THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

The Hon. Ernest F. Kinard, Jr., Circuit Court Judge
Trial Court Case No. 2008CP2101071

Opinion No. 4752
(S.C. Ct. App. Filed October 13, 2010)
Case No. 2008-CP-21-1071

James David Farmer — Respondent,

v

Florence County Sheriff's Office — Petitioner

AMENDED BRIEF OF THE RESPONDENT

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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 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 §39-15-1190 (Unauthorized use/trafficking in goods/services with counterfeit trademark) and one count of violation of S.C. Code §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 §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.

The 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 – p. 13, ¶ 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- 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. §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, 2008. The Florence County Sheriff's Office filed a *Cross-Motion for Summary Judgment, and supporting Memorandum of Law*, on August 20, 2008.

On September 2, 2008 a hearing was held before the Honorable J. Ernest Kinard in the Twelfth Judicial Circuit Court of Common Pleas. At that hearing the Court heard

oral arguments from both parties in regards to their Cross-Motions for Summary Judgment. After hearing oral arguments, the Court asked both parties to submit proposed Orders. Both parties submitted proposed Orders to the Court. Having reviewed both proposed Orders, the Court drafted and signed its own Order, directing the Florence County Sheriff's Office to return the property to Mr. Farmer within ten (10) days of the receipt of the Order and dismissing all other Cause of Actions pled by Mr. Farmer. The Court specifically noted that the Order is "obviously a reasonable compromise." The Order was dated September 26, 2008 and Farmer received written notice of entry of the Order on September 29, 2008.

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.

Both parties appealed the Order dated September 26, 2008. The Florence County Sheriff's Office appealed, seeking reversal on the finding of the trial court that ordered

the Florence County Sheriff's Office to return Mr. Farmer's property. Mr. Farmer appealed the portion of the Order dismissing his private causes of action.

Oral argument was heard before the Court of Appeals panel on April 13, 2010. The Court of Appeals panel filed an Order in the matter on October 13, 2010. The Court of Appeals affirmed the trial court's decision ordering the return of Mr. Farmer's property, while remanding the issue concerning Farmer's right to pursue private causes of action for a definitive ruling on the matter.

The Florence County Sheriff's Office petitioned the Court of Appeals for a rehearing, that petition was denied. The Florence County Sheriff's Office filed a *Petition for Writ of Certiorari* with the South Carolina Supreme Court on or about January 17, 2011 and Farmer responded to that Petition. The Supreme Court granted cert in this matter and the Florence County Sheriff's Office filed their Petitioner's Brief on or about July 13, 2012. This brief follows.

ARGUMENTS

I. THE PANEL DID NOT ERR AS MATTER OF LAW IN AFFIRMING THE TRIAL COURT'S ORDERING THE SHERIFF'S OFFICE TO RETURN THE SEIZED ITEMS.

a. The Opinion By The Court Of Appeals Is Not Contradictory Because The Florence County Sheriff's Office's Argument That Farmer Identified The Wrong Defendant Was Untimely And Improper, Ignores The Particular Facts Of The Case, And Ignores The Affirmative Duties Imposed By The Statute In Whole.

In their brief, the Florence County Sheriff's Office argues that the Court of Appeals opinion affirming the trial court's ordering the return of Mr. Farmer's property contradicts itself and the statute in question. The Sheriff's Office claims that in deciding

that Farmer could not have brought an action under S. C. Code §39-15-1195(C), the Court of Appeals ignores that the Sheriff's office itself could not have instituted proceedings under S. C. Code §39-15-1195(C). Such argument ignores not only the particular facts of this case, but also ignores other duties affirmatively proscribed to the Sheriff's Office under S. C. Code §39-15-1195.

First, Farmer does not believe it was proper for the Sheriff's Office to make this "identity argument" to the Court of Appeals. As Farmer argued in his Reply Brief below, **at no time** was such an argument made to the Trial Court. The 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*. See Appellant's Final Reply Brief of the Respondent/Appellant, p. 1.

The **sole grounds** argued by the Sheriff's Office to the trial court were that Farmer could have brought an action pursuant to S. C. Code §39-15-1195(H) that S. C. Code §39-15-1195(C) does not provide for private causes of action, and that the South Carolina Tort Claims Act barred Farmer from pursuing causes of action related to the enforcement of a law. See 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*, (R. p. 3-7).

At no time prior to filing their Response brief to the Court of Appeals did the Sheriff's Office raise the defense that Farmer "had the wrong agency." Issue not raised below is not preserved for appeal. Ex parte Carpenter, 318 S.C. 282, 458 S.E.2d 533

(1995) citing Talley v. S.C. Higher Educ. Tuition Grants Committee, 289 S.C. 483, 347 S.E.2d 99 (1986). As such, Farmer believes the argument was untimely and improperly before the Court and was therefore properly ignored by the Court of Appeals. (See also issue preservation argument in section V of this brief).

In addition to the particular facts of this case cited above concerning issue preservation, the Sheriff's Office's identity argument ignores the very specific duties S. C. Code §39-15-1195 places on them. It is uncontested that the Sheriff's Office seized Farmer's property pursuant to S. C. Code §39-15-1195. It is uncontested that the Sheriff's Office was in possession of Farmer's property after that seizure pursuant to S. C. Code §39-15-1195. Therefore it is uncontested that the Sheriff's Office owes Farmer duties in respect to his property. Specifically, S. C. Code §39-15-1195(F) places the affirmative duty on the Sheriff's Office (as the agency making the seizure) to take "reasonable steps to maintain the property." S. C. Code §39-15-1195(G) further places affirmative duties on the Sheriff's Office in submitting a report to "the appropriate prosecution agency," then lists out with specificity what information said report should contain.

In other words, the statute recognizes the practical operation of law enforcement in charging the Sheriff's Office, not just with affirmative duties regarding the protection of Mr. Farmer's property, but also with affirmative duties regarding communication with "the appropriate prosecution agency." Under the statute, the Sheriff's Office was in possession of Mr. Farmer's property and had affirmative duties to maintain the property and communicate with appropriate prosecution agencies. It is not a contradiction for the

Court of Appeals to read the statute as a whole and find that the Sheriff's Office has failed its duties and should return Farmer's property. It certainly is not contrary to the intent of the statute, as the Sheriff's Office argues, because the intent of the S. C. Code §39-15-1195 is clear from its title and the affirmative duties its subsections impose. **The statute is intended to protect property owners and their property**.

The Sheriff's Office knows there is no contradiction. For how could it be a contradiction if the Sheriff's Office itself described S. C. Code §39-15-1195(C) as "a directive to law enforcement" in their argument to the trial court? (R. p. 42). The Sheriff's Office is "law enforcement." They are the law enforcement that seized Farmer's property. They are the law enforcement that has a duty to maintain the property They are the law enforcement tasked with communicating to the appropriate prosecution agency. They are the law enforcement from which Farmer demanded his property twice, to no response. They are the law enforcement that appeared before the trial court, answering Farmer's complaint without ever arguing they were not responsible for instituting forfeiture proceedings under S. C. Code §39-15-1195(C). A such, there is no contradiction in the Court of Appeals finding the Sheriff's Office responsible for continuing to hold Farmer's property and ordering them to turn it over.

b. No Special and Important Reasons Exist to Reverse the Court of Appeals Given the Facts of This Case.

The Sheriff's Office also argues in their brief that special and important reasons exist for reversal. *FCSO Brief* p. 13. Those reasons are that many smaller agencies have no attorney on staff and that somehow the Court of Appeals decision will suppress

seizure activity. Such claims ignore the facts of this case, the realities of the way law enforcement operates and the Sheriff's Office own interpretation of the forfeiture statutes.

First, the Florence County Sheriff's Office has in house legal counsel.[1] In addition to in-house counsel, the Florence County Sheriff's Office has been represented throughout this matter by Florence County legal counsels.

Additionally, any policing agency has legal counsel to pursue forfeitures through the practical co-operations they utilize in day-to-day law enforcement: i.e., their resident Solicitor's office or the Attorney General's office. A fact conceded by the Sheriff's office and oral argument before the Court of Appeals.

In other words, the Sheriff's Office acknowledged at oral argument before the Court of Appeals that law enforcement enjoys the benefit of legal representation from the State in everything done in relation to these types of prosecutions. Yet now, the Sheriff's Office wishes to ignore that reality in an attempt to create special reasons to justify reversing the Court of Appeals order in this matter. No such special reasons exist and such argument fails.

II. THE OPINION IS IN LINE WITH FORFEITURE LAW AND DOES NOT MISCONCEIVE THE "OPPORTUNITY TO BE HEARD."

The Sheriff's Office argues the Court of Appeal's opinion was wrong because federal due process case law focuses only on an "opportunity to be heard" and Farmer had such an opportunity through S. C. Code §39-15-1195(H), which he did not exercise.

[1] The FCSO website lists Capt. Mike Nunn as "Public Info/Legal Counsel." http://www.fcso.org/phone-listing , last read July 23, 2012.

Further, the Sheriff's Office argues a "66-day delay post-plea" is not enough to amount to a due process violation.

Farmer argued extensively below why S. C. Code §39-15-1195(H) was not available to him for relief. Farmer argued that subsection was obviously meant for the relief of those who would qualify as an "innocent owner," not for the relief of those actually accused of trafficking and possessing counterfeit goods, as Farmer was.[2] However, the Sheriff's Office takes issue with the Court of Appeal's finding that any failure by Farmer to exercise an option under subsection (H) does not excuse the Sheriff's Office's failure to perform their duty under subsection (C). To make this argument, the Sheriff's Office must ignore the facts of this case.

The first fact the Sheriff's Office must ignore is that Farmer has consistently argued that he was unable to file an action under S. C. Code §39-15-1195(H). The Sheriff's Office agrees with this argument. The Sheriff's Office cites case law language in their brief stating that "property that is ordinarily used for unlawful purpose may not be returned, regardless of any violation, constitutional or statutory" and that "since this property was contraband, they have no right to have it returned to them." In summing up their argument, the Sheriff's Office states "the items have not yet been finally ruled to be contraband; but **that is scarcely reason to order them returned without a showing as to whether the items are, in fact, counterfeit**. *FCSO Brief* p. 26-27, emphasis added.

[2] Farmer would note that S. C. Code §39-15-1195(H)(3) actually incorporates the term "innocent person" in support of his argument that subsection H is restricted to those persons the law recognizes as "innocent owners," ie., persons not actually charged with a violation of the law.

The Sheriff's Office is trying to take both sides of this issue. On one hand, the Sheriff's Office argues that Farmer should have brought an action under S. C. Code §39-15-1195(H); on the other hand, the Sheriff's Office argues that Farmer cannot have his property returned via subsection H because there has to be a forfeiture hearing. In short, the Sheriff's Office argues that Farmer should have sought relief which could not be granted. It is a circular argument which results in stranding Farmer in a position where he can never obtain the return of his property.

The Sheriff's Office claims that "Farmer had the option to be heard by a circuit court judge. He chose not to take advantage of it." *FCSO Brief* p. 17. This ignores the fact that Farmer **did** bring the matter before a circuit judge. Without Farmer doing so, there would be no present case. Farmer availed himself of the only option to be heard he believed he had at his disposal, a belief the Sheriff's Office seems to share, at least during certain portions of their brief.

The second fact that the Sheriff's Office ignores, is that the Sheriff's Office was, or should have been, in control and possession of Farmer's property when Farmer promptly demanded its return. As the Sheriff's Office concedes, this first demand came within two (2) weeks of the criminal charges against Farmer being disposed of via the January 23, 2008 plea. (R. p. 32). That demand correspondence was sent out February 5, 2008. (R. p. 34). After receiving no response from the Sheriff's Office, a second demand followed via March 19, 2008 correspondence. (R. p. 37). After the Sheriff's Office failed to respond to Farmer's demands, a summons and complaint was filed on May 30, 2008. (R. p. 7).

In summary, Farmer made his first demand within 13 days of his criminal charges being resolved. Farmer made his second demand within 56 days of his criminal charges being resolved. Farmer did not file suit in this matter **until 128 days after his criminal charges had been resolved**. So, despite two specific demands made by Farmer on the Sheriff's Office, putting them on notice that Farmer was demanding his property back and that the property did not violate any trademarks, the Sheriff's Office refused to act. This refusal to act was made despite the affirmative duties placed on the Sheriff's Office by S. C. Code §39-15-1195.

The third fact that the Sheriff's Office ignores, is that not only did the Sheriff's Office refuse to act, but it also did not provide the Court of Appeals with "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." Farmer v. Florence County Sheriff's Office, 390 S.C. 358 at 365. This failure to offer justification led directly to the Court of Appeals' due process discussion in response to the Sheriff's Office's assertion 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." The Court of Appeals found such argument disregarded the purpose of a forfeiture hearing, which is "to confirm the state had probable cause to seize the property in question." Farmer at 365 citing Gowdy v. Gibson, 381 S.C. 225 at 229 (Ct. App. 2008). Farmer addresses the probable cause issue further in section III of this brief, infra.

The Sheriff's Office ignores that the statue in question here, goes above and beyond an "opportunity to be heard." S. C. Code §39-15-1195(C) specifically places a

duty on law enforcement, a "directive" as the Sheriff's Office conceded, to institute forfeiture proceedings "within a reasonable time." The Court of Appeals specifically noted the belief that this subsection was included by the General Assembly to address due process concerns. The South Carolina General Assembly and courts are certainly within their rights to be more protective of the constitutional rights of its citizens than the United States Constitution and its amendments allow. "It is firmly established that state courts may interpret their own constitutions in such a way as to expand rights conferred by the Federal Constitution." State v. Austin, 306 S.C. 9, 16, 409 S.E.2d 811, 815 (Ct. App. 1991). See also South Carolina v. Forrester, 343 S.C. 637, 644, 541 S.E.2d 837, 841 (2001) (stating "the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence").

The Sheriff's Office's brief discusses at length perceived problems with the Court of Appeal's citing of two federal cases, but overlooks the context in which they were cited. United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983), was cited specifically **after** the Court of Appeals noted their belief that S. C. Code §39-15-1195(C) was included by the General Assembly to address due process concerns.

In citing the $8,850 case, the Court of Appeals specifically quoted "The 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

by the right to a speedy trial." Farmer at 364-365. The United States Supreme Court went on in the $8,850 case to say:

> The Barker balancing inquiry provides an appropriate framework for determining whether the delay here violated the due process right to be heard at a meaningful time. We have often repeated the seminal statement from Morrissey v. Brewer, 408 U.S. 471, 481 (1972), that "due process is flexible and calls for such procedural protections as the particular situation demands." E.g., Schweiker v. McClure, 456 U.S. 188, 200 (1982); Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 14-15, n. 15 (1978). The flexible approach of Barker, which "necessarily compels the courts to approach speedy trial cases on an ad hoc basis," 407 U.S., at 530, is thus an appropriate inquiry for determining whether the flexible requirements of due process have been met. As we stressed in Barker, none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case. $8,850 at 564-565. Citing Barker v. Wingo, 407 U.S. 514 (1972)

The Barker case established a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant. $8,850 at 564.

It is uncontested in this case that Farmer asserted his rights by demanding his property be returned. Farmer did so by virtue of the two demand letters and his lawsuit. These three separate demands are further reason why the Court of Appeals did not feel the question over whether S. C. Code §39-15-1195(H) applied to Farmer mattered. **There is ample uncontested evidence in the record that Farmer demanded his property be returned and vigorously pursued a right to be heard**.

It is also uncontested that Farmer has been prejudiced. There is no question that Farmer operates a retail store and that the seized property was inventory. Farmer specifically notified the Sheriff's Office that the seized property represented a large portion of his inventory and its seizure was greatly hindering his ability to operate his business. R. p. 34. **As of August 30, 2012, Farmer will have been denied his property for five (5) years**.

That leaves two remaining Barker factors. The Sheriff's Office seems to focus their argument on the length of delay, arguing "a 66-day post-plea delay" is not enough for a due process violation. Obviously, that is not the law. Barker makes it clear that there is no set "statute of limitations" for a Due Process violation, rather it is the flexible approach of the Barker test that courts should employ on a case by case basis.

As to the length of delay, the United States Supreme Court noted that the length of delay "is to some extent a triggering mechanism," adding:

> Little can be said of on when delay becomes presumptively improper, for **the determination depends on the facts of the particular case**. Our inquiry is the constitutional one of due process; we are not establishing a statute of limitations. Obviously, short delays – of perhaps a month or so – need less justification than longer delays. $8,850 at 565, emphasis added.

It would appear, that the Sheriff's Office comes up with this "66-day post-plea delay" by counting the number of days between the disposition date for the violation of S. C. Code §39-15-1190 and the ten (10) day response time Farmer notified the Sheriff's Office he was giving them in his March 19, 2008 second and final demand letter. Of course, it's telling the Sheriff's Office uses the 66-day calculation when in fact **128 days**

passed from the time his criminal charges were disposed of until this suit was filed. **115 days** passed from his first demand for the return of his property until the suit was filed. The Sheriff's Office has simply chosen to ignore the additional **62 days** between the end of that 10-day deadline and the filing of the complaint giving rise to this case in an effort to bolster their argument that there are no due process concerns in this matter. It is an anemic argument overcome by the simple arithmetic of time.

The actual post-plea delay Farmer endured before finally being compelled to file suit in this matter is almost twice as long as the Sheriff's Office claims. **The Sheriff's Office waited over 2 years and 2 months from Farmer's first demand for the return of his property to even bring up the need for a forfeiture hearing.**[3] These are the delays for which the Court of Appeals specifically found the Sheriff's Office had offered no "concrete reasons to justify its refusal to return Farmer's merchandise or any meaningful argument that its delay in instituting forfeiture proceedings was justified." Farmer at 365. As such, Farmer argues this was more than enough of a delay for the Court of Appeals to find that this was exactly the type of due process violation the General Assembly intended for S.C. Code §39-15-1195(C) to protect against.

There was no error in the Court of Appeals considering all of the facts of this case and finding that Farmer was entitled to a return of his property under the reasoning adopted by the United States Supreme Court in the $8,850 case, specifically the Barker balancing inquiry, after the Court of Appeals found the intent of S.C. Code §39-15-

[3] Farmer's first demand letter was sent February 5, 2008. Oral argument to the Court of Appeals was April 13, 2010. That is time duration of approximately 2 years, 2 months and 8 days (798 days) assuming the letter was received by the Sheriff's Office on February 6, 2008.

1195(C) is to address just such due process concerns. The Sheriff's Office wants to take the fact that the Court of Appeals had a due process discussion and argue that since Farmer did not make any due process claims, the Court of Appeals opinion was in error. In doing so, the Sheriff's Office ignores that the due process analysis the Court of Appeals engaged in arose directly out of their analysis of the duties and requirements of S. C. Code §39-15-1195(C), the subsection whose language Farmer specifically cited in his complaint. (R. p. 13, ¶ 14).[4]

Clearly, it was not error for the Court of Appeals to analyze the statutory language cited in Farmer's complaint and to base their ruling on that analysis. That such an analysis delved in to a discussion of due process does not make it error. It simply provides the framework by which the Court of Appeals considered the duty the General Assembly had intended for S. C. Code §39-15-1195(C) to place on law enforcement agencies such as the Sheriff's Office. It certainly was not error for the Court of Appeals to look at the particular facts of this case and find that Farmer is entitled to have his property returned.

III. ORDERING THE RETURN OF FARMER'S PROPERTY DOES NOT CONFLICT BASIC PRINCIPLES OF STATUTORY CONSTRUCTION.

The Sheriff's Office's arguments concerning the error in the court ordering return of property for the due process violations ignores the facts of this case: that the Sheriff's

[4] Farmer also extensively discussed the specific language of S. C. Code §39-15-1195(C) and the duties it created in section I, subsection C of his Appellant's brief to the Court of Appeals, wherein he argued that the trial court was in error to dismiss his private causes of action.

Office never argued below that a forfeiture hearing should be ordered.[5] Rather, despite neglecting their statutory duties under S. C. Code §39-15-1195 and refusing to turn over Farmer's property, the Sheriff's Office is content to stand before the courts arguing that Farmer has forfeited his property without ever having a hearing to justify said property's taking by the government. This is despite Farmer's two written demands on the agency holding his property and subsequent lawsuit against said agency, as well as the statutory requirement the State conduct such a hearing within a reasonable time. Such a result would certainly be against the purpose and intent of S. C. Code §39-15-1195 which is obviously intended to protect the property rights of South Carolina citizens.

Several times in their brief, the Sheriff's Office claims that probable cause to seize Farmer's property was never disputed. That is not the case. It is quite clear that Farmer contests the Sheriff's Office's right to continue to hold his property, as Farmer had denied the property in question is in violation of trademark law. Farmer refused to plea guilty to any charges concerning use/trafficking in goods with counterfeit trademark. From the first demand letter the Sheriff's Office received, the Sheriff's Office was placed on notice that Farmer maintained he had legally purchased his goods from reputable trade publications and that "there is no trademark violation." (R. p. 34). Farmer's challenge to the alleged illegality of the property is itself a challenge of the probable cause by which the Sheriff's Office bases their right to withhold Farmer's property.

[5] See footnote #1 to the Court of Appeals opinion.

In both his *Motion for Summary Judgment* and at the hearing before the trial court, Farmer specifically demanded the return of the property. (R. p. 29, ¶ 8 and p. 101). As the Court of Appeals noted, the Sheriff's Office never asked for, nor instituted a forfeiture hearing before being ordered to return Farmer's property back over to him. It wasn't until oral argument that the Sheriff's Office claimed the relief the trial court should have provided was a forfeiture hearing. Farmer at 363, footnote 1. It is apparent that the Court of Appeals was concerned about what legal right the Sheriff's Office claimed to continue to withhold Farmer's property. The only response the Sheriff's Office provided the Court of Appeals was an untimely argument that it was someone else's fault and an equally untimely argument that they were entitled to a forfeiture hearing in the matter. In short, the Sheriff's Office position is that they have nothing to do with forfeiture hearings, but you can't order them to give this property back without giving them a forfeiture hearing.

Given the facts of this particular case, it was well within the Court of Appeals discretion to strike down such argument and affirm the trial court's decision to order the return of Farmer's property under the theory that the Sheriff's Office had failed its own duties under the statute and that Farmer had been denied the due process protection that S. C. Code §39-15-1195(C) was intended to provide.

IV. THE TRIAL COURT DID NOT LACK JURISDICTION IN THIS MATTER.

Farmer filed a Summons and Complaint in this matter which alleged cause of action for 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. Farmer cited S. C. Code §39-15-1195 in his complaint and specifically cited the exact language of S. C. Code §39-15-1195(C) in his complaint. (R. p. 12-13). At the hearing, Farmer's counsel specifically asked the Court to order the return of Farmer's property. (R. p. 101, l. 23-24). No objection was made in regard to that prayer for relief.

The Sheriff's Office now, for the first time, seeks to argue that the trial court lacked jurisdiction over this case. This argument was never made before the trial court, nor the Court of Appeals.

Regardless, the idea that the trial court in this matter lacked jurisdiction fails. S.C. Code §44-53-530, which governs forfeiture proceedings, states that the court having jurisdiction over forfeiture proceedings is the "court of common pleas for the jurisdiction where the items were seized." S.C. Code §44-53-530(A). Farmer filed his lawsuit in the Florence County Common Pleas Court. It is undisputed that property seized was seized in Florence County. As such, the trial court had jurisdiction to hear this matter.

Further, Farmer's complaint specifically alleged a cause of action of Negligence Per Se for the failure of the Sheriff's Office to institute forfeiture proceedings pursuant to S. C. Code §39-15-1195(C). Farmer argued extensively in his briefs below why he believed he had a private cause of action. The Court of Appeals has remanded that portion of the case back to the trial court for additional findings concerning his private causes of action. There is no question that Farmer's private causes of action were filed in the proper court. At the hearing, Farmer specifically asked for his property back, which

could easily have been interpreted by the trial court as an application under S. C. Code §39-15-1195(H). No objection was made to that request at trial. S. C. Code §39-15-1195(H) allows that an application under (H) "may proceed as a forfeiture hearing held pursuant to the provisions of S. C. Code §44-53-530." S. C. Code §39-15-1195(H). As such, it was within the trial court's discretion to treat Farmer's lawsuit itself as an application under S. C. Code §39-15-1195(H) and subsequently issue an order requiring the Sheriff's Office to return Farmer's property.

V. THE SHERIFF'S OFFICE DISCUSSION OF BOWEN IS UNWARRANTED GIVEN THE SPECIFIC FACTS OF THIS CASE AS IT PERTAINS TO FARMER. HOWEVER, ANY ISSUE PRESERVATION ANALYSIS WOULD BE DISPOSITVE AGAINST THE SHERIFF'S OFFICE.

The Sheriff's Office brief also contains argument concerning the remand portion of the Court of Appeal's order, taking issue with the Court of Appeal's reliance on Bowen v. Lee Processing Sys. Co., 342 S.C. 232 (Ct. App. 2000). The Sheriff's Office argues that the premise of Bowen which allows an appellate court to remand a case back to the trial court so it can make necessary findings is in conflict with decisions rendered by the Supreme Court of South Carolina which stand for the premise that it is the duty of the appellant to provide sufficient basis for review.

The Sheriff's Office relies on the Supreme Court's decision in I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406; 526 S.E.2d 716 (2000). In I'On, the Supreme Court reiterated previous rulings that if the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review. I'On at 422.

Farmer extensively argued his right to bring private causes of action to the trial court. Specifically, Farmer argued at the hearing before the trial court that he met all of the criteria under Summers v. Harrison Constr., 298 S.C. 451; 381 S.E.2d 493 (Ct. App. 1989), for there to be a "special duty" that the Sheriff's Office breached under S. C. Code §39-15-1195(C). R. p. 99 – 100. The S.C. Tort Claims Act does not create causes of action, rather, it removes the common-law of sovereign immunity in certain circumstances to the extent mandated by the Act. Summers at 451. In Summers, the Court of Appeals dealt with the "special duty" exception to the "public duty" rule. This Court has held that the public duty rule comes in to play when a plaintiff relies upon a statute as creating a duty. The public duty rule recognizes that, generally, statutes which create or define the duties of a public office create no duty of care towards individual members of the general public. When a plaintiff pleads a negligence cause of action against a governmental entity that is founded upon a statutory duty, then whether that duty will support the claim should be analyzed under the rule. Arthurs v. Aiken County, 346 S.C. 97 at 105-106; 551 S.E2d 579 at 583 (2001). Summers supports that part of that analysis has to be whether or not the special duty exception applies. This Court has found that only if it is found that a duty exists under such an analysis and the other negligence elements are shown, will it be necessary to reach SCTCA immunities issues. Arthur at 105.

The trial court's order that has been appealed would appear to have simply decided that there was no duty under a public duty rule and special duty exception analysis. This might explain the order's specific language that "the Tort Claims Act which remedy the Plaintiff should pursue, etc. are not mentioned." (R. p. 91). Farmer

certainly believed he had made enough of a showing from the uncontested facts of the case to support that there was a special duty that had been breached. Based on that belief and upon receiving the trial court's order and the subsequent *Notice of Appeal* by the Sheriff's Office, Farmer appealed. The idea that Farmer did not preserve these issues ignores the record.

In making this argument, the Sheriff's Office must also once again ignore specific facts of this case. The order from the trial court in this matter is dated September 26, 2008. The order was also filed that same day. (R. p. 91). September 26, 2008 was a Friday. The Sheriff's Office has previously admitted that the parties received written notice of the entry of judgment on September 29, 2008 and that they filed their *Notice of Appeal* on October 6, 2008.

The South Carolina Rules of Civil Procedure provide that a party has ten (10) days from the receipt of written notice of entry of an order to file a motion to alter or amend a judgment. SCRCP 59(e). Further, the South Carolina Appellate Court Rules clearly state that "upon the service of the notice of appeal, the appellate court shall have **exclusive jurisdiction** over the appeal..." SCACR 205, emphasis added.

In this case, the Sheriff's Office filed their notice of appeal in this matter before time had run for Farmer to file a motion to alter or amend.[6] By doing so, the Sheriff's Office deprived Farmer of the ability to seek an order from the trial court clarifying the grounds for the dismissal of Farmer's private causes of action. Having done this, the

[6] The tenth (10th) day after receiving written notice of entry of judgment would have been October 8th, 2008.

Sheriff's Office now argues that because Farmer did not win this race to the court house, he is forever barred from receiving a ruling from the trial court which will allow for proper appellate review of that portion of the order which Farmer appeals. Such a result would be absurd. It cannot possibly be in the interests of justice to allow such a "race to the courthouse" argument to prevail.

Additionally, since the Sheriff's Office voluntarily elected to file their notice of appeal prior to filing a motion to alter or amend, they were not barred as Farmer was due to jurisdiction being transferred to the appellate court. Based upon their Bowen argument, the Sheriff's Office should have filed a motion to alter or amend the trial court's order to insist the trial court address the issues they appealed. In fact, the trial court failed to address the Sheriff's offices main position. Nowhere in the trial court's Order does the court address the Sheriff's Offices argument that law enforcement agencies have the right to hold allegedly counterfeit goods even if the goods are not subject of a criminal proceeding and that the inquiry into the law enforcement's motives is not proper in a hearing for the return of confiscated items.

The Sheriff's Office waited until oral argument to raise the issue of a forfeiture hearing, waited until their response brief to raise the identity argument issue and they failed to file any motion to alter or amend to ask that the trial court clarify the order to address the position in their primary appeal, despite the fact that the trial court had not addressed that issue. Unlike Farmer, the time for the Sheriff's Office to file such a motion was not prematurely cut off by any filing by the opposing party. The Sheriff's

Office voluntarily elected to proceed to the appellate level by filing their *Notice of Appeal* and thus abandoned these issues.

VI. THE COURT OF APPEALS DECISION TO REMAND FARMER'S PORTION OF THE APPEAL BACK TO THE TRIAL COURT FOR ADDITIONAL FINDINGS IS NOT SUBJECT TO APPEAL.

As a general rule, only final judgments are appealable. Culbertson v. Clemens, 322 S.C. 20; 471 S.E.2d 163 (1996). Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory and not final. Mid-State Distrib., Inc. v. Century Importers, Inc., 310 S.C. 330 426 S.E.2d 777 (1993).

Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within S.C. Code §14-3-330. Ex Parte Wilson, 367 S.C. 7; 625 S.E.2d 205 citing Baldwin Const. Co. Inc. v. Graham, 357 S.C. 227; 593 S.E.2d 146 (2004).

S.C. Code §14-3-330 provides:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in the law cases, and shall review upon appeal:
>
> 1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> 2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues

the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code §14-3-330 (2012)

The Court of Appeals decision to remand Farmer's appellate issue back for the necessary findings of fact and conclusions of law meets none of the S.C. Code §14-3-330 criteria listed above. As such, the Sheriff's Office attempts to have that portion of the Court of Appeals order reversed are in error.

CONCLUSION

For the reasons stated above, this Court should AFFIRM the Court of Appeals opinion in this matter in full.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM FLORENCE COUNTY
COURT OF COMMON PLEAS

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

Opinion No. 4752
(S.C. Ct. App. Filed October 13, 2010)
Case No. 2008-CP-21-1071

James David Farmer .....Respondent,

v.

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

CERTICATE OF COUNSEL

The undersigned hereby certifies that Respondent's Brief complies with Rule 211(b), SCACR.

September 13, 2012

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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James David Farmer — Respondent,

v.

Florence County Sheriff's Office — Petitioner.

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a copy of the Amended Brief of the Respondent was served on opposing counsel this 13th day of September, 2012 by depositing a copy of the same in the United States Mail, postage prepaid, addressed as follows:

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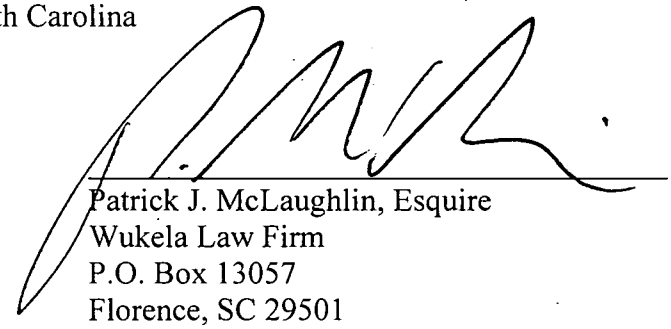

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September 13, 2012

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S.C. Supreme Court

Ms. Linda Allen
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Farmer, James D. v. Florence Sheriff's
Case Tracking No. 2011-183126

Dear Ms. Allen:

Enclosed please find copies of my Amended Respondent's Brief, the original and 14 copies, along with the Certificate of Service. I apologize for not sending all the copies earlier this week, but the denial of the Motion to Supplement the Appendix was a unique situation to our office and we got a bit confused that this was the final brief that we were to file all the copies with the court.

By courtesy copy of this correspondence, I am serving opposing counsels with my amended filings.

With kind regards, I am,

Yours truly,

WUKELA LAW FIRM

PATRICK J. MCLAUGHLIN

PJM/ksc
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