

THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
Division III

CASE # 349-86-1

SCOTT SHUPE, an individual

Appellant,

v.

CITY OF SPOKANE, a Washington municipality

Respondent.

APPELLANT'S OPENING BRIEF

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SCOTT SHUPE

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I. INTRODUCTION

This action arises out of the taking and destruction of personal property that belonged to Mr. Shupe by the City of Spokane. Prior to any answer being filed, the Trial Court granted the City's CR 12(b)(6) Motion to Dismiss based solely on the City's claim that the statute of limitations had run on every claim alleged. As set forth below, the Trial Court erred by failing to consider when the elements of the claims accrued and by applying a statute of limitations to an Inverse Condemnation claim.

II. ASSIGNMENTS OF ERROR

1. Did the Trial Court err by dismissing Shupe's Inverse Condemnation claim pursuant to CR 12(b)(6) based on the statute of limitations?
2. Did the Trial Court err by dismissing Shupe's conversion claim pursuant to CR 12(b)(6) based on the statute of limitations?
3. Did the Trial Court err by dismissing Shupe's violation of due process claim pursuant to CR 12(b)(6) based on the statute of limitations?

4. Did the Trial Court err by dismissing Shupe's violation of the right of privacy claim pursuant to CR 12(b)(6) based on the statute of limitations?

III. STATEMENT OF THE CASE

On or about September 10, 2009, police officers acting within the course and scope of their employment with the Defendant City of Spokane entered Shupe's property. See Complaint.¹

On or about September 10, 2009, officers acting within the course and scope of their employment with the Defendant City of Spokane seized and destroyed personal property. Id.

The police officers entered Shupe's property because they believed the property, marijuana, possessed by Shupe was an illegal substance and that he did not have a lawful right to possess it. Id.

On June 13, 2013, the Court of Appeals, Division III of the State of Washington entered a mandate confirming that the Defendant City of Spokane wrongfully entered Shupe's property, wrongfully searched his property, and wrongfully seized his property. The ruling confirmed for the first time, Shupe's lawful right to possession. Id.

¹ The Summons and Complaint are found at Clerks Papers 1-7

Shupe was not entitled to his property rights and to his privacy until the Court of Appeals determined possession of the property was legal, and that Shupe possessed a legal right to the property. As a direct result of Defendant City of Spokane's wrongful conduct, Plaintiffs timely filed a claim as a result of suffering damages.

IV. ARGUMENT

A. STANDARD OF REVIEW

To prevail on a CR 12(b)(6) motion, a defendant has the burden of establishing beyond doubt that the plaintiff can prove no set of facts consistent with the complaint, which would entitle the plaintiff to relief. Forden v. Klickitat County, 79 Wn. App. 850, 854 (1995). CR 12(b)(6) motions should be granted "*sparingly and with caution in order to make certain the plaintiff is not improperly denied a right to have his claim adjudicated on the merits.*" Id. Usually, dismissal is granted under this rule "*only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insufferable bar to relief.*" Id., citing 5A Wright & Miller § 1357, at 344. "*The motion should be denied if the plaintiff can assert any hypothetical factual scenario that gives rise to a valid claim, even if the facts are alleged informally for the first time on appeal.*" Id., citing, Bravo v. Dolsen Cos., 125 Wn.2d 745,

750 (1995). CR 12(b)(6) dismissals are review on appeal de novo. Kinney v. Cook, 159 Wn.2d 837, 842 (2007) citing Tenore v. AT & T Wireless Servs., 136 Wn.2d 322, 329–30 (1998).

The Court erred by granting the Defendant’s CR 12(b)(6) Motion to Dismiss because Shupe alleged facts, which if proven to be true, would entitle him to relief. As alleged, the facts show that no statute of limitations applies to Shupe’s inverse condemnation claim and all of the elements for the remaining claims did not exist until the mandate from the Court of Appeals was issued.

B. THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL THE COURT OF APPEALS ISSUED ITS MANDATE.

The law of conversion requires that the transferee wrongfully receive the property of another. Davenport v. Washington Educ. Ass’n, 147 Wn. App. 704, 726 (2008). “*Conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.*” Westview Investments, LTD v. U.S. Bank National Association, 133 Wn. App. 835, 852 (2006), citing, PUD of Lewis County v. WPPSS, 104 Wn.2d 353, 378 (1985). “*In order to make a prima facie case in conversion, the burden is on the plaintiff to prove a right to possess the property converted.*” Bloedel Timberlands Development, Inc. v. Timber Industries, Inc., 28 Wn. App.

669, 679 (1981). “*The burden is on the plaintiff to establish ownership and a right to possession of the converted property.*” Meyers Way Development Limited Partnership v. University Savings Bank, 80 Wn. App. 655, 675 (1996). In order to maintain a conversion action in Washington, the plaintiff must establish a property interest in the goods allegedly converted. Id. at 675.

In September of 2009, when the police officers entered Shupe’s property, seized and ultimately destroyed the property it was determined that Shupe did not possess a legal right to the property. Shupe was charged with possessing an illegal substance, was charged, and ultimately convicted of this crime in March of 2011. Because a necessary element of conversion required Shupe to prove the right to possession of the marijuana seized by the Defendants was unlawful, he did not have the ability to bring a cause of action at that time. See Bloedel Timberlands Development, Inc., 28 Wn. App. at 679. Shupe did not have a right to bring a cause of action for the damage to his property until the Appellate Court issued its mandate on June 13, 2013, when it was determined for the first time Shupe had a legal right to the marijuana property.

Statutes of limitations only begins to run when the plaintiff has a right to seek recovery in the courts once every element can be proved. Woods View II, LLC v. Kitsap County, 188 Wn. App. 1, 20, 352 P.3d 807

(2015) citing Malnar v. Carlson, 128 Wn.2d 521, 529 (1996). “*That is, the statute of limitations does not begin to run until every element of an action is susceptible to proof, including the occurrence of actual loss or damage.*”

Id. On June 13, 2013, it was determined that Shupe had legal right to the marijuana property that was seized and destroyed by the Defendants. It was only at this point that Shupe possessed every element of the claim of conversion, and had a right to bring a claim.

The case law cited by the Defendants at the trial court level is distinguishable. Defendants cited to Gausvik v. Abbey, 126 Wn. App. 868, 107 P.3d 98 (2005) in support of dismissal. This case deals with a plaintiff who failed to sue for false imprisonment until after the conviction was overturned. Id. at 881. The plaintiff was barred by the statute of limitations because he waited longer than the applicable period because he was waiting for the conviction to be overturned. The distinction is the plaintiff in Gausvik at all times had a right to freedom, and thus could pursue a claim at the time he was arrested, whereas in this case, Shupe possessed a substance determined to be illegal until the Court of Appeals determined otherwise.

The court in Gausvik states:

[T]he statute of limitations begins to run when a party has a right to apply to court for relief. To apply for relief, each element of the

cause of action must be susceptible to proof. A plaintiff cannot maintain a negligence action, and the statute of limitations will not begin to run, until the plaintiff has suffered actual appreciable damage.

Gausvik, 126 Wn. App. at 880. The case law cited by the Defendants supports Shupe's argument that the statute of limitations did not begin to run until the Appellate Court issued its mandate. As Shupe did not possess a legal right to the marijuana, as it was an illegal substance, until the Appellate Court determined he was legally in possession. Proving a legal right to the property is an essential element of the claim for conversion. See Bloedel Timberlands Development, Inc., 28 Wn. App. at 679. Shupe did not have a legal right to bring a claim until all elements of the cause were susceptible to proof. Gausvik, 126 Wn. App. at 880. The ownership required by the claim of conversion was not established until the mandate of the Court of Appeals was issued on June 13, 2013. Therefore, this was the date Shupe's statute of limitations began to run.

Likewise, this also meant that until the mandate issued, Shupe could not bring civil claims from violations of his right to privacy and due process. Consequently, none of these actions should have been dismissed.

**C. THERE IS NO STATUTE OF LIMITATIONS
ASSOCIATED WITH AN INVERSE CONDEMNATION
CLAIM**

The dismissal of Shupe's Inverse Condemnation Claim is unsupported by Washington law. Defendants did not dispute that Shupe properly alleged inverse condemnation. Unable to meet its burden under CR 12(b), without authority it claims a three-year statute of limitations should apply to the Inverse Condemnation claim. However, this is directly contrary to Washington law. A constitutional claim for just compensation is not affected by the passage of time. See Petersen v. Port of Seattle, 94 Wn.2d 479, 485 (1980). As a result, it would be improper to dismiss the Inverse Condemnation Claim by applying a three-year statute of limitations.

Despite moving based on a statute of limitations argument, for the first time in its reply brief the City made the conclusory assertion that the takings clause does not apply to personal property. However, this is contrary to the Constitution and well established law otherwise. See e.g. Government liability under inverse condemnation actions extends to both real and personal property. See Patrick v. Riley, 209 Cal. 350, 287 P. 455 (1930) (just compensation clause applied to the destruction of diseased cattle); Sutfin v. State, 261 Cal. App. 2d 50, 67 Cal. Rptr. 665 (3d Dist. 1968) (just compensation clause applied to the destruction of automobile).

V. CONCLUSION

Given an analysis of when Shupe could properly bring the causes of action alleged, the Trial Court erred and Shupe has stated claims for relief that are not barred by any statute of limitations. Therefore, Shupe respectfully requests the Trial Court's ruling be reversed and the matter remanded.

RESPECTFULLY SUBMITTED this 20th day of July, 2017.

ROBERTS | FREEBOURN, PLLC

s/ Kevin W. Roberts

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Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 20th day of July, 2017, a true and correct copy of the foregoing document was served by the method indicated below and addressed to the following:

Salvatore J. Faggiano	COA Notification	<input checked="" type="checkbox"/>
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5 th Floor Municipal Building	Facsimile	<input type="checkbox"/>
Spokane, WA 99201	Email	<input type="checkbox"/>

DATED this 20th day of July, 2017 at Spokane, Washington.

s/ Kevin W. Roberts
Kevin W. Roberts, WSBA #29473

ROBERTS FREEBOURN

July 20, 2017 - 10:12 AM

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