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No. 53799-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PORTLAND VANCOUVER JUNCTION RAILROAD, LLC,
Appellant,
v.
CLARK COUNTY,
Respondent.

CORRECTED OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

In 2004, Clark County and the predecessor-in-interest of Portland Vancouver Junction Railroad, LLC (“PVJR”), entered into a long-term lease to operate Clark County’s railroad. Fourteen years later, Clark County sued PVJR in Clark County’s home forum, seeking to declare the lease invalid. PVJR filed a competing lawsuit, seeking to declare the lease valid. PVJR’s competing lawsuit was also filed in Clark County in light of Washington’s priority-of-action doctrine, but PVJR moved to change venue of Clark County’s lawsuit under RCW 36.01.050(1). The competing lawsuits were subsequently consolidated. The Superior Court denied PVJR’s motion to change venue.

This appeal presents the following questions of first impression:

(1) whether RCW 36.01.050(1) is the specific and mandatory venue statute restricting a county’s venue when a county commences an action; (2) whether a limited liability company resides where it conducts business for the purposes of venue when sued by a county; and (3) whether consolidating a competing lawsuit excuses a county’s initial improper venue selection.

With regard to the first question, controlling authority and the plain language of RCW 36.01.050(1) establish it as the specific and mandatory venue statute restricting a county’s venue option for commencing an

action. A county may commence an action in its home forum only if the defendant resides in the home forum. To apply the general venue statute, RCW 4.12.025, to county-filed actions is to eviscerate RCW 36.01.050(1).

With regard to the second question, PVJR is a limited liability company with a single owner, whose principal place of business is in King County, even though it operates Clark County's railroad. Importing general venue language regarding corporations from RCW 4.12.025 into RCW 36.01.050(1) in order to determine where a limited liability company resides further eviscerates RCW 36.01.050(1)'s specific venue language; general language always swallows specific language, rendering the specific language superfluous. Further, a limited liability company is not synonymous with a corporation. PVJR does not "reside" in Clark County for the purposes of RCW 36.01.050(1).

Finally, with regard to the third question, improper initial venue selection cannot be excused when, under Washington's priority-of-action doctrine, the plaintiff's initial improper venue selection eliminates a defendant's venue options.

For these reasons, the Superior Court erred in denying PVJR's motion to change venue of Clark County's lawsuit to Skamania County, which is one of the proper venue options under RCW 36.01.050(1). PVJR

respectfully asks this Court to reverse and remand with instructions to transfer the actions to Skamania County.

II. ASSIGNMENT OF ERROR

Assignment of Error

1. The assignment of error is whether the Superior Court erred in denying PVJR's motion to change venue.

Issues Pertaining to Assignments of Error

This appeal presents three legal issues of first impression:

1. Is RCW 36.01.050(1) the specific and mandatory venue statute restricting venue choices when a county commences an action?

(Assignment of Error 1.)

2. Does a limited liability company reside in the county of its principal office or in the county in which it conducts business for purposes of venue selection under RCW 36.01.050(1)? (Assignment of Error 1.)

3. Is initial improper venue selection excused when a defendant files a subsequent lawsuit that is consolidated after the defendant moves to change venue of the first lawsuit? (Assignment of Error 1.)

III. STATEMENT OF CASE

Clark County owns Chelatchie Prairie Railroad, a 33-mile short-line railroad running diagonally across Clark County, Washington.

CP 129. On December 20, 2004, Clark County signed a lease with Columbia Basin Railroad to operate the railroad (the “Lease”). CP 129-30. The Lease’s term is 30 years with two 30-year extensions, or the maximum allowed under the Clark County Code, but in no event less than 50 years. CP 130. In 2012, Columbia Basin Railroad assigned the Lease to PVJR, with approval of the Clark County Board of Commissioners. CP 130, 179. PVJR is a limited liability company whose principal offices are located in Bellevue, King County, Washington. CP 109.

On March 15, 2019, after nearly 15 years of successful rail operations, including numerous subordinate agreements, CP 62-64, 178-80, Clark County sued PVJR in Clark County Superior Court, seeking declaratory relief that the Lease was suddenly invalid and illusory. CP 1-17. Clark County also asserted a breach-of-contract claim in case the Lease was declared valid, despite the Lease’s arbitration provision and no prior notices of default. CP 15, 47-48. Clark County alleged that venue was proper under RCW 36.01.050 and RCW 4.12.025 because PVJR transacts business in Clark County. CP 2.

Under Washington’s priority-of-action doctrine, Clark County’s first-filed action denied PVJR any choice of venue if it commenced its own action. CP 135. Stripped of its ability to file in an alternative venue, PVJR was left with the choice of remaining silent in the face of the

County's spurious attacks on the Lease's validity, or commencing suit in Clark County and moving to change venue due to Clark County's improper first filing. CP 152-53. PVJR chose not to remain silent; on March 19, 2019, PVJR filed a competing lawsuit, seeking a declaratory judgment that the Lease was valid. CP 184-94. PVJR alleged that venue was proper because the "action originated in Clark County and the defendant [Clark County] is located in Clark County." CP 185.

On April 18, 2019, PVJR moved to change venue of Clark County's lawsuit to Skamania County under RCW 36.01.050. CP 108-21. PVJR argued that under RCW 36.01.050, Clark County cannot sue PVJR in its home forum unless PVJR resides in its home forum. CP 115-16. Since PVJR resides in King County, Clark County's venue selection was unlawful under RCW 36.01.050. CP 115-16.

A month later, on May 17, 2019, the parties consolidated their competing lawsuits under one lead case, canceled competing scheduling conferences, and designated PVJR's competing lawsuit as a counterclaim to Clark County's complaint under the lead action. CP 123-27. The consolidation did not modify PVJR's pending motion to change venue of Clark County's complaint. CP 123-27.

Clark County opposed the motion to change venue, arguing that venue was proper under RCW 4.12.025; that PVJR conceded venue by its

competing lawsuit; that PVJR was simply venue-shopping; and that there was no justifiable reason to change venue. CP 128-39.

On August 16, 2019, the Superior Court denied PVJR's motion. CP 167-68. Over Clark County's objection, this Court granted discretionary review.

IV. SUMMARY OF ARGUMENT

Under *Eubanks v. Brown*, 170 Wn. App. 768, 285 P.3d 901 (2012), *aff'd*, 180 Wn.2d 590, 327 P.3d 635 (2014), RCW 36.01.050(1) is the specific venue statute applying to county-filed actions, controlling venue options to the exclusion of RCW 4.12.025, the venue statute applying to actions in general. Under RCW 36.01.050(1), Clark County had to commence its action either in PVJR's county of residence or in a judicial district adjoining Clark County. Clark County Superior Court is not PVJR's county of residence; as a limited liability company, PVJR resides in King County, not Clark County. RCW 25.15.006(13); RCW 25.15.071(1)(c); RCW 25.15.516(2). Clark County Superior Court is obviously not a judicial district adjoining Clark County.

Further, neither PVJR's filing of its competing suit in Clark County nor the subsequent stipulation to consolidate that suit with Clark County's suit operates as a waiver of its challenge to Clark County's venue selection or as a concession that venue for Clark County's suit was

proper in the first place. Clark County's initially improper venue selection stripped PVJR of its venue options. PVJR timely moved to change venue, which was not waived by consolidation.

Because venue in Clark County Superior Court was not authorized by RCW 36.01.050(1), the specific and mandatory venue statute, and PVJR has never conceded its right to proper venue, the superior court erred in denying PVJR's motion to change venue.

V. ARGUMENT

A. Standard of review.

Whether venue should be changed because the complaint was not brought in the proper county is a legal question reviewed de novo. *Eubanks*, 170 Wn. App. at 771 (citing *Moore v. Flateau*, 154 Wn. App. 210, 214, 225 P.3d 361, *rev. denied*, 168 Wn.2d 1042, 233 P.3d 889 (2010)).

When a plaintiff commences an action in the wrong venue, the defendant has an absolute right to change venue. *In re Guardianship of Marshall*, 46 Wn. App. 339, 341, 731 P.2d 5 (1986) (citing *Davidson v. Weyerhaeuser Co.*, 36 Wn. App. 150, 152, 672 P.2d 767 (1983)).

Here, as it relates to Clark County's lawsuit against PVJR, Clark County Superior Court is the improper venue. RCW 36.01.050(1).

B. RCW 36.01.050(1) controls venue selection when a county commences an action.

RCW 36.01.050(1)¹ is the specific and mandatory venue statute, controlling over RCW 4.12.025, the general venue statute. *Eubanks*, 170 Wn. App. at 776.

In *Eubanks*, this Court addressed the interplay between the general venue statute, RCW 4.12.025, and two specific venue statutes, RCW 4.12.020(2) and RCW 36.01.050. The *Eubanks* Court specifically noted that “the more specific venue statutes [including RCW 36.01.050(1)] *control over the general default statute*, RCW 4.12.025.” 170 Wn. App. at 776 (emphasis added).

Since *Eubanks* did not involve a county-filed lawsuit, its application is limited to establishing the analytical lens through which to view the County’s venue selection. Nevertheless, under *Eubanks*, RCW 36.01.050 is both the mandatory and the most specific statute controlling complaints filed by counties.

RCW 36.01.050(1) mandates that “[a]ll actions” filed by “any county” “shall be commenced” in one of three specific venues: (1) the

¹ “All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts. All actions by any county shall be commenced in the superior court of the county in which the defendant resides, or in either of the two judicial districts nearest to the county bringing the action.”

county where “the defendant resides” or (2) “the two judicial districts nearest to the county bringing the action.” (Emphasis added.) Unlike the venue statutes found in Chapter 4.12 of the Revised Code, RCW 36.01.050(1) directs venue based on *who* is filing the action, as opposed to the type of action being filed.

Applying *Eubanks*, the plain language of RCW 36.01.050(1) controls over RCW 4.12.025. The only question is where PVJR resides.

C. PVJR does not “reside” in Clark County for venue purposes.

PVJR is a limited liability company whose principal office is located in King County. A limited liability company resides in the county where its principal office is located as designated in its certificate of formation. RCW 25.15.006(13); RCW 25.15.071(1)(c); RCW 25.15.516(2).

Before RCW 4.12.025 was enacted, a corporation also resided at its principal office or place of business for venue purposes. *First Nat’l Bank of Everett v. Wilcox N. Coast Dry Kiln Co.*, 72 Wash. 473, 477, 130 P. 756 (1913) (pre-enactment of RCW 4.12.025, noting that “the place designated in the charter of local corporations as their principal office or place of business must be held to be the residence of such corporations”); *State ex rel. Harrington v. Vincent*, 144 Wash. 246, 250, 257 P. 849 (1927) (pre-enactment of RCW 4.12.025, noting that “[t]he corporation

could not be sued in any other place than the place where it maintains its principal place of business, and that must be the place shown by the records, as was shown in this case, to be the legal principal place of business of the corporation”); *Giesler v. Sedro Hardwood Co.*, 167 Wash. 647, 652-53, 9 P.2d 1104 (1932) (same).

While RCW 4.12.025 alters the general rule of corporate residency for venue purposes, a limited liability company is not a corporation, but an unincorporated business association closely resembling and modeled after a partnership. *See Koh v. Inno-Pac. Holdings, Ltd.*, 114 Wn. App. 268, 271, 54 P.3d 1270 (2002) (“Washington’s Limited Liability Company Act is modeled substantially upon the Uniform Limited Liability Company Act, which was in turn based upon the Uniform Partnership Act and the Revised Uniform Partnership Act”). It is generally accepted that venue for a partnership is where a partner resides or the partnership’s principal place of business. *See DeLaGarza v. Rennebohm*, 24 Wn. App. 575, 578, 602 P.2d 372 (1979) (noting that a defendant partner has an “absolute right to have the action commenced” where the defendant partner resides) (citing *Schroeder v. Schroeder*, 74 Wn.2d 853, 856, 447 P.2d 604 (1968)). *See also Ex parte Burr & Forman, LLP*, 5 So. 3d 557, 565 (Ala. 2008) (noting for venue purposes that “a partnership is deemed to reside where its partners reside”); *Maupin v. Meadow Park*

Manor, 329 Mont. 413, 415, 125 P.3d 611 (2005) (“A partnership resides where any partner resides for the purposes of venue.”) (citing *La Mirada Cmty. Hosp. v. Super. Ct.*, 249 Cal. App. 2d 39, 40, 57 Cal. Rptr. 42 (1967)); *Proforma Partners, LP v. Skadden Arps Slate Meagher & Flom, LLP*, 280 A.D.2d 303, 303, 720 N.Y.S.2d 139 (2001) (stating that “a partnership’s legal residence is where it maintains its principal place of business”).

Moreover, broad venue language governing corporations under RCW 4.12.025 cannot be read into RCW 36.01.050(1) for the following reasons. First, a court cannot insert language into a statute. *See, e.g., State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 579, 399 P.2d 8 (1965). A court may not legislate by inserting the corporate residency language found in RCW 4.12.025 into RCW 36.01.050(1).

Second, “the more specific statute will prevail, unless there is legislative intent that the more general statute controls.” *State v. Hirschfelder*, 170 Wn.2d 536, 546, 242 P.3d 876 (2010) (internal quotation marks and citation omitted). Here, RCW 36.01.050(1) is the specific venue statute, *Eubanks*, 170 Wn. App. at 776, and there is no legislative intent that corporate “residence” under RCW 4.12.025(1) controls RCW 36.01.050(1). Quite to the contrary, RCW 4.12.025(1)

specifically limits its reach to “the purpose of this section [RCW 4.12.025]” only—not RCW 36.01.050(1).

Third, RCW 36.01.050(1) must be construed to give it purpose, not render it merely superfluous to the general venue statute. *Nelson v. Dep’t of Labor & Indus.*, 198 Wn. App. 101, 113, 392 P.3d 1138 (2017), *rev. denied*, 190 Wn.2d 1025, 420 P.3d 707 (2018). Inserting general venue language into the specific venue statute renders the specific venue statute superfluous; the breadth and scope of general language will always swallow the limitations of specific language. RCW 36.01.050 must be construed to be something other than simply subordinate to RCW 4.12.025.

D. RCW 1.16.080(2) Does Not Turn a Limited Liability Company Into a Corporation for Venue Purposes Under RCW 4.12.025.

RCW 1.16.080(2) provides that “[u]nless the context clearly indicates otherwise, the terms ‘association,’ ‘unincorporated association,’ and ‘*person, firm, or corporation*’ or substantially identical terms shall, without limiting the application of any term to any other type of legal entity, be construed to include a limited liability company.” (Emphasis added.) Thus, a limited liability company becomes synonymous with a corporation when the statute in question uses a plurality of entities such as “person, firm, or corporation.”

Here, the general venue statute, RCW 4.12.025, does not use a plurality of business entities. Instead, it only speaks of the singular “corporation defendant.” RCW 4.12.025(1) (“For the purpose of this section, the residence of *a corporation defendant* shall be deemed to be in any county where *the corporation*: (a) Transacts business; (b) has an office for the transaction of business; (c) transacted business at the time the cause of action arose; or (d) where any person resides upon whom process may be served upon *the corporation*.”) (emphasis added); *see also* RCW 4.12.025(3) (“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; (b) in the county where the work was performed for said *corporation*; (c) in the county where the agreement entered into with the *corporation* was made; or (d) in the county where the *corporation* has its residence.”) (emphasis added).

Since RCW 4.12.025(1) and (3) use the singular “corporation,” RCW 1.16.080(2) does not allow RCW 4.12.025 to be construed as also including limited liability companies or any other type of business entity for venue purposes.

Division 3 of this Court agrees that RCW 1.16.080 does not turn a limited liability company into a corporation. *Holman v. Brady*, No. 33114-8-III, 2016 WL 4921457, noted at 195 Wn. App. 1063

(Sept. 13, 2016) (unpublished opinion). In *Holman*, the Court analyzed whether a court rule applied to a limited liability company when the rule specifically referred to a corporation or an unincorporated association. *Id.* at *3. The *Holman* Court noted that “[a] limited liability company is not a corporation and it is not an unincorporated association.” *Id.* at *4 (footnote omitted). The *Holman* Court considered RCW 1.16.080 and remained unconvinced that corporations by definition include limited liability companies, stating that if the legislature intended that outcome, it had had over 20 years to make revisions as it saw fit. *Id.* at *5.

While nonbinding, the *Holman* Court’s application of RCW 1.16.080(2) makes sense. Under RCW 1.16.080(2), statutes of broad applicability (applying to “person[s], firm[s], or corporation[s]” in general) will also apply to limited liability companies even if the statutes do not specifically refer to limited liability companies. Conversely, however, statutes of limited applicability (applying only to “corporations”) do not apply to limited liability companies. RCW 1.16.080(2) does not broaden the statutory scope to include limited liability companies if a statute uses the singular “corporation.”

Similarly, Washington’s business code itself distinguishes a corporation from a limited liability company. RCW 23.95.105(2), (18). In fact, the only all-inclusive statutory terms are “entity” and “persons.”

Thus, as in *Holman*, if the legislature had wanted the general venue statute to apply to all formations of business entities, it could have used one of the all-inclusive defined terms (i.e., “entity”). The legislature has not done so.

Simply put, RCW 1.16.080(2) does not broaden the scope of RCW 4.12.025 to make a limited liability company synonymous with a corporation. Instead, residency of corporations under RCW 4.12.025 applies to corporations only—not limited liability companies.

Since PVJR is not a corporation, PVJR does not “reside” in Clark County for the purpose of RCW 4.12.025, the general venue statute. This is fatal for the County and highlights the superior court’s error: even assuming that the general venue statute applies, RCW 4.12.025 creates residency for corporate defendants, but not limited liability company-defendants.

In sum, PVJR does not reside in Clark County, and therefore, under RCW 36.01.050(1), Clark County is the improper venue. The superior court erred in denying PVJR’s motion to change venue.

E. PVJR’s consolidated lawsuit does not absolve Clark County of its incorrect venue selection.

Consolidation at the superior court level neither absolves PVJR of its right to change venue nor rectifies Clark County’s initial improper venue selection. Rather, “an order of consolidation effectively

discontinues the separate actions and creates a single new and distinct action.” *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 628, 334 P.3d 1154 (2014) (citing *Jeffery v. Weintraub*, 32 Wn. App. 536, 547, 648 P.2d 914 (1982)).

But “[c]onsolidation does not change the rules of equity pleading, nor the rights of the parties, as those rights must still turn on the pleadings, proofs, and proceedings in their respective suits.” *Rash*, 183 Wn. App. at 626 (holding that an order consolidating two actions “for all purposes” did not mean that the ruling in the first consolidated action applies to the second consolidated action). Furthermore, consolidation does not preclude PVJR’s right to change venue for the following three reasons.

First, PVJR’s venue options under RCW 36.01.050(1) are different from Clark County’s venue options under RCW 36.01.050(1). So while PVJR’s choice of venue is correct for PVJR’s complaint, that does not mean that Clark County’s choice of venue for Clark County’s complaint is correct.

Second, once Clark County filed suit in the wrong venue, Clark County stripped PVJR of its venue options. Under the priority-of-action rule, when two actions are commenced that involve the same parties, same subject matter, and same relief, the first court to obtain jurisdiction possesses exclusive jurisdiction. *Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co.*,

137 Wn. App. 296, 302, 153 P.3d 211 (2007). Because it was filed first, Clark County's lawsuit stripped PVJR of any venue option. Therefore, PVJR could not have filed in another venue. Clark County concedes that PVJR had no venue option once Clark County filed its lawsuit. CP 135.

Third, PVJR moved to change venue of Clark County's lawsuit before consolidation. CP 108, 123-27. By filing its pre-answer motion to change venue before consolidation, PVJR preserved its right to challenge venue.

In sum, consolidation did not absolve Clark County of its improper venue selection, nor did it waive PVJR's rights to proper venue in the first instance.

VI. CONCLUSION

For the reasons above, PVJR respectfully asks this Court to reverse and remand with instructions to transfer the action to Skamania County. RCW 36.01.050(1) is the specific and mandatory statute controlling Clark County's venue selection. Since PVJR does not reside in Clark County, PVJR is entitled to defend itself against Clark County's claims in

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Skamania County as one of the two nearest judicial districts to Clark
County.

DATED: April 2, 2020.

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