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Court of Appeals  
Division II  
State of Washington  
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No. 17-2-00450-3

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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POTTS FAMILY MOTORS INCORPORATED, A Washington  
Corporation

Appellant,

vs.

CITY OF LONGVIEW, a Washington Municipal Corporation

Respondent.

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APPELLANT'S INITIAL BRIEF

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## **A. ASSIGNMENT OF ERROR**

### **1. Assignment of Error.**

- The Trial Court erred in granting summary judgment on behalf of the City on the claims of tortious interference, conversion, misconduct, and negligence based on immunity under RCW 69.50.506(c).
- The trial court erred in granting summary judgment on replevin because a material issue of fact existed as to the ownership of the cars seized.

### **2. Issue Pertaining to Assignment of Error.**

- The Court's Finding of Fact and Conclusion of Law regarding Governmental Immunity is insufficient to sustain the granting of summary judgment.
- The City is not immune under *Frost v. City of Walla Walla* because the actions leading to the suit are not lawful.
- The City failed to raise immunity as an affirmative defense which waives the defense and bars a grant of summary judgment on immunity.

- The Court did not grant summary judgment on the replevin action pursuant to immunity and an issue of fact as to ownership and possession of the vehicles seized from the Potts Family Motors car lot exists.

### **B. STATEMENT OF THE CASE**

The business of Potts Family Motors Inc. was incorporated on December 16, 2011. CP at 132. The corporation amended its Articles of Incorporation on April 25, 2012, to name Thomas Potts the President and sole officer of the corporation. CP at 140. The corporation held an annual meeting March 11, 2012, with the only officer of the corporation, Thomas Potts. Mr. Thomas Potts signed the Commercial Lease for Potts Family Motors Inc. and provided financial compensation into the corporation. Thomas Potts was the only shareholder and no other person owned any interest in the corporation. The corporation's registered agent was Michael Long, an attorney whose office is located in Longview, Washington. Both the corporation's existence, ownership, officers and registered agent are freely and readily ascertainable through a basic web search via the Secretary of State for Washington.

In August 2012, Sidney Potts was arrested on various felony counts involving allegations of drug delivery and organized crime. Items of

property were seized by law enforcement from the personal residence of Mr. Potts, as well as from the location of Potts Family Motors Inc. Law enforcement provided a single notice of forfeiture to Potts Family Motors Inc. regarding the seizure of a bank account in the name of the corporation. CP at 188. There was no notice to the corporation of forfeiture of vehicles, tools or similar property.

As a result of the lack of notice to the Appellant, an action was brought for damages. CP at 10. The City answered the complaint and alleged numerous affirmative defenses, not including immunity. CP at 63. A motion for Summary Judgment was filed by the City and a hearing was timely held. After a hearing, the Court granted Summary Judgment for the City. CP at 317.

### C. ARGUMENT

*The Analysis of the Court is insufficient to grant Summary Judgment for Governmental immunity.*

The Trial Court held that, pursuant to *Frost v. City of Walla Walla*, 106, Wn 2d 669, 724, P.2d 1017 (1986), the state was immune from liability under RCW 69.50.506(c). CP at 317-19. In *Frost*, a defendant attempted to sue the city of Walla Walla under a replevin action for damages after his vehicle was seized pursuant to RCW 69.50.505 and subsequently returned

after a hearing under the forfeiture statute. *Id.* at 671. At the hearing, the court suppressed evidence against Mr. Frost and ordered the illegally seized evidence to be returned. *Id.* The evidence was *returned* timely by law enforcement, but the action for replevin was brought by the defendant for damages for the seizure and impound of the vehicle. *Id.*

The court in *Frost* summarily holds that the city is immune from liability under the language of the seizure statute. *Id.* at 674. However, subsequent cases question the rationale of the holding in *Frost*.

In *Savage v. State*, 127 Wn.2d 434, 442, 899 P.2d 1270 (1995), the court analyzes the extension of qualified immunity for the actions of police officers to their employing jurisdictions. The court states that *Frost* “is not sound authority for the extension of qualified immunity from the agent to the state because they arrive at their holding in a manner which fails to engage the policy analysis the *Lutheran* court requires for deciding the question properly.” *Id.* The Court in *Savage v. State* identified concern that the lower court analysis resembles “that recently rejected by this court in *Lutheran*. There, we admonished against conclusory holdings which rely on ostensibly controlling cases while eschewing the detailed policy oriented factual inquiry which...is necessary to decide the immunity question.” *Id.* at 440, Citing *Lutheran Day Care v. Snohomish Cy.*, 119 Wn.2d 91, 100, 829 P.2d 746 (1992).

In the case at bar, the lower court improperly relied on conclusory holdings in *Frost* to establish summary judgment on the issue of immunity and the matter should be remanded back to the trial court for a determination on the proper standard for determining the extension of qualified immunity.

*The City of Longview is not immune from liability under Frost v. Walla Walla.*

The position of the Petitioner is that *Frost* creates an improper standard by which the lower court held that the City was immune from liability. However, even under the analysis of *Frost*, the City should not be immune from suit by Potts Family Motors. In *Frost*, an action was brought under replevin for property that was illegally seized and timely returned to the defendant. 106, Wn2d 669 at 671. Timely notice was given to Frost for the forfeiture hearing, and the matter proceeded as required under RCW 69.50.505. Frost argued that the immunity should not apply because the actions of law enforcement were not legal, and the court held that the seizure itself was done by an officer engaged in the good faith execution of his duties. *Id* at 674. There are significant factual differences between *Frost* and the factual circumstances which resulted in this cause of action.

In the present case, the action was brought not because of the seizure, but from the failure to provide notice to Potts Family Motors for the seizures that occurred. RCW 69.50.505(3) requires notice of seizure of property be

provided pursuant to the Rules of Civil Procedure. The statute specifically allows for service by certified mail with return receipt, as well as any method authorized by law or court rule.

“The purpose of statutes which prescribe the methods of service of process is to provide due process.” *Bruett v. Real Property Known as 18328 11<sup>th</sup> Ave. N.E.*, 93 Wn.App 290, 298, 968 P.2d. 913 (Div. I, 1998), Citing *Wichert v. Cardwell*, 117 Wn.2d, 148, 151, 812 P.2d 858 (1991). “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to be heard.” *Id.* Even if an officer is immune under RCW 69.50.506(c), the failure of the city to comply with the requirements of the forfeiture statute cannot be immune. Those separate and distinct acts are not included in the officer’s official duties of seizure as held in *Frost* that would extend immunity to the city. Agree to hold as it did. Better to not give notice at all?

The actions brought by Potts Family Motors were pursuant to the failure of the City to comply with notice requirements under the forfeiture statute. RCW 69.50.506(c) does not apply to extend the qualified immunity of law enforcement actions to the City for such failures.

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*The City Waived the Affirmative Defense by failing to Raise it as Required.*

Generally, “affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b) or (3) are tried by express or implied consent of the parties. *Henderson v. Tyrrell*, 80 Wn.App. 592, 624, 910 P.2d 522 (Div. III, 1996), citing *Bernsen v. Big Bend Elec. Coop.*, 68, Wn.App. 427, 433-34, 842 P.2d. 1047 (1993).

In the present case, the City failed to adequately plead the affirmative defense of immunity. CP at 63-66 (Answer to Complaint). The only issue is whether the matter was tried by express or implied consent of the parties. Neither party briefed with any significance the immunity issue under *Frost* in the summary judgment motion and response. A total of four lines of the motion for summary judgment addressed the immunity issue. The matter was not tried by express or implied consent and should be barred as improperly pled under the Rules of Civil Procedure.

*Summary Judgment was not appropriate as an issue of fact existed.*

A court should grant summary judgment only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). The burden is on the moving party to “demonstrating that

there is no genuine issue of material fact.” *Atherton Condominium Apartment–Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton*, 115 Wn.2d at 516.

In determining whether summary judgment was proper, the Court should consider all facts and the reasonable inferences that follow from them, in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516. “If the nonmoving party fails to do so, and reasonable persons could reach but one conclusion from all the evidence, then summary judgment is proper.” *Vallandigham*, 154 Wn.2d at 26.

In the present case, the court granted summary judgment for the replevin action based on a factual determination of ownership of the vehicles. The court asked for more information to obtain titles to the seized vehicles and make a decision on who the owner was based on the title of the car, ignoring the location on the sales lot or any facts in dispute. The court erred in granting summary judgment when a material dispute of fact existed.

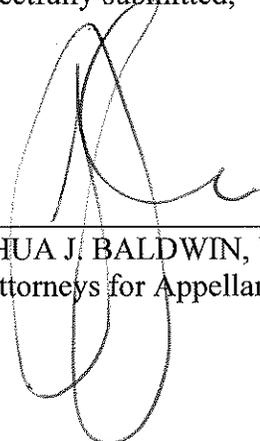
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**D. CONCLUSION**

The order granting Summary Judgment should be reversed and the matter remanded to the trial court for the action to proceed, or in the alternative, for a new hearing utilizing the proper standard for determining whether an extension of qualified immunity to the City is warranted. Additionally, to the extent the replevin action was dismissed based on a factual determination of the Court, that the dismissal of the action for replevin be reversed and the cause remanded to the trial court for the case to continue.

DATED: March 29, 2019.

Respectfully submitted,



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JOSHUA J. BALDWIN, WSBA #36701  
Of Attorneys for Appellant

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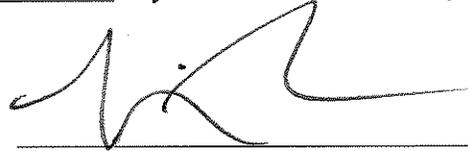
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CERTIFICATE

I certify that on this day I caused a copy of the foregoing APPELLANT'S INITIAL BRIEF to be mailed, postage prepaid, to Respondent's attorney, addressed as follows:

John Edward Justice  
Law Lyman Daniel Kamerrer et al  
2674 R W Johnson Boulevard SW  
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DATED this 29 day of March 2019, at Longview,  
Washington.



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ZOË V. NOLEN

# WALSTEAD MERTSCHING PS

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## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52751-1  
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