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SUPREME COURT  
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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RESPONDENTS' SUPPLEMENTAL BRIEF

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 ORIGINAL

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A. INTRODUCTION

Petitioner David Brown ("Brown") sexually harassed respondents Robin Eubanks and Erin Gray (collectively "Eubanks/Gray")<sup>1</sup> while Brown worked as a deputy prosecuting attorney at the Klickitat County Prosecuting Attorney's Office and Eubanks and Gray were staff in that office. Eubanks/Gray sued Brown and the County.

Eubanks/Gray had a choice of venue in Klickitat or Clark Counties under RCW 4.12.020(2) or RCW 36.01.050. In well-reasoned decisions, both the trial court and Division II agreed and rejected Brown's contention that he is entitled to have his case tried in Klickitat County while Eubanks/Gray's action against the County would be tried in Clark County. 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.

Alternatively, Brown was not acting in his official capacity as a public officer when he sexually harassed Eubanks/Gray. He conceded that he was sued in his individual capacity. RCW 36.01.050 makes venue appropriate in Clark County for all claims.

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<sup>1</sup> Since the action was commenced, two more women in the Prosecutor's office have stepped forward with sexual harassment cases against Brown. They were joined in this action below and have agreed to abide this Court's decision on venue.

Division II's opinion<sup>2</sup> in this case is the better-reasoned treatment of the statutes than Division III's approach in *Youker v. Douglas County*, 162 Wn. App. 448, 258 P.3d 60 (2011). This Court should disapprove of *Youker*.

B. STATEMENT OF THE CASE

The Court of Appeals decision provides the proper overview of the general facts of this case, which Eubanks/Gray incorporate by reference.

Both Eubanks and Gray worked as administrative assistants at the Klickitat County Prosecuting Attorney's Office; Brown was their attorney supervisor.<sup>3</sup> CP 8-9, 120. Eubanks/Gray argued Brown sexually harassed them at work and 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 *conceded* below 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.

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<sup>2</sup> Because different divisions of the Court of Appeals have addressed venue issues, this brief sometimes references specific divisions of that court. No disrespect is intended.

<sup>3</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.

Brown avoids mentioning his disgusting and intimidating conduct, pet. at 1-2, but the nature of his alleged misconduct and the question of whether he was acting "by virtue of his office" when he engaged in that misconduct are the crux of this case and should not be overlooked. CP 10, 12. Eubanks/Gray allege that Brown, a very large man, 6 feet tall and weighing nearly 400 pounds with poor personal hygiene, regularly sat in their shared office with his pants unzipped and his legs spread open on his desk; he positioned himself in the doorway to the office so that they would need to rub against his body when they left the office; he gave unwanted gifts to Eubanks; and 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. Eubanks/Gray suffered emotional and economic damages and eventually lost their employment with the County because of Brown's harassment.<sup>4</sup> CP 11, 13, 21.

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<sup>4</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. Her mental health provider expressly recommended that she not return to work at the County because of the possibility that she might relapse if she returned to the place where she was victimized. CP 120.

Eubanks/Gray mistakenly filed their action initially in Klickitat County<sup>5</sup> but later refiled it in Benton County and later amended their complaint to sue Brown *in his individual capacity*. CP 26-27, 41-56.<sup>6</sup> Ultimately, Eubanks/Gray filed the case in Clark County and simultaneously moved for a change of venue from Benton County to Clark County. CP 37-39.<sup>7</sup> The Benton County court granted Eubanks/Gray's motion and transferred the case to Clark County. CP 24, 28. *Brown never appealed that transfer order*. Instead, he filed a motion to dismiss or, alternatively, to transfer the case to Klickitat County. CP 97-100.<sup>8</sup> Eubanks/Gray opposed the motion. CP 122-29. It was only in his reply in support of his motion that he argued for the first time that he was entitled as a public officer to be sued in Klickitat County. CP 130-34.

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<sup>5</sup> Eubanks/Gray intended to file their lawsuit in Benton County, but an error by the process server caused the complaint to be misfiled in Klickitat County. KCP 1, 3, 5, 17-18. The Klickitat County court later dismissed the case on Eubanks/Gray's motion. KCP 17-20.

<sup>6</sup> 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 amended that complaint, CP 27, 41-56, again suing Brown in his individual capacity and against his marital community. CP 41. Eubanks/Gray learned that their action had to be filed in either of the two nearest judicial districts as declared by the Legislature.

<sup>7</sup> Brown did not oppose the motion and instead merely stated that he would not stipulate to venue in Clark County and that he did not agree to the transfer. CP 30-32. He later admitted that he did not oppose the motion. CP 134.

<sup>8</sup> Klickitat County did not join in this motion. It answered Eubanks/Gray's complaint asserting that Brown's conduct was prohibited by the County and fell outside the course and scope of his employment. CP 106-18.

The trial court, the Honorable Robert A. Lewis, denied Brown's motion in a well-reasoned memorandum opinion and order. CP 163-69. *See* Appendix. The Court of Appeals, Division II, affirmed the trial court's ruling. *Eubanks v. Brown*, 170 Wn. App. 768, 285 P.3d 901 (2012). *See* Appendix.

### C. 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. The first and third issues are at stake here.

RCW 4.12.025 is the general venue statute. It applies unless a more specific venue statute permits the plaintiff to file elsewhere.

RCW 36.01.050 is just such a more specific statute, an exception to the general venue statute governing 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. Venue in this case is thus proper in Clark County, which is one of the two nearest judicial districts to Klickitat County.

RCW 4.12.020(2), too, is an exception to the general venue statute applying to an “act done by [a public officer] in virtue of his or her office.” As Brown was sued in his individual capacity, the statute does not apply as his misconduct was not job-related and was solely to gratify his personal objectives or desires.

RCW 4.12.020, if even applicable, and RCW 36.01.050 are complementary; the plaintiff may select venue under either. RCW 36.01.050 does not carve out an exception for cases described in RCW 4.12.020. The trial court properly recognized that a plaintiff may choose venue under RCW 4.12.020 or RCW 36.01.050, noting that this approach avoids piecemeal litigation and generally respects the plaintiff's choice of forum.

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

#### D. ARGUMENT<sup>9</sup>

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<sup>9</sup> The standard of review to be applied to a trial court's decision on a motion to change venue is not clear. In *Baker v. Hilton*, 64 Wn.2d 964, 965-66, 395 P.2d 486 (1964) and *State v. Crudup*, 11 Wn. App. 583, 524 P.2d 479, review denied, 84 Wn.2d

(1) General Venue Principles and the Statutes at Issue Here

Certain fundamental principles apply to the Court's venue analysis. First, it has long been the rule in Washington that the choice of venue resides with *the plaintiff* in the first instance. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 314, 268 P.3d 892 (2011); *Baker*, 64 Wn.2d at 966. The plaintiff has suffered injuries and, as a matter of fairness, the plaintiff should be given the first choice of where to seek redress for those injuries.

RCW 4.12.025 is the general venue statute. While it is the default venue provision for civil actions in this state (*see Moore*, 154 Wn. App. at 215), it governs unless a more specific venue statute applies to allow the plaintiff to file elsewhere. *See Russell v. Marenakos Logging Co.*, 61 Wn.2d 761, 765, 380 P.2d 744 (1963).<sup>10</sup>

Brown argues that under RCW 4.12.020(2), a statute providing that actions against a public officer "for an act done by him or her in virtue of his or her office" must be filed in the county in which "the cause, or some

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1012 (1974), the courts applied an abuse of discretion standard. In *Moore v. Flateau*, 154 Wn. App. 210, 214, 225 P.3d 361 (2010), *review denied*, 168 Wn.2d 1042 (2010), Division III drew a distinction between motions under RCW 4.12.030(2-4), reviewed for an abuse of discretion, and RCW 4.12.030(1), reviewed de novo. Division II below applied a de novo standard here. 170 Wn. App. at 771. Under either standard, Eubanks/Gray prevail.

<sup>10</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).

part thereof arose," applies here. Br. of Appellant at 4-6.<sup>11</sup> It is an exception to the general venue statute.

RCW 36.01.050, a further exception to RCW 4.12.025, establishes the appropriate venue for suits against a county. *Hickey v. City of 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. *Youker*, 162 Wn. App. at 457; *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, 65 P.3d 1194 (2003). Plainly, county judges have relationships including budgetary relationships with county elected officials that can contribute to the perception, and sometime reality, of hometown bias.

(2) Division II's Analysis of the Interplay Between RCW 4.12.020 and RCW 36.01.050 Is Better Reasoned than Division III's

This Court may have taken review here because of the perceived differences between the divisions of the Court of Appeals in this case,

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<sup>11</sup> Brown argued below that he was entitled to be sued in Klickitat County under the general venue statute because he resides there. Br. of Appellant at 7. He is not so entitled because a more specific venue statute applies to permit Eubanks/Gray to file in Clark County. *See Russell*, 61 Wn.2d at 765. But Brown has apparently abandoned RCW 4.12.025 as the basis for his arguments. RCW 4.12.020(2) is the *only* focus of his argument to this Court in his petition for review.

*Youker*, and *Roy v. City of Everett*, 48 Wn. App. 369, 738 P.2d 1090 (1987). Pet. at 11-17. This case, then, involves the proper relationship between RCW 4.12.020(2) and RCW 36.01.050. The interpretation of those statutes offered by Brown and Division III in *Youker* is impractical and contrary to the plain terms of those statutes. Division II's analysis of the statutes here is the better analysis and should be adopted by this Court.

(a) Brown Misreads RCW 4.12.020(2) As Exclusive

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 that venue is improper in Clark County as to the claims brought against him; he also asserts that he is entitled under RCW 4.12.020(2) to be sued in Klickitat County. *Id.* at 5. He is mistaken. Venue is proper in Clark County.

Brown ignores the plain language of RCW 36.01.050 and this Court's decisional law. His position is contrary to a key principle of statutory construction that statutes must be interpreted so that all the language is given effect, rendering no part of the statute meaningless or superfluous. *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988).<sup>12</sup> It is well known that a county is a governmental

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<sup>12</sup> Where multiple statutes govern the same subject matter, courts must also give effect to all of the statutes to the extent possible. *In re Estate of Kerr*, 134 Wn.2d 328,

corporate entity and, like any other corporation, can only act through its officials and officers. *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 its 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>13</sup> *Nowhere* does RCW 36.01.050 carve out an exception for cases described in RCW 4.12.020.

This Court has determined that RCW 4.12.020 and RCW 36.01.050 are complementary and that the plaintiff may select venue under *either* statute. *Cossel*, 119 Wn.2d at 437. Read together, RCW 36.01.050 and RCW 4.12.020 afford a plaintiff 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. The trial court properly recognized as much here, noting that this approach avoids piecemeal litigation and generally respects the plaintiff's choice of forum.

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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).

<sup>13</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.

Division II below determined that RCW 4.12.020(2) and RCW 36.01.050 offered Eubanks/Gray a choice of venue. *Eubanks*, 170 Wn. App. at 774-75. Division II's analysis of the interplay between RCW 4.12.020(2) and RCW 36.01.050 here is consistent with *Cossel* and prior cases of Divisions II and III that considered and rejected Brown's arguments, as the court below observed. 170 Wn. App. at 775-76. In *Johanson v. City of Centralia*, 60 Wn. App. 748, 807 P.2d 376 (1991),<sup>14</sup> for example, the court considered a nearly identical venue question. There, Johanson's wife died in a car accident in Thurston County. The personal representative of her estate filed a wrongful death action in Pierce County. The defendants moved for a change of venue to Lewis County, or alternatively, to Thurston County, arguing they 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.

Division II considered the venue options in former RCW 4.12.020(3) and found them reconcilable with RCW 36.01.050:

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

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<sup>14</sup> This Court quoted *Johanson* with approval in *Cossel*. *Cossel*, 119 Wn.2d at 437-38.

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*,<sup>15</sup> Rabanco brought an action against Grant County and the Grant County commissioners for breach of contract. 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 that 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. *Id.* at 542. *See also, Bruneau v. Grant County*, 58 Wn. App. 233, 236 n.3, 792 P.2d 174 (1990) (had plaintiff sued Grant County

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<sup>15</sup> Division III's opinion in *Youker* did not overrule *Rabanco* although the latter opinion calls the former into question.

sheriff's department employees as individuals, rather than as public officials, she could have sued them and the county in Chelan County).

In sum, Division II was correct in holding that this Court's *Cosset* decision and *Johanson* and *Rabanco* afforded Eubanks/Gray a choice of commencing their action against Brown and the County in Clark or Klickitat Counties.

(b) Division II Correctly Perceived RCW 4.12.020 Did Not Apply Here Because Brown's Sexual Harassment of Eubanks/Gray Had Nothing to Do with His Role As a Deputy Prosecutor

An alternative basis upon which to affirm the trial court is that RCW 4.12.020(2) does not apply to Brown. Brown claimed for the first time in this case that this Court needs to define the phrase "by virtue of his or her office" in RCW 4.12.020(2) and to provide an authoritative determination for future guidance that addresses the factors a court should consider when deciding if a particular cause of action asserts liability based on acts performed by a public officer by virtue of his or her office. Pet. at 3-11.<sup>16</sup> He is wrong. The concept is clear.

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<sup>16</sup> Brown never briefed this issue nor raised it in the trial court or in the Court of Appeals. New issues cannot be raised for the first time in a petition for review. RAP 2.5(a); *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006) (noting this Court will not review an issue raised for first time in a petition for review, citing RAP 2.5(a)); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (same); *People's Nat'l Bank v. Peterson*, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973) (declining to review issues and theories raised for the first time in a petition for review where they were not presented in the trial court or the Court of Appeals).

In venue cases, this Court has made clear that RCW 4.12.020(2) is inapplicable where the public officer has no public purpose in mind when acting to create liability. Brown's actions were for his personal gratification and had nothing to do with the authority vested in him by his office.

In *State ex rel. McWhorter v. Superior Court*, 112 Wash. 574, 192 P. 903 (1920), Davis sued McWhorter in King County for malicious prosecution. McWhorter moved for a change of venue to Yakima, his county of residence. Davis then amended his complaint to show that McWhorter had prosecuted him in his capacity as an officer of the State Humane Bureau. *Id.* at 575. This Court held that McWhorter being sued as a public officer for actions done under color of and by virtue of his office statutorily fixed venue in the county where the cause of action arose and affirmed the trial court's refusal to grant a change of venue. *Id.* at 578.<sup>17</sup>

By contrast, in *State ex rel. Hand v. Superior Court*, 191 Wash. 98, 71 P.2d 24 (1937) there was a genuine dispute whether the defendants, who were members of Washington's National Guard, were public officers

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<sup>17</sup> In *Greenius v. Amer. Sur. Co. of NY*, 92 Wash. 401, 159 Pac. 384 (1916), a surety case, this Court made clear that a public officer is only acting in virtue of his/her office if the office gives him/her the authority to act. Here, of course, Brown's actions were for his personal gratification. The office of deputy prosecutor gave him no authority to sexually harass staff.

acting by virtue of their office. If they were, the acts complained of had occurred in Grays Harbor County and the plaintiff was entitled to bring his action for malicious prosecution and false arrest in that county. The guardsmen claimed that they were not public officers; that they resided in various counties of the state other than Grays Harbor; and that the case should be transferred to Yakima County, the residence of one of the defendants, for trial. The trial court granted a change of venue to defendants. This Court reversed, holding that the officers were not public officers. Merely because the guardsmen were in uniform did not mean that they were acting by virtue of their public offices. More than 75 years ago, this Court clearly rejected the concept that Brown now advances.

Brown also argues that the plain language of RCW 4.12.020(2) does not limit its applicability to conduct undertaken in furtherance of a public officer's "official duties."<sup>18</sup> Pet. at 5. He claims that the statute applies as long as the cause of action against the officer is based upon an "act" taken by the officer "by virtue of his or her office." Pet. at 6. This

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<sup>18</sup> Brown generally asserts that actions taken in furtherance of a public officer's "official duties" are not necessarily the equivalent of acts taken "by virtue of" his or her office. Pet. at 5. Yet he fails to explain the distinction and offers no authority to support the argument. The Court should decline to consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting appellate courts need not consider arguments not supported by reference to the record or citation of authority).

argument is meritless. It would allow a defendant to claim the benefit of the statute merely because he or she was a public officer even where the acts complained of plainly have nothing to do with the office.

Brown was not sued as a public officer. As he unequivocally *admitted* in the trial court, but attempts to now ignore, Eubanks/Gray sued him in his *individual capacity* rather than in his public capacity. CP 98. In fact, they amended their complaint to clarify that they were suing him in his individual capacity. CP 41-56. Brown's sexual harassment of Eubanks/Gray, while an "act," was not done by virtue of his public office because it was not part of his prosecutorial duties. Bluntly stated, sexual harassment of subordinates is not part of the job description for a deputy prosecuting attorney in Washington.<sup>19</sup> Sexual harassment was Brown's *personal* misconduct that is outside the scope of his employment. Regardless of Brown's reasons for sexually harassing Eubanks/Gray, his misconduct was not job-related and was done for his own *personal* gratification. *See Thompson*, 71 Wn. App. at 553. Under these

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<sup>19</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998) (noting sexual harassment is outside the scope of employment because it is done for personal motives). *See also, Robel v. Roundup Corp.*, 148 Wn.2d 35, 54, 59 P.3d 611 (2002) (where employee's acts are directed toward personal sexual gratification, employee's conduct falls outside scope of his employment); *Thompson v. Everett Clinic*, 71 Wn. App. 548, 553, 860 P.2d 1054 (1993), *review denied*, 123 Wn.2d 1027 (1994) (doctor's sexual assaults emanated from personal motive for sexual gratification and were not attributable to the clinic where he worked).

circumstances, RCW 4.12.020(2) does not apply to make venue proper in Klickitat County for Brown.

*Youker* and *Roy*, upon which Brown relies, are factually and procedurally distinct. In *Youker*, Youker sued Douglas County and two of its deputies for malicious prosecution, false arrest, and related claims arising out of a search, arrest, and ultimately-terminated prosecution. 162 Wn. App. at 453. He filed in Chelan County in reliance on RCW 36.01.050. The trial court granted a motion to transfer the case to Douglas County, reasoning that although RCW 36.01.050 provided for three acceptable venues in which to sue the county, RCW 4.12.020(2) specified that Douglas County was the only proper venue with respect to the deputies. Division III affirmed, holding that the statutes applied separately. *Id.* at 459-60. Thus, Division III's opinion condoned multiple trials in different counties.

In *Roy*, Roy sued the City of Everett, five Everett police officers, Snohomish County, three Snohomish prosecutors, and an estate. 48 Wn. App. at 370. 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. Division I reversed. Relying in part on RCW 4.12.020(2), that court ordered the case against the officers and the City of Everett transferred to Snohomish

County. Focusing on the language of the statutes, that 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, the court considered the statutes separately.<sup>20</sup>

Brown invokes *Youker* and *Roy*, but misses the critical distinction noted by Division II below (170 Wn. App. at 773-74) that the defendants in *Youker* and *Roy* were sued in their *official* capacities for actions done *by virtue of their public offices*. In other words, they were sued for acts authorized by their public offices, *e.g.*, arrest, prosecution, but improperly exercised. Hence, RCW 4.12.020(2) applied to make venue proper where the causes of action arose. But here, Eubanks/Gray did not sue Brown in his official capacity. As he admits, they sued him *in his individual capacity*. CP 98. Nor have they sued him for any acts done “by virtue of his public office.” His prosecutorial position does not authorize him to sexually harass his staff. His sexual misconduct is *personal* misconduct not within the scope of his employment.

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<sup>20</sup> This Court subsequently rejected the *Roy* court’s approach to the venue statutes in *Cossel*, 119 Wn.2d at 438. There, the 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 this Court’s subsequent decision in *Cossel*).

Moreover, the import of Division III's analysis in *Youker* is that RCW 4.12.020(2) is tantamount to a jurisdictional statute, a concept that has been routinely rejected by this Court. *Shoop*, 149 Wn.2d at 37-38; *Young v. Clark*, 149 Wn.2d 130, 134, 65 P.3d 1192 (2003). The upshot of *Youker* is that courts must conduct multiple trials in multiple counties. 162 Wn. App. at 459-60. Such an impractical result, expensive to the parties forced to litigate in such a fashion, inconvenient to witnesses, and wasteful of scarce judicial resources, should not be condoned by this Court.<sup>21</sup> Moreover, such an approach invites conflicting outcomes in different counties.

In sum, Division II's opinion here appropriately addressed the various decisions on venue and arrived at a practical interpretation of the interplay between RCW 4.12.020(2) and RCW 36.01.050 this Court should re-affirm. *Cossel, supra*.

#### E. CONCLUSION

The trial court and the Court of Appeals properly interpreted the applicable venue statutes.

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<sup>21</sup> Moreover, Brown suffers no prejudice from a Clark County trial. He would avoid participating in trials in separate counties. (He would obviously be a witness in Clark County in Eubank/Gray's action against the County). *Russell*, 61 Wn.2d at 761 ("except in rare instances, the mills of justice grind with equal fineness in every county of the state.").

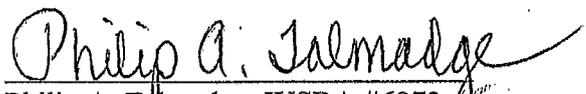
The fundamental principle underlying any venue decision is that the choice of venue resides with the plaintiff in the first instance. Eubanks/Gray had the right to sue Brown and the County in Klickitat or Clark Counties. They chose Clark. The trial court did not err in upholding that choice. The trial court's ruling avoided multiple trials in the same case in multiple counties.

Alternatively, only RCW 36.01.050 applies as to venue. RCW 4.12.020(2) is inapplicable because Brown's sexual harassment of Eubanks/Gray has nothing to do with his work as a deputy prosecuting attorney.

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 3d day of May, 2013.

Respectfully submitted,

  
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# APPENDIX

RCW 4.12.020:

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.

RCW 4.12.025:

- (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. For the purpose of this section, the residence of a corporation defendant shall be deemed to be in any county where the corporation: (a) Transacts business; (b) has an office for the transaction of business; (c) transacted business at the time the cause of action arose; or (d) where any person resides upon whom process may be served upon the corporation.
- (2) An action upon the unlawful issuance of a check or draft may be brought in any county in which the defendant resides or may be brought in any division of the judicial district in which the check was issued or presented as payment.

(3) The venue of any action brought against a corporation, at the option of the plaintiff, shall be: (a) In the county where the tort was committed; (b) in the county where the work was performed for said corporation; (c) in the county where the agreement entered into with the corporation was made; or (d) in the county where the corporation has its residence.

RCW 36.01.050:

(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.

April 22 2011

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

ROBIN EUBANKS and ERIN GRAY,	)	
	)	NO. 11-2-00802-2
Plaintiffs,	)	
	)	MEMORANDUM OF OPINION
vs.	)	AND ORDER DENYING
	)	DEFENDANT DAVID BROWN'S
KLICKITAT COUNTY, KLICKITAT	)	MOTION TO DISMISS OR
COUNTY PROSECUTING ATTORNEY'S	)	ALTERNATIVELY TO TRANSFER
OFFICE; DAVID BROWN, individually and	)	VENUE TO KLICKITAT COUNTY
on behalf of his marital community,	)	
	)	
Defendants.	)	

THIS MATTER came regularly before the above-entitled court on May 6, 2011, on the motion of the defendant, David Brown, for dismissal of the action against him, or for transfer of venue of that action to Klickitat County. Plaintiffs were represented by and through their attorney, Marletta Giles Ward. Defendant David Brown was represented by and through his attorney, Michael E. McFarland, Jr. The court considered the records and files herein, the materials submitted on behalf of the parties, and the oral argument of counsel. For the reasons stated below, the defendant's motion should be denied.

## STATEMENT OF FACTS

Robin Eubanks and Erin Gray were administrative assistants at the Klickitat County Prosecuting Attorney's Office. From September, 2007, through July, 2010, David Brown was also employed at the office as a deputy prosecuting attorney. The plaintiffs allege that Brown sexually harassed them at work, and that Klickitat County did not respond to their complaints about the harassment. As a result, they assert that they suffered emotion and economic damages, and eventually lost their employment with Klickitat County. Plaintiffs commenced this action for damages against Klickitat County, the Klickitat County Prosecuting Attorney's Office, and David Brown, individually.

Eubanks and Gray originally filed their action in Benton County, under the mistaken belief that an action against a county could be commenced in any adjoining county. Brown's counsel advised plaintiffs that their action against Klickitat County must be filed in either Klickitat, Yakima or Clark County. Plaintiffs then filed this case in Clark County, and simultaneously moved for a change of venue from Benton County. The Benton County court granted the motion.

Brown objected to the initiation of claims against him in Clark County. At all times, he has claimed an absolute right to have the action against him transferred to the county of his residence, Klickitat County. He has also asserted that Klickitat County is the exclusive initial venue for these proceedings, because he is accused of misconduct while a public officer in Klickitat County.

Brown moved for dismissal of the complaint against him, or transfer of the proceedings to Klickitat County. This motion is based upon RCW 4.12.030(1). Brown also asserts that the complaint against Klickitat County and its Prosecuting Attorney's Office

should be transferred to Klickitat County. The County did not join in this motion, and filed its answer to plaintiffs' complaint in this jurisdiction.

#### DECISION

Resolution of this motion requires consideration of several venue statutes, which initially appear to be inconsistent. RCW 4.12.020 provides in 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 action 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 . . . , 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.

Brown claims that RCW 4.12.020(2) is controlling, because his improper acts were alleged to have occurred during his employment as a deputy prosecuting attorney. Brown also contends that he is a resident of Klickitat County, and is entitled to have this case heard in the home county of all of the defendants, pursuant to RCW 4.12.025(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. . . .

Klickitat County does not complain that venue is improper in Clark County, because of the provisions of RCW 36.01.050:

(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 Office of the Administrator for the Courts.

There would be no basis to dismiss plaintiffs' claims against defendant Brown even if those claims cannot be pursued in Clark County. All of the cited statutes deal with venue, not the subject matter jurisdiction of this court. The appropriate remedy for filing an action in an improper venue is transfer of the case to the proper superior court, not dismissal. *Shoop v. Kittitas County*, 149 Wn.2d 29, 65 P.3d 1194 (2003).

Brown does not have standing to assert that the claims against the other defendants should be transferred to a different venue. Those parties are separately represented, and did not join in his motion. In addition, jurisdiction and venue of the claims against Klickitat County is clearly proper in Clark County. RCW 36.01.050.

Appellate courts have repeatedly held that the venue statutes in question here can be reconciled with one another. Despite these pronouncements, the cases are confusing, especially when multiple defendants and claims are involved. Until recently, the decisions were based upon the erroneous assumption that exclusive venue statutes deprived other superior courts of subject matter jurisdiction. Even after these jurisdictional rulings were overruled, decisions favored resolution of venue questions in the county where "exclusive" initial venue was apparently mandated.

The plaintiffs assert that Klickitat County would be an inappropriate forum to hear their claims, because of the close connection between the defendants and the Klickitat County Superior Court. Eubanks and Gray contend that they will suffer additional trauma if required to go back to their former workplace at the courthouse where the alleged sexual harassment occurred. They note that Brown, who is currently employed by the Skamania County Prosecutor's Office, continues to regularly appear before the judicial district's only judge. These considerations are not appropriately before the court. This is not a motion

pursuant to RCW 4.12.030(3). If venue is improper in Clark County with regard to Brown's claims, then venue must be transferred to Klickitat County. That court would have the discretion, on proper motion, to transfer the matter back to Clark County pursuant to RCW 4.12.030(3). This court may not retain improper venue, assuming that such a transfer would occur. The initial decision would need to be made by Klickitat County Superior Court.

However, I do not find that Clark County is an improper venue to hear the claims against Brown. In cases involving multiple defendants, our statutes tend to allow the plaintiff to bring an action in any court that is a permissible venue for any one of the defendants. This approach avoids piecemeal litigation, and generally respects the plaintiff's choice of forum. This interpretation of venue statutes is appropriate, even when one of the statutes appears to exclusively vest venue in a particular county for some of the claims. *Gabrielson v. State*, 67 Wn.2d 615, 408 P.2d 1020 (1965).

In *Johanson v. Centralia*, 60 Wn. App. 748, 807 P.2d 376 (1991), Division II of the Court of Appeals considered a similar venue question. Plaintiff's spouse died in a car accident in Thurston County, when she drove into a diversion canal operated by the City of Centralia, a Lewis County municipality. Plaintiff commenced a wrongful death action against Thurston County and Centralia in Pierce County Superior Court. The city obtained a change of venue, arguing that it could not be sued in Pierce County. The Court of Appeals found that the provisions of RCW 4.12.020 and RCW 36.01.050 were not in conflict, and reversed the trial court:

We believe the two statutes are complementary. RCW 4.12.020 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.

*Johanson v. Centralia*, *supra*, at 750-51. The Court of Appeals cited with approval the case relied upon by plaintiffs, *Robanco, Ltd. v. Weitzel*, 53 Wn. App. 540, 768 P.2d 523 (1989).

In effect, Division II construed RCW 36.01.050 to expand the “residence” of a county to include the two nearest adjoining judicial districts. All three of these counties would be a permissible venue for commencing action against the county. If a county is one of multiple defendants, and the venue selected is permissible as to the county, then it is permissible as to the other defendants, since one of the defendants “resides” in that venue.

As mentioned in *Robanco*, a non-county defendant can move for a change of venue pursuant to RCW 4.12.030. The basis for change of venue would not be that the initial venue was incorrect. Instead, there would need to be other grounds for the change—convenience of witnesses, consolidation of cases, publicity, or local bias. Brown does not assert these grounds to support his motion.

Brown cites *Roy v. Everett*, 48 Wn. App. 369, 738 P.2d 1090 (1987), which appears to conflict with the holdings in *Robanco* and *Johanson*. There are factual and procedural differences between the cases, although these would not explain the difference in result. The trial court’s basis for denying the change of venue in *Roy* appears to be bias in the other superior court, under RCW 4.12.030(3) [see *Roy v. Everett, supra*, at 370, noting the basis for denial was the “possibility of prejudice in Snohomish County”]. I agree with Division I that such considerations would not allow a judge to retain jurisdiction in an improper venue. However, I find the *Johanson* analysis of where venue lies in multiple claim cases, involving county and non-county defendants, to be more persuasive than the reasoning in *Roy*.

ORDER

For the reasons stated above, the defendant's motion to dismiss, or to change venue, is denied.

DATED this 27<sup>th</sup> day of May, 2011.

~~/s/ ROBERT A. LEWIS~~  
Judge Robert Lewis

Westlaw

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C

Court of Appeals of Washington,  
 Division 2.  
 Robin EUBANKS and Erin Gray, Respondents,  
 v.  
 David BROWN, individually and on behalf of his  
 marital community, Appellant,  
 Klickitat County, Klickitat County Prosecuting At-  
 torney's Office, Defendants.

No. 42329-4-II.  
 Sept. 18, 2012.

**Background:** Administrative assistants for county deputy prosecuting attorney filed suit against county and prosecuting attorney, seeking damages allegedly caused by prosecuting attorney's sexual harassment of them. Prosecuting attorney filed motion for change of venue. The Superior Court, Clark County, Robert A. Lewis, J., denied motion. Prosecuting attorney appealed.

**Holdings:** The Court of Appeals, Quinn-Brintnall, J., held that:

- (1) prosecuting attorney was not entitled to venue in county in which cause of action arose, and
- (2) administrative assistants were entitled to bring their suit in either adjacent county, situs county, or a county where one of the defendants resided.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪965

30 Appeal and Error  
 30XVI Review  
 30XVI(H) Discretion of Lower Court  
 30k963 Proceedings Preliminary to Trial  
 30k965 k. Change of venue. Most  
 Cited Cases  
 A decision to change venue that properly exists  
 is reviewed for abuse of discretion.

[2] Appeal and Error 30 ↪893(1)

30 Appeal and Error  
 30XVI Review  
 30XVI(F) Trial De Novo  
 30k892 Trial De Novo  
 30k893 Cases Triable in Appellate  
 Court

30k893(1) k. In general. Most Cited  
 Cases

The question whether venue should be changed because the complaint has not yet been brought in the proper county is a legal question that the appellate court reviews de novo.

[3] Venue 401 ↪3

401 Venue  
 401I Nature or Subject of Action  
 401k3 k. Constitutional and statutory provisions. Most Cited Cases  
 Venue in the state is governed by statute.

[4] Venue 401 ↪2

401 Venue  
 401I Nature or Subject of Action  
 401k2 k. Place in which action may be brought or tried in general. Most Cited Cases

Venue 401 ↪16

401 Venue  
 401I Nature or Subject of Action  
 401k16 k. Right to sue in more than one county or district, and election. Most Cited Cases  
 Venue rules limit a plaintiff's choice of forum to ensure that the lawsuit's locality has some logical relationship to the litigants or to the dispute's subject matter, but where those rules provide several places where venue may be proper, the choice lies with the plaintiff in the first instance.

[5] Venue 401 ↪3

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## 401 Venue

401I Nature or Subject of Action

401k3 k. Constitutional and statutory provisions. Most Cited Cases

It is generally accepted that specific venue statutes control over general venue statutes.

## [6] Venue 401 ↪21

## 401 Venue

401II Domicile or Residence of Parties

401k20 Privileges of Defendants

401k21 k. In general. Most Cited Cases

Under the default venue statute, defendant has a right to have an action against him commenced in the county of his residence, except under specific circumstances governed by other statutes. West's RCWA 4.12.025(1).

## [7] Venue 401 ↪2

## 401 Venue

401I Nature or Subject of Action

401k2 k. Place in which action may be brought or tried in general. Most Cited Cases

## Venue 401 ↪11

## 401 Venue

401I Nature or Subject of Action

401k11 k. Actions against public officers and others for official acts. Most Cited Cases

County deputy prosecuting attorney, against whom sexual harassment suit had been brought by his administrative assistants, was not entitled to venue in county in which cause of action arose, pursuant to statute providing that proper venue for claims against officers is county where the cause, or some part thereof, arose, as attorney was not being prosecuted for actions done by virtue of his office, but was being sued individually for personal misconduct in a workplace. West's RCWA 4.12.020(2).

## [8] Counties 104 ↪215

## 104 Counties

## 104XII Actions

104k215 k. Jurisdiction and venue. Most Cited Cases

## Venue 401 ↪2

## 401 Venue

401I Nature or Subject of Action

401k2 k. Place in which action may be brought or tried in general. Most Cited Cases

## Venue 401 ↪11

## 401 Venue

401I Nature or Subject of Action

401k11 k. Actions against public officers and others for official acts. Most Cited Cases

Statute permitting commencement in adjacent county of any suit against a county and statute governing venue of county in which action arose, read together, permitted administrative assistants of county deputy prosecuting attorney to bring suit against attorney alleging emotional distress, pain and suffering, and other damages stemming from attorney's sexual harassment of them against county and attorney in either the adjacent county, the situs county, or a county where one of the defendants resided. West's RCWA 4.12.020(3), 36.01.050.

**\*\*902** Michael Early McFarland Jr., Attorney at Law, Spokane, WA, for Petitioner.

Francis Stanley Floyd, Floyd Pflueger & Ringer PS, Seattle, WA, for Defendant.

Karen Suzette Lindholdt, Karen S. Lindholdt, PLLC, Marletta Giles-Ward, Colton Ward PLLC, Spokane, WA, Philip Albert Talmadge, Emmelyn Hart, Talmadge/Fitzpatrick, Tukwila, WA, for Respondent.

## QUINN-BRINTNALL, J.

**\*770 ¶ 1** David Brown appeals the Clark County Superior Court's denial of his motion for a change of venue, arguing that he had the right under Washington's venue statutes to have the action

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against him commenced in Klickitat County. Finding no error, we affirm.

#### FACTS

¶ 2 Brown is a former deputy prosecuting attorney for Klickitat County. During his employment with the county, he had supervisory authority over administrative assistants Robin Eubanks and Erin Gray. In 2010, Eubanks and Gray sued Brown, Klickitat County, and the Klickitat County Prosecuting Attorney's Office, alleging that Brown sexually harassed them while they worked in the prosecutor's office. Noting that they were suing Brown individually, they alleged that he regularly sat in their shared office with his pants unzipped and his legs spread open on his desk; that he positioned himself in the office doorway so that they would need to rub against him when they left; that he licked his lips constantly while talking to them; that he stared at them while they worked and followed them around the office; that he gave unwanted gifts to Eubanks; and that he stared at Gray's breasts during conversations.

¶ 3 Eubanks and Gray filed their lawsuit in Benton County, apparently believing that they could sue all parties in any adjoining \*\*903 county. When Brown's attorney informed them that venue in Benton County was not proper, they \*771 moved to change venue to Clark County, and the Benton County Superior Court granted their motion.

¶ 4 Brown then moved to dismiss the complaint or to transfer venue of the claims against him to Klickitat County. Brown argued that although venue as to the county was proper in Clark County, he had the right as a public officer to be sued in Klickitat County. The Clark County Superior Court denied his motion, finding that venue was proper in Clark County. When Division Three of this court filed a decision appearing to support Brown's position, he filed a CR 60(b)(11) motion to vacate the order denying his motion to dismiss or to transfer venue, but the trial court denied that motion as well. We granted Brown's motion for discretionary review.

#### ANALYSIS

##### VENUE FOR ACTION AGAINST COUNTY AND DEPUTY PROSECUTING ATTORNEY

[1][2] ¶ 5 At the outset, we disagree with the respondents' assertion that the standard of review is abuse of discretion. Although a decision to change venue that properly exists is reviewed for abuse of discretion, the question whether venue should be changed because the complaint has not yet been brought in the proper county is a legal question that we review de novo. *Moore v. Flateau*, 154 Wash.App. 210, 214, 225 P.3d 361, review denied, 168 Wash.2d 1042, 233 P.3d 889 (2010).

[3][4] ¶ 6 Venue in Washington is governed by statute. See *Shoop v. Kittitas County*, 108 Wash.App. 388, 396, 30 P.3d 529 (2001) (in contrast to subject matter jurisdiction of the superior court, venue is appropriate subject for legislation), *aff'd*, 149 Wash.2d 29, 65 P.3d 1194 (2003). Venue rules limit a plaintiff's choice of forum to ensure that the lawsuit's locality has some logical relationship to the litigants or to the dispute's subject matter. *Shoop*, 108 Wash.App. at 396, 30 P.3d 529. But where those rules provide several places where venue may be proper, "the choice lies with the plaintiff in the first \*772 instance." *Baker v. Hilton*, 64 Wash.2d 964, 965, 395 P.2d 486 (1964); see also *Russell v. Marenakos Logging Co.*, 61 Wash.2d 761, 765, 380 P.2d 744 (1963) (plaintiffs should not be allowed to select forums indiscriminately).

[5][6] ¶ 7 It is generally accepted that specific venue statutes control over general venue statutes. *Sim v. Wash. State Parks & Recreation Comm'n*, 90 Wash.2d 378, 382-83, 583 P.2d 1193 (1978); *Hickey v. City of Bellingham*, 90 Wash.App. 711, 716, 953 P.2d 822, review denied, 136 Wash.2d 1013, 966 P.2d 1278 (1998). Three venue statutes are at issue in this case. The First is the default provision found in RCW 4.12.025(1), which states that "[a]n 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 ac-

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tion." See *Moore*, 154 Wash.App. at 214-15, 225 P.3d 361 (recognizing RCW 4.12.025(1) as default venue provision for civil actions in Washington); *Hickey*, 90 Wash.App. at 716, 953 P.2d 822 (describing RCW 4.12.025 as the general venue statute). Under RCW 4.12.025(1), the legislature has decreed that the defendant has a right to have an action against him commenced in the county of his residence, except under specific circumstances governed by other statutes. *Russell*, 61 Wash.2d at 765, 380 P.2d 744.

¶ 8 The two more specific venue directives are found in RCW 36.01.050 and RCW 4.12.020. RCW 36.01.050(1) provides that all actions against a county "may be commenced in the superior court of such county, or in the superior court of either of the two nearest judicial districts." RCW 4.12.020 provides that actions against a public officer for acts done by him in virtue of his office "shall be tried in the county where the cause, or some part thereof, arose."

[7] ¶ 9 Brown argues that RCW 4.12.020(2) is the most specific venue statute applicable in this context and requires the action against him to be brought in Klickitat County, where the cause of action concerning acts done by him by virtue of his public office arose. As support, he cites Division Three's recent decision in \*773\*\*904 *Youker v. Douglas County*, 162 Wash.App. 448, 258 P.3d 60, review denied, 173 Wash.2d 1002, 268 P.3d 942 (2011).

¶ 10 Alleging malicious prosecution, false arrest, and related claims, the plaintiff in *Youker* sued Douglas County and two of its deputies in Chelan County Superior Court. 162 Wash.App. at 453, 456, 258 P.3d 60. The Chelan court granted a motion to transfer venue to Douglas County, reasoning that although RCW 36.01.050 provided for three acceptable venues in which to sue the county, RCW 4.12.020(2) specified that Douglas County was the only proper venue with respect to the deputies. *Youker*, 162 Wash.App. at 457-58, 258 P.3d 60. Division Three affirmed, holding that the statutes

applied as written and did not conflict. *Youker*, 162 Wash.App. at 459-60, 258 P.3d 60.

¶ 11 As support, the court cited *Roy v. City of Everett*, 48 Wash.App. 369, 738 P.2d 1090 (1987). In *Roy*, the plaintiff brought suit in King County against Snohomish County, five Everett police officers, and several other defendants, and the trial court denied the officers' motion to transfer venue to Snohomish County. 48 Wash.App. at 370, 738 P.2d 1090. Division One of this court reversed, holding that the officers had the right to have the action against them commenced in Snohomish County under both RCW 4.12.020(2) and .025(1). *Roy*, 48 Wash.App. at 371-72, 738 P.2d 1090.

¶ 12 We do not see these cases as controlling because, unlike the deputies in *Youker* and the officers in *Roy*, Brown is not being sued for actions done by virtue of his office. The deputies in *Youker* were sued for their actions in arresting and incarcerating the plaintiff. 162 Wash.App. at 453-56, 258 P.3d 60. The officers in *Roy* were sued for failing to protect the plaintiffs from their assailant. 48 Wash.App. at 370, 738 P.2d 1090. These actions and inactions clearly were related to the official duties of these public officers. Here, however, Brown is being sued individually for personal misconduct in a workplace and not for any failure concerning his official duties. See *Robel v. Roundup Corp.*, 148 Wash.2d 35, 54, 59 P.3d 611 (2002) (where employee's acts are directed toward personal sexual gratification, employee's conduct falls outside scope of his employment); *Thompson v. Everett Clinic*, 71 Wash.App. 548, 554, 860 P.2d 1054 (1993) (doctor's sexual assaults emanated from personal motive for sexual gratification and were not attributable to clinic), review denied, 123 Wash.2d 1027, 877 P.2d 694 (1994); see also *State ex rel. Hand v. Superior Court of Grays Harbor County*, 191 Wash. 98, 107, 71 P.2d 24 (1937) (where National Guard officers were sued as individuals, predecessor to RCW 4.12.020(2) did not control venue).

¶ 13 Brown argues in the alternative that even

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if RCW 4.12.020(2) does not apply, RCW 4.12.020(3) requires venue to be changed to Klickitat County because that is the only county where any of the defendants reside. Under RCW 4.12.020(3), a plaintiff seeking damages for personal injury "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."<sup>FN1</sup> Before its amendment in 2001, this provision addressed only damages arising from motor vehicle accidents; the amendment broadened its scope to include all injury actions. See former RCW 4.12.020(3) (1941); *Moore*, 154 Wash.App. at 215-16, 225 P.3d 361.

FN1. The plaintiffs here seek damages for "emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety and anguish, economic loss, damage to career, medical expenses," and other general and special damages. Clerk's Papers at 21.

[8] ¶ 14 Eubanks and Gray argue that RCW 36.01.050 and RCW 4.12.020(3) can and should be reconciled in a manner that allows their claims against both Brown and the county to be commenced in Clark County. As support, they cite *Cossel v. Skagit County*, 119 Wash.2d 434, 834 P.2d 609 (1992), *overruled by Shoop v. Kittitas County*, 149 Wash.2d 29, 65 P.3d 1194 (2003).<sup>FN2</sup> Our Supreme\*\*905 Court held \*775 that former RCW 4.12.020(3) and former RCW 36.01.050 (1963) could be read together to allow a plaintiff to commence an action against a county in either the adjacent county, the situs county, or a county where one of the defendants resides.<sup>FN3</sup> *Cossel*, 119 Wash.2d at 437, 834 P.2d 609. Interpreting the two statutes in this manner was consistent with the purposes behind RCW 36.01.050:

FN2. *Shoop* overruled *Cossel* in holding

that RCW 36.01.050 relates only to venue and not to subject matter jurisdiction; 149 Wash.2d at 37, 65 P.3d 1194.

FN3. As enacted in 1963, RCW 36.01.050 allowed a suit against a county to be brought in that county or the adjoining county. In 1997, the statute was divided into subsections and the reference to adjoining county was changed to "the two nearest counties," and in 2000, that reference was changed to "the two nearest judicial districts." LAWS OF 1997, ch. 401, § 1; LAWS OF 2000, ch. 244, § 1.

"The policy ... is apparently 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."

*Cossel*, 119 Wash.2d at 438, 834 P.2d 609 (quoting *Briedablik, Big Valley, Lofall, Edgewater, Surfrest, N. End Cmty. Ass'n v. Kitsap County*, 33 Wash.App. 108, 118, 652 P.2d 383 (1982), *overruled on other grounds by Save Our Rural Env't v. Snohomish County*, 99 Wash.2d 363, 367, 662 P.2d 816 (1983)).

¶ 15 *Cossel* also relied on our analysis in *Johanson v. City of Centralia*, 60 Wash.App. 748, 807 P.2d 376 (1991). The plaintiff in *Johanson* was a personal representative who sued Centralia and Thurston County in Pierce County after Johanson died in a car accident in Thurston County. 60 Wash.App. at 749, 807 P.2d 376. When the plaintiff appealed the trial court's order transferring the case to Thurston County, we considered the venue options in former RCW 4.12.020(3) and found them reconcilable with former RCW 36.01.050. *Johanson*, 60 Wash.App. at 749-50, 807 P.2d 376. We observed that former RCW 4.12.020(3) dealt with a specific kind of action while former RCW 36.01.050 dealt with a specific kind of defendant. *Johanson*, 60 Wash.App. at 750-51, 807 P.2d 376.

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Because former RCW 4.12.020(3) permitted the plaintiff to bring this particular<sup>776</sup> kind of lawsuit where one of the defendants resided, Thurston County was a permissible venue. *Johanson*, 60 Wash.App. at 750, 807 P.2d 376. Former RCW 36.01.050, dealing with a specific kind of defendant, then came into play and allowed the plaintiff the further option of filing suit in adjoining Pierce County. *Johanson*, 60 Wash.App. at 750-51, 807 P.2d 376.

¶ 16 Also pertinent is *Rabanco, Ltd. v. Weitzel*, 53 Wash.App. 540, 768 P.2d 523 (1989). *Rabanco* concerned an action filed in the Benton-Franklin County judicial district against Grant County for breach of contract and against Dorothy and Jim Weitzel individually for tortious conduct. 53 Wash.App. at 541, 768 P.2d 523. The court held that venue was proper against all defendants in the adjoining Benton-Franklin County judicial district under former RCW 36.01.050, and that the Weitzels were not entitled to have the action against them brought in Grant County, their county of residence. *Rabanco*, 53 Wash.App. at 542, 768 P.2d 523; see also *Bruneau v. Grant County*, 58 Wash.App. 233, 236 n. 3, 792 P.2d 174 (1990) (had plaintiff sued Grant County sheriff's department employees as individuals and not as public officials, she could have sued both them and the county in Chelan County).

¶ 17 Consequently, we conclude that the more specific venue statutes control over the general default statute, RCW 4.12.025. We conclude further that RCW 4.12.020(2) is inapplicable because Brown is not being sued for acts done by him in virtue of his office. Although RCW 4.12.020(3) does apply, it presents two options that are not incompatible with the third option in RCW 36.01.050(1). The plaintiffs may choose among the options presented, and venue in Clark County is therefore proper as to both Klickitat County and Brown. Accordingly, the trial court's denial of Brown's motion for change of venue was proper and we affirm.

We concur: VAN DEREN, J., and JOHANSON, A.C.J.

Wash.App. Div. 2, 2012.  
*Eubanks v. Brown*  
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END OF DOCUMENT

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Respondents' Supplemental Brief in Supreme Court Cause No. 88021-2 to the following parties:

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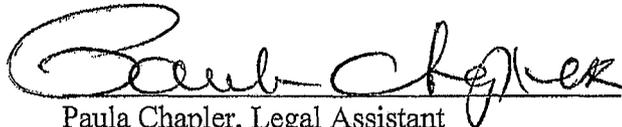
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 3, 2013, at Tukwila, Washington.



Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
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**From:** Paula Chapler [<mailto:paula@tal-fitzlaw.com>]  
**Sent:** Friday, May 03, 2013 1:19 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
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Per Mr. Talmadge's request, attached Respondents' Supplemental Brief for filing in the following case:

Case Name: Robin Eubanks, et al. v. David Brown, et al.  
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Sincerely,

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