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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

82531-9

NO. 264327-III

STATE OF WASHINGTON
COURT OF APPEALS - DIVISION III

JOSE GUILLEN,

Respondent,

v.

LORENA CONTRERAS, guardian of

JESUS JAIME TORRES, JR.,

Appellant.

BRIEF OF APPELLANT

TODD V. HARMS
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A. Assignments of Error

Assignment of Error

1. The Superior Court of Yakima erred in denying any and all attorney fees to Appellant by order entered June 15, 2007.

Issues Pertaining to Assignment of Error

1. Claimant, on appeal to Yakima Superior Court of a Sunnyside Municipal Court decision forfeiting all property, succeeded in recovering a 1997 BMW automobile and \$9,342.00 in U.S. currency but failed to recover \$57,990.00 in currency. Does a claimant “substantially prevail”, for the purpose of RCW 69.50.505(6), where the claimant does not prevail on all issues and a portion of the property sought remains forfeited?

B. Statement of the Case

On December, 29, 2006, the Sunnyside Municipal Court entered it's ruling that \$57,990.00 in cash, \$9,342.00 in cash and a 1997 BMW automobile were to be forfeited to the City of Sunnyside pursuant to RCW 69.50.505 and RCW 10.105.011. CP at 186-187.

Claimant (Appellant at Superior Court and Court of Appeals) filed an appeal of this decision to the Yakima Superior Court. CP at 234. Yakima Superior Court filed its decision on the substantive issues and reserved the issue of attorney fees for further briefing on March 28, 2007. CP 58-66.

The Superior Court ruled, as to the substantive issues, that the City of Sunnyside did not meet its burden of proof as to the \$9,342.00, CP at 62, Appellant was an innocent owner of the 1997 BMW automobile, CP 63-66, and that Appellant could not make the innocent owner defense as to the \$57,990.00 because those rights had been relinquished to another. CP at 63. The \$9,342.00 and BMW were returned to Appellant who relinquished this property to the estate of his father (the original owner). CP at 62. The \$57,990.00 remained forfeited to Respondent.

Appellant advanced four theories to the Superior Court for the return of the three articles of property. CP at 90. The primary theory or issue was that the innocent owner defense applied to all property seized. CP at 90-100. The second theory was that Respondent had

not met its burden of proof that the \$9,342.00 was forfeitable under RCW 69.50.505. CP at 96-97. The third theory was that seizure and forfeiture of the \$57,990.00 was the result of an unlawful search. CP at 97-98. The fourth and last theory was that forfeiture of the \$57,990.00 was flawed due to lack of proper notice or due process. CP at 98-99.

Appellant submitted a demand for \$12,000 in attorney fees. CP at 71. Appellant's theory for demand of attorney fees was that recovery of the car and the \$9,342.00 meant that relief had been obtained on a significant issue. CP at 34. The Superior Court, despite ruling that no attorney fees were warranted, asked Respondent if he objected to the amount of attorney fees requested in order to deal with this issue should there be an appeal. RP at 17. Respondent did not object to the amount. RP at 17.

Respondent's position regarding attorney fees was that Appellant's request for attorney fees did not comply with RALJ 11.2, CP at 25, and that the Sunnyside Police Department was not a "claimant" from which Appellant could seek attorney fees. CP at 25.

Respondent also argued that the City's seizure was "substantially justified" under the Equal Access to Justice Act and thus attorney fees are not warranted. CP at 26.

The Superior Court heard argument on the issue of attorney fees and ruled that because both parties prevailed on issues, Appellant did not "substantially prevail". RP at 11. Appellant petitioned to the Court of Appeals for Discretionary Review on the substantive issues and this petition was denied. Because the decision regarding attorney fees came after the substantive ruling, a separate Notice of Appeal was filed by Appellant which was ultimately granted as a Petition for Discretionary Review.

Subsequent to argument on the issue of attorney fees, counsel for Appellant became aware of a federal drug forfeiture case seemingly on point. Appellant filed a Motion and Memorandum for Reconsideration based upon the case of *United States v. Real Property Known as 22249 Dolorosa St.*, 190 F.3d 977 (9th Cir. 1999). CP at 8-9. The Superior Court denied this motion. CP at 7.

C. Summary of Argument

Appellant substantially prevailed in recovering the BMW Automobile and \$9,342.00 in U.S. Currency. Both of these are significant issues and a benefit to the claimant, therefore Appellant is entitled to attorney fees under RCW 69.50.505(6). *See*, RCW 4.84.350(1) (Washington's EAJA); *United States v. Real Property Known as 22249 Dolorosa St.*, 190 F.3d 977 (9th Cir. 1999) (Applying the federal Equal Access to Justice Act (EAJA) to determine attorney fees for a wrongful drug forfeiture action). Both federal courts and Washington courts looked to their respective EAJA for a determination of attorney fees prior to statutory amendments specifically addressing drug or asset forfeiture. *Id.*; *Moen v. Spokane City Police Dept.*, 110 Wn. App. 714, 42 P.3d 456 (2002).

The federal drug forfeiture statute is similar to that of Washington's drug forfeiture statute. *Robertson v. State Liquor Control Bd.*, 102 Wn. App. 848, 10 P.3d 1079, review denied, 143 Wn.2d 1009, 21 P.3d 290 (2000). Washington courts approve of

looking to federal case law to resolve issues relating to RCW 69.50.505(6). *City of Bellevue v. Cashier's Check for \$51,000.00 & \$1,130.00 in U.S. Currency*, 70 Wn. App 697, 855 P.2d 330 (1993), review denied 123 Wn.2d 1008, 869 P.2d 1084. Attorney fees for federal drug forfeitures are now governed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). 18 U.S.C. § 2465. Similarly, attorney fees for Washington drug forfeitures are now governed by RCW 69.50.505 and not the EAJA.

Washington has not defined the term “substantially prevails” as used in RCW 69.50.505. Federal case law has resolved the question of whether the change in terms from the EAJA’s “prevailing party” to that of CAFRA’s “substantially prevails” means a different standard is to be applied for an attorney fee determination. The term “substantially prevails” is to be applied in the same manner as the term “prevailing party”. *Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Department*, 288 F.3d 452, 454-455 (D.C. Cir. 2002). The *Dolorosa* Court applied the EAJA term “prevailing party” and defined it as meaning a party who succeeds on

any significant issue in litigation which achieves some of the benefit the party sought. *Dolorosa*, 190 F.3d at 981.

Appellant prevailed on the major issue, standing to assert the innocent owner defense. Appellant also prevailed as to the issue of burden of proof regarding the \$9,342.00. That the Appellant may not have prevailed in terms of monetary value is does not change this. *Id.* at 981-982. Recovery of the car and the money was a benefit to Mr. Torres. The threshold requirement for attorney fees has been met.

D. Argument

In 2001, RCW 69.50.505 was amended to state “In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys’ fees reasonably incurred by the claimant”. RCW 69.50.505(6). This replaced the EAJA as a remedy to claimants. *Moen*, 110 Wn. App. 717-718. The amendment was intended to harmonize with the EAJA, *Id.* at 721, however there are differences in the two provisions.

RCW 69.50.505 does not make an exception to the demand for attorney fees if the agency action was “substantially justified” and it uses the term “prevails” rather than “substantially prevails” as it pertains to the claimant. RCW 4.84.350(1). The EAJA defines a prevailing party as one who has “obtained relief on a significant issue that achieves some benefit that the qualified party sought”. Id.

Upon review of the trial court’s decision forfeiting all property, including a 1997 BMW automobile, \$9,342.00 and \$57,990.00, the claimant appealed to Yakima Superior Court. The claimant, Mr. Torres, advanced four theories to the Superior Court for the return of the three articles of property. CP at 90. The primary theory or issue was the innocent owner defense which was applied to all property seized. CP at 90-100. The second theory was that Respondent had not met its burden of proof that the \$9,342.00 was forfeitable under RCW 69.50.505. CP at 96-97. The third theory was that seizure and forfeiture of the \$57,990.00 was the result of an unlawful search. CP at 97-98. The fourth and last theory was that

forfeiture of the \$57,990.00 was flawed due to lack of proper notice or due process. CP at 98-99.

The Superior Court ruled, as to the substantive issues, that the City of Sunnyside did not meet its burden of proof as to the \$9,342.00, CP at 62, Appellant was an innocent owner of the 1997 BMW automobile, CP 63-66, and that Appellant could not make the innocent owner defense as to the \$57,990.00 because those rights had been relinquished to another. CP at 63.

Mr. Torres submitted a demand for attorney fees in the amount of \$12,000. CP at 71. The Superior Court ruled that because both parties prevailed on issues, Mr. Torres did not “substantially prevail”. RP at 11. The Superior Court, in order to resolve this issue prior to any appeal, asked Respondent if it objected to the amount of attorney fees requested. RP at 17. Respondent did not object to the amount. RP at 17.

RCW 69.50.505 does not explain what it means by “substantially prevail” and there is no case on point. The federal drug forfeiture statute is similar to that of Washington’s drug

forfeiture statute. *Robertson v. State Liquor Control Bd.*, 102 Wn. App. 848, 10 P.3d 1079, review denied, 143 Wn.2d 1009, 21 P.3d 290 (2000). Washington courts approve of looking to federal case law to resolve issues relating to RCW 69.50.505(6). *City of Bellevue v. Cashier's Check for \$51,000.00 & \$1,130.00 in U.S. Currency*, 70 Wn. App 697, 855 P.2 330 (1993), review denied 123 Wn.2d 1008, 869 P.2d 1084.

In the case of *United States v. Real Property Known as 22249 Dolorosa St.*, 190 F.3d 977 (9th Cir. 1999), a very similar attorney fee question arose. In that case, the government argued that the claimants prevailed on only 28.7% of the total value of the property forfeited. *Id.* at 981. The court applied the federal EAJA and its requirement that the claimant be a "prevailing party". *Id.* at 981. It defined prevailing party as one that succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit". *Id.* Furthermore, there is no requirement that success be measured by comparison of the value of the respective properties. *Id.* at 982.

Attorney fees for federal drug forfeitures had previously been brought pursuant to the EAJA but are now governed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). 18 U.S.C. § 2465. Similarly, attorney fees for Washington drug forfeitures are now governed by RCW 69.50.505(6) and not the EAJA.

Federal courts have also addressed the issue of whether the terms “prevailing party” and “substantially prevail” are to be applied differently. The term “substantially prevails” is to be applied in the same manner as the term “prevailing party”. *Oil, Chemical and Atomic Workers Intern. Union, AFL-CIO v. Department*, 288 F.3d 452, 454-455 (D.C. Cir. 2002).

Appellant prevailed on the major issue, standing to assert the innocent owner defense. Appellant also prevailed as to the issue of burden of proof regarding the \$9,342.00. That the Appellant may not have prevailed in terms of monetary value is does not change this. *Id.* at 981-982. Recovery of the car and the money was a benefit to Mr. Torres. The threshold requirement for attorney fees has been met. Mr. Torres is a substantially prevailing party under

RCW 69.50.505(6) and is entitled to demand attorney fees from the City of Sunnyside.

CONCLUSION

A substantially prevailing party under RCW 69.50.505 is one who succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. Mr. Torres succeeded in recovering the 1997 BMW automobile and \$9,342.00. These are significant issues and he is entitled to the \$12,000 in attorney fees.

In addition to this, Appellant requests attorney fees pursuant to RAP 181.

Respectfully submitted this 24 day of February, 2008.

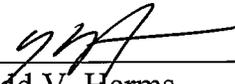
TODD V. HARMS, P.S.

By: 

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CERTIFICATE OF MAILING

I hereby certify under penalty of perjury under the laws of the State of Washington, that a copy of the foregoing was mailed, via 1st Class Mail, to Mark Kunkler, City Attorney, City of Sunnyside, 818 Edison Ave., Sunnyside, WA 98944 and Jesus Torres, Jr. c/o Lorena Contreras, P.O. Box 3442, Pasco, WA 99302 by depositing in the mail of the United States of America on the 26 day of February, 2008.



Todd V. Harms