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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case Nos. 2009-CP-26-1281
2009-CP-26-3127
2009-CP-26-3128

(Court of Appeals Case No. 2014-001344)

J. Gregory Hembree, on behalf of the Horry County Police Department, Respondent,

v.

Taurus .38 Special SN: sg53109, 1994 Monaco RV VIN: 1RF120611R1010972 and
One Thousand Eight Hundred and Forty Five Dollars (\$1,845.00) Defendant
Property,

Michaela Albin, Individually and as Personal Representative of the Estate of Michael
J. Albin, Appellant

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Whether the circuit court properly ruled that Appellant was not entitled to attorney's fees under S.C. Code §§ 15-77-300 to 340?

II. Whether Appellant should be awarded loss of use compensation for the Monaco 1994 RV?

STATEMENT OF THE CASE

This is the second appeal from the same underlying lawsuit. In the instant appeal, the Appellant contests the circuit court's denial of attorney's fees on the basis that the underlying lawsuit did not meet the requirements for receiving attorney's fees in a State initiated action under S.C. Code Ann. § 15-77-300. The Appellant also contests the circuit court's denial of compensation for the loss of use of his 1994 Monaco RV.

The underlying lawsuit originated as three civil forfeiture lawsuits. Respondent's first lawsuit, civil action number 2009-CP-26-1281, concerned Appellant's Taurus .38 Special handgun. See Complaint I. Respondent's second lawsuit, civil action number 2009-CP-26-3127, concerned Appellant's \$1,847.00 in U.S. currency. See Complaint II. And Respondent's third lawsuit, civil action number 2009-CP-26-3128, concerned Appellant's 1994 Monaco RV. See Complaint III. These three lawsuits were later merged into one.

Eight months after Respondent filed its lawsuits, Appellant moved for summary judgment as to the RV. See Motion for SJ. After consideration of Appellant's motion, the Honorable Steven H. John determined that each subsection of the drug forfeiture statute, S.C. Code § 44-53-520(a), was a standalone cause of

action. See 9-22-09 John S.J. Order. Therefore, he struck paragraph 7 of Respondent's Complaint because there was no evidence the RV was used to conceal, transport, or otherwise facilitate a transaction of 1 pound or more of marijuana. *Id.* However, Judge John ruled that Respondent could go forward on causes of action alleging the RV had been: (1) used as a container for narcotics and (2) used to facilitate certain drug activities. *Id.*; see S.C. Code § 44-53-520(a)(3) & (4); *see also Hembree v. One Thousand Eight Hundred Forty-Seven Dollars (\$1,847.00) U.S. Currency*, 404 S.C. 241, 244, 743 S.E.2d 864, 865 (Ct. App. 2013).

At the trial of this case, the parties presented live testimony and exhibits, and the Honorable Larry B. Hyman, Jr. ordered the forfeiture of the RV, despite the involvement of less than 1 pound of marijuana, and maintained Judge John's previous ruling – that each subsection of the drug forfeiture statute was a standalone cause of action. See 8-12-14 Hyman Trial Order. Judge Hyman ordered the return of the remaining property to Appellant. *Id.* Appellant filed a motion to amend the judgment, and Judge Hyman denied Appellant's motion. See 8-26-11 Motion to Reconsider & 4-5-12 Hyman Order on Motion to Reconsider.

Appellant subsequently filed the first appeal in this case, and this Court reversed Judge Hyman's order and ruled that the drug forfeiture statute "must be read as a whole and so that no phrase is rendered superfluous." *Hembree*, 404 S.C. at 247, 743 S.E.2d at 867. More specifically, any seizure of a conveyance, like Appellant's RV, must meet the drug weight requirements found in S.C. Code Ann. § 44-53-520(a)(6). *Id.* *Hembree* resolved novel issues regarding the drug forfeiture statute. On

July 5, 2013, the Horry County Clerk of Court filed this Court's Remittitur. See Remittitur.

On November 13, 2012, during the pendency of Appellant's initial appeal, the Horry County Police Department sold Appellant's RV for \$13,105.00 on govdeals.com. See Damages Trans. I, p. 47. On July 30, 2013, Appellant's attorney sent a letter to the Horry County Clerk requesting a "damages hearing." See 7-30-13 Cnty to Clerk. On November 12, 2013, Judge Hyman heard the first damages hearing and ordered: (1) neither party had an admissible expert as to the value of the RV; (2) the Respondent had not adequately answered discovery, and (3) the continuance of the damages hearing for 30 days. See Hyman Damages Order I.

On January 31, 2014, Judge Hyman resumed the damages hearing, and the parties presented live testimony and exhibits. On May 12, 2014, the court ordered the Horry County Police to pay Appellant \$57,640.00, "representing the value of the 1994 Monaco Motor Home no longer in their possession." See Hyman Damages Order II. The court declined to award Appellant attorney's fees or to award any other compensation. *Id.*

On February 28, 2014, Appellant filed the petition and affidavit for attorney's fees, which are required under S.C. Code Ann. § 15-77-310. See Petition. On June 13, 2014, Appellant initiated this appeal.

STATEMENT OF THE FACTS

This Court already set forth the facts of this case in *Hembree*, 404 S.C. 241, 743 S.E.2d 864. The relevant portions of this Court's factual findings are the following:

After receiving complaints of illegal gambling activities at Putters Lounge (“Putters”), a Horry County restaurant owned by Michael J. Albin, agents for the South Carolina State Law Enforcement Division (SLED) initiated an investigation. Pursuant to the investigation, Agents Christina Gainey and Kathy Bass visited Putters several times. During each of their visits, Agents Gainey and Bass engaged in illegal gambling while wearing a hidden recording device. In addition, during their final visit, Agent Gainey asked Albin if she could purchase some marijuana from him. Albin indicated that she and Agent Bass could smoke marijuana with him in his motor home, which was parked directly behind Putters.

The following day, SLED agents executed a search warrant of Putters and the motor home. Upon SLED’s request, officers from the Horry County Police Department (HCPD) assisted with the search. During the search and a subsequent inventory of the contents of the motor home, officers from the HCPD discovered five bags containing a total of 137 grams or approximately four ounces of marijuana in the motor home, a pistol, and \$1,847 in currency. In addition, SLED agents recovered approximately \$15,000 in currency and a laptop computer from the motor home and Putters. HCPD agents also seized the motor home during the execution of the warrant.

The HCPD brought the instant action against Albin for forfeiture of the marijuana, pistol, motor home, and \$1,847 in currency the HCPD seized during the execution of the search warrant...

At trial, Albin admitted giving marijuana to Agents Gainey and Bass in his motor home but denied ever selling marijuana to anyone. Albin also admitted purchasing and smoking marijuana in his motor home and claimed he smoked marijuana because his doctor recommended he do so to alleviate the effects of radiation treatments for cancer.

Hembree, 404 S.C. at 243-45, 743 S.E.2d at 865-66.

STANDARD OF REVIEW

“The decision to award or deny attorney’s fees under the state action statute will not be disturbed on appeal absent an abuse of discretion by the trial court in considering the applicable factors set forth by the statute.” *Layman v. State*, 376 S.C.

434, 444, 658 S.E.2d 320, 325 (2008) (citing *McMillan v. S.C. Dept. of Agric.*, 364 S.C. 60, 76, 611 S.E.2d 323, 331 (Ct. App. 2005)).

In general, “the trial judge has considerable discretion regarding the amount of damages, both actual or punitive. Because of this discretion, [this Court’s] review on appeal is limited to the correction of errors of law. [This Court’s] task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award.” *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct. App. 2004).

ARGUMENT

I. Whether the circuit court properly ruled that Appellant was not entitled to attorney’s fees under S.C. Code §§ 15-77-300 to 340?

A. Appellant did not file petition within 30 days of final disposition.

In order to receive attorney’s fees under S.C. Code Ann. § 15-77-300, Appellant must first “petition for the attorney’s fees within thirty days following final disposition of the case. The petition must be supported by an affidavit setting forth the basis for the request.” S.C. Code Ann. § 15-77-310.

“Where there has been an appeal, ‘final disposition of the case’ occurs when the remittitur is filed in the circuit court.” *Brackenbrook N. Charleston, LP v. Cnty. Of Charleston*, 366 S.C. 503, 507, 623 S.E.2d 91, 93 (2005) (citing *McDowell v. S.C. Dep’t of Soc. Serv.*, 300 S.C. 24, 386 S.E.2d 280 (Ct. App.1989)).

The Horry County Clerk of Court filed the Remittitur in this case on July 5, 2013. See Remittitur. Appellant filed his petition and affidavit for attorney’s fees on February 28, 2014. See Petition. Consequently, Appellant’s Petition for attorney’s

fees is not timely and does not comply with the requirements set forth in S.C. Code Ann. § 15-77-310.

Assuming arguendo that Appellant's July 30, 2013 letter to the Horry County Clerk's Office requesting a damages hearing was a "petition" for attorney's fees, this letter still fails the statutory requirements in that it does not contain "an affidavit setting forth the basis for the request." S.C. Code Ann. § 15-77-310. Therefore, Appellant's request for attorney's fees should be denied because his petition and affidavit were filed well after the 30 day deadline.

B. Respondent's action was substantially justified and involved special circumstances.

In addition to filing a timely petition and affidavit, Appellant must show that: (1) the state agency "acted without substantial justification in pressing its claim against the [Appellant]" and (2) "there are no special circumstances that would make the award of attorney's fees unjust." S.C. Code Ann. § 15-77-300(A).

i. Substantial Justification

Substantial justification for purposes of the state action statute means "justified to a degree that could satisfy a reasonable person." *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564 (1988)). "In deciding whether a state agency acted with substantial justification, the relevant question is whether the agency's position in litigating the case had a reasonable basis in law and in fact." *Layman*, 376 S.C. at 445, 658 S.E.2d at 326. "An agency's loss on the merits does not create a presumption that its position

was not substantially justified.” *Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue*, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct. App. 2004).

Appellant argues that Respondent’s action lacked substantial justification because the seizure of Appellant’s RV involved less than 1 pound of marijuana. However, Respondent did not have notice that the seizure of Appellant’s RV required the involvement of 1 pound or more of marijuana until this Court ruled in Appellant’s first appeal, *Hembree*, 404 S.C. 241.

Indeed, *Hembree* settled a novel issue in this State, and leading up to *Hembree*, two circuit court judges supported Respondent’s action. First, Judge John denied part of Appellant’s motion for summary judgment (see 9-22-09 John S.J. Order), and second, Judge Hyman upheld Judge John’s ruling and ordered the forfeiture of the RV (see 8-12-11 Hyman Trial Order). To follow Appellant’s argument would mean penalizing Respondent for failing to make a statutory interpretation that had not yet occurred. *See Jackson v. City of Abbeville*, 366 S.C. 662, 667, 623 S.E.2d 656, 659 (Ct. App. 2005) (“The determination of probable cause is not an academic exercise in hindsight.”) (citations omitted); *see also Gowdy v. Gibson*, 381 S.C. 225, 229, 672 S.E.2d 794, 796 (Ct. App. 2008) (“The purpose of a forfeiture hearing is to confirm the state had probable cause to seize the property in question.”). Therefore, at the time it was brought, Respondent’s action had a reasonable basis in law.

Respondent’s action also had a reasonable basis in fact. The factual findings by this Court were: (1) Appellant offered to smoke marijuana with the undercover SLED agents in his RV and (2) Respondent found approximately 4 ounces of

marijuana in the RV packaged in 5 separate bags. *Hembree*, 404 S.C. at 243, 743 S.E.2d at 865. Respondent also found in the RV a handgun, \$1,847 in U.S. currency, and \$15,000.00 in U.S. currency. *Id.* This property, while not drugs, is commonly associated with drug dealers. Respondent's burden in a forfeiture action is probable cause, and, as the lower court affirmed, the above facts were sufficient probable cause to believe Appellant used his RV to deal drugs. See 8-12-11 Hyman Trial Order; *see also Gowdy*, 381 S.C. at 229, 672 S.E.2d at 796.

Based on the above, Respondent's position in litigating the instant case had a reasonable basis in law and fact.

ii. Special Circumstances

The special circumstances that would make the award of attorney's fees unjust in this case are that forfeiture actions, such as the instant case are a "legitimate exercise of police power." *Myers v. Real Property at 1518 Holmes Street*, 306 S.C. 232, 235, 411 S.E.2d 209, 211 (1991). Almost every police agency in this State uses the drug forfeiture statutes to take money and property away from drug dealers. It promotes the general welfare of the community and protects a public interest.

This Court recently discussed the importance of police power in *Carolina Convenience Store, Inc. v. City of Spartanburg*, 398 S.C. 27, 727 S.E.2d 28 (Ct. App. 2012). In *Carolina Convenience Store*, Jimmy Johnson was fleeing from police when he ran into the Carolina Convenience Store and took an employee hostage. *Id.* at 28, 29. Johnson, who was armed, would not surrender, and the police ultimately used a bulldozer to breach the Store's

walls and shoot Johnson in the shoulder. *Id.* Carolina Convenience Store sued the City over the damage to its store and claimed inverse condemnation and negligence. *Id.* at 31, 30. Carolina Convenience Store believed that the City had taken its property, but this Court found the City's actions "more properly categorized as a legitimate exercise of its police power." *Id.*

Carolina Convenience Store is analogous to the instant case in that Appellant claims Respondent took his property during the course of police action and seeks additional compensation for that loss. However, "[p]olice power, '[a]lthough not clearly defined...is an extensive power...,and, in its widest sense, is said to be the general power of a government to preserve and promote the general welfare, even at the expense of private rights.'" *Id.* (quoting *City Council of Charleston v. Werner*, 38 S.C. 488, 495, 17 S.E. 33, 35 (1893) (citing *Arnold v. City of Spartanburg*, 201 S.C. 523, 538, 23 S.E.2d 735, 741 (1943) ("[T]he law will never, by any construction, advance a private interest to the destruction of a public interest; but, on the contrary, [] it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one."))).

While it is undisputed the Appellant should be compensated for the loss of his RV, the award of attorney's fees to the Appellant sets a precedent that encroaches on the exercise of a police power and would have a chilling effect on future drug forfeiture actions across this State. Therefore, the lower court's denial of attorney's fees should be upheld because the Respondent's action was a special circumstance.

II. Whether Appellant should be awarded loss of use compensation for the

Monaco 1994 RV?

A. Appellant did not preserve this issue for appeal.

Judge Hyman's order denies Appellant attorneys' fees but does not mention loss of use or prejudgment interest. See 5-12-14 Hyman Damages Order II. Appellant did not file a motion to alter or amend Judge Hyman's order under Rule 59(e), S.C. Rules of Civil Procedure. Therefore, Appellant's request for loss of use and/or prejudgment interest was not ruled upon by the lower court and cannot be reviewed by this Court. See *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (Holding a party must file a Rule 59(e), SCRCP motion to preserve an issue for review that has been raised to but not ruled upon by the trial court.).

B. Claims for replevin and trover are improper.

Appellant alleged he is entitled to loss of use because the recovery of personal property statutes allow for the award of punitive damages. See Appellant's Brief, p. 8 & S.C. Code Ann. § 15-69-210. Appellant also argued that his claim is one for trover and not replevin. In either event, actions of trover and replevin are covered in the recovery of personal property statutes. See *Reynolds v. Philips*, 72 S.C. 32, 32, 51 S.E. 523, 524 (1905) ("The statutory action of claim and delivery is practically a combination of the former actions of replevin and trover.").

Property taken pursuant to the drug forfeiture statute is not subject to replevin "but is considered to be in the custody of the department making the seizure subject only to the orders of the court having jurisdiction over the forfeiture proceedings." S.C. Code Ann. § 44-53-520(d). In other words, the judge overseeing the forfeiture

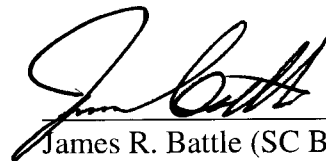
case decides what to do with the property and what damages to award. Id.

Extrajudicial actions such as replevin and trover are not proper.

Additionally, there is no evidence that Respondent committed any misconduct, which would justify trover. There was sufficient probable cause to believe Appellant used the RV in the course of dealing drugs, and the lower court granted the forfeiture of Appellant's RV. See 8-12-11 Hyman Trial Order. When this Court reversed the forfeiture due to a statutory interpretation, the lower court held a damages hearing and ordered Respondent pay Appellant \$57,640.00; an amount \$44,535.00 more than Respondent made when it sold the RV. See 5-12-14 Hyman Damages Order II & Damages Trans. I, p. 47. Now Appellant seeks additional compensation, which, under this State's statutes and case law, is not appropriate.

CONCLUSION

For the forgoing reasons, the Respondent respectfully requests that the Final Order of the Honorable Larry B. Hyman, Jr. be affirmed and that Appellant's appeal be dismissed.



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