No.: 45117-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DAVID HYYTINEN,

Appellant,

vs.

CITY OF BREMERTON and the STATE OF WASHINGTON, in its capacity as legal representative of the Washington State Patrol,

Respondents.

CORRECTED REPLY BRIEF OF APPELLANT DAVID HYYTINEN

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I. ARGUMENT IN REPLY TO STATE

A. The WSP Admits It Failed to Notify Mr. Hyytinen of the Escalade's Seizure and Impoundment as Required Under RCW 46.12.725. This Failure Violated Mr. Hyytinen's Due Process Rights.

The State inappropriately attempts to shift the burdens of RCW 46.12.725, to Mr. Hyytinen and his attorneys. RCW 46.12.725, required the WSP to comply with notice requirements. The statute imposes these duties on the State and not on Mr. Hyytinen or his counsel. The WSP admits it failed to comport with its statutory duties. RP (04/26/13)(p.7:21-24); see also, CP 707, ¶ 6-7.

The WSP argues that because Mr. Hyytinen had actual notice of the Escalade's seizure and impoundment (i.e., the Escalade was confiscated at the VIN inspection), the WSP had no duty "to take any further steps to inform him of his options." CP 377:22-24. The WSP's argument completely ignores RCW 46.12.725.

Seizure and impoundment which fails to comply with the strict letter of the law constitutes an illegal taking in violation of Mr. Hyytinen's due process rights. The WSP's admitted violation of Mr.

Hyytinen's due process rights divested him of his innate right to a timely hearing and judicial determination on his ownership interest/claims in the Escalade. As such, Mr. Hyytinen was unlawfully precluded from asserting theories of ownership by right, interest and/or equity.[1]

The Escalade was forfeited to the BPD by a court order. CP 726-27. Thereafter, title to the Escalade was issued by the State to the BPD on 03/13/2006. CP 101-102; CP 728. As such, title to the Escalade ***vested*** in the BPD by virtue of a court order. Title was transferred from the BPD to Mr. Hyytinen on 07/03/07. CP 334: 17-18 and CP 353. Mr. Hyytinen had valid claims that he was the true owner. Had Mr. Hyytinen been given the opportunity for hearing, the tangible property, i.e. the Escalade, would have remained the property of Mr. Hyytinen who purchased it in good faith from a law

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[1] For instance, Mr. Hyytinen was precluded from asserting a claim of ownership under RCW 63.32, et. al (unclaimed property in hands of city police), which mandates that any claims of ownership interest in liquidated personal property must be made to the municipality within three (3) years of the deposit of such funds into the municipality coffers:

> If the owner of said personal property so sold, or his or her legal representative, shall, at any time within three years after the funds were deposited in city current ex such money shall have been deposited in said police pension fund or the city current expense fund, furnish satisfactory evidence to the police pension fund board or the city treasurer of said city of the ownership of said personal property, he or she shall be entitled to receive from said police pension fund or city current expense fund the amount so deposited therein with interest.
>
> See, RCW 63.32.040.

enforcement agency in which title had vested more than 3 years prior. The WSP's failure to give the statutorily required notice resulted in the deprivation of Mr. Hyytinen's right to make this argument among others (see opening brief) regarding his ownership interest in the Escalade. The trial court erred in dismissing Mr. Hyytinen's due process claims.

B. Mr. Hyytinen is Entitled to Assert His Constitutional Claims Against the State.

The State argues that Mr. Hyytinen failed to state a cognizable constitutional claim. Mr. Hyytinen did allege violations of due process rights against the State. CP 313, ¶ 3.24. Mr. Hyytinen asserts that the State's violation of his due process rights resulted in damages to him. CP 313, ¶3.25. Washington is a notice pleading state.[2] Mr. Hyytinen adequately put the State on notice of his claims of deprivation of due process. When a Plaintiff alleges that a state agent deprived him of his property under color of law, the attorney general should know the nature of that claim, including §1983. Moreover, § 1983 is not itself a source of substantive rights, but rather provides a method for vindicating federal rights

[2] Wash. R. Civ. P. 8(f) provides: "All pleadings shall be so construed as to do substantial justice." CR 8(f). A complaint is sufficient if it contains a short and plain statement of the claim showing that the pleader is entitled to relief and a demand therefor; there is no necessity for stating the facts constituting a "cause of action." *Sherwood v. Moxee Sch. Dist.*, 58 Wn.2d 351 (Wash. 1961)

elsewhere conferred. See, *Hines v. City of Albany*, 2011 U.S. Dist. LEXIS 68548, 26-27 (N.D.N.Y June 27, 2011), affirmed by *Hines v. Albany Police Dep't*, 520 Fed. Appx. 5 (2d Cir. N.Y. 2013)(unpublished opinion), (citing *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004)(quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S.Ct. 2689, 61 L. Ed. 2d 433 (1979)).

Mr. Hyytinen is not precluded from raising a §1983 claim because Mr. Hyytinen's constitutional claims are not barred. The WSP has not demonstrated that Mr. Hyytinen made a voluntary, knowing and intelligent waiver of any constitutional right. See, *State v. Myers*, 86 Wn.2d 419, 426, 545 P.2d 538 (1976); *In re James*, 96 Wn.2d 847, 851, 640 P.2d 18 (1982); *State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1983).

1. <u>The State is liable for actions of the WSP</u>.

The State further argues that even if a §1983 claim existed, it must fail because Mr. Hyytinen sued the "State of Washington," which is not a "person" subject to suit under §1983. The State's position is again without merit. Mr. Hyytinen filed suit against the "State of Washington, in its capacity as legal representative of the Washington State Patrol." CP 309.

In order to establish a §1983 claim against a government official in his individual capacity, a plaintiff need only "show that the official, acting under color of state law, caused the deprivation of a federal right." *Hafer v. Melo*, 502 U.S. 21, 25, 112 S.Ct. 358, 362, 116 L. Ed. 2d 301 (1991) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985)).

2. <u>The State violated CR 12(i)</u>.

Even if Mr. Hyytinen had inadvertently named the wrong entity, the State had an affirmative duty to identify the WSP pursuant to CR 12(i), which states in pertinent part:

> (i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

This is yet another tactic meant to deflect from the real issues at bar. Clearly the State understood that: (1) it represents the WSP in its capacity as a legal representative; and (2) Mr. Hyytinen was alleging causes of action against the WSP (both constitutional and based in tort) for its conduct.

C. The WSP's Unreasonable Seizure of the Escalade and Subsequent Failure to Provide a Hearing Resulted in a Deprivation of Mr. Hyytinen's Constitutional Rights.

The State's reliance on *City of West Covina* is misplaced. *City of West Covina v. Perkins*, 525 U.S. 234 (1999)(distinguished 11 times). In *City of West Covina*, the seizure of property was conducted during a homicide investigation pursuant to a valid search warrant where the suspect was a boarder in a family's home and the police took property from the family. *City of West Covina*, 525 U.S. 234. The court held that, where municipal police officers seized property for a ***criminal investigation*** pursuant to a ***search warrant***, the Due Process Clause does not require the municipality to give individualized notice of the procedures for recovering the property, if those procedures are generally available to the public. *Id.*

As noted in the distinguishing case of *Hines v. City of Albany*:

> That case [*City of West Covina*], however, dealt with property that was legally seized for purposes of a criminal investigation pursuant to a state forfeiture law. Here, the Escalade was seized without a warrant for purposes of forfeiture.[3]

[3] We note that the *City of West Covina* also involved an Escalade which is referenced in this passage.

See, *Hines v. City of Albany*, 2011 U.S. Dist. LEXIS 68548, 48-49 (N.D.N.Y June 27, 2011), affirmed by *Hines v. Albany Police Dep't*, 520 Fed. Appx. 5 (2d Cir. N.Y. 2013)(unpublished opinion), (internal citation added). None of the factors in *City of West Covina* are present in this case.

Moreover, a seizure of personal property without a warrant is per se unreasonable unless law enforcement has probable cause to believe the property holds contraband or evidence of a crime. See *United States v. Howe*, No. 09-CR- 6076L, 2011 U.S. Dist. LEXIS 57491, 2011 WL 2160472, at *8 (W.D.N.Y. May 27, 2011), affirmed by *United States v. Howe*, 2013 U.S. App. LEXIS 23608 (2d Cir. N.Y. Nov. 25, 2013)(unpublished opinion),(citing *United States v. Place*, 462 U.S. 696, 701, 103 S.Ct. 2637, 77 L. Ed. 2d 110 (1983)).

Just as in *Hines*, the WSP seized, without a warrant[4], Mr. Hyytinen's Escalade for purposes of forfeiture and failed to provide an opportunity for judicial review of the legality of the seizure. In fact, the Escalade has never been determined to be a stolen vehicle by any judicial or administrative body. Accordingly, the trial

[4] It is undisputed that the WSP did not have a warrant to seize the Escalade.

court erred in dismissing Mr. Hyytinen's claims of due process violations.

D. The WSP's Acknowledged Failure to Comply with RCW § 46.12.725 is Negligence Per Se.

The WSP's failure to comply with RCW § 46.12.725 notice requirements is evidence of negligence and amounts to negligence per se. Breach of a statutory duty is evidence of negligence. *Estate of Templeton v. Daffern*, 98 Wn. App. 677, 684, 990 P.2d 968 (2000). Duty may arise from a legislatively created standard of conduct or from a judicially imposed standard. *Amend v. Bell*, 89 Wn.2d 124, 132, 570 P.2d 138 (1977). In order for a statutory duty to arise, the statute must: (1) protect a class of people that includes the person whose interest was invaded; (2) protect the particular interest invaded; (3) protect that interest against the kind of harm that resulted; and (4) protect that interest against the particular hazard that caused the harm. *Estate of Templeton v. Daffern*, 98 Wn. App. at 682 (citing *Restatement (Second) of Torts* § 286 (1965)).

In the instant matter, the WSP owed a legal obligation to send written notice of its seizure, impoundment and Mr. Hyytinen's remedies, including right to request a hearing, within five (5) days

from the date of impoundment so that Mr. Hyytinen might elect to pursue such remedies. The State concedes that Mr. Hyytinen was never sent the required notice and Mr. Hyytinen, who was unaware that his vehicle had been effectively seized and forfeited, was never given a hearing regarding his claims of ownership.

The WSP's failure to comply with the minimum statutory requirement of providing written notice pursuant to RCW 46.12.725, which would have informed Mr. Hyytinen of his right to request a hearing, is evidence of negligence. *Skeie v. Mercer Trucking Co., Inc.*, 115 Wn. App. 144, 61 P.3d 1207 (2003). As such, the trial court erroneously dismissed Mr. Hyytinen's claims of negligence against the WSP.

E. The Trial Court Abused Its Discretion by Denying Amendment.

Pursuant to CR 15, amendment to the pleadings should be freely given when justice so requires. *Chadwick Farms Owners Association v. FHC, LLC*, 139 Wn. App. 300, 160 P.3d 1061 (2007). CR 15(c) allows amendment of pleadings where the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

The amendments requested by Mr. Hyytinen arose out of the same conduct of the WSP which was set forth, or attempted to be set forth, in the Complaint. Moreover, the requested amendments where within the applicable statute of limitations such that the State received notice of the institution of the action based on the WSP's unlawful and/or negligent conduct, and would not have been prejudiced in maintaining its defense on the merits. In fact, a substantial amount of the requested amendments was briefed by both parties in various motion practice prior to the trial court's denial of the requested amendments. Mr. Hyytinen is also entitled to bring constitutional claims at a later date as he did not knowingly or voluntarily waive any of his constitutional rights.[5] Additionally, and perhaps most significantly, Mr. Hyytinen has been materially prejudiced by the trial court's denial and forced to resort to extensive and expensive litigation. The trial court abused its discretion by denying Mr. Hyytinen's requested amendments.

F. Mr. Hyytinen is Entitled to Damages from the State, including but not Limited to Attorney Fees.

[5] In stating that he has not waived his right to bring constitutional claims, Mr. Hyytinen is not agreeing that he did not effectively set forth state and federal claims of violation of due process rights in compliance with Washington's notice pleading standard.

Mr. Hyytinen, who properly pled violation of due process pursuant to Washington's notice pleading standard, is entitled to reasonable attorney's fees pursuant to 42 U.S.C. § 1988(b). The purpose of 42 U.S.C. § 1988(b) is to authorize attorney fee awards to prevailing plaintiffs in actions to enforce federally protected civil rights and is designed to encourage the vindication of civil rights through the mechanism of private lawsuits. *Parmelee v. O'Neel*, 168 Wn.2d 515 (Wash. 2010). A prevailing plaintiff in a 42 U.S.C. § 1983 action should recover attorney fees unless special circumstances render such an award unjust. *Brower v. Wells*, 103 Wn.2d 96, 108 (Wash. 1984)(citing *Newman v. Piggie Park Enters., Inc.,* 390 U.S. 400, 402, 19 L. Ed. 2d 1263, 88 S. Ct. 964 (1968); *Jacobsen v. Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983). The prevailing plaintiff prevailing under a 42 U.S.C. § 1983 is entitled to attorney fees regardless of the good faith or bad faith of the defendant. *Brower* (citing *Jacobsen,* 98 Wn.2d at 676). Good faith is not a special circumstance justifying denial of attorney fees to respondents. *Id.*

Brower v. Wells is directly analogous to the case at bar. In *Brower*, the municipality was required to provide notice of foreclosure proceedings as specified by statute. The municipality failed to comply with its statutory obligations and provided no notice of the actual foreclosure proceedings to the plaintiff other than by

publication. The Court held that the municipality's failure to mail notice of the actual foreclosure proceeding to the plaintiff violated due process requirements. *Brower v. Wells*, 103 Wn.2d at 102. The *Brower* court affirmed the trial court's holding that the city's foreclosure sale notices were unconstitutional and remanded for a determination of the owners' damages and attorney fees:

> To state a claim for relief under 42 U.S.C.S. § 1983, the plaintiff must allege that (1) defendant acted under color of state law, and (2) his conduct deprived the plaintiff of rights, privileges and immunities protected by the Constitution of the United States. ***Other jurisdictions have held that failure to specifically plead 42 U.S.C.S. § 1983 does not prevent recovery under its provisions so long as the essential elements of a § 1983 claim are stated***.

See, *id* (emphasis added).

Additionally, Mr. Hyytinen is entitled to an award for all attorney fees and costs incurred as a result of the WSP's unconstitutional taking of his property. Mr. Hyytinen is entitled to reasonable attorney fees under RCW 69.50.505(6):

> In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant. In addition, in a court hearing between two

> or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

The court in *Moen v. Spokane City Police Dep't*, 110 Wn. App. 714, 718-721, 42 P.3d 456 (2002), awarded attorney fees to the claimant due to the improper conduct of the seizing agency. Finally, the principles of equity would require that in order to do substantial justice, Mr. Hyytinen should be awarded all fees and costs of this suit.

II. ARGUMENT IN REPLY TO CITY

A. The City is Estopped from Asserting the Statute of Limitations as an Affirmative Defense.

The four (4) year statute of limitations is not absolute. Pursuant to the UCC itself, all principles of law and equity, which have not been displaced by its particular provisions, shall supplement the UCC. RCW 62A.1-103; *Gorge Lumber Co. v. Brazier Lumber Co.,* 6 Wn. App. 327, 334, 493 P.2d 782 (1972). Moreover, Washington's codification of the UCC mandates liberal construction. RCW 62A.1-103(a).

1. The 4 Year SOL is necessarily extended based upon the City's imputed knowledge that express warranty of good title was not being conveyed to Mr. Hyytinen at the time of sale.

In its business relations with individuals, the state must not expect more favorable treatment than is fair between men. *State ex rel. Washington Paving Co. v. Clausen*, 90 Wash. 450, 452, 156 P. 554 (1916). As specifically noted by the City, "a warranty of good title is a term in every contract for the sale of goods." RCW 62A.2-312(1)(a); see, *City's Responding Brief*, pg. 8-9. If the City has not fulfilled that contractual obligation, the City has breached the contract.

The seller creates an express warranty when "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." RCW 62A.2-313(1)(a). Implicitly, when purchasing a vehicle from a law enforcement agency, the seller promises good title which becomes a basis of the bargain between the contracting parties thereby creating an express warranty that the good (i.e., vehicle) shall conform to the seller's affirmation or promise of good title. It was the BPD who was in a position to know that it did not have good title and as such the City had imputed knowledge of false title when it sold the Escalade to Mr. Hyytinen for $21,500.00.

The City now argues that even though it breached its duty to convey good title at the time of sale, Mr. Hyytinen is precluded from recovery because the City didn't get caught in time.[6] This flies in the face of justice and must not be allowed to stand. To do so violates every concept of justice and equity.

2. Even if the 4 year SOL is applicable, Mr. Hyytinen's claims may proceed under the theory of equitable tolling.

Equitable tolling is a legal doctrine that allows a claim to proceed when justice requires it, even though it would normally be barred by a statute of limitations. See *Trotzer v. Vig*, 149 Wn. App. 594, fn 9 (Wash. Ct. App. 2009)(citing *Millay v. Cam*, 135 Wn.2d 193, 205, 955 P.2d 791 (1998)). The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d at 206 (citing *Finkelstein v. Security Properties*, 76 Wn. App. 733, 739-40 (Wash. Ct. App. 1995)).

[6] Under City's arguments, the only way the City could be held to its contractual obligations and remedies for the breach thereof, Mr. Hyytinen would have had to bring suit by 07/03/11, something Mr. Hyytinen could never have accomplished since the WSP seized his vehicle on 07/06/11.

The BPD had constructive notice that the Escalade was stolen.[7] Mr. Hyytinen had a right to rely on the statements of a government agent, such as the BPD who implicitly represented that the Escalade, despite its stolen status, had good title when it listed the Escalade for public auction in a local newspaper. Mr. Hyytinen purchased the Escalade with no knowledge of its title defects under false assurances from the BPD as to clean title and/or the BPD's bad faith failure to conduct standard VIN tests. As such, to the extent that a statute of limitations defense exists, it is rendered moot under the principles of equitable tolling.

B. Mr. Hyytinen is Entitled to Equitable Remedies Because the Contract is Void.

> The stolen nature of the Escalade does not eliminate any of the elements of a contract claim. ***In other words, Plaintiff may not have received what he bargained for, but that does not invalidate the contract***.

See, *City's Responding Brief* at pg. 10 (emphasis added).

The BPD's argument that a contract was created ignores the requirement that the parties mutually agree to the essential terms of

[7] The BPD, as a law enforcement agency, is well informed of tactics to conceal a stolen vehicle but failed to perform standard VIN verification tests despite its express knowledge that the Escalade was seized from a convicted forger with a criminal history positive for two counts of stolen property. CP 580; CP 711, ¶4; CP 740 (p. 14:13-16) and CP 741 (p. 19:21-25 and 20:1-7).

the contract. *West Coast Airlines, Inc. v. Miner's Aircraft & Engine Serv., Inc.*, 66 Wn.2d 513, 403 P.2d 833 (1965).

A sale is a consensual transaction. The subject matter which passes is to be determined by the intent of the parties, as revealed by the terms of their agreement, in the light of the surrounding circumstances. *W. Coast Airlines*, 66 Wn.2d at 518 (referencing 46 Am. Jur. *Sales* §§ 129, 142; 77 C.J.S. *Sales* § 24, pp. 630, 631; RCW 63.04.040). "***A contract of sale, like any other contract, must rest upon the mutual agreement of the parties on all essential elements of the sale.***" *Id.,* at 519 (referencing 77 C.J.S., *Sales*, Mutual Assent or Agreement, § 24, including the identity of the thing sold; *American Nat. Bank of Nashville v. West*, 31 Tenn. App. 85, 212 S.W.2d 683, 4 A.L.R.2d 314 (1948))(emphasis added).

Clearly, Mr. Hyytinen would not contract for the purchase of stolen goods. As such, there was no meeting of the minds, no contract and thus no proper sale of the Escalade. *Id.* (referencing *Huthmacher v. Harris's Adm'rs*, 38 Pa. 491, 80 Am. Dec. 502 (1861); *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600 (1883); *Evans v. Barnett*, 6 Del. (6 Penne.) 44, 63 Atl. 770 (1906)).

1. **Mr. Hyytinen's assent to the sale was induced by a fraudulent and/or material misrepresentation by the BPD.**

If a party's manifestation of assent is induced by a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient. See, *Restatement (Second) of Contracts* § 164(1) (1981). A misrepresentation is "an assertion that is not in accord with the facts." *BakeryEquipment.com v. Coastal Food, Inc.*, 2012 U.S. Dist. LEXIS 35329 (W.D. Wash. Mar. 15, 2012) (citing *Yakima County (W.Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 390-91, 858 P.2d 245 (1993) (quoting *Restatement*, *supra*, § 159)). The party seeking to have the contract voided bears the burden of proving any misrepresentation. *Id.*, at 391.

The doctrine of equitable estoppel is grounded in the principle that a party should be held to a representation made or position assumed if inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.

Implicit in its offer of sale was the BPD's representation that the Escalade had good title.[8] Mr. Hyytinen justifiably relied on the BPD's status as a law enforcement agency that there was indeed good title when he purchased the vehicle. However if the vehicle was stolen, the BPD did not have good title to give. Thus resulting in the material misrepresentation upon which Mr. Hyytinen justifiably relied and voiding the contract.

2. The contract was never valid given the mutual mistake of the parties.

A court of equity may provide relief from a mutual mistake by decreeing rescission of a contract. Such a remedy is available only if both parties to the agreement are clearly mistaken about a material fact, and if the party seeking rescission is not guilty of culpable negligence in failing to discover the mistake. The test in cases of mutual mistake is whether the contract would have been entered into had there been no mistake. At trial the burden of proof is on the party seeking relief, who must prove each element by clear, cogent, and convincing evidence. *Vermette v. Andersen*, 16 Wn. App. 466, 470 (Wash. Ct. App. 1976). A purchaser is bound by the facts a reasonable investigation would disclose. *Id.*, 471. A

[8] The BPD by virtue of being a law enforcement agency stood in a superior position of knowledge and ability to investigate. It had a duty to determine ownership of the vehicle before it sold the vehicle to an innocent party.

claim for money paid out is considered to be liquidated for purposes of awarding prejudgment interest thereon, regardless of the fact that there may be defenses asserted to such claim. *Id.*, 472-73.

The City's argument is not credible. It attempts to place the burden and risk of ascertaining whether good title exists on the purchaser even though the BPD held the vehicle out to have clean title by the very fact that it is a *law enforcement* agency. The BPD, as a police entity, has the requisite knowledge and expertise to determine whether a VIN is fake. Mr. Hyytinen, or any average citizen, would not have such knowledge, nor should he. Moreover, Mr. Hyytinen cannot be bound to a higher standard of "investigation" then the purported VIN checks that the BPD ran. Clearly Mr. Hyytinen, nor any other reasonable person, would enter into a contract for the sale of a vehicle that did not have good title. Accordingly, Mr. Hyytinen's recovery includes but is not limited to the purchase price plus an award of prejudgment interest on the purchase as damages for withholding the amount due. *Mall Tool Co. v. Far West Equip. Co.*, 45 Wn.2d 158, 273 P.2d 652 (1954); see also *Beedle v. General Inv. Co.*, 2 Wn. App. 594, 469 P.2d 233 (1970); C. McCormick, *Damages* § 54 (1935).

3. Mr. Hyytinen is entitled to recovery under the theory of unjust enrichment because substantial justice requires such a result.

The City argues that the City was not unjustly enriched because of the contractual relationship between the BPD and Plaintiff.

Under the City's argument, Mr. Hyytinen, a law-abiding citizen who purchased goods held out for sale by the ***police*** in good faith, is not only stuck with a $20,000+ loss, but on top of that, the City and the State get to retain the benefit.[9] This flies in the face of justice and invalidates all principles of equity. Accordingly, Mr. Hyytinen is entitled to recover under theory of unjust enrichment. *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008).

C. The City was Timely Noticed of Mr. Hyytinen's Claims Sounding in Tort.

The City again misconstrues the *Troxell* court's findings. The *Troxell* court does not bar a plaintiff from bringing a claim

[9] In 2006, Bremerton paid out 10% ($2,622.50) of the Escalade's fair market value ($26,225.00) to the State. CP 729. For some unknown reason, the BPD held onto the Escalade for over a year before selling it to the general public. Following the Escalade's sale to Mr. Hyytinen for $21,500.00, Bremerton retained $20,185.00, of the sale proceeds less the $1,315.00, sale fee to King County Auto Auction. CP 730. Given the date of the correspondence, the funds from the sale of the Escalade were deposited into City coffers no later than July 19, 2007. *Id.* Accordingly, the 3 years for the true owner to make claims would have occurred on or before July 19, 2010.

against a municipality because initially the plaintiff failed to comport with the notice requirement. Rather, the notice requirement only has that effect where the statute of limitations expired prior thereto.[10]

In the instant matter, Plaintiff's causes of action sounding in tort accrued in July of 2011, when Mr. Hyytinen' s Escalade was seized. Under RCW 4.16.080, the statute of limitations runs in July of 2014, more than three months away. RCW 4.16.080(2) – (5). Mr. Hyytinen filed a Standard Tort Claim Form in compliance with RCW 4.96.020(4), with the City on 11/03/11. Mr. Hyytinen filed his Second Amended Complaint on 02/06/12, 96 days after filing the required notice with the City. The City was afforded timely notice in compliance with RCW 4.96.020.

D. The BPD had Notice of the Falsity of Its Warranty of Title.

The City argues that the BPD did not misrepresent any fact because Mr. Hyytinen did not talk to anyone from the BPD prior to the purchase of the vehicle. By listing the Escalade for sale at a public auction for sale to the general public, the BPD held the

[10] A discussion regarding stay of tolling of statute of limitations during the pendency of the 60 day notice period is unnecessary as plaintiff clearly had plenty of time to issue proper notice to the City given that the statute of limitations has yet to expire for Mr. Hyytinen's tort claims.

vehicle out for sale with a bill of clean title. Significantly, the BPD did nothing to either stop the sale of the Escalade or notify Mr. Hyytinen that the Escalade did not in fact carry a clean title. As such, the BPD ratified the terms of the sale, including the representation that the Escalade had a clean title.

In the alternative, the City argues that even if the first element be proven, Mr. Hyytinen fails on element four in that the BPD did not know of the falsity. The BPD had constructive notice that the Escalade was stolen. Despite its knowledge that the Escalade was seized while in possession of a convicted forger with at least two counts for possession of stolen property, the BPD failed to perform its duties (i.e., conducting a standard VIN test) to verify ownership. Performance of its law enforcement duties would have prevented the sale.

1. **The BPD's negligent failure to verify the Escalade's VIN caused injury to Mr. Hyytinen.**

Again the City misconstrues *Moen v. Spokane City Police Department*, 110 Wn. App. 714, 42 P.3d 456 (2002). The City states that it complied with RCW 69.50.505(3) because it gave notice to Mr. Shears, the criminal whose list of convictions include forgery, and therefore fulfilled its duty. The BPD also owed a duty

to Mr. Hyytinen to notice the correct party so as to prevent the injury that was proximately caused by the BPD's failed conduct.

Just as in *Moen*, this case arises out of a controversy regarding a police department's seizure and forfeiture of a vehicle without giving the vehicle's true owner notice. In *Moen*, the Spokane Police Department failed to give notice of the forfeiture hearing to the true owner of the Taurus. In this case, after failing to identify and give notice to the alleged true owner of the vehicle, the BPD sold the improperly forfeited vehicle to Mr. Hyytinen. In *Moen*, Eugene Moen attempted to get his improperly forfeited vehicle back from the Spokane Police Department, but they refused, which prompted Mr. Moen to bring suit challenging the forfeiture. In this case, Mr. Hyytinen asked for a refund on the purchase price from the BPD when his vehicle was seized by the WSP after being identified as a stolen vehicle.

Pursuant to RCW 69.50.505, the seizure and forfeiture of the Escalade required the BPD to give the Escalade's true owner notice. The only way to give the true owner notice was to verify the Escalade's VIN number by conducting a standard VIN verification test. The BPD failed to do this thereby breaching its duty. Given the BPD's constructive notice of the Escalade's stolen status and by representing that the Escalade had clean title, the BPD put the Escalade back into the stream of commerce and created a good

faith purchaser when it subsequently sold the Escalade to Mr. Hyytinen. Therefore, the BPD's violation of RCW 69.50.505, proximately caused Mr. Hyytinen's damages. "But for" the BPD's failure to perform its duty, Mr. Hyytinen never would have purchased the Escalade.

III. CONCLUSION

Due to the actions and omissions of both the BPD and the WSP, Mr. Hyytinen has been damaged. The BPD sold property to Mr. Hyytinen without verifying its legitimacy. The WSP seized property without giving the required notice in violation of Mr. Hyytinen's constitutional rights. Both defendants acted negligently by failing to comply with their statutory duties. Both the City and the State were unjustly enriched. Mr. Hyytinen is entitled to damages including but not limited to costs and attorney's fees accrued in the prosecution of this action.

DATED THIS 11TH day of February, 2014.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DAVID HYYTINEN,

Appellant,

vs.

CITY OF BREMERTON and the STATE OF WASHINGTON, in its capacity as legal representative of the Washington State Patrol,

Respondents.

CERTIFICATE OF SERVICE

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I, Kathleen Forgette, the undersigned, certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct.

1. I am over the age of eighteen (18) years and not a party to the aforementioned action.

2. I certify that on February 12, 2014, I had one original and one copy of the corrected Appellant's Reply Brief delivered via legal messenger; and a copy of the same was emailed and sent out for service by US Postal Service to be served on the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of February, 2014, at Seattle, Washington.

Kathleen Forgette, Legal Assistant