

No. 36829-3-II

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

CONTINUANT INC, a Washington corporation,

Appellant,

v.

BUCK INSTITUTE FOR AGE RESEARCH, a California corporation,

Respondent.

CONTINUANT INC.'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT	1
1. PLAINTIFF'S CHOICE OF FORUM DOES IN FACT START "IN THE LEAD.".....	2
2. WASHINGTON LAW APPLIES AND YES, THAT IS A RELEVANT FACTOR.....	3
3. THE CONVENIENCE OF AND COST FOR WITNESSES ALSO FAVORS PIERCE COUNTY.....	3
4. BUCK'S ADMISSION THAT IT NEVER PROVIDED THE REQUIRED NOTICE AND OPPORTUNITY TO CURE IS HIGHLY RELEVANT.	11
5. A NEED TO VIEW THE PREMISES IS NOT A FACTOR IN THIS CASE.	16
6. PIERCE COUNTY IS MORE EXPEDITIOUS AND INEXPENSIVE THAN MARIN COUNTY, CALIFORNIA.....	18
7. <i>J.H. BAXTER V. CENTRAL</i> IS DISTINGUISHABLE.	19
B. THE COURT ERRED IN AWARDING FEES TO BUCK	20
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Aquatic Amusement Ltd. v. Walt Disney World Co.</i> , 734 F. Supp. 54 (ND NY 1990);	4
<i>Bromley v. Mitchell</i> , 902 P.2d 797 (1995)	22
<i>Community Merchant Services. v. Jonas</i> , 354 Ill. App. 3d 1077, 822 N.E.2d 515 (2004)	2
<i>Dattner v. Conagra</i> , 458 F.3d 98 (2 nd Cir. 2006).	22-23
<i>Filmline (Cross-Country) Productions, Inc. v. United Artists Corp.</i> , 865 F.2d 513 (2 nd Cir. 1989)	14
<i>Gray v. Gregory</i> , 36 Wn.2d 416, 218 P.2d 307 (1950)	14
<i>Gulf Oil v. Gilbert</i> , 330 U.S. 501 (1947)	2-4, 23-24
<i>Hatley v. Saberhagen</i> , 118 Wn.App. 485, 76 P.3d 255 (2003)	2
<i>J.H. Baxter v. CNIC</i> , 105 Wn.App. 657, 20 P.3d 967 (2001).	19-20
<i>Johnson v. Spider Staging Corp.</i> , 87 Wn.2d 577, 555 P.2d 997 (1976)	2, 3, 12, 23, 25
<i>Lazelle v. Empire State Surety</i> , 58 Wash. 589, 109 P. 195 (1910).	15
<i>Leasecom</i> , 1994 Mass.App.Div. 115	11, 14
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wn.2d 677, 132 P.3d 115 (2006)	2, 24
<i>Mike M. Johnson, Inc. v. County of Spokane</i> , 150 Wn.2d 375, 78 P.3d 161 (2003)	14
<i>Point Prods. A.G. v. Sony Music Entm't, Inc.</i> , 2000 U.S. Dist. LEXIS 10066 (SDNY 2000)	14, 15

<i>Sales v. Weyerhaeuser Co.</i> , 138 Wn. App. 222, 156 P.3d 303, (2007)	3, 18
<i>Sales v. Weyerhaeuser Co.</i> , 163 Wn.2d 14, 177 P.3d 1122, (2008).	3, 18
<i>SME Racks Inc. et al. v. Sistemas Mecanicos, et al.</i> , 382 F.3d 1097 (11 th Cir. 2004)	2
<i>Van Cauwenberghe v. Biard</i> , 486 U.S. 517 (1988).	4, 12
<i>Vandeveld v. Christoph</i> , 877 F. Supp. 1160 (ED Ill. (1995)	4
<i>Wachovia SBA Lending v. Kraft</i> , 138 Wn.App. 854, 158 P.3d 1271 (2007).	20-22, 24
Other Authorities	Page
Alaska R. Civ. Pro. 82	22
Alaska Stat. § 09.60.010	22
ER 201	18
GR 14.1(b)	15

ARGUMENT

Continuant's choice of forum, Pierce County, Washington, is entitled to substantial deference. The parties' choice of law provision choosing Washington law and contained in their commercial contract, also favored keeping the case in Pierce County. The convenience and cost of attendance of the likely witnesses favored Pierce County. Pierce County is obviously cheaper than Buck's proposed alternative, Marin County, California. Trial, which was eight weeks away at the time of the motion, would have been cheaper and more expeditious in mandatory arbitration in Pierce County than starting all over with litigation in Marin County. Finally, there was no evidence to support the trial court's conclusion that experts would be needed to view Buck's phone equipment to help interpret the Maintenance Contract. Buck has now even conceded that there is no need for experts to view its phone equipment in this case.

Despite all of the above, the trial court dismissed the case on the basis that there would be "more" witnesses in California, and because experts will need to see Buck's phone equipment in California. The trial court abused its discretion by applying the

wrong legal standard, relying on unsupported facts,¹ and dismissing this case where the *Gulf Oil* factors do not “strongly favor” the defendant.²

1. Plaintiff’s choice of forum starts “in the lead.”

Continuant filed this case in Pierce County, across I-5 from its home offices where, along with its sister company Telecom Labs, it employs about 100 people. Under Washington law, Continuant’s choice of forum is entitled to substantial deference and “should rarely be disturbed.”³ That is just another way of saying that “the battle over forum begins with the plaintiff’s choice already in the lead.”⁴ Buck’s Response takes issue with the metaphor used by the Court in Illinois, but there can be no dispute about the substance of the law: there is a strong presumption in favor of Continuant’s choice of forum; *forum non conveniens* only

¹ *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115, 118 (2006) (emphasis added).

² See *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579-80, 555 P.2d 997, 1000 (1976); 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); *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).

³ *Johnson*, 87 Wn.2d 577, 579

⁴ *Community Merchant Services*, 354 Ill. App. 3d 1077, 1082-83.

applies in “rare cases;”⁵ and the case can only be dismissed if the evidence “is strongly in favor of the defendant.”⁶

2. Washington law applies and yes, that is a relevant factor.

Buck argues that the applicability of Washington law “is not a necessary element of *forum non conveniens* analysis.”⁷ Buck is wrong. Washington law holds that one of the *Gulf Oil* factors is that the trial court should keep a “case in a jurisdiction familiar with the state law that governs the case.”⁸ The Maintenance Contract, section 11, states that Washington law applies to this case. (CP 57) The trial court should have weighed this factor in favor of Pierce County.

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

With regard to the convenience of the witnesses, it is necessary to note what the legal issues will be when the merits of this case are heard, and then determine whether the claimed witnesses are likely, unlikely, or not necessary. In other words, the court must consider the “nature, quality, and relevancy of the

⁵ *Gulf Oil v. Gilbert*, 330 U.S. 501, 509.

⁶ *Johnson*, 87 Wn.2d 577, 579-80.

⁷ Buck’s Resp. at p. 29.

⁸ *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 156 P.3d 303, 306-07 (2007); See also *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 177 P.3d 1122, (2008).

witnesses' testimony with respect to the issues in the case.”⁹ As the U.S. Supreme Court put it:

These [Gulf Oil] considerations make clear that in assessing a *forum non conveniens* motion, the district court generally becomes entangled in the merits of the underlying dispute. ... To examine the relative ease of access to sources of proof, and the availability of witnesses, the district court must scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action.¹⁰

With that in mind, the first legal issue on the merits will be: did Buck provide the 30-day opportunity to cure as required by section 6 of the contract? Buck has admitted it failed to do so (see below), and so that fact would likely end the case on summary judgment without any need for travel by witnesses. This issue will be referred to as the “Opportunity to Cure Issue.”

In the unlikely event that Buck gets by the Opportunity to Cure Issue, the next issue would be: Does the Maintenance Contract cover the Avotus equipment that needed repair? The Maintenance Contract, section 3(D) states that “coverage will be in accordance with the option(s) Customer has selected as listed on

⁹ *Aquatic Amusement 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).

¹⁰ *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988).

the attached schedule(s)." The schedule includes only the Nortel "Meridian Option 11(c)" and the Nortel "Meridian Voicemail," and there is a set price for each set of equipment. Avotus call accounting equipment is not listed as being within the scope of coverage. (CP 54, 59) Section 3(F) of the Maintenance Contract states that any equipment not identified on the attached schedule, will only be included as an "Added Product," at an extra cost, once Continuant certifies the product. Buck contends that its Avotus equipment was covered by the contract, and contends the failure to repair the Avotus equipment was a breach of the contract. This will be referred to as the "Contract Interpretation Issue."

If, and only if, Buck prevails on the first two issues, then the final issue would be: Who repaired the Avotus equipment? Was it Continuant's former employee, Brian Miles? Or was it the California contractor Packet Fusion hired by Buck? This will be referred to as the "Repair Issue."

In light of these issues, we turn to Buck's arguments relating to witnesses:

Buck's response takes issue with the chart on pages 21-22 of Continuant's Opening Brief and argues that Buck will actually need four witnesses and not just the two identified on the chart (or

the one that Buck claimed in its motion to the trial court (CP 31-32). The alleged witnesses are (1) a network technician subcontractor who Buck incorrectly refers to as “Telecom Labs,”¹¹ (2) the network technician from Packet Fusion, (3) Mr. Kennedy, who is employed by Buck as a network technician, and (4) Mr. Lees, Buck’s Chief Information Officer. Buck’s witness count is overstated.

The first unidentified technician: In its motion below, Buck claimed a need for only one witness, the unidentified service technician who first failed to repair Buck’s phones. The only potential relevance of this witness is for the Repair Issue. However, even for that second-alternative issue, the witness is not relevant because Continuant admitted that this witness, Continuant’s subcontractor, failed to repair the problem (CP 54)

Buck’s only stated basis for terminating the contract is that Continuant did not fix the Avotus equipment. That this first

¹¹ This subcontractor was not from “Telecom Labs” as designated in Buck’s response. Rather, as Buck’s brief initially admits at page 8, he or she was from an “unidentified third party.” Buck later inconsistently claims that the subcontractor was “believed to be” from Telecom Labs, and this claim is based on an invoice. (CP 17). Mr. Lees claims that the invoice shows the Telecom Labs subcontractor worked at Buck’s headquarters “for three hours and was unsuccessful.” (CP 6) But that invoice shows that Continuant’s former employee, Brian Miles, worked “remotely” for three hours, and that he “let it run for a couple of days and tested all clear.” (CP 17; 54) This invoice is for Continuant’s repair of the problem. In sum, the first technician subcontractor is unidentified, and was from California. He or she was not from Telecom Labs, which is located in Fife, Washington, and not in California as Buck claims. (CP 53-54)

subcontractor did not fix the problem was admitted by Continuant before the trial court. (CP 54) It is also undisputed that the Avotus equipment was the problem and was included in the scope of these failed repairs.¹² Therefore, that subcontractor's visit to Buck, the repairs attempted, the subcontractor's ability, and the scope of the repairs, are not relevant. There are no issues for this person to testify about, even if he or she could be identified and located.

Kevin Kennedy: Buck argues that Mr. Kennedy accompanied the first unidentified service technician and will testify about interactions with this technician. There is no evidence in the record to support that Mr. Kennedy was with this technician, and, as just stated above, that technician's work is not relevant because Continuant admits his or her nonperformance.

Buck next argues that Mr. Kennedy, its employee, and Mr. Lees, its Chief Information Officer, will both be needed to explain Buck's phone system.¹³ Before the trial court, Buck's lawyers (but not its witnesses) argued that experts would be needed to explain Buck's phone system and that this was relevant to the Contract Interpretation Issue. (CP 32-33) After Continuant's Opening Brief

¹² Note that the dispute over the Avotus equipment is whether it was included within the scope of the contract and not whether it was included in the scope of the repair order. (CP 54 & 74)

¹³ Resp. at. 24, 25-26

pointed out that experts are not needed to interpret the contract, Buck no longer argues for experts, and instead states that Mr. Kennedy or Mr. Lees will testify on the issue.

There is no evidence in the record that Mr. Kennedy was involved in the negotiations of the Maintenance Contract or would have any evidence to help a court decide the parties' intent in selecting the Nortel "Meridian Voicemail" and the Nortel "Meridian Option 11C" as being covered by the Contract, (CP 59), or whether the Avotus was yet to be an "Added Product" under section 3 of the Contract. Rather, it was Buck's Chief Information Officer, Mr. Lees, who negotiated the contract and not Mr. Kennedy. (CP 5 & 54) Buck admits that Mr. Lees can and will testify to the various components of Buck's phone system. Mr. Kennedy's testimony is not relevant to contract interpretation. And even if Buck needs someone to explain its phone system, they now admit that Mr. Lees can do so.¹⁴ Thus, Mr. Kennedy is not a necessary witness.

With regard to third-party witnesses, Buck argues that there is a "need to compel witnesses at trial who are all located in California. Any assertion to the contrary is not supported by the

¹⁴ Resp. at 26; also compare duplicate testimony on nature of phone system at CP 65-67 and 74-76.

record.”¹⁵ Once again, Buck’s hyperbole is wrong. No third party witnesses are necessary for the Opportunity to Cure Issue. Even if Buck survives that issue, there are still no third party witnesses necessary for the Contract Interpretation Issue. Even in the unlikely event that Buck gets past those two issues on the merits, and gets to the Repair Issue, there would be two third party witnesses - one for each side. There is the Packet Fusion employee who Buck hired and who Buck claims to have fixed the problem (CP 75, ¶ 11), and there is Brian Miles, a former continuant employee in Washington, who Continuant claims to have fixed the problem. (CP 54, 17) Thus, the need to compel third party witnesses would be equal, and Buck is wrong to claim that “all” potential non-party witnesses are in California.

In sum, considering the nature, quality, and relevancy of the witnesses' testimony with respect to the issues in the case:

- On the Opportunity to Cure Issue, which is the issue that will dominate the merits of this case, Buck’s only witness is Mr. Lees, who negotiated and signed the contract. Mr. Lees admitted that he terminated the Maintenance Contract without providing the contractually required 30-day opportunity to cure. For Continuant,

¹⁵ Resp. at 25.

its local witnesses on this issue are Ms. Riddle, who corresponded with Mr. Lees regarding the termination and opportunity to cure, Mr. Graham, Continuant's president, who negotiated and signed the Maintenance Contract, and Mr. Grossman, who also negotiated the contract with Mr. Lees. On this key and almost certainly dispositive issue, the convenience plainly favors keeping the case in Pierce County.

- On the Contract Interpretation Issue, Buck's only witness is again Mr. Lees. He negotiated the contract with Continuant. Even if the various components of Buck's phone system were relevant to interpretation of a contract that specifies its coverage as only Nortel equipment, he could, as the Chief Information Officer for Buck, testify to those facts. For Continuant, Mr. Graham and Mr. Grossman will be necessary because they were involved in the negotiations of the contract, its intended coverage, and course of performance, i.e. the first 13 repair attempts, and Ms. Riddle may also be necessary to testify to her conversations and emails with Mr. Lees regarding performance and termination.

- On the Repair Issue, this would be a dispute between Continuant's former Washington employee, Mr. Miles, and the

unidentified employee of Packet Fusion who Buck hired to allegedly fix the problem after Mr. Miles' work.

In sum, by the proper legal standards - convenience, cost, availability of compulsory process, the nature, quality and relevancy of testimony, and likelihood of need for testimony on the issues at stake – the chart at pages 21-22 of Continuant's Opening Brief is accurate. Pierce County is a more convenient forum for witnesses. The trial court abused its discretion in simply counting potential witnesses and finding that there would be "more" in California. That is the wrong legal standard and unsupported by the record.

4. Buck's admission that it never provided the required notice and opportunity to cure is highly relevant.

Buck has admitted the facts necessary to prove its liability for the amount sought in the complaint. "In the absence of any assertion or even suggestion by defendant of a defense to [plaintiff's] claim for breach of the parties' [contract], the trial court's dismissal of this action on the basis of forum non conveniens was error."¹⁶ Moreover, even if this Court does not require a defendant to "assert or suggest" facts that support a meritorious defense, Buck's admission to the facts that establish its liability is relevant. When there is no dispute over the dispositive facts, the

¹⁶ *Leasecomm v. Rivera*, 1994 Mass.App.Div. 115, 116 (1994).

“convenience of the parties and the ends of justice [cannot] be better served”¹⁷ by dismissing the case in order to start all over again in California. Finally, these admissions must be considered as relevant to the nature, quality, and relevancy of Buck’s witnesses.¹⁸ Witnesses for an admittedly bogus defense – Buck’s only defense - are not necessary, quality, or relevant witnesses.

The only defense that Buck has presented is that it was justified in terminating the Maintenance Contract due Continuant’s failure to repair the Avotus equipment. (CP 6-7) However, the Maintenance Contract, section 6 says that Buck may cancel without incurring the termination charge only “if Continuant fails to correct such measures within thirty (30) days of receipt of [Buck’s] written notice.” (CP 13)

Buck’s own evidence proved that just nine days after the start of the two-year Maintenance Contract, on September 27, 2006, Mr. Lees, Buck’s CIO, terminated the Maintenance Contract without any opportunity to cure. (CP 6) When reminded of the cure provision, Mr. Lees at Buck responded on October 3, 2006, and “formally” terminated the Maintenance Contract. Mr. Lees

¹⁷ *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997, 999 (1976)

¹⁸ *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528.

stated that he was canceling because of Continuant's inability to fix Buck's phone equipment. (CP 6-7, 21). Mr. Lees has testified to these separate contract terminations under oath. (CP 6 & 7)

Buck's response brief first admits that Buck terminated the contract on October 3, 2006, but later argues that Mr. Lees' October 3, 2006 email was not a termination but was the 30-day opportunity to cure required by the contract.¹⁹ Buck then claims that "upon receipt of the [October 3, 2006] email, Continuant failed to take any corrective measures to cure its non-performance." Buck's newfound argument is contrary to its testimony, considering:

- Mr. Lees' testimony under oath: "on September 27, 2006 I sent an email to ... Continuant terminating the Agreement based upon Continuant's nonperformance of the contract;" (CP 6)
- Mr. Lees' testimony under oath: "on October 3, 2006, I sent formal written notification of termination to Continuant, based upon non-performance of the contract;" (CP 6-7)
- Mr. Lees October 3, 2006 email does not state that it is an opportunity to cure. Rather, it says that Buck is "canceling the

¹⁹ Compare Resp. Br. at p. 10 ("Mr. Lees thereafter, on October 3, 2006, sent a second notification to Continuant that the Agreement was terminated based on nonperformance") with p. 31 (October 3 email was the notice and opportunity to cure).

contract without penalty” and is prepared to defend its decision “to the fullest degree in a court of law.” (CP 21) and

- The October 3 email is not notice of an opportunity to cure because Buck hired Packet Fusion to correct the alleged breach (CP 67), and Packet Fusion completed its work on October 3, 2006, the same day that Buck now claims it gave notice of the 30-day cure opportunity. (See CP 73 showing two hours of work on 10/3, and CP 71 showing invoice dated 10/16)

The trial court should have considered these admissions of breach of contract by Buck’s CIO. There can be no basis for moving a case based on convenience of witnesses, availability of evidence, or public interest when the defendant has admitted to the facts that make it liable for the sums claimed in the complaint.²⁰

²⁰ See *Leasecom*, 1994 Mass.App.Div. 115, 116; See also *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”).

Citing *Lazelle v. Empire State Surety*,²¹ Buck argues that its failure to provide the contractually required opportunity to cure is not relevant because Continuant was not harmed. But the purpose of the opportunity to cure clause is so that Buck cannot seize on a single failure to fix, especially one that is unknown to Continuant,²² as an excuse for terminating the two-year Maintenance Contract. The lack of opportunity to cure deprived Continuant of its contractual right to fix the alleged default and continue the benefits of its two-year Maintenance Contract.²³ Buck's admitted failure to allow Continuant an opportunity to cure was not a mere "technical violation," and the lack of opportunity of course "prevented [Continuant] from taking proper steps for its protection," i.e. to cure the failure and thereby maintain the contract. Therefore, Buck's reliance on *Lazelle* is misplaced.

Finally, Buck is wrong to claim that (a) *Leasecom*, 1994 Mass.App.Div. 115, is a trial court opinion, and (b) that Continuant cited an unpublished opinion.²⁴

²¹ *Lazelle v. Empire State Surety*, 58 Wash. 589, 109 P. 195 (1910).

²² Continuant thought it had fixed the problem. See CP 17 & 54.

²³ Buck's claim that it was a one-year contract is wrong. See CP 59.

²⁴ *Point Prods. A.G. v. Sony Music Entm't, Inc.*, 2000 U.S. Dist. LEXIS 10066, 55 U.S.P.Q.2d (BNA) 1946, (SDNY 2000) is not an unpublished opinion. The decision is not "designated 'unpublished,' 'not for publication,' non-precedential,' 'not precedent,' or the like." See GR 14.1(b) Moreover, the case is published in the United States Patent Quarterly at 55 U.S.P.Q.2d (BNA) 1946.

5. A need to view the premises is not a factor in this case.

The main issue in this case is whether Buck provided the 30-day opportunity to cure as required by the parties' contract. As discussed above, Buck admits that it did not do so, and thus, Buck is liable for the termination fee sought in the complaint. There is no need to visit Buck's headquarters to see any phone equipment.

A backup issue is the Contract Interpretation Issue. On this issue, the key question is whether the Maintenance Contract covers that separate phone equipment made by Avotus. The Maintenance Contract states that it only covers Nortel "Meridian Voicemail" and the Nortel "Meridian Option 11C," and states, in section 3, that other equipment not listed may only be covered as an "Added Product" with a higher monthly charge and only after certification by Continuant. (CP 54, 56 & 59) This is an issue of contract interpretation: Is equipment that is not listed in the section identifying the covered equipment nonetheless covered? And an issue of fact: Has Continuant yet certified the Avotus Equipment and included the additional charge under the Maintenance Contract such that it would be an "Added Product" under section 3?

The parties 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 equipment under this Maintenance Contract. Moreover, 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. It is telling that Buck has now abandoned its expert witness argument and now claims that Kevin Kennedy, Buck's employee network technician, and Mr. Lees, Buck's CIO, will instead testify regarding the various components of the phone system.²⁵ Since Buck now admits that Mr. Lees or Mr. Kennedy can handle this, there is no need for experts to visit the site, even if this issue and the testimony were relevant.

The trial court's conclusion that experts will be needed to view the phone equipment was an abuse of discretion because (a) it is based on the wrong legal standard of what is relevant to contract interpretation, (b) it was based on argument by Buck's

²⁵ Buck's original argument is at CP 32-33. Buck's current claim is in its Resp. Br. at p. 25-26.

counsel that was not supported by any facts, and (c) has since been torpedoed by Buck's admission that its CIO or its employee could handle this testimony in place of any expert.

6. Pierce County is more expeditious and inexpensive than Marin County, California.

Cases should be heard where they are most "easy, expeditious and inexpensive."²⁶ The burden was on Buck to prove that Marin County is easier, quicker, and less expensive.²⁷

Although mandatory arbitration is a convenience factor that favors Pierce County, Buck provided no evidence that a similar alternative to litigation is available in Marin County. Similarly, Buck provided no evidence or argument as to how Marin County would be quicker – particularly where this case in Pierce County was only eight weeks from trial.

With regard to expense and the cost of living in Marin County vs. Pierce County, this Court can take judicial notice of such facts.²⁸ Continuant cited sources, such as the Federal Government's census records and Marin County government records, the accuracy of which cannot reasonably be questioned. The argument was made to the trial court, and even without the

²⁶ *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 177 P.3d 1122, (2008).

²⁷ *Sales*, 138 Wn. App. 222, 156 P.3d 303, 306.

²⁸ See ER 201.

specific figures, it is common knowledge that Marin County California is substantially more expensive than Pierce County. Finally, although there is no evidence of what attorneys in Marin County charge, it is a fair assumption that it is significantly more than the \$140 per hour charged by Buck's attorney in Pierce County.

7. *J.H. Baxter v. Central* is distinguishable.

In *J.H. Baxter*,²⁹ Baxter's headquarters were in California, and its executive officers lived in California, but it filed suit in Washington. The Court determined that "the issues surrounding the contamination of the [California] facility will dominate the case," because the potential liability at that site was 300 – 400% higher than the Washington sites combined, and because, of the three Washington sites, Baxter had sold one, it was only a minor actor (one of 12 liable parties) at another, and its liability at the third site was unknown, but substantially less than the California site. Therefore, the Court dismissed the case in favor of plaintiff's home county.

In contrast to *Baxter*, Continuant filed this suit in its home county, across the freeway from its headquarters. This is a dispute

²⁹ *J.H. Baxter v. CNIC*, 105 Wn.App. 657, 20 P.3d 967 (2001).

over a contract that requires application of Washington law, and that contract's requirement to provide an opportunity to cure alleged defaults, and possibly the interpretation of the contract and a disputed repair attempt. In this case, the work done pursuant to the Maintenance Contract consisted of 13 service calls, 11 of them done remotely from Washington. (CP 55) One of the two disputed repair attempts at issue in this case was done remotely from Washington. (CP 17, 54) There is nothing in the record to suggest Marin County, or Buck's headquarters, "will dominate the case."³⁰ Rather, the meaning of the parties' Washington contract and Buck's admitted non-compliance dominates this case.

Continuant filed this case in its home county. The contract that "will dominate the case" applies Washington law, and this case should have gone to arbitration in Pierce County, which is more convenient for the witnesses and is easier, quicker, and less expensive than litigation in Marin County.

B. The Court Erred in Awarding Fees To Buck.

On April 1, 2008, the Washington Supreme Court accepted review of *Wachovia SBA Lending v. Kraft*, 138 Wn.App. 854, 158 P.3d 1271 (2007). This need not, however, delay a decision in this

³⁰ *J.H. Baxter*, 105 Wn.App. 657, 663.

case because this Court should reverse on the *forum non conveniens* issue, thus automatically reversing on the fee issue without a need to determine the applicability of *Wachovia*. If this Court does not reverse on the *non-conveniens* issue, Continuant reserves the right to ask for supplemental briefing if necessary after the Supreme Court rules on *Wachovia*.

In *Wachovia*, as in this case, the issue was the interpretation of RCW 4.84.330 and its definition of “prevailing party.” RCW 4.84.330 defines “prevailing party” as “the party in whose favor final judgment is rendered.” In *Wachovia*, this Court stated that final judgment means a “court order having preclusive effect,” and a “court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes, attorney’s fees) and enforcement of the judgment.” This Court also held: “given the definition of “final judgment,” we cannot say that the legislature intended a suit dismissed without prejudice to yield a “prevailing party” under RCW 4.84.330.”³¹

Buck focuses on the use of the word “preclusive” and argues that because this case cannot be re-filed in Washington, there is a semi-preclusive effect and thus a “final judgment.” But the statute

³¹ *Wachovia*, 138 Wn.App. 854, 860-62 (emphasis added).

does not say partial judgment and *Wachovia* does not refer to partial preclusion. Preclusive as to one jurisdiction is not “final.” For there to be a “final judgment,” the Court must have resolved “all issues in controversy,” and thus a decision that is preclusive as to the merits of the case, thereby leaving “nothing further to be determined.” Since, in this case, it is the merits of the case that remain “for a future day,” Buck does not have a final judgment.³²

Buck also relies on an Alaska case as persuasive, even though the award of fees in Alaska is always discretionary with the trial court and not limited by a statutory definition of “prevailing party” requiring a “final judgment” as in Washington.³³ Inconsistently, Buck then argues that *Dattner v. Conagra*³⁴ is not persuasive because the Second Circuit did not apply RCW 4.84.330.

Of the two cases, *Bromley* and *Dattner*, *Dattner* is the persuasive case because the Second Circuit interpreted the meaning of “prevailing party,” finding that a dismissal under *forum non conveniens* does not amount to a “judicially sanctioned change

³² *Wachovia*, 138 Wn.App. 854, 860-62.

³³ See *Bromley v. Mitchell*, 902 P.2d 797 (1995); see also Alaska Stat. § 09.60.010 and Alaska R. Civ. Pro. 82.

³⁴ 458 F.3d 98 (2nd Cir. 2006).

in the legal relationship of the parties.”³⁵ While a “judicially sanctioned change in the legal relationship of the parties” is not the same as a final judgment, it is a legal achievement that falls short of a final judgment. Still, and similar to this Court’s decision in *Wachovia*, the Second Circuit stated:

A 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, because Dattner is free to pursue his claims against the defendants in France, and because it remains to be seen which party will, in fact, prevail on the merits, defendants have not yet achieved a judicially sanctioned change in the legal relationship of the parties so as to be considered “prevailing.”³⁶

In sum, a determination of a “final judgment” does not depend on the position of the parties at each stage of the litigation. It is, rather, a decision made after the merits of the controversy are fully and finally decided.

CONCLUSION

The “convenience of the parties and the ends of justice”³⁷ were not served by dismissing this case in favor of California.

³⁵ 458 F.3d 98, 102

³⁶ *Id.* at 103.

³⁷ *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997, 999 (1976)

Plaintiff's choice of forum is entitled to substantial deference and starts "in the lead." The evidence in this case increased that lead. All of the relevant *Gulf Oil* factors favor Pierce County as the more convenient forum: the case was filed in Pierce County; the law of Washington applies under the contract; Pierce County is more convenient for the willing and unwilling witnesses, particularly when considering the admissions by Buck, the issues at stake and the relevancy of each witnesses' testimony; Pierce County is quicker and less expensive than Marin County; and, finally, Buck has admitted to the facts necessary to prove its liability, rendering convenience factors relating to a trial irrelevant.

Rather than apply these factors, the trial court dismissed this case on the grounds that there will be "more" witnesses in California than in Washington, and that there is a need for experts to view the phone equipment in California. In reaching these conclusions, the trial court applied the wrong legal standard, and relied on unsupported facts, and therefore abused its discretion.³⁸ The *Gulf Oil* factors, when properly applied, favor Pierce County.

³⁸ *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115, 118 (2006) (emphasis added).

The factors do not "strongly favor" Marin County, as would be required to uphold the dismissal.³⁹

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

DATED this 9th day of April, 2008.

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³⁹ *Johnson*, 87 Wn.2d 577, 579-80.

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CERTIFICATE OF SERVICE

I, Patty Schultz, 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 April 9, 2008, I deposited a copy of the foregoing Continuant Inc.'s Reply Brief in the U.S. Mail addressed to all counsel of record at the following address:

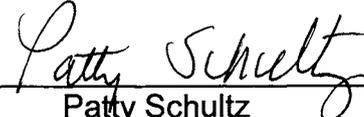
Shane Lytle Yelish
Dickson Steinacker LLP
1201 Pacific Ave, Suite 1401
Tacoma, WA 98402-4322

3. Also on April 9, 2008, I deposited the original and one copy of the foregoing Continuant Inc.'s Reply Brief in the U.S. Mail to the Washington Court of Appeals, Division II, at the following address:

Washington Court of Appeals, Division II
Clerk of the Court
950 Broadway, Suite 300
Tacoma, WA. 98402-4454

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

DATED: April 9, 2008, at Seattle, Washington.


Patty Schultz