The Honorable John Bridges

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

Timothy Borders, Thomas Canterbury, Tom Huff, Margie Ferris, Paul Elvig, Edward Monaghan, and Christopher Vance, Washington residents and electors, and the Rossi for Governor Campaign, a candidate committee, Petitioners, v. King County and Dean Logan, its Director of Records, Elections and Licensing Services, et al., Respondents.	No. 05-2-00027-3 PETITIONERS' OPPOSITION TO WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S MOTION TO DISMISS FOR IMPROPER VENUE OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

I. SUMMARY OF ARGUMENT

Venue is proper in this Court. This case, which is already well underway, should continue in this forum without the delays inherent in the requested dismissal or transfer. Nor should the Court move the case to a forum that the Washington State Democratic Central Committee ("Democratic Party") apparently perceives as potentially more favorable to it. It is the plaintiff that has the right to select the forum in the first instance, and the plaintiff's choice of forum should rarely be disturbed. *E.g., Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 579 (1976).

Chelan County is a proper venue in this multi-defendant case because Chelan County and some of its officials are among the defendants. Under RCW 4.12.025, this is

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sufficient to establish venue here as to all defendants. Under binding supreme court precedent, the specific statutes governing suits against counties or public officials must be read in harmony with RCW 4.12.025, allowing suit against multiple defendants to be filed where any one of them resides.

It is equally plain that election contests may be brought in the superior courts, and not simply in the supreme court, even with regard to elections for statewide office. RCW 29A.68.011 provides that "[a]ny . . . judge of the superior court in the proper county" may take appropriate action, and RCW 29A.68.120 provides for the possibility that an election may be "set aside by the judgment of the superior court." The election-contest statute, RCW 29A.68, does not define the "appropriate court" or the "proper county" in which an election contest may be brought. The appropriate court and the proper county are therefore to be determined by reference to the general jurisdiction and venue statutes. As explained below, venue in this Court is proper under those statutes.

II. ARGUMENT

A. Venue is Proper in Chelan County Under RCW 4.12.025.

In any action in which there is more than one defendant, venue is proper where any one of the defendants resides at the time of the commencement of the action. RCW 4.12.025 (the "Multiple-Defendant Venue Statute"). The Democratic Party concedes that this statute applies here. *See* Venue Motion at 5 n.3. Some counties, however, take the position that the venue statutes applicable to suits against counties or public officials, respectively, should apply instead. But the courts have held that the venue statutes must be read together, such that a suit against multiple counties or county officials can be brought where venue is proper as to any one of them. *See Cossel v. Skagit County*, 119 Wn.2d 434, 437 (1992) (*overruled on other grounds, Shoop v. Kittitas County*, 149 Wn.2d 29 (2003)); *Rabanco, Ltd. v. Weitzel*, 53 Wn. App. 540 (1989).

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Cossel held that despite RCW 36.01.050 (the "County Venue Statute"), "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***." 119 Wn.2d at 437 (emphasis added).[1] Similarly, *Rabanco* held that RCW 4.12.020 (the "Public-Official Venue Statute") must be read in conjunction with the County Venue Statute and that public officials therefore could be sued in an adjacent county, despite the provisions of the Public-Official Venue Statute.

The wisdom of these results is obvious, especially in an action like this one, in which two or more geographically distant counties or their officials are defendants.[2] If the rule were that venue in such a case is governed solely by RCW 4.12.020 and 36.01.050, then venue would not be available anywhere with respect to the entire case and all defendants.

B. The Superior Courts Are Appropriate Courts for Resolving Election Contests.

Notwithstanding its failure to present a valid legal argument as to why venue is improper in Chelan County, the Democratic Party asks the Court to dismiss this case "for improper venue" because the superior courts of Washington are not the "appropriate" courts to hear contests over elections for statewide office, which it contends can only be brought in the supreme court under its original jurisdiction. No authority whatever is cited for this proposition, and it is contrary to the express language of the contest statute, RCW 29A.68.

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[1] *Cossel* addressed the interplay between the County Venue Statute and RCW 4.12.020(3), which allows suit in a multi-defendant case in a county "where some one of the defendants resides," just as RCW 4.12.025 does.

[2] Such cases are not uncommon. *See, e.g., ATU Legislative Council of Washington State v. State*, 145 Wn.2d 544 (2002) (all counties named as defendants); *Seattle-King County Council of Camp Fire v. State Dept. of Revenue*, 105 Wn.2d 55 (1985) (King and Lewis Counties).

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1. The Election-Contest Statute Expressly Identifies the Superior Courts as Appropriate Courts in Which To Bring an Election Contest.

The election-contest statute expressly vests jurisdiction to correct election errors in "[a]ny justice of the supreme court, judge of the court of appeals, ***or judge of the superior court in the proper county***." RCW 29A.68.011 (emphasis added). It then provides that an elector may initiate an election contest by timely filing an affidavit in the "appropriate court." RCW 29A.68.030. The reference in RCW 29A.68.030 to the "appropriate court" can only reasonably be read as encompassing both the appellate courts and the superior courts empowered to remedy election contests in RCW 29A.68.011.[3] The statute therefore creates concurrent, rather than exclusive, original jurisdiction. *See Ledgerwood v. Lansdowne*, 120 Wn. App. 414, 420 (2004) ("When the legislature means exclusive original jurisdiction, it says exclusive original jurisdiction.")

2. The Fact That This Is a Contest of a Statewide Election Does Not Mean That Only the Supreme Court May Hear It in the First Instance.

Certainly the Legislature *might* have provided that gubernatorial election contests must be brought in the supreme court or in some other particular court. Equally plainly, it has *not* done so.

The election-contest statute recognizes that such contests often require fact-finding and supervision of discovery, for which the supreme court is ill-equipped. *See, e.g.,* RCW 29A.68.050 (authorizing issuance of subpoenas to witnesses and attachments to compel their attendance). As the Democratic Party itself acknowledges, the supreme court is sure to have the last word on this dispute, but after a hearing in this Court it can do so with the benefit of a fully-developed factual record. *See, e.g., Amren v. City of Kalama,* 131 Wn.2d 25, 38 (1997) ("it is not the province of this court to engage in fact finding"); *Berger Eng'g*

[3] Indeed, the Supreme Court has noted that superior courts would have jurisdiction to intervene in election contests "even without such [statutory] recognition by virtue of Const. art. 4, § 6, unless it were 'by law vested exclusively in some other court.'" *Foulkes v. Hays*, 85 Wn.2d 629, 632-33 (1975).

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Co. v. Hopkins, 54 Wn.2d 300, 308 (1959) (noting that the supreme court "is not a fact-finding branch of the judicial system of this state"); *Spring v. Dept. of Labor & Indus. of the State of Wash.*, 39 Wn. App. 751, 753 (1985) (remanding to the trial court "consistent with the supreme court's adherence to a reviewing, rather than a fact-finding role").

This Court, and any superior court, has full power to "hear and determine all matters legal and equitable in all proceedings known to the common law." *In re Guardianship of Hayes*, 93 Wn.2d 228, 232 (1980) (internal quotation marks omitted). Its "process shall extend to all parts of the state." Const. art. IV, § 6; *State ex rel Greenberger v. Superior Court*, 134 Wash. 400, 401 (1925). It has jurisdiction over all defendants and full power to grant whatever relief may appear appropriate when the facts are known.

The cases relied on by the Democratic Party do not suggest that this Court lacks power to act. All four cases cited involved mandamus proceedings filed in the supreme court in the first place. *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 266-67 (1975); *Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 53 (2003); *State ex rel. O'Connell v. Meyers*, 51 Wn.2d 454, 457 (1957); *State ex rel. Pac. Bridge Co. v. Wash. Toll Bridge Auth.*, 8 Wn.2d 337, 338 (1941). As with election contests, the supreme court has nonexclusive original jurisdiction (concurrent with the superior courts) to issue writs of mandamus. *City of Tacoma*, 85 Wn.2d at 268; *Wash. State Labor Council*, 149 Wn.2d at 54; *State ex rel. Pac. Bridge Co.*, 8 Wn.2d at 342. Thus, in each of the cases cited by the Democratic Party, the supreme court merely consented to exercise the concurrent jurisdiction it unquestionably had.

Moreover, in several of the cases the supreme court accepted the offer to exercise its jurisdiction only reluctantly. In one case, the Court recognized that "it is preferred that a party seek an injunction at the superior court level instead of filing an original action in the Supreme Court." *Wash. State Labor Council*, 149 Wn.2d at 55. In another, the Court acknowledged that the supreme court's "principal function is to exercise appellate or

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supervisory jurisdiction" and that they should assume original jurisdiction only in emergency situations "where there is no other adequate remedy." *State ex rel. Pac. Bridge Co.*, 8 Wn.2d at 341-42.

The suggestion by the Democratic Party that the Court should dismiss this case so that the supreme court can resolve legal issues within this Court's jurisdiction to decide, only to have the case possibly referred back to a superior court later for development of a factual record, reveals the Democratic Party's true purpose here: further delay. The Court should not allow additional delays and should deny the motion.

C. There Is No Basis for Transferring This Case to Another Court.

The Democratic Party finally contends that even if this Court has the power to hear and determine the case, as it has already begun to do, it should nevertheless transfer the case either to the Thurston County Superior Court or to the supreme court itself.

1. No Grounds Have Been Shown for a Transfer to Thurston County.

The Democratic Party points out that a court may transfer venue to another superior court if it finds that "the convenience of witnesses or the ends of justice would be forwarded by the change." RCW 4.12.030. The finding must be based, however, on a showing "by affidavit or other satisfactory proof" that the transfer would serve these ends. *Id.* The Democratic Party fails to show that the convenience of the witnesses or the ends of justice would be served by a change of venue to Thurston County Superior Court. Further, the Democratic Party ignores Petitioners' right to select the forum, within the limits imposed by the venue and jurisdiction statutes. *See, e.g., Baker v. Hilton*, 64 Wn.2d 964, 965 (1964) (choice of venue lies with plaintiff in the first instance); *Hatley v. Saberhagen Holdings, Inc.*, 118 Wn. App. 485, 489-90 (2003) (party seeking change of venue must present evidence that the statutory standards are met); *Unger v. Cauchon*, 118 Wn. App. 165, 171-172 (2003) (same). Plaintiffs have chosen Chelan County, and the

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Democratic Party has presented no evidence and no valid legal basis for upsetting that choice.

a. A transfer of venue to Thurston County would not further the convenience of the witnesses.

The convenience of the witnesses is primarily a matter of how far they will have to travel to the forum county and other, similar considerations. *See Hickey v. City of Bellingham*, 90 Wn. App. 711, 719 (1998); *Baker v. Hilton*, 64 Wn.2d 964, 966 (1964). To support a change of venue for the sake of convenience, "[t]he moving party should show through affidavits or other evidence, rather than by conclusory assertions, how the witnesses would be better accommodated by the requested change in venue." 1 WASH. PRACTICE § 2.17 (4th ed. 1997); s*ee also Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 579 (1978) (holding a trial court's refusal to grant a change in venue was proper when the moving party did not provide the court with substantial evidence that the witnesses were in fact inconvenienced). The Democratic Party offers no argument, let alone evidence, that a transfer to Thurston County would further the convenience of the witnesses.

The witnesses in this case are likely to be the various county auditors and other county officials and the Secretary of State. As for the county officials, they are located throughout Washington State; because Chelan County is located near the geographic center of the state, it is among the most convenient venues for them. And through Assistant Attorney General Jeff Even, the Secretary of State took the position at the January 20, 2005 hearing that Chelan County is the appropriate forum for resolving this matter.

The Democratic Party makes a vague gesture toward the issue of convenience by pointing out that the Thurston County Superior Court "is proximate to the Supreme Court." Venue Motion at 13. But there is no serious suggestion that the geographic proximity of those two courts would make the resolution of this matter more convenient for the witnesses.

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b. A transfer of venue to Thurston County would not further the ends of justice.

The Democratic Party offers no legitimate reason why transferring this matter to Thurston County would further the ends of justice. The Democratic Party's only "justice" argument appears to be that superior courts other than Thurston County Superior Court are unsuited to decide matters of statewide importance. In this vein, they contend that "the superior court in Thurston county . . . is the Court in which suits involving governmental actions commonly are brought," suggesting that that court has expertise in this area and is therefore more "appropriate" as superior courts go. Venue Motion at 13. Granting a motion to transfer venue on this basis, however, would be an abuse of discretion. *See Hatley v. Saberhagen Holdings, Inc.*, 118 Wn. App. 485, 489-90 (2003) (reversing the trial court's decision to transfer venue based on the "perceived expertise of a given court," holding that this "is not a proper basis for a venue choice.").

2. There Is No Basis for Transferring the Case to the Supreme Court.

Alternatively, the Democratic Party suggests that the case be transferred to the supreme court. There is no procedure for such a transfer in the RCW or in the Civil Rules, and the Democratic Party has cited none. Rather, when this Court's jurisdiction is properly invoked, it is the Court's duty to exercise it. *See, e.g., In re Guardianship of Hayes,* 93 Wn.2d 228, 234 (1980). It is not for this Court to determine how to manage the supreme court's docket.[4] The suggestion that this Court may actually ***set*** the supreme court's docket is even more far-fetched. There is no mechanism for a superior court to transfer a civil case to the supreme court.[5]

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[4] For this reason, the Democratic Party's reliance on CR 42 and *American Mobile Homes of Washington., Inc. v. Seattle-First National Bank* 115 Wn.2d 307 (1990), regarding consolidation, is wholly misplaced. Venue Motion at 10. Both authorities deal exclusively with consolidation by the superior courts of cases pending before the superior courts.

[5] Both RCW 4.12.030 and *State ex rel. Merritt v. Superior Court*, 147 Wash. 690 (1928), on which the Democratic Party relies, deal with the trial court's ability to change the place of trial—i.e., from one trial court to another, not from a trial court to the Supreme Court.

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The election-contest statute unambiguously contemplates that election contests will present factual issues and will be resolved based on the evidence. *See*, *e.g.*, RCW 29A.68.050 (providing that "the clerk shall issue subpoenas for witnesses...and the superior court shall have full power to issue attachments to compel the attendance of witnesses"); *id.* at § -.100 (providing that no testimony may be received unless the contesting party provides proper notice of certain facts that it "intends to prove at the trial"). Petitioners' allegations concern numerous factual issues, as reflected in their discovery requests and summarized in their motion for expedited discovery.[6] Indeed, the Democratic Party does not dispute that this election contest presents issues of fact. Such issues are appropriately heard and determined by the superior courts. Accordingly, this Court already has ordered that discovery should proceed. A dismissal or transfer will only delay that process and delay the development of a record on which to base a decision.

Nor is the fact that there are a few other election challenges pending before the supreme court a reason to deny these Petitioners their day in this Court. The petitions presently pending before the supreme court were filed *pro se*, and none of the petitioners appears to be seeking discovery. *See* Rava Decl. Exs. A, C, and G. The action in Kitsap County Superior Court also was filed pro se, *id.* Ex. E, and the petitioner in that action recently has moved for voluntary dismissal of his case. Thus, this is the only case in which

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In *Toliver v. Olsen*, 109 Wn.2d 607 (1987), there was a Criminal Rule (CrR 7.8(c)(2)) that expressly allowed the superior court to transfer a petition for a writ of habeas corpus to the Court of Appeals for consideration as a personal restraint petition. There is no such rule that would apply in this case.

[6] Among other things, the discovery requests seek information regarding the process in each county of reconciling the number of votes cast with the number of individual voters credited with voting; whether or to what extent provisional and absentee ballots were counted before being verified and whether they can be identified after they were counted; whether or to what extent ballots submitted by felons, dead persons, or those who voted more than once were counted; the number of unverified ballots counted and the manner in which that number was calculated; the manner of "enhancement" of ballots by election workers; the manner of handling overvotes and undervotes; the failure to recanvass ballots of select voters whose ballots had been improperly rejected while recanvassing others; and the security of ballots during the initial count and two recounts.

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the necessary full factual record and determinations are likely to be made. Once this case goes up on appeal, as the Democratic Party points out is "certain," it will bring with it the factual record needed to properly resolve not only this election contest but perhaps the others as well.

Finally, the Democratic Party suggests that transferring the case to the supreme court would promote efficiency—notwithstanding this Court's unique competence to determine the factual issues presented in the Election Contest Petition—because the supreme court can always "refer questions of fact to a master or superior court. RAP 16.2(d)." Venue Motion at 11. In other words, they claim it would be efficient for this Court to ***dismiss*** a case that it has express authority to hear—a case involving factual issues where discovery is underway—so that Petitioners can ***re-file*** it with the supreme court and the supreme court can, if it chooses, ***consolidate*** it with other cases similarly devoid of a factual record, resolve legal issues that this Court is perfectly competent to resolve in the first instance, and then ***refer the matter back*** to a superior court for development of the factual record that is already being developed in this Court and will be completed in less time than it will take for the supreme court to refer the matter back. This is anything but efficient.

III. CONCLUSION

Dismissing or transferring this case would frustrate rather than further the prompt and efficient resolution of this election contest. That appears to be the Democratic Party's goal. Its tactics should not be sanctioned. The Court should deny the venue motion in its various aspects and proceed promptly to a determination of the merits of this historic case.

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DATED this 26th day of January, 2005.

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