THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-002006
Case No. 2019-CP-33-0675

John Pendarvis and Lawton Drew, ……. Respondents,

v.

South Carolina Law Enforcement Division and
South Carolina Department of Agriculture, ……. Defendants,

Of which, South Carolina Law Enforcement Division is…… Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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I. The Circuit Court erred in granting a preliminary injunction that failed to maintain the status quo or balance the equities of the parties.

The Appellant South Carolina Law Enforcement Division ("SLED") contends that the Circuit Court erred in granting a preliminary injunction that authorized the Respondents to cultivate, harvest, and sell the hemp crop, all of which were illegal under South Carolina law. In doing so, the Circuit Court did not maintain the status quo, which is the primary purpose of a preliminary injunction. Moreover, the Circuit Court failed to balance the equities between the parties, as is a required and critical part of the analysis. *See*, *Foreman v. Foreman*, 280 S.C. 461, 313 S.E.2d 312, 314 (Ct. App. 1984), ("the court of equity must 'balance the equities' between the parties in determining what if any relief to give. The equities on both sides must be taken into account").

In response, the Respondents do not show that the preliminary injunction actually preserved the status quo. Instead, the Respondents suggest that the preliminary injunction was needed to prevent irreparable harm to the Respondents, and for that reason, it was proper. The Respondents' argument is illogical and unsupported by the evidence. First, the Respondents offer a lengthy argument that the evidence did not establish that the hemp crop at issue exceeded the "federally defined THC level for hemp" which thereby qualified the hemp crop as marijuana,

a Schedule I controlled substance that is illegal to sell and purchase under South Carolina law. *See*, S.C. Code Ann. §§ 46-55-10(7), 44-53-190. However, the Respondents concede that "[t]he trial court was actually presented with conflicting evidence about whether the hemp crop at issue exceeded the 'federally defined THC level for hemp.'" *See*, Respondents' Brief, p. 5. Thus, as SLED argues, the Respondents, who had the burden of proof, did not prove, nor did the Circuit Court find, that the hemp crop was not a controlled substance; yet, the Circuit Court allowed the crop to be harvested *and sold*. But more importantly, SLED has argued and shown that, even if the hemp crop did not exceed that THC threshold, the evidence is nonetheless *undisputed* that the Respondents had not been issued a license for the cultivation of hemp at the site in Marion County. The Respondents do not refute that. Hence, the hemp crop is contraband per se and illegal under the Hemp Farming Act, S.C. Code Ann. § 46-55-10, *et seq*. In short, there is no dispute that the Circuit Court authorized the Respondents to harvest *and sell* an illegal hemp crop, the THC level notwithstanding.

Remarkably, the Respondents suggest that the Circuit Court "balanced the equities" by "requiring the proceeds of any sale of the hemp crop be deposited in trust and held pending resolution of the litigation." *See*, Respondent's Brief, p. 7. That is illogical. The State's primary interest is to prevent the distribution and sale of the hemp crop which was indisputably an illegal crop under the Hemp Farming

Act and was potentially, depending on conflicting evidence, also marijuana. Thus, the preliminary injunction *allowed for the sale and distribution of an illegal crop*. Clearly, no balancing of equities was performed.

The Respondents also have to go beyond the evidence presented below to attempt to justify the preliminary injunction as issued. The Respondents claim that it is "common knowledge" that "a matured crop left in the field will surely rot." *See*, Respondent's Brief, p. 8. There are several flaws in this reasoning. First, the Respondents presented no admissible evidence that the matured hemp crop, if not harvested, would "rot in the field." Second, the Respondents never requested the Circuit Court to take judicial notice of that "fact" and only raise it for the first time on appeal. Third, it is not a proper subject for judicial notice.[1] It is not "common knowledge" that hemp, like fruit or vegetables, will rot if not timely harvested. In fact, like other plants, the opposite is most likely true; the hemp will continue to thrive if not harvested. Most importantly, however, even if the Respondents are correct and the hemp must be harvested so as not to "rot in the field," that only justifies the *harvest* of the crop as part of the preliminary injunction -- certainly not its *immediate distribution and sale*. Obviously, the crop could have been harvested

[1] *See, Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194, 196 (1984) ("For a fact to be subject to judicial notice, it must be so notorious that the court may properly assume its existence without proof. Unless the fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability, it is not subject to judicial notice").

and warehoused rather than being harvested and sold, which is what the Circuit Court authorized.

In sum, the Circuit Court's preliminary injunction did not preserve the status quo nor balance the equities of the parties. It allowed for the sale and distribution of an illegal crop under South Carolina law, and that injunction should be dissolved.

II. The Circuit Court erred in using its equitable powers to enjoin legitimate and valid law enforcement action where the hemp crop at issue was contraband per se and to which the Respondents have no cognizable property rights which could be "irreparably harmed."

The Circuit Court also erred in enjoining a legitimate and valid law enforcement action. South Carolina law provides that equity will not unjoin a criminal enforcement unless the law on which the enforcement is based is "clearly void" and "irreparable injury to property rights may result." *Cain v. Daly*, 74 S.C. 480, 55 S.E. 110, 112 (1906). In their response brief, the Respondents do not address this issue. The Respondents, like the Circuit Court, ignore the fact that they did not allege, let alone make any showing, that the Hemp Farming Act or the applicable provisions of the Controlled Substances Act are "clearly void." The reason for that is obvious. Those legislative enactments are not clearly void. That

alone demonstrates that the Circuit Court should have declined to use its equitable powers to enjoin SLED from enforcing the criminal laws of the State.

The Respondents do address the second part of the analysis -- whether the hemp crop is contraband per se to which the Respondents have no cognizable property rights that could be "irreparably harmed." The Respondents insist that the hemp crop was not proven to be in excess of the "federally defined THC level for hemp," and thus, was not shown to be marijuana. However, the Respondents have no credible argument to contest the undisputed fact that the Respondents had not been issued a license by the South Carolina Department of Agriculture ("SCDA") for the cultivation of the hemp at the site in Marion County. They instead suggest that "there is an unsettled question as to whether or not the Respondents' crop was 'contraband per se' due to the location issue." *See*, Respondents' Brief, p. 9. That is not the case.

In a series of opinions, the Attorney General has opined that "possession and handling of unprocessed or raw hemp material without a license is contraband per se and subject to seizure." *See*, S.C. Atty. Gen. Op., 2019 WL 3855186 (August 8, 2019). That is consistent with South Carolina case law which provides that contraband per se includes "things that may be forfeited because they are illegal to possess and not susceptible of ownership." *Mims Amusement Co. v. South Carolina Law Enforcement Division*, 365 S.C. 141, 621 S.E.2d 344, 348 (2005).

In its opening brief, SLED also cited United States Supreme Court authority and case law from other federal courts for the well-settled principle that a citizen has no property rights in contraband per se to which due process safeguards attach. The Respondents cite no counter authority. Instead, they rely on the Attorney General's opinion which states only that a post-seizure hearing *may* be required in the event there is a factual question as to whether the seized hemp crop qualifies as contraband per se.

In the case at bar, that was never an issue. On May 1, 2019, the SCDA issued a 2019 Hemp Grower License to the Respondent John Pendarvis as authorized by the Hemp Farming Act. By its express language, the license authorized Pendarvis "to engage in the growing of hemp *on such approved growing locations on records with the Department* during the calendar year shown above." (License). (Emphasis added). It is undisputed that the tract in Marion County at issue in this litigation was not a "licensed growing location" for Pendarvis. The Respondents have made no allegation in their verified Complaint nor presented any evidence by way of sworn affidavit to contest that critical fact.

At best, the Respondents argue that Pendarvis submitted an amendment application to add the acreage in Marion County, but that was not submitted until *after the property in Marion County had already been planted*. That plainly violated the terms of the South Carolina Hemp Farming Program Participation

Agreement ("Participation Agreement") entered with the SCDA, specifically Section II titled "Licensed Growing Locations," which required that "Permit Holder shall Submit a Permit Amendment Application and obtain written approval from a representative of SCDA *before implementing any change to the license sites* stated on the Permitted Grower's Application." (Agreement). (Emphasis added). Pendarvis also violated his agreement "to apply for registration of all growing, handling, and storage location[s], including GPS coordinates, *and receive SCDA approval for those locations prior to having living (non-cut) Hemp on those premises*." (Agreement). (Emphasis added).[2] Thus, it is undisputed that Pendarvis violated these provisions by planting the Marion County site, which had not been authorized by the SCDA. His submittal of an amendment application *after* the site had been planted was untimely and did not comply with Section II requirements.

In sum, based on the Hemp Farming Act and the terms of the Participation Agreement, there is no question that the hemp crop at the Marion County site is contraband per se. The Attorney General Opinions do not state otherwise. Accordingly, the Respondents, as a matter of law, have no property rights with respect to the hemp crop at issue.

[2] Section II is in compliance with Section 46-55-20(B)(1) of the Hemp Farming Act, which states in mandatory language that "[a] person applying for a license to cultivate hemp shall provide to the department a legal description and global positioning coordinates sufficient to locate the fields or greenhouses used to cultivate hemp." S.C. Code Ann. § 46-55-20(B)(1).

III. The Circuit Court erred in granting a preliminary injunction that was unsupported by the facts as pled by the Respondents in their Complaint.

Under South Carolina law, "[a] plaintiff's entitlement to an injunction requires the complaint to allege facts sufficient to constitute a cause of action for injunction while also showing an injunction must be reasonably necessary to protect the legal rights of the plaintiff pending in the litigation." *County of Richland v. Simpkins*, 348 S.C. 664, 560 S.E.2d 902, 904 (Ct. App. 2002). Rule 65, SCRCP, specifically states that temporary restraining orders must be based on "specific facts shown by affidavit or by a verified complaint," and that requirement does not change once the court considers making a temporary restraining order into a preliminary injunction.

In the case at bar, the Respondents submitted their verified Complaint which contains very limited facts. The Respondents did not file any supporting affidavits. SLED submits that the "facts" as verified in the Complaint are insufficient to support the preliminary injunction that was issued by the Circuit Court. In other words, the facts on which the preliminary injunction is based are not included in the verified Complaint, and on that additional basis, the preliminary injunction was entered in error.

In their response brief, the Respondents treat this as a "notice pleading" issue rather than a proof issue. SLED is not challenging whether the Complaint

satisfies notice pleading, which is typically the question with pleadings. But in this context, the verified Complaint serves a dual role -- it provides notice of the claim but more importantly it must be verified and, absent other affidavits, provide the *full evidentiary support* for the temporary restraining order and preliminary injunction. Here, the Respondents did not file any affidavits to establish the facts. They did file a verified Complaint but that was deficient in that it does not include all of the facts needed to support the temporary restraining order or the preliminary injunction that was issued by the Circuit Court. As a critical example, the Respondents never plead in the verified Complaint that they satisfied the requirements of the Participation Agreement or received authorization from the SCDA to plant hemp at the Marion County site before it was planted. Those facts are critical and have not be pled or shown. Without those two key facts, the Respondents have not provided the evidentiary support needed for the preliminary injunction as entered.

IV. In their response brief, the Respondents did not address all of the issues raised by the Appellant in this appeal.

Notably, there are several key issues raised on appeal on which the Respondents have offered no rebuttal or counter arguments.

Most significantly, the Respondents have not addressed the fourth issue on appeal which challenges the Circuit Court's refusal to enforce Section VIII of the Participation Agreement, whereby Pendarvis expressly consents to the forfeiture and destruction of any hemp crop "[g]rowing in an area that is not licensed by SCDA." (Agreement).

Likewise, the Respondents do not dispute SLED's argument that Lawton Drew has no protected property rights in the hemp crop at issue because he was not even a licensed grower under the Hemp Farming Act. The preliminary injunction should never have been issued in Drew's favor.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Law Enforcement Division respectfully renews its request that the Court reverse the Order issued by Circuit Court Judge William H. Seals, Jr. and dissolve the preliminary injunction as entered.

Respectfully submitted,

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BY: *s/ Andrew F. Lindemann*

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July 27, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM MARION COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-002006
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John Pendarvis and Lawton Drew, ……. Respondents,

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CERTIFICATE OF SERVICE

In accordance with Section (g)(3) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), the undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellant, does hereby certify that service of the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by email only this the 27th day of July 2020:

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July 27, 2020

Via Email Only
The Honorable Jenny Abbott Kitchings
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RE: John Pendarvis and Lawton Drew v. South Carolina Law Enforcement Division and South Carolina Department of Agriculture
Appellate Case Number: 2019-002006
Civil Action Number: 2019-CP-33-0675
Our File Number: 79.20234

Dear Ms. Kitchings:

In accordance with Section (c)(5) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), please find enclosed for filing the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (g)(3) of this same order, I am hereby serving copies on all counsel of record by email only.

If you have any questions, please advise.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

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