

**FILED**

JUN 20 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 318052 and No. 318095**

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**COURT OF APPEALS FOR DIVISION III**

**STATE OF WASHINGTON**

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**KEVIN PORTER,  
Appellant**

**v.**

**NATHANIAL (NATE) BOISSO, PERSONAL  
REPRESENTATIVE OF THE ESTATE OF CHARLES BOISSO,  
Respondent**

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**IN RE THE ESTATE OF CHARLES R. BOISSO**

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**REPLY BRIEF OF APPELLANT**

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## I. SUMMARY OF REPLY

The Appellant, Kevin Porter (“Porter”) is requesting this court overturn certain orders and vacate certain judgments made by Kittitas County Superior Court Judge Chmelewski between May 28, 2013 and August 5, 2013. The orders and judgments arise in two cases involving the same parties and facts and with related subject matter and legal issues.

In the first case, COA 318095, Porter is requesting this Court overturn the Orders of Kittitas County Superior Court Judge Chmelewski entered on May 28, 2013 granting the Personal Representatives Petition Clearing Title (“Order Clearing Title”), a subsequent Order Awarding Petitioner’s Fees and Costs entered on July 3, 2013 (“Fee Award”) and a Judgment entered on August 5, 2013 (“Probate Judgment”). These decisions were made in a probate action commenced on November 13, 2012 in Kittitas County Superior Court under Cause No. 12-4-00086-7, following death of Charles Bossio (“Probate Case”).

In the second case, COA 318052, Porter is requesting this court overturn Judge Chmelewski’s orders entered on July 3, 2013 granting the Personal Representatives Motion to Dismiss Porter’s claims against the Estate of Charles Bossio (“Order of Dismissal”) and a subsequent Judgment entered in the same case on August 5, 2013 dismissing Porter’s

Pierce County Case and awarding statutory costs (“Pierce County Judgment”).

In his opening brief Porter provided a thorough legal and factual analysis of the trial court’s rulings, explaining why these rulings should be overturned on this appeal including the following arguments:

(1) Porter’s commencement of his suit against the Estate in Pierce County Superior Court within the statutory limitation period of RCW 11.40.100(1) tolled the non-claim limitation period pursuant to RCW 4.16.170 and Superior Court Civil Rule 3;

(2) RCW 4.12.010(1) is a jurisdictional statute that required Porter commence his suit in Pierce County because his claims included specific performance of his alleged real estate contract and declaration of his right, title and interest in real property located in Pierce County;

(3) Porter’s claims are claims against the Estate of Bossio for breach of the real estate contract between Porter and Charles Bossio and unjust enrichment arose from actions of the Estate of Bossio occurring after Bossio’s death and therefore not subject to the nonclaim limitations of RCW 11.40.100(1) because they are claims against the Estate not the decedent;

(4) RCW 11.96A.050(5) is a venue statute, not a jurisdictional statute, and therefore Porter’s commencement of his action in Pierce County Superior

Court under RCW 4.12.010(1), which is a jurisdictional statute, invoked proper subject matter jurisdiction over Porter's claims and personal jurisdiction over the parties so that a change of venue was the proper resolution of any objections by the Estate of Bossio; and

(5) Porter's claims against the Estate of Bossio for unjust enrichment are separate legal claims from his breach of real estate contract and were not subject to the Order Clearing Title and therefore should not have been dismissed based on res judicate or collateral estoppel under the Order of Dismissal.

The Respondent argues in its brief that all of the lower court's decisions should be affirmed because all of Porter's claims are time barred under RCW 11.40.100(1) based on Porter's failure to commence his action against the Estate of Bossio in Kittitas County Superior Court within the 30 day claim limitation period. Respondent's arguments are based on its opinion that the Superior Court for county where the probate commenced has exclusive jurisdiction over all claims against estates and therefore is the only "proper court" where a person may commence any action against an estate. Respondent's argument is not supported by any case authority or reasonable legal arguments and is contrary to the jurisdictional authority of the state Superior Court's granted under the Washington Constitution Article IV, § 6 which is obtained upon service of the

summons and complaint on the defendant or the earlier filing of the complaint with the court pursuant CR 3 and RCW 4.28.020.

This reply will focus on the legal issues related to the central issue on this appeal which is whether Porter's timely filing of his suit against the estate in Pierce County Superior Court tolled any applicable 30 day non-claim limitation period under RCW 11.40.100(1). It is important to note that the Estate brought a motion to dismiss Porter's Pierce County lawsuit that was DENIED and the Estate did not appeal the order DENYING the Estate's motion to dismiss or the later order of the Pierce County court transferring venue of Porter's lawsuit to Kittitas County Superior Court. These unappealed orders confirmed the Pierce County Superior Court's jurisdiction of the subject matter of Porter's claims against the Estate. The Estate cannot raise an issue about a lack of jurisdiction in Pierce County because it did not appeal that court's orders. RAP 5.2; *In re Estate of Thornton*, 81 Wn.2d 72, 81, 499 P.2d 864, 1972 Wash. LEXIS 708 (Wash. 1972) (failure to appeal from it at that time precludes appellant from raising the issue later)

In the Estate's motion to dismiss it made the same arguments it later made to the Kittitas County Superior Court including its arguments that TEDRA required the act that lead to the Order Clearing Title which is part of Porter's appeal. Therefore, at the time the Kittitas County judge

entered her Order Clearing Title, Porter's lawsuit was pending in Kittitas Superior Court with a commencement date starting with filing in Pierce County that fell within the 30 day limitation period. The Kittitas County Superior Court had no authority to reject the decision of the Pierce County Superior Court regarding Porter's legal commencement of his suit against the Estate in Pierce County. Once jurisdiction of the Superior Court is invoked it continues until the case is dismissed.

For all the reasons stated in Porter's opening brief and the additional arguments and authorities presented in this Reply Brief the Order Clearing Title, Probate Judgment, Order of Dismissal and Pierce County Judgment should be vacated these cases remanded for trial.

## II. ARGUMENT

### A. Porter properly commenced his suit within the 30 day limitation period.

Under Washington law a suit is deemed commenced upon service of the summons and complaint on the defendant or the earlier filing of the complaint with the court pursuant CR 3 and RCW 4.28.020.

“From the time of commencement of the action by service of summons, or by the filing of the complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and do and have control of all subsequent proceedings.” RCW 4.28.020. See also *Seattle Seahawks, Inc. v. King County*, 128 Wn.2d 915, 917, 913 P.2d 375 (1976).

The Superior Court Civil Rules confirm the provisions of RCW 4.28.020 stating:

“...a civil action is commenced by service of a copy of a summons together with a copy of the complaint,...,or by filing a complaint...” CR 3.

There is no dispute that Porter commenced his suit against the personal representative by filing in Pierce County Superior Court within the 30 day limitation period of RCW 11.40.100(1). There is also no dispute the Estate’s motion to dismiss Porter’s Pierce County action was DENIED and Porter’s suit remained under the jurisdiction of the Superior Court through its transfer from Pierce County to Kittitas County under the Pierce County Order Transferring Venue. The Estate did not appeal either of the Pierce County Orders and therefore Porter’s claims against the Estate were properly pending in Kittitas County Superior Court with a commencement date within the 30 day limitation period of RCW 11.40.100(1) based on the original at filing date of January 29, 2013 in Pierce County. Under these circumstances it was error for the Kittitas Superior Court judge to dismiss Porter’s claims under RCW 11.40.100(1) as untimely because Porter commenced his suit in a proper court within the 30 day limitation period and commencement of an action tolls any statutory limitation periods. Washington’s tolling statute, RCW 4.16.170, states:

“...for the purpose of tolling any statute of limitations, actions shall be deemed commenced when the complaint is

filed or the summons is served, whichever occurs first....”

Porter’s action was properly commenced within the 30 day period and is not subject to dismissal under RCW 11.40.100(1).

**B. Respondent’s request to establish new jurisdictional limitations on Superior Courts should be rejected in this case.**

The Respondent argues that this court should set new legal precedent and hold that RCW 11.40.100(1) is an exclusive jurisdictional statute that limits the original general jurisdiction of all Superior Courts established under the Washington Constitution Article IV, § 6 which jurisdiction is properly obtained upon service of the summons and complaint on the defendant or the earlier filing of the complaint with the court pursuant CR 3 and RCW 4.28.020. The Respondent fails to cite any legal authority for its argument that RCW 11.40.100(1) creates exclusive subject matter jurisdiction over all claims against an estate to the Superior Court of the county where the probate is commenced. RCW 11.40.100(1) does not make any statement limiting jurisdiction of the Superior Court to the court in the county where the probate is commenced.

The Respondent’s selective cut and paste argument trying to tie the TEDRA provisions of RCW 11.96A to RCW 11.40.100 to gain more authority for his argument is without any merit and contrary to TEDRA.

As explained in the Porter's Appellant Brief, TEDRA is a venue statute not a restrictive jurisdictional statute. The title of RCW 11.96A.050 confirms it is a venue statute: "Venue in proceedings involving probate or trust matters." RCW 11.96A.050(7) states that: "(7) If venue is moved, an action taken before venue is changed is not invalid because of the venue." This subsection (7) confirms that the Order of the Pierce County Superior Court changing the venue of the Porter's Pierce County Case to Kittitas County is valid and enforceable and therefore Judge Chmelewski should not have dismissed Porter's claims based on a failure to file his action in Kittitas County within the 30 days statutory limitation period. The Respondent does not dispute this argument in its briefing.

Porter properly and timely commenced his suit and the Estates motion to dismiss was denied without appeal by the Estate. In this circumstance there is no factual basis to argue Porter's suit was untimely under RCW 11.40.100(1) regardless of any application of TEDRA and the lower court orders must be vacated.

**C. Respondent's "bright line" argument does not apply.**

Respondent argues this court should establish a new "bright line rule" that all claims against an estate must be brought the Superior Court of the county where the probate is filed by combining RCW 11.40.100(1), RCW

11.96A.010 and RCW 11.96A.050(5) into a new exclusive jurisdictional statute. There is no authority for this position. Respondent cites several cases that interpret former RCW 11.40.080 in support of his arguments. These case authorities and the statute are not applicable to the present case because they relate to the obligation of a person with claims against the decedent to file notice of those claims with the estate within 4 months of the date of first publication of the notice to creditors. In the present case the Estate admits that Porter properly filed his claim with the estate and therefore these cases simply don't apply to this case. The cited cases did not involve any issues regarding filing of actions under RCW 11.40.100(1) or the jurisdictional intentions of RCW 11.40.100(1). Also the cases cited involved factual situations where the claimant failed to file a timely notice.

The present case, the Estate admits that Porter timely filed his claim with the Estate under RCW 11.40.010 and RCW 11.40.051 – the current statutes subject to his cited authorities. Further, the Estate admits Porter filed his action in the Superior Court within the 30 statutory filing period under RCW 11.40.100(1). Under the facts in this case Porter has met the “bright line rule” applicable to the time for filing claims against an estate.

The Respondent does cite one case that discusses RCW 11.40.100(1), namely: *In re Estate of Stover v. Simmons*, 178, Wn.App. 550, 315 P.3d

579 (2013). The Stover case, like the other interpreting the 4 month claim limitation period discussed above, involved facts where the claimant failed to file its lawsuit within the 30 day claim period. That is not the issue in the present case. The issue in the present case is whether a timely filing of a claim in a Superior Court other than the court where the probate is pending, is a properly commenced case the tolls any limitation periods pursuant to RCW 4.16.170. Under the authorities cited in Porter's brief and the unappealed order of the Pierce County Superior Court denying the Estate's motion to dismiss Porter's action, it is clear that Porter's claims were properly commenced under RCW 4.12.010(1) and Porter is entitled to the tolling protection of RCW 4.16.170.

**D. Porter's motion to change venue from Pierce County Superior Court to Kittitas County Superior Court confirmed the original jurisdiction of the Pierce County Superior Court.**

Porter brought a motion in the Pierce County Superior Court to change venue of his lawsuit against the Estate from Pierce County to Kittitas County. The motion was heard and granted by the Pierce County Superior Court and the case was transferred by that order from Pierce County to Kittitas County. The Estate unsuccessfully opposed the motion, but did not appeal the order changing venue. Respondent's new argument

that Porter's action of bringing a motion to change venue to Kittitas County Superior Court is an admission that Pierce County Superior Court did not have original jurisdiction and venue is without any merit.

The fact that an order of from the Pierce County Superior Court was required to change the venue is an admission that Pierce County Superior Court had jurisdiction of the subject matter of the case. The Respondent did not appeal this order or the prior order of the Pierce County Superior Court denying the Estate motion to dismiss. RAP 5.2; *In re Estate of Thornton*, 81 Wn.2d 72, 81, 499 P.2d 864 (Wash. 1972) (failure to appeal from it at that time precludes appellant from raising the issue later). Respondent cannot now argue that the Pierce County Superior Court did not have jurisdiction to deny respondent's motion to dismiss or enter an order changing venue.

The Respondent, precluded by its own failure to appeal any of the Pierce County Court Orders, now makes a completely meritless argument that statements in the order of a trial court is an admission by a party under the rule of judicial admission. Judicial admissions are statements of a party to an action, not the judge hearing the case. This is evident from the authority cited by the Respondent in support of its argument. *Mukilteo Ret. Apartments v. Mukilteo Investors LP*, 176 Wn.App. 244, 310 P.3d 814

(2013). In Mukilteo, the defendant admitted in its answer that the enforceability of the contract in dispute would not be an issue at trial and that the lessee need not offer any evidence to prove a valid and binding contract. At trial the parties and the trial court all treated the question of the contract's enforceability as affirmatively established. The defendant appealed the judgment asserting that the option contract's enforceability could be raised for the first time on appeal pursuant to Wash. R. App. P. 2.5(a)(2). The appeals court rejected the appeal because the defendant did not contest the issue at trial and could not be heard to complain on appeal that the facts necessary to demonstrate a valid contract were not established at trial. Because the question of the contract's validity had been definitively resolved, and no proof of facts demonstrating its enforceability was necessary, Rule 2.5(a)(2) was inapplicable, and the defendant did not demonstrate an entitlement to appellate review.

There is nothing in the record that shows Porter or his attorneys admitted or agreed not to contest the Estate's claims that Pierce County Superior did not have jurisdiction over the subject matter of Porter's claims. In fact this issue was contested during the Estate motion to dismiss and the Pierce County Superior Court denied that motion. The estate judicial admission argument is without merit.

**E. Respondent’s argument that “priority of action rule” barred Porter’s Pierce County Action is untimely due to failure to appeal.**

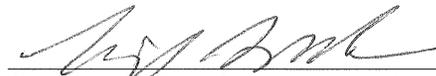
As discussed earlier in this reply brief, the Respondent did not appeal any of the decisions of the Pierce County Superior Court and his argument that Pierce County Judge Tollefson agreed the “priority of action rule” barred Porter’s action is completely contrary to the Judge’s order denying the Estate motion to dismiss. If Judge Tollefson had agreed with the Estate’s priority of action argument he would have dismissed Porter’s action.

**III. CONCLUSION**

The Appellant, Kevin Porter respectfully requests that this Court overturn the Order Clearing Title and all subsequent Orders and Judgments and awards of fees and costs that followed because: (1) Porter properly commenced his action against the Estate in Pierce County under RCW 4.12.010(1); (2) Porter’s actions are not claims against the decedent and therefore not subject to the nonclaim limitations of RCW 11.40.100(1); (3) If Porter’s claims are subject to RCW 11.40.100(1), Pierce County Superior Court was a proper court for the commencement of Porter’s action against the Estate and his commencement of his action in Pierce County Superior Court within the 30 statutory limitation period tolled the nonclaim limitation period; and (4) the Order Clearing Title did

not bar Porter's equitable claims against the Estate for unjust enrichment. In addition, Porter should be awarded its attorney fees and costs in the prior proceedings and on appeal under RAP 18.1(a) as allowed by law under RCW11.96A.150(1).

DATED this 18th day of June, 2014.

  
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