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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 PROSECUTING
ATTORNEY'S OFFICE;

Defendants

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Petitioner David Brown's Reply Brief

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A. ARGUMENT

Ms. Eubanks' and Ms. Gray's right to sue Klickitat County in Clark County pursuant to RCW 36.01.050 does not give them the right to sue Mr. Brown in Clark County. To the contrary, Mr. Brown has an absolute right to have the action tried against him in Klickitat County pursuant to RCW 4.12.020(2), and Ms. Eubanks' and Ms. Gray's rights pursuant to RCW 36.01.050 do not trump Mr. Brown's rights under RCW 4.12.020(2).

Under RCW 4.12.020(2), Mr. Brown has the absolute right to be sued in the county in which the cause of action arose. Nonetheless, Ms. Eubanks and Ms. Gray argue that RCW 36.01.050 is more specific than the general venue statute, RCW 4.12.025, and thus RCW 36.01.050 controls. While Ms. Eubanks and Ms. Gray may be correct in that regard, they fail to account for RCW 4.12.020(2). That statute provides:

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 . . .

RCW 4.12.020(2) (emphasis added).

Unlike the mandatory language of RCW 4.12.020(2), the permissive language of RCW 36.01.050 provides:

All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the nearest judicial districts. . .

RCW 36.01.050(1) (emphasis added).

"The use of the word 'shall' is imperative and operates to create a duty." *Ballasiotes v. Gardner*, 97 Wash.2d 191, 195, 642 P.2d 397 (1982) (citing *State Liquor Control Bd. v. State Personnel Bd.*, 88 Wash.2d 368, 377, 561 P.2d 195 (1977)). However, a "statute's express use of the term 'may' is permissive and does not create a duty. . . ." *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wash.2d 9, 28, 978 P.2d 481 (1999). It is clear that from the plain language of RCW 36.01.050 that it is permissible for Ms. Eubanks and Ms. Gray to file their action against Klickitat County in Clark County. However, RCW 4.12.020(2) requires the action against Mr. Brown to be tried in Klickitat County. Additionally, the Washington State Supreme Court has recognized that RCW 36.01.050 is not a controlling statute. *Save Our Rural Environment v. Snohomish County*, 99 Wash.2d 363, 367, 662 P.2d 816 (1983) ("On its face RCW 36.01.050 is subject to RCW 4.12.030. If the Legislature had something in mind other than the plain meaning of the words, it may, of course, enlighten the courts."). Thus, given the plain language of the statutes, it makes no difference that the Legislature has given Ms. Eubanks and Ms. Gray the option to pursue litigation against Klickitat County in Clark County, as the Legislature has required the action against Mr. Brown be tried in Klickitat County.

Furthermore, there is no conflict between the two statutes, as they can be harmonized. Ms. Eubanks and Ms Gray argue that RCW 4.12.020 and RCW 36.01.050 are complementary and that the plaintiff may select venue under either statute. Ms. Eubanks and Ms. Gray are correct in so far as they contend the statutes are complementary. However, Mr. Brown may move for a change of venue pursuant to RCW 4.12.030 and pursue his absolute right under RCW 4.12.020(2) to have the case tried in Klickitat County. Statutes must be interpreted and construed so that all the language within the statute is given effect and 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). Accordingly, a plaintiff may sue a county under a variety of legal theories in an adjacent county pursuant to RCW 36.01.050, but a plaintiff may only sue a "public officer" for acts done by the public officer in virtue of his or her office in the county in which the cause of action arose. RCW 4.12.020(2). Interpreting these two statutes in any other manner would render one or the other statute meaningless.

Ms. Eubanks and Ms. Gray cite various cases in support of their argument that RCW 36.01.050 allows the action against Mr. Brown to be filed in Clark County. However, none of the cases cited actually support that position and each is clearly distinguishable.

Cossel v. Skagit County, 119 Wn.2d 434, 834 P.2d 609 (1992) does not support Ms. Eubanks' and Ms. Gray's position because it was decided on the incorrect proposition that RCW 36.01.050 and RCW 4.12.020 are jurisdictional in nature. *Cossel* involved an action against a county for the recovery of damages arising from a motor vehicle accident. *Cossel*, 119 Wn.2d at 435. The plaintiff commenced the action in an adjacent county pursuant to RCW 36.01.050. *Id.* The defendant county contended that it was improper under RCW 4.12.020(3) and that the court lacked jurisdiction. *Id.* The Court disagreed and held both statutes were complementary and jurisdictional in nature, and that a plaintiff could therefore file an action in either venue under those statutes. *Id.* at 437-38. The fact that the Court in *Cossel* held both statutes were jurisdictional in nature is central to the reason why the case does not and cannot support Ms. Eubanks' and Ms. Gray's argument.

In contrast to subject matter jurisdiction of the superior court, venue is an appropriate subject for legislation. Venue rules serve to limit a plaintiff's choice of forum to ensure that the locality of a lawsuit has some logical relationship to the litigants or the subject matter of the dispute.

Shoop v. Kittitas County, 108 Wn.App. 388, 30 P.3d 529 (2001) (citing Friedenthal, Kane, Miller, *Civil Procedure* § 2.2 (3rd Ed.1999)). It is also important to note that *Cossel* did not involve a "public officer" as a

defendant. Thus, the Court in *Cosset* failed to account for the Legislative intent behind RCW 36.01.050 and RCW 4.12.020.

Additionally, *Johanson v. City of Centralia*, 60 Wn.App. 748, 807 P.2d 376 (1991) does not support Ms. Eubanks' and Ms. Gray's argument that the action against Mr. Brown may be tried in Clark County. The *Johanson* case involved a personal representative suing Centralia and Thurston County in Pierce County. *Johanson*, 60 Wn.App. at 749. It did not involve any allegations against a public officer. Centralia moved for a change of venue and the trial court transferred the case to Thurston County. *Id.* This Court overturned the change of venue holding that RCW 36.01.050 permitted that action against a county to be brought in an adjoining county. *Id.* at 750-51. This Court was interpreting the interplay between RCW 36.01.050 and RCW 4.12.020(3) and stated:

[e]ach statute deals with a different aspect of the same subject matter, venue of a lawsuit. RCW 4.12.020[(3)] deals with a specific kind of action, a motor vehicle accident, whereas RCW 36.010.050 deals with a specific kind of defendant, a county . . . We believe the two statutes are complementary. RCW 4.12.020[(3)] permitted the plaintiff 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.

Id. at 750-51 (emphasis in original). *Johanson* is unique in that the personal representative did not sue a "public officer," making it proper to

transfer the action to an adjacent county pursuant to RCW 36.01.050. However, in the instant case, Ms. Eubanks and Ms. Gray sued Mr. Brown, a public officer. RCW 4.12.020(2) addresses a particular kind of defendant, not lawsuit. Thus, *Johanson* does not support Ms. Eubanks' and Ms. Gray's position that RCW 36.01.050 will trump RCW 4.12.020(2) because it did not address the context of the instant case.

Further, *Rabanco, Ltd. v. Weitzel*, 53 Wn.App. 540, 768 P.2d 523 (1989) is of questionable support, as it does not stand for the proposition that Mr. Brown can be sued in Clark County. In that case, Rabanco sued Grant County and Jim Weitzel (Grant County Commissioner) in Benton County. Weitzel moved for dismissal, arguing that RCW 4.12.020(3) mandates that actions against public officials be brought in the county in which the official resides. *Rabanco*, 53 Wn.App. at 524. The court denied the motion and the Weitzels appealed. On appeal, the Court held that RCW 36.01.050 gave Rabanco the right to initiate the lawsuit in one of the counties adjoining Grant County. *Id.* at 524. However, and importantly, the Court further noted that a party sued in an adjoining county pursuant to RCW 36.01.050 may "move for a change of venue based upon RCW 4.12.030." *Rabanco*, 53 Wash.App. at 541 (emphasis added). That is exactly what Mr. Brown did herein. Mr. Brown properly raised the issue

of the improper venue and asked the trial court to transfer the case as it relates to Mr. Brown to the proper venue – Klickitat County.

Further, it appears that the *Rabanco* court or the parties misquoted and misinterpreted statutes upon which the court based its decision. The court stated:

The Weitzels [defendants] contend they are entitled to dismissal as a matter of law because RCW 4.12.020(3) mandates that actions against public officials be brought in the county in which they reside. . . In *Save Our Rural Environment v. Snohomish County*, 99 Wn.2d 363, 662 P.2d 816 (1983), the court synthesized the relationship between RCW 36.01.050 and 4.12.030; it found both statutes to be "straightforward and unambiguous." *Save Our Rural Environment*, at 366, 662 P.2d 816. . . We conclude that *Save Our Rural Environment* is dispositive of the issues presented here.

Rabanco, 53 Wn.App. at 541. The error in the Weitzels' contention is that 4.12.020(2) mandates that actions against public officers be brought "in the county where the cause, or some part thereof, arose," not the county of the defendant's residence. Further, RCW 4.12.030 specifies the grounds for a change of venue – it does not specify that a cause of action involving a public officer be brought in a certain county as RCW 4.12.020(2) commands. Thus, to hold that *Save our Rural Environment*, 99 Wn.2d 363, 662 P.2d 816, is dispositive is questionable. Additionally, the same division, Division III of the Court of Appeals, issued *Rabanco* only to subsequently issue an opinion directly supporting Mr. Brown's contention

in this appeal when it decided *Youker v. Douglas County*, 162 Wn.App. 448, 258 P.3d 60 (2011). Accordingly, *Rabanco* provides absolutely no support for Ms. Eubanks' and Ms. Gray's argument.

Ms. Eubanks and Ms. Gray also assert that Mr. Brown's alleged conduct has nothing to do with his duties as a Deputy Prosecuting Attorney or with acts taken "in virtue of his . . . office." However, Ms. Eubanks' and Ms. Gray's Complaint undermines that assertion.

The Complaint alleges "[a]ll alleged acts and omissions of Klickitat County officials, managers, supervisors, agent employees or representatives, including deputy prosecuting attorney David Brown, were on behalf of Klickitat County and occurred within the scope of employment." [CP 8] (emphasis added). Further, Ms. Eubanks and Ms. Gray allege "[a]t all times during his sexual harassment of plaintiff, defendant David Brown had supervisory authority over Ms. Eubanks, as she was his secretary/administrative assistant. David Brown was therefore acting in the interests and for the benefit of the defendant employer, Klickitat County and Klickitat County Prosecuting Attorney's Office." [CP 11] (emphasis added). Finally, Ms. Eubanks and Ms. Gray assert that "[a]t all times during his harassment of plaintiff Erin Gray, defendant David Brown was acting in a supervisory attorney position over Ms. Gray and was, therefore, acting in the interests and for the benefit of the

defendant, employer Klickitat County and Klickitat County Prosecuting Attorney's Office." [CP 13] (emphasis added). Ms. Eubanks and Ms. Gray concede that *Roy v. City of Everett*, 48 Wn.App. 369, 738 P.2d 1090 (1987) would control if Mr. Brown was sued in his *official* capacity rather than his *individual* capacity. Pursuant to the Complaint, Ms. Eubanks and Ms. Gray are alleging Mr. Brown was acting in his official capacity during the alleged sexual harassment, thus *Roy* and RCW 4.12.020(2) control.

The Supreme Court of Washington has previously held sexually harassing behavior by a district court judge was "related to the performance of his judicial duties . . ." *In re Deming*, 108 Wn.2d 82, 117, 736 P.2d 639 (1987). The Court went on to state:

[t]he nature, extent and frequency of the acts of sexual harassment, *all involving his judicial position*, reflect an unacceptable pattern of behavior. This misconduct occurred both in and out of the courtroom, often in public situations. He exploited his *official judicial position* for which there can be no excuse.

Id. at 120 (emphasis added). Here, it is clear from the allegations in the Complaint that the alleged sexual harassment involved Mr. Brown's deputy prosecuting position. Thus, the behavior all arises from his official position and falls within RCW 4.12.020(2).

Ms. Eubanks and Ms. Gray also argue requiring them to file their action against Mr. Brown in Clark County pursuant to RCW 4.12.020(2) would waste judicial resources and needlessly increase expenses. Such

arguments are not well-taken. As Ms. Eubanks and Ms. Gray correctly pointed out in their Response, 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). Thus, Mr. Brown cannot bear the blame for Ms. Eubanks' and Ms. Gray's decision to file suit against him in an improper venue. As explained by the court in *Youker v. Douglas County*:

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, 162 Wn.App. 448, 459, 258 P.3d 60 (2011). That is precisely the situation in this case. Ms. Eubanks and Ms. Gray filed their suit in Clark County and took the chance that Mr. Brown would waive his absolute right to have the case tried in Klickitat County. Further, "[a]s the Supreme Court held long ago in *McWhorter v. Superior Court*, 112 Wn. 574, 577, 192 P. 903 (1920), the reasons for requiring actions to be brought or tried in specific counties are important to the Legislature and not to the courts." *Shoop v. Kittitas County*, 108 Wn.App. 388, 392, 30 P.3d 529 (2001). Thus, any argument relating to the conservation of judicial resources and expenses saved by allowing Ms. Eubanks and Ms. Gray to keep the action

against Mr. Brown in Clark County would run counter to the "reasons" which "are important to the Legislature." Unfortunately for Ms. Eubanks and Ms. Gray, Mr. Brown did not waive his right under RCW 4.12.020(2) and cannot be held accountable for exercising his absolute right to have the action tried in Klickitat County.

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.

It is clear that *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) directly control the issue in this appeal. It was Ms. Eubanks' and Ms. Gray's choice to sue Mr. Brown for acts allegedly committed by him in virtue of his office. Accordingly, Mr. Brown has the absolute right to demand the action against him be transferred to Klickitat County pursuant to RCW 4.12.020(2).

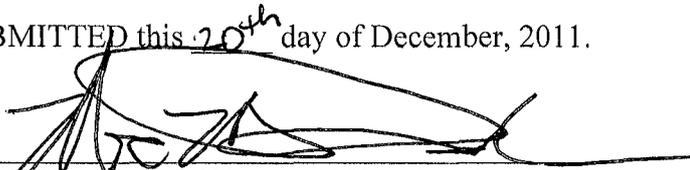
B. CONCLUSION

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 20th day of December, 2011.



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CERTIFICATE OF SERVICE

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I certify under penalty of perjury under the laws of the State of WASHINGTON Washington that on the 20th day of Dec., 2011, a true and correct copy of the foregoing *Petitioner's Reply Brief*, was served upon the following parties and their counsel of record in the manner indicated below:

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Dated: 12/20/11


Brooke Johnson