

79172-4

NO. 34274-0-II

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**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

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MARK POTTER,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent:

FILED  
COURT OF APPEALS  
DIVISION II  
NOV 22 11 15 AM '09  
CLERK OF COURT

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**BRIEF OF RESPONDENT**

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## I. NATURE OF THE CASE

This is a class action lawsuit for conversion brought by appellant Mark Potter<sup>1</sup> on behalf of individuals whose vehicles were impounded by Washington State Patrol (State Patrol) troopers because the drivers were driving with licenses suspended in the first, second or third degrees. The impounds occurred prior to the Washington State Supreme Court decision in All Around Underground v. Washington State Patrol, 148 Wn.2d 145, 60 P.3d 53 (2002). Mr. Potter argues that because the All Around Underground Court found the State Patrol's administrative rule requiring impounds invalid, any impound for driving while license suspended carried out by troopers while that rule was in effect subjects the State Patrol to liability for a conversion for each impounded vehicle.<sup>2</sup>

## II. STATEMENT OF THE ISSUES

1. Did the trial court properly grant summary judgment in favor of the Washington State Patrol where the impound of Mr. Potter's vehicles did not amount to conversion as a matter of law?

2. Is Mr. Potter required to challenge the impound of his vehicles under RCW 46.55.120 rather than in a tort action for conversion?

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<sup>1</sup> "Mr. Potter" will refer to Mr. Potter and the class, and "Mr. Potter's vehicles" will refer to Mr. Potter's vehicles and those of the class.

<sup>2</sup> Mr. Potter pled other theories of liability, but his appeal assigns error only based on a conversion theory of liability.

### III. STATEMENT OF THE CASE

#### A. Vehicle Towing And Impound

Chapter 46.55 RCW governs vehicle towing and impound in Washington. RCW 46.55.113 authorizes law enforcement officers to impound vehicles when the driver is arrested for driving or being in physical control of a vehicle while under the influence, or for driving while license suspended or revoked. The statute also authorizes officers to take custody of vehicles and provide for prompt removal to a place of safety under additional circumstances. RCW 46.55.113.

Chapter 46.55 RCW includes provisions for redeeming impounded vehicles and challenging impounds. RCW 46.55.120(1) provides a mechanism that allows owners to redeem their impounded vehicles. RCW 46.55.120(2) allows owners to challenge the impound of their vehicles promptly, and among other remedies this subsection allows an owner to recover damages for loss of use of the vehicle. RCW 46.55.120(3)(e). This statutory scheme has been amended a number of times over the years,<sup>3</sup> including in 1998 when the legislature amended RCW 46.55.113, in part as follows:

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<sup>3</sup> Former RCW 46.20.435, originally enacted in 1982, and amended in 1985, provided “[u]pon determining that a person is operating a motor vehicle . . . with a suspended or revoked license . . . a law enforcement officer may immediately impound the vehicle that person is operating.” RCW 46.20.435(1) (1994), CP 79-80. In 1987, the legislature adopted RCW 46.55.113, which provided that “a police officer may take

Whenever the driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504 or of RCW 46.20.342 or 46.20.420, the ~~((arresting officer may take custody of the vehicle and provide for its prompt removal to a place of safety))~~ vehicle is subject to impoundment, pursuant to applicable local ordinance or state agency rule at the direction of a law enforcement officer. In addition, a police officer may take custody of a vehicle and provide for its prompt removal to a place of safety under any of the following circumstances:

...

(7) Upon determining that a person is operating a motor vehicle without a valid driver's license in violation of RCW 46.20.005 or with a license that has been expired for ninety days or more ~~((; or with a suspended or revoked license in violation of RCW 46.20.342 or 46.20.420)).~~<sup>4</sup>

...

Laws of 1998, ch. 203, § 4, p. 809-10, CP 134-135.<sup>5</sup>

In response to the 1998 amendment, the State Patrol promulgated former WAC 204-96-010, which provided in part that “when a driver is arrested for a violation of RCW 46.61.502 [driving while under the influence], RCW 46.61.504 [physical control of a vehicle while under the

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custody of a vehicle and provide for its prompt removal to a place of safety” under listed circumstances. Laws of 1987, ch. 311 §10, p. 1097-98, CP 85-86. The legislature amended RCW 46.55.113 again in 1994 as part of a comprehensive driving under the influence bill. Laws of 1994, ch. 275, § 32, p. 1783, CP 108. Then in 1996, the language of RCW 46.20.435(1) was moved to RCW 46.55.113(7) and RCW 46.20.435 was repealed. Laws of 1996, ch. 89, § 1 and § 3, p. 265-66, and 269, CP 113-115. The statute was amended again in 1997 when driving without a valid license was decriminalized under certain circumstances. Laws of 1997, ch. 66, § 7, p. 424-25, CP 124; see also §§ 1-3, p. 411-12, CP 117-118.

<sup>4</sup> RCW 46.55.113 was amended again in 2003. Laws of 2003, ch. 177, § 1, p. 1139-40, CP 143-144, see also Laws of 2003, ch. 178 § 1, p. 1144-45, CP 146 (also amending RCW 46.55.113, although not relevant to the present case).

<sup>5</sup> For ease of reference, Laws of 1998, ch. 203, § 1 through § 5, p. 806-13, CP 133-136, are attached as Appendix A.

influence], RCW 46.20.342 [driving while license suspended or revoked] or RCW 46.20.420<sup>6</sup> [using out of state license while Washington license suspended or revoked], the arresting officer shall cause the vehicle to be impounded.”<sup>7</sup> CP 148-149. This “mandatory impound” provision of former WAC 204-96-010 was found invalid by the Supreme Court on December 12, 2002, in All Around Underground, 148 Wn.2d 145. In All Around Underground, the Court considered consolidated appeals from two separate district court impound hearings challenging impounds under RCW 46.55.120. Id. at 149-53. The Court held that the mandatory impound provision of former WAC 204-96-010 exceeded the statutory authority of RCW 46.55.113 because it did not allow officers to exercise discretion. Id. at 162.

#### **B. Procedural History**

State Patrol troopers impounded two of Mr. Potter’s vehicles on two separate occasions within six months, both arising from citations for driving while license suspended in the first degree, and both prior to the All Around Underground decision. CP 62. Mr. Potter was the registered owner of both vehicles. CP 62. Mr. Potter did not invoke the procedures

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<sup>6</sup> RCW 46.20.420 has been recodified at RCW 46.20.345.

<sup>7</sup> This was placed in administrative rule due to the 1998 statutory amendment providing that vehicles were subject to impound pursuant to “local ordinance or state agency rule.” See Laws of 1998, ch. 203, § 4, p. 809-10, CP 134-135.

under RCW 46.55.120(1) to redeem the vehicles or under RCW 46.55.120(2) to challenge the impounds in district or municipal court.

After the All Around Underground decision, however, Mr. Potter filed the present lawsuit as a putative class action in Thurston County Superior Court, naming the State Patrol as the sole defendant. CP 3-9. Mr. Potter originally alleged that the impound of his vehicles constituted conversion; negligent, reckless, willful, and wanton misconduct; and violation of state law and constitution. CP 3-9. Mr. Potter sought damages for the cost of redeeming his vehicles, the lost value of his vehicles, and the lost use of his vehicles. CP 3-9.

The Honorable Richard A. Strophy dismissed Mr. Potter's claims for negligent, reckless, willful, and wanton misconduct and violation of state law and constitution on the State Patrol's CR 12(b) motion to dismiss. CP 10-11. The case proceeded on the remaining conversion claim, which Judge Strophy certified as a class action pursuant to CR 23(a) and CR 23(b)(3), defining the class as follows:

Registered owners of motor vehicles that were impounded by the Washington State Patrol solely for Driving While License Suspended violations during the period of June 1, 2001 through December 19, 2002, who have not yet resorted to any other judicial or administrative method to challenge the legitimacy of the impound of their vehicle.

CP 12-14.

The parties then filed cross motions for summary judgment on the remaining conversion claim. CP 15-54; 59-60; 61-165. Judge Strophy granted the State Patrol's motion for summary judgment, denied Mr. Potter's motion, and dismissed the case with prejudice. CP 196-197. Mr. Potter appeals that dismissal. CP 198-201.

#### **IV. SUMMARY OF ARGUMENT**

The State Patrol twice impounded Mr. Potter's vehicles after he was cited for driving while license suspended in the first degree, in violation of RCW 46.20.342(1)(a). The vehicles were impounded pursuant to statutory authority and an administrative rule, and subject to Mr. Potter's statutory right to redeem the vehicles under RCW 46.55.120(1) and his statutory right to challenge the impounds and obtain damages for lost use under RCW 46.55.120(2).

Although the Supreme Court's decision in All Around Underground held that the State Patrol's administrative rule was invalid, that does not prove Mr. Potter's conversion claim. At best, it demonstrates that Mr. Potter had a basis for challenging the impounds like the parties in All Around Underground. But the fact that Mr. Potter had a basis to challenge the impound of his vehicles does not prove conversion. The essence of conversion is permanent deprivation of property and that

deprivation is lacking in the present case where the statutory impound procedures anticipate the release of vehicles. Because Mr. Potter's vehicles were impounded under a statutory scheme that anticipated vehicles would be returned to their owners, there was no conversion.

Furthermore, the State Patrol acted under authority created by law to preserve public safety when it impounded Mr. Potter's vehicles and thus, its actions were privileged under the Restatement (Second) of Torts § 265 (1965). The privilege afforded under § 265 is a privilege to act, not an immunity from suit, and is entirely consistent with the State of Washington's waiver of sovereign immunity. Because the State Patrol's actions were privileged it cannot be liable for conversion.

In addition to demonstrating why there is no conversion, Mr. Potter's right to request a district court impound hearing under RCW 46.55.120(2) provides the exclusive statutory method for challenging the impound of his vehicles under chapter 46.55 RCW and seeking remedies for lost use. This precludes Mr. Potter from sitting on his rights and claiming additional damages in a tort action for conversion.

Summary judgment may be affirmed for any one of these alternative reasons.

## V. ARGUMENT

### A. Standard of Review

Appellate court review of a trial court order granting summary judgment is *de novo*, with the appellate court performing the same inquiry as the trial court. Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The appellate court may affirm on “any theory established by the pleadings and supported by the proof,” even if the theory was not relied on by the trial court. Wendle v. Farrow, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

The moving party bears the initial burden, however, a “moving defendant may meet the initial burden by ‘showing’ . . . that there is an absence of evidence to support the nonmoving party’s case.” Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)) (internal quotation marks omitted). Summary judgment is appropriate in the present case because Mr. Potter cannot establish conversion as a matter of law, and because he did not challenge the impound of his vehicles under RCW 46.55.120(2).

## **B. The Impound Of Mr. Potter's Vehicles Was Not A Conversion**

### **1. Conversion**

The tort of conversion is “the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.” Judkins v. Sadler-Mac Neil, 61 Wn.2d 1, 3, 376 P.2d 837 (1962) (quoting Salmond on The Law of Torts § 78, at 310 (9<sup>th</sup> ed. 1936)) (internal quotation marks omitted). It is “[a]ny unauthorized act which deprives a man of his property permanently.” Muscatel v. Storey, 56 Wn.2d 635, 640, 354 P.2d 931 (1960) (citing Walker v. Cascade Milk Prod. Co., 21 Wn.2d 615, 152 P.2d 603 (1944); Phillipos v. Mihran, 38 Wash. 402, 80 P. 527 (1905)). The Restatement (Second) of Torts defines conversion as “an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.” Restatement (Second) of Torts § 222A(1).

The Restatement goes on to provide six factors to be considered in determining the seriousness of an alleged interference:

- (a) the extent and duration of the actor's exercise of dominion and control;
- (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
- (c) the actor's good faith;

- (d) the extent and duration of the resulting interference with the other's right of control;
- (e) the harm done to the chattel;
- (f) the inconvenience and expense caused to the other.

Id. at § 222A(2).

It is Mr. Potter that bears the burden of proving the elements of his claim of conversion and if he cannot establish a prima facie case, then summary judgment for the State Patrol is proper under CR 56. As shown in the next section, an impound under RCW 46.55.113, which is subject to redemption or challenge under RCW 46.55.120, is not a conversion as a matter of law. The extent and duration of the State Patrol's exercise of dominion and control is limited by statute so that it is not a conversion. The State Patrol acts in good faith and does not act with an intent to assert rights that are in fact inconsistent with the owner's right of control, only to impound according to law and subject to redemption or challenge. The extent and duration of the resulting interference with the other's right of control is limited by law so that it is not a conversion. There is no harm done to the vehicles by an impound, and the inconvenience and expense are addressed by the statutory remedies available for redeeming and challenging impounds.

Nor is conversion shown by Mr. Potter's reliance on All Around Underground and the invalidation of the mandatory impound provision of

former WAC 204-96-010. At best, Mr. Potter merely identifies reasons that can be raised in a challenge under RCW 46.55.120(2). The invalidity of the administrative rule does not convert the impounds into conversions of property.

**2. There Was No Conversion When The State Patrol Impounded Mr. Potter's Vehicles**

**a. Law Enforcement Authority To Impound Vehicles**

Law enforcement officers have broad authority to enforce the law and protect public safety. This includes the authority to seize, or impound, a vehicle under a variety of circumstances. For example, vehicles may be impounded:

(1) [A]s evidence of a crime; (2) as part of the police 'community caretaking function,' if the removal of the vehicle is necessary; and (3) as part of the police function of enforcing traffic regulations, if the driver has committed one of the traffic offenses for which the legislature has specifically authorized impoundment.

State v. Peterson, 92 Wn. App. 899, 902, 964 P.2d 1231 (1998). Law enforcement officers may also impound vehicles when they are subject to statutory forfeiture. See e.g., RCW 69.50.505. Additionally, vehicles may be impounded and held while a warrant is obtained if there is probable cause to believe that the car contains contraband or evidence of a crime.

See State v. Huff, 64 Wn. App. 641, 648-53, 826 P.2d 698, review denied, 119 Wn.2d 1007 (1992).

Driving while license suspended is one of the many reasons for impound that the legislature has specifically authorized by statute. RCW 46.55.113(1). Mr. Potter's vehicles were impounded under statutory authority and a then existing administrative rule that specifically authorized impound when the driver's license is suspended. RCW 46.55.113(1).

**b. The Invalidation Of The Mandatory Impound Rule Does Not Turn The Impound Of Mr. Potter's Vehicles Into Conversions Of Property**

In addition to the statutory authority, Mr. Potter's vehicles were impounded pursuant to a Washington Administrative Code provision, later invalidated. Former WAC 204-96-010 was enacted pursuant to a reasonable interpretation of a grant of authority made by the legislature, at a time when there was no case law interpreting the 1998 version of RCW 46.55.113.

Prior to 1998, RCW 46.55.113 listed operating a motor vehicle with a suspended or revoked license as one of the many circumstances under which an officer could take custody of a vehicle and provide for its prompt removal to a place of safety. See Laws of 1997, ch. 66 § 7, p. 424-25, CP 124; Laws of 1998, ch. 203, § 4, p. 809-10, CP 134-135. The

statute separately made the same provisions for vehicles whose drivers were arrested for driving while under the influence or in physical control of alcohol or drugs. See id. In 1998, the legislature removed driving while license suspended from the longer list, placed it with driving under the influence, and provided that such vehicles were “subject to” impoundment. The relevant amendment provided as follows:

Whenever the driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504 or of RCW 46.20.342 or 46.20.420, the ~~((arresting officer may take custody of the vehicle and provide for its prompt removal to a place of safety))~~ vehicle is subject to impoundment, pursuant to applicable local ordinance or state agency rule at the direction of a law enforcement officer. In addition, a police officer may take custody of a vehicle and provide for its prompt removal to a place of safety under any of the following circumstances:

...

(7) Upon determining that a person is operating a motor vehicle without a valid driver’s license in violation of RCW 46.20.005 or with a license that has been expired for ninety days or more ~~((, or with a suspended or revoked license in violation of RCW 46.20.342 or 46.20.420))~~.

...

Laws of 1998, ch. 203, § 4, p. 809-10, CP 134-135.

The legislature thus placed driving while license suspended on par with driving under the influence, by using the language “subject to” rather than take custody and provide for “prompt removal to a place of safety.” The legislation appeared to implement the intent expressed in the “intent

section” of the act, which indicated that such vehicles would, and should, be impounded. Laws of 1998, ch. 203 § 1, provides in part:

. . . Because of the threat posed by suspended drivers, all registered owners of motor vehicles in Washington have a duty to not allow their vehicles to be driven by a suspended driver.

. . . Existing sanctions are not sufficient to deter or prevent persons with a suspended or revoked license from driving. . . . Vehicle impoundment will provide an immediate consequence which will increase deterrence and reduce unlawful driving by preventing a suspended driver access to that vehicle. Vehicle impoundment will also provide an appropriate measure of accountability for registered owners who permit suspended drivers to drive their vehicles. . . . In order to adequately protect public safety and to enforce the state’s driver licensing laws, it is necessary to authorize the impoundment of any vehicle when it is found to be operated by a driver with a suspended or revoked license in violation of RCW 46.20.342 and 46.20.420. . . .

Laws of 1998, ch. 203, § 1, p. 806-07 (emphasis added), CP 133; see Appendix A.

Furthermore, the Final Bill Report explained: “Courts interpreting this statute have ruled that the authority granted is a discretionary authority to impound and that this statutory authority does not authorize impoundment unless impoundment is reasonable under the circumstances and serves to prevent a continuing violation of a motor vehicle regulation.” Final Bill Report on ESHB 1221, 55<sup>th</sup> Leg. (1988), CP 161. It was with this prior law in mind that the legislature amended the statute.

See Price v. Kitsap County Transit, 125 Wn.2d 456, 463, 886 P.2d 556 (1994) (legislature is presumed to know the existing state of case law). The legislature also amended RCW 46.55.120 to provide for thirty, sixty, and ninety day “holds” of vehicles impounded for driving while license suspended when the drivers had previous convictions for driving while license suspended. Laws of 1998, ch. 203, § 5, p. 810-13, CP 135-136.

Based upon this legislative intent, its past authority, and the additional authority for vehicle holds, the State Patrol in good faith interpreted the new law as authorizing and arguably requiring the mandatory impound of vehicles when the driver was arrested for driving while license suspended or revoked. The State Patrol therefore adopted former WAC 204-96-010 in 1999 and charged its troopers with following the rule.<sup>8</sup>

The Supreme Court disagreed and concluded that the mandatory impound provision of former WAC 204-96-010 was invalid because it

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<sup>8</sup> In Michigan v. DeFillippo, 443 U.S. 31, 38 (1979), the United States Supreme Court explained:

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality -- with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officer took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

exceeded statutory authority. See All Around Underground, 148 Wn.2d 145.<sup>9</sup> “[T]he statute does not require impoundment of every vehicle when its driver is arrested or driving with a suspended or revoked license; it merely authorizes individual impoundments.” Id. at 154. “[S]ubject to’ cannot be construed to mandate impoundment by removing from the individual officer discretion on whether to impound . . . .” Id.

All Around Underground, however, held only that an administrative rule was invalid. Id. at 162. The Court held that the impounds were inappropriate, and the vehicle owners were entitled to reimbursement of various costs and for loss of use as provided by RCW 46.55.120(3). Id. at 160-61. Notably, the Court did not find, or even consider, whether the fair market value of property should be paid as a conversion remedy. Id. All Around Underground also demonstrates that the vehicle impounds could have been challenged promptly. Id. at 149-53.

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<sup>9</sup> In apparent response to the All Around Underground decision, the legislature amended RCW 46.55.113 again in 2003 to provide in part as follows:

(1) Whenever the driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504 or of RCW 46.20.342 or ((46.20.420)) 46.20.345, the vehicle is subject to summary impoundment, pursuant to the terms and conditions of an applicable local ordinance or state agency rule at the direction of a law enforcement officer.

(2) In addition, a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances: . . .

Laws of 2003, ch. 177, § 1, p. 1139-40, CP 143-144. This is further evidence that the legislature’s intent was to allow the mandatory impound of any vehicle when the driver is arrested for driving while license suspended.

**c. The State Patrol Allowed Mr. Potter To Redeem His Vehicles And Challenge The Impounds**

Conversion requires a permanent deprivation of property, not merely a temporary interference. Conversion is “[a]ny unauthorized act which deprives a man of his property permanently.” Muscatel, 56 Wn.2d at 640 (citations omitted) (emphasis added). The requirement that a deprivation be permanent is supported by the method of measuring damages, which is “the value of the article converted at the time of the taking.” Washington State Bank v. Medalia Healthcare L.L.C., 96 Wn. App. 547, 554, 984 P.2d 1041 (1999), review denied, 140 Wn.2d 1007 (2000) (quoting Junkin v. Anderson, 12 Wn.2d 58, 63, 120 P.2d 548 (1941)) (internal quotation marks omitted); see In re Marriage of Langham, 153 Wn.2d 553, 567, 106 P.3d 212 (2005).

Mr. Potter relies on Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 20 P.3d 447, review denied, 145 Wn.2d 1004 (2001), for the assertion that a deprivation need not be permanent. However, Demelash and Olin v. Goehler, 39 Wn. App. 688, 694 P.2d 1129, review denied, 103 Wn.2d 1036 (1985), upon which the Demelash Court relies, both involved situations where there was dispute over whether the plaintiff was rightfully entitled to the property. Although such a dispute may warrant detention of property in order to determine the rightful owner, a detention under those

circumstances is warranted “only for so long as reasonably necessary to determine who rightfully owns the property.” Demelash, 105 Wn. App. at 522 (citing Olin, 39 Wn. App. at 694). In Demelash, the Court of Appeals found there was an issue of fact as to whether retaining a coat for 16 days after verifying Mr. Demelash’s receipt constitute conversion. Demelash, 105 Wn. App. at 522.

The State Patrol impounded Mr. Potter’s vehicles pursuant to a statutory scheme that anticipated the vehicles could be redeemed and returned to their owners.<sup>10</sup> The law equally allowed owners to challenge impound in district or municipal court and thus obtain their vehicles, and any lost use or other incidental costs. See RCW 46.55.120(1) and (2). While some of the class members, including Mr. Potter, did not redeem their vehicles – there is no genuine dispute that legally they could have done so. There is no dispute of law that any permanent deprivation of vehicles resulted from the owner’s choice not to redeem the vehicle or challenge the impound.<sup>11</sup>

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<sup>10</sup> Although RCW 46.55.120 provides for thirty, sixty, or ninety day “holds” of vehicles when the drivers had previous convictions for driving while license suspended, the statutory scheme nevertheless anticipates that vehicles will be returned to their owners. Additionally, the right to challenge an impound exists regardless of whether there is a hold.

<sup>11</sup> Unclaimed vehicles are ultimately considered “abandoned” and may be sold at auction. After satisfaction of the tow truck operator’s lien, any surplus money derived from auction is remitted to the department of licensing for deposit in the state motor vehicle fund. RCW 46.55.130(2)(h). If the department of licensing “subsequently

**3. There Was No Conversion Of Mr. Potter's Vehicles Because The State Patrol's Actions Were Privileged Under § 265 Of The Restatement (Second) Of Torts**

Even assuming for argument that Mr. Potter's conversion claim does not fail as a matter of law because the impounds were not conversions of property, police authority to impound vehicles for public safety purposes is privileged and does not give rise to liability in conversion. This principle is established by the Restatement (Second) of Torts § 265.

**a. The State Patrol's Actions Were Privileged Under § 265 Of The Restatement (Second) Of Torts**

The State Patrol was exercising authority created by law to further public safety when it impounded Mr. Potter's vehicles. See Laws of 1998, ch. 203, § 1, p. 806-07, CP 133. As such the State Patrol's actions are privileged under the Restatement (Second) of Torts § 265.

The Restatement (Second) of Torts describes circumstances where an actor is privileged to act and is not liable for conversion. Section 265 provides that:

One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if he is acting in discharge of a duty or authority created by law to preserve the public safety, health, peace, or other public interest, and

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receives a valid claim from the registered vehicle owner of record . . . within one year from the date of the auction, the surplus moneys shall be remitted to such owner." Id.

his act is reasonably necessary to the performance of his duty or the exercise of his authority.

Restatement (Second) of Torts § 265.

The impound of Mr. Potter's vehicles was carried out under the authority of RCW 46.55.113 and former WAC 204-96-010 in order to further public safety. See Laws of 1998, ch. 203, § 1, p. 806-07 (driver's license suspensions are made "to protect public safety following a driver's failure to comply with the laws of this state."), CP 133. The impound of a vehicle being driving by a suspended driver is made "[i]n order to adequately protect public safety and to enforce the state's driver licensing laws." Id. The WSP and the individual troopers who carried out the impounds were acting in the discharge of authority created by law to further public safety – by removing vehicles that were being driven by suspended drivers from the roadways. These actions were not conversions because they were privileged.

Comment a. to § 265 states that duty or authority "must be exercised in a reasonable manner, causing no unnecessary harm." Restatement (Second) of Torts, § 265, Comment a. Mr. Potter asserts that because the mandatory impound provision of former WAC 204-96-010 was ultimately found invalid, each and every impound was unreasonable and thus could not be privileged. However, Comment a. simply addresses

the “manner” in which the authority is exercised. In the present case there is no allegation that the actions of the troopers were unreasonable in the manner in which they impounded Mr. Potter’s vehicles. Moreover, claims about the manner of impound would be unique to an individual, not common to the class. There is no evidence that the State Patrol exercised its impound authority in an unreasonable manner.

The case of Downs v. United States, 522 F.2d 990 (6<sup>th</sup> Cir. 1975), cited by Mr. Potter, is distinguishable for the same reason. As an initial matter, Downs involved a claim of trespass, not conversion, based on an FBI agent’s response to an airline hijacking. Id. at 1003. The Downs court considered the application of the § 265 privilege (to the trespass claim) and found it was inapplicable because the FBI agent’s actions were unreasonable. Id. at 1003-04. The court noted that had the FBI agent “acted reasonably in deciding forcibly to disable the plane, his trespass would clearly have been privileged.” Id. at 1004 (citations omitted). However, since the court had already held (in reviewing the negligence claim against the FBI agent) that the agent’s decision to disable the plane was unreasonable, the court concluded that “it follows that the trespass was not ‘reasonably necessary’ to perform his duty and his authority was not exercised ‘in a reasonable manner.’” Id. As noted above, in the

present case there is no allegation that the manner in which the WSP, or its troopers, carried out the impounds was unreasonable.

Mr. Potter also relies on Blake v. Town of Delaware City, 441 F. Supp. 1189, 1195 (D. Del. 1977), however, in that case the city refused to return the plaintiff's vehicles after the ordinance he was cited under was found unconstitutional, the charges against him were dismissed, and the vehicles were ordered returned. Unlike the Blake case, Mr. Potter's vehicles were impounded prior to the Supreme Court ruling that former WAC 204-96-010 was not valid, Mr. Potter did not seek the return of his vehicles, and he did not challenge the impounds using available means, thus there was no order requiring return of the vehicles.

Finally, Mr. Potter alleges that “[n]othing in the language of § 265 or any of the reported cases suggests that it can be extended to immunize a municipality from liability for an unlawful policy or practice.” Appellant's Brief at 29. First, as discussed below, § 265 is not an immunity. It describes a privilege or authority to act that is not, by definition, a conversion of property. Application of the rule is consistent with the elements of conversion because it reflects a particular type of interference with property. Nothing in the Restatement language suggests that the § 265 privilege cannot apply to a state agency, and it is consistent

with the current situation where the State Patrol had lawful authority to further public safety and impound vehicles.

Summary judgment was therefore proper on this separate basis. There is no genuine issue of fact where Mr. Potter could show that the State Patrol acted unreasonably in the manner in which it carried out its authority to preserve public safety when it impounded Mr. Potter's vehicles. The administrative rule that was later invalidated does not, under any existing legal theory, make each and every impound a conversion. The State Patrol's actions in impounding Mr. Potter's vehicles were privileged and therefore Mr. Potter cannot establish conversion as a matter of law.

**b. The Privilege Afforded Under § 265 Of The Restatement (Second) of Torts Is Not A Qualified Immunity And Is Consistent With The State Of Washington's Waiver Of Sovereign Immunity**

Application of the Restatement (Second) of Torts § 265 does not amount to qualified immunity and is not inconsistent with the State of Washington's waiver of sovereign immunity. Mr. Potter asserts that applying § 265 to the present case is tantamount to affording qualified immunity to the State Patrol – a Washington State agency. Appellant's

Brief at 30-35. Mr. Potter then recites case law<sup>12</sup> relating to the unavailability of qualified tort immunity to the State of Washington and state agencies.<sup>13</sup> Section 265 of the Restatement (Second) of Torts affords a privilege from liability for the tort of conversion; it is not a qualified or good faith immunity doctrine belonging to a particular actor.

A privilege is a right to take, or refrain from taking, action. Where an actor has the right to take an action, there can be no liability because no tort has been committed. In contrast, immunity is freedom from suit for an action taken that otherwise results in liability. “[A] privilege exists when it is established that the defendant acts from a justifiable motive. An immunity exists when no inquiry is permitted into motive or motives.” W. Page Keeton, et al., Prosser & Keeton on The Law of Torts § 16, at 109 (5<sup>th</sup> ed. 1984). Because § 265 affords a privilege, there is no liability.

The comments to the Restatement (Second) of Torts § 240 and § 241 both refer to those respective Restatement provisions as “privileges;” specifically, the privilege to make a qualified refusal to surrender a chattel. See Restatement (Second) of Torts § 240, Comments

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<sup>12</sup> Guffey v. State, 103 Wn.2d 144, 690 P.2d 1163 (1984), was not an “impound case” as Mr. Potter suggests; Guffey was a use of force and false arrest case. See Appellant’s Brief at 33.

<sup>13</sup> Because Mr. Potter sues no individuals in tort or for denial of a constitutional right, the State Patrol has not asserted that it is entitled to qualified immunity.

a. and b.; § 241, Comment b. These “privileges” amount to a right to refuse to surrender property. As a result, there is no liability for conversion. The same is true for the “privilege” afforded under § 265. Because there is a “privilege,” there is no liability. Such a privilege is distinguishable from immunity from liability for an action taken.

Mr. Potter further alleges that application of § 265 of the Restatement (Second) of Torts would “create a special class of claims for which the government is immune.” Appellant’s Brief at 34. Mr. Potter relies on Savage v. State, 127 Wn.2d 434, 899 P.2d 1270 (1995) and Hertog v. City of Seattle, 138 Wn.2d 265, 979 P.2d 400 (1999), however, both of these cases involved claims of negligent supervision of parolees and have no application here. The allegation of negligence and negligent supervision resulting in the rape of an individual is markedly distinguishable from the alleged conversion of property. The fact that the State would not share in the qualified immunity of an individual tortfeasor is not material here, where application of § 265 simply recites the privilege of impounding property to protect public safety. Mr. Potter’s parade of horrors – that application of § 265 to this case would frustrate Washington’s waiver of sovereign immunity in tort – is without merit, because Mr. Potter neither proves the conversion nor disproves the privilege.

**C. Mr. Potter's Arguments Do Not Establish Conversion**

**1. The Cases Cited By Mr. Potter Do Not Establish Liability For Conversion And Are Distinguishable From Mr. Potter's Case**

Mr. Potter relies on a number of cases, each of which is distinguishable. In Boss v. City of Spokane, 63 Wn.2d 305, 387 P.2d 67 (1963), a Spokane city ordinance authorized removal and towing whenever “a peace officer [found] a vehicle unattended in such a position that it [constituted] an *obstruction to traffic* . . . .” Id. at 307 (emphasis in original). The city interpreted “obstruction” to include vehicles that had five outstanding parking violations against them and were found parked in violation of city parking regulations. Id. The court concluded that the impounding of such vehicles was not authorized by the ordinance because having five parking violations obviously did not constitute an obstruction to traffic within the plain meaning of that term. Id.

In Boss it was obvious that the city's interpretation was incorrect. In the present case, as discussed above, given the legislative intent of Laws of 1998, ch. 203, it was not at all obvious that “subject to” did not authorize mandatory impound. Another significant difference between Boss and the present case, is that in Boss there is no indication that Spokane had a statutory scheme under which vehicle owners could challenge the impound of their vehicles. Thus, a claim for conversion was

the only method by which the owner could challenge the validity of a vehicle impounded under the ordinance. In the present case the legislature has provided a method for challenging an impound in RCW 46.55.120. See Section V.D. below. The Boss case does not address these significant defects in Mr. Potter's conversion claim.

Nor do Mr. Potter's out of state cases assist him. In Crosby v. City of Chicago, 11 Ill. App. 3d 625, 627, 298 N.E.2d 719 (1973), police failed to comply with a statute that required delivery "forthwith" to the sheriff, who was to notify the state's attorney, who would determine whether or not to initiate forfeiture proceedings. Instead the police held the plaintiff's vehicle and refused to return it despite numerous requests. Id. In Crosby the police failed to comply with a statute. In contrast, there is no claim that the State Patrol did not comply with the legislation allowing persons to redeem their vehicles or challenge the impounds. Thus, the fact of conversion is lacking in the present case.

The case of In the Matter of 1969 Chevrolet, 134 Ariz. 357, 359, 656 P.2d 646 (Ariz. App. 1982), was not a tort lawsuit for conversion, but rather arose out of drug forfeiture proceedings in which the vehicle was forfeited, but the decision was later reversed on appeal. Although the court found the conduct constituted a "conversion," it does not change the fact that the court did so in the context of determining the amount of

damages in a forfeiture proceeding. Id. at 361. In any forfeiture proceeding a law enforcement agency has seized, and thus possesses, an individual's property and the primary issue is whether the property will be returned to that individual, or another individual claiming ownership or right to possession, or forfeited to the government. See e.g., RCW 69.50.505. In 1969 Chevrolet the court used conversion principles in determining that the state was responsible for damages and in determining the amount. Id. at 361.

In Heimberger v. Village of Chebanse, 124 Ill. App. 3d 310, 312-13, 463 N.E.2d 1368 (1984), city officials went to the plaintiff's property and removed a number of items, with no apparent authority, in an effort to "clean up" the property. In the present case, Mr. Potter's vehicles were impounded pursuant to statutory authority and administrative rule.

In Gore v. Davis, 243 Ga. 634, 635, 256 S.E.2d 329 (Ga. 1979), the Georgia statute at issue denied drivers an opportunity for a hearing to contest the impound. By contrast, Washington's statutory scheme provides a detailed procedure that allows owners to contest the impound of their vehicles, see RCW 46.55.120, a significant difference from the Georgia statute. Those Washington statutory provisions distinguish the out of state cases from the present case because the reasons, limits, and nature of the impound is different.

Finally, Mr. Potter cites (as he did below) to an unpublished non-binding federal district court order in a similar case, Price v. City of Seattle, which his counsel is litigating. The district court order is not binding on anyone but the parties to that particular lawsuit. It has no precedential value and is not relevant authority. See generally State v. Fitzpatrick, 5 Wn. App. 661, 668, 491 P.2d 262 (1971), review denied, 80 Wn.2d 1003 (1972); RAP 10.4(h) (may not cite unpublished court of appeals opinion as authority). This Court should not consider the federal district court order.<sup>14</sup>

**2. Mr. Potter's Argument That The State Patrol Exceeded Constitutional Authority Does Not Demonstrate Conversion**

Relying on dicta in All Around Underground, Mr. Potter argues that the State Patrol exceeded its authority under article 1, section 7, of the Washington State Constitution in adopting former WAC 204-96-010. See Appellant's Brief at 11-17. However, the Supreme Court did not find former WAC 204-96-010 unconstitutional. See All Around Underground, 148 Wn.2d at 159-60. Moreover, Mr. Potter's argument is irrelevant to his

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<sup>14</sup> Additionally, the order attached as Appendix A to Mr. Potter's Opening Brief is not the same order that was attached to Mr. Potter's motion for summary judgment in the trial court. CP 46-54. Accordingly, the order is not appropriately part of the appendix. See RAP 10.3(a)(7) ("An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)").

claimed conversion of property – and he has not pursued any claims against individuals for unconstitutional seizures.<sup>15</sup>

At most, Mr. Potter's constitutional arguments accomplish no more than showing that the rule was invalid, which is already established by All Around Underground. Because Mr. Potter claims a conversion of property, not an unconstitutional seizure, these cases need not be reviewed or addressed. They merely show that Mr. Potter had an alternative basis for challenging the seizures and seeking a timely remedy as did the parties in All Around Underground. But as shown above, the right to challenge an impound does not equate to a conversion.

Moreover, the cases relied upon by Mr. Potter are distinguishable from the present case. In four of the cases the impounds were not carried out under a statute authorizing impound, so they lacked the legal rights and limits of chapter 46.55 RCW. See State v. Houser, 95 Wn.2d 143, 622 P.2d 1218 (1980); State v. Hill, 68 Wn. App. 300, 842 P.2d 996, review denied, 121 Wn.2d 1020 (1993); State v. Hardman, 17 Wn. App. 910, 567 P.2d 238 (1977), review denied, 89 Wn.2d 1020 (1978); and State v. Bales, 15 Wn. App. 834, 552 P.2d 688 (1976), review denied, 89 Wn.2d 1003 (1977). In the absence of a statute authorizing impound, or

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<sup>15</sup> Mr. Potter and the class do not sue individual officers claiming deprivation of constitutional rights.

where impound is part of the community caretaking function or the vehicle is evidence of a crime, the reviewing courts required consideration of reasonable alternatives. State v. Singleton, 9 Wn. App. 327, 331, 511 P.2d 1396 (1973). In the present case, there was a statute, RCW 46.55.113, authorizing the impound of vehicles when drivers were arrested for driving while license suspended.

The remaining cases cited by Mr. Potter were decided under former RCW 46.20.435. See State v. Coss, 87 Wn. App. 891, 899, 943 P.2d 1126 (1997), review denied, 134 Wn.2d 1028 (1998); State v. Barajas, 57 Wn. App. 556, 561, 789 P.2d 321, review denied, 115 Wn.2d 1006 (1990); State v. Stortroen, 53 Wn. App. 654, 658, 769 P.2d 321 (1989), overruled on other grounds, 119 Wn.2d 685 (1992); State v. Reynoso, 41 Wn. App. 113, 118-19, 702 P.2d 1222 (1985). In Coss, Barajas, and Reynoso, the court found that the legislature authorized impounds in connection with traffic offenses simply to prevent continuing violations of those traffic offenses, e.g., to prevent a driver from getting back into the vehicle and committing the same offense. See Reynoso, 41 Wn. App. at 119 (“it is clear the Legislature was primarily interested in preventing a continuing violation of RCW 46.20.021 or the other traffic offenses listed in subsection (1) of RCW 46.20.435”); Coss, 87 Wn. App. at 899 (same). The courts there simply reasoned that if preventing

continuing traffic offenses is the intent, then officers must consider alternatives, such as having a friend drive the vehicle. See Coss, 87 Wn. App. at 899. Mr. Potter's constitutional argument does not establish conversion.

### **3. An Invalid Rule Does Not Lead To Strict Liability**

Ultimately, Mr. Potter reasons that because the Supreme Court found the mandatory impound provision of former WAC 204-96-010 invalid, any impound for driving while license suspended carried out while that rule was in effect is likewise invalid. He then leaps to the conclusion that this subjects the State Patrol to strict liability for conversion for every impound of every vehicle in the class. Mr. Potter's attempt to fit into a conversion cause of action should be rejected for multiple reasons.

First, as discussed above, even if the privilege to impound does not excuse all of the impounds, Mr. Potter fails to show that there should be liability for each and every impound. However, more significantly, impounding a vehicle does not demonstrate strict liability for conversion. Thus, even if this Court were to find that the impound of Mr. Potter's vehicles was not lawfully justified, it does not follow that there is liability as to the entire class. Vehicles may be impounded as evidence of a crime, as part of the community caretaking function, and where a driver has

committed a traffic offense for which the legislature has specifically authorized impoundment. Peterson, 92 Wn. App. at 902. “The reasonableness of a particular impoundment must be determined from the facts of each case.” Peterson, 92 Wn. App. at 902.

Reasonable bases to impound may include:

[T]he necessity for removing (1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver; (3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary; (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others using the highway; (6) a car impoundable pursuant to ordinance or statute which provides therefor as in the case of forfeiture.

Singleton, 9 Wn. App. at 332-33. However, “the ultimate issue is whether under all the facts and circumstances of the particular case there were reasonable grounds for an impoundment . . . .” Bales, 15 Wn. App. at 836 (citation omitted).

In Hardman, 17 Wn. App. 913-14, although the court ultimately found the impound was not proper, the court noted:

Nor do we think it practical to require a police officer to exhaust every possible alternative before he can conclude the vehicle may be impounded. Police have more to do than to attempt to locate someone to remove a car, often from among a long list of friends and relatives given them by a driver who, as in this case, may not be a model of

coherence. . . . We do not hold that impoundment of the defendant's vehicle from the tire company lot could not have been justified as a matter of law had the officer first explored and thereafter reasonably discarded other alternatives.

Id. In State v. Greenway, 15 Wn. App. 216, 219-20, 547 P.2d 1231, review denied, 87 Wn.2d 1009 (1976), the court found the impound valid, noting:

Greenway was under arrest for a felony warrant issued in Wenatchee, Washington. The officer had a reasonable basis to believe that Greenway would not be able to immediately return to his vehicle following his arrest. There was construction in the area and the vehicle was parked in a restricted zone. Although Greenway objected to the impoundment, he did not indicate to the officer that there were reasonable alternatives for the protection of his vehicle and its contents. He did not indicate that he had friends or a spouse who were readily available to remove the vehicle from the area. Under these facts the officer acted reasonably in impounding the vehicle and in conducting a good faith inventory search.

Id.; see Hill, 68 Wn. App. at 305) (citing Reynoso, 41 Wn. App. at 119) (decision to impound "necessarily involves sound judgment based upon the particular facts and circumstances confronting the officer").

Mr. Potter's proposed class relies solely on one common theory of liability, arguing that because former WAC 204-96-010 required impound of vehicles driven by suspended drivers, and because that rule was invalidated, there was a conversion. This ignores the possibility that absent the rule, impound may have otherwise been warranted. It ignores

how the challenge of an impound requires the reviewing court to look not only to what an officer did, but what he or she could have done based on the facts and circumstances known at the time. In an analogous situation involving arrests in Washington, the United States Supreme Court recently explained:

‘[T]he fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.’

Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (quoting Whren v. United States, 517 U.S. 806, 813 (1996)); see also Huff, 64 Wn. App. at 648. The reasoning is no different where the officer’s action is an impound rather than an arrest. Thus, even if this Court finds the impound of Mr. Potter’s vehicles was not authorized by the administrative rule, that does not demonstrate a conversion because it does not follow that every impound alone triggers strict liability for conversion.

Finally, if Mr. Potter suggests that individual vehicle owners may have individualized arguments to demonstrate conversion, that challenges the basis for his claim and basis for class certification. If Mr. Potter argues a theory other than *per se* conversion based on the invalidated administrative rule, the State Patrol should have the right to dissolve the class before addressing Mr. Potter’s individual claim. Without a *per se*

conversion theory, Mr. Potter's claim is not "typical" for purposes of CR 23(a) and there would no longer be a situation where prosecution of claims by individuals would create a risk of inconsistent adjudications for purposes of CR 23(b).

**D. Dismissal Of Mr. Potter's Claims Should Be Affirmed Because The Exclusive Means For Challenging An Impound Under Chapter 46.55 RCW Is A Hearing Under RCW 46.55.120(2)**

Chapter 46.55 RCW is a comprehensive chapter governing towing and impoundment. The legislature authorized the impound of vehicles in certain circumstances, and provided a mechanism to allow owners to redeem their vehicles and to challenge the impounds. RCW 46.55.120(1) and (2). RCW 46.55.120 provides the exclusive means and jurisdiction to challenge a vehicle impounded under RCW 46.55.113 and therefore precludes Mr. Potter's claims for conversion. Each member of the class is a person who did not seek to challenge the impound of their vehicle under RCW 46.55.120.

RCW 46.55.120(2)(b) provides:

Any person seeking to redeem an impounded vehicle under this section has a right to a hearing in the district or municipal court for the jurisdiction in which the vehicle was impounded to contest the validity of the impoundment or the amount of towing and storage charges. The district court has jurisdiction to determine the issues involving all impoundments including those authorized by the state or its agents. The municipal court has jurisdiction to determine the issues involving impoundments authorized by agents of

the municipality. Any request for a hearing shall be made in writing on the form provided for that purpose and must be received by the appropriate court within ten days of the date the opportunity was provided for in subsection (2)(a) of this section and more than five days before the date of the auction. At the time of the filing of the hearing request, the petitioner shall pay to the court clerk a filing fee in the same amount required for the filing of a suit in district court. If the hearing request is not received by the court within the ten-day period, the right to a hearing is waived and the registered owner is liable for any towing, storage, or other impoundment charges permitted under this chapter. Upon receipt of a timely hearing request, the court shall proceed to hear and determine the validity of the impoundment.

(Emphasis added.) The statute further authorizes the district court or municipal court to consider the propriety of an impound, as well as the amount of towing and storage fees, and who is responsible for payment of fees. RCW 46.55.120(3)(c); see also In re 1992 Honda Accord v. City of Warden, 117 Wn. App. 510, 519, 71 P.3d 226 (2003) (discussing procedure).

If a district or municipal court finds that an impound violates chapter 46.55 RCW – the essence of Mr. Potter’s claim – then the court can provide a remedy including impoundment fees, towing and storage fees, the filing fee for challenging the impound, and the “reasonable damages for loss of the use of the vehicle during the time the same was impounded”:

[T]he registered and legal owners of the vehicle or other

item of personal property registered or titled with the department [of licensing] shall bear no impoundment, towing, or storage fees, and any security shall be returned or discharged as appropriate, and the person or agency who authorized the impoundment shall be liable for any towing, storage, or other impoundment fees permitted under this chapter. . . . In addition, the court shall enter judgment in favor of the registered and legal owners of the vehicle, or other item of personal property registered or titled with the department, for the amount of the filing fee required by law for the impound hearing petition as well as reasonable damages for loss of the use of the vehicle during the time the same was impounded against the person or agency authorizing the impound. . . .

RCW 46.55.120(3)(e) (emphasis added). The statute goes on to protect the impounding officers:

However, if an impoundment arising from an alleged violation of RCW 46.20.342 or 46.20.345 is determined to be in violation of this chapter, then the law enforcement officer directing the impoundment and the government employing the officer are not liable for damages if the officer relied in good faith and without gross negligence on the records of the department in ascertaining that the operator of the vehicle had a suspended or revoked driver's license. . . .

Id. The legislature thus created a remedy, governing towing and impound, capable of providing prompt relief for vehicle owners. More significantly, the provisions define and limit the risks incurred by the law enforcement agency that impounds the vehicle. This right to relief and jurisdiction granted to the district or municipal court in RCW 46.55.120 bars a separate cause of action seeking a redundant remedy for conversion in

superior court. J.A. v. Dep't of Soc. and Health Services, 120 Wn. App. 654, 657, 86 P.3d 202 (2004) (“Subject matter jurisdiction typically refers to the authority of a court to provide relief, as granted by the constitution or the legislature”).

The plain language of the statute is unambiguous in this regard. One may challenge the “validity of the impoundment” in the district or municipal court. This legislative purpose is defeated if individuals can fail to request a hearing to determine the validity of the vehicle impound, and instead file a conversion case in superior court to challenge the validity of the vehicle impound and seek additional damages caused by the owner’s decision not to pursue the available statutory remedy. Individuals could intentionally forgo the district or municipal court action in order to accrue greater damages, claiming a longer loss of use or permanent loss of use in a superior court action when the plain language and intentions of the remedy in RCW 46.55.120 is to avoid such harms.

This conclusion is confirmed because the remedy provided by RCW 46.55.120 is comprehensive. Where a district or municipal court finds a vehicle impound is improper, the owners are not responsible for impound costs, and are also entitled to loss of use damages and their filling fees. In contrast, the statute does not provide a remedy for vehicles sold at auction because if a hearing is requested, as required, the vehicle

would not be sold at auction.<sup>16</sup> Similarly, the statute does not allow damages for loss of use where the officer acts in good faith reliance on department of licensing information, which confirms that the legislature intended to forego such causes of action in favor of a speedy restoration of the vehicle to the owners.

In summary, Mr. Potter’s conversion claim is based on the alleged “wrongful impound of motor vehicles by the [State Patrol]” pursuant to former WAC 204-96-010. CP 3-9. Mr. Potter, as well as all of the class members, had a remedy available to them under RCW 46.55.120 to challenge their impounds, but they did not take advantage of that remedy. Their conversion claims may therefore be dismissed because the law provides a comprehensive and exclusive remedy with jurisdiction in the district or municipal court. This precludes the conversion cause of action for damages in superior court.

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<sup>16</sup> Additional notice is also provided prior to auction. See RCW 46.55.130(1).

## VI. CONCLUSION

For all of the above reasons, the Washington State Patrol respectfully requests that this Court affirm the trial court order granting summary judgment in favor of the Washington State Patrol and dismissing Mr. Potter's lawsuit with prejudice.

RESPECTFULLY SUBMITTED this 21 day of June, 2006.

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# **APPENDIX A**

(a) Transfer to a nonprofit organization, association, or corporation for a use which also qualifies and is granted exemption under the provisions of chapter 84.36 RCW;

(b) A taking through the exercise of the power of eminent domain, or sale or transfer to an entity having the power of eminent domain in anticipation of the exercise of such power;

(c) Official action by an agency of the state of Washington or by the county or city within which the property is located which disallows the present use of such property;

(d) A natural disaster such as a flood, windstorm, earthquake, or other such calamity rather than by virtue of the act of the organization, association, or corporation changing the use of such property;

(e) Relocation of the activity and use of another location or site except for undeveloped properties of camp facilities exempted under RCW 84.36.030;

(f) Cancellation of a lease on property that had been exempt under RCW 84.36.040, 84.36.041, 84.36.043, 84.36.046, 84.36.060, or (~~84.36.046~~) section 1 of this act;

(g) A change in the exempt portion of a home for the aging under RCW 84.36.041(3), as long as some portion of the home remains exempt;

(h) The conversion of a full exemption of a home for the aging to a partial exemption or taxable status or the conversion of a partial exemption to taxable status under RCW 84.36.041(8).

Passed the Senate February 16, 1998.

Passed the House March 6, 1998.

Approved by the Governor March 27, 1998.

Filed in Office of Secretary of State March 27, 1998.

**CHAPTER 203**

[Engrossed Substitute House Bill 1221]

**IMPOUNDMENT AND FORFEITURES OF VEHICLES OPERATED BY PERSONS WITH SUSPENDED OR REVOKED DRIVER'S LICENSES**

AN ACT Relating to the impoundment and forfeiture of vehicles being operated by persons who have a suspended or revoked driver's license; amending RCW 46.55.105, 46.55.110, 46.55.113, 46.55.120, 46.55.130, 46.55.100, 46.12.095, and 46.12.101; adding a new section to chapter 46.55 RCW; adding a new section to chapter 46.12 RCW, creating new sections; and repealing RCW 46.20.344.

Be it enacted by the Legislature of the State of Washington:

**NEW SECTION. Sec. 1.** The legislature finds that the license to drive a motor vehicle on the public highways is suspended or revoked in order to protect public safety following a driver's failure to comply with the laws of this state. Over six hundred persons are killed in traffic accidents in Washington annually, and more than eighty-four thousand persons are injured. It is estimated that of the three million four hundred thousand drivers' licenses issued to citizens of Washington, more than two hundred sixty thousand are suspended or revoked at

any given time. Suspended drivers are more likely to be involved in causing traffic accidents, including fatal accidents, than properly licensed drivers, and pose a serious threat to the lives and property of Washington residents. Statistics show that suspended drivers are three times more likely to kill or seriously injure others in the commission of traffic felony offenses than are validly licensed drivers. In addition to not having a driver's license, most such drivers also lack required liability insurance, increasing the financial burden upon other citizens through uninsured losses and higher insurance costs for validly licensed drivers. Because of the threat posed by suspended drivers, all registered owners of motor vehicles in Washington have a duty to not allow their vehicles to be driven by a suspended driver.

Despite the existence of criminal penalties for driving with a suspended or revoked license, an estimated seventy-five percent of these drivers continue to drive anyway. Existing sanctions are not sufficient to deter or prevent persons with a suspended or revoked license from driving. It is common for suspended drivers to resume driving immediately after being stopped, cited, and released by a police officer and to continue to drive while a criminal prosecution for suspended driving is pending. More than half of all suspended drivers charged with the crime of driving while suspended or revoked fail to appear for court hearings. Vehicle impoundment will provide an immediate consequence which will increase deterrence and reduce unlawful driving by preventing a suspended driver access to that vehicle. Vehicle impoundment will also provide an appropriate measure of accountability for registered owners who permit suspended drivers to drive their vehicles. Impoundment of vehicles driven by suspended drivers has been shown to reduce future driving while suspended or revoked offenses for up to two years afterwards, and the recidivism rate for drivers whose cars were not impounded was one hundred percent higher than for drivers whose cars were impounded. In order to adequately protect public safety and to enforce the state's driver licensing laws, it is necessary to authorize the impoundment of any vehicle when it is found to be operated by a driver with a suspended or revoked license in violation of RCW 46.20.342 and 46.20.420. The impoundment of a vehicle operated in violation of RCW 46.20.342 or 46.20.420 is intended to be a civil in rem action against the vehicle in order to remove it from the public highways and reduce the risk posed to traffic safety by a vehicle accessible to a driver who is reasonably believed to have violated these laws.

**Sec. 2.** RCW 46.55.105 and 1995 c 219 s 4 are each amended to read as follows:

(1) The abandonment of any vehicle creates a prima facie presumption that the last registered owner of record is responsible for the abandonment and is liable for costs incurred in removing, storing, and disposing of the abandoned vehicle, less amounts realized at auction.

(2) If an unauthorized vehicle is found abandoned under subsection (1) of this section and removed at the direction of law enforcement, the last registered owner of record is guilty of a traffic infraction, unless the vehicle is redeemed as

provided in RCW 46.55.120. In addition to any other monetary penalty payable under chapter 46.63 RCW, the court shall not consider all monetary penalties as having been paid until the court is satisfied that the person found to have committed the infraction has made restitution in the amount of the deficiency remaining after disposal of the vehicle under RCW 46.55.140.

(3) A vehicle theft report filed with a law enforcement agency relieves the last registered owner of liability under subsection (2) of this section for failure to redeem the vehicle. However, the last registered owner remains liable for the costs incurred in removing, storing, and disposing of the abandoned vehicle under subsection (1) of this section. Nothing in this section limits in any way the registered owner's rights in a civil action or as restitution in a criminal action against a person responsible for the theft of the vehicle.

(4) Properly filing a report of sale or transfer regarding the vehicle involved in accordance with RCW 46.12.101(1) (~~or a vehicle theft report filed with a law enforcement agency~~) relieves the last registered owner of liability under subsections (1) and (2) of this section. If the date of sale as indicated on the report of sale is on or before the date of impoundment, the buyer identified on the latest properly filed report of sale with the department is assumed liable for the costs incurred in removing, storing, and disposing of the abandoned vehicle, less amounts realized at auction. If the date of sale is after the date of impoundment, the previous registered owner is assumed to be liable for such costs. A licensed vehicle dealer is not liable under subsections (1) and (2) of this section if the dealer, as transferee or assignee of the last registered owner of the vehicle involved, has complied with the requirements of RCW 46.70.122 upon selling or otherwise disposing of the vehicle, or if the dealer has timely filed a transitional ownership record or report of sale under section 12 of this act. In that case the person to whom the licensed vehicle dealer has sold or transferred the vehicle is assumed liable for the costs incurred in removing, storing, and disposing of the abandoned vehicle, less amounts realized at auction.

~~((4))~~ (5) For the purposes of reporting notices of traffic infraction to the department under RCW 46.20.270 and 46.52.100, and for purposes of reporting notices of failure to appear, respond, or comply regarding a notice of traffic infraction to the department under RCW 46.63.070(5), a traffic infraction under subsection (2) of this section is not considered to be a standing, stopping, or parking violation.

~~((5))~~ (6) A notice of infraction for a violation of this section may be filed with a court of limited jurisdiction organized under Title 3, 35, or 35A RCW, or with a violations bureau subject to the court's jurisdiction.

**Sec. 3.** RCW 46.55.110 and 1995 c 360 s 6 are each amended to read as follows:

(1) When an unauthorized vehicle is impounded, the impounding towing operator shall notify the legal and registered owners of the impoundment of the unauthorized vehicle and the owners of any other items of personal property registered or titled with the department. The notification shall be sent by first-

class mail within twenty-four hours after the impoundment to the last known registered and legal owners of the vehicle, and the owners of any other items of personal property registered or titled with the department, as provided by the law enforcement agency, and shall inform the owners of the identity of the person or agency authorizing the impound. The notification shall include the name of the impounding tow firm, its address, and telephone number. The notice shall also include the location, time of the impound, and by whose authority the vehicle was impounded. The notice shall also include the written notice of the right of redemption and opportunity for a hearing to contest the validity of the impoundment pursuant to RCW 46.55.120.

(2) In the case of an abandoned vehicle, or other item of personal property registered or titled with the department, within twenty-four hours after receiving information on the owners from the department through the abandoned vehicle report, the tow truck operator shall send by certified mail, with return receipt requested, a notice of custody and sale to the legal and registered owners.

(3) If the date on which a notice required by subsection (2) of this section is to be mailed falls upon a Saturday, Sunday, or a postal holiday, the notice may be mailed on the next day that is neither a Saturday, Sunday, nor a postal holiday.

(4) No notices need be sent to the legal or registered owners of an impounded vehicle or other item of personal property registered or titled with the department, if the vehicle or personal property has been redeemed.

**Sec. 4.** RCW 46.55.113 and 1997 c 66 s 7 are each amended to read as follows:

Whenever the driver of a vehicle is arrested for a violation of RCW 46.61.502 or 46.61.504 or of RCW 46.20.342 or 46.20.420, the ~~(arresting officer may take custody of the vehicle and provide for its prompt removal to a place of safety)~~ vehicle is subject to impoundment, pursuant to applicable local ordinance or state agency rule at the direction of a law enforcement officer. In addition, a police officer may take custody of a vehicle and provide for its prompt removal to a place of safety under any of the following circumstances:

(1) Whenever a police officer finds a vehicle standing upon the roadway in violation of any of the provisions of RCW 46.61.560, the officer may provide for the removal of the vehicle or require the driver or other person in charge of the vehicle to move the vehicle to a position off the roadway;

(2) Whenever a police officer finds a vehicle unattended upon a highway where the vehicle constitutes an obstruction to traffic or jeopardizes public safety;

(3) Whenever a police officer finds an unattended vehicle at the scene of an accident or when the driver of a vehicle involved in an accident is physically or mentally incapable of deciding upon steps to be taken to protect his or her property;

(4) Whenever the driver of a vehicle is arrested and taken into custody by a police officer;

(5) Whenever a police officer discovers a vehicle that the officer determines to be a stolen vehicle;

(6) Whenever a vehicle without a special license plate, card, or decal indicating that the vehicle is being used to transport a disabled person under RCW 46.16.381 is parked in a stall or space clearly and conspicuously marked under RCW 46.61.581 which space is provided on private property without charge or on public property;

(7) Upon determining that a person is operating a motor vehicle without a valid driver's license in violation of RCW 46.20.005 or with a license that has been expired for ninety days or more (~~or with a suspended or revoked license in violation of RCW 46.20.342 or 46.20.420~~).

Nothing in this section may derogate from the powers of police officers under the common law. For the purposes of this section, a place of safety may include the business location of a registered tow truck operator.

**Sec. 5.** RCW 46.55.120 and 1996 c 89 s 2 are each amended to read as follows:

(1) Vehicles or other items of personal property registered or titled with the department that are impounded by registered tow truck operators pursuant to RCW 46.55.080, 46.55.085, or 46.55.113 may be redeemed only under the following circumstances:

(a) Only the legal owner, the registered owner, a person authorized in writing by the registered owner or the vehicle's insurer, a person who is determined and verified by the operator to have the permission of the registered owner of the vehicle or other item of personal property registered or titled with the department, or one who has purchased a vehicle or item of personal property registered or titled with the department from the registered owner who produces proof of ownership or written authorization and signs a receipt therefor, may redeem an impounded vehicle or items of personal property registered or titled with the department. In addition, a vehicle impounded because the operator is in violation of RCW 46.20.342(1)(c) shall not be released until a person eligible to redeem it under this subsection (1)(a) satisfies the requirements of (b) of this subsection, including paying all towing, removal, and storage fees, notwithstanding the fact that the hold was ordered by a government agency. If the department's records show that the operator has been convicted of a violation of RCW 46.20.342 or a similar local ordinance within the past five years, the vehicle may be held for up to thirty days at the written direction of the agency ordering the vehicle impounded. A vehicle impounded because the operator is arrested for a violation of RCW 46.20.342 may be released only pursuant to a written order from the agency that ordered the vehicle impounded. An agency may issue a written order to release pursuant to a provision of an applicable state agency rule or local ordinance authorizing release on the basis of economic or personal hardship to the spouse of the operator, taking into consideration public safety factors, including the operator's criminal history and driving record.

If a vehicle is impounded because the operator is in violation of RCW 46.20.342(1)(a) or (b), the vehicle may be held for up to thirty days at the written direction of the agency ordering the vehicle impounded. However, if the

department's records show that the operator has been convicted of a violation of RCW 46.20.342(1)(a) or (b) or a similar local ordinance within the past five years, the vehicle may be held at the written direction of the agency ordering the vehicle impounded for up to sixty days, and for up to ninety days if the operator has two or more such prior offenses. If a vehicle is impounded because the operator is arrested for a violation of RCW 46.20.342, the vehicle may not be released until a person eligible to redeem it under this subsection (1)(a) satisfies the requirements of (b) of this subsection, including paying all towing, removal, and storage fees, notwithstanding the fact that the hold was ordered by a government agency.

(b) The vehicle or other item of personal property registered or titled with the department shall be released upon the presentation to any person having custody of the vehicle of commercially reasonable tender sufficient to cover the costs of towing, storage, or other services rendered during the course of towing, removing, impounding, or storing any such vehicle. In addition, if a vehicle is impounded because the operator was arrested for a violation of RCW 46.20.342 or 46.20.420 and was being operated by the registered owner when it was impounded, it must not be released to any person until the registered owner establishes with the agency that ordered the vehicle impounded that any penalties, fines, or forfeitures owed by him or her have been satisfied. Commercially reasonable tender shall include, without limitation, cash, major bank credit cards, or personal checks drawn on in-state banks if accompanied by two pieces of valid identification, one of which may be required by the operator to have a photograph. If the towing firm can determine through the customer's bank or a check verification service that the presented check would not be paid by the bank or guaranteed by the service, the towing firm may refuse to accept the check. Any person who stops payment on a personal check or credit card, or does not make restitution within ten days from the date a check becomes insufficient due to lack of funds, to a towing firm that has provided a service pursuant to this section or in any other manner defrauds the towing firm in connection with services rendered pursuant to this section shall be liable for damages in the amount of twice the towing and storage fees, plus costs and reasonable attorney's fees.

(2)(a) The registered tow truck operator shall give to each person who seeks to redeem an impounded vehicle, or item of personal property registered or titled with the department, written notice of the right of redemption and opportunity for a hearing, which notice shall be accompanied by a form to be used for requesting a hearing, the name of the person or agency authorizing the impound, and a copy of the towing and storage invoice. The registered tow truck operator shall maintain a record evidenced by the redeeming person's signature that such notification was provided.

(b) Any person seeking to redeem an impounded vehicle under this section has a right to a hearing in the district or municipal court for the jurisdiction in which the vehicle was impounded to contest the validity of the impoundment or the amount of towing and storage charges. The district court has jurisdiction to

determine the issues involving all impoundments including those authorized by the state or its agents. The municipal court has jurisdiction to determine the issues involving impoundments authorized by agents of the municipality. Any request for a hearing shall be made in writing on the form provided for that purpose and must be received by the court appropriate court within ten days of the date the opportunity was provided for in subsection (2)(a) of this section. At the time of the filing of the hearing request, the petitioner shall pay to the court clerk a filing fee in the same amount required for the filing of a suit in district court. If the hearing request is not received by the court within the ten-day period, the right to a hearing is waived and the registered owner is liable for any towing, storage, or other impoundment charges permitted under this chapter. Upon receipt of a timely hearing request, the court shall proceed to hear and determine the validity of the impoundment.

(3)(a) The court, within five days after the request for a hearing, shall notify the registered tow truck operator, the person requesting the hearing if not the owner, the registered and legal owners of the vehicle or other item of personal property registered or titled with the department, and the person or agency authorizing the impound in writing of the hearing date and time.

(b) At the hearing, the person or persons requesting the hearing may produce any relevant evidence to show that the impoundment, towing, or storage fees charged were not proper. The court may consider a written report made under oath by the officer who authorized the impoundment in lieu of the officer's personal appearance at the hearing.

(c) At the conclusion of the hearing, the court shall determine whether the impoundment was proper, whether the towing or storage fees charged were in compliance with the posted rates, and who is responsible for payment of the fees. The court may not adjust fees or charges that are in compliance with the posted or contracted rates.

(d) If the impoundment is found proper, the impoundment, towing, and storage fees as permitted under this chapter together with court costs shall be assessed against the person or persons requesting the hearing, unless the operator did not have a signed and valid impoundment authorization from a private property owner or an authorized agent.

(e) If the impoundment is determined to be in violation of this chapter, then the registered and legal owners of the vehicle or other item of personal property registered or titled with the department shall bear no impoundment, towing, or storage fees, and any security shall be returned or discharged as appropriate, and the person or agency who authorized the impoundment shall be liable for any towing, storage, or other impoundment fees permitted under this chapter. The court shall enter judgment in favor of the registered tow truck operator against the person or agency authorizing the impound for the impoundment, towing, and storage fees paid. In addition, the court shall enter judgment in favor of the registered and legal owners of the vehicle, or other item of personal property registered or titled with the department, for the amount of the filing fee required

by law for the impound hearing petition as well as reasonable damages for loss of the use of the vehicle during the time the same was impounded, for not less than fifty dollars per day, against the person or agency authorizing the impound. However, if an impoundment arising from an alleged violation of RCW 46.20.342 or 46.20.420 is determined to be in violation of this chapter, then the law enforcement officer directing the impoundment and the government employing the officer are not liable for damages if the officer relied in good faith and without gross negligence on the records of the department in ascertaining that the operator of the vehicle had a suspended or revoked driver's license. If any judgment entered is not paid within fifteen days of notice in writing of its entry, the court shall award reasonable attorneys' fees and costs against the defendant in any action to enforce the judgment. Notice of entry of judgment may be made by registered or certified mail, and proof of mailing may be made by affidavit of the party mailing the notice. Notice of the entry of the judgment shall read essentially as follows:

TO: . . . . .

YOU ARE HEREBY NOTIFIED JUDGMENT was entered against you in the . . . . . Court located at . . . . . in the sum of \$ . . . . ., in an action entitled . . . . ., Case No. . . . . YOU ARE FURTHER NOTIFIED that attorneys fees and costs will be awarded against you under RCW . . . . if the judgment is not paid within 15 days of the date of this notice.

DATED this . . . . day of . . . . ., ((+9)) (year) . . . . .

Signature . . . . .  
Typed name and address  
of party mailing notice

(4) Any impounded abandoned vehicle or item of personal property registered or titled with the department that is not redeemed within fifteen days of mailing of the notice of custody and sale as required by RCW 46.55.110(2) shall be sold at public auction in accordance with all the provisions and subject to all the conditions of RCW 46.55.130. A vehicle or item of personal property registered or titled with the department may be redeemed at any time before the start of the auction upon payment of the applicable towing and storage fees.

Sec. 6. RCW 46.55.130 and 1989 c 111 s 12 are each amended to read as follows:

(1) If, after the expiration of fifteen days from the date of mailing of notice of custody and sale required in RCW 46.55.110(2) to the registered and legal owners, the vehicle remains unclaimed and has not been listed as a stolen vehicle, then the registered tow truck operator having custody of the vehicle shall conduct a sale of the vehicle at public auction after having first published a notice of the date, place, and time of the auction in a newspaper of general circulation in the county in which the vehicle is located not less than three days and no more than ten days before the date of the auction. The notice shall contain a description of

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MOUNTAIN VIEW

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NO. 34274-0-II

STATE OF WASHINGTON

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

BY \_\_\_\_\_  
DEPUTY

MARK POTTER,

Appellant,

v.

WASHINGTON STATE PATROL,

Respondent.

DECLARATION OF  
SERVICE

I certify that I served a copy of BRIEF OF RESPONDENT on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- Federal Express
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered

TO:

ADAM J BERGER  
SCHROETER GOLDMARK & BENDER  
500 CENTRAL BUILDING  
810 THIRD AVENUE  
SEATTLE WA 98104

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 21 day of June, 2006, at Seattle, Washington.

Vicky Woods  
VICKY WOODS