

ORIGINAL

No. 91711-6
(Consolidated with Nos. 91725-6, 91726-4, and 91727-2)
SUPREME COURT OF THE
STATE OF WASHINGTON

WILLIAM RALPH, individually,
Petitioner,

vs.

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

Received *E*
Washington State Supreme Court

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Ronald R. Carpenter *by h*
Clerk

WILLIAM RALPH, individually,
Petitioner,

vs.

WEYERHAEUSER COMPANY, a Washington Corporation; and
GREEN DIAMOND RESOURCE COMPANY, a Washington
Corporation,
Respondents.

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,

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,

Respondents.

VIRGINIA CAREY, individually; JAMIE CAREY, individually;
PARADYCE INDUSTRIES INC., d/b/a THE PRINT SHOP, a
Washington corporation,

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,

Respondents.

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

This consolidated appeal arises from four lawsuits filed in King County including, among others, claims of real property damage in Lewis County. In *Ralph v. Weyerhaeuser, Dep't of Natural Resources*, 182 Wn.2d 242, 343 P.3d 342 (2014) (*Ralph I*), this Court held—without considering the applicability of any other venue statutes—that RCW 4.12.010 applies to tort actions involving claims of damage to real property and pertains to “mandatory venue,” not jurisdiction. After remand of the two lawsuits consolidated in *Ralph I*, as well as in two related lawsuit stayed until resolution of *Ralph I*, Respondents Department of Natural Resources (“Department”), Weyerhaeuser Company, and Green Diamond Resources Company then successfully moved to transfer the four related lawsuits from King County to Lewis County on the basis that RCW 4.12.010 confers not just mandatory but *exclusive* venue in the Lewis County Superior Court. This Court then consolidated the actions and granted discretionary review.

At its essence, this consolidated appeal distills to two simple, primary questions: (1) whether Respondents may assert an affirmative defense of improper venue never pled, never asserted in a CR 12 motion, and diametrically opposed to their previous representations to the trial court; and (2) whether this Court’s interpretation of RCW 4.12.010 as a “mandatory venue” statute meant that it operates to the total exclusion of any other applicable, mandatorily-phrased venue statutes?

The clear answer to both questions is “no.” First, well-established Washington precedent holds that improper venue is an affirmative defense and that affirmative defenses must be raised in a defendant’s answer or a CR 12 motion and must be consistent with a defendant’s prior positions before the trial court in order to avoid waiver. Here, Respondents not only failed to raise improper venue as an affirmative defense through either vehicle, but also expressly, repeatedly, and vociferously *rejected* the notion of a transfer of venue in favor of seeking outright dismissal of these cases. That is, of course, until Respondents received an adverse decision from this Court. Only then, after a lengthy appellate process, did Respondents become enthusiastic proponents of a venue transfer. Where Respondents carefully crafted their trial court pleadings to avoid even the mere suggestion of a venue transfer in a tactical decision to seek dismissal, Washington law does not permit them to reverse course years later. Under these circumstances, the Court should not allow Respondents to escape the legal consequences of their omissions and express representations—waiver of improper venue as an affirmative defense.

Second, even if the trial court did not err in reaching the merits of the venue issue, venue for these cases was proper in King County. Unlike in *Ralph I*, where this Court only had to consider the applicability of one venue statute, RCW 4.12.010, this appeal requires the Court to consider the applicability three additional venue statutes: RCW 4.12.020(3), RCW 4.12.025(3), and RCW 4.92.010(4). Like RCW 4.12.010, these other venue statutes are mandatorily worded, specifically to give mandatory effect to a

plaintiff's choice of venue. Fortunately, this Court's rules of statutory interpretation and precedent easily avoid any apparent conflict between the statutes by compelling a "complementary" interpretation giving effect to the mandatory phrasing of each by permitting plaintiffs a choice of venue so long as the chosen venue is one of those required by the multiple, applicable statutes. Here, King County was a permissible choice of venue under RCW 4.12.020(3), RCW 4.12.025(3), and RCW 4.92.010(4). Accordingly, under a proper complementary interpretation of the venue statutes applicable to this case, the trial court erred in transferring these actions to Lewis County under an improper "exclusive venue" interpretation of RCW 4.12.010.

Additionally, Respondents argued below that a venue transfer to Lewis County was appropriate for the convenience of witnesses. However, the trial court did not make any factual findings regarding witness convenience and did not exercise its discretion to order a transfer on this ground. Accordingly, should Respondents urge the Court to affirm on this alternative ground, such an action would be improper because it would require fact finding by an appellate court. Should the Court consider this ground, however, the record demonstrates that witness convenience would not be served by such a transfer, as the gravamen of the cases arises from forestry practices and actions developed, considered, and ordered at the King County headquarters of Respondents Weyerhaeuser and Green Diamond.

Finally, the trial court granted Respondents' transfer motions, including a request for costs, without any exclusions or reservations.

However, as discussed above, Respondents waived improper venue as an affirmative defense, thus barring their motions to transfer, much less a cost award in their favor. Moreover, a cost award against a plaintiff for a venue transfer is proper only where the plaintiff filed an action in an improper county. As discussed above, King County is a proper venue for these actions. Thus, the trial court erroneously awarded costs to Respondents.

For all these reasons, the trial court erred in entering orders transferring these actions to Lewis County and requiring Petitioners to pay the costs of transfer. Petitioners respectfully ask this Court to reverse and remand with instructions to vacate the orders and return the actions to King County.

II. ASSIGNMENTS OF ERROR

Assignments of Error

- No. 1: Whether the trial court erred in entering orders transferring venue in these four cases to Lewis County?
- No. 2: Whether the trial court erred in entering orders requiring Petitioners to pay the costs of transferring venue in these four cases to Lewis County?

Issues Pertaining to Assignments of Error

- No. 1: Whether the trial court erred in ruling that, after defendants failed to plead affirmatively the defense of improper venue, failed to assert that affirmative defense in their previous CR 12 motions, and

expressly argued against transfer of venue as a remedy, they had not waived the right to object to venue nearly four years after the fact? (Assignments of Error No. 1, 2)

- No. 2: Whether the trial court erred in ruling that venue was proper in Lewis County, not King County, when multiple, mandatorily-phrased venue statutes are applicable and this Court has previously held that, under such circumstances, a “complementary” interpretation permitting venue in any of the venues required by the applicable statutes is proper? (Assignments of Error No. 1, 2)
- No. 3: Whether the trial court erred in ruling that venue was proper in Lewis County, not King County, when transferring venue did not serve the convenience of witnesses? (Assignments of Error No. 1, 2)
- No. 4: Whether the trial court erred in ordering Petitioners to pay the costs of transferring venue when the cases were filed properly in King County? (Assignment of Error No. 2)

III. STATEMENT OF CASE¹

The Petitioners in this consolidated proceeding are owners of real and personal property located in Lewis County, Washington.² The Chehalis River flooded in early December 2007 and damaged Petitioners' real and personal property located in Lewis County.³ Between December 2010 and January 2011, Petitioners filed four separate tort actions in King County seeking compensation from Respondents for the damage to Petitioners' property, as well as general and specific damages.⁴ Specifically, Appellant Ralph filed a tort action against the Department, *Ralph v. Washington Dep't of Natural Resources*, and a tort action against Weyerhaeuser and Green Diamond, *Ralph v. Weyerhaeuser, et al.*⁵ Petitioners Forth and Carey both filed actions naming all three Respondents as defendants, *Forth v. Weyerhaeuser, et al.*, and *Carey v. Weyerhaeuser, et al.*⁶

In *Ralph v. Weyerhaeuser*, Petitioners alleged in the "jurisdiction and venue" section that Weyerhaeuser and Green Diamond's principal

¹ In preparing the record for this consolidated appeal, the trial court did not utilize numbered pagination for the *Ralph v. Department of Natural Resources* and *Ralph v. Weyerhaeuser, et al.* Clerk's Papers consecutive with each other, *Forth*, or *Carey*. For clarity, Petitioners cite to the *Ralph v. Department of Natural Resources* Clerk's Papers as "DNR CP" and the *Ralph v. Weyerhaeuser* Clerk's Papers as "Weyerhaeuser CP."

The trial court numbered the *Forth* and *Carey* Clerk's Papers consecutive with each other. Accordingly, Petitioners cite those Clerk's Papers as, simply, "CP."

² *Ralph I*, 182 Wn.2d at 246; Weyerhaeuser CP at 711-715; DNR CP at 179-181; CP at 1-3, 242-244.

³ *Id.*

⁴ Weyerhaeuser CP at 711-720; DNR CP at 179-189; CP at 1-13, 242-253.

⁵ Weyerhaeuser CP at 711-720, DNR CP at 179-189.

⁶ CP at 1-13, 242-253.

places of business were located in King County.⁷ In *Ralph v. Dep't of Natural Resources*, Petitioners alleged that venue was “appropriate” in King County.⁸ In *Forth*, and *Carey*, Petitioners alleged both that Weyerhaeuser and Green Diamond’s principal places of business were located in King County and venue was appropriate in King County under RCW 4.92.010(4).⁹

After appearing, Respondents filed answers to Petitioners’ complaints in each case.¹⁰ In each answer, Respondents failed to plead improper venue as an affirmative defense.¹¹ Instead, in *Ralph v. Weyerhaeuser, et al.*, Weyerhaeuser and Green Diamond both admitted their principal places of business were located in King County with no further objection or mention of appropriate venue.¹² In *Ralph v. Dep't of Natural Resources*, the Department denied without explanation that venue was appropriate in King County.¹³ In *Forth* and *Carey*, Weyerhaeuser and Green Diamond denied venue was proper in King County “for lack of information.”¹⁴ The Department admitted that Plaintiffs could “file an action against the state in King County where joinder of an additional

⁷ Weyerhaeuser CP at 714.

⁸ DNR CP at 182.

⁹ CP at 5-6, 246.

¹⁰ Weyerhaeuser CP at 723-731; DNR CP at 190-196; CP at 16-37, 256-275.

¹¹ *Id.*

¹² Weyerhaeuser CP at 724, 728.

¹³ DNR CP at 191.

¹⁴ CP at 26, 33, 265, 271.

defendant resident there permits,” but denied without explanation that venue was appropriate and “reserve[d] the right to move for a change of venue as permitted by court rule and statute.”¹⁵

Nor did Respondents move in any of the cases for a change of venue. Instead, in June 2011, Respondents moved under CR 12(b)(1) to dismiss each case for lack of subject matter jurisdiction, alleging that RCW 4.12.010(1) granted the Lewis County Superior Court exclusive subject matter jurisdiction over the cases.¹⁶

Respondents also expressly argued against transferring the cases to Lewis County. Specifically, in all four actions, Respondents made the following identical, affirmative representations to the respective trial courts: “Plaintiff may argue that the Court may cure this jurisdictional defect by transferring venue to Lewis County. This argument lacks merit.”¹⁷ In their oppositions to the motions to dismiss, Petitioners asserted that both jurisdiction and venue were proper in King County but, if the trial courts determined RCW 4.12.010 was applicable, it was best understood under existing precedent as a venue statute.¹⁸ Thus, a change of venue, not

¹⁵ CP at 18, 258.

¹⁶ *Ralph I*, 182 Wn.2d at 246; Weyerhaeuser CP at 733-738; DNR CP at 197-203; CP at 38-45, 276-282.

¹⁷ Weyerhaeuser CP at 736; DNR CP at 201; CP at 42, 280.

¹⁸ Weyerhaeuser CP at 756-762; DNR CP at 214-221; CP at 50-52, 289-296.

dismissal, was the applicable remedy for any error.¹⁹ However, in their reply briefing, Respondents again expressly rejected a venue change.²⁰

The trial court entered orders dismissing *Ralph v. Dep't. of Natural Resources* and *Forth*, from which Petitioners appealed; the trial court in *Ralph v. Weyerhaeuser* and *Carey* stayed those cases pending the appeals in the related matters.²¹ After consolidating the two previous appeals *Ralph v. Dep't. of Natural Resources* and *Forth*, the Court of Appeals, Division One, affirmed the orders dismissing those cases.²² On review, this Court held that RCW 4.12.010 pertains to venue, not subject matter jurisdiction; reversed the Court of Appeals; and remanded for further proceedings.²³

After remand, Respondents moved in each of these four cases to transfer venue to the Lewis County Superior Court.²⁴ Respondents generally argued that a transfer of venue to Lewis County was appropriate under RCW 4.12.030(1) because (1) under and this Court's characterization of RCW 4.12.010 in *Ralph I* as a "mandatory venue" statute, Lewis County was the mandatory venue for the cases and (2) a transfer of venue to Lewis County was also appropriate under RCW 4.12.030 for the convenience of the witnesses in the case.²⁵ Conditioned on a venue transfer under RCW

¹⁹ Weyerhaeuser CP at 761-762; DNR CP at 220-221; CP at 59-60, 295-296.

²⁰ DNR CP at 343; CP at 143, 378.

²¹ *Ralph I*, 182 Wn.2d at 246; Weyerhaeuser CP at 950-951; CP at 400-401, 542-543.

²² *Ralph I*, 182 Wn.2d at 247.

²³ *Ralph I*, 182 Wn.2d at 259.

²⁴ Weyerhaeuser CP at 952-956; DNR CP at 442-446; CP at 175-179; 559-563.

²⁵ *See, e.g.*, Weyerhaeuser CP at 954; DNR CP at 444-445; CP at 177-178, 561-562.

4.12.030(1), Respondents also requested that the trial court order Petitioners to pay the costs of changing venue and announced their intention to move for an award of attorney fees.²⁶

Petitioners opposed each motion on the exact same grounds: (1) Respondents waived the affirmative defense of improper venue under CR 12(h) by failing to plead it in their answers join that defense in their motion to dismiss; (2) venue was proper in King County under RCW 4.12.020, RCW 4.12.025, and RCW 4.92.010; (3) witness convenience did not warrant transferring venue to Lewis County under RCW 4.12.030(3); and (4) Respondents should not be awarded their associated costs if venue was transferred to Lewis County.²⁷

Ultimately, the trial courts entered orders in each case transferring venue to Lewis County.²⁸ The *Carey* trial court was the only one to provide an explanation in its order for transferring venue to Lewis County, reasoning that (1) Respondents' pre-*Ralph I* motion to dismiss had asserted that the action was "brought in the [in]correct county," but merely sought the wrong remedy, thus preserving their objection to venue; and (2) venue was appropriate in Lewis County, citing RCW 4.12.010(1) and this Court's decision in *Ralph I*.²⁹

²⁶ Weyerhaeuser CP at 955; DNR CP at 445; CP at 178, 562.

²⁷ Weyerhaeuser CP at 979, 981-985; DNR CP at 485-490; CP at 205-209, 614-619.

²⁸ Weyerhaeuser CP at 1062-1064; DNR CP at 552; CP at 231-232, 698-701.

²⁹ CP at 709.

In each case, Petitioners timely filed notices of discretionary review directed to this Court.³⁰ This Court then consolidated the four cases for appellate purposes and granted discretionary review under RAP 2.3(b)(4).

IV. ARGUMENT

A. The Trial Court Erred in Transferring Venue to Lewis County Because Respondents Waived the Affirmative Defense of Improper Venue

This Court reviews *de novo* whether a defendant waived an affirmative defense such as improper venue. *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 858, 313 P.3d 431 (2013). “The initial choice of venue belongs to the plaintiff.” *Eubanks v. Brown*, 180 Wn.2d 590, 595, 327 P.3d 635 (2014). “If initial venue is not proper as to the defendant, the defendant may either waive their objection to the erroneous venue by failing to object or move to transfer the case to where venue is proper.” *Id.*

However, because improper venue is an affirmative defense, Washington’s civil rules impose specific requirements for the timing and manner of “objections.” Specifically, an affirmative defense of improper venue is waived if not asserted in a responsive pleading or made by motion under CR 12. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008) (citing CR 12(h)(1)³¹; *Andrews v. Cusin*, 65

³⁰ Weyerhaeuser CP at 1065-1071; DNR CP at 554-556; CP at 234-237, 702-705.

³¹ CR 12(h)(1) provides:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived

Wn.2d 205, 396 P.2d 155 (1964) (“An affirmative defense of improper venue is waived if not made by motion under the rule or included in a responsive pleading.”); *Kahclamat v. Yakima County*, 31 Wn. App. 464, 466, 643 P.2d 453 (1982) (“When . . . a rule 12(b) defense or objection is raised by motion prior to pleading or in conjunction with the responsive pleading . . . a failure to join all other 12(b) defenses or objections which were then available to the defendant results in a waiver of the omitted defenses or objections.”).

Here, Respondents failed to assert the affirmative defense of improper venue in their answers and failed to join the defense in their CR 12(b) motions to dismiss. Furthermore, in their motions to dismiss, Respondents expressly refuted that transfer of venue was even an option. In their motions, Respondents stated,

Plaintiffs may argue that the Court may cure this jurisdictional defect by transferring venue to Lewis County. This argument lacks merit.

Kahclamat is on all fours. There, the issue was whether “the defendant waive[d] its right to request a change of venue by not asserting

(A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

CR 12(g) provides:

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

its objections to venue in a motion prior to pleading or in its answer, and in waiting a year to make its request.” 31 Wn. App. at 466. Division One of the Court of Appeals answered affirmatively. “A rule 12(b) defense or objection *must* be asserted by a defendant either by motion prior to pleading or else in its responsive pleading if no rule 12(b) motions were made by the defendant before so pleading.” *Id.* (Emphasis added); *see also Raymond v. Fleming*, 24 Wn. App. 112, 114-115, 600 P.2d 614 (1979). The *Kahclamat* court held that the defendant waived his challenge to venue because he did not move to change venue “until many months after its answer and motion to dismiss were filed.” *Id.*

Like in *Kahclamat*, Respondents failed to raise improper venue as an affirmative defense and failed to join the defense in their CR 12(b) motions. Only after a lengthy appeal process did Respondents argue on remand, for the first time, that venue is improper in King County. But Washington law is clear: defendants waive their right to assert improper venue if they (1) fail to plead the affirmative defense in a responsive pleading and (2) fail to join the defense in a CR 12(b) motion. Respondents waived their improper venue objections, and the trial court erred in granting their motions to transfer venue.

Alternatively, a defendant waives an affirmative defense where “(1) assertion of the defense is inconsistent with defendant’s prior behavior or (2) the defendant has been dilatory in asserting the defense.” *King v. Snohomish County*, 146 Wn.2d 420, 423, 47 P.3d 563 (2002). Either criteria is satisfied in this case. As discussed above, Respondents initially chose to

engage in a zero-sum game of requesting complete dismissal of the case and expressly rejecting transfer of the cases to Lewis County in the event that county was the proper venue. Only after receiving an adverse decision in *Ralph I* did Respondents completely reverse course and, four years later, request transfer to Lewis County on grounds of improper venue. Respondents' years-late assertion of improper venue is both entirely inconsistent with their previous hardline stance of requesting dismissal and extremely dilatory. Accordingly, Respondents waived any improper venue objection, and the trial court erred in granting their motions to transfer.

B. The Trial Court Erred in Transferring Venue Because Venue Was Proper in King County under a Required “Complementary” Interpretation of the Multiple, Mandatorily-Phrased Venue Statutes

Even if Respondents did not waive their affirmative defense of improper venue, the trial court still erred in transferring venue to Lewis County under RCW 4.12.030(1) pursuant to a “mandatory venue” interpretation of RCW 4.12.010 because venue was proper in King County under RCW 4.12.020, RCW 4.12.025(3), and RCW 4.92.010 under a “complementary,” harmonized interpretation of these mandatorily-phrased venue statutes required by this Court’s principles of statutory interpretation and prior precedent. Issues presents of determining the applicability of multiple venue statues are issues of statutory interpretation reviewed *de novo*. *Eubanks*, 180 Wn.2d at 596-97; *see also Moore v. Flateau*, 154 Wn. App. 210, 214, 255 P.3d 361 (2010) (transfers of venue under RCW 4.12.030(1) because case is filed in improper county reviewed *de novo*).

RCW 4.12.010 provides:

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.

Emphasis added. Prior to the *Ralph I* decision, this Court had interpreted RCW 4.12.010 as pertaining to a trial court’s jurisdiction to hear cases to which the statute applied. *Ralph I*, 182 Wn.2d at 251. However, in *Ralph I*, this Court properly reconciled RCW 4.12.010 with article IV, section 6 of the Washington State Constitution and held that the statute “relates to mandatory venue, not jurisdiction.” *Ralph I*, 182 Wn.2d at 257. Thus, it concluded that “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.” *Id.* at 258.

Because of the procedural posture of these cases at the time *Ralph I* was decided—i.e., appeals from Respondents’ CR 12 motions seeking an exclusive remedy of dismissal on jurisdictional grounds—this Court was unable to consider whether other venue statutes applied and their interaction with RCW 4.12.010. Despite the limited scope of the issues decided in *Ralph I*, however, on remand Respondents and, apparently, the trial court interpreted this Court’s “mandatory venue” characterization of RCW 4.12.010 to confer *exclusive* venue on a particular superior court.

But other venue statutes are applicable to this case and mandate venue in King County. For example, RCW 4.12.020 provides:

Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose:

. . . .

(3) For the recovery of damages for injuries to the person or for injury to personal property, the plaintiff *shall have the option* of suing either in the county in which the cause of action or some part thereof arose, or in the county in which the defendant resides, or if there be more than one defendant, where some one of the defendants resides, at the time of the commencement of the action.

Emphasis added. Likewise, RCW 4.12.025(3) provides:

The venue of any action brought against a corporation, *at the option of the plaintiff, shall be:* (a) In the county where the tort was committed; . . . or (d) in the county where the corporation has its residence.

Emphasis added. Finally, RCW 4.92.010(4) provides that venue for actions against the State “*shall be . . . [t]he county where the action may be properly commenced by reason of the joinder of an additional defendant.*” Emphasis added.

In these cases, the flooding damage at issue caused a great deal of damage to Petitioners; part of these damages undoubtedly will be damage to their real property in Lewis County, but another portion of the damages analysis will entail damage to their personal property as well as emotional distress in seeing their property destroyed. Furthermore, Petitioners have alleged that torts were committed and the cause of action arose at Weyerhaeuser’s headquarters in King County, where the policies and

procedures causing the negligent timber practices were born, cultivated, and ordered.³² And, at a minimum, both Weyerhaeuser and Green Diamond reside in King County by virtue of being headquartered there. Accordingly, given either the situs of the tort and cause of action or corporate residency, both RCW 4.12.020(3) and RCW 4.12.025(3) authorize venue in King County. Additionally, because King County was a proper venue in which to sue Weyerhaeuser and Green Diamond, RCW 4.92.010(4) further provides venue in King County for claims against the Department.

Accordingly, these three statutes not only authorized venue in King County, but also—through the use of the mandatory term “shall”—*mandated* venue or gave mandatory effect to Petitioners’ choice of venue in King County. Thus, they are in apparent conflict with RCW 4.12.010’s “mandatory” venue of the situs county and in absolute conflict with Respondents’ and trial court’s belief that RCW 4.12.010 operates to the exclusion of all other venue statutes, requiring this Court to resolve the fundamental issue of whether cases involving injuries to real property may only be heard in the situs county or whether venue is proper in other counties under other applicable statutes.

In interpreting venue statutes, this Court must begin with the “well-established principle” that the “choice of venue belongs to the plaintiff.” *Eubanks*, 180 Wn.2d at 595 (quoting *Hatley v. Saberhagen Holdings, Inc.*,

³² Weyerhaeuser CP at 712-14, 766; DNR CP at 180, 224, 322; CP at 2-3, 5-6, 122, 243-246, 357.

118 Wn. App. 485, 488-89, 76 P.3d 255 (2003)). Ultimately, this Court's "fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." *Ralph I*, 182 Wn.2d at 248 (quoting *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 840 (2004)). "In doing so, [this Court] cannot 'simply ignore' express terms." *Ralph I*, 182 Wn.2d at 248 (quoting *In re Parentage of J.M.K.*, 155 Wn.2d 374, 393, 119 P.3d 840 (2005)).

"However, where statutes relate to the same subject matter, [this Court] must read them as a unified whole to the end that a harmonious statutory scheme evolves which maintains the integrity of the respective statutes." *Anderson v. Dep't of Corrections*, 159 Wn.2d 849, 861, 154 P.3d 220 (2007). "[I]t is the duty of this court to construe two statutes dealing with the same subject matter so that the integrity of both will be maintained." *Id.* (quoting *Gilbert v. Sacred Heart Med. Ctr.*, 127 Wn.2d 370, 375, 900 P.2d 552 (1995)). "When two statutes apparently conflict, the rules of statutory construction direct the court to, if possible, reconcile them so as to give effect to each provision." *Anderson*, 159 Wn.2d at 861 (quoting *State v. Landrum*, 66 Wn. App. 791, 796, 832 P.2d 1359 (1992)).

Applying these principles of statutory interpretation, in order to give effect to the mandatory "shall" in each statute, the Court should interpret the statutes as complementary to each other and permitting plaintiffs a choice of venue, so long as the chosen venue is one of the "mandatory" venues required by the applicable statutes. Indeed, such an interpretation is consistent with prior precedent regarding the complementary reconciliation

of potentially competing venue statutes. For example, in *Johanson v. City of Centralia*, 60 Wn. App. 748, 750, 907 P.2d 376 (1991), a tort action against Thurston County and the City of Centralia arising from a fatal car accident, both former RCW 4.12.020 (1941) and former RCW 36.01.050 (1963) were applicable. Former RCW 4.12.020 provided in pertinent part:

Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose:

. . . .

(3) For the recovery of damages arising from a motor vehicle accident; but in a cause arising because of motor vehicle accident *plaintiff shall have the option of suing either in the county in which the cause of action or some part thereof arose, or in the county in which the defendant resides*, or if there be more than one defendant, where some one of the defendants resides, at the time of the commencement of the action.

Emphasis added. In contrast, former RCW 36.01.050 provided in pertinent part that “[a]ll actions against any county may be commenced in the superior court of such county, or of the adjoining county.”

In reconciling the two statutes, the Court of Appeals reasoned:

Each statute deals with a different aspect of the same subject matter, venue of a lawsuit. [Former] RCW 4.12.020 deals with a specific kind of action, a motor vehicle accident, whereas [former] RCW 36.01.050 deals with a specific kind of defendant, a county . . . [w]e conclude that what superficially appears to be a conflict is really not.

We believe the two statutes are complementary. [Former] RCW 4.12.020 permitted the plaintiff to bring this particular kind of *lawsuit* in the county where “some one of the defendants” resides; Thurston County was, therefore, a permissible venue. [Former] RCW 36.01.050, dealing with a specific kind of *defendant*, then came into play, allowing

the plaintiff the further option of filing suit in adjoining
Pierce County.

Johanson, 60 Wn. App. at 750-51 (emphases in original) (footnote omitted). As this Court subsequently observed, despite the arguably permissive nature of the “may be commenced” language of former RCW 36.01.050, a “complementary” interpretation of the two statutes was necessary to avoid an unnecessary conflict between the two statutes and to give full effect to each statute’s language. *Cossel v. Skagit County*, 119 Wn.2d 434, 437-38, 834 P.2d 609 (1992), *overruled on other grounds by Shoop v. Kittias County*, 149 Wn.2d 29, 37, 65 P.3d 1194 (2003).

The necessity of a “complementary” interpretation applies with even more force than in *Johanson* and *Cossel*, given the plainly and unarguably mandatory language of all the venue statutes in play in this case. Giving plaintiffs the option to commence a lawsuit involving both damage to real property and either personal injuries or damage to personal property in the situs county of the real property, the county where some part of a tort arose, or the county where one of the defendants resides is necessary to give effect to the mandatory language of RCW 4.12.010(1) and RCW 4.12.020(3) regarding where those types of lawsuits of may be heard. Likewise, in lawsuits raising claims of damage to real property and naming a corporate or State defendant, giving plaintiffs the option to have the action heard in the situs county of the real property, the county in which some part of a tort arose, or the county in which one of the corporations resides is necessary to avoid a conflict between and to effectuate fully the legislature’s intent to set

minimum venue requirements for lawsuits in this state while simultaneously giving mandatory effect to a plaintiff's choice of venue, as manifested by the unambiguously mandatory language of RCW 4.12.010(1), RCW 4.12.025(3), and RCW 4.92.010(4). Accordingly, Petitioners' choice of King County as venue in these actions was proper, and the trial court erred in transferring venue to Lewis County.

C. The Record Does Not Support Affirming the Venue Transfer to Lewis County Based on Witness Convenience

RCW 4.12.030(3) permits a trial court to transfer venue for certain enumerated reasons:

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

(1) That the county designated in the complaint is not the proper county; or,

(2) That there is reason to believe that an impartial trial cannot be had therein; or,

(3) That the convenience of witnesses or the ends of justice would be forwarded by the change; or,

(4) That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he or she is a party, or in which he or she is interested; when he or she is related to either party by consanguinity or affinity, within the third degree; when he or she has been of counsel for either party in the action or proceeding.

In turn, RCW 4.12.090(1) provides:

When an order is made transferring an action or proceeding for trial, the clerk of the court must transmit the pleadings and papers therein to the court to which it is transferred and charge a fee as provided in RCW 36.18.016. *The costs and fees thereof and of filing the papers anew must be paid by the party at whose instance the order was*

made, except in the cases mentioned in RCW 4.12.030(1), in which case the plaintiff shall pay costs of transfer and, in addition thereto, if the court finds that the plaintiff could have determined the county of proper venue with reasonable diligence, it shall order the plaintiff to pay the reasonable attorney's fee of the defendant for the changing of venue to the proper county. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

Emphasis added.

Although Respondents asserted and Petitioners contested below that transfer to Lewis County was appropriate for witness convenience, none of the trial court's written orders purported to rely on RCW 4.12.030(3) in transferring venue to Lewis County and no transcript reflecting any such reliance or related findings exists because the trial court heard the venue transfer motions without oral argument. Indeed, the existing record actually demonstrates that the trial court *did not and could not* have based its decision on RCW 4.12.030(3). In *Carey*, the trial court expressly stated that it was basing its transfer decision on RCW 4.12.010(1). In the other three cases, the trial court granted without limitation Respondents' transfer motions, all of which included a request for costs. Thus, because RCW 4.12.090(1) authorized the trial court to award costs to Respondents only for venue transfers based on RCW 4.12.030(1), the trial court necessarily granted the motions to transfer venue based on RCW 4.12.030(1). Accordingly, in the absence of any findings regarding witness convenience or exercise of the trial court's discretion in making such findings, RCW 4.12.030(3) does not present an alternative ground for affirming the trial

court because it is a ground unsupported by the record.³³ See *Conley v. Superior Court for King County*, 106 Wash. 569, 181 P. 50 (1919) (convenience of witnesses for purposes of venue is a question of fact committed to trial court’s discretion); *Quinn v. Cherry Lane Auto Plaza*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009) (appellate courts do not find facts).

However, even were this Court to consider RCW 4.12.030(3), no tenable or reasonable ground exists for transferring venue to Lewis County to serve “the convenience of witnesses.” This Court reviews a decision to transfer venue under RCW 4.12.030(3) for abuse of discretion. *Moore*, 154 Wn. App. at 214. A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). “A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *McCoy v. Kent Nursery*, 163 Wn. App. 744, 758, 260 P.3d 967 (2011) (internal quotation marks omitted) (quoting *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008)).

Here, on a balance, there cannot be a reasonable debate that most of the central witnesses to this lawsuit will be in King County. The underlying

³³ Likewise, because Petitioners also appeal the trial court’s cost awards, this Court must resolve whether transferring venue under RCW 4.12.030(1) was erroneous regardless of RCW 4.12.030(3). A holding that transfer under RCW 4.12.030(1) was appropriate is necessary to uphold the cost awards.

forest practices and policies that damaged Petitioners' property occurred at the Weyerhaeuser headquarters. All of the necessary documents will be coming from the Weyerhaeuser headquarters, and in fact, before this case was dismissed, the undersigned were planning to visit Weyerhaeuser headquarters to review the boxes of responsive discovery documents. The experts as well will also likely be from King County or immediately surrounding counties. The only witnesses who will be in Lewis County are Petitioners and some eyewitnesses. Taken together, witness convenience does not weigh in favor of transferring venue. Accordingly, the trial court abused its discretion in transferring the cases to Lewis County by exercising that discretion based on unreasonable and untenable grounds unsupported by the record.

D. The Trial Court Erred in Ordering Petitioners to Pay the Costs of Transferring Venue When the Cases Properly Were Filed in King County

Finally, the trial courts erred in ordering Petitioners to pay the costs of transferring venue. Respondents waived their objection to venue in King County, and this Court should reverse the orders transferring venue and awarding costs for the transfer.

Even if Respondents did not waive their objections, RCW 4.12.090 requires the party successfully moving for a venue change to pay the associated costs unless the venue change is ordered under RCW 4.12.030(1). For the reasons stated above, venue for these cases was also proper in King County under RCW 4.12.020, RCW 4.12.025(3), and RCW

4.92.010. Accordingly, the trial court erred by ordering Petitioners, not Respondents, to bear the cost of transfer.

Finally, and in the alternative, if this Court opts to affirm the trial court on the alternative ground that transfer was appropriate under RCW 4.12.030(3), it necessarily must reverse the trial court's award of costs to Respondents.

V. CONCLUSION

Respondents not only failed to plead improper venue as an affirmative defense but also vigorously opposed any notion of a venue transfer until it benefitted them to do so years later. Respondents thus waived any claim of improper venue. Even had they not waived their claims, however, this Court's principles of statutory interpretation and precedent establish that King County is a proper venue for these actions. Accordingly, Petitioners respectfully request that this Court reverse the trial court's orders transferring venue to Lewis County and awarding costs to Respondents.

RESPECTFULLY SUBMITTED this 22nd day of March 2016.
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