THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
William H. Seals, Jr., Circuit Court Judge

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Sep 15 2020
SC Court of Appeals

Appellate Case No. 2019-002006
Case No. 2019-CP-33-0675

John Pendarvis and Lawton Drew, ……. Respondents,

v.

South Carolina Law Enforcement Division and
South Carolina Department of Agriculture, ……. Defendants,

Of which, South Carolina Law Enforcement Division is…… Appellant.

BRIEF OF APPELLANT

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II. Did the Circuit Court err in using its equitable powers to enjoin legitimate and valid law enforcement action where the hemp crop at issue was contraband per se and to which the Respondents have no cognizable property rights which could be "irreparably harmed"?

III. Did the Circuit Court err in granting a preliminary injunction that was unsupported by the facts as pled by the Respondents in their Complaint?

IV. Did the Circuit Court err in refusing to enforce Section VIII of the South Carolina Hemp Farming Program Participation Agreement and refusing to allow for the forfeiture or destruction of the Respondents' illegal hemp crop to proceed, a remedy to which the Respondent John Pendarvis had expressly consented?

STATEMENT OF THE CASE

This is an appeal from the grant of a preliminary injunction. On September 26, 2019, the Respondents John Pendarvis and Lawton Drew filed a Petition for Ex Parte Temporary Restraining Order, Motion for Preliminary Injunction, and Complaint for Declaratory and Injunctive Relief against the Appellant South Carolina Law Enforcement Division ("SLED") and the South Carolina Department of Agriculture ("SCDA"). (R. 17-21). The Respondents allege that Pendarvis holds a 2019 Hemp Grower License issued by the SCDA with which he had planted two acres of hemp in Marion County having a value exceeding $300,000. The Respondents also alleged that they had learned that SLED intended to destroy the hemp crop at the Marion County site in accordance with its enforcement authority under the Hemp Farming Act, S.C. Code Ann. § 46-55-10, *et seq*.

On that same date, September 26, 2019, Circuit Court Judge William H. Seals, Jr. issued an Ex Parte Temporary Restraining Order that "temporarily restrained and preliminarily enjoined [Defendants] from entering onto the property under cultivation by Plaintiffs for the purpose of destroying the hemp crop planted thereon." (R. 15-16). Judge Seals made a finding that "Plaintiffs are likely to suffer immediate and irreparable loss or damage if Defendants proceed with destruction of Plaintiffs' hemp crop located in Marion County without the benefit

of due process and judicial review guaranteed to Plaintiffs by the South Carolina Constitution." (R. 15).

Judge Seals then scheduled a hearing on the merits of the request for a preliminary injunction on October 8, 2019. The Appellant SLED made an appearance and filed a memorandum of law on October 7, 2019, which included a copy of the South Carolina Hemp Farming Program Participation Agreement entered between John Pendarvis and the SCDA; a copy of an August 28, 2019 letter from Derek Underwood, the SCDA Assistant Commissioner, to John Pendarvis; and a SLED Forensic Services Laboratory Report showing that hemp material contained a total delta-9-tetrahydrocannabinol (THC) percent dry weight of .48 with a +/- of 0.07% as of September 16, 2019. (R. 28-54).

At the October 8, 2019 hearing, counsel for the Respondents and counsel for SLED presented legal arguments only. No affidavits were filed, and no live testimony was presented to the Circuit Court.

Thereafter, on November 8, 2019, Judge Seals issued an Order granting a preliminary injunction thereby "prohibiting the Defendants from entering onto the property under cultivation issued by the Plaintiff for the purpose of destroying the hemp crop planted thereon be left in place pending resolution of the pending litigation." (R. 12). Judge Seals further ordered the Respondents "to continue to exercise reasonable and necessary farming practices to harvest the hemp crop."

(R. 12). He also authorized the Respondents to sell the harvested hemp crop and required the sales proceeds to be held in trust. (R. 12-13).

The Appellant SLED subsequently filed a timely appeal to this Court.

STATEMENT OF FACTS

On May 1, 2019, the SCDA issued a 2019 Hemp Grower License to the Respondent John Pendarvis as authorized by the Hemp Farming Act. By its express language, the license authorized Pendarvis "to engage in the growing of hemp *on such approved growing locations on records with the Department* during the calendar year shown above." (R. 23). (Emphasis added). Pendarvis engaged in hemp cultivation at a site in Dorchester County which is not at issue in this litigation. Pendarvis' license was also utilized to cultivate a hemp crop on two acres in Marion County owned by the Respondent Lawton Drew. (R. 18). Drew did not hold a 2019 Hemp Grower License issued by the SCDA.

Or May 13, 2019, John Pendarvis entered into a South Carolina Hemp Farming Program Participation Agreement ("Participation Agreement") with the SCDA. Section II is titled "Licensed Growing Locations" and provides as follows:

> a. The Permitted Grower:
>
> i. Affirms that living (non-cut) Hemp shall not be grown, handled, or stored at any location other than the locations listed on the Permitted Grower's Application or Application Amendments(s);
>
> ii. Agrees to apply for registration of all growing, handling, and storage location, including GPS coordinates, and receives SCDA approval for those locations prior to having living (non-cut) Hemp on those premises; and

> iii. Acknowledges that Permit Holder shall Submit a Permit Amendment Application and obtain written approval from a representative of SCDA before implementing any change to the license sites stated on the Permitted Grower's Application.

(R. 50).[1] It is undisputed that the tract in Marion County at issue in this litigation was not a "licensed growing location" for Pendarvis. The Respondents made no allegation nor presented any evidence to contest that critical fact. Thus, Pendarvis breached the Participation Agreement by planting and cultivating hemp at the Marion County site.

In early August 2019, Pendarvis did submit an amendment application to the SCDA to obtain "licensed growing location" status for the acreage in Marion County, but that application was not submitted until *after* the property in Marion County had already been planted. (R. 18, 47). By letter dated August 28, 2019, Derek Underwood, an Assistant Commissioner with the SCDA, advised Pendarvis that he was "unlawfully growing Hemp on acreage **that is not on record with the SCDA**. This is a willful violation of the Hemp Farming Program which requires a licensed grower to provide the SCDA with a legal description and global

[1] Section II is in compliance with Section 46-55-20(B)(1) of the Hemp Farming Act, which states in mandatory language that "[a] person applying for a license to cultivate hemp shall provide to the department a legal description and global positioning coordinates sufficient to locate the fields or greenhouses used to cultivate hemp." S.C. Code Ann. § 46-55-20(B)(1).

positioning coordinates of the land on which the licensee **seeks to cultivate hemp**." (R. 47). (Emphasis in original).

Section VIII of the Participation Agreement provides, in pertinent part, as follows:

> a. Permitted Grower acknowledges and consents to the forfeiture or destruction, without compensation, of hemp material:
>
> i. Found to have measured a delta-9 THC content of more than 0.3 percent on a dry weight basis;
>
> ii. Bearing off-label pesticide residue (or believed by SCDA to have had pesticides applied off-label), regardless of the source or cause of contamination; and
>
> iii. Growing in an area that is not licensed by SCDA.

(R. 52). Subsection (a)(iii) provides that the licensee consents to the forfeiture or destruction of hemp plants that are grown at an unlicensed site, including the Marion County site at issue in this litigation.

Additionally, on September 24, 2019, Douglas Robinson, a SLED Forensic Scientist, issued a Forensic Services Laboratory Report regarding hemp material obtained from the Marion County site on September 16, 2019. Those results showed that the hemp material contained a total delta-9-tetrahydrocannabinol (THC) percent dry weight of .48 with a +/- of 0.07%. (R. 48). This was

significant because the Hemp Farming Act defines "hemp" as "the plant Cannabis sativa L, and any part of the plant, including nonsterilized seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with the federally defined THC levels for hemp." S.C. Code Ann. § 46-55-10(8). The term "federally defined THC level for hemp" means "delta-9-tetrahydrocannabinol THC concentration of not more than 0.3 percent on a dry weight basis, or the THC concentration for hemp defined in 7 U.S.C. Section 5940, whichever is greater." S.C. Code Ann. § 46-55-10(7). Thus, the hemp material tested by SLED exceeded the "federally defined THC level for hemp" which thereby qualified as marijuana, which is a Schedule I controlled substance that is illegal to sell and purchase under South Carolina law.

STANDARD OF REVIEW

"The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion." *Levine v. Spartanburg Regional Services District, Inc.*, 367 S.C. 458, 626 S.E.2d 38, 41 (Ct. App. 2005). "An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law." *County of Richland v. Simpkins*, 348 S.C. 664, 560 S.E.2d 902, 904 (Ct. App. 2002).

"Actions for injunctive relief are equitable in nature. In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." *Doe v. South Carolina Medical Malpractice Liability Joint Underwriting Assn.*, 347 S.C. 642, 557 S.E.2d 670, 672 (2001).

ARGUMENTS

The Circuit Court granted a preliminary injunction "prohibiting the Defendants from entering onto the property under cultivation issued by the Plaintiff for the purpose of destroying the hemp crop planted thereon be left in place pending resolution of the pending litigation." (R. 12). While inartfully stated, this ruling permitted the Respondents to *complete* the cultivation, harvest, and sale of the hemp crop. That is evident from the Court's other directives as follows:

> The Court is also aware that the hemp crop has almost reached maturation and will imminently be ready for harvest. As such, the Court orders the Plaintiffs to continue to exercise reasonable and necessary farming practices to harvest the hemp crop. Upon harvest, the Plaintiffs are directed to deposit in to [sic] trust all sale proceeds from the harvest and hold those funds until such time as this litigation is resolved.

(R. 12). Thus, the Circuit Court permitted the Respondents to harvest *and sell* the hemp crop. In so ruling, the Circuit Court committed a reversible error of law in several respects.

I. The Circuit Court erred in granting a preliminary injunction that failed to maintain the status quo or balance the equities of the parties. The Court authorized the Respondents to complete the cultivation as well as the harvest and sale of a hemp crop which, based on evidence presented, had THC levels to qualify as marijuana, a Schedule I controlled substance that is illegal to sell and purchase under South Carolina law.

The South Carolina Supreme Court has stated that "[a]n injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 603 S.E.2d 905, 9078 (2004). "The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it." *Compton v. South Carolina Department of Corrections*, 392 S.C. 361, 709 S.E.2d 639, 642 (2011). The party requesting the preliminary injunction "must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation." *Id.* Thus, the party seeking a preliminary injunction must establish "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co.*, 603 S.E.2d at 908. "The sole object of a temporary injunction is to preserve the subject of the controversy in its condition at the time of the order until opportunity is offered for full and deliberate trial investigation." *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591, 597 (2001).

The preliminary injunction issued by the Circuit Court does not fulfill that basic purpose. The Circuit Court's order *did not maintain the status quo*. Instead, the Circuit Court allowed the Respondents to *complete* the cultivation as well as harvest and sell the hemp crop. SLED presented evidence that the hemp crop at issue exceeded the "federally defined THC level for hemp" which thereby qualified the hemp crop as marijuana, a Schedule I controlled substance that is illegal to sell and purchase under South Carolina law. *See*, S.C. Code Ann. §§ 46-55-10(7), 44-53-190. In effect, the Circuit Court authorized and allowed for the Respondents to cultivate, harvest, and sell marijuana -- all of which is illegal under South Carolina law. The Circuit Court only required the sales proceeds of the marijuana to be placed in trust, but that does not serve the State's interests in enforcing the criminal laws that prohibit the cultivation and sale of marijuana. That did not protect the interests of the State and its citizens. In *Foreman v. Foreman*, 280 S.C. 461, 313 S.E.2d 312 (Ct. App. 1984), this Court explained that "the court of equity must 'balance the equities' between the parties in determining what if any relief to give. The equities on both sides must be taken into account." 313 S.E.2d at 314. The Circuit Court did not do that. The Court did not consider the equities for SLED and the clear public interest to be served by SLED's actions. The Court ultimately allowed for a controlled substance to be cultivated, harvested, and distributed. Thus, with its preliminary injunction, the Circuit Court failed to

prohibit and, in fact, specifically allowed for, the sale of the marijuana. The preliminary injunction clearly did not preserve the status quo.

II. The Circuit Court erred in using its equitable powers to enjoin legitimate and valid law enforcement action where the hemp crop at issue was contraband per se and to which the Respondents have no cognizable property rights which could be "irreparably harmed."

Additionally, the Circuit Court violated a basic premise of equity law that has been recognized since the early 1900s. The Supreme Court has held that "[o]rdinarily a court of equity has no jurisdiction to restrain criminal proceedings." *Cain v. Daly*, 74 S.C. 480, 55 S.E. 110, 112 (1906). The Supreme Court recognized an exception where "the ordinance or statute under which the prosecutions are had is clearly void and irreparable injury to property rights may result," and in that case, "equity may interfere." *Id*. That equitable principle was reaffirmed in *Harvie v. Heise*, 150 S.C. 277, 148 S.E.2d 66 (1929), where the Supreme Court explained that "equity will not interpose to enjoin the enforcement of a valid criminal law, or of prosecution under such law." 148 S.E.2d at 69. In that case, the Supreme Court denied writs of injunction to enjoin law enforcement from seizing and confiscating slot and vending machines.

In contrast to those cases, in the case at bar, the Circuit Court exercised its equitable powers to enjoin SLED from enforcing the Hemp Farming Act and the Controlled Substances Act. That constitutes reversible error. The Respondents

have not alleged, let alone made any showing, that those Acts, or any provisions thereof, are "clearly void." The Circuit Court likewise did not declare or even suggest that the underlying laws are "clearly void" or that the Respondents had made any showing that those Acts, or any provisions thereof, are "clearly void."

Moreover, the Respondents have not shown an "irreparable injury to property rights." South Carolina law clearly provides that marijuana and other controlled substances are contraband per se. *See*, *Mims Amusement Co. v. South Carolina Law Enforcement Division*, 365 S.C. 141, 621 S.E.2d 344, 346 (2005) (describing illegal drugs as contraband per se). Thus, if the hemp crop exceeds the "federally defined THC level for hemp," then clearly the crop is considered marijuana which is contraband per se. However, even if the hemp crop did not exceed that THC threshold, the evidence is nonetheless undisputed that the Respondents had not been issued a license for the cultivation of hemp at the site in Marion County. Thus, as the Attorney General has opined, the hemp crop qualifies as contraband per se under that reasoning as well. *See*, S.C. Atty. Gen. Op., 2019 WL 3855186 (August 8, 2019) ("possession and handling of unprocessed or raw hemp material without a license is contraband per se and subject to seizure"). The State Supreme Court has explained that contraband per se includes "things that may be forfeited because they are illegal to possess and not susceptible of ownership." *Mims*, 621 S.E.2d at 348. If contraband per se cannot be possessed or

owned, then it does not constitute "property" entitled to any protection or safeguards under the Due Process Clauses of the South Carolina and United States Constitutions. *See*, *United States v. Farrell*, 606 F.2d 1341, 1344 (D.C. Cir. 1979) (per se contraband may be summarily forfeited without any due process protections); *Cooper v. City of Greenwood*, 904 F.2d 302, 305 (5th Cir. 1990) ("[c]ourts will not entertain a claim contesting the confiscation of contraband *per se* because one cannot have a property right in that which is not subject to legal possession"). *See also*, *United States v. Jeffers*, 342 U.S. 48, 54 (1951); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). Consequently, the Respondents cannot claim "property rights" with respect to the hemp crop at issue.

The Circuit Court thus erred in using its equitable powers to enjoin legitimate and valid law enforcement action. Further, the Court erred in finding that the Respondents' violations of state law -- both the Hemp Farming Act and the Controlled Substances Act -- constitute "irreparable harm" sufficient to support preliminary injunctive relief.

III. The Circuit Court erred in granting a preliminary injunction that was unsupported by the facts as pled by the Respondents in their Complaint.

Under South Carolina law, "[a] plaintiff's entitlement to an injunction *requires the complaint to allege facts sufficient to constitute a cause of action for an injunction* while establishing that an injunction is reasonably necessary to

protect the legal rights of the plaintiff during the litigation." *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 352 S.C. 408, 574 S.E.2d 228, 232 (Ct. App. 2002). (Emphasis added). The Complaint filed by the Respondents, however, provides no factual support for the preliminary injunction that was issued by the Circuit Court. The Complaint alleges only as follows:

> 7. On May I, 2019, Plaintiff John Pendarvis was issued a Hemp Grower License from Defendant SCDA. *See* Exhibit A.
>
> 8. On August 10, 2019, Plaintiff John Pendarvis filed a Hemp Farming Program Acreage Amendment Application with Defendant SCDA to add two acres of crop in Marion County.
>
> 9. That the Plaintiff Pendarvis did plant two (2) acres of hemp crop in Marion County on property which is owned by Plaintiff Drew.
>
> 10. That the crop has been grown and cultivated and is nearing maturing for harvest.
>
> 11. That the crop grown on the property of Plaintiff Drew by Plaintiff Pendarvis has great value and that a loss of the crop at this time would cause enormous financial loss to the Plaintiffs.
>
> 12. On September 25, 2019, Plaintiffs were informed by Defendant SLED that the two (2) acres of crop located in Marion County would be destroyed in the next few days.

(R. 18). That is the extent of the "facts" as pled and verified by the Respondents in their Complaint.

Importantly, the Complaint does not allege that the hemp crop was less than the "federally defined THC level for hemp." Also, the Complaint fails to plead facts to show that the Respondents complied with the terms of the Participation Agreement entered between Pendarvis and the SCDA. Specifically, the Complaint does not allege that the Respondents received authorization from the SCDA to grow hemp at the Marion County site as required by the Participation Agreement and state law. Moreover, while the Respondents allege that Pendarvis did file an application to grow hemp at the Marion County site with the SCDA, the Respondents do not allege that the application was granted *before* the hemp crop was planted in Marion County as is also required under the terms of the Participation Agreement. In fact, it is undisputed that the Respondents never received authorization from the SCDA to plant hemp in Marion County. Thus, the facts as alleged by the Respondents, even if proven true, do not provide the evidentiary support for the preliminary injunction that was issued. For this additional reason, the issuance of the preliminary injunction was in error and should be reversed.

IV. The Circuit Court erred in refusing to enforce Section VIII of the South Carolina Hemp Farming Program Participation Agreement and refusing to allow for the forfeiture or destruction of the Respondents' illegal hemp crop to proceed, a remedy to which John Pendarvis had expressly consented.

The Participation Agreement as entered between the Respondent Pendarvis and the SCDA includes Section VIII which is titled "Plant Destruction." Section VIII states in pertinent part:

> a. Permitted Grower acknowledges and consents to the forfeiture or destruction, without compensation, of hemp material:
>
> i. Found to have a measured delta-9 THC content of more than 0.3 percent on a dry weight basis;
>
> ii. Bearing off-label pesticide residues (or believed by SCDA to have had pesticides applied off-label), regardless of the source or the cause of contamination; and
>
> iii. Growing in an area that is not licensed by SCDA.

(R. 52). The SCDA determined that Pendarvis was in violation of provision (iii), as stated above. The SCDA advised Pendarvis that he was "unlawfully growing Hemp on acreage **that is not on record with the SCDA**. This is a willful violation of the Hemp Farming Program which requires a licensed grower to provide the SCDA with a legal description and global positioning coordinates of the land on which the licensee **seeks to cultivate hemp**." (R. 47). (Emphasis in

original).

As discussed above, the Respondents did not make factual allegations in their Complaint nor present any evidence to the Circuit Court to dispute this stated fact. Pendarvis was never authorized by the SCDA to grow hemp in Marion County.[2] He did submit an amendment application to add the acreage in Marion County, but that was not submitted until *after* the property in Marion County had already been planted. That plainly violated the terms of the Participation Agreement, specifically Section II titled "Licensed Growing Locations," which required that "Permit Holder shall Submit a Permit Amendment Application and obtain written approval from a representative of SCDA *before implementing any change to the license sites* stated on the Permitted Grower's Application." (R. 50). (Emphasis added). Pendarvis also violated his agreement "to apply for registration of all growing, handling, and storage location[s], including GPS coordinates, *and receive SCDA approval for those locations prior to having living (non-cut) Hemp on those premises*." (R. 50). (Emphasis added). Thus, it is undisputed that Pendarvis violated these provisions by planting the Marion County site, which had not been authorized by the SCDA. His submittal of an amendment application

[2] The Respondent Lawton Drew was not so authorized either. Drew was not a licensed grower under the Hemp Farming Act and, thus, has no rights to the hemp crop at issue. The Act defines "licensee" as "an individual or business entity possessing a license issued by the department under the authority of this chapter to cultivate, handle, or possess hemp." S.C. Code Ann. § 46-55-10(10). On this basis alone, the preliminary injunction should not have been entered in Drew's favor.

after the site had been planted was untimely and did not comply with Section II requirements. In short, the Circuit Court erroneously granted a preliminary injunction where the undisputed evidence demonstrated that Pendarvis had failed to comply with the terms of the Participation Agreement.

Importantly, Pendarvis did expressly consent to the forfeiture or destruction of any hemp crop "[g]rowing in an area that is not licensed by SCDA." (R. 52). Again, the evidence shows that the hemp crop being grown in Marion County was not at a location licensed by the SCDA. The Respondents do not and cannot dispute that fact. Nonetheless, the Circuit Court issued a preliminary injunction that disregarded that express contract term, and in fact, allowed the Respondents to complete the cultivation, harvest, and sale of a crop that was in clear violation of the Participation Agreement. In short, the preliminary injunction bars the destruction of the crop by SLED -- the very remedy to which Pendarvis had consented.

The Circuit Court reasoned that the Respondents enjoy due process rights to contest the SCDA's decision and the destruction of the illegal crop. That ruling is erroneous in two key respects.

First, as discussed above, due process safeguards apply only to cognizable property rights. However, it is well settled that contraband per se is not protected property under the Due Process Clauses of the South Carolina and United States

Constitutions. Therefore, the hemp crop, which was indisputably in violation of the terms of the Participation Agreement, was contraband per se, and the Respondents have no due process rights with respect to that crop.[3]

Second, while the Participation Agreement provides for the consent of Pendarvis to forfeit or destroy any hemp crop "[g]rowing in an area that is not licensed by SCDA," the Circuit Court chose not to enforce that contractual provision on the premise that the waiver of due process rights was not "clear." (R. 10-11). As support, the Circuit Court relied *solely* on the Fourth Circuit case of *Bowens v. North Carolina Department of Human Resources*, 710 F.2d 1015 (4th Cir. 1983), which is inapposite or at least easily distinguishable. In *Bowens*, a physician brought an action pursuant to 42 U.S.C. § 1983 alleging that he was suspended from a Medicaid program without procedural due process. As one of its defenses, the state agency argued that a settlement agreement reached with the physician to resolve an administrative proceeding was a contractual waiver of his constitutional rights. The Fourth Circuit rejected that argument. The Court first acknowledged that "constitutional rights are subject to contractual waiver," but concluded that "the waiver must, at the very least, be clear." 710 F.2d at 1018. The Court found that the waiver was not clear because the settlement agreement

[3] To reiterate, the Respondent Lawton Drew has no protected property rights in the hemp crop because he was not even a licensed grower under the Hemp Farming Act. The preliminary injunction should never have been issued in Drew's favor.

did not include any provision relinquishing the physician's constitutional rights. *Id*. Of course, in the case at bar, the Participation Agreement contains Section VIII whereby Pendarvis expressly consents to the forfeiture and destruction of an illegal or unlicensed crop.

The United States Supreme Court case of *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174 (1972), is controlling on this issue. The Supreme Court identified the question before it as follows: "in a context of contract waiver, before suit has been filed, *before any dispute has arisen* and whereby a party gives up in advance his constitutional right to defend any suit by the other, *to notice and the opportunity to be heard*, no matter what defenses he may have, and to be represented by counsel of his own choice." 405 U.S. at 184. (Emphasis added). The Supreme Court found that such a contractual waiver of constitutional rights, including due process rights, was constitutional. The Court recognized that "[t]he due process rights to notice and hearing prior to a civil judgment are subject to waiver." 405 U.S. at 185. However, the contractual waiver must be "voluntary, knowing, and intelligently made." *Id*. In *Overmyer*, the issue involved a cognovit clause in a note where the debtor authorized a confession of judgment to the holder of the note based on the default in payments on the note. In upholding the contractual waiver of due process rights, the Supreme Court found that "Overmyer, in its execution and delivery to Frick of the second installment note containing the

cognovit provision, voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences." 405 U.S. at 187.

In the present case, the Respondents never alleged in their Complaint nor presented any evidence that Pendarvis did not voluntarily, intelligently, and knowingly enter into the Participation Agreement, including Section VIII titled "Plant Destruction." In fact, in their Complaint, the Respondents do not allege that Section VIII is unenforceable for any reason, including a lack of proper consent.[4] Yet, despite no such allegation in the Complaint, the Circuit Court found that "[n]owhere in the participation agreement does it expressly state that licensees waive their rights to due process and judicial reviews" and refused to uphold the provisions of Section VIII. (R. 10-11). The Circuit Court thus erred in granting the preliminary injunction on an unpled and unsupported theory. The ruling is also erroneous on its face. Section VIII of the Participation Agreement clearly provides for consent to the "forfeiture or destruction" of the "hemp material." That language and its legal implications are just as "clear" -- and probably much more so -- than the cognovit clause held to be enforceable by the United States Supreme Court in *Overmyer*. The Circuit Court thus erred in refusing to enforce Section

[4] In *D&D Leasing v. David Lipson, Ph.D. P.A.*, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991), this Court ruled that unenforceability of a contractual provision is an affirmative defense. Thus, if unenforceability is an affirmative defense when asserted by a defendant, it is certainly a theory that needs to be affirmatively pled in a complaint or petition for relief when asserted by a plaintiff.

VIII of the Participation Agreement and allowing for the destruction of the Respondents' illegal hemp crop to proceed.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Law Enforcement Division respectfully requests that the Court reverse the Order issued by Circuit Court Judge William H. Seals, Jr. and dissolve the preliminary injunction as entered.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that the Final Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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