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No. 53799-1

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

CLARK COUNTY,

Respondent,

v.

PORTLAND VANCOUVER JUNCTION RAILROAD, LLC,

Petitioner.

PORTLAND VANCOUVER JUNCTION RAILROAD, LLC,

Petitioner,

v.

CLARK COUNTY,

Respondent.

PETITIONER'S REPLY BRIEF

Jacob A. Zahniser, WSBA No. 39763
Miller Nash Graham & Dunn LLP
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
E-mail: jacob.zahniser@millernash.com
Phone: 503.224.5858
Attorneys for Petitioner

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I. INTRODUCTION

There are two venue issue before this Court. The first is whether RCW 36.02.050(1) is the specific and mandatory venue statute that Clark County was obligated to follow when it first commenced this action against Portland Vancouver Junction Railroad, LLC ("PVJR"). Based on *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 and mandatory venue statute controlling and limiting Clark County's venue options to the exclusion of RCW 4.12.025, the general venue statute.

Once RCW 36.02.050(1) is identified as the controlling venue statute, the second question is where a limited liability company resides for venue purposes under RCW 36.02.050. RCW 36.02.050(1) does not define "reside." RCW 4.12.025(1) cannot fill the gap because the generality of RCW 4.12.025(1) will always trump the specific nature of RCW 36.02.050(1), rendering the specific statute superfluous. Moreover, even if RCW 4.12.025 could fill the gap, a limited liability company is not synonymous with a corporation under RCW 4.12.025.

In the end, Clark County's lengthy brief in defense of its improper home court venue selection is rife with irrelevant argument and matters outside the record. Clark County attempts to strip RCW 36.02.050(1) of its meaning and purpose, which is to ensure that defendants to county-filed actions are on an

equal playing field and not forced to defend themselves in the county's home court. Further, Clark County's rush to its home court stripped PVJR of its venue options. As such, PVJR's subsequent complaint against Clark County, later consolidated with Clark County's action, did not waive PVJR's right to proper venue in defending itself from Clark County's allegations.

In the end, by failing to apply the plain language of RCW 36.02.050 in conjunction with *Eubanks*, *supra*, and RCW 1.16.080(2), the trial court erred by denying PVJR's motion to change venue.

II. ARGUMENT IN REPLY

A. Clark County impermissibly cites matters not contained in the record, which must be disregarded.

In flagrant disregard for the Rules of Appellate Procedure, Clark County riddles its brief with irrelevant matters outside the record in an attempt to disparage PVJR. PVJR's later-filed federal court action, involving first amendment retaliation and due process claims and seeking to enforce an arbitration clause, is utterly irrelevant to the issues presented in this appeal regarding proper venue of Clark County's first-filed action.

Furthermore, Clark County impermissibly overreaches by using a case citation to the federal court action to mask what would otherwise be required as designated clerk papers. RAP 10.3(a)(8) prohibits material "not contained in the record on review without permission from the appellate court." Clark County did not seek such permission, and therefore this Court must not consider

Clark County's red herring fact section or disparaging comments related to PVJR and the later-filed federal court action. *E.g., In re Dependency of K.S.C.*, 137 Wn.2d 918, 932, 976 P.2d 113 (1999) ("Portions of a brief which contain factual material not submitted to or considered by the trial court should be stricken").

In the absence of a motion to supplement the record, matters outside the trial court record may not be considered. RAP 10.3(a)(8). This Court should not consider "Attachment A" to Clark County's reply brief or its "citation" to the later filed federal court action, and any arguments related thereto. Even if considered, however, since these matters are wholly irrelevant, they do not thwart the merits of PVJR's appeal regarding Clark County's improper venue selection.

B. PVJR "resides" in King County, not Clark County.

PVJR is a limited liability company. A limited liability company is not a corporation, but an unincorporated business association closely resembling and modeled after a partnership. *Koh v. Inno-Pac. Holdings, Ltd.*, 114 Wn. App. 268, 271, 54 P.3d 1270 (2002). A partnership "resides" where the partners reside or the partnership's principal place of business is located. Similarly, a limited liability company resides in the county where its members or principal office are located as designated in its certificate of formation. RCW 25.15.006(13); RCW 25.15.071(1)(c). Here, it is undisputed that PVJR's

principal mailing address, registered principal place of business, and location of registered agent is King County. CP 109. Thus, PVJR resides in King County.

Holding a limited liability company "resides" in the county where its members or principal office is located also honors RCW 1.16.080(1)[1]. Under RCW 1.16.080(1), a limited liability company is statutorily synonymous with a "person." A person does not reside where he or she conducts business; rather, a person resides in his or her home. Similarly, since a limited liability company is statutorily synonymous with a person, a limited liability company resides at its home office (or where its member resides).

Nevertheless, Clark County argues PVJR "resides" in Clark County because PVJR transacts business in Clark County. However, nowhere in RCW 36.01.050(1) is the language "transacts business" included as part of the venue analysis. Instead, only in the general venue statute, RCW 4.12.025(1), includes "transacts business" as part of the venue analysis for corporations – not LLCs. Moreover, the language Clark County seeks to insert into RCW 36.01.050(1) is expressly limited "[f]or the purpose of this section [RCW 4.12.025(1)]" only and therefore not to be used for any other section, like RCW 36.01.050(1). Accordingly, the "transacts business" language in

[1] "The term 'person' may be construed to include the United States, this state, or any state or territory, or any public or private corporation *or limited liability company*, as well as an individual." (emphasis added).

RCW 4.12.025(1) cannot be imported into RCW 36.01.050(1) to cure Clark County's improper venue.

Clark County's argument in this regard violates three long standing canons of statutory interpretation noted in PVJR's opening brief: (i) it inserts language not found in RCW 36.01.050(1); (ii) it allows the general venue statute to control the specific venue; and (iii) it renders RCW 36.01.050 superfluous. Op. Br. at 11-12.

Clark County's citation to *Frank Coluccio Constr. Co. v. King Cty.*, 2 Wn. App. 2d 504, 510 n.3, 416 P.3d 756 (2018), *rev den*, 192 Wn.2d 1005, 430 P.3d 250 (2018), is equally unpersuasive; *Frank Coluccio Constr.* does not support the notion that RCW 4.12.025(1) can be used to construe RCW 36.01.050(1) and fill the gap Clark County needs filled. In *Frank Coluccio*, the Court defined corporate residency under RCW 4.12.025 in relation to the allegation of residency in the underlying complaint—not to address proper venue under RCW 36.010.050. *See Frank Coluccio*, 3 Wn. App. 2d at 510 n.3. The *Frank Coluccio* court did not analyze whether or how RCW 36.010.050 should be construed in relation to RCW 4.12.025. *Frank Coluccio* only operates to affirm that RCW 4.12.025(1) is the general venue statute with regard to a corporation and without any meaningful connection to RCW 36.01.050(1).

C. Federal venue statutes are incongruous with Washington's specific venue statutes controlling county-filed actions.

Clark County suggests federal venue analysis should apply to this venue question. Fundamentally, federal courts do not analyze venue in the same manner as Washington's courts, especially with regard to specific venue statutes controlling county-filed actions. Moreover, Clark County fails to cite Washington state authority interchanging limited liability companies and corporations for the purpose of venue. *But see Holman v. Brady*, 2016 WL 4921457, noted at 195 Wn. App. 1063 (Sept. 13, 2016, unpublished opinion) (holding in part that a limited liability company is not synonymous with a corporation for the purposes of CR 23.1). As such, Clark County's analogy to federal venue statutes and case law simply serves to highlight the weakness of its argument.

1. 28 U.S.C. § 1391(d) neither defeats RCW 36.01.050(1) nor establishes PVJR's residency in Clark County.

Venue under the federal landscape predominantly takes into consideration parties that transact business nationwide but have one principal place of business. By contrast, all parties here are in the State of Washington.

Clark County's application of federal law also makes a critical assumption that PVJR is a corporation (which it is not) that is subject to the general venue statute. Clark County relies on *Denver & Rio Grande W. R.R. Co. v. Bhd. of R.R. Trainmen*, 387 U.S. 556, 559-62, 87 S. Ct. 1746, 18 L. Ed.

2d 954 (1967), to treat the residency of limited liability companies as that of a corporation; however, this is an exaggerated interpretation of *Denver*, which discusses the general venue statutes under federal law for suing unincorporated associations and recognizing the procedural practicality of suing an entity in a state that entity has availed themselves to as opposed to the entity's state of incorporation.

To put this into perspective, had the Legislature enacted RCW 4.12.025(1) to include unincorporated associations, *Denver* may have persuasive authority. However, had the Legislature enacted RCW 4.12.025(1) to include unincorporated associations, RCW 1.16.080(2)[2] would clearly apply to resolve the issue without resort to *Denver*. Clark County cannot use *Denver* to re-write Washington law.

Relatedly, 28 U.S.C. § 1391(d)[3] is based on a minimum contacts test underlying personal jurisdiction, which is an unnecessary analysis under Washington state law and even more so when there is a specific and controlling

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[2] "Unless 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."

[3] "For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to *reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction of that district were a separate State*, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts." (Emphasis added.)

venue statute, such as RCW 36.01.050(1), that must be followed. *See Travelers Prop. Cas. Co. of Am. v. Ocean Reef Charters LLC*, 324 F. Supp. 3d 366, 376 (W.D.N.Y. 2018) (citing 28 U.S.C. § 1391(c)(2)) (state venue "standard differs from federal venue requirements, which recognize that an appropriate venue may be any judicial district where the limited liability company is subject to personal jurisdiction.").

In the end, whether a federal court would be a proper venue for Clark County's lawsuit is utterly irrelevant to applying RCW 36.01.050(1) to Clark County's action; federal venue law is substantially different than Washington venue law.

2. Foreseeability is a personal jurisdiction factor irrelevant to Washington's venue statutes.

Similarly, the notion of foreseeability of a lawsuit neither carries over from federal personal jurisdiction nor does it change the application and control of the RCW 36.01.050(1). Clark County relies on a single state law case from New Jersey to establish its foreseeability argument, but that case relied on *Denver*, and therefore the inapplicable federal venue statute. *Crepy v. Reckitt Benckiser, LLC*, 448 N.J. Super. 419, 428, 153 A.3d 968, 973 (N.J. Super. Ct. Law Div. 2016). Clark County's entire argument rests on the application of federal law premised on the assumption that the general venue statute referring to the residence of corporations applies under RCW 4.12.025(1). However,

RCW 36.01.050(1) is the applicable statute controlling Clark County's venue options.

D. RCW 4.12.025(3) does not apply.

Clark County relies heavily on RCW 4.12.025(3) as guiding the Court's application of RCW 36.01.050(1). Clark County's reliance on RCW 4.12.025(3) is misplaced; RCW 4.12.025(3) is irrelevant. PVJR is not a corporation—a condition precedent for RCW 4.12.025(3) to apply. Moreover, even Clark County rightfully recognizes that RCW 36.01.050(1) renders RCW 4.12.025(3) moot under these circumstances. Resp. at 25, n.10.

E. The specific venue statute is mandatory and controlling under Washington law.

The specific and general venue statutes in question are not "equally applicable venue statutes" and no deference should be given to whether the statutes are complementary in nature such that Clark County has discretion to select its own home court advantage. Resp. at 26.

RCW 36.01.050 protects defendants from "be[ing] required to appear in the superior court of the same county [whose] officials exercise financial control over the budgets of the court" and "reflects a recognition of the power of the sovereign and the weakness of the individual, permitting a county to sue the individual within its borders only if the defendant is, at least, a resident thereof." *Briedablik, Big Vly., Lofall, Edgewater, Surfrest, North End Community Ass'n v. Kitsap Cy.*, 33 Wn. App. 108, 118-119, 652 P.2d 383 (1982), *overruled on other*

grounds in Save Our Rural Env't v. Snohomish County, 99 Wn.2d 363, 662 P.2d 816 (1983).

Ralph v. Weyerhaeuser Co., 187 Wn.2d 326, 338, 386 P.3d 721, 726 (2016), allows a plaintiff the choice of venue selection only when the statutes are truly complementary, *i.e.*, not a difference between specific and general. Moreover, *Ralph* further reiterates *Eubank's* decision that "when interpreting venue statutes, this court has applied mandatory statutes to the exclusion of permissive ones and specific statutes to the exclusion of general ones." *Id.* (citing *Eubanks*, 180 Wash.2d at 596 n.1, 327 P.3d 635).

The plain language and policy of RCW 36.01.050(1) expressly applies to and limits county-filed actions. In other words, if there is any statute that is specific and mandatory for the purpose of venue, that statute controls to the exclusion of the general venue statute. Here, RCW 36.01.050(1) is the specific and controlling statute, a conclusion already reached in *Eubanks*.

Furthermore, contrary to Clark County's assertions concerning *Ralph*, Clark County overlooks the fundamental aspect of the Court's analysis, which was purely limited to RCW 4.12.025(1) and RCW 4.12.025(3) – not RCW 36.01.050(1). Accordingly, *Ralph* does not alter *Eubanks* with regard to the application of RCW 36.01.050(1) addressing the question of venue as it relates to Clark County commencing its action against PVJR.

F. The legislative history of RCW 1.16.080 does not change the plain words used in the statute.

"If the statute is unambiguous, its meaning is to be derived from the plain language of the statute." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). Here, RCW 1.16.080(2)[4] does not mandate that a "corporation," as used in the singular in RCW 4.12.025(1) and (3), includes a limited liability company because the plain language of RCW 1.16.080(2) only makes a "limited liability company" synonymous with a "corporation" where a statute uses a plurality of entities and RCW 4.12.025(1) and (3) use "corporation" in the singular. ("When statutory language is unambiguous, we do not need to use interpretive tools such as legislative history." *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013)). Clark County cannot cite legislative history to overcome the facial unambiguity of the statute.

Nevertheless, Clark County uses selective excerpts from the legislative record to try and overcome the statute's facial unambiguity. However, Clark County fails to provide the full story with regard to the 1996 Legislature's comments concerning limited liability companies and its applicability to "business entities in general." Resp. at 29. The reference to "business entities

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[4] "Unless 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."

in general" does not act to fold limited liability companies into a general mix of business entities, such that a limited liability company and a corporation could be deemed synonymous. Rather, the 1996 Legislature focused on certain provisions that were applicable to business entities in general. More specifically:

> There are innumerable sections of the code that are made applicable to business entities *in general*. When the Limited Liability Company Act was passed, these sections were not amended to include the newly created form of business organization, creating ambiguity as to whether the Legislature intended to exclude LLCs from those sections.

Subst. H. B. Rep., ESSB 6168, 54th Leg., Reg. Sess. (Wash. 1996) (emphasis of plurality included).

In other words, the House Report confirms the intent of RCW 1.16.080(2) was to include limited liability companies in statutes that apply to all "business entities" in general. Nowhere does it refer to a limited liability company as being synonymous with a corporation where the statute in question uses "corporation" in the singular form. Indeed, the only singular entities that are synonymous with a "limited liability company" are "person" "association," or "unincorporated association"; otherwise, a "limited liability company" is only synonymous with a corporation where the statute uses that term in conjunction with other business entities.

> Inclusion of LLCs: The general definition of "person" applicable throughout the code is amended to include limited liability companies. The terms "association," "unincorporated association," and "person, firm, or corporation" shall be construed to include limited liability companies unless the context clearly requires otherwise.

Id.

In short, this legislative history confirms the facial unambiguity of RCW 1.16.080(2): a limited liability company is statutorily synonymous with a "person," "association," and "unincorporated association." And, a limited liability company is statutorily synonymous with "corporation" only where the statute in question uses a plurality of business entities.

As a result, Clark County is wrong with regard to its absurdity argument. Since a limited liability company is modeled after partnerships and statutorily synonymous with a "person" it is not absurd to have a limited liability company subject to venue in the same manner as a person – where the person resides. In the case of a limited liability company, residency is where its home office is located or where its member resides.

As for *Holman v. Brady*, 195 Wn. App. 1063, 2016 WL 4921457 (2016), PVJR acknowledged that "the Court analyzed whether a *court rule* applies to a limited liability company when the rule specifically referred to a corporation or an unincorporated association." Opening Br. at 14 (emphasis added). However, court rules are "interpreted as though they were drafted by

the Legislature." *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997). Moreover, Clark County fails to acknowledge that the *Holman* court also expressly noted that "[a] limited liability company is not a corporation and it is not an unincorporated association" in rejecting the argument based on RCW 1.16.080(2). *Id.* at *4. In other words, Clark County is asserting a substantially similar argument here (applying RCW 1.16.080(2) to limited liability companies where the rule at issue does not use a plurality of business entities) that was raised and rejected by the *Holman* court.

G. PVJR is entitled to a venue transfer after complying with the priority-of-action rule.

PVJR's later action in Clark County does not excuse Clark County's failure to commence an action in accordance with RCW 36.01.050(1) in the first place. Furthermore, aside from filing a pre-answer motion to change venue before consolidation, PVJR has not affirmatively petitioned the Court for any substantive relief. CP 108, 123-27.

1. PVJR has been consistent with seeking a venue transfer.

PVJR has never acquiesced to venue in Clark County of Clark County's lawsuit. Indeed, PVJR filed a pre-answer motion to change venue.

Clark County errantly cites to *Matter of Polson*, 21 Wn. App. 489, 492, 585 P.2d 840 (1978), in support of its waiver argument, but *Polson* is distinguishable. *Polson* concerns acquiescing to the court's substantive

involvement (petitioning for a successor trustee) prior to seeking a venue transfer. Here, by contrast, PVJR filed a pre-answer motion to change venue—the very issue on appeal. PVJR has not sought the court's substantive involvement in the action.[5]

Moreover, Clark County's authority to suggest that filing a later lawsuit waives objection to venue overlooks any meaningful analysis of the priority-of-action rule. More specifically, Clark County seeks to align with *Red Carpet Studios v. Midwest Trading Grp., Inc.*, 1:12CV501, 2018 WL 4300544, at *3 (S.D. Ohio Sept. 10, 2018), by suggesting that consent to consolidation constituted a waiver; however *there* the Court actually concluded that "the factors of timeliness, procedural posture, and efficient use of judicial resources weigh against a transfer."

Here, by contrast, PVJR filed its pre-answer motion to change venue long before it agreed to consolidation. The order consolidating the cases was silent on the pending venue motion, thereby preserving the motion to change venue. Consolidation does not alter the rights of the parties, including the right to be heard in the correct venue. *See Rash v. Providence Health & Servs.*,

[5] While PVJR sought the Court's involvement in a discovery dispute, which pertained mainly to opposing Clark County's discovery while issues of venue and arbitration were unresolved, the hearing on discovery was noted for the same date and time and the hearing on venue and immediately followed the hearing on venue. A party does not waive venue by participating in an omnibus hearing on multiple issues, one of which is venue. To hold otherwise would be to present litigants with a Catch-22: you can have lawful venue or lawful discovery, but not both.

183 Wn. App. 612, 626, 334 P.3d 1154 (2014); *see also Roberson v. Perez*, 123 Wn. App. 320, 340, 96 P.3d 420 (2004). If consolidation is to act as a waiver of existing rights and pending motions, the order consolidating the actions must expressly state as such; otherwise, there can be no intentional relinquishment of a known right in order to support finding any waiver.

In sum, Clark County attempts to complicate the legal framework with a smattering of out-of-state cases that suggest filing a later suit waives proper venue of the first-filed suit. This argument and related cases are misplaced given the factual circumstances presented here, which indicate that none of PVJR's actions have constituted waiver of its right to change venue.

2. Clark County compelled PVJR to adopt Clark County's initial unlawful venue selection.

As a result of Clark County's initial improper venue selection, PVJR was compelled to initiate its counteraction in Clark County.[6] Once Clark County filed suit, PVJR had no venue options under Washington's priority-of-action rule. As Clark County has repeatedly argued, when two actions are commenced that involve the same parties, same subject matter, and same relief, the first

[6] Despite Clark County's disregard for RAP 10.3(a)(8), prohibiting materials outside of the record, its suggestion that PVJR is engaging in a form of gamesmanship is not well received given the public statements made by Clark County with regard to the validity of the lease between the parties and refusal to retract such statements. CP 113, 180, 191. It was apparent that Clark County intended to file this lawsuit and PVJR recognized its own need to prepare for such eventual litigation. However, there is a tremendous difference between PVJR circulating a *draft* complaint in the hopes of avoiding litigation and PVJR commencing an action. In the end, Clark County rushed to its home court immediately after getting wind of PVJR's draft complaint. A draft complaint does not absolve Clark County's unlawful venue selection.

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). *See also* CP135; *Temple v. Clark Cty.*, No. 20-CV-5034-RJB-JRC, 2020 WL 2708830 (W.D. Wash. Apr. 22, 2020) (successfully arguing that the Federal Court should abstain in light of this pending action). In short, PVJR was left with no option but to file its counteraction in the Clark County Superior Court after Clark County commenced its lawsuit first.

Clark County suggests PVJR had a venue choice, citing *Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 323, 796 P.2d 1276 (1990). Clark County is wrong. While, under *Am. Mobile Homes*, courts will not blindly apply the priority-of-action rule, a long-line of cases have established that the rule applies "where there is identity of subject matter, relief, and parties between the two actions." *Atl. Cas. Ins. Co.*, 137 Wn. App. at 302, 153 P.3d 211) (citing *Am. Mobile Homes*, 115 Wash.2d at 317, 796 P.2d 1276)). Moreover, Clark County concedes its home court had "exclusive authority to resolve the dispute." CP 00135. It is completely disingenuous for Clark County to now argue PVJR had any meaningful venue choice under the priority-of-action rule.

Seemingly Clark County attempts to have its cake and eat it too by arguing that PVJR was remiss in arguing that Clark County's first lawsuit

stripped PVJR of its venue option, but conceding its "earlier" lawsuit against PVJR established "exclusive authority" over the matter. CP 00135.

In short, PVJR's second-filed suit, with no meaningful venue option, cannot absolve Clark County's first-filed suit in an improper venue in violation of RCW 36.010.050 (1). "It cannot be said that the respondents either implicitly or intentionally waived an objection to improper venue by bringing a motion to dismiss that argued for a correct application of then-controlling precedent." *Ralph v. Weyerhaeuser Co.*, 187 Wn.2d 326, 336, 386 P.3d 721, 725 (2016). While *Ralph* addressed compliance with RCW 4.12.010, the principle remains: a party does not waive venue rights by following controlling precedent. As such, PVJR did not waive venue rights by following the priority-of-action rule.

H. Skamania County is an entirely appropriate venue that adheres to the specific venue statute.

Under RCW 36.01.0505(1), proper venue is either the county of PVJR's principal place of business *or* the two nearest counties to Clark County. Skamania County is one of the two nearest counties. Contrary to Clark County's assertions that PVJR has not articulated "any connection" to Skamania County, PVJR provides its reasoning to the trial court:

> In its motion, PVJR suggests Skamania County as opposed to King County for two reasons. First, Skamania County is "one of the two judicial districts nearest to the county bringing the action." RCW 36.01.050. Second, all the witnesses, except for PVJR's representative, are located in Southwest

> Washington. Therefore, Skamania County is the most appropriate county to preside over this action.

Resp. at 39; CP 144.

Clark County then goes on to suggest that if venue is improper in its home court, the matter should be transferred to King County. This Court should reject this argument for two reasons. First, Clark County never sought this alternative relief in the trial court. Instead, PVJR moved to change venue to Skamania County, which Clark County opposed, doubling down on its venue choice. In the event this Court rules the trial court erred in denying PVJR's motion, the matter should be transferred to Skamania County, which is the issue on appeal. *See Davidson v. Weyerhaeuser Co*., 36 Wn. App. 150, 152–53, 672 P.2d 767, 769 (1983) ("When a plaintiff commences an action in a county not authorized by statute, a solely named defendant has an absolute right, when timely sought, to have venue of a transitory action changed to his county of residence. * * * Only after venue has been changed to a proper county may a party seek a discretionary order of the court to change venue based on convenience of witnesses.") (internal citation omitted).

Clark County could have dismissed and refiled in a correct venue or agreed to proper venue, but instead it chose to double-down on its unlawful venue selection and now must live with the consequences of that choice.

Second, while Clark County, as plaintiff, had first choice of venue, it does not have the second choice. "The initial choice of venue belongs to the plaintiff. * * * 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." *Eubanks*, *supra*, 180 Wn.2d at 595 (internal citation omitted). This is precisely the issue here. If Clark County's initial venue selection was unlawful (and it was for the reasons stated above), Clark County loses its right to dictate venue. The option goes to PVJR, as defendant, to either waive the venue objection or move to transfer the case to a proper venue.

Under RCW 36.01.050(1), venue is improper in Clark County but proper in Skamania County. As such, the trial court erred in denying PVJR's motion. The remedy is to transfer the case to where venue is proper, Skamania County, which was the motion and relief presented to the trial court.

III. CONCLUSION

RCW 36.01.050(1) is the specific and mandatory statute controlling Clark County's venue selection. Clark County's response fails to establish otherwise. Consistent with RCW 36.01.050(1) and *Eubanks*, *supra*, PVJR

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respectfully requests this Court reverse and remand with instructions to transfer the action to Skamania County.

DATED: July 8, 2020.

MILLER NASH GRAHAM & DUNN LLP

/s/ Jacob A. Zahniser

Jacob A. Zahniser, WSBA No. 39763
jacob.zahniser@millernash.com
3400 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
Phone: 503.224.5858

Attorneys for Defendant-Petitioner
Portland Vancouver Junction Railroad, LLC

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington that on the date below, I caused to be filed with Court of Appeals, Division II, and served via COAL electronic filing, a true and correct copy of this document to:

Mr. Matthew J. Segal
Ms. Sarah Washburn
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2000
Seattle, Washington 98101
Phone: 206.245.1700
Fax: 206.245.1750

Attorneys for Plaintiff-Respondent

DATED: July 8, 2020.

/s/ Jacob A. Zahniser
Jacob A. Zahniser, WSBA No. 39763
Of Attorneys for Defendant-Petitioner
Portland Vancouver Junction Railroad, LLC

MILLER NASH GRAHAM & DUNN LLP

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