

No. 37721-7

Washington State Court of Appeals
Division II

JIM SCHUMACHER,
PLAINTIFF

Vs.

IMG GROUP LLC,
DEFENDANT

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

APPELLANT'S OPENING BRIEF

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ORIGINAL

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Assignments of Error

1. The Superior Court erred in dismissing this case and finding an absence of personal jurisdiction over defendant IMG Group LLC.
2. The Superior Court erred in awarding IMG attorney fees without any showing by IMG except that it prevailed on the jurisdictional question.
3. The Superior Court abused its discretion in finding that \$33,876.28 is a fair and reasonable fee for litigating the question of whether IMG is amenable to suit in Washington state.
4. The Superior Court abused its discretion in dismissing this case pursuant to the doctrine of forum non-conveniens.

Issues Pertaining to Assignments of Error

1. A Utah LLC contracts with a Washington resident for employment, is licensed by Washington State to do business in Washington, has bought and sold material for its business in Washington, tested its products at Washington State University, paid Washington State employment comp for an employee in Washington, and its Washington employee met with several Washington businesses in an effort to secure

contracts; are there sufficient contacts to meet the requirements of jurisdiction under Washington's long-arm statute for claims arising from breach of the employment contract and related disputes?

2. If an out-of-state resident is sued under Washington's long-arm statute, and prevails on the jurisdictional defense, is that showing alone sufficient to justify an award of fees and costs under the long-arm statute?

3. Is \$33,876.28 a fair and reasonable fee for litigating a single pre-trial motion questioning whether IMG is amenable to suit in Washington State?

4. Forum non-conveniens is a legal doctrine by which a court with jurisdiction can decline jurisdiction after considering a number of factors if another jurisdiction is a more appropriate place to litigate; is a case properly dismissed under this doctrine before any answer is filed, before any witnesses have been disclosed, and before any evidence has been exchanged?

Statement of the Case

Mr. Schumacher is an engineer who has some considerable expertise in extruded composite materials – material that has certain

advantages over vinyl or aluminum for common applications such as window frames, door frames, and many other products. CP 142-43.

Mr. Schumacher lives in Sumner, Washington and at one time worked for Mikron Industries, which makes vinyl windows and doors at its factory in Washington. CP 17; *see also* www.mikronvinyl.com

IMG is a limited liability corporation incorporated in the State of Utah. IMG was formed to research and develop various technologies useful in the construction industry. Specifically, IMG was formed to research technologies, processes and applications for the reinforcement of plastic resins through the use of natural fibers and fillers for plastic composites. CP 14-15.

On October 31, 2005, IMG hired Jim Schumacher. There was a written contract signed. CP 16; 21-28. The contract was signed by Jim Schumacher at his home in Bonney Lake, Washington. CP 133.

About six months later, on June 9, 2006, IMG registered with the State Department of Revenue and was assigned UBI number 602621776. The registration was open even after this lawsuit was filed. CP 145. ¹

¹ The current status of IMG's registration is publicly available here: <http://dor.wa.gov/content/doingbusiness/registermybusiness/brd/Results.aspx?RequestType=1&Criteria=img&City=#brdResults> The court can see that this Revenue Account is currently open and even after the trial court's dismissal of the lawsuit, IMG has not closed its Washington account. The IMG Group LLC account with L&I is currently "closed." See: <https://fortress.wa.gov/lni/crpsi/AcctInfo.aspx?AccountId=11552000&BusinessId=602621776&BusinessName=IMG+GROUP+LLC&BusinessLegalName=IMG+GROUP+LLC>

Earlier, on February 23, 2006, IMG bought various testing equipment from PSAC in Kent, Washington. CP 142, 147.

On April 3, 2006, IMG bought some cut steel from Microform Services in Auburn, Washington. CP 142, 148.

On April 25, 2006, Jim Schumacher bought \$462.00 of plate steel as IMG's representative. CP 142, 149.

On February 8, 2006, "Jimmy Schumacker" purchased equipment from Heatcon, Inc in Seattle, Washington. According to Mr. Schumacher, this is material he bought for IMG. CP 142, 150.

During the course of his employment with IMG, Mr. Schumacher called on Mikron Industries in Kent, Piper Extrusion in Ferndale/Bellingham, Certaineed in Kent, and Milgard in Tacoma, all companies producing vinyl extrusion products for the purpose of working out business arrangements on behalf of IMG Group LLC. CP 143.

Mr. Schumacher also performed testing of developmental fibre-reinforced resins at Washington State University. CP 142, CP 17.

Eventually, however the company demanded that Jim sign over his interests in various patents for which application had been made by IMG. Asserting that he had not been paid by IMG various fringe benefits, bonuses, expenses and costs as required by the contract, Mr. Schumacher refused.

And, on December 4, 2007, Mr. Schumacher filed a lawsuit against IMG in Pierce County Superior Court asking that the court find his written employment contract to be “unenforceable on account of defendant’s breach,” and for related relief.²

IMG did not answer the complaint, but instead filed a motion to dismiss on grounds that the court lacked personal jurisdiction over IMG. CP 112-135.

A hearing was held and the court determined that the case be dismissed for lack of personal jurisdiction over IMG and also determined that the case should be dismissed pursuant to the doctrine of forum non conveniens. CP 165-66.

A motion to reconsider was denied. CP 212-13.

The defense then requested attorney fees under RCW 4.28.184(5). The court granted that request and awarded \$33,876.28 in fees. CP 270-73.

This timely appeal followed. CP 256-58, 274-78.

² Really, this suit is an alternative to IMG’s filing suit to *enforce* its claim that the contract obligated Mr. Schumacher to sign over patent rights. It seems that IMG *did* file in Utah. Service of the Utah suit on Mr. Schumacher post-dated his filing of this lawsuit; just as service on IMG seems to have post-dated their filing. Notwithstanding all that confusion, but for the huge award of fees, probably this appeal would be uneconomical. On the other hand, jurisdiction and other technical issues in Utah have yet to be resolved. It might be, after some discovery is had, that it’s clear Washington is the more appropriate forum.

APPLICABLE LAW AND ARGUMENT

Standard of Review

As to the dismissal for lack of jurisdiction, summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Phillips v. King County, 136 Wn.2d 946, 956, 968 P.2d 871 (1998); CR 56(c). The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Appellate courts review motions for summary judgment de novo, engaging in the same inquiry as the trial court, which is to treat all facts and reasonable inferences in the light most favorable to Mr. Schumacher, who is the nonmoving party. Phillips, 136 Wn.2d at 956.

IMG, as the moving party, has the burden to demonstrate the absence of a genuine dispute as to any material fact with all reasonable inferences resolved against them. Folsom, 135 Wn.2d at 663.

The standard of review for a dismissal on grounds of forum non conveniens is abuse of discretion. Myers v. Boeing Co., 115 Wn.2d 123, 128, 794 P.2d 1272 (1990).

There is no evidence or findings sufficient to sustain a dismissal pursuant to the doctrine of forum non conveniens.

All parties can agree that it makes little sense to have multiple lawsuits in two states both addressing the same issue. However, there has been zero discovery in this case. IMG has not even ***Answered*** the complaint. In this case, the court abused its discretion because it did not have sufficient evidence on the appropriate factors to properly exercise any discretion.

Lynch v. Pack, 68 Wn. App. 626, 846 P.2d 542 (1993) tells us that in considering a motion to dismiss a complaint on forum non conveniens grounds, a court should consider (A) the following private interests: (1) the relative ease of access to the sources of proof; (2) the availability of compulsory process for unwilling witnesses; (3) the cost of obtaining the attendance of willing witnesses; (4) the possibility of viewing the premises, if appropriate; (5) all other practical problems that make the trial easy, expeditious, and inexpensive; and (6) the enforceability of a judgment if one is obtained; and (B) the following public interests: (1) administrative difficulties in congested courts not at the origin of the litigation; (2) the burden of jury duty on a community that has no relation to the litigation; (3) the interest in having local controversies decided locally; and (4) having the case tried in the jurisdiction whose law applies under conflict of

law principles. ***The plaintiff's choice of forum may be disturbed if the factors weigh strongly in favor of the defendant.*** Id. at 630 (citing Myers v. Boeing Co., 115 Wn.2d 123, 128, 794 P.2d 1272 (1990)).

There has been in this case no Answer to the Complaint, no exchange of witness lists, and no discovery of any kind. There is no evidence about whether witnesses are “willing” or “unwilling.” There is no evidence about the cost of procuring witnesses. The witnesses are basically unknown. We don’t know whether the Utah courts are relatively more congested; neither do we know much about the interests in having this controversy decided “locally,” except that Washington has strong public policies about failing to perform on employment contracts. There has been no briefing on what law applies to this case.

It is true that the employment contract has a consent by Mr. Schumacher to Utah’s jurisdiction. However, Consenting to personal jurisdiction in Utah courts is not the same as agreeing that Utah courts are the ***exclusive*** venue in which a claim may be brought. Chew v. Lord, ___ Wn.2d ___, 181 P.3d 25 (2008). The language in the contract signed by Schumacher merely provides that, should suit be brought in a Utah court, he will not contest personal jurisdiction. The contract does not provide that Utah courts are the ***only*** forum in which an action may be brought.

On this record, it is impossible for the court to have assessed fairly any of the factors that go into consideration of a motion to dismiss for forum non conveniens.

It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. **But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.** See Johnson v. Spider Staging Corp., 87 Wash.2d 577, 579, 555 P.2d 997 (1976) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508, 91 L.Ed. 1055, 67 S.Ct. 839 (1947)) (Emphasis added.)

There is no finding by the trial court that this suit was brought by Mr. Schumacher to "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to resolving the dispute. Nor would the evidence support any such finding.

Moreover, there is little more than speculation about witnesses and evidence, and certainly not a showing by IMG that "the balance is strongly in favor of the defendant." Accordingly, the trial court acted improperly in dismissing the case at this stage on the basis of forum non conveniens.

An abuse of discretion occurs when a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons." Associated Mortgage Investors v. G.P. Kent Const. Co., 15 Wn. App. 223, 229, 548 P.2d 558 (1976). A discretionary decision rests on "untenable grounds" or is based on "untenable reasons" if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take." State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

Here, there are no factual findings that would support dismissal on the basis of forum non conveniens, and given the state of the pleadings, and discovery, no facts pertinent to dismissal on that basis could possibly have been weighed by the court.³

Taking the facts in a light most favorable to Mr. Schumacher, IMG has the minimum contacts needed to give Washington personal jurisdiction over the defendant.

General jurisdiction over a nonresident defendant is proper when the defendant's actions in the state are so substantial and continuous that justice allows the exercise of jurisdiction even for claims not arising from the defendant's contacts within the state. Precision Lab. Plastics, Inc. v.

³ There are no factual findings, and none are required on summary judgment.

Micro Test, Inc., 96 Wn. App. 721, 725, 981 P.2d 454 (1999); Im Ex Trading Co. v. Raad, 92 Wn. App. 529, 534-35, 963 P.2d 952 (1998). RCW 4.28.080(10) authorizes general jurisdiction over a nonresident defendant if the defendant is transacting substantial and continuous business within the state of such character as to give rise to a legal obligation. Crose v. Volkswagenwerk Aktiengesellschaft, 88 Wn.2d 50, 54, 558 P.2d 764 (1977); Hartley v. Am. Contract Bridge League, 61 Wn. App. 600, 605, 812 P.2d 109 (1991); Hein v. Taco Bell, Inc., 60 Wn. App. 325, 330, 803 P.2d 329 (1991).

Taking the facts in a light most favorable to the plaintiff – IMG hired Schumacher, purchased items from several Washington vendors, held a Washington UBI registration, paid Schumacher’s unemployment compensation premiums, and engaged Schumacher and others to meet up with a variety of potential corporate customers in Washington – there is substantial and continuous business giving rise to general jurisdiction.

Responding to Mr. Schumacher’s production of IMG’s UBI number and other evidence of business activities, IMG asserts: “Management at IMG specifically discussed whether to apply for such a license in Washington and decided not to, because IMG did not anticipate conducting any business in Washington.” CP154. That, of course, is Mr. Prince’s statement, but it’s at odds with Schumacher’s declaration that he

was negotiating for all kinds of business deals on behalf of IMG, and particularly his declaration that “The company expense account records, and other corporate records of IMG Group will conclusively demonstrate that they were doing business here, but of course, we have not yet had an opportunity to conduct appropriate discovery.” CP143.⁴

The idea that IMG had no intention of doing business in Washington is just odd. Mr. Prince admits that “Piper Extrusion did approach IMG about using the process we were developing in their products. Representatives of Piper flew to Salt Lake City at their own expense to discuss this possibility, but nothing came from that meeting.” CP 155. How indeed, would Piper have any idea that IMG was developing an alternative to vinyl extrusion? And, why would IMG “write off” any chance of working with Mr. Schumacher’s former employer, Mikron Industries, if IMG had hired Schumacher and was producing an alternative to vinyl as an extrusion product? Why would IMG be completely disinterested in working with Milgard windows, a major producer of vinyl extrusion products in Washington (see www.milgard.com)? So, aside from

⁴ Really, there is an absurdity to Mr. Prince’s declaration. What purpose would anyone have to register IMG if the corporate officers had disapproved? The only reason I suppose would be if Mr. Schumacher planned to use it as evidence of jurisdiction. However, the account was opened 6/9/2006 (CP 145); that is, a year and a half *before* this lawsuit was filed on 12/4/2007 (CP 1) and 15 months before Jim Schumacher was fired by IMG in September of 2007. CP 2. Because disputes between the parties did not arise until September of 2007, it seems highly improbable that the registration of IMG in June of 2006 would be anything other than a bona-fide business registration.

taking facts in a light most favorable to Schumacher, the statements of Mr. Prince on their face make little sense. *Compare* Schumacher declaration at CP 142-43.

This is IMG Group's motion for summary dismissal. Accordingly, disputes of fact must be resolved in a light most favorable to the non-moving party. Resolving this dispute in favor of the non-moving party requires accepting Mr. Schumacher's sworn statement indicting that IMG is licensed to do business in Washington, has been doing business here with a variety of vendors and potential clients, and hired Mr. Schumacher to make contact with potential customers, which he has done, and expense account records, and other corporate records will confirm this.

A summary ***dismissal*** really requires that disputes about the scope of IMG's business in Washington be erroneously resolved in favor of IMG, which is improper at this stage in proceedings. Resolving facts in a light most favorable to Schumacher, there is general jurisdiction over IMG.

Even if there is not "general jurisdiction," there is "special jurisdiction." This case is about Schumacher's ***employment contract***. And, the questions arise from that specific activity between Jim Schumacher and IMG. Thus, Mr. Schumacher need not proceed under the general jurisdiction statute, which is RCW 4.28.080, rather he is entitled to proceed under RCW 4.28.185, which confers specific jurisdiction for

litigation under circumstances where the court might not have general jurisdiction. See generally Precision Lab. Plastics v. Micro Test, 96 Wn. App. 721, 981 P.2d 454 (1999), and see Raymond v. Robinson, 104 Wn. App. 627, 15 P.3d 697 (2001).

Three factors must coalesce to satisfy RCW 4.28.185:

(1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. *Id.* at 726. (citing Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wn.2d 106, 115-16, 381 P.2d 245 (1963) (emphasis added); Smith v. York Food Mach. Co., 81 Wn.2d 719, 721, 504 P.2d 782 (1972); Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 767, 783 P.2d 78 (1989)). RCW 4.28.185 extends personal jurisdiction over out-of-state defendants to the full limit of federal due process. Shute, 113 Wn.2d at 771.

Cofinco of Seattle v. Weiss, 25 Wn. App 195, 605 P.2d 794 (1980), holds that a person who's only "contact" with Washington was entering into an employment contract with a Washington resident is subject to suit in Washington for litigation ***over the terms of the employment contract***; jurisdiction is conferred by RCW 4.28.185 – the special jurisdiction statute.⁵

There is zero dispute that IMG entered into an employment agreement with Mr. Schumacher, who is a Washington resident. It happens that the contract was signed here in Washington by Schumacher, but really it's the fact that IMG deliberately contracted with Schumacher for employment that creates the contacts sufficient to subject IMG to suit in Washington over the employment contract. And, of course, it's that employment contract that is central to the claims made on both sides of this case.

If IMG did not wish to be subject to suit in Washington over the employment contract, then it must choose ***not*** to employ residents of Washington. Once it decides to "do business" with Washington residents by hiring and firing Washington residents, then it has created by its own

⁵ Technically, in Cofinco, the roles were reversed. An employer contracted with an employee by telephone. When the dispute arose, the employer sued the employee who was a New York resident, never owned property in Washington nor had the defendant been to Washington. Nevertheless, because the dispute centered on the employment contract, jurisdiction was established. There would seem to be no reason for a different result merely because the employer was out of state and the employee a Washington resident.

actions sufficient contacts to confer specific jurisdiction under RCW 4.28.185.

In the end, there is zero dispute that IMG deliberately chose to hire Mr. Schumacher, who is a Washington resident and that alone subjects them to jurisdiction under RCW 4.28.185 pursuant to the Cofinco case reasoning – at least as to disputes about the employment contract itself. Accordingly, the trial court erred in summarily dismissing the case.

The award of fees is inconsistent with the long-arm statute that requires more than a mere win on the jurisdictional claim before fees can properly be awarded.

IMG relies on RCW 4.28.185(5) for fees. The statute says:

In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there **may** be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees. (Emphasis added.)

Notice that the statute uses the permissive “may,” rather than mandatory “shall.” Thus, the statute allows for fees, but does not compel an award of fees to a prevailing party.

An early line of cases culminating in Osborn v. Spokane, 48 Wn. App. 296, 738 P.2d 1072 (1987) suggested that a party was not entitled to

fees under Washington's long-arm statute unless the party prevailed on the **merits** of the underlying claim.

The Osborn court seems to have interpreted State v. O'Connell, 84 Wn.2d 602, 528 P.2d 988 (1974), as requiring that result.

A careful reading of the cases, including Osborn, demonstrates that factors other than failure to prevail on the merits governed the denial of fees. However, Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 124, 786 P.2d 265 (1990) squarely dispenses with the idea that a party **must** prevail on the merits to obtain fees. Scott Fetzer says:

"O'CONNELL says nothing to suggest that the fees statute authorizes fees awards only when the defendant prevails on the merits of the principal action."

Scott Fetzer, 114 Wn.2d at 113.

From that language, IMG persuaded the trial court that it was entitled to fees irrespective of the merits of IMG's case. But Scott Fetzer says **only** that a party need not prevail on the merits to get fees.

That's quite different from saying that every party prevailing on the narrow jurisdiction question **automatically** is entitled to fees.

Fetzer does not covert the "may" to a "shall" in the statutory scheme.

Accordingly, before an award of fees is appropriate, something more must necessarily be shown than **simply** a successful dismissal based

on jurisdiction. This, of course, is consistent with Fetzer's core decision "In sum, we hold that RCW 4.28.185(5) authorizes an award of attorney fees when a foreign defendant, sued under the long arm statute, obtains a dismissal for want of personal jurisdiction."

The fact that success in showing a lack of personal jurisdiction **authorizes** an award of fees, is not to say that the showing alone **mandates** an award of fees.

In evaluating whether the court **should** award fees, we believe the following factors apply:

First, it is obviously a pre-requisite that the party seeking fees successfully show a lack of personal jurisdiction. IMG has made that showing.

Beyond that, the court needs to take notice of the other purpose of the fee award statute. As described by Fetzer, "Another [purpose] is to deter plaintiffs from invoking long-arm jurisdiction as a means to harass foreign defendants." Fetzer at n. 6, page 122.

Where the court finds that an action was filed for the **purpose** of harassing a foreign defendant, obviously, fee awards are appropriate. But, plaintiff is not asserting that IMG **must** make that showing. Other factors might be important.

Where a plaintiff causes substantial and unwarranted delays in resolving the issue, or where a plaintiff needlessly increases the expense of addressing the issue or where in the hundreds of other ways possible a plaintiff is obstructionist in resolving the issue, as for example in failing to diligently provide discovery or other evidence on the question of minimum contacts, then fees are appropriately awarded.

In analyzing the propriety of this analysis, the court's attention is called to Park Hill Corporation v. Sharp, 60 Wn. App. 283, 803 P.3d 326 (1991). This case is important because it post-dates Fetzer. (Fetzer was decided in 1990.)

In Park Hill, the court denied a request for fees by out-of-state defendants. The appellate court affirmed a denial of fees based on the trial court's application of a variety of factors, including its finding that the claims were "not frivolous and [were] not brought to harass such defendants. Such Defendants did not attend the trial in Washington and were deposed in their resident states." Finding that the trial court's refusal to award fees was within its discretion, the decision was affirmed. One other important aspect of the Park Hill case is that claims against the out-of-state defendants were dismissed **on the merits**. Even so, the trial court's refusal to award fees was affirmed. So, clearly the rule is not – as

asserted by IMG – that a successful jurisdictional defense *requires* an award of fees.

In this case, there is a genuine dispute. Even the defense admits that, asserting only that the dispute should be resolved elsewhere.

In this case, the first response by IMG was the filing of a motion raising the jurisdictional question, to which Schumacher promptly filed and served his evidence of minimal contacts, including IMG's UBI registration, and other objective evidence of contacts, including receipts for purchases, etc.

In this case, counsel for Schumacher have been cooperative in scheduling hearings and in framing the issues for the court in a way that presents the case in a straight-forward manner.

Finally, there is an important facet of this case justifying a denial of fees for merely prevailing on the jurisdictional question, and that is this: The case is about a written employment contract, which itself has a fee provision. CP 25.

It's unclear at this point who will prevail on the merits and what all the facts are. At this point, the court can't know which side of the dispute will ultimately be entitled to fees. But, the court will know that after a full hearing on the merits.

Assuming the court rejects all the prior argument and somehow reads Fetzer to generally require an award of fees whenever the defense prevails on jurisdiction, then at least an exception should be carved out in those cases where the parties have contracted for an award of fees. In all such cases, the trial court – after addressing the case on its merits – is in the best position to determine what fee award is appropriate.

There is no case known to plaintiffs' counsel where a summary dismissal on the jurisdictional question, without any further showing, is thereafter followed by an award of fees.

Again, to permit that, is to convert the “may” to a “shall” in the statute, which is properly the legislature's prerogative, not the function of courts.

These parties are all going to run up considerable fees and costs trying to resolve their dispute. It is hard to imagine how the question of jurisdiction could possibly have been resolved by the plaintiff in a more expeditious and cost-effective manner.

Under these circumstances, the trial court erred in awarding IMG fees at this stage of the proceedings.

\$33,976.28 is an unconscionable fee for a single pre-trial motion addressing jurisdiction filed prior to even Answering the complaint, and the court abused its discretion in awarding that amount.

In this case, there has been no answer to the complaint ever filed. There has been zero discovery in any formal fashion. There has been a single basic International Shoe-type motion followed by a concise reconsideration, the reconsideration based on a single case submitted to the court.

Against that background, the defense asked the trial court to award over \$35,000.

In evaluating that claim, this court should consider the concern of 4 justices who wrote a concurrence in Fetzer calling attention to the possibility of good faith plaintiff becoming subject to very onerous fees on account of good-faith, but erroneous filings. The concurring opinion cautions as follows:

This case is a perfect illustration of an outrageous abuse by a defendant which chose to escalate a simple jurisdictional issue into a predatory legal foray.

The transaction underlying this suit is factually uncomplicated. The Spokane distributor for Kirby called Dwight's in Texas and offered to sell 120 vacuum cleaners; Dwight's accepted. The president and owner of Dwight's came to Spokane, with two cashier's checks issued by a Texas bank.

One check paid off the security interest of a Spokane bank, the other paid Weeks' "profit." The bank authorized release of the vacuum cleaners from a commercial warehouse to Weeks or her designee. At the warehouse Dwight's affixed shipping labels for transportation of the vacuum cleaners to Texas. Kirby notified the warehouse of a claimed interest in the vacuum cleaners; the warehouse refused delivery absent a court order.

These facts are mainly uncontested, yet Dwight's declaration of war leads to an incredible claim of \$180,913.79 in fees and costs. Dwight's was awarded \$116,785.54 in the trial court and seeks \$33,919.42 in the Court of Appeals and \$30,206.83 in this court.

This action was filed in July 1986; in October 1986, Dwight's filed an 88-paragraph, 21-page answer, including one paragraph alleging lack of jurisdiction. Not until the second trial date (the first trial date was stricken on Dwight's motion), February 9, 1987, did Dwight's file a motion to dismiss for lack of jurisdiction.

This single transaction took place over several days, yet this uncomplicated set of facts has produced 410 pages of clerk's papers and a 200-plus-page transcript. Dwight's Texas counsel claims in the trial court, \$11,125 in fees for taking depositions, \$14,375 for briefing and \$11,875 in preparation for TRIAL. These figures represent only minimum amounts, limited to those where the affidavit clearly identifies those categories. Incredibly, Texas counsel sought at least another \$14,400 for briefing on appeal to the Court of Appeals SOLELY on the issue of jurisdiction. Likewise, I am astonished at a claim of at least an additional \$8,650 for briefing on the single-issue petition for review even though no new citations or theories arose from the Court of Appeals decision. These claims are exorbitant. Defendant could have and should have asserted its jurisdictional issue by motion. CR 12(b)(2). The operative facts could have been presented by affidavit as indeed they were eventually in a 10-page affidavit by the president of defendant.

I agree completely with Justice Durham's statement that "Fees awards to defendants who prevail jurisdictionally thus should reflect only that amount of lawyering that reasonably should have been necessary to prevail on the jurisdictional defense." Majority, at 122. Defendant's claims herein warrant strict scrutiny.

In addition to recognizing these comments about the proper **amount** of fees, it's important to recognize that procedurally, the Fetzer case ended up actually deciding that the trial court had not applied the proper standards in determining the amount of the award when it awarded \$116,785 in fees.

After remand, the trial court reduced its award to \$72,746. That was reduced on appeal to \$22,454, and fees for the second appeal were denied completely. See Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 859 P.2d 1210 (1993), indicating also: "Because of the State's strong interest in allowing its citizens the broadest constitutionally permissible access to our courts, we must zealously circumscribe the scope of advocate activity which will be reimbursed under the long-arm statute." Id at 152-53

The Fetzer case ended up awarding \$22,454 after multiple appeals to Washington's Supreme Court. Here, the request is for way, way more, and it's just been one basic motion **prior** to answering the complaint. It's a little unclear whether the defense actually billed the \$35,360.65 they requests, but really such a fee for addressing a single issue seems unconscionably high. See also declaration of John Cain, CP 228-55.

CONCLUSION.

While there are a number of disputed facts bearing on jurisdiction in this case, taking facts and inferences in a light most favorable to plaintiff, there is general jurisdiction in Washington over IMG, but certainly there are sufficient contacts for Mr. Schumacher to litigate issues relating to his own employment contract; accordingly, the court erred in dismissing the case for lack of personal jurisdiction.

While everyone agrees that it makes little sense to have similar cases in Utah and Washington, there is insufficient evidence on the issues bearing on forum non-conveniens for the court to have properly declined jurisdiction on that basis.

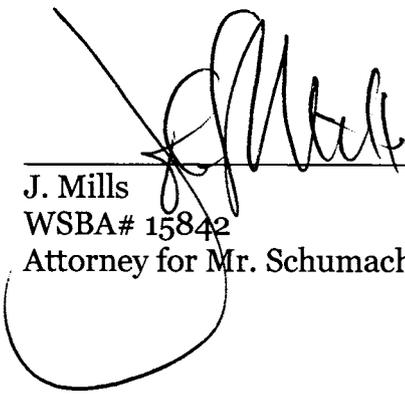
Regardless of the propriety of the trial court's ruling on jurisdiction, a defendant is not automatically entitled to an award of fees simply for prevailing under the long-arm statute. Something more must be shown else the permissive "may" contained in the statute is converted to a mandatory "shall"; if that change to the statute is appropriate, it is a matter for the legislature, not the courts. Particularly in cases, such as this, where there is a contractual basis for fees, any award of fees should await trial because the court – after a full and fair hearing – is in a better position to evaluate the propriety of a fee award. Accordingly, the award of

attorney fees should be reversed even if the jurisdictional ruling itself is not reversed.

In all events, the amount of fees actually awarded is not justified by the complexity of issues or of the litigation itself inasmuch as no Answer has been filed, no discovery conducted and only the single pre-trial jurisdictional question raised and resolved.

For all these reasons, the trial court's summary dismissal should be reversed and the case remanded for further proceedings.

RESPECTFULLY SUBMITTED this 16th day of August, 2008.



J. Mills
WSBA# 15842
Attorney for Mr. Schumacher

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PIERCE COUNTY

Jim Schumacher,

Plaintiff,

NO. 07-2-14554-6

vs.

IMG Group, LLC (IMG) a Utah
Corporation.

DECLARATION OF SERVICE

Defendants

DECLARATION OF SERVICE

I, TERRIA HARRIS, declare as follows:

I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

I am the Legal Assistant for the Law Offices of David Smith, PLLC.

On August 19, 2008, I caused to be served at the addresses and in the manner described a copy of the following document(s):

- Appellants Opening Brief

James Sanders
Atty for IMG Group
1201 3rd Ave Ste 4800
Seattle WA 98101

_____	Facsimile
_____	U.S. Mail
_____XX_____	Legal Messenger
_____	Hand Deliver
_____	Federal Express

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

Executed on this 19th day of AUGUST, 2008 in Tacoma, WA.



Terria Harris
Legal Assistant

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Terria Harris
Legal Assistant

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