also included, in section 6, a provision requiring Buck to provide 30-days notice and an opportunity to cure for any alleged contractual breach by Continuant. (CP 57)

In September 2006, Buck asked Continuant to repair its Avotus call-accounting equipment. Continuant sent a California subcontractor to make a service call at Buck. It is undisputed that this service technician was unable to fix the problem. Because of this, Bryan Miles, then a Continuant employee, worked on the issue remotely from his office in Fife, Washington, and fixed the problem. (CP 54) Continuant felt the work on the Avotus call equipment was not covered by the Maintenance Contract, as that Contract specified only the Nortel Meridian equipment as being covered. (CP 54, 59) As such, Continuant billed Buck a service charge for Mr. Miles' work from Washington (CP 17).

The Breach of the Maintenance Contract

On September 27, 2006, Buck's Chief Information Officer, Mr. Lees, sent an email "terminating the agreement." (CP 6)

In response, via an October 2, 2006 email, Ms. Kitty Riddle at Continuant specifically reminded Mr. Lees that the Maintenance Contract allowed Buck to "cancel the agreement without penalty if

we receive written notice of our default and there is no cure within 30 days from that notice.” She also reminded him that if Buck cancelled without providing 30 days notice and opportunity to cure, the Maintenance Contract had a termination charge “equaling 12 months charges or the remainder of the term, whichever is less.” (CP 6, 19, 21-22, 54)

On October 3, 2006, Mr. Lees at Buck responded to Ms. Riddle and “sent a formal written notification of termination” of the Maintenance Contract. (CP 6-7, 21)

Buck never provided the 30-day notice or an opportunity to cure any defaults, as required by section 6 of the Maintenance Contract. (CP 54, 57, 6, 7, 21)

Continuant filed suit in Pierce County Superior Court to collect the \$13,372.62 early termination charge. (CP 1-3)

The Maintenance Contract, section 11, states that Washington law governs disputes under the Contract. (CP 57)

Eight weeks before the trial date, the trial court, the Honorable Rosanne Buckner, granted defendant’s motion to dismiss under the doctrine of *forum non conveniens*. In her verbal ruling, Judge Buckner stated that she was granting the motion to dismiss because (a) “it appears that we will have witnesses, as

well, from California, more from California than we will have in Washington,” and (b) the telephone equipment covered by the Maintenance Contract is located in Marin County, CA. (R. 12)

After relying on this Court’s decision in *Wachovia v. Kraft*² to deny defendant’s request for \$3,550 in fees (R 13-14), Judge Buckner then reversed herself and granted defendant’s motion for reconsideration and awarded defendant \$7,392 in fees as the “prevailing party.” (CP 133)

ARGUMENT

I. The Trial Court Abused Its Discretion in Dismissing This Case Under the Doctrine of *Forum Non Conveniens*

A. Standard of Review

The standard of review for a dismissal under the doctrine of *forum non conveniens* is that questions of law are reviewed *de novo*, while the application of the *forum non conveniens* factors under *Gulf Oil*³ are reviewed for abuse of discretion.⁴ Under the abuse of discretion standard, “a dismissal may only be reversed if it is “manifestly unfair, unreasonable or untenable.” “A discretionary decision rests on untenable grounds or is based on untenable

² *Wachovia SBA Lending v. Kraft*, 138 Wn.App. 854, 158 P.3d 1271 (2007).

³ *Gulf Oil v. Gilbert*, 330 U.S. 501, 509, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).

⁴ *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 156 P.3d 303, 305 (2007).

reasons if the trial court relies on unsupported facts or applies the wrong legal standard.”⁵

A trial court abuses its discretion where it dismisses a case where the *Gulf Oil* factors do not “strongly favor” the defendant,⁶ or when it fails to balance the relevant factors.⁷

B. The Gulf Oil Factors.

The doctrine of *forum non conveniens* “refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum.”⁸ The doctrine is to be applied only in “rare cases.”⁹ “A plaintiff’s right to select the forum is substantial, and unless the [convenience] factors weigh strongly in favor of transfer, the plaintiff’s choice of forum should rarely be disturbed. ... [T]he battle over forum begins with

⁵ *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115, 118 (2006) (emphasis added).

⁶ *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579-80, 555 P.2d 997, 1000 (1976); See also *SME Racks Inc. et al. v. Sistemas Mecanicos, et al.*, 382 F.3d 1097, 1103 (11th Cir. 2004) “district court simply found that the convenience factors were about equal and failed to weigh the presumption in favor of the plaintiffs into the balance. This failure is a clear abuse of discretion.”; See also *Community Merchant Services. v. Jonas*, 354 Ill. App. 3d 1077, 1082-83, 822 N.E.2d 515 (2004) (failure to accord deference to plaintiff’s choice grounds for reversal either as abuse of discretion or error of law).

⁷ *Id.*; See also, *Hatley v. Saberhagen*, 118 Wn.App. 485, 76 P.3d 255 (2003) (failure to apply proper factors in change of venue case is an abuse of discretion).

⁸ *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579.

⁹ *Gulf Oil v. Gilbert*, 330 U.S. 501, 509.

the plaintiff's choice already in the lead."¹⁰ The "balancing test is an uneven one which requires that in order to justify a change of venue, the relevant factors, viewed in their totality, must strongly favor transfer to the forum suggested by defendant."¹¹

The Washington Supreme Court follows the U.S. Supreme Court's decision in *Gulf Oil*¹² and applies the various private and public factors – the "*Gulf Oil* factors" – under the doctrine of *forum non conveniens*. Quoting from *Gulf Oil*, the Washington Supreme Court has identified the private interest factors as follows:

Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.¹³

Significantly, the Washington Supreme Court also adopted the U.S. Supreme Court's statement that "unless the balance [of

¹⁰ *Community Merchant Services*, 354 Ill. App. 3d 1077, 1082-83 (emphasis added) (applying same *Gulf Oil* factors as Washington Courts); see also *Johnson*, 87 Wn.2d at 579 (evidence must "strongly favor" defendant in order to dismiss case).

¹¹ *People ex rel. Skoien v. Utility Mechanical Contractors, Inc.*, 207 Ill. App. 3d 79, 84, 565 N.E.2d 286 (1990) relying on *Griffith v. Mitsubishi Aircraft Int'l, Inc.*, 136 Ill. 2d 101, 554 N.E.2d 209 (1990) and its citation of *Gulf Oil*, 330 U.S. 501.

¹² *Gulf Oil*, 330 U.S. 501.

¹³ *Johnson*, 87 Wn.2d 577, 579.

these factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."¹⁴

The Washington Supreme Court also adopted *Gulf Oil's* public interest factors, including "the desirability of trying the case in a jurisdiction familiar with the state law that governs the case."¹⁵

C. The Trial Court Abused its Discretion by Relying on Unsupported Facts and/or Applying the Wrong Legal Standards

The trial court's ruling was an abuse of discretion because (1) the evidence in the record proved that there will be more witnesses who reside in Washington than in California, and Washington is a more convenient forum for the willing and unwilling witnesses; (2) Buck failed to present even a *prima facie* defense to this lawsuit that would require any defense witnesses to attend a trial; (3) there is no evidence in the record supporting the trial court's finding that it will be necessary to view the telephone equipment in California; (4) the evidence shows that Pierce County is more efficient and less expensive forum than Marin County, California; (5); the evidence as a whole did not "strongly favor" Marin County as a more convenient forum; and (6) considering the evidence as a whole, the trial court relied on unsupported

¹⁴ *Id.*

¹⁵ *Sales v. Weyerhaeuser Co.*, 156 P.3d 303, 304.

allegations, failed to consider the proper factors, and/or failed to accord substantial deference to Continuant's choice of forum.

(1) Plaintiff chose Pierce County, Washington

Forum non conveniens only applies in "rare cases."¹⁶ Plaintiff's choice of forum is entitled to substantial deference, and "should rarely be disturbed."¹⁷ Particularly when a plaintiff chooses its home county, "the battle over forum begins with the plaintiff's choice already in the lead."¹⁸

In this case, Continuant chose its home county, Pierce County, WA, to resolve this dispute. Continuant's choice started in the lead, and, as will be shown herein, the evidence before the trial court increased its lead.

(2) Washington law applies to this case.

Under the *Gulf Oil* public interest factors, it is desirable to keep a "case in a jurisdiction familiar with the state law that governs the case."¹⁹ Pursuant to section 11 of the Maintenance Contract, Washington law governs this dispute. (CP 57) Thus, this important

¹⁶ *Gulf Oil v. Gilbert*, 330 U.S. 501, 509.

¹⁷ *Johnson*, 87 Wn.2d 577, 579

¹⁸ *Community Merchant Services*, 354 Ill. App. 3d 1077, 1082-83 (emphasis added) (applying same *Gulf Oil* factors as Washington Courts); see also *Johnson*, 87 Wn.2d at 579 (evidence must "strongly favor" defendant in order to dismiss case).

¹⁹ *Sales*, 156 P.3d 303, 306-07.

factor also favors plaintiff's choice of forum - Pierce County – further increasing its lead.

(3) The convenience of and cost for witnesses also favors Pierce County

In determining whether a particular forum is more convenient or cost effective to witnesses, a court should not limit its investigation to a review of which party can produce the longer witness list. Rather, a court should look to the nature, quality, and relevancy of the witnesses' testimony with respect to the issues in the case.²⁰

Although the standard should not be “which party can produce the longer witness list,”²¹ the trial court appeared to do just that, stating, “it appears that we will have witnesses, as well, from California, more from California than we will have in Washington.” (R. 12) Not only is this the wrong standard, but the finding is also not supported by the evidence, and thus relies on “unsupported facts” and is an abuse of discretion.²² The evidence proved that there will actually be more witnesses from Washington than from

²⁰ See *Aquatic Amusement Assoc., Ltd. v. Walt Disney World Co.*, 734 F. Supp. 54, 57 (ND NY 1990); *Vandeveld v. Christoph*, 877 F. Supp. 1160, 1167-68 (ED Ill.1995) (both deciding a motion to change venue on grounds of convenience under 28 USC 1404(a))

²¹ *Aquatic Amusement*, 734 F. Supp. at 57.

²² *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684

California – and that Pierce County is a more convenient forum for the witnesses.

Buck's motion to dismiss was based solely on its claim that it was justified in terminating the Maintenance Contract due to non-performance by Continuant. In its motion, Buck relied on the location of only one alleged third-party witness, an unidentified service technician (hereinafter referred to as Unidentified Technician). Mr. Lees, Buck's Chief Information Officer, testified that Buck terminated the contract due to the inability of Continuant's subcontractor, the Unidentified Technician, to repair Buck's Avotus call-accounting equipment in September 2006. (CP 6-7) Buck's attorneys then argued: "Without the testimony of the [Unidentified] Technician who inspected Buck's phone equipment and the only individual who performed any services on behalf of Continuant, adjudication on the merits is impossible." (CP 32)

In response, Continuant admitted that the Unidentified Technician failed to fix the Avotus call-accounting equipment. (CP 54) Thus, even if he/she could be identified and found, the Unidentified Technician will not be a witness in this case as his/her inability to repair is not disputed.

Continuant's response also proved that Continuant actually performed 13 service calls on Buck's equipment, 11 of them remotely from Washington. (CP 55) One of those service calls came after the Unidentified Technician failed to fix the problem. Continuant's evidence showed that a Continuant employee - working remotely from Continuant's home office in Fife, Washington - fixed the problem. This employee's name was Bryan Miles. (CP 54) On October 9, 2006, Continuant invoiced for Mr. Miles' work separately from the monthly charges under the Maintenance Contract because the Avotus-equipment work was extra work. (CP 17) Thus, if there is any dispute at trial in this case over performance, Mr. Miles, a Washington resident, and now a former Continuant employee, will need to testify. (CP 54)

With Buck's reply, it submitted testimony that it hired another unidentified technician from Packet Fusion to fix its phone equipment. With this evidence, and if Buck could get past the fact that it did not provide the contractually required 30-day opportunity to cure the alleged default (see below), there could be a dispute for trial over performance for the attempt to repair the Avotus call-accounting equipment.

Therefore, the only possible third party witnesses for Buck's defense are Mr. Miles, a former Continuant employee who can be compelled to appear in Washington, but not in California, and an unidentified technician from Packet Fusion. Thus, even if the Packet Fusion employee could be identified and found, the availability of compulsory process over unwilling witnesses would be equal – one witness in each state.

As for the attendance of willing witnesses, i.e. employees, for Buck, Mr. Lees negotiated and signed the Maintenance Contract. (CP 54, 58) As an officer for Buck, he can be compelled to appear in Washington.²³ As the CIO who oversees the phone equipment, and who negotiated and then terminated the Maintenance Contract, he should be the only Buck witness.

For Continuant, there is Doug Graham, its president, located in Fife Washington, who negotiated and signed the Maintenance Contract. (CP 57-58) There is also Ms. Kitty Riddle, a Washington employee who corresponded with Mr. Lees regarding Buck's termination of the Contract and the termination charge (CP 6, 19, 21-22). Also for Continuant, there is Gabe Grossman, the sales

²³ See CR 43(f); see also *Campbell v. A.H Robins*, 32 Wn.App. 98, 102, 106, 645 P.2d 1138, 1140, 1143 (1982).

rep who sold and negotiated the contract with Mr. Lees. Mr. Grossman works in Portland, Oregon. (CP 53-54)

Again, even assuming that Buck's defense could survive the fact that it did not provide the required 30-day notice and an opportunity to cure, the evidence supported only the need for the following witnesses on this breach of contract claim:

Witness	Location	Reason	Compelled to Appear?	Convenience and Cost Favors?
Bryan Miles	WA	Former employee; he repaired Buck's phone equipment; relevant to Buck's claim of non-performance.	Yes in WA Not in CA	WA
Doug Graham	WA	President; negotiated, signed Maintenance Contract	Yes in WA CA unknown	WA
Kitty Riddle	WA	Continuant Contract Manager – corresponded with Mr. Lees re termination	Yes in WA Not in CA	WA
Gabe Grossman	Portland, OR	Continuant sales person, negotiated contract with Mr. Lees	Yes in WA Not in CA	WA
Unidentified	CA	Claims to	Not in WA	CA, if he/she

Packet Fusion employee		have fixed equipment after Bryan Miles' work	CA unknown	is found
Alan Lees	CA	CIO of Buck; negotiated & signed contract	Yes in WA Yes in CA	CA

In sum, the trial court abused its discretion in finding that there will be “more [witnesses] from California than we will have in Washington.” That is the wrong standard and is not supported by the evidence. Under the evidence actually presented, there are more Washington witnesses, and the “availability of compulsory process for attendance of unwilling witnesses” and “the cost of obtaining attendance of willing witnesses,”²⁴ favors keeping the case in Washington – again, further increasing the lead of plaintiff’s choice of forum. The evidence certainly does not “strongly favor” California as a more convenient forum for the witnesses, as would be required to uphold the dismissal.²⁵

(4) The trial court abused its discretion by not requiring Buck to show a prima facie defense to this lawsuit.

While *Leasecomm v. Rivera* is not a Washington case, it correctly held that “the existence of a ... meritorious defense” is an implicit requirement in the *Gulf Oil* analysis. As *Leasecomm* held,

²⁴ *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579.

²⁵ See *id.* at 579-80.

[I]t is unnecessary in the instant case to endeavor to compile an exhaustive list of those public and private factors customarily utilized in judicial determinations of forum non conveniens, or to apply such factors to the circumstances of this case. ... In the absence of any assertion or even suggestion by defendant of a defense to Leasecomm's claim for breach of the parties' equipment lease, the trial court's dismissal of this action on the basis of forum non conveniens was error.²⁶

Buck's own evidence proves that Buck has no defense to this lawsuit. Buck's motion to dismiss was based solely on its claim that it was justified in terminating the Maintenance Contract due to non-performance by Continuant. However, Buck's own evidence proved that on September 27, 2006, Mr. Lees, Buck's CIO, terminated the Maintenance Contract without notice or an opportunity to cure. (CP 6) Ms. Riddle at Continuant subsequently reminded Mr. Lees that the Maintenance Contract allowed Buck to "cancel the agreement without penalty if we receive written notice of our default and there is no cure within 30 days from that notice." She also reminded him that if he did not give the 30 days notice and opportunity to cure, the Maintenance Contract had a termination charge "equaling 12 months charges or the remainder of the term, whichever is less." (CP 19)

²⁶ *Leasecomm v. Rivera*, 1994 Mass.App.Div. 115, 116 (1994).

Mr. Lees at Buck responded to Ms. Riddle's email, and, on October 3, 2006, he "formally" terminated the Maintenance Contract. Mr. Lees stated that he was canceling because of Continuant's inability to fix Buck's phone equipment. (CP 6-7, 21)

The contract was signed on September 18, 2006 (CP 57), and Buck terminated the contract on September 27, 2006, (CP 6), and again on October 3, 2006. (CP 6-7). Thus, with these admissions by Mr. Lees, the termination was undisputedly a breach of the Maintenance Contract as a matter of law because Buck never provided the contractually required 30-day notice and opportunity to cure.²⁷

Buck's attorneys alleged in their reply brief that the October 3, 2006 e-mail from Mr. Lees was the 30-day notice and opportunity to cure. However, this argument is directly contradicted by Mr. Lees original declaration testifying that he "terminated the

²⁷ See *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386-87, 78 P.3d 161 (2003) (holding "procedural contract requirements must be enforced"); *Gray v. Gregory*, 36 Wn.2d 416, 418-419, 218 P.2d 307 (1950); (contractual provision requiring notice and opportunity to cure must be followed); *Point Prods. A.G. v. Sony Music Entm't, Inc.*, 2000 U.S. Dist. LEXIS 10066 (SDNY 2000) (holding that party asserting nonperformance must afford a defaulting party any contractually-secured opportunity to cure prior to terminating a contract) relying in part on *Filmline (Cross-Country) Productions, Inc. v. United Artists Corp.*, 865 F.2d 513, 518 (2nd Cir. 1989) (holding that without contractually required notice and opportunity to cure, "purported termination was in violation of the terms of the Agreement, it was inoperative and plaintiffs are entitled to recover for breach of contract").

agreement” on September 27, 2006, and, “on October 3, 2006, [he] sent a formal written notification of termination to Continuant based upon non-performance of the contract.” (CP 6 - 7)

In sum, Buck admitted that it breached the Maintenance Contract, and did not present any basis for a meritorious defense to its breach that would require any witnesses, and thus Buck was not entitled to dismissal on the basis that a trial would be more convenient in California.²⁸

(5). The trial court also abused its discretion in holding that it was necessary to view the equipment in California.

One of the *Gulf Oil* factors is “possibility of view of premises, if view would be appropriate to the action.”²⁹ In this case, there is no evidence in the record supporting a need to view the phone equipment in California.

Defendant’s motion contended that the parties will need expert witnesses in this \$13,000+ case to visit Buck’s office in Marin County to view the phone equipment covered by the Maintenance Contract. (CP 32) This position requires a brief explanation.

²⁸ See *Leasecom*, 1994 Mass.App.Div. 115, 116; cf *Vandeveld v. Christoph*, 877 F. Supp. 1160, 1167 (defendant has the “burden to demonstrate that the testimony of [its] witnesses is relevant to the issues in this case”).

²⁹ *Gulf Oil*, 330 U.S. at 508-09 (emphasis added); see also *Johnson*, 87 Wn.2d 577, 579.

As discussed above, Continuant believes that it is entitled to the early-termination fees sought in this suit because Buck terminated the contract without giving the 30-days notice and opportunity to cure. It is, however, one of Continuant's backup positions that it was never in default under the Maintenance Contract because the Avotus call-accounting equipment that was the subject of the disputed repair attempts in September 2006 is not covered by the Maintenance Contract. (CP 54) Schedule A to the Maintenance Contract lists the equipment covered by the Maintenance Contract and it does not list Avotus' accounting equipment. It only lists Meridian 11C, which is by Nortel, a different manufacturing company from Avotus. (CP 54, 59) Thus, it is Continuant's back-up position that even a material failure to fix the Avotus equipment does not allow termination of the Maintenance Contract since the Maintenance Contract did not cover Avotus. The work on the Avotus was a separate repair order contract, which was invoiced separately. (CP 17)

In Buck's motion to the trial court, Buck's *lawyers argued* that the Avotus equipment is part of the Meridian equipment that was covered by the Maintenance Contract, and thus, they argued, the alleged failure to repair the Avotus could serve as a basis for

terminating the Maintenance Contract. Buck's lawyers claimed expert witnesses will be needed to view the equipment to help interpret the Contract to determine whether the Avotus is covered by the Maintenance Contract. (CP 32) The trial court referred to this alleged need to view the equipment in Marin County as a basis for dismissing the case. (R. 12) That was an abuse of discretion because Buck's lawyers' arguments are not supported by any evidence.

Despite two declarations from Buck's Chief Information Officer (CP 5, 74) and one from its Network Technician (CP 65), there was no evidence that anyone from Buck actually believes that an expert will need to see this particular equipment. There is no testimony about whether this equipment is unique, or is common, or could be the basis of expert testimony without view of the specific equipment. Buck failed in its burden to produce evidence on the issue, even if it were a relevant issue on a contract case involving an improperly timed termination.

Second, the issue in the case would be one of contract interpretation, i.e. does the Contract, which only lists the Nortel Meridian equipment, also cover the Avotus call accounting equipment? The plain language of the contract does not include

Avotus. Washington is an objective manifestation state and our courts look at the language of the contract and extrinsic evidence to determine the parties' objective intent.³⁰ It was the parties who identified the scope of the equipment covered by the Maintenance Contract, and not an expert. There was no evidence from which the trial court could find that having experts view the equipment is relevant to the parties' intent to include or not include the Avotus call equipment under this telephone Maintenance Contract.

Finally, there is no reason to view the equipment because whether the Avotus call equipment is covered by the contract is only relevant if Continuant's alleged inability to repair the Avotus equipment is an issue. As discussed above, Buck admittedly terminated the contract without providing the contractually required 30-day opportunity to cure. Thus, even if this Court assumes that the Contract covers the Avotus call-accounting equipment and assumes that Continuant was in default for failure to fix the Avotus equipment, Continuant is still entitled to a judgment as a matter of law³¹ and there is no need for travel by witnesses, a site visit, or experts.

³⁰ *Hearst v. Seattle Times Co.*, 120 Wn. App. 784, 791, 86 P.3d 1194, 1198 (2004) *aff'd* 154 Wn.2d 493, 503-504 (2005).

³¹ See *supra* note 27.

(6) This case should be heard where it is easy, expeditious, and inexpensive, i.e. Pierce County, and not Marin County California.

The final relevant *Gulf Oil* private interest factor is that a case should be heard where it is “easy, expeditious and inexpensive.”³² This is a small case – Continuant sought just \$13,373 in its complaint – and is subject to mandatory arbitration in Pierce County, a quick, efficient, and less expensive procedure than litigation in Marin County, California. (CP 2, 4) When the trial court dismissed this case, trial was only eight weeks away.³³ It obviously would have been more expeditious to send the case to local arbitration and resolve it in eight weeks or so, than to start over in one of the most expensive counties in the United States.

Buck’s main attorney in this case charges only \$140 per hour (CP 37-41), a rate presumably unheard of in Marin County, which has a significantly higher cost of living than Pierce County. For example, the median house/condo in Marin County in October 2007 was \$895,000, more than triple the \$266,000 median price of a Pierce County house/condo.³⁴ The median household income in

³² *Sales v. Weyerhaeuser Co.*, 156 P.3d at 306.

³³ www.co.pierce.wa.us/cfapps/linx/calendar/GetCivilCase.cfm?cause_num=07-2-06691-3

³⁴ See <http://www.co.marin.ca.us/depts/AR/main/Sales.cfm> and <http://www.thenewstribune.com/business/realestate/story/197561.html>.

Marin County (\$67,731 in 2004) is also about 36% higher than Pierce County (\$49,790 in 2004).³⁵

Small companies like Continuant that choose to make their home in Pierce County and employ 100 people there should be able to take advantage of quick, efficient, and less expensive procedures such as mandatory arbitration of small disputes where the arbitrators are paid for with local tax dollars, and discovery is limited to keep costs down. A transfer to the Marin County California court system deprives a local employer of that process, and needlessly increases costs and delays resolution of this small case.

Summary of Gulf Oil Factors

In order to dismiss a case under the doctrine of *forum non conveniens*, the evidence must “strongly favor” the defendant.³⁶ As such, the “battle over forum begins with the plaintiff’s choice already in the lead.”³⁷ The “balancing test is an uneven one which requires that in order to justify a change of venue, the relevant factors,

³⁵ See <http://quickfacts.census.gov/qfd/states/06/06041.html> and <http://quickfacts.census.gov/qfd/states/53/53053.html>

³⁶ See *Johnson*, 87 Wn.2d 577, 579.

³⁷ *Community Merchant Services*, 354 Ill. App. 3d 1077, 1082-83.

viewed in their totality, must strongly favor transfer to the forum suggested by defendant.”³⁸

In this case, Continuant’s choice of forum, Pierce County, started “in the lead” - and the evidence increased its lead:

- The fact that Washington law applies to this case favors keeping the case in Washington;
- The evidence showed that there are more witnesses located in Washington than in California;
- The evidence showed that the conveniences of, and cost for, attendance at trial for unwilling and willing witnesses favors keeping the case in Washington;
- Buck admitted that it terminated the Contract without giving Continuant the required notice and an opportunity to cure, and failed to present even a *prima facie* defense to this lawsuit that would require a trial.
- There was no evidence from which the trial court could find that it is necessary to view Buck’s equipment in California; and
- Pierce county is a more “expeditious and inexpensive” forum than Marin County, CA;

³⁸ *Utility Mechanical Contractors, Inc.*, 207 Ill. App. 3d 79, 84 (relying, like Washington Courts, on the *Gulf Oil* factors).

A trial court abuses its discretion where it dismisses a case where the convenience factors do not “strongly favor” the defendant.³⁹ A trial court abuses its discretion when it fails to balance the relevant factors.⁴⁰ And a trial court abuses its discretion where it relies on unsupported allegations.⁴¹

As the defendant, Buck plainly failed to meet its burden to prove that the *Gulf Oil* factors “strongly favor” Marin County, California, as a more convenient forum for this case. The relevant factors, when applied to the evidence in the record, strongly favor Pierce County. Therefore, the trial court’s dismissal of this case under the doctrine of *forum non conveniens* was an abuse of discretion and must be reversed.

II. Continuant is Entitled to an Award of Its Attorneys’ Fees on this Appeal.

The Maintenance Contract, section 5, provides that Continuant is entitled to its attorneys’ fees incurred in collecting delinquent payments. (CP 57) Pursuant to RAP 18.1, if Continuant prevails on this appeal of the *forum non conveniens* issue,

³⁹ *Johnson*, 87 Wn.2d at 579-80 (trial court reversed where factors did not strongly favor defendant); *See also SME Racks*, 382 F.3d 1097, 1103 (“district court simply found that the convenience factors were about equal and failed to weigh the presumption in favor of the plaintiffs into the balance. This failure is a clear abuse of discretion.”)

⁴⁰ *Id.*; *see also, Hatley*, 118 Wn.App. 485 (failure to apply proper factors in change of venue case is an abuse of discretion).

⁴¹ *Mayer*, 156 Wn.2d 677, 684.

Continuant asks that this Court also rule that should Continuant prevail on the merits before the trial court on its breach of contract claim, then Continuant will be entitled to its attorneys' fees incurred during this appeal based on RCW 4.84.330. The trial court should be empowered to award those fees.

III. The Trial Court's Award of Fees to Buck is Contrary to This Court's Decision in *Wachovia v. Kraft*.

This Court should reverse the trial court on the *forum non conveniens* issue, and in such case, the trial court's award of fees to Buck is also reversed. However, even if this Court does not reverse the trial court on the *forum non-conveniens issue*, then it must reverse the trial court's award of attorneys' fees under this Court's decision in *Wachovia v. Kraft*.⁴²

A. Standard of Review

Interpretation of a statute is reviewed *de novo*.⁴³

B. Trial Court Erred By Failing to Follow *Wachovia v. Kraft*.

This is a breach of contract lawsuit, and the contract contains a prevailing party fee clause. RCW 4.84.330 governs the award of attorneys' fees under a contractual clause providing an award of fees to the prevailing party in litigation. RCW 4.84.330

⁴² *Wachovia SBA Lending v. Kraft*, 138 Wn.App. 854.

⁴³ *Wachovia*, 138 Wn.App. 854, 858.

states: "As used in this section "prevailing party" means the party in whose favor final judgment is rendered."

This Court, in a reported May 2007 opinion, denied a fee request holding that a dismissal without prejudice is not a "final judgment" within the meaning of RCW 4.84.330.⁴⁴ This Court found that the term "final judgment" is "facially unambiguous - it refers to any court order having preclusive effect" and is "a court finding that is conclusive as to jurisdiction and precluding the right to appeal or continue the case in any other court upon the merits."⁴⁵ Thus, this Court held that a dismissal without prejudice "is not a final judgment because it is not a formal decision or determination leaving nothing further to be determined by the court. [Plaintiff] is free to file a new action against [defendant] leaving final judgment on their dispute for another day."⁴⁶

Wachovia is directly on point. As in *Wachovia*, this case has been dismissed without prejudice. As in *Wachovia*, defendant asked the trial court to determine that it is a "prevailing party" within the meaning of RCW 4.84.330. As in *Wachovia*, defendant does not have a "final judgment" in its favor, and is not a "prevailing

⁴⁴ *Wachovia*, 138 Wn.App. 854.

⁴⁵ *Id.* at 860-61.

⁴⁶ *Id.* at 862.

party” under RCW 4.84.330. As in *Wachovia*, plaintiff Continuant “is free to file a new action against [defendant] leaving final judgment on their dispute for another day.”⁴⁷ As in *Wachovia*, defendant is not entitled to an award of fees. Thus, the trial court erred as a matter of law when it awarded prevailing party attorneys’ fees to Buck under RCW 4.84.330.

The trial court initially agreed that *Wachovia* governs this case and denied Buck’s request for \$3,750 in attorneys’ fees. (R. 14) The trial court, however, responding to defense counsel’s claim that he had not read *Wachovia* prior to oral argument (R 14), invited defense counsel to file a motion for reconsideration “once [he] had a chance to study the case.” (*Id.*) Buck’s counsel accepted that invitation, filed a motion for reconsideration, and the trial court granted the motion and awarded \$7,392 in fees. (CP 133)

In its successful motion for reconsideration below, Buck relied on federal law. (CP 90 – 95) Despite relying on federal law, Buck failed to cite even one federal case that awarded fees to a party obtaining a *forum non conveniens* dismissal. To the contrary, see *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 101 (2nd Cir. 2006) (holding that defendant obtaining dismissal for *forum non*

⁴⁷ *Id.* at 862.

conveniens is not a prevailing party and not entitled to prevailing party attorneys' fees).

Buck's motion for reconsideration also argued that *Wachovia* is distinguishable because this case can only be re-filed in California. But the holding of *Wachovia* is based on the plain language of RCW 4.84.330, which requires a final judgment before fees may be awarded under a contract. RCW 4.84.330 does not make any exceptions for dismissals without prejudice that can only be re-filed outside of Washington. A dismissal without prejudice is not a final judgment regardless of where the case can be re-filed.⁴⁸

CONCLUSION

Plaintiff's choice of forum starts "in the lead." The evidence in this case only increased that lead. The relevant *Gulf Oil* factors, when applied to the evidence in the record, favor Pierce County as the more convenient forum: Washington law applies; Pierce County is more convenient for the willing and unwilling witnesses; Pierce County is quicker and less expensive than Marin County; and Buck has admitted it breached the Maintenance Contract and

⁴⁸ See *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 101 (2nd Cir. 2006) (dismissal in favor of France as a more convenient forum, defendant not a "prevailing party" because "dismissal on the ground of *forum non conveniens* does not, after all, immunize a defendant from the risk of further litigation on the merits of a plaintiff's claims; it merely provides that another forum "would be the most convenient and best serve the ends of justice").

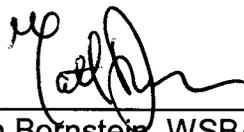
thus no witnesses will be necessary. The *Gulf Oil* factors certainly do not “strongly favor” Marin County, as would be required to uphold the dismissal.

The trial court failed to accord substantial deference to plaintiff’s choice of forum, relied on unsupported facts, failed to apply the relevant factors, and dismissed a case where the factors did not “strongly favor” defendant’s proposed forum. The trial court abused its discretion in finding that the factors “strongly favor” Marin County, California, as a more convenient forum than Pierce County. The trial court, therefore, must be reversed.

The trial court committed a second error in awarding prevailing party attorneys’ fees to Buck even though the dismissal is without prejudice. That award is contrary to this Court’s holding in *Wachovia v. Kraft* and must also be reversed.

DATED this 16th day of January, 2008.

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By 
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CERTIFICATE OF SERVICE

I, Valerie Cheetham, declare as follows:

1. I am a secretary with the law firm of Jameson Babbitt Stites & Lombard, P.L.L.C., over the age of 18 years, a resident of the State of Washington, and not a party to this matter.

2. On January 17, 2008, I deposited with ABC-Legal Messenger Service a copy of the foregoing Continuant Inc.'s Opening Brief and a copy of the August 24, 2007 transcript of proceedings to be served upon all counsel of record by January 17, 2008, 4:30 p.m. at the following address:

Shane Lytle Yelish
Dickson Steinacker LLP
1201 Pacific Ave, Suite 1401
Tacoma, WA 98402-4322

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

DATED: January 17, 2008, at Seattle, Washington.

Valerie Cheetham
Valerie Cheetham

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