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Court of Appeals No. 70751-5-I

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

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB 24 PM 2:15

**RICHARD AZPITARTE**, *appellant*

v.

**GAYLE SAUVE, JANE DOE SAUVE** and the marital community composed thereof and **BURIEN COLLISION CENTER, INC.** and **DANIEL SPINO, JANE DOE SPINO,** and the marital community composed thereof, and **MUSCLE CARS NORTHWEST INC.**, *respondents*

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**ON APPEAL FROM KING COUNTY SUPERIOR COURT**
**STATE OF WASHINGTON, THE HONORABLE ELIZABETH J. BERNS**

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# OPENING BRIEF

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Richard Azpitarte
pro se

## TABLE OF CONTENTS


| | Page |
|---|---|
| ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR REVIEW | 1 |
| A. ASSIGNMENTS OF ERROR | 1 |
| B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR | 1 |
| STATEMENT OF THE CASE | 2 |
| A. PROCEDURAL FACTS | 2 |
| B SUBSTATIVE FACTS | 5 |
| ARGUMENT | 15 |
| 1. THE LAWSUIT IS WITHIN THE STATUTE OF LIMITATION BECAUSE OF FRAUD AND FRAUDULENT CONCEALMENT BY THE DEFENDANTS. | 15 |
| 2. THE PLAINTIFF'S CLAIMS ARE NOT BARRED BY RES JUDICATA. | 20 |
| 3. NONE OF THE DEFENDANTS WERE BONA FIDE PURCHASERS. | 28 |
| 4. THE COURT ABUSED ITS DISCRETION BY NOT GRANTING THE MOTION TO AMEND AND CONSIDERING HOW THE ISSUES COVERED IN THE AMENDMENT WERE TO BE DEALT WITH UNDER A SUMMARY JUDGMENT MOTION. | 32 |

**5. UNDER CIVIL RICO, THE STATUTE OF LIMITATIONS IS 4 YEARS, AND ITS PROVISIONS HAVE NOT BEEN LITIGATED IN EARLIER LAWSUITS** 36

**6. COURT DID NOT HAVE GROUNDS TO AWARD ATTTORNEY FEES.** 42

**7. THE DEFENDANTS ARE NOT ENTITLED TO ATTORNEY FEES IN EQUITY BECAUE THEY COME TO THE COURT WITH UNCLEAN HANDS** 44

**ALTERNATIVE MOTION FOR CONTINUANCE** 48

**CONCLUSION** 50

## TABLE OF AUTHORITIES

**Page**

### WASHINGTON CASES


*1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575--76, 146 P.3d 423 (2006) 17

*Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) 27

*Appliance Buyers Credit Corp. v. Upton*, 65 Wash. 2d 793, 399 P.2d 587 (1965) 34, 36

*Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wash. 2d 343, 670 P.2d 240 (1983) 35

*Cowles Pub'g Co. v. Murphy*, 96 Wn.2d 584, 588, 637 P.2d 966 (1981)

*Crisman v. Crisman*, 931 P.2d 163, 85 Wash.App. 15 (Wash.App.Div.2 01/03/1997) 17

*Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000) 18, 26

*Elliott v. Barnes*, 32 Wash. App. 88, 645 P.2d 1136 (1982) 34

*Harris v. NW Motor Co.*, 116 Wash. 412, 419, 199 P. 992 (1921) 27

*Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash. App. 502, 516-17, 728 P.2d 597 (1986) 17

*In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1988) 42

*King County v. Azpitarte*, 130 Wash.App. 1047 (Wash.App.Div.1 12/19/2005) 11, 20

*King County v. Azpitarte*, 136 Wash.App. 1021 (2006) ) 15, 20

*King County v. Taxpayers of King County*, 133 Wn.2d 584, 644, 949 P.2d 1260 (1997) 45

*Lincoln v. Transamerica Inv. Corp.*, 89 Wash. 2d 571, 573 P.2d 1316 (1978) 32

*Linn v. Reid*, 114 Wash. 609 at 613 30, 31

*Locke v. City of Seattle* 133 Wash. App. 696, 713, 137 P.3d 52 (2006) 16

*Nord v. Shoreline Savings Association*, 57 Wash. App. 151, 787 P.2d 66 (Wa.App. 03/05/1990) 17

*Quackenbush v. State*, 72 Wash. 2d 670, 434 P.2d 736 (1967) 36

*Richardson v. Seattle-First Nat'l Bank*, 38 Wn.2d 314, 316-17, 229 P.2d 341 (1951) 30

*Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461 (9th Cir. 199), *rev.d* on other grounds, 503 U.S. 258 (1992) 40

*State ex rel. Carroll v. Junker*, 79 Wash. 2d 12, 26, 482 P.2d 775 (1971). 32

*State v. S.H.*, 102 Wn.App. 468, 474, 8 P.3d 1058 (2000). 43

*Tagliani v. Colwell*, 10 Wash. App. 227, 517 P.2d 207 (1973) 32, 33

**FEDERAL CASES**

*Agency Holding Corp. V. Malley-Duff & Assoc. Inc.*, 483 U.S. 143 (1987) 36

*Bankers Trust v. Rhoades*, 859 F.2d 1096 at 1103 (2nd Cir 1988), 37

*Chambers v. NASCO Inc.* 501 U.S. 32, 45-47, 111 S.Ct. 2123, 115 L.Ed. 2d 27 (1991) 42

*Deppe v. Tripp*, 863 F.2d 1356, 1366, (7th Cir. 1988) 41

*Foman v. Davis*, 37 US 178 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) 33, 36

*H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989) 41

*Klehr v. A.O. Smioth Corp.* 521 US 179 (1997) 37

*Rotella v. Wood* 528 US 549 (2000) 37

**STATUTES**

RCW 4.16.080(2), (4) 27

RCW 10.79.050 30

RCW 42.56, 21

RCW 46.12.635 21

RCW 46.55.120 9

RCW 46.55.120(2)(a) 7

RCW 46.55.120(2)(b) 7

RCW 46.55.130(2)(b) 12

RCW 46.55.130(2)(f) 18

RCW 46.55.130(3) 18

15 USC §15 37

18 USC 1341 38

18 USC Sec. 2312 39

18 USC Sec. 2313 39

18 USC §2721 23

18 U.S.C. 2725(3) 23

**COURT RULES**

CR 11 41

CR 15(a) 32, 33

CR 26(g) 41

CrR4.7(h)(7) 41

## ASSIGNMENT OF ERROR AND ISSUES PRESENTED FOR REVIEW

### A. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that that the statute of limitations had run for conversion, replevin, fraud, and conspiracy on an automobile that was converted from possession of the plaintiff.

2. The trial court erred in not allowing the plaintiff to amend his complaint to include RICO causes of action.

### B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does knowledge that a title has been transferred, as a matter of law, begin the statute of limitations on conversion when prior to that time the vehicle was fraudulently concealed from the plaintiff?

2. Can due diligence in conducting a search for a fraudulently concealed automobile be determined as a matter of law for the purposes of staying a statute of limitations of conversion?

3. Did the court error in not allowing the plaintiff to amend his complaint to include RICO causes of action?

## STATEMENT OF THE CASE

### A. PROCEDURAL FACTS

1. The plaintiff filed suit on March 26, 2012 , for causes of action of conversion, repleven, and fraud against the defendants. The complaint mentions three automobiles and states one of the cars was converted into the possession of defendant Spino by use of a forged AVR. (CP 1-6).

2. On June 22, 2012 the Spino defendants were served. (CP 18-19).

3. On August 2, 2012, the plaintiff moved to amend the complaint (CP 9-15).

4. On August 6, 2012, the defendants filed their answer (CP 16-17)

5. On August 10, 2012, the court granted plaintiff's motion to amend. (CP22-24).

6. On August 16, 2012, plaintiff's amended complaint was filed. (CP 25-30).

7. On March 21, 2013, defendants filed for summary judgment. (CP 33-58). A note for motion was filed with it that had the wrong

mailing address for the plaintiff. (CP 31-32). It noted the hearing for summary judgment on April 26, 2013.

8. On April 18, 2013, plaintiff brought a motion to amend citing additional RICO causes of action. (CP 59-73,76-77). It was noted for April 26, 2013.

9. On April 24, 2013, plaintiff filed a reply to the motion for summary judgment stating he had not been served. (CP 83-84).

10. On April 26, 2013, 2013, the court granted a continuance on the motion for summary judgment for unspecified reasons. (CP 88-89)

11. On May 20, 2013 the plaintiff brought a motion to change the trial date. (CP 90-93).

12. On June 5, 2013, the court denied the motion to change the trial date without prejudice. (CP 94-95).

13. On June 11, 2013, brought a motion to compel on outstanding discovery. (CP 96-179), It was noted for June 20, 2013. (CP 180-181).

14. On June 17, 2013, plaintiff filed his response to summary judgment along with a declaration. (CP 182-433).

15. On June 19, 2013, defendants filed their reply to the Response to Summary Judgment. (CP 434-437).

16. On June 19, 2013, plaintiff filed a motion for relief of the order denying him a change in trial date. (441-445).

17. On June 27, 2013, the defendants filed their reply. (CP 454-456).

18. On June 27, 2013, the court granted defendants' motion for summary judgment. (CP 457-459).

19. On July 8, 2013, plaintiff filed a motion for reconsideration. (CP 460-664).

20. On July 10, 2013, the court denied the motion for reconsideration. (CP 465).

21. On July 11, 2013, the defendants brought a motion for attorney fees. (CP 468-479).

22. On July 24, plaintiff filed his response (CP 482-495).

23. On July 25, 2013 court awarded attorney fees to defendants. (CP 499-500).

24. On August 9, 2013, plaintiff filed a notice of appeal. (CP 501-502).

25. On September 24, 2013, plaintiff filed an amended notice of appeal (CP 503-504).

## B. SUBSTATIVE FACTS

1. Before August of 2004, Richard Azpitarte (Azpitarte) was a collector of older cars. He collected his first one when he was fifteen and had been continually collecting them for over 40 years. His specialty was the so-called "muscle cars" that were made by United States manufacturers between 1964 and 1972. Cars in good condition in this era typically sold for between $25,000 up to $200,000 in 2004. The 69 Chevelle that is one of the subjects of this suit was one of these.. He had approximately 30 cars of this caliber and maybe another 30 cars of the same vintage but not quite as rare. He also had a number of cars that he referred to as "runners". Runners were cars that ran, that he picked up at auctions, but were not collector cars. He bought them because they were bargains, and legal running cars. He also had other vehicles such as tow trucks ramp trucks. trailers and tow dollies that were that were used to service the collection. The value of service vehicles ranged from $25,000 on up. (CP 208, 209).

2. The collector cars he had were valuable. not only because of their condition, but because they were "number matching vehicles." This means that all major components were from the original car. Also, the rest of the vehicle was made up of Original Equipment by the Manufacturers

(hereinafter referred to as "OEM" parts.) Since the cars were more correct and desirable if they were "number matching" and entirely OEM parts, he also collected OEM parts. The OEM parts are also collector items by themselves. Each of the collector cars had valuable OEM parts in their trunks. In addition, he had two school buses that were packed entirely with carefully cataloged OEM parts. Also included in the school buses were original titles for most of the cars. At the time, the value of the OEM parts in the school buses was approximately $500,000. (CP 209).

3. For years the county had been claiming that his collector car collection was a "nuisance". They tried for several years to make him get rid of his collection. The county was generally unsuccessful until early 2004 when the County passed an ordinance that put a limit on the number of cars a property owner could have on his lot.. Richard Azpitarte immediately made an agreement with county officials vehicles to fix up his property by getting rid of all excess junk tires and reducing the number of vehicles on his property. The agreement was to reduce the number of vehicles to 12 or less. (CP 209).

4. By late August of 2004 he had moved virtually all of the tires and refuse and approximately 20 cars, when unexpectedly and in violation

of the agreement, the police showed up to seize all his remaining cars on August 26th and 27th. The county had Jony McCall of Cedar Rapids towing supervise the towing of all the vehicles off Azpitarte's property. (CP 209).

5. By this date, Azpitarte had already given the county the Vin numbers, make and model of twelve vehicles that were intended to be stored on the property. It was also his understanding that a number of other vehicles would be allowed to be parked in the right of way around his property. When the tow began, he told the towing coordinator, Bill Turner that he was actually entitled to 18 cars because there were three lots total. However, Turner ignored him completely, and ordered all the cars towed on his property and on the right of way surrounding his property. (CP 209-210).

6. Jony McCall, Cedar Rapid Towing, CW Williams Construction Company, were there and were contracted to tow the cars. The supervising tow company, Cedar Rapids Towing LLC never provided him any notices of right to appeal the tows as required by RCW 46.55.120(2)(a). Therefore, there was no way for him to appeal the tows before the vehicles were sold, as required by RCW 46.55.120(2)(b).

Whenever he attempted to get an appeal form whether it be from the Towing companies or agents of the county, he was refused. (CP 210).

7. When the county had all the vehicles towed, Azpitarte immediately took steps to regain possession of them, with the goal of storing most of them elsewhere and coming into compliance with the new county code. He immediately went to the tow lot where Cedar Rapids Towing was supposed to have towed the vehicles. None of the vintage muscle cars were there. Jony McCall refused to allow him to redeem the parts that were in the cars or buses that were in the lot. (CP 210).

8. Azpitarte attempted to redeem the vehicles but all the agents for the county claimed that he would have to go through Cedar Rapids Towing LLC to redeem them. On September 24, 2004, he paid $25,000 to Cedar Rapids Towing, which should have been more than enough to pay for redemption rights for all vehicles and property stored within vehicles. Jony McCall and Cedar Rapids Towing assured him personally that $25,000 was sufficient to redeem all the vehicles. In fact, he stated that it would pay for the entire abatement, with only approximately $10,000 being used to pay for the tows. (CP 210).

9. However, after paying the $25,000, Azpitarte only received a fraction of the vehicles and none of his valuable muscle cars. Whenever he went to the yards to view the cars, the more valuable collector cars were always missing. (CP 210).

10. Mr. Azpitarte knew several people involved in the industry including defendant Gayle Sauve. He asked all of them in early 2005, including Gayle Sauve if they knew where his cars were. Azpitarte was very specific about mentioning the 70 gold Chevelle SS. 454. VIN # 136370R231345. All of them, including Sauve, responded in the negative. Azpitarte told all of them, including Gayle Sauve about the $25,000 credit card payment he had given Jony McCall to redeem the cars. He also told everyone that he was contesting the tows through an appeal. (CP 211).

11. In March of 2005, when Azpitarte or his associates attempted to exercise his redemption rights under RCW 46.55.120, Cedar Rapids Towing, and Jony McCall, (who had done all the towing under the contract of CW Williams Construction Company) refused to allow Azpitarte or his agents on the property before the auction. None of the agents for Cedar Rapids Towing would tell Azpitarte where his cars were. (CP 211).

12. Azpitarte closely monitored the public auctions that occurred after that. The first one he learned of was in March. Gayle Sauve was there. Azpitarte told the police and Jony McCall that he was there to redeem a vehicle he had paid the tow fees with the $25,000 credit card payment. He had the title in hand in his name, and his registration. He was also prepared to pay any disputed fees in order to redeem the car. Gayle Sauve witnessed this. (CP 211)

13. There was another auction in April. Again Azpitarte was not allowed to attend, even though he had paid for the redemption rights. He had a list of VIN numbers of the cars that were on his property. He gave them to Darrell Helton, the tow coordinator for the Washington State Patrol. Helton told Azpitarte that he would be entitled to the overages once the cars were auctioned, but Azpitarte never received any. Helton could not locate Azpitarte's cars either even though Helton told him he had looked them up in the state's computer system. (CP 211).

14. Even though Azpitarte was monitoring all of the community newspapers in the area, there was never any notice given of the June 28, 2005 auction where the 70 gold Chevelle SS 454 that was previously litigated suit was auctioned. (CP 211-212).

15. In December of 2005, the Court of Appeals partially reversed the actions of the Superior Court in *King County v. Azpitarte*, 130 Wash. App. 1047 (Wash.App.Div.1 12/19/2005). This decision ruled that the tows on the right of way were improper, which included the cars that are the subject of this suit..

16. It was not until late December of 2007 that Azpitarte finally learned that Gayle Sauve had acquired one of his cars. Azpitarte had confronted him with a rumor that Sauve had purchased one of his cars and Sauve admitted that he purchased it and it was not through a legal auction. This was the 70 gold Chevelle SS. 454. VIN # is 136370R231345 that was the subject of the previous suit. (CP 211-212).

17. Later, Azpitarte learned in March of 2009 that Darren Helton had finalized a report and obtained a copy of it. According to that report, Jony McCall claimed in May of 2005, that the Gold 1970 Chevelle SS 454 Vin #136370R231345 had been returned to Richard Azpitarte.(CP 223) Helton made a notation on the AVR for that car "claimed released to Richard." (CP 302). Helton made the inspection on May 18, 2005.

18. The AVR claims that the car was sold for $10.00 to Gayle Sauve on June 28th, 2005. (CP 415). It appears that the practice of Cedar

Rapids Towing was to have the buyers write their names and addresses on AVR's at the time of Auction. (CP 275, 278, 280, 282, 285, 289, 292, 295, 297, 300). The printed name of Gayle Sauve on the sign-up list (CP .61, 208) is similar to the signed name and addresses on two cars (CP 278, 280, 300).. Sauve claims to have made a phone bid from Alaska on the 70 Chevelle SS 454 Vin #136370R231345, even though phone bids are not allowed under RCW 46.55.130(2)(b). (CP 498). Unexplained is how this phone bid could have been placed from Alaska while the Notary on that date was certifying an AVR stating that Sauve purchased the vehicle, with his name and address written in his handwriting. Also unexplained is how this car, at a public auction, sold for only $10.00 for a car worth in excess of $25,000.(CP 416).

19. According to the interrogatory answers of Gayle Sauve, the only vehicle he knew about purchasing that belonged to the defendant was the 70 Chevelle SS. (CP 498) The Defendants counsel certified the same answers on behalf of the other two defendants. In a letter to the plaintiff, defendants counsel also claimed that Burien Collision and Jane Doe Sauve did not have "any relationship" with the cars in the original set of interrogatories or the follow-up.

20. However, according to the Helton report defendant Burien Collision bought two vehicles belonging to Azpitarte on February 24, 2005. (CP 275-288)) Compare to Azpitarte lists of vehicles he got towed (CP 215-216, 318-319). The AVR for the 69 Chevelle Vin #136379B353345 on CP 208 which is the subject of this suit, is extremely interesting. It shows up again in the public disclosure AVR for Daniel Spino with Daniel Spino's name forged over the notarized signature of the notary, who was certifying McCall's affidavit that Burien Collision, not Spino, bought the vehicle. (CP 413). Also suspicious is why the handwriting for Burien Collision is obviously different than that of the address, which looks like it was written by Gayle Sauve.(CP 205-208) This also leads to the question as to why is Spino using Burien Collision's address. The fact that Sauve gave the AVR to Spino rather that title it in his own name and then transfer it, leads to an inference that Sauve knew about the disputed nature of the title and was trying to keep his name off the chain of title to avoid a lawsuit like the present suit.

21. Similarly, the Chev Nova VIN#114279W426724 purchased on February 24, by Burien Collision was also fraudulently titled. (See CP 280) (Helton report), compare VIN with public disclosure request of

March 27, 2009 showing no record for vehicle with that VIN (CP ).) The reason that Azpitarte's public disclosure request did not turn up the vehicle was that Sauve had conspired with Westover to create a title that had an altered VIN # of 114279W425724 instead of VIN#114279W426724. (Emphasis added)(CP 430). Amazingly, this new number shows up on a vehicle Certification of Title Ownership for Muscle Cars on 10-24-2011 (CP 428), who then had the vehicle inspected and changed the vehicle ID to the original #. (CP429). Also unexplained is why the vehicle was sold out of state to the defendant Lilliard under the forged number. (CP432)

22. Defendant Sauve also bought Azpitarte vehicle in his own name on April 20, 2005 (See CP 300 (Helton report), compare with VIN of last car on CP 251 (Helton report). But according to documents obtained from DOL records two years later, he still had not titled the vehicle even though the law requires it be done within 15 days. (See 69 Chevelle with this VIN titled to Legal owner Shannon Shipp last transferred on 9-6-1996) (CP 224). This failure to title a vehicle within 15 days after the auction, likewise indicates knowledge that the ownership of the car was in dispute. This is especially true when the defendants Sauve

and Burien Collision employed the same tactic on the 69 Nova VIN #114279W426724 to fraudulently title the vehicle.

23. While it is true that Azpitarte litigated the original tows in *King County v. Azpitarte* 136 Wn. App. 1021, (2006) that suit did not deal with the redemption rights he attempted to exercise against Jony McCall. Also, that suit concluded that the tow of the vehicles on the public right of way, which includes the vehicles in this suit, was improper.

24. There is another problem with this "auction" that supposedly was held on June 28 of 2005. Another vehicle, an 84 Chevrolet ramp truck was supposedly purchased by Jason Biscay on that date. (CP However, according to Azpitarte, he talked to Biscay who claimed he bought it directly from Cedar Rapids Towing and not through an auction.(CP 215) Azpitarte has sued Biscay in another lawsuit over that vehicle but has not been able to obtain discovery any documents so that a deposition can be held. A motion to compel is pending in that case. (CP 215).

## ARGUMENT

**1. THE LAWSUIT IS WITHIN THE STATUTE OF LIMITATION BECAUSE OF FRAUD AND FRAUDULENT CONCEALMENT BY THE DEFENDANTS.**

First, the defendants have not met their burden of proof for their affirmative defenses. (the defendant bears the burden of proof "only where it asserts an 'affirmative defense'"); *Locke v. City of Seattle* 133 Wash. App. 696, 713, 137 P.3d 52 (2006) ("The burden of proof is ... placed upon the party asserting the avoidance or affirmative defense.").

Here the defendants have not established any facts that allow them to meet their burden of proof. They claim in their briefing that Spino and Muscle Cars were purchasers of the cars without notice of any wrongdoing but there are no declarations in the record that establish this. The defendants have not established any facts that indicate the plaintiff should have learned of the car thefts earlier.

Traditionally, the rule has been applied in cases where the defendant fraudulently conceals a material fact from the plaintiff and thereby deprives the plaintiff of the knowledge of accrual of the cause of action. Application of the discovery rule tolls the limitation period until such time as the plaintiff knew or, through the exercise of due diligence.

should have known of the fraud. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash. App. 502, 516-17, 728 P.2d 597 (1986), review denied, 107 Wash. 2d 1022 (1987).

An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; *Nord v. Shoreline Savings Association*, 57 Wash. App. 151, 787 P.2d 66 (Wa. App. 03/05/1990)

In *Crisman v. Crisman*, 931 P.2d 163, 85 Wash. App. 15 (Wash.App.Div.2 01/03/1997) the Washington Court of Appeals applied the discovery rule to the tort of conversion where fraudulent concealment was involved. Under the discovery rule, a cause of action accrues when the plaintiff discovers, or in the reasonable exercise of due diligence should discover, the elements of a cause of action. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575--76, 146 P.3d 423 (2006)". This does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action. *Id.* Though the question of due diligence is ordinarily a question of fact,

the issue can be decided as a matter of law if reasonable minds could reach but one conclusion. *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000).

Here, the tow truck company had a statutory duty to keep the vehicle in its lot, so the plaintiff could redeem it. Here defendant Suave concealed the location of the vehicle even though he, by his own admission is well acquainted with the statutory procedures for auctions where an auction must be held within 90 days (See RCW 46.55.130(3)) and then titled within 15. (See RCW 46.55.130(2)(f)). He also had a statutory duty to title the car after it was obtained. By not fulfilling this duty he was able to conceal the fact that he had gained possession of the vehicle from the plaintiff. He misrepresented to the defendant that he did not know anything about the vehicle even though he knew where it was... in his garage. His story of obtaining the vehicle through a non-existent auction and remodeling and painting it within a month is unbelievable. His claim that he made an illegal phone bid is convenient because he does not have to explain who the witnesses to the non-existent auction were. However, his presence is in dispute because the handwriting on the AVR was his and he cannot explain how he could be both in Alaska on a phone

bid, yet at the same time be in Seattle to write his name and address on the AVR.

It is a reasonable inference that there was no legal auction on June 28., 2005. It is also a reasonable inference that there was no legal auction on February 24, 2005, because of the small number of bidders and the fact the sheet did not indicate there were any #2 bids on any of the auctions as required by RCW 46.55.130(2)(d). Also, with a small number of bidders it is suspicious that the three Sauve bids came in even amounts, unlike the other auctions where the bids came in at odd dollar amounts.

Furthermore, the evidence indicates multiple instances of fraudulent concealment to hide from the plaintiff where the other cars Sauve purchased were. The defendants have misrepresented to the court that they obtained possession of the vehicles through auctions of questionable legality. On February 24, 2005, the second highest bids were not listed. There was no attempt to title the some of vehicles, so the plaintiff would not know where to look as to who had possession..

Also suspicious is Sauve's method of titling the 70 Chevelle SS 454. From the documents it can be seen that he obtained a duplicate rather than use the original AVR to obtain title. In the Helton report, a notation

on the AVR would have revealed to potential buyers including Sauve of the disputed issue as to whether the AVR was even valid. Conveniently, the copy supplied by Jony McCall and Cedar Rapids towing does not contain the language added by Helton, yet purports to be a true copy.

**2. THE PLAINTIFF'S CLAIMS ARE NOT BARRED BY RES JUDICATA.**

The case cited by the defendants, *King County v. Azpitarte* 136 Wn. App. 1021, 2006 does not support an affirmative defense of res judicata. That case only dealt with the plaintiff's efforts to enforce an injunction against King County for wrongfully towing his vehicles. That has nothing to do with the plaintiffs attempts to recover his cars that were wrongfully taken from him by the defendants, who had nothing had nothing in common with King County who instigated the tow of the vehicles. Also, part of the claim of res judicata the defendants are trying to claim was reversed in *King County v. Azpitarte*, 130 Wash. App. 1047, with respect to the vehicles in this suit.

The defendants also claim that the court's decision in Court of Appeals case #67715-2-I is somehow controlling. That case involved just one car and turned on issues like why there was no explanation in the

record as to why the plaintiff could not have obtained Dennis Beggerly's declaration earlier, and why fraudulent concealment does not apply because there was no duty to disclose, supposedly, on the part of Sauve, even though state laws require him to and why the evidence concerning the non-existence of an auction did not give rise to a reasonable inference. All of these issues are currently under appeal to the Washington State Supreme Court.

The court did not sustain the trial court's ruling that the registration of the vehicles is a public record as the defendants' counsel continues to argue. There is good reason for that, because the records are not public records.

The most blatant error in the court's and the Sauve Defendants' approach is that these are not public records as the term is defined in RCW 42.56, the public disclosure statute. RCW 46.12.635 puts restrictions on the release of this information that could prove prohibitive to someone like Azpitarte:

> (1) Notwithstanding the provisions of chapter 42.56 RCW, the name or address of an individual vehicle owner shall not be released by the department, county auditor, or agency or firm authorized by the department except under the following circumstances:

(a) The requesting party is a business entity that requests the information for use in the course of business;

(b) The request is a written request that is signed by the person requesting disclosure that contains the full legal name and address of the requesting party, that specifies the purpose for which the information will be used; and

(c) The requesting party enters into a disclosure agreement with the department in which the party promises that the party will use the information only for the purpose stated in the request for the information; and that the party does not intend to use, or facilitate the use of, the information for the purpose of making any unsolicited business contact with a person named in the disclosed information. The term "unsolicited business contact" means a contact that is intended to result in, or promote, the sale of any goods or services to a person named in the disclosed information. The term does not apply to situations where the requesting party and such person have been involved in a business transaction prior to the date of the disclosure request and where the request is made in connection with the transaction.

(2) Where both a mailing address and residence address are recorded on the vehicle record and are different, only the mailing address will be disclosed. Both addresses will be disclosed in response to requests for disclosure from courts, law enforcement agencies, or government entities with enforcement, investigative, or taxing authority and only for use in the normal course of conducting their business.

(3) The disclosing entity shall retain the request for disclosure for three years.

In addition, the Federal government has implemented 18 USC §2721 which is even more restrictive:

> (a) In General.— A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:
> (1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section
> ...
> (b) Permissible Uses.— Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321–331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:
> (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.
> (2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle

manufacturers.
(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only –
(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and
(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.
(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.
(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.
(6) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.
(7) For use in providing notice to the owners of towed or impounded vehicles.
(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.
(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.
(10) For use in connection with the operation of private toll transportation facilities.

> (11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.
> (12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.
> (13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.
> (14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

First of all, the court has no evidence before it that the plaintiff Azpitarte is a business, as he has never claimed to be one. Therefore under the state statute he is not even allowed to request the information directly. There is no case law interpreting whether a "business" under state law would include an attorney... a court could easily conclude the term business is the same as defined by federal statute, which clearly does not include an attorney. The state statute does not on its face, allow for the (b)(4) exception allowed in federal law so there is a possibility that the court rule that (b)(4) does not apply for an attorney investigation in anticipation of investigation.

Even if a court said it would, there is also a factual question as what circumstances constitute a legitimate investigation in anticipation of

litigation. The law may require an attorney to have the elements of a cause of action firmly established before he can say his investigation is in anticipation of litigation. It could be argued that an attorney has to have more than a mere suspicion before he launches a fishing expedition on 120 vehicles. This would put Azpitarte in the situation of the chicken and the egg, he would have to be able to prove fraud in order to obtain the evidence he needs to prove it.

Even if the investigation in anticipation of litigation applied, this would then raise a factual question as to whether a diligent search would include hiring an attorney to search 120 cars every few months for 5-8 years. This could be a costly and prohibitively expensive for someone in Azpitarte's position. As argued in opening brief, though the question of due diligence is ordinarily a question of fact, the issue can be decided as a matter of law if reasonable minds could reach but one conclusion. *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000). Here reasonable minds could have concluded that a diligent search would not include hiring an attorney to continually keep looking for 120 vehicles.

The argument by defense counsel that Azpiatarte should have been able to discover the elements of his claim based upon the court of appeals

decision in case number 67715-2-I has no basis here. The triggering event was not the admission by Gayle Sauve that he obtained the car through an illegitimate auction, but because Azpitarte did not obtain the evidence of the Spino forgery on the 1969 Chevelle Vin #136379B353345 which was much later. In this action the plaintiff has pleaded fraud and conspiracy, which were not pleaded in the court of appeals decision 677125-2-I. A three-year statute of limitation applies to an action "for any . . . injury to the person or rights of another" and to an "action for relief upon the ground of fraud." RCW 4.16.080(2), (4). Both fraud and civil conspiracy are subject to this and the discovery rule which accrues when the plaintiff learns the essential elements of the cause of action. (See *Allen v. State*, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) (under the discovery rule, a cause of action accrues when the plaintiff should have known the essential elements of the cause of action).

In this case, the grounds for fraud and conspiracy on the 1969 Chevelle, VIN #136379B353345 were not known until after March 27, 2009. On that date, Mr. Azpitarte learned for the first time, that the defendant Spino had acquired the car using an AVR that had been generated as a result of a car auction. It was not until a short time later

that Azpitarte learned that in fact, the AVR had been altered and that the real purchase of the car was made by Burien Collision. (See CP 280 (Helton Report).

The grounds for fraud and civil conspiracy on the 1969 Nova VIN #114279W426724 were not known until August 8, 2012, when the plaintiff received an email from DMV showing that defendants Sauve and/or Burien Collision had fraudulently transferred title to proposed defendants William and Jane Doe Westover with a false VIN #114279W425724v.

The defendants argument that the plaintiff's claims are barred by res judicata is incorrect. The case the defendants are relying upon dealt only with the issue of the plaintiff's claim that King County illegally towed his cars. That litigation had nothing to do with the issue as to whether the plaintiff was denied his redemption rights. In this case the plaintiff had exercised his redemption rights, but through fraud by the towing operator and the defendants, he was prevented from accessing his vehicles and the parts contained therein and was thus prevented from recovering his property. Also, according to the court of appeals, the

automobiles in this case were illegally towed because they were on the right of way.

**3. NONE OF THE DEFENDANTS WERE BONA FIDE PURCHASERS.**

The defendants including Spino, were not bona fide purchasers. The only way for the tow company to legally transfer ownership to the defendants was through an auction that was conducted according to RCW 46.55.130. There was no such auction and in fact, the vehicle in question was transferred to the defendant Sauve almost immediately after the vehicle was towed from the plaintiff's property and without any purchase whatsoever. By their own actions of concealing the vehicles from the plaintiff, as well as the testimony of the plaintiff, it is a reasonable inference that the defendants knew of the disputed nature of the claim on the vehicles and therefore cannot be bona fide purchasers.

The case law cited by the defendant's counsel is not applicable. He first cites *Harris v. NW Motor Co.*, 116 Wash. 412, 419, 199 P. 992 (1921) for the proposition that the defendant is a bona-fide purchaser. However, the defendants have not submitted any evidence that the car was purchased by Spino at all, let alone for compensation. The plaintiff cited to a number

of circumstances that indicated that the vehicle was stolen and the defendant was part of the theft. The facts cited show that the car was not sold at an auction as required by statute. Since the tow yard never had title, the title obtained by use of a forged AVR means nothing. The plaintiff paid $25,000 for towing and should have had the car returned. Instead, the tow yard, with the connivance of the defendant, concealed the car over 11 months, then transferred the car using a forged AVR.

In 1873, the state legislature passed 2129 Rem. Code, now RCW 10.79.050, expanding an exception to the general rule protecting an innocent buyer's title. *Richardson v. Seattle-First Nat'l Bank*, 38 Wn.2d 314, 316-17, 229 P.2d 341 (1951). RCW 10.79.050 provides, "All property obtained by larceny, robbery or burglary, shall be restored to the owner; and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his rights to such property."

In an early case interpreting "larceny" in RCW 10.79.050, the Washington State Supreme Court examined the legislative history of RCW 10.79.050 in order to determine the intent of the statute. *Linn v. Reid*, 114 Wash. 609at 613. The court concluded that the statute was the equivalent of declaring that no sale, whether in good faith on the part of the purchaser

or not, shall divest the owner of his rights to property obtained from him by the feloniously stealing, taking and carrying, leading or driving it away, or by embezzlement, or by the false impersonation of another, or by robbery or burglary . . . . Those were the only ways in which larceny could be committed. That was all the word larceny meant. *Linn*, 114 Wash. at 616.

It is a reasonable inference that there was no legitimate auction on February 22, 2005 for the Spino car because Spino was not listed as the buyer on the AVR and apparently used a forged AVR to acquire title. There is no evidence in the record that Spino paid anything for the car. Defendant Burien Collision may claim it paid $2000 for a car that the. That is hardly valuable consideration for an automobile worth over $25,000.

Furthermore, the plaintiff claims that he gave notice to Sauve on several occasions of the dispute over ownership. This is consistent with the actions of Sauve who cannot nor has not explained why he would spend thousands on automobiles and not even title them up after more than six years. The only logical inference was he did not want to title them because that would let Azpitarte know where his cars were so that he

could refile suit to regain possession. This fraudulent action on the part of the defendants means that he was not a bona fide purchaser of any of the automobiles he purchased from Cedar Rapids towing.

**4. THE COURT ABUSED ITS DISCRETION BY NOT GRANTING THE MOTION TO AMEND AND CONSIDERING HOW THE ISSUES COVERED IN THE AMENDMENT WERE TO BE DEALT WITH UNDER A SUMMARY JUDGMENT MOTION.**

CR 15(a) reads in part as follows:

> Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The amendment of pleadings is addressed to the sound discretion of the trial court, whose determination will be overturned on review only for abuse of such discretion. *Lincoln v. Transamerica Inv. Corp.*, 89 Wash. 2d 571, 573 P.2d 1316 (1978). An abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wash. 2d 12, 26, 482 P.2d 775 (1971).

In *Tagliani v. Colwell*, 10 Wash. App. 227, 517 P.2d 207 (1973), an action for personal injuries, the plaintiff appealed from a denial of a motion to amend the pleadings and from a summary judgment entered in the defendant's favor. The first amended complaint restated the original complaint and stated two additional causes of action. The motion for leave to amend was filed after the defendant's answer to the original complaint, and after the motion for summary judgment had been argued, but before the formal] entry of the order granting summary judgment. The Tagliani court, in reversing the denial of leave to amend, quoted the United States Supreme Court in *Foman v. Davis*, 37 US 178 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) as follows:[1]

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, . . . the leave sought should, as the rules require, be "freely given."
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> *Tagliani v. Colwell*, supra at 233.

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[1] The Foman case construes FRCP 15, which is identical to CR 15(a)

Because the trial court in the case before us declined to state a reason on the record for its denial of the motion to amend the pleadings, the court cannot ascertain whether its decision was based on untimeliness of the motion or on some other reason. For this reason this court should hold that the trial court abused its discretion in denying leave to amend the answer.

Although undue delay is a legitimate ground for denying leave to amend the pleadings, such delay must be accompanied by prejudice to the nonmoving party. *Appliance Buyers Credit Corp. v. Upton*, 65 Wash. 2d 793, 399 P.2d 587 (1965). In *Elliott v. Barnes*, 32 Wash. App. 88, 645 P.2d 1136 (1982), purchasers of real estate sought damages from the sellers. One week before the scheduled trial date, the plaintiff sought leave to amend the complaint, which was denied.

On appeal, the Elliott court affirmed the trial court's decision, noting that the trial court's order was based on undue delay of the plaintiffs in seeking the amendment, coming more than 1 year after the original complaint was filed, but less than 1 week before trial. The court held that because undue delay was an adequate ground for denial of the motion, there was no abuse of discretion. *Elliot*t, at 92.

However, in *Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wash. 2d 343, 670 P.2d 240 (1983), the plaintiff filed an action seeking damages for defamation and interference with business relations. He was allowed to add the defamation claim 5 years 4 months after the filing of the original complaint. The Caruso court noted that the purpose of pleadings is to enable a proper decision to be made on the merits, and not to erect formal and burdensome impediments to litigation. *Caruso*, at 349.

The Caruso court held that delay in and of itself is insufficient to deny leave to amend:

The touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party. *Caruso*, at 350.

The Caruso court noted that the nonmoving party filed an affidavit that it would suffer undue prejudice because of lack of prior knowledge, making it difficult to prepare a defense, but the affidavit set forth no specific objections relating to actual prejudice. The Caruso court held that this was an insufficient showing to find that the trial court abused its discretion. *Caruso*, at 351.

In the present case, if the trial court's decision was based on undue delay, such a decision was an abuse of discretion. Unlike an attempt to

amend the pleadings less than 1 week before trial, a motion to amend brought several months before a trial date allows sufficient time to conduct adequate discovery and prepare a case for trial, absent special circumstances. The defendants did not respond to the motion to amend and therefore the court is left with nothing to conclude as to how the defendants were prejudiced. *Quackenbush v. State*, 72 Wash. 2d 670, 434 P.2d 736 (1967).

Although the grant or denial of an opportunity to amend is within the discretion of the trial court, "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman*, 371 U.S. at 182. See also *Appliance Buyers Credit Corp. v. Upton*, supra.

**5. UNDER CIVIL RICO, THE STATUTE OF LIMITATIONS IS 4 YEARS, AND ITS PROVISIONS HAVE NOT BEEN LITIGATED IN EARLIER LAWSUITS**

Civil RICO actions are subject to a four-year statue of limitations. In *Agency Holding Corp. V. Malley-Duff & Assoc. Inc.*, 483 U.S. 143 (1987), the United States Supreme Court decided to apply this uniform four-year limitations period primarily because RICO was largely modeled

on the Clayton Act. 15. USC §15. and a four-year statute is applicable to that statute. The Supreme Court has rendered three statute of limitations opinions in RICO cases, but has declined to enunciate with finality when a civil RICO claim accrues. In *Rotella v. Wood* 528 US 549 (2000) the court that the limitations period runs no later than when the plaintiff knows when he has been hurt and who inflicted the injury. In this case for the vehicles in question, the plaintiff did not know who inflicted the injury until when he discovered the fraud and conspiracy.

The Supreme Court in *Rotella* did "not decide whether civil RICO allows for a cause of action when a second predicate act follows the injury or what limitation accrual might apply in such a case," 528 US at 559, but the lower courts applying the injury discovery rule have done so. They hold that, if at any date after injury has been discovered, a new and independent injury is incurred from the same violation, the plaintiff is again "injured in his business or property" with section 1964(c) and the plaintiff's right to sue for damages from the latter injury "accrues at the time he discovered or should have discovered the [later] injury." *Bankers Trust v. Rhoades*, 859 F.2d 1096 at 1103(2nd Cir 1988),

In *Klehr v. A.O. Smioth Corp.* 521 US 179 (1997) the Supreme Court did clarify that the doctrine of fraudulent concealment equitably tolls the running of the limitations period in RICO actions if the plaintiff has exercised reasonable diligence in respect of its RICO claim., that is, the period is tolled if and to the extent that the plaintiff shows that he neither knew nor in the exercise of due diligence, reasonably could have known of the RICO violation. Here the defendants prevented the plaintiff from learning of the true nature of the fraud until Azpitarte learned the details in the Helton report.

In this case the plaintiff has alleged a series of predicate acts under RICO.

> **18 USC 1341** Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives

therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

**18 USC Sec. 2312** Whoever transports in interstate or foreign commerce a motor vehicle, vessel, or aircraft, knowing the same to have been stolen, shall be fined under this title or imprisoned not more than 10 years, or both.

**18 USC Sec. 2313. Sale or receipt of stolen vehicles**
(a) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any motor vehicle, vessel, or aircraft, which has crossed a State or United States boundary after being stolen, knowing the same to have been stolen, shall be fined under this title or imprisoned not more than 10 years, or both.
(b) For purposes of this section, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

In this case, the defendants caused automobile titles to be sent through the mail which had fraudulent information on them so that the plaintiff could not determine who the owners of the vehicles were.

In the case of the, the 70 gold Chevelle SS. 454. VIN # 136370R231345, the defendant used a phony auction to gain possession of an automobile that was then transported across state lines

In the case of the 69 Chevelle Vin #136379B353345 this would arguably only first occur when he learned of the Helton report. Even then he did not know for sure exactly what transpired.

In the case of the 69 Nova VIN#114279W426724 the plaintiff did not learn of the alleged fraud until August 8, 2012, when the plaintiff received an email from DMV showing that defendants Sauve and/or Burien Collision had fraudulently transferred title to proposed defendants William and Jane Doe Westover with a false VIN #..

While the defendants may object to re-litigating the circumstances of the 70 gold Chevelle SS. 454. VIN # 136370R231345, because of the earlier suit, the holding there has nothing to do with the proof here, which requires the plaintiff to establish two predicate acts.

The rule in this circuit is given in *Securities Investor Protection Corp. v. Vigman*, 908 F.2d 1461 (9th Cir. 199), *rev'd* on other grounds, 503 U.S. 258 (1992) is that the RICO text does not require that the plaintiff have standing to sue for the predicate acts forming the pattern "so long as

the plaintiff suffered injury 'by reason of the alleged Rico Violation'". 908 F.2d at 1466.

To show an injury from a predicate act, it is only necessary to show that the plaintiff suffered injury from a pattern of predicate acts, not from each predicate act. The classic illustration: a hoodlum extorts "protection" money from each of several shopkeepers. To state a pattern, it may be necessary for any one plaintiff shopkeeper to allege the defendant's extortion of others as well. But the plaintiff will not have been injured by the defendant's extortion of others[2]

[N]o requirement exist that the plaintiff must suffer an injury from two or more predicate acts or from all the predicate acts. Thus, a RICO verdict can be sustained when a pattern of racketeering acts existed, but when only one act caused the injury. *Deppe v. Tripp*, 863 F.2d 1356, 1366, (7th Cir. 1988)

## 6. COURT DID NOT HAVE GROUNDS TO AWARD ATTTORNEY FEES.

Various court rules allow the imposition of sanctions. E.G. CR 11,

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[2] This classic illustration is drawn from the United State's Supreme Court decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989)

26(g): CrR4.7(h)(7). Sanctions, including attorney fees may also be imposed under the court's inherent equitable powers to manage its own proceedings.. *In re Recall of Pearsall-Stipek,* 136 Wn.2d 255, 266-67, 961 P.2d 343 (1988). Moreover, where the court's inherent powr is concerned, "[w]e are at liberty to set the boundaries of the exercise of that power."Id. at 267 n.6. Trial courts have the inherent authority to control and manage their calendars, proceedings, and parties. See *Cowles Pub'g Co. v. Murphy,* 96 Wn.2d 584, 588, 637 P.2d 966 (1981).

The defendants have not argued that the sanctions in this case were imposed under a statute or a rule or because of a violation of a court order or that attorney fees were awarded by contract or statute. Therefore, the analysis is limited to the court's inherent powers to sanction. The Washington State Supreme Court stated that a finding of bad faith is sufficient for attorney fee sanctions under its inherent powers *Pearsall-Stipek,* 136 Wn.2d at 267 n.6. Under federal case law, courts may assess attorney fees as an exercise of inherent authority only where a party engages in willfully abusive, vexatious, or intransigent tactics designed to stall or harass. *Chambers v. NASCO Inc.* 501 U.S. 32, 45-47, 111 S.Ct. 2123, 115 L.Ed. 2d 27 (1991). Washington's Court of Appeals has based

its jurisprudence on federal case law. It has held that while an express finding of bad faith by the trial court is not required, a sanction of attorney fees imposed under the court's inherent authority must be based on a finding of conduct that was at least "tantamount to bad faith". *State v. S.H.*, 102 Wn.App. 468, 474, 8 P.3d 1058 (2000).

The defense claims that the suit was frivolous because the plaintiff filed a similar suit in 2010. They have not entered into the record the previous suit. Therefore there is no evidentiary basis for their claim.

Even if this court were to look at the unpublished decision into account, the issues were different. In the first suit the Sauve defendants claimed they were buyers in good faith because the car was purchased at an auction in good faith. The defendants cannot claim the same here, because Spino apparently was never at the auction and forgeries were committed in order to get it into his name. In the second case involving the Nova, the vehicle was not even titled correctly until recently, iwht the defendants pulling a fraud by titling the vehicle with the wrong VIN number and the wrong owner. There was no evidence that Muscle Cars was even involved until 2012 and there was no way for the plaintiff to make a diligent search until the car was titled correctly because there was

no way to determine the falsified VIN number it was titled under.

The first case involved an issue where Sauve had clearly itled the car on a certain date. In this case it is nnot clear when the car was actually titled. The defendants have not met their burden of proving their affirmative defense because they have submitted no admissible evidence that the car was ever titled in Spino's name. Although the title reprot claims it was done shortly after the auction, the plaintiff contacted officer Helton some time later and Helton claimed their was no record of the car being titled. Since the titling involved the use of obviously forged documents, there was a strong possibility that the defendants had help from someone inside DOL where it would be as simple matter to predate the application.

The plaintiff could not base the first suit on the information used in the second suit because at the time of trhe filing of the first suit, he did not have the informaiton yet, that he had obtained at the time of the second suit.

Also, the second suit included a cause of action for fraud and for conspiracy which has a different statute of limitations and rule for using the discovery rule.

The defendants claim that the plaintiff should have known at the time he filed the suit that he would lose at the court of appeals. However, at the time of signing of the original complaint, the court of appeals had not ruled.

## 7. THE DEFENDANTS ARE NOT ENTITLED TO ATTORNEY FEES IN EQUITY BECAUE THEY COME TO THE COURT WITH UNCLEAN HANDS

Under the "clean hands" doctrine a court in equity will not intervene on behalf of a party whose conduct has been unconscientious, unjust or marked by lack of good faith. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 644, 949 P.2d 1260 (1997).

The plaintiff has cited to authority here that use of inherent powers is an equitable remedy and the defendants cite to equity in their motion.

However, the defendants come to the court with unclean hands. The plaintiff has produced direct uncontroverted evidence to this court that the defendants used forged and fraudulently produced documents to first hide, and then convert stolen vehicles to parties outside the state (interstate transportation of stolen vehicles, a federal offense). The defendants have refused to produce a single declaration from the defendants explaining

their indefensible conduct, apparently because they fear criminal prosecution.

This was a continuation of refusing to answer questions that began in the first suit. The Sauve defendants denied any knowledge of the cars in this suit, even though the Helton report showed that Sauve purchased all four of these cars in these two suits on behalf of Burien Collision and/or Gayle Sauve . Even if this court takes the generous approach taken by the trial court, by letting the defendants off with no evidence and without granting an equitable stay of the statute of limitations, it cannot ignore that the defendants basically invited this suit with their own criminal behavior.

Furthermore, the defendant's counsel also comes to the court with unclean hands. In his motion for attorney fees he demands fees for wasting the courts time with a mtoion when he knew that his own secretary had mis-addressed the envelope and the plaintiff would not be attending. Instead of simply re-noting the motion (which should have been obvious, because his secretary's own not for motion listed the wrong address) the attorney deliberately wasted both his and the court's time by going through with the unnecessary hearing. The attorney wants to charge the plaintiff for a motion for reconsideration that supposedly signed on or

about February 2013. yet the court can take judicial notice that there was no reconsideration made within months of this dat. He also wants to charge him for research on real properties in King and Skagit counties but gives us no indication how any such research would be remotely connected with this case. He also wants to charge for two phone calls with someone named Norman regarding trust funding, with no explanation how trust funding has anything to do with this case. Finally the attorney culminates his argument by demanding $10,000 in attorney fees, ignoring the fact that the sum of the aforemetioned inflated bills is only $8717.00. Even allowing for the most conservative estimate, it is clear that he intends to use the court to defraud the plaintiff out of at least $2000.00.

**REMEDIES**

The plaintiff contends that the replevin action still holds for all the vehicles that the defendants purchased from Cedar Rapids Towing. The appellant has submitted evidence the cars were stolen and Cedar Rapids never had title to the vehicles and did not follow statutes in creating new titles. The defendants have produced no evidence that they have any right to hold possession of the cars. The cause of action of repleven should

therefore remain open.

In the event the recovery of the vehicles in their original condition remains impossible, the plaintiff should be entitled to collect damages through the conversion claim.

The claims for parts also remains in dispute. The plaintiff contends that each of the cars sold had OEM parts in them. He should also be able to get the parts returned or get damages.

## ALTERNATIVE MOTION FOR CONTINUANCE

As stated in this reply, there were too many factual issues in dispute for this case to be resolved without a trial. However, if the court does not believe the plaintiff has come forth with enough to defend against the summary judgment motion, then the plaintiff requested a CR 56(f) continuance so that he can obtain statements from Officer Helton which would verify the claim that the notation was on the original which would have put Sauve on notice of the disputed claim and the subsequent effort to obtain a certified copy was an attempt to avoid having to admit he was on notice of the dispute. Helton could also verify the plaintiff's efforts to locate owners of the cars through Helton. The plaintiff also needs to depose Gayle Sauve as to an explanation for his actions which would

demonstrate he was aware of the dispute over the cars and his actions of not titling the cars was to prevent the plaintiff from learning of their whereabouts. Sauve's testimony about the present location of the vehicles and whose control they are now in would either verify that he is entitled to possession directly through the replevin action against the defendants or by adding more parties to the suit so he could regain possession through the added parties.

The plaintiff should have been allowed to depose Jony McCall and his wife. He should be allowed to demonstrate the defendants were well aware of the disputed nature of the transaction as shown by their evasive actions in not titling the cars and the subsequent efforts to alter and/or forge the AVR's.

The plaintiff should also have been allowed to bring in a handwriting expert to verify that it was Mr. Sauve's handwriting on the AVR's indicating that he was present at the sale and he knew the ownership of the vehicle was in dispute and therefore that was the reason it was not being sold at a legal auction.

The plaintiff should have been able to conduct discovery on the ebay and pay pal accounts of the defendants to see if they have sold any of

the missing parts on Ebay. The plaintiff should be able to obtain the discovery he has asked for in his first amended and second interrogatories, which would show that the Sauve defendants were aware of the fraudulent transactions of the Spino 69 Chevelle Vin # and the 69 Nova VIN#114279W426724 Nova which eventually were wrongfully titled.

Finally, if necessary, the plaintiff should been allowed to depose other participants of the February 24 and June 28th auctions to see what actually happened at those auctions.

## CONCLUSION

For all the reasons stated above, the appellant requests that the ruling of the trial court be reversed and the case reinstated with the plaintiff being allowed to continue with discovery.

Dated this 3 day of September, 2014

Richard Azpitarte

I hereby certify that on September 4, 2014, I caused to be served a copy of the appellants opening brief by the method indicated below and addressed to the following:

Robert Hardy
153 SW 154th
Burien WA., 98166-2315

☐ Hand Delivered By:_____
☒ U.S. Mail first class postage prepaid
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_____
Richard Azpitarte

I hereby certify that on September 24, 2014, I caused to be served a copy of the appellants opening brief by the method indicated below and addressed to the following:

Robert Hardy
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Richard Azpitarte

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