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 REPLY BRIEF

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I. INTRODUCTION & SUMMARY OF ARGUMENT

Appellant Jerri Mainer, submits this Reply Brief in response to the City of Spokane. The Appellant's reply brief is summarized below:

1. The Trial Court's dismissal of the above-action should be reversed because: This Court has jurisdiction to hear this case.

2. The trial court erred in considering matters outside the pleadings.

3. Plaintiff's reliance on *Wardrop* is proper.

4. Plaintiff's claims are not barred by *res judicata.*

5. Plaintiff's claims are not barred by the statute of limitations.

6. Plaintiff's claims are not barred by the voluntary payment doctrine.

7. The trial court erred in finding it lacked subject matter jurisdiction.

II. ARGUMENT IN REPLY

A. THE COURT OF APPEALS HAS JURISDICTION TO HEAR THIS CASE.

The City argues that this Court lacks jurisdiction to hear this case because the amount in controversy is less than $200.00. (Resp. Br. Pg. 4)

The City's argument fails for two reasons. First, the amount in controversy exceeds the $200 dollar threshold for appellate jurisdiction because the amount in controversy, for appellate purposes, is determined by the pleading's averments not by the demand for judgment. *Ingham v. Harper & Son,* 71 Wn. 286, 286-287, 128 P. 675 (1912). Here, Ms. Mainer's complaint alleges not only $124 paid, but

prejudgment interest, other damages and attorneys' fees. Prejudgment interest is favored in the law based on the premise that he who retains money he should pay to another should be charged interest on it. *Universal/Land Constr. Co. v. Spokane,* 49 Wn. App. 634, 641, 745 P.2d 53, 57 (1987). Indeed, courts hold prejudgment interest can be used in calculations to determine original amount in controversy. *Id.* at 289. Here, Ms. Mainer paid $124.00 on March 15, 2011 and she filed suit in June 16, 2014. As of March 18, 2014, the judgment's value is $183.68 (this assumes a 12% per annum interest[1], non-compounding beginning March 15, 2011). Customarily, civil trials do not commence until 12 to 18 months post filing. As such, even if trial were to occur in this case within the next year then the judgment's amount would exceed the $200.00 threshold.

Second, in addition to restitution, Ms. Mainer seeks injunctive and equitable relief. CP 11. As such, RCW 2.06.030 does not prevent review of requests for injunctive relief. The Court of Appeals has jurisdiction over Ms. Mainer's case.

B. THE TRIAL COURT ERRED IN CONSIDERING EVIDENCE OUTSIDE THE PLEADINGS.

The City argues Ms. Mainer waived objection to the City's submission of evidence outside the pleadings at the Motion to Dismiss stage. (Resp. Br. Pg. 5)

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[1]. RCW 19.52.010.

errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *State v. Guloy,* 104 Wn.2d 412, 421, 705 P.2d 1182, 1189 (1985). Ms. Mainer's brief in reply to the City's 12(b)(6) motion, and Ms. Mainier's lawyer's oral argument, properly objected to the use of matters outside of the pleading. CP 52-53; RP 8. In fact, during oral argument the City responded directly to the issue of matters outside of the pleadings. RP 12. Furthermore, the reference to the notice of infraction was only part of the objection to the matters outside of pleadings as to being at issue. *Id.* Ms. Mainer properly objected to the City's offering in its entirely. The issue is preserved for review.

On a CR 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. *Brown v. MacPherson's Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13, 17 (1975). The trial court erred in relying on matters outside the pleadings when granting a CR 12(b)(6) motion.

C. THE CITY OF SPOKANE V. WARDROP, ET AL., CAUSE NO. 2011-02-00432-0 PUT THE CITY ON NOTICE THAT IT WAS WRONGFULLY COLLECTING AND RETAINING MONEY FROM THE PHOTO RED PROGRAM.

The City argues plaintiff's reliance on *Wardrop* is misplaced because *Wardrop* lacks precedential value. (Resp. Br. Pg. 8)

While Superior Court decisions lack precedential value, *Wardrop, et al.* put the City on notice that the photo red program was operating contrary to Washington State Law and that any proceeds from the program were wrongfully retained. As such, citizens subject to such procedures are entitled to reimbursement for wrongfully retained monies. Upon *Wardrop* being decided, the City had actual knowledge that it improperly retained money since November of 2008 and made no attempts to refund individuals. Thus, Ms. Mainer filed a suit for unjust enrichment and for a putative class of individuals similarly affected. Ms. Mainer's reliance on *Wardrop* is not misplaced.

D. Ms. Mainer's claim is not barred by Res Judicta.

The City argues Ms. Mainier's claim is barred by Res Judicata and relies on *Holder v. City of Vancouver* in support. (Resp. Br. Pg. 8-12) The City's argument fails.

Holder v. City of Vancouver, is distinguishable as Holder court based its dismissal on the *Rooker-Feldman* doctrine: a doctrine holding that lower United States federal courts do not have subject matter jurisdiction to sit in direct review of state court decisions unless Congress has enacted legislation that specifically authorizing such relief. *See Rooker,* 263 U.S. at 415-16; *Feldman,* 460 U.S. at 486-87. To date, Congress has not authorized the District Court to review code enforcement proceedings. *Holder* at 3. Since Ms. Mainier's case does not involve

a federal court reviewing a state court decision, the *Rooker-Feldman* doctrine does not apply.

Additionally, *Holder* found that plaintiff's claims asserted in the Washington State Court of Appeals pertained to the code violations assessed against Holder for improperly parking his vehicles, i.e. the *Holder* plaintiff's state claims arose from the exact set of facts giving rise to the state citation. *Holder* at 3. The subject matter of Ms. Mainer's claim is Unjust Enrichment, not whether she ran a red light. Given the unjust enrichment claim, a different set of facts must be proven at trial (i.e. the elements of an unjust enrichment claim) than what was entertained at Spokane Municipal Court (i.e. whether Ms. Mainier ran a red light).

Furthermore, the City's reliance on *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 429 P.2d 207 (1967) is misplaced. In *Bordeaux*, the Supreme Court determined that Res Judicata did not apply because there is a lack of identity of quality between the persons and parties to the two proceedings as prescribed in the fourth concurrence of identity - - - which is the case here. *Id.* at 397.

In terms of subject matter and cause of action, "res judicata does not bar claims arising out of different causes of action, or intend "to deny the litigant his or her day in court." *Schoeman v. N.Y. Life Ins. Co.*, 106 Wn.2d 855, 860, 726 P.2d 1, 3 (1986). The threshold requirement of res judicata is a final judgment on the merits in the prior suit. *Id.* Once that threshold is met, res judicata requires sameness of subject matter, cause of action, people and parties, and "the quality of

the persons for or against whom the claim is made." *Rains v. State,* 100 Wn.2d 660, 663, 674 P.2d 165, 168 (1983).

The Supreme Court has held that the same subject matter is not necessarily implicated in cases involving the same facts. *See Hayes v. City of Seattle,* 131 Wn.2d 706, 712, 934 P.2d 1179, 1182 (1997) (finding different subject matter in cases involving a master use permit where the initial case sought to nullify the city council decision and the second case sought damages); *Mellor v. Chamberlin,* 100 Wn.2d 643, 646, 673 P.2d 610, 612 (1983) (finding different subject matter in cases involving the sale of property where the initial case sought to establish misrepresentation and the second case sought to establish a breach of the covenant of title).

Here, Ms. Mainer seeking 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 3-12. 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, where she alleges that the City falsely stated the tickets were issued under penalty of perjury in violation of RCW 9A.72.085 and CR 30. Both the subject matter and cause of action are entirely different that would have been before the Spokane Municipal Court. Furthermore, the Spokane Municipal Court has no capacity to

hear an unjust enrichment claim and no capacity to deal with a putuative class actions. *See SPMCCrRLJ.*

E. MS. MAINER'S CLAIM IS NOT BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS.

The City argues Ms. Mainier's claim is barred by the statute of limitations. (Resp. Br. Pg. 14)

The statute of limitations for a unjust enrichment claim is three years. *Davenport v. Washington Education Ass'n*, 147 Wash.App. 704, 737-38, 197 P.3d 686, 704 (2008). The three year statute of limitations began to run on June 17, 2011, when the City was put on notice that the Photo Red System was defective. The discovery rule was raised at the trial level and thus preserved for review. RP 9-10; CP 52-58.

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, 552 P.2d 1053, 1056 (1979). The question of when the plaintiff should have discovered the elements of a cause of action so as to being the running of the statue 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, 960 P.2d 912, 918 (1998).

Here, the three-year statute of limitations began to run on the date the City's retention of photo red tickets fines became unjust. That was June 17, 2011.

And Ms. Mainier complied with the statute of limitations by timely filing her lawsuit on June 13, 2014.

F. THE VOLUNTARY PAYMENT DOCTRINE DOES NOT APPLY TO MS. MAINER'S CASE.

The City argues the voluntary payment applies to this case. (Resp. Br. Pg. 17-20)

The voluntary payment doctrine does not apply to Ms. Mainer's case because: (1) the defendant has not pled the affirmative defense in its answer, (2) the use of such a defense is a question of fact, inappropriate for CR 12(b)(6) motion, (3) Ms. Mainier's payment of the ticket was not made with full knowledge of the facts, and (4) such payments were not voluntarily paid.

The voluntary payment doctrine provides that "money voluntarily paid under claim of right to the payment, and with full knowledge of the facts by the 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, 170 P.3d 10, 23 (2007).

In *Indoor Billboard/Washington, Inc.*, the Supreme Court determined when the plaintiff had "full knowledge of all the facts" is an issue of material fact and thus inappropriate for summary judgment. *Id.* at 68. Thus, it was error by the trial court to apply the doctrine to this case at the Rule 12 stage.

In furtherance of this position, the City relies on *Speckert v. Bunker Hill Ariz. Mining Co.*, however this reading of *Speckert* ignores key reasoning. 6 Wn.2d 39, 106 P.2d 602 (1940). That case stated:

> A rule which will furnish a safe guide in the determination of particular cases is that where a person pays an illegal demand, *with a full knowledge of all the facts which render the demand illegal, without an immediate and urgent necessity therefore*, or unless to release his person or property from detention, or *to prevent an immediate seizure of his person or property*, such payment is voluntary:...

Speckert, 6 Wn.2d 52 (Emphasis added.) Here, facts pled in the complaint point out that Ms. Mainer did not learn of the illegality of the City's program until June 17, 2011. She did not have full knowledge of all the facts which rendered the demand illegal. Such facts were only exposed at the June 17, 2011 hearing.

As stated in the original complaint, Ms. Mainer was told that "additional monetary penalties, non-renewal of vehicle license, and unpaid penalties will be assigned to a collection agency," if she did not pay immediately. CP 8. Failure to pay would have resulted in the loss of her driver's license, additional fines and possible criminal liability if her license were to be suspended. Under this line of reasoning, the payment was not voluntary, and the Voluntary Payment Doctrine would not apply.

G. THE TRIAL COURT HAD JURISDICTION TO HEAR MS. MAINER'S CLAIM.

The City argues the trial court lacked jurisdiction to adjudicate plaintiff's claim. (Resp. Br. Pg. 20-24) The City is wrong as trial courts have jurisdiction to hear equitable claims.

The plaintiff's unjust enrichment claim is an equitable claim. *Bill v. Gattavara*, 34 Wn. 2d 645, 650, 209 P.2d 457, 460 (1949)("[T]he action for unjust enrichment is an equitable proceeding.") The substance of an action for unjust enrichment lies in a promise, implied by law, that one will render to the person entitled thereto that which in equity and good conscience, belongs to the latter. *Id.* Superior courts have exclusive jurisdiction over equitable claims. And RCW 2.08.010 provides, in full:

> **The superior court shall have original jurisdiction in all cases in equity**, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce and for annulment of marriage, and for such special cases and proceedings as are not otherwise provided for; and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, and shall have the power of naturalization and to issue papers therefor. Said courts and their judges shall have power to issue writs of mandamus,

> quo warranto, review, certiorari, prohibition and writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued on legal holidays and non-judicial days. (Emphasis added)

The City's reliance on *Ducolon Mechanical, Inc. v. Shinstine/Forness, Inc.* is misplaced. *Ducolon* addressed whether a defaulting party can recover an amount in excess of the contract price from a defaulting defendant. 77 Wash.App. 707, 713, 893 P.2d 1127, 1130 (1995). In *Ducolon*, the plaintiff underbid a job by $50,000 and attempted to recover much more than what it bid. *Id.* at 709. However, the *Ducolon* plaintiff did not plead equitable relief, but rather quantum meruit. As such, the court determined that the legal remedy was adequate and equitable relief in the form of restitution was not required. *Id.* at 711. The *Ducolon* case says nothing that would prevent the superior court from hearing Ms. Mainer's unjust enrichment claim and is inapplicable to the case at bar.

Again, this case is analogous to *Orwick v. City of Seattle,* 103 Wn.2d 249, 692 P.2d 793 (1984): Ms. Mainer alleges that the procedures used by the City to adjudicate red light citations violated the provisions of 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.

Furthermore, a municipal court does not have exclusive original jurisdiction merely because the factual basis for a claim is related to enforcement

of a municipal ordinance as 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, 445 P.2d 334, 336 (1968). And here the equitable nature of the claim vests jurisdiction in the superior court.

III. 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.

Submitted this 20th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 20th day of March, 2015, I caused a true and correct copy of the foregoing document, "Reply Brief of the Appellant", to be delivered by hand delivery to the attorney of record:

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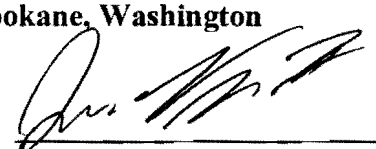
Dated this 20th Day of March, 2015, at Spokane, Washington



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