

Received   
Washington State Supreme Court

No. 91711-6  
(Consolidated with Nos. 91725-6, 91726-4, and 91727-2)

AUG 10 2015

Ronald R. Carpenter  
Clerk 

SUPREME COURT OF THE  
STATE OF WASHINGTON

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WILLIAM RALPH, individually,  
Appellant,

vs.

STATE OF WASHINGTON DEPARTMENT OF NATURAL  
RESOURCES, a Washington State Public Agency,  
Respondent.

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WILLIAM RALPH, individually,  
Appellant,

vs.

WEYERHAEUSER COMPANY, a Washington Corporation; and  
GREEN DIAMOND RESOURCE COMPANY, a Washington  
Corporation,  
Respondents.

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WILLIAM FORTH, individually; GUY BAUMAN, individually;  
EILEEN BAUMAN, individually; LINDA STANLEY, individually and  
as personal representative IN RE THE ESTATE OF CORAL COTTON;  
ROCHELLE STANLEY as personal representative IN RE THE ESTATE  
OF CORAL COTTON; DONALD LEMASTER, individually; and  
DAVID GIVENS, individually  
Petitioners,

vs.

STATE OF WASHINGTON DEPARTMENT OF NATURAL  
RESOURCES, a Washington State Public Agency; WEYERHAEUSER  
COMPANY, a Washington Corporation; and GREEN DIAMOND  
RESOURCE COMPANY, a Washington Corporation,  
Respondents.

 ORIGINAL

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VIRGINIA CAREY, individually; JAMIE CAREY, individually;  
PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a  
Washington corporation,  
Appellants,

vs.

STATE OF WASHINGTON DEPARTMENT OF NATURAL  
RESOURCES, a Washington State Public Agency; WEYERHAEUSER  
COMPANY, a Washington Corporation; and GREEN DIAMOND  
RESOURCE COMPANY, a Washington Corporation,  
Respondents.

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PETITIONERS' REPLY IN SUPPORT OF MOTION FOR  
DISCRETIONARY REVIEW

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## I. ARGUMENT

### A. The Parties Agree that Discretionary Review is Appropriate Under RAP 2.3(b)(4)

In their Joint Answer to this motion, Respondents concede that discretionary review of the trial courts' orders<sup>1</sup> changing venue is appropriate under RAP 2.3(b)(4), authorizing review where

all parties to the litigation have stipulated . . . that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

Petitioners agree. Accordingly, the Court should accept this stipulation and grant this motion in its entirety. However, should the Court require further analysis, review is appropriate because the respective trial courts' orders transferring venue in this consolidated matter involve (1) controlling questions of law (2) as to which there is substantial ground for a difference of opinion and (3) immediate review of the orders may materially advance the ultimate termination of the litigation.

First, the overarching issues raised by Petitioners' motion—whether Respondents waived their affirmative defense of improper venue and how RCW 4.12.010(1) interacts with other applicable, mandatory

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<sup>1</sup> Respondents do not appear to limit this concession that review of the orders is appropriate to any particular issues. Likewise, their requested relief is, at best, ambiguous as to which issues it agrees should be reviewed: "If the Court accepts review under RAP 2.3(b)(4), it should hold that the mandatory venue doctrine is not subject to waiver and affirm." Joint Answer at 15. That request presumes that the Court first determine whether "mandatory" venue equates to "exclusive" venue, a determination it has yet to make and requested by Petitioners.

venue statutes—are questions of law. As with all questions of law, waiver of an affirmative defense is reviewed *de novo*.<sup>2</sup> *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 858, 313 P.3d 431 (2013). Likewise, issues of statutory interpretation are questions of law. *Cashmere Valley Bank v. Dep’t of Revenue*, 181 Wn.2d 622, 631, 334 P.3d 1100 (2014).

Moreover, these questions of law are “controlling.” As the Court of Appeals has observed, a venue decision involves the controlling issue of whether the case can “go forward” in the present venue, *Hickey v. City of Bellingham*, 90 Wn. App. 711, 712, 953 P.2d 822 (1998); and an appellate court’s determination of error would require remand for a new trial after appellate review. *See, e.g., Roy v. City of Everett*, 48 Wn. App. 369, 370, 738 P.2d 1090 (1987); *Kahclamat v. Yakima County*, 31 Wn. App. 464, 465, 643 P.2d 453 (1982). As such, prompt interlocutory review of venue decisions is necessary, as a reversal of the trial court’s venue decision threatens to invalidate subsequent trial court proceedings and decisions held and made in the improper venue. *See Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 578, 573 P.2d 1316 (1978) (footnote omitted). Thus, because the issues raised in Petitioners’ motion are dispositive of the proper venue for this action, it involves controlling questions of law.

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<sup>2</sup> This is so because such issues involve the interpretation and application of court rules—questions of law, *State v. Hawkins*, 181 Wn.2d 170, 183, 332 P.3d 408 (2014)—to a set of undisputed facts, namely, the substance of defendants’ pleadings and motions practice before the trial court.

Second, substantial ground for a difference of opinion on these issues exists. For example, in this consolidated appeal, the four trial courts relied on this Court's "mandatory venue" characterization of RCW 4.12.010 in *Ralph v. Dep't of Natural Res.*, 182 Wn.2d 242, 257, 343 P.3d 342 (2014), to rule that the statute confers *exclusive* venue on a county, notwithstanding other applicable, mandatory venue statutes. In contrast, other trial courts have relied on existing Washington precedent to rule that RCW 4.12.010 is "complementary" to other applicable, mandatory venue statutes and provides a choice of venues amongst those required by the statutes.<sup>3</sup> Likewise, Respondents represent that trial courts are already wrestling with the issue of whether a defendant can waive "mandatory" venue under RCW 4.12.010.<sup>4</sup> Accordingly, substantial ground for a difference of opinion exists regarding these issues.

Finally, immediate review of the orders will materially advance the ultimate termination of the litigation. As recognized by Washington appellate courts, Washington's general rule of accepting discretionary review of venue decisions furthers the policy goal of avoiding a second trial and the accompanying expense and waste of judicial resources. *Lincoln*, 89 Wn.2d at 578; *In re Marriage of Hennemann*, 69 Wn. App. 345, 348, n.3, 848 P.2d 760 (1993). Accordingly, discretionary review of the trial courts' venue decisions at this stage of the proceedings would

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<sup>3</sup> Statement of Grounds for Direct Review at 6-14; Appendix to Statement of Grounds for Direct Review at 330-334.

<sup>4</sup> Respondents' Joint Answer to Statement of Grounds for Direct Review at 5.

materially advance the ultimate termination of the litigation by avoiding a potential second trial. Thus, because RAP 2.3(b)(4)'s criteria are met, the Court should grant Petitioners' motion in its entirety.

**B. The Respective Trial Courts Committed Obvious or Probable Error**

Even if the Court concludes discretionary review is inappropriate under RAP 2.3(b)(4), review is still appropriate under RAP 2.3(b)(1)'s or RAP 2.3(b)(2)'s "obvious" or "probable" error standards.

**1. The Trial Courts and Respondents Erroneously Interpreted Ralph's "Mandatory" Venue Language to Mean "Exclusive Venue"**

Respondents claim that "there is no ambiguity" in *Ralph's* description of RCW 4.12.010 as establishing "mandatory venue," and, thus, the trial courts in this case were required to transfer venue to Lewis County, notwithstanding other applicable mandatory venue statutes.<sup>5</sup> But Respondents' logic involves a legally unsupported leap that redefines "mandatory" as "exclusive."

First, Respondents, citing *Ralph*, 182 Wn.2d at 249-51, claim that this Court already held that RCW 4.12.010 establishes exclusive venue for cases to which it applies.<sup>6</sup> Respondents' citation is not well-taken. In *Ralph*, this Court framed the issue it was deciding as whether RCW

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<sup>5</sup> Joint Answer at 6. Respondents' assertion that *Ralph's* application to this case is straightforward and made a venue transfer to Lewis County a *fait accompli* is undermined by its earlier concession that review of this case is appropriate under RAP 2.3(b)(4), whose criteria requires a stipulation that the order for which review is sought involves a "substantial ground for a difference of opinion."

<sup>6</sup> Joint Answer at 10.

4.12.010 applies *at all* to Petitioners' actions. *Ralph*, 182 Wn.2d at 248-49. Ultimately, this Court concluded only that "RCW 4.12.010(1) applies to Ralph's and Forth's claims." *Id.* at 251. *Nowhere* in its opinion did this Court purport to decide the applicability of other venue statutes to this case or their interaction with RCW 4.12.010.

Likewise, after determining that RCW 4.12.010(1) applied, nowhere in its opinion did this Court determine that Petitioners' actions were filed in the wrong county or order transfer to Lewis County.<sup>7</sup> In doing so, this Court clearly left open the question of whether venue might be appropriate in another county under other applicable venue statutes. Accordingly, to the extent that the trial courts relied on Respondents' contention that *Ralph* foreclosed that question, they erred.

Second, Respondents contend that the other venue statutes applicable to this case, RCW 4.12.020<sup>8</sup>, RCW 4.12.025, and RCW

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<sup>7</sup> Instead, it conditionally held:

*If* an action for injuries to real property is commenced in an improper county, the result is not dismissal but rather a change of venue to the county in which the real property is located. We therefore . . . remand to the trial court for *further proceedings consistent with this opinion*.

*Ralph*, 182 Wn.2d at 259. Emphasis added.

<sup>8</sup> RCW 4.12.020 provides:

*Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose:*

.....

(3) For the recovery of damages for injuries to the person or for injury to personal property, *the plaintiff shall have the option* of suing either in the county in which the cause of action or some part thereof arose, or in the county in which the defendant resides, or if there be more than one defendant, where some one of the defendants resides, at the time of the commencement of the action.

4.92.010<sup>9</sup>, are not mandatory.<sup>10</sup> For instance, Respondents assert that RCW 4.12.025 is a general, default venue statute whose application is trumped by more specific venue statutes.<sup>11</sup> However, the Court of Appeals has clarified that the permissively-and-generally phrased RCW 4.12.025(1)<sup>12</sup> is the general, default venue statute. *Eubanks v. Brown*, 170 Wn. App. 768, 772, 285 P.3d 901 (2012), *affirmed*, 180 Wn.2d 590 (2014). In contrast, Petitioners rely on RCW 4.12.025(3)<sup>13</sup>, whose plain language gives mandatory force to a plaintiff's choice of several venues in cases specifically involving corporate defendants. Thus, RCW 4.25.025(3) is a specific statute whose grant of mandatory force to a plaintiff's choice of venue must be harmonized with other applicable mandatory venue statutes, not merely brushed aside as a "general" or "default" statute.

In the same vein, Respondents contend that RCW 4.12.020(1) should exclusively<sup>14</sup> control as a more "specific" venue statute than RCW

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<sup>9</sup> RCW 4.92.010(4) provides that venue for actions against the State "*shall be . . . [t]he county where the action may be properly commenced by reason of the joinder of an additional defendant.*" Emphasis added.

<sup>10</sup> Joint Answer at 10-13.

<sup>11</sup> Joint Answer at 10.

<sup>12</sup> RCW 4.12.025(1) provides, "An action *may* be brought in any county in *which the defendant* resides, or, if there be more than one defendant, *where some one of the defendants* resides at the time of the commencement of the action." Emphasis added.

<sup>13</sup> RCW 4.12.025(3) provides, "The venue of any action brought against a corporation, *at the option of the plaintiff, shall be:* (a) In the county where the tort was committed; (b) in the county where the work was performed for said corporation; (c) in the county where the agreement entered into with the corporation was made; or (d) in the county where the corporation has its residence." Emphasis added.

<sup>14</sup> In support of their contention that RCW 4.12.010(1) confers exclusive venue on the superior court for the situs county, Respondents cite *ZDI Gaming Inc. v. State ex rel. Wash. State Gambling Com'n*, 173 Wn.2d 608, 616-20, 268 P.3d 929 (2012). But that

4.12.020 and RCW 4.92.010 in order to harmonize the statutes.<sup>15</sup> But Respondents' interpretation is self-defeating; under well-established Washington standards of statutory construction, the "specific-general" rule is utilized *only* when statutes address the same subject matter *and* "conflict to the extent they cannot be harmonized." *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998). Thus, Respondents' interpretation hinges on the very statutory conflict it purports to avoid and violates the requirements that Washington courts must make "every effort" to harmonize statutes in apparent conflict, *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992) and, to that end, "will read statutes as complementary, rather than in conflict," *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Com'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994).

Instead, Petitioners' complementary interpretation of the statutes is proper, as it avoids a conflict between and gives effect<sup>16</sup> to the mandatory

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citation actually illustrates the opposite point. That case involved RCW 9.46.095, that "*No court of the state of Washington other than the superior court of Thurston county shall have jurisdiction over any action or proceeding against the commission.*" Emphasis added. The *ZDI* court interpreted the statute as relating to venue and establishing exclusive venue for "cases involving the Gambling Commission" in Thurston County. *ZDI Gaming Inc.*, 173 Wn.2d at 619-620.

*ZDI* demonstrates that the legislature knows how to establish "exclusive" venue through "No court . . . other than" language. The legislature did not include such language in RCW 4.12.010(1) before *Ralph* and has not taken any action to amend the statute after *Ralph*. Accordingly, RCW 4.12.010(1)'s plain language demonstrates it is intended to be mandatory, but not exclusive of other mandatory venue statutes.

<sup>15</sup> Joint Answer at 10-12.

<sup>16</sup> Respondents also suggest that RCW 4.12.010(1) should be given exclusive application over other applicable venue statutes because doing so would preserve the legislature's intent to codify the common law "local action" rule. But the legislature also intended to give mandatory force to a plaintiff's choice of venue as demonstrated by the other applicable statutes. Essentially, Respondents ask the Court to elevate one legislative policy over others, a task meant for the legislature, not the courts.

language in all four venue statutes by permitting plaintiffs a choice of venue in which to file their lawsuits, so long as the chosen venue is one of the mandatory venues required by the statutes. *Accord Johanson v. City of Centralia*, 60 Wn. App. 748, 750, 907 P.2d 376 (1991); *Cossel v. Skagit County*, 119 Wn.2d 434, 437-38, 834 P.2d 609 (1992), (approving complementary interpretation as giving effect to all language in multiple applicable venue statutes), *overruled on other grounds by Shoop v. Kittias County*, 149 Wn.2d 29, 37, 65 P.3d 1194 (2003). Accordingly, the trial courts committed obvious or probable error by creating an unnecessary conflict between the applicable venue statutes and failing to give effect to each.

2. The Trial Courts Committed Obvious or Probable Error in Transferring Venue Because Respondents Waived Their Objections to Improper Venue

Respondents also contend that the trial courts did not err in transferring venue because (1) “mandatory” venue under RCW 4.12.010(1) cannot be waived and (2) they did not waive their objections to improper venue. First, Respondents’ only supporting citation to *Miles v. Chinto Min. Co.*, 21 Wn.2d 902, 903, 907, 153 P.2d 856 (1944) is not well-taken, as that case interpreted RCW 4.12.010(1)’s predecessor statute as jurisdictional and, thus, the parties could not create jurisdiction in an improper court by stipulation. In contrast, improper venue is an affirmative defense that can be waived.

Second, Respondents assert that no “known” and waivable right to transfer the case to Lewis County existed under RCW 4.12.010(1) until

this Court's decision in *Ralph*, as prior to that point RCW 4.12.010(1) was characterized as jurisdictional and the only recognized remedy was dismissal. However, Respondents fail to offer any rebuttal to *Ralph*'s observation that, despite the statute's previous jurisdictional characterization, Washington courts had always been allowed to transfer cases under RCW 4.12.010(1) despite a "jurisdictional" defect. *Ralph*, 182 Wn.2d at 255-56. Accordingly, Respondents should have known transfer of the case was an option, and their tactical decision to pursue of dismissal of the case and express disavowal of transfer as an option waived their right to later seek transfer. *Pub Util. Dist. No. 1 of Lewis County v. Washington Pub. Power Supply Sys.*, 104 Wn.2d 353, 365, 705 P.2d 1195 (1985) (waiver "is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage."). Thus, the trial courts committed obvious or probable error in transferring the cases to Lewis County.

3. If The Court Denies This Motion, Respondents' Are Not Entitled to Their Attorney Fees

Finally, Respondents argue that, if the Court denies this motion, they are entitled to their attorney fees on appeal under RCW 4.12.090(1) because Petitioners could have determined with reasonable diligence before filing these actions that they were required to file them in Lewis County. However, before *Ralph*, however, precedent only dissuaded Petitioners from filing in King County on jurisdictional grounds, a point Petitioners rejected and successfully refuted on appeal. And both before

and after *Ralph*, no precedent exists to shed light on whether RCW 4.12.010(1), newly and correctly recognized as a venue statute, operates in a complementary or exclusionary fashion to other mandatorily-phrased venue statutes. Accordingly, no amount of legal research or other diligence could have definitively established that Lewis County was the only proper county for filing. Respondents admitted as much when conceding discretionary review is warranted under RAP 2.3(b)(4)'s criteria, including the existence of substantial grounds for a difference of opinion. Thus, the Court should not award Respondents their attorney fees.

## II. CONCLUSION

For all these reasons, Petitioners respectfully request this Court to accept discretionary review of the respective trial courts' April 16 and April 21, 2015 orders transferring venue from King County to Lewis County.

RESPECTFULLY SUBMITTED this 10th day of August, 2015.

PFAU COCHRAN VERTETIS AMALA, PLLC

By:  \_\_\_\_\_

Darrell L. Cochran, WSBA No. 22851  
Christopher E. Love, WSBA No. 42832

STATE OF WASHINGTON     )  
  )ss  
COUNTY OF KING         )

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

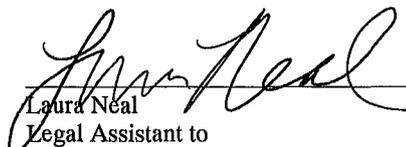
That on August 10, 2015, I placed for delivery with Legal Messengers, Inc., a true and correct copy of the above, directed to:

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DATED this 10th day of August, 2015.

  
\_\_\_\_\_  
Laura Neal  
Legal Assistant to  
Darrell L. Cochran

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

William Ralph,

Appellant,

vs

No. 91711-6  
DECLARATION OF  
EMAILED DOCUMENT  
(DCLR)

State of Washington Department of Natural  
Resources, et al.,

Respondent

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I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. SE #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 14 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: August 10, 2015 at Tumwater, Washington.

Signature: \_\_\_\_\_

Print Name: Jacob Josephsen