

No. 349861

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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SCOTT SHUPE,

Appellant,

v.

CITY OF SPOKANE,

Respondent.

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BRIEF OF RESPONDENT

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## **I. INTRODUCTION.**

Appellant Scott Shupe's civil lawsuit against Respondent City of Spokane was properly dismissed by the trial court. In September 2009, Mr. Shupe was arrested and charged with delivery, possession with intent to deliver, and manufacture of marijuana. Following a jury trial, Mr. Shupe was convicted on all counts. Mr. Shupe appealed his conviction to this Court. On December 11, 2012, this Court reversed Mr. Shupe's conviction, remanding the case to the trial court. This Court's Mandate terminating review of the criminal matter was issued on June 4, 2013 and filed in the trial court June 14, 2013.

On August 19, 2016, Mr. Shupe filed a civil lawsuit against the City of Spokane for the return of the marijuana seized during his arrest almost seven years prior. Mr. Shupe's Complaint for Damages alleges causes of action for the following: Conversion of his personal property (marijuana); Inverse Condemnation of his personal property (marijuana); and Constitutional Claims under Art. 1. Sec. 7 of the Washington State Constitution alleging due process violations for the deprivation of his personal property (marijuana), as well as a violation of his privacy rights through the unreasonable

search and seizure of the same property (marijuana). The trial court properly dismissed his lawsuit.

Mr. Shupe's lawsuit is subject to being commenced within three years from the date of the alleged injury. Giving the Mr. Shupe all the benefit of the doubt as to when his cause of action accrued, his lawsuit is untimely. The trial court's dismissal of Mr. Shupe's lawsuit should be affirmed.

## **II. STATEMENT OF THE CASE.**

Mr. Shupe alleges on September 10, 2009 police officers employed by the City acting within the course and scope of their employment with the City of Spokane "entered [his] property ... and searched and seized [his] property."<sup>1</sup>

On August 19, 2016, Mr. Shupe filed his Complaint for Damages in the Spokane County Superior Court under Cause No. 16203232-4.<sup>2</sup> On August 25, 2016, Mr. Shupe served the City with his Summons and Complaint.

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<sup>1</sup> CP 4, at ¶¶ 2.1-2.3.

<sup>2</sup> CP 1-7.

On September 20, 2016, the City moved the trial court for dismissal of the Complaint.<sup>3</sup> After briefing and oral argument by the parties, the trial court granted the City's motion.<sup>4</sup>

### **III. ARGUMENT.**

#### **A. STANDARD OF REVIEW.**

A trial court's ruling on a motion to dismiss for failure to state a claim on which relief can be granted is a question of law that courts of appeal review *de novo*. CR 12(b)(6); *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994) (en banc). Courts should dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. *Cutler*, 124 Wn.2d at 755. Such motions are appropriate when, as here, a plaintiff "includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984); *see also Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007) (dismissing case under CR 12(b)(6) based on statute of limitations).

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<sup>3</sup> CP 15

<sup>4</sup> CP 31-33

**B. THE TRIAL COURT PROPERLY RECOGNIZED THAT THE STATUTE OF LIMITATIONS BEGAN TO RUN WHEN MR. SHUPE'S PROPERTY WAS ALLEGEDLY SEIZED AND/OR DESTROYED.**

Mr. Shupe argues that statutes of limitations only begin to run once every element can be proved.<sup>5</sup> The argument being that he did not have the ability to bring a cause of action due to the conflicting civil and criminal cases until the Court of Appeals issued its mandate.<sup>6</sup> Given the undisputed facts of this matter, Mr. Shupe's arguments are specious at best.

A civil cause of "action accrues when the factual basis for the action becomes known to the party bringing the action."<sup>7</sup> Washington courts have consistently held that a party has knowledge of such factual basis when they suffer "actual and appreciable damage."<sup>8</sup> Washington courts are "not unmindful of the difficulty" of defending oneself in a criminal case while simultaneously pursuing a civil suit, nevertheless "a showing of

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<sup>5</sup> CP 5.

<sup>6</sup> CP 19; *Appellant's Opening Brief* at pp 2-3, 5 -7.

<sup>7</sup> *Gausvik v. Abbey*, 126 Wn. App. 868, 879-880, 107 P.3d 98 (Div. 2, 2005).

<sup>8</sup> *Id.* (citing *Haslund v. City of Seattle*, 86 Wn.2d 607, 620, 547 P.2d 1221 (1976)); see also *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 220, 543 P.2d 338, 341 (1975); *Crisman v. Crisman*, 85 Wn. App. 15, 20, 931 P.2d 163, 165 (1997) (unless the discovery rule applies, the limitations period begins to run when the plaintiff suffers some form of injury or damage).

hardship or understandable delay is insufficient to support tolling of the statute of limitations.”<sup>9</sup>

Mr. Shupe readily acknowledges in his complaint that, no later than September 10, 2009, he was aware that police officers had allegedly “entered [his] property ... and ... searched and seized [his] property.”<sup>10</sup> Mr. Shupe suffered “actual and appreciable” damage on September 10, 2009 upon the seizure of his property.

What is further noteworthy is in his criminal trial, Mr. Shupe openly admitted that he possessed, delivered, and manufactured marijuana and he claimed it was legal for him to do so under authority of Washington's Medical Use of Marijuana Act, chapter 69.51A RCW.<sup>11</sup> This law was in place at the time of the seizure and available to Mr. Shupe independent of any mandate being issued by this Court. Clearly, Mr. Shupe’s causes of action against the City of Spokane for wrongfully taking and/or destroying his

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<sup>9</sup> *Petcu v. State*, 121 Wn. App. 36, 72, 86 P.3d 1234, 1253 (Div. 2, 2004) (citing *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992) (holding that a wife's grief over her husband's murder did not excuse her failure to file a wrongful death action within the limitations period); see also *Gausvik, supra*, at 882 (in dismissing the plaintiff’s claim as untimely the court suggested the proper method to preserve a civil claim was to file the action and move to stay it during the pendency of the criminal appeal).

<sup>10</sup> CP 4 at ¶ 2.3.

<sup>11</sup> *State v. Shupe*, 172 Wn. App. 341, 344, 349, 289 P.3d 741 (2012).

marijuana were susceptible of proof based upon the same statute he relied upon as a defense in his criminal trial.

Mr. Shupe's argument further ignores the effect of and misconstrues the mandate itself. The mandate issued in the criminal matter from which Mr. Shupe's cause of action stems simply suppressed evidence seized which arguably was used in establishing the crime for which Mr. Shupe was convicted.<sup>12</sup> This Court did not establish that Mr. Shupe had a legal right or claim to possess the marijuana seized by law enforcement as evidence of the crime for which he was convicted or that the marijuana seized was legal for Mr. Shupe to possess as he argues.<sup>13</sup> This Court merely ruled that Mr. Shupe had established a prima facie case to support his defense to the criminal charges which the State did not rebut with evidence.<sup>14</sup>

Therefore, September 10, 2009 is the date on which all of Mr. Shupe's claims flow out of and dictate when the statute of limitations began to run. The trial court's decision should be affirmed based on this analysis.

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<sup>12</sup> *Id.*

<sup>13</sup> CP 19-20; *State v. Shupe, supra*, at 356.

<sup>14</sup> *Id.*

**C. MR. SHUPE'S CLAIMS ARE UNTIMELY AND BARRED BY APPLICABLE STATUTES OF LIMITATION.**

**1. The Trial Court Correctly Recognized that Mr. Shupe's Inverse Condemnation Claim is Subject to a Three-Year Statute of Limitations.**

Relying on *Petersen v. Port of Seattle*<sup>15</sup>, Mr. Shupe argues that there is no statute of limitations governing an action for inverse condemnation.<sup>16</sup> Mr. Shupe is wrong.

In *Petersen v. Port of Seattle, supra*, property owners brought an inverse condemnation action seeking just compensation for the diminished value of their residences and land resulting from the operation of an airport by a municipal corporation.<sup>17</sup> At issue was whether the municipal corporation met all the elements of adverse possession to establish the existence of a prescriptive easement in order to invoke the 10 year statute of limitations associated with real property.<sup>18</sup> The Supreme Court analyzed a number of cases and specifically noted and reaffirmed that by virtue of the doctrine of prescription, a 10 year statutory period is

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<sup>15</sup> *Petersen v. Port of Seattle*, 94 Wn.2d 479, 618 P.2d 67 (1980).

<sup>16</sup> CP 21; *Appellant's Opening Brief* at pg. 8.

<sup>17</sup> *Petersen, supra*, at 69.

<sup>18</sup> *Id.*, at 70; See also: *Highline School District 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976).

applicable to inverse condemnation suits relative to real property.<sup>19</sup> Because the Port of Seattle was unable to show the crucial element of “hostility” needed to establish a prescriptive right, the property owners’ claims were not time barred.<sup>20</sup>

A three-year statute of limitations applies to Mr. Shupe’s inverse condemnation claim. Case law explicitly defines inverse condemnation as taking or damaging of property without the formal exercise of the power of eminent domain.<sup>21</sup> Washington case law has found a distinction between personal property and real property when considering eminent domain and that distinction naturally flows to inverse condemnation.<sup>22</sup>

Mr. Shupe’s inverse condemnation claim is simply another way of asking for money for his allegedly seized and/or damaged personal property. As such, the trial court was correct in granting the City’s motion to dismiss as this claim is subject to RCW

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<sup>19</sup> *Petersen, supra*, at 484- 486.

<sup>20</sup> *Id.*

<sup>21</sup> *Dickgieser v. State*, 153 Wn.2d 530, 534-35, 105 P.3d 26, 29 (2005) (citing *Phillips v. King Cty.*, 136 Wn.2d 946, 957, 968 P.2d 871, 876 (1998)).

<sup>22</sup> *Union Elevator & Warehouse Co. Inc., v. State*, 144 Wn. App. 593, 604-05, 183 P.3d 1097, 1103 (Div. 3, 2008) (grain elevator equipment was personal property and was not compensable under when underlying real property and fixture was seized through eminent domain).

4.16.080, which provides actions “for taking, detaining, or injuring personal property, including an action for the specific recovery thereto” are subject to a three-year statute of limitations. As this claim is untimely, the City respectfully requests this Court to affirm the trial court’s dismissal.

**2. The Trial Court Correctly Recognized the Mr. Shupe’s Conversion Claim is Subject to a Three-year Statute of Limitations.**

“[C]onversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession.”<sup>23</sup> Pursuant to RCW 4.16.080(2), conversion claims are subject to a three-year statute of limitations.<sup>24</sup> Unless the discovery rule applies, the limitations period begins to run when the plaintiff suffers some form of injury or damage.<sup>25</sup>

There is no dispute that Mr. Shupe’s claim for conversion is subject to a three-year statute of limitations.<sup>26</sup> What Mr. Shupe

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<sup>23</sup> *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008).

<sup>24</sup> See *Hudson v. Condon*, 101 Wn. App. 866, 872-74, 6 P.3d 615 (Div. 3, 2000) (the plaintiffs’ conversion claim is subject to a three-year statute of limitations); *Farrare v. City of Pasco*, 68 Wn. App. 459, 465, 843 P.2d 459 (Div. 3, 1992).

<sup>25</sup> *Crisman*, *supra*, at 20.

<sup>26</sup> RCW 4.16.080(2); *Crisman*, *supra*, at 20.

disputes is when his claim accrued.<sup>27</sup> Under Washington law, conversion claims accrue at the time of the alleged taking/deprivation.<sup>28</sup> Here, Mr. Shupe concedes that his property was taken “[on] or about September 10, 2009, [when Spokane police] officers acting within the course and scope of their employment with the Defendant City of Spokane wrongfully seized and destroyed personal property belonging to the Plaintiff”.<sup>29</sup> Accordingly, the limitations period ran on **September 10, 2012**—three years after the alleged deprivation. Simply put, Mr. Shupe’s claim for conversion, which was filed on **August 19, 2016**, is time-barred, and the trial court’s decision granting the City’s motion to dismiss should be affirmed.

**3. The Trial Court Correctly Recognized that Mr. Shupe’s Claims of Washington Constitutional Violation are Subject to, at Most, a Three-Year Statute of Limitations.**

Mr. Shupe’s second and fourth claims allege violation of his constitutional rights, Washington courts, including the trial court, have consistently refused to create a cause of action for damages

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<sup>27</sup> CP 19.

<sup>28</sup> *Crisman, supra*, at 18; *Farrare, supra*, at 465; *Petcu, supra*, at 68; *Vaughn v. Montague*, 924 F.Supp.2d 1256 (W.D. WA, 2013).

<sup>29</sup> CP 4.

due to a violation of a citizen's constitutional rights.<sup>30</sup> Plaintiff's rights are adequately protected by "their day in court" and a constitutional violation does not, "without the aid of augmenting legislation, establish a cause of action for money damages against the state."<sup>31</sup> The trial court correctly refused to consider these claims as stand - alone causes of action. Regardless, the claims are untimely.

Cause of Action Two alleges Mr. Shupe was deprived of personal property without due process of law.<sup>32</sup> Deprivation of due process constitutes "personal injury."<sup>33</sup> As outlined above, RCW

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<sup>30</sup> See generally, *Reid v. Pierce Cty.*, 136 Wn.2d 195, 961 P.2d 333 (1998) (explicitly refusing to recognize a cause of action for damages under state constitution for violation of privacy for sharing pictures of a deceased relative); *Spurrell v. Bloch*, 40 Wn. App. 854, 861-62, 701 P.2d 529, 535 (Div. 2 1985) (quoting *Sys. Amusement, Inc., v. State*, 7 Wn. App. 516, 518, 500 P.2d 1253 (1972)) (wrongful removal of children from home due to medical neglect); *Blinka v. Wash. State Bar Ass'n*, 109 Wn. App. 575, 591, 36 P.3d 1094, 1102 (Div. 1, 2001) (refusing to recognize an independent cause of action for a violation of plaintiff's freedom of speech)

<sup>31</sup> *Spurrell, supra*, at 862.

<sup>32</sup> CP 5, at ¶ 3.8.

<sup>33</sup> *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 638-39, 127 P.3d 713 (Div. 1, 2005) (When a person acting under the color of state law deprives an individual of due process guaranteed by the federal constitution, the individual may sue under § 1983 for damages. The United States Supreme Court has held that the applicable state law period for personal injury torts is the appropriate limitations period for § 1983 claims. Thus, the three-

4.16.080 requires that claims for personal injury or damage to personal property be commenced within three years. Mr. Shupe did not commence his cause of action within the requisite time frame and as such, the trial court was correct in granting the City's motion to dismiss as the claim is time barred.

Cause of Action Four alleges violation of Mr. Shupe's Art. 1, § 7 right to privacy by way of an unlawful search and seizure. Under RCW 4.16.100, privacy actions are subject to a two-year statute of limitations.<sup>34</sup> Unlawful searches and seizures accrue at the time the allegedly unlawful act(s) takes place<sup>35</sup> and are subject

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year statute of limitations for personal injury torts under Washington law applies to a § 1983 action alleging due process violations.).

<sup>34</sup>See 29 Wash. Prac., Wash. Elements of an Action § 25:6 (2015-2016 ed.); *Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466, 469, 722 P.2d 1295 (1986)).

<sup>35</sup>Federal law is also in accord, see e.g. *Hawkins v. Douglas Cty.*, 2016 WL 347684, at \*5-6 (E.D. Wash. Jan. 28, 2016) (The plaintiff's section 1983 claim for unlawful search and seizure was barred by the statute of limitations. The Ninth Circuit has held that a claim for unlawful search and seizure follows the standard rule of accrual; that is, it accrues when the wrongful act occurs. *Citing Belanus v. Clark*, 796 F.3d 1021, 1026 (9th Cir. 2015) (holding that the plaintiff's cause of action accrued when the police conducted the searches and plaintiff knew of the searches); *quoting Johnson v. Johnson Cnty. Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) ("Claims arising out of police actions toward a criminal suspect, such as...search and seizure, are presumed to have accrued when the actions actually occur.")).

to a three-year statute of limitations.<sup>36</sup> Under either standard, the trial court was entirely correct in granting the City's motion to dismiss, recognizing that Mr. Shupe's claims were brought far too late.

4. **The Trial Court Correctly Recognized that Mr. Shupe Filed His Lawsuit more than Three Years from this Court's Decision and/or Mandate.**

Finally, assuming arguendo that the statute of limitations to bring his causes of action began to run on June 14, 2013<sup>37</sup>, Mr. Shupe's argument still fails. Mr. Shupe filed his Complaint for Damages with the Superior Court on August 19, 2016, **66** calendar days **after** the applicable three (3) year statute of limitations had expired. Additionally, Mr. Shupe's complaint does not allege any facts or offer any evidence (because there are none) which would toll the period in which the statute would begin.<sup>38</sup>

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<sup>36</sup> *Farrare, supra*, at 465.

<sup>37</sup> This Court's decision regarding Mr. Shupe's criminal charges was filed on December 11, 2012. Given Mr. Shupe's argument regarding when the statute of limitations began to run, if not on September 10, 2009, then on **December 11, 2012**, Mr. Shupe clearly was on notice that he had the "legal ability" to bring an action against the City. As such, **December 11, 2015** was the statutory deadline in which Mr. Shupe was required to file his lawsuit.

<sup>38</sup> See *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 266-68, 189 P.3d 753, 755-56 (2008) (en banc) (holding that plaintiff bears the burden of establishing tolling under RCW 4.16.190); CP 3-7.

**IV. CONCLUSION.**

For the above reasons, the City respectfully requests that the Court affirm the lower court's ruling granting the City's motion to dismiss.

Respectfully submitted this 16<sup>th</sup> day of August, 2017.

s/Salvatore J. Faggiano  
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## DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 16<sup>th</sup> day of August, 2017, I caused a true and correct copy of the foregoing “Brief of Respondent,” to be electronically filed with the Washington State Court of Appeals, Division III, which will send notification of such filing to the following :

---

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