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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____ DEPUTY

NO. 45117-4-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

David Hyytinen, Appellant,

v.

City of Bremerton and State of Washington, in its capacity as legal representative of the Washington State Patrol, Respondents.

BRIEF OF RESPONDENT CITY OF BREMERTON

Mark E. Koontz
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Bremerton, as Respondent

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I. INTRODUCTION

Plaintiff's claim against the City of Bremerton ("the City") is merely a breach of contract claim under the UCC, Article 2. He bought a car from the City. He alleges that he did not get what he bargained for – a car with clear title. He did not file his claim within the statute of limitations, so his UCC breach of contrct claim is time barred. In an effort to revive his action against the City, plaintiff alleges tort claims and equitable claims. Predictably, since his claim sounds in contract, plaintiff cannot meet the elements of any tort or equitable claim. Therefore, his claims against the City were properly dismissed by the trial court.

II. COUNTERSTATEMENT OF THE ISSUES

A. Whether plaintiff's breach of contract/breach of implied warranty claim should be dismissed when Article 2 of the UCC imposes a four-year statute of limitations on sales contracts, a breach of warranty occurs when delivery is made, plaintiff's suit was filed more than four years after the Escalade was delivered to him, and the UCC does not recognize the discovery rule for tolling the four-year statute of limitations.

B. Whether plaintiff's tort claims should be dismissed because he failed to file a claim for damages with the City under RCW 4.96.020 prior to filing his case in superior court.

C. Whether plaintiff's fraud claim should be dismissed because the City did not make a representation of fact to plaintiff and even if the City did make such a representation, the City did not know that the representation was false.

D. Whether plaintiff's negligence claim should be dismissed because the City did not owe plaintiff a duty under RCW 69.50.505.

E. Whether plaintiff's unjust enrichment claim should be dismissed because a remedy of unjust enrichment is only available when the parties do not have a contractual relationship.

F. Whether plaintiff is entitled to attorney's fees against the City under RCW 69.50.505 when plaintiff is not a prevailing party on appeal, he was not entitled to notice under the statute, and the action at bar is not a proceeding to forfeit property.

III. STATEMENT OF THE CASE

A. Procedure Below.

Plaintiff filed his original complaint on September 21, 2011. CP 4-9. Plaintiff alleged three causes of action against the City and the Bremerton Police Department ("BPD"): breach of contract, violation of the consumer protection act and fraud. CP 4-9. On February 4, 2011, plaintiff's amended his complaint to include two additional causes of action: unjust enrichment and unlawful taking. CP 10-15. Upon the City's

motion, the trial court dismissed BPD from the case and dismissed the consumer protection act claim and the unlawful taking claim against the City. CP 42-44. Upon leave of court, plaintiff filed his second amended complaint naming only the City and alleging the following causes of action: breach of contract and violation of implied warranty of good title, fraud, unjust enrichment and negligence. CP 48-53. On December 13, 2012, plaintiff filed his third amended complaint for damages, naming the City and the State of Washington ("the State") as defendants and alleging the following causes of action against the City: breach of contract and violation of implied warranty of good title, fraud, unjust enrichment and negligence. The trial court granted the City's motion for summary judgment dismissal of all claims against the City. CP 685-687. Plaintiff has appealed the order.[1]

B. Statement of Facts

In 2003, BPD began a narcotics investigation. CP 354 at ¶ 3. During the investigation, the police department discovered that a Cadillac Escalade was being used to facilitate the sale and delivery of cocaine, a controlled substance. CP 354 at ¶ 3. BPD ran the license plates through the Washington State Department of Licensing ("DOL"), and DOL informed BPD that the Escalade was owned by Darryl Anthony Shears. *Id.* On

[1] Plaintiff has also appealed the dismissal of his claims against the State. The City only addressed plaintiff's claims the City in this brief.

January 28, 2004, the Kitsap County Superior Court issued a warrant authorizing BPD to seize the Escalade pursuant to RCW 69.50.505. *Id.*, CP 357-58. On January 30, 2004, BPD seized the Escalade from Mr. Shears' residence on the strength of the warrant. CP 354 at ¶ 3.

After seizing the Escalade, BPD input the license plate number and the VIN into ACCESS, which queries law enforcement databases such as DOL, the Washington Crime Information Center ("WACIC") and the National Crime Information Center ("NCIC"). CP 355 at ¶ 4. BPD was informed through these databases that the Escalade was not stolen and that Darryl Anthony Shears owned the Escalade. *Id.*

BPD provided notice of seizure and intended forfeiture to Mr. Shears. CP 355 at ¶ 5; CP 360. Mr. Shears claimed ownership of the vehicle. CP 355 at ¶ 5; CP 362. The City ultimately entered into a settlement agreement with Mr. Shears, which resulted in Mr. Shears forfeiting the Escalade to BPD. CP 355 at ¶ 5.

In 2007, BPD put the Escalade up for auction using King County Auction. CP 355 at ¶ 6. In July 2007, plaintiff purchased the Escalade at auction. CP 349-50. On July 3, 2007 title of the Escalade was transferred from King County Auction to plaintiff. CP 353.

In July 2011, the Washington State Patrol (WSP) contacted BPD Sergeant Randy Plumb. CP 355 at ¶ 7. WSP told Sergeant Plumb that

WSP seized the Escalade because WSP believed that the Escalade had been stolen. *Id.* WSP also informed Sergeant Plumb that it believed that the VIN on the Escalade had been altered in an effort to hide the fact that it was stolen. *Id.*; CP 364.

On November 3, 2011, plaintiff filed a Standard Tort Claim Form with the City's Clerk. CP 365. Plaintiff's original summons and complaint were filed on September 21, 2011. CP 1-9.

IV. ARGUMENT

A. Standard of Review.

This appeal involves the review of the trial court's granting a summary judgment motion. The standard of review is de novo:

> The trial court should grant summary judgment if it determines, after viewing the entire record and drawing all reasonable inferences in favor of the nonmoving party, that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The initial burden of demonstrating the absence of material facts rests with the moving party; the burden then shifts to the nonmoving party to come forward with 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. The nonmoving party's rebuttal must involve specific facts, not speculative or conclusory statements. We review a summary judgment order de novo, from the same position as the trial court.

Deschamps v. Mason County Sheriff's Office, 123 Wn.App. 551, 557-558, 96 P.3d 413 (2004) (internal citations omitted).

B. Plaintiff's claim for breach of contract and violation of implied warranty of good title is barred by the statute of limitations.

Plaintiff's purchase of the Escalade is governed by Washington's Uniform Commercial Code, Article 2. RCW 62A.2-101, *et seq.* Plaintiff alleges that the City breached its contract with plaintiff by violating the implied warranty of good title.

RCW 62A.2-312 states that a contract of sale includes a warranty that the title conveyed shall be good and its transfer rightful. RCW 62A.2-312(1)(a). The statute of limitations for a breach of contract is four years after the cause of action accrued. RCW 62A.2-725(1). The cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. RCW 62A.2-725(2); *See Western Recreational Vehicles, Inc. v. Swift Adhesives, Inc.*, 23 F.3d 1547 (9th Cir. 1994); *see also Giraud v. Quincy Farm and Chemical*, 102 Wn.App. 443, 6 P.3d 104 (2000)

In our case, delivery occurred when plaintiff took possession of the Escalade within a day or two of July 3, 2007.[2] CP 349-50. Therefore, plaintiff was required to file his claim by July 5, 2011. Since plaintiff filed his complaint in superior court on September 21, 2011, his claim was not filed within the four-year statute of limitations.

[2] The Title filed with DOL indicates that title to the Escalade transferred on July 3, 2007. CP 353.

Plaintiff argues that the four-year statute of limitations should not bar his claim because the UCC should be liberally construed. He cites no case law supporting this argument. In fact, a court may not ignore the plain language of a statute and rewrite it even though the Legislature has intended the statute to be liberally construed. *Helenius v. Chelius*, 131 Wn.App. 421 433-34, 120 P.3d 954 (2005). The plain language of RCW 62A.2-725(2) states that the cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. RCW 62A.2-725(2).

Moreover, it is clear that the Legislature weighed the policy considerations associated with establishing a bright line four-year statute of limitations. In *Western Recreational Vehicles, Inc.* 23 F.3d 1547 (9th Cir. 1994), a trailer manufacturer (Western) brought a breach of warranty claim under Article 2 of the UCC against Swift, which sold Western an adhesive to bond the sidewalls of its trailers. *Western Recreational Vehicles, Inc.* at 1548-49. Western entered into a contact with Swift in 1984. *Id.* at 1549. In 1987 Western discovered that the adhesive was not bonding properly. *Id.* at 1549. On January 17, 1990 Western filed suit for breach of warranty against Swift. *Id.* The Ninth Circuit, interpreting RCW 62A.2-725, held that the four-year statute of limitations applies to Western's cause of action, regardless of when Western discovered the

breach. *Id.* Therefore, Western's claims were barred for any delivery of adhesive prior to January 17, 1986 – four years before the Western filed suit. *Id.* at 1550.

The Court recognized that the drafters of Article 2 weighed the policy considerations of a statute of limitations that does not allow a discovery rule. The Legislature decided that such a limitation period was preferred:

> The drafters of the UCC decided that the seller's need to have some clearly defined limit on the period of its potential liability outweighed the buyer's interest in an extended warranty and reserved the benefits of an extended warranty to those who *explicitly* bargained for them.

Western Recreational Vehicles, Inc. at 1551, citing *H. Sand & Co. v. Airtemp Corp.,* 738 F.Supp. 760, 770 (S.D.N.Y.1990) (internal quotation omitted) (emphasis in original). If this Court does not give effect to the four-year statute of limitations, it would create uncertainty in the market, which the drafters of the UCC intended to prevent.

In the alternative, plaintiff argues that the four-year statute of limitation does not apply because he did not enter into a contract with the City. He argues that since the City did not provide clear title, there was no contract. Again, plaintiff fails to cite any case law for this novel legal theory. In fact, a warranty of good title is a term in every contract for the

sale of goods. RCW 62A.2-312(1)(a). Plaintiff alleges that the City has not fulfilled that contractual obligation. If true, the City has breached the contract. As such, plaintiff is making a breach of contract claim under the UCC, and the four-year statute of limitations applies.

Since plaintiff's claim is time-barred, the Court need not address whether plaintiff has met the elements of his breach of contract/implied warranty claim.

C. Plaintiff's unjust enrichment claim fails because a contractual relationship existed between the City and plaintiff.

Unjust enrichment is not a cause of action. "Unjust enrichment is the method of recovery for the value of the benefit retained ***absent any contractual relationship*** because notions of fairness and justice require it." *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (emphasis added). Recovery of unjust enrichment is only available in the absence of a contract between plaintiff and defendant. *Id.*, *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943); *Washington Ass'n of Child Care Agencies v. Thompson*, 34 Wn.App. 235, 238, 660 P.2d 1129 (1983); *Bybee Farms, LLC v. Snake River Sugar Co.*, 563 F.Supp.2d 1184, 1195 (E.D.Wash. 2008). Absent an express contract, the court, in equity, recognizes a quasi-contract (or contract implied in law). *Id.* at 484. The theory is to create a contract

where one does not already exist. Plaintiff is apparently attempting to revive his breach of contract claim under the guise of unjust enrichment.

Plaintiff does not dispute that an essential element of an unjust enrichment claim is the absence of a contraction relationship. Instead, he argues that plaintiff did not have a contract with the City because the parties did not mutually agree on the essential terms of the contract. First, plaintiff has admitted that he "entered into a valid and binding contract for the purchase and sale of the vehicle." CP 311 at ¶ 3.2. Second, the essential elements of a contract are 1) the subject matter, 2) the parties, 3) the promise, 4) the terms and conditions, and 5) consideration. *Trotzer v. Vig*, 149 Wn.App. 594, 605, 203 P.3d 1056 (2009). The stolen nature of the Escalade does not eliminate any of the elements of a contract claim. In other words, Plaintiff may not have received what he bargained for, but that does not invalidate the contract. It may entitle plaintiff to a claim for breach of contract if the claim is timely filed. However, the essential elements of the contract are present.

Since plaintiff and the City entered into a contract, plaintiff is not entitled to unjust enrichment. The Court need not address the other essential elements of unjust enrichment.

D. Plaintiff's tort claims fail because plaintiff failed to file a timely notice of claim with the City and because plaintiff cannot meet the elements of negligence and fraud.

1. Plaintiff failed to file a claim with the City prior to filing his lawsuit.

A plaintiff seeking damages for a tort claim against a municipality must first file a claim for damages with the municipality: "Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages." RCW 4.96.010(1). RCW 4.96.020 states as follows:

> No action subject to the claim filing requirements of this section shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim has first been presented to the agent of the governing body thereof.

RCW 4.96.020.

"RCW 4.96.020(4) forbids the commencement of a tort action against a local government defendant 'until sixty days have elapsed after' the plaintiff files a claim notice with the local government entity." *Troxell v. Rainier Public School Dist. No. 307*, 154 Wn.2d 345, 347, 111 P.3d 1173 (2005). Strict compliance is required. *Id.* at 360. Dismissal of the tort action is the proper remedy for failing to comply with the notice claim requirement. *Id* at 360.

In our case, plaintiff brings two tort claims, negligence and fraud. Plaintiff filed his tort action against the Bremerton Police Department on September 21, 2011. CP 1-9. Plaintiff alleged claims of breach of contract, violation of the consumer protection act, and fraud, and he sought relief for "damages in an amount to be proven at the time of trial...". CP 1-9. On November 4, 2011, plaintiff filed his Amended Complaint adding claims of unjust enrichment and unlawful taking and adding the City of Bremerton as a defendant. CP 10-15. On February 6, 2012, plaintiff filed his Second Amended Complaint which added a claim of negligence. CP 48-53. On November 3, 2011, plaintiff filed a Standard Tort Claim Form with the City's Clerk. CP 365

Plaintiff failed to comply with RCW 4.96.020. He filed his tort action in superior court before sixty days had passed since filing his claim for damages with the City. His tort claims of negligence and fraud were properly dismissed by the trial court.

2. Plaintiff cannot meet the elements of fraud.

As stated above, plaintiff's fraud claim should be dismissed because plaintiff failed to comply with RCW 4.96.020. In addition, plaintiff cannot meet at least two of the elements of fraud.

Plaintiff appears to argue that he may establish a fraud claim by merely showing that the City breached an affirmative duty to disclose a

material fact. He cites *Crisman v. Crisman*, 85 Wn.App. 15, 931 P.2d 163 (1997). He misreads *Crisman*. In *Crisman*, the plaintiff filed a claim against her brother for conversion. The brother argued that the statute of limitations had run before the complaint was filed. The Court held that in a conversion action a plaintiff may overcome the statute of limitations affirmative defense if the reason for the delay in filing was that the defendant fraudulently concealed a material fact that the defendant had a duty disclose. *Crisman* at 21-22. Fraudulent concealment only applies to defeat a statute of limitations defense, not to prove a fraud claim. Moreover, plaintiff fails to show how the City owed him an affirmative duty to disclose a material fact or that the City knew that it was concealing a material fact.

In order to establish a claim for fraud, plaintiff must prove nine elements: 1) defendant's representation of an existing fact; 2) its materiality; 3) its falsity; 4) the speaker's knowledge of its falsity; 5) the speaker's intent that it be acted upon by the person to whom it is made; 6) ignorance of its falsity on the part of the person to whom the representation is addressed; 7) the latter's reliance on the truth of the representation; 8) the right to rely upon it; and 9) consequent damage. *Elcon Const., Inc. v. Eastern Washington University*, 174 Wn.2d 157, 166, 273 P.3d 965 (2012).

First, the City did not make a representation of any fact. Plaintiff did not talk to anyone from the City prior to purchasing the Escalade. CP 351 (14:3-10). Plaintiff has failed to identify any statement made by the City to anyone regarding the Escalade's title. The City simply did not make a representation of any fact to plaintiff. Plaintiff cannot meet the first element of the tort of fraud.

Plaintiff argues that this element should be ignored because BPD "by its very nature invokes public confidence." He cites no authority for this proposition. The City did not make a false statement. If the Escalade did not have a clean title as plaintiff alleges, then his claim is a breach of contract under the UCC. As stated above, that claim is time barred.

Second, even assuming that the City represented that it had valid title to the Escalade as plaintiff alleges in his complaint, the City had no knowledge of its falsity. In 2003 BPD investigated Darryl Anthony Shears for dealing narcotics. Mr. Shears used the Escalade at issue in this case to facilitate the delivery of narcotics. BPD ran the license plates of the Escalade through DOL, and DOL informed BPD that the Escalade was owned by Darryl Anthony Shears. BPD seized the Escalade pursuant to RCW 69.50.505. After seizing the Escalade, BPD input the license plate number and the VIN located on the dash into a law enforcement database. BPD received information from DOL, WACIC, and NCIC. BPD was

informed through these databases that Darryl Anthony Shears owned the Cadillac Escalade. CP 354-55 at ¶¶ 3-4.

Again, plaintiff asserts that this requirement of a fraud claim be ignored. He argues that BOD had "constructive knowledge" because of its status as a law enforcement agency. Again, he cites no authority for this novel theory.

All of the information available to the City revealed that the Escalade was not stolen and that it was legally owned by Mr. Shears. CP 354-55. Plaintiff cannot establish the fourth element that the City knew it did not have valid title to the Escalade. The trial court properly dismissed plaintiff's fraud claim.

3. Plaintiff's negligence claim fails because the City did not breach a duty of care owed to plaintiff.

As stated above, plaintiff's negligence claim should be dismissed for failure to comply with RCW 4.96.020. In addition, plaintiff cannot prove that the City owed him a duty.[3] Plaintiff alleges that the City owed him a duty under RCW 69.50.505(3) to notify the owner of the Escalade that it had been seized.

RCW 69.50.505 is a statute that authorizes law enforcement agencies to seize and forfeit property used in the facilitation of illegal drug

[3] The elements of negligence are duty, breach, proximate cause and damage or injury. *Schwartz v. Elerding*, 166 Wn.App. 608, 615 270 P.3d 630 (2012).

transactions. The statute provides for an administrative hearing for a claimant who seeks ownership of property seized by a law enforcement agency. RCW 69.50.505(5). The seizing agency must give notice to the owner of the property and the person in charge of the property:

> The law enforcement agency under whose authority the seizure was made shall cause notice to be served within fifteen days following the seizure on the owner of the property seized and the person in charge thereof and any person having any known right or interest therein, including any community property interest, of the seizure and intended forfeiture of the seized property.

RCW 69.50.505(3).

BPD complied with the statute. BPD gave notice to Mr. Shears, who was the registered owner (according to DOL, NCIC and WACIC) and the person in possession of the Escalade. To the extent there is a duty imposed by RCW 69.50.505(3), the City fulfilled its duty.

However, even if the City failed to comply with RCW 69.50.505, the duty imposed by RCW 69.50.505 is to the owner of the property at the time of the seizure. BPD seized the Escalade on January 30, 2004. Plaintiff was not the owner at the time of the seizure. He did not become the owner until July 2007. Any duty under RCW 69.50.505 was owed to the owner of the vehicle on January 30, 2004, not plaintiff.

Plaintiff argues that he is in the same position as the claimant in *Moen v. Spokane City Police Department*, 110 Wn.App. 714, 42 P.3d 456

(2002). However, in *Moen*, the claimant had an ownership interest in the vehicle when it was seized by the Spokane Police Department. *Moen* at 716. Pursuant to RCW 69.50.505 he was entitled to a notice of hearing that he never received. *Moen* at 716-17. In our case, when BPD seized the Escalade in 2004, plaintiff did not have an ownership interest in the Escalade. BPD had no obligation to provide plaintiff a notice of hearing. *Moen* is not applicable to our case.

E. Plaintiff is not entitled to attorney's fees

Plaintiff argues that he is entitled to attorney's fees from the City under RCW 69.50.505(6), which states:

> In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant. In addition, in a court hearing between two or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

RCW 69.50.505(6).

First, for all the reasons listed above, plaintiff is not a prevailing party. Second, plaintiff's case is not a proceeding to forfeit property under Title 69 RCW; it is a complaint for damages seeking monetary compensation. RCW 69.50.505 does not authorize attorney's fees for a plaintiff's complaint against a police department alleging the department sold him a stolen vehicle.

Third, plaintiff is not a claimant under RCW 69.50.505. Under the statute, a person who believes they have an ownership right in a seized vehicle may make a claim to the seizing agency:

> If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section within forty-five days of the service of notice from the seizing agency in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right.

RCW 69.50.505(5).

Plaintiff did not have any ownership interest in the Escalade when it was seized by BPD in 2004. Plaintiff purchased the Escalade in 2007, three years after BPD seized the Escalade. He is not a claimant under RCW 69.50.505, so he is not entitled to attorney's fees under RCW 69.50.505.

Again, plaintiff erroneously relies on *Moen v. Spokane City Police Department*, 110 Wn.App. 714, 42 P.3d 456 (2002). However, as stated above, in *Moen*, the claimant had an ownership interest in the vehicle at the time it was seized. BPD seized the Escalade in 2004. Plaintiff did not have an ownership interest in the Escalade in 2004. He bought the Escalade at auction in 2007. BPD had no obligation to provide plaintiff a

notice of hearing and plaintiff is not a claimant under the statute. Even if plaintiff were to prevail on appeal, he is not entitled to attorney's fees.

V. CONCLUSION

Plaintiff did not file his UCC breach of contract/implied warranty claim in a timely manner. His unjust enrichment claim fails because he had a contract with the City. His tort claims were filed in superior court without filing the prerequisite claim with the City, and he cannot meet the elements of this tort claims. For all these reasons the superior court's order of dismissal should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of November, 2013.

ROGER A LUBOVICH
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By: _____
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BREMERTON POLICE DEPARTMENT,

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DECLARATION OF SERVICE

I am the Assistant City Attorney for the Bremerton City Attorney's Office. On the 27th day of November, 2013, I caused a copy of City of Bremerton's Brief of Respondent and this Declaration to be served on Rick J. Wathen, attorney for appellant, and Paul Triesch, attorney for State of Washington, by electronic mail and by United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Bremerton, Washington this 27th day of November 2013.

Mark E. Koontz
Assistant City Attorney

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