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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

32836-8
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JERI MAINER,

Appellant,

v.

CITY OF SPOKANE,

Respondent.

APPEAL FROM CR 12(b)(6) DISMISSAL
BY THE SUPERIOR COURT
OF SPOKANE COUNTY

APPELLANT'S BRIEF

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I. INTRODUCTION

During the November 1, 2008 – August 3, 2011, timeframe the City of Spokane issued hundreds of photo red¹ traffic tickets. The Spokane County Superior Court found - - on June 17, 2011 - - that the City's issuance of those photo red tickets violated the law insofar as the law required the officer issuing the ticket to certify such issuance in Washington whereas, under the photo red scheme, the tickets were electronically certified in Arizona. On June 13, 2014, Ms. Mainer sued the City for unjust enrichment seeking damages for herself, and a putative class, who received photo red tickets between November 1, 2008 and June 20, 2011.

The issue before this Court is whether the Spokane County Superior Court properly dismissed Ms. Mainer's putative class action lawsuit under the auspices of CR 12(b)(6). For the reasons stated below, the trial court should be reversed. It is undisputed that Ms. Mainer properly filed the class action lawsuit within three years of June 17, 2011 - - - the date the statute of limitations began to run on her equitable claim. It is undisputed that Washington law allows a citizen, like Ms. Mainer, to bring an equitable claim, such as unjust enrichment, in a Superior Court: Ms. Mainer did just that and any argument to the contrary fails under a

¹ "Photo Red is a traffic safety program that places red-light cameras at ten City of Spokane intersections in order to reduce the number of red-light violations." Photo Red – the City of Spokane's Intersection Safety Program *available at* <https://beta.spokanecity.org/police/prevention/photored/> (last visited December 31, 2014).

plain reading of our State's law. Lastly, it is undisputed that Ms. Mainer - - then unaware that the City's photo red ticketing scheme violated the law - - fulfilled her obligation by paying the photo red ticket issued to her. As such, the City's argument that Ms. Mainer's voluntary payment of that ticket defeats her claim fails: the City cannot rightfully claim that Ms. Mainer's fulfillment of her legal duty (paying her traffic ticket) absolves the City of its undisputed violation of the certification laws upon which it illegally issued the photo red tickets.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in considering matters outside of the pleadings when granting the City's CR 12(b)(6) motion.
2. The trial court erred in granting the City's Motion to Dismiss, pursuant to CR 12(b)(6)²:
 - A. The trial court erred in finding that the Superior Court lacked jurisdiction over the plaintiff's claims;
 - B. The trial court erred in barring Ms. Mainer's claim under *Res Judicata*;
 - C. The trial court erred in barring Ms. Mainer's claim under the statute of limitations;
 - D. The trial court erred in finding that the voluntary-payment doctrine applied.

² The trial court did not articulate the specific reason(s) for granting the City's CR 12(b)(6) motion. (CP 61-62) As such, Ms. Mainer assumes the trial court granted the City's Motion to Dismiss on the arguments the City advanced in its moving papers. (CP 63-74).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether this Court should find that the trial court erred in considering matters outside of the plaintiffs complaint in support of the defendant's CR 12(b)(6) motion to dismiss.
2. Whether this Court, acting *de novo*, should reverse the trial court's Order Granting Defendant's Motion to Dismiss pursuant to CR 12(b)(6);
 - A. Whether the trial court erred in finding that the Superior Court lacked jurisdiction over the plaintiff's claims;
 - B. Whether the trial court erred in barring Ms. Mainer's claim under *Res Judicata*;
 - C. Whether the trial court erred in barring Ms. Mainer's claim under the statute of limitations for unjust enrichment;
 - D. Whether the trial court erred in finding that the voluntary-payment doctrine applied.

IV. STATEMENT OF THE CASE

This action arises out of photo red tickets improperly issued by the City between November 1, 2008 and June 20, 2011. On June 17, 2011, the Spokane County Superior Court found those photo red tickets to be void. Yet the City refuses to compensate those who paid the voided tickets.

Accordingly, Ms. Mainer seeks damages for herself and those similarly situated who received now-void photo red tickets during the November 1, 2008 and June 20, 2011, timeframe.³

1. The City's photo red traffic infraction system violated Washington law from November 2008 to June 2011.

By way of a brief background, in 2005, Washington's legislature legalized use of traffic cameras and codified such use into law as RCW 46.63.170. The City subsequently enacted ordinance 16A.64 which permits the use of automated traffic cameras to enforce RCW 46.61.060. The penalty for violating RCW 46.61.060 is a fine of \$124. CP 2. The City uses an automated web-based citation processing system, called Axis, to issue RCW 46.61.060 violation tickets.

On March 10, 2008, the City contracted with American Traffic Solutions, LLC (ATS) of Arizona, to install and maintain red light traffic cameras at certain intersections. On November 1, 2008, the City started to issue red light violation tickets. CP 3.

The photo red system involves placing a camera system at selected intersections. If a vehicle allegedly runs a red light, or commits a traffic infraction, the system videos the incident and photographs the vehicle's front and back license plates. Thereafter, the license plate numbers are cross-checked with Department of Licensing records. Citations then issue to the vehicle's registered

³ June 20, 2011, is the date the City brought its photo red traffic ticket issuance procedures in compliance with Washington law. CP 1.

owner. Issuing the citation involves an officer logging onto Axis via a unique ID and secure Password. The ID and Password allows the officer to enter the system and review the alleged infractions. Once in Axis the Officer reviews the photos and videos of the alleged infractions and assesses whether an infraction occurred. CP 3. If the reviewing officer determines probable cause exists to issue a citation he or she presses an “accept” button which, in turn, electronically signals American Traffic Solutions in Tempe, Arizona, to request, authorize, and print the citation. The request-authorize-print process involves affixing the officer’s signature on the citation. Until June 20, 2011, the electronic signature affixation took place in Tempe, Arizona. Since the signature affixation took place in Arizona it violated RCW 9A.72.085’s requirement that such citations be executed in the State of Washington. CP 3.

2. The Spokane County Superior Court rules that the City’s photo red system violates Washington law.

On June 17, 2011, Spokane County Superior Court Judge Jerome Leveque orally ruled that the City’s pre-June 17, 2011, photo red citations were void because RCW 9A.72.085 was not followed insofar as the signatures on the citations were made in Arizona, not Washington as required under RCW 9A.72.085. On August 3, 2011, Judge Leveque’s previous oral ruling was formally entered in court along with findings of fact and conclusions of law; and, that same day, the City obtained an order staying Judge Leveque’s order pending

final mandate on appeal. It is believed that after June 20, 2011, the City of Spokane complied with the Court's ruling and changed the matter in which the photo red light citations were processed. The City filed a notice and motion for discretionary review in the Court of Appeals. On September 26, 2011, Commissioner McCown issued an order denying review. CP 3.

The City of Spokane motioned to modify the commissioner's ruling on October 26, 2011. On December 29, 2011, the Court of Appeals, Division III, issued a published opinion denying review. On February 15, 2012, the City petitioned the Supreme Court of Washington for discretionary review. On April 12, 2012, the Supreme Court denied review. On June 12, 2012, Court of Appeals Division III issued a certificate of finality. CP 3.

3. The City issues Ms. Mainer a photo red citation in violation of Washington law, Ms. Mainer pays the citation and commences the present action.

The City issued Jeri Mainer a photo red citation on December 14, 2010 for allegedly running a red light on December 7, 2010 in the intersection of South Freya and 3rd Ave in Spokane, Washington. Plaintiff Jeri Mainer's citation (wrongfully) states that it was signed in Spokane, Washington. The notice stated "[f]ailure to appear for a requested hearing, or failure to pay a penalty imposed after a hearing will result in additional monetary penalties, non-renewal of the vehicle license, and unpaid penalties will be assigned to a collection agency". CP 4.

Ms. Mainer contested the violation. *Id.* Nonetheless the City, on February 8, 2011, determined an infraction occurred and fined Ms. Mainer \$124.00. Ms. Mainer, fearful of the City's threats to take her license and send her to collections, subsequently paid the fine unaware the citation violated RCW 9A.72.085. CP 4.

On January 15, 2013, - - - years after the City was on notice that its November 2008 – June 2011 photo red citations violated Washington law - - - Ms. Mainer demanded restitution for the monies she paid for the above-referenced ticket. CP 5. The City refused to pay and, in turn, unjustly retained monies received from the photo red scheme that violated Washington law. *Id.*

On June 13, 2014, Plaintiff filed the class action cause of action in Spokane County Superior Court. CP 1-12. The City moved to dismiss Ms. Mainer's case. CP 63-74. Oral argument occurred on September 19, 2014 and the trial court granted the City's motion to dismiss pursuant to CR 12(b)(6) on September 22, 2014. CP 61-62 The dismissal order did not state the basis on which the trial court's decision was made. *Id.* On October 7, 2014, Ms. Mainer timely filed this appeal.

V. STANDARD OF REVIEW

The Court of Appeals reviews rulings on motions to dismiss for failure to state a claim upon which relief can be granted under the de novo standard. *Hippie v. McFadden*, 161 Wn.App. 550, 556-57 (2011); *Burton v. Lehman*, 153 Wn.2d 416, 422 (2005). Motions to dismiss under Civil Rule 12(b)(6) are rarely granted

“only if it appears beyond doubt that the plaintiff cannot prove any set of facts, consistent with the complaint, justifying recovery.” *See also McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101 (2010)(refusing to change the standard for dismissing a Civil Rule 12(b)(6) motion despite the United States Supreme Court’s *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal* decisions).

VI. ARGUMENT

1. The trial court erred in considering matters outside of the pleadings when granting the City’s CR 12(b)(6) motion.

The City submitted a document titled “Notice of Infraction” as part of its CR 12(b)(6) motion. CP 13-34. The Washington Supreme Court consistently holds that items, like the Notice of Infraction, cannot be considered on a CR 12(b)(6) motion. *Brown v. MacPherson's, Inc.*, 86 Wn. 2d 293, 297 (1975)(“On a 12(b)(6) motion, no matter outside the pleadings may be considered ... and the court in ruling on it must proceed without examining depositions and affidavits which could show precisely what, if anything, the plaintiffs could possibly present to entitle them to the relief they seek.”) Since the Notice of Infraction fell outside of plaintiff’s complaint the trial court erred in considering it.

Knowing this the City tried to dodge CR 12(b)(6) and *Brown* by asking the Court to take “judicial notice” of the Notice of Infraction. To that end, ER 201(b) provides “[a] judicially noticed fact must be one not subject to reasonable

dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resorts to sources whose accuracy cannot reasonable be questioned.” But the City’s Exhibit A “Notice of Infraction” did not accurately reflect the Notice of Infraction Ms. Mainer received insofar as the City’s “Notice of Infraction” contained an apparently altered signature block that reads “No Signature”. CP 17. By way of comparison, Ms. Mainer’s Notice of Infraction is signed. CP 47-50.

Furthermore, since Ms. Mainer had to submit additional evidence to refute the City’s factual allegations the trial court had to evaluate evidentiary weight and credibility - - - factors beyond a CR 12(b)(6) motion’s scope. CP 49. As such, the trial court erred to the extent it relied on the Notice of Infraction in adjudicating the CR 12(b)(6) motion.

2. The trial court erred in granting Defendant’s Motion to Dismiss, pursuant to CR 12(b)(6).

Washington courts consistently hold that CR 12(b)(6) motions should be granted sparingly as such dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts [that] ... would entitle the plaintiff to relief." *Orwick v. Seattle*, 103 Wn.2d 249, 254 (1984) (*quoting Corrigan v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961 (1978)). To that end, a plaintiff’s allegations are presumed true and the Court should consider hypothetical facts not in the record. *See id.* Indeed, “CR 12(b)(6) motions should

be granted ‘sparingly and with care’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.’” *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755 (1994)(citation omitted). Accordingly, the trial court’s decision to dismiss Ms. Mainer’s case should be considered in light of the law that limits CR 12(b)(6) dismissals.

A. The Trial Court Erred in Finding that the Superior Court Lacked Jurisdiction over the Plaintiff’s Claim.

The City argued Ms. Mainer’s claim failed for lack of jurisdiction. CP 65. The City’s argument (and trial court’s purported reliance on the same) fails for three reasons. First, Superior courts have exclusive jurisdiction over equitable claims. RCW 2.08.010(The superior court shall have original jurisdiction in all cases in equity...). Ms. Mainer’s unjust enrichment claim is an equitable claim. *Bill v. Gattavara*, 34 Wn.2d 645, 650 (1949)(“[T]he action for unjust enrichment is an equitable proceeding.”)⁴. *See also Young v. Young*, 164 Wn.2d 477, 484 (2008)(“Unjust enrichment occurs when one retains money or benefits which in justice and equity belong to another.”). As such, jurisdiction over plaintiff’s unjust enrichment claim properly lay with the Spokane County Superior court under the plain language of RCW 2.08.010.

⁴ When interpreting statutes courts must “first attempt to effectuate the plain meaning of the words used by the legislature, examining each provision in relation to others in search of a consistent construction of the whole.” *In re Lofton*, 142 Wn. App. 412, 415 (2008). Here it is clear that the superior court possessed jurisdiction over Ms. Mainer’s equitable claim.

Second, the Superior Court has jurisdiction over equitable claims regarding system wide violations of mandatory statutory requirements - - such as RCW 9A.72.085 - - and from repetitious violations of constitutional rights by a municipality in enforcement of municipal ordinances. RCW 35.20.030; Wash. Const. Art. 4, § 6; *Orwick v. City of Seattle*, 103 Wn.2d 249 (1984). *Orwick* held, in part:

Here, plaintiffs allege system-wide violations of the statutory requirements in RCW 46.63 and state and federal constitutional violations. Petitioners' claim for injunctive and declaratory relief is based on their rights under a state statute and the state and federal constitutions. These claims do not "arise under" a municipal ordinance and, therefore, are not within the exclusive jurisdiction of the Spokane Municipal Court. Thus, the superior court has jurisdiction to hear petitioners' claim and jurisdiction to grant equitable relief, if appropriate. 103 Wn.2d at 252.

This case is analogous to *Orwick*: Ms. Mainer alleged that the procedures used by the City to adjudicate red light citations violated RCW 9A.72.085 and GR 30, the state statute governing the certification of unsworn statements and court rule governing electronic filing, i.e. an allegation of a system-wide violation of a statutory requirement.

Third, as the City may argue, a municipal court does not have exclusive original jurisdiction because the factual basis for a claim is related to enforcement of a municipal ordinance. Instead, the relevant consideration for determining jurisdiction is the nature of the cause of action and the relief sought. *Silver*

Surprize, Inc. v. Sunshine Mining Co., 74 Wn.2d 519, 522 (1968). And here the equitable nature of the claim vests jurisdiction in the Superior Court under RCW 2.08.010.

The Spokane County Superior Court possessed jurisdiction to adjudicate Ms. Mainer's claim and erred to the extent it concluded otherwise.

B. The Trial Court Erred in barring Ms. Mainer's Claim under Res Judicata.

The City argued that Ms. Mainer's claim failed under the doctrine of *res judicata*. The City's argument (and trial court's reliance on the same) fails because the City did not establish each *res judicata* element.

A party asserting a *res judicata* defense must establish that the subsequent action is identical to an earlier action in: (1) identity of persons and parties, (2) the subject matter, (3) the cause of action, and (4) the quality of the persons for or against whom the claim is made. *Stevens Cnty. v. Futurewise*, 146 Wn. App. 493, 503 (2008).

The City did not meet the *Stevens* criteria. As to points (1) and (4), the parties differ from the above-referenced 2011 action, as this case is *not* simply Ms. Mainer, but rather Ms. Mainer and a class of plaintiffs similarly situated. Therefore, the parties have changed since Ms. Mainer's original case, and *res judicata* does not apply. As to point (2) Ms. Mainer's claim is more than, as the City claimed, an action "seeking to overturn her citation for a traffic infraction."

CP 69. Ms. Mainer's citation was "overturned" in 2011 when the Spokane County Superior Court found the photo red scheme void. Ms. Mainer now seeks repayment of a fine improperly levied (against her and a putative class of similarly situated citizens) as part of a broad scheme that violated RCW 9A.72.085. CP 1-12. The system wide violation of RCW 9A.72.085 was not addressed at Ms. Mainer's red light infraction hearing; and, as such, is not barred in this action. As to point (3), the City's claim that "Ms. Mainer is challenging the same citation and is seeking to undo it, without any new evidence," is inaccurate.

CP 70. The cause of action originally before the municipal court was whether Ms. Mainer ran the red light, in violation of RCW 46.61.060. Ms. Mainer's claim in this case is for unjust enrichment - - - an entirely different claim. And, as part of the unjust enrichment claim Ms. Mainer alleged that the City falsely stated the tickets were issued under penalty of perjury in violation of RCW 9A.72.085 and GR 30. Furthermore, Ms. Mainer alleged that the City retained the monies paid for invalid photo red tickets despite a demand to return the money to Ms. Mainer and others similarly situated. CP 5.

Ms. Mainer's present case will be the first opportunity for her to present evidence of the City's systematic violations of RCW 9A.72.085 and GR 30. Such violations were confirmed by the Superior Court ruling on June 17, 2011, and, as such, constitute new evidence Ms. Mainer can present as part of her class action lawsuit.

Ms. Mainer's claim was not barred under *res judicata* and the trial court erred in concluding otherwise.

C. The trial court erred in barring Ms. Mainer's claim under the statute of limitations for unjust enrichment.

The City argued that the statute of limitations time-barred Ms. Mainer's claim. CP 70-71. The City's argument (and the trial court's reliance on the same) fails.

A three-year statute of limitations applies for a cause of action for restitution and unjust enrichment. *See Davenport v. Washington Educ. Ass'n.*, 147 Wn. App. 704, 737-38 (2008). A cause of action accrues when a party has a right to apply to a court for relief. *Malnar v. Carlson*, 128 Wn.2d 521 (1996). *See also Eckert v. Skagit Corp.*, 20 Wn. App. 849, 851 (1978)(evaluating the statute of limitations for a unjust enrichment claim and holding "[g]enerally cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief.")(citations omitted). Under the discovery rule the statute of limitations does not begin to run until the plaintiff, using reasonable diligence, should have discovered the cause of action. *Peters v. Simmons*, 87 Wn.2d 400, 404 (1976). Additionally, the question of when a plaintiff should have discovered the elements of a cause of action so as to begin the running of the statute of limitation is a question of fact inappropriate for dismissal on a CR 12 motion. *Green v. A.P.C. (Am. Pharm. Co.)*, 136 Wn. 2d 87, 100 (1998).

Here the statute of limitations commenced on June 17, 2011, - - - the day Judge Leveque ruled that photo red light infractions issued by the City were void due to the fact that the provisions of RCW 9A.72.085 and GR 30 were not followed in issuing the citations. At that point, three things happened. First, it became unjust for the City of Spokane to retain the monies it obtained from the illegal photo red scheme⁵ Second, Ms. Mainer obtained a right seek damages for unjust enrichment.⁶ Third, the statute of limitations on Ms. Mainer's unjust enrichment claim began to run.

Since Ms. Mainer filed her claim within three years of June 17, 2011, her claim was not time barred and the trial court erred in dismissing her claim.

D. The trial court erred in finding that the voluntary-payment doctrine applied.

Finally, the City argued the Voluntary-Payment Doctrine applied. CP 70-73. The City misapplied the Voluntary Payment doctrine and the trial court erred in relying on it.

The Voluntary Payment doctrine provides that “money voluntarily paid under a claim of right to the payment, and with full knowledge of the facts by the

⁵ When the City became aware that it improperly issued all of its red light tickets, it had an obligation to repay *all* the people who wrongfully paid the tickets. *See Nelson v. Appleway*, 160 Wn. 2d 173 (2007) (holding a car dealer liable for unjust enrichment to *all* persons it wrongfully charged for its B&O tax).

⁶ It bears repeating, before June 17, 2011, Ms. Mainer had no unjust enrichment claim because no court or legislative body determined such a claim existed.

person making the payment, cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance.”

Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 162 Wn.2d 59, 85 (2007)(holding the Voluntary Payment Doctrine only applies to contract claims, refusing to apply the Voluntary Payment doctrine to a CPA claim, and citing *Speckert v. Bunker Hill Ariz. Mining Co.*, 6 Wn.2d 39 (1940)).

The Voluntary Payment doctrine does not apply, however, “where [the] payment of money ... is induced by fraud and deceit, [wrongfully withheld monies] may be recovered back by the payor, and if the fraud is the inducement for the payment, the rule applies although it is not the sole producing cause.” *Id.* Additionally the doctrine does not apply when the person making the payment is (a) unaware of the facts that make the demand illegal and (b) is not faced with an immediate and urgent necessity to pay the illegal demand. *Speckert*, 6 Wn.2d at 52. And lastly, “the question whether a payment is voluntary or involuntary is one of law where the facts are undisputed, but when the facts are in dispute it is for the jury to say whether the money was paid voluntarily or in consequence of compulsion or duress.” *Id.* at 52.

The Voluntary Payment doctrine does not apply in this case for two reasons. First, Ms. Mainer’s complaint pleads facts - - which must be assumed true and construed in Ms. Mainer’s favor - - that Ms. Mainer was unaware that the photo red citation she received violated RCW 9A.72.085. Instead the City

informed her that “additional monetary penalties, non-renewal of the vehicle license, and unpaid penalties will be assigned to a collection agency” if she did not pay immediately.⁷ CP 6. Second, the City’s demand for payment was induced by deceit insofar as the citation referenced that the issuing officer signed the contract in Washington when that was not true. CP 47-50. But, even if the Voluntary Payment doctrine applies to this case, the trial court erred in using it as a dismissal mechanism at the Rule 12 stage given that “when the facts are in dispute” - - - as they most certainly are here - - - “it is for the jury to say whether the money was paid voluntarily or in consequence of compulsion or duress.” *Speckert*, 6 Wn.2d at 52.

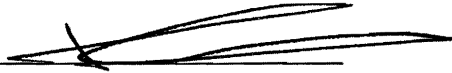
As such, the Voluntary Payment doctrine does not apply to this case and, even if it did, the trial court erred because issues of fact exist as to whether Ms. Mainer’s payment was voluntary.

VII. CONCLUSION

For the foregoing reasons, Ms. Mainer respectfully requests that this Court reverse trial court’s granting of the City’s CR 12(b)(6) motion to dismiss.

⁷ Indeed “[i]llegal payments coerced under duress or compulsion may be recovered, provided the compulsion supplies the motive for the payment sought to be recovered, and proceeds from the person against whom the action is brought.” *Speckert*, 6 Wn.2d at 57.

Submitted this 23 day of January, 2015.



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