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CIRCUIT COURT
DANE COUNTY, WI
2022CV001178

BY THE COURT:

DATE SIGNED: May 15, 2023

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 8	DANE COUNTY

KHARY PENEBAKER, et al.,

Plaintiffs,

vs. Case No. 22-CV-1178

ANDREW HITT, et al.,

Defendants.

DECISION AND ORDER DENYING DEFENDANTS' MOTION TO CHANGE VENUE

INTRODUCTION

In the United States Electoral College, each state must choose electors to vote for the President. U.S. CONST. art. II, § 1. In 2020, Wisconsin chose its electors in a statewide election. Wis. Stat. § 5.10. Khary Penebaker alleges that attorneys James Troupis and Kenneth Chesebro, along with ten others, created a public nuisance when they met in the Wisconsin State Capitol and pretended to be Wisconsin's 2020 Presidential Electors.[1]

[1] For brevity, I refer to the plaintiffs, together, as Penebaker. I refer to the individual parties, when necessary, by their

The Defendants now seek change of venue because they interpret a specific subsection of Wisconsin's venue statute, Wis. Stat. § 801.50(5t), to require scattering Penebaker's claims across ten venues in three states. Specifically, the Defendants seek these changes in venue:

1. Darryl Carlson to Sheboygan County,
2. Carol Ruh to Brown County,
3. Kathy Kiernan to Washington County,
4. Carol Brunner to some unspecific place in Iowa,
5. Andrew Hitt to Outagamie County,
6. Bill Feehan to LaCrosse County,
7. Mary Buestrin to Milwaukee County,
8. Robert Spindell to Milwaukee County,
9. Pam Travis to Walworth County (or maybe Clark County), and,
10. Kenneth Chesebro to somewhere else.[2]

Wisconsin law does not allow the problematic consequences of ten judges simultaneously litigating the same claims in ten different courts, or ten juries—some 120 jurors—hearing the same claims and rendering ten different verdicts.

I deny the Defendants' motion because the statute on which they rely plainly applies only to "a civil action to impose a forfeiture …" Wis. Stat. § 801.50(5t). Penebaker seeks no forfeitures, so § 801.50(5t) cannot apply. Or, even if § 801.50(5t) could somehow apply, venue would still be proper in Dane County as to at least one Defendant. This also disposes of the venue question because I cannot ignore Wisconsin's common law rule that "if venue is proper as to any one defendant, then the action is properly venued …" *Stelling by Ryberg v. Middlesex Ins. Co.,* 2023 WI App 10, ¶3, 406 Wis. 2d 197, 986 N.W.2d 354 (citing *State ex rel. Boyd v. Aarons,* 239 Wis. 643, 646, 2 N.W.2d 221 (1942).).

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first and last names.

[2] Kenneth Chesebro orally joined the other defendants' written motion, but has filed no argument or evidence explaining why he should be entitled to a change of venue or where that venue should be. Accordingly, his request is denied for the additional reason that he failed to file a written motion and failed to submit any argument in support of his request.

Accordingly, I deny the Defendants' motion to change venue.

I. LEGAL STANDARD

Wisconsin's venue statute, Wis. Stat. § 801.50, generally provides that venue shall be:

> (a) In the county where the claim arose;
>
> (b) In the county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated;
>
> (c) In the county where a defendant resides or does substantial business; or
>
> (d) If the provisions under par. (a) to (c) do not apply, then venue shall be in any county designated by the plaintiff.

Wis. Stat. § 801.50(2). In addition to these general provisions, Wis. Stat. § 801.50 contains numerous specialized subsections. Relevant here is subsection (5t), which says that venue in certain forfeiture actions shall be "in the circuit court for the county where the defendant resides." Wis. Stat. § 801.50(5t).[3]

There are two main reasons to seek a change of venue. First, a party may seek change of venue "on the grounds of noncompliance with s. 801.50 …" Wis. Stat. § 801.51. If an action has been venued improperly under § 801.50, then change of venue under § 801.51 is mandatory. *Salachna v. Edgebrook Radiology,* 2021 WI App 76, ¶14, 399 Wis. 2d 759, 966 N.W.2d 923. Second, a party may seek to change venue "in the interest of justice or for the convenience of the parties or witnesses …" Wis. Stat. § 801.52. However, this discretionary change of venue applies

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[3] Wis. Stat. § 801.50(5t) reads, in full:

> Except as otherwise provided in ss. 801.52 and 971.223 (1) and (2), venue in a civil action to impose a forfeiture upon a resident of this state for a violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, or for a violation of any other law arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, shall be in circuit court for the county where the defendant resides. For purposes of this subsection, a person other than a natural person resides within a county if the person's principal place of operation is located within that county. This subsection does not affect which prosecutor has responsibility under s. 978.05 (2) to prosecute civil actions arising from violations under s. 971.223 (1).

only "[i]f venue is proper …" in the first instance. *Salachna,* 2021 WI App 76, ¶20. Under either Wis. Stat. §§ 801.51 or 801.52, a motion to change venue "shall be determined on the basis of proofs submitted by the parties unless the court orders a hearing …" Wis. Stat. § 801.53.

II. DISCUSSION

A. Venue is proper in Dane County regardless of whether Wis. Stat. § 801.50(5t) applies because at least one defendant resides in Dane County.

"[T]he basic function of venue statutes is to set a fair and convenient location for trial." *Voit v. Madison Newspapers, Inc.,* 116 Wis. 2d 217, 224, 341 N.W.2d 693 (1984). To determine a fair and convenient trial location, I begin with Wisconsin's general venue statute, Wis. Stat. § 801.50. It sets forth three basic rules: "except as otherwise provided by statute," venue shall be (a) in the county where the claim arose, or (b) where the property is situated or (c) in the county where a defendant resides. Wis. Stat. § 801.50(2). Under these general rules, venue is proper here because Penebaker's claim arose in Dane County. Additionally, three Defendants—James Troupis, Edward Grabbins, and Kenneth Chesebro—either appear to reside in Dane County or provide no proof from which to determine some other residence. *See* Wis. Stat. § 801.53. So, unless "otherwise provided by statute," venue would be proper in Dane County under Wis. Stat. §§ 801.50(2)(a) and/or (c).

I turn, next, to Wis. Stat. § 801.50(5t), the venue subsection that the Defendants now say applies to this case. In relevant part, subsection (5t) provides that: "venue in … any matter that involves elections … shall be in circuit court [sic] for the county where the defendant resides…" Assuming, for now, that subsection (5t) applies in this case, venue in Dane County would be proper for James Troupis, Edward Grabins, and Kenneth Chesebro. This is because, once again, these Defendants either appear to reside in Dane County or because they provide no evidence that they

reside in some other place. *See* dkt. 60-69 (the other Defendants provide evidence about their respective residences, but Troupis, Grabins, and Chesebro do not). So, assuming subsection (5t) applies, venue is proper in Dane County for at least these three Defendants. This is important because "in an action against multiple defendants, if venue is proper as to any one defendant, then the action is properly venued, and any other defendant is not entitled to a change in venue as a matter of right." *Boyd,* 239 Wis. at 646; *Stelling,* 2023 WI App 10, ¶3 (same).

In sum, because venue in Dane County is proper as to James Troupis, Edward Grabins, and Kenneth Chesebro, venue must also be proper as to the other Defendants, too.

B. Venue is proper in Dane County because Wis. Stat. § 801.50(5t) plainly applies only to "to impose a forfeiture upon a resident of this state."

The Defendants do not discuss *Boyd* and *Stelling* and whether they resolve the venue question. But assuming those cases did not exist, the Defendants next argue that subsection (5t) commands a separate venue for each individual who does not reside in Dane County. According to the Defendants' interpretation of subsection (5t), venue is proper in an unspecified place in Iowa, plus Sheboygan, Brown, Washington, Outagamie, LaCrosse, Milwaukee, Walworth, and Dane Counties.

I reject this interpretation of Wis. Stat. § 801.50(5t) because the plain language of that statute compels no such result. "[W]e have repeatedly held that statutory language begins with the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.,* 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation and quotation marks omitted). "If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id*. Furthermore, "[c]ontext is important to meaning. So, too, is the structure of the statute in which the operative language appears." *Id.* ¶46. For these reasons, "statutory language is interpreted in the context in which it is used; not in isolation but as part of

the whole; in relation to the language of surrounding or closely-related statutes …" *Id.*

Turning to the language of the statute, subsection (5t) plainly applies only to "a resident of this state." A "resident" is not defined in Wis. Stat. § 801.50, but its ordinary meaning is "a person who lives or has their home in a place."[4] Using this ordinary definition, someone who neither lives nor has their home in Wisconsin cannot be "a resident of this state." And, to determine whether any defendant lives or has a home in Wisconsin, I must rely on the evidence the Defendants have or have not supplied. Wis. Stat. § 801.53. So, based on this record, subsection (5t) cannot possibly apply to Kenneth Chesebro, James Troupis, and Edward Grabins (because each provides no evidence about where he lives) and subsection (5t) also cannot apply to Carol Brunner (because she testifies that she resides in Iowa. Carol Brunner Aff. ¶2, dkt. 66). To repeat: even if Wis. Stat. § 801.50(5t) might apply to the other defendants, because venue is proper in Dane County as to at least one defendant, then it is also proper as to the rest. *Boyd,* 239 Wis. at 646; *Stelling,* 2023 WI App 10, ¶3.

There is yet another problem with the Defendants' application of § 801.50(5t). The statute plainly applies to three discrete categories of actions "to impose a forfeiture." A diagram of subsection (5t) illustrates these categories of forfeitures. Here, subdivided into those categories, is the relevant text of the statute:

> Venue in a civil action to impose a forfeiture upon a resident of this state
>
> - for a violation of chs. 5 to 12, subch III of ch. 13, or subch III of ch.; 19, or
>
> - for a violation of any other law arising from or in relation to the official functions of the subject of the investigation, or

[4] *Resident,* www.dictionary.cambridge.org/us/dictionary/english/resident, last visited May 10, 2023.

> - for any matter that involves elections, ethics, or lobbying regulations under chs. 5 to 12, subch III of ch. 13, or subch III of ch.; 19,
>
> shall be in circuit court for the county where the defendant resides.

Wis. Stat. § 801.50(5t) (formatting added).

The Defendants read this statute a different way. Initially, the Defendants outlined the same statutory text as creating "three different subject matter scenarios," but in doing so, the Defendants simply omitted the inconvenient opening clause that limits each of those scenarios to "a civil action to impose a forfeiture upon a resident of this state." Defendants Br., dkt. 60:9-10. Then in their reply brief, the Defendants refined their argument by pointing to an isolated sub-sub-section of a statute in chapter 19, which they say would be surplusage if § 801.50(5t) applied only to an "action to impose a forfeiture." In the Defendants' words:

> To limit the third clause to forfeitures, as Plaintiffs propose, would instead render meaningless the "other legal and equitable relief" expressly authorized in § 19.59(8)(b).

Defendants Reply Br., dkt. 119:6.

Assuming the Defendants accurately characterize this sub-sub-section of ch. 19 as superfluous, I do not agree that the plain meaning of § 801.50(5t) can so lightly be set aside. The categories of actions described in § 801.50(5t) span the better part of nine chapters of the Wisconsin statutes. Within those nine chapters, the fact that one sub-sub-section of one statute might be surplusage says almost nothing about the legislature's intent—if anything, it is remarkable that so much statutory text can be read consistently with § 801.50(5t). But in any event, "sometimes the most reasonable reading of a statute, one that gives it the legislatively intended effect, is one that renders some language in the statute surplusage." *State v. Mason,* 2018 WI App 57, ¶26, 384 Wis. 2d 111, 918 N.W.2d 78; *See Milwaukee Dist. Council 48 v. Milwaukee Cnty.,*

2019 WI 24, ¶24, 385 Wis. 2d 748, 924 N.W.2d 153 (also tolerating surplusage). Here, even assuming that a plain meaning analysis of § 801.50(5t) creates surplusage, I would not set aside that plain meaning.

To summarize, § 801.50(5t) creates a special venue rule only for three categories of civil actions to impose a forfeiture. The first category includes forfeitures for violations of chs. 5 to 12, plus parts of chs. 13 and 19. The second category broadens that scope to include forfeitures for violations of any other law arising from, or in relation to, the official functions of the subject of the investigation. The third category expands further still because it considers forfeitures for any "regulations under" chs. 5 to 12, subch III of ch. 13, or subch III of ch.; 19. But, because the Amended Complaint does not seek any forfeitures, none of these categories may apply.

ORDER

For the reasons stated,

IT IS ORDERED THAT Darryl Carlson, Carol Ruh, Kathy Kiernan, Carol Brunner, Andrew Hitt, Bill Feehan, Mary Buestrin, Robert Spindell, Pam Travis, and Kenneth Chesebro's motion to change venue is denied.

This is NOT a final order for purposes of appeal. Wis. Stat. § 808.03(1).