

Court of Appeals No. 72749-4-1  
King County Superior Court No. 12-2-10513-8 KNT

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION ONE**

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**RICHARD AZPITARTE, Plaintiff**  
vs.

**JASON BISCAY, JANE DOE BISCAY** and the Marital Community comprised  
thereof and **MARVIN BURNETT, JANE DOE BURNETT** and the Marital  
Community comprised thereof, Defendants

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**ON APPEAL FROM KING COUNTY SUPERIOR COURT  
STATE OF WASHINGTON,  
THE HONORABLE JAMES CAYCE**

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**RESPONSE TO PLAINTIFF'S OPENING BRIEF**

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FILED  
DIVISION ONE  
COURT OF APPEALS  
STATE OF WASHINGTON  
NOV 15 2012

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## **I. STATEMENT OF THE CASE**

COME NOW THE Appellees/Defendants (hereinafter Defendants) herein, by and through their attorney of record, Christopher R. McLeod, and respond as follows to Plaintiff's motion to find error in the lower court setting aside improperly obtained default judgments and entering a finding and order granting summary judgment as to all of Plaintiff's claims as set forth by him in his complaint, and dismissing that complaint under the terms of CR 56, based on the records, declarations and legal basis, as set forth below. Respondents assign no error to the trial court's actions or decisions.

## **II. FACTUAL SUMMARY**

Before 2004, Plaintiff collected as many as 80 vehicles, many inoperable, which he largely stored on his residential property in Burien, Washington. King County impounded the cars in August of 2004 to abate a nuisance because the means of storage created a hazard that violated county law. He received a fine of over \$60,000, and lost the cars to impoundment by King County, which cars were sold by a third party to pay the Plaintiff/Appellant's (hereinafter called Plaintiff) fine. The county had the vehicles towed away by Cedar Rapids Towing of Renton, Washington,

where many were in the years thereafter sold to various purchasers, one of whom was Defendant Jason Biscay.

Plaintiff has litigated this seizure and sale almost continuously since it occurred. He first sued King County and a long list of individuals (including Cedar Rapids Towing) over the taking of his vehicles and their sale. The matter was removed to Federal Court under case No.Co7-1998-JCC, where it was dismissed on March 3, 2009 for failure to serve all but one party, for missing deadlines, for not making initial disclosures for over 6 months, failure to participate in court-ordered mediation, and other errors. Plaintiff then blamed his attorney for these failures, a position the court rejected. See McLeod Declaration at Ex 5, CP 276-287. The attorney in that case, John Scannell, was later disbarred, in large part for improper trial and discovery tactics. Plaintiff has denied that Mr. Scannell continues to assist him, after first asserting orally to this court that Mr. Scannell is still able to practice in Federal Court though disbarred in this state.

Plaintiff then sued pro se against the purchaser of one of the impounded vehicles, Gayle Sauve. *Azpitarte v. Sauve*, Wash. App. Docket No. 67715-2-1 (2013), See McLeod Declaration at Ex 3, CP 267-275. He claimed that the purchaser, Sauve, had illegally

obtained possession of one of the impounded vehicles, and claimed conversion and sought an order of replevin. These are essentially the same causes of action pled in the instant case. Division I of the Washington State Court of Appeals in Docket No. 67715-2-1 issued an unpublished opinion (cited here as fact, and not for precedent) in which the case was dismissed. See Declaration of McLeod, Ex 3, CP 267-275. In that case, Cedar Rapids Towing had filed an abandoned vehicle report (about the vehicle it sold to Sauve) on September 2, 2004 and on August 5, 2005 Sauve registered the vehicle in his own name. After being sued Sauve moved, as Defendants later did here, for Summary Judgment noting the lapsing of the statute of limitation, the bona fide purchaser statute and res judicata.

Plaintiff responded by claiming that the discovery rule applied because he did not discover the sale until 2007 because of fraud by Sauve. He claimed to have conversed with Sauve and not been told of the sale, that Sauve had an affirmative duty to tell him of the sale, and that he could not have independently discovered the sale by exercising due diligence. This was all rejected and the case was dismissed finally by the appeals court on January 22,

2013. See McLeod Declaration at Ex 5, CP 276-287. All of these claims mirror those he now makes against the Biscays.

In his brief in the Sauve case, Plaintiff wrote the following referring to a vehicle sale to Sauve in June 28, 2005:

“Another vehicle, an ‘84 Chevrolet ramp truck was supposedly purchased by Jason Biscay on that date. However, according to Azpitarte, he talked to Biscay who claimed he bought it directly from Cedar Rapids Towing and not through an auction.” See McLeod Declaration Ex 6 at page 13 #25, CP 304.

Biscay denies ever speaking with Plaintiff. Still the point is that Azpitarte, when it suited him while suing Sauve, claimed to know about Mr. Biscay purchasing the vehicle, and now wishes to claim that he did not know and could not have known of it prior to March 27, 2009. His prior brief in the Sauve case should resolve the question of when the statute of limitations began to run in this case.

While the Sauve matter was working its way through the courts, Plaintiff filed the instant lawsuit on March 26, 2012. The issues were essentially identical inasmuch as the only two causes of action stated here were, as in Sauve, conversion and replevin. Fraud was later added, while the losing Sauve case was pending. Based on his Sauve brief, it is clear that Plaintiff knew about the

June 28, 2005 sales to Sauve and to Biscay well before March of 2009. So, he waited nearly seven years to bring suit.

Further, while the Sauve and Biscay cases were pending, Plaintiff also brought suit on essentially identical grounds against Daniel Spino, a purchaser of another of the impounded vehicles. This case under Court of Appeals, Cause Number 70751-5-1 was dismissed by the court of appeals in another unpublished opinion on June 15, 2015, and fees were awarded against Plaintiff. Spino is not cited as precedent, but as fact. While neither the Sauve nor the Spino cases may be cited as precedent, they do contain essentially similar claims to the case at bar giving rise to consideration of both collateral estoppel and res judicata in addition to the statute of limitations reasons on which the court below based its decisions.

### **III. FACTUAL BACKGROUND OF THIS CASE**

Defendant Jason Biscay bought the 1984 Chevrolet ramp truck in question from Cedar Rapids towing on June 28, 2005. This is the transaction Plaintiff referenced in his Sauve brief. Biscay denies ever speaking with Plaintiff about this. He had nothing to do with its having been impounded from Plaintiff's possession by King County in 2004, and never dealt with Plaintiff. He did register the

vehicle in his own name on January 9, 2006. More than six years later he was sued along with his wife and Marvin Burnett (to whom he later sold the truck). Since the obtaining of a title and the registration of Biscay's claim to ownership of the ramp truck was through the Washington State Department of Licensing, it was a matter of public record. See Biscay Supplemental Declaration at page 2, Ex 1, CP 243 and 245.

Biscay's sale of the truck to Burnett in November of 2008 was also a matter of public record, acknowledged by Azpitarte, CP-244.

#### **IV. EVIDENCE RELIED UPON**

1. Plaintiff's complaint, filed separately March 26, 2012, CP 421-423, First Amended Complaint filed May 29, 2012, CP 424-427;
2. Declaration of Jason Biscay dated March 3, 2014, filed separately on May 19, 2014, CP 145-149;
3. Declaration of Brenda Biscay dated April 1, 2014, filed separately on May 18, 2014 CP 150-152;
4. Declaration of Christopher R. McLeod filed on July 30, 2014, CP 261-314;

5. Supplemental Declaration of Jason Biscay dated July 21, 2014, CP242-246.

## **V. ISSUE PRESENTED**

Should Plaintiff's claims for conversion, fraud and replevin have been dismissed for failure to commence suit within the applicable statute of limitations, because Defendants were protected by the statute of limitations from this action, and/or because of res judicata?

## **VI. LAW AND ARGUMENT**

### **A. BASIC RULES OF SUMMARY JUDGMENT.**

Summary judgment of dismissal, as was granted in the court below, is appropriate if there is no evidence to show that there is a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR56. That was so in this case at the trial court level. Summary judgment should be granted if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Young v. Key Pharmaceuticals*, 112 Wn.2d 216 225, 770 P.2d 182 (1989); quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L.Ed.2d 265, 106 S. Ct. 2548 (1986). In this case, the trial court granted summary judgment after Plaintiff

failed to show that he filed his suit within the statute of limitations, or after permissible delay due to delayed awareness of the claim.

A party cannot rely on mere allegations and pleadings to avoid summary judgment of dismissal. Rather, the non-moving party must set forth affirmative and admissible factual evidence that creates a genuine issue of a material fact. *Mackey v. Graham*, 99 Wn.2d 572, 663 P.2d 490 (1983). In this regard, “speculation, argumentative assertions, opinions and conclusory statements will not suffice.” *Suarez v. Newquist*, 70 Wn. App. 827, 832, 855 P.2d 2 (1993). Yet, even as in his opening brief, Plaintiff has relied exclusively on speculation, argumentative assertions, opinions and conclusory statements (including many that are not a part of the record).

**B. CONVERSION, FRAUD AND REPLEVIN ARE EACH SUBJECT TO A THREE-YEAR STATUTE OF LIMITATIONS.**

1. RCW 4.16.080(2) makes clear that

“An action for taking, detaining or injuring personal property, including an action for the specific recovery thereof...) shall be commenced within three years.”

Conversion is a tort involving the taking of personal property, and is clearly subject to the three year limitation. Replevin is likewise a matter involving detaining of personal property and so is

subject to the three year statute of limitations. The same is true of fraud or fraudulent concealment. Before the substance of Plaintiff's claims needed to be considered, the court below found that his claims were untimely. Yet, in his opening brief, Plaintiff scarcely mentions this prerequisite issue. Since this lawsuit involves a vehicle Jason Biscay purchased on June 28, 2005 and that was openly, publicly and legally registered with the Washington State Department of Licensing by Mr. Biscay on January 9, 2006, the filing of the lawsuit on March 26, 2012 is clearly beyond the statutory time limit. Adding to this the admission by Plaintiff in prior briefing in *Sauve* that he knew of this transfer well before 2009, and his admissions in his opening brief herein that he knew the vehicle in question had been sold, it is clear that he can show no genuine issue of material fact indicating that he did not know or have reason to know about the Biscay purchase before 2009. So, his filing on March 26, 2012 was not timely. Plaintiff's Opening Brief at #11 on page 15.

The only possible means Plaintiff has for claiming the right to extend the time limit, then, would be for the court to apply the discovery rule by finding that the claim did not accrue until some later date bringing the filing date within the statute of limitations.

Mr. Azpitarte has himself, in briefing the Sauve case given reason to disprove such a claim having any legitimate basis. See Declaration of McLeod, Ex 6, page 13 CP 304. He cannot represent to this court that he knew the fact of Biscay's purchase when it suits him in one case and then deny such knowledge when it does not suit him in this case.

2. The discovery rule should not extend the statute of limitations here since Mr. Azpitarte had actual knowledge that did or should have made him with minimal due diligence aware of the elements of his claims.

When Plaintiff wrote that he had spoken to Mr. Biscay in 2005 (assuming for the sake of argument that his statement is true), and when he noted that he then knew of the 2005 purchase, then he also showed that he knew or had reason to know that the ramp truck in question was sold to Biscay the same day as Gayle Sauve bought a different vehicle that had been impounded from Plaintiff's property in King County. In the Sauve case, he had written in his brief that he knew by 2007 that Sauve had bought one of the vehicles he was trying to get back from Cedar Rapids Towing. See Declaration of McLeod at Ex 6, pages 7 and 8, items #10 and #11, CP 298-299. So, he knew that vehicles were being

sold and titles issued more than 4 years before filing suit. And, since Plaintiff and Mr. Biscay were not in contractual privity or in any relationship of trust or fiduciary duty at that time, Mr. Biscay had no duty to seek out past owners and disclose this purchase. *Favors v. Matzke*, 53 Wash. App. 789, 796, 770 P 2d 686 (1989).

It has long been established that a claim accrues when the act complained of occurs. *Easter v. American West Financial, C. A. 9*, 381 F 3rd 948 (2003), but when there is a delay between an injury and the Plaintiff's discovery of it, the cause of action can accrue for purposes of the statute of limitations when the Plaintiff knew, or in the exercise of due diligence should have known, the essential elements of the cause of action. In *Re Estates of Hibbard* 118 Wash. 2d 737, 752, 826 P 2d 690 (1992): *Hamilton v. Arriola Bros. Custom Farming* 85, Wash. App. 207, 931 P 2d 925 (1997).

The key element missing here is the exercise of due diligence in the face of the actual knowledge noted above, in that Plaintiff has admitted in a previous case that he knew Biscay had the truck, and the fact that Biscay had registered it in early 2005. The simple and obvious act of checking with the Department of Licensing (particularly after knowing of the Sauve purchase of a vehicle from the same group of impounded cars) not having been

done, a claim of due diligence would be a self-serving fiction. So, no extension is warranted.

3. There was no fraud or showing of fraud on the part of the Defendants, or concealment of any kind.

Mr. Biscay cannot be shown to have done anything to conceal his purchase, certainly not on the record before the trial court or this court. No fact is presented to indicate that he, or any other Defendant, did anything fraudulent. Whatever Plaintiff's complaints may have been with Cedar Rapids Towing, they were dismissed in the federal lawsuit against King County, et al. They cannot be renewed against subsequent persons not involved in the original seizure.

4. The Defendants, knowing nothing of Mr. Azpitarte or his history with this vehicle, were bona fide purchasers under RCW 46.12.655.

There is no evidence of any kind to suggest that Mr. Biscay was not a bona fide purchaser under RCW 46.12.655. That is, Mr. Biscay gave value in the form of money to a vendor in the form of Cedar Rapids Towing without any notice or awareness of any right to the truck in law or equity on the part of Plaintiff. The same goes for Mr. Burnett when he purchased the ramp truck from Mr. Biscay.

This statute bars this kind of suit against such purchasers. Given this status and Biscay's open and public registration of the vehicle as his own in early 2005, there was nothing secret or concealed about this possession of the vehicle. So, the discovery rule should not apply, and if applied should not extend beyond the time of the registration by Mr. Biscay.

5. The issues in this case are essentially identical, and were pled as identical, to those in the several similar cases which Plaintiff has fully litigated and lost.

Having failed to prove in one case that King County improperly took his vehicles from him, Plaintiff sued Sauve (a later purchaser of one of those vehicles) on claims identical in law and essential facts to those he now brings against these Defendants. Having failed to obtain a result against Sauve for many of the same reasons not being argued in this motion, he then made a third attempt to obtain a result against Spino, and then a fourth attempt against these Defendants, who are even more remote from the original issue. Mr. Azpitarte should not be permitted to serially sue all persons affected in the same category of transactions when the essential facts and law are those that have already been litigated to his disadvantage. *Rains v. State 100 Wash. 2d 660 (1983)*.

For all of the above reasons, the trial court's decision to grant Summary Judgment was well grounded in law and fact, and should not be disturbed on appeal UNDER Plaintiff's Assignment of Error #5. The court's decisions to set aside the default judgments in this case is likewise well grounded and will be addressed below.

C. THE TRIAL COURT PROPERLY SET ASIDE DEFAULT JUDGMENTS TAKEN AGAINST ALL DEFENDANTS.

1. The one-year period for requesting that defaults be set aside under CR 60(b) (1-3) is not absolute.

A default judgment not set aside within one year may be set aside after one year based on a showing of good cause. This does not under the rule require the trial court to make and enter findings of fact and conclusions of law, and the decision not to do so does not disqualify the ruling. Moreover, Plaintiff did nothing to present or propose any findings at the time or within the reconsideration period, and so slept on his rights. In the pleadings, Defendants made a showing of good cause why the default judgments were improperly obtained without adequate notice and in contradiction of a ruling made by a prior judge shortly before the judge granting the default came onto the case. So, the aspect of the appeal relying on a lack of findings and conclusions and a lack of timely motion to set

aside is not well taken. CR 60(b)(1-3). Also, Defendants' pleadings revealed the lack of notice provided to them by Plaintiff in obtaining the judgments. See Declarations of Jason and Brenda Biscay CP 145-152. So, the court was able to assess the credibility of the declarants before it and to rely on CR 60 (b) (4) as to the "misrepresentation or other misconduct" of the adverse party, the Plaintiff, in setting aside the default judgments. So, the court did not err as claimed in Plaintiff's Assignment of Error #3 and #4.

2. The court properly considered and ruled on Defendants Burnett's motions for relief from judgment of default.

The Plaintiff has not included in Clerk's Papers an Order of Default or Judgment against Burnett. The Order of Default against the Biscays was entered on October 7, 2013, CP 108-109 and Judgment entered on January 7, 2014, CP 127-129. Defendants Biscay moved to set aside the October order on May 19, 2014. CP 132-144. Defendants Burnett then moved to join in the Biscay's motion to set aside, on May 22, 2014, CP 153-158.

The court then considered both motions, granted all motions and set aside both default orders on June 26, 2014, CP 188-189. The order setting aside the defaults specifically refers to all Defendants in its caption, and specifically refers to the date of the

Burnett order separately from its specific reference to the date of the Biscay order. Clearly, the defaults were considered as to all parties, and set aside as to all parties. CP 337-338.

CR 60 (B) only requires that motion shall be made within a "reasonable time" when they concern any issue not directly limited to subsections (1-3). The rule also allows setting aside default judgments for "any other reason justifying relief from the operation of the judgment." Cr 60 (B) (11). After Defendants in their moving papers raised significant questions as to the validity of notice in the noting of the motions for default by Plaintiff, the court found sufficient justification for relieving Defendants from the judgment.

Therefore, the trial court did not make an error in not ruling on the motions regarding the Burnetts as alleged in Plaintiff's Assignment of Error #'s 1 and 2. It considered the motion to join by the Burnetts, and the motions to set aside by all parties, and ruled in favor of Defendants.

Plaintiff did not appear to argue this matter, and did not appear to argue the Summary Judgment Motion that followed. His argument that he was prevented from doing so by manipulation of the court's calendar to make travel from his home impossible assumes that he had to travel only on the day of hearing, and that

defense counsel tells the court when to hold hearings rather than the other way around. Having foregone his chance to argue these motions, he should not now be allowed to exceed the record before the court to do so.

D. HAVING BEEN FOUND IN SEVERAL COURTS TO HAVE FAILED TO OBEY COURT RULES IN ORDER TO OBTAIN ADVANTAGE, PLAINTIFF SEEKS NOW TO EXCEED THE RECORD IN ORDER TO CAST WITHOUT SUBSTANTIATION HIS ACCUSATION OF SIMILAR MISCONDUCT BY THE DEFENSE.

1. Defendants and their counsel have misrepresented nothing, to the trial court or here.

Plaintiff describes the position taken by Defendants as a concoction, brazen and a perjury. These are strong allegations coming from someone who has been unable to produce evidence in prior court proceedings to support his many claims about the misconduct of others. In order for these eight claims of misrepresentation to be believed and accepted by this court, it would be necessary to believe that numerous people agreed to lie and that a competent trial court agreed to accept or overlook those lies. That argument defies reason and experience, and does not amount to a substantive demonstration that there has been any

misconduct that would require the overturning of the trial court's judgment.

## VII. CONCLUSION

The only causes of action pled are subject to the three year statute of limitation stated in RCW 4.16.080 (2). The discovery rule does not apply because of Mr. Biscay having openly registered his ownership of the truck and because of Plaintiff's own admissions. The lawsuit was filed well beyond the applicable statute of limitations. Therefore, both causes of action should be dismissed, with prejudice. The Defendants were released from civil liability in any case by operation of RCW 46.12.102, and the claims precluded by res judicata after the Sauve litigation. These claims are barred by the statute of limitations, the bona fide purchaser law and res judicata. They should be dismissed with prejudice.

DATED this 31<sup>ST</sup> day of January, 2016.

RESPECTFULLY SUBMITTED,



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## **VII. CONCLUSION**

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DATED this 31<sup>ST</sup> day of January, 2016.

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