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No. 80472-9

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

(COURT OF APPEALS NO. 35247-8-II)

CHARLES SALES and
PATRICIA SALES, a married couple,

Respondents,

v.

WEYERHAEUSER COMPANY,
a Washington corporation,

Petitioner.

**RESPONDENTS' ANSWER TO *AMICI CURIAE* BRIEF OF
COALITION FOR LITIGATION JUSTICE, INC., *ET AL.* RE
WEYERHAEUSER'S PETITION FOR REVIEW**

Matthew P. Bergman
Brian F. Ladenburg
Bergman & Frockt
614 First Avenue, Fourth Floor
Seattle, WA 98104
Telephone (206) 957-9510
Fax (206) 957-9549

John W. Phillips
Matthew Geyman
Phillips Law Group, PLLC
315 Fifth Avenue S., Suite 1000
Seattle, WA 98104
Telephone (206) 382-6163
Fax (206) 382-6168

Counsel for Respondents

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I. INTRODUCTION

In an effort to create a basis to review a straightforward decision that simply applies established Washington *forum non conveniens* law to the specific facts of this case, *amici curiae* Coalition for Litigation Justice, Inc., *et al.* (“the Coalition”) makes arguments unrelated to issues in this appeal and attempts, improperly, to insert new facts that are not in the record relied upon by either the trial court or the Court of Appeals. To the limited extent that the Coalition’s arguments are relevant to the appeal, they are redundant of arguments made by Weyerhaeuser in its Petition for Review and are, on that basis, improper as well.

II. ARGUMENT

A. This Court Should Deny Weyerhaeuser’s Petition.

Respondents have already explained why Weyerhaeuser’s Petition for Review should be denied. *See* Respondents’ Answer to Petition, dated August 8, 2007. The Court of Appeals’ holding that the trial court abused its discretion when it failed to require Weyerhaeuser to prove that its proposed forum was truly available followed established Washington *forum non conveniens* law. *Id.* at 5-8. Conditioning dismissal on Weyerhaeuser’s agreement that the case would proceed in the forum that Weyerhaeuser proposed did not raise a significant constitutional question under the antiquated “unconstitutional conditions doctrine” or on any other basis, *id.* at 9-14, nor did it raise an issue of public interest. *Id.* at 14-15. In the face of these obstacles barring review, the Coalition resorts to hyperbole to summon a basis for granting the Petition. As explained

below, the Coalition's arguments are impertinent and ineffective and should not alter this Court's conclusion regarding denial of the Petition.

B. The Coalition's Attempt to Show a Conflict with Precedent Improperly Raises Non-Issues and Introduces New Facts While Failing to Show a Conflict.

In its first argument, the Coalition purports to show that the Court of Appeals' decision in *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 156 P.2d 303 (2007), "conflicts with past precedent." Coalition Brief at 1-5. Yet the Coalition points to no Washington case that conflicts with the *Sales* court's holding that a defendant seeking a dismissal on grounds of *forum non conveniens* has a threshold burden of establishing the adequacy of its proposed alternative forum and that it can be required to stipulate that it will actually try its case in its proposed forum—here the Arkansas state court. *See Sales*, 138 Wn. App. at 306 & 309. Instead, the Coalition argues (incorrectly) that the *Sales* court improperly applied the appellate standard of review for *forum non conveniens* decisions. Coalition Brief at 1-2. Not only is that untrue,¹ but improper application of an appellate standard of review – even had it occurred, which it did not – does not constitute a "conflict with past precedent" under *forum non conveniens* law.

The Coalition further argues that the *Sales* court "altered the test" for *forum non conveniens* determinations by conditioning dismissal on

Weyerhaeuser's agreement to proceed in its proposed alternative forum. Coalition Brief at 2-3. But the Court of Appeals clearly applied the appropriate test. *See Sales*, 138 Wn. App. at 228-32. The application of established law to the facts of a new case to reach a particular result, as was done here, is not a conflict with past precedent—it is simply what happens each time a court confronts a new fact pattern. As this Court has stated, “[a]n appellate decision that settles a point of law without overturning prior precedent . . . [and] simply applies settled law to new facts . . . does not constitute a significant change in the law.” *In re Turay*, 150 Wn.2d 71, 83, 74 P.3d 1194 (2003). The Coalition may believe (incorrectly) that the Court of Appeals misapplied existing law to the facts of this case, but mere error in applying existing law does not warrant granting a petition for review under this Court's rules. Rather, a demonstrated conflict with a prior appellate decision is required. RAP 13.4(b)(1) & (2).

Failing to demonstrate any such conflict, the Coalition devotes the greatest part of its brief to arguing that if Weyerhaeuser removed this case and transferred it to the asbestos MDL proceeding in the Eastern District of Pennsylvania, the MDL proceeding would be an adequate forum to

¹ The *Sales* court correctly applied the abuse of discretion standard, 138 Wn. App. at 228, and held that the trial court abused its discretion because

address Mr. Sales' claim. *See* Coalition Brief at 3-5. But this is not the ground upon which either the trial court or the Court of Appeals based its decision. What the Court of Appeals held is that the trial court abused its discretion because it based its ruling on the trial court's *erroneous legal opinion* that it lacked authority to condition dismissal on Weyerhaeuser's stipulation to try the case in the forum that Weyerhaeuser proposed in its *forum non conveniens* motion, namely Arkansas state court. *Sales*, 138 Wn. App. at 234. The issue presented to the trial court and the Court of Appeals was *not* whether the MDL in the Eastern District of Pennsylvania was an adequate forum. Indeed, that issue was not squarely framed because Weyerhaeuser assiduously refused to say whether it would remove the case and seek a transfer to the MDL. *Id.* at 229. Thus, by seeking to argue that the MDL proceeding would be adequate if it had been the proposed alternative in Weyerhaeuser's *forum non conveniens* motion (which it was not), the Coalition attempts to insert an issue into this appeal that does not belong here. This is both confusing and contrary to the rules governing *amicus* briefs. *See* RAP 10.6(a); *see also* *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993) ("We will not consider issues raised first and only by *amicus*").

it based its decision on an "erroneous view of the law." *Id.* at 232 & 234.

The MDL proceeding was relevant in the trial court and Court of Appeals only to the extent of showing that Arkansas would not be the *real* alternative forum and that Weyerhaeuser had failed to meet its burden of proving that it would not remove and transfer the case instead of allowing the case to remain in Weyerhaeuser's proposed Arkansas forum. Plaintiffs presented evidence that Weyerhaeuser would remove and transfer the case to the MDL proceeding where it would languish and they thus established that Weyerhaeuser had failed to meet its burden of showing that Arkansas would be the real alternative forum. The Court of Appeals agreed that based on the *record evidence* presented, Mr. Sales had demonstrated that removal and transfer to the MDL was likely and would produce unacceptable delays for his case. As the Court of Appeals held:

In spite of Bruch's affidavit, Sales' evidence on the Multi-District Litigation, coupled with Weyerhaeuser's refusal to stipulate to Arkansas state court forum, compels us to conclude that Weyerhaeuser failed to establish that Arkansas was truly an adequate alternate forum.

Sales, 138 Wn. App. at 234. The trial court also agreed that the MDL would create significant delays, but mistakenly believed that it could not "speculate" about Weyerhaeuser's future maneuvers:

In dismissing Sales' case, the trial court voiced its concern that "the delays and inconvenience of handling this case through the system established by the [f]ederal [c]ourts in Pennsylvania[] would be a significant prejudice to [Sales]." CP at 161. It concluded that "it would be in the interest[] of justice to have this

case tried in the county and location where the incident occurred, where the majority of the factual witnesses are located, and where [Sales] resides.” CP at 161. Yet it believed that it could not “speculate on whether . . . this case would be removed to [f]ederal court . . . or [about] the status . . . of cases relating to this subject matter in the [f]ederal system.” CP at 161. Moreover, it stated that it did not know of any law that would allow it to retain jurisdiction solely because of the potential delays if Weyerhaeuser removed the case to federal court.

Id. at 231-32. The Court of Appeals reversed the trial court not based on a determination about the adequacy of the MDL, but because the trial court erroneously believed that it could not condition the *forum non conveniens* dismissal to ensure that the alternative forum that Weyerhaeuser proposed would indeed be the real alternative forum.

In its discussion of the MDL, Coalition Brief at 3-5, the Coalition improperly attempts to augment the factual record that was developed in the trial court on this subject, and it asks this Court to disagree with both the trial court’s and the Court of Appeals’ conclusions based on the established record. This, too, is inappropriate under the appellate rules. *See* RAP 9.11 (restricting appellate consideration of additional evidence on review); *King County v. Central Puget Sound Growth Management Hearings Bd.*, 142 Wn.2d 543, 549 n. 6, 14 P.3d 133 (2000) (same). The Coalition has not sought permission to introduce new evidence pursuant to RAP 9.11, nor could it meet the strict conditions that must be met before additional facts will be considered for the first time on review. *See In re Recall Charges Against Feetham*, 149 Wn. 2d 860, 872, 72 P.3d 741 (2003) (citing RAP 9.11(a)).

Most importantly, the true issues in the Court of Appeals, as noted above, were (1) whether Weyerhaeuser met its burden of showing that Arkansas was an adequate and *real* forum, and (2) whether, absent such a showing by Weyerhaeuser, the trial court could condition dismissal on Weyerhaeuser's stipulation that Arkansas would be the real forum. In its *forum non conveniens* motion, Weyerhaeuser never proposed the MDL as an alternative to Mr. Sales' chosen forum in Washington. There is no basis for allowing the Coalition to recast this issue on appeal and augment the factual record through its *amicus* submission. *See* RAP 9.11; *see also* Washington Appellate Practice Deskbook § 28.8 at 28-6 (2005) ("An *amicus curiae* brief should be confined to analysis of legal issues . . . and should not address factual disputes between the parties"); *In re Hunt*, 754 F.2d 1290, 1294 (5th Cir. 1985) (same); *Banerjee v. Board of Trustees of Smith College*, 648 F.2d 61, 65 n. 9 (1st Cir. 1981) (same).

In short, the Coalition's argument that the *Sales* decision conflicts with past precedent fails to identify a single such precedent, but instead impermissibly makes new arguments based on facts not contained in the factual record on appeal, and which were not material to the Court of Appeals' decision. The Coalition's argument is thus improper and should be given no weight.

C. Conditioning Dismissal on Weyerhaeuser's Agreement that the Case Would Proceed in Weyerhaeuser's Proposed Forum Does Not Raise a Significant Constitutional Question.

The Coalition's remaining arguments are a repetition of arguments made in Weyerhaeuser's Petition for Review, and should be disregarded on that basis. *Compare* Coalition's Brief at 6-9 *with* Weyerhaeuser Petition at 6-13. As Plaintiffs previously explained, this case does not involve a significant constitutional issue because the opportunity to remove a case to federal court is a limited privilege granted by statute, not the Constitution. *See* Respondents' Answer to Petition at 11-17. The only new case cited by the Coalition is *Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616 (1967), which the Coalition suggests stands for the proposition that the "Supreme Court continues to recognize the continuing validity" of *Terral v. Burke Const. Co.*, 257 U.S. 529, 532-33, 42 S. Ct. 188 (1922), a case in which the Supreme Court indicated that the right to resort to federal courts was constitutional in nature. *Garrity* itself was decided forty years ago, but more importantly, the issue there was the Fourteenth Amendment's protection against the use of coerced statements, not the constitutional underpinnings (or lack thereof) of removal based on diversity of citizenship. *Garrity*, 385 U.S. at 500. The Supreme Court has never revisited its post-*Terral* decision in *Kline v. Burke Construction Co.*, 260 U.S. 226, 233-34, 43 S.Ct. 79 (1922), holding that there is no constitutional right to have a case heard in federal court. *See also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S.Ct. 1563 (1999)

(holding that issue of complete diversity of citizenship “rests on statutory interpretation, not constitutional demand”).

Plaintiffs also have shown that the Supremacy Clause of the United States Constitution is not implicated here because it is federal law, not state law, that prevents Weyerhaeuser as a resident of Washington from removing this case to federal court. *See* Respondents’ Answer to Petition at 9-10 (citing 28 U.S.C. § 1441(b)). This is not a case in which a state law or decision attempts to deprive the federal court of jurisdiction in violation of the Supremacy Clause. The Court of Appeals simply held that a *forum non conveniens* dismissal could be conditioned on a party’s agreement to litigate in its proposed forum and not to remove and transfer the case to another forum that it had never proposed. If the right to have a case heard in federal court may be waived by contractual agreement, *see The Bremen*, 407 U.S. 1, 12-13, 92 S. Ct. 1907 (1972) (holding that forum selection clause did not oust the district court of jurisdiction but that the jurisdiction should have been exercised to give full effect to the agreement between the parties to have case heard in London), it can certainly be waived as a condition of granting a defendant its request to have a case pursued in a different forum – a discretionary decision by a court that engages no constitutional issues.

D. The Court of Appeals’ Decision Does Not Raise an Issue of Public Interest.

The Coalition’s argument that the *Sales* decision raises an issue of public importance because it might lead to more nonresident asbestos

filings in Washington, Coalition Brief at 9-10, again merely repeats arguments previously made by Weyerhaeuser, *see* Weyerhaeuser Petition at 19-20, and previously refuted by Plaintiffs. *See* Respondents' Answer to Petition at 17.

The *Sales* decision does not expand the class of potential plaintiffs or change the grounds for recovery under Washington law. The threat that large numbers of dying asbestos plaintiffs will file claims in Washington against Washington-based companies with the intent of preventing the defendants from removing those cases to federal court and transferring them to MDL proceedings is far too attenuated and unlikely to be a matter of public importance. Normally, a Washington-based company would prefer to have claims against it tried in its home state, where its officers live and where the state has an interest in the company's continued economic vitality. It is ironic that the Coalition suggests that the risk of being sued in one's own home state should constitute a matter of public interest.

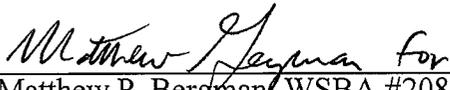
III. CONCLUSION

For these reasons and the reasons stated in Respondents' Answer to Weyerhaeuser's Petition for Review and Motion for Expedited Decision on Petition for Review, this Court should deny the Petition expeditiously so that this case can proceed and Mr. Sales can have his day in court.

DATED this 12th day of September, 2007.

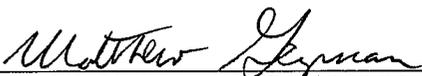
Respectfully submitted,

BERGMAN & FROCKT



Matthew P. Bergman, WSBA #20894
Brian F. Ladenburg, WSBA #29531

PHILLIPS LAW GROUP, PLLC



John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544

Attorneys for Plaintiffs/Respondents

CERTIFICATE OF SERVICE

I declare under the penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, not a party to this action, competent to testify in this matter and that on September 12, 2007 I caused to be served one copy of Respondents' Answer to *Amici Curiae* Brief of Coalition for Litigation Justice, Inc., *et al.* re Weyerhaeuser's Petition for Review, as follows:

Diane J. Kero
Elizabeth P. Martin
Gordon Thomas Honeywell, et al.
600 University Street, Suite 2100
One Union Square
Seattle, WA 98104
Via Hand Delivery

James O. Neet, Jr.
Shook, Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, MO 64108
Via E-mail and U.S. Mail

Mark A. Behrens
Cary Silverman
Shook Hardy & Bacon LLP
600 14th Street NW, Suite 800
Washington, DC 20005
Via U.S. Mail

Paul W. Kalish
Crowell & Moring LLP
1001 Pennsylvania Ave NW
Washington, DC 20004
Via U.S. Mail

Robin S. Conrad
Amar D. Sarwal
National Chamber Litigation Center,
Inc.
1615 H Street NW
Washington, DC 20062
Via U.S. Mail

Ann W. Spragens
Robert J. Hurns
Property Casualty Insurers
Association of America
2600 South River Road
Des Plaines, IL 60018
Via U.S. Mail

Gregg Dykstra
National Association of Mutual
Insurance Companies
3601 Vincennes Road
Indianapolis, IN 46268
Via U.S. Mail

Lynda S. Mounts
Kenneth A. Stoller
American Insurance Association
1130 Connecticut Ave NW, Suite
1000
Washington, DC 20036
Via U.S. Mail

Donald D. Evans
American Chemistry Council
1300 Wilson Boulevard
Arlington, VA 22209
Via U.S. Mail

DATED this 12th day of September, 2007.

By: _____



Carrie J. Krogh