THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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

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SC Court of Appeals

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.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE

On September 26, 2019, the Respondents John Pendarvis ("Pendarvis") and Lawton Drew ("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"). (Petition/Complaint).

In those filings, the Respondents alleged that Pendarvis was issued a Hemp Grower License by SCDA on May 1, 2019; that he filed a Hemp Farming Program Acreage Amendment Application with SCDA to add two acres of crop in Marion County on August 10, 2019; and that he planted two (2) acres of hemp crop in Marion County on property owned by Drew. (R. p. 18). On September 25, 2019, the Respondents were informed by SLED that the two (2) acres of crop

located in Marion County would be destroyed in the next few days and that the crop had great value and a loss of the crop would cause enormous financial loss to the Respondents. (R. p. 18). The Respondents alleged that the destruction of the crop through official action taken by SLED in contravention of state law and/or due process would cause irreparable harm and prejudice for which there was no adequate remedy at law. Accordingly, the Petition sought a temporary restraining order prohibiting SLED and SCDA from destroying the Marion County crops. (R. p. 19).

Via order dated September 26, 2019, the Marion County Court of Common Pleas issued an Ex Parte Temporary Restraining Order and Preliminary Injunction finding that the Respondents "are likely to suffer immediate and irreparable loss or damage if [Defendants] proceed with destruction of Plaintiff's hemp crop located in Marion County without the benefit of due process and judicial review guaranteed to Plaintiff's by the South Carolina Constitution." That order went on to find "that the [Defendants] will not be harmed by the granting of this TRO and Preliminary Injunction pending a hearing on the merits," before ordering that "[Defendants] are hereby temporarily restrained and preliminarily enjoined from entering onto property under cultivation by [Plaintiffs] for the purpose of destroying the hemp crop planted thereon." (R. p. 15).

A hearing on the matter was scheduled for October 8, 2019. SLED appeared via counsel on October 4, 2019 and subsequently filed a Memorandum of Law on October 7, 2019. Respondents filed a Supplemental Memorandum in Support on October 8, 2019. The hearing was held with the trial court considering the filings by the parties and argument by counsels before taking the matter under advisement for further consideration.

On November 8, 2019, the trial court issued an Order finding it would leave the temporary restraining order (TRO) and preliminary injunction issued via the September 26, 2019 order in place pending resolution of the pending litigation, that the Respondents continue to "exercise reasonable and necessary farming practices to harvest the hemp crop" and ordering that any sale proceeds of the harvest of the hemp crop be deposited in trust and held until such time as the litigation was resolved. (R. pp. 12-13). In making these rulings, trial court specifically noted that "dispute at the heart of this issue is one of due process" (R. p. 3) and that "an injunction is the only way to protect the [Plaintiffs'] rights at this stage, while they exercise their due process rights." (R. p. 12).

Appellant SLED filed this appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING A PRELIMINARY INJUNCTION TO PROTECT THE RESPONDENTS' DUE PROCESS RIGHTS.

A. The standard of review is correction of an abuse of discretion.

"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, 625 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).

To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002).

B. The evidence presented to the trial court did not establish by a preponderance of the evidence that the Respondents' hemp crop was a Schedule I controlled substance and therefore the granting of the TRO was a reasonable finding to maintain the status quo given the facts and circumstances presented to the trial court.

SLED argues that trial court's order failed to fulfill the basic purpose of a preliminary injunction. "The Circuit Court's order *did not maintain the status quo*." (Initial Brief, p. 12).

As SLED's own brief points out, there are **two** basic purposes of a preliminary injunction. "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 Dept. of Corrections, 392 S.C. 361, 709 S.E.2d 639, 642 (2011). (Initial Brief, p. 11, emphasis added).

Taking that second basic purpose first, the trial court specifically found that the preliminary injunction was necessary to prevent irreparable harm to the party that requested it: the Respondents.

> The court is aware that [Defendant] SLED has already confiscated and destroyed some of [Plaintiff] Pendarvis' crop located in another county. Certainly, both [Defendants] will take the position that the participation agreement prohibits the [Plaintiffs] from being entitled to compensation for crops lawfully confiscated and destroyed. *See* Section VIII(a) of the agreement. Thus, if the crop is confiscated and destroyed, the Plaintiffs will face significant legal hurdles in seeking remedy.

(R. pp. 7-8).

SLED argues that the trial court was required to "'balance the equities' between the parties in determining what if any relief to give" and that the "equities of both sides must be

taken into account." (Initial Brief, p. 12, citing to Foreman v. Foreman, 280 S.C. 461, 313 S.E.2d 312, 314 (Ct. App. 1984).

SLED claims the trial court "did not do that," arguing:

> 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.

(Initial Brief, pp. 12-13).

This argument falsely relies on the idea that the hemp crop in question was a controlled substance.

> 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.

(Initial Brief, p. 12)

The burden a party seeking an injunction has is a preponderance of the evidence. Wellborn v. Page, 247 S.C. 554, 563, 148 S.E.2d 375, 379 (1966).

In reality, the evidence presented to the trial court did **not** establish that the hemp crop was a Schedule I controlled substance. The trial court was actually presented with conflicting evidence about whether the hemp crop at issue exceeded the "federally defined THC level for hemp."

SLED did produce a SLED Drug Analysis report, claiming in their written response that it "specifically and unequivocally indicates that the plant material on this field contained Total Delta-9-Tetrahydrocannabinol (THC) percent dry weight of **.48** with a +/- of .07% as of September 16, 2019." (R. p. 33).[1] However, the Respondents produced their own analysis showing the opposite:

> Well, here's the problem with that finding, (a) we've got a test that we included as Exhibit C to our Reply that was filed today which shows the analysis date was September 27, 2019 **and it shows a total THC which would read higher. That ain't just the delta-9, it's got total THC of 0.26 which is well below the legal limit of 0.3**. Now, at a minimum what we're presented her with now – and by the way, the Department of Agriculture recognizes the fact that these hemp growers can test the material themselves, it's laid out in the agreement, and it lays out for them what they're supposed to do. They're supposed to take four plants and send to an independent lab.[2] The lab's got to be ISO certified. Interestingly enough, it appears from the lab report that SLED's given us that they took two plants and submitted it. So, SLED's note [*sic*] even following the – and here's where a big problem is, Judge, there is no regulations. The Department of Agriculture is supposed to regulate this. We looked, the only – we found one example within all of the Department of Ag's regulations and I mean I guess it's possible we missed it but we could only find one example of them even referencing hemp in their regulations and it was like talking about how to do weights and measurements. It had nothing to do with this hemp program. So they're really kind of making it up as they go along. **But, we've got two tests now that show different readings**.

(R. p. 81, line 25 – R. p. 82, line 24, emphasis added).

In addition to offering a differing test result and showing how SLED had not even followed the testing procedure as outlined in the Hemp Program agreement, the Respondents

[1] It should be noted that October 7, 2019 was the first time Respondents were ever noticed of any allegation that the hemp crop was "too hot" (above the legal limit). (*See* R. p. 78, lines 11-19 and (R. p. 55).

[2] The participation agreement actually requires the sampling of four (4) plants per grow to be tested by "an independent testing laboratory" for delta-9 concentration "not more than thirty (30) days prior to harvest." (R. p. 56).

also pointed out to the trial court that the Respondents acknowledge the fluctuating nature of testing for delta-9 in industrial hemp does not necessarily mean the plants testing "too hot" are "illegal" and barred from being processed as hemp.

> They also acknowledge this problem with the fickle nature of the delta-9 measurement in hemp, industrial hemp. And they acknowledge it through the fact that **they allow that licensed growers, even if they have hemp that measures about [*sic*] the 0.3, that they can still collect and process hemp all the way up to 1.0 percent**. They just have to recondition it, which to my very naïve and brand new understanding of what that means is they mix in, I guess, the flower and the bud with the stalks and the stems and they grind it all up and it kind of spreads it out more.

(R. p. 83, lines 2-11, emphasis added).

It should be noted that despite the claim in their memo that their report "specifically and unequivocally" established that the hemp crop was marijuana, SLED conceded at the hearing that argument was fatally flawed:

> **I'm not going to get into the weight issue because Patrick's right**. I learned yesterday via talking to the investigator that yeah, I might test these four plants and they may be out of compliance bit [*sic*] these two plants might be in compliance. Our readings do show that the samples that were tested were too hot. They had too much THC in it to be legal. Patrick had another one tested and it came in within the bound and I understand all that. **That's one of the ways they could probably challenge all of this is on the samples and whether the THC is too high or too low**.

(R. p. 91, lines 8 – 17, emphasis added).

Once that argument was conceded, to the extent any "balancing of the equities" to the parties that was required, the trial court performed such by requiring the proceeds of any sale of the hemp crop be deposited into trust and held pending resolution of the litigation. As the Respondents argued at the hearing:

> ...the only thing going to happen to them is they might make money out of this because if we harvest it we agree any money from the proceeds from the harvest would have to be kept in trust and not disbursed to anyone pending adjudication of this issue on

> the merits. If the plaintiffs wind up being unsuccessful the State's going to get that money. They're going to come out ahead. As they stand now, they're going to have to pay somebody to go out there. They're going to have to pay for the fuel to take a tractor out there and bush hog these crops.

(R. p. 84, line 23 – R. p. 85, line 7).

As to the other basic purpose of a preliminary injunction as outlined in Compton, the order issued by the trial court was the sole way of preserving the status quo. The trial court noted in its order that "the hemp crop has almost reached maturation and will imminently be ready for harvest." By then directing that the Respondents "continue to exercise reasonable and necessary farming practices to harvest the hemp crop," the trial court was acknowledging common knowledge a circuit court in Marion County, South Carolina is well within its discretion to consider: a matured crop left in the field will surely rot. (R. p. 12). To not allow the crop to be harvested would merely be destruction by other means, and impose upon the Respondents the same irreparable harm from which they had sought relief.

The trial court's order was merely the fairest and most appropriate way to maintain the status quo while balancing the equities amongst the parties.

C. The trial court did not err in finding that the Respondents had a property right that would suffer irreparable injury if the TRO and preliminary injunction were not granted.

SLED argues that the Respondents have not shown an "irreparable injury to property rights" because "South Carolina law clearly provides that marijuana and other controlled substances are contraband per se." (Initial Brief, p. 14).

As noted above, the argument that the hemp crop was "specifically and unequivocally" established to be in violation of "federally defined THC level for hemp" is so fatally flawed, it was conceded at the hearing before the trial court. Nevertheless, SLED renews this argument on appeal by arguing:

> However, even if the hemp crop did not exceed that THC threshold, the evidence is undisputed that the Respondents had not been issued a license for 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 of unprocessed or raw hemp material without a license is contraband per se and subject to seizure").

(Initial Brief, p. 14).

As with the THC level argument, SLED's position again ignores the fact that there is an unsettled question as to whether or not the Respondents' crop was "contraband per se" due to the location issue. That question arises from the fact that it is undisputed that Respondent Pendarvis sought to amend his location and that SCAG specifically allows for such amendments to take place.

One need look no further than the very Attorney General opinion cited by SLED to see that the question of whether or not the hemp crop is "contraband per se" is not yet answered, as the Attorney General opined it cannot be answered until the Respondents receive a hearing on the matter.

That opinion was specifically requested by SLED's general counsel and was issued with a specific note that it "be read in the context" of a July 10, 2019 Attorney General Opinion, an opinion which clearly contemplated a similar "contraband per se" argument as such is referenced in the quoted section of that previous Attorney General's opinion: "A court is likely to conclude possession and handling of unprocessed or raw hemp material without a license is contraband per se and subject to seizure." (R. p. 67).

Despite that finding in the previous opinion, the Attorney General still opined that:

> Of course, due process would still require an "opportunity for an innocent owner to come forward and show, if he can, why the res should not be forfeited and disposed of as provided by law." *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 197,

> 525 S.E.2d 872, 883 (2000) (citing *Moore v. Timmerman*, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981)). Given the absence of any legislative direction in the Hemp Farming Act, **we advise that the prudent course of action would be to provide that opportunity in a hearing**. We hope that this also will lead to judicial clarification of some of the many questions created as a result of the Hemp Farming Act.

(R. p. 70, emphasis added)

The trial court specifically noted the same due process concerns as the Attorney General opinion cited by the Appellants, quoting that Attorney General opinion in the order after discussing the specific requirements demanded by the South Carolina Constitution for due process when the State seeks to confiscate property:

> In conclusion, it is the opinion of this Office that in the absence of legislative direction, SLED should seek judicial authorization for the seizure of illegally-grown hemp in order to ensure that the grower receives due process consistent with the Constitutions of the United States and the State of South Carolina. *See, e.g., State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). We advise that this authorization be sought with notice to the grower and an opportunity for them to be heard in a hearing in an abundance of caution. *See id.*

(R. p. 11, citing to R. p. 70).

The trial court noted that while Attorney General opinions are not binding, South Carolina appellate courts have instructed that "they should not be disregarded without cogent reason" and found "no cogent reason to disregard the reasoning set forth by the South Carolina Attorney General opinion issued at [Respondent's] request in this matter." (R. p. 11).

In short, the very opinion cited by the Appellants finds that the action taken by the trial court in this matter, was the "prudent course of action" since it was the only avenue by which to afford the Appellants an opportunity for a hearing on the matter and protect their due process rights.

D. The preliminary injunction was supported by the facts as pled in the Complaint.

SLED argues the complaint filed "provide no factual support for the preliminary injunction." (Initial Brief, p. 16). SLED's argument in this regard is that a) the Complaint "does not allege that the hemp crop was less than the "federally defined THC level for hemp," and b) that it does not allege "that the Respondents received authorization from the SCDA to grow hemp at the Marion County site…"

Appellant admits that Respondents did allege that Pendarvis "filed an application to grow hemp at the Marion County site with the SCDA." (Initial Brief, p. 17). That is enough notice to satisfy South Carolina's notice pleading requirement. The mere fact that Appellant argues the Respondents' failure to allege the plants were not over the "federally defined THC level for hemp" makes the complaint insufficient is not credible.

First, Respondents clearly pled that they planted a "hemp" crop, not marijuana. (R. p. 18, ¶9). That allegation alone is enough to satisfy the liberal notice pleading requirements under South Carolina law. South Carolina is a notice pleading state, wherein allegations are merely to be simple and direct, with all pleadings to be construed as to do substantial justice to all the parties. Unisun Ins. v. Hawkins, 342 S.C. 537, 541-542, 537 S.E.2d 559, 561-562 (Ct. App. 2000).

Second, it is uncontested that Respondents did not have any notice of the alleged THC level issue until the Appellant's filed their *Response in Opposition*. (*See* R. p. 81, lines 11-19 and R. p. 55). How on earth could the Respondents have known the need to more specifically allege something they did not know was in dispute?[3]

[3] As noted previously in this brief, the THC level argument was so fatally flawed, the Appellant abandoned it before the trial court.

As the trial court found:

> Whether the [Respondents] provided Defendant SCDA with enough information to satisfy S.C. Code §46-55-20(B)(1) is a question for which the [Respondents] have a right to due process. Whether the [Respondents] plants are "too hot" is a question for which the [Respondents] have a right to due process. Whether the [Respondents'] acted willfully or negligently is a question for which the [Respondents] have a right to due process.
>
> Accordingly, the Court finds that an injunction is the only way to protect the [Respondents'] rights at this stage, while they exercise their due process rights.

(R. p. 12)

The Respondents' complaint sufficiently met the notice pleading requirement under South Carolina law and supported the preliminary injunction granted by the trial court.

CONCLUSION

For the reasons stated above, this Court should affirm the trial court's Order granting the preliminary injunction and allow the Respondents to continue to pursue their due process rights in this matter.

Respectfully submitted,

September 4, 2020

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