

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
COURT OF COMMON PLEAS

The Honorable Ernest F. Kinard, Jr., Circuit Court Judge

Opinion No. 4752
(S. C. Ct. App. Filed October 13, 2010)

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S.C. Supreme Court

James David Farmer..... Respondent,

v.

Florence County Sheriff's Office..... Petitioner

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James David Farmer,

Respondent/Appellant,

v.

Florence County Sheriff's
Office,

Appellant/Respondent.

Appeal From Florence County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 4752
Heard April 13, 2010 – Filed October 13, 2010

AFFIRMED IN PART AND REMANDED

James C. Rushton, III, of Florence, for
Appellant/Respondent.

Patrick J. McLaughlin, of Florence, for
Respondent/Appellant.

THOMAS, J.: This is a cross-appeal of an order in a civil action for damages allegedly arising from the retention by the Florence County Sheriff's Office (the Sheriff's Office) of inventory from James David Farmer's retail business pursuant to a warrant asserting that Farmer was selling counterfeit

merchandise. The trial judge ordered the Sheriff's Office to return to Farmer the seized inventory items that were not involved in any resulting criminal conviction and, based on that ruling, refused to allow Farmer to proceed on his claims for negligence, conversion, and civil conspiracy. In the primary appeal, the Sheriff's Office argues the trial judge erred in ordering the return of the contraband. In his cross-appeal, Farmer argues he should have been allowed to pursue several private causes of action for damages against the Sheriff's Office. We affirm in part and remand.

FACTS AND PROCEDURAL HISTORY

Farmer was the sole proprietor of "Top Gear Clothing," a retail business in Florence, South Carolina. On August 30, 2007, pursuant to a warrant issued the same day, agents of the Sheriff's Office initiated a raid of Top Gear Clothing, seizing Farmer's inventory of clothing, footwear, movie DVDs and music CDs.

Farmer was subsequently charged with trafficking in counterfeit goods in violation of section 39-15-1190 of the South Carolina Code (Supp. 2009) and distribution of pirated recordings in violation of sections 16-11-930 and 16-11-940 (2003). On January 23, 2008, Farmer negotiated a plea on the charge concerning the alleged distribution of pirated recordings. The charges concerning the counterfeit goods were dismissed.

By letter dated February 5, 2008, Farmer's attorney demanded that the Sheriff's Office return the clothing and footwear seized from Top Gear Clothing, noting these items were not the subject of any guilty plea. After receiving no response, counsel sent another letter on March 19, 2008, informing the Sheriff's Office he was making a "final demand" on Farmer's behalf for the return of the items referenced in the previous letter. Counsel further advised that if the items in question were not returned within ten days of the date of the letter, a lawsuit would follow.

On May 30, 2008, Farmer filed his summons and complaint in the present action against the Sheriff's Office, alleging various causes of action arising from the allegedly wrongful retention of his inventory, namely, (1) negligence per se, (2) general negligence, (3) conversion, and (4) civil

conspiracy. In his prayer for relief, Farmer asserted he was entitled to actual and consequential damages, special damages, lost profits and interest, and punitive damages. In its answer, the Sheriff's Office denied Farmer was entitled to the relief he requested and also asserted (1) Farmer failed to state a cause of action upon which relief could be granted, (2) it was entitled to immunity under the South Carolina Tort Claims Act, (3) Farmer failed to exhaust his administrative remedies, and (4) Farmer's negligence exceeded its own negligence. The Sheriff's Office admitted that no forfeiture proceedings had been filed in the matter.

On June 24, 2008, Farmer moved for summary judgment, arguing (1) the Sheriff's Office had no legal basis to continue to deny him the return of his inventory and (2) he was entitled to the immediate return of his property as well as special damages. On August 20, 2008, the Sheriff's Office filed a notice and cross-motion for summary judgment. Accompanying the motion was a memorandum of law in opposition to Farmer's motion and in support of the cross-motion. In its memorandum, the Sheriff's Office argued (1) the applicable statute did not provide Farmer with a private right of action, (2) Farmer failed to avail himself of the means provided in the statute to recover his inventory, and (3) the South Carolina Tort Claims Act prevented Farmer from proceeding on his claim.

The trial judge heard both motions on September 2, 2008, and on September 26, 2008, issued the appealed order. In the order, the trial judge ruled Farmer was "entitled to the return of his inventory seized not related to his criminal convictions (i.e. clothes and shoes)" within ten days of the receipt of the order by the Sheriff's Office; however, the trial judge also cautioned Farmer that "if said items are, in fact counterfeit and he attempts to traffic such items after their return, he will, again, be subject to criminal charges." Based on this disposition of the matter, the trial judge further refused to grant a damages hearing, noting this decision was subject to the condition "that the items are returned in substantially the same condition as when seized." Acknowledging his order was "obviously a reasonable compromise," the trial judge purported to dismiss Farmer's private causes of action. He qualified this ruling, however, by suggesting Farmer should pursue redress under the South Carolina Tort Claims Act, which he did not consider in disposing of the cross-motions, and explaining that "[t]he

Sheriff's Office simply cannot hold [Farmer's] property unless it is being held for use in a criminal proceeding." Both the Sheriff's Office and Farmer appeal.

ISSUES

- I. Did the trial judge err in ordering the Sheriff's Office to return the confiscated items to Farmer? (Sheriff's Office appeal)
- II. Did the trial judge err in holding that Farmer's remedy was limited to recovery of his property and that Farmer did not have a private right of action against the Sheriff's Office for failing to return it? (Farmer's appeal)

STANDARD OF REVIEW

Both the primary appeal and the cross-appeal involve the interpretation of sections 39-15-1190 and 39-15-1195 of the South Carolina Code (Supp. 2009), which prohibit the sale of counterfeit goods, state the penalties for this offense, and set procedures for the seizure of counterfeit goods and institution of forfeiture proceedings by law enforcement agencies. Furthermore, although the matter came before the trial court on cross-motions for summary judgment, the facts are not in dispute; therefore, both issues to be decided in this appeal are to be reviewed de novo. See Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

LAW/ANALYSIS

I. Return of the Property (Sheriff's Office Appeal)

The Sheriff's Office argues the trial judge erred in ordering it to return the confiscated clothing and footwear to Farmer, contending it should have been allowed to retain possession of these items because (1) law enforcement agencies may hold allegedly counterfeit goods for purposes other than use in criminal proceedings, (2) inquiry into law enforcement's motives is not proper in a hearing for the return of the confiscated items, and (3) Farmer did

not follow the statutory procedure available to him to obtain a forfeiture hearing.¹ We disagree.

The confiscated articles at issue in this appeal were seized pursuant to sections 39-15-1190 and 39-15-1195 of the South Carolina Code (Supp. 2009). Section 39-15-1190(B)(1) prohibits a person from "knowingly and wil[l]fully transport[ing], transfer[ring], distribut[ing], sell[ing], or otherwise dispos[ing] of" an item with a counterfeit mark. Section 39-15-1195(A)(1) authorizes the "seizure by and forfeiture to any law enforcement agency" of any property upon the violation of section 39-15-1190, and other paragraphs within this statute describe procedures that a law enforcement agency must observe for storing seized items in its custody. If a seizure is made "without process" pursuant to section 39-15-1195(B),² "proceedings pursuant to Section 44-53-530 regarding forfeiture must be instituted within a reasonable time." S.C. Code Ann. § 39-15-1195(C) (Supp. 2009) (emphasis added).

Although section 39-15-1195 does not indicate who is to institute a forfeiture proceeding, section 44-53-530 of the South Carolina Code (2002 & Supp. 2009), which is referenced within paragraph (C) of the statute, describes the procedures required to finalize a forfeiture of property seized in connection with the enforcement of laws regulating controlled substances. These procedures include a petition by the Attorney General, the circuit solicitor, or the appropriate designee, that identifies the seized property and

¹ During oral argument before this court, counsel for the Sheriff's Office asserted the trial judge should have set the matter for a forfeiture hearing. Because, however, the Sheriff's Office made no argument to this effect in its appellant's brief, we do not consider whether it is entitled to this relief. See Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief.").

² Section 39-15-1195(B) allows seizure without process under various circumstances, among them, "if the seizure is incident to . . . a search pursuant to a search warrant." S.C. Code Ann. § 39-15-1195(B)(1) (Supp. 2009).

all persons known by the petitioner to have interests in it. Farmer, then, could not have invoked section 39-15-1195(C) to obtain a forfeiture hearing.

Section 39-15-1195(C) also mandates that, when allegedly counterfeit property is seized pursuant to a warrant, "proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time." We believe the South Carolina General Assembly included this requirement in recognition of due process concerns arising when the government deprives a claimant of the use of his or her property. See United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency, 461 U.S. 555, 564 (1983) ("[T]he Fifth Amendment claim here—which challenges only the length of time between the seizure and the initiation of the forfeiture trial—mirrors the concern of undue delay encompassed in the right to a speedy trial."). Delays between the seizure and the institution of forfeiture proceedings must be reasonable, and unjustifiable delays have been, on due process grounds, recognized as reason to bar the government from further proceedings and to order the return of the seized property. United States v. \$62,972 in United States Currency, 539 F. Supp. 586, 593 (D. Nev. 1982).

As the trial judge observed, the items in dispute were not the subject of any criminal conviction and no hearing had taken place to determine whether or not they were in violation of section 39-15-1190. The Sheriff's Office has not provided any concrete reasons to justify its refusal to return Farmer's merchandise or any meaningful argument that its delay in instituting forfeiture proceedings was justified; indeed, it has even asserted that law enforcement need not provide any reason whatsoever to hold lawfully seized goods beyond the fact that a warrant had been issued for the seizure. In making these arguments, however, the Sheriff's Office appears to disregard the recognized purpose of a forfeiture hearing, which is "to confirm the state had probable cause to seize the property in question." Gowdy v. Gibson, 381 S.C. 225, 229, 672 S.E.2d 794, 796 (Ct. App. 2008) (emphasis added) (citing Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001, 322 S.C. 127, 131, 470 S.E.2d 373, 376 (1996)). Regardless of whether forfeiture of property is contingent on a criminal conviction involving that property, a post-seizure hearing is the means by which an individual deprived by the government of his or her property is able to be heard on the matter. See

Moore v. Timmerman, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981) ("[I]f . . . property seized is intended to be subject to forfeiture, then the parties claiming an interest in the property must be afforded the basic due process notice and hearing rights.").

The Sheriff's Office further argues that Farmer should have sought return of his property under section 39-15-1195(H). This section, however, only gives an aggrieved owner of items confiscated pursuant to section 39-15-1195 the option to "apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter." Because section 39-15-1195(C) requires law enforcement to institute forfeiture proceedings "within a reasonable time," we hold that any failure on Farmer's part to exercise an option provided under section 39-15-1195(H) does not excuse the Sheriff's Office from discharging its statutorily mandated responsibility to commence forfeiture proceedings in a timely manner.

II. Private Right of Action (Farmer's appeal)

Farmer argues the trial judge erred in dismissing various private causes of action he asserted in his complaint, contending (1) the alleged ineffectiveness of section 39-15-1195(H) as a remedy made it necessary for him to seek redress through a private action against the Sheriff's Office and (2) section 39-15-1195(C) gives rise to a private cause of action especially in light of the South Carolina Tort Claims Act. We decline to address these arguments.

The matter came before the trial judge on cross-motions for summary judgment; however, conspicuously absent from the trial judge's rulings on Farmer's private claims is any analysis that would support a determination that the Sheriff's Office is entitled to judgment as a matter of law on these claims. Rather, the trial judge simply declined to hold a damages hearing in regards to the items he ordered the Sheriff's Office to return, noting the refusal to grant a damages hearing would stand "provided that the items are returned in substantially the same condition as when seized," and, in the laudable interest of effecting "a reasonable compromise," purported to dismiss Farmer's private claims. The trial judge further explained his decision did not take into consideration the South Carolina Tort Claims Act

and specifically noted that Farmer should pursue whatever redress was available through that legislation. Contrary to the arguments Farmer has made in his cross-appeal, the trial judge's order did not bar him from seeking additional recompense from the Sheriff's Office for its refusal to return his inventory. Without any indication as to why the evidence, when viewed in light most favorable to Farmer, does not entitle him to seek private redress of any kind against the Sheriff's Office, we are unable to engage in meaningful review of that portion of the appealed order addressing his claims. See Bowen v. Lee Process Sys. Co., 342 S.C. 232, 241, 536 S.E.2d 86, 90-91 (Ct. App. 2000) ("It is imperative . . . that the trial court state the material facts it found undisputed and the applicable law supporting its grant to summary judgment . . ."). Based on our uncertainty in discerning precisely how the trial judge intended to dispose of Farmer's private causes of action, we remand this issue for a definitive ruling on the matter.

CONCLUSION

We agree with the trial judge that the retention by Sheriff's Office of the items in dispute, without instituting forfeiture proceedings, warranted an order that the goods be returned to Farmer. We remand this matter to the trial judge for the necessary findings of fact and conclusions of law regarding whether or not the Sheriff's Office is entitled to judgment as a matter of law on Farmer's private causes of action.

AFFIRMED IN PART AND REMANDED.

FEW, C.J., and HUFF, J., concur.

SCANNED

The South Carolina Court of Appeals

James David Farmer,

Respondent/Appellant

v.

Florence County Sheriff's Office,

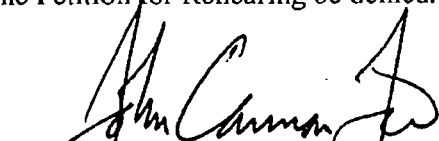
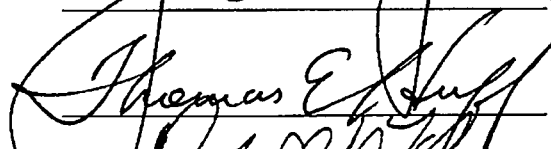
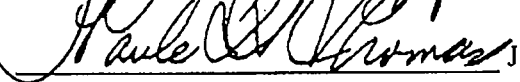
Appellant/Respondent

The Honorable J. Ernest Kinard, Jr.
Florence County
Trial Court Case No. 2008-CP-21-01071

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.


C. J.

J.

J.

Columbia, South Carolina

FILED
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS
The Hon. Ernest F. Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

James David Farmer Respondent-Appellant,

v.

Florence County
Sheriff's Office Appellant-Respondent.

PETITION FOR REHEARING

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SUMMARY OF FACTUAL AND PROCEDURAL BACKGROUND

James David Farmer was arrested for selling pirated DVDs and counterfeit clothing and luggage. Via plea bargain, he admitted to piracy. However, he wants the clothing and luggage returned. Specifically, he wants it returned without any judge passing judgment on whether the merchandise is counterfeit (that it, without any judge other than the magistrate judge who authorized the seizure of the goods and specifically found probable cause to do so). The admitted pirate also seeks to sue the Sheriff for damages for holding the merchandise that was seized pursuant to a warrant. He further seeks punitive damages.

He has promised to attempt again to sell the clothing and luggage if they are returned.

The Sheriff has vigorously resisted returning the goods without a second judge passing judgment on whether the goods are counterfeit. The lower court ordered the Sheriff to return the clothing without first determining whether the clothing is in fact counterfeit, and dismissed the damages claims. This Court affirmed the Order requiring the return of the goods without any judicial determination that they are not counterfeit, and remanded to allow Farmer to create a better record for his claim that the Sheriff owes the pirate damages.

The Sheriff respectfully requests rehearing.

SUMMARY OF ANALYSIS

Farmer's claim, from the beginning, has been that the Sheriff must do for him what he was powerless to do for himself. His claim is premised on his assertion that he was powerless to seek a judicial determination of the counterfeit nature of his merchandise. Statutory and case law make clear that a Petition for forfeiture proceedings (brought by the state) or an Application for return of seized goods (brought by the owner) each pose both sides of the question: whether the goods are to be returned or are instead forfeit. Farmer thus maintained (a) that he could not institute such forfeiture-or-return proceedings; (b) that the Sheriff could and was required to do so; and (c) because the Sheriff failed to do for Farmer what Farmer was forbidden to do for himself, Farmer is entitled to relief. (His Complaint asked only for actual and punitive damages; when the lower court inquired at the hearing whether Farmer wanted the property back, Farmer added a claim for return of the goods.) He sought to have the property returned without any judicial determination of any question related to whether the merchandise is counterfeit (other than the magistrate's initial finding of probable cause to believe the merchandise is counterfeit).

On cross-motions for summary judgment, the trial judge, without finding whether the goods were in fact counterfeit, or whether probable cause existed at the time of seizure to believe them to be counterfeit, ordered the goods to be returned. He largely denied the request for damages.

This Court affirms the Order requiring return of the goods. It does so on grounds not raised below, on grounds contrary to the arguments of both sides. It holds that it does not matter whether Farmer could have instituted proceedings to determine whether the merchandise is truly counterfeit. Its Opinion does so in the concluding paragraph of its Part I, referencing paragraph (H) of S.C. Code Ann. Section 39-15-1195. It so holds at least for purposes of return of the goods, and arguably leaves open the question of whether it matters for purposes of damages. The Sheriff would respectfully submit that this is error. It matters both for return and for damages that Farmer was able to, and chose not to, seek a judicial review of the initial probable cause hearing.

The Court, again on grounds not raised below, raises and rules on federal constitutional questions. Citing two federal cases, the Court holds that the federal due process clause mandates that seized property be returned without a hearing on the merits of whether the property is properly forfeit, if and when the government delays too long in instituting such proceedings.

The Sheriff respectfully submits this too is error: the federal statutes at issue in the federal cases contained no provision for the Owner to institute proceedings for return of the property. It was essential to the rationale of those federal cases that there was no statutory mechanism for the Owner to apply to a court for return of the goods. The federal cases, then, are directly opposite to the Court's sua sponte holding that the availability of direct application by the Owner is irrelevant.

It was error, the Sheriff submits, for multiple additional reasons, among them: the federal Supreme Court case on which the opinion relies states that it does not automatically follow from a failure of the government to institute suit that the remedy is to punish the government by requiring return of the property. Rather, even where statutes provide no direct route for the owner to seek judicial determination that the goods should not be forfeit, the availability of indirect relief, such as an equitable action to compel the property party to institute forfeiture proceedings, can (and did, in the case cited) bar the drastic remedy of ordering the property returned, without a hearing on the merits of the forfeiture claim. The federal Supreme Court, then, endorsed an analysis virtually identical to that raised by the Sheriff, and overlooked by the Court.

Thus, the Sheriff respectfully maintains that the holding that it is irrelevant whether means were available for Farmer to obtain a judicial ruling on the merits of his contention that the merchandise was legitimate – a position not taken nor mentioned by any party nor the lower court – is erroneous.

The Court, again sua sponte, remands Farmer's appeal for another "bite at the apple," holding that Farmer had not obtained a sufficiently specific ruling to allow this Court to reverse. This too, the Sheriff submits, was error; it is an appellant's task to provide a sufficiently clear record, and a sufficiently clear order, to permit meaningful appellate review, and if the order has not clearly ruled on issues the appellant wishes this Court to consider, it is an appellant's task to request modification of the lower court order.

The Court, likely as a cause of factors mentioned above, overlooks or misapprehends the Sheriff's arguments, especially the Sheriff's repeated insistence that a hearing to determine whether the goods should be returned, or are instead forfeit, should focus on such matters as whether there was probable cause to believe the goods were counterfeit, whether the owner can overcome a showing of probable cause, and similar matters. The Court

misperceives these arguments as "disregard" for the principle that the purpose of such a hearing is "to confirm the state had probable cause."

The opinion's reasoning is internally contradictory. It holds that Farmer could not have brought an action for forfeiture-or-return under Paragraph (C) of Section 39-15-1195. As the opinion notes, neither Paragraph (C) nor 39-15-1195 as a whole state by whom forfeiture proceedings are to be brought. Paragraph (C), as the Opinion further observes, incorporates S.C. Code Ann. Section 44-53-530. That incorporated section, 44-53-530, the Opinion observes, allows a Petition for forfeiture-or-return to be brought only by (a) the Attorney General, (b) the circuit solicitor, or (c) a party designated by the Attorney General or the solicitor to petition in their behalf. Farmer is not the Attorney General, nor the Solicitor, nor was he designated to petition in their behalf, the Opinion notes. Therefore, the Opinion concludes, "Farmer could not have invoked Paragraph (C)" to obtain a forfeiture hearing.

Yet, relying solely on that same Paragraph (C), the Court concludes that the Sheriff had a "statutorily mandated responsibility to commence forfeiture proceedings". This is the same Paragraph C of 39-15-1195, which "does not indicate who is to institute a forfeiture proceeding;" which incorporates Section 44-53-530's limitation to the Attorney General, the

circuit solicitor, or a party designated by one of the first two, of the ability to institute such proceedings. The Sheriff is not any of these. The Court advances no other theory to require, or even authorize, the Sheriff to institute such proceedings. Nor did Mr. Farmer. Nor did the lower court. Indeed, there is no other theory by which the Sheriff is required, or even authorized, to institute such proceedings. The Court's analysis elegantly proves that the Sheriff "could not have invoked section 39-15-1195(C) to obtain a forfeiture hearing." With this, Farmer's entire case collapses. The Sheriff could not have done for Farmer what Farmer complains the Sheriff failed to do on Farmer's behalf.

See
39-15-1195
(G)

The result of all the above – the contradiction regarding Paragraph (C) of Section 30-15-1195, the reluctance to determine whether Paragraph (H) allows Farmer to obtain the forfeiture-or-return proceeding that is not allowed by Paragraph (C), the sua sponte raising of federal constitutional issues, the misapprehension of the federal cases cited, the sua sponte remand of Farmer's appeal for a second bite at the apple, the sua sponte determination that Farmer need not establish what he, the Sheriff, and the lower court saw as his bedrock fundamental claim, i.e., that he could not have brought a forfeiture action himself; the overlooking of some of the Sheriff's arguments, the misperception of others, and the explicit conclusion

that still others, i.e., the Sheriff's arguments concerning Paragraph (H), were irrelevant – is that the Court has rewritten the statutory scheme. Moreover, it has replaced a sensible statutory scheme with a chaotic one.

Sections 39-15-1195 and 44-53-530 draw a distinction between policing agencies (which it refers to as "law enforcement") and prosecuting agencies. The distinction is between entities whose key employees are primarily trained in detection, arrest, and seizure, and those whose key employees are primarily trained in legal practice. (The Sheriff does not maintain that the term "law enforcement" always excludes prosecutors and the like, but he recognizes that the statutes relevant here use the term "law enforcement" in a narrower sense, one that excludes prosecutors.) In this legislative scheme, the policing agencies, such as a county Sheriff's Office, a city Police Department, and the like, investigate, search, and seize; the agencies whose expertise is in bringing and defending lawsuits bring or defend the forfeiture action.

The distinction is perhaps most clearly stated in Paragraph (G) of Section 39-15-1195 ("When property . . . or anything else of value is seized . . . , the law enforcement agency making the seizure, . . . shall submit a report to the appropriate prosecution agency." 39-15-1195(G) (emphasis supplied)). As the Court accurately observes, 39-15-1195 does not say by

whom forfeiture proceedings are to be instituted, but instead refers the reader to Section 44-53-530, which states as its opening words, "Forfeiture of property . . . must be accomplished by petition of the Attorney General or his designee or the circuit solicitor or his designee to the court of common pleas for the jurisdiction where the items were seized." 44-53-530(a) (emphasis supplied). The policing agency reports to the lawyers, who handle the civil case from that point on.

In the statutory plan, then, two sets of entities are empowered to bring a civil suit for determination of whether seized goods are forfeit or are to be returned: the Owner (of the property or of a lien on the property), either pro se or via counsel; and the state, via its "counsel's" offices. Excluded are the policing agencies, who have neither the expertise nor the authorization to bring civil suits in circuit court. "Forfeiture of property . . . must be accomplished by petition . . . to the court of common pleas . . ." 44-53-530(a) (emphasis added). Law enforcement officers who are not themselves attorneys are banned from personally bringing suit in common pleas; it would be the unauthorized practice of law were they to do so. Law enforcement entities in smaller jurisdiction lack the funds to hire counsel; some departments consist of a handful of officers or even a single officer. The legislature, it is respectfully submitted, did not intend to require these

small agencies to hire an attorney every time they seize contraband. Nor did it intend to expose them to actual and punitive damages if they failed to hire an attorney to institute a forfeiture action.

The Opinion, then, rewrites the statutory scheme, with immensely consequential results. If exposed to such liability, or if required to hire an attorney, as the consequence of seizing contraband, law enforcement officers will be required to choose between turning a blind eye to contraband, and depleting the already-strained budget. The legislature did not intend to put them to a choice between violating their oaths and bankrupting their department.

Neither this Court nor the Supreme Court has previously ruled on whether policing agencies, as distinct from prosecuting agencies, are authorized or required to institute such forfeiture proceedings. This opinion, unless withdrawn, creates a dangerous and unworkable precedent. The Court should accordingly rehear, withdraw the current opinion, and substitute a new opinion.

The new opinion should further address the question the current opinion avoids, i.e., whether Paragraph (H) authorizes Farmer to institute himself the proceeding for forfeiture-or-return of the property he complains that the Sheriff did not institute. It should hold that Paragraph (H) does

authorize such a suit. It may do so either under the plain language of Paragraph (H), or the obvious intent of the statute, or by applying the constitutional principles mentioned in the present Opinion. A holding that Paragraph (H) allows Farmer to accomplish for himself what he complains others have not accomplished for him would and should terminate his present case.

The Arguments as presented in the Analysis section of this Petition do not track the order in which they were discussed above. Instead, they begin with the contradiction regarding Paragraph (C) of 39-15-1195. This is because the point regarding Paragraph (C) both requires relatively little explanation and suffices to resolve the entire case: if the Sheriff could not do for Farmer what Farmer complains about the Sheriff not doing, Farmer's entire case should be dismissed; this Court should reverse that part of the Order below declaring that the property is to be returned, and should modify that part of the Order tentatively or partially dismissing the damages claims so as to direct that the lower court fully dismiss the case.

ANALYSIS

I. The Opinion is Self-Contradictory.

The Court references S.C. Code Ann. Section 39-15-1195 (Supp. 2009), governing seizure and forfeiture of counterfeit goods, and its incorporation by reference of S.C. Code Ann. Section 44-53-530 (2002 & Supp. 2009), governing forfeiture procedures generally. It holds that Farmer could not have brought an action under Section 39-15-1195(C) to determine whether property is properly forfeit or properly returned, because 39-15-1195(C) references section 44-53-530, and 44-53-530 states that only the Attorney General, the circuit solicitor, or a party designated by the Attorney General or the circuit solicitor may institute such proceedings. Farmer was not the Attorney General, nor was he the Solicitor, nor did either designate him to bring a forfeiture action in this matter, the Court observes. Therefore, the Court concludes, Farmer could not have instituted an action under 39-15-1195(C).¹ Op., p. 5-6.

¹ The Court writes:

Although section 39-15-1195 does not indicate who is to institute a forfeiture proceeding, section 44-53-530 of the South Carolina Code (2002 & Supp. 2009), which is referenced within paragraph (C) of the statute, describes the procedures required to finalize a forfeiture of property seized in connection with the enforcement of laws regulating controlled substances. These procedures include a petition by the Attorney General, the circuit solicitor, or the appropriate designee, that identifies the seized property and all persons known by the petitioner to

Having held on pages 5-6 that only the Attorney General, the circuit solicitor, or one designated by either of them to do so may institute such proceedings, the opinion then holds, on page 7, that under paragraph Section 39-15-1195(C), the Sheriff was obligated to institute such a proceeding. It castigates the Sheriff for failing to "discharg[e] its statutorily mandated responsibility to commence forfeiture proceedings in a timely manner." With respect, this conflicts with the holding on page 5-6 that only the Attorney General, the solicitor, or one whom they have designated to do so, may commence such proceedings.

This is important. All the issues addressed below will be mooted if the Court will apply to the Sheriff the same logic it applied to Farmer. Farmer's claims, that the Sheriff was supposed to do something for Farmer that Farmer could not do for himself, necessarily require that Farmer establish a two things: (a) that Farmer could not do X for himself, and (b) that the Sheriff could and must do X.

Moreover, as discussed below, the Sheriff submits that the Court's holding, that Paragraph (C) of 39-15-1195 requires the Sheriff to institute proceedings, is independently erroneous. It creates a most unfortunate

have interests in it. Farmer, then, could not have invoked section 39-15-1195(C) to obtain a forfeiture hearing.

precedent on a matter of great public importance, one on which no appellate court has yet ruled, namely, whether Sheriffs are required to institute these civil forfeiture proceedings in circuit court.

II. The Opinion Misapprehends the Sheriff's Arguments.

Four misapprehensions or possible misapprehensions are brought to the Court's attention: one is major, one is of intermediate importance, two are of apparently minor importance.

While the Court's opinion begins in Section I of the subject opinion with a largely accurate condensation of the general thrust of the arguments in the Sheriff's Appellant's brief, Op. pp. 4-5, later in the opinion, where the Court undertakes its analysis, it severely misapprehends the Sheriff's arguments, both a central argument concerning "probable cause," a lesser argument concerning burdens of proof.

A. Probable cause.

The Sheriff wrote, in his Appellant's Brief, at 8:

in an abundance of caution, the Sheriffs Office states that it does not agree that even under Section 39-15-1195 (H) it would be proper to inquire as to the reason law enforcement is not returning the goods, other than the fact that the goods are properly subject to seizure and not properly for return.

Sheriff's Appellant's Brief, p. 8 (emphasis supplied). The Court declares, "the Sheriffs Office appears to disregard the recognized purpose of a forfeiture hearing, which is 'to confirm the state had probable cause to seize the property in question.'" Op. p. 6 (emphasis is the Court's). The Court does not explain how "probable cause to seize" is incompatible with "properly subject to seizure."

The Sheriff was emphatic on this point throughout. Sheriff's Appellant's Brief at 8 ("the focus [of such a hearing] . . . should be on such matters as the illegal nature of the goods [on] whether the owner is entitled to their return, ..."); Respondent's Final Brief of Appellant/Respondent Florence County Sheriff's Office ("Sheriff's Respondent's Brief") at 7 ("The obvious purpose of Paragraph (H) of § 39-15-1195 is to enable an owner of seized goods to apply for a determination of whether the items should be returned, ..."); Sheriff's Reply Brief at 2-3 (emphasis supplied) ("the only reasons an owner had to demand recovery of the items had [to do] only with such matters as whether the goods were properly subject to forfeiture. . . . [T]he focus should be on such matters as the illegal nature of the goods . . . e.g., a challenge to whether there existed probable cause at the time of the magistrate's warrant, or that on closer examination the goods turn out to be legitimate").

The Sheriff did not maintain that a probable cause review was irrelevant to whether goods should be returned; he argued that in this case, it was highly important. He maintained throughout that it would be improper for him to return the goods without a judicial officer overriding the initial determination that there was probable cause, or determining that despite initial probable cause, later evidence showed the goods to be legitimate, or similar matters. He similarly maintained that a court should not order return of the goods without first finding a lack of probable cause, or finding that despite initial probable cause, later evidence showed the goods to be legitimate, or similar matters.

Farmer, in contrast, never mentions the term "probable cause" in any of his briefs. He neither mentions the term, nor references the concept. Nor does he argue that he should be afforded a chance to show the goods are not in fact counterfeit. Yet the opinion reads almost as if Farmer has been seeking such a determination, and the Sheriff has been resisting.

B. Other matters.

1. Evidentiary Burden

Similarly, the Court declares that the Sheriff "has even asserted that law enforcement need not provide any reason whatsoever to hold lawfully seized goods beyond the fact that a warrant had been issued for the seizure."

Op. p. 8. The Court overlooks the context in which the Sheriff asserted, and continues to assert, the same. The Sheriff maintains that it need not provide any reason whatsoever to hold lawfully seized goods beyond the fact that a warrant had been issued for the seizure, unless and until a forfeiture proceeding is instituted. Until a party statutorily authorized to institute a forfeiture proceeding does so, and thus institutes the only proceeding statutorily authorized for judicial determination of whether the goods should be returned, the Sheriff need not provide any reason for holding the property a judge had told it to seize, other than the fact of the judge's order.

Until such a time, the Sheriff need not provide any answer to the question, "Why are you holding the property?", other than the fact that a judge told him to, because the judge found probable cause the goods were counterfeit.

For the Record, though not of any obvious direct relevance to this appeal, the Sheriff would further note:

* The Sheriff understands that such proceedings generally progress through two stages. In the first stage, the State attempts to establish that it had probable cause to seize the goods at the time the goods were seized. In the second stage, the owner attempts to establish that nevertheless, he is entitled to return of the goods.

* This general rule applies as well to property that was seized without an initial determination, by a judicial officer, that probable cause exists to seize the property. Here, on the other hand, a judicial officer had already determined that probable cause existed at the time of seizure. The Sheriff would, therefore, maintain that in such a situation – with probable cause already having been found – the burden in that first stage of a forfeiture proceeding should properly be on a party who maintains there was no probable cause. The Sheriff would maintain that procedurally, even at such a hearing, law enforcement need not provide any reason that probable cause existed, except to show that probable cause had been properly found by a duly-appointed judicial officer, until after the other party has presented at least some evidence to call that prior determination into question. The initial burden should be on that party. "[T]he burden is on the party who would reverse the magistrate's order." Sheriff's Appellant's Brief, at 7.

The Sheriff maintains, and has maintained throughout, that a forfeiture proceeding is the proper mechanism for determining whether the goods are forfeit; that when and if such a proceeding occurs, the proceeding should seek to determine such matters as "the illegal nature of the goods;" "whether there existed probable cause;" "whether the goods were properly subject to forfeiture;" whether the goods are "properly subject to seizure and

not properly for return." (Moreover, at such a proceeding, when and if one occurs, the Sheriff would maintain that the prior judicial determination that probable cause existed at the time of seizure suffices to establish that probable cause existed at the time of seizure, unless and until countervailing evidence or argument is presented).

Describing the Sheriff's arguments as appearing to disregard probable cause most greatly misapprehends the Sheriff's arguments.

2. Minor matters.

(a) There was only one seizure. There is thus only one standard.

The Sheriff seeks clarification and/or correction of what appears to a minor matter. As the Court observes, Section 39-15-1195 distinguishes between two mechanisms for seizure. "If a seizure is made 'without process' pursuant to section 39-15-1195(B), 'proceedings pursuant to Section 44-53-530 regarding forfeiture must be instituted within a reasonable time.'" Op. p. 5 (quoting S.C. Code Ann. § 39-15-1195(C) (Supp. 2009) (emphasis is the Court's). "Section 39-15-1195(B) allows seizure without process under various circumstances, among them, 'if the seizure is incident to . . . a search pursuant to a search warrant.'" *Id.* n.2 (quoting S.C. Code Ann. § 39-15-1195(B)(1) (Supp. 2009) (emphasis added).

The Court proceeds to analyze the claim that Farmer was able to institute such a proceeding himself.

The Court then observes, "Section 39-15-1195(C) also mandates that, when allegedly counterfeit property is seized pursuant to a warrant, 'proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time.'" Op. p. 6 (emphasis added).

The opinion then proceeds to analyze federal constitutional issues, and the claim that the Sheriff was required to institute such a proceeding.

The Sheriff does not perceive the reason why the Court analyzes Farmer's disputed rights and/or obligations under the "incident to" a warrant provision, and the Sheriff's disputed rights and/or obligations under the "pursuant to" a warrant provision. The same property was seized via the same seizure. The clothing, the luggage, and the pirated DVDs were sought under a single warrant, found in a single search, and seized at a single time. Either the seizure was merely "incident to" a warrant, or it was directly pursuant to a warrant. There was only one seizure, which must have been the same regardless of whose supposed obligations are said to arise from it.

In an abundance of caution, the Sheriff would ask for clarification and/or correction. The Sheriff wishes to avoid being placed in a situation in which Farmer argues the law of the case is now that his obligation is to be analyzed under the one provision, and the Sheriff's disputed obligation is to be analyzed under the other. The Sheriff would maintain, as he has throughout, and as Farmer has not contested, that the property was seized "pursuant to" a warrant, regardless of whether one is discussing Farmer's or the Sheriff's ability to institute forfeiture proceedings. The Sheriff would ask the Court to so find.

The Sheriff's concern stems in part from the fact that, in order to prevail, Farmer must show a significant difference between what Farmer is allowed to do and what the Sheriff is allowed/required to do.

(b) The Court should clarify Its statement re: "delay"

The Sheriff would also seek clarification of the statement that it provided "no meaningful argument" that its "delay" in instituting such proceedings was justified. The Sheriff's office argued that it was not required to institute such proceedings at all, and maintains that an argument that one is not required to do X implicitly responds to a claim that one has improperly delayed in doing X. To avoid any misperception or any argument that the law of the case is that the Sheriff has not so argued, the

Sheriff would respectfully request a clarification that the Court meant literally that the Sheriff did not address the supposed "delay" as a separate issue, and that the Court has not overlooked the Sheriff's arguments to the effect that he was not allowed to institute such proceedings.

III. THE COURT'S FAILURE TO RULE ON FARMER'S OTHER MEANS TO SEEK A RETURN OF HIS PROPERTY IS ERRONEOUS.

The Sheriff argued at some length that Farmer had means to obtain a judicial determination as to whether the property at issue is counterfeit, and thus not to be returned, or legitimate, and to be returned. Most prominently, he argued that Paragraph H of Section 39-15-1195 entitled Farmer to seek such a determination. E.g., Sheriff's Appellant's Brief at 6-8; Sheriff's Response Brief at 3-4; see also Farmer's Appellant's Brief at 5 (recognizing that Farmer's entitlement to institute proceedings under Paragraph (H) is among the Sheriff's major points). That paragraph provides,

(H) (1) An owner may apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter. Notice of hearing or rule to show cause accompanied by a copy of the application must be directed to all persons and agencies entitled to notice as provided in Section 44-53-530. If the court denies the application, the hearing may proceed as a forfeiture hearing held pursuant to the provisions of Section 44-53-530.

(2) The court may return a seized item to the owner if the owner demonstrates to the court by a preponderance of the evidence that the owner was not a consenting party to, or privy to, or did not have knowledge of, the use of the property that made it subject to seizure and forfeiture.

(3) The lien of an innocent person or other legal entity, recorded in public records, continues in force upon transfer of title of a forfeited item, and a transfer of title is subject to the lien, if the lienholder demonstrates to the court by a preponderance of the evidence that the lienholder was not a consenting party to, or privy to, or did not have knowledge of, the involvement of the property which made it subject to seizure and forfeiture.

Farmer, strangely, never mentioned (H) in his Complaint. Nor did he mention it in his Motion for Summary Judgment. He first addressed it at the Hearing, and then, in his Appellant's Brief, made the rather strange argument that he would be unable to qualify for relief if he were to bring an action under (H) to seek judicial determination of whether the property should be returned. He repeated the argument in his Respondent's Brief. His argument is that since he knew of the "use" to which the property is put, he could never qualify for relief. He relies on the literal words of the statute, which provide relief to an owner only if he did not know of "the use of the property that made it subject to seizure and forfeiture." It should be rather easy to reject that argument. It would be a simple matter to establish at a hearing, the hearing Mr. Farmer studiously seeks to avoid:

Q: Mr. Farmer, do you have any knowledge of the use of the property that made it subject to seizure and forfeiture?

A: No. There was no such use, so I have no knowledge of any such use.

Q: You did not know of any use of the property that made it subject to forfeiture?

A: None, none at all.

See Sheriff's Respondent's Brief at 3, pointing out the flaw in Farmer's argument: "It is not illegal to offer for sale legitimate goods. There is thus no 'use' of the property that made it subject to forfeiture." See also id. at 4 (explaining that even if a literal reading of the statute would prevent an owner of legitimate goods from showing they are legitimate if the goods had been seized under the false impression that they were contraband, a court would not read the statute so literally as to defeat its purpose, but would allow an owner to make that showing). The Sheriff in his Reply Brief similarly argued that in a hearing to determine whether the goods are to be returned:

the focus should be on such matters as the illegal nature of the goods and the use to which they were put; e.g., a challenge to whether there existed probable cause at the time of the magistrate's warrant, or that on closer examination the goods turn out to be legitimate (the white powder was sugar, not cocaine; the "Louis Vuitton" luggage with the bottoms falling off were actually manufactured by Louis Vuitton)

Sheriff's Reply Brief, at 3 (emphasis added).

However, the Court never rules on whether Paragraph (H) entitles Farmer to institute such proceedings. Instead, the Court declares that such argument is irrelevant ("we hold that any failure on Farmer's part to exercise an option provided under section 39-15-1195(H) does not excuse the Sheriff's Office from discharging its statutorily mandated responsibility to commence forfeiture proceedings in a timely manner . . . "; Op. p. 7).

The Sheriff respectfully submits this is error. As the analysis is intertwined with the opinion's federal constitutional analysis, addressed below, and with the opinion's state procedural analysis, also addressed below, the issue will be addressed in more depth in the response to those issues. Nevertheless, several points are in order here:

(1) As argued above, the Court's analysis as to why Farmer could not bring an action via Paragraph (C) applies as well to the Sheriff, thus the Sheriff had no such statutorily mandated responsibility.

(2) The Sheriff recognizes that the discussion of Paragraph (H) was only in Part I of the opinion, which discusses whether the Sheriff must return the goods, and not in Part II, which discusses whether Farmer may sue the Sheriff for damages. The Sheriff is concerned that on remand the lower court may believe, and/or Farmer may argue, that the analysis of (H) in Part I applies to Part II as well. If the Court intended to allow the lower court

freedom to determine, in deciding the question of whether the shop-owner may sue the Sheriff, whether any failure on Farmer's part to pursue his Paragraph (H) remedy is relevant, the Sheriff would respectfully request the Court clarify.

(3) If, on the other hand, the Court intended to bar the Sheriff from raising his Paragraph (H) defense as a defense to the damages claim, the Court should rehear.

Assuming, for the sake of argument, that each party had the right to institute such proceedings, as the Court appears to do in rejecting the arguments based on (H), the Sheriff maintains that the failure of a party to do for himself what he wants another to do in his behalf bars him from seeking damages in a case such as this. That is, it simply cannot be irrelevant to a damages determination whether Farmer could have cured the problem directly.

(4) As explained more extensively below, the Sheriff respectfully submits it is also error to conclude that, regardless of whether Farmer had the ability to obtain the hearing he complains was not provided, the Sheriff must return the goods. The legislature intended there be a judicial determination that the property seized is not illegal contraband before the property is returned.

IV. THE COURT'S SUA SPONTE RULING ON FEDERAL CONSTITUTIONAL GROUNDS MISAPPREHENDS THE STATUTE, THE SHERIFF'S ARGUMENTS, AND THE CASES ON WHICH IT RELIES.

The opinion declares, regarding 39-15-1195(C), "We believe the South Carolina General Assembly included this requirement in recognition of due process concerns arising when the government deprives a claimant of the use of his or her property." Op. p. 7. The Court then cites federal case law interpreting the federal constitution. If this was indeed the reason,² the opinion overlooks the elephant in the room. Any due process concerns were addressed more directly and more powerfully in paragraph (H), which provides the owner himself direct access to the courts. It states that "An owner" (to whom the due process concerns would be addressed) "may apply" (and does not need someone else to apply for him) "to the court of common pleas" (a judicial officer empowered to rule on the matter) "for the return of an item" (to resolve the matter in dispute). It is difficult to conceive of how due process concerns could be more fully or more directly addressed than by providing the owner, by statute, a process, to be heard by a circuit court judge, whom is statutorily authorized to resolve the matter.

² As an initial matter, the Court cites no legislative history for its belief; it appears the legislature may have included this requirement not out of fear of offending the federal constitution, but for a variety of other reasons.

The Sheriff respectfully maintains that the Court's reliance on federal cases discussing federal constitutional concerns stemming from federal statutes is erroneous, for those federal statutes contain no such statutory provision. The federal statutes allow only the federal government to institute such judicial proceedings. In such a situation, courts need to look closely to determine whether the federal government's actions have denied the owner of due process. The South Carolina statute, in contrast, has a provision that says, in effect, "Owner! Here is your process."

In United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency, 461 U.S. 555, 564 (1983), the only federal Supreme Court decision on which the opinion relies, the United States Supreme Court stated, as the opinion notes, "[T]he Fifth Amendment claim here—which challenges only the length of time between the seizure and the initiation of the forfeiture trial—mirrors the concern of undue delay encompassed in the right to a speedy trial." Op. p. 7 (quoting United States v. Eight Thousand Eight Hundred and Fifty Dollars (\$8,850) in United States Currency, 461 U.S. 555, 564 (1983)) (emphasis added). Because of that concern regarding undue delay, the South Carolina legislature enacted the Speedy Trial Act, which provides a process by which a criminal defendant may demand a speedy trial. It is only if, and when, the defendant

has complied with the statutory requirements that the right to a speedy trial becomes applicable. The defendant may not claim due process violations if he has not taken advantage of the process the legislature has provided. So too here. Here, the legislature has gone an extra step. It has provided the owner not merely the right to demand that the government call the case within a certain amount of time following the demand; it has provided the owner with the ability to institute the proceedings himself. This is more than ample process; more than that required by precedent governing the analogous situation, more than required by precedent governing the precise right the Court relies on as analogous.³

Further, in the \$8,850 case, the Supreme Court found that no constitutional violation had occurred. The statutes controlling that case did not provide the owner the right to institute suit; at most, she could petition the seizing agency for return of the goods. That is why the constitutional due process concern arose: the owner was prevented from directly seeking judicial determination; thus, the only party entitled directly to seek judicial determination had an obligation to do so for her, and thus an ensuing

³ If anything, constitutional concerns run in the opposite direction. The legislature has provided more process to avert delay regarding property rights than it has for the right to be free from incarceration. An incarcerated citizen, who is presumed innocent, would have a colorable claim that his right to cease delay in resolution of his case is greater than, and thus entitled to more protective process than, the right of one deprived of property.

obligation to do speedily. Here, there is no such constitutional concern, for the South Carolina statute explicitly authorizes the owner to do that which the federal statute forbids.

Moreover, the federal statute there, unlike the State statute here, explicitly authorizes the seizing agency, upon such a request, to determine for itself that the goods should be returned. In contrast, there is nothing in the State statute that either Farmer, the lower court, or this Court has pointed to, that even allows the Sheriff to return such goods, without a judicial determination that the goods are not properly subject to forfeiture. And as the Sheriff insists, and as all agree, e.g., opinion at 7 ("no hearing had taken place to determine whether or not they were in violation of section 39-15-1190."), no such determination has been made.

Another important difference between the relevant statutes and facts in \$8,850 and the present case is that in \$8,850 the relevant property was seized by the executive branch, on its own initiative, without a prior judicial determination that probable cause existed. Here, on the other hand, the magistrate had specifically determined not merely that probable cause existed to search the premises for evidence of a crime, but to seize the property. As the Supreme Court explicitly stated in \$8,850, it was concerned there with the "extraordinary situation" in which the state has

"seize[d] a person's property without a prior judicial determination that the seizure is justified." 461 U.S. at 563.

Thus, the federal statute is different in that (a) it does not allow the owner to institute proceedings, thus creating a potential due process problem not applicable here, (b) it explicitly allows for return without judicial determination of probable cause, of goods taken without judicial determination, whereas here, there is no provision for return without judicial determination of goods that were taken with judicial determination.

Reliance on the Nevada federal case, United States v: \$62,972 in United States Currency, 539 F. Supp. 586, 593 (D. Nev. 1982), is similarly inapposite. That some courts have held that "due process" requires return of the property as punishment for a delay is irrelevant, for here, there is no due process violation. Nor would it follow that there would be reason "to order the return of the seized property", Op. p.6, even if there had been a due process violation. As the federal Supreme Court wrote in \$8,850, 461 U.S. at 561 n.8: "Because we find no violation of due process, we do not decide whether dismissal of the forfeiture action with prejudice would be an appropriate remedy for undue delay."

In certain ways, however, the federal statutory scheme is similar to the State's. And these ways also militate against the Court of Appeals' decision.

As the Supreme Court wrote,

The third element to be considered in the due process balance is the claimant's assertion of the right to a judicial hearing. A claimant is able to trigger rapid filing of a forfeiture action if he desires it. First, the claimant can file an equitable action seeking an order compelling the filing of the forfeiture action or return of the seized property. See *Slocum v. Mayberry*, 2 Wheat. 1, 10 (1817) (Marshall, C. J.). Less formally, the claimant could simply request that the Customs Service refer the matter to the United States Attorney.' If the claimant believes the initial seizure was improper, he could file a motion under Federal Rule of Criminal Procedure 41(e) for a return of the seized property.

Id. at 568-569 (emphasis added). This is exactly the argument the Sheriff made to this Court and to the lower court. "[I]t seems strange to conclude that the legislature intended to allow an action for damages. It would seem more reasonable that the Legislature intended, at most, that the owner bring a declaratory and/or injunctive action to require the proper party to bring the forfeiture action." Sheriff's Respondent's Brief, at 7-8. The Court of Appeals overlooks this argument in the Sheriff's Brief. It refers as contrary authority to a Supreme Court opinion making the same point, and again overlooks the point.

Accordingly, the Court should rehear, and reverse its earlier decision.

V. THE OPINION'S RELIANCE ON UNARGUED SOUTH CAROLINA CASE LAW MISAPPREHENDS THE SHERIFF'S ARGUMENTS AND CONFLICTS WITH THE DECISIONS IT CITES.

The Court's similar reliance on South Carolina case law unargued below is similarly misplaced. These cases support the Sheriff's reading of the law. As to Moore v. Timmerman, 276 S.C. 104, 276 S.E.2d 290 (1981), the current opinion states:

a post-seizure hearing is the means by which an individual deprived by the government of his or her property is able to be heard on the matter. See Moore v. Timmerman, 276 S.C. 104, 109, 276 S.E.2d 290, 293 (1981) ("[I]f . . . property seized is intended to be subject to forfeiture, then the parties claiming an interest in the property must be afforded the basic due process notice and hearing rights.").

Op. p. 7.

The Sheriff has been arguing exactly the points the Court presents here as contradicting the Sheriff's view. The Sheriff has been saying all along that "a post-seizure hearing" is required; he has been saying all along that such a hearing "is the means by which an individual deprived by the government of his or her property is able to be heard on the matter." As the Sheriff has been arguing, Farmer has been afforded "notice and hearing rights" explicitly via the statute. As the Sheriff has been arguing, and as the federal Supreme Court has held, the availability of injunctive relief to require the proper agency to institute forfeiture proceedings – even were the

Sheriff the proper agency, which it is not, and even were there no statutory means for the Owner to institute proceedings directly – militates against any "due process" claim.⁴

Gowdy v. Gibson, 381 S.C. 225; 672 S.E.2d 794 (Ct. App. 2008), the other South Carolina case on which the opinion relies, also supports the Sheriff's position. There, the property at issue was U.S. currency, in cash, allegedly traceable to drug activity. The safe in which the money was found was accessible only via the bedroom of a man whom overwhelming evidence connected to drugs and drug money. He lived with his mother. She claimed, after the seizure, that the money was hers. This Court divided the analysis into two stages. The Court first determined whether probable cause had been established that the money was traceable to drug activity, and found that probable cause had been established. The Court then turned to step 2, "The Gibsons' Rebuttal." 381 S.C. at 232, 672 S.E.2d at 798. It noted that,

⁴ The constitutional argument fails for another reason. Precisely because of the due process concerns, a Court would be reluctant to read the statute the way Farmer reads it. Under the canon of constitutional avoidance, the Court would choose the reading that avoids constitutional concerns. Thus, even were Farmer's reading of the statute plausible, that the legislature intended to block owners of legitimate goods from applying to a court for a return-or-forfeiture proceeding, the court would avoid that reading in favor a reading that allows owners to apply directly to the court to commence the proceedings. The constitutional concern weighs in favor of the Sheriff's reading, not against it.

If probable cause is shown, the burden shifts to the owner to show by the preponderance of the evidence that he or she was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture.

381 S.C. at 233, 672 S.E.2d at 798 (internal quotation marks and citations omitted). Of course, there was no "use" of the property that made it subject to seizure and forfeiture; it was not the "use" of the cash that was in dispute. It was its nature, its origins, where it had come from, not what it was used for. This Court did not rely on an overly literal reading of the statute to deny Ms. Gibson her day in Court; it allowed her to attempt to show that despite the existence of probable cause on the day of seizure, the property was entirely legitimate, and thus should not be forfeited. This is exactly what the Sheriff said a Court would do were Farmer to institute the proceedings for return/forfeiture. A court would not deny him his day-in-court, even if Farmer's supposedly literal reading of the statute were accurate. After citing case law on the rules of statutory construction, and explaining that Farmer's reading of the statute so as to preclude Farmer from bringing an action under Paragraph (H) was facially erroneous, the Sheriff continued to explain that even if Farmer's reading was facially accurate, he would still be able to obtain a hearing under Paragraph (H). Sheriff's Respondent's Brief, at 4:

assuming, for the sake of argument, that a technical reading of Paragraph (H) would preclude an owner of legitimate

goods from bringing a suit for their return, the rules of construction would preclude such a technical reading at odds with the purpose of the statute.

The Gowdy case on which the Court relies illustrates the very point the Sheriff was making.

The final South Carolina case that the opinion mentions, is cited only indirectly. Op. p. 6. It, too, supports the Sheriff. That case, Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001, 322 S.C. 127, 470 S.E.2d 373 (1996)), states, "South Carolina's drug forfeiture provisions require that any forfeiture action must be accomplished by 'petition of the Attorney General . . . to the court of common pleas for the jurisdiction where the items were seized.'" Medlock, 322 S.C. at 130, 470 S.E.2d at 375 (quoting S.C. Code Ann. § 44-53-530(a) (Supp. 1994)). "Section 44-53-586(b) specifically places the burden of proof on the property owner to show innocent ownership by a preponderance of the evidence, showing legislative intent to place the burden of proving innocence on the property owner. " 322 S.C. at 131, 470 S.E.2d at 376.

Thus, the South Carolina cases on which the Court relies support the Sheriff.

VI. REMANDING, RATHER THAN DISMISSING, FARMER'S CROSS-APPEAL RELIES ON IMPLICITLY OVERRULED CASE LAW AND IS UNFAIR.

The Court properly "decline[d] to address" the arguments Farmer raised in his cross-appeal, Op. p. 7, as it is "unable to engage in meaningful review" of the portion of the Order addressing his claims. This, in turn, is due to Farmer's failure, as Appellant, to provide the Court the necessary material. An Appellant has the duty to ensure the Record on Appeal is sufficient to enable such review. An Appellant further has a duty to ensure that any objections or arguments he has are ruled on by the lower court. Precedent is clear on each of these points. E.g., State v. Carlson, 363 S.C. 586, 608, 611 S.E.2d 283, 294 (Ct. App. 2005) (burden is on the appellant to provide a record sufficient to enable meaningful review); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)) (duty to ensure clear rulings on any arguments one wishes to preserve for appeal); S.C. Coastal Conservation League v. S.C. Dep't of Health & Env'tl. Control, 380 S.C. 349, 379, 669 S.E.2d 899, 915 (Ct. App. 2008) (similar); Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) (stating that "The appellants have the responsibility to identify errors on appeal, not the Court.")

The opinion relies instead on a Court of Appeals decision stating that a lower court should clearly state the bases for its rulings. Op. p. 8 (relying on Bowen v. Lee Process Sys. Co., 342 S.C. 232, 241, 536 S.E.2d 86, 90-91 (Ct. App. 2000)). Bowen, however, relied exclusively on law from foreign jurisdictions for its conclusion, and has never been cited by the South Carolina Supreme Court. Because the Court of Appeals' decision here, like its earlier decision on which it relies, is contrary to binding Supreme Court precedent, the Court should rehear, reverse its decision as to Farmer's cross-appeal, and declare that the arguments Farmer wishes to raise are not preserved for review.

If Farmer wished to present these arguments to this Court, he should have filed a Rule 59 Motion. He did not, and is barred now.

The Sheriff realizes that the Order below was not the most detailed in its reasoning. Neither party filed a Rule 59 Motion. The Sheriff therefore appropriately limited his arguments. He limited his Appellant's Brief to the reasoning the lower court provided, and was mocked by Farmer for doing so. E.g., Respondent's Brief of Farmer, at 4-6. (The other issues the Sheriff addressed were issues to which Farmer had opened the door in Farmer's own Briefs.)

It is simply unfair for this Court to affirm against the party that conscientiously limited its arguments to those properly present for review, and to remand against, and provide a second bite at the apple to, the party whose arguments are not preserved. See, e.g., Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 28, 609 S.E.2d 506, 511 (2005).

Farmer did not complain, either in his Briefs to this Court or via way of a Rule 59 motion to the lower court, that the Order was insufficient for Review. This Court, sua sponte, raised the argument and ruled on it. To the extent, if any, that Bowen is good law, the Sheriff would maintain that it would be in a case where a party who has filed a Rule 59 Motion seeking clarification of the lower court's ruling, has been denied such clarification; such a party may properly raise the Bowen point in his brief. He may then seek reversal specifically of the lower court's refusal to clarify, with an accompanying remand for that purpose. He may seek to have the appellate court declare the refusal-to-clarify an implicit ruling on, and rejection of, all the arguments that party had made to the lower court. He may seek other relief. However, he must both raise the lack of clarity in a motion to the lower court and raise it in his Brief. "The appellants have the responsibility to identify errors on appeal, not the Court." Kennedy, 349 S.C. at 533, 564 S.E.2d at 323. If he does not ask the lower court to preserve the arguments,

and does not ask this Court to remand due to a lack of clarity, he has failed to preserve any claim below and "abandoned" or failed to raise it on appeal.

The Sheriff further, and in an abundance of caution, notes, that as the lack of clarity as to the lower court's reasoning was raised by this Court, and not by the opposing party, it is entirely proper for the Sheriff to raise his counter-arguments now. At a minimum, if the Court is to remand, it should allow both parties second bites at the apple. However, for reasons stated above, the Sheriff submits it would nevertheless be error to remand for further determination of either claim; the Court should affirm the dismissal of the damages action; and hold that the Sheriff need not return the goods unless and until either Farmer or the Solicitor or the Attorney General institute a forfeiture action and provide the Court the means to determine whether the goods are properly returned or are instead counterfeit.

VII. THE NOVEL INTERPRETATION OF THE STATUTE IS UNWORKABLE.

Holding that it is simply irrelevant whether Farmer could have instituted the statutorily-required proceedings to determine whether the property is contraband, the Opinion orders the Sheriff to return the property without any such hearing, and remands for further development as to whether the statute allows actual and punitive damages against the Sheriff

for failing in his “statutorily mandated responsibility to commence forfeiture proceedings”. This puts the Sheriff in an untenable situation in this case, and will place other Sheriffs in untenable situations in other cases, if the situation arises again.

The Sheriff strongly believes the property at issue is contraband. Nor is the Sheriff’s concern irrational. As the Court observed during oral argument, Farmer’s position is that the counterfeit statutes make a crime out of what he believes is not a crime. Farmer’s position has been, see R. p. 18, that there is no such thing as a counterfeiting violation involving trademarks. “[T]oday’s clothing manufacturers do not even make their own products and cannot accurately identify what is or is not their product. Hence, there is no trademark violation.” He thus maintains, id., that it is permissible to obtain from “reputable trade publications” records to support the purchases, as if a trade publication could sell the manufacturer’s trademark. The Sheriff thus has a substantial defense to any claim Farmer would make that the property is not contraband.

Since he believes the merchandise is counterfeit, and since his belief is substantially justified, and since Farmer has vowed to offer the merchandise for sale if it is returned, the effect of the Order would be to

compel the Sheriff to assist in a crime, or in what he reasonably believes to be a crime.

Nor will future Sheriffs be able to avoid this dilemma by complying with the Court's ruling that a Sheriff has an obligation to commence forfeiture proceedings. Those proceedings may only be commenced in a circuit court. Practicing law in a civil, circuit court, is a crime. See, e.g., Renaissance Enters., Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999) (stating "We now hold a non-lawyer cannot represent a corporation in circuit or appellate courts."). Nor would it matter that the Statute requires the Sheriff to commence such suits; the legislature may not, by statute, redefine the practice of law.

Babb relies upon S.C. Code § 40-5-320(A)(1)(Supp. 1998) which provides: "(A) It is unlawful for a corporation or voluntary association to: (1) practice or appear as an attorney at law for a person other than itself in a court in this State or before a judicial body . . ." (emphasis added). In In re Unauthorized Practice of Law, we did not address the language in this statute.

The adjudicative power of the Court carries with it the inherent power to control the order of its business to safeguard the rights of litigants. Williams v. Bordon's Inc., 274 S.C. 275, 262 S.E.2d 881 (1980)(statute which attempted to exercise ultimate authority over inherent power of Court violated separation of powers doctrine). As pointed out in In re Unauthorized Practice of Law, [309 S.C. 304, 422 S.E.2d 123 (1992)] supra, "the Constitution commits to this Court the duty to regulate the practice of law in South Carolina." 309 S.C. at 305, 422 S.E.2d at 124. Any interpretation which

would expand our decisions regarding the practice of law
would violate the separation of powers provision which is set
forth in article 5, section 1 of our State Constitution.

Renaissance Enters., Inc., 334 S.C. at 651-52, 515 S.E.2d at 258. See also In
re Richland County Magistrate's Court, --S.C. --, 699 S.E.2d 161, 164 (S.C.
2010) (similar); id., 699 S.E.2d at 163, which noted that prosecutors practice
law in that “the prosecutor independently decides whether to prosecute,
decides what evidence to submit to the court, and negotiates the State's
position in plea bargaining.” Under the new reading of the statute, the
decision whether to institute proceedings is statutorily mandated, leaving the
Sheriff to decide what evidence to submit and what agreements to reach.
With respect, these are inherently prosecutorial decisions, which Sections
39-15-1195 and 44-53-530 leave to prosecutors to make, and are, in any rate,
clearly the practice of law.

These problems may be less severe for the current Appellant-
Respondent, as the Florence County Sheriff has an attorney on staff.
However, the precedent established applies to all Sheriffs and police chiefs
in the State. Moreover, even for the current Sheriff, the procedure is not
without costs; it diverts his attorney from the work the attorney was hired to
perform.

Sections 39-15-1195 and 44-53-530 draw a distinction between policing agencies (which it refers to as "law enforcement") and prosecuting agencies. The distinction is between entities whose key employees are primarily trained in detection, arrest, and seizure, and those whose key employees are primarily trained in legal practice. (The Sheriff does not maintain that the term "law enforcement" always excludes prosecutors and the like, but he recognizes that the statutes relevant here use the term "law enforcement" in a narrower sense, one that excludes prosecutors.) In this legislative scheme, the policing agencies, such as a county Sheriff's Office, a city Police Department, and the like, investigate, search, and seize; the agencies whose expertise is in bringing and defending lawsuits bring or defend the forfeiture action.

The distinction is perhaps most clearly stated in Paragraph (G) of Section 39-15-1195 ("When property . . . or anything else of value is seized . . . , the law enforcement agency making the seizure, . . . shall submit a report to the appropriate prosecution agency." 39-15-1195(G) (emphasis supplied)). As the Court accurately observes, 39-15-1195 does not say by whom forfeiture proceedings are to be instituted, but instead refers the reader to Section 44-53-530, which states as its opening words, "Forfeiture of property . . . must be accomplished by petition of the Attorney General or

his designee or the circuit solicitor or his designee to the court of common pleas for the jurisdiction where the items were seized." 44-53-530(a) (emphasis supplied). The policing agency reports to the lawyers, who handle the civil case from that point on.

Under 44-53-530, law enforcement is to be notified, not be the notifier. "Notice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the petition, including law enforcement agencies which have notified the petitioner of their involvement in effecting the seizure." 44-53-530(a). "Any forfeiture may be effected by consent order approved by the court without filing or serving pleadings or notices provided that all owners and other persons with interests in the property, including participating law enforcement agencies, entitled to notice under this section, except lienholders and agencies, consent" 44-53-530(d).

In the statutory plan, then, two sets of entities are empowered to bring a civil suit for determination of whether seized goods are forfeit or are to be returned: the Owner (of the property or of a lien on the property), either pro se or via counsel; and the state, via its "counsel's" offices. Excluded are the policing agencies, who have neither the expertise nor the authorization to bring civil suits in circuit court. "Forfeiture of property . . . must be

accomplished by petition . . . to the court of common pleas" 44-53-530(a) (emphasis added). Law enforcement officers who are not themselves attorneys are banned from personally bringing suit in common pleas; it would be the unauthorized practice of law were they to do so. Law enforcement entities in smaller jurisdiction lack the funds to hire counsel; some departments consist of a handful of officers or even a single officer. The legislature, it is respectfully submitted, did not intend to require these small agencies to hire an attorney every time they seize contraband. Nor did it intend to expose them to actual and punitive damages if they failed to hire an attorney to institute a forfeiture action.

The Opinion, then, rewrites the statutory scheme, with immensely consequential results. If exposed to such liability, or if required to hire an attorney, as the consequence of seizing contraband, law enforcement officers will be required to choose between turning a blind eye to contraband, and depleting the already-strained budget. The legislature did not intend to put them to a choice between violating their oaths and bankrupting their department. The decision can be expected to reduce seizure activity throughout the State, which, it is respectfully submitted, is not what the Legislature intended.

Neither this Court nor the Supreme Court has previously ruled on whether policing agencies, as distinct from prosecuting agencies, are authorized or required to institute such forfeiture proceedings. This opinion, unless withdrawn, creates a dangerous and unworkable precedent. The Court should accordingly rehear, withdraw the current opinion, and substitute a new opinion.

Better to follow the plain reading of the statutes: it is the Solicitor, the Attorney General, or a party designated by them who may institute such proceedings.

Rather than interpret the statute to require the Sheriff to commit a crime, and specifically to engage in the unauthorized practice of law, which the legislature is without power to define, it would be better to read the statute as written.

All these problems can be avoided if the Court will simply extend its analysis of Paragraph (C) to its logical conclusion. Paragraph (C) mandates that one of the parties mentioned in 44-53-530 as entitled to institute forfeiture proceedings do so. No one else is authorized to do so. Therefore, the Sheriff is not required or authorized to do so.

All but the last sentence above are straight from the Court's opinion.
The final sentence, beginning "Therefore," does follow.

CONCLUSION

For the foregoing reasons, the Court should rehear, and grant other relief as described above, or such other relief as the Court may see fit.

Respectfully submitted,



Michael C. Abbott
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Florence, SC 29503-1770
(843) 662-5000

Attorney for Appellant-Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY

COURT OF COMMON PLEAS

The Hon. Ernest F. Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

James David Farmer..... Respondent-Appellant,

v.

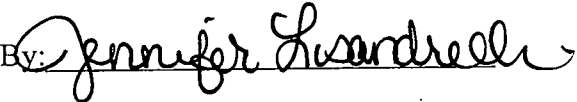
Florence County Sheriff's Office..... Appellant-Respondent.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Rehearing was served on all parties to this matter by depositing a copy in the U.S. mail, sufficient postage pre-paid, on November 23, 2010, addressed to:

Patrick J. McLaughlin
Wukela Law Firm
Post Office Box 13057
Florence, SC 29504-3057

THE HYMAN LAW FIRM, LLP

By: 

Florence, SC

Dated: November 23, 2010

17408

COPY

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

James David Farmer, ... Respondent/Appellant,

v.

Florence County Sheriff's Office, ... Appellant/Respondent.

RECORD ON APPEAL

February 24, 2009

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STATE OF SOUTH CAROLINA

COUNTY OF Florence

AFFIDAVIT

Personally appeared before me, one _____
who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions
of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Searching for Nike Counterfeit shoes, Counterfeit/pirated CD's, DVD movies, computers to
download Counterfeit CD's and movies, Counterfeit clothing and cash money
from selling Counterfeit merchandise.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING) TO BE SEARCHED

706 S. Church Street, Top Bear Clothing, a white and black cinder block
building with windows in front of store, iron bars on the window, with
three shirts hanging in the front left window.

REASON FOR AFFIANT'S BELIEF THAT THE PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

Inv. Tim Compton, with the Florence Police Dept. received complaints that the store, Top Bear
Clothing, at 706 S. Church Street were selling Counterfeit merchandise, such as shoes, CD's, and DVD's.
A private investigator, Rick Hawks with Blazer Investigations, who is Certified through the recording artist
and movie industry, walked into 706 S. Church Street and observed in plain view Counterfeit CD's
and DVD movies in the glass front counter at the cash register. He also observed Nike shoes on the
wall and in the back storage room. Mr. Hawks observed Lacoste shirts hanging in the front window.
A Confidential informant was sent in to the store and made a purchase of Nike Air Force tennis shoes for
\$60.00. The Confidential informant has been a reliable informant since 1988 and has over a 90% reliability rate.
Rick Hawks and Nike Corp. Confirmed that the shoes that the Confidential informant purchased were indeed
Counterfeit.

Sworn to and Subscribed before me

this 30 day of August, 2004
Jim R. [Signature] (L.S.)
Signature of Judge

[Signature]
Affiant

Address 6719 Friendfield Road
Effingham, SC 29541
Phone 843-665-2121

000001

STATE OF SOUTH CAROLINA

COUNTY OF Florence

SEARCH WARRANT

Form Approved by
S.C. Attorney General
Section 17-13-160
March 15, 1978

TO ANY BONDED LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY
OF Florence

It appearing from the attached affidavit that there are reasonable grounds to believe that certain property subject to seizure under provisions of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises:

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

706 S. Church Street, Top Gear Clothing, a white and black cinder block building with windows in front of store, iron bars on the windows, with three shirts hanging in the front left window.

Now, therefore, you are hereby authorized to search the subject premises for the property described below, and to seize such property if found:

DESCRIPTION OF PROPERTY

Searching for Nike Counterfeit shoes, Counterfeit/pirated CD's, DVD movies, Computers to down load Counterfeit CD's and movies. Counterfeit clothing and cash money from selling Counterfeit merchandise.

This Search Warrant shall not be valid for more than ten days from the date of issuance.

A written inventory of all property seized pursuant to this Search Warrant shall be made to

Magistrate J. W. Hurrell, Florence County

within ten days from the date of this warrant, such inventory to be signed by the officer executing this warrant, and a copy of such inventory shall be furnished to the person whose premises are searched if demand for such copy is made.

A copy of this Search Warrant shall be delivered to the person in charge of the premises searched at the time of such search if practicable, and, if not, to such person as soon thereafter as is practicable; in the event the identity of the person in charge is not known or if such person cannot be found after reasonable diligence in attempting to locate the person, a copy shall be attached to a prominent place on such premises.

Florence

, S.C.

August 30

2007

Signature of Judge

(L.S.)

RETURN

I received the attached Search Warrant August 30, 2007, and have executed it as follows:

On August 30, 2007 at 3:20 o'clock A M, I searched
(the person) described in the warrant and (the premises)

I left a copy of the warrant with ERNESTINE FARMER
Name of person searched or "at the place of search" with.
Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

NIKE AIR JORDAN (RETRO) 28, 30, 22 (50)
NIKE AIR FORCE ONE 31, 24, 33, 25, 30, 24, 9 (176)
ROCA WEAR 12 pieces
LOUIS VUITTON 4
1 High Point model CF380 serial P825196 Handgun
1 mag. 4 rounds 380 ammo.
1 compact computer tower serial 6Y31-KNB2-M05
1 monitor MPC, 1 keyboard, 1 lexmark printer, 1 netopia ^{wireless} modem
Coogi jeans - 9 Coogi jean shorts - 2
evisu jeans 4
evisu - 3 shirts
LRG - 16 T-shirts + 4 (20) T-shirts
Coogi shirts - 7 jeans
Red monkey - 7 T-shirts
LRG jeans - 2 + 8 (10)

This inventory was made in the presence of _____

AND _____

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this _____

day of _____, 19 _____

(L.S.)

Signature of Judge



(Signature of Officer Executing Warrant)

RETURN

I received the attached Search Warrant August 30 2007, and have executed it as follows:
On August 30 2007 at 3:20 o'clock P M, I searched
(the person) described in the warrant and (the premises)

I left a copy of the warrant with _____
Name of person searched or "at the place of search" with.
Together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant: _____

Roca Wear Jeans - 10

Roca Wear Shirt - 1

NBA jerseys - 5

Ralph Lauren - 1

Lacoste - 6

Burberry - 1 Boot

Gucci - 1 Boot

Coach - 1 Shoe

Coach - 1 purse

DrD's - 41 + 3

(44)

CD's - 214 + 9

(223)

Blank DVD's - 22

Blank CD's - 37

3 CD jewel cases + 1

(4)

This inventory was made in the presence of _____

AND _____

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

SWORN to before me this _____

day of _____

, 19 _____

(L.S.)

Signature of Judge

(Signature of Officer Executing Warrant)

*
*
*

*NARRATIVE

TO: SHERIFF WILLIAM K. BOONE
FROM: INV. CHAD COLLINS
SUBJECT: COUNTERFEIT MERCHANDISE/ ILLEGAL RECORDINGS
VICTIM: SOCIETY
SUSPECT: JAMES FARMER
DATE: 091407

ON 091007 I WAS ASSIGNED THIS CASE BY LT. CAMP. PRIOR TO BEING ASSIGNED THIS CASE I HAD BEEN CONTACTED BY SGT. DETECTIVE TIM COMPTON WITH THE FLORENCE POLICE DEPARTMENT IN REFERENCE TO COMPTON RECEIVING INFORMATION ON COUNTERFEIT MERCHANDISE AND ILLEGAL VIDEO AND AUDIO RECORDINGS BEING SOLD AT THE INCIDENT LOCATION OF 706 SOUTH CHURCH STREET IN FLORENCE. THE NAME OF THE BUSINESS IS TOP GEAR CLOTHING. DET. COMPTON HAD CHECKED THE TAX ACCESSORS OFFICE TO DETERMINE IF THE LOCATION WAS IN THE CITY LIMITS OR IF THE LOCATION WAS IN THE COUNTY. WE DETERMINED THAT IT WOULD BE BEST FOR THIS TO BE A COUNTY CASE. I MET WITH SGT. COMPTON AT THE FLORENCE POLICE DEPT ON 8/30/07 TO GO OVER THE PERTINENT INFORMATION ON THIS CASE. SGT. COMPTON HAD ALREADY BEEN IN CONTACT AS WELL WITH RICK HAWKS OF BLAZER INVESTIGATIONS. HAWKS WORKS WITH THIS COMPANY TO CONDUCT INVESTIGATIONS INTO COUNTERFEIT MERCHANDISE. HAWKS HAS BEEN IN THIS LINE OF WORK FOR OVER 20 YEARS. HAWKS AND COMPTON HAD ALREADY DONE SOME INITIAL INVESTIGATION INTO THE COMPLAINT OF COUNTERFEIT MERCHANDISE PRIOR TO ADVISING ME OF THE SITUATION. I ALONG WITH SGT. COMPTON, RICK HAWKS, DOUG RENEUX FROM THE SC DEPT OF REVENUE AND A CONFIDENTIAL INFORMANT WENT TO THE FLORENCE COUNTY EMS STATION LOCATED ON CHURCH STREET. UTILIZING THE CONFIDENTIAL INFORMANT IN A CONTROLLED BUY WE SENT THE INFORMANT IN TO TOP GEAR CLOTHING TO BUY A PAIR OF SHOES SPECIFIED AS NIKE AIR FORCE SHOES. THE INFORMANT WAS GIVEN \$80 BY HAWKS TO PURCHASE THE SHOES. THE INFORMANT THEN WENT TO TOP GEAR CLOTHING AND PURCHASED A PAIR OF NIKE AIR FORCE SHOES FOR \$60. HAWKS CHECKED THE SHOES BROUGHT BACK BY THE INFORMANT AND DETERMINED THE SHOES TO BE COUNTERFEIT BASED ON HAWKS EXPERIENCE. AT THAT POINT WE DETERMINED TO OBTAIN A SEARCH WARRANT FOR THE STORE BASED ON THE PRIOR INVESTIGATION AND THE BUY MADE BY THE INFORMANT. I, ALONG WITH HAWKS, RENEUX AND SGT. COMPTON WENT TO TOP GEAR CLOTHING TO MAINTAIN A PRESENCE WHILE THE SEARCH WARRANT WAS OBTAINED. THE SUSPECT IN THIS CASE WAS PLACED INTO INVESTIGATIVE DETENTION BY ME BASED ON THE COUNTERFEIT MERCHANDISE THAT WAS VISIBLE. SGT. COMPTON THEN WENT TO THE FLORENCE COUNTY MAGISTRATES OFFICE TO OBTAIN THE SEARCH WARRANT FOR THE PROPERTY LOCATED AT 706 SOUTH CHURCH STREET AT TOP GEAR CLOTHING, WHICH BASED ON BUSINESS LICENSE, STATES THAT IS OWNED AND OPERATED BY JAMES FARMER THE SUSPECT. WHILE AWAITING THE SEARCH WARRANT FARMER BECAME DISORDERLY AND WAS HANDCUFFED. IT WAS THEN DETERMINED THAT FARMER WOULD BE TRANSPORTED TO THE FLORENCE COUNTY SHERIFFS OFFICE. FARMER RELATED THAT HE WOULD LIKE TO HAVE SOMEONE PRESENT DURING THE SEARCH AND WANTED HIS GIRLFRIEND PRESENT. FARMER'S GIRLFRIEND ARRIVED AT THE LOCATION ALONG WITH FARMER'S MOTHER. BOTH WERE PRESENT AT THE EXECUTION OF THE SEARCH WARRANT. PRESENT DURING THE EXECUTION OF THE SEARCH WARRANT FOR THE COUNTY INCLUDED INV. LYNCH, INV. MCFADDEN, INV. COLLINS, RICK HAWKS (BLAZER INVESTIGATIONS), DOUG RENEUX (SC DEPT OF REVENUE). UPON EXECUTION OF THE SEARCH WARRANT ITEMS SEIZED INCLUDED NIKE SHOES, LOUIS VATTON SHOES, NBA JERSEYS, ENYCE CLOTHING, LACOSTE CLOTHING, ROCA WEAR, AND ALSO APPROXIMATELY 44 DVD'S AND 223 CD'S. ALL ITEMS HAD A TOTAL RETAIL VALUE \$40,000. THE ITEMS WERE RECORDED ON THE SEARCH WARRANT ACCORDING TO STATE LAW. ALSO FOUND DURING THE SEARCH WAS A HIGH POINT MODEL CF380 380 CALIBER HANDGUN WHICH WAS FOUND IN A CABINET IN THE OFFICE OF THE BUILDING.

IT WAS LOCATED WHILE SEARCHING THE CABINET FOR ILLEGAL RECORDINGS AND PAPERWORK PERTAINING TO THE PURCHASE OF COUNTERFEIT MERCHANDISE. THE SERIAL NUMBER ON THE HANDGUN IS P825196. A RECORDS CHECK OF THE WEAPON SHOWED THAT THE WEAPON WAS CLEAR. ALL ITEMS WERE RECORDED ON THE SEARCH WARRANT AND THE ITEMS WERE TRANSPORTED TO A STORAGE FACILITY SET UP BY BLAZER INVESTIGATION INVESTIGATOR RICK HAWKS. ALL ITEMS SEIZED EXCEPT FOR THE HANDGUN WAS PLACED IN THE STORAGE UNIT. WARRANTS FOR FARNEMR WERE OBTAINED BY ME FOR ILLEGAL DISTRIBUTION OF RECORDINGS WARRANT NUMBER K271870 AND TRAFFICKING IN COUNTERFEIT MERCHANDISE WARRANT NUMBER K271869. WARRANTS WERE SERVED AT THE FLORENCE COUNTY SHERIFF'S OFFICE ON 83107. A CRIMINAL HISTORY CHECK SHOWED THE SUSPECT HAVING A FELONY ON HIS RECORD. I THEN CONTACTED CRAIG TOWNSEND WITH ATF TO ADVISE HIM OF THE SITUATION.

FROM THE INFORMATION BEFORE YOU PLEASE CONSIDER THIS CASE CLEARED BY ARREST.

RESPECTFULLY SUBMITTING,
INV. CHAD COLLINS/CC

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

JAMES DAVID FARMER

Plaintiff(s)

vs.

FLORENCE COUNTY SHERIFF'S OFFICE

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2008-CP - 21- 1071

(Please Print)

Submitted By: Patrick J. McLaughlin

Address: Wukela Law Firm, P.O. Box 13057, Florence,
SC 29504-3057

SC Bar #: 73675

Telephone #: 843-669-5634

Fax #: 843-669-5150

Other:

E-mail: Patrick@wukelalaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☒ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|---|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Notice/ File Med Mal (230)
☒ Other (299)
<i>Negligence per se</i> | Torts - Personal Injury
☐ Assault/Slander/Label (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Sexual Predator (510) | | |

Submitting Party Signature:

Date: May 30, 2008

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11 and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

CERTIFIED: A TRUE COPY

Cornie Red Sherrin

CLERK OF COURT C.P & G.S.
FLORENCE COUNTY, S.C.

000007

FOR MANDATED ADR COUNTIES ONLY
Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

JAMES DAVID FARMER,

Plaintiff,

vs.

FLORENCE COUNTY SHERIFF'S
OFFICE,

Defendant,

) IN THE COURT OF COMMON PLEAS
) CIVIL ACTION NO: 2008-CP-21-1071

SUMMONS FOR RELIEF
COMPLAINT SERVED
(JURY TRIAL DEMANDED)

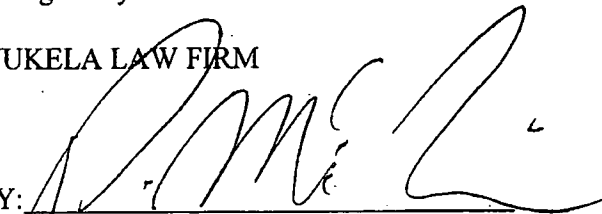
2008 MAY 30 PM 4:41
CLERK OF COURT
FLORENCE COUNTY, S.C.

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices at 403 Second Loop Road, Florence, South Carolina within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

WUKELA LAW FIRM

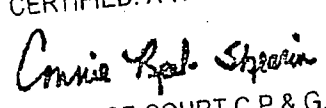
BY:


PATRICK J. MCLAUGHLIN
ATTORNEY FOR PLAINTIFF
P.O. BOX 13057
FLORENCE, SC 29504-3057
TELEPHONE: 843-669-5634

Florence, South Carolina

May 30, 2008

CERTIFIED: A TRUE COPY


CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

000009

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

JAMES DAVID FARMER,

Plaintiff,

vs.

FLORENCE COUNTY SHERIFF'S
OFFICE,

Defendant,

) IN THE COURT OF COMMON PLEAS
) CIVIL ACTION NO: 2008-CP-21-1071

COMPLAINT
(JURY TRIAL DEMANDED)

2008 MAY 30 PM 4:41
CLERK OF COURT
FLORENCE COUNTY, S.C.

The Plaintiff, James David Farmer, by and through his undersigned counsel,
hereby makes the following claims and allegations:

JURISDICTION

1. That the Plaintiff is a citizen and a resident of the County of Florence, State of South Carolina.
2. That the Plaintiff is informed and believes that Defendant Florence County Sheriff's Office (hereinafter "Defendant FCSO") is a governmental entity charged with protecting and serving the county of Florence, South Carolina, by way of law enforcement.
3. All actions referenced in this complaint took place in the county of Florence, State of South Carolina.
4. That venue is properly laid in this Court pursuant to §15-7-30 South Carolina code of Laws Amended [Law. Co-op. 1976].

CERTIFIED: A TRUE COPY

Connie Red Spain
CLERK OF COURT C.P & G.S.
FLORENCE COUNTY, S.C.

FACTS

5. That on or about August 30, 2007, agents of Defendant FCSO in their capacity as law enforcement officers, initiated a raid on the Plaintiff's commercial establishment, "Top Gear Clothing" located at 706 S. Church St, Florence, South Carolina.
6. Pursuant to this raid, the investigating officers seized the Plaintiff's inventory, which consisted of clothing, footwear, movie DVDs and music CDs.
7. As a result of the raid, the Plaintiff was arrested and charged with counterfeit charges as well as with "Destruction of Sea Oats or Venus Flytrap Plant."
8. On or about January 10, 2008, the Plaintiff was indicted on one count of violation of S.C. Code Ann. §39-15-1190 (Unauthorized use/trafficking in goods/services with counterfeit trademark) and one count of violation of S.C. Code Ann. §16-11-0930, 940 (a) (Illegal distribution of recordings (1,000 or more audio, 65 or more video)).
9. Subsequent to the events described in Paragraph Eight (8), the State of South Carolina's criminal case against the Plaintiff was disposed of by the Plaintiff's plea of guilty to a violation of S.C. Code Ann. §16-11-940 (c) (Illegal distribution of recordings (not more than 25 audio, not more than 10 video). The counterfeit trademark charges were dismissed. The Plaintiff is unsure of what happened to the peculiar sea oats/flytrap charge as he has never seen any documentation concerning that charge (it simply appeared on the copy of his criminal record provided during discovery).

10. On or about February 5, 2008 and subsequent to the disposition of the criminal charges against the Plaintiff, Plaintiff's counsel sent a demand letter to Defendant FCSO (see *Exhibit A*). This letter was addressed to Investigator Chad Collins, as well as Sheriff Kenny Boone. The letter explained the disposition of the Plaintiff's charges and documented why that particular disposition had occurred. The letter went on to inform Defendant FCSO that the seized items represented a large portion of the Plaintiff's inventory and its seizure was hindering the Plaintiff's ability to operate his business. The letter demanded the seized inventory, with the exception of the movies and CDs, be returned to the Plaintiff.
11. On or about March 19, 2008, having received no response from Defendant FCSO, the Plaintiff, through counsel, sent a second demand letter. (see *Exhibit B*). This letter demanded the return of the Plaintiff's inventory within Ten (10) days of the letter and placed Defendant FCSO on notice that failure to return the inventory would result in the Plaintiff bringing an action before the Court.

FOR A FIRST CAUSE OF ACTION
(Negligence Per Se against Defendant FCSO)

12. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.
13. Pursuant to S.C. Code Ann. §39-15-1195 (B), property is subject to seizure and forfeiture to any law enforcement agency upon violation of S.C. Code Ann. §39-15-1190.

14. If a seizure is made pursuant to S.C. Code Ann. §39-15-1195 (B), proceedings pursuant to S.C. Code Ann. §44-53-530 regarding forfeiture and disposition must be instituted within a "reasonable time."
15. S.C. Code Ann. §39-15-1195 (D) specifically states property seized pursuant to this statute is not subject to replevin.
16. Therefore, because the Plaintiff was statutorily barred from filing an action for the return of his inventory, Defendant FCSO had a statutorily created duty to institute forfeiture proceedings in a reasonable time.
17. Defendant FCSO has violated its statutorily created duty to institute forfeiture proceedings in a reasonable time, by not filing forfeiture proceedings.
18. As of the date of this Complaint, no forfeiture proceedings have been filed in this matter, a delay of approximately nine (9) months since the material was seized and approximately three (3) months since the Plaintiff demanded the return of the inventory and noticed Defendant FCSO of the harm the seizure was inflicting on him.
19. That as a direct and proximate result of the Defendants' negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A SECOND CAUSE OF ACTION
(Negligence-General against Defendant FCSO)

20. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

21. Defendant FCSO, a law enforcement agency, had a duty of care to the Plaintiff in that Defendant was required to return the seized inventory, which consisted of clothing and footwear in a timely manner.
22. Defendant FCSO had a heightened duty of care to return seized inventory to Plaintiff as a result of Plaintiff's statutory inability to seek return of the seized inventory.
23. Defendant FCSO breached this duty of care in wrongfully retaining Plaintiff's seized inventory for almost nine (9) months. Defendant FCSO has caused damages to the Plaintiff in denying him use of the seized inventory for almost nine (9) months.
24. That as a direct and proximate result of the Defendants' negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A THIRD CAUSE OF ACTION
(CONVERSION AGAINST DEFENDANT FCSO)

25. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.
26. The Plaintiff had a right to possess the inventory seized by the Defendant FCSO, in that there was no violation of S.C. Code Ann. §39-15-1190.
27. Defendant FCSO has converted the seized inventory to its own use in denying Plaintiff his rightful possession of the inventory seized
28. Plaintiff has at no time given Defendant FCSO permission to use the inventory seized.

29. Plaintiff is entitled to the return of the inventory seized, as well as any lost profits plus interest that has resulted from Defendant FCSO's seizure.

30. That as a direct and proximate result of the Defendants' negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

FOR A FOURTH CAUSE OF ACTION
(CIVIL CONSPIRACY AGAINST DEFENDANT FCSO)

31. The Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

32. Unknown agents of Defendant FCSO have acted in concert to deny the Plaintiff the return of his inventory by illegally continuing hold the Plaintiff's property when they have no legal right to do so. In addition, unknown agents of Defendant FCSO have acted in concert to deny the Plaintiff the return of his property by failing to meet their duty under the law of instigating forfeiture proceedings.

33. The Plaintiff would note that at a minimum, both Investigator Chad Collins and Sheriff Kenny Boone have been aware of the Plaintiff's demand for the return of his property since the February 5, 2008 correspondence.

34. That as a direct and proximate result of the Defendants' negligence, carelessness, recklessness, gross negligence, and willful and wanton conduct, the Plaintiff has suffered injuries and damages as hereinafter set out.

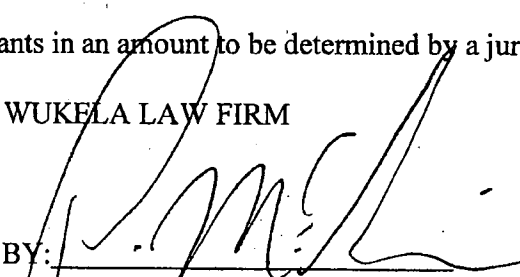
DAMAGES

Having fully pled his Complaint against the Defendant Florence County Sheriff's Office, the Plaintiff prays this Honorable Court will award the following damages:

35. Special damages to Plaintiff in that he has had to seek legal assistance to obtain the return of the seized inventory. Defendant has further caused special damages to Plaintiff in denying him the use of his inventory in his business, as well as his day to day life;
36. Loss of profits and interest from those profits arising from Defendant FCSO's seizure of the Defendant's property;
37. All other actual and consequential damages resulting from the actions or failures to act of Defendant FCSO;
38. That in addition, the Plaintiff is informed and believes that he is entitled to an award of punitive damages in an amount to be determined by a jury.

WHEREFORE, the Plaintiff prays judgment for actual, consequential, and punitive damages against the Defendants in an amount to be determined by a jury.

WUKELA LAW FIRM

BY: 
PATRICK J. MCLAUGHLIN
ATTORNEY FOR PLAINTIFF
P.O. BOX 13057
FLORENCE, SC 29504-3057
Telephone: (843) 669-5634
Facsimile: (843) 669-5150

Florence, South Carolina

May 30, 2008

EXHIBIT A

000017

WUKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Christi B. McDaniel
Stephen J. Wukela
Patrick J. McLaughlin
Pheobe A. Clark
April S. Purvis
Michael T. Miller

403 Second Loop Road
P.O. Box 13057
Florence, SC 29504-3057

February 5, 2008

(843) 669-5634
FAX (843) 669-5150

Investigator Chad Collins
Law Enforcement Complex
6719 Friendfield Road
Effingham, SC 29541

Re: State vs. James David Farmer
Warrant No. K-271869, Unauthorized use/trafficking in Goods/Services with Counterfeit
Trademark by Individual
Warrant No. K-271870, Illegal Distribution of Recordings

Dear Investigator Collins:

I am not sure whether you are aware or not, but the above referenced charges against my client have been resolved. Mr. Farmer accepted a plea to §16-11-940 (c). That charge, of course, deals solely with recordings. In other words the charges brought against my client for unauthorized use or trafficking in counterfeit trademark items were dismissed. I will tell you that it was our position to the solicitor's office that my client had the records and receipts to support the purchasing of these items from reputable trade publications. Additionally, for all practical purposes, today's clothing manufacturers do not even make their own products and cannot accurately identify what is or is not their product. Hence, there is no trademark violation.

I am writing you today to demand the return of all items seized from my client's business, with the exception of the movies and audio recordings. As the seized material represents a large portion of my client's inventory, its seizure has greatly hindered his ability to operate his business. Therefore, I would appreciate your prompt attention to this matter.

Please contact me as soon as possible so we can schedule a return of these items.

Thank you for your cooperation in this matter.

Yours truly,

WUKELA LAW FIRM

PATRICK J. MCLAUGHLIN

PJM/ksc

000018

Investigator Chad Collins

Page 2

February 5, 2008

cc:

Sheriff Kenney Boone
Law Enforcement Complex
6719 Friendfield Road
Effingham, SC 29541

James David Farmer
P.O. Box 12563
Florence, SC 29505

000019

EXHIBIT B

000020

JKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Christi B. McDaniel
Stephen J. Wukela
Patrick J. McLaughlin
Pheobe A. Clark
April S. Purvis
Michael T. Miller

403 Second Loop Road
P.O. Box 13057
Florence, SC 29504-3057

March 19, 2008

(843) 669-5634
FAX (843) 669-5150

Investigator Chad Collins
Law Enforcement Complex
6719 Friendfield Road
Effingham, SC 29541

Re: State vs. James David Farmer
Warrant No. K-271869, Unauthorized use/trafficking in Goods/Services with Counterfeit
Trademark by Individual
Warrant No. K-271870, Illegal Distribution of Recordings

DEMAND

Dear Investigator Collins:

Please accept this final demand on behalf of my client requesting the return of all items seized from my client's business with the exception of the movies and the audio recordings. I initially requested this return of inventory via correspondence of February 5, 2008 and have received no response.

As this is a second and final demand for my client's inventory, if my client has not received return of his inventory within ten (10) days of this letter, we will bring this matter before the Court. I look forward to your prompt response.

Please contact me as soon as possible so we can schedule a return of these items.

Thank you for your cooperation in this matter.

Yours truly,

WUKELA LAW FIRM

PATRICK J. MCLAUGHLIN

PJM/ksc
cc:
Sheriff Kenney Boone
Law Enforcement Complex
6719 Friendfield Road
Effingham, SC 29541

000021

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

James David Farmer,

Plaintiff,

Vs.

Florence County Sheriff's Office,

Defendant.

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2008-CP-21-1071

DEFENDANT, FLORENCE COUNTY
SHERIFF'S OFFICE, ANSWER TO
COMPLAINT OF PLAINTIFF

FILED
2008 JUN 18 PM 4:18
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

The Defendant, Florence County Sheriff's Office, by way of Answer to the Complaint of the Plaintiff, alleges as follows:

**FOR A FIRST DEFENSE
(By Way of Answer)**

1. Paragraphs 1, 2, 3, and 4 of the Complaint are admitted.
2. Paragraphs 5, 6, 7, and 8 of the Complaint are admitted.
3. As to Paragraph 9 of the Complaint, it is admitted that the Plaintiff entered a guilty plea to violation of South Carolina Code Ann. §16-11-940. The Defendant is without sufficient information with which to respond to the remaining allegations and therefore denies the same.
4. As to Paragraph 10 of the Complaint, it is admitted that certain documents were sent to the Defendant by the attorney for the Plaintiff and the Defendant refers to those documents for subject and content and denies the remaining allegations of that Paragraph.
5. As to Paragraph 11 of the Complaint, it is admitted that certain documents were sent to the Defendant by the attorney for the Plaintiff and the Defendant refers to those documents for subject and content and denies the remaining allegations of that Paragraph.

CERTIFIED: A TRUE COPY

Connie Ral. Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

000022

**AS TO THE FIRST CAUSE OF ACTION
(Negligence Per Se against Defendant FCSO)**

6. Paragraph 12 of the Complaint requires no response but to the extent that it does, the allegations of the defenses above are re-alleged as if fully set forth hereafter.
7. As to the Paragraphs 13, 14, and 15 of the Complaint, the Defendant craves reference to the statutes themselves for content and construction thereof and denies the remaining allegations of those paragraphs.
8. Paragraphs 16 and 17 of the Complaint are denied.
9. As to Paragraph 18 of the Complaint, it is admitted that no forfeiture proceedings have been filed but the remaining allegations of that paragraph are denied.
10. Paragraph 19 of the Complaint is denied.

**AS TO THE SECOND CAUSE OF ACTION
(Negligence-General against Defendant FCSO)**

11. Paragraph 20 of the Complaint requires no response but to the extent that it does, the allegations of the defenses above are re-alleged as if fully set forth hereafter.
12. Paragraphs 21, 22, 23, and 24 of the Complaint are denied.

**AS TO THE THIRD CAUSE OF ACTION
(Conversion against Defendant FCSO)**

13. Paragraph 25 of the Complaint requires no response but to the extent that it does, the allegations of the defenses above are re-alleged as if fully set forth hereafter.
14. Paragraphs 26, 27, 28, 29, and 30 of the Complaint are denied.

**AS TO THE FOURTH CAUSE OF ACTION
(Civil Conspiracy against Defendant FCSO)**

15. Paragraph 31 of the Complaint requires no response but to the extent that it does, the allegations of the defenses above are re-alleged as if fully set forth hereafter.
16. Paragraphs 32, 33, and 34 of the Complaint are denied.
17. Paragraphs 35, 36, 37, and 38 of the Complaint are denied.

**FOR A SECOND DEFENSE
(As to All Causes of Action)**

18. The defenses above are re-alleged as if fully set forth hereafter.
19. The Complaint of the Plaintiff fails to state a cause of action and therefore should be dismissed by this Court.

FOR A THIRD DEFENSE

20. The defenses set forth above are re-alleged as if fully set forth hereafter.
21. The Defendant is entitled to immunity under the South Carolina Tort Claims Act and all causes of action against the Defendant should be dismissed.

FOR A FOURTH DEFENSE

22. The defenses above are re-alleged as if fully set forth hereafter.
23. The Plaintiff has failed to exhaust his administrative remedies and therefore all causes of action against the Defendant should be dismissed.

FOR A FIFTH DEFENSE

24. The defenses above are re-alleged as if fully set forth hereafter.
25. The Defendant denies any negligence on its part and affirmatively alleges that the Plaintiff was negligent and that such negligence on the part exceeded any negligence on the part of

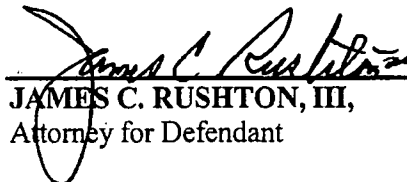
the Defendant and the Defendant is entitled to dismissal of all causes of action due to the comparative negligence of the Plaintiff.

WHEREFORE, the Defendant prays as follows:

- a) That the Court into the matters and things set forth herein;
- b) That the Complaint of the Plaintiff be dismissed; and
- c) For such other and further relief as may be just and proper.

Florence, SC

June 18, 2008



JAMES C. RUSHTON, III,
Attorney for Defendant

THE HYMAN LAW FIRM, LLP
170 Courthouse Square
Post Office Box 1770
Florence, SC 29503-1770
(843) 662-5000

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

James David Farmer,

Plaintiff,

Vs.

Florence County Sheriff's Office,

Defendant.

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2008-CP-21-1071

CERTIFICATE OF
MAILING

2008 JUN 18 PM 4:18
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC

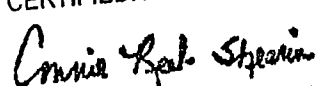
The undersigned, a Paralegal for The Hyman Law Firm, LLP, attorneys for the Defendant, does hereby certify that she deposited in the United States Mail a copy of the Defendant, Florence County Sheriff's Office, Answer to Complaint of Plaintiff dated June 18, 2008, the same being addressed to those persons whose names and addresses appear below, this being done on June 18, 2008, and that sufficient postage was affixed thereto:

Patrick J. McLaughlin
Wukela Law Firm
Post Office Box 13057
Florence, SC 29504-3057

Florence, SC

June 18, 2008


JENNIFER L. LISANDRELLI

CERTIFIED: A TRUE COPY

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

000026

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

JAMES DAVID FARMER

☒ Plaintiff

v.

Florence County Sheriff's Office

☐ Defendant.

IN THE COURT OF COMMON PLEAS

FILED

2008 JUN 24 PM 4:39

CASE NO.
2008-CP-21-1071

CONNIE REEL SHEARIN
CCCP & GS
FLORENCE COUNTY, SC
MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Patrick J. McLaughlin, Bar No. 73675 Address: Wukela Law Firm, P.O. Box 13057, Florence, SC 29504 phone: 843-669-5634 fax: 843-669-5150 e-mail: patrick@wukelalaw.com other:		Defendant's Attorney: , Bar No. Address: phone: fax: e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion For Summary Judgment Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☐ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☒ Plaintiff / ☐ Defendant _____ Date submitted _____			
SECTION III: Motion Fee ☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION Collected by: <u>M. Barr</u> ☐ MOTION FEE COLLECTED: <u>25# 34501</u> ☐ CONTESTED - AMOUNT DUE: _____ Date Filed: _____ CERTIFIED: A TRUE COPY <u>Connie Reel Shearin</u> CLERK OF COURT C.P. & G.S. FLORENCE COUNTY, S.C.			

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

FILED

2008 JUN 24

IN THE CIRCUIT COURT FOR
THE TWELFTH JUDICIAL CIRCUIT
CIVIL ACTION: 2008-CP-21-1071

James David Farmer,

Plaintiff,

vs.

Florence County Sheriff's Office,

Defendant.

CONNIE REEL-SHEARIN
CLERK OF COURT
FLORENCE COUNTY, SC

**MOTION FOR SUMMARY
JUDGMENT**

PLEASE TAKE NOTICE THAT the Plaintiff, by and through his undersigned counsel, respectfully moves, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for summary judgment in the above-captioned matter on the grounds that there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The grounds therefore are as follows:

1. The Plaintiff is the sole proprietor of a commercial establishment, "Top Gear Clothing," located at 706 S. Church St., Florence, South Carolina.
2. That it is admitted that on or about August 30, 2007, agents of Defendant FCSO initiated a raid on the Plaintiff's establishment described above.
3. That it is admitted the agents of Defendant FCSO seized the Plaintiff's inventory which consisted of clothing, footwear, movie DVDs and music CDs.
4. That it is admitted that on or about January 10, 2008, the Plaintiff was indicted on one count of violation of S.C. Code Ann. §39-15-1190 (Unauthorized use/trafficking in goods/services with counterfeit trademark) and one count of violation of S.C. Code Ann. §16-11-0930, 940 (a) (Illegal distribution of recordings (1,000 or more audio, 65 or more video)).

CERTIFIED: A TRUE COPY

Connie Reel-Shearin

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

5. That on or about January 23, 2008, the State of South Carolina's criminal charges against the Plaintiff was disposed of by the Plaintiff's plea of guilty to a violation of S.C. Code Ann. §16-11-940 (c) (Illegal distribution of recordings (not more than 25 audio, not more than 10 video). The counterfeit trademark charges were dismissed. (See *Exhibit A*).

6. That on or about February 5, 2008, the Plaintiff began attempts to recover his seized inventory not related to his criminal conviction (i.e. the clothes and shoes). These attempts consisted of two separate pieces of correspondence sent to the Defendant (see *Exhibits B & C*).

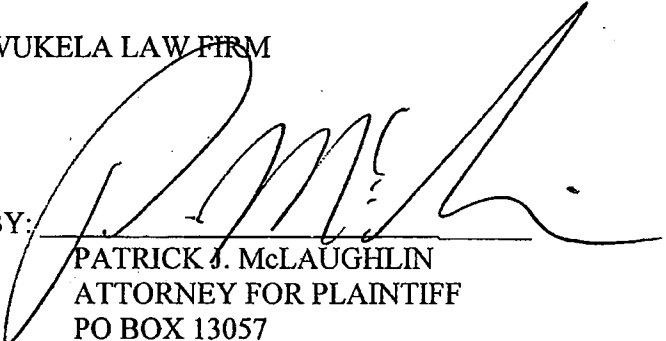
7. That it is admitted via paragraph nine (9) of the Defendant's answer that no forfeiture proceedings have been filed in this matter.

8. That there is no legal basis for the Defendant to continue to deny the Plaintiff the return of his lawfully purchased inventory and that the Plaintiff is entitled to the return of his property immediately, as well as a finding of special damages against the Defendant, incurred as a result of the Defendant's refusal to return the Plaintiff's property. The Plaintiff would note to the Court that continued delay in the return of his inventory only increases the Plaintiff's damages resulting from lost profits and interest on said lost profits.

In support of this motion, the Plaintiff relies upon the pleadings filed in this action, a forthcoming memorandum of law, such other affidavits and materials as may be timely submitted, and the applicable statutory and case law of South Carolina.

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court grant this motion, enter judgment in his favor pursuant to Rule 56 of the South Carolina Rules of Civil Procedure and award damages to include court costs, attorney's fees, lost profits and interest on those lost profits, as well as such additional damages as the Court sees fit.

WUKELA LAW FIRM

BY: 

PATRICK J. McLAUGHLIN
ATTORNEY FOR PLAINTIFF
PO BOX 13057
FLORENCE SC 29504
Telephone: (843) 669-5634
Facsimile: (843) 669-5150

Florence, South Carolina

June 24, 2008

Exhibit A

000031

06/23/2008 16:30 FAX

FLORENCE CNTY SOLICITORS

001/001

DEFENDANT: FARMER JAMES DAVID CASE#: 00071367-001
301 PINELAND DR INDICTMENT NO. 08- 138
FLORENCE SC 295010000 DOB: 8/18/71

CHARGE# 001 UNAUTH.USE/TRAFFICKING IN GOODS/SERVICES
WITH COUNTERFEIT TRADEMARK BY INDIVIDUAL
DATE 8/30/07 WARRANT# K271869 AGENCY: FLOR.CTY. SHERIFF DEPT.

DISPOSITION DATE: 1/23/08

PROSECUTION ENDED

JUDGE: SOLICITORS

CHARGE# 002 ILLEGAL DISTRIBUTION OF RECORDINGS (101
TO 999 AUDIO, 11 TO 64 VIDEO) - 1ST OFF
DATE 8/30/07 WARRANT# K271870 AGENCY: FLOR.CTY. SHERIFF DEPT.

DISPOSITION DATE: 1/23/08

REMAND

JUDGE: SOLICITORS

000032

Exhibit B

000033

WUKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Christi B. McDaniel
Stephen J. Wukela
Patrick J. McLaughlin
Pheobe A. Clark
April S. Purvis
Michael T. Miller

403 Second Loop Road
P.O. Box 13057
Florence, SC 29504-3057

(843) 669-5634
FAX (843) 669-5150

February 5, 2008

Investigator Chad Collins
Law Enforcement Complex
6719 Friendfield Road
Effingham, SC 29541

Re: State vs. James David Farmer
Warrant No. K-271869, Unauthorized use/trafficking in Goods/Services with Counterfeit
Trademark by Individual
Warrant No. K-271870, Illegal Distribution of Recordings

Dear Investigator Collins:

I am not sure whether you are aware or not, but the above referenced charges against my client have been resolved. Mr. Farmer accepted a plea to §16-11-940 (c). That charge, of course, deals solely with recordings. In other words the charges brought against my client for unauthorized use or trafficking in counterfeit trademark items were dismissed. I will tell you that it was our position to the solicitor's office that my client had the records and receipts to support the purchasing of these items from reputable trade publications. Additionally, for all practical purposes, today's clothing manufacturers do not even make their own products and cannot accurately identify what is or is not their product. Hence, there is no trademark violation.

I am writing you today to demand the return of all items seized from my client's business, with the exception of the movies and audio recordings. As the seized material represents a large portion of my client's inventory, its seizure has greatly hindered his ability to operate his business. Therefore, I would appreciate your prompt attention to this matter.

Please contact me as soon as possible so we can schedule a return of these items.

Thank you for your cooperation in this matter.

Yours truly,

WUKELA LAW FIRM

PATRICK J. MCLAUGHLIN

PJM/ksc

000034

Investigator Chad Collins

Page 2

February 5, 2008

cc:

Sheriff Kenney Boone
Law Enforcement Complex
6719 Friendfield Road
Effingham, SC 29541

James David Farmer
P.O. Box 12563
Florence, SC 29505

000035

Exhibit C

000036

WUKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Christi B. McDaniel
Stephen J. Wukela
Patrick J. McLaughlin
Pheobe A. Clark
April S. Purvis
Michael T. Miller

403 Second Loop Road
P.O. Box 13057
Florence, SC 29504-3057

March 19, 2008

(843) 669-5634
FAX (843) 669-5150

Investigator Chad Collins
Law Enforcement Complex
6719 Friendfield Road
Effingham, SC 29541

Re: State vs. James David Farmer
Warrant No. K-271869, Unauthorized use/trafficking in Goods/Services with Counterfeit
Trademark by Individual
Warrant No. K-271870, Illegal Distribution of Recordings

DEMAND

Dear Investigator Collins:

Please accept this final demand on behalf of my client requesting the return of all items seized from my client's business with the exception of the movies and the audio recordings. I initially requested this return of inventory via correspondence of February 5, 2008 and have received no response.

As this is a second and final demand for my client's inventory, if my client has not received return of his inventory within ten (10) days of this letter, we will bring this matter before the Court. I look forward to your prompt response.

Please contact me as soon as possible so we can schedule a return of these items.

Thank you for your cooperation in this matter.

Yours truly,

WUKELA LAW FIRM

PATRICK J. MCLAUGHLIN

PJM/ksc

cc:

Sheriff Kenney Boone
Law Enforcement Complex
6719 Friendfield Road
Effingham, SC 29541

000037

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

FILED

James David Farmer,

☒

Plaintiff,

2008 AUG 20 PM 4:37

CASE NO.

2008-CP-21-1071

Vs.

Florence County Sheriff's Office,

CONNIE REEL-SHEARIN

CCCP & GS

FLORENCE COUNTY, SC

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET☐ Defendant.

Check box above indicating submitting party

Name, S.C. Bar no. and address of defendant's attorney

James C. Rushton, III, S.C. Bar no. 4821

The Hyman Law Firm, LLP

Post Office Box 1770, Florence, SC 29503-1770

Telephone (843) 662-5000 Fax (843) 678-9273

E-mail jcrushton@hymanlawfirm.com

Name, S.C. Bar no. and address of plaintiff's attorney

Patrick J. McLaughlin, Esquire

Wukela Law Firm

Post Office Box 13057

Florence, SC 29504-3057

Telephone (843) 669-5634 Fax (843) 669-5150

E-mail Patrick@wukelalaw.com

☒

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐

FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐

PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Summary Judgment

Estimated Time Needed: 1 hour

Court Reporter Needed:

☐ YES☐ NO

SECTION II: Motion/Order Type

☒

Written motion attached

☐

Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Defendant

8/20/08

Date submitted

SECTION III: Motion Fee

☐

PAID - AMOUNT:

☒

EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act☐ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☒

Other: County Office

JUDGE'S SECTION

☐

Motion Fee to be paid upon filing of the attached order.

☐

Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by:

M. Barr

Date Filed:

☒

MOTION FEE COLLECTED:

☐

CONTESTED - AMOUNT DUE:

Exempt

CERTIFIED: A TRUE COPY

Connie Reel-Shearin

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

SCCA/233 (11/03)

000038

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

James David Farmer,

Plaintiff,

Vs.

Florence County Sheriff's Office,

Defendant.

FILED

2008 AUG 20 PM 4:37
CONNIE REEL-SHEARIN
CLERK OF COURT
FLORENCE COUNTY, SC

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2008-CP-21-1071

**DEFENDANT'S NOTICE AND CROSS-
MOTION FOR SUMMARY JUDGMENT**

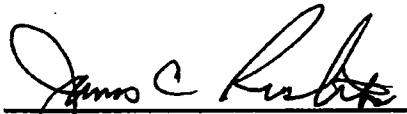
TO: PATRICK J. MCLAUGHLIN, ATTORNEY FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Florence County Sheriff's Office, in the above entitled action, will move before the Presiding Judge of the Court of Common Pleas for the Twelfth Judicial Circuit in the Florence County Courthouse, Florence, South Carolina, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, as follows:

That the Defendant be granted a summary judgment pursuant to SCRCP 56 as on the pleadings, discovery, affidavits, and any other documents which show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Florence, SC

August 20, 2008


JAMES C. RUSHTON, III,
Attorney for Defendant

THE HYMAN LAW FIRM, LLP
170 Courthouse Square
Post Office Box 1770
Florence, SC 29503-1770
(843) 662-5000

CERTIFIED: A TRUE COPY


CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

FILED

2008 AUG 20 PM 4: 37
STATE OF SOUTH CAROLINA IN THE CIRCUIT COURT FOR THE
COUNTY OF FLORENCE CONNIE REEL-SHEARIN TWELFTH JUDICIAL CIRCUIT
CCCP & GS
FLORENCE COUNTY, SC Civil Action No. 2008-CP-21-1071

James David Farmer,

Plaintiff,

v.

Florence County Sheriff's Office,

Defendant.

**DEFENDANT'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND IN SUPPORT OF DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT**

COMES NOW DEFENDANT, the Florence County Sheriff's Office, and
presents as follows:

FACTUAL AND PROCEDURAL BACKGROUND

A. The Previous Action

The present Plaintiff, James David Farmer, was charged with criminal violations of S.C. Code Ann. § 39-15-1190 (trafficking in counterfeit goods) and of S.C. Code Ann. § 16-11-0930 (distribution of pirated recordings). Specifically, the evidence was that he was selling counterfeit goods out of his store, much of it in plain view. Ex. A (Aff. Chad Collins, August 30, 2007). The \$44,000 of counterfeit goods included "Nike," "Louis Vaton," "National Basketball Association," "Lacoste," and other trademarks, shirts and shoes, as well as more than 200 CD's and 40 DVD's. Ex. B. (Narrative to Sheriff William K. Boone from Inv. Chad Collins, 09/14/07).

The merchandise was seized by law enforcement.

CERTIFIED: A TRUE COPY

Connie Reel-Shearin

CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

A plea bargain was worked out, whereby Mr. Farmer pled guilty to violation of § 16-11-0930 (distributing pirated recordings), and the charge of trafficking in pirated goods was dropped.

Mr. Farmer pled guilty.

B. The Current Action.

Mr. Farmer has now filed the present action. He seeks the return of the counterfeit clothes. He does not claim that he is entitled to the pirated recordings, but he wants the counterfeit clothes returned.

He so moves under S.C. Code Ann. § 39-15-1195 (C). The case law in South Carolina with regard to whether a statute provides a private cause of action is set forth in Summers v. Harrison Constr., 298 S.C. 451, 381 S.E. 2d 493 (Ct. App. 1989). The Court stated in that case that in order to establish a duty of care arising from a statute, a Plaintiff is required to show (1) that the essential purpose of the statute is to protect from the kind of harm to be suffered by the Plaintiff, and (2) that he is a member of the class of persons that statute is intended to protect. Clearly, the statutes involved in the present case are not designed to protect someone who is in the business of selling counterfeit goods, but it designed, rather, to protect the public from someone who sells counterfeit goods. The Plaintiff simply can not construe and take advantage of this statute to create a private cause of action against the Sheriff's Office. He can only avail himself of the provisions set forth in § 39-15-1195 (H) which the Plaintiff has not done.

ARGUMENT

I. Plaintiff's Motion Should Be Denied Because Section 39-15-1195, Subsection (C) Does Not Create A Private Cause Of Action. Instead, Private Actions To Require The Return Of Seized Property Are Governed By Subsection (H) Of That Section.

A. Basic Argument

S.C. Code Ann. § 39-15-1195 allows for the seizure by law enforcement of counterfeit goods. Mr. Farmer rests his claim here on subsection (C) of that statute. Subsection (C), states, in its entirety, "If a seizure is made pursuant to subsection (B), proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time." However, this provision is a directive to law enforcement, and should not be read as not an attempt to create a private cause of action under 1195(C).

Instead, §39-15-1195 explicitly provides the rule for such a private cause of action. It does so in Subsection (H), which states (emphasis supplied),

(H)(1) *An owner may apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter. Notice of hearing or rule to show cause accompanied by a copy of the application must be directed to all persons and agencies entitled to notice as provided in Section 44-53-530. If the court denies the application, the hearing may proceed as a forfeiture hearing held pursuant to the provisions of Section 44-53-530.*

(2) *The court may return a seized item to the owner if the owner demonstrates to the court by a preponderance of the evidence that the owner was not a consenting party to, or privy to, or did not have knowledge of, the use of the property that made it subject to seizure and forfeiture.*

Thus, Mr. Farmer is simply wrong when he writes, Complaint, para. 16, "Therefore, because the Plaintiff was statutorily barred from filing an action for the return of his inventory, Defendant FCSO had a statutorily created duty to institute forfeiture proceedings in a reasonable time." See also *id.*, para. 22 (similar). Mr. Farmer was not

statutorily barred from filing an action for the return of his inventory, and the very statute on which relies provides the means.

B. Additional Grounds to Deny Plaintiff's Motion

Obviously, § 39-15-1195(H) is the mechanism via which the legislature intended for property owners to be able to move to recover their property. Nor can § 39-15-1195(C) be plausibly read as creating an additional cause of action for property owners to recover their property. To so read Subsection (C) would make Subsection (H) a nullity, or "mere surplusage." Cf. *Dorman v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 159, 166 (Ct. App. 2002) (rejecting interpretation that would render a statute a nullity.)

Further, the legislature has stated the means via which a private property owner may seek recovery of seized property; it did so in subsection (H). *Expressio unius est exclusio alterius*. See *State v. Bolin*, 378 S.C. 96, 100; 662 S.E.2d 38, 40 (S.C. 2008):

By expressly allowing the regulation of the sale of alcoholic beverages to the 18-to 20-year-old age group and not stating any other situation in which the General Assembly may restrict the rights of this age group, the state constitution precludes the General Assembly from prohibiting this age group's possession of handguns. See *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) (the canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative); see also *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007) (when interpreting a statute, the words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation).

Because Plaintiff has neither sought to bring an action under § 39-15-1195(H), nor made any showing, let alone by a preponderance, that Mr. Farmer, the store owner, was unaware that he was selling counterfeit goods (and, indeed, he admitted knowingly

selling other counterfeit goods), Plaintiff's Motion for Summary Judgment should be DENIED.

II. Defendant's Motion For Summary Judgment Should Be Granted Because Section 39-15-1195, Subsection (C) Does Not Create A Private Cause Of Action. Instead, Private Actions To Require The Return Of Seized Property Are Governed By Subsection (H) Of That Section. Further, Plaintiff's Entire Complaint Rests On A Failure To Read The Statute.

As outlined above, § 39-15-1195(H) provides the means for a private property owner to seek return of seized property. Plaintiff has failed to avail himself of this option. His Complaint has four causes of action. The first two causes of action explicitly rest on the premise that, "because the Plaintiff was statutorily barred from filing an action for the return of his inventory," Defendant was required to file the action for him. Para. 16 (First Cause of Action.). The second cause of action similarly rests on the same concept (Para. 22) (stating that "Defendant FCSO had a heightened duty of care to return seized inventory to Plaintiff as a result of Plaintiff's statutory inability to seek return of the seized inventory.") These claims are frivolous, as the very statute on which Plaintiff relies provides a means for Plaintiff to have sought return of his goods.

The Third and Fourth Causes of Action rest on the first two, and thus collapse when the first two causes of action fail.

For the above reasons, the Court should DISMISS the complaint WITH PREJUDICE.

III. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED, AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT GRANTED, BECAUSE S.C. CODE ANN. SECTION 15-78-60 MAKES PLAINTIFF'S CLAIMS FRIVOLOUS.

A. Because Plaintiff's Causes of Action All Rest on an Alleged Failure by the Defendant to Enforce a Statute, the Claims Must Be Dismissed.

The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*, limits the tort liability of governmental units. For example, that Act provides, in § 15-78-20(a) (emphasis supplied):

[W]hile total immunity from liability on the part of the government is not desirable, . . . neither should the government be subject to unlimited nor unqualified liability for its actions. . . . Consequently, it is declared to be the public policy of the State of South Carolina that *the State, and its political subdivisions, are only liable for torts within the limitations of this chapter* and in accordance with the principles established herein.

It reiterates, in § 15-78-20(b), "The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter."¹

That Act further provides, in § 15-78-60 (entitled, "Exceptions to waiver of immunity") (emphasis supplied):

¹ The Act again re-iterates, S.C. Code Ann. § 15-78-140, "For any claim filed under this chapter, the remedy provided in § 15-78-120 is exclusive."

While the statute is clear as applied to the present case, were Plaintiff able to create any ambiguity, the rule of decision is that if ambiguity exists, it, too, is to be resolved in favor of the governmental entity. S.C. Code Ann. § 15-78-200 (entitled, "Exclusive and sole remedy for torts committed by employee of governmental entity while acting within scope of employee's official duty"), provides in its entirety (emphasis supplied):

Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty. The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and *must be liberally construed in favor of limiting the liability of the governmental entity.*

The governmental entity is not liable for a loss resulting from:

....
(4) adoption, enforcement, or compliance with any law or *failure to adopt or enforce any law*, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;

Because Plaintiff's causes of actions all rest on an alleged failure by the government to enforce a law (specifically, an alleged failure to enforce S.C. Code Ann. § 39-15-1195), Plaintiff's Complaint should be DISMISSED.

B. Plaintiff's Claim for Punitive Damages Is Independently Barred.

Plaintiff's claim (Complaint, para. 38) that "Plaintiff is informed and believes he is entitled to an award of punitive damages" also reflects a failure to read the controlling statutes. The South Carolina Tort Claims Act, S.C. Code. Ann. § 15-78-10 *et. seq.*, in § 15-78-120 (entitled (emphasis supplied), "*Limitation on liability; prohibition against recovery of punitive or exemplary damages* or prejudgment interest; signature of attorney on pleadings, motions, or other papers"); provides in subsection (b) (quoted here in its entirety): "(b) No award for damages under this chapter shall include punitive or exemplary damages or interest prior to judgment."

Plaintiff's claim for punitive damages is multiply barred: first, because it rests on an assertion that Plaintiff is statutorily barred from bringing an action to recover his counterfeit goods, an assertion disproven by the very statute on which Plaintiff relies for his claim; second, because the Tort Claims Act prohibits a cause of action based on a failure of a governmental entity to enforce a law; third, because the Tort Claims Act further prohibits awards of punitive damages.

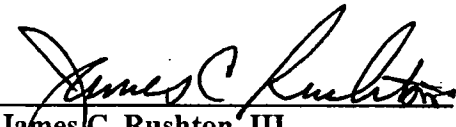
Conclusion

The Plaintiff's Motion for Summary Judgment should be DENIED. The Defendant's Motion for Summary Judgment should be GRANTED, and the Complaint be DISMISSED WITH PREJUDICE.

Respectfully Submitted,

Florence, SC

August 20, 2008


James C. Rushton, III
Attorney for Defendant

THE HYMAN LAW FIRM, L.L.P.
170 Courthouse Square
Post Office Box 1770
Florence, SC 29503-1770
(843) 662-5000

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STATE OF SOUTH CAROLINA

COUNTY OF Florence

AFFIDAVIT

Personally appeared before me, one _____
who, being duly sworn, says that there is probable cause to believe that certain property subject to seizure under provisions
of Section 17-13-140, 1976 Code of Laws of South Carolina, as amended, is located on the following premises in this County:

DESCRIPTION OF PROPERTY SOUGHT

Searching for Nike Counterfeit shoes, Counterfeit/pirated CD's, DVD movies, Computers to
down load Counterfeit CD's and movies; Counterfeit clothing and cash money
from selling Counterfeit merchandise.

DESCRIPTION OF PREMISES (PERSON, PLACE OR THING)
TO BE SEARCHED

706 S. Church Street, Top Gear Clothing, a white and black cinder block
building with windows in front of store, iron bars on the window, with
three shirts hanging in the front left window.

REASON FOR AFFIANT'S BELIEF THAT THE
PROPERTY SOUGHT IS ON THE SUBJECT PREMISES

Inv. Tim Compton, with the Florence Police Dept. received complaints that the store, Top Gear
Clothing, at 706 S. Church Street were selling Counterfeit merchandise, such as shoes, CD's, and DVD's.
A private investigator, Rick Hawks with Blazer Investigations, who is Certified through the recording artist
and movie industry, walked into 706 S. Church Street and observed in plain view Counterfeit CD's
and DVD movies in the glass front counter at the cash register. He also observed Nike shoes on the
wall and in the back storage room. Mr. Hawks observed Lacoste shirts hanging in the front window.
A Confidential informant was sent in to the store and made a purchase of Nike Air Force tennis shoes for
\$160.00. The Confidential informant has been a reliable informant since 1988 and has over a 90% reliability rate.
Rick Hawks and Nike Corp. Confirmed that the shoes that the Confidential informant purchased were indeed
Counterfeit.

Sworn to and Subscribed before me

this 30 day of August, 2004

John R. Hancock (L.S.)
Signature of Judge

Chad
Affiant

Address 6719 Friendfield Road
Effingham, SC 29541

Phone 843-665-2121

000049

*
*
*

*NARRATIVE

TO: SHERIFF WILLIAM K. BOONE
FROM: INV. CHAD COLLINS
SUBJECT: COUNTERFEIT MERCHANDISE/ ILLEGAL RECORDINGS
VICTIM: SOCIETY
SUSPECT: JAMES FARMER
DATE: 091407

ON 091007 I WAS ASSIGNED THIS CASE BY LT. CAMP. PRIOR TO BEING ASSIGNED THIS CASE I HAD BEEN CONTACTED BY SGT. DETECTIVE TIM COMPTON WITH THE FLORENCE POLICE DEPARTMENT IN REFERENCE TO COMPTON RECEIVING INFORMATION ON COUNTERFEIT MERCHANDISE AND ILLEGAL VIDEO AND AUDIO RECORDINGS BEING SOLD AT THE INCIDENT LOCATION OF 706 SOUTH CHURCH STREET IN FLORENCE. THE NAME OF THE BUSINESS IS TOP GEAR CLOTHING. DET. COMPTON HAD CHECKED THE TAX ACCESSORS OFFICE TO DETERMINE IF THE LOCATION WAS IN THE CITY LIMITS OR IF THE LOCATION WAS IN THE COUNTY. WE DETERMINED THAT IT WOULD BE BEST FOR THIS TO BE A COUNTY CASE. I MET WITH SGT. COMPTON AT THE FLORENCE POLICE DEPT ON 8/30/07 TO GO OVER THE PERTINENT INFORMATION ON THIS CASE. SGT. COMPTON HAD ALREADY BEEN IN CONTACT AS WELL WITH RICK HAWKS OF BLAZER INVESTIGATIONS. HAWKS WORKS WITH THIS COMPANY TO CONDUCT INVESTIGATIONS INTO COUNTERFEIT MERCHANDISE. HAWKS HAS BEEN IN THIS LINE OF WORK FOR OVER 20 YEARS. HAWKS AND COMPTON HAD ALREADY DONE SOME INITIAL INVESTIGATION INTO THE COMPLAINT OF COUNTERFEIT MERCHANDISE PRIOR TO ADVISING ME OF THE SITUATION. I ALONG WITH SGT. COMPTON, RICK HAWKS, DOUG RENEUX FROM THE SC DEPT OF REVENUE AND A CONFIDENTIAL INFORMANT WENT TO THE FLORENCE COUNTY EMS STATION LOCATED ON CHURCH STREET. UTILIZING THE CONFIDENTIAL INFORMANT IN A CONTROLLED BUY WE SENT THE INFORMANT IN TO TOP GEAR CLOTHING TO BUY A PAIR OF SHOES SPECIFIED AS NIKE AIR FORCE SHOES. THE INFORMANT WAS GIVEN \$80 BY HAWKS TO PURCHASE THE SHOES. THE INFORMANT THEN WENT TO TOP GEAR CLOTHING AND PURCHASED A PAIR OF NIKE AIR FORCE SHOES FOR \$60. HAWKS CHECKED THE SHOES BROUGHT BACK BY THE INFORMANT AND DETERMINED THE SHOES TO BE COUNTERFEIT BASED ON HAWKS EXPERIENCE. AT THAT POINT WE DETERMINED TO OBTAIN A SEARCH WARRANT FOR THE STORE BASED ON THE PRIOR INVESTIGATION AND THE BUY MADE BY THE INFORMANT. I, ALONG WITH HAWKS, RENEUX AND SGT. COMPTON WENT TO TOP GEAR CLOTHING TO MAINTAIN A PRESENCE WHILE THE SEARCH WARRANT WAS OBTAINED. THE SUSPECT IN THIS CASE WAS PLACED INTO INVESTIGATIVE DETENTION BY ME BASED ON THE COUNTERFEIT MERCHANDISE THAT WAS VISIBLE. SGT. COMPTON THEN WENT TO THE FLORNCIEE COUNTY MAGISTRATES OFFICE TO OBTAIN THE SEARCH WARRANT FOR THE PROPERTY LOCATED AT 706 SOUTH CHURCH STREET AT TOP GEAR CLOTHING, WHICH BASED ON BUSINESS LICENSE, STATES THAT IS OWNED AND OPERATED BY JAMES FARMER THE SUSPECT. WHILE AWAITING THE SEARCH WARRANT FARMER BECAME DISORDERLY AND WAS HANDCUFFED. IT WAS THEN DETERMINED THAT FARMER WOULD BE TRANSPORTED TO THE FLORENCE COUNTY SHERIFFS OFFICE. FARMER RELATED THAT HE WOULD LIKE TO HAVE SOMEONE PRESENT DURING THE SEARCH AND WANTED HIS GIRLFRIEND PRESENT. FARMER'S GIRLFRIEND ARRIVED AT THE LOCATION ALONG WITH FARMER'S MOTHER. BOTH WERE PRESENT AT THE EXECUTION OF THE SEARCH WARRANT. PRESENT DURING THE EXECUTION OF THE SEARCH WARRANT FOR THE COUNTY INCLUDED INV. LYNCH, INV. MCFADDEN, INV. COLLINS, RICK HAWKS (BLAZER INVESTIGATIONS), DOUG RENEUX (SC DEPT OF REVENUE). UPON EXECUTION OF THE SEARCH WARRANT ITEMS SEIZED INCLUDED NIKE SHOES, LOUIS VATTON SHOES, NBA JERSEYS, ENYCE CLOTHING, LACOSTE CLOTHING, ROCA WEAR, AND ALSO APPROXIMATELY 44 DVD'S AND 223 CD'S. ALL ITEMS HAD A TOTAL RETAIL VALUE \$40,000. THE ITEMS WERE RECORDED ON THE SEARCH WARRANT ACCORDING TO STATE LAW. ALSO FOUND DURING THE SEARCH WAS A HIGH POINT MODEL CF380 380 CALIBER HANDGUN WHICH WAS FOUND IN A CABINET IN THE OFFICE OF THE BUILDING.

IT WAS LOCATED WHILE SEARCHING THE CABINET FOR ILLEGAL RECORDINGS AND PAPERWORK PERTAINING TO THE PURCHASE OF COUNTERFEIT MERCHANDISE. THE SERIAL NUMBER ON THE HANDGUN IS P825196. A RECORDS CHECK OF THE WEAPON SHOWED THAT THE WEAPON WAS CLEAR. ALL ITEMS WERE RECORDED ON THE SEARCH WARRANT AND THE ITEMS WERE TRANSPORTED TO A STORAGE FACILITY SET UP BY BLAZER INVESTIGATION INVESTIGATOR RICK HAWKS. ALL ITEMS SEIZED EXCEPT FOR THE HANDGUN WAS PLACED IN THE STORAGE UNIT. WARRANTS FOR FARNEMR WERE OBTAINED BY ME FOR ILLEGAL DISTRIBUTION OF RECORDINGS WARRANT NUMBER K271870 AND TRAFFICKING IN COUNTERFEIT MERCHANDISE WARRANT NUMBER K271869. WARRANTS WERE SERVED AT THE FLORENCE COUNTY SHERIFF'S OFFICE ON 83107. A CRIMINAL HISTORY CHECK SHOWED THE SUSPECT HAVING A FELONY ON HIS RECORD. I THEN CONTACTED CRAIG TOWNSEND WITH ATF TO ADVISE HIM OF THE SITUATION.

FROM THE INFORMATION BEFORE YOU PLEASE CONSIDER THIS CASE CLEARED BY ARREST.

RESPECTFULLY SUBMITTING,
INV. CHAD COLLINS/CC

298 S.C. 451; Tommie SUMMERS v. HARRISON CONSTRUCTION; 381 S.E.2d 493

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Tommie SUMMERS and Helen Summers, Respondents v. HARRISON CONSTRUCTION, Alwin Harrison, and the Lexington County Department of Planning and Development, Defendants. Of whom the Lexington County Department of Planning and Development is the Appellant. Appeal of LEXINGTON COUNTY DEPARTMENT OF PLANNING AND DEVELOPMENT.

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Court of Appeals

1. STATES.---South Carolina Tort Claims Act does not create causes of action; rather, it removes common-law bar of sovereign immunity in certain circumstances to extent mandated by Act. Code 1976, § 15-78-10 et seq.

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2. NEGLIGENCE.---In order to establish duty of care arising from statute, tort plaintiff must show that essential purpose of statute is to protect from kind of harm suffered by plaintiff, and that he is member of class of persons statute is intended to protect.

3. OFFICERS AND PUBLIC EMPLOYEES.---Statute creates special duty of public officer to plaintiff if essential purpose of statute is to protect against particular kind of harm, statute imposes on specific public officer duty to guard against or not cause that harm, class of persons that statute intends to protect is identifiable before fact, plaintiff is person within protected class, public officer knows or has reason to know of likelihood of harm to members of class if he fails to do his duty, and officer is given sufficient authority to act in circumstances or he undertakes to act in exercise of his office.

4. COUNTIES.---Statute requiring county planning department to refuse to issue building permit to unlicensed residential home builders created no special duty flowing from department to builder's customers such that department could be held liable for customers' damages on ground that it negligently issued permit to builder; statutory duty was designed to benefit public in general and did not impose duty upon department to guard against poor performance in construction. Code 1976, § 40-59-160.

Susan P. McWilliams, of Nexsen, Pruet, Jacobs & Pollard, Columbia, for appellant.

Frederick I. Hall, III, of Lexington, for respondents.

Heard April 18, 1989.

Decided June 5, 1989.

CURETON, Judge:

This case concerns the renovation of a residence. Tommie and Helen Summers entered into a contract with Alwin Harrison and Harrison Construction dated December 10, 1985, for the renovation of their home. Harrison began work in either June or July of 1986. He applied for and received a building

permit in the name of Tommie Summers from the Lexington County Department of Planning and Development. The renovation work was poorly performed and never completed although Harrison was paid over \$16,000 by the Summers.

The Summers sued Harrison and the Department of Planning. The jury returned a verdict in their favor. The issues on appeal concern only the Department. The Summers sued the Department under the South Carolina Tort Claims Act alleging the Department was grossly negligent in issuing a

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building permit to Harrison because the permit was obtained in violation of the rules and regulations of the South Carolina Residential Home Builders Commission. The Department raised numerous defenses basically arguing that Summers had no cause of action against it for the issuance of the permit. The Department appeals the denial of its motions for directed verdict, judgment notwithstanding the verdict, and for a new trial. We reverse.

In ruling on motions for directed verdict and judgment notwithstanding the verdict the trial court is required to view the evidence and the inferences which can reasonably be drawn from it in the light most favorable to the party opposing the motion. The motion should be denied if more than one inference can be drawn from the evidence. *Felder v. K-Mart Corp.*, 297 S. C. 446, 377 S. E. (2d) 332 (1989). On appeal of an action at law tried by a jury the jurisdiction of this court extends only to correction of errors of law and a factual finding by the jury will not be disturbed if there is any evidence to support it. *Id.*; *Glover v. North Carolina Mutual Life Ins. Co.*, 295 S. C. 251, 368 S. E. (2d) 68 (Ct. App. 1988).

Viewing the evidence in the light most favorable to the Summers, they hired Harrison based upon a referral from another person. Harrison gave them a proposal for the renovations and a contract was executed. The Summers testified Harrison told them he was a qualified, licensed, bonded contractor although they knew nothing about his reputation and did no investigation of his background. Concerning the building permit, Tommie Summers testified as follows:

Q: Did you apply for the building permit in this case?

A: No, ma'am.

Q: Who did?

A: He went and got it himself.

Q: All right. Did you expect him to do that as part of his contract?

A: I didn't know he had to have one but I expected him to have.

Q: You expected him to get one.

A: But not on my consent.

Q: All right. How did you expect him to get one?

A: If he needed one he had to have one.

Harrison obtained the building permit in the name of Tommie Summers from the Department. Harrison was not a licensed residential home builder and the permit was issued to him as the agent of Summers. The representatives of the Department testified they did not talk with the Summers or obtain any additional evidence of agency other than Harrison's signature on the application for the permit. There is evidence Harrison left the job unfinished after obtaining over \$16,000 from the Summers. An expert witness testified there were defects in the work and he gave an estimate of the cost to correct the defects and finish the job.

1 The Summers cite Section 15-78-60(12) of the South Carolina Code as a basis for their suit against the Department. This section is part of the South Carolina Tort Claims Act. It provides as follows:

The governmental entity is not liable for a loss resulting from:

(12) licensing powers or functions, including, but limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner.

The South Carolina Tort Claims Act does not create causes of action. Rather, it removes the common law bar of sovereign immunity in certain circumstances, but only to the extent mandated by the Act. The legislature has indicated that liability under the Act is based upon "the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty." Section 15-78-20 (a). Further, the provisions relating to limitations on and exemptions to liability are to be liberally construed in favor of limiting the liability of the state. Section 15-78-20(f).

The elements of a tort action for negligence are (1) a duty of care owed to the plaintiff by the defendant; (2) a breach of that duty of care by negligent act or omission; and (3) damage to the plaintiff proximately resulting from the breach. *Andrews v. Piedmont Air Lines*, 297 S. C. 367, 377

S. E. (2d) 127 (Ct. App. 1989). If any of these elements is absent a negligence claim is not stated. *Id.*

Our analysis must begin with the question of whether the Department owed the Summers a duty of care. The common law does not generally impose a duty on a person to act. "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Rayfield v. S. C. Dept. of Corrections*, 297 S. C. 95, 100, 374 S. E. (2d) 910, 913 (Ct. App. 1988). In this case, the duty purportedly arises from statute. Chapter 59 of Title 40 of the South Carolina Code deals with residential home builders. Generally, residential home builders are required to be licensed. The chapter provides for the licensing process as well as penalties for failure to procure a license. Section 40-59-160 is the provision in issue. It provides, in part, as follows:

It is the duty of the building official, or other authority charged with the duty of issuing building or similar permits, ... to refuse to issue a permit for any undertaking which would classify the applicant as a residential home builder under the provision of this chapter unless the applicant has furnished evidence that he is either licensed as required by this chapter or exempt from the requirements of this chapter.

The Summers contend the Department breached the duty of care imposed by this section by acting in a grossly negligent manner in issuing the building permit to Harrison and this action was a proximate cause of harm to them.

2, 3 In order to establish a duty of care arising from a statute a plaintiff must show (1) that the essential purpose of the statute is to protect from the kind of harm suffered by the plaintiff; and (2) that he is a member of the class of persons the statute is intended to protect. *Rayfield*, 297 S. C. at 100, 374 S. E. (2d) at 914. Of further importance to this case are the concepts of public duty and special duty. The "public duty" rule presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. Such statutes create no duty of care towards

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individual members of the general public. *Rayfield*, 297 S. C. at 95, 374 S. E. (2d) at 915; *Jensen v. S. C. Dept. of Social Services*, 297 S. C. 323, 377 S. E. (2d) 102 (Ct. App. 1988). However, a statute may have the essential purpose of protecting identifiable individuals from a particular harm and the statute then creates a "special duty" to support a negligence action.^(fn 1) To determine if a statute creates a special duty of a public officer to the plaintiff the court must examine the statute and the facts of the case. A special duty exists if: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office. *Id.*

4 We find Section 40-59-160 creates no special duty flowing from the Department to the Summers. The chapter on residential home builders is designed to benefit the public in general by insuring that only licensed builders perform residential building. The duty to issue a building permit to qualified applicants only does not impose upon a public official the responsibility to guard against poor performance in construction. The Department has no supervision or control over the performance of the work.

Because we find no duty of care from the Department to the Summers the decision of the trial court is reversed as regards liability of the Department to the Summers. We need not rule on the Department's other grounds for reversal.

Reversed.

GARDNER and GOOLSBY, JJ., concur.

Footnotes:

1. It has been observed that the very nature of a sovereign's obligations to its people make this distinction crucial, and that to hold otherwise would expose the sovereign to liability for practically every action taken by it. 57 Am. Jur. (2d) *Municipal, County, School and State Tort Liability* Section

140 (1988).

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350 S.C. 159; Paul Dexter DORMAN v. South Carolina DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; 565 S.E.2d 119

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Paul Dexter DORMAN, II, and Charles R. May, III, M.D., Respondents, v. South Carolina DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL and Bureau of Ocean and Coastal Resource Management, and Frances Pate Adams, Defendants, of whom Frances Pate Adams is, Appellant.

No. 3502.

Court of Appeals of South Carolina.

Heard April 17, 2002.

Decided May 28, 2002.

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David J. Gundling, and Jeffrey J. Galan, both of Pawley's Island, for appellant.

Howell V. Bellamy, Jr., and Douglas M. Zayicek, both of Bellamy, Rutenburg, Copeland, Epps, Gravely & Bowers, of Myrtle Beach, for respondents.

STILWELL, Judge:

Frances Pate Adams appeals the circuit court's order reinstating the Administrative Law Judge's (ALJ's) denial of a dock permit, which was overturned on appeal by the Coastal Zone Management Appellate Panel (the Panel) of the Bureau of Ocean and Coastal Resource Management (OCRM).(fn1) We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

LaFon LeGette(fn2) applied for a critical area permit to build a boat dock with a roof and floating dock. OCRM initially

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granted the permit, but the neighbors on both sides, Dorman and May, objected and requested a contested case hearing because the proposed boat dock would crowd too close to their existing docks and because the roof would impinge on their view. Adams' lot is pie-shaped, with only 33 feet of water frontage, so any dock configuration will necessarily cross the extended property lines of the neighboring lots.

The ALJ reversed the OCRM staff's determination and denied the permit because the dock (1) would obstruct navigation and create problems with May's floating dock, (2) would cross extended property lines and no justification was given for an exception to the general rule, (3) would rest on the mud bottom at low tide, and (4) would diminish the use and enjoyment of neighboring lots. He stated none of these grounds individually was significant enough to deny the permit, but cumulatively they posed a serious problem. He ruled Regulation 30--12.A(2)(o), which requires that a lot have minimum water frontage of 50 feet to qualify for a dock permit, was not applicable, since the lot was platted prior to 1993. He did not directly rule on the issue of whether the dock roof would seriously impact views, but his ruling as to diminishment and enjoyment of neighboring lots effectively did so. He balanced the factors under S.C.Code Ann. § 48--39--150(A) to be considered in granting or denying a permit, which was within his discretion.

On appeal, the Panel reversed the ALJ and reinstated the grant of the permit. The Panel made its own findings of fact, on which it based its legal conclusions that the purpose and policy of the Regulation would not be undermined by granting the permit. The Panel concluded the ALJ incorrectly interpreted "navigation" within the meaning of the regulations. "It is the position of OCRM that any navigational issues between docks is a private property owner issue. It is not the policy of OCRM to police navigational disputes that should be dealt with among the adjacent property owners." The Panel also found, based on its own review of the record below, that the dock would not rest on the creek bottom at normal low tide and that the dock as permitted would not diminish the enjoyment or value of adjacent land owners. Finally, the Panel held that OCRM was properly before it as a party on appeal.

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The circuit court reversed the Panel, holding that it applied the wrong standard of review and improperly substituted its judgment for that of the ALJ. Alternatively, the circuit court held the petition for review was insufficient, and therefore the appeal should have been dismissed for lack of jurisdiction, and OCRM was not properly a party on appeal, since it did not appeal from the ALJ's order. The circuit court judge ruled the ALJ's interpretation of all subsections of Regulation 30--12.A(2) at issue were supported by substantial evidence, except subsection (o), which he held prohibited lots with less than fifty feet of water frontage from having a dock. Thus, the circuit court reinstated the ALJ's order as modified.

LAW/ANALYSIS

Standard of Review: Substantial Evidence Standard

As the parties acknowledge, the crucial and perhaps dispositive issue in this appeal revolves around applying the correct standard of review.

This case involves appearances before four tribunals and includes three levels of appellate review... [T]he ALJ presided as the fact-finder ... [and] was not sitting in an appellate capacity and was not restricted to a review of OCRM's permit decision....

The first appellate review ... by the Board [was] under its limited scope of review set forth in § 1--23--610(D). The second appellate review [before] the circuit court ... is [governed by the standard] set forth in § 1--23--380(A)(6).... Our scope of review is the same as that established for the circuit court. § 1--23--380(A)(6).

Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 512, 560 S.E.2d 410, 413 (2002). "[I]n

environmental permitting cases, the ALJ presides as the finder of fact. § 1-23-600(B).... The Board, on the other hand, sits as a quasi-judicial tribunal in reviewing the final decision of the ALJ. § 1-23-610 (A). As the 'reviewing tribunal,' the Board is not entitled to make findings of fact...." *Id.*, 348 S.C. at 520, 560 S.E.2d at 417; see also *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 45, 564 S.E.2d 341, 345 (Ct.App. 2002).

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On appeal, the standard for appellate review to the Panel is whether the ALJ's findings are supported by substantial evidence under S.C.Code Ann. § 1-23-610(D) (Supp. 2001).(fn3) "The "possibility of drawing two inconsistent conclusions from the evidence does not prevent [the ALJ's] finding from being supported by substantial evidence." "*Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 130-31, 530 S.E.2d 643, 650 (Ct.App.2000) cert. denied (June 13, 2000). Substantial evidence "is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached...." *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The Panel cannot reweigh the facts or make findings of fact in accord with its own view of the evidence. The Panel can validly reverse the ALJ based on an error of law under this appellate standard or if his findings are not supported by substantial evidence. The Panel stated the ALJ misinterpreted navigation in the regulations to include issues between neighbors. Thus, that portion of the Panel's order on OCRM policy underlying navigation and construing its regulation was proper.

Adams cites the recent cases of *McQueen and Guerard*, both issued since the creation of the Administrative Law Judge Division (ALJD) for the proposition that the Panel retains essentially a de novo standard of review and may make its own findings based on its own review of the evidence. *McQueen v. S.C. Coastal Council*, 329 S.C. 588, 496 S.E.2d 643 (Ct.App.1998), rev'd 340 S.C. 65, 530 S.E.2d 628 (2000), vacated and remanded by 533 U.S. 943, 121 S.Ct. 2581, 150 L.Ed.2d 742 (2001) in light of *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981). Initially, we note that the first is on dubious legal footing and the second was decided well before the creation of the ALJD.

Adams misapprehends the operative date in these decisions. The key date is not when the decisions were published but

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when the cases were heard below and what procedure they followed. The ALJD was created by the Restructuring Act of 1993. 1993 Act No. 181, § 11-19 (eff. July 1, 1993), 1993 S.C. Acts 1407, 1433-1448 (codified as amended at S.C.Code Ann. § 1-23-310 to -660 (Supp.2001).) Both of these cases, though decided after the creation of the ALJD, were heard in the first instance by the Board as a contested case, and hence retained the old standard of review.

Under the applicable standard of review in cases heard by the ALJ, the Board or Panel must affirm the ALJ if the findings are supported by substantial evidence, not based on the Panel's own view of the evidence. To hold otherwise would contravene the clear mandate of § 1-23-610(D) and render the ALJ process a superfluous nullity.

I. Interpretation of Regulation 30-12.A(2)

On appeal, Adams challenges the interpretation and application of several subsections of Regulation 30-12.A(2)(fn4) governing dock permits.

- (a) Docks ... shall normally be limited to one structure per parcel and shall not impede navigation or restrict the reasonable public use of State lands and waters; ...
- (n) Docks must extend to the first navigable creek ... and floating docks which rest upon the bottom at normal low tide will not normally be permitted.
- (o) For lots platted and recorded after May 23, 1993, ... [l]ots less than 50 feet wide are not eligible for a dock.
- (p) No docks ... should normally be allowed to be built closer than 20 feet from extended property lines....However, the Department may allow construction closer than 20 feet or over extended property lines where there is no material harm to the policies of the Act.
- ...
- (r) Roofs on private docks will be permitted on a case-by-case basis, with consideration given to the individual merits

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of each application. Precedent in the vicinity for similar structures will be considered as well as the potential for impacting the views of others. Roofs which have the potential to seriously impact views will not be allowed, while those that have minimal impact may be allowed....

23A S.C.Code Ann. Regs. 30--12.A(2) (Supp.2001)

Initially, we address the circuit court's ruling that reversed both the ALJ and the Panel's finding that Regulation 30--12.A(2)(o) is inapplicable to this case because the lot in question was platted before 1993. By its clear terms, this subsection is inapplicable to this lot and does not prohibit the issuance of a dock permit in this case. *See Brown* at 414 ("Where the terms of the statute are clear, the court must apply those terms according to their literal meaning."). We therefore reverse the circuit court on this issue.

Turning to the difference in the construction and interpretation of Regulation 30--12.A(2)(a), we note that while the ALJD is an independent entity, it still functions as an arm of the agency for purposes of according the agency deference in interpretation. "[T]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Id.* Moreover, the Panel, in interpreting its regulations, may reverse the ALJ as a matter of law and is entitled to deference on appeal.

The ALJ denied the permit at least partially on the finding that the dock would obstruct navigation and create problems with the adjoining dock. The Panel, in interpreting its own regulation, held that navigation, as contemplated in the regulation, did not encompass problems between neighbors or conflict with nearby docks but only applied to impediments to the general public's use of State waters.

Adams argues that because May's floating dock, which is the primary one that causes navigational problems, is not permitted, Adams' dock permit should be evaluated as if it were not there. The correct approach is to consider this dock permit in light of what is actually there, as did the ALJ. S.C.Code Ann. § 48--39--150(A) (Supp.2001) provides that each permit must be considered on its own merits. The ALJ

is

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confined to make his decision on the record before him, as are we.

[J]udicial prudence dictates and our statute mandates that the record reflect accurately evidence which forms the basis of decisions independent of any consideration to contemplated remedial action, the result thereof, or the occurrence of any other future event. This requirement aborts the potential for continuing controversy spawned by litigation of this nature.

Weaver v. S.C. Coastal Council, 309 S.C. 368, 375, 423 S.E.2d 340, 344 (1992). Thus, the illegality of May's dock is an issue for another day.

Because the ALJ premised his denial on the confluence of factors, this case must be remanded to the ALJD to reconsider his findings based on the OCRM Panel's interpretation and application of its own regulations. Because we remand for reconsideration by the ALJD, we do not find it necessary to address the other subsections of the regulation pertaining to water access, resting on the mud bottom, extended property lines, or roofs and the impact on neighboring views.

II. Sufficiency of the Petition for Review

Adams argues the circuit court erred in holding the petition for review insufficiently set forth the legal grounds for appeal to confer jurisdiction. We agree. The applicable regulations for OCRM cases are 30--6 and 30--7, not 61--72, which applies to DHEC matters.(fn5) 23A S.C.Code Ann. Regs. 30--6 & 30--7 (Supp.2001). Regulation 30--6 requires only a bare bones petition of basically the party's name and permit number. Thus, this petition was sufficient. Obviously, the SCACR do not apply in proceedings before the Panel, and the appeal process is much more informal than court requirements.

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Respondents argue correctly that Regulations 30--6 and 30--7 as currently written were not in effect at the time of this appeal.(fn6) However, the requirements under the prior version for the petition for review were substantively the same. Respondents argue that the S.C. Administrative Procedures Act (APA) trumps agency-specific statutes. *See Pringle v. Builders Transp.*, 298 S.C. 494, 381 S.E.2d 731 (1989). This is true of pre-existing agency-specific statutes where the two conflict, but it is not true of statutes and regulations enacted since the APA. As Regulations 30--6 and 30--7 were substantially amended after the passage of the APA, we must presume some modification was intended and the action did not result in a futile act. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998). "In interpreting a regulatory amendment, we presume a regulatory agency, in adopting an amendment to a regulation, intended to make a change in the existing law." *Converse* at 48, 564 S.E.2d at 346. The minimal petition for review required under OCRM regulations is consistent with the purpose of providing notice of the appeal.

III. OCRM as a Party on Appeal

In response to the Panel's reversal of the ALJ and grant of the permit, Respondent argues that because OCRM did not appeal the ALJ's order, it should not have been permitted to argue the agency's viewpoint or interpretation of its regulations before the Panel or the circuit court on appeal. Thus,

Respondent reasons the Panel had no authority to interpret the meaning of "navigation" at the appellate hearing. We disagree.

While OCRM did not appeal the ALJ's order, the agency remains a party at all levels to represent the agency and its policy stance. While we do not hold that the OCRM staff is a necessary party on appeal, we find it clearly is a proper party. In *Owen Steel*, this court held that the agency was not a necessary party to the appeal and was not required to be made a party on appeal by statute. *Owen Steel Co. v. S.C.*

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Tax Comm'n, 281 S.C. 80, 84--85, 313 S.E.2d 636, 639 (Ct.App. 1984). "In considering whether there is a defect of parties, the distinction between necessary and proper parties is crucial." *Id.* However, the agency may be a proper party on appeal, and the APA requires an appellant to serve the agency with a copy of the petition for review to ensure it has notice of any proceeding. *Id.* at 85--86, 313 S.E.2d at 638. Upon notice, the agency may petition to be made a party to the appeal. "Except in unusual circumstances, we anticipate that such a motion would be granted as a matter of course." *Id.*

Similarly, our supreme court has held that "whether or not additional parties are proper to a controversy is left to the sound discretion of the Trial Judge subject to review by appeal." *Robinson v. S.C. State Highway Dep't*, 241 S.C. 137, 141, 127 S.E.2d 286, 287 (1962). Applications to bring in additional parties are ordinarily granted as a matter of course, especially where to do so will not injure the other parties. *Id.* at 141, 127 S.E.2d at 288. The Panel relies on reports of its staff. Clearly, the agency is charged with administering its permitting regulations and is charged with "insur[ing] consistent permit evaluations by the Department." S.C.Code Ann. Regs. 30--1.A(2)(b) (Supp.2001). Thus, we find no error in the Panel's and circuit court's decisions to allow counsel for OCRM to present arguments as to the proper implementation and interpretation of those regulations the agency is charged with administering.

Respondent argues that to define this term is beyond the Panel's statutory authority on appeal. We strongly disagree. Moreover, even if OCRM was not properly before the Panel on appeal, the Panel always has the ability to interpret and define terms within its own regulations consistent with its enabling statute. OCRM is charged with administering coastal zone permits and promulgating regulations governing construction in critical areas. S.C.Code Ann. § 48--39--50 (Supp. 2001). Thus, the Panel did not exceed its authority in interpreting "navigation" and correcting the ALJ for an error of law under the standard of review as set forth in S.C.Code Ann. § 1--23--610(D) (Supp.2001).

IV. Constitutional Claims

Adams first raised the regulatory taking issue to the Panel and the due process and equal protection issues

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before this court. Because none of these constitutional arguments were presented to the ALJ, they are not preserved for appellate review and thus are not properly before us. Adams argues that she made repeated requests for equal treatment at every level. That is insufficient. The legal theory on which she seeks to prevail must be raised to and ruled upon by the ALJ.

In reviewing the final decision of an administrative agency, the circuit court sits as an appellate court. Consequently, issues not raised to and ruled on by the agency are not

preserved for judicial consideration. Likewise, issues not raised to and ruled on by the ALJ are not preserved for appellate consideration.

Brown at 519, 560 S.E.2d at 417 (citations omitted). While it is true that ALJs cannot rule on a facial challenge to the constitutionality of a regulation or statute, ALJs can rule on whether a law as applied violates constitutional rights. "ALJs [cannot] rule on the validity of a statute. However, an agency or ALJ can still rule on whether a party's constitutional rights have been violated....[M]erely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling." *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000) (also, claimant is not required to exhaust administrative remedies when challenging the constitutionality of a statute).

CONCLUSION

Because the ALJ's factual findings are supported by substantial evidence in the record, the Panel erred in making its own findings of fact and reweighing the evidence. Because the agency's interpretation of its regulations through the Panel and the ALJ is accorded deference, we adopt the Panel's interpretation of navigation. We hold that Regulation 30--12.A(2)(o) by its plain language does not apply. The petition for review was sufficient to confer jurisdiction under Regulations 30--6 and 30--7. OCRM remains a proper party before the Panel and the courts on appeal. Because the ALJ accorded significant weight to his interpretation of navigation under the regulations and stated that none of the subsections individually was a substantial enough reason to deny the permit, we remand this case to the ALJD for determination of

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whether the permit should issue in light of the Panel's interpretation of its own regulations.

The ALJ should evaluate the permit based on the records of the contested case hearing below but also has discretion to take any additional evidence necessary to this determination.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF and HOWARD, JJ., concur.

Footnotes:

1. The Panel was the governing board of OCRM at all times pertinent to this appeal.
2. Appellant Adams is the land owner; LeGette was a potential buyer, but the contract of sale had a condition that the dock permit could be obtained. On appeal to the circuit court, LeGette sought to withdraw from the litigation, and Adams moved to substitute as a party. The circuit court denied the motion to substitute Adams for LeGette because it was made just before hearing. This court granted her motion, and no exception has been taken to that ruling.
3. See also Jean Hoefer Toal et al., *Appellate Practice in S.C.* (1999) 56--57 ("The scope of review of final ALJ decisions is essentially identical to the scope of review established in section 1--23--380. This scope of review applies to the circuit court or the applicable board or commission.")
4. Regulation 30--12 was substantially rewritten, effective June 25, 1999. Judge Breeden's order is

dated August 14, 1998. Because none of the changes are substantive but merely clarified the existing regulation, we have cited to the current version. The changes are set forth in 23 S.C. Reg., No. 6, 107 (June 25, 1999).

5. Regulation 61--72 sets forth procedures for contested cases, but the DHEC Board no longer hears contested cases. It has numerous conflicts with the ALJD Rules and is of questionable validity in light of the subsequent creation of the ALJD. The ALJs have generally held that 61--72 controls the time frames for appeal and related matters but that ALJD Rules control once the ALJD has jurisdiction. *Cf. Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510, 548 S.E.2d 223, 225--26 (Ct.App.2001) (ALJD Rules are applicable to proceedings before ALJ, not SCRCPC.).

6. Regulations 30--6 and 30--7 were substantially rewritten contemporaneously with Regulation 30--12.A, effective June 25, 1999, to reflect the modified procedure for appeal after the creation of the ALJD. *See* n. 2, *supra*.

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LEXSEE 378 S.C. 96

The State, Appellant, v. Berry Scott Bolin, Respondent.

Opinion No. 26494

SUPREME COURT OF SOUTH CAROLINA

378 S.C. 96; 662 S.E.2d 38; 2008 S.C. LEXIS 152

March 5, 2008, Heard

May 19, 2008, Filed

PRIOR HISTORY: [***1]

Appeal From York County. John C. Hayes, III, Circuit Court Judge.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant was indicted for, among other things, possession of a pistol by a person under 21 years of age pursuant to *S.C. Code Ann. § 16-23-30* (2003 & Supp. 2007). He filed a motion to quash the indictment on the ground that § 16-23-30 was unconstitutional. The State challenged a judgment of the Circuit Court of York County (South Carolina), which granted the motion to quash.

OVERVIEW: Defendant argued that because he was old enough to be sui juris, and *S.C. Const. art. I, § 20* granted him the right to bear arms, he could not be charged with a crime for handgun possession. The supreme court held that *S.C. Code Ann. § 16-23-30* (2003 & Supp. 2007) did not violate *S.C. Const. Art. I, § 20*. Although a person under the age of 21 was prohibited from possessing a handgun, that did not prevent a person under the age of 21 from possessing other types of guns. Defendant also argued that *S.C. Code Ann. § 16-23-30* (2003 & Supp. 2007) violated *S.C. Const. art. XVII, § 14* because the age group of 18 to 20-year-olds was treated differently than adults. The supreme court found that *S.C. Code Ann. § 16-23-30* (2003 & Supp. 2007) violated the plain language of *S.C. Const. art. XVII, § 14*. By expressly allowing the regulation of the sale of alcoholic beverages to the 18 to 20-year-old age group, and not stating any other situation in which the general assembly could restrict the rights of that age group, art. XVII, § 14 precluded the general assembly from prohibiting that age group's possession of handguns.

OUTCOME: The supreme court affirmed the judgment.

LexisNexis(R) Headnotes

*Evidence > Inferences & Presumptions > Presumptions
Evidence > Procedural Considerations > Burdens of
Proof > Allocation*

Governments > Legislation > Interpretation

[HN1] When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the Constitution. This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution.

Criminal Law & Procedure > Criminal Offenses > Weapons > Trafficking > Elements

[HN2] See *S.C. Code Ann. § 16-23-30(A)(3)* (2003 & Supp. 2007).

Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > Elements

[HN3] See *S.C. Code Ann. § 16-23-30(B)* (2003 & Supp. 2007).

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

[HN4] See *S.C. Const. art. I, § 20*.

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

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Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > General Overview

[HN5] The portions of *S.C. Code Ann. § 16-23-30* (2003 & Supp. 2007) regarding persons under the age of 21 do not violate the constitutional right of a person under the age of 21 to keep and bear arms. While a person under the age of 21 is prohibited from possessing a handgun, except in certain circumstances, this does not prevent a person under the age of 21 from possessing other types of guns. The South Carolina Constitution, *S.C. Const. art. I, § 20*, simply requires that a person's right to keep and bear "arms" not be infringed upon. The legislature's regulation of who may have access to handguns does not infringe upon that right because persons under the age of 21 have access to other types of guns. Accordingly, *S.C. Code Ann. § 16-23-30* (2003 & Supp. 2007) does not violate *S.C. Const. art. I, § 20*, regarding a person's right to keep and bear arms.

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

[HN6] Right to possess a handgun, whether fundamental or not, is not absolute and is subject to reasonable regulation.

Constitutional Law > State Constitutional Operation Governments > State & Territorial Governments > Legislatures

[HN7] See *S.C. Const. art. XVII, § 14*.

Constitutional Law > State Constitutional Operation Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > General Overview Governments > State & Territorial Governments > Legislatures

[HN8] By expressly allowing the regulation of the sale of alcoholic beverages to the 18-to 20-year-old age group and not stating any other situation in which the general assembly may restrict the rights of this age group, the South Carolina Constitution, *S.C. Const. art. XVII, § 14*, precludes the general assembly from prohibiting this age group's possession of handguns.

Governments > Legislation > Interpretation

[HN9] The canon of construction "expressio unius est exclusio alterius" or "inclusio unius est exclusio alterius" holds that to express or include one thing implies the exclusion of another, or of the alternative. When interpreting a statute, the words must be given their plain and ordinary meaning without resorting to subtle or

forced construction which limit or expand the statute's operation).

Constitutional Law > Bill of Rights > Fundamental Rights > Right to Bear Arms

Constitutional Law > State Constitutional Operation Criminal Law & Procedure > Criminal Offenses > Weapons > Possession > General Overview Governments > State & Territorial Governments > Legislatures

[HN10] The general assembly's prohibition on hand gun possession by the 18-to 20-year old age group does not infringe upon the right to bear arms, *S.C. Const. art. I, § 20*. However, *S.C. Code Ann. § 16-23-30* (2003 & Supp. 2007) violates the plain language of *S.C. Const. art. XVII, § 14*.

COUNSEL: Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, of Columbia; and Kevin Scott Brackett, Solicitor, of York, for appellant.

Leland B. Greeley, of Rock Hill, for respondent.

JUDGES: JUSTICE MOORE. TOAL, C.J., WALLER, BEATTY, JJ., and Acting Justice E. C. Burnett, III, concur.

OPINION BY: MOORE

OPINION

[*98] [**38] JUSTICE MOORE: Respondent was indicted for murder, assault and battery with intent to kill, possession of a firearm during commission of a violent offense, assault with intent to kill, discharging a firearm into an occupied vehicle, and possession of a pistol by a person under 21 years of age pursuant to *S.C. Code Ann. § 16-23-30* (2003 & Supp. 2007).

Respondent argued that the possession of a pistol indictment should be quashed because *§ 16-23-30(B)* under which he was charged is unconstitutional. The motion to quash was granted by the trial court. The State appeals and we affirm.

ISSUE

Did the trial court err by quashing the indictment for possession of a handgun while under the age of 21 on the ground that the [***2] criminal statute making such possession illegal is unconstitutional?

[**39] DISCUSSION

[HN1] When the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution. *State v. Gaster*, 349 S.C. 545, 564 S.E.2d 87 (2002). This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution. *State v. White*, 348 S.C. 532, 560 S.E.2d 420, cert. denied, 537 U.S. 825, 123 S. Ct. 114, 154 L. Ed. 2d 37 (2002).

Section 16-23-30(A) provides:

[i]t is [HN2] unlawful for a person to knowingly sell, offer to sell, deliver, lease, rent, barter, exchange, or transport for sale into this State any handgun to: (3) a person under the age of twenty-one, but this shall not apply to the issue of handguns to members of the [military or other like organizations or to those receiving instruction on handgun use under the immediate supervision of a parent or adult instructor].

[*99] Subsection (B) states that [HN3] "[i]t is unlawful for a person enumerated in subsection (A) to possess or acquire handguns [***3] within this State."¹

1 The General Assembly recently passed and the Governor signed a bill amending § 16-23-30. The amendment makes it unlawful for a person under the age of eighteen to possess a handgun. Therefore, the 18-to 20-year-old age group may now legally possess a handgun. However, this amendment does not apply to the instant case because the General Assembly provided that this amendment does not affect pending actions.

Respondent argues that because he was old enough to be *sui juris* and the state constitution granted him the right to bear arms, then he could not be charged with a crime for handgun possession. See S.C. Const. Art. I, § 20 ([HN4] a well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed).

[HN5] The portions of § 16-23-30 regarding persons under the age of 21 do not violate the constitutional right

of a person under the age of 21 to keep and bear arms. While a person under the age of 21 is prohibited from possessing a handgun, except in certain circumstances, this does not prevent a person under the age of 21 from possessing other types of guns. Our constitution simply requires that a person's [***4] right to keep and bear "arms" not be infringed upon. The legislature's regulation of who may have access to handguns does not infringe upon that right because persons under the age of 21 have access to other types of guns. Cf. *State v. Johnson*, 76 S.C. 39, 56 S.E. 544 (1907) (city ordinance prohibiting firing of guns within city limits is not unconstitutional as infringing on right to bear arms); *State v. Johnson*, 16 S.C. 187 (1881) (purpose of act was to prohibit, as far as consistent with a citizen's right to bear arms, the carrying of deadly weapons, with a view to prevent acts of violence).² Accordingly, § 16-23-30 does not [*100] violate S.C. Const. Art. I, § 20, regarding a person's right to keep and bear arms.

2 See also *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994) (ban of assault weapons was a reasonable exercise of police power despite the right to bear arms); *Benjamin v. Bailey*, 234 Conn. 455, 662 A.2d 1226 (Conn. 1995) (ban on sale and possession of assault weapons did not infringe on right to bear arms because access to a wide array of weapons was still permitted); *Mosby v. Devine*, 851 A.2d 1031 (R.I. 2004) ([HN6] right to possess a handgun, whether fundamental or not, is not absolute [***5] and is subject to reasonable regulation; statute was not a total ban on the right to bear arms).

Respondent further argues that § 16-23-30 violates the state constitution because the age group of 18-to 20-year-olds is being treated differently than adults aged 21 and above. *South Carolina Const. Art. XVII, § 14*, provides:

[HN7] Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law, shall be deemed *sui juris* and endowed with full legal rights and responsibilities, provided, that the General Assembly may restrict the sale of alcoholic beverages to persons until age twenty-one.

Article XVII, § 14, specifically makes reference to the fact the General Assembly can [***40] restrict the sale of alcoholic beverages to persons until age 21.

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[HN8] By expressly allowing the regulation of the sale of alcoholic beverages to the 18-to 20-year-old age group and not stating any other situation in which the General Assembly may restrict the rights of this age group, the state constitution precludes the General Assembly from prohibiting this age group's possession of handguns. See *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) [***6] ([HN9] the canon of construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*" holds that "to express or include one thing implies the exclusion of another, or of the alternative"); see also *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007) (when interpreting a statute, the words must be given their plain and ordinary meaning without resort-

ing to subtle or forced construction which limit or expand the statute's operation).

We find [HN10] the General Assembly's prohibition on hand gun possession by the 18-to 20-year old age group does not infringe upon the right to bear arms; however, § 16-23-30 violates the plain language of *Article XVII*, § 14, of our state constitution. Accordingly, the decision of the trial court is

AFFIRMED.

TOAL, C.J., WALLER, BEATTY, JJ., and Acting Justice E. C. Burnett, III, concur.

341 S.C. 79; Jim HODGES, Governor of the State of South Carolina, Petitioner, v. John S. RAINEY, former Member and Chairman of the Board of Directors of the South Carolina Public Service Authority, Respondent.; 533 S.E.2d 578

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Jim HODGES, Governor of the State of South Carolina, Petitioner, v. John S. RAINEY, former Member and Chairman of the Board of Directors of the South Carolina Public Service Authority, Respondent.

No. 25149.

Supreme Court of South Carolina.

Heard Feb. 15, 2000.

Decided June 12, 2000.

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Chief Legal Counsel Jim O. Stuckey, II, of the Office of the Governor, of Columbia, and Susan Taylor Wall, of Nexsen, Pruet, Jacobs, Pollard & Robinson, LLP, of Charleston, for petitioner.

William C. Hubbard, Dwight F. Drake and C. Mitchell Brown, of Nelson Mullins Riley & Scarborough, L.L.P., of Columbia, for respondent.

TOAL, Justice:

Governor Jim Hodges ("Governor Hodges") initiated this action in the original jurisdiction of this Court pursuant to Rule 229, SCACR to clarify his authority to remove members of the Board of Directors of the South Carolina Public Service Authority ("Santee Cooper") pursuant to S.C.Code Ann. § 1-3-240 (B) (Supp.1998).

FACTS/PROCEDURAL BACKGROUND

In 1993, the South Carolina General Assembly adopted the Restructuring Act, which provided for a substantial reorganization of South Carolina state government. A key provision of the Restructuring Act was the grant to the Governor of broad discretionary authority to appoint and remove executive branch officials. These provisions allow the Governor the flexibility to assemble his or her management team. To this end, included in that act was section 1-3-240(B), which allows the Governor to remove any appointed state officer at his or her discretion, notwithstanding that the officer's term has not yet expired or that a substantial amount of time remains in the officer's term. When Governor Hodges was elected in 1999, he chose not to issue a broad executive order removing all state officers appointed by past

governors. Instead, he requested the resignation of certain members of state boards and commissions. Governor Hodges requested that John S. Rainey ("Rainey") resign his position as Chairman of the Board of Directors of Santee Cooper. When Rainey refused, Governor Hodges issued Executive Order 99--62 removing Rainey from the Board. On December 8, 1999, Rainey sent a letter to Governor Hodges in which he refused to relinquish his office on the grounds that the 1993 Restructuring Act

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granting the Governor discretionary power to remove state officers from their positions did not apply to him.

The sole issue before this Court is as follows:

Whether the Governor of South Carolina has the authority to remove a member of the Board of Directors of Santee Cooper upon the issuance of an executive order pursuant to S.C.Code Ann. § 1-3-240(B) (Supp.1998)?

LAW/ANALYSIS

Governor Hodges argues that this Court should declare that the members of the Board of Directors of Santee Cooper are subject to the Governor's discretionary removal power under the provisions of the 1993 Restructuring Act and, thus, the executive order removing Rainey is effective. We agree.

I. Statutory Construction

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

The language of section 1-3-240(B) and (C) is unambiguous and evidences the General Assembly's intent to grant the Governor of South Carolina the power to remove appointed state officers at his or her discretion. Specifically, section 1-3-240(B) provides for the general power to remove as follows:

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(B) Any person appointed to a state office by a Governor, either with or without the advice and consent of the Senate, other than those officers enumerated in subsection (C), may be removed from office by the Governor at his discretion by an Executive Order removing the officer.

Immediately following is section 1-3-240(C) which provides for an enumerated list of agencies where the Governor's power of removal is limited:

(C) Persons appointed to the following offices of the State may be removed by the Governor for malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty in office, or incapacity:

- (1) Workers' Compensation Commission;
- (2) Commission of the Department of Revenue;
- (3) Ethics Commission;
- (4) Election Commission;
- (5) Professional and Occupational Licensing Board;
- (6) Juvenile Parole Board;
- (7) Probation, Parole and Pardon Board;
- (8) Director of the Department of Safety;
- (9) Board of the Department of Health and Environmental Control, excepting the Chairman;
- (10) Chief of State Law Enforcement Division.

This Court has upheld the Restructuring Act and has applied the above set forth sections 1-3-240(B) and (C) to other directors of state boards and commissions. *See, e.g., Rose v. Beasley*, 327 S.C. 197, 489 S.E.2d 625 (1997) (affirming Governor Beasley's removal of Boykin Rose from the office of Director of Department of Public Safety under section 1-3-240(C)).

The canon of construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*" holds that "to express or include one thing implies the exclusion of another, or of the alternative." Black's Law Dictionary 602 (7th ed. 1999). Section 1-3-240(C) does not specifically exempt the Santee Cooper Board of Directors from its operation, as it

does ten other boards. The fact that the Santee Cooper Board of Directors was not included in the list of exclusions implies that the General Assembly intended for section 1-3-240(B) to apply to the Board. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded. Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." Norman J. Singer, *Sutherland Statutory Construction* § 47.23 at 227 (5th ed. 1992) (citations omitted).

The text of the Restructuring Act is certain---the Act grants the Governor the right to remove appointed state officers at his or her discretion, while specifically exempting ten boards and commissions. If the legislature's intent is clearly apparent from the statutory language, a court may not embark upon a search for it outside the statute. *Abell v. Bell*, 229 S.C. 1, 91 S.E.2d 548 (1956). When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to

determine its meaning. *Timmons v. South Carolina Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970).

While it is true that the purpose of an enactment will prevail over the literal import of the statute, this does not mean that this Court can completely rewrite a plain statute. According to this Court in *South Carolina Board of Dental Examiners v. Breeland*:

A choice of language in a act will not be construed with literality when to do so will defeat the lawmakers' manifest intention, and a court will reject the ordinary meaning of words used in a statute when, to accept the ordinary meaning, will lead to a result so plainly absurd that it can not possibly have been intended by the legislature.

208 S.C. 469, 480, 38 S.E.2d 644, 650 (1946) (citations omitted). For example, this Court has interpreted statutes in accord with legislative intent despite contrary literal meaning in cases where there has been an oversight by the legislature that is clearly in conflict with the overall intent of the statute, such as when the legislature uses "or" instead of "and" or "county"

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instead of "city." (fn1) However, this Court should not completely disregard the text of an unambiguous statute based on an alleged conflict with an earlier statute. In the instant case, the ordinary meaning of section 1-3-240(B) will not lead to absurd results unintended by the legislature, so the plain language of the statute should not be disregarded.

II. Implied Repeal

Rainey argues that section 1-3-240(B) is in conflict with Santee Cooper's enabling legislation that allows for the removal of board members for cause, S.C.Code Ann. § 58-31-20 (Supp.1998) (fn2). According to Rainey, section 1-3-240(B) should not be read according to its literal meaning because the legislature did not intend for section 1-3-240(B) to "impliedly repeal" Santee Cooper's 1934 enabling legislation. Rainey maintains that because the two statutes are in inherent conflict, this Court should not apply section 1-3-240(B) to Santee Cooper, even though its Board of Directors were not specifically listed in the section 1-3-240(C) exclusions. We disagree.

The law does not favor the implied repeal of statute. *Butler v. Unisun Ins.*, 323 S.C. 402, 475 S.E.2d 758 (1996). Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. *Id.* "It is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would ... expressly do so; hence, if by any fair or liberal

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construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first." *Justice v. Pantry*, 330 S.C. 37, 43--44, 496 S.E.2d 871, 874 (Ct.App.1998) (quoting *State v. Hood*, 181 S.C. 488, 491, 188 S.E. 134, 136 (1936)).

In the instant case, we find that the 1934 Santee Cooper enabling legislation and the 1993 Restructuring Act are not in conflict. On the contrary, section 1-3-240(B) and (C) of the Restructuring Act can be reconciled with section 58-31-20 of the Santee Cooper legislation because both statutes provide alternative and complimentary means of removal. (fn3) In fact, it is very logical to have both statutes in effect because the provision in the Santee Cooper Act (section 58-31-20) acts as an important

safety net. Pursuant to section 58-31-20 of the Santee Cooper Act, the advisory board can remove a board member for cause, which allows the advisory board to remove a member who is not properly performing in the event the Governor fails to do so. For example, if the Governor decides to appoint a political ally to the board who commits some type of malfeasance, section 58-31-20 acts as the ultimate safety net by permitting the advisory board to remove the Governor's appointee.

Section 1-3-240(B) of the Restructuring Act does not affect the advisory board's removal power, it merely allows the Governor to remove a director at his or her discretion. As a matter of public policy, the Governor's discretionary removal power is important because it allows the Governor to remove a director with whom he or she cannot work. Moreover, the Restructuring Act states that the Governor's removal power is not in conflict with other removal provisions because it is merely additional to any removal powers conferred by other statutes. S.C.Code Ann. § 1-3-260 (1976) ("The power and procedure of removal conferred and provided for in §§ 1-3-240 and 1-3-250 are *additional* to any other removal powers or procedure authorized by statute.") (emphasis added).

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III. State Office

Governor Hodges argues that section 1-3-240(B) applies to the Santee Cooper Board of Directors because Santee Cooper is a state agency and, therefore, the office of its board members is a "state office" for purposes of the statute. We agree.

Pursuant to section 1-3-240(B), state officers can be removed by the Governor at his discretion. Rainey argues that section 1-3-240(B) does not apply to Santee Cooper's board members because Santee Cooper's enabling legislation provides that they are not "public officers." Section 58-31-60 of Santee Cooper's 1934 enabling legislation provides:

The position of director of the Public Service Authority is not a public office, and the State shall in no way be responsible for the acts of the directors, but each director and his surety and the Public Service Authority shall be responsible for all acts of the director in connection with the functions herein provided for.

S.C.Code Ann. § 58-31-60 (1976) (emphasis added).

General law on this subject provides that public officers are "all officers of the State that have heretofore been commissioned and trustees of the various colleges of the State, members of various State boards and other persons whose duties are defined by law." S.C.Code Ann. § 8-1-10 (1976). However, Santee Cooper's directors have many indicia of public office holders. The directors are appointed by the Governor, they are commissioned, and their duties are defined by law. Santee Cooper is also considered a state agency under current statutory law.^(fn4) Under current law, Santee Cooper "is a corporation owned completely by the people of the State" for a "public purpose" and is operated "for the benefit of the all the people of the State." S.C.Code Ann.

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§ 59-31-80 (Supp.1998). Santee Cooper also enjoys the many benefits and protections of a state agency, such as: (1) the power of eminent domain, S.C.Code Ann. § 58-31-30(18) (Supp.1998); (2) protection under the South Carolina Tort Claims Act, S.C.Code Ann. § 15-78-40 (Supp.1998); and (3) protection under the Freedom of Information Act, S.C.Code Ann. § 30-4-10 (Supp.1998). Thus, we are faced with

the question of how to harmonize various sections of law with respect to the status of Santee Cooper's directors.

The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. *Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 501 S.E.2d 725 (1998).

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Id. (citing *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994)). If one examines section 58-31-60 of Santee Cooper's enabling legislation in context it is clear that it deals specifically with director liability. Specifically, section 58-31-60 states that "the State shall in no way be responsible for the acts of the directors, but each director and his surety and the Public Service Authority shall be responsible for all acts of the director in connection with the functions herein provided for." Section 58-31-60 limits the State's liability for the individual wrongs committed by directors, such as fraudulent acts. This statute is given limited effect because it was intended to apply solely to director liability prior to the South Carolina Tort Claims Act. If this Court were to give section 58-31-60 broad effect and decline to classify Santee Cooper's board members as state officers, such interpretation would lead to an absurd result where board members are classified as state officers under statutes that protect Santee Cooper as a state agency, such as the South Carolina Tort Claims Act and the Freedom of Information

Act, and not classified as state officers where that classification might not be beneficial, such as in the instant case.

Furthermore, in 1934 when Santee Cooper's enabling legislation was enacted, the State was protected by total sovereign immunity and could only be sued in tort or in contract when the State consented. The 1934 Act, therefore, offered Santee Cooper bondholders protection because it provided that although bondholders could not sue the State, they could sue both the directors and Santee Cooper on their bonds. S.C.Code Ann. § 58-31-60 ("... each director and his surety and the Public Service Authority shall be responsible for all acts of the director in connection with the functions herein provided for."). We eliminated the State's immunity from suit based upon its contractual obligation in 1978 in *Kinsey Construction Co. v. South Carolina Department of Mental Health*, 272 S.C. 168, 249 S.E.2d 900 (1978). In 1985, we abolished total sovereign immunity with respect to torts in *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). In response to *McCall*, the legislature passed the Tort Claims Act, which waived sovereign immunity under certain circumstances. Under the current law, it would be illogical to find that Santee Cooper's directors were not state officers because they would not be protected by the Tort Claims Act and potentially would be personally liable on Santee Cooper's bonds, as they arguably were under the 1934 enabling legislation.

Rainey argues that Santee Cooper should be considered a state agency for some purposes and not for others. In *South Carolina Pub. Serv. Auth. v. Citizens & South. Nat. Bank*, 300 S.C. 142, 160, 386 S.E.2d 775, 786 (1989), this Court held "Santee Cooper is a unique state agency ... Santee Cooper has been held to be a quasi-municipal corporation that is for some purposes an agency of South Carolina." Rainey argues that for some purposes and under some statutes Santee Cooper will be considered a state agency,

depending on the statute's own distinct legislative history and meaning. Rainey cannot choose which statutes will classify Santee Cooper as a state agency based upon how advantageous that classification will be to him. Because current case law and statutory law classify Santee Cooper a state agency, Santee Cooper's Board of Directors should be considered state officers for purposes of section 1-3-240(B).

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IV. Contracts Clause

Rainey argues that section 1-3-240(B) would be unconstitutional in application if used to remove a Santee Cooper board member because it would violate the Contract Clause of the United States and South Carolina Constitutions(fn5) by impairing the contractual rights of Santee Cooper bondholders. To constitute a Contract Clause violation this Court must determine three issues: (1) whether there is a contractual relationship; (2) whether the change in the law impairs that contractual relationship; and (3) whether the impairment is substantial. See *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). Finally, "[f]or a law to survive scrutiny under the Contract Clause when the law substantially impairs a contract, it must be reasonable and necessary to accomplish a legitimate public purpose." *Ken Moorhead Oil Co. v. Federated Mutual Ins. Co.*, 323 S.C. 532, 542, 476 S.E.2d 481, 486 (1996) (citations omitted).

A. Contractual Relationship

"When bonds are issued, there arises a contract between the purchaser and seller, the obligation of which cannot be impaired, as it would be in violation of article 1, § 10, Const. U.S., and of article 1, § 8, Const. S.C." *Welch v. Getzen*, 85 S.C. 156, 67 S.E. 294 (1910); see also *South Carolina Pub. Serv. Auth. v. Summers*, 282 S.C. 148, 318 S.E.2d 113 (1984) (holding municipal tax assessment impaired rights of holders of bonds issued by Santee Cooper in violation of the United States and State Constitutions). Santee Cooper is the seller of its bonds. The contract exists between the bondholders and *Santee Cooper*, not its *Board of Directors*. Therefore, any change in the Board of Directors does not affect the underlying contract with Santee Cooper. If that

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were the case, every time the Board of Directors changed, a contractual impairment would occur.

B. Substantial Impairment

"For purposes of Contract Clause analysis, a statute can be said to substantially impair a contract when it alters the reasonable expectations of the contracting parties." *Ken Moorhead Oil*, 323 S.C. at 542, 476 S.E.2d at 486. A change in the composition of Santee Cooper's Board of Directors for any reason does not alter the reasonable expectations of the bondholders. Rainey argues that the "bondholders could reasonably expect that the rights of Santee Cooper, including the right to a stable board (which in turn translates into stable management) whose members may only be removed for cause by the Advisory Board, would not be altered or limited until after the bonds were retired." Rainey argues that the Governor's discretionary removal of the Chairman of Santee Cooper constitutes a threat to the stability of Santee Cooper, which may result in a lowering of the value of the bonds. According to Rainey, affecting the Board of Director's stability will have adverse effects on: (1) Santee Cooper's favorable bond ratings; (2) the bond's attractiveness to buyers; (3) the marketability of the outstanding Santee Cooper debt securities; and (4) increased credit insurance costs.

The adverse effects proposed by Rainey do not rise to the level of a substantial impairment of contract.(fn6) A change in the composition of the Board of Directors, as a result of the Governor's will, death of a member, retirement, or removal for

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cause, would not lead to the vast instability that Rainey proposes. The Board of Directors would still be able to function and the outstanding bonds would still exist. Rainey has supplied no evidence that the value of the outstanding bonds would be affected by the Governor's removal of a board member. He merely provides affidavits that speculate about the possibility of a change in bond value if the bond ratings are adversely affected by a change in the Board composition.(fn7)

CONCLUSION

We find that the members of Santee Cooper's Board of Directors are subject to the Governor's discretionary removal power under section 1-3-240(B) of the 1993 Restructuring Act and, thus, Governor Hodges' executive order removing Rainey is effective.

MOORE, and WALLER, JJ., concur.

FINNEY, C.J., and BURNETT, J., dissenting in a separate opinion.

BURNETT, Justice (concurring in part, dissenting in part):

I concur with Parts III and IV of the majority's opinion. I disagree, however, with Parts I and II. In my opinion, the Governor does not have discretionary authority to remove a member of the Board of Directors of Santee Cooper.

Relying on the statutory construction maxim "*expressio unius est exclusio alterius*," the majority concludes because Santee Cooper was not included in the list of exclusions noted in § 1-3-240(C), the General Assembly intended the Governor's

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discretionary removal power to apply to the Board of Santee Cooper. The majority's application of the maxim improperly effects an implied repeal of Santee Cooper's enabling legislation.(fn1)

When Santee Cooper was created in 1934, the General Assembly enacted specific provisions for the removal of Santee Cooper's Board members. Section 58-31-20 (1976) specifically provides: "[m]embers of the board of directors [of Santee Cooper] may be removed *for cause* by the advisory board or a majority thereof." (Italic added). The advisory board is composed of five members, *one of whom is the governor*. § 58-31-20.

As recognized by the majority, the law does not favor the implied repeal of a statute. *Butler v. Unisun Ins.*, 323 S.C. 402, 475 S.E.2d 758 (1996). Nonetheless, the majority concludes § 1-3-240(B) and § 58-31-20 are not in conflict; § 58-31-20 simply acts as a "safety net" allowing the advisory board to remove the governor's appointee if he commits some type of malfeasance.

As I read § 1-3-240(B) and § 58-31-20, the two statutes are irreconcilable and cannot be reasonably harmonized. Allowing the Governor complete and sole discretion to remove a Board member without

cause usurps the advisory board's authority to remove a Board member for cause. Simply put, if the advisory board, of which the Governor is a member, fails to remove a Board member for cause, the Governor can effectively veto the action and remove the member at his own discretion. Contrary to the majority's assertion, § 1-3-240(B) impliedly repeals the advisory board's removal power.

Because § 1-3-240(B) and § 58-31-20 are clearly in conflict, the latter, as the specific act, controls, even though it was passed before § 1-3-240(B). *Atlas Food Systems and Services, Inc. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995); see Norman J. Singer, *Sutherland Statutory Construction*

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§ 51.05 at 174 (5th ed. 1992) ("[w]here one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, ...").

Furthermore, the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996). When it passed the Restructuring Act, the General Assembly amended the removal provisions of administrative agencies, specifically stating removal is subject to § 1-3-240(B). See § 24-1-40 (Supp.1999) (director of Department of Corrections is subject to removal from office as provided in § 1-3-240); § 44-9-30 (Supp.1999) (governing board of State Department of Mental Health may be removed by Governor pursuant to § 1-3-240); § 44-49-20 (Supp.1999) (director of Department of Alcohol and Other Drug Abuse Services is subject to removal by Governor pursuant to § 1-3-240); § 48-4-30 (Supp.1999) (Governor may remove any board member of the Department of Natural Resources pursuant to § 1-3-240); § 51-1-10 (Supp.1999) (director of Parks, Recreation and Tourism is subject to removal by the Governor pursuant to § 1-3-240). The legislature's failure to amend § 58-31-20 indicates a conscious decision by the General Assembly to exclude the Santee Cooper Board from the Governor's removal power in § 1-3-240(B).

In my opinion, § 1-3-240 does not authorize the Governor to remove a member of the Santee Cooper Board at his sole discretion. Accordingly, I would vacate Executive Order 99--62 which removes Rainey from the Board. *Rose v. Beasley*, 327 S.C. 197, 489 S.E.2d 625 (1997) (under South Carolina law, the Governor may not remove from office unless the power to do so is conferred upon him by the Constitution or statute).

FINNEY, C.J., concurs.

Footnotes:

1. Rainey cites several examples where this Court has interpreted statutes in accord with legislative intent, despite the literal meaning of the statute. However, in none of these examples has this Court completely disregarded the plain meaning of the statute. In all of his examples this Court changed particular words to be more in line with the overall intent of the statute. None of his examples involve this Court disregarding the whole text of a statute because a contrary legislative intent can be ascertained from reading other earlier statutes, which is what Rainey argues this Court should do in the instant case. The examples provided by Rainey include where this Court has found: "July" to mean "June;" "attached" to mean "taxed;" "county" to mean "city;" and "hereinafter" to mean "hereinbefore." See generally *Fulghum v. Bleakley*, 177 S.C. 286, 181 S.E. 30, 32 (1935); *Robson v. Cantwell*, 143 S.C. 104, 141 S.E. 180 (1928).

2. "Members of the board of directors may be removed for cause by the advisory board or a majority thereof." S.C.Code Ann. § 58-31-20 (1976).

3. Even if the Restructuring Act was incompatible with Santee Cooper's enabling legislation, the Restructuring Act would prevail because it was enacted subsequent to the enabling legislation. The more recent and specific legislation controls if there is a conflict between two statutes. *Porter v. South Carolina Pub. Serv. Comm'n*, 327 S.C. 220, 489 S.E.2d 467 (1997).

4. South Carolina case law also confirms that Santee Cooper is a state agency. *See Cooper v. South Carolina Pub. Serv. Auth.*, 264 S.C. 332, 215 S.E.2d 197 (1975) (Public Service Authority is "a public corporation in the nature of a quasi municipal corporation, exercising certain governmental functions as an agency of the state."); *Creech v. South Carolina Pub. Serv. Auth.*, 200 S.C. 127, 20 S.E.2d 645 (1942), *superseded by statute on other grounds*, 311 S.C. 417, 429 S.E.2d 802 (1993) ("South Carolina Public Service Authority is a public corporation, exercising certain governmental functions as an agency of the State").

5. Article 1, section 10 of the United States Constitution provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters or Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto law, or *Law impairing the Obligation of Contracts*, or grant any Title of Nobility.

U.S. Const. art. I, § 10, cl. 1 (emphasis added). *See* S.C. Const. art. I, § 4.

6. If the adverse effects cited by Rainey are considered an impairment, they certainly do not constitute a substantial impairment. In fact, the affidavits used by Rainey to support his claim of impairment do not describe substantial or highly detrimental effects as the result of a change in the composition of the Board of Directors. For example, in the affidavit of Walter T. Cox he states that the removal of the Chairman by the Governor is a threat to stability which "may result" in the bonds being less valuable if it affects the overall bond ratings. The affidavit of Alan Spen, who has rated Santee Cooper's bond offerings, merely states that the possibility that the Board could be replaced by the Governor is "viewed as less than favorable." Finally, the affidavit of Christopher Fink of Morgan Stanley & Company merely states that the possibility of removing the Chairman prior to the expiration of his term will lead to uncertainty which "could have a negative impact on the marketability of the outstanding Santee Cooper debt securities." (emphasis added).

7. Rainey attempts to compare the instant case with *South Carolina Serv. Auth. v. Summers*, 282 S.C. 148, 318 S.E.2d 113 (1984) where this Court held that the imposition of an *ad valorem* tax on Santee Cooper's property violated the Contract Clause because it violated the statutory tax exemption granted to Santee Cooper. *Summers* is not analogous to the instant case because it involves the imposition of a tax, which clearly impairs the security provision provided to bondholders and violates the covenant made by the State not to alter any rights of Santee Cooper. *See* S.C.Code Ann. § 58-31-30 (1976).

1. *Expressio unius est exclusio alterius* is a rule of statutory construction; it is not a rule of substantive law. Accordingly, the maxim "should be used with care." Norman J. Singer, *Sutherland Statutory Construction* § 47.25 at 234 (5th ed. 1992).

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650 S.E.2d 465; STRICKLAND v. STRICKLAND; 650 S.E.2d 465

STRICKLAND v. STRICKLAND
650 S.E.2d 465 (SC 2007)

Carol S. STRICKLAND, Appellant/Respondent,
v.
Krom STRICKLAND, Respondent/Appellant.

No. 26375.

Supreme Court of South Carolina.

Heard May 1, 2007.
Decided August 27, 2007

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This Page Contains Headnotes.

Appeal from the Family Court, Lee County, R. Wright Turbeville, J.

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S. Bryan Doby, of Jennings & Jennings, of Bishopville, for Appellant/Respondent.

Paul M. Fata, of Stuckey, Fata & Segars, of Bishopville, for Respondent/Appellant.

Chief Justice TOAL.

This case began as an action to enforce an alimony award. The family court dismissed the claim finding it was barred by the doctrine of laches. We affirm, but modify the family court's decision and we additionally vacate a portion of the family court's decision.

FACTUAL/PROCEDURAL BACKGROUND

Upon the parties' divorce in April 1988, the family court awarded \$1200 per month in permanent periodic alimony to Appellant/Respondent Carol Strickland ("Wife") to be paid by Respondent/Appellant Krom Strickland ("Husband"). This monthly total was increased by \$200 in November 1990 after the family court held Husband in contempt of court for failing to remain current on his alimony obligation. In May 1992, the parties signed a consent order providing that instead of making payments to the county clerk of court, all further alimony would be paid directly to Wife, and any arrears would be "worked out between the parties."

From November 1990 until December 1997, Husband paid Wife \$300 per month in alimony

payments. During this time, Wife did not object to Husband's failure to pay the full amount awarded by the court. In July 1998, Husband made a one-time payment of \$500 (at Wife's request). After this, Husband made no further payments to Wife and Wife made no additional requests for alimony until December 2004 when her lawyer contacted Husband to discuss "a deficient alimony claim."

In May 2005, Wife initiated an action seeking enforcement of the \$1200 per month alimony obligation and approximately \$225,000 in past due alimony. As an affirmative defense, Husband argued the doctrine of laches barred Wife's claim for past due alimony and, as a counterclaim, alleged that Wife had continuously cohabitated with another man for seven years and was therefore no longer entitled to ongoing alimony under S.C.Code Ann. § 20-3-150 (Supp.2006) (the "continued cohabitation" statute).

The family court agreed with Husband and dismissed Wife's complaint, holding that her claims for both past due and ongoing alimony were barred by laches.^(fn1) The court additionally

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found that Husband had not proven by a preponderance of the evidence that Wife had continuously cohabitated with another man within the meaning of S.C.Code Ann. § 20-3-150. Wife and Husband each appealed from the trial court's ruling.

The case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR. The parties raise the following issues for review:

- I. Did the family court err in dismissing Wife's claims to enforce her alimony award based on the doctrine of laches? (Wife's issue on appeal)
- II. Did the family court err in failing to terminate alimony because Wife had continuously cohabitated with another man for a period of ninety or more consecutive days? (Husband's issue on appeal)

STANDARD OF REVIEW

In appeals from the family court, the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence. *Wooten v. Wooten*, 364 S.C. 532, 540, 615 S.E.2d 98, 102 (2005). This broad scope of review does not require the reviewing court to disregard the findings of the family court; appellate courts should be mindful that the family court, who saw and heard the witnesses, sits in a better position to evaluate credibility and assign comparative weight to the testimony. *Cherry v. Thomasson*, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981).

LAW/ANALYSIS

I. Laches

Wife argues that the family court erred in dismissing her claims to enforce her alimony award based on the doctrine of laches. We agree.

Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a

right, resulting in prejudice to the defendant. *Kelley v. Kelley*, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct. App.2006).

On previous occasions, this Court has alluded to the inapplicability of the defense of laches in actions to enforce a court order. In *Jefferson Pilot Life Insurance Co. v. Gum*, 302 S.C. 8, 393 S.E.2d 180 (1990), Husband was required pursuant to a 1974 divorce decree to name Wife # 1 as the beneficiary of his life insurance policy. *Id.* at 9, 393 S.E.2d at 181. In 1976, Wife # 1 learned Husband had changed the beneficiary to Wife # 2 and thereafter, Wife # 1 obtained several court orders to reinstitute herself as the beneficiary of the policy, the final order to this effect being issued in 1980. Despite these proceedings, Wife # 1 was aware that Husband never designated her as beneficiary. After Husband's death in 1987, Wife # 1 and Wife # 2 both brought claims seeking the insurance policy proceeds. The trial court granted Wife # 2's motion for summary judgment based on the doctrine of laches. *Id.* at 9-10, 393 S.E.2d at 181.

On appeal, this Court found that because there had been no modification to the court's order designating Wife # 1 as the beneficiary, Husband was "still under an obligation" by order of the court to designate her as such. *Id.* at 11, 393 S.E.2d at 182. Therefore, the Court held that the trial court erred in granting summary judgment based on laches to Wife # 2. *Id.* at 12, 393 S.E.2d at 182.

In our opinion, this Court's reasoning in *Jefferson Pilot* is equally applicable to a family court award of alimony. Although the equitable nature of laches generally comports with the family court's equitable jurisdiction in determining support and maintenance between former spouses, the concept of "inexcusable delay" in the laches defense

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is inconsistent with the judicial authority inherent in a court order. Because court orders awarding support and maintenance do not have an expiration date, allowing a party to avoid compliance based solely on the oblique notion of delay only serves to undermine the authority of the court. *See also Stephens v. Hamrick*, 86 N.C.App. 556, 358 S.E.2d 547, 549 (1987) (holding that the doctrine of laches does not bar the enforcement of a court order for child support because "the obligation to furnish support is continuous [and therefore] a lapse of time will not be a bar to commencement of an enforcement action."). Accordingly, we hold that laches is not a defense to a claim for the enforcement of an alimony award and that therefore, the family court erred in applying laches as a defense to both Wife's claim for past due alimony and Wife's claim for ongoing alimony.(fn2)

In holding as we do today, we do not seek to limit the concept of fairness underlying actions in equity. Instead, we believe that a court's focus in deciding an issue related to the enforcement of an alimony obligation should be on the equity of enforcing the court order rather than the general application of equitable defenses. In this context, we find that the theory of equitable estoppel appropriately balances principles of equity and judicial authority when the underlying facts of a case call into question the equity of enforcing a court order.

The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel. *Kelley*, 368 S.C. at 608, 629 S.E.2d at 392. The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in

question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped. *Boyd v. Bellsouth Tel. Tel. Co., Inc.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006). As the elements exhibit, equitable estoppel is based on affirmative conduct between the parties. In our opinion, contesting the enforcement of a court order based on the affirmative conduct of the parties is less offensive to judicial authority than the emphasis on the *lack of* conduct by a party inherent in the defense of laches. Accordingly, we hold that equitable estoppel is the appropriate defense to an action for the enforcement of a court order for support and maintenance.

Turning to the instant case, we recognize that affirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading. *Wright v. Craft*, 372 S.C. 1, 20-21, 640 S.E.2d 486, 497 (Ct.App.2006) (quoting Rule 12, SCRPC). Therefore, because Husband only asserted laches as an affirmative defense, the question of whether Wife is equitably estopped from enforcing past due alimony is not squarely preserved in the instant case. *See id.* (noting that an issue must have been raised to and ruled upon by the trial court to be preserved for review). Noting the equitable foundation of this case, we next consider whether a decision by this Court on the merits of equitable estoppel is appropriate under these circumstances.

Laches is an equitable doctrine which arises upon the failure to assert a known right. *Emery v. Smith*, 361 S.C. 207, 215, 603 S.E.2d 598, 602 (Ct.App.2004). The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the "voluntary and intentional relinquishment or abandonment of a known right," *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). Both laches and waiver require a

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party to have known of a right, and known that the party was abandoning that right.

The doctrine of equitable estoppel may be enforced in a court of law as well as in equity matters. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). Often confused with waiver, equitable estoppel focuses on a party's detrimental reliance on another party's conduct while a waiver analysis focuses on a party's "unequivocal intent to relinquish a known right." 7 S.C. Jur. *Estoppel and Waiver* § 17 (1991). Nevertheless, this Court has acknowledged that "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Parker*, 313 S.C. at 487, 443 S.E.2d at 391 (quoting *Janasik*, 307 S.C. at 344, 415 S.E.2d at 388).

Given their derivation from the legal doctrine of waiver, we note that the doctrines of laches and equitable estoppel may be similarly indistinct at times. For example, one who delays unreasonably could be said to be estopped from asserting a claim if another has relied on that delay to his detriment. *See* 7 S.C. Jur. *Estoppel and Waiver* § 28. Thus, it is possible to assert only one of these equitable defenses - yet have successfully pled both.

In the instant case, we find this precise scenario to have occurred. As it is argued in the pleadings and briefs, Husband's laches defense is virtually indistinguishable from an equitable estoppel defense - the underlying concept of waiver being the essence of Husband's argument. Therefore, regardless of the "laches" title assigned to his argument, we find that equity demands that this Court consider whether Wife is equitably estopped from pursuing her claim for past due alimony. *See also* Rule 15(b), SCRPC ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

Turning to the merits, we find that Wife's claim for past due alimony is barred under the doctrine of equitable estoppel. Beginning as early as 1990, Wife's conduct conveyed the impression that she was willing to accept alimony in an amount different from that articulated in the 1988 divorce decree. Wife accepted Husband's \$300 monthly alimony payments for seven years and further testified that she agreed on [\$300 per month] as long as I could make my other payments - because he was trying to get straightened out. Furthermore, Wife pursued no alimony - other than a single request in July 1998(fn3) - when Husband's monthly payments altogether ceased, testifying that at that time, "I told him as long as I could make it that I would not go after him."

Furthermore, Wife intended Husband to rely on her actions and assertions. Wife's communication with Husband and use of the court system early on indicate that she was clearly aware of Husband's financial situation as well as the procedure for modification or enforcement of the alimony award. Wife herself initiated the claim which resulted in the 1992 consent order for Husband's alimony payments to be made directly to Wife and for the arrears to be "worked out between the parties." Later in 1992, Wife went so far as to initiate a claim to reduce the amount of alimony to \$500 per month.(fn4) In our opinion, the trial court correctly determined that between 1990 and 2004, Wife "by her actions, and her inactions, lulled [Husband] into thinking they had resolved the issue between themselves and that he did not need to take any actions to protect himself by attempting to have the Court reduce or terminate his alimony."

Moreover, other than her 1990 contempt action for alimony in arrears, Husband had no indication that Wife was dissatisfied with the parties' own terms of alimony. In light of Wife's 1992 court appearances, Husband

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justifiably relied on Wife's assertions that she did not need alimony on the terms ordered by the divorce decree. Specifically, the consent order for the parties to settle the issue of arrears themselves, and Wife's subsequent initiation of a claim to significantly reduce alimony to an amount closer to that which Husband was actually paying at the time, gave Husband no reason to believe that he either needed to seek modification of alimony in light of his financial situation or ultimately face accountability for the entire amount dating back to the 1988 divorce decree.

Lastly, Husband was prejudiced in relying on Wife's assurances that the parties had settled all issues related to alimony. The facts show, and the trial court correctly found, that Husband would not have incurred substantial farm debt beginning in 2004 if he had known he would ultimately be responsible for the full amount of his alimony obligation.

Although Husband's almost immediate failure to adhere to the divorce decree, or at the very least seek a modification of alimony at that time, is unacceptable, Wife's assurances and reassurances that Husband need only pay what he could justifiably resulted in Husband's belief that his past due alimony obligations had been settled between them. Accordingly, we hold that Wife is equitably estopped from bringing a claim for enforcement of past due alimony against Husband.(fn5)

II. Continuous cohabitation as a bar to alimony

Husband argues that the family court erred in failing to find that Wife was no longer entitled to alimony because she had continuously cohabited with another man for the last seven years. We disagree.

S.C.Code Ann. § 20-3-150 provides that permanent alimony and support requirements of a

supporting spouse will terminate "upon the remarriage or continued cohabitation of the supported spouse." Unless another meaning has been agreed to in writing, § 20-3-150 defines "continued cohabitation" as when:

the supported spouse resides with another person in a romantic relationship for a period of ninety or more consecutive days. . . . [or] there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement.

If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. *Vaughan v. McLeod Reg'l Med. Ctr.*, 372 S.C. 505, ___, 642 S.E.2d 744, 747 (2007). The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation. *Id.*

Although neither party disputes that Wife has been in a "romantic relationship" for more than seven years, Husband attempts to bypass the statute's other requirements for termination of alimony by refusing to interpret the phrase "resides with another person" on its face. We find that the phrase "resides with" in the context of § 20-3-150 sets forth a requirement that the supported spouse live under the same roof as the person with whom they are romantically involved for at least ninety consecutive days. Any other interpretation essentially takes the "cohabitation" out of "continued cohabitation." Because Husband admits that Wife and her boyfriend do not live together in this fashion, and further, does not contend that their living arrangement is an attempt to circumvent the statute, Husband has not shown that Wife's relationship with another man amounts to "continued cohabitation" under § 20-3-150. Accordingly, we affirm the family court's refusal to terminate Husband's ongoing alimony obligation under § 20-3-150.

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CONCLUSION

For the foregoing reasons, we hold that laches is not a defense to claims for either past due or ongoing alimony. Rather, we hold that equitable estoppel is the appropriate defense to the enforcement of a court order for support and maintenance. We therefore affirm the decision of the family court dismissing Wife's claim for past due alimony on the modified grounds that Wife is equitably estopped from collecting alimony in arrears. As to ongoing alimony, we vacate the decision of the family court finding laches barred Wife's claim for ongoing alimony and affirm the family court's refusal to terminate ongoing alimony pursuant to the continuous cohabitation statute.

MOORE, BURNETT, JJ., and Acting Justice J. MICHAEL BAXLEY, concur. PLEICONES, J., concurring in a separate opinion.

Justice PLEICONES:

I concur in the majority's disposition of this appeal, but write separately because the fact the obligation sought to be enforced arises by virtue of a court order does not, in my opinion, preclude a plea of laches. While I appreciate the majority's sensitivity to the dignity of court orders, I do not see that interposing either laches or equitable estoppel in any way undermines a court's authority. These bars lie to prevent a party from enforcing a stale order, while the court's authority is vindicated through its contempt powers. Further, I do not agree with the application of equitable estoppel to these facts. The

former husband was aware from the May 1992 consent order that he was obligated to pay his former wife \$1200/month alimony and to make up arrearages as the parties agreed, and was aware that for many years his former wife had accepted less alimony than she was entitled to under this order. Assuming his former wife meant for him to believe that she was satisfied with the underpayments when she in fact was not, and assuming he relied upon her "false representation," this does not change his actual or constructive knowledge of the "true facts": he had, for years, failed to meet his court-ordered alimony obligation.

I would affirm the family court order barring the request for alimony arrearages on the ground of laches, affirm the refusal to terminate alimony under the "continual habitation" statute, and reverse the order barring future alimony payments on the ground of laches.

Footnotes:

FN1. Although Husband only asserted that laches barred Wife's claims for past due alimony, the order of the family court decreed that laches barred Wife's claims for both past due and ongoing alimony.

FN2. Recently, the court of appeals determined in *Kelley v. Kelley*, 368 S.C. 602, 629 S.E.2d 388, that the doctrine of laches only acts to bar a spouse's claim for past due alimony payments, but will not apply to bar a claim for future alimony payments. *Id.* at 606 n. 2, 629 S.E.2d at 391 n. 2. Our opinion today vacates this portion of *Kelley*.

FN3. Wife requested \$500 for home renovations.

FN4. Wife apparently initiated the claim and had Husband sign an affidavit saying he agreed to the modification of alimony. When Husband did not appear at the hearing, Wife withdrew the claim. Husband's undisputed testimony was that Wife led him to believe that his only responsibility in the matter was to sign the affidavit, and further, that he never received notice of the hearing.

FN5. Given that Husband only asserted that laches barred Wife's claims for past due alimony, we do not consider whether Wife is equitably estopped from enforcing the alimony obligation on a going-forward basis. For this reason, we vacate the portion of the trial court's decision holding that Wife's claim for ongoing alimony is barred by laches.

SC

Adv. Sheet

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STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

James David Farmer,

Plaintiff,

Vs.

Florence County Sheriff's Office,

Defendant.

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
C/A # 2008-CP-21-1071

CERTIFICATE
MAILING

FILED
2008 AUG 20 PM 4:37
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

The undersigned, a Paralegal for The Hyman Law Firm, LLP, attorneys for the Defendant, does hereby certify that she deposited in the United States Mail a copy of the Defendant's Notice and Cross-Motion for Summary Judgment and Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment dated August 20, 2008, the same being addressed to those persons whose names and addresses appear below, this being done on August 20, 2008, and that sufficient postage was affixed thereto:

Patrick J. McLaughlin
Wukela Law Firm
Post Office Box 13057
Florence, SC 29504-3057

Florence, SC

August 20, 2008


JENNIFER L. LISANDRELLI

CERTIFIED: A TRUE COPY


CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

000087

County of Florence County

2008-CP-21-1071James David FarmerFlorence County Sheriff's
Office.

Plaintiff(s)

Defendant(s)

Check one:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41 (a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow) ☐ Statement of Judgment by the court:

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Connie Reel ShearinCLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

Dated at Florence, South Carolina, this _____ day of _____ 2008.

FILED
2008 SEP 26 PM 3:53
FLORENCE COUNTY, S.C.

PRESIDING JUDGE

This judgment was entered on the 26 day of September 2008, and a copy mailed first class this 29 day of September, 2008, to attorneys of record or to parties (when appearing pro-se) as follows.

P.J. McLaughlinP.O. Box 13057Florence S.C. 29504

Attorney(s) for Plaintiff(s)

J.C. Rushon IIIP.O. Box 1770Florence S.C. 29503-1770

Attorney(s) for Defendant(s)

CONNIE REEL-SHEARIN

Florence County Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

FILED

2008 SEP 25

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

James David Farmer,

Plaintiff,

v.

Florence County Sheriff's Office,

Defendant.

FLORENCE COUNTY, SC

C.A. No.: 2008-CP-21-1071

ORDER

This matter comes before the Court on competing motions for summary judgment filed by the Plaintiff James David Farmer, and the Defendant, Florence County Sheriff's Office. I hereby order the return of certain items and dismiss all other claims and find as follows:

FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff is the sole proprietor of a commercial establishment, "Top Gear Clothing," located at 706 S. Church St., Florence, South Carolina. On or about August 30, 2007, agents of Defendant initiated a raid on the Plaintiff's establishment described above. As a result of this raid, the agents of the Defendant seized the Plaintiff's inventory, which consisted of clothing, footwear, movie DVD's and music CD's.

As a result of the raid described above, on January 10, 2008, the Plaintiff was indicted on one count of violation of S.C. Code Ann. § 39-15-1190 (Unauthorized use/trafficking in goods/services with counterfeit trademark) and one count of violation of S.C. Code Ann. § 16-11-0930, 940 (a) (Illegal distribution of recordings: 1,000 or more audio, 65 or more video). That on January 23, 2008, the State of South Carolina's criminal charges against the Plaintiff were



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Carrie Reel Shearin

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

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disposed of by the Plaintiff's plea of guilty to a violation of S.C. Code Ann. § 16-11-940 (c) (Illegal distribution of recordings: not more than 25 audio, not more than 10 video). The counterfeit trademark charges were dismissed.

That on or about February 5, 2008, the Plaintiff began attempt to recover his seized inventory not related to his criminal convictions (i.e. the clothes and shoes). These attempts consisted of two separate pieces of correspondence sent to the Defendant, by Plaintiff's counsel, in which the Plaintiff demanded the return of his inventory and state that if the inventory was not returned, the Plaintiff would file suit. The inventory was not returned to the Plaintiff and the Plaintiff filed suit against the Defendant on May 30, 2008. A hearing was held on the Summary Judgment Motion on September 2, 2008.

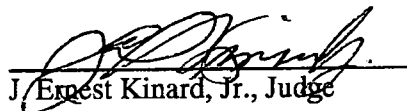
FINDINGS OF THE COURT

The Plaintiff, James David Farmer, is entitled to the return of his inventory seized not related to his criminal convictions (i.e. clothes and shoes). In regards to those items, there has been no criminal conviction and no hearing to determine whether or not said items violated S.C. Code Ann. § 39-15-1190 (Unauthorized use/trafficking in goods/services with counterfeit trademark). However, Plaintiff should take notice that if said items are, in fact, counterfeit and he attempts to traffic such items after their return, he will, again, be subject to criminal charges. Said items shall be returned to the Plaintiff within ten (10) days of the receipt of this Order. Accordingly, this Court will grant no damage hearing in regards to such items, provided that the items are returned in substantially the same condition as when seized.

A handwritten signature, likely of the judge, in black ink, consisting of stylized initials.

All other causes of action pled by the Plaintiff against the Florence County Sheriff's Office are hereby dismissed. The Order is obviously a reasonable compromise and the applicability of the Tort Claims Act which remedy the Plaintiff should pursue, etc. are not mentioned. The Sheriff's Office simply cannot hold the Plaintiff's property unless it is being held for use in a criminal proceeding.

IT IS SO ORDERED.

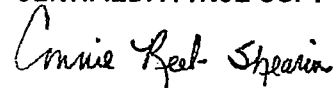

J. Ernest Kinard, Jr., Judge

Date: September 26, 2008

Camden, South Carolina

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CLERK OF COURT
FLORENCE COUNTY, SC

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FLORENCE COUNTY, S.C.

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ORIGINAL

STATE OF SOUTH CAROLINA)
) Court of Common Pleas
COUNTY OF KERSHAW)

James David Farmer,)
)
 PLAINTIFF,) PLAINTIFF'S MOTION
) FOR SUMMARY JUDGMENT
 -VS-)
) 2008-CP-21-1071
 Florence County Sheriff's)
 Office,)
)
 DEFENDANT.)
 _____)

BEFORE THE HONORABLE J. ERNEST KINARD, JUDGE
SEPTEMBER 2, 2008
CAMDEN, SOUTH CAROLINA

A P P E A R A N C E S:

P. J. MCLAUGHLIN, ESQ.
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P. O. Box 13057
Florence SC 29504
For the Plaintiff

J. C. RUSHTON, III, ESQ.
Hyman Law Firm
P. O Box 1770
Florence, SC 29503
For the Defendant

REMA K. GANTT THOMAS
CIRCUIT COURT REPORTER

I N D E X

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E X H I B I T S

(THERE WERE NO EXHIBITS INTRODUCED AT THIS HEARING.)

1 THE COURT: You had a motion of some sort?

2 MR. MCLAUGHLIN:: Yes, sir, Your Honor.

3 May it please the Court. I'm Patrick McLaughlin and
4 I'm representing the Plaintiff James David Farmer in
5 this matter. We filed for a motion for summary
6 judgment. The defendants filed a cross-motion of
7 response to our motion for summary judgment with a
8 cross-motion for summary judgment of their own, Your
9 Honor.

10 THE COURT: Good for you guys.

11 MR. MCLAUGHLIN:: May it please the Court?
12 May I approach?

13 THE COURT: All right.

14 MR. MCLAUGHLIN:: Your Honor, this is a
15 civil action that was brought as the result of a
16 criminal case. Mr. Farmer was arrested, Your Honor,
17 and charged with trafficking in goods bearing and
18 unauthorized trademark and with a copyright charge,
19 for some illegal -- I think it's distribution of
20 illegal recordings.

21 Subsequent to being indicted on those two
22 particular counts, we entered into a plea agreement
23 where Mr. Farmer pled guilty to a misdemeanor level
24 on copyright infringement for having illegal
25 recordings and the trademark violations were thrown

1 out.

2 Subsequent to those, to that plea, and the
3 trademark violations being thrown out, we sent
4 correspondence to the defendant on behalf of the
5 plaintiff requesting return of anywhere from \$40,000
6 to \$80,000 in inventory. We're not sure of the
7 exact amount. There's some dispute over it. At
8 least in the warrant, in the indictment, I believe
9 it is stated that it's \$40,000 worth of inventory.

10 This was a raid on a clothing store, Your
11 Honor, and when they raided it they seized a whole
12 bunch of goods, Nike shorts, LaCoste shirts, and
13 they seized a whole bunch of burnt CD's and burnt
14 videos.

15 Now, Mr. Farmer plead guilty to the burnt
16 CD's and burnt videos but of course he did not plead
17 to anything to the trademark violations. So we sent
18 a letter, correspondence to the defendant, on two
19 separate dates, and I believe it's spelled out in
20 the motion for summary judgment when they were sent,
21 and there is no -- I believe it's admitted that the
22 correspondence was received. It was received on --
23 the raid took place on August 30, 2007, he was
24 indicted in January of 2008, correspondence was sent
25 February 5th 2008 and March 19th 2008, Your Honor.

1 And both of those letters, Your Honor,
2 they were demand letters requesting the return of
3 the inventory explaining to the defendant that the
4 criminal charges relating to that inventory had been
5 dismissed and that not only did he demand the
6 inventory back, and did he need the inventory back,
7 that by the defendant's continued refusal to return
8 it to him he was suffering damages. In other words,
9 he was suffering lost profits.

10 THE COURT: All right, they did not return
11 the Nike and the -- the hard goods--

12 MR. MCLAUGHLIN:: The clothing.

13 THE COURT: The clothing, all right.

14 MR. MCLAUGHLIN:: Yes, sir, Your Honor.

15 THE COURT: And those charges were
16 dismissed?

17 MR. MCLAUGHLIN:: That's correct. And
18 Judge, there's any number of reasons why those
19 charges were dismissed but I don't only really need
20 to get into that with the Court. The State
21 dismissed those charges.

22 Therefore, I expect the defendant is going
23 to argue a lot that this was counterfeit goods but
24 Your Honor that argument has been waived. Those
25 charges were dismissed. In absence of those charges

1 they have no right to hold on to this stuff.

2 The statute that I handed up to the Court,
3 Your Honor, the 1195 deals with, is entitled seizure
4 and forfeiture, storage and maintenance of seized
5 property, reports to prosecuting agencies and the
6 return of seized items.

7 THE COURT: All right.

8 MR. MCLAUGHLIN:: This statute deals with
9 violation of the previous code section which is
10 having unauthorized trade mark. Under this statute,
11 Your Honor, and what our complaint used as the basis
12 for all causes of action is subsection "C." "A" and
13 "B" lays out what property can be seized. And then
14 under subsection "C" it says, "If seizure is made
15 pursuant to subsection "B" they --

16 THE COURT: They got to do it within a
17 reasonable time.

18 MR. MCLAUGHLIN:: They got to do it within
19 a reasonable time. Must be instituted within a
20 reasonable time.

21 Unfortunately, the defendant doesn't
22 agree. The defendant says, Well, he didn't have a
23 right. We argued in our complaint that not only
24 should you have done it because you failed to do
25 that you can be held liable. And we believe that

1 gets past the Tort Claims Act, Judge, because of the
2 argument between general duty or the public duty
3 versus this specific duty.

4 There's no doubt, there's no question we
5 believe, under I believe it's a case the defendant
6 cite in their own case, I believe it's the Summers
7 case, Your Honor, sets out like five things that a
8 special duty can arise from, from a statute that can
9 make the government liable here. And there's no
10 question that under those five duties, those five
11 elements are here.

12 And that is, "Essential purpose of a
13 statute is to protect against a particular type of
14 harm." There's no doubt that the purpose of 1195 is
15 to protect the property and the people who may own
16 that property. The statute either directly or
17 indirectly imposes on a specific public officer a
18 duty to guard against or not cause that harm, that's
19 clear by the language of subsection "C."

20 Not only that, the defendant admits, he
21 and his memorandum of law, on page three, that this
22 provision is a directive to law enforcement. It's
23 an affirmed -- they have to take an affirmative act
24 to bring these proceedings, these forfeiture
25 proceedings.

1 Number three is the class of persons the
2 statute intends to protect is identifiable before
3 the fact, clearly is folks who have their property
4 seized as the result of this violation.

5 Four, is about the person within the
6 protective class. There's no doubt that his
7 property was seized under this section.

8 And five, the public officer knows or has
9 reason to know the likelihood of harm, Your Honor.
10 He had reason to know because he seized the
11 inventory from the store. But beyond that, we
12 specifically warned him that if he continued to hold
13 this stuff he was harming the defendant.

14 And last but not least, the officer is
15 given sufficient authority to act in the
16 circumstances or undertakes the act and exercises of
17 his office. There's no other person telling the
18 defendant he can hold this property other than
19 himself. There are no charges pending.

20 I am not quite sure, Your Honor -- in
21 their response, in their cross-motion they argue
22 that we should have filed some type of action under
23 subsection "H." And Your Honor, subsection "H" that
24 statute is pretty clear -- there's a difference here
25 between an owner and an accused. Subsection "H" is

1 dealing with a third party that may have an interest
2 in property that is already -- you have to
3 presuppose the property is counterfeit for "H" to
4 apply.

5 And surely under "H" Two, it says that the
6 only way an owner can get it back is if the
7 use of the property that made itself -- that the
8 person can claim that they did not have any
9 knowledge of the use of the property that made
10 itself to be seized.

11 Well, somebody in my client's position can
12 never claim that. Someone who operates a store
13 knows what they are using the property for. I'm a
14 little unsure exactly under the defendant's position
15 when we can get the property back.

16 It's as if it can just be held in
17 perpetuity and would never there ever be any
18 admission or adjudication on the fact that's it
19 counterfeit.

20 THE COURT: Well, I take it you don't want
21 the property back?

22 MR. MCLAUGHLIN:: No, sir, we do want --
23 what we are asking for today Judge, is an order
24 demanding return of the property for summary
25 judgment on our liability issues in the complaint

1 and then of course we are not prepared yet to be
2 able to present damages to the Court because we
3 don't know the state of the property, whether or not
4 this is clothing, whether or not it was adequately
5 protected and we can have it for resale.

6 And my client is still in the process of
7 trying to get his books together so we can figure
8 out how this affects his--

9 THE COURT: Does he still have a clothing
10 place?

11 MR. MCLAUGHLIN:: He does. He was down
12 for about two or three months.

13 THE COURT: I could use some knock-offs on
14 the way home.

15 MR. MCLAUGHLIN:: It's a little cinder
16 block store right over near the projects.

17 THE COURT: I'm kidding.

18 MR. MCLAUGHLIN:: Your Honor, I would
19 yield to the defendant.

20 MR. RUSHTON: Your Honor, on behalf of the
21 County, going right to what is the purpose of the
22 forfeiture statute, which is 13-15-1195, the purpose
23 of that is not to protect owners of forged goods or
24 disparaging goods. The purpose of that statute is
25 to protect the public from people that are selling them.

1 when he talk about subsection "H" which an
2 owner, and he said it could be a third party, the
3 statute clearly says "An owner may apply to the
4 Court for the return of the return of the goods if
5 he has no reason to think they are pirated or
6 counterfeited."

7 The owner in this case has never done
8 that. I think he has to undertake that and the
9 statute sets forth the specific way for him to do
10 that and he has never done it. To this day he has
11 never done it. That's the reason that provision is
12 in there. If he's an innocent owner and he can
13 prove it to the Court he is entitled to them back.

14 He is trying to take, with 39-15-1195, and
15 make it a private cause of action. And there's a
16 memorandum that I filed that should be in your file.
17 We specifically cite the case of Summers vs.
18 Harrison Construction.

19 And the two basic requirements are there
20 that in order to make a private cause of action out
21 of the statutory directive that the essential
22 purpose of the statute is to protect from the kind
23 of harm suffered by the plaintiff. The plaintiff is
24 selling pirated goods. It's not to protect them
25 selling and from getting back those pirated goods.

1 It's to protect the public from them.

2 And again, he's got the right under the
3 forfeiture statute to file to get them back, which
4 he has never done. And in order to get the private
5 cause of action he has to show that he's a member of
6 the class that is to be protected.

7 Well, it's not the purveyor that's to be
8 protected. It's the owner. It's the public that's
9 to be protected.

10 Beyond that, you go straight to the Tort
11 Claims Act and the provision in the Tort Claims Act
12 under 15-78-60, provides that the adoption and
13 enforcement or compliance with any law or failure to
14 adopt or enforce any law whether valid or invalid,
15 is exempt.

16 And he's saying here that the failure to
17 enforce this forfeiture statute gives him a private
18 cause of action. Not only does it not give him a
19 private cause of action, under the Tort Claims Act
20 it doesn't give him any cause of action.

21 So, we've got the two basis for not only
22 the denial of his summary judgment but the grounds
23 for our summary judgment that he clearly has no
24 private cause of action against the County. He's
25 got a provision where he can proceed under

1 subsection "H" which he has done.

2 And number three, under the Tort Claims
3 Act he clearly -- or the county clearly falls within
4 an exception where they are protected under these
5 circumstances.

6 THE COURT: All right.

7 MR. MCCLAUGHLIN:: Your Honor, briefly in
8 reply, I would simply argue that by taking the
9 defendant's argument full circle, how a person in
10 the plaintiff's position ever forced the hand of the
11 defendant to give up their property. The only
12 reason he is able to come before the Court now and
13 do it is because he has resolved the criminal
14 charges that are against him.

15 Of course the State controls the docket.
16 If the State --

17 THE COURT: You prepare an order you think
18 I should sign.

19 Mr. Rushton, you prepare one.

20 This is the way it looks to me.
21 Understand I don't know anything about it. I think
22 section "H" does you in. I don't think he has a
23 private cause of action. But that's, you know, I
24 just listened to it right now.

25 I think you've got to go through "H"

1 before you can get into court. But they ought to
2 give you your stuff back. I don't think you have a
3 private cause of action. But I'll look at the whole
4 thing. I can't rule on that off the top of my head.

5 MR. MCLAUGHLIN:: Thank you, Your Honor.

6 THE COURT: Okay.

7 --End of Transcript of Record--

8

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT THOMAS, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON SEPTEMBER 2, 2008 IN CAMDEN, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT CHAPIN, SOUTH CAROLINA, THIS THE ELEVENTH DAY OF NOVEMBER, 2008.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

James David Farmer, ...Respondent/Appellant,

v.

Florence County Sheriff's Office, ...Appellant/Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

February 24, 2009



James C. Rushton, III
THE HYMAN LAW FIRM, LLP
170 Courthouse Square
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Attorney for Appellant/Respondent

COPY

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

James David Farmer Respondent/ Appellant,

v.

Florence County Sheriff's Office.....Appellant/Respondent,

APPELLANT'S FINAL BRIEF OF THE RESPONDENT/APPELLANT

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James David Farmer

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR AS A MATTER OF LAW IN DISMISSING THE RESPONDENT/APPELLANT'S PRIVATE CAUSES OF ACTION.

STATEMENT OF THE CASE

James Farmer is the sole proprietor of a commercial establishment, "Top Gear Clothing," located at 706 S. Church St., Florence, South Carolina. On or about August 30, 2007, agents of the Florence County Sheriff's Office initiated a raid on the establishment described above. During this raid, the agents of the the Florence County Sheriff's Office seized Mr. Farmer's inventory, which consisted of clothing, footwear, movie DVDs and music CDs.

As a result of the raid described above, on January 10, 2008, Mr. Farmer was indicted on one count of violation of S.C. Code Ann. §39-15-1190 (Unauthorized use/trafficking in goods/services with counterfeit trademark) and one count of violation of S.C. Code Ann. §16-11-0930, 940 (a) (Illegal distribution of recordings (1,000 or more audio, 65 or more video)). On January 23, 2008, the State of South Carolina's criminal charges against Mr. Farmer were disposed of by his plea of guilty to a violation of S.C. Code Ann. §16-11-940 (c) (Illegal distribution of recordings (not more than 25 audio, not more than 10 video)). The counterfeit trademark charges were dismissed.

On or about February 5, 2008, Mr. Farmer began attempts to recover his seized inventory not related to his criminal conviction (i.e. the clothes and shoes). These attempts consisted of two separate pieces of correspondence sent by counsel, to the Florence County Sheriff's Office in which Mr. Farmer demanded the return of his

inventory and stated that if the inventory was not returned, Mr. Farmer would file suit. The inventory was not returned. Suit was filed via Summons and Complaint on May 30, 2008.

This Complaint stated the following Causes of Action: Negligence Per Se Against the Florence County Sheriff's Office; Negligence General Against the Florence County Sheriff's Office; Conversion Against the Florence County Sheriff's Office; and Civil Conspiracy Against Florence County Sheriff's Office. The Complaint sought damages by way of the following: special damages related to legal assistance needed to obtain the return of the seized inventory; loss of profits and interest from loss of profits; all other actual and consequential damages; and punitive damages. (Complaint of James Farmer, (R. p. 12, ¶ 12 – R. p. 16, ¶ 38), hereinafter "Complaint").

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That Order dated September 26, 2008 is the Order Respondent/Appellant appeals, asking this Court to affirm the finding of the trial court that ordered the Florence County Sheriff's Office to return Mr. Farmer's property and reverse the finding that dismissed all of Mr. Farmer's private causes of action.

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT PLAINTIFF'S WERE ONLY ENTITLED TO RECOVER PROPERTY SEIZED PURSUANT TO SOUTH CAROLINA CODE §39-15-1195 AND WERE NOT ALLOWED TO PURSUE PRIVATE CAUSES OF ACTIONS AGAINST LAW ENFORCEMENT AGENCIES FOR VIOLATING §39-15-1195.

A. THE STARDARD OF REVIEW IS *DE NOVO*

Whether Plaintiffs are allowed to pursue private Causes of Action against law enforcement agencies regarding violations of S.C. Code §39-15-1195 is a question of law. Whether or not a law enforcement agency has to comply with the directives §39-15-1195 is also a question of law. Review is thus *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110 662 S.E.2d 40 41 (2008) (citing, *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)) (holding that questions of law are reviewed *de novo*).

B. THE TRIAL COURT ERRED IN DISMISSING ALL THE RESPONDENT/APPELLANTS CAUSES OF ACTION, BECAUSE WITHOUT ALLOWING SUCH PRIVATE CAUSES OF ACTIONS RESPONDENT/APPELLANT HAD NO OTHER AVENUE TO SEEK THE RETURN OF HIS PROPERTY DUE TO THE FACT THAT RESPONDENT/APPELLANT WOULD NEVER BE ABLE TO QUALIFY FOR RELIEF UNDER S.C. CODE §39-15-1195 (H).

S.C. Code §39-15-1195 is titled "Seizure and forfeiture; storage and maintenance of seized property; reports to prosecuting agencies; return of seized items."

In his Complaint, Mr. Farmer relied on subsection (C) of this statute. Subsection (C) specifically states:

If a seizure is made pursuant to subsection (B), proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time.

At no time has the Florence County Sheriff's Office ever asserted that they complied with S.C. Code §39-15-1195 (C). Further the Sheriff's Office admitted that S.C. Code §39-15-1195 (C) "was a directive to law enforcement." (*Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment And In Support of Defendant's Cross-Motion for Summary Judgment* of Florence County Sheriff's Office, (R. p. 42) (hereinafter "MEMO").

In their response to Mr. Farmer's Motion for Summary Judgment, Florence County's Sheriff's Office's argument was basically that because Mr. Farmer failed to bring an action pursuant to S.C. Code §39-15-1195 (H), the Plaintiff has no cause of action. (MEMO, (R. p. 42))

Without the benefit of pursuing private causes of action, no person in Mr. Farmer's position would ever be entitled to bring an action for recovery of their property under similar circumstances.

Specifically, the statute requires an owner may have the property returned if the owner can demonstrate that he/she "was not a consenting party to, or privy to, or have knowledge of the use of property that made it subject to seizure and forfeiture." S.C. Code §39-15-1195 (H)(2). Of course, Mr. Farmer and similarly situated persons, could never seek relief under this subsection due to the particular facts of this type of case. Namely, a shop owner could never deny he was selling goods when the entire purpose of his business is selling goods.

A full and complete reading of S.C. Code §39-15-1195 makes it obvious that subsection (H) must apply to property other than that which is alleged counterfeit under S.C. Code §39-15-1190. If that was not the case, then the very same subsection would

allow some individuals to obtain counterfeit property simply because they had liens against it, S.C. Code §39-15-1195 (H)(3).

Of special note is the Legislature's use of the word "owner" when describing who may apply for the return of items seized. S.C. Code Ann. §39-15-1195 (H)(1). Mr. Farmer argues that inherent in this statute is a distinction between an "owner" and someone who is "accused" of being in violation of S.C. Code Ann. §39-15-1190. How could there not be such a distinction, as in cases such as the present one, where it is the ownership of the property seized that has given rise to the seizure itself?

If there is no such distinction, the Florence County Sheriff's Office would create a perilous situation for similarly situated Plaintiffs. A person in Mr. Farmer's situation could never file a cause of action under S.C. Code Ann. §39-15-1195 (H) as long as criminal charges were pending, because they could never claim lack of knowledge. Therefore as long as the charges were pending, such persons would be denied their property. In our criminal system of justice in South Carolina, it is the State that controls the docket. Therefore it is conceivable that the State, who has seized the property, could decide to perpetually delay the resolution of the criminal charges, easily creating situations where "accused" persons would be denied their property in perpetuity, regardless of the person's guilt or innocence.

Surely, that cannot be what the Legislature intended. Such an interpretation of subsection (H) would be in direct contradiction to the purpose of the subsection, which is evident in the statute's title: "Seizure and forfeiture; storage and maintenance of seized property; reports to prosecuting agencies; *return of seized items*." S.C. Code Ann. §39-15-1195 (2007), [*emphasis added*.] Mr. Farmer was not able to bring an action under

subsection (H), thus restricting Mr. Farmer to bringing a private cause of action solely under S.C. Code Ann. §39-15-1195 (C).

Since Mr. Farmer was unable to bring an action under S.C. Code §39-15-1195 (H), he properly pursued relief via the only available option, by filing suit based on violation of S.C. Code §39-15-1195 (C).

C. THE TRIAL COURT ERRED IN DENYING RESPONDENT/APPELLANT PRIVATE CAUSES OF ACTION BECAUSE S.C. CODE ANN. §39-15-1195 (C) GIVES RISE TO A PRIVATE CAUSE OF ACTION, ESPECIALLY IN LIGHT OF THE SOUTH CAROLINA TORT CLAIMS ACT AND RELATED CASE LAW.

The Legislature passed the South Carolina Tort Claims act with the intention to “grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter.” S.C. Code Ann. §15-78-20 (b) (2007). The Legislature has also indicated that liability under the South Carolina Tort Claims Act is based upon traditional tort concepts of duty and the reasonably prudent person’s standard of care in the performance of that duty. S.C. Code Ann. §15-78-20 (a) (2007).

The Florence County Sheriff’s Office cited Summers v. Harrison Construction, et al., 298 S.C. 451, 381 S.E. 2d 493 (Ct. App. 1989) in their *Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendant’s Cross-Motion for Summary Judgment* (hereinafter “MEMO”) in arguing when a statute provides a private cause of action. The Summers Court stated a Plaintiff is required to show (1) that the essential purpose of the statute is to protect from the kind of harm to be suffered by the Plaintiff, and (2) that he is a member of the class of persons the statute is

intended to protect. Summers v. Harrison Construction, et al., 381 S.E.2d. 493 (S.C. App. 1989).

The Florence County Sheriff's Office argued in its Memorandum that the purpose of S.C. Code Ann. §39-15-1195 is to protect the public from the sale of counterfeit goods and that Mr. Farmer cannot use the statute to protect himself, as he is in the business of selling counterfeit goods. (MEMO) (R. p. 41) Such argument made it clear that the Florence County Sheriff's Office had adjudicated the goods counterfeit and Mr. Farmer guilty. That was not the case. There has never been an adjudication finding the property in question counterfeit, nor has Mr. Farmer been found guilty or pled guilty to selling counterfeit goods. Therefore such argument was fatally flawed.

More so, Mr. Farmer believes the "purpose" of S.C. Code Ann. §39-15-1195 makes the very foundation of such an argument faulty. Protecting the public from the sale of counterfeit goods is clearly not the purpose of S.C. Code Ann. §39-15-1195. That would be the purpose of S.C. Code Ann. §39-15-1190, which makes such activity illegal. S.C. Code Ann. §39-15-1195 is titled: "Seizure and forfeiture; storage and maintenance of seized property; reports to prosecuting agencies; return of seized items." That very titling advances the purpose of the statute, which is to protect the property and the rights of those who have an interest in any property seized as a result of a violation of S.C. Code Ann. §39-15-1190. The section includes provisions for proper reporting of seized property; places a specific, affirmative duty on law enforcement agencies to maintain the property; as well as creating a specific, affirmative duty to have a disposition made regarding the property. S.C. Code Ann. §39-15-1195 (C), (F) and (G).

Clearly, Mr. Farmer is a person who has had his property seized as a result of an alleged violation of S.C. Code Ann. §39-15-1190, continues to be deprived of said property and has been harmed by the deprivation of his property. The essential purpose of S.C. Code Ann. §39-15-1195 is to protect the property and the rights of those who have an interest in any property seized as a result of a violation of S.C. Code Ann. §39-15-1190. Mr. Farmer is without question a member of the class of persons S.C. Code Ann. §39-15-1195 is meant to protect.

The Florence County Sheriff's Office's use of the Summers case is an acknowledgement that any exception to liability under the Act, in this case, would arise from the "Public Duty" doctrine. The public duty doctrine holds that public officials are not liable to individuals for their negligence in discharging public duties, as the duty is owed to the public at large rather than to anyone individually. Arthurs v. Aiken County, 525 S.E.2d 542 (S.C. App. 1999). The public duty created by S.C. Code Ann. §39-15-1195 has been addressed in the analysis above.

The Summers case also illustrates an exception to the exception, when the public duty rule is in play. This exception to the exception, as the Summers court describes it, is the difference between public duty and special duty. Basically, the Summers court explained that if a statute has an essential purpose of protecting identifiable individuals from a particular harm, then the statute was creating a "special duty" which would support a negligence action. Summers at 497.

In determining if a statute creates a special duty of a public officer to the plaintiff, the court must examine the statute and facts of the case. A special duty exists if: (1) an essential purpose of the statute is to protect against a particular kind of harm; (2) the

statute, either directly or indirectly, imposes on a specific public officer a duty to guard against or not cause that harm; (3) the class of persons the statute intends to protect is identifiable before the fact; (4) the plaintiff is a person within the protected class; (5) the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office. Summers v. Harrison Construction, et al., 381 S.E.2d. 493 at 498.

The essential purpose of S.C. Code Ann. §39-15-1195 is to protect against a particular kind of harm, specifically, depriving people of their rights in property as a result of seizure and/or forfeiture. So element one of the determination of a special duty is satisfied.

As to element two of the determination of a special duty, S.C. Code Ann. §39-15-1195 imposes a direct duty on a specific public officer to guard against that harm. Specifically, S.C. Code Ann. §39-15-1195 (C) states “proceedings pursuant to S.C. Code Ann. §44-53-530 regarding forfeiture and disposition *must be* instituted within a reasonable time.” S.C. Code Ann. §39-15-1195 (C) (2007), *emphasis added*. The Legislature used mandatory language in this subsection, “must,” as opposed to more discretionary language. It is clear the Legislature is imposing a direct duty. When interpreting a statute, “the words must be given their plain and ordinary meaning without resorting to subtle or forced construction...”, Strickland v. Strickland, 650 S.E.2d 465 (S. Ct., 2007). As to who this direct duty is imposed on, S.C. Code Ann. §39-15-1195 (B) and (F) make clear that the agency/department having authority upon a warrant and seizing the property are responsible for protecting the property, and thus the property

owners rights. In this case, the property was seized by the Florence County Sheriff's Office upon a warrant an agent of Florence County Sheriff's Office obtained. Even the Florence County Sheriff's Office admits subsection (c) is a "directive" to law enforcement, i.e. them. See MEMO (R. p. 42). Therefore, element two of the finding a special duty is satisfied.

As to element three of determination of a special duty, the class of persons S.C. Code Ann. §39-15-1195 intends to protect is identifiable before the fact. As found above, S.C. Code Ann. §39-15-1195 seeks to protect those persons who have rights in property subject to forfeiture pursuant to S.C. Code Ann. §39-15-1195. There is no question that the Florence County Sheriff's Office could identify such persons before the fact, as the Florence County Sheriff's Office is the agency that would be seizing their property. Therefore, element three of the finding a special duty is satisfied.

As to element four of determination of a special duty, the facts, which are undisputed, qualify Mr. Farmer as a person within the protected class. Mr. Farmer is a person who had rights in property seized pursuant to §39-15-1195. Therefore element four of finding a special duty is satisfied.

As to element five of determination of a special duty, the Florence County Sheriff's Office knew or had reason to know of the likelihood of harm to Mr. Farmer if the Florence County Sheriff's Office failed to do its duty. The Florence County Sheriff's Office admitted to not instigating any forfeiture proceedings. Answer, (R. p. 23, ¶ 9). Mr. Farmer specifically noticed the Florence County Sheriff's Office of the harm he was suffering as a result of the continued deprivation of his property. Such notice was provided by Demand letters Mr. Farmer sent to the Florence County Sheriff's Office on

February 5, 2008 and on March 19, 2008, in which the Florence County Sheriff's Office was specifically warned that the seized property was inventory for a commercial establishment and failure to return the property was interfering with Mr. Farmer's ability to operate his business. The Florence County Sheriff's Office admitted receipt of this correspondence. Answer, (R. p. 22, ¶¶ 4-5). Therefore the Florence County Sheriff's Office knew or had reason to know of the likelihood of harm to Mr. Farmer if the Florence County Sheriff's Office failed to do its duty.

As to element six of determination of a special duty, it is clear that S.C. Code Ann. §39-15-1195 not only gives the Florence County Sheriff's Office sufficient authority to act in the present case, but that S.C. Code Ann. §39-15-1195 demands that Florence County Sheriff's Office act. Thus element six of determining a special duty is satisfied.

Having satisfied all elements of determining whether a special duty exists, it is apparent that S.C. Code Ann. §39-15-1195 creates a special duty that Florence County Sheriff's Office owes Mr. Farmer. That duty is the duty to protect Mr. Farmer's rights in property that the Florence County Sheriff's Office seized, by instituting forfeiture proceedings within a reasonable time. The Florence County Sheriff's Office failed to perform that special duty. By its own admission, the Florence County Sheriff's Office had notice by at least February 5, 2008 that the charges against Mr. Farmer for violation of S.C. Code Ann. §39-15-1190 had been dropped and that Mr. Farmer was demanding a return of his property.

The Florence County Sheriff's Office failure to institute forfeiture proceedings pursuant to S.C. Code Ann. §39-15-1195 (C) after that date certainly constitutes a breach

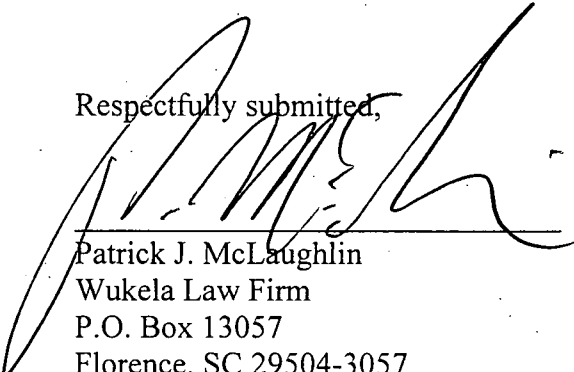
of their special duty to the Mr. Farmer. As such, Mr. Farmer is entitled to pursue private causes of action against the Florence County Sheriff's Office.

CONCLUSION

For the reasons stated, this Court should AFFIRM the Judgment of the Trial Court directing Florence County Sheriff's Office to return Mr. Farmer's property and REVERSE the Judgment of the Trial Court dismissing Mr. Farmer's private causes of action.

Respectfully submitted,

March 13, 2009



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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY

COURT OF COMMON PLEAS

Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

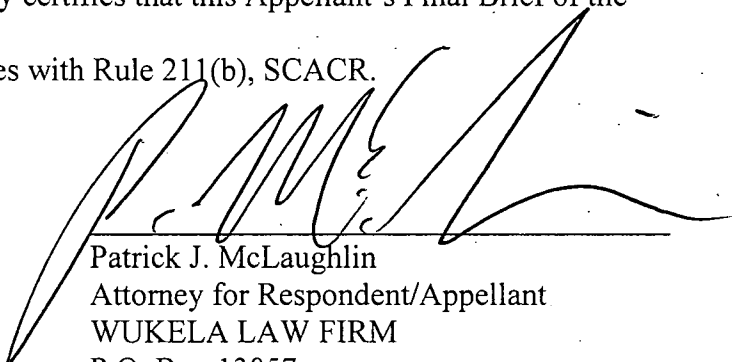
James David Farmer Respondent, Appellant,

v.

Florence County Sheriff's Office.....Appellant/Respondent,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Appellant's Final Brief of the
Respondent/Appellant complies with Rule 211(b), SCACR.



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March 13, 2009

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STATEMENT OF THE ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR AS A MATTER OF LAW IN REQUIRING THE FLORENCE COUNTY SHERIFF'S OFFICE TO RETURN JAMES FARMER'S PROPERTY.**

STATEMENT OF THE CASE

James Farmer is the sole proprietor of a commercial establishment, "Top Gear Clothing," located at 706 S. Church St., Florence, South Carolina. On or about August 30, 2007, agents of the Florence County Sheriff's Office initiated a raid on the establishment described above. During this raid, the agents of the the Florence County Sheriff's Office seized Mr. Farmer's inventory, which consisted of clothing, footwear, movie DVDs and music CDs.

As a result of the raid described above, on January 10, 2008, Mr. Farmer was indicted on one count of violation of S.C. Code Ann. §39-15-1190 (Unauthorized use/trafficking in goods/services with counterfeit trademark) and one count of violation of S.C. Code Ann. §16-11-0930, 940 (a) (Illegal distribution of recordings (1,000 or more audio, 65 or more video)). On January 23, 2008, the State of South Carolina's criminal charges against Mr. Farmer were disposed of by his plea of guilty to a violation of S.C. Code Ann. §16-11-940 (c) (Illegal distribution of recordings (not more than 25 audio, not more than 10 video)). The counterfeit trademark charges were dismissed.

On or about February 5, 2008, Mr. Farmer began attempts to recover his seized inventory not related to his criminal conviction (i.e. the clothes and shoes). These attempts consisted of two separate pieces of correspondence sent by counsel, to the Florence County Sheriff's Office in which Mr. Farmer demanded the return of his

inventory and stated that if the inventory was not returned, Mr. Farmer would file suit. The inventory was not returned. Suit was filed via Summons and Complaint on May 30, 2008.

This Complaint stated the following Causes of Action: Negligence Per Se Against the Florence County Sheriff's Office; Negligence General Against the Florence County Sheriff's Office; Conversion Against the Florence County Sheriff's Office; and Civil Conspiracy Against Florence County Sheriff's Office. The Complaint sought damages by way of the following: special damages related to legal assistance needed to obtain the return of the seized inventory; loss of profits and interest from loss of profits; all other actual and consequential damages; and punitive damages. (Complaint of James Farmer, (R. p. 12, ¶ 12 – R. p. 16, ¶ 38), hereinafter "Complaint").

The Florence County Sheriff's Office filed an Answer on June 18, 2008. In that Answer the Florence County Sheriff's Office acknowledged receipt of the demand letters sent on or about February 5, 2008 and March 19, 2008. (Answer of Florence County Sheriff's Office, ((R. p. 22, ¶ ¶ 4-5), hereinafter "Answer"). The Answer contained a general denial and denials as to allegations in each cause of action, (R. p. 22, ¶ 1- R. p. 24, ¶ 17), and affirmative defenses, including the negligence of the Plaintiff, (R. p. 24, ¶ 25); the failure of the Complaint to set forth a cause of action, (R. p 24, ¶ 19); immunity under the Tort Claims Act (S.C. Code. Ann. §15-78-10 et. seq.); (R. p 24, ¶ 21); failure to exhaust administrative remedies, (R. p 24, ¶ 23); and others.

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On October 6, 2008, Florence Country Sheriff's Office filed a Notice of Appeal in this matter. On October 13, 2008, Mr. Farmer filed a Petition for Rule to Show Cause Hearing/Contempt against the Florence County Sheriff's Office. That Petition stated Florence Country Sheriff's Office had failed to comply with the Court's September 26, 2008 Order by failing to return the property or file a surety with the Court. On October 15, 2008, Florence County Sheriff's Office filed a Return to Mr. Farmer's Contempt Petition. On November 19, 2008, a hearing on the contempt petition was held before the Honorable J. Ernest Kinard in the Twelfth Judicial Circuit Court of Common Pleas, wherein the Court ordered Florence Country Sheriff's Office to return the property or file a surety with the Court.

That Order dated September 26, 2008 is the Order that Florence County Sheriff's Office appeals, asking this Court to reverse the finding of the trial court that ordered the Florence County Sheriff's Office to return Mr. Farmer's property. Mr. Farmer has also

appealed the portion of the Order dismissing his private causes of action. However, this brief is Mr. Farmer's response to Florence County Sheriff's Office's Appeal.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR AS MATTER OF LAW IN REQUIRING THE RETURN OF THE SEIZED ITEMS.

A. THE STARDARD OF REVIEW IS *DE NOVO*

When law enforcement agencies are required to return property held for violating S.C. Code §39-15-1195 is a question of law. Whether or not a law enforcement agency has to comply with the directives of S.C. Code §39-15-1195 is also a question of law. Review is thus *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110 662 S.E.2d 40 41 (2008) (citing, *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)) (holding that questions of law are reviewed *de novo*).

B. THE TRIAL COURT DID NOT ERR IN REQUIRING THE FLORENCE COUNTY SHERIFF'S OFFICE TO RETURN MR. FARMER'S PROPERTY. NOR DID THE TRIAL COURT BASE THAT RETURN SOLELY ON THE FACT THAT THERE WERE NO LONGER CRIMINAL PROCEEDINGS AGAINST MR. FARMER.

In their Initial Brief the Florence County Sheriff's Office argues that the trial court erred in requiring the Florence County Sheriff's Office to return the seized property to Mr. Farmer. That argument is built around the very last sentence of the Order, which states:

The Sheriff's Office simply cannot hold the Plaintiff's property unless it is being held for use in a criminal proceeding. (Appellant/Respondent Initial Brief, pg. 4, citing Circuit Court Order dated September 26, 2008)

The Florence County Sheriff's Office Initial Brief then goes on to document "ample reasons" that exist for law enforcement agencies to hold goods other than use in criminal proceedings. (Appellant Respondent Initial Brief, pg. 5-6)

However the argument proposed by the Florence County Sheriff's Office ignores other specific findings the court considered when ordering the return. Specifically, the trial court found that Mr. Farmer was entitled to:

. . . the return of his inventory seized not related to his criminal convictions (i.e. clothes and shoes). In regards to those items, there has been no criminal conviction and no hearing to determine whether or not said items violated S.C. Code Ann §39-15-1190 (Unauthorized use/trafficking in goods/services with counterfeit trademark) (R. p. 90)

It is clear from the language cited above that the Court's rationale behind ordering the return of the property relied on more than the sole fact that there were no longer criminal proceedings against Mr. Farmer. The trial court ordered the return of the items based on three (3) findings of fact. First, that there were no criminal proceedings pending against Mr. Farmer. Second, that there was no criminal conviction for violation of S.C. Code §39-15-1190. And finally, that there had been no hearing to determine whether or not said items violated S.C. Code §39-15-1190. The last finding regarding the lack of a hearing is obviously a reference to the proceedings law enforcement agencies are required to bring pursuant to §39-15-1195, proceedings which Florence County Sheriff's Office admits they have not brought. (R. p. 23, ¶ 9)

Because of the argument above, Mr. Farmer does not believe the trial court made an error in ordering the return of his property.

However, the Florence County Sheriff's Office also went on to argue in their initial brief reasons why law enforcement agencies should be allowed to keep seized property in such situations.

They specifically cite that if they have to return the counterfeit goods the "owner of the trademark and the public could be injured." Through a footnote attachment to this language, the Florence County Sheriff's Office states:

Not only could, but would, if the owner of the counterfeit goods attempts to sell them – as Plaintiff here has indicated he intends to do. Complaint ¶ 10. (Initial Brief, p. 6)

This argument fails for two reasons. First, it ignores the fact that the trial court's order specifically places Mr. Farmer on notice that:

. . . if said items are, in fact, counterfeit and he attempts to traffic such items after their return, he will, again be subject to criminal charges. (R. p. 90)

In other words, the trial court's Order contemplates any such danger and has written into it protection for the Trademark holder and the public. Secondly, that argument assumes the property is counterfeit, which is improper. The property is legitimate, unless adjudicated otherwise. Of course, no such adjudication has taken place, because Florence County Sheriff's Office has failed to bring such proceedings, despite a statutory duty to do so. (See S.C. Code §39-15-1195 (C)).

Finally, the Florence County Sheriff's Office attempts to assert that they can hold seized property "unless and until the owner of the goods brings a claim under paragraph H. S.C. Code §39-15-1195." (Initial Brief p. 6) Mr. Farmer argues that if subsection (H) was interpreted in such a way, it would render the purpose of the entire statute ineffective, in cases such as his.

Specifically, the statute requires an owner may have the property returned if the owner can demonstrate that he/she "was not a consenting party to, or privy to, or have knowledge of the use of property that made it subject to seizure and forfeiture." S.C. Code §39-15-1195 (H)(2). Of course, Mr. Farmer and similarly situated persons, could never seek relief under this subsection due to the particular facts of this type of case. Namely, a shop owner could never deny he was selling goods when the entire purpose of his business is selling goods.

A full and complete reading of S.C. Code §39-15-1195 makes it obvious that subsection (H) must apply to property other than that which is alleged counterfeit under S.C. Code §39-15-1190. If that was not the case, then the very same subsection would allow some individuals to obtain counterfeit property simply because they had liens against it, S.C. Code §39-15-1195 (H)(3). This scenario would contradict the Florence County Sheriff's Office's own "trademark holder and public injury" argument.

Of special note is the Legislature's use of the word "owner" when describing who may apply for the return of items seized. S.C. Code Ann. §39-15-1195 (H)(1). Mr. Farmer argues that inherent in this statute is a distinction between an "owner" and someone who is "accused" of being in violation of S.C. Code Ann. §39-15-1190. How could there not be such a distinction, as in cases such as the present one, where it is the ownership of the property seized that has given rise to the seizure itself?

If there is no such distinction, the Florence County Sheriff's Office would create a perilous situation for similarly situated Plaintiffs. A person in Mr. Farmer's situation could never file a cause of action under S.C. Code Ann. §39-15-1195 (H) as long as criminal charges were pending, because they could never claim lack of knowledge.

Therefore as long as the charges were pending, such persons would be denied their property. In our criminal system of justice in South Carolina, it is the State that controls the docket. Therefore it is conceivable that the State, who has seized the property, could decide to perpetually delay the resolution of the criminal charges, easily creating situations where "accused" persons would be denied their property in perpetuity, regardless of the person's guilt or innocence.

Surely, that cannot be what the Legislature intended. Such an interpretation of subsection (H) would be in direct contradiction to the purpose of the subsection, which is evident in the statute's title: "Seizure and forfeiture; storage and maintenance of seized property; reports to prosecuting agencies; *return of seized items.*" S.C. Code Ann. §39-15-1195 (2007), [*emphasis added.*] Mr. Farmer was not able to bring an action under subsection (H), thus restricting Mr. Farmer to bringing a private cause of action solely under S.C. Code Ann. §39-15-1195 (C).

Since Mr. Farmer was unable to bring an action under S.C. Code §39-15-1195 (H), he properly pursued relief via the only available option, by filing suit based on violation of S.C. Code §39-15-1195 (C).

In proposing the argument concerning subsection (H), Florence County Sheriff's Office ignores their duties under subsection (C). Mr. Farmer would draw this court's attention to the language used in subsection (H) and subsection (C):

(C) If a seizure is made pursuant to subsection (B), proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition **must be** instituted within a reasonable time. [Emphasis Added] S.C. Code §39-15-1195 (C); and,

(H)(1) An owner **may** apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter [Emphasis Added] S.C. Code §39-15-1195 (H).

Mr. Farmer argues the difference in the language is clear. In subsection (H) the Legislature uses more permissive or discretionary language of "may," as opposed to the more commanding or mandatory language of "must" contained in subsection (C). Mr. Farmer believes the difference in the language addresses the arguments he has put forth concerning the difficulties of someone in his situation being able to bring any action under subsection (H). Mr. Farmer would note to the court that Florence County Sheriff's Office admits the strong nature of the "must" language used, by the fact that they admit subsection (C) "is a directive to law enforcement." (*Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment And In Support of Defendant's Cross-Motion for Summary Judgment* of Florence County Sheriff's Office (R. p. 42))

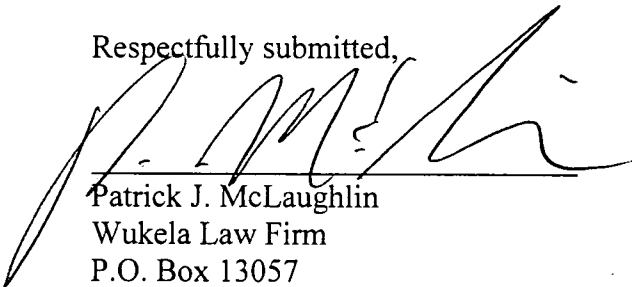
Mr. Farmer argues he was not required nor would he have been able to institute any proceedings under S.C. Code §39-15-1195 (H), which would have provided for the recovery of his seized property. Mr. Farmer would note that he brought the only action he was able to bring which was a suit asserting private causes of action against Florence County Sheriff's Office. The arguments in support of Mr. Farmer's right to bring private causes of action are extensively briefed in his Cross-Appeal in this matter. Therefore, Mr. Farmer argues it was no error for the trial court to order the return of Mr. Farmer's property.

CONCLUSION

For the reasons stated, this Court should AFFIRM the Judgment of the Trial Court directing Florence County Sheriff's Office to return Mr. Farmer's property.

Respectfully submitted,

March 13, 2009



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IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY

COURT OF COMMON PLEAS

Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

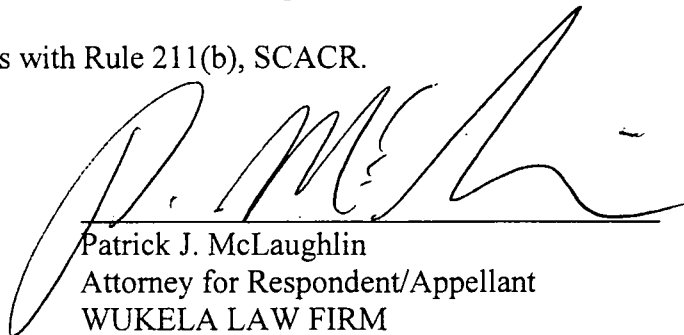
James David Farmer Respondent, Appellant,

v.

Florence County Sheriff's Office.....Appellant/Respondent,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Respondent's Final Brief of the
Respondent/Appellant complies with Rule 211(b), SCACR.



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APPEAL FROM FLORENCE COUNTY

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Honorable J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

James David Farmer Respondent/ Appellant,

v.

Florence County Sheriff's Office Appellant/Respondent,

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ARGUMENT

I. FLORENCE COUNTY SHERIFF'S OFFICE'S ARGUMENT THAT MR. FARMER HAS SUED THE WRONG AGENCY IS IMPROPERLY BEFORE THE COURT.

In Appellant/Respondent's Response Brief, (hereinafter "FCSO's Response") the Florence County Sheriff's Office asserts that Mr. Farmer has sued the wrong agency. (FCSO's Response Brief, II, B, pg. 6-7). Mr. Farmer argues that such an argument is improperly before the court. Mr. Farmer makes this argument, because at no time was such an argument made to the Trial Court. The Florence County Sheriff's Office failed to argue this defense in their *Answer, Motion for Summary Judgment*, or in their extensive Defendant's *Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment And In Support of Defendant's Cross-Motion for Summary Judgment* (hereinafter "MEMO").

II. ASSUMING ARGUENDO, THAT FLORENCE COUNTY SHERIFF'S OFFICE'S ARGUMENT REGARDING MR. FARMER IS PROPERLY BEFORE THIS COURT, SUCH ARGUMENT WOULD NOT JUSTIFY DENYING MR. FARMER FROM PERSUING PRIVATE CAUSES OF ACTION.

Even if this court finds that the Florence County Sheriff's Office may properly raise the issue that Mr. Farmer has sued the wrong agency at this time, that argument should not result in Mr. Farmer's private causes of action being denied. The Florence County Sheriff's Office's bases this argument on the Special Duty Rule (Response Brief, pg. 8). The Florence County Sheriff's Office argues that since they are not specifically named in §39-15-1195(C), that they are not the specific public officer, therefore the Special Duty Doctrine would not apply to the Florence County Sheriff's Office. The

Florence County Sheriff's Office makes this argument despite their previous admission that subsection (C) "is a directive to law enforcement" (*Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment And In Support of Defendant's Cross-Motion for Summary Judgment* of Florence County Sheriff's Office, (R. p. 42)

Now wishing to change their interpretation of Subsection (C), Florence County Sheriff's Office has crafted this "identity argument."

Mr. Farmer argues that in addition to this argument being improperly before this Court, it would also be premature for this Court to rule that he has sued the wrong agency. Assuming this Court accepted the identity argument the Florence County Sheriff's Office is now trying to make, Mr. Farmer would point out there are additional specific duties imposed on law enforcement agencies seizing property through §39-15-1195. Specifically Mr. Farmer would point out the duties arising out of Subsection (F) and (G) of §39-15-1195. Those subsections clearly place specific duties on Florence County Sheriff's Office in this case, duties that would give rise to the Special Duty Doctrine, thus allowing Mr. Farmer to proceed with his private causes of action.

If the Court were to agree with the Florence County Sheriff's Office's identity argument, Mr. Farmer should be entitled to have his case reversed and remanded back to the trial court with leave to amend his complaint, should any additional parties require being named.

Having replied to the arguments of the Florence County Sheriff's Office through his initial Brief and his Reply Brief, Mr. Farmer asks that this Court AFFIRM the Judgment of the Trial Court directing Florence County Sheriff's Office to return Mr.

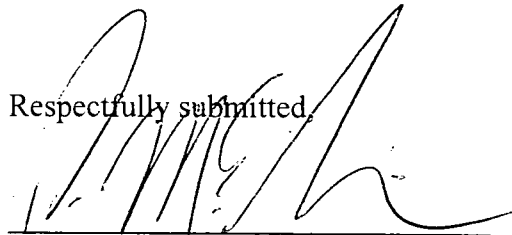
Farmer's property and REVERSE the Judgment of the Trial Court dismissing Mr. Farmer's private causes of action.

CONCLUSION

For the reasons stated, this Court should AFFIRM the Judgment of the Trial Court directing Florence County Sheriff's Office to return Mr. Farmer's property and REVERSE the Judgment of the Trial Court dismissing Mr. Farmer's private causes of action.

Respectfully submitted,

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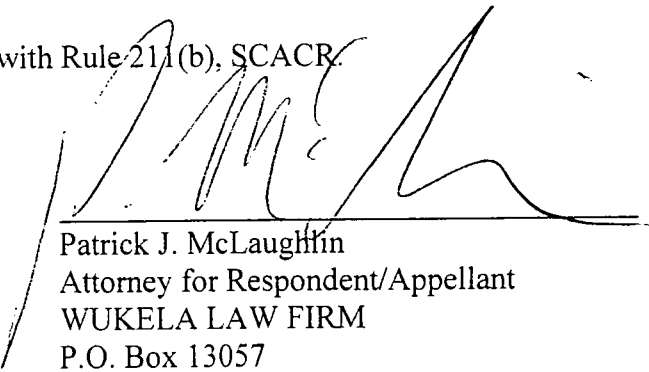
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Appellant's Final Reply Brief of the
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March 13, 2009

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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS**

The Hon. Ernest F. Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

James David Farmer..... Respondent/Appellant,

v.

Florence County Sheriff's Office..... Appellant/Respondent.

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STATEMENT OF THE ISSUE

- I. Whether the court below erred in holding that law enforcement agencies may not hold confiscated goods unless those goods are being held for use in a criminal proceeding?

STATEMENT OF THE CASE

This is an appeal from the Order of the Court of Common Pleas, Twelfth Judicial Circuit, the Honorable Ernest F. Kinard, Jr., dated September 26, 2008 and filed the same day (hereinafter, "Order," R. pp. 89-91). The Notice of Appeal of Appellant/Respondent Florence County Sheriff's Office (hereinafter, "Sheriff's Office" or "Sheriff") was timely filed October 6, 2008.

The underlying criminal case against the Respondent/Appellant (hereinafter, "Mr. Farmer") began with Mr. Farmer being indicted on January 10, 2008, for violating S.C. Code Ann. §§ 16-11-0930, 16-11-0940, and 39-15-1190. Order, p. 1, R. p. 89. These statutes concern violations of intellectual property laws in consumer goods, and specifically, criminal violations thereof. (16-11-0930 and -0940 prohibit illegal sales of copyrighted recordings; 39-15-1190 prohibits the sale of counterfeit goods.) The charges were the result of an August 30, 2007 raid by law enforcement officers on the 706 South Church Street, Florence, South Carolina store of which Mr. Farmer is the sole proprietor. R. p. 89. That raid resulted in the confiscation of more than 1,000 allegedly illegal recordings, and clothing containing trademarks such as Nike, Louis Vuitton, and others. *Id.*

The raid was in turn based on a warrant, lawfully obtained on August 20, 2007, and based on sworn statements that Mr. Farmer was selling counterfeit goods out of his store, much of it in plain view. R. pp. 1-6 (Warrant with Aff. Sheriff's Dept. Investigator Chad Collins, August 30, 2007). The Warrant authorized the seizure of the goods. That warrant and resulting raid resulted in Mr. Farmer being charged with violations of §§ 16-

11-0930, 16-11-0940, and 39-15-1190, and his allegedly offending property being seized pursuant to 39-15-1195.

The parties entered a plea bargain, via which on January 23, 2008 Mr. Farmer pled guilty to violating § 16-11-940 (concerning illegal recordings) and the charge under 39-15-1190 (concerning counterfeit goods) was dropped.

The current case began with the filing of a summons and complaint on May 30, 2008. R. pp. 9-16. Mr. Farmer's Complaint referenced a February 5, 2008, letter from Mr. Farmer to the Sheriff, demanding return of the allegedly counterfeit goods, and a similar March 19 letter. In that Complaint, Mr. Farmer did not seek the return of the illegal recordings. Nor did he seek return of the allegedly counterfeit goods. Rather, he sought, under S.C. Code Ann. § 39-15-1195, to hold the Sheriff's Office liable for actual and punitive damages for the retention of his allegedly counterfeit goods. He brought causes of action against the Sheriff's Office for Negligence per se; "Negligence-General"; Conversion; and Civil Conspiracy (pp. 3-6, R. pp. 12-16) – and added a claim for punitive damages, p. 7, ¶38, R. p. 16, ¶38 ("That in addition, the Plaintiff is informed and believes that he is entitled to an award of punitive damages").

The Answer of the Florence County Sheriff's Office, dated June 18, 2008, and filed the same day, R. pp. 22- 26, contained a general denial and denials as to allegations in each cause of action, R. pp. 22-24, ¶ ¶ 1-17, and affirmative defenses, including the negligence of the Plaintiff, R. p. 24-25, ¶ 25; the failure of the Complaint to set forth a cause of action, R. p. 24, ¶ 19; immunity under the Tort Claims Act (S.C. Code. Ann. § 15-78-10 *et seq.*); R. p. 24, ¶ 21; failure to exhaust administrative remedies, R. p. 24, ¶ 23; and others.

Mr. Farmer then moved for summary judgment as to liability, on June 24. R. pp. 28-30. The Sheriff's Office filed a cross-motion for Summary Judgment, and supporting Memorandum of Law, on August 20, 2008. R. pp. 39-47.

In its Order on the cross-motions, R. pp. 89-91, the court below denied Mr. Farmer's claims for actual and punitive damages. However, the court ordered the Sheriff to return the allegedly counterfeit goods.

The Court's rationale was that "The Sheriff's Office simply cannot hold the Plaintiff's property unless it is being held for use in a criminal proceeding." Order, at 3; R. p. 91.

ARGUMENT

I. The Court Below Erred as a Matter of Law in Requiring Return of the Confiscated Items on Grounds that Law Enforcement Agencies May Not Hold Confiscated Items Unless Those Items Are Being Held for Use in a Criminal Proceeding.

A. The Standard of Review Is *De Novo*.

Whether "use in a criminal proceeding" exhausts the legitimate reasons for law enforcement agencies to hold allegedly counterfeit goods seized pursuant to a warrant is a question of law. So too is the underlying question of whether it was proper to even consider the motivation of the Sheriff's Office. So too is the underlying question of whether it was proper to even consider ordering a return of confiscated goods when no action had been filed under SC Code Ann. § 39-15-1195. Review is thus *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (citing, *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)) (holding that questions of law are reviewed *de novo*).

B. The Lower Court Erred, Because Ample Reasons Exist for Law Enforcement Agencies to Hold Allegedly Counterfeit Goods Other Than Use in a Criminal Proceeding, Because Inquiry into Law Enforcement's Motives Is Not Proper in a Hearing for the Return of Confiscated Items, and Because No Proceeding May Be Brought for the Return of Confiscated Items Except Pursuant to Statute.

Reasons abound for law enforcement agencies to hold allegedly counterfeit goods other than to use the goods to criminally prosecute their owner. With today's technology, unauthorized duplications of recordings in electronic format might be qualitatively indistinguishable from authorized duplications. Once a customer buys a CD, even if his turning the song into an .MP3 file on his computer for his personal use is legitimate, if he then sends via the internet several copies of that .MP3 to other persons, he has denied the holder of the copyright its revenue. "The most notorious example of these P2P file sharing systems is the former Napster website." *Interscope Records v. Doe*, 494 F. Supp. 2d 388, 390 (E.D. Va. 2007) (citing, *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 924, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005)). Thus, even were counterfeit "Seikos" or "Louis Vuitton" goods of exactly the same quality as are the legitimate brand name goods, the owner of the trademark is injured. However, counterfeit physical goods pose a special problem for the public, for the quality of the counterfeit good may be far below the quality of the legitimate good.

Indeed, that is a central reason for the existence of trademarks, and for the law's protection of trademarks. Where many manufacturers make similar goods (handbags, shoes, etc.), a trademark assures the consumer that the good was made to that manufacturer's standards.

Were law enforcement to return the counterfeit goods, both the holder of the trademark and the public could be injured.¹ Law enforcement agencies attempt to protect both the public and the rights-holder by preventing crime, and not only to prosecute crimes that have already occurred. It is the position of Appellant/Respondent Sheriff's Office that it is entirely proper for law enforcement agencies to consider crime prevention, and not merely prosecute crimes that have already occurred. If the Court agrees, the decision should be in favor of Appellant/Respondent Sheriff's Office.

Thus, law enforcement may have legitimate reasons other than to use the items in a criminal proceeding to hold allegedly counterfeit goods, lawfully seized under §39-15-1195 pursuant to a warrant, unless and until the owner of the goods brings a claim under paragraph H of that section. (That paragraph provides, in pertinent part, "An owner may apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter.").

No action under § 39-15-1195, paragraph H, was filed by Mr. Farmer, the Defendant in the underlying criminal case.

Because law enforcement may hold lawfully seized counterfeit goods until a successful action is brought under § 39-15-1195(H) to show the goods are not in fact counterfeit, and may do so to protect the public, or the trademark holder, or for any other legitimate reason, the court below clearly erred in holding that the only reason law enforcement may hold lawfully seized goods is for their evidentiary value in a criminal prosecution. *See* Sheriff's Memorandum of Law, pp. 3-7, R. pp.42-46 (arguing that

¹ Not only could, but would, if the owner of the counterfeit goods attempts to sell them – as Plaintiff here has indicated he intends to do. Complaint, ¶10.

paragraph H, § 39-15-1195, is the only legislatively-mandated and proper means for the owner of lawfully seized allegedly counterfeit goods to require the return of those goods).

While the above analysis focuses on counterfeit goods, additional reasons exist to hold lawfully seized goods more broadly. A scale used to measure out unlawful drug sales may be seized, whether made of purest gold or basest metal, *Austin v. United States*, 509 U.S. 602, 627 (U.S. 1993) (Scalia, J., concurring), and once seized, it may be held for later sale, even after the owner is convicted. A van used to transport contraband may be seized, and even were the owner to die before trial, and thus, obviously, never to be prosecuted, law enforcement can hold the van for later sale. Other contraband may be held, after conviction or after acquittal, for training purposes.

While the above are all good reasons to hold counterfeit goods or other contraband, it is the position of the Sheriff's Office that law enforcement need not provide *any* reason to hold lawfully seized goods, beyond the fact of the magistrate's order authorizing such seizure. Rather, the burden is on the party who would reverse the magistrate's order. As argued extensively in the Sheriff's Memorandum of Law, Sheriff's Memorand. pp. 3-5, R. pp. 42-44, the only mechanism via which a property owner can seek to have the confiscated property returned is via filing an action under § 39-15-1195(H). *See State v. Bolin*, 378 S.C. 96, 100; 662 S.E.2d 38, 40 (S.C. 2008) (employing the principle of *expressio unius est exclusio alterius* as a matter of statutory interpretation). Since the legislature had mandated the means by which a property owner may seek to have the property returned, one seeking return of property must follow the legislatively-prescribed route. "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of

public policy." *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 337 (Ct. App. 2003) (quoting *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989)). It is the position of the Sheriff's office that § 39-15-1195(H) is the only means by which a property owner may seek the return of goods.

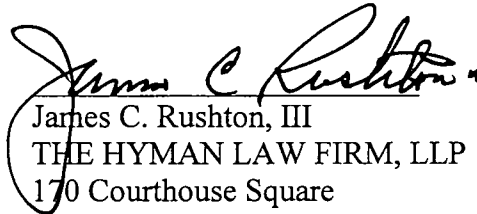
Further, and in an abundance of caution, the Sheriff's Office states that it does not agree that even under § 39-15-1195(H) it would be proper to inquire as to the reason law enforcement is not returning the goods, other than the fact that the goods are properly subject to seizure and not properly for return. Whether the Sheriff is keeping the goods for sale, to demonstrate common types of counterfeiting, etc., is simply not for the lower court's determination.

Thus (a) the lower court erred in even reaching the question of return of the goods without an action being filed under § 39-15-1195(H); (b) in the alternative, and assuming, for the sake of argument, that it was proper for the lower court to reach the question of return of the goods, without the owner following the statutorily-mandated route, the lower court erred in considering the motivation of the Sheriff's office in refusing to return the goods, because the focus – even under 39-15-1195 – should be on such matters as the illegal nature of the goods and the use to which they were put – i.e., whether the owner is entitled to their return, not the Sheriff Department's motivation; and (c) again in the alternative, and assuming for the sake of argument, that it was proper to reach the question of return of the goods, and that it was proper to inquire into the Sheriff Department's motivation for refusing to return the goods, the lower court erred in holding that "use in a criminal prosecution" exhausts the allowable reasons.

Conclusion

For the foregoing reasons, the judgment below should be REVERSED.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "James C. Rushton, III". The signature is written in a cursive style with a large, looping initial "J".

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STATEMENT OF THE FACTS

A. The Underlying Criminal Action.

The present Respondent/Appellant, James David Farmer, was charged with criminal violations of S.C. Code Ann. § 39-15-1190 (trafficking in counterfeit goods) and of S.C. Code Ann. § 16-11-0930 (distribution of pirated recordings). The evidence was that he was selling counterfeit goods out of his store, much of it in plain view. (Aff. Chad Collins, August 30, 2007, R. p 1). The \$44,000 of counterfeit goods included "Nike," "Louis Vutton," "National Basketball Association," "Lacoste," and other trademarks, shirts and shoes, as well as more than 200 CD's and 40 DVD's. (Narrative to Sheriff William K. Boone from Inv. Chad Collins, 09/14/07, R. pp. 5-6).

The merchandise was seized by law enforcement.

A plea bargain was worked out, whereby Mr. Farmer pled guilty to violation of § 16-11-0930 (distributing pirated recordings), and the charge of trafficking in counterfeit goods was dropped.

Mr. Farmer pled guilty.

B. The Civil Case.

Mr. Farmer filed the present action. He sought damages, actual and punitive, under S.C. Code Ann. § 39-15-1195(C). (Complaint, R. pp. 10-16).

The court below denied his request for damages (Order, pp. 2-3, R. pp. 90-91), but, without conducting a hearing to determine whether the items were counterfeit, ordered the Sheriff's Office to return the items. The Court below declared that to be "a reasonable compromise." (Order, p. 3, R. p. 91.)

ARGUMENT

In this cross-appeal, Mr. Farmer asks the Court to reverse solely on the question of whether he may seek damages against the Sheriff's Office under 39-15-1195(C). He claims the court below erred in its construction of 39-15-1195.

PRINCIPLES OF STATUTORY CONSTRUCTION

The cardinal rule of statutory construction is to ascertain and effectuate legislative intent. *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 7, 664 S.E.2d 471, 474 (2008). Intent is to be determined primarily from the plain language of the statute. *Georgia-Carolina Bail Bonds, Inc v. County of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003).

To determine intent, one must also look at the statute as a whole. "Th[at] language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Id. See also Bursey v. S.C. Dep't of Health & Envtl. Control*, 369 S.C. 176, 181, 631 S.E.2d 899, 902 (2006):

A technical reading of § 48-20-190, however, indicates that respondents' appeals should not go to the Council. . . . We conclude, however, that such a technical reading is strained and is not a practical interpretation of § 48-20-190 that is consonant with the purpose and policy of the appeal provisions of the Mining Act. *See TNS Mills, Inc. v. South Carolina Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998) (statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers).

A construction is preferred that gives effect to every part of a statute. *Cf. Dorman v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 159, 166, 565 S.E.2d 119, 123 (Ct. App. 2002) (rejecting interpretation that would render a statute a nullity.)

I. A Plain Reading of the Statute Indicates that Paragraph (H) Was Intended to Allow Innocent Owners of Seized Goods to Bring an Action for Their Return.

Appellant ("Mr. Farmer") bases his claim on S.C. Code Ann. § 39-15-1195. He claims, first, that this statute precludes him, as an owner of seized goods, from bringing an action to recover his goods. However, that same statute provides, in Paragraph (H), "An owner may apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter." Mr. Farmer's entire case thus collapses.

He was not, as he claims, precluded from bringing an action for the return of his goods, and thus the underpinning of his case collapses.

Mr. Farmer complains that a guilty person could not bring a successful action under Paragraph (H). He states (Respondent/Appellant's Initial Brief (hereinafter, "Farmer's Brief"), p. 4), "Respondent/Appellant had no other avenue to seek the return of his property due to the fact that Respondent/Appellant would never be able to qualify for relief under S.C. Code Ann. § 39-15-1195(H)." He similarly claims (Farmer's Brief, p. 6), "A person in Mr. Farmer's situation could never file a cause of action under S.C. Code Ann. § 39-15-1195(H) as long as criminal charges were pending, because they could never claim lack of knowledge."

That is probably true – if he is guilty.

A guilty owner would probably not want to bring an action under §39-15-1195(H). However, if the merchandise was legitimate, all an innocent owner would need do is show the merchandise was legitimate. It is not illegal to offer for sale legitimate goods. There is thus no "use" of the property that made it subject to forfeiture.

Again, the plain intent of Paragraph (H) was to allow an *innocent* owner to seek return of the goods. Were Mr. Farmer innocent, he could do so. The wording of

Paragraph (H) may prevent a *guilty* person from reacquiring the merchandise, but if so, that is entirely proper.

And assuming, for the sake of argument, that a technical reading of Paragraph (H) would preclude an owner of legitimate goods from bringing a suit for their return, the rules of construction would preclude such a technical reading at odds with the purpose of the statute. *Bursey v. S.C. Dep't of Health & Env'tl. Control*, 369 S.C. 176, 181, 631 S.E.2d 899, 902 (S.C. 2006):

Thus, under a plain reading, his case collapses; under a technical reading, his case collapses; and were his case to survive both the plain meaning and technical reading, it would be trumped by the principle that statutory language is to be read practically, and in consonance with its purpose and policy.

II. Even Assuming, for the Sake of Argument, that Mr. Farmer's Reading of Paragraph (H) Is Correct, Mr. Farmer's Argument Collapses.

Assuming, for the sake of argument, that Paragraph (H) does not entitle someone in Mr. Farmer's position, whether guilty or innocent, to bring an action for return of the merchandise, there are many steps between that assumption and the conclusion that the Sheriff's Office may be sued for damages, and Mr. Farmer's argument stumbles on each.

A. If Paragraph (H) does not allow an innocent owner of legitimate goods to bring an action for their return, then Paragraph (C) does.

Section 39-15-1195 Paragraph (C), on which Mr. Farmer bases his entire case, provides, in its entirety,

(C) If a seizure is made pursuant to subsection (B), proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time.

Note that Paragraph (C) does not say by whom such an action may be initiated. Mr. Farmer makes much of a supposed "admission" by the Sheriff's Office in its Memorandum of Law filed below, that this is a directive to law enforcement. But that statement does not take Mr. Farmer where he wants to go.

First, in making that statement, the Sheriff's Office was reading the statute as a whole, and reading Paragraph (H) as allowing an owner such as Mr. Farmer to bring suit. Since Paragraph (H) specifically authorizes an owner to bring an action, the reasoning went, why read Paragraph (C) as also entitling an owner to bring an action? *See, e.g., Bursey v. S.C. Dep't of Health & Env'tl. Control*, 369 S.C. 176, 181, 631 S.E.2d 899, 902 (S.C. 2006) (stating that statutes are best read as a whole):

A plain reading of Paragraph (C), in isolation, does not say who may bring such a suit. On the literal language of Paragraph (C), such a suit could be brought by law enforcement, by an owner, or by anyone else in the world. However, applying some common sense, the Sheriff's Office reasoned that it must be someone with standing regarding the property. That would include law enforcement and the owner, or perhaps a victim of a crime such as fraud, seeking restitution via recovery of assets (such as a van) used by the perpetrator in other crimes. Under the factual situation presented to the Sheriff's Department, there was no such victim. Under the Sheriff's Department's reading of Paragraph (H), there was no need to read Paragraph (C) to allow the owner to bring an action. That left law enforcement. After all, why read the ambiguous (C), which does not say who may bring an action, as implicitly allowing an owner to bring an action, if the owner was explicitly allowed to bring an action under (H)?

However, were the Court to read Paragraph (H) as denying an owner of legitimate goods the right to bring an action for their return, then the context in which, and rationale for, the Sheriff's Department's reading of Paragraph (C) evaporates.

Let us attempt to state the analysis more succinctly. The Legislature obviously intended to allow the owner of legitimate goods to bring an action for their return. If it did not do so in Paragraph (H), then it did so in Paragraph (C).

B. Assuming, for the sake of argument, that Paragraph (H) does not allow Mr. Farmer to bring an action for return of the items, and further assuming that Paragraph (C) is directed solely to law enforcement, Mr. Farmer has sued the wrong agency.

Were one to conclude (1) that Paragraph (H) does not afford effective relief for the owner of seized items, and were one to conclude (2) that Paragraph (C) does not allow such an owner to bring an action under Section 44-53-530 for the return of the property, and were one to conclude (3) that Paragraph (C) authorizes law enforcement, and only law enforcement, to bring a Section 44-53-530 action, Mr. Farmer still has a problem. He has sued the wrong agency.

Above, we analyzed Section 39-15-1195 Paragraph (C) in isolation, and concluded that, in isolation, one could not tell who was to bring the 44-53-530 action. We then read Paragraph (C) in context, and concluded that if Paragraph (H) afforded an owner the right to bring an action, there was no need to read Paragraph (C) as duplicating that authorization. We further concluded that if Paragraph (H) did not do the job, then there was reason to read Paragraph (C) as so authorizing. Let us now put Paragraph (C) in deeper context.

Paragraph (C) authorizes unnamed persons or entities to bring a 44-53-530 action. Light can be shed by analyzing that statute, Section 44-53-530. It provides, in its very first sentence (emphasis supplied): "(a) Forfeiture of property defined in Section 44-53-530 must be accomplished by petition of the *Attorney General* or his designee or the *circuit solicitor* or his designee to the court of common pleas for the jurisdiction where the items were seized."

The Attorney General and the circuit solicitor are plainly part of law enforcement. *If* Paragraph (C) contains a glitch which precludes an innocent person who is otherwise in Mr. Farmer's position from bringing suit (which the Sheriff's Department denies), and *if* Paragraph (H) is not read as stepping forward to fill the hole, and if that means the owner of the goods may sue a governmental agency, Mr. Farmer has sued the wrong agency.

C. Mr. Farmer's entire claim for damages is flawed.

1. Even were there no Tort Claims Act, Mr. Farmer's claim for damages against any Governmental agency would fail.

Even if the Tort Claims Act had never been enacted, Mr. Farmer's claim would fail. The obvious purpose of Paragraph (H) of § 39-15-1195 is to enable an owner of seized goods to apply for a determination of whether the items should be returned, regardless of whether the Government files such an action. Assuming, for the sake of argument, that there is a "glitch" in Paragraph (H) that would preclude an owner of legitimate goods, otherwise in Mr. Farmer's position, from bringing such an action, and left the bringing of such an action only to the Government, it seems strange to conclude that the Legislature intended to allow such an owner to bring an action for damages. It would seem more reasonable that the Legislature intended, at most, that the owner bring a

declaratory and/or injunctive action to require the proper party to bring the forfeiture action.

2. Mr. Farmer's claim of an exception to the Tort Claims Act is directed at the wrong officer.

Mr. Farmer argues (Mr. Farmer's Brief, pp. 9-10), that the "special duty rule" comes into play only when a statute "imposes on a *specific public officer* a duty . . ." Mr. Farmer then concludes that the statutes at issue must have imposed upon the Sheriff's Office the specific duty to institute an action under 44-53-530. But the only public officers who are named are the Attorney General and the Circuit Solicitor, not the Sheriff's Office. Assuming for the sake of argument that damages are proper against some "specific public officer" named in a statute, the Florence County Sheriff's Office is not that officer.

3. The Tort Claims Act precludes damages against *any* public officer in this situation.

The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et seq.*, provides, in § 15-78-20(a) (emphasis supplied):

[W]hile total immunity from liability on the part of the government is not desirable, . . . neither should the government be subject to unlimited nor unqualified liability for its actions. . . . Consequently, it is declared to be the public policy of the State of South Carolina that *the State, and its political subdivisions, are only liable for torts within the limitations of this chapter* and in accordance with the principles established herein.

The Act reiterates, S.C. Code Ann. § 15-78-140, "For any claim filed under this chapter, the remedy provided in § 15-78-120 is exclusive."

That Act further provides, § 15-78-60 (entitled, "Exceptions to waiver of immunity") (emphasis supplied):

The governmental entity is not liable for a loss resulting from:

....
(4) adoption, enforcement, or compliance with any law or *failure to adopt or enforce any law*, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;

The Act further provides, § 15-78-200 (entitled, "Exclusive and sole remedy for torts committed by employee of governmental entity while acting within scope of employee's official duty") (emphasis supplied):

Notwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act', is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty. The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and *must be liberally construed in favor of limiting the liability of the governmental entity*.

Mr. Farmer's entire point is that the Attorney General and/or circuit solicitor failed to bring an action under § 44-53-530 to enforce Mr. Farmer's rights under 39-15-1195. His claim is thus barred under the Tort Claims Act.

SUMMATION

Section 39-15-1195 was obviously intended to, and indeed does, serve a main purpose of protecting the public via allowing the forfeiture of seized goods, so that counterfeit goods or drugs are not returned. It serves a secondary function of protecting an innocent stake-holder by allowing him to bring an action to determine whether the items should be returned. It allows either the government or an innocent person claiming an interest in seized goods to bring an action to determine whether the goods should be forfeited or instead provided to the private citizen. The Court should construe that statute in accord with its obvious intent. Paragraph (H) fulfills the function of allowing the

private citizen with a rightful claim to have that claim adjudicated. It does so via its plain language. Assuming, for the sake of argument, that Paragraph (H) does not fulfill that function in the case of an owner of legally seized, allegedly counterfeit (but actually legitimate) goods, the ambiguous language of Paragraph (C) should be read as filling that hole. Mr. Farmer's claim also fails because, even if Paragraph (H) leaves a hole which Paragraph (C) does not fill, the statute should not be stretched, even under its plain terms, as authorizing an action for damages, but as authorizing only an action to fill that hole, that is, an action for declaratory or injunctive relief requiring the Government to bring an action to determine the legitimacy of the goods. The hole, if it exists, should be filled. But there should not be an edifice erected on top.

Further, the Tort Claims Act bars Mr. Farmer's damages claims. First, were there an exception for situations such as Mr. Farmer's, the only "specific public officer" charged with a duty under the statute is (are) the Attorney General and the circuit solicitor, not the Sheriff. Second, there is no such exception. Rather, the Act specifically forbids Tort Claims based on failure to enforce any law.

Conclusion.

For the foregoing reasons, that aspect of the Order which dismissed Mr. Farmer's claims for damages should be AFFIRMED.

Respectfully Submitted,


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COPY

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS**

The Hon. Ernest F. Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-21-1071

James David Farmer..... Respondent/Appellant,

v.

Florence County Sheriff's Office..... Appellant/Respondent.

**APPELLANT'S FINAL REPLY BRIEF OF
APPELLANT/RESPONDENT FLORENCE COUNTY
SHERIFF'S OFFICE**

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ARGUMENT

I. Mr. Farmer's Argument that the Case Should Repeat Itself Is Without Merit.

Mr. Farmer's Initial Brief as Respondent (hereinafter, "Farmer's Responsive Brief") complains throughout that the Sheriff's Office's Brief as Appellant (hereinafter, "Sheriff's Brief") focused on the final sentence of the Order below. That concluding sentence stated: "The Sheriff's Office simply cannot hold the Plaintiff's property unless it is being held for use in a criminal proceeding." (Order, p. 3; R. p. 91.) The Sheriff's Office explained (Sheriff's Brief, p. 3) that this was "[t]he Court's rationale." The Sheriff's Office then provided "ample reasons" the rationale was erroneous.

Mr. Farmer does not dispute that this was the rationale. Mr. Farmer does not dispute that the rationale was erroneous.

Mr. Farmer argues, instead, that the Sheriff's Brief fails to properly acknowledge the *context* in which the Court stated its reasoning. Mr. Farmer complains that the Sheriff's Brief did not mention (1) that the Court's Order found there "had been no hearing to determine" whether the goods are counterfeit (Mr. Farmer's Responsive Brief, p. 5 (quoting Order, p. 2)); and Mr. Farmer complains (2) (ellipsis is Mr. Farmer's) that "the trial court's order specifically places Mr. Farmer on notice that: . . . if said items are, in fact, counterfeit and he attempts to traffic such items after their return, he will, again be subject to criminal charges." (Farmer's Responsive Brief, p. 6 (quoting Order, p. 2)).

The items Mr. Farmer brings to the Court's attention only increase one's certainty that the lower court erred.

Suppose that the items are returned, as Mr. Farmer requests. Mr. Farmer has told both this Court and the court below that he will again attempt to sell the "merchandise." It has already been determined that the Sheriff's Office has probable cause to arrest Mr. Farmer and seize the goods. (Warrant, August 30, 2007; R. p. 2). Mr. Farmer has not challenged here or below the validity of that warrant. Regardless, if that warrant were no longer valid, the same reasons to have obtained that warrant a year ago exist now, and the Sheriff's Office would obtain a similar warrant, conduct a similar search and seizure, perform a similar arrest. We would be back to Square One.

The Sheriff's Office strongly objects to this "revolving door" approach to justice.

As explained in depth in the Sheriff's main Brief in this matter, "use in a criminal proceeding" does not exhaust the legitimate reasons to hold items seized pursuant to a lawful order of a magistrate judge. Among the other reasons provided there was that law enforcement agencies could hold a van used to transport illegal drugs, even if seized from a defendant who had died after his arrest, and would thus never be prosecuted. Such a van could be sold, or used for undercover investigation. Items could also be held for use in training, etc., the Sheriff's Office pointed out. The Sheriff's Office also pointed out that it was further improper to even inquire into the Sheriff's Office's motivation for holding goods seized according to a lawful court Order. Rather, the burden was on one challenging the lawful Order to explain why that Order should be overturned. And further, if the items were lawfully seized pursuant to court order, and were contraband, the owner could not prevail in demanding their return regardless of what law enforcement intended to do with the goods (resale, gift to charity, training purposes, or a trophy on the wall). Rather, the only reasons an owner had to demand recovery of the items had

nothing to do with the Sheriff's use or planned use, but only with such matters as whether the goods were properly subject to forfeiture.

That is, the focus should be on such matters as the illegal nature of the goods and the use to which they were put; e.g., a challenge to whether there existed probable cause at the time of the magistrate's warrant, or that on closer examination the goods turn out to be legitimate (the white powder was sugar, not cocaine; the "Louis Vuitton" luggage with the bottoms falling off were actually manufactured by Louis Vuitton), or someone has a claim even if the goods were properly seized (the bank with the lien on the automobile had no knowledge that it would be used to transport contraband, or had even inquired into the character of the borrower and been assured, and should not lose its interest when the borrower used the vehicle to transport drugs, *S.C. State Law Enforcement Div. v. Crook*, 273 S.C. 285, 285-87, 255 S.E.2d 846, 846-47 (1979).)

As Mr. Farmer points out, the court below ordered the items returned without determining whether they were legitimate or counterfeit. That does not cure the lower court's error in stating that the only reason the Sheriff's Office can hold the goods is for use in a criminal proceeding. Rather, it is additional error.

Mr. Farmer intends to offer the items for sale if they are returned before a determination of their counterfeit status. The Sheriff's Office believes the items to be counterfeit. The Sheriff's Office would thus re-seize the goods. At some point, there needs to be a determination of their counterfeit or legitimate status. The time to do that is before their return.

II. With One Exception (His Argument about "Must" versus "May"), the Remainder of Mr. Farmer's Argument Repeats Argument Made More Extensively in His Brief as Appellant, and Is Rebutted in the Sheriff's Brief as Respondent.

Mr. Farmer next argues that he could not have brought an action under § 39-15-1195(H). He argued the point much more extensively in his Brief as Appellant. The Sheriff extensively rebutted Mr. Farmer's argument in the Sheriff's Brief as Respondent. Rather than repeat the Sheriff's rebuttal here, the Sheriff would refer the reader to the Sheriff's Brief as Respondent, pp. 1-5, 7-8.

Mr. Farmer's argument about "must" versus "may" is addressed directly below.

III. Mr. Farmer's Argument about "Must Be" and "May Be" Concedes His Case.

Mr. Farmer asks this Court to consider deeply the difference (emphases are Mr. Farmer's) between the "must be" language of § 39-15-1195(C) and the "may" language of Paragraph (H). (Farmer's Responsive Brief, p. 8.) "Mr. Farmer would draw this Court's attention to the language used in subsection (H) and subsection (C)." (Farmer's Responsive Brief, p. 8). He argues that this must or may make the Sheriff's Office liable. He quotes the statute (*id.*, again, emphasis is Mr. Farmer's):

(C) If a seizure is made pursuant to subsection (B), proceedings pursuant to Section 44-53-530 regarding forfeiture and disposition must be instituted within a reasonable time.;

whereas, in Mr. Farmer's telling, (H) provides (again, emphasis is Mr. Farmer's):

(H) (1) An owner may apply to the court of common pleas for the return of an item seized pursuant to the provisions of this chapter

Mr. Farmer argues "*the difference in language is clear.*" (Farmer's Responsive Brief, p. 9) (emphasis supplied).

He further writes (*id.*),

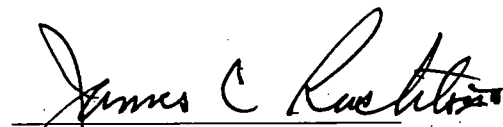
In subsection (H) the Legislature uses the more permissive or discretionary language of 'may', as opposed to the more commanding or mandatory language of 'must' contained in subsection (C). Mr. Farmer believes the difference in language addresses the arguments he has put forth. . . .

Mr. Farmer is arguing that he "may" bring an action to determine whether he gets the items back, but the Sheriff "must" bring such an action. If so, by not doing what he "may" do for himself, Mr. Farmer has created his own injuries (if he has any). The case is thus moot. Further, since Mr. Farmer is asserting that the statute allowed him ("may") to bring such an action, he has effectively conceded his underlying case for damages, which rests on his assertion that he "may not" bring such an action.

Conclusion.

That aspect of the Order which demanded the Sheriff's Office return the seized goods should be REVERSED.

Respectfully Submitted,


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