

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

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

v.

Taurus 38 Special Pistol, SN: SF53109, 1994 Monaco RV, SN: VIN: 1RF120611R1010972 and
One Thousand Eight Hundred Forty-Seven Dollars (\$1,847.00), Defendant Property.

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

INITIAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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STATUTES

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion in denying attorneys fees to the successful Appellant?
2. Did the trial court err in failing to award pre-judgment interest and/or loss of use of the motor home for the five years preceding judgment?

STATEMENT OF THE CASE

These three cases, consolidated for trial, were brought as separate actions on February 10, 2009 (2009-CP-26-1280) and March 27, 2009 (2009-CP-26-3127, 3128). Respondent filed Affidavits in support of Motions for Service by Publication and obtained Orders for Service by Publication on April 16, 2009 and May 28, 2009.

Defendant's decedent timely Answered and Counterclaimed on May 27, 2009 and June 4, 2009. Defendant's decedent moved for Partial Summary Judgment which was granted in part and denied in part by Order dated September 22, 2009. Trial was held on July 28, 2011, and a final Order issued August 12, 2011. This Honorable Court reversed in part and affirmed in part in

Hembree v. Albin, 404 S.C. 241, 743 S.E.2^d 864 (SC App. 2013) and the Remittitur was handed down on July 2, 2013.

Respondent, unable to comply with this Honorable Court's Order, proceeded to a damages hearing before the Hon. Larry B. Hyman on November 12, 2013 and January 31, 2014 the trial Judge ordered on May 15, 2014 Judgment for money damages for the value of the motor home at the time of its seizure five years earlier and denied Appellant's request for attorney's fees, (lodestar amount approximately \$ 37,871.46 at the time) pre-judgment interest (\$22,176.80) and loss of use (\$31,500.00) of the motor home. Notice of this Appeal followed on June 11, 2014.

FACTS

The State Law Enforcement Division (SLED) obtained and executed a search warrant for Putter's Bar and Grill in the Socastee community of Myrtle Beach after undercover investigation of reported gambling activity. The Horry County Police Department was asked to assist SLED in the January 29, 2009 raid. Appellant's decedent resided in the subject motor home which he had parked behind and adjacent to the restaurant after a series of burglaries at the restaurant. The subject monies and pistol were seized from within the motor home which was itself seized. Also seized were four ounces of marijuana admittedly within the motor home. Appellant's decedent, a 65 year old retired U.S. Air Force veteran with no criminal record who was undergoing radiation therapy for prostate cancer, was admitted to and successfully completed the Pre-Trial

intervention program as a result of which his charge of possession of marijuana with intent to distribute was dismissed. No scales, baggies or other indicia of drug sales were found.

Standard of Review

Attorneys fees awards under 15-77-300 are subject to an abuse of discretion standard. Heath v. County of Aiken., 302 S.C. 178, 394 S.E.2^d 709 (1990), citing Pierce v. Underwood, 487 U.S. 552, 108,S. Ct. 2541, 101 L.Ed.2^d 490 (1988).

ARGUMENT

A. Appellant's petition for attorney's fees was timely

Had the remittitur in this case constituted a "final disposition" Respondent's argument might have merit. However, it was Respondent and no other entity which put itself in the position of being unable to comply with the Opinion of this Honorable Court by selling Appellant's motor home out of state before the appeal was heard. By doing so Respondent ensured that the case would not thereby reach "final disposition". Respondent cannot now hope to profit by its misconduct. Respondent's willful conduct alone rendered a "final disposition" by virtue of this Honorable Court's Opinion impossible.

B. Respondent's conduct was in no sense justified and involved no special circumstances.

I. Substantial Justification

The statute plainly requires one pound of marijuana be present to seize a motor vehicle, §44-53-520 (A)(6), Code of Laws of South Carolina (2002). Approximately one fourth that amount was found in the motor home of a 65-year-old cancer patient, a two time Vietnam veteran with no criminal record undergoing radiation therapy. No person was ever convicted of any crime as a result of this raid. The state stipulated there was "no drug buy" and Appellant's decedent was adamant that he had never sold marijuana to anyone.

Appellant's contention that "...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. 421" flies in the face of the plain language of the statute. As this Court stated, Id., "It is difficult to ascertain why the legislature would preclude the forfeiture of a motor vehicle pursuant to subsection (6) but allow the forfeiture of the same motor vehicle pursuant to subsections (3) or (4)."

As stated in McDowell vs. SCDSS 405 S.E. 2D 830, 304 S.C. 539 (1991): "...the agency action we examine for substantial justification is DSS' action in 'pressing its claim' against the adverse party." Therefore for purposes of this court's analysis the examination should be of all of the individual actions taken by and on behalf of the Horry County Police in the unsuccessful litigation of this forfeiture over the past six (6) years from the moment the SLED agent exclaimed "We got the RV! We got the RV!"

II. Special Circumstances

Respondent's contention that forfeiture actions are an exercise of police power and therefore "special" misapprehends the definition of "special". As set forth in Appellant's brief the trial court's finding of "special" circumstances was in no way "special". Similarly, although Respondent now takes a tack completely unrelated to the trial court's findings, Respondent's new argument fails also and for precisely the same reason. There is nothing "special" about it.

With regard to the "chilling effect" on forfeiture actions which Respondent fears would result from some modicum of compensation for Appellant and her decedent battling for years at extraordinary expense to vindicate their rights in the face of oppressive, arguably abusive County action, that seems unlikely unless the conduct displayed in the instant case is common. Appellant submits it is not.

Respondent's conduct throughout the trials of this matter has been extraordinary. Appellant submits that an award of attorney's fees would encourage the County when pursuing forfeitures to act reasonably, respond to discovery, submit pre-trial briefs, refrain from litigating the insignificant, stipulate to the obvious and compromise in the interest of justice. If the path chosen is one of scorched earth in maintaining an obviously untenable position there should indeed be consequences. An award of attorney's fees would have no chilling effect on forfeitures but hopefully would have a chilling effect on litigating forfeitures in this manner.

C. Loss of use and pre-judgment interest.

Appellant expressly argued for and submitted a proposed Order for loss of use and pre-judgment interest which the trial court through its subsequent Order denied. Respondent unlawfully procured title to and sold the RV, kept the proceeds, and refused to surrender them even after this Honorable Court's Opinion and the expiration of the time to appeal. Respondent had and continues to enjoy the interest income on those funds prior to the entry of the last judgment.

By specifically excluding replevin and not trover the legislature intended that while the process to recover possession should be governed by a stricter standard more favorable to the government, the risk of liability for wrongful detention remained the same. Accordingly, while our statutory scheme put possession further out of reach, pendente lite, by excluding actions in replevin the liability for wrongful detention was not correspondingly reduced. Had the legislature intended to exclude trover as well it could have easily so stated yet did not. By choosing “replevin” rather than “Claim and Delivery” the intent expressed is something other than a merger of the two.


Respondent's contention that "... there is no evidence that Respondent committed any misconduct" flies in the face of the record. It is precisely because of Respondent's egregious misconduct (and the utter absence of sanctions against any individual or entity as a result thereof) that we find ourselves before this Honorable Court.

CONCLUSION

The action of the Horry County Police in seizing and selling the Appellant's decedent's home was unreasonable and no special circumstances exist to justify a denial of attorney's fees. Appellant is entitled to prejudgment interest and loss of use of her decedent's home to the time of his death. The trial court's denial of all such relief was an abuse of discretion and must be reversed.

February 3, 2015

Respectfully submitted,



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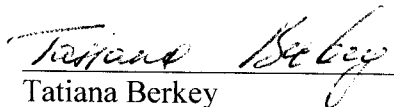
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Taurus 38 Special Pistol, SN: SF53109, 1994 Monaco RV, SN: VIN: 1RF120611R1010972 and
One Thousand Eight Hundred Forty-Seven Dollars (\$1,847.00), Defendant Property,

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

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant on J. Gregory Hembree, on Behalf of the Horry County Police Department by depositing a copy of it in the United States Mail, postage prepaid, on February 3, 2015, addressed to the attorney of record, James Richard Battle, II, Esq., P.O. Box 530, 1200 Main St., Conway, S.C. 29528-0530.


Tatiana Berkey

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February 3, 2015

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 116929
Columbia, S.C. 29211

Re: J. Gregory Hembree v. Taurus
Appellate Case No.: 2014-001344

Dear Madam Clerk,

Enclosed please find our Initial Reply Brief of Appellant, together with proof of service upon opposing counsel.

Thanking You and With Best Wishes,
Yours Very Truly,



David J. Canty

cc: clt.

James R. Battle, II, Esq.

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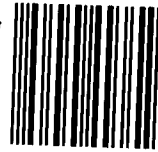
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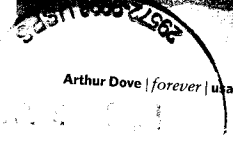


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