

No: 35247-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CHARLES SALES and
PATRICIA SALES, a married couple,

Appellants,

v.

WEYERHAEUSER COMPANY,
a Washington corporation,

Respondents.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR	1
III. STATEMENT OF THE CASE	2
<i>A. Background of Parties</i>	2
<i>B. Federal MDL Proceeding</i>	5
<i>C. Procedural History</i>	10
IV. ARGUMENT	16
<i>A. Standard of Review</i>	16
<i>B. Plaintiff's Choice of Forum Should Be Accorded Substantial Deference and Is Rarely Disturbed.</i>	16
<i>C. First and Second Assignments of Error — The Trial Court Erred as a Matter of Law By Failing to:</i>	17
<i>(1) Require Weyerhaeuser to Meet Its Burden to Prove that Arkansas Is an Adequate Alternative Forum Where Plaintiffs' Claim Would In Fact Be Litigated;</i>	
<i>(2) Consider the Overwhelming Evidence that Dismissal Would Mean that This Case is Destined for the MDL; and</i>	
<i>(3) Require Weyerhaeuser to Agree to Litigate in Arkansas as a Condition of Dismissal</i>	

D. Third Assignment of Error — The Trial Court Abused Its Discretion in Dismissing this Action Without Considering Whether the Ends of Justice Are Better Served By Allowing Plaintiff, Who is Terminally Ill, to Litigate this Case in his Chosen Washington Forum Where He Is Most Likely to Be Able to Testify at Trial Before He Dies. 24

E. Fourth Assignment of Error — The Court Erred in Failing to Conclude, as It was Required to Do, that the Myers Factors “Strongly Favor” or “Weigh Heavily” in Favor of the Arkansas State Forum. 28

V. CONCLUSION 34

TABLE OF AUTHORITIES

<u>CASES</u>	Page
<u>Baker v. Hilton</u> , 64 Wn.2d., 964, at 965, 395 P.2d. (1964)	16
<u>Bank of America,N.A. v. Miller</u> , 108 Wn. App. 745, 33 P.3d 91 (2001)	33
<u>Ceramic Corp. of America v. INKA Maritime Corp.</u> , 1 F.3d 947 (9th Cir. 1993)	18, 22, 24
<u>Ceramic Corp. of America v. INKA Maritime Corp.</u> , 1 F.3d 947 (9th Cir. 1993)	18, 22
<u>Demelash v. Ross Stores, Inc.</u> , 105 Wn. App. 508, 530, 20 P.3d 447 (2001)	16, 19
<u>Dix v . ICT Group, Inc.</u> 125 Wn. App. 929, 106 P.3d 841 (2005)	33
<u>El-Fadl v. Central Bank of Jordan</u> , 75 F.3d 668, 677 (D.C. Cir. 1996)	17, 18, 19, 24
<u>Erwin v. Cotter Health Centers, Inc.</u> , 123 Wn. App. 143 135 P.3d 547 (Wn. App. Div. 3, 2006)	33
<u>Gulf Oil Corp v. Gilbert</u> , 330 U.S. 501, 508, 67 S. Ct. 839 (1947)	17, 30
<u>Hatley v. Saberhagen Holdings, Inc.</u> 118 Wn.App. 485, 487, 76 P.3d 255 (2003)	16
<u>Hill v. Jawanda Transport, Ltd.</u> 96 Wn. App. 537, 541 & n.4, 983 P.2d 666 (1999)	17, 24, 27
<u>In re Asbestos Product Liability Litigation</u> (No. V1), 771 F. Supp. 415 (Jud. Pan. Mult. Lit. 1991)	5
<u>In re Maine Asbestos Cases</u> , 44 F. Supp. 2d 368 (D. Me. 1999)	6
<u>Johnson v. Spider Staging Corp.</u> , 87 Wn.2d 577, 555 P.2d 997 (1976)	16, 27, 29, 30
<u>Looney v. Superior Court</u> , 16 Cal. App. 4th 521 (1993)	25
<u>Lynch v. Pack</u> , 68 Wn. App. 626, 635, 846 P.2d 542 (1993)	27
<u>Madden v. Able Supply Co.</u> , 205 F. Supp. 2d 695, 702 (S.D. Tex. 2002)	7
<u>Mercier v. Sheraton International, Inc.</u> , 935 F.2d 419, 426 (1st Cir. 1991)	18, 24
<u>Myers v. Boeing Co.</u> , 115 Wn.2d 123, 141, 794 P.2d 1272 (1990)	2, 12, 13, 17, 20, 21,

	26, 27, 28, 29, 30 27
<u>Piper Aircraft Co. v. Reyno</u> , 454 U.S. 235, 249-50, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).	
<u>Ravelo Monegro v. Rosa</u> , 211 F.3d 509, 514 (9th Cir. 2000)	18, 24
<u>Sablic v. Armada Shipping APS</u> , 973 F. Supp. 745, 748 (S.D. Tex. 1997)	20
<u>Tyee Constr. Co. v. Dulien Steel Prods, Inc.</u> , 62 Wn.2d 106, 116, 381 P.2d 245 (1963)	28
<u>Werner v. Werner</u> , 84 Wn.2d 360, 378, 526 P.2d 370 (1974)	21, 27, 30
<u>Wolf v. Boeing Co.</u> , 61 Wn. App. 316, 329, 810 P.2d 943 (1991)	21, 30

<u>STATUTES</u>	Page
RCW 4.44.025	26
28 U.S.C. § 1407	5
28 U.S.C. § 1407(a)	5
28 U.S.C. § 1332	11
28 U.S.C. § 1441	11
28 U.S.C. § 1441(b)	11
N.Y.C.P.L.R. § 3403	26
R.I. Gen. Laws § 9-2-18	26
Nev. Rev. Stat. Ann. 16.025(1)(1998)	26
LA C.C.P. Art. 1573 (2004)	26

<u>PUBLICATIONS</u>	Page
Rand Institute for Civil Justice	6

I. INTRODUCTION

This is a personal injury action arising from Appellant Charles Sales' diagnosis of mesothelioma, an incurable and invariably fatal cancer caused by exposure to asbestos fibers. Mr. Sales, a 22-year old Arkansas resident, was diagnosed with mesothelioma in January 2005 and filed this action against Weyerhaeuser Company, a Washington corporation, in Pierce County Superior Court. On June 26, 2006, the trial court dismissed this action under the doctrine of *forum non conveniens*. See CP 156-60. Appellants appeal this order and ask this Court to reverse the trial court's dismissal.

II. ASSIGNMENTS OF ERROR

1. The trial court applied an improper legal standard in failing to require Weyerhaeuser to meet its initial burden of proving that the proposed alternative forum of Arkansas was an adequate alternative forum, because Weyerhaeuser refused to agree to litigate this case in an Arkansas court.

2. Irrespective of the burden of proof, the trial court erred in believing it could not consider the overwhelming evidence that, if dismissed, the case would be destined for the federal MDL and that it could not require Weyerhaeuser to agree to litigate in Arkansas as a condition of dismissing the Washington action.

3. The trial court abused its discretion in failing to consider the overriding factor that the ends of justice are better served by allowing Mr. Sales, who is terminally ill, to litigate this case in Washington, his forum of choice, where he is substantially more likely to be able to testify at trial before he dies.

4. The trial court erred in dismissing this action, because it failed to find that the *forum non conveniens* factors set forth in Myers v. Boeing Co., 115 Wn.2d 123, 141, 794 P.2d 1272 (1990) “strongly favor” or “weigh heavily” in favor of Weyerhaeuser’s proposed alternative forum in Arkansas, as required by Washington case law to overcome the strong judicial deference to Plaintiffs’ choice of forum, particularly in light of the fact that 1) Weyerhaeuser is a Washington corporation that was sued in a Washington forum just minutes away from its corporate headquarters; 2) Weyerhaeuser’s alleged corporate misconduct originated at its Washington corporate headquarters; and 3) key material witnesses and documents are located in Washington.

III. STATEMENT OF THE CASE

A. Background of Parties.

Plaintiff Charles Joby Sales is a 22 year-old living mesothelioma victim who lives in Hot Springs, Arkansas. Clerk’s Papers (“CP”) at 6. Mr. Sales was exposed to asbestos from his father “Chuck” who brought

asbestos dust into the family home from his work at a Weyerhaeuser mill in Mountain Pine, Arkansas between 1984 and 1992. CP at 7. The elder Mr. Sales worked with and around asbestos-containing materials at this mill and brought dust from that mill on his clothing into the family home, thereby exposing his son to this poison. Id.

Mesothelioma is a terminal cancer of which asbestos is the only known cause. It is invariably fatal and most individuals who contract the cancer die within six to eighteen months. CP at 29-30. Plaintiff was diagnosed with mesothelioma in January, 2005 and thus is already near the outer limits of his remaining life expectancy. CP at 32-33.

Weyerhaeuser has been a Washington corporation for 106 years. CP at 108. It advertises on its website that it has been a Fortune 200 company since 1956, presently ranked 89th. It employs 54,000 people in 19 countries and is headquartered in Federal Way, Washington, between Seattle and Tacoma. CP at 109-111. It has operations in at least a dozen states throughout the United States. CP at 109. Weyerhaeuser has been aware of asbestos hazards since at least 1972. CP at 199-201. Joseph Wendlick, a Federal Way, Washington resident, is a former employee of Weyerhaeuser who served as an in-house industrial hygienist from 1972 through the 1980s. CP at 200. Working out of Weyerhaeuser's corporate headquarters which were then in Tacoma, Mr. Wendlick "became

responsible for every operating division in the entire company as it relates to workers health.” Id. He lived and worked in Washington State, but he traveled to every single North American Weyerhaeuser operation between 1972 and 1978. Id. Mr. Wendlick is a critical witness regarding Weyerhaeuser’s corporate knowledge of the hazards of asbestos in the workplace at the time Chuck Sales worked there and exposed his small child to asbestos fibers.

Mr. Wendlick’s testimony is supported by Weyerhaeuser corporate documents demonstrating his work in the area of industrial hygiene, particularly in the area of asbestos exposure. In 1973, Weyerhaeuser’s corporate headquarters authorized a “confidential” assessment of asbestos exposures at its out-of-state facilities. CP at 217-230. This “confidential” memorandum specifically identified industrial hygiene practices that would protect family members of Weyerhaeuser employees from asbestos contamination arising from the employee’s work clothes. CP at 222, 224. See also CP at 249, 275-276. These documents demonstrate that Mr. Wendlick and others at corporate headquarters in Washington State were making decisions with respect to the monitoring of Weyerhaeuser facilities nationwide for asbestos exposure to employees and their families. They show that Weyerhaeuser knew and had actual knowledge of the hazards of asbestos exposure—including the risk of workers and

their families developing mesothelioma. And they show that Weyerhaeuser managed its asbestos problem at the corporate level in Washington State — not in Arkansas.

B. Federal MDL Proceeding.

On July 29, 1991, the Judicial Panel on Multi-District Litigation ("MDL Panel") issued an Order and Opinion in an aggregation of asbestos personal injury cases captioned In re Asbestos Product Liability Litigation (No. V1), 771 F. Supp. 415 (Jud. Pan. Mult. Lit. 1991). By that Order, the MDL Panel transferred *en masse* some 21,937 asbestos personal injury cases to that MDL proceeding in the Eastern District of Pennsylvania (the "MDL proceeding" or "MDL"). As of January 2006, an additional 80,074 asbestos personal injury cases have been transferred to that MDL proceeding, and the number continues to grow. CP 290.

The statute empowering the transfer of these cases to the MDL proceeding is 28 U.S.C § 1407. The stated purpose of transfers pursuant to that statute is to "coordinate or consolidate pretrial proceedings regarding common issues of law and fact for the convenience of the parties and to promote the just and efficient conduct of such actions." 28 U.S.C. §1407. Section 1407(a) specifically states that each action so transferred shall be remanded by the panel at or before the conclusion of

such pretrial proceedings. Id. Except in limited circumstances, such remand is to be to the transferor court. Id.

In this MDL framework, however, the overwhelming majority of cases are never remanded for trial at all, and those that are remanded languish in the Eastern District of Pennsylvania for years before remand. Recently, the Rand Institute for Civil Justice issued a leading study on the current status of asbestos litigation in the United States (the “Rand Study”). CP 306-411. In discussing the MDL in the Eastern District of Pennsylvania, the Rand Study found that, as of 2002, of the 95,954 actions transferred to the MDL for consolidated pretrial proceedings, only 265 of the actions had been transferred back to their originating federal districts for trial. CP 342. In other words, during the first eleven years of the MDL, less than *one third of one percent* (265 of 95,954 or 0.27 percent) of the cases transferred to the MDL have returned to their originating districts for trial. Id.

Given this stunning reality, several courts have expressly recognized that because no discovery or trials can occur in the MDL, transfer to federal court effectively precludes asbestos plaintiffs from litigating their claims. For example, in In re Maine Asbestos Cases, 44 F. Supp. 2d 368 (D. Me. 1999), the district court remanded several cases to

state court in order to avoid significant delays that would have resulted from a transfer to the MDL, finding that:

[I]f these claims return to state court, they will proceed to resolution. If they remain in federal court, they will encounter significant delay upon their transfer through the panel on multidistrict litigation to the Eastern District of Pennsylvania where no asbestos trials or discovery takes place in deference to global settlement efforts. This delay is of economic benefit to the defendants and imposes costs on the plaintiffs.

Id. at 373 n. 2. Similarly, in Madden v. Able Supply Co., 205 F. Supp. 2d 695, 702 (S.D. Tex. 2002), the court observed: “[T]here are thousands of asbestos cases pending in [the MDL proceeding] and, if history be any indicator, Plaintiff’s claims against the Remaining Defendants will not be heard for many years. Keeping these claims in federal court will not increase efficiency and expediency.”

These sobering statistics and judicial observations are corroborated by the recent experience of Plaintiffs’ counsel in their other asbestos personal injury cases that were presented and made part of the record before the trial court. In the year prior to Weyerhaeuser’s motion, three of Plaintiffs’ counsel’s other mesothelioma cases were transferred to the Eastern District of Pennsylvania after being removed to federal court. CP 192-194. None of those cases had progressed after their transfer to the MDL, and none of them had been returned to the originating federal

districts for trial. CP 294. They simply fell into the procedural “black hole” and indefinite delay that has come to be associated with the MDL.

Perhaps most instructive is the case of Leo Sweeney—a case that remains before the MDL over a year after it was removed and transferred to the MDL, despite a timely *and unopposed* motion to remand. The Sweeney case demonstrates the magnitude of the obstacles and delays that a mesothelioma victim faces when his case is transferred to the MDL. Mr. Sweeney contracted mesothelioma in 2005. CP 192. He filed his case in King County Superior Court on August 24, 2005, and defendant removed it to federal court on September 27, 2005. The removing defendant then filed a “Notice of Tag Along Action” in federal court, seeking to transfer the case from the Western District of Washington to the consolidated MDL litigation in the Eastern District of Pennsylvania. CP 193. While Mr. Sweeney’s motion to remand was pending, the MDL Panel issued a “Conditional Transfer Order,” which “conditionally” transferred the case to Pennsylvania unless Mr. Sweeney filed an objection with the MDL within 15 days.

The MDL panel then transferred Mr. Sweeney’s case to Pennsylvania as part of an omnibus order transferring some 62 cases from across the nation. CP 289-304. The Court never addressed (nor is there

any indication that it was even aware of) the fact that Mr. Sweeney's counsel never received the conditional transfer order. Nor has Mr. Sweeney's motion to remand ever been ruled on. The Western District of Washington was divested of jurisdiction as soon as the MDL's transfer order was filed in the clerk's office, thus depriving the district judge before whom the remand motion was pending of the ability to rule on it. Neither the MDL panel nor the judge handling the case in Pennsylvania has issued an order on the motion to remand, and there is no indication as of the filing of this brief that the motion to remand is even scheduled for a resolution. CP 193-194

Meanwhile, Mr. Sweeney's original March 6, 2006 trial date has come and gone. His case remains unresolved. His health grows more precarious by the day. CP 194. Unlike many plaintiffs with mesothelioma, he lived long enough so that he could have attended his trial if it had occurred as originally scheduled in state court. Instead, his case is lost in the MDL quagmire, with no hope of a trial before he dies. A jury will never hear his live testimony, and that is what defendants who remove and transfer cases to the MDL want. Mr. Sweeney's case is a fair and accurate predictor of the future of this case if the trial court's dismissal is upheld and Plaintiffs are forced to re-file the case in Arkansas.

C. Procedural History.

This action was filed in Pierce County Superior Court on May 18, 2006. CP 5. Plaintiffs filed their Preliminary Disclosure of Witnesses in compliance with the Case Scheduling Order. CP 100-107. Of the fifteen witnesses identified by Plaintiffs, six reside in the State of Washington, three reside in Arkansas, one lives in British Columbia and the remaining expert witnesses reside in other states around the country. Id. The Arkansas witnesses are Plaintiffs Charles and Patricia Sales and plaintiff's father -- witnesses who were willing to provide testimony in Washington without a subpoena. CP 106. By contrast, two of the five Washington witnesses identified by Plaintiffs have no current affiliation with Weyerhaeuser, and the only way to compel their attendance at trial is for this action to proceed in Washington. CP 106.

On June 13, 2006, Weyerhaeuser filed a motion to dismiss based on the doctrine of *forum non conveniens*. CP 45-55. It argued that Arkansas was a viable alternative and a better and more appropriate forum because, it asserted, many fact witnesses live in Arkansas and many of the traditional private and public interest factors bearing on *forum non*

conveniens motions (*i.e.*, where the events giving rise to the injury occurred) favored the Arkansas state court forum. Id.¹

Plaintiffs responded that the Arkansas state court proposed by Weyerhaeuser was not a genuine alternative forum because if Plaintiffs were required to dismiss their case here and re-file it there, Weyerhaeuser would remove the case to federal court based on diversity jurisdiction, and the case would promptly be transferred to the MDL proceeding in the Eastern District of Pennsylvania — a strategy Weyerhaeuser could not employ in its home state of Washington.² Plaintiffs further argued that the only real alternative forum, the MDL, is inadequate for all the reasons noted above. Given his precarious health, Mr. Sales explained to the trial court that the MDL was extremely inconvenient and unjust for him compared to his chosen Washington forum where he stood a fighting chance to testify at trial. Verbatim Report of Proceedings (“RP”), June 23, 2006, at 20-21.

¹ Weyerhaeuser never identified the Arkansas witnesses it intended to call in this case, but merely asserted that such unidentified witnesses would be called at trial. In contrast, Plaintiffs did identify Washington state residents it intended to call at trial, including former Weyerhaeuser employees.

² Under 28 USC §§ 1332 and 1441, if Plaintiff, an Arkansas resident, is required to re-file this case in state court in Arkansas against Weyerhaeuser, a Washington corporation, Weyerhaeuser may immediately remove the action to the federal district court in Arkansas in which the state court is located. In contrast, because Weyerhaeuser is a Washington corporation and thus a citizen of the state in which this action was filed, it could not remove the case to federal district court in the Western District of Washington, and could not delay the case by transferring it to the MDL Panel when the case was filed in state court in Washington. 28 U.S.C. § 1441(b).

During oral argument, the trial court asked Weyerhaeuser whether it would agree to litigate in the Arkansas state court that it proposed was a more convenient alternative forum and to waive its right to remove to federal court and transfer to the MDL. RP, June 23, 2006, at 25-26. Weyerhaeuser declined to do so. Id.

In dismissing the case, the trial court failed to (1) address whether Weyerhaeuser had met its burden of establishing that Arkansas state court was an adequate alternative forum when Weyerhaeuser refused to agree to litigate the case in Arkansas state court, (2) condition its dismissal on Weyerhaeuser's agreement to litigate the case in the Arkansas state court, or (3) consider whether, in the absence of such agreement, the case would languish in the MDL proceeding and that the ends of justice thus required denial of Weyerhaeuser's motion.

Instead, the court simply stated: "The Court cannot speculate on whether or not this case would be removed to Federal Court by the Defendant or what the status is of cases relating to this subject matter in the federal system." Id. Having excluded such fundamental considerations, the trial court then weighed the Myers factors and concluded that they leaned in favor of litigating the case in Arkansas. CP 156-162. The trial court did not, however, find that those factors "strongly weigh" in favor of Arkansas. Id.

After the trial court issued its order, Plaintiffs moved for reconsideration and submitted additional relevant materials, including deposition excerpts from the former Weyerhaeuser industrial hygienist Joseph Wendlick and Weyerhaeuser corporate documents generated at corporate headquarters in Washington addressing the dangers of asbestos and means of ameliorating that danger to Weyerhaeuser workers. CP at 161-414. These materials further established why the trial court should have deferred to Plaintiffs' choice of a Washington forum based on the public and private interest factors set forth in Myers.

Plaintiffs' primary focus on reconsideration, however, continued to be that Weyerhaeuser could not establish that the Arkansas state court forum proposed by Weyerhaeuser was an adequate alternative forum, because Weyerhaeuser refused to agree to litigate in that forum if the case were re-filed there, which the trial court should require Weyerhaeuser to do in order to meet its burden of proof. As Plaintiffs' counsel stated at the reconsideration hearing:

I have been practicing law for 15 years. I can count on one hand the number of times I've sought reconsideration. In this case I feel compelled to do so, however, because of the practical affect of the Courts' ruling, which I am confident to a moral certainty will be to deny this man a chance to have his day in court before the time he passes away, which is very close. The key basis of the case law in Washington establishes that when a Court grants a motion to dismiss on *forum non conveniens* the court does not wash its hands of

the case, but rather the Court ensures that substantial justice can be obtained in the jurisdiction to which the transfer is sought. . . Therefore, *I believe, your Honor, that in order to effectuate this transfer under the interest of justice and under Washington law the Court should have asked Weyerhaeuser to stipulate not to remove the case to federal court.*

RP, July 28, 2006, at 4-5 (emphasis added). Plaintiffs further argued:

All they [Weyerhaeuser] have to do is stipulate and say they won't remove the case and they haven't done that. . . . All we want is a chance for this man to have his day in court before he dies.

RP, July 28, 2006, at 13.

Despite Weyerhaeuser's refusal and plaintiffs' entreaty, the trial court never required Weyerhaeuser to agree that the case would be litigated in the state court in Arkansas. Rather, the trial court agreed with Weyerhaeuser's counsel, who stated: "We don't know what defendants will be in the case when the case is re-filed, whether there will be federal jurisdiction, whether it will be exercised. . . . It continues to be speculative what would happen in this case . . ." RP, July 28, 2006, at 10. The trial court also expressed the view that it was "inappropriate for Counsel to argue about something that may or may not occur," *Id.* Yet as argued below, by granting dismissal without requiring Weyerhaeuser to agree to litigate in Arkansas state court, the entire foundation for the trial court's

decision — that trial would be more convenient in Arkansas — was based on sheer speculation.

While the trial court appeared moved by the gravity of Mr. Sales' predicament, it erroneously concluded that it had no legal authority to require Weyerhaeuser to agree to litigate in the alternative forum proposed by Weyerhaeuser, and that whether or not Weyerhaeuser agreed to do so was irrelevant to its *forum non conveniens* decision:

I don't think anybody who is involved in this case doesn't recognize the human issues that are involved in terms of this plaintiff having a very serious diagnosis and a life threatening illness . . . [I]t reminds me of the instruction that I give to jurors before I start every case, and that's whether or not a juror can be an impartial jury in the sense that they will follow the instructions regarding the laws despite what their own personal belief may be. This is such a case for the Bench in the sense from an emotional viewpoint, its very tempting to say I'll do whatever I can to assist your client in getting his day in court. . . .

[But] I do believe that I would be speculating in terms of what kinds of problems this case will face if I were simply to keep it here, simply to avoid the diversity of jurisdiction issue that Counsel was so concerned about, and the fact that it may end up in Pennsylvania. *In short, I don't believe I have any authority under any of the cases that have been submitted for the plaintiff to retain jurisdiction simply for the reason as indicated by the plaintiff. Maybe if this case goes to a higher court they will have a different opinion of say that this is now a legitimate factor that the Court can take into consideration, but I don't believe I'd be following Washington law if I retained jurisdiction for that reason.*

RP, July 28, 2006, at 13-15. (emphasis added). Based on these findings, and on this record, the trial court denied Plaintiffs' motion for reconsideration, but found that "time is of the essence in any appellate review of this matter." CP 464. Plaintiff then filed this timely appeal. CP 473.

IV. ARGUMENT

A. Standard of Review.

This Court reviews a dismissal based on *forum non conveniens* for an abuse of discretion. Johnson v. Spider Staging Corp., 87 Wn.2d 577, 555 P.2d 997 (1976). A trial court "necessarily abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 530, 20 P.3d 447 (2001).

B. Plaintiff's Choice of Forum Should Be Accorded Substantial Deference and Is Rarely Disturbed.

Washington courts hold that forum choice generally "lies with the plaintiff in the first instance." Baker v. Hilton, 64 Wn.2d., 964, at 965, 395 P.2d. (1964); Hatley v. Saberhagen Holdings, Inc. 118 Wn.App. 485, 487, 76 P.3d 255 (2003).³ Thus, "the plaintiff's choice of forum should

³ Hatley was an asbestos case filed by the undersigned law firm in Pierce County Superior Court and transferred to King County This Court granted plaintiffs motion for discretionary review and reversed the transfer, holding that the action should have been maintained in Pierce County.

rarely be disturbed.” Gulf Oil Corp v. Gilbert, 330 U.S. 501, 508, 67 S. Ct. 839 (1947). A plaintiff is not permitted to choose an inconvenient forum to vex or harass a defendant, but the court must respect the plaintiff’s choice of forum unless doing so constitutes a manifest injustice to the defendant. Myers v. Boeing Co., 115 Wn.2d 123, 128, 794 P.2d 1272 (1990) (citation omitted).

C. First and Second Assignments of Error — The Trial Court Erred as a Matter of Law By Failing to (1) Require Weyerhaeuser to Meet Its Burden to Prove that Arkansas Is an Adequate Alternative Forum Where Plaintiffs’ Claim Would In Fact Be Litigated; (2) Consider the Overwhelming Evidence that Dismissal Would Mean that This Case is Destined for the MDL; and (3) Require Weyerhaeuser to Agree to Litigate in Arkansas as a Condition of Dismissal.

As the moving party seeking to dismiss this case based on *forum non conveniens*, Weyerhaeuser had the threshold burden of proving that an adequate alternative forum exists. Hill v. Jawanda Transport, Ltd. 96 Wn. App. 537, 541 & n.4, 983 P.2d 666 (1999) (citing El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 677 (D.C. Cir. 1996)). Only if Weyerhaeuser meets that threshold burden may the trial court engage in the discretionary balancing of other factors to determine which forum—Plaintiffs’ presumptively favored chosen forum or defendant’s proposed alternative forum—is more appropriate. Id.; see also El-Fadl, 75 F.3d at 677.

As part of that showing, Weyerhaeuser was required to establish that the alternative forum in Arkansas is where the case would in fact be litigated, if this case were filed there by Plaintiffs. See Hill v. Jawanda Transport, 96 Wn. App. at 541 (defendant bears burden of proving that proposed alternative forum will actually exist); See also Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) (reversing *forum non conveniens* dismissal because if the suit were re-filed in the proposed alternative forum, it was “not clear that defendant Rosa would appear, or could be compelled to appear, in that forum”); El-Fadl, 75 F.3d at 677-79 (reversing *forum non conveniens* dismissal because moving defendant failed to meet burden of establishing that the case could proceed in the proposed alternative forum); Ceramic Corp. of America v. INKA Maritime Corp., 1 F.3d 947 (9th Cir. 1993) (same -- “In this case, it is uncontroverted that a Japanese court would dismiss Ceramic’s action on its own motion. . . . Japan [the proposed alternative forum] is thus an inadequate alternative forum and the district court abused its discretion in dismissing Ceramic’s action on the grounds of forum non conveniens”); Mercier v. Sheraton International, Inc., 935 F.2d 419, 426 (1st Cir. 1991) (same - “the district court mistakenly relieved the moving defendant of its burden of assuring the district court that all conditions essential to establishing an adequate alternative forum exist”).

The trial court did not even acknowledge—much less require Weyerhaeuser to comply with — Weyerhaeuser’s initial burden to prove that Arkansas is an adequate alternative forum. Indeed, the trial court appears to have explicitly stated its misapprehension of Weyerhaeuser’s burden: the trial court stated in its order that “All cases are clear in that the decision is within the clear discretion of the court and that the court must *first* do a balancing test with regard to the public and private interest factors that would affect each of the litigants.” CP at 157 (emphasis added). The trial court’s failure to hold Weyerhaeuser to its threshold burden of proof establishes that the dismissal order is based on an erroneous legal standard and was thus an abuse of the trial court’s discretion. See El-Fadl, 75 F.3d at 677 (*forum non conveniens* dismissal is an abuse of discretion if court “fails to consider a material factor . . . [or] does not hold defendants to their burden of persuasion on all elements of the *forum non conveniens analysis*”) (citations omitted); see also Demelash, 105 Wn. App. at 530 (trial court “necessarily abuses its discretion if its ruling is based on an erroneous view of the law”).

Regardless of whether Weyerhaeuser met its burden of proof on this issue, the trial court erred in failing to consider the inevitable removal and transfer of the case to the MDL in light of Weyerhaeuser’s refusal to agree to litigate this case in the Arkansas court. The trial court simply

erred as a matter of law in concluding that it lacked authority to consider the prospect that the case would be transferred from Arkansas state court to the MDL — a virtual certainty in light of Weyerhaeuser’s refusal to stipulate. Yet central to the adequacy determination is knowledge that the Arkansas state forum would be where the case would actually be litigated. Not only was the trial court authorized to consider evidence of the likelihood of removal and its disastrous consequences to Plaintiffs, the trial court was required to do so under the Myers private interest factors, the most important of which is “all other practical problems that make a trial case easy, expeditious, and inexpensive.” Myers, 115 Wn.2d at 131. The MDL is not expeditious for Plaintiffs. Quite to the contrary. The MDL bears a strong resemblance to the Croatian forum that one court found wholly inadequate:

Croatia, while it may be an available forum, is not an adequate forum . . . While it is possible for Plaintiff’s case to be heard in Croatian courts, there is likely a backlog of cases that could present a significant delay in the resolution of Plaintiff’s case. The Court finds that the possibility of a lengthy delay may be considered in this analysis because *justice delayed is often justice denied*. Therefore, the Court finds that Croatia is not an adequate alternative forum.

Sablic v. Armada Shipping APS, 973 F. Supp. 745, 748 (S.D. Tex. 1997)

(emphasis added). In concluding that it could not consider the injustice

of a virtually certain transfer to the MDL, the trial court simply erred as a matter of law.

While the trial court thought it would be speculative for it to consider transfer to the MDL, Plaintiffs submit that given Weyerhaeuser's refusal to agree to try the case in Arkansas state court, the only real speculation resided in assuming that Arkansas state court was an adequate forum where the case would be litigated. A *forum non conveniens* analysis contemplates a court's weighing of real, and not hypothetical alternatives. The trial court simply erred as a matter of law in failing to make certain that the Arkansas alternative was "real."

Indeed, the trial court also appears to have erroneously believed that it lacked the authority to ensure that Arkansas was a "real" alternative by requiring Weyerhaeuser to agree to litigate in Arkansas as a condition of dismissing the case in Washington. That is clearly not the law. See, e.g., Wolf v. Boeing Co., 61 Wn. App. 316, 329, 810 P.2d 943 (1991) (trial courts have discretion to place conditions on *forum non conveniens* dismissals); see also Myers v. Boeing Co., (conditioning *forum non conveniens* dismissal on defendant's willingness to stipulate to liability in alternative forum); Werner v. Werner, 84 Wn.2d 360, 378, 526 P.2d 370 (1974) (conditioning *forum non conveniens* dismissal on defendant's agreement to waive statute of limitations in alternative forum). If the trial

court had so conditioned its dismissal, it could have ensured that the case would proceed in the very Arkansas state court forum that Weyerhaeuser claimed was adequate. The trial court failed to do so because it erroneously believed it lacked legal authority to do so.

The Ninth Circuit's decision in Ceramic Corp. of America v. INKA Maritime Corp., 1 F.3d 947 (9th Cir. 1993), is instructive here. In that case, the trial court granted the defendant's *forum non conveniens* motion, finding that Japan provided an adequate and more convenient alternative forum for resolution of the dispute. Id. at 948. The plaintiff predicted that if the case were re-filed in Japan, the Japanese court would transfer the case to Germany based on forum selection clauses in the contracts at issue. Id. at 949. Because the defendant failed to establish that the case would in fact proceed in Japan, even though that was its proposed alternative forum, the Ninth Circuit held that the defendant had failed to prove that Japan was an adequate alternative forum, and accordingly, it reversed the dismissal based on *forum non conveniens*. Id. at 949-50.

The court in Ceramic Corp. also rejected defendant's fall-back argument that even if the case did not proceed in Japan, the *forum non conveniens* dismissal should still be upheld because if the case were transferred from Japan to Germany as predicted by the plaintiff, Germany

would also be an adequate alternative forum for resolving the dispute. *Id.* at 950. This failed argument mirrors Weyerhaeuser's fall-back argument to the trial court in this case, which was that even if the case were transferred from Arkansas state court to the MDL in Eastern District of Pennsylvania, Plaintiff would still have an adequate forum in the MDL.

As the Ninth Circuit stated, that argument did not satisfy the defendant's burden to establish the adequacy of the alternative forum that it had proposed, which was *Japan*, not Germany. *Id.* (defendant's fall-back argument that German was an adequate alternative forum failed to "address[] the argument before us: whether *Japan* is an adequate alternative forum") (emphasis in original). Nor did the trial court in this case conclude – nor could it on the record – that the MDL would be an adequate alternative forum for the simple reason that it was not the forum proposed and analyzed by Weyerhaeuser.

In short, by failing to require Weyerhaeuser to meet its burden of proof; by failing to consider the overwhelming evidence that dismissal would result in the case being re-filed and then transferred to the MDL because Weyerhaeuser refused to agree to litigate in Arkansas; and by failing to require Weyerhaeuser to agree to litigate the case in its proposed adequate forum (the Arkansas state court) as a condition of the dismissal,

the trial court simply misunderstood the law and its own legal authority to serve justice in this case.⁴

D. Third Assignment of Error — The Trial Court Abused Its Discretion in Dismissing this Action Without Considering Whether the Ends of Justice Are Better Served By Allowing Plaintiff, Who is Terminally Ill, to Litigate this Case in his Chosen Washington Forum Where He Is Most Likely to Be Able to Testify at Trial Before He Dies.

When this case was filed, Plaintiff Charles Sales realistically had months and perhaps a year to live. He wanted to see this lawsuit through for his family before he succumbed to this horrible disease. Mindful that bringing suit against Weyerhaeuser in Arkansas would almost certainly result in a removal and transfer of the MDL, Mr. Sales elected to bring suit in Weyerhaeuser's home state—the only state in the country where Weyerhaeuser could not remove the case and thus ensure that Mr. Sales' death would precede his trial. Mr. Sales chose his own geographic inconvenience in favor of the extraordinary temporal inconvenience of suing in Arkansas, having the case removed, and never seeing his day in court.

The uncontroverted record establishes that mesothelioma is invariably fatal and that death most typically comes within six to eighteen

⁴ See Hill v. Jawanda Transport, 96 Wn. App. at 541; see also Ravelo Monegro, 211 F.3d at 514 (reversing *forum non conveniens* dismissal based on defendant's failure to establish that the case would proceed in alternative forum); El-Fadl, 75 F.3d at 677-79 (same); Ceramic Corp., 1 F.3d at 949-50 (same); Mercier, 935 F.2d at 426 (same).

months of diagnosis. A reasonable and diligent mesothelioma victim has perhaps that much time, perhaps a few months more if lucky, to live. Any attempt to secure civil justice against those who cause this harm must happen within that short window of time. This stark reality severely limits the window of justice for these victims.

Washington has a statute that grants a terminally ill plaintiff such as Mr. Sales a right to a priority trial setting:

When setting civil cases for trial, unless otherwise provided by statute, upon motion of a party, the court may give priority to cases in which a party is frail and over seventy years of age, a party is afflicted with a terminal illness, or other good cause is shown for an expedited trial date.

RCW 4.44.025. In addition to this statutory presumption, courts have long recognized the importance of live trial testimony, if possible, in cases involving personal injury or wrongful death. In Looney v. Superior Court, 16 Cal. App. 4th 521 (1993), for example, the California Court of Appeals held:

There can be little argument that section 36 [granting a plaintiff the right to a priority trial setting] was enacted for the purpose of assuring that an aged or terminally ill plaintiff would be able to participate in the trial of his or her case and be able to realize redress upon the claim asserted. Such a preference is not only necessary to assure a party's peace of mind that he or she will live to see a particular dispute brought to resolution but it can also have substantive consequences. The party's presence and ability to testify in person and/or assist counsel may be critical to

success. In addition, the nature of the ultimate recovery can be adversely affected by a plaintiff's death prior to judgment.

Id. at 532. California is not unique in granting a terminally ill plaintiff priority in setting their civil cases for trial.⁵

While the trial court suggested that allowing the case to remain in Washington State was in fact the best way to ensure that Charles Sales would have his day in court during his lifetime,⁶ the court erred as a matter of law in believing it could not honor Plaintiff's wish and serve the ends of justice. The trial court dismissed this action based solely on mechanical application of the list of *forum non conveniens* factors set forth in Myers v. Boeing, 115 Wn.2d 123, 794 P.2d 1272 (1990), without considering the broader and more fundamental question of whether the "ends of justice" would be better served by allowing Plaintiff, who is terminally ill, to litigate this case in the Washington court that was the forum of his choice, less than fifteen minutes by car from Weyerhaeuser's world headquarters.

⁵Indeed, several states grant elderly or terminally ill plaintiffs priority in setting civil cases for trial. See, e.g. N.Y. C.P.L.R. §3403 (providing expedited trial date for plaintiffs over the age of 70, minors, and "plaintiffs who are terminally ill and alleges that such terminal illness is a result of the conduct, culpability, or negligence of the defendant"); R.I. Gen. Laws § 9-2-18 (granting expedited trial dates to all parties age 65 and over); Nev. Rev. Stat. Ann. 16.025(1) (1998) (granting a plaintiff with a terminal illness a priority trial date within six months of the hearing of a motion to expedite); R.C.W. 4.44.025 (Washington statute allowing for an expedited trial date for terminally ill plaintiffs); LA C.C.P. Art. 1573 (2004) (granting trial preference to elderly and to those who establish a medical probability that an illness will not allow them to live more than six months).

⁶ See RP, July 28, 2006, at 13-16.

Yet the “ends of justice” is the benchmark for weighing all the balancing factors that Washington courts consider in a *forum non conveniens* analysis. See, e.g., Johnson v. Spider Staging Corp., 87 Wn.2d 577, 579 (1976) (“*Forum non conveniens* refers to the discretionary power of a court to decline jurisdiction when the convenience of the parties and the *ends of justice* would be better served if the action were brought and tried in another court”) (emphasis added); Hill v. Jawanda, 96 Wn. App. at 540 (same).

The Washington Supreme Court adopted the doctrine of *forum non conveniens* in 1971 in Werner v. Werner, 84 Wn.2d 360, 377-78 526 P.2d 370 (1971). Since Werner, Washington courts have consistently held that the doctrine cannot be applied with mathematical precision, and that the fundamental goal underlying the balancing of factors is to ensure fairness to all parties. Lynch v. Pack, 68 Wn. App. 626, 635, 846 P.2d 542 (1993). The Myers factors require a “fact specific” inquiry with the ends of justice as the primary and foundational concern. Myers v. Boeing Co., 115 Wn.2d 123, 131, 794 P.2d 1272 (1990).

Thus, each case turns on its unique facts and “if central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.” Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249-50, 102 S.Ct. 252, 70 L.Ed.2d

419 (1981). Focus on the “basic equities of the situation” as set forth in Tyee Constr. Co. v. Dulien Steel Prods, Inc., 62 Wn.2d 106, 116, 381 P.2d 245 (1963), should inform any judicial analysis of the balancing factors.

Yet in failing to take account of (1) Plaintiff’s forum choice and the reality that Washington is the only forum where he might be able to attend trial before his death, (2) Weyerhaeuser’s refusal to stipulate to litigate this case in Arkansas, and (3) its own legal authority to require Weyerhaeuser to do agree to litigate in Arkansas as a condition of dismissing the case, the trial court deprived itself of the most important tools it had to ensure that the ends of justice would be served in this case.⁷

E. Fourth Assignment of Error — The Court Erred in Failing to Conclude, as It was Required to Do, that the Myers Factors “Strongly Favor” or “Weigh Heavily” in Favor of the Arkansas State Forum.

Putting to the side the trial court’s legal errors that prevented it from serving the ends of justice in this case, the trial court also erred in failing to conclude that the evidence that it did consider “strongly favored” Arkansas as a preferred forum. In another asbestos case, this Court

⁷ It is worth noting that the trial court never found that adjudication of the case in Washington would constitute a manifest injustice to Weyerhaeuser, see Myers, 115 Wn.2d at 128, or that there was a substantial public interest against litigating this case in Washington. Nor could it. Washington is Weyerhaeuser’s home.

recently held that venue choice “lies with the plaintiff in the first instance,” and “should rarely be disturbed,” Hatley, 118 Wn. App. at 487. Having chosen to file this action twelve miles from Weyerhaeuser’s corporate headquarters, Plaintiffs were entitled to substantial deference by the trial court as to Mr. Sales’ decision to prosecute this case in the venue of his choice. The strong preference for respecting a plaintiff’s choice of forum is why a trial court must find that the Myers balancing factors “strongly favor” or “weigh heavily” in favor of Weyerhaeuser’s proposed Arkansas forum. See, e.g., Myers, 115 Wn.2d at 128-29 (“Unless the balance is *strongly in favor* of the defendant, the plaintiff’s choice of forum should rarely be disturbed”) (citing Gulf Oil, 330 U.S. at 508 (emphasis added)); Johnson v. Spider Staging, 87 Wn.2d at 1000 (same); Wolf, 61 Wn. App. at 322 (balance of factors must “weigh heavily” in favor of proposed alternative forum to overcome plaintiff’s choice of forum).

Yet in weighing the Myers factors, the trial court failed to hold that those factors “weigh heavily” in favor of Arkansas. Rather, the trial court found that Arkansas had only a “slight edge” over Washington. That finding is insufficient as a matter of law to overcome the preference for Plaintiffs’ chosen forum. The trial court’s discussion of Myers’ fifth (and most important) private interest factor is contained, in its entirety, below:

Based on the fact that most, if not all, of the activity complained of occurred in the State of Arkansas where the physical plant is located, where the treating physicians are located, where the Plaintiff himself resides, *there would be a slight edge in the advantage of having this case in Arkansas*. Their court system and trial date availability is equal to, or comparable to, Pierce County.

CP at 159 (emphasis added).⁸

Such a “slight edge” is simply legally insufficient under Washington law to overcome Plaintiffs’ choice of forum. Nor on the record before this Court could the trial court have found that such factors “strongly favor” Arkansas.

The question in this case will be whether Weyerhaeuser’s conduct in relation to the Sales family was reasonable given what was known and knowable to Weyerhaeuser about asbestos hazards. Those answers are going to come from corporate industrial hygienists and other corporate officials at Weyerhaeuser in Washington, not the functionaries who were in charge of the Mountain Pine facility. Plaintiffs allege that much of the tortious conduct that constitutes the basis for liability against

⁸ Choice of law is not among the factors included in the *forum non conveniens* analysis. See, e.g., Wolf v. Boeing Co., 61 Wn. App. 316, 327-28, 810 P.2d 943 (1991) (“We do not read Werner as imposing a requirement that conflict of law issues be included in the forum non conveniens analysis. This is made clear by the [Washington Supreme] Court’s subsequent decision in Johnson v. Spider Staging, *supra*, where the court adopted the Gulf Oil factors as the standard to be used in forum non conveniens decisions . . . The Court in Spider Staging clearly separated the forum non conveniens analysis from the choice of law issues, and that approach was recently approved by the court in Myers v. Boeing Co.”).

Weyerhaeuser occurred in Washington State through failures of policy, prevention and oversight regarding asbestos hazards at company facilities.

Documents that Plaintiffs have requested in discovery come primarily from Weyerhaeuser's corporate headquarters in Federal Way, CP 122-131. Key witnesses include present and former Weyerhaeuser corporate officials who were responsible for keeping abreast of scientific knowledge regarding asbestos risks and implementing company-wide policies to protect Weyerhaeuser employees and their families from asbestos hazards. This discovery can best proceed under the auspices of a Washington Court, located less than 12 miles from Weyerhaeuser's corporate headquarters rather than in a theoretical Arkansas court that lacks jurisdiction over the key witnesses in the case.

Of the fifteen individuals identified by Plaintiffs as trial witnesses, six reside in the State of Washington, three reside in Arkansas and agree to be deposed in Washington, one lives in British Columbia and the remaining witnesses are experts who reside in other states around the country. Id. While Weyerhaeuser may rely upon certain Arkansas witnesses in forming its defense, most if not all of those witnesses will be Weyerhaeuser employees over whom Weyerhaeuser will exert control. In contrast, Plaintiff has identified as material witnesses several former Weyerhaeuser employees who reside in Washington State and over whom

Weyerhaeuser has no control. These Washington residents will require a subpoena to appear for trial or deposition. Hence if this case were theoretically litigated in Arkansas, Washington courts would still have to become involved to secure the participation of these witnesses at a deposition.

Most of the inconvenience arising out of litigating this case in Washington will be voluntarily borne by Charles Sales and his family who will be obliged to travel to Washington for trial. Because they have voluntarily assumed that burden it can not weigh against their choice of forum in Washington.

By contrast, and despite the breadth of its world-wide operations and the international scope of its legal proceedings, Weyerhaeuser claimed here that it was inconvenient for it to defend a single personal injury lawsuit in its home state because it might have to take a few depositions in Arkansas. This is an absurd argument.⁹ Plaintiffs cannot possibly be said to have “vex[ed]”, “harass[ed], or “oppress[ed],” Weyerhaeuser by coming to the closest court of general jurisdiction in the world to Weyerhaeuser’s Federal Way headquarters for the purpose of pursuing Mr. Sales’ personal injury claim. Indeed, Washington courts

have routinely been asked to adjudicate disputes involving Washington parties where at least a significant portion of the disputed transaction took place in another jurisdiction.¹⁰ See, e.g. Bank of America, N.A. v. Miller, 108 Wn. App. 745, 33 P.3d 91 (2001) (reversing dismissal of a commercial dispute between a Michigan cattle rancher and Bank of America based on the doctrine of *forum non conveniense* and remanding for trial in Pierce County, Washington); Dix v. ICT Group, Inc. 125 Wn. App. 929, 106 P.3d 841 (2005) (reversing a trial court's dismissal of a class action brought by Washington consumers against a Virginia internet company, even though the contracts contained Virginia forum selection clauses).

In sum, even as to the evidence the trial court erroneously believed it was constrained to consider, the trial court's basis for dismissing this case fails to meet the requirement under Washington law that the evidence "strongly favor" Arkansas as an alternative forum. For this reason as well, the trial court must be reversed.

⁹ An internet map search indicates that the Pierce County Superior Court is 11.4 miles from Weyerhaeuser's corporate headquarters and is a mere 14 minute drive from the headquarters. CP 120.

¹⁰ The Washington Court of Appeals recently affirmed, for example, the general proposition that it is not unduly burdensome for a Washington-based company to litigate an action in its home state pursuant to a forum selection clause. Erwin v. Cotter Health Centers, Inc., 123 Wn. App. 143 135 P.3d 547 (Wn. App. Div. 3, 2006).

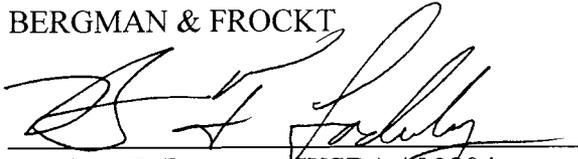
V. CONCLUSION

For all the foregoing reasons, the trial court's order dismissing this action under the doctrine of *forum non conveniens* was legal error and an abuse of discretion, and should be reversed.

DATED this 22 day of December, 2006.

Respectfully submitted,

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

CHARLES SALES and PATRICIA
SALES, a married couple,

Appellants,

v.

WEYERHAEUSER COMPANY, a
Washington Corporation,

Respondents.

No: 35247-8-II

**DECLARATION OF
SERVICE**

I, Wil John Cabatic, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of King County, Washington, and am over the age of 18 years.

2. On the 22nd day of December, 2006, I caused to be served true and correct copies, of:

- (1) Brief of Appellants;
- (2) Appellants Motion for Expedited Hearing and Review Due to Terminal Illness of Appellant;
- (3) Declaration of Brian F Ladenburg In Support of Appellants Motion for Expedited Hearing and Review Due to Terminal Illness of Appellant;
- (4) Notice of Association of Counsel; and
- (5) Declaration of Service, on the following:

I. Via Legal Messenger:

Court of Appeals – Division II [Original and one copy]

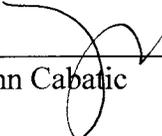
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 22nd day of December, 2006.



Wil John Cabatic