

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

NO. 42329-4-II

ROBIN EUBANKS and ERIN GRAY
Respondents/Plaintiffs,

v.

DAVID BROWN, individually and behalf of his marital community,

Petitioner/Defendants.

&

KLICKITAT COUNTY, KLICKITAT COUNTY PROSECUTOR
ATTORNEY'S OFFICE;

Defendants

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COURT OF APPEALS
DIVISION II

Petitioner David Brown's Opening Brief

EVANS, CRAVEN & LACKIE, P.S.
Michael E. McFarland Jr., WSBA #23000
818 W. Riverside, Suite 250
Spokane, WA 99201-0910
(509) 455-5200
ATTORNEYS FOR PETITIONER

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A. INTRODUCTION

The issue on review is whether a defendant loses his or her statutory venue rights simply because a county is a co-defendant. That issue has two subparts. First, does a plaintiff's right to sue a county in an adjoining county pursuant to RCW 36.01.050 override a public officer's right, pursuant to RCW 4.12.020(2), to be sued in the county in which the cause of action arose? Second, does a plaintiff's right to sue a county in an adjoining county override an individual defendant's right, pursuant to RCW 4.12.025 and RCW 4.12.020(3), to be sued in the county in which the defendant resides and in which the cause of action arose? For the reasons set forth herein, the answer to both questions is "no."

B. ASSIGNMENTS OF ERROR

Petitioner David Brown submits that the trial court erred in finding that the plaintiffs' right to sue a county in an adjoining county pursuant to RCW 36.01.050 gave the plaintiffs the right to sue him in the adjoining county. Mr. Brown submits that venue for the claims against him are in Klickitat County and that the trial court therefore erred in not transferring the claims against him from Clark County to Klickitat County.

The sole issue pertaining to the assignment of error is whether Ms. Eubanks' and Ms. Gray's right to sue Klickitat County in Clark County gives them the right to sue Mr. Brown in Clark County.

C. STATEMENT OF THE CASE

Petitioner/Defendant David Brown was previously employed as a deputy prosecuting attorney for Klickitat County. [CP 4, 11, 17] Respondents/Plaintiffs Robin Eubanks and Erin Gray were likewise employed in the Klickitat County Prosecuting Attorney's Office. [CP 4, 17] Ms. Eubanks and Ms. Gray brought suit against Mr. Brown and Klickitat County alleging that Mr. Brown sexually harassed them while they were employed in the Klickitat County Prosecuting Attorney's Office. [CP 4, 17]

Ms. Eubanks and Ms. Gray originally filed this lawsuit in Klickitat County on December 17, 2010. [CP 8, 17] Then, on December 29, 2010, they dismissed the lawsuit and re-filed in Benton County (December 27, 2010). [CP 8, 17] On February 10, 2011, counsel for Mr. Brown brought to the attention of Ms. Eubanks' and Ms. Gray's attorney that venue in Benton County was not proper. [CP 8, 17] In response, Ms. Eubanks and Ms. Gray filed a motion to change venue to Clark County, which was subsequently granted by the Benton County Superior Court. [CP 8, 17] On February 24, 2011, Ms. Eubanks and Ms. Gray filed suit in Clark County. [CP 8, 17]

On April 22, 2011, Mr. Brown brought a Motion to Dismiss or Alternatively to Transfer Venue to Clark County. [CP 8, 17] Mr. Brown's

Motion was premised upon the argument that while venue in Clark County was proper as it related to Klickitat County, venue was not proper as it related to Mr. Brown, as Mr. Brown had the right to be sued in Klickitat County. [CP 8] On May 27, 2011, the Clark County Superior Court denied Mr. Brown's Motion, finding that venue was proper in Clark County. [CP 17]

On June 24, 2011, Mr. Brown filed a Notice of Discretionary Review seeking review of the trial court's denial of Mr. Brown's motion. [CP 20]

On July 5, 2011, the Washington Court of Appeals published its decision in *Youker v. Douglas County*, 162 Wash.App. 448, 258 P.3d 60 (2011), a decision Mr. Brown contends controls the venue question in this matter. Therefore, on July 11, 2011, Mr. Brown filed a CR 60(b)(11) Motion to Vacate the Order Denying Brown's Motion to Dismiss or Alternatively Transfer Venue. [CP 26] On July 14, 2011, the trial court denied Mr. Brown's Motion to Vacate. [CP 29]

On August 31, 2011, the Court Commissioner concluded that the "trial court appears to have committed obvious error in denying Brown's motion to transfer venue of the claims against him to Klickitat County," and therefore granted Brown's Motion for Discretionary Review.

D. ARGUMENT

Venue as it relates to Ms. Eubanks' and Ms. Gray's claims against Klickitat County is proper in Clark County. RCW 36.01.050. The only question is whether Ms. Eubanks' and Ms. Gray's right to sue Klickitat County in Clark County gives them the right to sue Mr. Brown in Clark County. The answer is "no."

In *Roy v. City of Everett*, 48 Wash.App. 369, 370, 738 P.2d 1090 (1987), the Washington Court of Appeals addressed this very issue. In that case, an injured citizen brought suit against the estate of an assailant, the City of Everett, individual police officers, Snohomish County and county prosecutors to recover for injuries caused by the assailant. The plaintiff filed the lawsuit in King County. The City of Everett and the City of Everett police officers challenged venue in King County, arguing that venue was only proper in Snohomish County. The plaintiff argued "that because she can sue Snohomish County in King County [pursuant to RCW 36.01.050], other properly joined defendants can also be sued there." *Roy v. City of Everett*, 48 Wash.App. at 372. The Court of Appeals disagreed, holding:

The City of Everett and the police officers have the right to have the action against them commenced in Snohomish County, the county of their residence. *Russell v. Marenakos Logging Co. Inc.*, 61 Wash.2d 761, 765, 380 P.2d 744 (1963). The officers also have that right under RCW 4.12.020(2). See *State ex rel. McWhorter v. Superior Court for King Cy.*, 112 Wash. 574, 192 P. 903 (1920). Roy has no right to sue them in King County. That being the case

and these defendants having demanded that the trial be had in Snohomish County, the action against these defendants should be transferred there. *See Isno v. Angland*, 65 Wash.2d 375, 397 P.2d 422 (1964).

Roy v. City of Everett, 48 Wash.App. at 371-372.

The same principle applies here. Clark County is proper venue as it relates to Ms. Eubanks' and Ms. Gray's claims against Klickitat County, but not as it relates to their claims against Mr. Brown. RCW 36.010.050 simply does not give Ms. Eubanks and Ms. Gray the right to bring suit against Mr. Brown in Clark County. RCW 4.12.020 (causes of action against "a public officer, or person specially appointed to exercise his or her duties" "shall be tried" where the cause of action arose).

In *Youker v. Douglas County*, 162 Wash.App. 448, 258 P.3d 60 (2011) the plaintiff (Youker) commenced suit against Douglas County and two deputy sheriffs in Chelan County. As noted by the Court of Appeals, Youker commenced suit in Chelan County "in reliance on RCW 36.01.050(1), which provides that actions against a county 'may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts.'" *Youker*, 258 P.3d at 264-65. Douglas County denied that venue was proper, and argued that pursuant to RCW 4.12.020, venue was proper in Douglas County. *Id.* at 265. In holding that "[t]he Chelan court properly transferred Mr. Youker's claims against the officers to Douglas County," the Court of Appeals noted:

We do not find any conflict between RCW 4.12.020 and RCW 36.01.050. RCW 4.12.020(2) provides that proper venue for the claims against the officers is the county where the cause, or some part thereof, arose; a venue the officers have the right to enforce. RCW 36.01.050 gives a plaintiff the right to sue the county in the county, or, if it prefers, in either of the two nearest judicial districts. Because objection to improper venue can be waived, a plaintiff suing both a county and its officers can commence its action in an adjacent county and see if the officers accede to its choice. If the officers move to transfer the case to the county in which the events occurred, they face the possibility that only the claims against them—not the claims against the county—will be transferred.

Youker, 258 P.3d at 266.

Youker is directly on point. Pursuant to RCW 4.12.020, Mr. Brown has the "right" to venue in Klickitat County. *Youker* clearly requires that Ms. Eubanks' and Ms. Gray's claims against Mr. Brown be transferred to Klickitat County.

Mr. Brown has the "right" to have the lawsuit against him tried in Klickitat County, and RCW 36.05.010 does not trump that right. RCW 4.12.020(2) is the more specific, and thus controlling, of the two statutes, and requires that Mr. Brown be sued in Klickitat County. This issue has been reviewed by courts in Washington several times and the courts have consistently ruled that lawsuits against public officers must be brought in the county in which the cause of action arose, not the adjoining county. *See, Aydelotte v. Audette*, 110 Wash.2d 249, 750 P.2d 1276 (1988); *Shoop*

v. Kittitas County, 149 Wash.2d 29, 65 P.3d 1194 (2003); *Cossel v. Skagit County*, 119 Wash.2d 434, 834 P.2d 609 (1992); *Young v. Clark*, 149 Wash.2d 130, 65 P.3d 1192 (2003); *See also, Bruneau v. Grant County*, 58 Wash.App. 233, 236, 792 P.2d 174 (1990) ("Ms. Bruneau's action against defendants Ramon, Melvin, and Wiester, acting in their official capacity, had to be commenced in Grant County" pursuant to RCW 4.12.020(2)").

The only judicial controversy regarding this issue has been whether the statute is a matter of jurisdiction or venue, but that issue was resolved in *Young v. Clark* (RCW 4.12.020 relates to venue). However, Washington courts have never been confused about the plain meaning of the statute itself and have consistently held that lawsuits against public officers must be filed in the county where the cause of action arose, not the adjoining county. Similarly, Washington courts have consistently held that pursuant to RCW 4.12.025, defendants have the right to be sued in the county of their residence, not the adjoining county. Case law is clear. Mr. Brown, who resides in Klickitat County, has the right to be sued in Klickitat County. RCW 36.01.050 does not deprive him of that right.

In addition to the foregoing, Mr. Brown has the right pursuant to RCW 4.12.020(3) to be sued in Klickitat County, as that is where he resides and that is where the cause of action arose. RCW 4.12.020(3) provides that if there is more than one defendant, the plaintiff has the

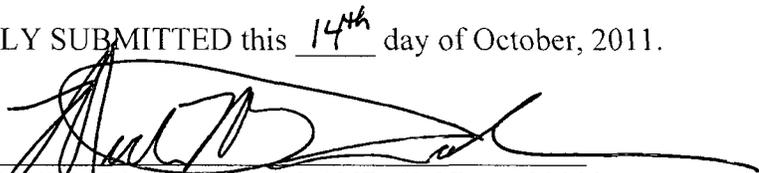
option of suing "where some one of the defendants resides." In this case, there is no defendant who resides in Clark County.

E. CONCLUSION

Pursuant to RCW 4.12.020(2), Mr. Brown, as a public officer, has the right to be sued in the county in which the cause of action arose. In this case, that is Klickitat County. In addition, RCW 4.12.025 and RCW 4.12.020(3) give Mr. Brown the right to venue in Klickitat County, as that is where he resides.

If Ms. Gray and Ms. Eubanks were suing only Mr. Brown, there is absolutely no question that the lawsuit would have to be brought in Klickitat County, as Mr. Brown has the statutory right to venue in that county. The fact that Ms. Gray and Ms. Eubanks have the ability to sue Klickitat County in Clark County does not deprive Mr. Brown of his statutory venue rights. Mr. Brown therefore respectfully request that the Court find that the trial court erred in not granting Mr. Brown's Motion to Transfer Venue and direct the trial court to transfer venue of the claims against Mr. Brown to Klickitat County.

RESPECTFULLY SUBMITTED this 14th day of October, 2011.



MICHAEL E. MCFARLAND, WSBA # 23000
Attorneys for Petitioner David Brown

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON
BY BM

I certify under penalty of perjury under the laws of the State of Washington that on the 14th day of Oct., 2011, a true and correct copy of the foregoing *Petitioner's Opening Brief*, was served upon the following parties and their counsel of record in the manner indicated below:

Thomas S. Boothe	Via Regular Mail	<input checked="" type="checkbox"/>
Attorney at Law	Via Certified Mail	<input type="checkbox"/>
1635 S.W. Westmoor Way	Via Overnight Mail	<input type="checkbox"/>
Portland, OR 97225	Via Facsimile	<input type="checkbox"/>
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Marletta Giles-Ward	Via Regular Mail	<input checked="" type="checkbox"/>
Colton Ward PLLC	Via Certified Mail	<input type="checkbox"/>
505 W. Riverside Ave. Ste. 460	Via Overnight Mail	<input type="checkbox"/>
Spokane, WA 99201	Via Facsimile	<input type="checkbox"/>
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Karen Suzette Lindholdt	Via Regular Mail	<input checked="" type="checkbox"/>
Attorney at Law	Via Certified Mail	<input type="checkbox"/>
1020 N. Washington St.	Via Overnight Mail	<input type="checkbox"/>
Spokane, WA 99201	Via Facsimile	<input type="checkbox"/>
	Hand Delivered	<input type="checkbox"/>

James E. Baker	Via Regular Mail	<input checked="" type="checkbox"/>
Attorney at Law	Via Certified Mail	<input type="checkbox"/>
451 Diamond Dr.	Via Overnight Mail	<input type="checkbox"/>
Ephrata, WA 98823	Via Facsimile	<input type="checkbox"/>
	Hand Delivered	<input type="checkbox"/>

Philip A. Talmadge	Via Regular Mail	<input checked="" type="checkbox"/>
Talmadge-Fitzpatrick	Via Certified Mail	<input type="checkbox"/>
18010 Southcenter Parkway	Via Overnight Mail	<input type="checkbox"/>
Tukwila, WA 98188	Via Facsimile	<input type="checkbox"/>
	Hand Delivered	<input type="checkbox"/>

Dated: 10/14/11

Brooke Johnson
Brooke Johnson