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

SUPREME COURT
OF THE STATE OF WASHINGTON

WILLIAM RALPH, Petitioner,

v.

WEYERHAEUSER COMPANY, et al., Respondents.

WILLIAM RALPH, Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL
RESOURCES, Respondent.

WILLIAM FORTH, et al., Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL
RESOURCES, et al., Respondents.

VIRGINIA CAREY, et al., Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF NATURAL
RESOURCES, et al., Respondents.

JOINT BRIEF OF RESPONDENTS

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I. INTRODUCTION

The trial court transferred these lawsuits to Lewis County, following this Court's instruction in *Ralph v. State Department of Natural Resources*, 182 Wn.2d 242, 343 P.3d 342 (2014), that mandatory venue lies there. Plaintiffs' objections to changing venue are meritless, and this Court should affirm the trial court's orders.

II. STATEMENT OF THE CASE

The history of these cases is well documented. *See Ralph*, 182 Wn.2d at 246-47 (reciting history). Defendants will summarize the history here.¹

Plaintiffs claim damage to their properties in Lewis County from flooding of the Chehalis River caused by the December 2007 storm.² They filed several lawsuits in King County on December 2, 2010, and filed another lawsuit on January 31, 2011.³ Plaintiffs' theory is that Defendants' forest practices caused the flooding of their properties.⁴ Defendants

¹ The Clerk's Papers for the *Forth* case (King County Superior Ct. No. 10-2-42009-6 KNT), the *Carey* case (King County Superior Ct. No. 10-2-4201108 KNT), and the *Ralph v. Weyerhaeuser Co. et al.* case (King County Superior Ct. No. 10-2-42012-6 KNT) are numbered consecutively. The Clerk's Papers for those cases will be abbreviated "CP." The Clerk's Papers for *Ralph v. State Department of Natural Resources* (King County Superior Ct. No. 11-2-05769-1 KNT) will be abbreviated "Ralph CP."

² CP 1-15, 242-255, 711-722; Ralph CP 179-189.

³ *Id.*

⁴ *Id.*

answered in early 2011 and denied Plaintiffs' allegations that venue was proper in King County.⁵

In June 2011, Defendants moved to dismiss these cases for lack of jurisdiction under RCW 4.12.010(1).⁶ Plaintiffs objected and argued that the remedy for violating RCW 4.12.010(1) was a change of venue, not dismissal.⁷ In July 2011, the trial court granted some of the motions and denied the others.⁸ Plaintiffs appealed the dismissals, which were subsequently consolidated.⁹ The Court of Appeals affirmed, citing *Snyder v. Ingram*, 48 Wn.2d 637, 296 P.2d 305 (1956), and this Court's recognition in *Five Corner Family Farms v. State*, 173 Wn.2d 296, 315 n.5, 268 P.3d 892 (2011), that *Snyder* remained good law. *Ralph v. State Dept. of Natural Res.*, 171 Wn. App. 262, 269-70, 286 P.3d 992 (2012). Plaintiffs moved for discretionary review, which this Court granted. *Ralph v. State Dept. of Natural Res.*, 176 Wn.2d 1024, 301 P.3d 1047 (2013).

On December 31, 2014, this Court reversed, overruling *Snyder* and many other precedents by holding that RCW 4.12.010(1) related to venue, not jurisdiction. *Ralph*, 182 Wn.2d at 258-59. The Court denied

⁵ CP 16-37, 256-75, 723-32; Ralph CP 190-96.

⁶ CP 38-45, 276-82, 733-38; Ralph CP 197-203.

⁷ CP 60, 296, 762; Ralph CP 221.

⁸ CP 166-168, 400-02, 742-43; Ralph CP 349-50.

⁹ CP 169-174; Ralph CP 351-56.

Defendants' motion for reconsideration and the mandate issued on April 2, 2015.¹⁰

On April 8, 2015, Defendants filed motions to change venue to Lewis County and assess the costs of changing venue against Plaintiffs.¹¹ The trial court granted the motions.¹² Plaintiffs sought direct review, which this Court granted.

III. ARGUMENT

A. Lewis County Is the Proper Venue for These Actions.

1. RCW 4.12.010(1) applies to these actions.

Plaintiffs argue venue for these actions should be determined by applying three “complementary” venue statutes in “harmony” with one another: RCW 4.12.020, RCW 4.12.025, and RCW 4.92.010. Brief at 14-21. However, the Court has already decided this issue. In their supplemental brief to this Court in *Ralph*, Plaintiffs argued these same statutes applied to these actions instead of RCW 4.12.010(1). *See* Appendix at p. 17-18. This Court rejected those arguments. In *Ralph*, this Court held that RCW 4.12.010(1) applied to these actions and determined the proper venue for them. *Ralph*, 182 Wn.2d at 249-51. The Court stated:

We conclude that RCW 4.12.010(1) applies to Ralph's and Forth's claims. Actions for damages to real property from flooding are properly considered “injuries to real property”

¹⁰ *Ralph* CP 357-58.

¹¹ CP 175-79, 559-63, 952-56; *Ralph* CP 401-06.

¹² CP 231-33, 698-701, 1069-1071; *Ralph* CP 552-53.

for purposes of RCW 4.12.010(1). This holding is consistent with the statute's plain language, the common law from which the statute derives, and our case law.

Ralph, 182 Wn.2d at 251.

Moreover, Plaintiffs' argument ignores how those venue statutes operate. RCW 4.12.025 is the default venue provision for civil actions, and it applies only if a more specific venue statute does not apply. *Moore v. Flateau*, 154 Wn. App. 210, 214-15, 225 P.3d 361 (citing *Russell v. Marenakos Logging Co.*, 61 Wn.2d 761, 765, 380 P.2d 744 (1963)), *review denied*, 168 Wn.2d 1042 (2010). In this case, the more specific applicable venue statute is RCW 4.12.010(1).

The other two venue statutes, RCW 4.12.020 and RCW 4.92.010, do not mandate that actions must be commenced in one specific county, as does RCW 4.12.010(1). Under RCW 4.12.020, venue lies in the county where the cause of action arose (here, Lewis County, where the flooding occurred) or in a county where a defendant resides (here, King County). And under RCW 4.92.010, venue lies in the county where the plaintiffs reside (here, Lewis County), the county where the cause of action arose (here, Lewis County, where the flooding occurred), the county in which the real property that is the subject of the action is situated (here, Lewis County), the county in which a defendant resides, or in Thurston County. Unlike these statutes, RCW 4.12.010(1) requires a plaintiff suing for injuries to real property to commence the action in only one county: the one in which the real property is situated (here, Lewis County). This Court described the statute as one identifying the *mandatory* venue for actions

involving real property, *Ralph*, 182 Wn.2d at 257, precisely because of the statute's compulsory language identifying the proper county for such actions.

The cases Plaintiffs cite interpreting RCW 4.12.020 and other venue statutes are inapposite. Those cases do not involve claims for injuries to real property and RCW 4.12.010(1). *Ralph* applies here.

2. Mandatory venue lies in Lewis County.

This Court has already held that, under RCW 4.12.010(1), mandatory venue for these actions lies in Lewis County. In *Ralph*, the Court interpreted RCW 4.12.010 together with two other venue statutes, RCW 4.12.030(1) and RCW 4.12.060. RCW 4.12.030 lists the grounds for changing venue, and RCW 4.12.060 identifies the county to which venue should be changed. The Court determined that if an action for injury to real property “has not been commenced in the proper county under RCW 4.12.010, the court in that county *shall transfer it to the proper county* pursuant to RCW 4.12.060.” *Ralph*, 182 Wn.2d at 255 (emphasis added). The Court concluded:

We hold RCW 4.12.010 applies to tort actions seeking monetary relief for damages to real property and relates to venue, not jurisdiction. If an action for injuries to real property is commenced in an improper county, the result is not dismissal but rather a change of venue to the county in which the real property is located. We therefore reverse the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

Id. at 259. The trial court properly followed this Court's instructions by ordering venue for these actions changed to Lewis County.

B. Defendants Did Not Waive Their Right to Change Venue.

1. Mandatory venue cannot be waived.

Plaintiffs argue Defendants waived their objection to improper venue. Brief at 11-13. Their argument assumes—without justification—that mandatory venue under RCW 4.12.010(1) is subject to waiver. Plaintiffs’ presumption is wrong because it ignores the statute’s history and the Legislature’s intent.

RCW 4.12.010(1) codifies the local action rule, which could not be waived. The rule’s compulsory nature is rooted in the common law, *see Livingston v. Jefferson*, 4 Hall L.J. 78, 15 F.Cas. 660 (1811) (applying local action rule from English common law to dismiss trespass action for lack of jurisdiction) and written into the statute’s language, which is:

Actions for the following causes *shall be commenced* in the county in which the subject of the action, or some part thereof, is situated:

(1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title, or for any injuries to real property.

RCW 4.12.010(1) (emphasis added). This Court has long held that parties may not waive compliance with the statute. *Alaska Airlines, Inc. v. Molitor*, 43 Wn.2d 657, 665, 263 P.2d 276 (1953) (statute cannot be waived); *Miles v. Chinto Mining Co.*, 21 Wn.2d 902, 907, 153 P.2d 856 (1944) (parties could not consent to venue other than that required by RCW 4.12.010(1)).

Although this Court has now removed territorial limits on superior court jurisdiction, nothing in the constitution prohibits the Legislature from designating exclusive venue for certain types of actions. For example, in *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Commission*, this Court affirmed a Pierce County Superior Court order changing the venue for an appeal of a Washington State Gambling Commission decision from Pierce County to Thurston County. *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n*, 173 Wn.2d 608, 619, 268 P.3d 929 (2012). The Court held that the Legislature may designate Thurston County as the sole venue for appeals of Gambling Commission decisions. *Id.*

This Court's holding that RCW 4.12.010(1) established *mandatory* venue for actions relating to injuries to real property is consistent with the Legislature's intent in requiring that such actions "shall be commenced in the county in which the subject of the action, or some part thereof, is situated." RCW 4.12.010(1). Such exclusive, mandatory venue is not subject to waiver.

2. Defendants did not waive their objection to venue.

Even if mandatory venue were subject to waiver, Defendants did not waive their right to change venue. A waiver is the intentional and voluntary relinquishment of a known right. *Pub. Util. Dist. No. 1 of Lewis Cnty. v. WPPSS*, 104 Wn.2d 353, 365, 705 P.2d 1195 (1985). However, a defendant cannot waive a right it does not possess. For example, in *Curtis*

Publishing Company v. Butts, the defendant did not assert a constitutional defense in a libel lawsuit because the defense was not established at the time the defendant answered. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 138-39, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967). However, during the course of the case, the U.S. Supreme Court determined the availability of the defense in *New York Times Company v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). *Id.* at 138. The defendant immediately asserted the defense. *Id.* The U.S. Court of Appeals held that the defendant had waived the defense by failing to assert it before trial. *Id.* at 139. The U.S. Supreme Court reversed on the issue of waiver, holding that “the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking [the defense].” *Id.* at 143. The Supreme Court reasoned that an effective waiver must be one of a known right. *Id.* And the Supreme Court rejected the plaintiff’s argument that the defendant “should have seen the handwriting on the wall” by the Supreme Court’s granting of certiorari in *New York Times*, the precedent relied upon in that decision, or the defendant’s counsel’s participation in that case. *Id.* at 143-44.

No waiver occurred here. At the time Defendants objected to the trial court’s jurisdiction in June 2011, RCW 4.12.010 restricted superior court jurisdiction, not venue.¹³ The Court had made the jurisdictional

¹³ As Plaintiffs acknowledge, Defendants had already denied Plaintiffs’ allegations that venue was proper in King County. Brief at 7-8.

nature of RCW 4.12.010 clear in *Snyder*, in which the Court unambiguously stated, “[T]his court is now committed to the doctrine that [RCW 4.12.010] is a jurisdictional statute, rather than one of venue.” *Snyder*, 48 Wn.2d at 638. Even this Court acknowledged *Snyder* remained good law at the time Defendants made their jurisdictional objection. *Five Corner Family Farms*, 173 Wn.2d at 315 n.5 (decided in December 2011 and stating that *Snyder* remained law unless overruled). The Court of Appeals affirmed dismissal by the trial courts based on this law. *Ralph*, 171 Wn. App. at 269-70. In June 2011, Defendants could not have waived a right to object to venue.

It was not until December 31, 2014, that this Court changed the law by overruling *Snyder* (and many other decisions), holding that RCW 4.12.010 relates to venue, not jurisdiction. *See Ralph*, 182 Wn.2d at 258. Defendants therefore did not possess an objection to venue until after December 31, 2014. This Court’s mandate in *Ralph* issued on April 2, 2015. Defendants filed motions to change venue only six days later, on April 8, 2015. None of Defendants’ actions suggest they intentionally and voluntarily relinquished a known right.

Plaintiffs also contend Defendants cannot request a change in venue because Defendants previously argued these cases should be dismissed for lack of jurisdiction. Brief at 2, 19. But the Court’s then binding precedent made clear that without jurisdiction, the trial court could do nothing but enter an order of dismissal. *Cugini v. Apex Mercury Mining, Co.*, 24 Wn.2d 401, 409, 165 P.2d 82 (1946). Under that

precedent, a trial court lacking jurisdiction could not order a change of venue. *Id.* Defendants therefore had no basis in law in 2011 to request a change of venue.

All of the cases cited by Plaintiffs regarding waiver are distinguishable because none involve this Court changing the law from jurisdiction to venue during the course of the case. *E.g., Kahclamat v. Yakima Cnty.*, 31 Wn. App. 464, 465-67, 643 P.2d 453 (1982) (defendant possessed venue objection at the outset of the case and should have raised objection then).

Plaintiffs' opposition to a change of venue is surprising. They previously argued changing venue was the appropriate remedy for their violation of RCW 4.12.010(1)'s mandate. In their briefing, Plaintiffs said:

In the alternative, if the court finds certain elements of Plaintiffs [sic] claims to be local interests, unique to the properties' physical location, *then venue change*, not dismissal of the action as a whole, *is the only appropriate remedial action*.

(Emphasis added).¹⁴ This Court agreed in *Ralph*. Having avoided dismissal, Plaintiffs now oppose the remedy they sought.

C. The Trial Court Did Not Err By Changing Venue for the Convenience of the Parties and Witnesses.

Plaintiffs argue the trial court abused its discretion by ordering a change of venue under RCW 4.12.030(3) for the convenience of the parties and the witnesses. Brief at 21-24. Plaintiffs do not dispute that they, their injured properties, and the eye witnesses to the storm are

¹⁴ CP 60, 296, 762; Ralph CP 221.

located in Lewis County. Instead, they claim the trial court lacked a factual basis to order a change of venue. But the Plaintiffs' complaints provide the factual basis for the trial court's ruling. They made clear the Plaintiffs, their properties, and non-party witnesses to the storm are all located in Lewis County.

Plaintiffs ask this Court to substitute its judgment for that of the trial court to evaluate the venue most convenient for the parties and the witnesses. To support their argument, they argue Weyerhaeuser's decision to gather documents responsive to Plaintiffs' discovery requests from various locations for inspection at Weyerhaeuser's headquarters in Federal Way make King County the most convenient venue for all parties and their witnesses. Brief at 24. They also argue King County is the most convenient venue for unidentified experts who may purportedly testify at trial. *Id.* Plaintiffs' position would permit parties (including defendants) to choose the most convenient venue merely by moving documents for production to a different county or by designating experts based upon the county in which the experts reside. In reality, expert witnesses routinely travel from all over the country to testify in the appropriate venue, and parties routinely produce documents for inspection at a location convenient for counsel without regard to venue. If Plaintiffs have an issue with the location selected by Weyerhaeuser for its document production, their remedy is a discovery conference. The trial court did not abuse its discretion by rejecting Plaintiffs' arguments and changing venue to Lewis County.

D. The Trial Court Did Not Err By Ordering Plaintiffs to Pay the Costs of Changing Venue.

Finally, Plaintiffs argue the trial court erred by ordering them to pay the costs of changing venue. Brief at 24-25. However, Plaintiffs complain of injuries to their real property in Lewis County. They commenced these actions in King County. Regardless of whether RCW 4.12.010(1) relates to jurisdiction (as it did until the Court's decision in *Ralph*) or venue (as it has since *Ralph*), the statute plainly required Plaintiffs to commence these cases in Lewis County. The Court has already determined Lewis County is the proper venue for these actions. *Ralph*, 182 Wn.2d at 259. A real property case commenced in the wrong county must be transferred to the county where the property is situated under RCW 4.12.030(1) and RCW 4.12.060. *Ralph*, 182 Wn.2d at 255. Under these circumstances, RCW 4.12.090(1) requires Plaintiffs to pay the costs for changing venue to the proper county because the change is made under RCW 4.12.030(1). Therefore, the trial court properly ordered Plaintiffs to pay the costs of changing venue.

E. The Court Should Award Defendants Their Attorneys' Fees.

Defendants request an award of their attorneys' fee under RAP 18.1. Defendants are entitled an award of their reasonable attorneys' fees under RCW 4.12.090(1). The statute requires a court to award the defendant attorneys' fees if the plaintiff commences an action in the wrong county and could have determined the proper county with reasonable diligence. RCW 4.12.090(1). Here, Plaintiffs knew that the

flooding caused injury to their real property in Lewis County. Basic diligence would have revealed RCW 4.12.010(1) required them to commence their lawsuits in Lewis County regardless of whether the statute related to jurisdiction or venue. But Plaintiffs failed to exercise reasonable diligence and instead commenced their cases in King County. If the Court affirms the change of venue, it should award Defendants their attorneys' fees for this appeal and remand to the trial court for determination of the appropriate amount of fees.

F. Enforcing Transfer to a Mandatory Venue Is Essential to the Orderly Administration of Inherently Local Actions.

For 160 years, RCW 4.12.010 limited the territorial jurisdiction of our state superior courts. The statute was intuitive and easy to follow: cases asserting claims for possession, title, or injury to real property had to be commenced in the county where the property was situated. Its jurisdictional character reflected the framers' intent to enact the common law local action rule, which prevents plaintiffs from trying to shop for a forum in real property cases, and establishes an orderly system for the administration and monitoring of inherently local actions.

The local action rule embodied in RCW 4.12.010(1) has deep roots in our jurisprudence, and promotes stability and predictability in our state's land title system and real property actions. Purchasers of real property know they only need to search the public records of one county to learn the property's history. Owners of real property know if someone

asserts a claim to their property, the claim will be litigated in their local county. Homeowners know if their property is foreclosed upon, they will be able to defend themselves in the county where they reside. The same is true for tenants facing eviction lawsuits. These are all reasons why generations of jurists interpreted RCW 4.12.010(1) as establishing exclusive jurisdiction. Now that this Court has interpreted the statute to relate to venue, it should not stray from its holding that the statute determines a *mandatory* venue for real property cases.

IV. CONCLUSION

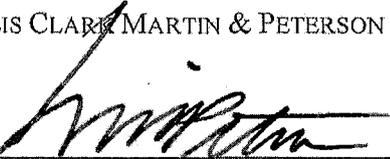
The trial court followed this Court's instructions in *Ralph* when it changed venue for these cases to Lewis County. Regardless of whether RCW 4.12.010(1) is a statute of mandatory venue or jurisdiction, Plaintiffs should have commenced these cases in Lewis County. That is where their injured properties are situated, where the plaintiffs reside, where the storm and flooding occurred, where the witnesses to the storm and flooding are located, and where the acts complained of (here, forest practices) were performed. These are all common sense reasons why actions such as these should be commenced in the county where the properties are situated. Undoubtedly, these reasons and many others persuaded the Legislature to codify the local action rule in RCW 4.12.010(1) and jurists to enforce it

for many years. The Court should affirm the trial court's decision to change venue to Lewis County where these cases belong.

RESPECTFULLY SUBMITTED this 21st day of April, 2016.

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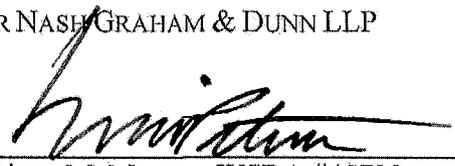


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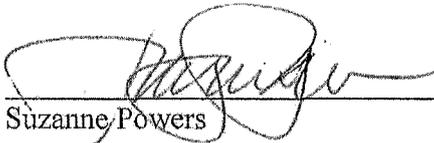
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CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be served via email and U.S. Mail to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 21st day of April, 2016, at Seattle, Washington.



Suzanne Powers

APPENDIX

Supreme Court Case No. 88115-4
Court of Appeals No. 67515-0-I (Consolidated with 67704-7-I)

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

RECEIVED

WILLIAM RALPH, individually,
Plaintiff-Petitioner,

MAY 03 2013

vs.

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

HILLIS CLARK MARTIN & PETERSON

Defendant-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

Plaintiffs-Petitioners,

vs.

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

Defendants-Respondents.

SUPPLEMENTAL BRIEF OF PETITIONER RALPH, ET AL.

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I. INTRODUCTION

Petitioners William Ralph and William Forth, et al., each filed a lawsuit in the Superior Court, King County, to recover damages from extensive flooding to their property in Lewis County. The superior court dismissed each complaint on the ground that the court lacked subject matter jurisdiction under RCW 4.12.010. Ralph and Forth appealed to the Court of Appeals, Division One, where their lawsuits were consolidated on appeal for efficiency. For clarity, this brief hereinafter refers to both Ralph and Forth collectively as “Ralph” because both appeals involve identical legal issues arising from an identical procedural posture.

This petition presents a straight-forward question that has, in principle, already been decided: does RCW 4.12.010 divest the Washington Superior Court of its original subject matter jurisdiction to hear a tort action? This Court has recently and repeatedly answered ‘no’ to the same question under different statutes, including a related Chapter 4.12 RCW section. The rationale is that a legislative promulgation cannot divest the superior court of the original jurisdiction that article IV, section 6 confers. Here, article IV, section 6 does not function differently in relation to RCW 4.12.010, and Ralph respectfully asks this Court to reverse and remand.

This petition also presents the question of whether the superior

court erred in relying upon RCW 4.12.010 where only monetary damages for a tort action were at stake. RCW 4.12.010's "injury to land" requirement is unclear, and Ralph believes the statute applies to situations where an "injury to land" occurs in the abstract. Ralph brings a tort action that concerns real property, but he only seeks monetary damages, which are transitory in nature. The traditional justification that lawsuits should be filed in the county in which the land is located to notify subsequent land purchasers about title defects does not apply where the damages from which the complaint seeks relief can literally be seen or found through a physical property inspection. The damages here are patent, not latent.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: By relying on RCW 4.12.010, the Washington Superior Court, King County, erred in dismissing Ralph's and Forth's lawsuit for lack of subject matter jurisdiction under CR 12(h)(3).

Issues Pertaining to Assignments of Error

No. 1: The Washington Superior Court has universal original jurisdiction over all cases and proceedings under article IV, section 6 of the Washington State Constitution. Does RCW 4.12.010 divest the Washington Superior Court of its universal original jurisdiction to hear a tort action, or is RCW 4.12.010 simply a venue statute where it applies?

No. 2: Even though these tort lawsuits partially involve real property, Ralph and Forth filed suit to recover monetary damages for injuries personal to them. Does RCW 4.12.010 apply in this tort lawsuit?

III. STATEMENT OF CASE

A. Procedural history

The facts of this case are not disputed. This consolidated case will affect 6 lawsuits of plaintiffs who filed a tort action in one county to recover from damage to real and personal property located in a different

county.¹ In each of these lawsuits, the defendants filed a motion to dismiss for lack of subject matter jurisdiction, arguing that RCW 4.12.010 limits jurisdiction for “any injuries” to real property to the county in which the property is situated.

Three judges heard three of the six cases and denied the defendants’ motions to dismiss for lack of subject matter jurisdiction; these cases are currently stayed at trial court, pending the outcome of this appeal. In the other three cases, two judges granted the defendants’ motions to dismiss. Two of the dismissed cases, *Ralph v. State Dep’t of Nat. Res.*, 67515-0-I, and *Forth v. State Dep’t of Nat. Res., et al.*, 67704-7-I, are the subject of this petition for review.²

B. Relevant Facts

Ralph is a resident of Lewis County, Washington, where he owns real property. CP-Ralph at 3; CP-Forth at 2. In December 2007, his

¹ Five cases were filed in the Superior Court, King County: (1) *Davis et al. v. State Dep’t of Nat. Res. et al.*, King County Superior Court Case No. 10-2-42010-0 KNT (Cayce, J.); (2) *Forth et al. v. State Dep’t of Nat. Res. et al.*, King County Superior Court Case No. 10-2-42009-6 KNT (McCullough, J.); (3) *Carey et al. v. State Dep’t of Nat. Res.*, King County Superior Court Case No. 10-2-42011-8 KNT (Mack, J.); (4) *Ralph v. Weyerhaeuser, et al.*, King County Superior Court Case No. 10-2-42012-6 KNT (Gain, J.); and (5) *Ralph v. State Dep’t of Nat. Res., King County Superior Court Cause No. 11-2-05769-1 KNT (McCullough, J.)*. And one was filed in the Superior Court, Pierce County: *Triol et al v. State Dep’t of Nat. Res. et al.*, Pierce County Superior Court Case No. 11-2-06140-5 (Hogan, J.). *Davis* is not part of this appeal; however, the plaintiffs there will move for relief from judgment under CR 60 if this petition is successful.

² *Davis et al. v. State Dep’t of Nat. Res. et al.*, King County Superior Court Case No. 10-2-42010-0 KNT (Cayce, J.), was the third case that was dismissed. *Davis* did not perfect her appeal and is not a petitioner, even though her case was dismissed under the same reasons for lack of subject matter jurisdiction.

property flooded when landslides displaced waters from the Chehalis River. CP-Ralph at 3; CP-Forth at 2.

Seeking recovery from damages to real and personal property, Ralph filed suit in the Superior Court, King County, where all defendants reside and may be sued under Chapter 4.12 RCW (personal injury statute and corporation statute) and Chapter 4.92 RCW (state statute). CP-Ralph at 4, 11; CP-Forth at 5-6, 13. His complaint alleged that the defendants' unreasonably dangerous and unlawful forest practices on steep and unstable slopes of the Chehalis River basin caused their properties to flood. CP-Ralph at 2, 4-7; CP-Forth at 2, 6-9. Ralph suffered monetary damages necessary to, among other things, restore real property, replace or repair personal property, and recover lost business expectancies. CP-Ralph at 10-11; CP-Forth at 9-12. He pleaded only special and general damages. CP-Ralph at 10; CP-Forth at 12.

The defendants moved to dismiss Ralph's lawsuit under CR 12(h)(3) for lack of subject matter jurisdiction. CP-Ralph at 19-32; CP-Forth 38-48. Essentially, the defendants argued that the Superior Court, Lewis County, was the only court with proper subject matter jurisdiction over the lawsuit because Ralph alleged injury to his real property. CP-Ralph at 21-23; CP-Forth at 40-41. When an action arises out of an injury to property, the defendants contended, RCW 4.12.010 applies. CP-Ralph

at 21-22; CP-Forth at 40-41. When RCW 4.12.010 applies, the defendants further contended, only the superior court in the county in which the real property is located—here Lewis County—has subject matter jurisdiction. CP-Ralph at 22; CP-Forth at 41. Superior court Judge LeRoy McCullough, King County, agreed with the defendants and dismissed Ralph's lawsuit for lack of subject matter jurisdiction. CP-Ralph at 171-72; CP-Forth at 166-68.

Ralph appealed to Division One and raised two issues. First, Ralph argued that article IV, section 6 of the Washington State Constitution confers universal original subject matter jurisdiction and, therefore, RCW 4.12.010 cannot divest the Superior Court, King County, of its jurisdiction over his lawsuit. Division One recognized that this Court has recently and repeatedly “interpreted filing restrictions similar to the one in RCW 4.12.010 as specifying venue, and expressly overruled previous decisions holding the statutes jurisdictional.” However, citing cases from the 1940s and 1950s, Division One was constrained to hold that RCW 4.12.010 affected jurisdiction. Division One followed the precedent from the 1940s and 1950s even though it was “difficult to reconcile” with several of this Court's recent decisions.

Ralph also argued in the alternate that RCW 4.12.010 did not apply because he was claiming only monetary damages. Division One rejected his argument, reasoning that his complaint involved “injury to land” and therefore was local in nature.

IV. ARGUMENT

A. The Washington Superior Court, King County, erred in dismissing Ralph’s lawsuit because article IV, section 6 confers it universal original subject matter jurisdiction.

On several occasions, this Court has recently held that statutes cannot displace the Washington Superior Court’s original jurisdiction conferred under article IV, section 6, and has overruled precedents to the contrary. *See, e.g., State v. Posey*, 174 Wn.2d 131, 272 P.3d 840 (2012); *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Comm’n*, 173 Wn.2d 608, 616–18, 268 P.3d 929 (2012); *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 734, 254 P.3d 818 (2011); *Dougherty v. Dep’t of Labor & Indus.*, 150 Wn.2d 310, 316–20, 76 P.3d 1183 (2003); *Young v. Clark*, 149 Wn.2d 130, 133–34, 65 P.3d 1192 (2003); *Shoop v. Kittitas County*, 149 Wn.2d 29, 38, 65 P.3d 1194 (2003); *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 541, 886 P.2d 189 (1994).³ Here, the

³ A similar trend is also apparent at the federal level, where courts have strived to “us[e] the term ‘jurisdictional’ only when it is apposite” and to “curtail . . . ‘drive-by jurisdictional rulings.’” *Reed Elsevier v. Muchnick*, 559 U.S. 154, 130 S. Ct. 1237, 1243-44, 176 L.Ed.2d 18 (2010) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998)); *see also Payne v. Peninsula Sch. Dist.*, 653 F.2d 863, 869 (2011).

Superior Court, King County, erred by relying upon RCW 4.12.010 to dismiss Ralph's lawsuit for lack of subject matter jurisdiction, even though it had original subject matter jurisdiction under article IV, Section 6 to hear tort actions such as Ralph's lawsuit. The briefs already before this Court explain this issue, and repetition here is not necessary.

B. The cases upon which the superior court and Division One relied upon must be overturned to the extent that they are inconsistent with article IV, section 6.

In dismissing Ralph's lawsuit, the Superior Court, King County, and Division One have relied upon two cases that this Court published over 50 years ago: *Cugini v. Apex Mercury Mining Co.*, 24 Wn.2d 401, 165 P.2d 82 (1946), and *Snyder v. Ingram*, 48 Wn.2d 637, 296 P.2d 305 (1956). *Cugini* and *Snyder* are a part of a handful of cases in the 1940s and 1950s standing for the general proposition that the precursor statute of RCW 4.12.010 is jurisdictional in nature; they are part of a line of cases that, as Division One previously recognized, has "a tendency to speak of improper venue and lack of subject matter jurisdiction as though they mean the same thing." *Shoop v. Kittitas County*, 108 Wn. App. 388, 398, 30 P.3d 529 (2001), *aff'd on other grounds*, *Shoop*, 149 Wn.2d 29.

The briefs before this Court explain in detail why *Cugini* and *Snyder* do not control and, again, repetition is not necessary here. However, Ralph emphasizes that *Cugini* and *Snyder* do not control this

petition because neither case considered RCW 4.12.010 under article IV, section 6, which is the issue squarely before this Court now. To the extent that *Cugini* and *Snyder* are inconsistent with article IV, section 6, they must be reversed.

C. *Cugini* and *Snyder* cannot stand in conflict with article IV, section 6 of our constitution.

The supremacy of our constitution over any legislative statute governs this case, and *stare decisis* does not protect court precedent that conflicts with our constitution. “Under our constitution there is a limit to the application of the doctrine of stare decisis. That limitation inheres in our checks and balance form of constitutional democracy, which vests the legislative power in the legislature and the people, subject only to certain constitutional prohibitions and limitations. . . . Of course, it is the duty of the court to invalidate a statute if it contravenes the constitution.” *Windust v. Dep't. of Labor and Indus.*, 52 Wn.2d 33, 37, 323 P.2d 241 (1958).

Recently, this Court has held that article IV, section 6 confers on the Washington Superior Court universal subject matter jurisdiction and that, as a result, statutes cannot be applied to divest the superior court of jurisdiction. This reasoning is consistent with the well-established principle that the state constitution is supreme law. Here, relying on *Cugini* and *Snyder*, the superior court erred in applying RCW 4.12.010 as

a limit on original jurisdiction. To the extent that *Cugini* and *Snyder* conflict with the numerous recent decisions holding that article IV, section 6 grants original jurisdiction on the Washington Superior Court, they must be reversed.

D. *Cugini* and *Snyder* cannot stand in conflict with several of this Court's recent opinions on related statutes.

Similarly, *Cugini* and *Snyder* cannot stand in conflict with this Court's recent decisions holding that legislative statutes cannot displace the Washington Superior Court's original jurisdiction. See, e.g., *Posey*, 174 Wn.2d 131; *ZDI Gaming, Inc.*, 173 Wn.2d 608; *Williams*, 171 Wn.2d 726; *Dougherty*, 150 Wn.2d 310; *Young*, 149 Wn.2d 130; *Shoop*, 149 Wn.2d 29; *Marley*, 125 Wn.2d 533. To the extent that *Cugini* and *Snyder* are in conflict with modern case law, they have already been overruled by effect. See, e.g., *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) ("A later holding overrules a prior holding sub silentio when it directly contradicts the earlier rule of law). The more recent pronouncement controls. See, e.g., *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 659, 272 P.3d 802 (2012) ("As a matter of construction, when there is conflicting case law, *Woodley* should control, as this court's more recent pronouncement on the subject.").

E. **Ralph is challenging the constitutionality of applying RCW 4.12.010 as a limit on the Washington Superior Court's original jurisdiction.**

For clarity, Ralph is challenging RCW 4.12.010 *as applied* to limit the superior court's jurisdiction, not the constitutionality of the statute, as defendant-respondents believe. Much of the defendant-respondents' briefing conflates facial constitutional challenges with as-applied constitutional challenges, asserting in one breath that the issue is whether RCW 4.12.010 is "constitutional as a statute limiting superior court jurisdiction over property located in a different county" (as applied), but then asserting in another breath that "[a] party challenging the constitutionality of a statute must prove that the statute is unconstitutional beyond a reasonable doubt" (facial). Ct. App. Br. of Resp.'t at 2, 9. Most recently, the defendant-respondents have conflated facial and as applied challenges in their answer to the petition for review as follows: "Confronted with the incontrovertible evidence that the statute now codified at RCW 4.12.010 did not conflict with Article IV, Section 6 when the state constitution was written, Plaintiffs are now placed in the difficult position of explaining how Section 6 has since been amended to render the statute unconstitutional." Resp't's Ans. to Pet. for Rev. at 11. But Ralph has nothing to "explain[]" because he is not arguing that RCW 4.12.010 is unconstitutional; instead, Ralph has always argued that it has been

unconstitutionally applied as a limit on the Washington Superior Court's original jurisdiction.

“An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional.” *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004). If this Court agrees that the Superior Court, King County, unconstitutionally applied RCW 4.12.010 here, the statute would remain in full effect, and the only impact of the decision would be to reverse its decision here and prohibit future application of the statute as a limit on jurisdiction. *Id.*; *ZDI Gaming*, 173 Wn.2d at 619 (“We interpret statutes as constitutional if we can, and here we can.”) RCW 4.12.010's “shall” language can be read constitutionally by interpreting the word “shall” to be permissive. *Id.* (“By interpreting the word “shall” to be permissive, RCW 9.46.095 relates to venue, not jurisdiction.”).

F. Washington law does not support the argument that RCW 4.12.010 is different because it involves land.

This case is about applying legislative statutes to unconstitutionally limit the Washington Superior Court's original jurisdiction under article IV, section 6. From the beginning, defendant-respondents have sought to distract from this straight-forward issue by arguing RCW 4.12.010 is

different because it involves land. However, defendant-respondents have provided no authority to support the necessary predicate to their argument, namely, *that article IV, section 6* operates differently when land is at stake (as opposed to claiming that RCW 4.12.010 is special because it involves land). Defendant-respondents cannot offer any such support because none exists.

Instead, defendant-respondents rely upon an incomplete and contrived statutory interpretation analysis to argue that RCW 4.12.010 is “plainly constitutional.” Resp’t’s Ans. to Pet. for Rev. at 6-12. Much of the problem with this analysis, however, is that courts have historically muddled concepts of venue and jurisdiction, resulting in what federal courts call “drive-by jurisdictional rulings.” *Reed*, 130 S.Ct. at 1244. At least two Washington appellate courts have also recognized that the imprecise and casual use of the term “jurisdiction” has caused inconsistent opinions. *Shoop*, 108 Wn. App. at 397-98 (some early Supreme Court decisions “display a tendency to speak of improper venue and lack of subject matter jurisdiction as though they mean the same thing”); *see also Dougherty*, 150 Wn.2d at 315 (“the separate issues of venue and jurisdiction have been blurred”). Furthermore, as explained above, Ralph is not arguing that RCW 4.12.010 is unconstitutional.

Under article IV, section 6, “The superior court shall . . . have *original jurisdiction in all cases and of all proceedings* in which jurisdiction shall not have been by law vested exclusively in some other court.” (Emphasis added). As this Court has several times held, article IV, section 6’s clear language confers equal jurisdiction to the superior court; the legislature cannot limit the superior court’s jurisdiction in a certain matter *unless it vests authority over such matters in some other court, such as a court of limited jurisdiction*. Const. art. IV, § 6; *Young*, 149 Wn.2d 130; *Shoop*, 149 Wn.2d 29. Here, the legislature did not enact RCW 4.12.010 to “carve out” the limited jurisdiction of an inferior court, as its plain language states, in relevant part:

Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:

(1) For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title, or for any injuries to real property.

Defendant-respondents do not argue that RCW 4.12.010 carves out jurisdiction to a court of limited jurisdiction because they cannot. Without vesting jurisdiction in some other court, RCW 4.12.010 cannot constitutionally limit the Washington Superior Court’s original jurisdiction. *See Posey*, 174 Wn.2d 131; *ZDI Gaming, Inc.*, 173 Wn.2d

608; *Williams*, 171 Wn.2d 726; *Dougherty*, 150 Wn.2d 310; *Young*, 149 Wn.2d 130; *Shoop*, 149 Wn.2d 293; *Marley*, 125 Wn.2d 533. Therefore, by dismissing Ralph's lawsuit under RCW 4.12.010, the Washington Superior Court, King County, unconstitutionally applied RCW 4.12.010 and must be reversed.

G. Applying RCW 4.12.010 as a venue statute only will do nothing to affect stability of title to real property.

Defendant-respondents unpersuasively predict a "destabilizing effect on title to real property" if this Court holds that RCW 4.12.010 is related to venue. Resp't's Ans. to Pet. for Rev. at 16. However, if RCW 4.12.010 is held to affect only venue, parties would simply file motions that are framed differently but still involve the same issue of where to try the case. Here, for example, if this case is reversed and remanded, the defendant-respondents will immediately move to change venue, arguing why Lewis County is a better venue. There may be many reasons why the superior court may exercise its discretion to have a case involving title to property filed in the county in which the property is located. Ralph will not speculate as to what these reasons might be, but the point is that such issues are left properly in the discretion of the superior court. If a case involves title to real property, a compelling argument is that the superior court of the county in which the land is located is the proper venue

because, as a matter of public policy, individuals should not be required to perform statewide title searches.

H. The superior court here erred in applying RCW 4.12.010 where Ralph's claims are transitory in nature and request monetary damages only.

Ralph also contends that his claims are personal to him and transitory in nature because his action seeks relief in the form of monetary and will not affect title or property in the abstract. *See State ex rel. U.S. Trust Co. v. Phillips*, 12 Wn.2d 308, 316-17, 121 P.2d 360 (1942); *McLeod v. Ellis*, 2 Wn. 117, 122, 26 P. 76 (1891); *Washington State Bank v. Medalia Healthcare L.L.C.*, 96 Wn. App. 547, 555, 984 P.2d 1041, 1047 (1999); *Shelton v. Farkas*, 30 Wn. App. 549, 553, 635 P.2d 1109 (1981). Ralph's claims deal with an "injury" to real property only in the most literal sense: floodwaters damaged real property and personal belongings. But this form of "injury" is not what RCW 4.12.010 contemplates. Instead, RCW 4.12.010 contemplates an "injury" to real property in the more abstract sense, meaning that *title* is affected, and accordingly, RCW 4.12.010 requires such actions are to be brought in the county in which the property is located to protect future owners.

Certainly Ralph's real property is part of a lawsuit because floodwater damaged it, but this alone does not make the action local in nature. 14 Karl B. Tegland, *Washington Practice Civil Procedure* §6:5

(2011) (citing *State v. Superior Court of Spokane County*, 110 Wn. 49, 187 P. 708 (1920)) (“The mere fact that real estate is attached in an action which would otherwise be considered a transitory action does not convert the action into a local action.”). To the contrary, Ralph is solely seeking monetary damages, and the superior court will not have to deal directly with the real and personal property that the defendants are alleged to have negligently damaged. Future owners will have nothing to gain from notice that the defendants’ negligence caused Ralph to suffer monetary damages. This action affects Ralph personally, not his land or title to land in the abstract. Therefore, RCW 4.12.010 does not apply to Ralph’s lawsuit.

This issue is particularly important because, if the lawsuits are remanded, the defendants will undoubtedly move to change venue. In one of the stayed cases, *Triol et al v. State Dep’t of Nat. Res. et al.*, Pierce County Superior Court Case No. 11-2-06140-5, the plaintiffs have already invested over \$60,000 in costs and have nearly gone to trial in Pierce County (the case was stayed only after Division One’s opinion was released because the erosion is continuing). Ralph filed in jurisdictions where the defendant resides and there is no reason to have the case tried in the county where the property is located. RCW 4.12.020(3); RCW 4.12.025(3) (actions against corporations); RCW 4.92.010 (actions against the state). These specific statutes should not apply with any more force

than RCW 4.12.010. Applying RCW 4.12.010 and forcing the trial to occur in the county where the property is located provides no benefit in theory (i.e., no cloud on title), and no benefit in practice (i.e., the jury is not going to visit the land when photos and videos are brought to the courtroom). As the damages are transitory and flow to the plaintiffs who have had to deal with cleaning up their land, and the loss of use and enjoyment thereof, there is no reason why the personal injury venue statute does not apply. RCW 4.12.020(3).

V. SUMMARY AND CONCLUSION

The superior court is one bench, and the legislature cannot divest the original jurisdiction that article IV, section 6 confers, unless it vests that authority in a court of lesser jurisdiction. RCW 4.12.010 does not vest authority in a lesser jurisdiction. Thus, several lawsuits, including Ralph's, were improperly dismissed for want of jurisdiction under RCW 4.12.010. Petitioners respectfully ask the Court to reverse and remand.

Additionally, the superior court erred in applying RCW 4.12.010 because Ralph's lawsuit sounds in tort and requests only monetary damages. Having no rational basis to apply "injury to land" outside of the abstract scenario, Ralph posits that the competing personal injury venue statute, RCW 4.12.020(3), is in conflict and applies here.

///

RESPECTFULLY SUBMITTED this 3rd day of May 2013.

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Subject: Case # 91711-6 - William Ralph v Weyerhaeuser Company, et al. - Joint Brief of Respondents

RE: Case # 91711-6 - *William Ralph v Weyerhaeuser Company, et al.*

Attached is the Joint Brief of Respondents, with Appendix and Certificate of Service, in the above-referenced matter.

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This brief is being served on counsel of record by email and U.S. mail.

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