NO. 45117-4-II

COURT OF APPEALS, DIVISION OF THE STATE OF WASHINGTON

DAVID HYYTINEN,

Appellant,

v.

CITY OF BREMERTON and the STATE OF WASHINGTON

Respondents.

BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

This is an appeal from two orders granting summary judgment to respondent State of Washington, Washington State Patrol. Following a routine Vehicle Identification Number (VIN) inspection on July 5, 2011, the Patrol seized a Cadillac Escalade that appellant David Hyytinen had purchased from respondent City of Bremerton. CP at 402-05, 407, 415-29. The Patrol informed Hyytinen that day that the Escalade was a stolen vehicle and it would not be returned to him. CP at 404-05, 407, 416, 426. It is undisputed that neither Hyytinen nor his attorneys ever requested a hearing to establish his ownership of or right to possess the Escalade. CP at 416.

After Hyytinen sued the Patrol for an alleged due process violation, the Patrol successfully moved for summary judgment. Following that motion, Hyytinen claimed that he had also sued for negligence. The Patrol successfully moved for summary judgment on that purported claim, too.

This appeal follows.[1]

[1] Respondent City of Bremerton also successfully moved for summary judgment on statute of limitations and other grounds. Hyytinen is also appealing that decision.

II. COUNTER-STATEMENT OF ISSUES

1. Whether Hyytinen was denied due process where he received actual notice of the seizure of the Escalade and had a statutory remedy available to him which he chose not to exercise.

2. Whether Hyytinen states a claim in negligence where the Patrol seized a stolen vehicle under authority of a statute and there is no evidence that the Patrol's failure to give Hyytinen written notice of the seizure proximately caused him any damages.

3. Whether the trial court abused its discretion by denying Hyytinen's motion to add a state law due process claim where Hyytinen failed to show there was any difference between a state law due process claim and the dismissed federal due process claim, and where no such theory exists in the State of Washington, as a matter of law.

III. COUNTER-STATEMENT OF THE CASE

A. Factual History

1. Notice to Hyytinen of the Escalade's Seizure.

The Bremerton Police Department seized a Cadillac Escalade during drug enforcement activity. CP at 387, 436-64, 713-14, 726-27; *see* RCW 69.50.505 (seizure and forfeiture of property used in violation of Uniform Controlled Substances Act; no property right in seized property). Hyytinen later purchased the Escalade from the City of Bremerton at an

auction. CP at 106-13, 387, 730. Prior to selling the Escalade, the City apparently failed to recognize that the vehicle had been stolen. CP at 387.

On July 5, 2011, Hyytinen brought the Escalade to the Patrol's VIN program for inspection. CP at 403-04, 420-26. The VIN program is a part of the Patrol's Criminal Investigation Division. CP at 415-17. When a VIN officer cannot determine the vehicle's VIN or believes a vehicle was stolen, the VIN Identification Specialists contact CID detectives. CP at 415-17.

During the July 5 inspection, VIN Identification Specialist, Lance Fry, contacted CID detective, Ian Morhous, regarding the Escalade's VIN. CP at 402-05, 407, 415-17, 420-26. Morhous confirmed that the Escalade had been stolen from a dealership located in Ontario, Canada. CP at 416. He notified Hyytinen in person that day that the stolen Escalade would not be returned to him. CP at 403-05, 407, 415-17, 420-26. Specialist Fry also informed Hyytinen that the vehicle was being seized. CP at 426.

Three weeks later, on July 27, 2011, Morhous received a letter from Hyytinen's current attorneys. CP at 416, 421, 466-67. Though the attorneys stated that they represented Hyytinen regarding the Patrol's seizure of the Escalade, neither they nor Hyytinen requested a hearing to establish his ownership of or right to possess the stolen Escalade. CP at 416; *see* RCW 46.12.735 ("any person may submit a written request for a hearing to

establish a claim of ownership or right to lawful possession of the vehicle . . . seized pursuant to this section").

2. Notice to Hyytinen of the Escalade's Return to Owner.

On August 5, 2011, nine days after Hyytinen's attorneys appeared, Morhous informed Hyytinen that the insurance company for the dealership from which the Escalade was stolen wanted it returned to recoup money paid for the vehicle. CP at 416, 422. Two weeks later, on August 17, 2011, Hyytinen informed Morhous that he did not need anything from the Escalade before it was returned. CP at 416, 422. The record does not reflect the date on which the Escalade was returned to its owner in Canada.

B. Procedural History

Hyytinen sued the City of Bremerton. CP at 1-9. He later added the Patrol to that lawsuit in a Third Amended Complaint. CP at 386-91 (Third Amended Complaint); *Cf.* CP at 877-82 (Second Amended Complaint).

Hyytinen alleges that the Patrol violated his due process rights in the July 5, 2011 seizure of the Escalade. CP at 390 (¶¶ 3.24, 3.25), 884-88 (Motion to Amend Complaint), 900-02 (Tort Claim), 903-05 (September 12, 2012 letter to Risk Management). He never alleged a claim under 42 U.S.C. § 1983. *See e.g.,* CP at 386-91. He also never alleged a cause of action in negligence or stated facts establishing negligence. CP at 386-91.

The Patrol moved for summary judgment to dismiss the due process claim, which the court granted. CP at 374-467, 788-90, 852-54. When the Patrol sought entry of judgment on the dismissal, Hyytinen claimed he had also sued the Patrol for negligence. CP at 791-854. The Patrol therefore brought a second Motion for Summary Judgment to dismiss the purported negligence claim, which the court also granted. CP at 855-921, 1063-69.

IV. SUMMARY OF ARGUMENT

Hyytinen had actual notice of who seized the Escalade and why on the day the seizure occurred. Within three weeks of that seizure, his attorneys also had actual notice of who seized the Escalade and why. Hyytinen argues the Patrol violated his constitutional due process rights because it did not provide him written notice of the seizure, pursuant to RCW 46.12.725. As a matter of law, actual notice of a seizure is constitutionally sufficient notice of a remedial procedure that is publicly available by statute. *City of West Covina v. Perkins*, 525 U.S. 234, 241, 119 S. Ct. 678, 142 L. Ed. 2d 636 (1999); *McKinney v. Chidley*, 87 Fed. Appx. 615, 617 (9th Cir. 2003); *Revell v. Port Auth. of N.Y. & N.J.*, 598 F.3d 128, 139 (3rd Cir. 2010); *Mora v. The City of Gaithersburg*, 519 F.3d 216, 230 (4th Cir. 2008). The mere existence of a remedial procedure precludes such a claim. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194, 105 S. Ct. 3108, 87 L.

Ed. 2d 126 (1985); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984). Hyytinen does not state facts supporting a constitutional claim for violation of due process and he failed to allege 42 U.S.C. § 1983, the legal vehicle for bringing such claims. CP at 386-91.

Hyytinen also never pleaded a negligence theory against the Patrol. CP at 386-91, 390, 884-88, 900-05. He simply recast as negligence his constitutional claim for violation of due process. But even if Hyytinen properly alleged negligence, he fails to state facts supporting that theory.

As a matter of law, an alleged wrongful seizure of property does not state a cause of action in negligence. A seizure is a conversion, which is an intentional tort. *Western Bond & Mortg. Co. v. Chester*, 145 Wash. 81, 259 P. 13 (1927) (seizure is a conversion); *King v. Rice*, 146 Wn. App. 662, 191 P.3d 946 (2008) (conversion is an intentional tort). Moreover, the Patrol does not owe Hyytinen a duty to refrain from seizing stolen vehicles. To the contrary, the legislature has expressly directed the Patrol to make such seizures under the authority of RCW 46.12.725.

Hyytinen also does not supply evidence to establish the Patrol's failure to provide written notice of the seizure proximately caused him any damages. At worst, Hyytinen can prove that, though he was represented by counsel, he did not receive written notice of his right to a hearing. But this does not prove that the Patrol wrongfully deprived him the Escalade which,

in fact, he cannot prove. CP at 416; *see Kutner Buick, Inc. v. Strelecki*, 267 A.2d 549, (N.J. Sup. Ct. 1970) (*bona fide* purchaser of personal property taken wrongfully, as by trespass or theft, does not acquire a title good against the true owner). This court should affirm the trial court.

V. ARGUMENT

A. The Patrol Did Not Violate Hyytinen's Due Process Rights

Since *City of West Covina, supra*, courts have held that where a claimant fails to take advantage of a State's post-deprivation procedures, he cannot then complain of the State's subsequent disposition of the seized property. *See City of Dallas v. VSC, LLC*, 347 S.W.3d 231 (Tex. 2011) (action by operator of storage facility for non-consensually towed vehicles against city alleging constitutional taking based on city's seizure and subsequent disposition of vehicles without notice to operator; no obligation to provide notice of statutory process). Hyytinen had actual notice that the Patrol seized the Escalade as a stolen vehicle and that it would not be returned to him. Despite this actual knowledge, neither he nor his attorneys invoked the statutory recourse provided by the Legislature. *See* RCW 46.12.735.

As a matter of law, actual notice of a seizure is constitutionally sufficient notice of a remedial procedure when that procedure is easily discoverable. *City of West Covina,* 525 U.S. at 241; *Revell*, 598 F.3d at 139

(affirming summary judgment against the claimant because "he did not take advantage of state procedures available to him for the return of his property"); *Mora*, 519 F.3d at 230 ("Mora has had, and continues to have, notice and an opportunity to be heard in Maryland, and he cannot plausibly claim that Maryland's procedures are unfair when he has not tried to avail himself of them."); *McKinney*, 87 Fed. Appx. at 617 (memo. op.) (affirming summary judgment against claimant because he admitted that he did not follow State procedures for recovering property). Where the Legislature creates a statutory procedure, recourse to a constitutional suit may only occur where the procedure proves inadequate. *Williamson Cnty. Reg'l Planning Comm'n*, 473 U.S. at 194; *Ruckelshaus*, 467 U.S. at 986 (holding that a statutory procedure that provides just compensation "nullif[ies] any claim against the Government for a taking").

The facts here mirror those in *West Covina*. The Patrol legally seized a stolen Escalade and Hyytinen was aware of the fact of and reason for that seizure when it occurred. The Legislature provides a statutory remedy for such seizures that was easily discoverable from public sources, particularly where, as here, the aggrieved party is represented by legal counsel. Having given constitutionally sufficient notice of the seizure, the Patrol was under no obligation to invite Hyytinen to initiate a hearing, either verbally or in writing. *See City of Dallas*, 347 S.W.3d at 231.

Hyytinen had clear due process available to him, which he and his attorneys ignored. As a matter of law, his constitutional claim fails.

B. Hyytinen Does Not State a Cognizable Constitutional Claim

Even if Hyytinen supplied facts sufficient to support a constitutional claim for violation of due process, he fails to allege a legal vehicle by which such a claim could be vindicated. 42 U.S.C. § 1983 is the enforcement mechanism for addressing the deprivation of federally-protected rights committed by persons acting under color of state law.

Even if Hyytinen had alleged a § 1983 claim, however, his due process claim would fail. Hyytinen sued the "State of Washington," which is not a "person" subject to suit under § 1983. *See Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) (a public entity cannot be sued under § 1983); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); *Pittman v. Oregon Emp't Dept.*, 509 F.3d 1065, 1072 (9th Cir. 2007); *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 4 P.3d 808 (2000); *Hontz v. State*, 105 Wn.2d 302, 309, 714 P.2d 1176 (1986).

C. Hyytinen Did Not Allege Facts Proving Negligence

Hyytinen's argument that he alleged facts supporting a negligence theory against the Patrol is undermined by his tort claim, his attorneys' letter to Risk Management, his Second Amended Complaint, his Motion

to Amend Complaint to Join the State of Washington, his Third Amended Complaint, and the facts in the record. CP at 900-05, 877-95, 386-91. Hyytinen relies upon precisely the same negligence facts in his Third Amended Complaint as he relied upon in his Second Amended Complaint, which focused on the City of Bremerton alone. *Cf.* CP at 386-92 and 877-82, ¶¶ 3.18-3.20. The only new allegation in Hyytinen's Third Amended Complaint was a violation of due process. CP at 390.

When Hyytinen moved to amend his complaint against the City to add the Patrol as a defendant, he informed the trial court of the following:

> The Washington State Patrol did not provide (Hyytinen) with notice or a hearing regarding its intent to seize the vehicle . . . the Defendants' conduct, including the WSP's conduct, amounts to an unconstitutional taking of (Hyytinen's) property . . . .

CP at 885. These facts do not state a cause of action in negligence.

Moreover, the negligence allegations in both the Second Amended Complaint and the Third Amended Complaint are directed toward the conduct of the City of Bremerton alone. In both Complaints, Hyytinen claims that the "defendants" (sic) had a duty to comply with a notice requirement under "RCW 69.50.050" (3) (sic),[2] and that the "defendants" (sic) breached a duty to "verify the VIN numbers on the

[2] Hyytinen likely intended to reference RCW 69.50.505, which governs the seizure of property associated with the acquisition, possession, or distribution of controlled substances under the Uniform Controlled Substances Act, chapter 69.50 RCW.

Cadillac that was sold to (Hyytinen)." CP at 389 (¶¶ 3.18-3.20). But the Patrol was not involved in either the original seizure of the Escalade for drug activity under RCW 69.50.505 or the City's sale of the Escalade at auction. The negligence facts Hyytinen alleges do not apply to the Patrol.

The Patrol seized the Escalade on July 5, 2011 long after the Bremerton Police Department seized the Escalade for drug activity and long after the City sold the Escalade to Hyytinen. The Patrol's seizure was made pursuant to RCW 46.12.725,[3] not RCW 69.50.505.

RCW 4.92.100 requires that a person claiming tortious actions against the state file a claim that "at a minimum requires . . . [a] description of the conduct and the circumstances that brought about the injury or damage." RCW 4.92.100 (1)(a). Hyytinen's Tort Claim and his attorneys' letter to Risk Management only identify a due process claim. CP at 900-05.

> The Washington State Patrol did not provide (Hyytinen) with notice or a hearing regarding its intent to seize the vehicle . . . [b]y seizing the vehicle without adequate notice and/or a hearing, the State of Washington violated (Hyytinen's) due process rights in violation of (his) basic constitutional rights to life, liberty and property pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution.

CP at 904. This states a constitutional violation, not negligence.

[3] RCW 46.12.725 permits the Patrol to seize vehicles that are reported stolen or where the VIN has been removed or altered.

Our Supreme Court has held that "[w]here a given set of facts gives rise" to a particular cause of action, "it cannot be recharacterized as a [different] cause of action for statute of limitations purposes." *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986); *see also Seely v. Gilbert*, 16 Wn.2d 611, 615, 134 P.2d 710 (1943). Other courts have rejected similar attempts to recharacterize claims. *Snow-Erlin v. United States*, 470 F.3d 804, 808-809 (9th Cir. 2006) (holding false imprisonment is not negligence); *Cline v. City of Seattle*, No. C06-1369MJP, 2007 WL 2671019 (W.D. Wash. Sept. 7, 2007) (same); *Kinegak v. State, Dep't of Corr.*, 129 P.3d 887, 888 (Alaska 2006) (holding that prisoner could not overcome state's immunity from false imprisonment claim by pleading department of corrections had "negligently failed to correctly compute [respondent's] release date"). The same principle applies here. Hyytinen cannot re-characterize as negligence a due process claim arising out of an alleged wrongful seizure. A wrongful seizure of property is a conversion, which is an intentional tort.

To the extent Hyytinen argues that RCW 46.12.725 creates an implied right of action, he misapplies that theory. The Patrol acknowledges that, where appropriate, a cause of action may be implied from a statutory provision when the legislature creates a right or obligation without providing a corresponding remedy. *See Bennett v. Hardy*, 113 Wn.2d

912, 919, 784 P.2d 1258 (1990) (citing *McNeal v. Allen,* 95 Wn.2d 265, 274, 621 P.2d 1285 (1980). Here, however, Hyytinen appears to argue an implied right of action in the remedial statute the legislature provided.

Hyytinen also cannot establish that the Patrol's failure to provide him with written notice of the seizure--of which Hyytinen had actual, personal knowledge--proximately caused any damages to him. At worst, the Patrol failed to notify Hyytinen in writing of a hearing at which he could attempt to prove ownership of a vehicle he did not lawfully own.

D. No Abuse of Discretion in Denying Amendment

At summary judgment, Hyytinen moved to "clarify" that he had, in fact, alleged a negligence theory and to add a new claim for violation of the Washington State Constitution. CP at 922-30. The Patrol opposed that motion because Hyytinen merely sought to re-characterize his dismissed due process claim as a negligence theory. CP at 978-80. The trial court properly denied Hyytinen's motion. CP at 984-85.

The trial court's decision was within the court's sound discretion. *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 373-374, 112 P.3d 522 (2005). When reviewing a trial court's decision to grant or deny leave to amend, the reviewing court applies a manifest abuse of discretion test. *Herron v. Tribune Publ'g Co., Inc.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987) (citing *Del Guzzi Constr. Co. v. Global Northwest, Ltd.*, 105

Wn.2d 878, 888, 719 P.2d 120 (1986)). Here, the trial court did not abuse its discretion because Hyytinen's federal due process claim had already been dismissed and he provided no evidence that the State constitution offered different protections.

Moreover, Washington courts do not recognize a tort cause of action under the State constitution. *Janaszak v. State*, 173 Wn. App. 703, 735, 297 P.3d 723 (2013) (affirming summary judgment in allegation that State negligently investigated a dental license); *Blinka v. Wash. State Bar Ass'n*, 109 Wn. App. 575, 591, 36 P.3d 1094 (2001).

E. Hyytinen Is Not Entitled To Attorney Fees

The Patrol did not seize the Escalade under RCW 69.50.505, the statute under which Hyytinen seeks attorney fees. Hyytinen fails to cite a legal basis to support his fee request and his request should be denied.

VI. CONCLUSION

The Patrol respectfully requests that this court affirm the trial court's orders dismissing Hyytinen's claims against the Patrol.

RESPECTFULLY SUBMITTED this 7th day of January, 2014.

ROBERT W. FERGUSON
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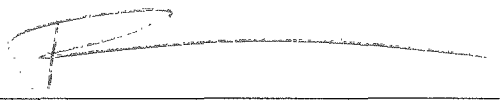

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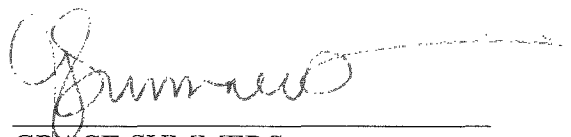

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