IN THE SUPREME COURT OF FLORIDA

CASE NO.: 74,751

IN RE: Forfeiture of 1976 Kenworth Tractor Trailer Truck, Altered VIN 243340M

STATE OF FLORIDA, EX REL., FLORIDA HIGHWAY PATROL,

Petitioner,

vs.

HUBERT HALES AND BRENDA G. HALES,

Respondents.
/

INITIAL BRIEF OF PETITIONER

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

PRELIMINARY STATEMENT

In this Brief, the following references will be used:

Petitioner, State of Florida, ex rel., Florida Highway Patrol, will be referred to as "the Department". The Florida Highway Patrol is a division of the Department of Highway Safety and Motor Vehicles, pursuant to section 20.24, Florida Statutes. Respondent Brenda Hales, will be referred to as "Hales" or Respondent.

References to the Record on Appeal will be indicated by the letter "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND THE FACTS

This case is before the court on discretionary review pursuant to Fla. R. App. P. 9.030(a)(2)(v) and 9.120 to review the following question certified by the Fourth District Court of Appeal to be a question of great public importance in the case of, In re Forfeiture of 1976 Kenworth Tractor Trailer Truck, 546 So.2d 1083 (Fla. 4th DCA 1989):

> May a party in a civil forfeiture proceeding present a claim for incidental damages based upon a violation of a trial court order directing return of the confiscated property?

This case commenced as a civil forfeiture action filed in October, 1983, by the State Attorney's office, 15th Judicial Circuit, on behalf of the Florida Highway Patrol seeking forfeiture of a 1976 Kenworth Tractor Truck, according to section 932.701 et. seq., Florida Statutes. (R 1-4)

On October 3, 1983, the trial court entered a Rule to Show Cause Why Property Should Not Be Forfeited (R-5) and on December 7, 1984, entered a Final Order of Forfeiture awarding the truck to the Florida Highway Patrol as contraband. The order directed that a certificate of title to the truck be immediately transferred to the Florida Highway Patrol (R 10-11).

Respondents took a timely appeal from the Final Order of Forfeiture which ultimately resulted in an opinion from the Fourth District Court of Appeal reversing the judgment forfeiting the Kenworth tractor truck. The Mandate with opinion attached was filed with the trial court on May 13, 1986 (R12-15). That case is reported as Hales v. State, 487 So.2d 100 (Fla. 4th DCA, 1986).

It is significant that the Hales never sought or obtained a stay pending their review that was available under Fla. R. App. P. 9.130.

On May 8, 1985, pursuant to the Final Order of forfeiture the Department obtained title to the forfeited Kenworth Truck (R-20) and thereafter transferred the truck to the Department of Transportation on July 24, 1985. (R-26)

The Department of Transportation acquired the truck upon payment of $4,500.00 in storage charges. They subsequently expended $19,738.99 in order to make the truck safe and usable. (R-24)

On July 22, 1986, pursuant to a Motion For Return of Property directed to the State Attorney's office, the trial court entered an Order for Return of Property authorizing Brenda Hales to recover the truck. The order did not contain a date for compliance and it was not furnished to the Department's headquarters in Tallahassee. (R-19)

The next record activity occurred on May 11, 1987, when the Department, in an effort to respond to the Order for Return of Property, filed a Motion to Substitute or Add Party. The necessity of this motion was the Department's inability to comply with the order for return, because the truck had previously been transferred to the Department of Transportation on July 24, 1985. (R-20)

On July 24, 1987, the trial court entered an Amended Order granting the Department's motion to add the Department of Transportation as a party based upon their status as registered

owner of the vehicle. (R-27) The Department filed a Third Party Complaint against the Department of Transportation on September 28, 1987, (R 31-33) which was responded to with a motion to dismiss. (R-36)

On October 14, 1987, Hales filed a Motion to Determine Damages. The motion requested the court to determine the value of the vehicle and enter judgment, "to compensate her for her loss, and to include in the same not only the value of the vehicle at the time it was taken and the necessary depreciation but also to include the value of the loss of use of the vehicle for the period the same has been withheld from the Defendant and to include all prejudgement interest provided by law as well as a reasonable attorney's fee." (R 34-35)

On January 21, 1988, the Department filed a Motion to Strike Hales Motion to Determine Damages and Response Thereto. (R-47-59)The Department included in its motion and response Hales failure to comply with conditions precedent for a tort action against the State and State immunity under 5768.28 Fla. Stats. The trial court then set a notice of hearing in which the Department's Motion to Strike and the Department of Transportation's Motion to Dismiss would be heard and that, subject to their disposition, an evidentiary hearing would be scheduled thereafter on Hales' motion €or damages. (R 62-63)

On January 14, 1988, the Department filed its Memorandum In Support of Its Motion to Strike. (R 64-71) The Department of Transportation also filed a memorandum. (R 72-76)

On April 11, 1988, the trial court entered an Order denying Transportation's motion to dismiss and granting the Department's motion to strike Hales' motion to determine damages on the authority of Morton v. Gardner, 513 So.2d 725 (Fla. 3rd DCA, 1987) and the presence of probable cause for initial seizure of the truck. The order was without prejudice for Hales to pursue any available damage claim under section 768.28, Florida Statutes. The Department of Transportation was directed to return the truck within ten days. Hales was also permitted to set an evidentiary hearing to determine the value of the truck in order for the court to consider an award of interest from the earlier order directing the return to Hales. (R 77-78)

Hales filed a memorandum in opposition to this order on April 13, 1988 (R-79). The Department of Transportation moved for equitable relief from the order directing its return of the truck and also moved to stay the order. (R 81-87) The Department moved to modify the prior order and to delete any interest award to Hales. (R 88-90)

On May 12, 1988, the trial court entered a Final Order in which the Department of Transportation's motions were denied and they were again directed to return the truck. The Department's motion to delete any interest award to Hales was granted. The prior order of April 8, 1988, was confirmed in all other respects. (R 101-102)

Hales filed Notice of Appeal from the trial courts orders of Apri 8, 1988, and May 12, 1988. (R 103- 04) The Department of Transportation also filed a Notice of Appeal as to the order of April 8, 1988, which was later voluntarily dismissed incident to the return of the truck to Hales.

On June 14, 1989, rehearing denied August 24, 1989, the Fourth District rendered its opinion reversing and certifying a question of great public importance now before this Court.

SUMMARY OF ARGUMENT

A party in civil forfeiture proceedings cannot institute a supplemental claim for incidental damages associated with the delayed return of the forfeited item. Such a claim can only properly be brought in a separate action complying with section 768.28 Fla. Stats.

The only remedy available to a successful owner in a forfeiture case in return of the vehicle, when probable cause existed for initial seizure. Respondent failed to seek possession through enforcement of the trial courts order for return. Instead, Respondent sought to convert the supplemental proceedings into an unauthorized tort damage claim against the Department.

Petitioner had a legal basis for not complying with the order for return. Respondents failure to obtain a stay of the initial forfeiture award facilitated the intervening transfer to the Department of Transportation and the necessity of extinguishing their interest before return of the truck. Respondent ultimately regained possession of the truck. The Department should not be liable for the failure to immediately comply with an order to return under the facts of this case.

ARGUMENT

THE INCIDENTAL DAMAGES CLAIMED BY RESPONDENT ARE IN FACT TORT DAMAGES WHICH MUST BE BROUGHT PURSUANT TO THE STATES WAIVER OF SOVEREIGN IMMUNITY, §768.28 FLA. STATS., AND NOT AS SUPPLEMENTARY PROCEEDINGS IN A STATUTORY FORFEITURE ACTION: THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE.

A. The District Court misconstrued the record in concluding there was no legal basis for not returning the truck following entry of the trial courts order for return of property.

The District Court erred in concluding the Department had no legal basis for not returning the truck to Respondents. The court below simply overlooked the actual status of the record, which was properly handled by the trial court in denying supplemental relief to Respondents. Pursuant to the final order of the trial court, the Department of Transportation has returned the truck to Hales.

On July 22, 1986 the trial court ordered that Hales recover the truck from the Department following her successful appeal of the original order granting forfeiture. The order for return gave no date for compliance. It contained no findings regarding the Departments ability to comply. Furthermore, copies were not directed to either the Department or the Department of Transportation. (R-19)

The ability to comply with the order was of critical importance, because at that time title possession of the truck had passed to the Department of Transportation who had not been made a party to the proceedings. Title passed to Transportation on July 24, 1985 following their expenditure of $4,500.00 in accumulated storage fees to a private storage company.

The Department of Transportation thereafter expended an additional $19,738.99 in making extensive repairs to the truck, not including regular maintenance costs, all of which occurred prior to the trial courts order for return in July, 1986. (R 24-25) Clearly, the Department of Transportation was a necessary party to any meaningful return of the truck to the Hales.

Respondents facilitated the transfer to the Department of Transportation. The Final Order of Forfeiture, which directed the immediate transfer of title, was entered on December 7, 1984. (R 11). The order for return following the successful appeal of that order was dated July 24, 1986. At no time during that nineteen month period did Respondents seek or obtain any type of stay pending review that would have been available under Fla. R. App. P. 9.310.

Thus, when the order authorizing return was entered, there was a legal basis for non-compliance, apart from Respondents failure to directly notify either the Department or Department of Transportation. When the Department subsequently learned of the order and determined the actual status of the truck it took appropriate action to bring the Department of Transportation before the Court. This was accomplished by the next record activity, the Departments Motion To Substitute or Add Party, filed on May 11, 1987. (R 20)

Thereafter, the issue of the Department of Transportation's presence before the court and their duty to return the truck, as well as Respondents entitlement to damages, were actively litigated. On May 12, 1988 the trial court properly entered its

Final order directing the Department of Transportation to return the truck to Respondents. That final order confirmed a previous order dated April 8, 1988 which denied Respondents motion to determine damages without prejudice for her pursuit of a §768.28 Fla. Stats damage claim in another proceeding. (R 77) The trial court final order also deleted any interest award from the order of return. (R 101)

According to the record in this proceeding the Department had a clear legal basis and inability to comply with the order for return. The Department was only under one order for return, not several orders as noted by the District Court. The Department took the appropriate action in responding to its Order for return in bringing the Department of Transportation before the court and ultimately gaining the return of Respondents truck.

The District Courts failure to properly comprehend this record is the key factual error invalidating their reversal of the trial courts correct disposition of this controversy.

B. Respondent elected to enforce the order for return of property by seeking tort damages for non-compliance, rather than moving the trial court to enforce its order.

It is important to recognize that Respondents made no attempt to enforce the order for return and regain possession of the truck. They abandoned the remedy of possession of the truck in favor of the remedy of damages associated with its detention from their possession. In doing so, Respondents sought an improper remedy based upon the forum and jurisdiction possessed by the trial court.

Following the Departments motion to add or substitute the Department of Transportation, a hearing and order thereon, and the filing of Plaintiffs (Departments) Third Party Complaint against the Department of Transportation, Respondent filed her Motion To Determine Damages in October 1987. (R 34) It is clear from this motion that Respondent was not interested in regaining possession of the vehicle. The "Wherefore" clause is instructive, in addition to the title of motion. Hales requested judgment for the value of the vehicle, compensation for loss of use, depreciation, prejudgment interest and attorneys fees.

Respondents alternative, which she did not pursue and therefore waived, was resort to the circuit court for entry of an order to show cause why the order for return should not be complied with or the Department would be held in contempt. Had that been done, the Department recognizes that much the same course would have ensued. The trial judge would have been advised of the inability to comply and the need to bring the Department of Transportation before the court, as ultimately accomplished through the Departments motion. However, such a motion to compel by Respondent would properly focus the court on the issue of possession as opposed to damages.

It must be remembered that this action commenced as a contraband forfeiture governed by sections 932.701-.704 Fla. Stats. As held in Morton v. Gardner, 513 So.2d 725,728 (Fla. 3d DCA 1987), review denied, 525 So.2d 879 (Fla.), certificate denied _____ U.S. _____, 109 S. Ct. 305, 102 1. Ed. 2d 324 (1988),

> 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)

By focusing on the perceived non-compliance with the trial courts order for return, the District Court erroneously failed to recognize that Respondent never sought enforcement through appropriate sanctions, but instead sought to convert the proceeding into a tort damage claim.

C. The recovery of tort damages against a state agency is limited to actions filed pursuant to the States waiver of sovereign immunity according to $768.28 Fla. Stats.

The District Courts reversal of the trial courts Final Order effectively converts a relatively narrow forfeiture action brought under $932.701 et seq., into a tort claim against the state without meeting the statutory conditions set forth in $768.28 Fla. Stats. There are strong legal and practical reasons why that ruling is in error.

Article X, section 13 of the Florida Constitution provides that sovereign immunity may be waived by general law. As held in Davis v. Watson 318 So.2d 169 (Fla. 4th DCA 1975), cert. den. 330 So.2d 16 (Fla. 1976) "the power to waive the states immunity is vested exclusively in the legislative." Another case holds, "sovereign immunity is the rule, rather than the exception, (cite

omitted) and ... a waiver of sovereign immunity should be strictly construed in favor of the state, and against the claimant (cite omitted) Windham v. Florida Department of Transportation 476 So.2d 735 (Fla 1st DCA, 1985), rev. den. 488 So.2d 69 (Fla. 1986).

Relevant portions of §768.28 Fla. Stats (1988 Supplement) provide as follows (Emphasis Added):

768.28 Waiver of sovereign immunity in tort actions: recovery limits: limitation on attorney fees, statute of limitations: exclusions. -

(1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission or any employee or the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

* * *

(6)(a)An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing ot the appropriate agency, and also, except as to any claim against a municipality, presents such claim in writing to the Department of Insurance, within 3 years after such claim accures and the Department of Insurance or the appropriate agency denies the claim in writing;

* * *

> (7) In actions brought pursuant to this section, process shall be served upon the head of the agency concerned and also, except as to a defendant municipality, upon the Department of Insurance; and the department or the agency concerned shall have 30 days within which to plead thereto.

Respondents Motion To Determine Damages does not allege compliance with these statutory requirements. That motion does not constitute separate process served on the Department and Department of Insurance. Compliance with the statutory notice provisions are conditions precedent to maintaining suit against the state which should be alleged in the complaint. Commercial Carrier Corp. v. Indian River County So.2d 1010, 1022 (Fla. 1979).

Petitioner initially raised non-compliance with $768.28 in its Motion To Strike Defendants (Hales) Motion To Determine Damages (R 47-48) and has continued to do so throughout this proceeding. The trial court correctly recognized the availability of $768.28 as the proper method to address Respondents damage claims.

This Court has recently acknowledged the propriety of a separate civil action against a government agency for vehicle damage and loss of use claims follwoing an unsuccessful forfeiture. In Wheeler v. Corbin, 546 So.2d 723 (Fla. 1989) the Court answered a certified question from the First District and held that a government agency was not liable to an owner for loss use damages during forfeiture proceedings when the forfeiture award is reversed on appeal. It is significant that under the facts of that case, Wheeler, the owner, filed a civil suit for

damages against the seizing agency following issuance of the mandate and return of the vehicle based upon reversal of the initial order of forfeiture . Wheeler v. Corbin 528 So.2d 954 (Fla. 1st DCA, 1988).

The District Courts reliance on City of Miami Beach v. Bales, 479 So.2d 205 (Fla.3d DCA 1985) as justification for allowing incidental damages in supplemental forfeiture proceedings is misplaced. This Courts decision in Wheeler, effectively distinguished that case as follows:

> Wheeler relies upon City of Miami Beach v. Bules, 479 So.2d 205 (Fla. 3d DCA 1985), to support her claim for loss of use. There, the district court found that the owner of an outboard runabout which the City seized in a forfeiture action was entitled to compensation or loss of use during the pendency of appeal proceedings. Significantly, the district court concluded that such compensation was "clearly contemplated by the terms of the trial court's order" granting a stay and that such compensation was in the nature of a supersedeas. Rules, 479 So.2d at 206. Since the circuit court below imposed no such condition in its order granting a stay, Bules is inapplicable.

Bules is equally inapplicable to the instant review because Respondents failed to obtain any type of stay order in her initial appeal and the order for return has no conditions which warrant the imposition of damages.

Respondent also sought an interest award on the order for return from date of entry until receipt of the truck. The trial judge properly recognized that such a claim was barred under authority of Flack v. Graham, 461 So.2d 82 (Fla. 1984) and

the general rule of governmental immunity from interest in the absence of an express statutory provision or a stipulation by the agency.

By authorizing the recovery of incidental, tort related damages in supplementary forfeiture proceedings to effect the return of this truck, the District Court has impermissably extended the legislative waiver of sovereign immunity beyond that authorized by 5768.28 Fla. Stats. The opinion should be reversed in this regard.

Conclusion

The certified question must be answered in the negative under the record of this proceeding. The District Courts reversal of the Final Order under review must itself be reversed with the trial courts disposition and recognition of relief under §768.28 Fla. Stats, reinstated as the proper determination of this case.

Respectfully submitted,

ENOCH J. WHITNEY
General Counsel

Judson Chapman

JUDSON M. CHAPMAN
Assistant General Counsel
Department of Highway Safety
and Motor Vehicles
Neil Kirkman Bldg, 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 Ray Sandstrom, Esquire, 429 South Andrews Avenue, Fort Lauderdale, Florida 33301, this 24 day of November, 1989.

Judson Chapman

JUDSON M. CHAPMAN
Assistant General Counsel