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, Solicitor, 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.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court abuse its discretion in denying attorneys fees to the successful Defendant?
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.

ARGUMENTS

I. The trial court's denial of attorney's fees was an abuse of discretion.

An award of attorney's fees to a prevailing party in a state-initiated civil action is governed by Section 15-77-300, Code of Laws of South Carolina (2010). The 2010 amendment (Act 125) prescribed in some detail the process for an award of attorney's fees. It provided, in pertinent part:

> "(A) In any civil action brought by the State...unless the prevailing party is the State...the court may allow the prevailing party to recover reasonable attorneys fees...if:
>
> 1.) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> 2.) the court finds that there are no special circumstances that would make the award of attorneys fees unjust. The agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or

constitutional mandate that has not been invalidated by a court competent jurisdiction.

(B) Attorneys fees allowed pursuant to subsection (A) must be limited to a reasonable time expended at a reasonable rate."

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).

A. Substantial Justification

The statute under which the State proceeds mandates that controlled substances only be seized and "summarily" forfeited to the State, § 44-53-520 (E), all other property described "may" be seized (§44-53-520 (B)). Because the seizures of the money, pistol and motor home were discretionary and not mandatory there is no resulting presumption that the State was substantially justified in pressing its claims against Defendant's decedent §15-77-300 (A), *supra*.

Absent the presumption of reasonableness arising from a statutorily mandated act, the action of the agencies (Horry County Police Department and Solicitor's Office) must be analyzed according to a "substantial justification" standard, which has been held to mean justified to a degree that could satisfy a reasonable person. An agency action supported by substantial justification is one which has a reasonable basis in law and fact. 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).

> "Under §15-77-300, the agency action we examine for substantial justification is DSS's action in 'pressing its claim' against the adverse party. We therefore look to the agency's position in litigating this case to determine whether it is one which has a reasonable basis in law and fact." M^{c}Dowell v. S. C. Dept. of Social Services, 405 S.E.2^{d} 830, 304 S.C. 539 (1991).

"DSS therefore relied on an erroneous legal conclusion in defending its decision in proceeding before the Circuit court and Court of Appeals. DSS's litigation position was not substantially justified because it had no reasonable basis in law and fact." Id. at 833, 543.

The government's position must be "more than merely undeserving of sanctions for frivolousness" Pierce v. Underwood, supra, at 566, 108 S.Ct. 2541, and must instead have "a reasonable basis in both law and fact." Id. at 565, 108 S. Ct. 2541. U.S. v. Cox, 575 F.2d 352 (CA4 2009)

As in McDowell, *supra*, the relevant facts herein were undisputed. The statutory language is plain. There was far less than half the statutory minimum quantity of marijuana present for forfeiture of a motor vehicle. As in McDowell the agency herein argued an erroneous legal theory at the trial level and maintained that position on appeal, unsuccessfully.

Because there was far less than one pound of marijuana present the Respondents position had no reasonable basis in fact. The Respondent's position had no reasonable basis in law because, as this Court noted in Hembree v. $1,847.00 I, supra, "...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 subsection (3) or (4)." Id., at 248.

B. Special Circumstances

The trial Judge herein found that the fact that Defendant's decedent possessed the admitted quantity of marijuana was a "special circumstance" which barred an award of attorney's fees and precluded further analysis of the issue. The trial court also found that it was "undisputed" that Defendant's decedent had offered to sell marijuana. (Record pp. 8, 9)

The trial court was mistaken on both counts as virtually all forfeiture cases pursuant to the statute (Section 44-53-520, Code of Laws of South Carolina (2002) involve the possession, use or sale of drugs: Gowdy v. Gibson, 391 S.C. 374, 706 S.E.2d 495 (2011) (crack cocaine,

marijuana); Medlock v. Ford F-150, 308 S.C. 68, 417 S.E.2d 85 (1992) (narcotics); Medlock v. 1985 Jeep Cherokee, 322 S.C. 127, 470 S.E.2d 373 (1995) (cocaine); Condon v. 1985 BMW, 312 S.C. 431, 440 S.E. 2d 895 (S.C. App. 1994) (controlled substance); Gadson v. Hembree, 364 S.C. 316, 613 S.E. 2d 533 (2005) (crack cocaine); Ducworth v. Neely, 319 S.C. 158, 459 S.E. 2d 896 (S.C. App. 1995) (drugs); Myers v. Real Property at 1518 Holmes St., 306 S.C. 232, 411 S.E. 2d 209 (1991) (drug trafficking); Pope v. Gordon, 369 S.C. 469, 633 S.E. 2d 148 (2006) (crack cocaine).

Further, Appellant's decedent adamantly denied ever selling or offering to sell marijuana. The trial court's finding that "It is undisputed that the Defendant invited undercover agents who were investigating defendant's illegal gambling into the motor home to use and/or buy marijuana" (R. p. 9) is controverted by the Defendant's decedent's testimony:

"Q: Did you sell marijuana in the RV?

A: No

Q: Tell the Court where, if anywhere, you ever sold marijuana?

A: I never sold marijuana"

(R. p. 126, ll. 12-16)

"Q: Did you ever sell it to them or did you just give it to them?

A: I never sold any."

(R. p. 129, ll. 7-9)

"Ct.: ...any testimony he was selling?

Ms. Elder: No, sir, your Honor, not for money."

(R. p. 131, ll. 13-16)

Respondent tried and failed in the first trial to establish that Defendant's decedent sold marijuana. In fact it was stipulated in the instant case that there was "no drug deal."

An accommodation sale is treated as simple possession, by statute, § 44-53-460, S.C. Code of Laws (1979). The Trial court's equivocation as to substantial justification (R. p. 9) is an error of law.

Having acted without substantial justification and in the absence of special circumstances the trial court's denial of attorneys fees was an abuse of discretion. M^{c}Dowell, *supra,* at 543, citing Heath, *supra*.

Horry County never conducted an undercover investigation as set forth in the trial court's Order (R. p. 8) nor is there anything in the record to suggest that it did. Horry County, in fact, argued successfully in the last appeal that SLED conducted it.

II. The trial court erred in denying pre-judgment interest and/or loss of use for the five years preceding Judgment.

Defendant's decedent purchased the motor home for $69,000, moved it to the parking lot behind the restaurant and occupied it as a residence because his restaurant was burglarized seven times (R. p. 124, ll. 2-24). The Horry County Police Department made no arrests and recovered no property as a consequence of any of the burglaries. Defendant's decedent maintained that they conducted no investigations.

Following the seizure of the motor home Defendant's decedent was required to procure other accommodations at a cost of $750.00 per month and to continue to service the debt on the (R. p. 157, ll. 7-18, p. 165, ll.13-21) motor home at the rate of $1,171.66 per month until his death 42 months later (R. p. 121, ll. 2-18). Similarly, he maintained the insurance coverage and registration and paid the ad valorem taxes thereon until the date of his death in June, 2012. (R. p. 158, ll. 4-21).

Drug forfeiture laws have been the source of well publicized excesses by law enforcement and prosecutors. It is known that the typical sum involved is small (for the calendar year 2011 the average forfeiture in the State of Georgia was $647.00) and therefore it is not cost effective for even the innocent to contest seizures. Additionally, law enforcement agencies and

Solicitors in South Carolina keep 95% of seized property and therefore have an incentive to "push the envelope" when seizing citizens' property both in actual taking and in the subsequent litigation. Indeed, following the instant raid when the undercover SLED agents are driving away one is overheard on an open microphone exclaiming "We got the RV! We got the RV!" while on a cellular phone with another SLED agent still at the scene.

Should this Court affirm the trial court's denial of attorneys fees, the award of prejudgment interest and/or compensation for loss of use of Defendant's decedent's residence would be the only disincentive for repeating the conduct herein. The record reflects that no person has ever been disciplined in any manner for: a.) the false affidavits in support of Motions for Service by Publication and unwarranted service by publication; [1] b.) the erroneous legal assertion that the one pound statutory minimum was inapplicable in this case; c.) the unjustified seizure of the motor home itself; d.) the discovery irregularities in the litigation;[2] e.) the dilatory conduct of the litigation;[3] f.) the misrepresentation to the Department of Motor Vehicles to procure a title to the motor home;[4] g.) the failure to maintain the motor home while in custody; h.) the unauthorized sale of the motor home; i.) the failure to disclose the unauthorized sale of the motor home; j.) the misrepresentation to the Court of the value of the improperly sold motor home;[5] k.) the failure to comply with the previous Order's provisions for the disposition of the proceeds of the sale of the motor home[6] and l.) the failure to disgorge the proceeds of the improper sale of the motor home for more than sixteen (16) months after this Court's ruling.

[Ft 1] [Respondent's trial counsel corresponded to Appellant's counsel on March 18, 2009 regarding the pistol case (09-CP-26-1281) and she responded by letter dated April 2, 2009, two weeks prior to her filing affidavits in 09-CP-26-3127, 3128 that despite a diligent search she was unable to locate Appellant's decedent Mr Albin was out of jail on bond at the time and subject to appear in the Court of General Sessions at the call of the Solicitor Appellant's counsel had also appeared of record at the January 25 bond hearing and the preliminary hearing) The statute provides that service by mail may be had at the address in the records of the agency which records the title, § 44-53-530(A) The Solicitor mailed her pleadings to a different address The statute further provides that service by mail may be had at the address provided by counsel for a defendant who gives written notice of his interest in the property and service may not be had by publication Id The statute further provides that the seizing agency shall check with detention facilities for the presence of the owner after receiving a non-service affidavit before attempting service by publication] (R pp 275-280)

[Ft 2] Some of Respondent's counsel's discovery responses are included in the record and are self-explanatory (R pp 315-318)

[Ft 3] The sixth anniversary of the seizure will occur January 24, 2015

[Ft 4] The application is of record and is admittedly a "mistake " (R pp 226-227)

[Ft 5] Respondent's counsel submitted an Affidavit of an expert witness that the value was $18,410 00 The same witness, on cross-examination, put the value at $56,000 plus (R p 319)

[Ft 6] Judge Hyman's Order provided for the statutory distribution, 5% to the State, 20% to the Solicitor's office and 75% to the Horry County Police Department (R p 4) Respondent's witness testified none of the provisions were complied with, (R pp 194-197)) despite the passage of fifteen months)

In the first trial the Solicitor's surprise main witness, undisclosed in Answers to Interrogatories, was candid about having learned his lesson from a previous case of failing to maintain an erroneously seized vehicle (R. p. 92, l. 22 - p. 93, l. 12) and subsequent to that testimony failed to maintain the instant vehicle.[7]

Because South Carolina's statutory scheme is so unfavorable to citizens by virtue of its low standard (probable cause) for seizure, immediate presumption of the validity of a seizure and "looking back" procedure for litigating the "confirmation" of a seizure, the citizen stands upon a very unlevel playing field after his government has seized his property. If he is ultimately successful, as was the instant decedent, it is likely to take years and the odds are stacked against him. Even with a high value asset such as the instant motor home the cost of six years' uncompromising and aggressive litigation by the Solicitor exceeded the value of the wrongfully seized asset. If attorneys fees, prejudgment interest and loss of use are all denied, the message is that the misconduct catalogued herein is licensed and may be perpetrated with impunity.

Because the statutory minimum quantity of marijuana was not present the Respondent's seizure of the property was fatally flawed at the outset. The Respondent is not entitled to the presumption of legitimacy of its patently illegitimate seizure. Yet the trial court seems to cling to the notion that the unlawful seizure was an excusable mistake for which no consequence whatever should attach. But for the improper sale of a vehicle which it had no right to possess, the Respondent would have simply tendered possession of the damaged and neglected motor home, five years later.

It is noteworthy that trial counsel for Respondent sat in the courtroom for the last oral argument in this case before this Honorable Court, inferably aware that the Respondent had obtained title to and sold the motor home to an out of state buyer seven months earlier.

[7] (See photographs of vehicle from on-line auction, (R pp 247-265)

Had this Court then known that the remedy which it ordered was an impossibility the case may have been viewed differently.

Absent the protection of the forfeiture statute the Respondent should properly be held to the standard of the Claim and Delivery statutes, Chapter 69 of Title 15, Code of Laws of South Carolina. Section 15-69-210 recites:

> "In an action to recover the possession of personal property judgment for the Plaintiff may be the possession, for the recovery of possession or for the value thereof in case a delivery cannot be had and for damages, both punitive and actual, for the detention." (emphasis added).

Under this standard Appellant would be liable for pre-judgment interest on the value of the motor home, attorneys fees and damages for loss of use of the motor home for the forty two months following its seizure until Appellant's decedent's demise. Each element of damages is a direct and proximate result of the detention. Howard v. Holiday Inns, Inc., 276 S.C. 502, 280 S.E.2^{d} 204 (1981).

The forfeiture statute recites that seized property is not subject to replevin, §44-53-520(D), but is silent as to trover.

> "Replevin was an action to recover the possession of specific chattels, together with damages for their unlawful detention. Trover was an action for damages arising out of the unlawful conversion of personal property." Reynolds v. Phillips, 72 S.C. 32, 51 S.E. 523 (1905)

Further, since the statutory language is plain and unambiguous and the facts undisputed, Respondent never had any basis to take possession of the motor home.

It is noteworthy that Respondent paid interest on the value of the motor home only from the date of the May, 2014 Order and not from the date of this Honorable Court's Opinion and Remittitur ten months earlier, nor from the date it received the proceeds of the sale of motor home, seventeen months earlier.

CONCLUSION

The trial court's denial of attorneys fees was premised upon an erroneous conclusion of law as well as factual findings unsupported and contradicted by the record. As such it amounted to an abuse of discretion and should be reversed and remanded for further proceedings to establish the reasonable amount of attorneys fees and costs. Similarly, the value of the misappropriated residence alone is not sufficient compensation for a sick, elderly veteran in light of the fact that the State has suffered no consequence for the misconduct of its agents and therefore has no incentive to prevent yet another recurrence of these circumstances. The matter must be remanded to ascertain damages for loss of use as well as pre-judgment interest.

Respectfully submitted,

December 3, 2014

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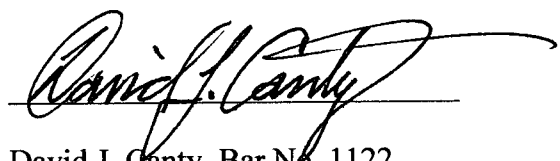
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

March 16, 2015



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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant along with the Record on Appeal 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 March 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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