RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 26, 2013, 2:30 pm
BY RONALD R. CARPENTER
CLERK

No. 88115-4

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM RALPH, individually,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES, a Washington State public agency,

Respondent.

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

Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES, a Washington State public agency; WEYERHAEUSER COMPANY, a Washington corporation; and GREEN DIAMOND RESOURCE COMPANY, a Washington corporation,

Respondents.

AMICUS CURIAE BRIEF OF WASHINGTON LAND TITLE ASSOCIATION, WASHINGTON REALTORS®, AND WASHINGTON FOREST PROTECTION ASSOCIATION

Mark D. Schedler, WSBA #07752
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Amicus Curiae

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101-2389
(206) 628-6600

FILED
OCT - 4 2013
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

4281969.1

ORIGINAL

TABLE OF CONTENTS

Page

I. IDENTITY AND INTEREST OF AMICI 1

A. Identity of Amici 1

B. Interests of Amici 2

II. PERTINENT FACTS 3

III. ARGUMENT 4

A. There Is No Reason to Suppose that the Framers and Ratifiers of the Constitution Considered Section 47 of the 1881 Territorial Code "Repugnant to" the Constitution within the Meaning of Article XXVII, Section 2 4

B. The Commitment this Court Reaffirmed in *Snyder v. Ingram* Warrants Application of *Stare Decisis* Principles 10

C. Even if There Had to Be "Justification" for the "Injury to Property" Portion of RCW 4.12.010 for the Statute to Be Jurisdictional, That Portion Serves a Useful Purpose 15

D. It Is Immaterial for Purposes of Article XXVII, §2 "Repugnance" Analysis That Petitioners Sued Only for Money Damages 17

IV. CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Allstate Ins. Co. v. Khani,
75 Wn. App. 317, 877 P.2d 724 (1994) 12

Barstad v. Stewart Title Guar. Co.,
145 Wn.2d 528, 39 P.3d 984 (2002) 2

Cole v. Harveyland, LLC,
163 Wn. App. 199, 258 P.3d 70 (2011) 12

Cugini v. Apex Mercury Mining Co.,
24 Wn.2d 401, 165 P.2d 82 (1946) 7

In re Det. of Danforth,
173 Wn.2d 59, 264 P.3d 783(2011) 9

In re Habeus Corpus of Eng,
113 Wn.2d 178, 776 P.2d 1336 (1989) 9

In re Marriage of Leslie,
112 Wn.2d 612, 772 P.2d 1013 (1989) 12

In re Rights to Use of Waters of Stranger Creek,
77 Wn.2d 649, 466 P.2d 508 (1970) 10

Keene v. Edie,
131 Wn.2d 822, 935 P.2d 588 (1997) 10, 15

League of Educ. Voters v. State,
176 Wn.2d 808, 295 P.3d 743 (2013) 4, 15

Malyon v. Pierce County,
131 Wn.2d 779, 799, 935 P.2d 1272 (1997) 8-9

Marley v. Dep't of Labor & Indus.,
125 Wn.2d 533, 886 P.2d 189 (1994) 12

McKee v. Am. Home Prods. Corp.,
113 Wn.2d 701, 782 P.2d 1045 (1989) 15, 17

McLeod v. Ellis,
2 Wash. 117, 26 P. 76 (1891) 6

Miles v. Chino Mining Co.,
21 Wn.2d 902, 153 P.2d 856, 156 P.2d 235 (1944) 7

Ralph v. Dep't of Natural Res.,
171 Wn. App. 262, 286 P.3d 992 (2012) 4

Riehl v. Foodmaker, Inc.,
152 Wn.2d 138, 94 P.3d 930 (2004) 10

Seattle Land Co. v. Day,
2 Wash. 451, 27 P. 74 (1891) 3

Shoop v. Kittitas County,
149 Wn.2d 29, 65 P.3d 1194 (2003) 5, 7, 9, 12

Smith v. City of Spokane,
55 Wash. 219, 104 P. 249 (1909) 6

Snyder v. Ingram,
48 Wn.2d 637, 296 P.2d 305 (1956) 6-7, 10, 11, 18

State ex rel. Billington v. Sinclair,
28 Wn.2d 575, 183 P.2d 813 (1947) 8

State ex rel. Gallwey v. Grimm,
146 Wn.2d 445, 48 P.3d 274 (2002) 8

State ex rel. Grove v. Card,
35 Wn.2d 215, 211 P.2d 1005 (1949) 7

State v. Devin,
158 Wn.2d 157, 142 P.3d 599 (2006) 10

State v. Estill,
55 Wn.2d 576, 349 P.2d 210 (1960) 9

State v. Reyes,
104 Wn.2d 35, 700 P.2d 1155 (1985) 9

Tacoma v. Cavanaugh,
45 Wn.2d 500, 275 P.2d 933 (1954) 4

Tacoma v. Duane,
15 Wn. App. 698, 552 P.2d 1068 (1976) 4

Ventenbergs v. City of Seattle,
163 Wn.2d 92, 178 P.3d 960 (2008) 6

Young v. Clark,
149 Wn.2d 130, 65 P.3d 1192 (2003) 5, 7, 9

ZDI Gaming, Inc. v. State ex rel. Wash, State Gambling Comm'n,
173 Wn.2d 608, 268 P.2d 929 (2012) 5, 9

FEDERAL CASES

Payne v. Tennessee,
501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) 10

STATE STATUTES

Laws of 1941, ch. 81, § 1 5

Territorial Laws of 1854, p. 175, § 240 12

Territorial Laws of 1854, p. 392, § 2 11

Territorial Laws of 1854, p. 392, § 4 11

Territorial Laws of 1854, p. 402, § 1 11

Territorial Laws of 1854, p. 403, § 4, p. 424, § 2 11

1881 Territorial Code, § 47 ..... passim

1881 Territorial Code, § 308 12

1881 Territorial Code, § 321 12

1881 Territorial Code, §§ 1957-1971 11

1881 Territorial Code, § 2311 11

1881 Territorial Code, § 2727 11

1881 Territorial Code, § 2314 11

RCW 4.12.010 ..... passim

RCW 4.12.010(1) ..... passim

RCW 4.12.020 ..... 8, 9

RCW 4.12.020(3) 5

RCW 4.28.320 14

RCW 4.56.200(3) 12

RCW 9.46.095 5

RCW 36.01.050 5

RCW 48.29.010(3) 2

RCW 64.04.010 11

RCW Chapter 65.08 4

RCW 65.08.070 11

RCW 65.08.150 11

RCW Chapter 65.12 4

RCW Chapter 70.105D 16

RCW 70.105D.040(3) 16

RCW 70.105D.040(3)(b)(i) 17

RCW Chapter 60.04 11

CONSTITUTIONAL PROVISIONS

Wash. Const. Article I, § 12 6

Wash. Const. Article IV, § 6 ..... Passim

Wash. Const. Article XXVII, § 2 ..... Passim

OTHER AUTHORITIES

WSBA Real Property Deskbook,
§ 39.10, at 39-15 (3d ed. 1996) 3

I. IDENTITY AND INTEREST OF AMICI

A. Identity of Amici.

The Washington Land Title Association ("WLTA") is a non-profit corporation the members of which include title insurance underwriters, agents and professionals in related fields, including law. The WLTA promotes high quality land title evidencing and title insurance services. The WLTA seeks to participate in the appellate process as *amicus curiae* when a matter is of significance to the overall stability of land titles in Washington. These consolidated cases present issues of significance to the overall stability of land titles in Washington and maintenance of a system of predictable and certain land titles that helps avoid increases in the risks and costs associated with underwriting title insurance coverage for owners of homes and other types of real property.

Washington REALTORS® is a statewide trade association of approximately 14,000 real estate licensees, and is the state's largest professional real estate association. Its members are involved in all aspects of residential and commercial real estate development and sales. Washington REALTORS® advocates before local governments, the Washington Legislature, and this Court regarding issues of importance to Washington real estate licensees and their clients, including issues that bear on the stability of land titles and the insuring of title to real property.

Washington Forest Protection Association (WFPA) is a trade association representing private forest landowners in Washington. WFPA members are large and small companies, individuals and families who grow, harvest and re-grow trees on about 4.0 million acres. WFPA promotes public policies that encourage investment in forestland, protection of fish, water and wildlife, and responsible forest management as a preferred land use. Because WFPA promotes and protects investments in forest lands, it has a strong interest in a reliable and consistent rule of law for the adjudication of claims involving real property.

B. Interests of Amici.

Amici have convergent interests in laws that facilitate, rather than hinder, the sale, purchase, ownership and financing, of interests in real property. Real estate licensees have an interest in ensuring that sellers have, and buyers can acquire, title that is marketable. Buyers of real property typically need lenders willing to provide funds for the purchase. Typically, a lender agrees to make a loan based on a title insurance company's preliminary commitment or preliminary report,[1] in which it

[1] A preliminary commitment for title insurance is not the same thing as an abstract of title, which lists recorded conveyances and other chain-of-title documents. It is a statement of the terms and conditions upon which the title insurer is willing to issue a title policy. RCW 48.29.010(3); *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 539, 39 P.3d 984 (2002)). It will usually include "'(1) the type of policy or policies to be issued, (2) the amount of the proposed policy or policies to be issued, (3) the nature of the title (fee, leasehold, etc.), (4) the current owner of the title, (5) the legal description of the land, (6) the title defects that the title company would not be willing to eliminate if the

commits to issue a policy of insurance to defend the title against various kinds of defects in title or encumbrances.[2] A recording system that reliably discloses the status of title and claims affecting title enables insurers to issue commitments and title insurance policies efficiently and at reasonable cost.

II. PERTINENT FACTS

The cases before the Court involve claims for injury to real property. Each was filed in a superior court of a county other than that in which the property allegedly damaged is situated. Both cases were dismissed for lack of jurisdiction pursuant to RCW 4.12.010(1).

The WLTA, Washington REALTORS®, and the WFPA offer this brief to supplement the arguments offered by respondents, to address arguments made by petitioners, and to follow up on the Court of Appeals' suggestion that *amici* comment on the effect of a decision in petitioners' favor on "the potential effects of treating RCW 4.12.010 as applying only

---

policy were then being written, and (7) requirements, if any, of the title company.'" *Id.* at 540 (quoting WSBA Real Property Deskbook, § 39.10, at 39-15 (3d ed. 1996)).

[2] To the extent that case law sheds light on the matter, it indicates that title insurance was being offered in Washington by 1891. *See Seattle Land Co. v. Day*, 2 Wash. 451, 27 P. 74 (1891).

to venue on the stability and security of land title registration."[3] *Ralph v. Dep't of Natural Res.*, 171 Wn. App. 262, 270 n.30, 286 P.3d 992 (2012).[4]

III. ARGUMENT

A. There Is No Reason to Suppose that the Framers and Ratifiers of the Constitution Considered Section 47 of the 1881 Territorial Code "Repugnant to" the Constitution within the Meaning of Article XXVII, Section 2.

Petitioners bear the burden of showing that RCW 4.12.010 is unconstitutional beyond any reasonable doubt. *E.g.*, *League of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013). Because the statute now codified as RCW 4.12.010 was in effect at the time of ratification, 1881 Territorial Code, §47,[5] it remained in force pursuant to art. XXVII, §2 unless it was "repugnant" to the constitution.

Without acknowledging art. XXVII, §2 in their supplemental brief even though that section was cited in the answer to their petition for review, petitioners ask the Court to apply the sweeping pronouncement,

---

[3] It is unclear why the Court of Appeals referred to the Torrens Act, RCW ch. 65.12, rather than the recording statutes, RCW ch. 65.08, which are more widely used to give the world notice of real property titles and liens.

[4] Due to this suggestion by the Court of Appeals, amici devote a portion of this brief to the "potential effects ... on the stability and security of land title registration" if RCW 4.12.010 were treated "as applying only to venue." 171 Wn. App. at 270 n.3. Focus on that issue is not meant to diminish the important arguments by respondents that RCW 4.12.010 is a jurisdictional statute requiring that claims "for any injuries to real property" be brought in the county where the real property is situated. RCW 4.12.010(1). Indeed, each part of a statute "must be construed in connection with every other part or section," *Tacoma v. Cavanaugh*, 45 Wn.2d 500, 503, 275 P.2d 933 (1954), not in a vacuum, *Tacoma v. Duane*, 15 Wn. App. 698, 700-01, 552 P.2d 1068 (1976).

[5] It dates back to Territorial Laws of 1854, p. 133, §13.

made in *Shoop v. Kittitas County*, 149 Wn.2d 29, 37, 65 P.3d 1194 (2003), that art. IV, §6 "precludes *any* subject matter [jurisdiction] restrictions as among [different counties'] superior courts [italics added]," and hold that the statute now codified as RCW 4.12.010 cannot be more than a venue statute. However, as respondents point out in their supplemental brief (pages 14-16), *Shoop* and its companion decision, *Young v. Clark*, 149 Wn.2d 130, 133, 65 P.3d 1192 (2003), concerned statutes that did not date back to territorial days. Nor, as respondents point out, did *Shoop* or *Young* consider Wash. Const. art. XXVII, §2, which preserved in force all territorial laws "which are not repugnant to this Constitution . . . until they expire by their own limitation, or are altered or repealed. . ."[6] RCW 4.12.010 dates back to 1854,[7] and more than one lawyer who was involved

---

[6] RCW 36.01.050, which *Shoop* held could only be a venue statute in light of art. IV, §6, had been enacted in 1963 and amended in 1997 and 2000. *Shoop*, 108 Wn. App. at 389-90. The holding of *Young* was that RCW 4.12.020(3), first enacted in 1941 (*Laws of 1941, ch. 81 §1)*, also could only be a venue statute in light of art. IV, §6. The Court's most recent decision applying *Shoop* and *Young* concerned RCW 9.46.095, enacted in 1981. *ZDI Gaming, Inc. v. State ex rel. Wash, State Gambling Comm'n*, 173 Wn.2d 608, 268 P.2d 929 (2012). In *ZDI Gaming*, the court held RCW 9.46.095 to be an unconstitutional restriction on original jurisdiction of superior courts other than that of Thurston County, explaining by analogy that "our constitution does not allow the legislature to decree that only King County judges have subject matter jurisdiction to hear child dependency actions or that only Pend Oreille County judges have subject matter jurisdiction to hear shareholder derivative actions." 173 Wn.2d at 619. Unlike the statute at issue in *ZDI Gaming*, RCW 4.12.010 does not restrict the filing of cases relating to real property to the superior court of a designated county only; all superior courts may hear such cases, and all are limited in the same way jurisdictionally, in that each may hear cases relating only to real property in the county in which the property is located.

[7] The statute has never been substantively amended. The only change to the wording of what is now RCW 4.12.010 was the deletion of "or district" following "county" in the

in drafting the constitution and then served on the Supreme Court following ratification understood that section 47 of the 1881 Territorial Code – now RCW 4.12.010 – was a jurisdictional statute, not a venue statute, and thus recognized implicitly that the "local action" rule is not "repugnant" to the constitution and therefore, pursuant to art. XXVII, §2, remained in force *as* a jurisdictional statute after ratification.[8]

This Court has been "committed to the doctrine that this statute [RCW 4.12.010] is a jurisdictional one, rather than one of venue." *Snyder*

1881 Territorial Code (§47). *Amici* believe that reflects the temporary existence of districts, *i.e.*, "two or more counties . . . joined for judicial purposes." *See McLeod v. Ellis*, 2 Wash. 117, 121, 26 P. 76 (1891).

[8] In *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 108 n.14, 178 P.3d 960 (2008), the majority found it worth noting that Ralph Dunbar, "a member of the Washington constitutional convention and signatory to the constitution," had been a member of the state Supreme Court when, 20 years after ratification, in *Smith v. City of Spokane*, 55 Wash. 219, 220, 104 P. 249 (1909), the court held that "[o]rdinances conferring the exclusive right to collect garbage and refuse substances upon some department of the city government, or upon a contractor with the city, have almost universally been sustained" against challenges based on Wash. Const. art. I, §12, the state "privileges and immunities" clause. As respondents point out in their supplemental brief (pages 9-11), Judge Dunbar had been a member of the Judiciary Committee that drafted article IV, and, just *two* years after the constitution was ratified, he joined in deciding *McLeod v. Ellis*, 2 Wash. 117, 121, 26 P. 76 (1891), which declared that §47 of the Code of 1881 (which was still in effect) preserved the common law requirement that "local" (as opposed to "transitory") actions be commenced – as opposed to tried – in the county or district where the property is located. And Judge Dunbar, as respondents point out, was not the sole framer who sat on the Court for *McLeod* (as he was by the time *Smith* was decided in 1909). Judge Theodore Stiles had been a member of the Constitutional Convention's Judiciary Committee along with Judge Dunbar, and Judge John Hoyt had been the Convention's President. Whatever weight was given in *Ventenbergs* to Judge Dunbar's presence on the *Smith* court in 1909 should be extended to this case as well, because three of the five judges on the *McLeod* court in 1891 were drafters of the constitution and declared what is now RCW 4.12.010 to be a jurisdictional statute.

v. Ingram, 48 Wn.2d 637, 638, 296 P.2d 305 (1956).[9] Based on that commitment, title insurers have not needed to be concerned about and search for lawsuits in 38 of Washington's counties in which a superior court may be exercising jurisdiction over an action that could affect title to a given parcel of real property, because only the court in the county where the real property is *located* can exercise jurisdiction over such a lawsuit. If RCW 4.12.010 is held to be only a venue statute, prospective buyers and sellers of property, and mortgage lenders and title insurers, will have to be concerned that a court in any of 39 counties may be exercising jurisdiction over an action that could affect title to a given parcel of real property. Because of the inconvenience and inefficiency that would impose on the land title transfer system, *amici* urge the Court to reject petitioner's proposal to extend *Shoop* and *Young* to statutes that predate 1889 and to renew the commitment the *Snyder* court reaffirmed. Neither *Shoop* nor *Young* precludes renewing that commitment, because neither addressed RCW 4.12.010 or the application of art. XXVII, §2.

There is no evidence that the framers/ratifiers meant art. IV, §6 to repeal Section 47 of the 1881 Territorial Code so a court in Adams or

---

[9] Citing *Miles v. Chino Mining Co.*, 21 Wn.2d 902, 153 P.2d 856, 156 P.2d 235 (1944); *Cugini v. Apex Mercury Mining Co.*, 24 Wn.2d 401, 165 P.2d 82 (1946); and *State ex rel. Grove v. Card*, 35 Wn.2d 215, 211 P.2d 1005 (1949).

Benton County could adjudicate a case involving injury to land or affecting title to or liens on land in Clark County.

To the contrary, drafters who sat as Supreme Court judges after ratification declared what is now RCW 4.12.020 to be jurisdictional. They did so in a legal context in which the local action statute then complemented, as it still does, statutes requiring the recording of an instrument in the county where the land is located as a condition of giving constructive notice to the world of a title or lien claim affecting the land. To hold as petitioners urge it to, the Court would be declaring repeal and prohibition of the "local action" rule to have been *exactly* what the framers and ratifiers intended, regardless of its impact on the stability of land titles. *State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 579, 183 P.2d 813 (1947) ("the fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and of the people who adopted it"); *State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 460, 48 P.3d 274 (2002) ("This court's 'objective is to define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise'") (quoting *Malyon v. Pierce* County, 131 Wn.2d 779, 799,

935 P.2d 1272 (1997)). Such a result is not mandated by *Shoop* and *Young*.[10]

When art. XXVII, §2 is considered along with art. IV, §6, it is evident that the *Shoop* reasoning does not extend to RCW 4.12.010. "[W]herever possible, 'it is the duty of this court to construe a statute so as to uphold its constitutionality.'" *In re Det. of Danforth*, 173 Wn.2d 59, 70, 264 P.3d 783(2011) (quoting *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985)). The Court does not have to repudiate the holdings of *Shoop, Young,* or *ZDI Gaming,* to adhere to the commitment expressed in *Snyder* because each of those decisions concerned a statute (or, in *Young*, a separate portion of RCW 4.12.020) that was enacted after 1889. The Court needs only to reaffirm that art. XXVII, §2 mandates a different constitutional analysis for statutes that predate 1889. *State v. Estill*, 55 Wn.2d 576, 582, 349 P.2d 210 (1960) ("Territorial laws have a specific constitutional sanction and approval which subsequent state statutes do not have"). Because petitioners fail to demonstrate beyond a reasonable doubt that 1881 Territorial Code, §47 was a law that the constitution's drafters and ratifiers considered repugnant to the constitution, their argument that,

[10] When two sections of the constitution are implicated, the Court must try to harmonize them and not let one "bypass" the other. *In re Habeus Corpus of Eng*, 113 Wn.2d 178, 184, 776 P.2d 1336 (1989). The voters in 1889 ratified a constitution that included art. IV, §6 and art. XXVII, §2 Those sections are harmonized most sensibly by holding that 1881 Territorial Code, §47 remained in force as a jurisdictional statute because the drafters and ratifiers did not consider it repugnant to the constitution

considering art. IV, §6 but ignoring art. XXVII, §2, RCW 4.12.010 can be no more than a venue statute is not persuasive.

B. The Commitment this Court Reaffirmed in *Snyder v. Ingram* Warrants Application of *Stare Decisis* Principles.

Under *stare decisis,* a well established holding should be abandoned only when it is "incorrect and harmful." *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Use of Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970))). *Stare decisis* "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)).

The holding that RCW 4.12.010 is jurisdictional is as well-established as a holding can be. This Court has been unequivocally "committed to" it. *Snyder*, 48 Wn.2d at 638. The holding does not undermine the integrity of the judicial process. It establishes an easily applied, bright-line rule that provides certainty for litigants and their counsel. It does

good, not harm, by avoiding a major potential inefficiency in the land title transfer system.

Adherence to *Snyder* serves the reliance interests recognized in the principle of *stare decisis*. To give the world notice of who has title to a parcel of land, Washington statutes have, since before the constitution was adopted in 1889, required conveyances of land to be by deed,[11] and have made them valid as against bona fide purchasers once recorded in the office of the auditor in the county where the land is situated.[12] Under statutory law that likewise predates 1889, a mechanic's and materialman's lien is effective against an owner's real property – and takes priority over subsequently attaching mortgages or other encumbrances – provided that, within a prescribed time after work or materials are provided, a lien-claim notice is recorded with the auditor in the county where the property is located.[13] Lien-claim notices filed in other counties have no effect.

Under pre-1889 statutory law a land owner's creditor can obtain a lien against the owner's real property by obtaining a judgment against the owner on any claim, including a type not listed in RCW 4.12.010. A

---

[11] 1854 Territorial Code, p. 402, §1; 1881 Territorial Code, §2311, 2727; RCW 64.04.010.

[12] 1854 Territorial Code, p. 403, §4, p. 424, §2; 1881 Territorial Code, §§2314, 2727; RCW 65.08.070 and .150.

[13] 1854 Territorial Code, p. 392, §§2, 4; 1881 Territorial Code, §§ 1957-1971; RCW ch. 60.04.

judgment lien takes effect upon entry of judgment if the court is in the county where the property is located. However, if the court in of another county, a judgment lien does not take effect until recording of the proper document (levy, transcript, or abstract) in the county where the property is located. 1854 Territorial Code, p. 175, §240; 1881 Territorial Code, §321; RCW 4.56.200(3).

Washington has 39 counties. If RCW 4.12.010(1) is jurisdictional, an out-of-county lawsuit to which the owner/seller of real property is party before closing a sale cannot involve a viable claim for possession or partition of the property, cannot be a viable foreclosure claim, and cannot affect title to the property, because no court outside the county where the property is situated has subject matter jurisdiction and thus no such court has the power to enter any order except one of dismissal. *Shoop*, 149 Wn.2d at 35.[14] Furthermore, even if out-of-county litigation involves a kind of claim that *can* be asserted against the seller in the other county, no judgment lien can attach before an abstract of judgment is filed in the county where the property is located. RCW 4.56.200(3). That was true at the time of ratification of the constitution. 1881 Territorial Code, §308.

[14] *See also Cole v. Harveyland, LLC*, 163 Wn. App. 199, 205, 258 P.3d 70 (2011) ("A judgment entered by a court that lacks subject matter jurisdiction is void and [t]here is no time limit for attacking a void judgment") (citing *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994), and *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 324, 877 P.2d 724 (1994)). Not even laches bars a party from attacking a void judgment. *In re Marriage of Leslie*, 112 Wn.2d 612, 619-20, 772 P.2d 1013 (1989).

If this Court were to now decide that 1881 Territorial Code, §47 became a venue statute upon ratification of the Constitution 116 years ago, persons interested in an efficient system for transferring title to real property – buyers, sellers, lenders, and title insurers – would have to be concerned that one or more of 38 out-of-county superior courts *might* be exercising jurisdiction over a claim for recovery of, or for the possession or, or for the partition of, or for foreclosure of a mortgage on, or affecting title to, the property. If RCW 4.12.010 is only a venue statute, and if the seller is unaware of the out-of-county lawsuit or does not disclose it, the prospect that an abstract will be recorded in the situs county just before closing, or that a lawsuit subject to RCW 4.12.010 will be transferred to the situs county just before closing, will be more likely to occur than if RCW 4.12.010 is a jurisdictional statute, as the Supreme Court has held. If RCW 4.12.010 abruptly is converted to being only a venue statute, the preliminary commitment process will be made more cumbersome, expensive, and uncertain. More property transactions will be delayed due to last-minute surprises affecting the seller's title, and some of them will not close at all. A higher percentage of delayed or failed transactions will put upward pressure on transaction costs, including real estate commissions and lenders' fees, to compensate real estate licensees and lenders for wasted time and effort. Such costs will be passed on to buyers and

sellers. And there will be more potential for costly disputes between buyers and sellers when litigation affecting real property is discovered late in the process or after closing. None of these risks are warranted.

Petitioners suggest (*Suppl. Br. at 15*) that the problem is academic because courts faced with lawsuits involving real property in other counties are likely to change venue to the situs county. Such an argument fails to appreciate the problem: a broader array of lawsuits in non-situs counties will potentially produce more last-minute judgment liens or last-minute venue-transferred lawsuits, even assuming that the owner/seller, if made a party to litigation in another county of a type listed in RCW 4.12.010, will *move* for a change of venue, and that the court will *order* the change of venue. A title insurer, lender, and buyer cannot make such assumptions if RCW 4.12.010 is merely a venue statute. A case or cases in any of 38 other counties *could* result in a judgment clouding – or even quieting – title to land situated in County A. And, if the plaintiff in such a case were to file a lis pendens pursuant to RCW 4.28.320 in County A before the defendant/owner/seller transferred title, the sale would be jeopardized.

Petitioners seek to reverse what has been settled statutory law in Washington for more than 156 years. Considering that *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal

principles [and] fosters reliance on judicial decisions," *Keene*, 131 Wn.2d at 831, the Court should take into account how heavily those involved in real estate title transfers have been relying on its commitment to RCW 4.12.010 being a jurisdictional statute and not merely a venue statute.

C. Even if There Had to Be "Justification" for the "Injury to Property" Portion of RCW 4.12.010 for the Statute to Be Jurisdictional, That Portion Serves a Useful Purpose.

At page 2 of their supplemental brief, petitioners assert that one cannot justify the local action rule "where the damages from which the complaint seeks relief can literally be seen or found through a physical property inspection." Petitioners bear the burden of showing that RCW 4.12.010 is unconstitutional beyond any reasonable doubt. *E.g.*, *League of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013). They cite no authority for the proposition that lack of "justification" for a statute, or for a portion of a statute, can render the statute or any portion of the statute unconstitutional. The Court has said it will not consider issues on appeal that are not supported by argument and citation of authority. *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989).

Although it is not necessary for respondents or *amici* to provide 21st century justifications for the "injury to land" portion of RCW 4.12.010, such justifications are available. A jury drawn from the same

county where injured property is located will have a more accurate geographic and factual context to reference when weighing issues such as the reasonable duty of care that a local landowner would be expected to apply in the management of property or complex issues of causation such as property damage due to flooding in a specific local drainage.[15] In addition, judges sometimes decide to view or have juries view real property, and court budgets are better conserved if travel to a distant county is unnecessary. Further, a prospective buyer of real property is well advised to investigate whether there is a history of litigation alleging or involving injury to the property. Because RCW 4.12.010(1) requires all claims "for any injuries to" real property to be filed in the county where the property is located, prior lawsuits shedding light on a parcel's history should appear in files of a single superior court, not of 39 separate superior courts. That has been true and important since territorial days, and it is even more, not less, important today.[16] The "any injuries to"

[15] And, even if a picture of land is sometimes as good as a view, that is not always true. The local action rule affords courts more discretion to authorize viewing of property instead of relying on pictures when the interests of justice are best served by viewing the property.

[16] Nowadays, a prudent buyer – particularly of commercial property – also will want to know whether the land was used for purposes that polluted it in ways not apparent. Under the Model Toxics Control Act, RCW ch. 70.105D, the owner of polluted land (a "facility") is strictly liable, jointly and severally, for the cost of cleaning it up unless the owner can establish a defense. RCW 70.105D.040(3) provides a defense to an owner who can establish that, at the time of acquisition, he or she "had no knowledge or reason to know that any hazardous substance, the release or threatened release of which has resulted in or contributed to the need for the remedial action, was released or disposed of

clause of RCW 4.12.010(1) helps efficiently allocate risk attendant to the transfer of title to real property. It also discourages forum-shopping and allows local title companies – ones that do not have offices throughout the state – to exist and continue their business.

D. It Is Immaterial for Purposes of Article XXVII, §2 "Repugnance" Analysis That Petitioners Sued Only for Money Damages.

Petitioners argue that the part of RCW 4.12.010(1) that requires filing in the county were real property is situated of any claim "for any injuries to" the property is unnecessary because they are claiming only damages and the court "will not have to deal directly with the real and personal property that the defendants are alleged to have negligently damaged," *Petrs' Supp. Br. at 17*, and because a jury can view pictures of the land and need not visit it, *id. at 18*. Petitioners cite no authority for the proposition that a statute is unconstitutional if the Court considers it unnecessary in a particular instance. The Court should decline to consider arguments not supported by citation of authority. *McKee*, 113 Wn.2d at 705.

---

on, in, or at the facility. . ." To establish that defense, an owner must satisfy a court that he or she undertook "at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice. . ." RCW 70.105D.040(3)(b)(i). The MTCA does not immunize against remediation liability an owner who only walked the land before buying it; a buyer fails to check local court records at the risk of being found not to have made "appropriate inquiry."

IV. CONCLUSION

Compelling evidence indicates that prominent and knowledgeable drafters of the constitution meant the "local action" rule to remain in force after 1889 and understood that it had remained in force. Absent a reason to conclude that §47 of the 1881 Territorial Code is a law the drafter/ratifiers considered "repugnant" to their constitution, this Court should affirm the Court of Appeals and reaffirm that RCW 4.12.010 "is a jurisdictional [statute], rather than one of venue." *Snyder*, 48 Wn.2d at 638.

RESPECTFULLY SUBMITTED this 26th day of September, 2013.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Mark D. Schedler, WSBA #07752
Daniel W. Ferm, WSBA #11466

Attorneys for Amici Curiae Washington Land Title Association, Washington REALTORS®, and Washington Forest Protection Association

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2013, I caused a true and correct copy of the foregoing document, "Amicus Curiae Brief of Washington Land Title Association, Washington REALTORS®, and Washington Forest Protection Association" to be delivered in the manner indicated below, to the following counsel of record:

Counsel for Petitioner:
Darrell L. Cochran, WSBA #22851
Loren A. Cochran, WSBA #32773
Kevin M. Hastings, WSBA #42316
PFAU COCHRAN VERTITIS AMALA, PLLC
911 Pacific Avenue, Suite 200
Tacoma, WA 98402
Ph: (253) 777-0799
Email: darrell@pcvalaw.com
loren@pcvalaw.com
kevin@pcvalaw.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Respondent Department of Natural Resources:
Mark C. Jobson, WSBA #22171
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 40126
Olympia, WA 98504-0126
Ph: (360) 586-6300
Email: markj@atg.wa.gov

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Respondent Weyerhaeuser Company:
Louis D. Peterson, WSBA #5776
Michael R. Scott, WSBA # 12822
Alexander M. Wu, WSBA #40649
HILLIS CLARK MARTIN & PETERSON, P.S.
1221 Second Avenue, Suite 500
Seattle, WA 98101-2925
Ph: (206) 623-1745
Email: ldp@hcmp.com
mrs@hcmp.com
amw@hcmp.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Respondent Green Diamond Resource Co.:
Kelly P. Corr, WSBA #555
Joshua J. Preece, WSBA #15380
Seann C. Colgan, WSBA #38769
CORR CRONIN MICHELSON
BAUMGARDNER & PREECE, LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154
Ph: (206) 625-8600
Email: kcorr@corrcronin.com
jpreece@corrcronin.com
scolgan@corrcronin.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☑ Regular U.S. Mail
☑ E-file / E-mail

Dated this 26th day of September, 2013, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Custer, Carrie
Cc: Ferm, Dan; Schedler, Mark; darrell@pcvalaw.com; loren@pcvalaw.com; kevin@pcvalaw.com; markj@atg.wa.gov; ldp@hcmp.com; ~Scott, Michael; amw@hcmp.com; ~Corr, Kelly; jpreece@corrcronin.com; scolgan@corrcronin.com
Subject: RE: Ralph v. State of WA / No. 84115-4

Rec'd 9-26-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Custer, Carrie [mailto:CCuster@williamskastner.com]
Sent: Thursday, September 26, 2013 2:29 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Ferm, Dan; Schedler, Mark; darrell@pcvalaw.com; loren@pcvalaw.com; kevin@pcvalaw.com; markj@atg.wa.gov; ldp@hcmp.com; ~Scott, Michael; amw@hcmp.com; ~Corr, Kelly; jpreece@corrcronin.com; scolgan@corrcronin.com
Subject: Ralph v. State of WA / No. 84115-4

Dear Clerk of Court,

Attached for filing in .pdf format are the Motion by Washington Land Title Association, Washington Forest Protection Association, and Washington Realtors® to File Amicus Curiae Brief in Support of Lower Court Decisions Under Review and Amicus Curiae Brief of Washington Land Title Association, Washington Realtors®, and Washington Forest Protection Association in *Ralph v. State of Washington, et al.*, No. 84115-4. The attorney filing this motion and amicus brief is Daniel W. Ferm, WSBA #11466, dferm@williamskastner.com.

Respectfully submitted,

Carrie A. Custer
Legal Assistant to Mary H. Spillane, Daniel W. Ferm, and Jake Winfrey
Williams Kastner
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Main: 206.628.6600
Direct 206.628.2766
Fax: 206.628.6611
ccuster@williamskastner.com
www.williamskastner.com

WILLIAMS KASTNER™