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No. 54492-0-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

U4IK GARDENS, LLP, a Washington limited liability partnership,

Appellant,

v.

STATE OF WASHINGTON, THE WASHINGTON STATE LIQUOR
CONTROL BOARD, KENDRA OGRAN and JOHN DOE NOS. 1-6,

Respondents,

OPENING BRIEF OF U4IK GARDENS, LLP

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Introduction

This is an appeal of a decision of the Superior Court of Thurston County denying any remedy at law to a licensed marijuana producer, U4IK Gardens LLP (hereafter "U4IK") suing the State, the Washington Liquor Control Board (hereafter, the "Board"), and its agents. The Board's Enforcement Officer arrived unannounced at U4IK's premises, found its inventory of 411 marijuana plants to be without required identification tags, and destroyed them on the spot, thereby destroying the business. The Superior Court granted Respondents' motion for summary judgment from any liability and dismissed U4IK's complaint.

Assignment of Error

The trial court erred in entering its Order Denying Plaintiff's Motion for Partial Summary Judgment and Granting Defendants' Cross-Motion for Summary Judgment on February 21, 2020, (CP193-95¹) insofar as that judgment dismissed with prejudice all claims of U4IK against Defendants, and failed to grant U4IK's motion to hold Defendants liable as a matter of law.

Issues Pertaining to Assignments of Error

1. Was the Board's Enforcement Officer authorized to destroy marijuana plants on the spot without notice or hearing upon discovering that plants were not tagged in accordance with the Board's regulations?

¹ All documents included in the Index to Clerk's Papers are cited as "CP__".

2. If the Enforcement Officer lacked such authority, did her actions in destroying the plants and U4IK's business render the Respondents liable for trespass pursuant to RCW 4.24.630?

3. If the Enforcement Officer lacked such authority, did her actions in destroying the plants and U4IK's business render Respondents liable for conversion?

4. Did RCW 69.50.505 deprive U4IK of all property rights in its business inventory on account of any regulatory violation?

5. If the Enforcement Officer was not authorized by statute or rule to destroy U4IK's property without notice or hearing, and RCW 69.50.505 forbids U4IK from recovering in tort, does the Constitution of the State of Washington provide a remedy for the damage caused by the Officer's violations of U4IK's fundamental rights to due process of law under the Washington Constitution?

Statement of Facts and Procedural History

A. Events Giving Rise to this Appeal.

U4IK held Washington State License No. 414272 to produce marijuana. (CP54.) As of July 11, 2018, U4IK was growing approximately 411 marijuana plants in excess of eight inches high, which were worth approximately \$500,000. (CP55.)

On July 11, 2018, Respondent Kendra Ogren, an Enforcement Officer employed by Board, visited the premises of U4IK without prior notice and observed the plants were not tagged with identification labels. (CP55.) The plants had, however, been entered into the Board's traceability system. (CP55; *see also* CP180-192 (list of batch identification numbers for the plants).) The reason for the violation was that U4IK had been unable to get its printer to print out the labels generated by the traceability system. (CP55.)

There is no dispute that the failure to have tags attached to the plants was a violation of WAC 314-55-083(4)(f), which declares that "[a]ll marijuana plants eight or more inches in height or width must be physically tagged and tracked individually . . .". (CP106)

Officer Ogren cut every plant down, severing the main stalks at the base where they met the growing medium and killing them, put them in garbage bags and took them away, leaving U4IK a receipt for the 411 plants. (CP55; CP57.) U4IK had no opportunity to save the plants or its business by any process of appeal or law. (CP56.)

In its briefing, the Board has previously emphasized other alleged violations identified by Officer Ogren, but only two violations were charged: (1) a violation of the traceability provisions in WAC 314-55-083(4) and (2) and "disorderly conduct and/or being intoxicated" (CP81-82). These were the first violations charged against U4IK of any kind. (*Id.*; CP35-36.)

Through a stipulated settlement agreement, in which the Board acknowledged a "bona fide question as to the basis of the alleged conduct violation," the board dismissed the second charge, and U4IK paid the presumptive \$2,500 fine on the first. (CP85; CP56.)

B. Procedural History

The case proceeded on U4IK's First Amended Complaint filed November 12, 2019 (CP24-31), which Respondents answered on November 19, 2019 (CP32-41). All parties recognized the essential legal question was whether the Board might, through its agents, lawfully destroy U4IK's inventory and business without prior notice or opportunity to be heard on account of a regulatory violation identified by the Enforcement Officer. On November 22, 2019, U4IK moved for summary judgment on the issue of liability on its claims for trespass, conversion, takings and an (as yet unrecognized) direct remedy under the Washington Constitution for substantive and procedural due process violations (CP42-53.) On December 20, 2019, Respondents cross-moved for summary judgment dismissing the claims.

On February 21, 2020, the Thurston County Court entered its Order Denying Plaintiff's Motion for Partial Summary Judgment and Granting Defendants' Cross-Motion for Summary Judgment on February 21, 2020, which simply recited the record reviewed and offered no rationale for the

decision, and dismissed U4IK's amended complaint with prejudice.

(CP193-95). This appeal followed.

Summary of Argument

The Board and its Enforcement Officer lacked authority, under the Board's own regulations, to arrive at U4IK's business and destroy it by chopping down its inventory of growing plants. This lack of authority renders the conduct tortious under Washington law, with the destruction constituting both statutory trespass (RCW 4.92.090) and common law conversion.

The Board's defense, that any violation of its regulations rendered the plants "contraband" as to which U4IK could assert no property interest under Washington law, is not supported by the statutes and rules legalizing the production and sale of marijuana.

And whether or not the plants constituted property, the conduct challenged here violated one of the most fundamental protections of the Washington Constitution, for due process of law requires notice and an opportunity to be heard before the State takes such extreme sanctions against a duly-licensed business for its first regulatory offenses. In prior cases, the courts of Washington have declined to create a remedy under the Washington Constitution akin to that created by the U.S. Supreme Court, but that was because adequate alternative remedies existed, or the suit itself constituted the opportunity to be heard.

It is undisputed that U4IK had no opportunity to be heard before its business was summarily destroyed in gross violation of its Constitutional rights. Its only remedy is this action for damages.

Argument

This Court is to review an order on cross motions for summary judgement de novo. *Wilkinson v. Chiwawa Cmty. Ass'n*, 180 Wn.2d 241, 249, 327 P.3d 614, 618 (2014). The trial court's order granting summary judgment in favor of Respondents may only be sustained "if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law". *Id.* Here, the parties largely agree on the material facts, and the primary question is one of law: whether Respondents are liable for the summary destruction of U4IK's business without notice or opportunity to be heard.

I. THE BOARD NEVER AUTHORIZED ITS ENFORCEMENT OFFICER TO ENGAGE IN THIS EXTRAORDINARY CONDUCT, AND IS RESPONSIBLE FOR THE OFFICER'S CONDUCT.

Over time, the People of the State of Washington rejected treating marijuana production and consumption as a crime. Beginning in 1998, Initiative 692² permitted patients with certain terminal or debilitating conditions to use medical marijuana. By 2012, Initiative 502³ authorized a legal marijuana production system for any users under the jurisdiction of the

² <https://www.sos.wa.gov/elections/initiatives/text/i692.pdf>.

³ <https://sos.wa.gov/assets/elections/initiatives/i502.pdf>.

Board. The overarching purpose of the Initiative Measure 502 was to abolish the entire “criminal contraband” approach to marijuana, and bring “it under tightly regulated, state-licensed system similar to that for controlling hard alcohol”. (2013 Laws, Chapter 3, § 1.)

Later, the Legislature acted to protect licensees like U4IK from excess Board regulation and enforcement, warning that

“[t]he risk taking entrepreneurs who are trying to comply with board regulations should not face punitive consequences for mistakes made during this initial phase of the industry that did not pose a direct threat to public health and safety.”

(2019 Laws, Chapter 394, § 1.)

Pursuant to statutory authority, the Board has issued a number of relevant regulations. Most directly relevant is the Board's assertion of the power to issue a "summary destruction order" in WAC 314-55-220:

What is the process once the WSLCB summarily orders marijuana, usable marijuana, marijuana concentrates, or marijuana-infused products of a marijuana licensee to be destroyed? (1) *The WSLCB may issue an order to summarily destroy marijuana, usable marijuana, marijuana concentrates, or marijuana-infused products after the WSLCB's enforcement division has completed a preliminary staff investigation of the violation and upon a determination that immediate destruction of marijuana, usable marijuana, marijuana concentrates, or marijuana-infused products is necessary for the protection or preservation of the public health, safety, or welfare.*

(2) Destruction of any marijuana, usable marijuana, marijuana concentrates, or marijuana-infused products under this provision shall take effect immediately upon personal service on the licensee or employee thereof of the

summary destruction order unless otherwise provided in the order.

(3) When a license has been issued a summary destruction order by the WSLCB, an adjudicative proceeding for the associated violation or other action must be promptly instituted before an administrative law judge assigned by the office of administrative hearings. If a request for an administrative hearing is timely filed by the licensee, then a hearing shall be held within ninety days of the effective date of the summary destruction ordered by the WSLCB.

(Emphasis added.) However, the Board did not use this power. It is undisputed that no "preliminary staff investigation" ever occurred here; that the Board never reviewed any such investigation and concluded immediate and summary destruction was required; that the Board never issued a "summary destruction order;" and that no such order was ever served on the licensee. (*See* CP55.)

Having failed to comply with the only express procedure for summary destruction, the Board has pointed to WAC 314-55-210, which lists the circumstances under which the Board "*may* seize, destroy, confiscate, or place an administrative hold on marijuana, usable marijuana, marijuana concentrates, and marijuana-infused products" (emphasis added). This regulation specifies that "during a criminal investigation, officers shall follow seizure laws detailed in RCW 69.50.505 and any other applicable criminal codes". WAC 314-55-210(4).

But the destruction here challenged was initiated by an administrative Enforcement Officer employed by the Board. (CP132.) It resulted in an administrative Complaint before the Board (CP81-82), which noted that the failure-to-tag charge was "Licensee's first Group 2 regulatory violation and the standard penalty for this is a \$2,500 monetary fine under WAC 314-55-525" (since reduced to \$1,250).

The procedures to be followed to see whether the Board *does* destroy the marijuana it *may* seize in an administrative enforcement proceeding are either those set in WAC 314-55-220 ("summary destruction order") or more often, through case adjudication following the seizure, as referenced in WAC 314-55-230(2) (referring to "[d]estruction . . . after case adjudication).

Before the Superior Court, the Board attempted to find authority for the Enforcement Officer to act summarily by invoking two subsections of WAC 314-55-210, neither of which applies. Subsection (2) provides for possible destruction of "[a]ny product not properly logged in inventory records or untraceable product required to be in the traceability system." But the 411 plants were not "product". *See* RCW 69.50.101(cc) ("'Marijuana products' means useable marijuana, marijuana concentrates, and marijuana-infused products as defined in this section").

Subsection (5) provides:

The WSLCB may destroy any marijuana, marijuana concentrate, usable marijuana, and/or marijuana-infused products *in its possession*

that is not identifiable through the Washington marijuana traceability system or otherwise in a form that is not compliant with Washington's marijuana statutes or rules, chapters 69.50 RCW and 314-55 WAC.

(Emphasis added.) But this subsection addresses what can happen *after* the Board seizes marijuana, and it is "in its possession". It *may* destroy such marijuana, but only after a "case adjudication" or other process. Here, as explained below, the destruction occurred immediately, on site, by cutting down the plants on the licensee's premises.

It is apparent from the design of WAC 314-55-210 that the Enforcement Officer's actual authority when faced with unlabeled plants inside the highly-regulated facility is set forth in subsection (6):

“WSLCB officers may order an administrative hold of marijuana, usable marijuana, marijuana concentrates, and marijuana-infused products to prevent destruction of evidence, diversion or other threats to public safety, while permitting a licensee to retain its inventory pending further investigation, pursuant to the following procedure:

“(a) If during an investigation or inspection of a licensee, a WSLCB officer develops reasonable grounds to believe certain marijuana, usable marijuana, marijuana concentrates, and marijuana-infused products constitute evidence of acts in violation of the state laws or rules, or otherwise constitute a threat to public safety, the WSLCB officer may issue a notice of administrative hold of any such marijuana, usable marijuana, marijuana concentrate, or marijuana-infused products. The notice of administrative hold shall provide a documented description of the marijuana, usable marijuana, marijuana concentrate, or marijuana-infused products to be subject to the administrative hold.

“(b) The licensee shall completely and physically segregate the marijuana, usable marijuana, marijuana concentrate, and marijuana-infused products subject to the administrative hold in a limited access

area of the licensed premises under investigation, where it shall be safeguarded by the licensee. Pending the outcome of the investigation and any related disciplinary proceeding, the licensee is prohibited from selling, giving away, transferring, transporting, or destroying the marijuana, usable marijuana, marijuana concentrate, and marijuana-infused products subject to the administrative hold.

“(c) Nothing herein shall prevent a licensee from the continued cultivation or harvesting of the marijuana subject to the administrative hold. All marijuana, usable marijuana, marijuana concentrate, and marijuana-infused products subject to the administrative hold must be put into separate harvest batches from product not subject to the administrative hold.

“(d) Following an investigation, the WSLCB may lift the administrative hold, order the continuation of the administrative hold, or seek a final agency order for the destruction of the marijuana, usable marijuana, marijuana concentrate, and marijuana-infused products.

(Emphasis added.) If there is an issue with respect to tagging plants, the plants can and should continue to grow while due process works out the appropriate penalty for noncompliance. But no administrative hold occurred here, or any investigation beyond the Enforcement Officer's bare observation that the plants lacked tags.

In short, the Enforcement Officer lacked authority under the Board's own regulations to seize and destroy the plants on the spot. The record does not support any claim that the Enforcement Officer was exercising criminal seizure and forfeiture powers directly under RCW 69.50.505, but even that statute merely provides a seizure power, RCW 69.50.505(2), and then provides due process beginning with formal notice in RCW 69.50.505(3):

"In the event of seizure pursuant to subsection (2) of this section, proceedings for forfeiture shall be deemed commenced by the seizure. The law enforcement agency under whose authority the seizure was made shall cause notice to be served within fifteen days following the seizure on the owner of the property seized and the person in charge thereof and any person having any known right or interest therein, including any community property interest, of the seizure and intended forfeiture of the seized property. . . ."

The reference to "intended forfeiture" makes it clear that additional process is required before destroying the property, and the next two subsections allow an additional forty-five days after notice before such forfeiture (RCW 69.50.505(4)) followed by a "reasonable opportunity to be heard" (RCW 69.50.505(5)).

In short, had the Enforcement Officer simply followed either the Board's own rules or the statute, U4IK would have had the opportunity to do precisely what it did after it was already too late: acknowledge this technical regulatory violation and pay a fine, avoiding destruction. Instead, the Enforcement Officer, after some extremely strange goings on involving an apparent friendship with a former partner in U4IK (*see* CP25-26 (allegations in complaint)), destroyed the plants and business on the spot.

II. SUMMARY JUDGMENT SHOULD BE ENTERED HOLDING RESPONDENTS LIABLE FOR TRESPASS BECAUSE THE ENFORCEMENT OFFICER LACKED AUTHORIZATION TO SUMMARILY DESTROY THE PLANTS.

As a general matter, "[t]he state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out

of its tortious conduct to the same extent as if it were a private person or corporation.” RCW 4.92.090. A special remedy is provided for cutting down crops like U4IK's marijuana in RCW 4.24.630:

“Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, *a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act.*”

(Emphasis added.)

By the plain language of the statute, the Board’s agents went onto plaintiff’s land removed crops, and destroyed personal property. The critical question here is whether the Board’s agents were somehow privileged to come onto the premises and destroy the plants. Their destruction was done “wrongfully” because the Enforcement Officer, knew, or had reason to know, that she lacked authorization to kill the 411 plants on the spot without any process of law (or even administrative review). This is not a close question: it should be obvious to modern government officials that we do not live in a tyranny where their word is law, and they can serve as judge, jury and executioner of a business that has committed a minor regulatory offense.

As set forth above, the Board’s regulations are clear that the lawful response to untagged plants is to issue an administrative hold pending

adjudication. And if the Enforcement Officer believed that exigent circumstances required immediate destruction, she could have sought a summary determination order from the Board and served it upon the licensee—a procedure of questionable constitutionality—but even that didn't happen here. There was simply no authorization in law to kill all the plants immediately, and the Board is therefore liable in trespass.

It is well established that trespass liability is available for “unnecessary damage to property caused by its law enforcement officers”. *Brutsche v. City of Kent*, 164 Wn.2d 664, 671, 193 P.3d 110, 115 (2008). The *Brutsche* court rejected the City's defense that it had a valid, judicially-issued warrant to privilege its conduct, just as this Court should reject Respondents' attempts to find authorization for this extraordinary conduct. In her Declaration, the Enforcement Officer asserts that failure to tag the plants "creates serious risks to the public because the source and quality of marijuana products cannot be verified" (CP133), but there is no dispute that the plants were in the system, and had not left the premises; to the extent the Enforcement Officer was operating under some pre-legalization understanding the plants were "contraband" (*id.*) and subject to immediate destruction without due process of law, she certainly had "reason to know" better within the meaning of RCW 4.24.630.

III. SUMMARY JUDGMENT SHOULD BE ENTERED HOLDING RESPONDENTS LIABLE FOR CONVERSION BY REASON OF THE ENFORCEMENT OFFICER'S UNJUSTIFIED AND WILLFUL CONDUCT.

The undisputed facts also confirm Respondents are liable for conversion. “Under our modern jurisprudence, “[c]onversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession.” *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691, 696 (2008) (internal citations omitted). In *Potter*, the Supreme Court permitted a Washington citizen to sue the State Patrol for unlawful impoundment of a vehicle, explaining that “[t]he unlawful impoundment of a vehicle may be an unjustified, willful interference with another's property sufficient to constitute conversion.” *Id.* at 79.

So too was Respondents’ unlawful destruction of the plants an “unjustified, willful interference with another’s property” sufficient to constitute the tort of conversion, and summary judgment should issue holding Respondents liable for it.

IV. THE BOARD'S POSITION THAT THE PLANTS WERE NOT "PROPERTY" FOR PURPOSES OF WASHINGTON TORT LAW.

The State attempts to defeat the tort claims by arguing that the plants were "contraband," a term defined by the Supreme Court as an object, "the possession of which, without more, constitutes a crime." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 85 S. Ct. 1246,

1250 (1965). Since Initiative 502, however, more is required than the bare nature of a marijuana plant to show that possession is a crime, for its possession is not categorically unlawful, and it thus has lost whatever "contraband" status might have allowed the State's officials to search and destroy it at will.

Respondents thus refine their argument to suggest that has no property interest whatsoever in its business inventory for purposes of invoking Washington tort law. This arcane and meritless conclusion is based on RCW 69.50.505, which begins, in subsection (1), by declaring that "the following are subject to seizure and forfeiture and no property right exists in them". As set forth above, that statute is not even relevant in the administrative enforcement context.

Respondents' argument involves the assertion that nearly any property, from money to real estate, can lose its status as "property" under Washington law, based on the many sections and subsections of RCW 69.50.505, but Respondents focus on RCW 69.60.505(1)(a): "All controlled substances which have been manufactured, distributed, dispensed, acquired, or possessed *in violation of this chapter . . .*". RCW 69.50.505(1)(a) (emphasis added). The statute may be easily construed to avoid the serious constitutional problems arising from the destruction of licensed businesses for minor regulatory violations based on a proper

construction of "violations of this chapter"—as distinguished from violations of the Board's rules.

In Chapter 69.50, the People and the Legislature repeatedly distinguish between the "provisions of this chapter" and the "rules adopted to implement and enforce it". The basic authority under which U4IK received its license provides that

"[t]he production, possession, delivery, distribution, and sale of marijuana in accordance with *the provisions of this chapter and the rules adopted to implement and enforce it*, by a validly licensed marijuana producer, shall not be a criminal or civil offense under Washington state law.

(Emphasis added.)

The Board of course has general authority to issue such "rules not inconsistent with the spirit of chapter 3, Laws of 2013 [that is, Initiative 502] as are deemed necessary or advisable." RCW 69.50.342(1). It even has express authority to adopt rules for:

"Identification, seizure, confiscation, destruction, or donation to law enforcement for training purposes of all marijuana, marijuana concentrates, useable marijuana, and marijuana-infused products produced, processed, sold, or offered for sale within this state which do not conform in all respects *to the standards prescribed by this chapter or chapter 69.51A RCW or the rules adopted to implement and enforce these chapters.*

(Emphasis added.)

The People (and later the Legislature, in reenacting this action) had special concern for due process in evaluating violations of the Board's

rules, for an additional provision, RCW 69.50.345(12) provides that the Board "must" adopt rules

"Specifying procedures for identifying, seizing, confiscating, destroying, and donating to law enforcement for training purposes all marijuana, marijuana concentrates, useable marijuana, and marijuana-infused products produced, processed, packaged, labeled, or offered for sale in this state that do not conform in all respects to *the standards prescribed by this chapter or the rules of the state liquor and cannabis board.*"

(Emphasis added.) As we have seen *supra* Point I, those rules did not provide for summary destruction of the plants on the spot by the Enforcement Officer.

Chapter 69.50 does establish some core standards, the violation of which could be construed to make marijuana contraband, as to which no property right can be asserted, if RCW 69.50.505 even applied, which it does not. First and foremost, the overarching intent of RCW 69.50.505(1)(a) was to affirm that anyone producing marijuana *without a license* might suffer the seizure and destruction of the product without claiming violation of any property rights. But at all relevant times, Appellant U4IK had a marijuana producer's license consistent with RCW 69.50.325.

Second, as to licensed marijuana producers like U4IK, RCW 69.50.366 declares:

"The following acts, when performed by a validly licensed marijuana producer or employee of a validly licensed marijuana

producer in compliance with rules adopted by the state liquor and cannabis board to implement and enforce this chapter, do not constitute criminal or civil offenses under Washington state law:

"(1) Production or possession of quantities of marijuana that do not exceed the maximum amounts established by the state liquor and cannabis board under RCW 69.50.345(3)^[4] . . ."

This provision provides a core Chapter 69.50 standard for producers: do not produce a greater quantity than your license allows.

But U4IK was authorized to grow the 411 plants, so the Enforcement Officer was not summarily destroying excess production that might reasonably be regarded as contraband. These plants were the licensed business inventory, and it is simply unreasonable to construe them as anything other than the property of U4IK.

The fact that RCW 69.50.366 refers to production in compliance with the rules does not make the rules the "standards of this Chapter," or convert a rule violation into a "violation of this Chapter". To hold that any *regulatory* violation destroys entirely licensed business' property right in its crops would raise serious constitutional questions, for the Board's rules extend to matters such as what sort of signs to post on the premises (WAC 315-55-086), the height and type of fences to be used (WAC 315-55-075) and a plethora of other mundane regulatory matters. While the

⁴ RCW 69.50.345(3) directs the Board to issue rules "[d]etermining the maximum quantity of marijuana a marijuana producer may have on the premises of a licensed location at any time without violating Washington state law".

Board can and will assert that each and every one of its regulations is vital to protect the health and safety of the people of Washington, its own procedural regulations would not even revoke a license for violation of the plant tagging rule until the fourth violation in a two-year window. WAC 314-55-521.

In sum, the Respondents' position that any and all regulatory violations are "violations of this Chapter" for purposes of destroying any property rights in a licensee's inventory does violence to the language and structure of the statute, and is flatly contrary to the People's decision to create a regulatory system "similar to that for controlling hard alcohol". (2013 Laws, Chapter 3, § 1.)

V. IF TORT LAW DOES NOT PROVIDE A REMEDY, THE WASHINGTON CONSTITUTION SHOULD.

Construing U4IK's failure to tag the plants as a regulatory violation, rather than a violation of Chapter 69.50 itself, will avoid any constitutional question on this appeal by allowing the tort remedy to proceed. But if tort law offers no remedy, the question remains whether the Washington Constitution allows the Enforcement Officer's extraordinary conduct to pass without remedy. It should not.

A. The Enforcement Officer's Conduct Was Blatantly Unconstitutional.

The Washington Constitution takes care to pronounce that: "The provisions of this Constitution are mandatory, unless by express words

they are declared to be otherwise." Wash. Const. Art. I, § 29. Among the most important of those provisions is that: "No person shall be deprived of life, liberty or property without due process of law." *Id.* § 3. In addition, Article I, § 7 provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." And § 12 provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."⁵

The idea that Enforcement Officers may visit licensees of the Board and destroy their businesses at will without any standards, guidance or any process other than the Enforcement Officer serving as judge, jury and executioner cannot be reconciled with these fundamental and mandatory protections of the Washington Constitution.

The Supreme Court settled this issue long ago, in holding a prior version of RCW 69.50.505(b)(4) unconstitutional on its for failure "to

⁵ U4IK eschews the assertion of any federal constitutional rights in this action because federal marijuana policy differs from Washington's, and hence extended discussion of the "*Gunwall*" factors for "whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution," *State v. Gunwall*, 106 Wn.2d 54, 61, 720 P.2d 808, 812 (1986), should not be necessary. U4IK does not propose to extend the protections of Washington's constitution beyond the federal one except insofar as the marijuana-related nature of its business should not disqualify it from the protection of the Washington Constitution.

provide for any notice or opportunity for a hearing prior to actual seizure of the property." *Everett v. Slade*, 83 Wn.2d 80, 85, 515 P.2d 1295, 1298 (1973). There, the police officer seized appellant's car for selling a controlled substance, averring that drug violation "involved the use of a vehicle". *Id.* at 82.

That the law might ultimately allow the forfeiture of the car was of no moment. The Supreme Court's extended discussion of the nature of due process rights in this context is controlling:

It is said that the questioned provision falls within the "extraordinary situations" exception recognized in various federal due process cases. We do not agree.

Unlimited power of "seizure" is not authorized by the suggested exception. Even there, due process requires that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest except, as stated by *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971), "for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Further, the "opportunity" for a hearing must be granted "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965). The hearing must be "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950).

Recognizing that "extraordinary situations" may justify the postponement of notice and hearing, the United States Supreme Court recently stated that such situations must be "truly unusual" and that ordinary costs in time, effort, and expense incurred by providing a hearing cannot outweigh the constitutional right. *Fuentes v. Shevin*, 407 U.S. 67, 90, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). Regarding such situations, the court had this to say:

Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

(Footnote omitted.)

Everett, 83 Wn.2d at 83-84; *see also State v. One 1972 Mercury Capri*, 85 Wn.2d 620 (1975) (striking down seizure under state and federal constitution).

There was nothing extraordinary U4IK's circumstances to justify not merely the lack of any pre-seizure hearing, but any hearing whatsoever before the total destruction of the plants and business. The Enforcement Officer's actions were blatantly unconstitutional, under longstanding Constitutional norms.

The post-*Everett* cases construing the amended version of RCW 69.50.505 continue to insist that notwithstanding the statutory innovation that "no property right exists" in seized property, ordinary due process standards must still apply. *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 92, 838 P.2d 111, 123 (1992). The Legislature cannot legislate due process away.

B. If No Tort Remedy Is Available, This Court Should Follow its Sister States in Creating a Constitutional Remedy.

To the extent that no tort remedy is available—and it should be—the Washington Constitution should be invoked to afford a remedy. As Chief Justice John Marshall declared: “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” *Marbury v. Madison*, 5 U.S. 137, 163, 1 Cranch 137, 2 L. Ed. 60 (1803). And the provisions of the Washington Constitution can hardly be said to be "mandatory" if the Board's agents are privileged to violate them whenever a personal whim so motivates them.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the U.S. Supreme Court created a direct remedy for damage where federal agents violated citizens’ Fourth Amendment rights against unreasonable searches and seizures. Appellant understands that Washington courts have heretofore declined to follow *Bivens* and establish a direct, constitutionally-based damage claim where agents of the State of Washington have violated rights guaranteed under the Washington State Constitution, but each of those cases is distinguished because the fundamental rationale for declining to create the cause of action has no application in this case.

As the initial case on this issue explained:

“. . . plaintiff's counsel candidly invites us to create a 'cause of action' based solely upon an alleged violation of a constitutionally guaranteed right: 'No person shall be deprived of life, liberty, or property, without due process of law.' Const. art. 1, § 3.

“Plaintiff misconstrues the basic nature of the due process clause. The clause is a protection against arbitrary action by the state; but if a person has his day in court, he has not been deprived of due process.

Systems Amusement, Inc. v. State of Washington, 7 Wn. App. 516, 518

(1972); *see also Spurrell v. Block*, 40 Wn. App. 854, 861 (1985)

(“Plaintiffs' rights are adequately protected by recognized causes of action; they have had their day in court”). The theme of this entire line of cases is where there is an existing cause of action, no constitutional remedy need be created. *E.g., Reid v. Pierce County*, 136 Wn.2d 195, 213-14 (1998) (common law invasion of privacy action); *Blinka v. Wash. State Bar Ass'n*, 109 Wn. App. 575, 594 (2001) (wrongful discharge claim).

If no tort remedy lies here, this is the archetypical case in which a constitutional remedy should be created, for there was a blatant violation of Appellant's substantive and procedural due process rights resulting in damage. Many, many other states have taken this step where, as here, no other law provides a remedy. *See Benjamin v. Wash. State Bar Ass'n*, 138 Wn.2d 506, 548 n.119, 980 P.2d 742, 764 (1999) (Sanders, J., dissenting) (concluding that “[m]any states have recognized that citizens have a

remedy for violation of state constitutional rights" and listing cases across the country).

Substantively, Respondents put Appellant out of business for conduct that was a first offense and presumptively (and later actually) addressed with a small fine. Procedurally, Respondents' conduct failed to provide the minimally required notice and opportunity to be heard before the destruction occurred.

Conclusion

The trial court should be reversed, and summary judgment entered in favor of Appellant U4IK Gardens holding Respondents liable for damages.

RESPECTFULLY SUBMITTED this 28th day of May, 2020.

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I hereby certify that I served a true and correct copy of the foregoing document on the following via the COA e-filing portal and e-mail on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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