IN THE SUPREME COURT OF THE STATE OF OREGON

ROSA AURELIA PALACIOS ESPINOZA, Personal Representative of the Estate of Victor Andres Espinoza Horna, Deceased, for her own benefit as the surviving spouse and for the benefit of Micaela Ariana Espinoza and Mariam Andrea Espinoza, surviving children of the deceased, Plaintiff-Appellant, Respondent on Review, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased, Defendant.	Multnomah County Circuit Court No. 0909-12350 CA No. A147028 SC No. S062903 **REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW EVERGREEN HELICOPTERS, INC.**
ERIKA CONSUELO MACHADO MERINO, Personal Representative of the Estate of Juan Francisco Garcia Rubio, Deceased, for her own benefit as the surviving spouse and for the benefit of Macarena Garcia Machado and Mariono Garcia Santolalla, surviving children of the deceased, and Arturo Benjamin Garcia Pinillos, surviving father of the deceased, Plaintiff-Appellant, Respondent on Review, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review,	Multnomah County Circuit Court No. 0909-12777 CA No. A147028 SC No. S062903

August 2015

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

JULY MARLENE CHURATA FERNANDEZ, Personal Representative of the Estate of Christian Martin Querevalu Quiroz, Deceased, for her own benefit as the surviving spouse and for the benefit of Camila Milagros Querevalu Churata, surviving child of the deceased, Freddy Quiroz Dulanto De Querevalu, and Rolandi Querevalu Suarez, surviving parents of the deceased,

Plaintiff-Appellant, Respondent on Review,

vs.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent, Petitioner on Review,

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

Multnomah County Circuit Court No. 0909-13294

CA No. A147028

SC No. S062903

FLOR DE MARIA GAMBOA ALVAREZ, Personal Representative of the Estate of Fernando Cesar Nunez Del Prado Reynoso, Deceased, for her own benefit as the surviving spouse and for the benefit of Caroline Anthuanet Nunez Del Prado Gamboa and Fernando Junior Nunez Del Prado Gamboa, surviving children of the deceased, and Margarita Severiana Reynoso Quispe and Ricardo Cesar Nunez Del Prado Saavedra, surviving parents of the deceased,

Multnomah County Circuit Court No. 0910-15153

CA No. A147028

SC No. S062903

Plaintiff-Appellant,
Respondent on Review,

vs.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

FLOR KATHERINE SOTO LICAN, Personal Representative of the Estate of Jose Luis Saldana Eustaquio, Deceased, for her own benefit as the surviving spouse and for the benefit of Joseph Saldana Soto, Luiggi Saldana Soto, Miguel Angel Saldana Soto, Maria Elizabeth Saldana Gutierrez, and Alexandra Himena Saldana Gutierrez, surviving children of the deceased; and Amadeo Saldana Narro, surviving father of the deceased,

Plaintiff-Appellant,
Respondent on Review,

vs.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

Multnomah County
Circuit Court
No. 0910-15154

CA No. A147028

SC No. S062903

OLGA PAULINA CHIBA QUISPE, Personal Representative of the Estate of Peter Michael Liza Chiba, Deceased, for her own benefit as the surviving mother and for the benefit of Jose Armando Liza Nunton, surviving father of the deceased, Plaintiff-Appellant, Respondent on Review, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased, Defendant.	Multnomah County Circuit Court No. 0912-17035 CA No. A147028 SC No. S062903
BRENDA VILMA HOYLE DE CASTRO, Personal Representative of the Estate of Miguel Max Castro Gutierrez, Plaintiff-Appellant, Respondent on Review, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased, Defendant.	Multnomah County Circuit Court No. 1002-02814 CA No. A147028 SC No. S062903

GIOVANNA PATRICIA OTERO DE VASQUEZ, Personal Representative of the Estate of Jhon Henry Vasquez Lopez, Deceased, for her own benefit as the surviving spouse of the deceased and for the benefit of Angie Patricia Vasquez Otero, Henry Gianpierre Vasquez Otero, Karen Elizabeth Vasquez Otero, and Jhon Henry Vasquez Otero, surviving children of the deceased; and Pablo Wilfredo Vasquez Meza, surviving father of the deceased; and Catalina Lopez De Vasquez, surviving mother of the deceased, Plaintiff-Appellant Respondent on Review, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased, Defendant.	)	Multnomah County Circuit Court No. 1003-03637 CA No. A147028 SC No. S062903

REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW EVERGREEN HELICOPTERS, INC.

On the Petition for Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Multnomah County Circuit Court

Honorable Jerry B. Hodson, Judge

Opinion Filed: October 8, 2014
Author of Opinion: Armstrong, P.J.
Concurring: Nakamoto, J. and Egan, J.

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REPLY ARGUMENT

A. Jurisdiction: Seven Appeals Should Be Dismissed.

Plaintiffs' efforts to avoid the jurisdictional issue fail. The contention that Evergreen needed to seek review of earlier rulings neglects, among other things, ORAP 7.15(3), which permits the court's reconsideration of any motion that "challenge[s] * * * the court's jurisdiction." The rule reflects the basic fact that appellate jurisdiction is always in play.[1] It cannot be waived.

Also misconceived is the assertion that Evergreen had to seek review of the court's waiver of ORAP 2.10 (Pl Br 10). That ruling was neither "independent" nor "alternative" (*id.*); the court waived the requirement of multiple notices for precisely the same reason it denied Evergreen's motion: it believed the requirement wasn't jurisdictional.

When plaintiffs finally reach the merits, they never address the critical fact that eight plaintiffs in eight different cases filed one appeal from one judgment. Instead, they misstate things, contending that "the trial court dismissed all eight actions * * * through an identical judgment 'entered in these consolidated cases on October 12, 2010.'" (Pl Br 15.) "All eight actions" were dismissed by eight judgments. Their terms may have been identical, but that did not make them one.

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[1] *E.g.*, *State v. K.P.*, 324 Or 1, 4, 921 P2d 380 (1996) (considering "threshold" issue of appellate jurisdiction before reaching issue on review); *Assisted Living Concepts, Inc. v. Fellows*, 244 Or App 475, 479-80, 260 P3d 726 (2011) (dismissing appeal for lack of jurisdiction after previously determining jurisdiction existed).

Had the eight cases been resolved by eight judgments whose terms were *not* identical, plaintiffs obviously could not have established appellate jurisdiction over each judgment by taking a single appeal from one. Why should the result differ because the judgments had identical terms? Seven appeals should be dismissed.[2]

B. The Court of Appeals Correctly Acknowledged That *Forum Non Conveniens* Doctrine Applies.

Plaintiffs' ardent opposition to *forum non conveniens* (Pl Br 17-26) seeks to turn back the clock to a time when one Justice Marshall inhabited a world far different from the one inhabited by the Justice Marshall who wrote *Piper Aircraft Co. v. Reyno*, 454 US 235, 102 S Ct 252, 70 L Ed 2d 419 (1981). To support their contention that the doctrine's support is limited to the 1929 musings of "a Wall Street lawyer" (Pl Br 17), plaintiffs misstate law and make new arguments. Evergreen's brief in the Court of Appeals offered a detailed response to the arguments made in that court (Red Br 6-23). We address new arguments here.

A review of the Court of Appeals proceedings assists. As that court noted, 266 Or App at 35, plaintiffs based their first assignment of error "almost exclusively" on *State ex rel Kahn v. Tazwell*, 125 Or 528, 266 P 238 (1928)—a case they hadn't cited in the trial court, but which, they told the Court of Appeals, was "controlling authority" that "clearly rejected" *forum non*

[2] Plaintiffs suggest that (a) one can't tell which judgment they attached to their notice and (b) the Commissioner agreed with them about that (Pl Br 11 n 2). They are mistaken on both counts. The Commissioner didn't address the issue because, to him, it didn't matter.

conveniens doctrine in favor of a rule that "jurisdiction cannot be declined" (Blue Br 19, 21, 29).

But as the court readily apprehended, 266 Or App at 35-37, *Kahn* did not consider whether jurisdiction could be "declined"; it considered whether jurisdiction existed *at all*, with the Court rejecting the trial court's conclusion "that the court could not obtain jurisdiction over the person of the defendant * * *." 125 Or at 531-32; *see id*. at 541-42. There *was* a ruling in *Kahn* that might have offered some support for plaintiffs' position—a refusal to enforce a forum selection clause the Court deemed void as against "public policy"—but *that* ruling was rejected in *Reeves v. Chem. Industrial Co.*, 262 Or 95, 101, 495 P2d 729 (1972), with the Court favorably comparing enforcement of such clauses to *forum non conveniens* dismissals (Red Br 8-10).

Indeed, *Reeves* (and other cases) show that there's nothing novel about *forum non conveniens* in Oregon jurisprudence. While this case may have afforded the Court of Appeals an opportunity to "explicitly" confirm the doctrine's availability, the court correctly noted that it had been "implicitly affirmed" in numerous decisions over the past 75 years, starting with *Horner v. Pleasant Creek Mining Corp.*, 165 Or 683, 107 P2d 989 (1940). *Id*. at 38-41.[3] In turn, plaintiffs' contention that courts may not "decline jurisdiction" had been rejected over 25 years before that. *Id*. (citing *Beard v. Beard*, 66 Or 512,

[3] Plaintiffs do not even cite *Horner*, let alone address Justice Linde's comment that the case "seems to hold" that the doctrine applies in Oregon. *State ex rel Academy Press v. Beckett*, 282 Or 701, 722 n 3, 581 P2d 496 (1978) (Linde, J., concurring).

517, 133 P 797, 134 P 1196 (1913), *overruled on other grounds by Mack Trucks, Inc. v. Taylor*, 227 Or 376, 380-81 (1961)).

Plaintiffs now try to attribute that history—and the doctrine's availability in all federal courts and 48 state courts (see Red Br 6 & n 4)—to a failure to distinguish suits in equity from actions at law (Pl Br 17-28). Embracing Justice Black's dissent in *Gulf Oil Corp. v. Gilbert*, 330 US 501, 67 S Ct 839, 91 L Ed 1055 (1947) (Pl Br 7, 18, 21-22, 28), plaintiffs amend their "comity" theory—advanced for the first time in reply below, 266 Or App at 37 n 3—to assert that "authority for declining jurisdiction arises only when equitable relief is sought" (Pl Br 23; *see id*. at 22 ("comity" demands that courts not "relinquish their jurisdiction * * * when a foreign suitor has brought damage claims here")). The Court shouldn't consider this new argument, which is wrong regardless.

Bowles v. Barde Steel Co., 177 Or 421, 434-35, 164 P2d 692 (1945) (Pl Br 21-23) certainly offers no support for plaintiffs' contention. That case is but another that considered whether jurisdiction *existed*, not whether it could be *declined*. The issue was whether an Oregon court could entertain an action for damages by the federal government under the Emergency Price Control Act. 177 Or at 428-29, 483. And the question was resolved as a matter of federal supremacy, not comity. *Id*. at 449-53, 472-73.

Bowles's discussion of state court enforcement of another state's laws (Pl Br 22) is also unhelpful, founded as it is on full faith and credit. *Id*. at 435-36. Nowhere did the Court examine a court's authority to decline jurisdiction—authority that, the Court of Appeals correctly observed, was "generally accepted * * * in both state and federal courts" long before 1945. 266 Or App at 38.

Again, however, plaintiffs argue that that "generally accepted" view should now be limited in favor of the approach of the "[f]our dissenters in *Gilbert*," who, they say, sought to restrict such authority to suits in equity (Pl Br 18, 21, 23.) Plaintiffs are wrong. First, to clarify, there were only *two* such dissenters. Justices Reed and Burton relied on their dissent in *Koster v. Lumbermens Mut. Cas. Co.*, 330 US 518, 67 S Ct 828, 91 L Ed 1067 (1947), which *acknowledged* that a court could dismiss for inconvenience. 330 US at 533 (Reed, J., dissenting). Only Justices Black and Rutledge believed that a court's decision to "decline to exercise [its] jurisdiction" depended on "reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity * * *." 330 US at at 513-14 (Black, J., dissenting).

But Justice Black was mistaken. As the *Gilbert* majority explained, courts had by then (nearly 70 years ago) "repeatedly recognized the existence of the power to decline jurisdiction" at law *and* in equity. *Id*. at 504. The Court pointed to Justice Brandeis's refutation of "*judex tenetur impertiri judicium suum*" 15 years earlier, *id*. (quoting *Canada Malting Co., Ltd. v. Paterson Steamships, Ltd.*, 285 US 413, 422, 423, 52 S Ct 413, 76 L Ed 837 (1932) (emphasis added)), as well as the Court's endorsement of state court decisions applying *forum non conveniens*, *id*. at 505 (citing *Broderick v. Rosner*, 294 US 629, 55 S Ct 589, 79 L Ed 1100 (1935)). The Court then made the point directly:

> This Court in recognizing and approving it by name has never indicated that it was rejecting application of the doctrine to law actions which had been an integral and necessary part of evolution of the doctrine.

Id. at 505 n 4; *see also* Shapiro, *Jurisdiction and Discretion*, 60 NYU L Rev 543, 556 & n 75 (1985) ("Contrary to the position taken by Justice Black in his *Gulf Oil* dissent, the doctrine of *forum non conveniens* is not confined to equity and admiralty cases; many of the leading instances of dismissal occurred in ordinary actions for damages.").

Gilbert correctly recognized in 1947 that it was too late in the day to limit the doctrine to equity. After all, the Federal Rules of Civil Procedure had merged law and equity nine years earlier. Obviously, the same goes here. *See Foster v. Miramontes*, 352 Or 401, 425, 287 P3d 1045 (2012) ("Because Oregon has eliminated the procedural distinctions between law and equity, there is no longer any necessity for or benefit in perpetuating that system."). Plaintiffs' new theory fails, too.

Plaintiffs' remaining arguments reprise those in the Court of Appeals and are adequately addressed by Evergreen's brief in that court. For a response to plaintiffs' claims based on legislation or "legislative silence" (Pl Br 26-29), *see* Red Br 21-22.[4] For a response to plaintiffs' arguments based on *Kahn*, *see* Red Br 6-13. In addition, however, plaintiffs' persistent reliance on *Kahn* leads us to add some further history.

In 1930, Oregon District Judge Robert S. Bean dismissed "one of a series of cases"—like *Kahn*—brought by German citizens on insurance policies issued

[4] Plaintiffs claim that 22 states have legislatively adopted the doctrine (Pl Br 29). Only eight have done so; the other 14 enacted legislation after the doctrine's judicial recognition (Red Br 6 & n 4). Plaintiffs' amicus says that some (unidentified) states among those 22 "bar[ ] the doctrine's use by local defendants" (OTLA Br 6-7). We find no support for that claim.

in Germany. *Heine v. New York Life Ins. Co.*, 45 F2d 426 (D Or 1930), *aff'd*, 50 F2d 382 (9th Cir 1931). The Supreme Court later cited the Ninth Circuit's affirmance with approval in *Rogers v. Guaranty Trust Co. of New York*, 288 US 123, 131, 53 S Ct 295, 77 L Ed 652 (1933). But the focus *here* is on the district court decision. In it, Judge Bean—a former Chief Justice of this Court—explained his dismissal as follows:

- "None of the causes of action arose here, nor do any of the material witnesses reside in the district, nor are any of the records of the defendant companies pertaining to the policies in suit in the district"; and
- "it would no doubt consume months of the time of this court to try and dispose of these cases, thus necessarily disarranging the calendar, resulting in delay, inconvenience, and expense to other litigants who are entitled to invoke its jurisdiction."

Id. at 426. For those reasons and others, the court "unhesitatingly" agreed with the defendants that, while "the court has jurisdiction of the person and subject-matter, * * * it should refuse, in its discretion, to exercise such jurisdiction." *Id*. The court rejected the plaintiffs' assertion that it had "no discretion" to do that, *id*. at 427, and observed that "Judge Tucker, in the state court of Multnomah county, in an able and well-considered opinion in a case brought on one of the German policies (*Kahn v. New York*), reached the same conclusion." *Id*. In other words, 85 years ago—after this Court held in *Kahn* that the circuit court *had* jurisdiction—that court declined to exercise it for reasons of convenience. This ship, to be sure, has long since sailed.

C. It Is Not Reasonable to Assume the Convenience of a Forum That Is Not the Plaintiff's Residence.

Little more need be said regarding the view that an Oregon forum must be presumed convenient even when the plaintiff doesn't live here. Plaintiffs fail to address their preservation problems, and their response on the merits is no better. With respect to those merits, we add the following comments.

First, plaintiffs neglect that the distinction drawn is *not* between citizens and aliens, but between residents and nonresidents (Evergreen Br 21-22).

Second, plaintiffs fail to explain how taking *their* thumb off the scale somehow results in *Evergreen's* thumb being placed upon it (Pl Br 34). The point is that the scales should be in equipoise: the question is convenience alone (Evergreen Br 25).

Acceptance of that point does not close Oregon's courts to anyone—a plaintiff's "venue privilege" (Pl Br 33) is unhindered.[5] All persons—residents and nonresidents—are welcome to seek relief in an Oregon court whenever and wherever jurisdiction over the defendant and the subject matter exists. But that conclusion does not carry with it a presumption that the Oregon forum is convenient. Whether the forum should be presumed convenient for a nonresident presents another question altogether—one whose answer is obvious, which is why plaintiffs refuse to address it.

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[5] To clarify, that "privilege" refers to nothing more than a plaintiff's right to choose any venue proper under the federal venue statutes. *Van Dusen v. Barrack*, 376 US 612, 627, 84 S Ct 805, 11 L Ed 2d 945 (1964). It has nothing to do with forum convenience. *See id*. at 635 (federal venue transfer statute "was not designed to narrow the plaintiff's venue privilege * * *, but rather * * * *to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court*") (emphasis added).

D. The Trial Court Made No Improper Findings "Going to the Merits."

Plaintiffs' continuing efforts to obfuscate are unfortunate. Evergreen took pains to provide the Court with a thorough and accurate summary of the evidence and the proceedings. Plaintiffs ignore that presentation entirely. Their response leaves it for us to clarify the following matters of law and of fact.

As for the law, it is not Evergreen's view that is uncertain (cf. Pl Br 45). The uncertainty lies in the Court of Appeals' broad statement that the trial court made improper "factual determinations that go to the underlying merits of plaintiffs' claims." 266 Or App at 50. To clarify:

- If the court meant to say that the trial court *decided* the merits of any claim, or any aspect of any claim, the court was mistaken as a matter of fact.
- If the court meant to say that it was improper for the trial court to *account* for those claims and the location of the evidence needed to prove them, the court was mistaken as a matter of law.

Because plaintiffs now *concede* the last point, acknowledging that an analysis of convenience requires a court to "entangle" itself with the merits of claims (and defenses) (Pl Br 45-46), we need not spend further time on it. But to be clear: the *consequence* of that concession is that plaintiffs had to make *some* showing that material evidence concerning their claims is more likely to be found in Oregon than in Peru (Evergreen Br 35-39).

But—and now we turn to matters of fact—*plaintiffs made no such showing*. And rather than come to grips with that, plaintiffs proceed in this

Court as they did in the Court of Appeals, misrepresenting the record and the trial court's ruling. Plaintiffs say they showed that:

- "the vast majority of key witnesses and evidence related to Plaintiff's direct liability claims is located" in Oregon (Pl Br 5 (emphasis omitted));
- Evergreen "acknowledged that Oregon was the most favored forum *if* the court accepted Plaintiff's legal theory" that the navigational systems were the "proximate cause" of the crash (*id*. (emphasis in original));
- the helicopter's navigational systems were "updated" in Oregon and "pilot and mechanic training" occurred here (*id*.);
- "*The trial court* shifted the determinative issue to evidence of actual causes for the crash, prompted by *Defendant's* reply memo referencing the Peruvian DGAC report that pilot error was the likely cause" (Pl Br 52 (emphasis added)); and
- plaintiffs were "whipsawed" by this shift in focus, as their efforts to obtain responsive discovery were "thwarted" (Pl Br 53 & n 16), although they *were* able to cite "the Shelby deposition" to support their contention that there were "problems" or "squawks" with the helicopter's navigational systems (Pl Br 53-54).

Enough. *Every one* of those assertions misstates the record:

- The "vast majority" of evidence of plaintiffs' "direct liability" claims—concerning alleged failures to maintain, inspect, test, and repair the aircraft, 266 Or App at 31—is in Peru, *not* Oregon:
    - Helinka, a Peruvian company, serviced the helicopter in Peru, and its records are located there (CR 8, ¶¶ 4, 6);

  - Peruvian aviation authorities were responsible for inspecting and certifying the aircraft, and the related witnesses and records are located in Peru (CR 7, ¶ 8, Ex 3; CR 8, Ex 4; CR 33, ¶ 20, Ex 20);
  - witnesses and records concerning plaintiffs' alleged damages—regardless of theory—are in Peru (ER 9; see CR 8, ¶ 8); and
  - witnesses and records concerning the Peruvian investigation into the causes of the crash are in Peru (CR 33, ¶ 2; CR 35, Ex 9 at 1).

- The assertion that navigational systems were "updated" in Oregon also lacks any evidence. Plaintiffs' counsel made that claim (without evidence) for the first time at the hearing, to which Evergreen's counsel responded that the systems were updated in *Ecuador* (Tr 80).
- The mechanics were trained in Peru (CR 33, ¶ 6 & Ex 6); plaintiffs' own evidence shows the pilots were trained in Texas or Peru (ER 56).
- Plaintiffs, *not* Evergreen, raised the issue of the cause of the crash, asserting—again without evidence—that a malfunctioning navigational system was "a proximate cause of this crash" (ER 39). Evergreen *responded* to that assertion by referring to a Peruvian accident report that *plaintiffs*—not Evergreen—had submitted (CR 30 at 9-10) *and* to the DGAC "physical discrepancy notice" (CR 33, ¶ 20, Ex 20).
- As plaintiffs admit, the trial court limited discovery to that necessary to resolve the motion to dismiss (Pl Br 51). Plaintiffs never moved to compel *any* discovery, and did not assign error to any discovery limitations. They cannot now complain that they were "thwarted" from

obtaining discovery on *any* issue, let alone one they belatedly injected into the case (without evidence).

- Plaintiffs cite to the *hearing* transcript—*not* a deposition transcript—for their claim that Ronald Selvy (not "Shelby") testified that there were "problems" with navigational systems that were "repaired" (Pl Br 53-54). *There is no deposition testimony to that effect*. Selvy *never* testified that there was any operational problem or "squawk" relating to navigational systems (CR 30, Ex K). When the court asked plaintiffs to identify such testimony, *their counsel could not do so* (see Tr 88-90).
- Finally, Evergreen never "acknowledged" that Oregon would be "the most favored forum" if plaintiffs' system malfunction theory were correct. To the contrary, Evergreen's counsel stated at the hearing that plaintiffs' theory was entirely speculative, but that in any case, most of the evidence relating to it *would be located in Peru* (see Tr 19-20).

Consistent with the foregoing effort, plaintiffs also assert—repeatedly—that the trial court found they were unlikely to succeed on their "direct liability" claims, and thus disregarded evidence in Oregon relating to those claims (see Pl Br 43, 47, 50, 52, 54). That tactic worked in the Court of Appeals, and so, apparently, plaintiffs believe it will work here. But nothing in the trial court's ruling supports the assertion. This, again, is what the trial court said:

> The materials submitted by the parties persuade me that trial of this lawsuit will largely center on, and depend upon, witnesses and documents regarding circumstances in Peru at the time of the crash, rather than circumstances in Oregon or the United States. At oral argument, based on what counsel referred to as "squawks," plaintiffs suggested that with further discovery they may find evidence of a malfunction in the warning or altimeters systems

> installed by Evergreen in the United States. I decline to base my decision on such possibilities, especially given the record that is before me.

(ER 69.)

Nothing in that ruling refers to or distinguishes between plaintiffs' "direct" and "vicarious" theories of liability. Plaintiffs' complaints do not *say* where Evergreen's alleged "direct" negligence occurred, 266 Or App at 31, and the trial court's finding that most of the relevant evidence was located "in Peru" does not suggest that the "direct" negligence claims are doomed to fail.[6] How does the conclusion that evidence relevant to those claims is in Peru bear on the claim's success?

By the same token, the trial court did not "disregard" *any* Oregon-based evidence relevant to plaintiffs' "direct" liability claims. Rather, plaintiffs never showed there *was* any such evidence. All plaintiffs offered was speculation that navigational systems *may* have malfunctioned and that, because those systems were installed in Oregon, there *may* be material evidence relating to that alleged malfunction here. Plaintiffs offered no factual basis whatsoever to conclude that there *was* any such malfunction, or that, if there was, the evidence relating to such malfunction was most likely in Oregon (where the systems were installed) rather than Peru (where they were maintained and inspected). The trial court properly discounted plaintiffs' unsupported speculation because, as

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[6] For that reason, plaintiffs' unpreserved argument that the trial court failed to "assume the truth of all well-pleaded allegations" (Pl Br 43) is beside the point. One can "assume the truth" of plaintiffs' "direct" liability claims, which lack geographical specificity, and still find that most of the relevant evidence supporting the claims was in Peru.

the court noted, that speculation lacked support in "the record that [was] before [it]."

The trial court did what it was supposed to do: assess the parties' showings to decide whether trial in Oregon would be seriously inconvenient as compared to Peru. The Court of Appeals' second-guessing of that decision cannot be squared with either the evidence or the standard of review. *See Horner*, 165 Or at 704 ("assumption of jurisdiction in such a case as this is a matter within the sound judicial discretion of the trial court"); *see also State ex rel Stephens v. Londer*, 311 Or 385, 388, 811 P2d 1375 (1991) (refusing to substitute judgment for trial court on decision declining to transfer venue for reasons of convenience under ORS 14.110(c) because that is "a question so clearly committed to the discretion of the trial court").

CONCLUSION

The Court should reverse the decision of the Court of Appeals. The Court should dismiss the appeal of each plaintiff who failed to appeal from the judgment entered in her individual case. Any judgment of the trial court from which an appeal was properly taken should be affirmed.

Respectfully submitted,

LANE POWELL PC

By s/ Thomas W. Sondag
Thomas W. Sondag

Attorneys for Petitioner on Review
Evergreen Helicopters, Inc.

CERTIFICATE OF COMPLIANCE

WITH ORAP 5.05(2)(d)

Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,862 words.

Type Size

I certify that the size of the type in this brief, for both text and footnotes, is not smaller than 14 point, as required by ORAP 5.05.

s/ Thomas W. Sondag
Thomas W. Sondag

Of Attorneys for Petitioner on Review
Evergreen Helicopters, Inc.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing reply brief on the merits of petitioner on review by causing it to be electronically filed with the Appellate Court Administrator on August 27, 2015, through the appellate eFiling system.

I further certify that, through the use of the electronic service function of the appellate eFiling system, on August 27, 2015, I served the foregoing document on the following: Richard S. Yugler; Arthur C. Johnson; and Cody Hoesly.

s/ Thomas W. Sondag
Thomas W. Sondag

Of Attorneys for Petitioner on Review
Evergreen Helicopters, Inc.