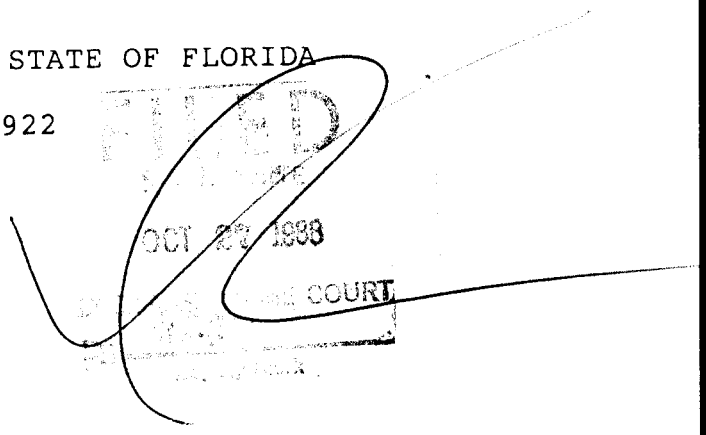
IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: 72,922



GAILYN W. WHEELER,

Appellant,

vs.

FINLAY CORBIN, et al.

Appellee.

_____/

BRIEF OF AMICUS CURIAE

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ENOCH J. WHITNEY
General Counsel
JUDSON M. CHAPMAN
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, A432
Tallahassee, Florida 32399-0504

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (cont'd)

SUMMARY OF ARGUMENT

The Department appears as amicus curiae before this Court in support of Appellee's position that the certified question be answered in the negative. Government must remain immune from tort liability for loss of use arising solely from the detention of property which was seized upon probable cause but subsequently returned by court order. This position is consistent with federal forfeiture decisions, Florida's forfeiture act and the general immunity associated with discretionary acts of police officers.

ARGUMENT

A GOVERNMENTAL AGENCY SHOULD NOT BE LIABLE TO AN OWNER FOR LOSS OF USE DAMAGES AS THE RESULT OF AN UNSUCCESSFUL FORFEITURE WHERE THE INITIAL SEIZURE WAS BASED UPON PROBABLE CAUSE.

The Department is a state agency having as one of its divisions the Florida Highway Patrol, section 20.24, Florida Statutes. The Patrol is a statewide law enforcement agency whose duties are generally described at section 321.05, Florida Statutes. State Troopers are routinely involved in traffic and other vehicle stops which result in the discovery of contraband articles as defined in the Florida Contraband Forfeiture Act, sections 932.701-932.704, Florida Statutes. Contraband is seized pursuant to section 932.703(1) and 321.05(1), Florida Statutes. Forfeiture proceedings are then initiated according to the Act with proceeds ultimately placed in the Department's Law Enforcement Trust Fund, section 932.705, Florida Statutes.

By virtue of this involvement, the Department is keenly interested in the forfeiture law. It is especially concerned about the issue of governmental liability following the return of a seized vehicle. This potential liability is in the area of "loss of use" damages sought by the prevailing owner in a tort action. Such damages normally involve recovery for interference with an owners right to use property. They are generally measured by the amount necessary to rent a similar article. 17 Fla.Jur.2d, Damages §70. They do not involve damages for the negligent destruction of property in the custody of government or storage fees associated with detention, which items, under proper circumstances, are reimbursable by the seizing agency.

The Department is currently involved as appellee in a similar issue under review by the Fourth District Court of Appeal in the case of In re: Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN 243340M; Hubert Hales and Brenda G. Hales v. State of Florida, ex rel., Florida Highway Patrol, Case No. 88-1235.

In Hales, supra, similar to these proceedings, the Patrol obtained a Rule to Show Cause Why the Property Should Not Be Forfeited. After an evidentiary hearing, the trial court entered a Final Judgment of Forfeiture. That decision was appealed by claimants and the judgment reversed in Hales v. State, 487 So.2d 100 (Fla. 4th DCA, 1986). Thereafter the claimants filed a motion to determine damages. The trial court denied loss of use damages on the basis of Morton v. Gardner, infra. The claimant's appeal of that ruling is now pending before the Fourth District Court of Appeal.

In Morton v. Gardner, 513 So.2d 725 (Fla. 3rd DCA, 1987), the Third District issued a comprehensive opinion on whether the prevailing owner in a forfeiture action is entitled to damages in tort for loss of use. The Court ruled that once probable cause for seizure is present, the owner's exclusive avenue of recovery is the forfeiture proceeding itself and that the claimant is entitled only to the return of his property.

Morton involved the seizure of a commercial lobster fishing boat by the Florida Marine Patrol based upon probable cause. That cause was described at footnote 8, p. 729, to involve the vessels use in transporting marijuana. A Marine Patrol pilot reported seeing a bale of marijuana on the vessel's transom being

pushed overboard. Officers later found a plastic bag and several pounds of marijuana in the water, but found no sign of contraband on board.

The trial court found that the vessel was not transporting marijuana and dismissed the forfeiture petition. The case proceeded on the Morton's counterclaim for loss of use compensation based on theories of tort and inverse condemnation. The latter went to trial by jury and resulted in a verdict for the state. An appeal was filed by Morton.

The Appellate Court carefully examined both federal and state law as to the tort claim. They concluded that both statutory schemes allow seizure upon probable cause, with actual forfeiture dependent on an evidentiary finding that the property was in fact used in violation of the forfeiture act.

The Court stated in relevant part:

> Although Florida statutory law lacks the protection from damage suits given federal officers by the probable cause certificate, no forfeiture proceeding can go forward under the Florida scheme without a determination that probable cause existed. Following a seizure, the State must promptly proceed against the property by petition for a rule to show cause. §932.704(1), Fla. Stat. (1983). The Claimant's exclusive avenue of recovery then becomes the forfeiture proceeding itself, where he may prove by a preponderance of the evidence (as the Mortons did here) that the forfeiture statute was not violated. But a successful claimant becomes entitled only to the return of his property. In Re: Approximately Forty-Eight Thousand Nine Hundred Dollars in U. S. Currency, 432 So.2d 1382, 1385 n. 6 (Fla. 4th DCA, 1983); §932.703(1). (Emphasis added.)

Appellants in Morton contended that the finding that the vessel was not in fact being used in violation of the act retroactively invalidated the seizure. That argument was specifically rejected by the Court, which went on to state, "if a person's property is seized upon probable cause, it is not necessary that the state prevail in the forfeiture proceeding in order to justify the seizure." (p. 729)

The Morton rationale for denying loss of use claims against the seizing agency was recognized by the First District Court of Appeal in the case sub judice. The trial court's denial of such relief was thus affirmed. This Court, in now answering the certified question, should also adopt the Morton reasoning and affirm the Wheeler decision.

Morton looked to relevant federal cases interpreting federal seizure statutes. This was based on the Florida act being patterned after the federal act and the legislatures desire for uniformity between the two as discussed in Griffis v. State, 356 So.2d 297, 299 (Fla. 1978). The legislative history of the Florida act subsequent to Griffis is described in Department of Highway Safety and Motor Vehicles v. Pollack, 462 So.2d 1199 (Fla. 3rd DCA, 1985).

Morton discusses applicable federal cases and concludes, "the existence of probable cause for seizure remains a barrier to recovery of damages against the United States. United States v. 1500 Cases, More or Less, 249 So.2d 382 (7th Cir., 1957)." Morton, p. 728.

Florida forfeiture proceedings require the seizing agency to promptly proceed against the contraband article by rule to show cause in the circuit court within the jurisdiction in which the seizure occurred. Section 932.704(1), Florida Statutes. The trial court's issuance of a Rule to Show Cause is tantamount to a recognition of probable cause. As held in In Re: Approximately Forty-Eight Thousand Nine Hundred Dollars in U. S. Currency, 432 So.2d 1382, 1385 n. 6 (Fla. 4th DCA, 1983), "the rule to show cause must be signed by a judge upon determining that the allegations of the petition are sufficient and not frivolous." In Lobo v. Metro-Dade Police Department, 505 So.2d 621 (Fla. 3rd DCA, 1987), it was held, "the determination of probable cause in a forfeiture proceeding simply involves a question whether the information relied upon by the state is adequate and sufficiently reliable to warrant the belief by a reasonable person that a violation had occurred." Probable cause is also defined in In Re: Forfeiture of 1983 Wellcraft Scarab, 487 So.2d 306, 310 (Fla. 4th DCA, 1986), as "a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." The trial court's entry of a final judgment of forfeiture in Wheeler is further evidence of the existence of probable cause for seizure.

With the opportunity for a judicial determination of probable cause for seizure available at the initial stage of the proceeding, claimant's are protected from confiscations made without a proper basis. The federal decisions barring the recovery of damages where probable cause is present are directly applicable to the Florida act.

Another basis for rejecting loss of use claims in unsuccessful forfeitures is the existence of sovereign immunity for discretionary acts. This was addressed in Morton at footnote 10, p. 729. The decision of a law enforcement officer to seize contraband is similar to the decision to arrest. Both must be based on probable cause. This Court has recognized governmental, discretionary immunity for liability in tort concerning an officer's decision whether to arrest an individual. Everton v. Willard, 468 So.2d 936 (Fla. 1985). See also Eder v. Department of Highway Safety and Motor Vehicles, 463 So.2d 443 (Fla. 4th DCA, 1985).

In addition to the foregoing, the Florida Contraband Forfeiture Act does not authorize any relief to an innocent owner other than return of the property. Section 932.703(1), states in relevant part,

> ...All rights and interest in and title to contraband articles or contraband property used in violation of s. 932.702 shall immediately vest in the state upon seizure by a law enforcement agency, subject only to perfection of title, rights, and interests in accordance with this act. Neither replevin nor any other action to recover any interest in such property shall be maintained in any court, except as provided in this act; however, such action may be maintained if forfeiture proceedings are not initiated within 90 days after the date of seizure. (emphasis supplied)

Subsection (2) of section 932.703, provides in part:

> (2) No property shall be forfeited under the provisions of ss. 932.701-932.704 if the owner of such property establishes that he neither knew, nor should have known after a reasonable inquiry, that such property was being employed or was likely to be employed in criminal activity.

Clearly, the legislature has not provided for the type of damages sought by claimant in the case under review. If any provision is to be made for such recovery, it should be by the legislature and not the judiciary. This is particularly true when the federal example on which the Florida act is based prohibits this type of damage. The Department recognizes that a different situation exists where the siezed article is physically damaged or destroyed while in the State's custody. That circumstance was not present in Morton or this case, however.

Appellant has shown no basis for this Court to answer the certified question other than in the negative according to the Morton rationale. Forfeiture would become a much less effective tool for law enforcement if the answer were otherwise. "The interests of the government and the well being of society demand that the officers of the law be able to seize property used as an instrument of crime in violation of a statute providing for seizure." In Re: The Forfeiture of One 1981 Chevrolet El Camino, 468 So.2d 1093 (Fla. 4th DCA, 1985), citing United States v. One 1967 Porsche, 492 F.2d 893, 895 (9th Cir., 1974). Where siezure is exercised in good faith and upon probable cause the officer and his agency should be relieved of any responsibility for loss of use damages associated with an unsuccessful forfeiture. The probable cause standard should remain the test for the propriety of the seizure and the forfeiture action.

CONCLUSION

The question certified by the First District Court of Appeal should be answered in the negative and the denial of loss of use damages to Appellant should be affirmed.

Respectfully submitted,

ENOCH J. WHITNEY
General Counsel

JUDSON M. CHAPMAN
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Building, A432
Tallahassee, Florida 32399-0504
Telephone: (904)488-1606

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular United States mail to H. Hentz McClellan, Esquire, 119 River Street, Blountstown, Florida, 32424; and Rhonda S. Martinec, Esquire, and John F. Daniel, Esquire, Post Office Box 2522, Panama City, Florida, 32402, this 27th day of October, 1988.

JUDSON M. CHAPMAN
Assistant General Counsel