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NO. 69008-6-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

2019 JUL 18 PM 1:24
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

PACCAR Inc,

Petitioner,

v.

CASSIE LISBY as personal representative for the ESTATE OF
CLAYTON LISBY,

Respondent.

REPLY BRIEF

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INTRODUCTION

When granting a forum non conveniens dismissal, trial courts indisputably have the discretion to impose procedural conditions designed to preserve the status quo in the new forum. The question here is whether a trial court may impose a stipulation to apply a specific portion of Washington's substantive law in Texas. The answer must be no, for two overarching reasons.

First, the order is legally improper. Lisby claims that the trial court made no choice-of-law ruling. Yet, a plain reading of the court's order makes clear that the court, in fact, did make a choice of law determination when it ordered that PACCAR stipulate to a specific Washington statute – an issue solely for the Texas court.

Second, the order overreaches. The trial court carefully weighed the forum non conveniens factors, finding that on balance, they “strongly” favor Texas – a conclusion that Lisby does not challenge here. But on reconsideration – and without analysis – the court erred by conditioning the dismissal on PACCAR's acceptance of an unprecedented condition that conferred a substantive advantage on Lisby. This was an abuse of discretion.

This Court should reverse the stipulation condition, leave the unchallenged dismissal order in place, and dismiss.

REPLY

A. The trial court's untenable forum non conveniens ruling was an abuse of discretion.

PACCAR explained that an errant legal ruling is an abuse of discretion. BA 6. Lisby does not respond. The trial court abused its discretion by conditioning its forum non conveniens dismissal on PACCAR's agreement that Washington's Statute of Repose (RCW 7.72.060) shall apply in Texas. The Court should reverse the stipulation condition, leave the unchallenged dismissal order in place, and dismiss.

B. The trial court abused its discretion by conditioning its forum non conveniens dismissal on PACCAR's stipulation that Washington's statute of repose applies in Texas.

PACCAR explained that a statute of repose – unlike a merely procedural statute of limitation – is the substantive law of the state. BA 6-9 (citing *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 212, 875 P.2d 1213 (1994) and *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 574-75, 146 P.3d 423 (2006)). Lisby fails to address this fundamental jurisprudential difference between statutes of limitations and repose. Yet a case that she cites turns on this distinction: *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 322, (2010).

In **Chang**, the Seventh Circuit addressed the merits of both the choice-of-law and forum non conveniens, where the alternative forum (Taiwan) had a statute of repose that effectively “capped” (or shortened) California’s statute of limitation.¹ 599 F.3d at 737. The trial court ruled that California would “borrow” the Taiwanese statute of repose.² *Id.* at 733. This statute of repose was a “substantive policy that the plaintiff [was] trying to avoid.” *Id.* at 737. The court rejected plaintiff’s argument and refused to bestow such a “gratuitous substantive advantage” on the plaintiff. *Id.*

Our courts too have rejected attempts to improperly merge the choice-of-law and forum non conveniens analyses. BA 6-9 (citing **Myers v. Boeing Co.**, 115 Wn.2d 123, 794 P.2d 1272 (1990); **Johnson v. Spider Staging Corp.**, 87 Wn.2d 577, 555 P.2d 997 (1976)). This is because a procedural bar like an expired statute of limitations makes the alternative forum unavailable, while

¹ The Court explains the purpose of procedural conditions like waiving the statute of limitations: eliminating unfairness that may arise when, “as a consequence of delays inherent in litigation the defendant has acquired an airtight defense of untimeliness in the alternative forum since the litigation began.” **Chang**, 599 F.3d at 736. Here, no such defense arose after the litigation began, so no such unfairness exists.

² Unlike in California, Washington’s borrowing statute does not apply to statutes of repose because they are substantive law. **Rice**, 124 Wn.2d at 212 (“We hold that statutes of repose do not fall under the statute of limitations borrowing statute, RCW 4.18.020, but instead may raise a conflict of substantive law”).

a substantive difference in the law is not an appropriate basis for a forum non conveniens dismissal. *Id.* (citing ***Piper Aircraft Co. v. Reyno***, 454 U.S. 235, 247, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)). Indeed, “a *forum non conveniens* motion does not entail any assumption by the court of substantive ‘law-declaring power.’” ***Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.***, 549 U.S. 422, 433, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007).

PACCAR so quoted ***Sinochem*** in its opening brief, but Lisby fails to respond. BA 8. There, a unanimous United States Supreme Court held that a district court may transfer a case due to forum non conveniens before it even decides whether it has subject matter jurisdiction. 549 U.S. at 432. This is because a forum non conveniens dismissal “is a determination that the merits should be adjudicated elsewhere.” *Id.* Thus, “*forum non conveniens* [is] a threshold, nonmerits issue,” which “does not entail any assumption by the court of substantive ‘law-declaring power.’” *Id.* at 433 (quoting ***Ruhrgas AG v. Marathon Oil Co.***, 526 U.S. 574, 584-85, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)).

Contrary to Lisby’s repeated conclusory assertions, this is the only “principled” way to address the fundamental legal

difference between limitations and repose. If a court is not assuming law-declaring power, it cannot choose which substantive law applies. That is left to the convenient forum.

PACCAR also explained the ill-effects of a holding from this Court that a plaintiff may file in this inconvenient forum and ask our Superior Court to dismiss only on the condition that the defendant forfeit substantive legal defenses in the alternate forum. BA 8-9. The Court is aware that many large companies who litigate around the country (and around the world) make their homes here in Washington. Many other forums' substantive liability and/or damages laws are more restrictive than Washington law. This court should not affirm a decision that will reduce our trial courts to a litigation clearinghouse in which a plaintiff briefly passes through Washington in order to strip a party of a substantive defense en route to the proper convenient forum.

C. The trial court erred as a matter of law in contradicting its initial correct ruling that choice of law is reserved to the Texas court.

PACCAR also explained that the trial court erred as a matter of law in contradicting its own correct ruling that choice of law is reserved to the Texas court, permitting an end-run around its own forum non conveniens ruling. BA 9-10 (citing, *inter alia*, **Hill v.**

Jawanda Transp. Ltd., 96 Wn. App. 537, 546, 983 P.2d 666 (1999)). The trial court carefully analyzed forum non conveniens, concluding that Texas is – by far – the more convenient forum. CP 335 (“The court . . . finds those [public and private interest] factors strongly favor trial in the State of Texas [and] strongly disfavor trial in Washington”). The court then properly deferred *all* choice of laws issues to Texas. *Id.* (“this Court declines to address *any* choice of law issues which will properly be addressed to the Texas court” (emphasis added)). Yet on reconsideration, it chose the Washington Statute of Repose, leaving “[a]ll *other* choice of law issues” to the Texas court. CP 362 (emphasis added). This shift is unexplained and untenable.

Lisby’s response to the court’s shift is surprising: the trial court “did not make a choice of law determination.” BR 14. While it is true that the trial judge did not do an actual choice-of-law analysis (see BA 10-11), her orders’ plain language makes clear that she made the choice of law determination. There is no doubt that statutes of repose are substantive law, so the trial court chose the law by ordering PACCAR to stipulate to it. Candor requires an acknowledgement of this basic truth.

Lisby concedes that it is “a correct statement of the law” that plaintiffs cannot defeat a forum non conveniens motion by showing that the law in the proper forum is less favorable. BR 6. But Lisby claims that this law is “inapplicable” here because she is asserting that “the case would likely not be litigated in Texas” absent the stipulation. *Id.* PACCAR does not understand Lisby’s contention. Lisby can re-file her case in Texas and proceed to litigate all choice-of-law issues there. Lisby has never conceded that the Texas statute of repose applies and she may ultimately prevail in arguing that Washington law should govern. That analysis and decision have yet to be made. At this juncture, Lisby is simply guessing about what might happen in the future. Such guesswork is an improper basis for Lisby to assume that her case cannot proceed in Texas, which everyone – even Lisby³ – agrees is the proper forum.

Indeed, PACCAR pointed out that Lisby has recently filed actions in Texas and Oklahoma arising out of this same accident. BA 5. Yet she nowhere explains how she can maintain these separate actions. See, e.g., ***Sprague v. Adams***, 136 Wash. 614,

³ That is, Lisby has not challenged the forum non conveniens ruling, so it is the law of the case, and Lisby has conceded the issue.

247 P. 960 (1926) (claim-splitting long forbidden), *followed by* ***McFarling v. Evaneski***, 141 Wn. App. 400, 405, 171 P.3d 497 (2007) and ***Landry v. Luscher***, 95 Wn. App. 779, 782 (1999). Lisby obviously finds litigating in Texas convenient enough, and such forum shopping should not be tolerated.

D. Lisby's cases are all inapposite, and at most they permit procedural conditions to preserve the status quo in the new forum, not conditions affecting substantive law.

Lisby cites six inapposite Washington opinions to argue that courts "routinely" condition forum non conveniens dismissals. BR 3-5. There is no question that courts may place certain conditions on a forum non conveniens dismissal. But none of Lisby's cases addresses the issue presented here: whether a court may require a defendant to forfeit a substantive defense as a condition of trying the case in the proper, convenient forum.

And no case supports Lisby's further argument that courts "routinely" impose conditions more onerous than stipulating to a statute of repose. But her cases (and many more around the country) do follow a consistent pattern: courts routinely impose procedural conditions designed to preserve the status quo for the new forum. By contrast, the stipulation condition in this case destroys the status quo.

1. **Myers v. Boeing Co.**

Myers arose from an airplane crash in Japan. Here in Washington, defendant Boeing *admitted liability* (and judgment was entered) and then moved to dismiss the Japanese nationals' bifurcated damages trial, arguing that Japan was the more convenient forum. 115 Wn.2d at 127. The trial court agreed, conditioning its dismissal on Boeing (1) submitting to jurisdiction in Japan; (2) waiving statute of limitations defenses; (3) admitting liability for compensatory damages; (4) and not opposing recognition of the Washington judgment in Japan, to all of which *Boeing agreed. Id.* The *plaintiffs* appealed, but the Supreme Court found no abuse of discretion. *Id.* at 140.

Myers obviously does not support *Lisby*. When that forum non conveniens ruling was made, the liability judgment had already been voluntarily stipulated to by Boeing, so it gave up no substantive rights by agreeing to honor that judgment in Japan. *Id.* at 127. Thus, each of the conditions is simply procedural, preserving the status quo.

2. ***Sales v. Weyerhaeuser*, 163 Wn.2d 14, 177 P.3d 1122 (2008).**

Sales was an asbestos case. The trial court failed to apply the well-established forum non conveniens standards before dismissing in favor of Arkansas, without first determining whether removal to federal court in Arkansas (and a possible transfer to multi-district litigation in Pennsylvania) could affect the convenience of litigating in Arkansas. 163 Wn.2d at 22. The Supreme Court remanded for proper consideration of the factors, noting that Arkansas may still be the more convenient forum. *Id.* at 23.

Sales does not help Lisby. Removal is a procedural issue, so it is proper to at least consider conditioning a dismissal on a stipulation not to attempt to remove the case. That just preserves the status quo in the new forum.

3. ***Klotz v. Dehkhoda*, 134 Wn. App. 261, 141 P.3d 67 (2006).**

Klotz was a wrongful death action arising out of a car accident in Stevens County, Washington. The defendant drunk driver sought a forum non conveniens dismissal (to Canada), which the trial court granted on condition that the he admit liability and that the Canadian court accept jurisdiction. *Id.* at 264. The defendant accepted the conditions and did not appeal.

Klotz does not support Lisby's argument. That case does not address whether the liability condition was proper or whether defendant intended to contest liability (regardless of the forum).

4. *Int'l Sales & Lease, Inc. v. Seven Bar Flying Svc., Inc.*, 12 Wn. App. 894, 533 P.2d 445 (1975).

Int'l Sales was really a question of long-arm jurisdiction over the sale of an airplane. The appellate court reversed an order quashing the complaint and remanded, but *sua sponte* raised the issue of forum non conveniens and imposed conditions regarding paying attorney fees and certain costs. 12 Wn. App. at 898-900.

These procedural conditions properly preserved the status quo in the new forum, a far cry from requiring a defendant to stipulate to apply Washington law in Texas.

5. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1235 (9th Cir. 2011), cert. denied, 133 S. Ct. 1996 (2013).

Carijano arose out of oil exploration in Peru. The district court failed to condition dismissal on waiver of the statute of limitations, plainly an abuse of discretion. 643 F.3d at 1235. It also failed to consider other procedural issues, like discovery and possible difficulties with enforcing a Peruvian judgment, so the Ninth Circuit reversed and remanded. *Id.* at 1235-36.

Again, procedural conditions preserving the status quo are fine, and *Carijano* does not support Lisby.

6. ***FIL Leveraged US Gov't Bond Fund Ltd. v. Mansfield*, No. 97-56414, 1998 U.S. App. LEXIS 17586 (9th Cir. July 29, 1998).**

FIL was basically a collection action. The district court dismissed for forum non conveniens, imposing the usual status-quo procedural conditions, like acceding to jurisdiction in Hong Kong, waiving any statutes of limitations, and making its documents and employees available there. Like so many other cases Lisby cites, the *plaintiffs* appealed, claiming these conditions were not enough. *Id.* at *8-*9. The Ninth Circuit affirmed. *Id.*

If anything, *FIL* supports PACCAR, as the Ninth Circuit held that asking the district court to impose additional restrictions on reconsideration – after the “the district court had already engaged in the whole delicate balancing process” – was too late. *Id.* at *8. Here, the trial court upset the delicate balance by throwing-on a choice of Washington law well after the eleventh hour. This was an abuse of discretion.

7. **Foreign Cases.**

Lisby also cites two foreign cases. BR 11-13 (citing ***Manfredi v. Johnson Controls, Inc.***, 487 N.W.2d 475 (Mich. App.

1992) and **Downs v. 3M Co.**, 2010 R.I. Super. LEXIS 1 (R.I. Sup. Ct. Jan 5, 2010)). **Manfredi** was a products-liability claim arising in Georgia, but plaintiff sued in Michigan, where the machine was manufactured. 487 N.W.2d at 523. The trial court dismissed based on forum non conveniens, and (again) the *plaintiff* appealed, albeit while failing to bring up any transcript of the trial court's reasoning. *Id.* at 521. The Defendant also did not file a brief. *Id.* at 523 n.2.

The **Manfredi** court found in *dicta* that the trial court abused its discretion in denying plaintiff's motion to reconsider the forum non conveniens dismissal, which argued that Georgia's statute of repose barred his claims. *Id.* at 526-27. The court remanded for a hearing to consider whether Georgia was an appropriate alternate forum, but did not address the substance of plaintiff's statute of repose argument. This ruling is not surprising given that Michigan's forum non conveniens test is different from Washington's and specifically incorporates a conflict-of-law analysis as a factor in Michigan's forum non conveniens balancing test. *Id.* at 524 (citing **Cray v. General Motors Corp.**, 207 N.W.2d 393 (Mich. 1973)).

Manfredi is inapposite and questionable authority based on the fundamental differences between Washington and Michigan

forum non conveniens law, and its *dicta* should not be followed here. Our record is clear – and no dispute exists – that the trial court properly weighed the appropriate factors, finding on balance that they “strongly” favor a Texas trial. CP 335. The issue is rather whether the trial court abused its discretion by piling-on a choice of law *after* it had weighed the delicate balance. See **FIL**, *supra*, at *8 (raising new conditions on reconsideration is too late).

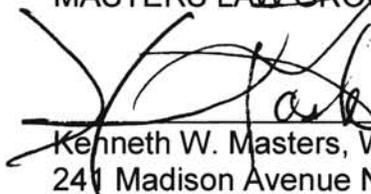
Downs is a Rhode Island trial court’s forum non conveniens ruling in an asbestos case, or rather many such cases against a great number of non-resident defendants. 2010 R.I. Super. LEXIS (“**Downs**”) at *1-*2. One plaintiff lives in Nebraska, another in Colorado, and the defendants moved to dismiss them for forum non conveniens. *Id.* at *5-*6. What Lisby fails to mention (BR 12-13) is that the trial court *declined* to dismiss, so its hypothetical footnote about the statute of repose is *dicta* in what is obviously not binding or even persuasive authority. **Downs** at *24 n.7, *55.

CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse the stipulation condition, leave the unchallenged dismissal order (with the statute of limitations waiver condition) in place, and dismiss.

RESPECTFULLY SUBMITTED this 17th day of July, 2013.

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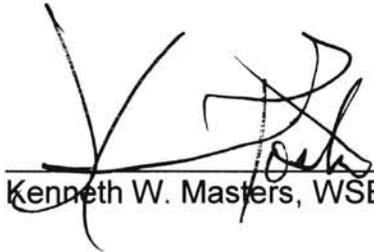
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