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NO. 69008-6-1

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

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PACCAR Inc,

Petitioner,

v.

CASSIE LISBY as personal representative for the ESTATE OF  
CLAYTON LISBY,

Respondent.

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**BRIEF OF PETITIONER**

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## INTRODUCTION

This appeal arises from a January 2011 water-truck-rollover fatality in Fort Worth, Texas. The Kenworth truck was manufactured in Ohio in 1990. Kenworth Truck Company is an unincorporated division of PACCAR Inc, a Delaware corporation whose principal place of business is in Bellevue, Washington. Cassie Lisby, as PR for Clayton Lisby's Estate, and as legal guardian of their minor child, filed a wrongful death action in King County Superior Court.

On PACCAR's motion to dismiss based on forum non conveniens, the trial court correctly refused to address any choice of law issues, dismissing the action on the condition that PACCAR waive statutes of limitation. PACCAR did so.

But on Lisby's motion to amend the dismissal order, the trial court erred as a matter of law in requiring PACCAR to stipulate that Washington's statute of repose will apply in Texas. Cases like **Myers v. Boeing Co.**, 115 Wn.2d 123, 133 n.6, 794 P.2d 1272 (1990) and **Johnson v. Spider Staging Corp.**, 87 Wn.2d 577, 579, 555 P.2d 997 (1976) forbid merging the forum non conveniens and choice of law analyses in this manner. This is the sole issue on appeal: Lisby did not appeal the rulings that Texas is an adequate and available forum. This Court should reverse and dismiss.

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## INTRODUCTION

This appeal arises from a January 2011 water-truck rollover in Fort Worth, Texas. The Kenworth truck was manufactured in Ohio in 1990. Kenworth Truck Company is an unincorporated division of PACCAR Inc, a Delaware corporation whose principal place of business is in Bellevue, Washington. Cassie Lisby, as personal representative and legal guardian of her minor child, filed a wrongful death action in King County Superior Court.

On PACCAR's motion to dismiss based on forum non conveniens, the trial court correctly refused to address any choice of law issues, dismissing the action on the condition that PACCAR waive statutes of limitation. PACCAR did so.

But on Lisby's motion to amend the dismissal order, the court erred as a matter of law in requiring PACCAR to stipulate that Washington's statute of repose will apply in Texas. Cases like ***Myers v. Boeing Co.***, 115 Wn.2d 123, 133 n.6, 794 P.2d 1272 (1990) and ***Johnson v. Spider Staging Corp.***, 87 Wn.2d 577, 579, 555 P.2d 997 (1976) forbid merging the forum non conveniens and choice of law analyses in this manner. This is the sole issue on appeal: Lisby did not appeal the rulings that Texas is an adequate and available forum. This Court should reverse and dismiss.

## **ASSIGNMENT OF ERROR**

The trial court erred as a matter of law – and thus abused its discretion – in granting plaintiff Lisby's motion to amend its forum non conveniens dismissal order and in adding a provision requiring PACCAR to stipulate that Washington's statute of repose, RCW 7.72.060, shall apply in the Texas proceedings. CP 361-62.

### **ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

Did the trial court err as a matter of law in conditioning its forum non conveniens dismissal order on PACCAR's stipulation that Washington's statute of repose applies in Texas, where *Myers* and its progeny forbid merging forum non conveniens with choice of law analysis in this manner, and where the trial court had correctly ruled that it would not address choice of law issues because they were properly reserved to the Texas court?

### **STATEMENT OF PROCEDURE**

The trial court granted PACCAR's motion to dismiss based on forum non conveniens. CP 334-35. This order is conditioned on PACCAR's agreement to waive the statute of limitations. *Id.* at 335. PACCAR did so. CP 336-38. The order also expressly notes that the trial court "declines to address any choice of law issues[,] which will properly be addressed to the Texas court." CP 335.

Lisby moved to amend the order, arguing that the dismissal should be without prejudice (CP 339-40)<sup>1</sup> and that the order should require PACCAR to waive “all limitations defenses, including any statute-of-repose defense.” CP 342. PACCAR’s response noted that no case law supports Lisby’s unprecedented request. CP 354. This is because a statute of repose is substantive law, not a mere statute of limitations whose waiver may condition a forum non conveniens dismissal. CP 354-55 (citing **1000 Virginia Ltd. P’ship v. Vertecs Corp.**, 158 Wn.2d 566, 574-75, 146 P.3d 423, 428 (2006) and **Galbraith Eng’g Consultants, Inc. v. Pochucha**, 290 S.W.3d 863 (Tex. 2009)). No case law permits a court to merge the forum non conveniens and choice of law analyses in this manner, or to strip a defendant of substantive defenses in another jurisdiction, much less to require a Texas court to apply Washington law. CP 355-56.

The trial court nonetheless granted Lisby’s motion, although in a different manner than she had asked. CP 361-62. Instead of requiring PACCAR to waive all limitations defenses, including statutes of repose, as Lisby had asked, the trial court conditioned dismissal on PACCAR’s “stipulation that Washington’s Statute of

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<sup>1</sup> PACCAR agreed to this request. CP 356.

Repose, RCW 7.72.060 shall apply in this proceeding [*sic*]<sup>2</sup> in Texas.” CP 362. And contrary to its prior order declining to address choice of law issues and deferring to the Texas court (CP 335) it now ruled: “All other choice of law issues will be addressed to the Texas court.” *Id.* (emphasis added).

PACCAR sought discretionary review. CP 363-66. The Commissioner’s ruling granting review (attached) states as follows:

- ◆ PACCAR has consistently argued that Texas law applies on all issues, regardless of the forum, and that choice of law is properly resolved in Texas, not in Washington. See **Myers**, 115 Wn.2d at 133 n.6 (plaintiff improperly merges forum non conveniens with choice of law).
- ◆ Authority provides that unlike the statute of limitations, the application of which is an issue of procedural law, application of the statute of repose is an issue of substantive law. [See, e.g., **1000 Virginia** and **Galbraith**, *supra*.]
- ◆ Authority also provides that once a court grants a forum non conveniens dismissal, the court in the new forum decides the applicable substantive law. See **Johnson**, 87 Wn.2d at 579 (if forum non conveniens dismissal is proper, court need not reach choice of law issue, as the new state will decide that issue); **Hill v. Jawanda Transp. Ltd.**, 96 Wn. App. 537, 546, 983 P.2d 666 (1999) (choice of law analysis is not necessary to forum non conveniens analysis; at most, choice of law may inform, but does not govern, a dismissal).
- ◆ Authority also provides that it is error to resolve a choice of law/conflict question without proper briefing and detailed analysis. See **Southwell v. Widing Transp., Inc.**, 101 Wn.2d 200, 205, 676 P.2d 477 (1984) (record insufficient to

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<sup>2</sup> The Judge’s handwritten “this proceeding” is likely just a typo, but if the court believed that its dismissal somehow transferred the same proceeding to another state, that would also be an error.

properly analyze choice of law issue); **Payne v. Saberhagen Holdings, Inc.**, 147 Wn. App. 17, 28-29, 190 P.3d 102 (2008) (stating choice of law analysis).

- ◆ The parties have cited no authority from anywhere in which a forum non conveniens dismissal was conditioned on a stipulation regarding a statute of repose.
- ◆ A plaintiff may not defeat a forum non conveniens motion on the ground that the substantive law in the alternative forum is less favorable than the present forum. **Piper Aircraft Co. v. Reyno**, 454 U.S. 235, 247, 254-55, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). Rather the remedy in the alternative forum must be “so clearly inadequate or unsatisfactory that it is no remedy at all.” *Id.*; accord **Hill**, 115 Wn. App. at 541.
- ◆ Thus, if “all choice of law issues are left to the Texas court, as the trial court initially ruled, that court would determine whether the Washington or Texas statute of repose should apply, as well as the effect on Lisby’s claims.”
- ◆ Discretionary review is PACCAR’s only avenue of redress. See **Youker v. Douglas Cnty.**, 162 Wn. App. 448, 460, 258 P.3d 60, *rev. denied*, 173 Wn.2d 1002 (2011); **Lincoln v. Transamerica Inv. Corp.**, 89 Wn.2d 571, 578, 573 P.2d 1316 (1978) (where plaintiff objects to venue decision, remedy is to seek discretionary review and not to wait until the trial is concluded and then ask an appellate court to set aside an unfavorable judgment on the basis that the venue was laid in the wrong county).

Lisby has now sued decedent Clayton Lisby’s employer, Hammer Construction Inc., in Wise County, Texas. CP 81; **Lisby v. Hammer Const. Co.**, Wise County District Court No. CV 13-01-039. Lisby has also sued the water-tank manufacturer in Stephens County, Oklahoma. CP 41; **Lisby v. Barkley**, Stephens County District Court No. CJ-2013-11R.

## ARGUMENT

**A. The trial court's forum non conveniens ruling is subject to abuse of discretion review, but an untenable legal conclusion is an abuse of discretion.**

This Court reviews a trial court's forum non conveniens ruling for an abuse of discretion. See, e.g., *Myers*, 115 Wn.2d at 128. The trial court abuses its discretion if its ruling is "manifestly unfair, unreasonable or untenable." *Id.* A ruling is untenable when it is an "errant interpretation of the law." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010) (citing *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007)).

**B. Although the trial court's order to dismiss based on forum non conveniens was properly conditioned on PACCAR waiving statutes of limitation, its choice of law ruling requiring PACCAR to stipulate that Washington's statute of repose applies in Texas is in error.**

The trial court's ruling conditioning its forum non conveniens dismissal on PACCAR's agreement to waive statutes of limitation is supported, and is not challenged here. See, e.g., *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1235 (9th Cir. 2011), *cert. denied*, 2013 U.S. LEXIS 3190 (Apr. 22, 2013); CP 336-38. This correct ruling is now the law of the case.

But unlike statutes of limitation, statutes of repose are substantive law terminating even the right to bring an action:

A statute of repose terminates a right of action after a specific time, even if the injury has not yet occurred. **Morse v. Toppenish**, 46 Wn. App. 60, 729 P.2d 638 (1986), *review denied*, 108 Wn.2d 1007 (1987).

The general authority is that statutes of repose are to be treated not as statutes of limitation, but as part of the body of a state's substantive law in making choice-of-law determinations. [Citations omitted.] We hold that statutes of repose do not fall under the statute of limitations borrowing statute, RCW 4.18.020, but instead may raise a conflict of substantive law.

**Rice v. Dow Chem. Co.**, 124 Wn.2d 205, 212, 875 P.2d 1213 (1994) (emphasis added); *accord* **1000 Virginia**, 158 Wn.2d at 574-75. The only question here is whether the trial court erred in conditioning dismissal on PACCAR's stipulation that Washington's statute of repose would apply in any Texas proceedings.

The answer is yes. In **Myers**, our Supreme Court rejected the plaintiffs' attempt to merge the forum non conveniens analysis with a choice of law analysis. 115 Wn.2d at 133 n.6. The Court noted that it had previously refused to reach choice of law until after it had decided the forum non conveniens issue in favor of Washington. *Id.* (citing **Johnson, supra**). While a procedural bar like an expired statute of limitations makes the alternative forum unavailable, a substantive difference in the law cannot do so. See, e.g., **Piper**, 454 U.S. at 247.

“Resolving a *forum non conveniens* motion does not entail any assumption by the court of substantive ‘law-declaring power.’” ***SinoChem Int’l Co. v. Malaysia Int’l Shipping Corp.***, 549 U.S. 422, 433, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007). The trial court improperly assumed that power here. It erred in doing so.

It also followed bad policy. Requiring a defendant to stipulate to Washington’s statute of repose in exchange for a *forum non conveniens* dismissal could encourage forum shopping to cherry-pick the more favorable law. That is, if this ruling were upheld, future litigants could use our courts to abrogate many substantive defenses provided elsewhere (e.g., comparative negligence or anti-spoliation laws) where they perceived our law as more favorable and could obtain Washington jurisdiction over the defendant. They would simply file here – no matter how inconvenient this forum – and ask the court to condition dismissal on waiving the defense. This strategy overrides the core purpose of *forum non conveniens* – getting the action into the proper forum – and undermines traditional notions of interstate comity.

The trial court could not (and did not) know which substantive claims Lisby may choose to bring if and when she files another Texas action, or which law the Texas court will chose to

apply. As a practical matter, then, choice of law decisions must be left to the new forum: only that court can and may decide which substantive law properly applies to any given claim, much less which specific provisions of law may apply. And the new forum cannot make any of these decisions until Lisby files there. This Court should reverse the stipulation condition and dismiss, giving the original dismissal order effect.

**C. The trial court erred as a matter of law in contradicting its own correct ruling that choice of law is reserved to the Texas court, permitting an end-run around forum non conveniens.**

Similarly, the trial court also erred as a matter of law in contradicting its own correct ruling that choice of law decisions should be made by the Texas court. *Compare* CP 335 *with* CP 362. Requiring a defendant to stipulate to a Washington statute of repose as a condition for dismissal is little different than simply stripping PACCAR of a substantive defense, without analysis. The trial court erred in doing so.

As this Court held in *Hill*, “the fact that a particular claim cannot be raised in a foreign forum does not establish that it is inadequate.” 96 Wn. App. at 543 (following *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 610 (6th Cir. 1984) and

**Capital Currency Exch. N.V. v. National Westminster Bank PLC**, 155 F.3d 603, 611 (2d Cir. 1998)). Indeed, **Piper** itself states that plaintiffs may not defeat a motion to dismiss on forum non conveniens grounds merely by showing that the substantive law to be applied in the alternative forum would be less favorable to the plaintiffs than that of their chosen forum. 454 U.S. at 247.

Under the trial court's unchallenged rulings, Texas is adequate, available, and more convenient. Lisby's attempted end-run is improper. This Court should reverse and dismiss.

**D. The trial court also erred in ruling on the choice of law issue because the parties did not ask the court to decide the issue or fully brief it, and the court did not actually engage in any choice of law analysis.**

In Washington, courts do not address choice of law issues without adequate briefing. See, e.g., **Southwell**, 101 Wn.2d at 205 (insufficient record to properly analyze choice of law issue); **Payne**, 147 Wn. App. at 28-29 (stating proper choice of law analysis). Here, the parties did not fully brief this issue.<sup>3</sup>

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<sup>3</sup> In a footnote to its motion to amend, Lisby made a brief argument that under "Texas's statute of repose, Plaintiff's claims would likely be barred, whereas Washington's statute of propose [sic] would allow Plaintiff to establish that [the] incident in question occurred during the product's useful life." CP 340 n.2. But Lisby did not analyze which state's law should apply. *Id.*

PACCAR did note in passing (in its motion to dismiss) that this action should be governed by Texas law, no matter where it is heard. CP 55-56. It asserted that the state with the “most significant relationship” to the action is Texas, where the alleged tort and all injuries occurred, and where the decedent, the plaintiffs, and many, many witnesses reside. *See generally, e.g.*, CP 53-60.<sup>4</sup> But PACCAR also correctly noted that choice of law is not directly implicated in the forum non conveniens analysis. CP 55-56 & n.72 (citing, *e.g.*, **Myers**, 115 Wn.2d at 129; **Hill**, 96 Wn. App. at 546; *see also Piper*, 454 U.S. at 247). Lisby did not respond. CP 143-55.

In short, the trial court correctly decided not to address choice of law, but then ruled incorrectly on a choice of law issue that was not sufficiently briefed or argued. PACCAR has already agreed to Texas jurisdiction and waived statutes of limitation. The Court should reverse the dismissal order containing the statute-of-repose-stipulation condition and dismiss, leaving the prior dismissal order intact.

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<sup>4</sup> Both Texas and Washington follow the “most significant relationship” test for torts choice of law issues. CP 56 n.73 (citing **Haberman v. Wash. Pub. Power Supply Sys.**, 109 Wn.2d 107, 134, 744 P.2d 1032 (1987) (citing **Southwell**, 101 Wn.2d at 204)).

## CONCLUSION

For the reasons stated, this Court should reverse the order containing the statute-of-repose-stipulation condition and dismiss.

RESPECTFULLY SUBMITTED this 30th day of April, 2013.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF PETITIONER** postage prepaid, via U.S. mail on the 30th day of April 2013, to the following counsel of record at the following addresses:

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CASE #: 69008-6-I  
Cassie Lisby, Resp. vs. PACCAR, Inc., et al., Petitioners

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on December 18, 2012:

**RULING ON DISCRETIONARY REVIEW**

**Lisby v. PACCAR, Inc.**

**No. 69008-6-I**

**December 18, 2012**

This matter arises from a wrongful death action involving a vehicle rollover accident in Fort Worth Texas in January 2011. The Kenworth truck was manufactured in Ohio in 1990. Kenworth Truck Co. is an unincorporated division of PACCAR, Inc., a Delaware corporation with its principal place of business in Bellevue, Washington. The decedent's widow, Cassie Lisby, as personal representative and legal guardian of her minor child, filed the action in King County Superior Court.

PACCAR moved to dismiss the action based on forum non conveniens, citing a host of reasons why the litigation should be pursued in Texas. Lisby vigorously opposed the motion, arguing that the balance of factors did not strongly favor litigation in Texas. Alternatively, Lisby argued that if the court were inclined to grant dismissal of the Washington action, it should condition the dismissal on PACCAR actually litigating the matter in Texas and agreeing to waive any limitations defenses, including the statute of repose. Lisby noted that it appeared likely her claims would not be barred under the Washington statute of repose, but it appeared possible her claims against PACCAR could be barred under the Texas statute of repose. She argued:

Washington's statute of repose in a products liability case such as this is generally based on the useful life of the product, . . . whereas Texas generally has 15-year limitation with a few minor exceptions, none of which are likely present here . . . . Washington has a rebuttable presumption that if a harm occurs more than 12 years after the time of delivery, then the harm occurred after the product's useful life, but that presumption can be overcome by a preponderance of the evidence. . . . From what little and incomplete discovery has been conducted to date, it appears that the truck was manufactured in 1990, and thus was likely sold some time shortly thereafter. . . . Under Texas's statute of repose, Plaintiff's claims would likely be barred, whereas Washington's statute of repose would allow Plaintiff to establish that incident in question occurred during the product's useful life.

In reply, regarding Lisby's argument that the court should condition any dismissal on waiver of statute of repose defenses, PACCAR argued in part:

Plaintiff's argument is flawed for several reasons. First, while some states' statutes and authorities permit forum non conveniens dismissal to be conditioned on a defendant's waiver of the statute of *limitations* defense, Plaintiff has offered no authority for conditioning dismissal on waiver of the statute of *repose* defense. The two defenses are very different . . . . Second, Plaintiff improperly injects choice of law issues into the forum non conveniens analysis by asking the Court to jump ahead and strip PACCAR of "any statute of repose defenses" if the case is transferred to Texas, where she assumes Texas law will apply. Plaintiff also appears to assume that if the case remains here, Washington law will apply. It is PACCAR's position that Texas law applies to this action regardless of venue. But that issue is not before the Court and Plaintiff's suggested alternative of conditioning dismissal on a waiver of the repose defense is an attempted end run around the future choice of law question and would be tantamount to a summary judgment on PACCAR's repose defense. . . .

On May 9, 2012, the trial court granted PACCAR's motion:

The court has balanced the private and public interest factors (as set forth in the motion) and as set forth in Myers v. Boeing, 115 Wn.2d 123 [1990] and finds those factors strongly favor trial in the state of Texas and strongly disfavor trial in Washington. Dismissal is conditioned upon defendant PACCAR, Inc.'s waiver of statute of limitations, however, this court declines to address any choice of law issues which will properly be addressed to the Texas court.

Lisby filed a motion to amend and/or clarify the order, and PACCAR opposed it. On June 5, 2012, the trial court granted Lisby's motion to amend:

IT IS HEREBY ORDERED that Defendant PACCAR, Inc.'s motion to dismiss based upon the doctrine of forum non conveniens is granted without prejudice . Dismissal is conditioned upon defendant PACCAR Inc.'s waiver of the statute of limitations and stipulation that Washington's statute of repose , RCW 7.72.060 shall apply in the proceeding in Texas. All other choice of law issues will be addressed to the Texas court.

PACCAR seeks discretionary review of this order under RAP 2.3(b)(1), obvious error that renders further proceedings useless, or (2), probable error that substantially alters the status quo or substantially limits PACCAR's freedom to act. Lisby does not seek review of the trial court's decision that balancing the public and private factors strongly favors trial in Texas. The trial court stayed the proceedings pending a decision on discretionary review. I conclude that review is warranted.

First, contrary to Lisby's assertion at oral argument, PACCAR has not changed its position regarding the applicability of Texas law. As it did below, PACCAR takes the position that whether the matter is in Washington or Texas, it will argue that Texas law should apply on all issues, but that issue is properly resolved by the Texas court, not Washington. See Myers v. Boeing Co., 115 Wn.2d 123, 133 n. 6, 794 P.2d 1272 (1990) (plaintiff's argument improperly merges forum non conveniens argument with choice of law analysis).

Second, PACCAR has cited authority that unlike the statute of limitations, the application of which is an issue of procedural law, application of the statute of repose is an issue of substantive law. It has also cited authority that once a court grants a forum non conveniens dismissal, it is the function of the court in the new forum to decide the applicable substantive law. See Johnson v. Spider Staging Corp., 87 Wn.2d 577, 579, 555 P.2d 997 (1976) (if trial court properly granted forum non conveniens dismissal, we need not reach choice of law issue, as Kansas will assume jurisdiction and determine the applicable law); Hill v. Jawanda Transport Ltd., 96 Wn. App. 537, 546, 983 P.2d 666( 1999) (choice of law analysis is not a necessary element of forum non conveniens doctrine; at most resolution of a choice of law question informs but does not govern trial court's forum non conveniens dismissal).

Third, PACCAR has cited authority supporting its position that it was error for the trial court to resolve a choice of law/conflict question without briefing and the detailed analysis required. See Southwell v. Widing Transportation, Inc., 101 Wn.2d 200, 205, 676 P.2d 477 (1984) (parties have not presented court with a record that is sufficiently developed to enable court to undertake the analysis necessary for proper resolution of choice of law issues); Payne v. Saberhagen Holdings, Inc., 147 Wn. App. 17, 28-29, 190 P.3d 102 (2008) (setting out step-by-step choice of law analysis).

Fourth, the parties have cited no authority from Washington or Texas, or for that matter any jurisdiction, where a forum non conveniens dismissal was conditioned upon a stipulation to a particular jurisdiction's statute of repose.

Fifth, Lisby argues that the purpose of allowing the trial court to condition its forum non conveniens dismissal is to ensure that the alternative forum is actually available. The standard may be higher. See Piper Aircraft Co. v. Reno, 454 U.S. 235, 247, 255, 102 S. Ct. 252 (1981) (lower court erred in holding plaintiff may defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable than the present forum; if the remedy provided by the alternative forum is *so clearly inadequate or unsatisfactory that it is no remedy at all*, the unfavorable change in law may be given substantial weight); Hill, 115 Wn. App. 540-41 (applying Piper). If all choice of law issues are left to the Texas court, as the trial court initially ruled, that court would determine whether the Washington or Texas statute of repose should apply, as well as the effect on Lisby's claims.

Finally, and most importantly, it is undisputed that granting discretionary review is effectively PACCAR's only opportunity to challenge the trial court's decision conditioning forum non conveniens dismissal upon PACCAR's stipulation that the Washington statute of repose will apply in Texas. See Youker v. Douglas County, 162 Wn. App. 448, 460, 258 P.3d 60 (2011); Lincoln v. Transamerica Investment Corp., 89 Wn.2d 571, 578, 573 P.2d 1316 (1978) (where plaintiff objects to venue decision, remedy is to seek discretionary review and not to wait until the trial is concluded and then ask an appellate court to set aside an unfavorable judgment on the basis that the venue was laid in the wrong county).

Therefore, it is  
ORDERED that discretionary review is granted.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

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