

SUPREME COURT OF FLORIDA

GAILYN W. WHEELER,

Petitioner

vs.

CASE NO. 72,922

FINLAY CORBIN, as Mayor of
Blountstown, a subdivision of
the State of Florida, and R. W.
DEASON, as Police Chief of the
Blountstown Police Department,

Respondents.

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ON REVIEW By _____
FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

RESPONDENTS ANSWER BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	ii
PRELIMINARY STATEMENT.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3
IS A GOVERNMENTAL AGENCY LIABLE TO AN OWNER FOR LOSS OF USE OF HIS VEHICLE DURING FORFEITURE PROCEEDINGS WHEN THE FORFEITURE IS HELD TO BE UNLAWFUL UPON APPELLATE REVIEW?	
CONCLUSION.....	11
CERTIFICATE OF SERVICE.....	12

TABLE OF CITATIONS

<u>CASES:</u>	<u>PAGES</u>
<u>Morton v. Gardner</u> , 513 So. 2d 725 (Fla. 3d DCA 1987).....	3,5,7,8,11
<u>Wilson v. O'Neal</u> , 118 So. 2d 101 (Fla. 1st DCA 1960).....	3,9,10
<u>U.S. v. One 1962 Ford Thunderbird</u> , 232 F. Supp. 1019 (N.D. Ill. 1964).....	3,4,7
<u>U.S. v. One 1965 Chevrolet Impala Convertible</u> , 475 F. 2d 882 (6th Cir. 1973).....	4,5
<u>U.S. v. United States Coin and Currency</u> , 401 U.S. 715, 91 S. Ct. 1941, 28 L.Ed. 2nd 434 (1971).	5
<u>Kamienska v. County of Westchester</u> , 241 N.T.S. 2d 814 (Westchester Co. Ct. 1963).....	5,6
<u>City of Miami Beach v. Bules</u> , 479 So. 2d. 205 (Fla. 3d DCA 1985).....	6
<u>In Re Forfeiture Hearing as to Caplin and Drysdale</u> , 837 F. 2d 637 (4th Cir. 1988).....	7,8
<u>Trianon Park Condominium Assoc. v. City of Hialeah</u> , 468 So. 2d 912 (Fla. 1985).....	9
<u>STATUTES:</u>	
§§932.701-704 FLA. STAT. 1983.....	5,8,10
<u>OTHER:</u>	
<u>Uniform Controlled Substances Act</u> , 9 Uniform Laws Annotated §505.....	7

PRELIMINARY STATEMENT

Petitioner, Gailyn W. Wheeler, was the Plaintiff/Appellant below and will be referred to herein as Petitioner or Wheeler. Respondents, Finlay Corbin as Mayor of the City of Blountstown, a subdivision of the State of Florida, and R. W. Deason, as Police Chief of the Blountstown Police Department, were the Defendants/Appellees below and will be referred to herein as CITY.

SUMMARY OF ARGUMENT

The determination that property seized by a governmental agency is not forfeitable, whether made at trial or on appeal, does not operate to retroactively invalidate the seizure so as to make the agency liable for loss of use damages. The owner's loss of use of his property is an unavoidable consequence of the institution of forfeiture proceedings, unlike damages to or destruction of that property during the pendency of the proceeding. The agency is liable to the owner in tort only if it acts without probable cause and in bad faith, and no such allegations were made in this case.

ARGUMENT

Wheeler here argues, as did appellants in Morton v. Gardner 513 So. 2d 725 (Fla. 3d DCA 1987), for an expansion of liability against a governmental agency resulting from an unsuccessful forfeiture to include damages for loss of use. Otherwise, Wheeler maintains, she will have been "unlawfully injured and denied an opportunity for redress" (Petitioner's brief at page 4). Unlike the appellants in Morton, supra, Wheeler advances no particular theory of recovery, but apparently reasons that since successful forfeiture claimants have been allowed to recover other types of damages, they should recover loss of use of damages as well.

To Wheeler's argument that "For every wrong, there is a remedy", we cite the comments of Judge Carroll in Wilson v. O'Neal, 118 So. 2d 101, 104, (Fla. 1st DCA 1960):

"While the ideal of 'no wrong without a remedy' is widely regarded as a correct principle in this country, no support for it can be found in our jurisprudence as a universal rule."

The fact that a loss occurs does not thereby create a cause of action. The loss may be, as the Court in Morton held "temporary taking" losses to be, damnum absque injuria. Not all "takings" of property, even property of innocent parties, is compensable. As the Court states in United States v. One 1962 Ford Thunderbird, 232 F. Supp. 1019 (N.D. Ill. 1964) in denying compensation to an innocent lienholder:

"We find ourselves confronted with an instance where Congress may provide for such a taking without compensation. Where Congress, in the implementation of its constitutional powers, provides for penalties such as forfeitures, such action is not a taking of property in a constitutional sense. It is not an instance of eminent domain, in which property is taken because the use of such property is beneficial to the public. Rather, the property interest is infringed because Congress has decreed it necessary in order to preserve other incidents of the public welfare. As such, it represents a federal exercise of a police power to which the constitutional requirement of compensation is inapplicable. Id., at 1022.

The difficulty Wheeler faces is that there is no cause of action for this "taking", nor is there a cause of action in tort against a governmental agency acting in good faith and upon probable cause, in performing its duties under the law.

Wheeler notes that "a governmental agency is liable to the owner for damages to a vehicle resulting from improper storage, towing or negligent care...[and] destruction of property..." (Petitioner's brief at pg. 4). That is true. Those damages are not a necessary and natural consequence of the forfeiture proceedings, however, as are loss of use damages. Instead, they are the result of independent negligent acts for which the agency is properly held accountable. Until the final order of forfeiture, the governmental agency is simply the bailee of the property with a duty to exercise reasonable care to prevent damage or destruction of the property.

Wheeler next cites United States v. One 1965 Chevrolet Impala Convertible, 475 F. 2d 882 (6th Cir. 1973) as support for the award of damages for depreciation of property following seizure. The seizure and subsequent forfeitures involved in

that case, however, were held to be violative of the owner's Fifth Amendment rights and were void ab initio based upon the Supreme Court's ruling in United States v. United States Coin and Currency, 401 U.S. 715, 91 S Ct. 1941, 28 L.E.D. 2d 434 (1971). United States Coin and Currency retroactively invalidated all such seizures as violating the owners' Fifth Amendment privilege against self-incrimination. Thus One 1965 Chevrolet Impala Convertible holds that a governmental agency may be liable for depreciation damages resulting from an illegal seizure, and has no application where the seizure was lawful.

Wheeler's automobile was being used to transport cannabis, and was lawfully seized by the Blountstown Police pursuant to the Florida Contraband Forfeiture Act §932.703(1). There is no dispute that the seizure was made in good faith and upon probable cause. That lawful seizure and subsequent detention was not retroactively invalidated by the ultimate determination that Wheeler neither knew nor should have known that her vehicle was being so used and should not be forfeited. See Morton supra, at page 729.

In Kamienska v. County of Westchester, 241 N.Y.S. 2d 814, (Westchester Co. Ct. 1963), the New York District Attorneys office seized currency alleged to be gambling monies in a gambling raid. The defendant, following arrest and prior to acquittal, filed an action demanding return of his money. In discussing the seizure of the money, the Court stated:

"Since the Deputy Sheriff and Assistant District Attorney were then acting under claim or color of authority in the course of enforcement of the penal laws...., and there is no showing..... that they were acting wholly without legal justification, the taking was not tortious and no cause of action in conversion then occurred to the plaintiff..... Continued detention thereafter does not thereby become a conversion, where the original taking and possession were lawful....

.....[Following acquittal, plaintiff was] entitled to demand the return of possession, and upon a demand for its return and refusal thereof, his cause of action in conversion for wrongfully withholding such property would have matured.

Id., 241 N.Y.S. 2d. at 818-819.

If the initial seizure was lawful, the resulting possession of the property by CITY continued to be lawful until mandate issued by the First District directing the property to be returned. That is the distinction between this case and the case of City of Miami Beach v. Bules, 479 So. 2d 205 (Fla. 3d DCA 1985) relied on by Wheeler. In Bules, once the trial court determined that the property should be returned, the City of Miami Beach had no lawful authority to continue its possession of the property. While probable cause will support the seizure and detention of property until final hearing, there must be a judicial determination of forfeiture to permit the government to possess the property post-hearing. Here, CITY had probable cause to support the seizure and a judicial determination of forfeiture to permit its continued possession until mandate issued.

It is CITY'S position that liability of governmental agencies in forfeiture proceedings should be the same as in

arrest proceedings generally. As stated in Morton (supra at 731):

"....[T]he purpose of [the Florida Contraband Forfeiture Act]...is to protect the public from the proliferation of substances, instrumentalities, and the like, related to criminal offenses."

Further evidence of the purpose of the act is reflected in the comments to the Uniform Controlled Substances Act, the model act from which Florida's law derives:

".....Effective law enforcement demands that there be a means of confiscating the vehicles and instrumentalities used by drug traffickers in committing violations under this Act. The reasoning is to prevent their use in the commission of subsequent offenses involving transportation or concealment of controlled substances and to deprive the drug trafficker of needed mobility." Uniform Controlled Substances Act, 9 U.L.A. §505 at pg. 835.

The act is an exercise of the police power of the government:

"[I]t is conceded that decrees of forfeiture are well established as exercises of governmental power. Their roots, as the Supreme Court has noted, reach back to the law of deodand and even to the Mosaic Law.

.....
By decreeing forfeiture of vehicles used to transport narcotics...Congress has sought to establish a 'secondary defense against a forbidden use.' U.S. v. One 1962 Ford Thunderbird, 232 F. Supp. 1019, 1022 (N.D. Ill. 1964)

The seizure of property reasonably believed to be contraband, and the arrest of persons believed to have committed a criminal offense, are necessary to protect the public welfare even though such exercises of police power ultimately prove to be mistaken. In In Re Forfeiture Hearing as to Caplin & Drysdale, 837 F. 2d 637 (4th Cir. 1988), the Court in denying a Sixth Amendment challenge to forfeiture of attorney's fees

discussed the right of the government to seize property prior to a determination of guilt:

"Forfeiture, like other pretrial deprivations, is problematic in that it can interfere with the use of property that is merely alleged to be illicit, and thus owned by the government. The fact that no trial has yet been held does not mean, however, that the government is powerless to protect the public interest in any way that interferes with liberty or property. Just as the government may restrain liberty to prevent the flight of a suspect...it may restrain property to prevent the flight of forfeitable assets." Id. at 643.

If a governmental agency acts upon probable cause and in good faith in seizing property pursuant to the Florida Contraband Forfeiture Act, as it is undisputed CITY did in this case, it cannot be liable for the natural and necessary consequences of that act----loss of use of the property---any more than it can be held liable for the detention of a person alleged to have committed a criminal act.

The standard in both instances should be the requirement of probable cause and good faith. And the sole remedy must be an action for malicious prosecution in those cases where a governmental entity acts improperly. Even if the agency is negligent in seizing the property, that alone should not render it liable absent a showing of malice and want of probable cause.

The Court in Morton, supra at pg.. 729, note 3, did not deem it necessary to address the issue of immunity, since it found no want of probable cause. For the same reason, this court need not reach that issue here. However, it is implicit

in our analysis herein that even if Wheeler's property had been negligently seized (i.e. without probable cause), CITY would not be liable for loss of use damages absent proof of malice or bad faith. It is, after all, the decision to seize the property and institute forfeiture proceedings that results in the damages Wheeler seeks, as opposed to the actual conduct of CITY or its agents. And that decision, even if negligently made, does not render CITY liable for the resulting damages unless there be proof of malice or bad faith. The decision to seize contraband property, like the decision to arrest, is a discretionary, judgmental decision inherent in enforcing the laws of the state and is an exception to Florida's waiver of sovereign immunity. As this Court held in Trianon Park Condominium Association v. City of Hialeah, 468 So. 2d 912 (Fla. 1985):

"How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a duty of care. This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials....

Id. at 919.

This immunity from liability for merely negligent, as opposed to malicious, governmental decision making is vital to the enforcement of the laws of this state.

"The public policy aspects...are easily apparent. On the one hand, surely citizens should be given some protection against the irresponsible instituting against them of civil or criminal proceedings by other persons, even law

enforcement officers...On the other hand, law enforcement and the protection of society from crime would likely be adversely affected if law enforcement agents were subject to liability in damages for simple negligence in the performance of their duties if the citizens they charge with crime should not be convicted." Wilson v. O'Neal, 118 So. 2d 101, 105 (Fla. 1st DCA 1960).

This public policy applies with equal force to forfeiture proceedings. Not all forfeiture proceedings will result in forfeiture, but all such proceedings will result in some loss of use damage to the owner of the property. To hold the seizing agency liable for such loss of use damages where the agency has acted in good faith would have the practical effect of ending forfeiture proceedings and frustrating the salutary purposes of the Florida Contraband Forfeiture Act.

CONCLUSION

The seizure and detention of allegedly contraband property necessarily requires the deprivation of an owner's right to use the property during the pendency of the forfeiture proceedings. But where the seizure is authorized by the legislature in the legitimate exercise of its police power, that deprivation has never been and should not now be held compensable. CITY urges this Court to adopt the holding of the Third District Court in Morton and answer the certified question in the negative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been furnished to Rhonda S. Martinec, P. O. Box 2522, Panama City, Florida, 32402, and John F. Daniel, P. O. Box 2522, Panama City, Florida, 32402, Attorneys for Petitioner, by U. S. Mail this 4th day of October, 1988.

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