

No. 36829-3-II

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

CONTINUANT, INC.,

Appellant,

v.

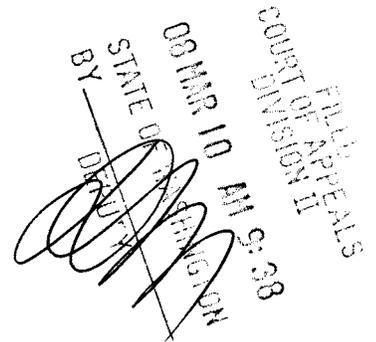
BUCK INSTITUTE FOR AGE RESEARCH,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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**RESPONSE TO ASSIGNMENTS OF ERROR AND ISSUES
PERTAINING THERETO**

1. The trial court did not abuse its discretion in dismissing the case under the doctrine of forum non conveniens based in part upon evidence regarding the locations of the witnesses.

2. The trial court did not abuse its discretion in dismissing the case under the doctrine of forum non conveniens, holding that Marin County, California was a more convenient forum.

3. The trial court did not abuse its discretion in dismissing the case under the doctrine of forum non conveniens because a defendant is not required to present a prima facie defense.

4. The trial court did not abuse its discretion in dismissing the case under the doctrine of forum non conveniens based in part upon its determination that a view of the equipment may be necessary.

5. The trial court did not abuse its discretion in dismissing the case under the doctrine of forum non conveniens based upon its evaluation of the appropriate factors.

6. The trial court did not abuse its discretion in dismissing the case under the doctrine of forum non conveniens despite the plaintiff's choice to litigate in Pierce County.

7. Buck Institute is entitled to its attorney fees on appeal.

8. The trial court properly awarded attorney's fees to Buck as the prevailing party under RCW 4.84.330.

STATEMENT OF THE CASE

A. Factual Background.

Buck Institute is an independent non-profit organization which is dedicated to extending the healthy years of each individual's life. CP 28. Continuant performs maintenance and support services for telecommunication systems. CP 43.

1. The Maintenance Contract.

In August of 2006, a representative of Buck Institute contacted Continuant to inquire into Continuant's ability to provide maintenance and support services for Buck Institute's Nortel Meridian and Avotus telecommunication system. CP 65 Continuant stated that it had sufficient knowledge and experience to perform routine maintenance and troubleshoot problems in the telecommunication system when they arose. CP 74-75. Continuant required Buck Institute to sign a twelve month Service Agreement in order for Continuant to send a technician to inspect Buck Institute's telecommunication system.

Continuant faxed the Master Maintenance Advantage Plan Agreement and the Addendum to Master Maintenance Advantage Plan

Agreement (“Agreement and Addendum”) to Buck Institute’s headquarters in California. CP 6. On September 8, 2006, Alan Lees, Chief Information Officer of Buck Institute, executed the Agreement and Addendum and faxed the documents back to Gabe Grossman in Continuant’s office in Pierce County, Washington. CP 5-6. Buck Institute does no business in Washington and no members of Buck Institute entered Washington to execute the Agreement. CP 5.

Under the terms of the Agreement and Addendum, the documents became effective the date they were signed by Buck Institute and accepted in writing by Continuant. CP 12. The contracts became effective when Doug Graham, President of Continuant, executed them on September 18, 2006. CP 13.

2. Breach of the Maintenance Contract.

Once the Agreement and Addendum were executed, Continuant dispatched to Buck Institute’s headquarters a third-party technician from an unidentified company located in California. CP 6 Though Continuant reserved the right to subcontract work in the Agreement, Continuant never informed Buck Institute that it would have an unidentified third party subcontractor perform all the labor, rather than a Continuant employee. CP 6. The subcontractor, believed to be Telecom Labs Inc. (“Telecom

Labs”), performed services at Buck Institute’s headquarters for approximately three hours. CP 6.

The ability of the technician dispatched by Continuant was far below the representation of ability made by Continuant. CP 6. The technician was unable to comprehend the system in place at Buck Institute and required assistance from a Buck Institute employee in an attempt to detect the cause of the problems experienced by Buck Institute. CP 6. The technician was unsuccessful at diagnosing or remedying the problem and lacked the necessary technical expertise to fulfill the claims and representations made by Continuant. CP 6.

On September 27, 2006, Mr. Lees sent an email to Sara Baydeck of Continuant terminating the parties’ contract based upon the technician’s and Continuant’s failure to adequately perform as represented by the terms of the Agreement and Addendum. CP 6. Paragraph 6 of the Agreement, titled Exclusive Remedies and Limitation of Liability, provides in part the following:

Customer’s exclusive remedies ... shall be: (1) for Continuant’s failure to perform any material term of this agreement (e.g. Continuant’s MAP Service Obligations), Customer’s sole remedy shall be to cancel this agreement without incurring cancellation charges, if Continuant fails to correct such failures within thirty (30) days of receipt of Customer’s written notice.

CP 13 at ¶ 6. Continuant's Contract Manager, Kitty Riddle, acknowledged this paragraph in the email dated October 2, 2006. CP 6. Mr. Lees thereafter, on October 3, 2006, sent a second notification to Continuant that the Agreement was terminated based upon non-performance of the contract. CP 21-22.

After Buck Institute believed it had terminated the Agreement, it received an invoice dated December 1, 2006 stating that their account was "Seriously Past Due" in the amount of \$20,519.96. CP 24. Thereafter, Buck Institute received a second invoice dated December 13, 2006 stating that the account with Continuant was delinquent in the amount of \$12,653.50, totaling twelve months of service under the Agreement. CP 26. No explanation has been provided to Buck Institute for this discrepancy. CP 7. Buck Institute declined to pay the full twelve month charge. CP 21. Continuant filed this lawsuit in Pierce County, Washington on March 30, 2007. CP 1-3.

B. Proceedings Below.

Continuant's Complaint, filed March 30, 2007, claims breach of contract and damages in the amount of at least \$13,372.62. CP 1-3. Buck Institute filed its Motion and Memorandum for Dismissal on forum non conveniens grounds on August 10, 2007. CP 27-35.

Buck Institute supported its motion with the following declarations and supporting exhibits: Declaration of Allan Lees, CP 5-26; Declaration of Counsel Shane L. Yelish, CP 36-41; Buck Institute's Reply, CP 60-64; Declaration of Kevin Kennedy, CP 65-73; and the Supplemental Declaration of Allan Lees, CP 74-78. Continuant's Response was supported by the Declarations of Matt Adamson and Doug Graham. CP 42-59.

The trial court reviewed the pleadings, declarations, and exhibits, and granted Defendant's motion, dismissing Plaintiff's claims without prejudice. CP 79-80. The trial court declined to award attorney fees and costs, allowing those fees to be sought in the jurisdiction where and if the case was to be re-filed. *Id.* Buck Institute filed a Motion for Reconsideration and supporting declaration, CP 81-114, requesting fees in the amount of \$8,138.00. CP 123-131.

The court awarded \$7,392.00 in attorneys' fees and entered Findings of Fact and Conclusions of Law as to the award of attorney's fees on the motion to dismiss. CP 132-136. This appeal followed.

ARGUMENT

The decision of the trial court must be upheld. The trial court did not abuse its discretion in determining that California was a more convenient forum to resolve this dispute. Continuant has failed to show that dismissal under the doctrine of forum non conveniens was an abuse of discretion by the trial court. Moreover, the award of attorney fees was appropriate because Buck Institute was the prevailing party within the meaning of RCW 4.84.330.

I. The Trial Court's Decision to Dismiss on Forum Non Conveniens Grounds Must Be Upheld

The dismissal by the trial court based on forum non conveniens was not an abuse of discretion and should be affirmed. Trial courts have discretionary power to decline jurisdiction where, in the court's view, the convenience of the parties and the ends of justice would be better served if the action were brought in another forum. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579, 555 P.2d 997 (1976). In evaluating a trial court's dismissal of a suit based on the basis of forum non conveniens, an appellate court applies an abuse of discretion standard of review. *Meyers v. Boeing Co.*, 115 Wn.2d 123, 128, 794 P.2d 1272 (1990).

When a decision or order of the trial court is a matter of discretion, it will not be disturbed on review unless the trial court's decision is

“manifestly unfair, unreasonable or untenable.” *Id.* (citing *Gen. Tel. Co. v. Utilities and Transp. Comm’n*, 104 Wn.2d 460, 474, 706 P.2d 625 (1985)). Discretion is only abused only “where no reasonable man would take the view adopted by the trial court.” *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584 (1970). If “reasonable men could differ as to the propriety of the action taken by the trial court,” the trial court did not abuse its discretion. *Id.* at 21-22.

When reviewing a decision for abuse of discretion, the question is not whether the appellate court agrees with the decision, but only whether the ruling was supported by any tenable grounds. *E.g. Balise v. Underwood*, 71 Wn.2d 331, 340, 428 P.2d 573 (1967). The trial court considered the factors, determined that they were strongly in favor of Buck Institute, and dismissed the action: “[T]he defendant has sustained its burden to prove that trial in this jurisdiction would not be as easy or expeditious as trial in California.”¹ RP 12:11-13; *see also* CP 45; RP 6 (informing trial court “the burden is on the defendant to prove that those factors weigh ‘strongly in favor of the defendant’”).

¹ This case is distinguishable from the 11th Circuit decision of *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097 (11th Cir. 2004), cited by Continuant. Here the trial court considered the defendant’s burden and found California to be more convenient. In *SME Racks*, the trial court failed to consider the presumption in favor of plaintiff’s choice of forum and found either forum to be equally convenient.

Throughout its brief, Continuant continually relies upon the proposition that Plaintiff's choice of forum is entitled to great deference and starts "already in the lead." Brief of Appellant, 14, 15, 17, 31. Continuant relies upon an Illinois Court of Appeals opinion² as the basis for this "already in the lead" language. No similar language exists in any published Washington decision on forum non conveniens. The language suggested by Continuant does not alter the standard of review. This Court does not review the factors de novo to independently determine the motion to dismiss, but only evaluates the record to determine whether the decision was supported by tenable grounds.

The trial court did not abuse its discretion in dismissing Continuant's lawsuit. Dismissal was appropriate because sufficient facts exist from which the trial court may reasonably determine another forum is more convenient.

A. Dismissal Was Appropriate Because California Is an Adequate Alternative Forum

California is an adequate alternative forum to adjudicate this lawsuit. To obtain a dismissal for inconvenient forum, the party seeking dismissal must first show the existence of an adequate alternative forum.

² Continuant cites *Community Merchant Services v. Jonas*, 354 Ill. App. 3d 1077, 82 N.E.2d 515 (2004), and *People ex rel. Skoien v. Utility Mech. Contractors, Inc.*, 207 Ill. App. 3d 79, 565 N.E.2d 286 (1990).

Meyers, 115 Wn.2d at 128. An alternative forum is adequate as long as a plaintiff can litigate the essential subject matter in the alternate forum and recover some relief, regardless how small. *E.g. Klotz v. Dehkhoda*, 134 Wn. App. 261, 265, 141 P.3d 67 (2006).

Buck Institute is domiciled in California and conducts no business in Washington. CP 5. No members or employees of Buck Institute entered Washington to execute the Agreement and Addendum. *Id.* California recognizes an action for damages caused by breach of contract. *See, e.g., Coughlin v. Blair*, 41 Cal.2d 587, 262 P.2d 305 (1953) (Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract). Based on these facts, the trial court found that California was an adequate alternative forum. RP 12:13. Continuant has not challenged that California is an adequate alternative forum to resolve this dispute.

B. The Trial Court's Decision Should Be Upheld Because the Appropriate Factors Were Weighed and Favor Dismissal

The trial court considered the appropriate factors in dismissing Continuant's case under the doctrine of forum non conveniens. If an alternative forum exists, the court must analyze and balance a number of "private" and "public" interest factors. *Johnson*, 87 Wn.2d at 579

(adopting forum non conveniens factors in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). The United States and Washington Supreme Courts, in recognizing that the trial court has discretion to determine whether an alternate forum is more convenient, expressly declined to set up bright line rules and instead set out a list of private and public interest factors to be considered and balanced. *Meyers*, 115 Wn.2d at 128. While the factors to be considered in a forum non conveniens analysis remain constant, “the balance and result are fact specific.” *Id.* at 131. The balancing of factors performed by the trial court “is not subject to the same mathematical certainty as an accountant’s financial statements. The court must consider the evidence presented and make what is necessarily a subjective judgment.” *Lynch v. Pack*, 68 Wn. App. 626, 635, 846 P.2d 542 (1993).

(i) Private Interest Factors

The private interest factors to be considered by the trial court weigh in favor of California. The private interest factors are as follows:

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

Johnson, 87 Wn.2d at 579 (quoting *Gulf Oil*, 330 U.S. at 508). The trial court did not abuse its discretion in finding California more convenient based upon these factors.

In a case factually similar to this one, a dismissal on forum non conveniens grounds was upheld based on these private interest factors. *J.H. Baxter & Co. v. Central National Ins. Co. of Omaha*, 105 Wn. App. 657, 20 P.3d 967 (2001). There, J.H. Baxter, headquartered in San Mateo County, California, was sued in King County, Washington, for environmental damage at seven wood treatment plants located in four western states. *Id.* at 659. Three of the wood treatment plants were located in Washington and only one of the plants was located in California. *Id.* at 664. Baxter had already spent over \$2 million to remedy the environmental damage in Washington, and anticipated the future costs to remedy the damage in Washington to exceed \$4 million. *Id.* Dismissal based on forum non conveniens was upheld, despite King County's proximity to three contaminated sites and local interest pertaining to cleanup, because "Baxter's headquarters is in San Mateo County, and its executive officers live there. And the record indicates that the issues surrounding the contamination of the Weed [California] facility will dominate the case." *Id.* at 663.

As in *Baxter*, Buck Institute's headquarters is in Marin County, California, and its executive officers live there. The telecommunications system which is central to the dispute in this litigation is located in Marin County, California. Buck Institute does no business in Washington and does not have any relation to Washington. CP 5. The trial court's order dismissing the case to California on forum non conveniens grounds should be affirmed because trial in Washington is even more inconvenient than in *Baxter*.

In contrast to *Baxter*, there is only one published Washington decision where a trial court's dismissal for forum non conveniens was overturned on appeal. *Johnson*, 87 Wn.2d 577. In *Johnson*, allegedly defective scaffolding was manufactured in Washington and used in Kansas. *Id.* at 580. The trial court dismissed the plaintiff's Washington lawsuit on the basis that Kansas would be a more convenient forum, and the Washington Supreme Court reversed, finding that the factors did not "strongly favor" the Kansas forum:

All of the evidence which pertains to the manufacturing and marketing of the scaffold is in Washington State. Respondents are Washington corporations, and all of their principal officers reside in King County. Both of the engineers who designed the scaffold live in King County. The two principal witnesses from Kansas stated in affidavits that they willingly would appear in Washington. Also, Appellant will bring the scaffold to Washington and give Respondents an opportunity to examine it. The trial

court therefore should not have disturbed Appellant's choice of forum.

Id.

Unlike *Johnson*, all the evidence which pertains to the telecommunications system, which is the subject matter of this litigation, is located in California. The telecommunications system cannot be removed and brought to Washington as was possible with the scaffolding in *Johnson*. Additionally, all of the principal officers of Buck Institute, and a majority of the witnesses which will be necessary to adjudicate this dispute, including the non-party witnesses, are located in California. The facts of this dispute are significantly dissimilar from those of *Johnson* and much more like *Baxter*. Pursuant to prior forum non conveniens decisions, and based upon factors discussed in more detail below, the trial court did not abuse its discretion in dismissing Continuant's claims for forum non conveniens.

(a) Relative Ease of Access to Sources of Proof

The sources of proof essential to disposition of this action are located in California. Buck Institute's headquarters, and the location of the telecommunications system, is in Marin County, California. Buck Institute's executive officers live in Marin County. Additionally, Kevin Kennedy, a Network Technician for Buck Institute who accompanied the

Telecom Labs technician is located in California and would testify regarding the Nortel Meridian system and its various components and his interactions with the Telecom Labs technician. CP 66. The location of Buck Institute and its officers and employees favor trial in California.

The Telecom Labs technician dispatched by Continuant to diagnose and resolve the problems experienced by Buck Institute is also located in California. CP 6. Continuant argues that the testimony of the Telecom Labs technician is unnecessary because it is uncontroverted that the subcontractor failed to fix the problem. Brief of Appellant, 19. Contrary to Continuant's assertions, testimony from the Telecom Labs technician may be needed to establish the scope of repairs attempted, the symptoms he observed, the knowledge and ability of the subcontractors hired by Continuant, the several components from various manufacturers which comprise the system, and whether the Avotus call equipment was inspected by him and included in the scope of the Agreement and Addendum. See CP 65-66; 75. Continuant's self-serving assertion is not supported by the record and should not be considered by this court. The location of the Telecom Labs technician favors trial in California.

More importantly, Packet Fusion, the company hired by Buck Institute to repair the telecommunications system after Continuant was

unable to do so, is located in California. CP 75. The location of the Packet Fusion technician also favors trial in California.

The trial court recognized the relative ease to sources of proof favors California. In so finding, the trial court stated that “defendant company was located entirely there [California], and it appears that we will have witnesses, as well, from California, more from California than we will have in Washington.” RP 12:15-18. Continuant asserts that the trial court incorrectly based this decision on a simple count of the number of witnesses in each state.³ Brief of Appellant, 18. Continuant then proceeds to count the witnesses in each state.⁴ This argument is inconsistent.

Overall, the majority of the proof in this lawsuit is located in California. The trial court did not abuse its discretion when it decided that trial in California would be closer to the sources of proof in this lawsuit.

(b) Availability of Compulsory Process for Attendance of Unwilling, and the Cost of Obtaining Attendance of Willing, Witnesses

³ The authority cited by Continuant is not persuasive, consisting of two out of state cases, both deciding a motion to change venue under 28 USC 1404(a), rather than a motion to dismiss for forum non conveniens. *Aquatic Amusement Assoc., Ltd. v. Walt Disney World Co.*, 734 F. Supp. 54 (ND NY 1990); *Vandeveld v. Christoph*, 877 F. Supp. 1160 (ED Ill. 1995).

⁴ Continuant’s count of the witnesses is incorrect. Continuant fails include two witnesses located in California (Kevin Kennedy, who submitted a declaration below, and the Telecom Labs technician). Thus, there are three in Washington, one in Oregon, and four in California.

The availability of compulsory process of unwilling witnesses also favors a trial in California. As discussed above, Telecom Labs and its technicians are located in California. Buck Institute would have authority to compel the attendance of the Telecom Labs technician at a trial in Marin County, California, but not in Washington. *See Myers*, 115 Wn.2d at 129 (Washington courts have no power to compel the attendance of witnesses from other jurisdictions).

More importantly, Packet Fusion, the company which ultimately repaired the telecommunications system, is located in California. CP 75. *Myers* permits Buck Institute to compel technicians employed by Packet Fusion to testify at a trial in California, but not in Washington.

The ability to compel the attendance of the Packet Fusion technician is significant because the parties dispute who actually repaired the telecommunications system. Brief of Appellant, 20 (employee of Continuant performed repairs remotely from Washington). Contrary to Continuant's assertion, Buck Institute claims that the system was not repaired until it retained a third party, Packet Fusion, to repair the system after it had terminated the contract with Continuant. CP 67. In order to disprove Continuant's argument, Buck Institute will be required to present testimony of the technician from Packet Fusion regarding his diagnosis of the problems and actions to repair Buck Institute's phone system.

Continuant is able to have any number of their employees or representatives testify at a trial in California regarding the procedures which the Continuant employee undertook. Without the ability to prove that Continuant failed to repair the system, Buck Institute is significantly prejudiced in defending this lawsuit as it would be unable to present testimony proving Buck Institute was entitled to terminate the Agreement and Addendum due to Continuant's inability to perform.

It is unknown whether the Packet Fusion employee would be willing to testify at trial in California without a subpoena. It is highly unlikely that this employee, with no relation to this litigation or its parties, would be willing to travel to Washington to testify at trial without a subpoena. If the Packet Fusion employee was unwilling to voluntarily travel to Washington, under *Meyers*, Buck Institute would not have authority to compel the attendance of the Telecom Labs technician or Packet Fusion technician at a trial in Washington.

Finally, Continuant incorrectly states that it is unknown whether Doug Graham can be compelled to testify in California. Mr. Graham is an officer of the corporation, and because Washington law applies, Mr. Graham may be compelled to appear for the same reason that Alan Lees could be compelled to appear in Washington. CR 43(f).

Furthermore, the cost of obtaining attendance of willing witnesses is in favor of a California forum. Buck Institute has identified the need to have four witnesses testify. All four of these witnesses are located in Marin County, California. In addition to the technicians from Telecom Labs and Packet Fusion, Kevin Kennedy, a Network Technician for Buck Institute, will testify regarding the Nortel Meridian system and its various components and the assistance he provided to the Telecom Labs technician when he visited the site. CP 65-73. Additionally, Alan Lees, an officer of Buck Institute, will testify regarding his negotiations and interactions with Continuant. CP 5-26.

Continuant has identified three witnesses located in Washington that would testify at the trial. Brief of Appellant, 22. A fourth witness identified by Continuant, Gabe Grossman, is located in Portland, Oregon. *Id.* Continuant alleges that both Mr. Graham and Mr. Grossman, individuals who negotiated the contract with Buck Institute, will be needed to testify. *Id.* It would be cumulative evidence, and likely inadmissible, to present two witnesses to testify regarding their negotiations with Buck Institute. Even if Mr. Grossman's testimony is not cumulative, the difference between cost and inconvenience of his attendance at a trial in California, as opposed to a trial in Washington, is likely inconsequential, given his location in Portland.

Overall, the record indicates that the costs for obtaining attendance of willing witnesses and the availability of compulsory process for attendance of unwilling witnesses both favor California as the forum for this litigation. Of more importance, the record also indicates that the need to compel witnesses at trial who are all located in California. Any assertion to the contrary is not supported in the record. The trial court did not err in finding that California would be a more convenient forum for this litigation.

(c) Possibility of View of Premises

The litigation will concentrate on the Buck Institute headquarters in Marin County because the phone system which is the subject matter of this dispute is located there. The trial court weighed this consideration when finding in favor of dismissal: “trial in this jurisdiction would not be as easy or expeditious as trial in California because of the location of the equipment there.” RP 12.

Contrary to Continuant’s assertion, there is sufficient evidence in the record from which the trial court could determine that view of the premises may be necessary. The parties dispute whether the Avotus component of Buck Institute’s Nortel Meridian telephone system is contained within the scope of the Agreement and Addendum. Brief of Appellant, 27. Mr. Kenendy testified regarding the complexity of the

Nortel Meridian phone system in place at the Buck Institute. CP 65-66. Mr. Lees also testified regarding the complexity of the system because it consists of several components from various manufacturers. CP 75. Based upon argument of the parties and testimony from Mr. Kennedy and Mr. Lees, it was reasonable for the trial court to draw the inference that view of the premises will be necessary. The trial court did not abuse its discretion in making this determination.

(d) Other Considerations Which Make Trial Easy, Expeditious and Inexpensive

The facts in the record relating to the foregoing private interest factors are sufficient to uphold the trial court's decision. Continuant would have this Court believe that Pierce County is an easier and less expensive forum than California. Brief of Appellant, 30-31. However, this argument cannot be considered by this Court because the evidence provided in support was not presented to the trial court. A reviewing court will not consider facts mentioned in the briefs but not supported by the record. *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007); *see also Barnes v. Wash. Nat. Gas Co.*, 22 Wn. App. 576, 577 n.1, 591 P.2d 461 (1979) ("The recitation of facts not supported by the record and outside the pleadings violates [RAP 10.3(a)(4)].")

Continuant cites to several websites for information relating to relative cost of living that is not contained in the record below. Brief of Appellant, 30-31. Furthermore, continuant assumes without evidentiary support that the billable rate of “Buck’s main attorney in this case ... [is] presumably unheard of in Marin County.” Brief of Appellant, 30. Continuant also assumes without any evidence that there is no arbitration alternative in Marin County, and that Marin County is “one of the most expensive counties in the United States.” Brief of Appellant, 30. There is no information in the record which supports these arguments and they should be stricken.

All of the *Gulf Oil* private factors strongly favor dismissal to California. Because the trial court’s decision is reasonably based upon evidence in the record and is not “manifestly unfair, unreasonable, or untenable,” it did not abuse its discretion and the dismissal should be affirmed.

(ii) Public Interest Factors

The public interest factors do not greatly affect this dispute, as it involves one corporation headquartered in Washington and one corporation headquartered in California. The public interest factors to be considered are as follows:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation. . . . [T]here is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Myers, 115 Wn.2d at 129 (citing *Gulf Oil*, 330 U.S. at 508-509). The public interest factors are equally divided between California and Washington and have little effect upon this forum non conveniens determination. Accordingly, these issues were not considered below and the record lacks any information which may be weighed pursuant to these public interest factors: both communities have a similar relation to the litigation for purposes of the burden of jury duty, and there is no evidence in the record regarding the congestion of court systems in either potential jurisdiction.

The only information in the record that possibly relates to public interest factors is the contractual choice of law provision mandating Washington law. CP 13. However, a choice of law provision has little effect on the weighing of factors pertinent to dismissal for forum non conveniens. See *Hill v. Jawanda Transport Ltd.*, 96 Wn. App. 537, 546, 983 P.2d 666 (1999) (citing *Myers*, 115 Wn.2d at 133). Analysis of a

choice of law provision is a separate inquiry from the issue of a dismissal based upon forum non conveniens. *Id.* (citing *Myers*, 115 Wn.2d at 133). Choice of law analysis is not a necessary element of the forum non conveniens doctrine. *Id.* At most, resolution of a choice of law question informs, but does not govern a trial court's forum non conveniens dismissal. *Id.*

Accounting for the Agreement's choice of law provision in Section 11 is not a necessary element of forum non conveniens analysis, and at most, simply informs the trial court's decision. The Agreement lacks a clause specifying venue and simply states that this "Agreement is governed by the local laws (as opposed to the conflict of law provisions) of the State of Washington." CP 13. If this provision is held enforceable, a California court will have no difficulty applying Washington law. *See e.g. Shell Oil Co. v. National Union Fire Ins. Co.*, 52 Cal. Rptr. 2d 580, 583-584 (1996) (where parties contracted for engineering work to be performed in Washington, and agreed choice of law governing interpretation and performance of contract would be determined by "the laws of the state in which the Work Site is located," Washington law applied where required).

The trial court did not abuse its discretion in dismissing on forum non conveniens grounds despite the choice of law provision in the Agreement.

C. Washington Law Does Not Require Buck Institute to Present a Prima Facie Defense

Buck Institute is not required to assert a prima facie defense in order to prevail on a motion to dismiss based on forum non conveniens. Even if it were, the evidence and arguments presented by Buck Institute were sufficient to establish a defense to the complaint. In support of its position that a prima facie defense must be presented, Continuant relies exclusively upon *Leasecomm v. Rivera*, 1994 Mass. App. Div. 115, 116 (1994). Continuant concedes *Leasecomm* is not a Washington case, but fails to mention that the opinion is a Massachusetts trial court decision with little or no precedential value.

No published Washington decision even hints that a moving party must assert a meritorious defense. The *Leasecomm* opinion fails to cite any authority for its holding and neglects even to analyze the *Gulf Oil* factors in its discussion. *Id.* *Leasecomm* should be given no value in this Court's application of the law.

Even if a meritorious defense was part of the analysis in Washington, Buck Institute satisfies such a requirement. The evidence

shows that Buck Institute provided notice of nonperformance to Continuant on September 27, 2006. CP 6. Thereafter, on October 3, 2006, Buck Institute sent an email which begins: "Please regard this email as formal written notification that we regard Continuant to be in non-performance of the contract." CP 21. Continuant made no attempt to cure the deficient performance entitling Buck Institute to terminate the Agreement and Addendum pursuant to Provision 7 of the Agreement. CP 13.

The legal effect of Buck Institute's notice of default is disputed. However, the cases cited by Continuant do not support Continuant's position that it could not act as notice under the contract. *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003) concerns bar of a contractor's recovery where the contractor made no attempt whatsoever to provide notice of any dispute or otherwise comply with contractual notice provisions. As stated above, the October 3, 2006 email unequivocally notified Continuant that Buck Institute considered it to be in breach of the Agreement and Addendum. CP 6, 21. Upon receipt of the email, Continuant failed to take any corrective measures to cure its non performance. Continuant also relies upon *Gray v. Gregory*, 36 Wn.2d 416, 218 P.2d 307 (1950), in which the court found the procedural requirements necessitating the notice of default was deliberately not

followed by the appellant, because “to have done so would have permitted a cure of the default, and thus her stated purpose of forfeiting the lease would have been defeated.” *Gray*, 36 Wn.2d at 418. Buck Institute complied with the notice requirement of the contract, and no such intent for allegedly disregarding the notice provision was found by the trial court. Finally, Continuant cites *Point Prods. A.G. v. Sony Music Entm’t, Inc.*, 2000 U.S. Dist. LEXIS 10066 (S.D.N.Y. 2000), an unpublished decision from the Second Circuit with no precedential value.⁵ Under *Point Productions A.G.*, a failure to provide contractually-required notice is excusable as futile if the non-performing party abandons performance under the contract. *Point Productions A.G.*, page 4. By Buck Institute providing Continuant with notice of default, and

⁵ Continuant fails to inform the court that the *Sony Music Entm’t* case is an unpublished case. *Point Prods. A.G. v. Sony Music Entm’t, Inc.*, 2000 U.S. Dist. LEXIS 10066 (S.D.N.Y. 2000). Not only does an unpublished opinion have no precedential value under RCW 2.06.040, but courts disapprove of citing such opinions “for any purpose.” *State v. Sanchez*, 74 Wn. App. 763, 765 n.1, 875 P.2d 712 (1994). Citation to an unpublished opinion may subject a party to sanctions. *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005); *Dwyor v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000). GR 14.1(b) also requires citation to an unpublished opinion “only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. The party citing the opinion shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited.” Not only did Continuant fail to provide a copy of the cited opinion with the brief, but 2nd Cir. R § 0.23(c)(2) provides “Citation to summary orders filed prior to January 1, 2007, is not permitted in this or any other court.” Continuant failed to even alert counsel or the Court that the opinion is unpublished, but rather attempted to slip the citation in as persuasive authority.

Continuant's subsequent failure to make any attempt to cure, Buck Institute's allegedly defective notice is excused based upon Continuant's abandonment of the contract. None of the case law relied upon by Continuant is instructive in resolving the issue of Buck Institute's alleged failure to adequately provide notice of nonperformance.

Considering, for arguments sake, that the notice provided by Buck Institute was insufficient for purposes of the Agreement and Addendum's notice requirements, this will not act to prevent forum non conveniens dismissal. In Washington, failure to comply with notice requirements is insignificant unless the party claiming lack of notice can show no damages as a result of the lack of notice. *Lazelle v. Empire State Sur. Co.*, 58 Wash. 589, 109 P. 195 (1910). Here, Buck Institute sent two emails, one on September 27, 2006 and the other on October 3, 2006, informing Continuant that it planned to cancel the Agreement based upon nonperformance. Even if these emails are found not to comply with the notice and subsequent thirty day right to cure, Continuant failed to ever make an attempt to cure the nonperformance. Accordingly, Continuant can demonstrate no damages resulting from the alleged failure to comply with the notice requirement.

Buck Institute provided clear notice of its intent to cancel the contract based upon Continuant's nonperformance. CP 21. Continuant's

allegation that Buck Institute is unable to assert a prima facie defense to its claims of breach of contract is unfounded.

II. The Trial Court's Decision to Award Attorney Fees and Costs Must Be Upheld Because Dismissal on Forum Non Conveniens Grounds Is a Final Judgment for Purposes of RCW 4.84.330

Buck Institute was properly awarded attorney fees as the prevailing party. Where the meaning of an attorney fee statute is at issue, the trial court's decision whether to award attorney fees is reviewed de novo as a question of law. *Wachovia SBA Lending v. Kraft*, 138 Wn. App. 854, 859, 158 P.3d 1271 (2007). The reasonableness of an award of attorney fees is reviewed under the abuse of discretion. *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990). *Wachovia*, 138 Wn. App. at 858-59. Continuant has not asked this Court to review the reasonableness of the amount of attorney fees awarded to Buck Institute.

Buck Institute is entitled to attorney fees pursuant to the parties' Agreement and Addendum and RCW 4.84.330. The Agreement and Addendum provides: "Customer agrees to reimburse Continuant for attorneys' fees and any other costs associated with collecting delinquent payments." CP 13. Under RCW 4.84.330, this unilateral fee provision

must be applied bilaterally.⁶ *E.g. Herzog Aluminum v. General American*, 39 Wn. App. 188, 692 P.2d 867 (1984).

Where RCW 4.84.330 applies, awarding attorney fees is mandatory. *Singleton v. Frost*, 108 Wn. 2d 723, 729, 742 P.2d 1224 (1987). There is no authority to support an interpretation of RCW 4.84.330 other than as mandating an award of “reasonable attorney fees to the prevailing party where a contract so provides.” *Id.* Even when the contract is held to be unenforceable, RCW 4.84.330 still applies to award attorney fees to the prevailing party. *Herzog*, 39 Wn. App. at 196-97.

A. Dismissal on Forum Non Conveniens Grounds Is a Final Judgment for Purposes of RCW 4.84.330 Because it Has Preclusive Effect

Forum non conveniens dismissal is a final judgment for purposes of RCW 4.84.330. RCW 4.84.330 awards attorney fees to the prevailing party when: the action is “on a contract or lease,” and the contract contains

⁶ The full text of the statute is as follows:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney’s fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney’s fees in addition to costs and necessary disbursements.

Attorney’s fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney’s fees is void.

As used in this section “prevailing party” means the party in whose favor final judgment is rendered.

a unilateral attorney fee or cost provision. RCW 4.84.330; *Wachovia*, 138 Wn. App. at 859. Both parties acknowledge that these requirements are satisfied. Brief of Appellant, 34. This dispute centers on whether Buck Institute was the prevailing party under the statute.

Washington courts have not specifically addressed whether attorney fees are appropriate under RCW 4.84.330 in the context of a forum non conveniens dismissal. The statute defines “prevailing party” as “the party in whose favor final judgment is rendered.” RCW 4.84.330; *Wachovia*, 138 Wn. App. at 860. RCW 4.84.330 does not define the term “final judgment.” “The term ‘final judgment’ is facially unambiguous – it refers to any court order having preclusive effect.” *Wachovia*, 138 Wn. App. at 860. *Wachovia* also refers to final judgment as a “formal decision or determination leaving nothing further to be determined by the court.” *Id.* at 862.

Determination of finality is a matter of substance and not form. “In determining the nature of the court’s determination, substance controls over form.” *Nestegard v. Investment Exchange Corp.*, 5 Wn. App. 618, 623, 489 P.2d 1142 (1971) (citing *State ex rel. Lynch v. Pettijohn*, 34 Wn.2d 437, 209 P.2d 320 (1949)). Thus, the content and effect of a ruling determine whether it is final, not its title. *Id.*; see also *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 255, 884 P.2d 13 (1994).

A dismissal on forum non conveniens grounds is a final judgment because it has preclusive effect. *See Alcantara v. Boeing Co.*, 41 Wn. App. 675, 705 P.2d 1222 (1985). A “prior forum non conveniens dismissal precludes relitigation between the parties of those issues of law and fact actually litigated and necessary to the dismissal of the action.” *Id.* at 679-80. In *Alcantara*, a prior dismissal due to forum non conveniens was held to bar relitigation of the same issues in Washington. *Id.* at 685. *Alcantara* held that under the theory of collateral estoppel, the forum non conveniens dismissal in the District Court of Illinois precluded a motion for summary judgment in Washington. *Id.* at 676-77. In order for either res judicata or collateral estoppel to apply, there must be, among other things, a final judgment.⁷ *Id.* at 679. Because a nonfinal judgement cannot preclude relitigation of the same issue or claim, and because res judicata and collateral estoppel do not apply without a final judgment, *Alcantara* inherently holds that a dismissal on forum non conveniens grounds is a final judgment.

⁷ Collateral estoppel, or issue preclusion, requires, in part, a final judgment on the merits. *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507-08, 745 P.2d 858 (1987). Likewise, res judicata, or claim preclusion, also requires a final judgment on the merits. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1, (1986). This means that in order for collateral estoppel or res judicata to apply, the precluding decision must be a final judgment. Judgments which are not final would not act to preclude the issue or claim.

Other jurisdictions confirm that dismissal for forum non conveniens has preclusive effect and operates as a final judgment. For instance, the Alaska Supreme Court in *Bromley v. Mitchell*, 902 P.2d 797 (Alaska 1995), considered whether dismissal on forum non conveniens grounds precludes the rights in its state's courts. *Bromley* stated as follows:

While a forum non conveniens dismissal is not a judgment on the merits, the trial court was correct to state that it did operate as a dismissal with prejudice "insofar as any adjudication in this court is concerned," because it finally resolved the rights of the parties in the Alaska courts.

Id. at 805; *see also Pastewka v. Texaco, Inc.*, 420 F.Supp. 641 (D.Del. 1976), *aff'd* 565 F.2d 851 (3rd Cir. 1977) (forum non conveniens ruling has preclusive effect, in that all other courts of equal jurisdiction in that forum are found to abide by the conclusion that the case should be tried elsewhere); *Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139, 141 (E.D. Tex 1992) (citing *Pastewka*); *Hughes v. Foster Wheeler Co.*, 932 P.2d 784 (Alaska 1997) (attorney's fees and costs are awardable in conjunction with a forum non conveniens dismissal); *Saudi American Bank v. Azhari*, 460 N.W.2d 90 (Minn. App. 1990) (court dismissed second case because of preclusive effect of first case after plaintiffs sued in same Minnesota state court that dismissed action on forum non conveniens two years earlier).

The trial court's order dismissing on the grounds of forum non conveniens was a final judgment. The dismissal precludes further litigation in Washington, and would act to bar relitigation of the issues considered by the later court. Because the dismissal was final, Buck Institute is the prevailing party under RCW 4.84.330. The trial court's order awarding Buck Institute its attorney fees and costs should be affirmed.

B. The Case of *Wachovia SBA Lending v. Kraft* Is Not Controlling

The *Wachovia* case, relied upon by Continuant almost exclusively, is not inconsistent with the trial court's determination that Buck Institute was the prevailing party. *Wachovia* discusses whether voluntary dismissal under CR 41(a)(1)(B) is a final judgment for purposes of RCW 4.84.330. 138 Wn. App. 854. *Wachovia* does not mention dismissal for forum non conveniens, and its decision regarding voluntary dismissal does not control where forum non conveniens is at issue.

Continuant misstates the holding of *Wachovia* when it claims that "a dismissal without prejudice is not a 'final judgment' within the meaning of RCW 4.84.330." Brief of Appellant, 35. Rather, *Wachovia* held that a "CR 41 voluntary dismissal without prejudice is not a "final judgment" within the meaning of RCW 4.84.330's 'prevailing party' language." 138 Wn. App. at 863. Critical to the holding was that it was a

voluntary dismissal without prejudice, not simply the fact that the dismissal was without prejudice. “The effect of a voluntary dismissal ‘is to render the proceedings a nullity and leave the parties as if the action had never been brought.’” *Id.* at 861 (quoting *Beckman v. Wilcox*, 96 Wn. App. 355, 359, 979 P.2d 890 (1990)).

In contrast, a dismissal on forum non conveniens grounds has a very different effect. The effect of a forum non conveniens dismissal does not “leave the parties as if the action had never been brought,” but rather, precludes the party from re-filing in the present jurisdiction. Thus, while a voluntary dismissal under CR 41 has no preclusive effect, a dismissal for forum non conveniens does, and it must be considered a final judgement.

Continuant’s reliance on *Dattner v. Conagra Foods, Inc.*, 458 F.3d 98, 66 Fed.R.Serv.3d 1126 (2d Cir. 2006), is also misplaced. When determining whether a party is the prevailing party, a court must keep in mind the context in which prevailing party is applied. Thus, in *Hawk v. Branjes*, the “final judgment” test of RCW 4.84.330 was not used to determine whether the party was the prevailing party, because that statute did not apply to the parties’ contract. 97 Wn. App. 776, 781, 986 P.2d 841 (1999); *see also Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990). Rather, *Hawk* applied a different definition to determine which

party was prevailing, considering what the parties intended when drafting the contract. 97 Wn. App. at 781.

Similarly, the holding of *Conagra Foods* is inapplicable to this appeal because it applies a different test to determine whether the defendant was the prevailing party. 458 F.3d 98. *Conagra Foods* dealt with the determination of prevailing party under Fed. R. Civ. P. 54(d). *Id.* at 100. The test for prevailing party used under that rule required a determination as to whether there was a “judicially sanctioned change in the legal relationship of the parties.” *Id.* at 102. The opinion held that the party who successfully obtained dismissal due to forum non conveniens was not the prevailing party under that test because there had not been a sufficient change in the parties’ legal rights. *Id.* at 103.

Conagra Foods did not apply the test specifically adopted by the Washington Legislature to determine whether a dismissal for forum non conveniens was a final judgment. Although it applies the term “prevailing party” to a forum non conveniens dismissal, *Conagra Foods* has no persuasive value on this appeal because the test this Court must apply is entirely different. This Court cannot apply a test applicable for determining the prevailing party under Fed. R. Civ. P. 54(d) where RCW 4.84.330 explicitly provides the criteria to be used to determine who is the prevailing party for the purposes of recovering fees under that statute.

III. Buck is Entitled to Fees on Appeal Pursuant to RAP 18.1.

Pursuant to RAP 18.1, Buck requests its attorneys' fees and costs incurred on appeal. As set forth in RAP 18.1(a), if applicable law grants to a party the right to recover attorney fees or expenses on review, the party must request the fees and expenses as provided in this rule. For the reasons set forth at length above, as the prevailing party at the trial court and upon appeal before this court, Buck Institute has a contractual right to recover their attorneys' fees and costs of defense. *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989) (contractual provision for award of attorney fees at trial supports award of attorney fees on appeal); *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 774, 750 P.2d 1290 (1988). Buck requests fees and costs on appeal.

IV. Continuant is Not Entitled to Fees.

Continuant does not request fees on appeal, but only requests that the trial court award fees incurred on this appeal in the event that continuant prevails both on this appeal and at an eventual trial on the merits. Brief of Appellant, 34. This Court should make no ruling on the issue, but leave such a decision to the trial court. The trial court has the authority to determine whether fees are appropriate and the reasonable amount of any fee award, and this Court should not make any decision that

would mandate an award of fees on a potential question that the trial court may never need to address.

CONCLUSION

In the context of this case, California has been shown to be an adequate and more convenient alternative forum for resolution of this matter. Taken together, private and public interests favor the trial court's forum non conveniens dismissal of this case, given the access to proof, ability to compel attendance of witnesses, and ability to view the premises at issue. Continuant has not established that the trial court abused its discretion when it dismissed this case for forum non conveniens.

In addition, the dismissal based upon forum non conveniens prevents Continuant from pursuing its claim in Washington courts. There is nothing further for Washington courts to do in the matter. Accordingly the dismissal is a final judgment, and the trial court properly awarded Buck Institute its attorney's fees as the prevailing party under RCW 4.84.330.

For the foregoing reasons, Buck Institute respectfully requests that this Court affirm the trial court's order dated August 24, 2007 dismissing the case on forum non conveniens grounds, and the trial court's order

dated September 14, 2007, awarding Buck Institute attorneys' fees. Buck also requests attorney's fees incurred during this appeal.

Respectfully submitted this 7th day of March, 2008.

DICKSON STEINACKER LLP

A handwritten signature in cursive script, appearing to read "Shane Yelish".

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Certificate of Service

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the foregoing Brief of Respondent to be served upon:

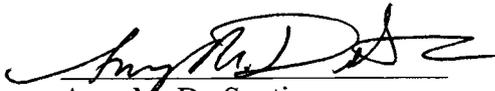
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DATED this 7th day of March, 2008 at Tacoma, Washington.


Amy M. De Santis
Legal Assistant

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