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STATE OF WASHINGTON
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NO. 34274-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MARK POTTER, on behalf of himself
and the class he represents,

Appellant,

v.

WASHINGTON STATE PATROL,
a Washington State Agency,

Respondent.

APPEAL FROM THE THURSTON COUNTY
SUPERIOR COURT

Cause No. 04-2-01086-9

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. A Temporary Unlawful Deprivation Of Property Can Constitute Conversion.

The State Patrol incorrectly asserts that conversion requires a permanent deprivation of property. The court clearly held otherwise in Demelash v. Ross Stores, 105 Wn. App. 508, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001), and the State Patrol fails to distinguish that case.

In Demelash, the defendant department store accused plaintiff of shoplifting, seized his coat, and held on to it for 16 days. The store argued “that there was no conversion because it ultimately returned the coat.” Id. at 521-22. The court rejected this argument, explaining, “A defendant is liable for conversion if he willfully and without legal justification deprives another of ownership of his property.” Id. Even though the store had a legitimate basis for seizing the coat initially and returned it before plaintiff filed suit, the court ruled that plaintiff asserted a viable claim for conversion. Id. The unambiguous holding of the case is that a wrongful deprivation of property, even if temporary, can give rise to a claim for conversion under Washington law.

Boss v. City of Spokane, 63 Wn.2d 305, 387 P.2d 67 (Wash. 1963), supports this conclusion. In Boss, the Supreme Court held that the police could be held liable for conversion for impounding plaintiff’s vehicle in excess of their statutory authority. “We conclude that the

impounding of the vehicle was not authorized by this ordinance and, therefore, amounted to a conversion of it by the defendants.” Id. at 307. The act of impounding deprived Boss of possession and dominion over his vehicle; nothing in the Court’s opinion suggests that the viability of his claim turned on the deprivation being permanent rather than temporary. Moreover, the Court affirmed the viability of the claim, even though it recognized that Boss had the ability to redeem the vehicle but chose not to. Id. at 306.

Muscatel v. Storey, 56 Wn.2d 635, 354 P.2d 931 (1960), and the other cases cited by the State Patrol are not to the contrary. Although those opinions contain language characterizing conversion as a permanent deprivation of property, the courts in those cases simply were not confronted with the question of whether a temporary deprivation of property could constitute conversion.

In fact, courts throughout the country long have held that temporary deprivations of property can give rise to claims for conversion. E.g., Buri v. Ramsey, 693 N.W.2d 619, 624 (N.D. 2005); White v. Webber-Workman Co., 591 P.2d 348, 350 (Ok. App. 1979) (“The tort of conversion is committed by one who wrongfully exercises temporary or permanent dominion over property owned by another.”); Frank v. Schaff, 123 N.W.2d 827, 830 (N.D. 1963) (“the essence of conversion is ... in

wrongfully depriving the owner of it, whether such depriving is temporary or permanent”); Even-Heat Co. v. Wade Elec. Products Co., 58 N.W.2d 923, 927 (Mich. 1953); Vetter v. Browne, 85 S.W.2d 197, 199 (Mo. App. 1935) (temporary dispossession of automobile by parking lot company) (quoted in Alexander v. Link’s Landing, Inc., 814 S.W.2d 614, 617 (Mo. App. 1991)); Williams v. Braswell, 51 Ala. 397, 399 (1874).

“While, therefore, it is a conversion where one takes the plaintiff’s property and sells or otherwise disposes of it, *it is equally a conversion if he takes it for a temporary purpose only*, if in disregard of the plaintiff’s right. Therefore, if one hire a horse to go to one place, and drive him to another, this is a conversion, though he return him to the owner.... Any asportation of a chattel for the use of a defendant or a third person amounts to a conversion, for this simple reason: that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places.”

Tsuru v. Bayer, 25 Haw. 693, 696 (1920) (quoting 2 *Cooley on Torts* (3d ed.), 859-61) (emphasis added). See also Gillespie & McCulley v. Holland, 3 Ohio App. 116, 120 (1914) (same).

The Restatement (Second) of Torts supports this conclusion, the State Patrol’s arguments to the contrary notwithstanding. Comment (d) to § 222A of the Restatement cites A’s mistaken taking of B’s hat and failure to return it for three months as an example of temporary conversion. Although many impounds in this case lasted less than three months, the

inconvenience and expense of losing access to a vehicle for even a few days is sufficiently serious to constitute conversion. The courts repeatedly have recognized the importance of daily access to an automobile in modern American life. See Krimstock v. Kelly, 306 F.3d 40, 44 (2nd Cir. 2002) (“A car or truck is often central to a person’s livelihood or daily activities.”); Coleman v. Watt, 40 F.3d 255, 261 (8th Cir. 1994) (“Automobiles occupy a central place in the lives of most Americans, providing access to jobs, schools, and recreation as well as to the daily necessities of life.”); Stypmann v. City and County of San Francisco, 557 F.2d 1338, 1342-43 (9th Cir. 1977). Complete dispossession of a vehicle by impound, whether for days, weeks or months, is a sufficiently serious interference with an owner’s rights of possession and control to be actionable in conversion.

The State Patrol disputes this conclusion by citing the six factors listed in Restatement § 222A(2) and asserting that RCW 46.55 imposes sufficient limits on the scope of its impounds to negate a characterization of conversion. This argument is untenable for several reasons.

First, the Patrol’s interference with an owner’s right of control is absolute for the duration of the impound. Second, in many instances, RCW 46.55.120 requires that vehicles be held for 30, 60 or 90 days, even if the owner is willing and able to redeem it earlier. Third, even when

there is no hold, the owner must pay hundreds of dollars in towing and storage fees to redeem the vehicle or wait for days for a challenge to be heard in district court. See All Around Underground v. Washington State Patrol, 148 Wn.2d 145, 149, 60 P.3d 53 (2002) (fees of \$476 for three-day impound). If the owner does not or cannot pay the fees, the vehicle will be auctioned. RCW 46.55.120(1)(b). Even applying the criteria in Restatement § 222A(2), therefore, the Patrol's DWLS impounds are sufficiently burdensome to amount to a temporary, and in some cases permanent, conversion.¹

The Patrol similarly argues that DWLS impounds cannot constitute conversion because owners had the ability to redeem their vehicles or challenge the impounds under RCW 46.55.120. However, the ability to regain possession of a vehicle does not change the wrongful nature of the initial seizure or eliminate the substantial interference with the owners' rights of possession. The Supreme Court noted in Boss that the plaintiff made no attempt to redeem his impounded vehicle, 63 Wn.2d at 306, but that did not preclude him from asserting a claim for conversion. Similarly, in E.J. Strickland Constr., Inc. v. Department of Ag. and Consumer Svcs., 515 So.2d 1331, 1333-35 (Fla. App. 1987), plaintiff stated a viable claim

¹ The Restatement also lists "the actor's good faith" as a factor, but in Washington good faith is not a defense to conversion. In re Marriage of Langham, 153 Wn.2d 553, 560, 106 P.3d 212 (2005).

for conversion where a sheriff mistakenly seized his tractor as stolen property, even though the sheriff agreed to return the tractor and pay all storage and towing charges.² Other courts also have held that an actor who wrongfully takes possession of a chattel is not relieved of liability for conversion by expressing a willingness to return the property once his demands are met. Frank, 123 N.W.2d at 829; Gillespie & McCulley, 3 Ohio App. at 119. Here, owners either had to pay substantial towing and storage fees to redeem their vehicles or experience the cost, delay, and inconvenience of a district court proceeding. Even if they could pursue one of these avenues to retrieve their vehicles, the complete dispossession in the interim constituted a temporary conversion.³

Finally, the Patrol argues that a temporary seizure, like a DWLS impound, cannot constitute conversion because the measure of damages for conversion is the full value of the thing converted. However, the courts have recognized that the traditional measure of damages may not be applicable where the deprivation is temporary or the owner regains possession. In such cases, “the plaintiff is still entitled to recover,

² The tractor eventually was auctioned by the towing company despite this offer, because the owner and the sheriff could not agree on who would inspect and repair the tractor before its return. Id. at 1333.

³ The Patrol ignores reality by asserting that only owners who *choose* not to redeem their vehicles lose them at auction. Many owners cannot afford the towing and storage fees or may be unable to get to the tow yard in time to prevent auction because of incarceration, hospitalization or otherwise.

whatever he may have been compelled to expend in regaining possession, or whatever damage the temporary taking or conversion may have caused him.” Williams, 51 Ala. at 399; see also Vetter, 85 S.W.2d at 199 (damages measured by diminishment in value and loss of use during period of deprivation); Even-Heat, 58 N.W.2d at 927; Buri, 693 N.W.2d at 626; Reardon v. Lovely Dev., Inc., 852 A.2d 66, 69 (Me. 2004); Martinez v. Vigil, 142 P. 920, 921 (N.M. 1914).

In this case, the DWLS impoundments completely and wrongfully deprived the class members of possession and control over their vehicles either permanently or for a significant period of time until redeemed by payment of expensive fees or through a successful court challenge. The interference with plaintiffs’ ownership interests in either event is sufficiently great to support a claim for conversion.

B. The DWLS Impounds Were Unlawful Because The Mandatory Impound Policy Was Invalid.

The State Patrol argues it should not be held liable for impounds under its mandatory DWLS impound policy because the policy was a “good faith” or “reasonable interpretation” of the intent behind the 1998 revision of RCW 46.55.113. Resp. Br. at 12, 15. The flaws in this argument were addressed in plaintiff’s opening brief, including the fact that good faith is not a defense to conversion and the rejection of the asserted legislative intent in All Around Underground. App. Br. at 23-27.

The Patrol's citation to Michigan v. DeFillippo, 443 U.S. 31, 38 (1979), does not alter the analysis. DeFillippo held that police officers may not speculate about a law's constitutionality. However, here it was not the statutory amendment that was unconstitutional, but rather the agency's mandatory policy that exceeded statutory and constitutional constraints. Plaintiff seeks to hold the Patrol accountable for its own unlawful acts, not a mistake by the legislature that the Patrol was duty-bound to follow.

Similarly, the Patrol's attempt to distinguish Boss on the basis that "it was obvious that the city's interpretation [of its statutory authority] was incorrect" is irrelevant. Resp. Br. at 26. The fact that the impound exceeded the agency's authority in Boss as in this case is what gives rise to the claim for conversion. In addition, it should have been "obvious" to the Patrol that its mandatory impound policy violated the well-established constitutional requirement that officers consider reasonable alternatives before impounding a vehicle. See App. Br. at 13-17 (discussing cases).⁴

⁴ The Patrol's attempt to distinguish the out-of-state authorities cited by plaintiff is equally weak. All of those cases involved a similar physical deprivation of vehicles for alleged criminal or statutory violations with some ability for owners to challenge the seizures or redeem the vehicles. Thus, the reasons, limits and nature of the impounds were highly similar, and in all those cases conversion claims were upheld because the state actors exceeded restrictions on their lawful authority to impound.

C. Restatement § 265 Does Not Apply To These Impounds.

The State Patrol argues that its seizure of class members' vehicles was privileged under Restatement (Second) of Torts § 265 because "[t]here is no evidence that [the Patrol] exercised its impound authority in an unreasonable manner." Resp. Br. at 21. This statement ignores the fact that impounds under the mandatory impound policy exceeded the Patrol's statutory and constitutional authority and were therefore unlawful and unreasonable. See All Around Underground, 148 Wn.2d at 145; Boss, 63 Wn.2d at 307. The Patrol's contention that seizures pursuant to an unlawful policy can nonetheless be conducted in a reasonable "manner" makes no sense as a matter of logic or law. Id.⁵

The Patrol also disputes that application of § 265 to this case would violate Washington's refusal to extend qualified immunity to state agencies because § 265 confers a "privilege from liability" and not an "immunity." This argument is opaque and illogical. What is an immunity if not a privilege from liability? In fact, the only support that the Patrol cites for this contention, Keeton, et al., *Prosser & Keeton on Torts* § 16, at 109 (5th ed. 1984), demonstrates its lack of merit. The referenced section

⁵ The seizure of Mr. Potter's vehicles also demonstrates the flaw in the Patrol's argument. The Patrol asserts there is no evidence his vehicles were impounded in an unreasonable manner. However, Mr. Potter testifies that his vehicles were seized despite the availability of reasonable alternatives, CP 209-11, violating longstanding Washington precedent. See All Around Underground, 148 Wn.2d at 155 n.8 (citing cases).

of *Prosser & Keeton*, read in its entirety, indicates that “privilege” and “immunity” often are used interchangeably. *Id.* (“When no inquiry is permitted into motive or purpose, it is sometimes said that defendant has an absolute privilege; at other times, it is said that he has an immunity.”) The two sentences quoted by the Patrol express the authors’ suggestion that the two terms be used to distinguish between absolute and qualified immunity, which they recommend calling “immunity” and “privilege,” respectively. Thus, they define “privilege” in terms applicable to good faith immunity, *i.e.*, when “the defendant acts from a justifiable motive.” *Id.* However, this is precisely the kind of immunity from liability that the Washington courts have refused to extend to government agencies. See Savage v. State, 127 Wn.2d 434, 899 P.2d 1270 (1995); Hertog v. City of Seattle, 138 Wn.2d 265, 979 P.2d 400 (1999). Semantics aside, Restatement § 265 cannot be applied to this case without violating the principal that when a Washington state agency breaks the law by policy or practice, it must pay for the injuries it causes, no matter how reasonable its belief that its actions were lawful.

D. RCW 46.55.120 Does Not Exclude Common Law Remedies.

The State Patrol argues that RCW 46.55.120, which provides vehicle owners with an expedited means to challenge impounds,

establishes the exclusive remedy for victims of unlawful impounds and divests the courts of jurisdiction over plaintiff's common law claim.⁶

“[A] statutory remedy does not bar a common law tort claim unless the statutory remedy is mandatory and exclusive.” Korslund v. Dyncorp Tri-Cities Services, 121 Wn. App. 295, 321, 88 P.3d 966 (2004). Relevant to this inquiry is whether the statute contains a clear expression of legislative intent to preclude other remedies, whether the statutory remedy is certain and comprehensive, and whether the remedy creates new rights or duplicates rights already existing at common law. Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 61-62, 821 P.2d 18 (1991).

The language of RCW 46.55.120 provides that a person seeking to redeem an impounded vehicle “has a right to a hearing in the district or municipal court” to contest the validity of the impound or the amount of towing and storage fees. Providing a “right” to an expedited hearing, however, does not indicate a legislative intent to make that forum the sole and mandatory remedy for unlawful seizures of vehicles, especially where the right to a prompt post-deprivation hearing is required by the federal due process clause. See Stypmann, 557 F.2d at 1342-44 (due process requires prompt post-deprivation hearing). “Had the Legislature intended the statute to be exclusive it would have been very simple to have

⁶ This argument was raised by the State Patrol in a pre-certification CR 12 motion and rejected by the trial court at that time.

expressly said so.” Wilmot, 118 Wn.2d at 62. Rather, the intent appears to be to provide a supplemental remedy consistent with due process requirements, not to preempt all other avenues of redress.

In addition, the remedy provided by RCW 46.55.120 is not comprehensive, because “it does not clearly authorize all damages which would be available in a tort action.” Wilmot, 118 Wn.2d at 61 (statutory remedy for retaliatory discharge not exclusive where it does not provide all damages recoverable in tort, such as emotional distress); see also Wilson v. City of Monroe, 88 Wn. App. 113, 125-26, 943 P.2d 1134 (1997) (statutory remedy for wrongful discharge not exclusive where it did not clearly allow recovery of general damages). The monetary remedy available under RCW 46.55.120 falls short of providing full and just compensation to victims of unlawful impounds in at least two respects.⁷

First, the statute does not provide compensation for loss of a vehicle by auction following impound, even though the vehicle may be sold while the impound appeal is working its way through the legal system.⁸ Second, the courts have stated that the government is not liable for loss of use damages under RCW 46.55.120 if the impounding officer

⁷ The certainty of this remedy also is open to question since at least one district court expressly disavowed the ability of owners to challenge DWLS impounds through the impound hearing procedure. CP 207-08.

⁸ The owner of an impounded vehicle can forestall the auction by paying the tow company a security deposit of one half the total towing and storage fees for the entire period of impound, RCW 46.55.120(1)(b), but this is of no use to those who lack sufficient resources to pay the deposit.

relied on Department of Licensing records to determine that the driver had a suspended license, even if the impound was invalid for some other reason, like the officer's failure to exercise reasonable discretion. See Becerra v. City of Warden, 117 Wn. App. 510, 521, 71 P.3d 226 (2003) (statutory loss of use damages precluded by statutory good faith exception even if impound was unlawful because local ordinance precluded arresting officer from exercising discretion).⁹

The statutory remedy in this case also is "cumulative rather than exclusive" because it does not create new substantive rights, but merely overlaps rights extant at common law. Wilmot, 118 Wn.2d at 63. The hearing provided by RCW 46.55.120 provides a specific mechanism to challenge an impound, but does not create new substantive rights. Common law remedies such as conversion or replevin to obtain damages or return of a wrongly impounded vehicle existed prior to and apart from the statutory remedy. E.g., Boss, *supra*. Statutes should not be read to strip citizens of existing common law rights or remedies absent an unambiguous expression of legislative intent. State v. Crider, 78 Wn. App. 849, 856, 899 P.2d 24 (1995); Matthews v. Elk Pioneer Days, 64 Wn. App. 433, 437, 824 P.2d 541 (1992) (statutes in derogation of

⁹ The Becerra court also noted that the owner in that case did not file an action for damages, suggesting that RCW 46.55.120 does not provide the exclusive avenue for relief from an unlawful impound. Id. at 523.

common law rules of liability are “*strictly construed* and no intent to change that law will be found unless it appears with clarity”). Here, no clear expression of intent to eliminate all common law remedies is present on the face of RCW 46.55.120.

Finally, the Washington Constitution vests the superior courts with original jurisdiction over all cases and proceedings in which jurisdiction is not vested by law exclusively in some other court. Wash. Const. Art. IV, § 6. Although the legislature may extend limited jurisdiction to adjudicate certain issues, the superior court retains concurrent jurisdiction over those subjects unless the legislative grant of jurisdiction is exclusive. Ledgerwood v. Landsdowne, 120 Wn. App. 414, 419, 85 P.3d 950 (2004). A statute that does not confer exclusive jurisdiction by its plain language is merely a legislative grant of jurisdiction. Id. at 420.

RCW 46.55.120 merely authorizes district courts to hear appeals of vehicle impounds within the scope of the statute. Nowhere does the statute confer *exclusive* jurisdiction on the district courts over the subject matter of unlawful impounds. The statute *allows* district courts to adjudicate impoundment challenges, but does not *require* that every challenge be heard in those courts. The superior courts therefore retain jurisdiction over the subject of DWLS impounds and are not prevented from entertaining common law claims relating to those seizures.

E. The Patrol May Not Use Post Hoc Justifications Of Individual Impounds Under Its Mandatory Policy To Avoid Liability.

The State Patrol contends that dismissal of plaintiff's conversion claim may be affirmed because the courts must examine the circumstances of each impound under the unlawful mandatory policy to determine whether the seizure would otherwise have been justified. This argument, which was never presented to the trial court, is misplaced and incorrect.

The argument is misplaced because it provides no basis for granting summary judgment *to* the State Patrol. Even if the contention has merit – which it does not – at most it provides a basis for denying plaintiff's motion for class-wide summary judgment, not for granting the State Patrol's motion. To grant summary judgment to the Patrol, a court would have to assume that the impounds under the mandatory policy *were* otherwise justified, but there is no evidence in the record to support this belief. To the contrary, the class definition expressly excludes all vehicles that were impounded for reasons in addition to DWLS in consideration of this issue. CP 12. Moreover, Mr. Potter's testimony demonstrates that in his case, at least, there were reasonable alternatives to impound that the state troopers refused to consider. CP 209-11.

The Patrol in fact admits that this argument really amounts to a challenge to class certification, rather than a ground for summary

judgment. Resp. Br. at 35. However, the Patrol has not appealed the order certifying the class, and the Court should not reach this issue now.

More important, the Patrol's contention is substantively flawed. Examining the circumstances of individual impounds under the unlawful mandatory policy is neither necessary nor appropriate to determine liability in this case.

First and foremost, the Supreme Court disposed of this question in All Around Underground. In that case, the district court affirmed one of the impounds on the basis that the particular seizure was reasonable even if the mandatory impound regulation was unconstitutional. The Court expressly rejected this approach and held the impound unlawful:

We reject this reasoning on grounds of logic. Since WAC 204-96-010 divests officers of all discretion on whether to impound a particular vehicle, the officer who impounded All Around's van cannot have reasonably exercised discretion he did not have.

148 Wn.2d at 150 n.2. The Supreme Court properly focused on the reason the officer actually impounded the vehicle, rather than some hypothetical alternative basis for the seizure.

In analogous situations, the federal courts have held that analysis of the reasonableness of any individual search or seizure is not necessary in a class action for damages where the searches were conducted under an unreasonable or unconstitutional government policy. E.g., Bynum v.

District of Columbia, 217 F.R.D. 43, 49 (D.D.C. 2003) (routine strip searches of detainees); Doan v. Watson, 168 F. Supp.2d 932 (S.D. Ind. 2001) (same); Doe v. Calumet City, 754 F. Supp. 1211, 1221 n.23 (N.D. Ill. 1990) (routine strip searches of arrestees); cf. Dellums v. Powell, 566 F.2d 167, 188 n.56 (D.C. Cir. 1977) (false arrest and violation of First Amendment rights). These courts have recognized that allowing post hoc justifications for actions taken pursuant to an unlawful policy would inappropriately insulate the government from accountability for systematic invasions of citizens' rights. As the Doe court explained:

Even if Calumet City were to offer evidence that in retrospect might have given an officer some basis for conducting a particular strip search, it cannot justify post-hoc an unreasonable intrusion without showing that each officer involved has such a reasonable basis at the time of the search.... Given the existence of a pattern of searches that clearly did not distinguish among many of the arrestees, Calumet City cannot manufacture bases in an effort to legitimize the strip searches that were inflicted on plaintiffs.

754 F. Supp. at 1221 n.23.

Despite the holdings of All Around Underground and these federal cases, the State Patrol relies on Devenpeck v. Alford, 543 U.S. 146 (2004), to argue that where other lawful reasons for impounding a vehicle exist the seizure would be proper; thus, the court must consider whether bases for impound other than the unlawful mandatory policy existed in each case. However, Devenpeck did not concern impounds or property seizures, but

the validity of an arrest when probable cause existed to believe the suspect committed a crime different than the one for which he was arrested or charged. This distinction is critical because the inquiry into the validity of arrests is different from the inquiry into the validity of seizures. See United States v. Henderson, 241 F.3d 638, 647 (9th Cir. 2000). For example, although an arrest under an invalid arrest warrant may be lawful if probable cause exists to believe that the suspect committed a felony, police cannot legitimize seizures under an invalid search warrant by claiming after the fact that the search was reasonable and justified on other grounds. United States v. Miles, 468 F.2d 482, 486-87 (3rd Cir. 1972); see also Bumper v. North Carolina, 391 U.S. 543, 549 (1968) (“A search conducted in reliance on a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.”); Ramirez v. Butte-Silver Bow County, 298 F.3d 1022, 1026-27 (9th Cir. 2002) (affirming § 1983 claim for search under invalid warrant despite officer’s possession of knowledge that would have cured defects in warrant and thus made search reasonable), *aff’d sub nom.* Groh v. Ramirez, 540 U.S. 551 (2004).

The federal courts further have recognized that a distinction exists between situations where police action is based upon probable cause, like arrests, and those where action is premised on other grounds, like searches and seizures under the community caretaking function. E.g., United States

v. Cervantes, 219 F.3d 882, 889-90 (9th Cir. 2000) (reasonableness of searches under “emergency doctrine” exception to warrant requirement depends on officer’s motivation to search). In the former cases, “there is with rare exception no balancing to be done or reasonableness determination to be made because the probable cause itself serves as the exclusive “measure of the lawfulness of enforcement;”” Id. (quoting LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.4 (3d ed. 1996)). Therefore, inquiry into an officer’s subjective motivation is unnecessary and inappropriate where the standard for action is probable cause. Id. In the latter cases, however, where property is seized to serve some special purpose, inquiry into actual motivation is permissible to avoid violation of citizens’ rights on pretextual grounds. Id. In this case, of course, inquiry into officers’ subjective motivations is not necessary because of the mandatory nature of the Patrol’s DWLS impound policy. As All Around Underground recognized, troopers could not exercise discretion they did not have. Nonetheless, the distinction explained in Cervantes demonstrates that the rationale of Devenpeck and other arrest cases cannot be transposed to the seizures in this case.

In fact, the State Patrol’s reliance on Devenpeck would turn the logic of that case upside down. In Devenpeck, the Court refused to delve into the officer’s subjective state of mind in determining whether probable

cause to arrest existed. Here, the Patrol argues for precisely that type of conjecture by demanding speculation as to how troopers would have exercised their discretion in the absence of the mandatory impound policy.

In Devenpeck and other arrest cases, there is no question that the officer intended to and did arrest the suspect, even if the officer misidentified the actual offense perpetrated by the individual. The courts in these cases recognize that police officers are not lawyers and cannot anticipate what a prosecutor or grand jury will choose to charge. E.g., United States v. Bowers, 458 F.2d 1045, 1047 (5th Cir. 1972); Saffron v. Wilson, 481 F. Supp. 228, 242 (D.D.C. 1979). However, it is known how the officer chose to act, and as long as there was probable cause that a crime had been committed, the label applied by the officer is unimportant.

By contrast, in this case it is unknown how troopers would have exercised their discretion in the absence of the mandatory impound policy. Any present-day “reconstruction” of an officer’s analysis of the circumstances of a stop and consideration of alternatives to impound would necessarily be fictional, because the trooper would not have engaged in such an analysis at the time. Moreover, different standards would apply to the actual impound, where officers were required by policy to seize the vehicle, and any alternative basis for impound, where officers would be required by RCW 46.55.113 and Washington Constitution art. I,

§ 7 to exercise reasonable discretion. Devenpeck and other arrest cases deal with mislabeling of the basis for a known and certain action where a common substantive standard – probable cause – applies to both the stated and alternative bases for action. Those cases do not support the proposition that actions pursuant to an unlawful agency policy can be justified on other grounds where different substantive standards apply to the action actually taken and the hypothetical alternative grounds asserted after the fact by the government and its attorneys.

Analogy to cases under the “inevitable discovery” doctrine further proves this point. Under this doctrine, courts decline to exclude unlawfully seized evidence from a criminal case where it is established that the evidence inevitably would have been discovered by lawful means. For the ‘inevitable discovery’ rule to apply, however, the *actual* seizures must have been reasonable and the *hypothetical* seizures on other, lawful grounds must have been “inevitable” and not “speculative.” State v. Richman, 85 Wn. App. 568, 577, 933 P.2d 1088 (1997) (“The rule authorizes admission of unlawfully obtained evidence only when the State can prove that the evidence would have been inevitably discovered under proper and predictable investigatory procedures.”).

The DWLS impounds fail both prongs of this test. First, the actual seizures were not reasonable, because they were conducted under a policy

that stripped officers of the requisite ability to exercise discretion. Second, because impound on grounds other than the mandatory policy would require an exercise of discretion and would occur only in the absence of any reasonable alternatives, whether a DWLS vehicle would have been impounded on any alternative basis is necessarily speculative, not inevitable. E.g., United States v. Donnelly, 885 F. Supp. 300, 308 (D. Mass. 1995) (unconstitutional impound of van incident to arrest not excused where it was not “inevitable” that van would have been impounded for traffic violations); United States v. Cooper, 949 F.2d 737, 746 n.32 (5th Cir. 1991) (rejecting attempt to justify seizure of car on grounds other than those used by police at the time).

Moreover, even when the inevitable discovery rule applies to admission of evidence in a criminal case, it does not preclude a civil claim for damages for the illegal seizure. DeBoer v. Pennington, 206 F.3d 857, 865 (9th Cir. 2000), *vacated and remanded on other grounds*, 532 U.S. 992 (2001), *on remand*, 287 F.3d 748 (9th Cir. 2002) (reinstating prior ruling on Fourth Amendment claim). In DeBoer, plaintiffs brought suit for violation of their Fourth Amendment rights by unlawful confiscation of their business and personal records. The government argued that its audit of the records would have occurred in any event and therefore the action should be dismissed. The Ninth Circuit disagreed:

Under the inevitable discovery exception, evidence unlawfully obtained may be admitted at trial if the government by a preponderance of the evidence can demonstrate that the evidence would inevitably have been acquired through lawful means.... **The doctrine, however, does not negate the unlawfulness of the seizure** and, therefore, is no bar to a § 1983 action. *See Chatman v. Slagle*, 107 F.3d 380, 382 (6th Cir. 1997); *see also Heck v. Humphrey*, 512 U.S. 477, 487 n.7, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994)

206 F.3d at 865-66 (emphasis added, citation omitted). By the same token, the hypothetical possibility that a trooper in this case would have impounded a class member's car for reasons other than the mandatory impound policy is no bar to an action for damages where the vehicle was in fact seized under the unlawful rule.

Finally, the Patrol's citation to cases such as State v. Peterson, 92 Wn. App. 899, 964 P.2d 1231 (1998), State v. Hill, 68 Wn. App. 300, 842 P.2d 996 (1993), State v. Hardman, 17 Wn. App. 910, 567 P.2d 238 (1977), State v. Greenaway, 15 Wn. App. 216, 547 P.2d 1231 (1976), and State v. Bales, 15 Wn. App. 834, 552 P.2d 688 (1976) does not support a contrary conclusion. See Resp. Br. at 32-34. These cases emphasize the need for officers to consider reasonable alternatives and the specific circumstances of a stop before ordering an impound. However, these cases do not support the proposition that where an agency policy impairs such consideration, impounds under that policy can be retroactively legitimized. The Supreme Court conclusively held otherwise in All

Around Underground, 148 Wn.2d at 150 n.2. Put another way, although these cases instruct that a court cannot determine that an impound is lawful and constitutional without analyzing the circumstances surrounding the seizure, they do not imply that the courts must reexamine the circumstances surrounding seizures under a patently unlawful policy in a belated effort to resuscitate the legitimacy of the impounds.

Similarly, the fact that Washington law allows impounds for a variety of reasons, see State v. Singleton, 9 Wn. App. 327, 511 P.2d 1396 (1973) (cited in Resp. Br. at 33), does not justify impounds that were ordered pursuant to an unlawful policy. Even where impound is authorized by statute for a particular offense, that authority must be exercised consistent with statutory and constitutional requirements to consider and utilize reasonable alternatives. State v. Reynoso, 41 Wn. App. 113, 119, 702 P.2d 1222 (1985); Hill, 68 Wn. App. at 305. Thus, there is no need for the finder of fact to consider the circumstances of each impound in this case. There is no question that the State Patrol's mandatory impound policy unlawfully stripped its troopers of the discretion required by the statute and constitution and there is no question that class members were deprived of their property under that policy. Nothing requires plaintiffs or the Court to speculate about what State

troopers would have done in some hypothetical universe where discretion was still allowed.

II. CONCLUSION

For the reasons stated above and in appellants' opening brief, the Court should reverse the grant of summary judgment to the State Patrol and remand to the superior court for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of **August**,
2006.

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