

NO. 42329-4-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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ROBIN EUBANKS and ERIN GRAY,

Respondents,

v.

DAVID BROWN, individually and on behalf of his marital community,

Petitioner,

and

KLICKITAT COUNTY, KLICKITAT COUNTY PROSECUTING  
ATTORNEY'S OFFICE,

Defendants.

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RESPONSE BRIEF OF RESPONDENTS  
ROBIN EUBANKS AND ERIN GRAY

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	ii-iii
A. INTRODUCTION .....	1
B. RESTATEMENT OF THE ISSUES .....	2
C. COUNTERSTATEMENT OF THE CASE.....	2
D. SUMMARY OF ARGUMENT .....	6
E. ARGUMENT .....	8
(1) <u>Standard of Review</u> .....	8
(2) <u>The Trial Court Did Not Abuse Its Discretion         By Refusing To Change Venue to Klickitat County</u> .....	8
F. CONCLUSION.....	20

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

*Aydelotte v. Audette*, 110 Wn.2d 249, 750 P.2d 1276 (1998),  
*overruled on other grounds, Young v. Clark*,  
 149 Wn.2d 130, 65 P.3d 1192 (2003).....17

*Baker v. Hilton*, 64 Wn.2d 964, 395 P.2d 486 (1964) .....9

*Bratton v. Calkins*, 73 Wn. App. 492, 870 P.2d 981,  
*review denied*, 124 Wn.2d 1029 (1994).....19

*Cossel v. Skagit County*, 119 Wn.2d 434, 834 P.2d 609 (1992),  
*overruled on other grounds by Shoop v. Kittitas County*,  
 149 Wn.2d 29 (2003) .....11, 13, 17

*Draper Mach. Works, Inc. v. Dep't of Natural Resources*,  
 117 Wn.2d 306, 815 P.2d 770 (1991).....15

*Hatley v. Saberhagen Holdings, Inc.*, 118 Wn. App. 485,  
 76 P.3d 255 (2003).....9

*Hickey v. City of Bellingham*, 90 Wn. App. 711, 953 P.2d 822,  
*review denied*, 136 Wn.2d 1013 (1998).....10, 17

*In re Estate of Kerr*, 134 Wn.2d 328, 949 P.2d 810 (1998).....13

*Johanson v. City of Centralia*, 60 Wn. App. 748,  
 807 P.2d 376 (1991).....9, 13, 15, 16

*Kyrearos v. Smith*, 89 Wn.2d 425, 572 P.2d 723 (1977).....19

*Moore v. Flateau*, 154 Wn. App. 210, 225 P.3d 361,  
*review denied*, 168 Wn.2d 1042 (2010).....10

*Rabanco, Ltd. v. Weitzel*, 53 Wn. App. 540,  
 768 P.2d 523 (1989) .....13, 14, 15, 16

*Roy v. City of Everett*, 48 Wn. App. 369, 738 P.2d 1090(1987).....16, 17

*Russell v. Marenakos Logging Co.*, 61 Wn.2d 761,  
 380 P.2d 744 (1963).....10

*Save Our Rural Envir. v. Snohomish Cty.*, 99 Wn.2d 363,  
 662 P.2d 816 (1983).....9, 14

*Shoop v. Kittitas Cty.*, 149 Wn.2d 29, 65 P.3d 1194 (2003).....9, 11, 13

*State v. Crudup*, 11 Wn. App. 583, 524 P.2d 479,  
*review denied*, 84 Wn.2d 1012 (1974).....8

*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) .....8

*State v. Halsen*, 111 Wn.2d 121, 757 P.2d 531 (1988).....10

<i>State v. McChristian</i> , 158 Wn. App. 392, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003 (2011).....	13
<i>Stone v. Chelan County Sheriff's Dep't</i> , 110 Wn.2d 806, 756 P.2d 736 (1988).....	12
<i>Thoman v. Hearst Consol. Publ'ns</i> , 187 Wash. 290, 60 P.2d 106 (1936).....	12
<i>Thompson v. Everett Clinic</i> , 71 Wn. App. 548, 860 P.2d 1054 (1993) review denied, 123 Wn.2d 1027 (1994).....	19
<i>Youker v. Douglas County</i> , 162 Wn. App. 448, 258 P.3d 60 (2011).....	15, 16, 17, 18
<i>Young v. Clark</i> , 149 Wn.2d 130, 65 P.3d 1192 (2003).....	9, 13, 17

Statutes

RCW 4.12.020 .....	<i>passim</i>
RCW 4.12.020(2) .....	<i>passim</i>
RCW 4.12.020(3) .....	1, 15
RCW 4.12.025 .....	<i>passim</i>
RCW 36.01.050 .....	<i>passim</i>

Rules and Regulations

CR 60(b)(11) .....	6
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A. INTRODUCTION

This discretionary appeal arises out of the sexual harassment of respondents Robin Eubanks and Erin Gray (collectively “Eubanks/Gray”) by petitioner David Brown (“Brown”) while Brown worked as a deputy prosecuting attorney at the Klickitat County Prosecuting Attorney’s Office.

Brown challenges the trial court’s refusal to transfer venue of Eubank/Gray’s claims against him from Clark County to Klickitat County, arguing he is entitled to be sued as a public officer in Klickitat County because the underlying cause of action arose there and he resides there. RCW 4.12.025; RCW 4.12.020(2), (3). In doing so, he ignores the fundamental concept that the choice of venue resides with *the plaintiff* in the first instance. Where Brown was not acting in his official capacity as a public officer when he sexually harassed Eubanks/Gray and he concedes he was sued in his individual capacity, RCW 36.01.050 applies to make venue appropriate in Clark County for all claims. Brown’s arguments to the contrary are impractical, squandering scarce judicial resources and increasing expenses for the parties by requiring two separate multi-week trials in two separate counties.

B. RESTATEMENT OF THE ISSUES

Eubanks/Gray acknowledge the issues advanced by Brown in his introduction, but believe the critical issues in this case are more appropriately formulated as follows:

(1) Did the trial court correctly determine venue was proper in a county not the individual defendant's county of residence where the general venue statute, RCW 4.12.025, is inapplicable because a more specific venue provision applies to allow the plaintiffs to file elsewhere?

(2) Did the trial court correctly determine the proper venue for an action against both a county and an individual defendant where RCW 36.01.050 and RCW 4.12.020 are complementary, the plaintiffs may select venue under either statute, and the individual defendant was not acting in his capacity as a public officer when his alleged misconduct occurred because his official duties did not include sexually harassing his staff?

C. COUNTERSTATEMENT OF THE CASE

Brown ignores unfavorable facts and misleads the Court concerning this case's procedural course. Eubanks/Gray submit the following more developed factual statement for the Court's consideration:

Both Eubanks and Gray worked as administrative assistants at the Klickitat County Prosecuting Attorney's Office; Brown was their attorney

supervisor.<sup>1</sup> CP 8-9, 120.<sup>2</sup> Eubanks/Gray claim Brown sexually harassed them at work and Klickitat County and the Klickitat County Prosecuting Attorney's Office (collectively "the County") failed to take any action in response to their complaints despite knowing that other female employees had accused Brown of sexually harassing them. CP 10-14. Brown concedes that Eubanks/Gray sued him in his *individual* capacity rather than for anything arising out of his official duties as a deputy prosecutor. CP 98.

Brown self-servingly ignores any mention of the explicit allegations brought against him. Br. of Appellant at 2. The nature of those allegations and the question of whether he was acting in the course of his official duties when he engaged in that misconduct, however, are the crux of this case and should not be overlooked. In particular, Eubanks/Gray allege that Brown, who is about 6' tall, weighs nearly 400 pounds and has poor personal hygiene, regularly sat in their shared office with his pants unzipped and his legs spread open on his desk; that he positioned himself in the doorway to the office so that they would need to

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<sup>1</sup> Eubanks was on extended medical leave from her employment at the prosecutor's office when the lawsuit was filed. CP 11. Although Gray was still employed when the complaint was filed, she was terminated less than eight days later. CP 8, 14. Brown resigned from his position in July 2011 and later went to work for the Skamania County Prosecuting Attorney's Office. CP 9, 120.

<sup>2</sup> "CP" refers to the pleadings designated in the underlying Clark County action.

rub against his body when they left the office; that he gave unwanted gifts to Eubanks; and that he stared at Gray's breasts during conversations. CP 10, 12. Even after the County no longer required Eubanks to work for Brown or to share office space with him, he continued to engage in sexually harassing behavior whenever he saw her. CP 10. As a result of Brown's harassment, Eubanks/Gray suffered emotional and economic damages and eventually lost their employment with the County.<sup>3</sup> CP 11, 13, 21.

Brown intentionally misleads the Court when he states Eubanks/Gray originally filed their lawsuit in Klickitat County. Br. of Appellant at 2. As he well knows, Eubanks/Gray intended to file their lawsuit in Benton County; the case caption on their original complaint and the jurisdictional statement within the complaint stated: "Personal and subject matter jurisdiction are proper in *Benton County Superior Court*. KCP 1, 3, 5 (emphasis added).<sup>4</sup> But an error by the process server at the time of the filing caused the complaint to be misfiled in Klickitat County. KCP 17-18. Despite the obvious filing error, the Klickitat County Court

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<sup>3</sup> Eubanks suffered a mental and emotional breakdown because of Brown's sexual harassment and the County's failure to protect her from it. CP 11. She took extended family medical leave to recover, but later resigned from her position with the County because the thought of returning to work caused her to suffer severe stress, post-traumatic stress responses, and panic attacks. CP 11, 120.

<sup>4</sup> "KCP" refers to the pleadings misfiled in Klickitat County.

Clerk's Office accepted the filing and assigned a case number. KCP 1, 18. Eubanks/Gray were required to file a motion to dismiss the case, which the Klickitat County court granted. KCP 17-20.

Eubanks/Gray refiled the case in Benton County pursuant to RCW 36.01.050 under the mistaken impression that an action against a county could be commenced in any adjoining county. CP 26, 68-89. They later filed an amended complaint. CP 27, 41-56. As before, Brown was sued in his individual capacity and on behalf of his marital community. CP 41. After Eubanks/Gray learned that their action had to be filed in either of the two nearest judicial districts as declared by the Legislature, they filed the case in Clark County and simultaneously moved for a change of venue from Benton County to Clark County. CP 37-39.

Brown did not present any argument in opposition to the motion and merely stated he did not consent to venue in Clark County and did not agree to the transfer. CP 30-32. The Benton County trial court granted the motion and transferred the case to Clark County. CP 24, 28. Brown did not appeal that order, which should preclude further review by this Court.

Brown then moved to dismiss Eubanks/Gray's complaint or alternatively to transfer venue to Klickitat County. CP 91-104, 130-38. The County did not join in Brown's motion. Instead, it filed an answer to

Eubank/Gray's amended complaint and asserted among other things that Brown's conduct was prohibited by the County and fell outside the course and scope of his employment. CP 106-18. Eubanks/Gray opposed the motion. CP 122-29.

The trial court, the Honorable Robert A. Lewis, denied Brown's motion in a memorandum opinion and order. CP 163-69. Brown filed a notice of discretionary review in this Court on July 19, 2011. CP 160-70. The trial court subsequently denied Brown's motion to vacate under CR 60(b)(11); however, Brown did not seek review of that decision. CP 187-97. This Court's Commissioner granted Brown's motion for discretionary review on August 31, 2011.

#### D. SUMMARY OF ARGUMENT

This Court's venue analysis is guided by three fundamental principles: (1) the choice of venue resides with *the plaintiff* in the first instance; (2) venue is not a jurisdictional issue; and (3) the venue statutes should be read consistently with one another.

RCW 4.12.025 is the general venue statute and is considered the default provision for civil actions in this state. It provides that if venue is proper as to one of many defendants, then it is proper as to all defendants. The general venue statute applies unless a more specific venue statute permits the plaintiff to file elsewhere.

RCW 36.01.050 is an exception to the general venue statute and governs the appropriate venue for suits against a county. Its purpose is to alleviate concerns of hometown bias when suing counties. RCW 36.01.050 contemplates that a lawsuit against a county *and* its officials will be brought in either of the two nearest judicial districts. RCW 36.01.050 does not carve out an exception for cases described in RCW 4.12.020. Venue in this case is thus proper in Clark County, which is one of the two nearest judicial districts to Klickitat County.

Our Supreme Court has already determined that RCW 4.12.020 and RCW 36.01.050 are complementary and that the plaintiff may select venue under either. The trial court properly recognized as much here, noting that this approach avoids piecemeal litigation and generally respects the plaintiff's choice of forum.

RCW 4.12.020(2) does not apply to preclude venue in Clark County given the context of this case. That statute applies to an "act done by [a public officer] in virtue of his or her office." As Brown concedes, he has been sued in his individual capacity. Whatever his reasons for his misconduct, they were not job related and were solely to gratify his personal objectives or desires.

Transferring this case to Klickitat County will waste judicial resources and needlessly increase expenses for the parties by requiring two separate multi-week trials in two separate counties.

Eubanks/Gray properly exercised their right to choose the forum for their lawsuit when they filed in Clark County. The trial court here did not err by denying Brown's motion to change venue.

E. ARGUMENT

(1) Standard of Review

The decision to grant or to deny a motion to change venue is within the trial court's discretion. *See, e.g., State v. Crudup*, 11 Wn. App. 583, 524 P.2d 479, *review denied*, 84 Wn.2d 1012 (1974). An abuse of discretion occurs when the court's decision is manifestly unreasonable or is based on untenable grounds or for untenable reasons. *See State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). No such abuse of discretion is present here.

(2) The Trial Court Did Not Abuse Its Discretion By Refusing To Change Venue to Klickitat County

Brown *agrees* that Clark County is the proper venue for Eubanks/Gray's claims against the County pursuant to RCW 36.01.050. Br. of Appellant at 4. But he contends venue is improper in Clark County as to the claims against him because he resides in Klickitat County, he is a

public officer, and the cause of action arose in Klickitat County. *Id.* at 5. He is mistaken. Venue is proper in Clark County.

Certain fundamental principles apply to the Court's venue analysis. First, the choice of venue resides with *the plaintiff* in the first instance. *See Baker v. Hilton*, 64 Wn.2d 964, 966, 395 P.2d 486 (1964); *Hatley v. Saberhagen Holdings, Inc.*, 118 Wn. App. 485, 489, 76 P.3d 255 (2003) (noting this concept is a well-established principle). In making this pronouncement, the courts in *Baker* and *Hatley* obviously appreciated the fact that it is the plaintiff who has suffered injuries and as a matter of fairness, it is the plaintiff who should be given the first choice of where to seek redress for those injuries. Second, venue is not a jurisdictional issue. *See Young v. Clark*, 149 Wn.2d 130, 134, 65 P.3d 1192 (2003); *Shoop v. Kittitas Cty.*, 149 Wn.2d 29, 37, 65 P.3d 1194 (2003). Finally, the venue statutes should be read consistently with one another. *See Save Our Rural Envir. v. Snohomish Cty.*, 99 Wn.2d 363, 366-67, 662 P.2d 816 (1983); *Johanson v. City of Centralia*, 60 Wn. App. 748, 750, 807 P.2d 376 (1991).

The general venue statute, RCW 4.12.025 provides:

(1) An action may be brought in any county in which the defendant resides, or, if there be more than one defendant, where some one of the defendants resides at the time of the commencement of the action.

This statute is recognized as the default venue provision for civil actions in this state. *See Moore v. Flateau*, 154 Wn. App. 210, 215, 225 P.3d 361, review denied, 168 Wn.2d 1042 (2010). That statute provides that if venue is proper as to one of many defendants, then it is proper as to all defendants. RCW 4.12.025 governs unless a more specific venue statute applies to allow the plaintiff to file elsewhere.<sup>5</sup> *See Russell v. Marenakos Logging Co.*, 61 Wn.2d 761, 765, 380 P.2d 744 (1963).

Brown argues he is entitled to be sued in Klickitat County under the general venue statute because he resides there. Br. of Appellant at 7. He is not, because a more specific venue statute applies to permit Eubanks/Gray to file in Clark County. *See Russell*, 61 Wn.2d at 765.

RCW 36.01.050<sup>6</sup> is an exception to RCW 4.12.025 and governs the appropriate venue for suits against a county. *See Hickey v. City of*

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<sup>5</sup> This is consistent with the general statutory interpretation principle that a more specific statute controls over a general statute. *See, e.g., State v. Halsen*, 111 Wn.2d 121, 122, 757 P.2d 531 (1988).

<sup>6</sup> RCW 36.01.050 states:

(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.

(2) The determination of the nearest judicial districts is measured by the travel time between county seats using major surface routes, as determined by the administrative office of the courts.

*Bellingham*, 90 Wn. App. 711, 715, 953 P.2d 822, *review denied*, 136 Wn.2d 1013 (1998). The purpose of the statute is to alleviate concerns of hometown bias when suing counties in the superior courts of those counties. Plainly, county judges have relationships including budgetary relationships, with county elected officials that can contribute to the perception, and sometime reality, of “hometown bias.” See *Cossel v. Skagit County*, 119 Wn.2d 434, 438, 834 P.2d 609 (1992), *overruled on other grounds by Shoop v. Kittitas County*, 149 Wn.2d 29 (2003).

Despite the clear purpose and intent behind RCW 36.01.050, Brown argues RCW 4.12.020<sup>7</sup> controls and makes venue improper in Clark County as to the claims against him. Br. of Appellant at 4-6. His arguments are unpersuasive.

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<sup>7</sup> RCW 4.12.020 is another statutory exception to RCW 4.12.025 and provides that certain actions must be brought in the county where the action arose. It states in relevant part:

Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose:

(2) Against a public officer, or person specially appointed to execute his or her duties, for an act done by him or her in virtue of his or her office, or against a person who, by his or her command or in his or her aid, shall do anything touching the duties of such officer.

(3) For the recovery of damages for injuries to the person or for injury to personal property, the plaintiff shall have the option of suing either in the county in which the cause of action or some part thereof arose, or in the county in which the defendant resides, or if there be more than one defendant, where some one of the defendants resides, at the time of the commencement of the action.

First, Brown attempts to create a conflict where none exists and abrogates the RCW 36.01.050 language. This runs counter to one of the standard principles of statutory construction – that statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *See Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988). It is well known that a county is a governmental corporate entity and, like any other corporation, can only act through its officials and officers. *See Thoman v. Hearst Consol. Publ'ns*, 187 Wash. 290, 294, 60 P.2d 106 (1936). Inasmuch as any lawsuit against a governmental entity is also an action against the officers and employees who committed the actionable misconduct, RCW 36.01.050 contemplates that such a lawsuit against the County *and* its officials will be brought in either of the two nearest judicial districts.<sup>8</sup> *Nowhere* does RCW 36.01.050 carve out an exception for cases described in RCW 4.12.020. Venue is thus proper in Clark County, which is one of the two nearest judicial districts to Klickitat County.

Our Supreme Court has already determined that RCW 4.12.020 and RCW 36.01.050 are complementary and that the plaintiff may select

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<sup>8</sup> The Legislature was aware in enacting RCW 36.01.050 that counties can only act through their officers and staff. It would make little sense to say that a plaintiff has a right to have his or her claim heard in a neighboring county to avoid "hometown bias" only to allow such bias to persist as to individual county staff litigating in their home county.

venue under *either* statute. *See Cossel*, 119 Wn.2d at 437. Both statutes deal with a different aspect of the same subject matter – venue of a lawsuit. *See Young*, 149 Wn.2d at 134; *Shoop*, 149 Wn.2d at 37. In the case of multiple statutes or provisions governing the same subject matter, effect will be given to both to the extent possible. *See In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998); *State v. McChristian*, 158 Wn. App. 392, 241 P.3d 468 (2010), *review denied*, 171 Wn.2d 1003 (2011). Read together, then, a plaintiff is given the option under the statutes of commencing an action against a county in either the adjacent county, the situs county, or a county where one of the defendants resides. *See Cossel*, 119 Wn.2d at 437. The trial court properly recognized as much here, noting that this approach avoids piecemeal litigation and generally respects the plaintiff’s choice of forum.

Moreover, this Court and Division III in *Rabanco, Ltd. v. Weitzel*, 53 Wn. App. 540, 768 P.2d 523 (1989) have already considered and rejected Brown’s arguments. In *Johanson v. City of Centralia*, 60 Wn. App. 748, 807 P.2d 376 (1991),<sup>9</sup> this Court considered a nearly identical venue question. There, Johanson’s wife died in a car accident in Thurston County after she drove into a diversion canal operated by the

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<sup>9</sup> The Supreme Court quoted *Johanson* with approval in *Cossel*. *Cossel*, 119 Wn.2d at 437-38.

City of Centralia (“City”), which is a Lewis County municipality. Johanson sued the City and Thurston County in a wrongful death action filed in Pierce County. The City moved for a change of venue to Lewis County, or alternatively, to Thurston County, arguing it could not be sued in Pierce County under RCW 4.12.020. The trial court granted the motion and ordered the case transferred to Thurston County. *Id.* at 749.

On appeal, this Court refused to consider the City’s claim that the trial court erred in transferring the case to Thurston instead of Lewis County because the City invited the error. *Id.* n.1. On cross appeal, Johanson contended the trial court erred in transferring venue because Pierce County was a permissible venue under RCW 36.01.050. This Court agreed and reversed, explaining that RCW 4.12.020 and RCW 36.01.050 are complementary and not in conflict:

We conclude that what superficially appears to be a conflict is really not. We believe the two statutes are complementary. RCW 4.12.020 permitted [Johanson] to bring this particular kind of *lawsuit* in the county where “some one of the defendants” resides; Thurston County was, therefore, a permissible venue. RCW 36.01.050, dealing with a specific kind of *defendant*, then came into play, allowing the plaintiff the further option of filing suit in adjoining Pierce County.

60 Wn. App. at 750 (citing *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 366-67, 662 P.2d 816 (1983) and *Rabanco, Ltd. v. Weitzel*, 53 Wn. App. 540, 768 P.2d 523 (1989)).

In *Rabanco*, Rabanco brought an action against Grant County and the Grant County commissioners for breach of contract. 53 Wn. App. at 541. It also sued Commissioner Jim Weitzel and his wife individually, alleging tortious conduct. The action was filed in the Benton-Franklin County judicial district pursuant to RCW 36.01.050. The Weitzels moved to dismiss on jurisdictional grounds pursuant to RCW 4.12.020(3), contending they were entitled to be sued in Grant County, the county where they resided. The trial court denied the motion.

Division III affirmed, holding Rabanco had the right to file the lawsuit in one of the counties adjoining Grant County pursuant to RCW 36.01.050 despite the fact that RCW 4.12.020(3) states that actions against public officers should be brought in the county in which the public officer resides. In other words, Rabanco properly exercised *its option* to file suit in the Benton-Franklin judicial district. *Rabanco*, 53 Wn. App. at 542. Division III rejected the very argument that Brown now attempts to make to this Court.<sup>10</sup>

Only by finding complementary jurisdiction as the *Johanson* and *Rabanco* courts did is it possible to “read the two statutes so as to give each effect and to harmonize each with the other.” *See Draper Mach.*

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<sup>10</sup> Division III’s decision in *Youker* did not overrule *Rabanco*, despite its later issuance.

*Works, Inc. v. Dep't of Natural Resources*, 117 Wn.2d 306, 313, 815 P.2d 770 (1991). *Johanson* and *Rabanco* support the trial court's decision to deny Brown's motion to transfer venue.

Second, Brown's reliance on *Roy v. City of Everett*, 48 Wn. App. 369, 738 P.2d 1090(1987) and *Youker v. Douglas County*, 162 Wn. App. 448, 258 P.3d 60 (2011) is misplaced. Both cases are factually and procedurally distinct. In *Roy*, Roy sued the City of Everett, five Everett police officers, Snohomish County, three Snohomish prosecutors, and an estate. She commenced her lawsuit in King County. The City and the police officers challenged venue in King County, but the trial court denied their motions to transfer venue to Snohomish County.<sup>11</sup>

On appeal, the Court of Appeals, Division I, reversed. Relying in part on RCW 4.12.020(2), Division I ordered the case against the officers and the City of Everett transferred to Snohomish County. Focusing on the language of the statutes, the court concluded that RCW 36.01.050 did not require Roy to file in King County but that RCW 4.12.020 required her to sue the City of Everett and the officers in Snohomish County, their county of residence. *Roy*, 48 Wn. App. at 372. In reaching this conclusion, Division I considered the statutes separately.

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<sup>11</sup> Unlike the situation here, the trial court in *Roy* denied the motion to transfer venue "because of the possibilities of prejudice in Snohomish County." *Roy*, 48 Wn. App. at 370.

The crucial distinction between this case and *Roy* is that unlike Eubanks/Gray, Roy sued the police officers in their individual *and* official capacities. *Roy*, 48 Wn. App. at 370. Hence, RCW 4.12.020(2) would apply.<sup>12</sup> But here, Brown was not sued in his official capacity. As he admits, Eubanks/Gray sued him in his individual capacity. CP 98.

In addition, the Supreme Court subsequently rejected the *Roy* court's interpretive approach to the venue statutes in *Cossel*. There, the Supreme Court noted that the better approach is to read the venue statutes as complementary and to give effect to each. *Cossel*, 119 Wn.2d at 437. *See also, Hickey*, 90 Wn. App. at 719 n.18 (noting *Roy*'s analysis as it pertains to RCW 36.01.050 is questionable in light of the *Cossel* court's subsequent decision).

In *Youker*, Youker commenced a lawsuit alleging malicious prosecution, false arrest, and related claims against Douglas County and two of its deputies (collectively "the defendants") in Chelan County arising out of a search, arrest, and ultimately-terminated prosecution. 2011 WL 1468352 at \*1. Youker filed in Chelan County in reliance on RCW 36.01.050. The trial court granted a motion to transfer the case to

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<sup>12</sup> RCW 4.12.020(2) applies in cases against public officials involving allegations of misconduct arising out of the officials' duties. *Youker*, 162 Wn. App. at 461, 465, (malicious prosecution and false arrest); *Aydelotte v. Audette*, 110 Wn.2d 249, 750 P.2d 1276 (1998), *overruled on other grounds*, *Young v. Clark*, 149 Wn.2d 130, 65 P.3d 1192 (2003) (assault and battery).

Douglas County over Youker's objection. Following the transfer, the defendants moved for summary judgment. The trial court granted the motion because RCW 36.01.050 provided for three acceptable venues in which to sue the County, while RCW 4.12.020 specified that venue was proper only in Douglas County with respect to the claims against the deputies. From this, the trial court reasoned that the only proper county in which to sue all three defendants was Douglas County. Youker appealed both the transfer of venue and the dismissal of his claims.

On appeal, the Court of Appeals, Division III, did not find any conflict between the statutes and affirmed. In doing so, Division III noted that a plaintiff suing both a county and its officers can commence the action in an adjacent county and wait to see if the officers accede to the choice. This decision is impractical and should not be repeated by this Court. The *Youker* court failed to consider that transferring the case would waste judicial resources and needlessly increase expenses for the parties by requiring two separate multi-week trials in two separate counties. It also ignored the overriding principle that the plaintiff's venue choice should control.

Finally, RCW 4.12.020(2) does not apply to Brown given the context of this case. That statute applies to an "act done by [a public officer] in virtue of his or her office." As Brown concedes, he has been

sued in his *individual capacity*. CP 98. His misconduct here has nothing to do with his duties as a Deputy Prosecuting Attorney or with acts taken “in virtue of his ... office.” He was engaged in sexual harassment, which is *personal* misconduct and clearly not done by virtue of his public office. Brown does not argue that his sexual harassment of Eubanks/Gray was part of his prosecutorial duties.

Sexual harassment at the workplace clearly would not be within the scope of Brown’s employment. *See Bratton v. Calkins*, 73 Wn. App. 492, 500-01, 870 P.2d 981 (school district not vicariously liable for teacher’s sexual relationship with student because conduct was outside scope of employment), *review denied*, 124 Wn.2d 1029 (1994); *Thompson v. Everett Clinic*, 71 Wn. App. 548, 553, 860 P.2d 1054 (1993) (clinic not vicariously liable for doctor’s sexual assault of patient because act was outside scope of employment), *review denied*, 123 Wn.2d 1027 (1994); *Kyreacos v. Smith*, 89 Wn.2d 425, 572 P.2d 723 (1977) (premeditated murder not within scope and course of police officer’s employment). Whatever Brown’s reasons for his misconduct, they were not job related and were solely to gratify his personal objectives or desires. *See Thompson*, 71 Wn. App. at 553.

Transferring this case to Klickitat County will waste judicial resources and needlessly increase expenses for the parties. With multiple

plaintiffs in this case, it is unclear whether Brown is seeking one multi-week consolidated trial or two separate multi-week trials in Klickitat County in addition to the multi-week trial that would still be required to take place in Clark County as to the claims against the County. Regardless, the outcome is the same: transferring venue of Eubanks/Gray's claims against Brown to Klickitat County would cause a race to the courthouse for trial. If the juries in the various trials reached different results, what would the res judicata or collateral estoppel impact be on the remaining trial or trials? How would the different courts handle discovery and the multiplicity of witnesses that would need to appear at each trial? Brown does not suggest that Eubanks/Gray's claims against him are without merit or are barred. Even if he could prevail here, the case will still have to be tried. Eubanks/Gray properly exercised their right to choose the forum for their lawsuit when they filed in Clark County. The trial court here did not err by denying Brown's motion to change venue.

#### F. CONCLUSION

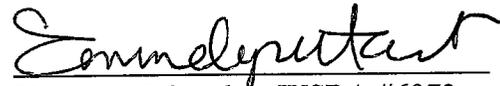
The fundamental principle underlying any venue decision is that the choice of venue resides with the plaintiff in the first instance. The trial court did not err by applying the specialized venue statute rather than the general venue statute to deny Brown's motion to dismiss or in the

alternative to transfer venue to Klickitat County. The trial court's ruling is in line with established precedent.

This Court should affirm the trial court order denying Brown's motion to dismiss or in the alternative for change of venue. The Court should award Eubanks/Gray their costs on appeal.

DATED this 18<sup>th</sup> day of November, 2011.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the Response Brief of Respondents Robin Eubanks and Erin Gray in Court of Appeals Cause No. 42329-4-II to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 18, 2011, at Tukwila, Washington.



Paula Chapler, Legal Assistant  
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