

**FILED**

SEP 22 2010

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

No. 291651

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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JASON YOUKER, Appellant

v.

DOUGLAS COUNTY, a municipal corp. and LISA WHITE,  
a single woman, and WILLIAM BLACK and JANE DOE BLACK,  
a marital community, Respondents

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APPELLANT'S BRIEF

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Julie A. Anderson, WSBA #15214  
Attorney for Appellant Jason Youker  
25 N. Wenatchee Avenue Suite 106  
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(509) 663-0635

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## TABLE OF CONTENTS

	<u>PAGE</u>
I. <u>ASSIGNMENTS OF ERROR</u>	1
ISSUES PERTAINING TO ASSIGNMENT OF ERROR	1
II. <u>STATEMENT OF THE CASE</u>	2
A. STIPULATED FACTS-RE CHANGE OF VENUE ISSUE	2
B. STATEMENT OF FACTS-RE SUMMARY JUDGMENT	2
III. <u>ARGUMENT</u>	5
A. CHANGE OF VENUE ISSUE	5
1. Mr Youker had a right to file his action in Chelan County as it was one of the two “nearest judicial districts” to Douglas County under RCW 36.01.050.	5
2. The court should have granted the Plaintiff’s Motion for Reconsideration of the Order Granting Change of Venue.	12
B. SUMMARY JUDGMENT OF DISMISSAL SHOULD NOT HAVE BEEN GRANTED	15
1. JoAnn Youker did not have actual authority to consent to a search of Jason Youker’s property.	16
2. Apparent Authority does not apply.	17
3. The Sheriff Deputies were reckless in their investigation and did	

not give the Commissioner full disclosure of the relevant facts  
pertaining to Probable cause.

20

IV. CONCLUSION

26

## TABLE OF AUTHORITIES

### Table of Cases

	Page No.
<u>Aydelotte v. Audette</u> , 110 Wn. 2d 249, 750 P. 2d 1276 (1988)	6
<u>Bender v Seattle</u> , 79 Wn. 2d 582, 592, 664 P. 2d 492 (1983)	20, 21, 22, 23
<u>Brin v. Stutzman</u> , 89 Wn. App. 809, 819, 951 P.2d 291 (1998)	16
<u>Bruneau v. Grant Cy.</u> , <u>58 Wn. App. 233, 792 P.2d 174</u> (1990)	14
<u>Clark v. Baines</u> , 150 Wn.2d at 911-12...16,	
<u>Cossell v. Skagit County</u> , 119 Wn. 2d 434, 834 P. 2d 609 (1992)	6, 8, 10, 11, 14, 15
<u>Hanson v City of Snohomish</u> , 121 Wn.2d 552, 558, 852 P.2d 295 (1993))	16
<u>Hanson v Estell</u> , 100 Wn. App. 281, 286-7, 997 P.2d 426 (2000)	16
<u>Johanson v. Centralia</u> , 60 Wn. App 748, 807 P. 2d 376 (1991)	11
<u>Klein v. Pyrodyne Corp.</u> , 117 Wn.2d 1, 13, 810 P.2d 917, 817 P.2d 1359 (1991)	14
<u>Ladd v Miles</u> , [171 Wash. 44, 17 P.2d 875 (1932)]	22
<u>Pallett v. Thompkins</u> , 10 Wn.2d 697, 699, 118 P.2d 190 (1941)	16
<u>Pay’N Save Corp. v. Eads</u> , 53 Wn. App. 443, 447, 767 P.2d 592 (1989)	16
<u>Peasley v. Puget Sound Tug &amp; Barge Co.</u> , 13 Wn.2d 485, 499-502	21
<u>Rabanco, Ltd. v. Weitzel</u> , <u>53 Wn. App. 540, 541, 768 P.2d 523</u> (1989)	14
<u>Shoop v. Kittitas County</u> , 149 Wn. 2d 29, 65 P. 3d 1194 (2002)	6, 7, 8, 10, 11, 14, 15
<u>State v. Gluck</u> , 83 Wn. 2d 424, 426-27, 518 P. 2d 703(1974)	23
<u>Tyner v DSHS</u> , 141 Wn.2d 68, 87-88, 1 P.3d 1148, (2000)	24
<u>Waring v Hudspeth</u> , [75 Wash. 534, 135 P. 222 (1913)]	22
<u>Young v. Clark</u> , 149 Wn. 2d 130, 65 P. 3d 1192 (2003)	6, 7

## Constitutional Provisions

4 <sup>th</sup> Amendment to the United States Constitution	19
Washington State Constitution, Article IV, section 6	7, 8
Washington State Constitution, Article I, section 7	18, 19

## Statutes

RCW 36.01.050	5, 6, 10, 14, 15, 26
RCW 36.01.050 (2005)	9, 12, 13
RCW 36.01.050 (1963)	8
RCW 36.01.050 (1997)	7, 8, 10, 11
RCW 4.12.020 (1941)	6, 7, 8, 10, 11, 14, 15
RCW 4.12.020 (2001)	11, 13, 14
RCW 4.12.030	12, 13, 15

## Regulations and Rules

CR 59	12
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## Other Authorities

Newell, Malicious Prosecution (1892), 237, section 3;  
34 AN.JUR.728, Malicious Prosecution, section 45;  
38 C.J.421-425, Malicious Prosecution, SS 60-67;  
3Restatement, Torts (1938), section 668;

## State cases

<u>State v. Acrey</u> , 148 Wn.2d 738, 746, 64 P.3d 594 (2003)	18
<u>State v. Birdsong</u> , 66 Wn.App. 354, 832 P.2d 533 (1992))	19, 20
<u>State v. Hendrickson</u> , 129 Wn. 2d 161, 170, 917 P.2d 833 (1999)	18
<u>State v. Jackson</u> , 150 Wn.2d 251, 259, 76 P.3d 217 (2003)	19
<u>State v. Jones</u> , 146 Wn.2d 328, 332, 45 P.3d 1062 (2002))	19
<u>State v. Kinzy</u> , 141 Wn2d 373, 382 5 P.3d 668 (2000)	18
<u>State v. Mathe</u> , 102 Wn.2d 537, 543-544, 668 P.2d 859 (1984)	19, 20

<u>State v. Morse</u> , 156 Wn.2d 1, 8, 123 P.3d 832 (2005)	17, 18, 19, 20
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 131, 101 P.3d 80(2004)	18
<b>Federal cases</b>	
<u>Illinois v Rodriguez</u> , 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed. 2d 148 (1990)	19
<u>New York v. Paterson</u> , 445 U.S. 573, 585-586, 100 S.Ct. 1371, 1379-1380	18
<u>United States v. Davis</u> , 332 F. 3d 1163, 1166 (9 <sup>th</sup> Cir. 2003)	18
<u>United States v. Reid</u> , 226 F. 3d 1020 (9 <sup>th</sup> Cir. 2000)	18
<u>United States v. Ruiz</u> , 428 F.3d 877, 880 (9 <sup>th</sup> Cir. 1993)	17

**I. ASSIGNMENTS OF ERROR**

No.1: Did the Chelan County Superior Court abuse its discretion in granting the Defendant’s Motion to Transfer Venue to Douglas County?

No. 2: Did the Douglas County Superior Court err in granting the Defendant’s Motion for Summary Judgment?

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

No. 1: Should the Chelan County Superior Court have granted a motion to change venue to Douglas County, where RCW 36.01.050 grants the Plaintiff the right to file in either one of the two “nearest judicial districts” to the county being sued in all actions against any county, notwithstanding the fact that RCW 4.12.020(2) states that actions against public officers shall be tried in the county in which the cause arose?

No. 2: Were there genuine issues of material fact sufficient to go to the jury in a case involving false arrest, false imprisonment, invasion of privacy, and malicious prosecution, where the police officers were reckless in their investigation of the issues of an ex-wife’s authority to consent to the entry of her ex-husband’s residence, and where (1) there was a no-contact order prohibiting the ex-wife from the residence, and (2) the officers failed to conduct a reasonable investigation of the facts regarding the consent issue prior to entering the residence?

## **II. STATEMENT OF THE CASE**

### **A. STIPULATED FACTS – RE CHANGE OF VENUE ISSUE**

The Plaintiff stipulates to the fact that the events that are the subject of this lawsuit occurred in Douglas County, where Jason Youker resided at the time of the search of his residence.

Jason Youker's attorney, Ms. Anderson, contacted the Administrative Office of the Courts, which office confirmed that Chelan County is one of the "nearest judicial districts" to Douglas County. CP 6.

### **B. STATEMENT OF FACTS – RE SUMMARY JUDGMENT**

On or about April 20, 2007, Jason Youker's ex-wife, JoAnn Youker, was being held at the Douglas County Sheriff's office on an arrest warrant. CP 116. While JoAnn Youker was in custody, she reported that her ex-husband, Jason Youker, had a rifle under his bed at his residence. CP 116. Jason Youker was not allowed to be in possession of a firearm because of his status as a convicted felon. CP 116.

Ms. Youker claimed that she knew the rifle was there because of contact she had had with Jason Youker. CP 116. At the time this report was made, Ms. Youker had a no-contact order against her, which prohibited any and all contact between her and Jason Youker or his

residence. CP 116, 120. This no-contact order was part of the law enforcement database to which the Douglas County Sheriff's department had access. CP 133, 164-165, 197. Despite access to this information, Douglas County Sheriff's deputies Lisa White and William Black transported JoAnn Youker to Jason Youker's residence and obtained consent from JoAnn Youker to search Jason Youker's residence. CP 116.

Douglas County Sheriff Deputies Lisa White and William Black entered the residence and were led by JoAnn Youker to a rifle located under the bed, along with a box of 30-30 ammunition. CP 116-117. Deputy White arrested Jason Youker on 4/21/07. CP 117

As a result of Jason Youker's arrest a no-contact order was entered, which prohibited Jason Youker from having contact with his son, Jetta Youker. CP 117. Douglas County officers failed to verify Ms. Youker's authority to consent to a search of Jason Youker's property prior to searching the residence due to the no-contact order. CP 117. Ms. Youker did not have mutual and joint access to the property, and was actually excluded from that residence due to the no-contact order. CP 117. Jason Youker spent ½ day in jail. CP 117. Those criminal charges in Douglas County were dismissed on the merits on or about August 6, 2007. CP 117. The same day the charges were dismissed, the Douglas County prosecutor

referred the case to the federal prosecutor. CP 117. Jason Youker spent 45 days in the Spokane County jail as a result of that referral. CP 117. Ultimately, the federal charges were also dismissed on the merits and Jason Youker was released from jail. CP 117.

Jason Youker alleged in his complaint that Deputies White and Black's entry into the residence of Jason Youker without consent constituted an invasion into the sanctity of his home, which was an intrusion highly offensive and objectionable to a reasonable person and to him as well. CP 117.

As a direct and proximate result of this invasion of privacy, Jason Youker was wrongfully charged with a crime causing him to have lost income while he was in jail, incurred bail, loss of residential time with his son, loss of his rental property, loss of his personal belongings which were repossessed during his incarceration, emotional distress and humiliation. CP 117.

Mr. Youker also alleged that Douglas County Sheriff Deputies White and Black had no authority to enter the residence of Jason Youker, so therefore the subsequent search of his residence was illegal, and the

firearm seized could not constitute probable cause for the arrest of Jason Youker. CP 118.

Jason Youker also alleged that Douglas County Sheriff's Deputies' arrest of Jason Youker resulted in imprisonment, which violated Jason Youker's right to liberty without legal authority. CP 118.

The following additional facts were established by the Declarations of Jason Youker and JoAnn Youker as follows:

- (1) JoAnn Youker was not living at Jason Youker's residence at the time of the unlawful search, seizure, and arrest which are the subject of this action. CP 264-265; (2) JoAnn Youker was angry because Jason Youker, her ex-husband, had a new girlfriend. CP 262; (3) Jason Youker had a Domestic Violence Restraining Order prohibiting JoAnn from coming to his residence. CP 265; (4) JoAnn Youker, in retaliation against her ex-husband, planted a rifle under his bed and then reported it to the Douglas County Sheriff's Department. CP 261; (5) Jason Youker was arrested on a warrant for "felon in possession of a firearm. CP 265; (6) Jason Youker did not give JoAnn Youker, his ex wife, permission to enter his residence, nor did he authorize the Sheriff's Deputies to enter and search his residence. CP 261, 265.

### **III. ARGUMENT**

#### A. CHANGE OF VENUE ISSUE

1. **Mr. Youker had a right to file his action in Chelan County as it was one of the two “nearest judicial districts” to Douglas County under RCW 36.01.050.**

RCW 36.01.050 provides as follows:

#### **36.01.050 Venue of actions by or against counties.**

(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.

(Emphasis added.)

The defendants in moving for transfer of venue, incorrectly cited to the trial court the cases set forth on page 2 in their Defendants’ Memorandum in Support of Motion to Transfer Venue. First, the Aydelotte v. Audette, 110 Wn. 2d 249, 750 P. 2d 1276 (1988) case was **overruled** by Young v. Clark, 149 Wn. 2d 130, 65 P. 3d 1192 (2003).

Further, the court in Aydelotte did not discuss the interplay between the two-venue statutes—RCW 4.12.020 and RCW 36.01.050, so it is not instructive in this case.

In addition, the Cossell v. Skagit County, 119 Wn. 2d 434, 834 P. 2d 609 (1992) case was **overruled** by Shoop v. Kittitas County, 149 Wn. 2d 29, 65 P. 3d 1194 (2002). Specifically at issue in Shoop were whether RCW 36.01.050 and RCW 4.12.020 (1941) are jurisdictional statutes or venue statutes. The court in Shoop held that those statutes were venue statutes and not jurisdictional statutes.

The facts in Shoop v. Kittitas County, 149 Wn. 2d 29, 65 P.3d 1194 (2002) case are instructive in the case at bar. In that case, Kathleen Shoop alleged that she sustained serious personal injury when she lost control of her vehicle in 1996 while driving on the Cle Elum River Bridge located in Kittitas County. She sued Kittitas County and several unnamed defendants in King County, alleging negligence in the design, maintenance, and inspection of the bridge. Although King County adjoins Kittitas County, it is not one of the two nearest counties, pursuant to the administrator of the courts. Shoop, 149 Wn. 2d at 32.

In Shoop, Kittitas County moved to dismiss claiming that the King County Superior Court lacked subject matter jurisdiction. Because the

statute of limitations had run by the time the motion to dismiss was made, dismissal would have terminated the action. Ms. Shoop responded with a motion to transfer venue to Yakima County, which if granted, would have allowed her case to proceed within the statute of limitations. The King County Superior Court granted Kittitas County's motion to dismiss the case.

The Court of Appeals in Shoop reversed and remanded, with directions to transfer venue to Yakima County. Shoop, 149 Wn. 2d at 33. Yakima County was one of the two nearest counties to Kittitas County under RCW 36.01.050. Shoop, 149 Wn. 2d at 35.

The Shoop case cited RCW 36.01.050 (1997), then in effect:

- (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 counties. . . .
- (2) The determination of the nearest counties is measured by the travel time between county seats using major surface routes, as determined by the office of the administrator for the courts.

RCW 36.01.050 (1997).

Thus, the court in Shoop stated that RCW 36.01.050 (1997) authorized Shoop to commence her action in the county of Kittitas, Yakima, or Grant. Shoop, 149 Wn. 2d at 35. Although the Court of Appeals in Shoop based its decision on its interpretation of legislative

history, the Washington State Supreme Court affirmed the Court of Appeals in Shoop on other grounds. It held that, consistent with the Young v. Clark, 149 Wn. 2d 130, 65 P. 3d 1192 (2003) case, the court's previous interpretations of RCW 4.12.020(3) (1941), which restricted subject matter jurisdiction to courts in the county where the motor vehicle accident occurred, or where the defendant resides, violated article IV, section 6 of the Washington State Constitution, which states in relevant part:

The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. . .

The Washington State Supreme Court in Shoop declared that that provision precludes any subject matter restrictions as among superior courts.

Thus, the court in Shoop held that the previous interpretation that RCW 36.01.050 (1963) was a jurisdictional statute is inconsistent with Article IV Section 6 of the Washington State Constitution. For that reason, the court **overruled** Cossell, 119 Wn. 2d 434, and held that the filing requirements of RCW

36.01.050 related only to venue, not to the trial court's subject matter jurisdiction.

The court further held that because RCW 36.01.050 (1997) and RCW 4.12.020 (1941) are both venue statutes, the court was not required to consider Kittitas County's alternative argument that Shoop had failed to comply with the jurisdictional requirements of RCW 4.12.020 (1941). Shoop, 149 Wn. 2d at 37-38. Specifically, Kittitas County had argued that the former RCW 4.12.020 (1941) required that actions arising out of automobile accidents be brought in the county in which defendant resides, or the county in which the accident occurred. If RCW 4.12.020(3) (1941) had controlled, the Shoops' action should have been brought in Kittitas County, where the accident occurred, or in a county in which one of the defendants resided. That subsection provided as follows:

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

(3) For the recovery of damages arising from a motor vehicle accident, but in a crime arising because of a motor vehicle accident 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.

The Court of Appeals had remanded the case back to King County with directions to transfer venue to Yakima County. Yakima County was not where the accident occurred; rather, Yakima County was one of the two nearest counties under RCW 36.01.050.

RCW 36.01.050 has been amended since the Shoop case. It now provides:

- (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 . . .
- (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.

In summary, the defendants in this case cited Shoop for the proposition that “the courts have consistently ruled that lawsuits against public officers must be brought in the county in which the cause arose, not in adjoining counties.” The court in Shoop did not in any way so hold. On the contrary, the Washington State Supreme Court held that the case would be properly transferred to Yakima County, which was one of the two nearest counties to Kittitas County under RCW 36.01.050 (1997). Therefore, the

plaintiffs in Shoop were not bound by RCW 4.12.020(3). Further, it did not discuss the issue of “public officers” at all, because the case in Shoop dealt with subsection (3) of RCW 4.12.020 (1941) pertaining to motor vehicle accidents, not subsection (2) which relates to public officers.

Although the Cossell v. Skagit County case, supra, was overruled by the Shoop case, the Shoop case did not overrule Cossell’s explanation of the policy behind RCW 36.01.050. The court in Cossell explained that the policy behind RCW 36.01.050 was to “provide plaintiffs with alternative forums without the need to demonstrate bias or impartiality in any other forum. The statute affords a degree of protection to plaintiffs suing counties without unduly burdening the county officials who must respond to the charges.” Cossell v. Skagit County, 119 Wn. 2d at 438. The court in Cossell held that these policies would be thwarted if a plaintiff was first required to bring a suit in the county being sued, and then seek a change of venue to an adjacent county. The Cossell case also dealt with the conflict between RCW 4.12.020(3) related to motor vehicle accidents, versus RCW 36.01.050 dealing with cases involving counties.

In addition, although the Cossell case was overruled on the point of whether the statutes pertained to jurisdiction or venue, the court in Shoop v. Kittitas County did not overrule Cossell's reasoning that the two statutes (RCW 4.12.020(3) and RCW 36.01.050) could be construed together, such that “a plaintiff is given the option of commencing an action against a county in either the adjacent county, the situs county, or a county where one of the defendants resides. “(Emphasis added.) Cossel, 119 Wn. 2d at 437. The court in Cossel agreed with the court in Johanson v. Centralia, 60 Wn. App 748, 807 P. 2d 376 (1991) that RCW 36.01.050 is complementary to RCW 4.12.010. Cossel, 119 Wn. 2d at 437.

In summary, the Defendants’ posture that the Washington Courts have consistently ruled that lawsuits against public officers must be brought in the county in which the cause arose and not in an adjoining county, is incorrect. The conclusion from the recent cases is that both RCW 36.01.050 and RCW 4.12.020 relate to venue, and that the plaintiff has a choice whether to file under RCW 4.12.020(2) against a public officer in the county in which the cause arose (which in this case would be Douglas County) or to

file under the venue provisions of RCW 36.01.050 which allows the case to be filed in the county in which the action arose or in either of the two nearest judicial districts.

RCW 4.12.020 now provides:

Actions to be tried in county where cause arose.

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

- (1) For the recovery of a penalty or forfeiture imposed by statute;
- (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.

In this case, according to the Administrative Office of the Courts, Chelan County is one of the two nearest counties to Douglas County. Thus, the Plaintiff's filing in Chelan County was proper under RCW 36.01.050(1), and the Defendants' Motion for Change of Venue should have been denied.

2. **The court should have granted Plaintiff's Motion for Reconsideration of the Order Granting Change of Venue.**

This motion for reconsideration was based on CR 59(a)(1).

("Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, abuse of discretion, by which such party was prevented from having a fair trial.") RCW 4.12.030 sets forth the factors authorizing a change of venue. That statute provides in full:

**4.12.030 Grounds authorizing change of venue.**

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

- (1) That the county designated in the complaint is not the proper county; or,
- (2) That there is reason to believe that an impartial trial cannot be had therein; or,
- (3) That the convenience of witnesses or the ends of justice would be forwarded by the change; or,
- (4) That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity, within the third degree; when he has been of counsel for either party in the action or proceeding.

(Emphasis added.)

In their Motion to Transfer Venue to Douglas County, the defendants did not argue subsections 2, 3, or 4. Thus, the only ground alleged was that venue was not “proper” in Chelan County (subsection 1). As discussed in the preceding section venue in Chelan County was proper under RCW 36.01.050, so the judge abused her discretion in granting a change of venue.

Based on the authorities cited in the previous section, the Plaintiff had every right to file the case in Chelan County because of RCW 36.01.050.

Defendants’ attorney argued that this case was different because RCW 4.12.020 subsection 2 used the “shall” language, and therefore, that statute controlled over the “may” language used in RCW 36.01.050. But the “shall” language argument was rejected in Cossel, and that part of Cossel was not overruled by Shoop.

The Washington State Supreme Court in Cossel explained as follows:

Nonetheless, the County argues that the language in RCW 4.12.020, "shall be tried", controls over the permissive language in RCW 36.01.050. However, the County's argument creates a conflict where one need not exist, and takes all meaning out of the RCW 36.01.050 language. "[N]o part of a statute should be deemed inoperative or superfluous unless it is the result of obvious . . . error."

Klein v. Pyrodyne Corp., 117 Wn.2d 1, 13, 810 P.2d 917, 817 P.2d 1359 (1991). The better approach is to give effect to the "may be commenced" language in RCW 36.01.050 and read the two statutes as complementary. See Bruneau v. Grant Cy., 58 Wn. App. 233, 792 P.2d 174 (1990); Rabanco, Ltd. v. Weitzel, 53 Wn. App. 540, 541, 768 P.2d 523 (1989).

Defendants argued that the "shall" language in RCW 4.12.020 is only present in subsection 2. That was not an accurate statement. The "shall" language applies to all three subsections as follows:

**4.12.020 Actions to be tried in county where cause arose.**

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

- (1) For the recovery of a penalty or forfeiture imposed by statute;
- (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.

(Emphasis added.)

Thus, when Cossel held that the “shall” language did not cause RCW 4.12.020(3) to take precedence over 36.01.050. That “shall” language came before all three subsections. Thus, Defendants argument that subsection 2 is special and distinguishable from Cossel and Shoop fails.

Accordingly, both Shoop and Cossel support venue being proper in Chelan County. Because venue is proper and no other argument was made about “prejudice” or “inconvenience,” (other reasons for granting a change of venue under RCW 4.12.030), the court had no proper grounds to exercise its discretion to transfer venue to Douglas County. Thus the trial court abused its discretion in transferring the case to Douglas County.

The Court should have granted the Motion for Reconsideration and confirmed that venue in Chelan County is proper, as it is one of the three counties with proper venue under RCW 36.01.050, as supported by the Shoop and Cossel cases.

**B. SUMMARY JUDGMENT OF DISMISSAL SHOULD NOT HAVE BEEN GRANTED.**

At common law, an action for malicious prosecution required the plaintiff to prove (1) the defendant instituted or

maintained the alleged malicious prosecution; (2) lack of probable cause to institute or continue the prosecution; (3) malice; (4) the proceedings ended on the merits in favor of the plaintiff or were abandoned; and (5) the plaintiff suffered injury or damage as a result. Hanson v Estell, 100 Wn. App. 281, 286-7, 997 P.2d 426 (2000) (citing Pay'N Save Corp. v. Eads, 53 Wn. App. 443, 447, 767 P.2d 592 (1989)).

Proof of probable cause is an absolute defense to a claim of malicious prosecution. Clark v. Baines, 150 Wn.2d at 911-12 (citing Hanson v City of Snohomish, 121 Wn.2d 552, 558, 852 P.2d 295 (1993)). Brin v. Stutzman, 89 Wn. App. 809, 819, 951 P.2d 291 (1998). A malicious prosecution plaintiff establishes a prima facie case that there was no probable cause by proving that the criminal proceedings were dismissed or terminated in his or her favor. Pallett v. Thompkins, 10 Wn.2d 697, 699, 118 P.2d 190 (1941). The criminal charges in both Douglas and the federal court were dismissed in Mr. Youker's favor.

**1. JoAnn Youker did not have actual authority to consent to a search of Jason Youker's property.**

It is clear from the facts that JoAnn Youker did not possess actual authority to consent to the search of Mr. Youker's home. In fact, she was not even legally allowed to be in Mr. Youker's home due to her no contact order that was still in affect at the time of the search. A third party has actual authority if he or she has been authorized by the owner to consent to a search, or if the third party has mutual use of the property. United States v. Ruiz, 428 F.3d 877, 880 (9<sup>th</sup> Cir. 1993).

JoAnn Youker does not meet either one of the two elements required to have actual authority to consent to a search. There is no evidence that Jason Youker authorized JoAnn to consent to a search of his home. Second, JoAnn did not have mutual use and joint access of the property. A third party cannot, as a matter of law have mutual use of a property if the party cannot legally be on the premises.

Officers' Black and White knew about JoAnn Youker's no contact order. JoAnn Youker was in police custody because of a warrant for her arrest when she gave consent to search Jason Youker's home. Notice of an individual's arrest warrant(s) is issued through a CAD report, which includes among other things any current no contact orders. Ultimately,

JoAnn Youker lacked authority to consent to a search of Jason Youker's house. Therefore, the officers did not only commit an illegal act by performing a warrantless search of Jason Youker's home without consent, but compounded the illegality by actually escorting JoAnn Youker to a place where she was not authorized to be as a result of the no-contact order.

**2. Apparent Authority does not apply.**

Under the Washington State Constitution, the apparent authority doctrine is not the appropriate standard. State v. Morse, 156 Wn.2d 1, 12, 123 P.3d 332 (2005).

The fourth amendment has traditionally placed a great deal of safeguards against searches of the home especially searches without a warrant. See, New York v. Paterson, 445 U.S. 573, 585-586, 100 S.Ct. 1371, 1379-1380.

Because of this, officers generally go through great efforts to determine the authority of an individual to consent to a search before the search is conducted. See, United States v. Reid, 226 F. 3d 1020 (9<sup>th</sup> Cir. 2000). The officer's actions in Reid exemplifies such actions. See Id. In that case the officer sought to verify the ability of the individual to consent to a search by confirming his residence with the apartment manager and other residents of the complex in addition to surveillance of the apartment. Id. At 1022. At the very least, it is

common for an officer to seek some form of verification by the individual claiming to have authority to consent to a search, such as a lease, before conducting the search. See, United States v. Davis, 332 F. 3d 1163, 1166 (9<sup>th</sup> Cir. 2003).

Under Article I, section 7 of the Washington State Constitution, warrantless searches are per se unreasonable. State v. Hendrickson, 129 Wn. 2d 161, 170, 917 P.2d 833 (1999). Exceptions to the warrant requirement for a search are to be “jealously and carefully drawn:” State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80(2004) (quoting Hendrickson, 129 Wn.2d at 72). The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exception to the warrant requirement. State v. Acrey, 148 Wn.2d 738, 746, 64 P.3d 594 (2003) (quoting State v Kinzy, 141 Wn.2d 373, 382, 5 P.3d 668 (2000).

In the context of a search, consent is a form of waiver. State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). Ordinarily, only the person who possesses a constitutional right may waive that right. *Id.* To be valid, a consensual search requires voluntary consent by one having authority to consent and the search must be limited to the scope of the consent. Illinois v Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed. 2d 148 (1990).

Article I, section 7 of the Washington State Constitution is more

protective of individual privacy than the 4<sup>th</sup> Amendment (e.g. State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002)). Under the Washington State Constitution, authority to consent to a search is based upon a person's independent authority to consent and the reasonable expectation of his co-occupant about that authority. Morse, 156 Wn.2d at 8. In Morse, the Washington Supreme Court held that “[s]tanding alone, a police officer’s subjective belief made in good faith about the scope of a consenting party’s authority to consent cannot be used to validate a warrantless search. Under Article I, SS 7.” Id. at 12. Under Article I section 7 analysis: 1) the consenting party must be able to permit the search in his own right, and 2) it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search. State v. Mathe, 102 Wn.2d 537, 543-544, 668 P.2d 859 (1984). “In short, while under the 4<sup>th</sup> Amendment the focus is on whether the police acted reasonably under the circumstances, whereas under Article I, subsection 7 we focus on the expectation of the people being searched and the scope of the consenting party’s authority.” Morse, 156 Wn.2d at 10.

Thus, Washington courts have found authority to consent to a search did not exist where a landlord consents to the search of a renter’s room when the renter retains control of the premises. See Mathe, 102 Wn.2d, 537, 688 P.2d

859 (1984); see also State v. Birdsong, 66 Wn.App. 354, 832 P.2d 533 (1992)) where guests of an apartment renter consented to search the apartment. In Mathe, the Washington Supreme Court, held that a landlord did not have authority to consent to a search, because the tenant had exclusive possession of the property. Mathe, 102 Wn. 2d at 544. The landlord did not have common authority of the area to be searched. Mathe, 102 Wn. 2d at 544.

In this case, at the time in question, JoAnn Youker was not legally in Jason Youker's home at 920-½ S. Nancy and lacked the common authority to consent to a police search of that residence. At the time of Ms. Youker's consent she was under the restrictions of an no contact order regarding Jason Youker which prohibited JoAnn Youker from "having any contact whatsoever..." with Jason Youker, and from, "entering, knowingly coming within, or knowingly remaining on" Mr. Youker's residence." JoAnn Youker's contact with Jason Youker and her presence at his residence was illegal, thus she did not possess common authority in the residence. Where, as here, the consenter does not have common authority over the area to be searched, consent given is not effective and any subsequent search relying on that consent is illegal. See Morse, 156 Wn. 2d at 12. Birdsong, 66 Wn. App. at 539-40.

**3. The Sheriff Deputies were reckless in their investigation and did not give the Commissioner full disclosure of the relevant facts pertaining to Probable cause.**

The court in Bender v Seattle, 79 Wn.2d 582, 592, 664 P. 2d 492 (1983) held that where the same officer seeks the warrant and then executes it, the other should not be allowed to cleanse the transaction by supplying only those facts favorable to the issuance of a warrant to the prosecutor.

This rule prevents an officer from asserting the facial validity of a warrant as an absolute defense to a false arrest or false imprisonment action. The officer has a defense to such action by proving to the satisfaction of the jury, the existence of probable cause to arrest under the circumstances. Bender, 99 Wn. 2d at 592.

In malicious prosecution cases, malice and want of probable cause are the gist of the action and the burden of proof is on the plaintiff. Bender, 99 Wn.2d at 593.

The method of determining probable cause or the lack thereof is set forth in Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 499-502 as follows:

If it clearly appears that the defendant, before instituting criminal proceedings against the plaintiff, made to the prosecuting attorney a full and fair disclosure, in good faith, of all the material facts known to him, and that

the prosecuting attorney thereupon preferred a criminal charge and caused the arrest of the accused, probable cause is thereby established as a matter of law and operates as a complete defense to a subsequent action by the accused. And the same rule prevails where such disclosure was made to a competent practicing attorney, and the criminal prosecution was instituted upon his advice....

A corollary to this rule is that if any issue of fact exists, under all the evidence, as to whether or not the prosecuting witness did fully and truthfully communicate to the prosecuting attorney, or to his own legal counsel, all the facts and circumstances within his knowledge, then such issue of fact must be submitted to the jury with proper instructions from the court as to what will constitute probable cause, and the existence or nonexistence of probable must then be determined by the jury....

[M]alice... has a broader significance than that which is applied to it in ordinary parlance. The word "malice" may simply denote ill will, spite, personal hatred, or vindictive motives according to the popular conception, but in its legal significance it includes something more. It takes on a more general meaning, so that the requirement that malice be shown as part of the plaintiff's case in an action for malicious prosecution may be satisfied by proving that the prosecution complained of was undertaken from improper or wrongful motives or in reckless disregard of the rights of the plaintiff. Impropriety of motive may be established in cases of this sort by proof that the defendant instituted the criminal proceedings against the plaintiff: (1) without believing him to be guilty, or (2) primarily because of hostility or ill will toward him, or (3) for the purpose of obtaining a private advantage as against him. Newell, Malicious Prosecution (1892), 237, § 3; 34 Am. Jur. 728, Malicious Prosecution, § 45; 38 C.J. 421-425, Malicious Prosecution, §§ 60-67; 3 Restatement, Torts (1938), § 668. We have recognized and applied this broader conception of the term in Waring v Hudspeth, [75 Wash. 534, 135 P. 222 (1913)]. Compare Ladd v Miles, [171 Wash. 44, 17 P.2d 875 (1932)].

(Emphasis added.)

If a factual issue as to probable cause or malice exists, the question must be submitted to the jury. Bender, 99 Wn.2d at 594. The credibility of witnesses and the weight to be given evidence are matters that rest within provence of the jury. Bender, 99 Wn.2d at 514-5.

In Bender, the allegation was that Bender had purchased rings that were stolen. The informant also inferred that he had frequently sold Bender stolen goods. The investigator testified that after reviewing Bender's records there was no evidence that Bender had prior transactions with the informant, but the investigator had not included that information in his report to the prosecution. Bender, 99 Wn.2d at 595-96.

The investigation in Bender, further failed to inform the prosecutor's office that Bender had complied with all reporting laws required regarding purchases and that Bender had complied with those laws regarding the purchases of goods from the informant. These facts would have reinforced Bender's credibility that he did not know the rings were stolen. Finally, the price paid

by Bender was not unusual with respect to the second hand jewelry market, and this fact was not reported to the prosecutor's office.

Bender, 99 Wn.2d at 596. Whether evidence is material is a question for the jury. Bender, 99 Wn.2d at 596.

Probable cause is measured by an objective standard:

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and which he has reasonable, trustworthy information are sufficient in themselves, to warrant a man of at reasonable caution is belief that an offense has been or is being committed.

Bender, 99 Wn.2d at 597, citing, State v. Gluck, 83 Wn. 2d 424, 426-27, 518 P. 2d 703(1974).

The court in Bender explained: "The City suggests that since several deputy prosecutors found the existence of probable cause, this somehow settles the question. We disagree. The subjective views of those deputy prosecutors on the question of probable cause merely constitutes evidence which could be considered by the jury along with any other evidence on the existence or nonexistence of probable cause." Bender, 99 Wn.2d at 597.

In looking at whether all material evidence has been presented, the court can also look at the failure of an investigator to disclose the fact that the investigator failed to follow-up on information which might have been

material. Tyner v DSHS, 141 Wn.2d 68, 87-88, 1 P.3d 1148, (2000).

Here the evidence shows the failure of Deputies Black and White to follow-up on information material to the issue of consent to enter the residence.

First Black admitted that he knew there was a no-contact order but didn't have the details of that order. CP 137. The incoming Rivercom gave JoAnn Youker's address as 2 Pinerest Road South, Tonasket, WA 98855. CP 146-149. He did not recall looking at the LAW report which gave that address CP 148-149. Thus, Deputy Black failed to look at the information given as part of the Rivercom call, a fact which was not reported in Deputy White's report to the prosecutor. Black didn't know who was the Respondent in the no-contact order and he didn't look into it. CP 158.

Deputy White admitted that she did not investigate this other address for JoAnn Youker prior to going to South Nancy. CP 188-189. The failure of her to investigate these issues was not reported in her reports to the prosecutors.

During her testimony in the federal case, White admitted that she didn't know who the petitioner was in the restraining order. CP 192. She admitted that she had never taken a look at the actual order. CP 192. She talked to JoAnn Youker about 15 minutes prior to going to the residence. CP 166-167.

Deputy White admitted that prior to entering Jason Youker's residence, JoAnn did not give her any document indicating that she lived at 920 ½ South

Nancy. CP 199. She further indicated that she did not contact neighbors, inquire with the owner of the house, contact Mr. Youker's landlord, ask who paid the rent, ask to see a lease, or inquire about whether there had been a nasty divorce between Jason or JoAnn. CP 211-214. All of these issues were relevant to the issue of consent to enter the residence.

The incident report form for the "weapons violation" against Jason Youker also lists an alternative mailing address for JoAnn Youker, 331 Valley Mall Parkway # 206, CP 72. There was no evidence in her report that Deputy White checked out this address.

The fact that these issues were not investigated by Deputies Black and White created an issue as to whether all material issues were investigated, and whether the prosecutor's office knew of material omissions in the investigation prior to making a probable cause determination. These "failure to investigate" issues also pertain to whether Deputy White correctly made the decision on whether JoAnn Youker had the right to consent to the entry of Jason Youker's residence (which led to the search, finding of a rifle, and charges against Jason Youker being filed.)

There was an issue of fact for the jury as to whether Black and White's investigation was in reckless disregard of Jason Youker's right to be free from illegal searches and seizures given the lack of investigation before determining

that JoAnn Youker could lawfully consent to entry into the residence. Thus the court erred in granting summary judgment on the issues of false arrest, false imprisonment, malicious prosecution, and invasion of privacy.

Thus a motion for Reconsideration was made to clarify that JoAnn Youker was not in fact residing at Jason Youker's residence at the time of the Douglas County Sheriff's Officers' unlawful entry to his residence, seizure of the rifle, and arrest. JoAnn Youker admitted that she was not living there at the time of the search and that she had planted the rifle under Jason Youker's bed. Based on this clarification, JoAnn Youker did not in any legal right to consent to the search and seizure of Jason Youker's residence.

#### **IV. CONCLUSION**

The Plaintiff had a right to file the action in Chelan County under RCW 36.01.050, so the Chelan County court erred in transferring the case to Douglas County.

The Defendants' motion for summary judgment should have been denied where the evidence is undisputed that JoAnn Youker did not have the power to do authorize the warrantless search of Jason Youker's residence. Accordingly no probable cause existed to justify the filing of criminal charges against Jason

Youker, and the motion for summary judgment on all claims should have been denied. The court should reverse the decisions of the lower court and remand the case to Chelan County for further proceedings.

Respectfully submitted on this 16<sup>th</sup> day of September, 2010.

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