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NO. 264327-III

STATE OF WASHINGTON
COURT OF APPEALS – DIVISION III

FILED

MAR 31 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

JOSE GUILLEN,

Respondent,

v.

LORENA CONTRERAS, guardian of

JESUS JAIME TORRES, JR.,

Appellant.

BRIEF OF RESPONDENT
WASHINGTON STATE COURT OF APPEALS

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A. Introduction

Respondent CITY OF SUNNYSIDE submits this brief in opposition to Appellant's Brief for Attorney's Fees. Appellant advances a request for an award of attorney's fees and costs pursuant to RCW 69.50.505(6) arising out of the Yakima County Superior Court's Decision filed March 28, 2007 in the above-captioned case.

B. Statement of the Case

This case was initiated when the Sunnyside Police Department seized the vehicle and cash described above. The case was heard by the Sunnyside Municipal Court. On December 29, 2006, the Sunnyside Municipal Court issued its written decision forfeiting the cash and vehicle to the Seizing Agency. CP at 186-187.

Claimants subsequently appealed to the Yakima County Superior Court. CP at 234. The Honorable F. James Gavin considered the briefs of the parties and oral argument and thereafter filed his decision on March 28, 2007. The Court's Decision included specific analysis of the record and law with regard to three distinct properties: (a) Cash in the amount of \$57,990.00 originally located in a package on a loveseat in the living room

of a manufactured home at the scene; (b) Cash in the amount of \$9,342.00 found in the clothes on Jesus Jaime Torres, killed at the scene on June 28, 1005; and (c) One BMW vehicle owned and registered to Jesus Jaime Torres, driven to the scene by Mr. Torres. The court also considered distinct issues of “standing” regarding each of the Claimants. CP at 58-66.

The Court analyzed each of the items of property separately by applying the applicable standard of proof supporting the seizure. The Court concluded that probable cause existed to support the seizure of the BMW and the \$57,990.00 cash, but that the seizure of the \$9,342.00 cash was not supported by a preponderance of the evidence. CP at 62. The Court applied distinct analysis to the facts and circumstances surrounding seizure of each separate item of property and applied the probable cause standard separately to each item of property.

The Court ruled separately that Claimant Lorena Contreras had proven no ownership interest in any of the property. CP at 60-61.

Having found evidence to support the seizure of the \$57,990.00 and the BMW, the Court then applied legal principles regarding “innocent owner” status to each of these properties. CP at 62-66. The Court entered separate conclusions regarding the \$57,990.00 and the BMW. Specifically, the Court found that the evidence showed that the exchange

of cash for intended controlled substances had already occurred so that Jesus Jaime Torres, Jr. (infant son of Jesus Jaime Torres, deceased) could not be considered the “owner.” In short, the consideration had been paid and the cash was now owned by another person. CP at 63.

Regarding the BMW, the Court concluded that, while a preponderance of the evidence existed to show that the vehicle was an instrumentality used to facilitate an intended violation of Chapter 69.50 RCW (CP at 60), the vehicle was not traded, exchanged or used as consideration for the intended illegal purchase and sale of drugs, and therefore “ownership” immediately vested in the heirs or devisees of the decedent. CP at 63-66. The court then concluded that the infant son, Claimant Jesus Jaime Torres, Jr., could have standing to assert the innocent owner defense. In the absence of evidence that someone was using the infant as a “straw” owner to hide funds from forfeiture, the Court ruled that the infant was the innocent owner of the BMW. CP at 63-66.

Thus, as a result of separate analysis and decision, the City of Sunnyside prevailed on the issue of the \$57,990.00 cash, and the Claimant Jesus Jaime Torres prevailed as innocent owner for the BMW, and that the \$9,342 belonged to the “estate” of the decedent. Also by separate

analysis, the City of Sunnyside prevailed on the claim regarding status of Lorena Contreras as “owner.” CP at 60-61.

Appellant had presented a motion for attorneys’ fees at argument of the appeal before the Superior Court. CP at 71. In its March 28, 2007 ruling the court reserved determination of the motion for attorneys’ fees to give the parties an opportunity to brief the issue. At the hearing of this motion, the court ruled that because both parties prevailed on issues, Appellant did not substantially prevail, and thus would not be awarded attorneys’ fees. RP at 11. Appellant’s subsequent Notice of Appeal regarding attorneys’ fees was granted as a Petition for Discretionary Review.

C. Summary of Argument

The current provisions of RCW 69.50.505(5) and (6) pertaining to forfeiture hearings and attorneys’ fees were revised in 2001. Prior to amendment, the provisions of former RCW 69.50.505(e) provided that the “prevailing party” in a court hearing between two or more claimants regarding the seized property could seek an award of attorneys’ fees and costs. The 2001 amendment established a new subsection (f) which provided:

(f) 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. In addition, in a court hearing between two or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

(Emphasis added.) The italicized sentence was new language. The second sentence was the provision formerly included in subsection (e). It would appear at first glance that two different standards for an award of attorneys' fees (and costs) were thus created. The first sentence uses the words "where the claimant substantially prevails," and the second sentence uses the words "prevailing party." (The second sentence also includes a provision for an award of "costs," which is absent in the first sentence.) However, with regard to the practical effect of the two terminologies, Washington courts have found the terms "substantially prevail" and "prevailing party" to be synonymous. Thus the standards for determining whether a party "substantially prevails" or is the "prevailing party" are the same.

Moreover, existing Washington case law holds that where both parties prevail on substantive issues, there is no "prevailing party" entitled to an award of attorneys' fees. This, in fact, was the decision of the Yakima County Superior Court in this case. There is no need to seek "guidance" from other states or federal courts construing the terms of the statute.

D. Argument

A. Statutory Provisions and Law: Seizure and Forfeiture.

RCW 69.50.505(5) and (6) provide:

(5) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section within forty-five days of the seizure in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee, except where the seizing agency is a state agency as defined in RCW 34.12.020(4), the hearing shall be before the chief law enforcement officer of the seizing agency or an administrative law judge appointed under chapter 34.12 RCW, except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction. Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure. The person seeking removal of the matter must serve process against the state, county, political subdivision, or municipality that operates the seizing agency, and any other party of interest, in accordance with RCW 4.28.080 or 4.92.020, within forty-five days after the person seeking removal has notified the seizing law enforcement agency of the person's claim of ownership or right to possession. The court to which the matter is to be removed shall be the district court when the aggregate value of personal property is within the jurisdictional limit set forth in RCW 3.66.020. A hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW. In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.

The seizing law enforcement agency shall promptly return the article or articles to the claimant upon a determination by the administrative law judge or court that the claimant is the present lawful owner or is lawfully entitled to possession thereof of items specified in subsection (1)(b), (c), (d), (e), (f), (g), or (h) of this section.

(6) 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. In addition, in a court hearing between two or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.

A seizing law enforcement agency cannot be a "claimant" within the attorney fees provisions of this section. *Irwin v. Mount*, 47 Wn. App. 749, 737 P.2d 277 (1987); *Smith v. Mount*, 45 Wn. App. 623, 726 P.2d 474 (1986).

The legislative history of the attorneys' fees' provision in RCW 69.50.505 is also worth noting. This section was amended in 2001, Laws of 2001 chapter 168. This legislation made the following changes:

(e) If any person notifies the seizing law enforcement agency in writing of the person's claim of ownership or right to possession of items specified in subsection (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), or (a)(8) of this section within forty-five days of the seizure in the case of personal property and ninety days in the case of real property, the person or persons shall be afforded a reasonable opportunity to be heard as to the claim or right. The hearing shall be before the chief law enforcement officer of the seizing agency or the chief law enforcement officer's designee, except where the seizing agency is a state agency as defined in RCW 34.12.020(4), the hearing shall be before the chief law enforcement officer of the seizing agency or an administrative law judge appointed under chapter 34.12 RCW, except that any person asserting a claim or right may remove the matter to a court of competent jurisdiction. Removal of any matter involving personal property may only be accomplished according to the rules of civil procedure. The person seeking removal of the matter must serve process against the state, county, political subdivision, or municipality that operates the seizing agency, and any other party of interest, in accordance with RCW 4.28.080 or 4.92.020, within forty-five days after the person seeking removal has notified the seizing law enforcement agency of the person's claim of ownership or right to possession. The court to which the matter is to be removed shall be the district court when the aggregate value of

personal property is within the jurisdictional limit set forth in RCW 3.66.020. A hearing before the seizing agency and any appeal therefrom shall be under Title 34 RCW. <<-In a court hearing between two or more claimants to the article or articles involved, the prevailing party shall be entitled to a judgment for costs and reasonable attorney's fees. In cases involving personal property, the burden of producing evidence shall be upon the person claiming to be the lawful owner or the person claiming to have the lawful right to possession of the property.->> In <<+all+>> cases <<- involving real property->>, the burden of <<-producing evidence shall be->> <<+proof is+>> upon the law enforcement agency <<+to establish, by a preponderance of the evidence, that the property is subject to forfeiture+>>. <<-The burden of proof that the seized real property is subject to forfeiture shall be upon the law enforcement agency.->>

The seizing law enforcement agency shall promptly return the article or articles to the claimant upon a determination by the administrative law judge or court that the claimant is the present lawful owner or is lawfully entitled to possession thereof of items specified in subsection (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), or (a)(8) of this section.

(f) <<+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. In addition, in a court hearing between two or more claimants to the article or articles involved, the prevailing party is entitled to a judgment for costs and reasonable attorneys' fees.+>>

(Emphasis added.)

As shown above, the prior statute contained a directive that attorney's fees could be awarded to the "prevailing party" in a court hearing between two or more claimants. Thus, under the prior statute, a "single claimant" could not recover costs and attorneys' fees. See, e.g., *Deeter v. Smith*, 106 Wn.2d 376, 721 P.2d 519 (1986).

The current statute seemingly sets up two “standards” for consideration of attorneys’ fees (and costs):

- (a) In “any proceeding to forfeit property” where “the claimant substantially prevails,” the claimant is entitled to “reasonable attorneys’ fees reasonably incurred by the claimant.”
- (b) In a “court hearing between two or more claimants” to the property, the “prevailing party” is entitled to a judgment for reasonable attorneys’ fees and “costs.”

First, a judgment for “costs” is apparently only available in a “court hearing between two or more claimants.” Second, different standards are seemingly announced to support an award of attorneys’ fees, depending on the type of hearing and number of claimants involved, *i.e.*, a claimant who “substantially prevails” in any proceeding to forfeit property; and the “prevailing party” in a court hearing between two or more claimants. However, on review of existing case law in the State of Washington, no inconsistency is found.

The general rules regarding “prevailing party” for purposes of attorneys’ fees can be summarized as follows. A prevailing party generally does not recover its attorneys’ fees unless expressly authorized

by statute, by agreement of the parties, or upon a recognized equitable ground. *Cohn v. Dep't of Corr.*, 78 Wn.App. 63, 66, 895 P.2d 857 (1995).

The prevailing party is the party who receives an affirmative judgment in their favor. *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). However, the prevailing party also means the party who “substantially prevailed.” *Hertz v. Riebe*, 86 Wn.App. 102, 105, 936 P.2d 24 (1997). Accordingly, if both parties prevail on a major issue, neither party is a prevailing party. *Id.* In *Phillips Bldg. Co., Inc. v. An*, 81, Wn.App. 696, 702-03, 915 P.2d 1146 (1996), the court stated:

In cases where both parties are awarded relief, the net affirmative judgment may determine the prevailing party. *Marassi v. Lau*, 71 Wash.App. 912, 915, 859 P.2d 605 (1993); *see also* (under net affirmative judgment rule, defendant who received greater amount as a counterclaim was prevailing party under former lien statute, RCW 60.04.130). The net affirmative judgment rule, however, may not lead to a fair or just result in situations where a party receives an affirmative judgment on only a few claims. *Marassi*, 71 Wash.App. at 916, 859 P.2d 605. In *Marassi*, the plaintiff prevailed on only two of the original 12 separate and distinct claims. *Marassi*, 71 Wash.App. at 916, 859 P.2d 605. The court, therefore, developed a proportionality approach for such situations. The *Marassi* court held that the plaintiff should be awarded attorney fees for the claims it prevails upon, the defendant should be awarded attorney fees for those claims it successfully defends, and the awards should offset. *Marassi*, 71 Wash.App. at 918, 859 P.2d 605.

If both parties prevail on major issues, however, there may be no prevailing party. *American Nursery Prod. Inc. v. Indian Wells Orchards*, 115 Wash.2d 217, 234-35, 797 P.2d 477 (1990); *Puget Sound Serv. Corp. v. Bush*, 45 Wash.App. 312, 320-21, 724 P.2d 1127 (1986). In such situations, neither party is entitled to an

attorney fee award. *American Nursery*, 115 Wash.2d at 235, 797 P.2d 477; *Puget Sound*, 45 Wash.App. at 321, 724 P.2d 1127. Accordingly, when both parties to an action are afforded some measure of relief and there is no singularly prevailing party, neither party may be entitled to attorney fees. *Marine Enter., Inc. v. Security Pacific Trading Corp.*, 50 Wash.App. 768, 772, 750 P.2d 1290, *review denied* 111 Wash.2d 1013 (1988).

The “proceeding to forfeit property” occurred before the Sunnyside Municipal Court. The City of Sunnyside, the seizing agency, prevailed on all issues. The Superior Court heard the matter on appeal of the municipal court decision. The issues included claims by Lorena Contreras, on behalf of the infant child Jesus Jaime Torres, and Jesus Jaime Torres as claimed “innocent owner.” The “net affirmative judgment rule” is not applicable because, under RCW 69.50.505, a “seizing agency” cannot be a “claimant,” and thus cannot present a claim for attorneys’ fees or costs.

The proper approach to resolving statutory provisions “seemingly” in conflict is to read the provisions together with related provisions to achieve a harmonious statutory scheme. In *Moen v. Spokane City Police Dept.*, 110 Wash. App. 714, 718, 42 P.2d 456 (2002) the court was asked to construe the attorneys’ fees provisions of RCW 69.50.505 and the attorneys’ fees provisions of the Equal Access to Justice Act (EAJA) as codified at RCW 4.84.350:

Our fundamental objective in construing statutes is to ascertain and carry out the intent of the Legislature. *Rozner v. City of Bellevue*, 116 Wash.2d 342, 347, 804 P.2d 24 (1991). Each provision of a

statute should be read together with related provisions so as to achieve a harmonious statutory scheme that maintains the integrity of the respective statutes. *State v. Chapman*, 140 Wash.2d 436, 448, 998 P.2d 282, *cert. denied*, 531 U.S. 984, 121 S.Ct. 438, 148 L.Ed.2d 444 (2000). A more specific statute will supersede a general statute, but only if the two statutes pertain to the same subject matter and cannot be harmonized....

Moen, *supra* at 719. The *Moen* court ruled that the EAJA and former RCW 69.50.505(e) could be harmonized, thus allowing recovery of the claimant's attorney's fees.

In the case at bar, it is not necessary to reach to decisions of other states or federal courts in order to harmonize the terms "prevailing party" and party who "substantially prevails." "Prevailing party" has been interpreted to mean "substantially prevailing" party. *Hertz v. Riebe*, 86 Wn.App. 102, 105, 936 P.2d 24 (1997). *Marine Enters., Inc. v. Security Pac. Trading Corp.*, 50 Wash.App. 768, 772, 750 P.2d 1290, *review denied*, 111 Wash.2d 1013 (1988). Because the terms are synonymous, the legal principles regarding determination of "prevailing party" cited above apply to RCW 69.50.505(6). As determined by Judge Gavin of the Yakima County Superior Court, both parties prevailed on major issues, and thus neither party could be said to "substantially prevail." In this, the judge was correct in light of existing court decisions in the State of Washington, particularly *Hertz v. Riebe*, 86 Wn.App. 102, 936 P.2d 24 (1997), a decision of this Court. Moreover, construing the terms

“prevailing party” and “substantially prevailing” as synonymous brings consistent application to RCW 69.50.505(6) to any action, whether it arising “in any proceeding to forfeit property” or in any court action between two or more claimants.

In the case at bar, there are four distinct issues: (a) the \$57,990 cash; (b) the \$9,342 cash; (c) the BMW vehicle; and (d) the standing of Claimant Lorena Contreras and Claimant Jesus Torres, Jr. The Court’s ruling shows on its face that the City’s action in seizing and forfeiting the \$59,990 and the denial of any standing of Claimant Lorena Contreras were justified.

While the central facts giving rise to the issues concern an intended transaction in illegal drugs, the specific issues have always been briefed and considered separately. The issues and operative facts relating to the \$57,990 are distinct from the \$9,342, for example. The issues and operative facts concerning the BMW are separate and distinct from the \$57,990 and the \$9,342.00. The City of Sunnyside clearly prevailed on the seizure and forfeiture of the \$57,990 and its challenge to the standing of Lorena Contreras.

Finally, the “harmonizing” of the terms and standards applicable to “prevailing party” and “substantially prevailing” provides support for the

purposes of Chapter 69.50 RCW. The following statement of purpose was adopted by the legislature in 1989:

Findings--1989 c 271: "The legislature finds that: Drug offenses and crimes resulting from illegal drug use are destructive to society; the nature of drug trafficking results in many property crimes and crimes of violence; state and local governmental agencies incur immense expenses in the investigation, prosecution, adjudication, incarceration, and treatment of drug-related offenders and the compensation of their victims; drug-related offenses are difficult to eradicate because of the profits derived from the criminal activities, which can be invested in legitimate assets and later used for further criminal activities; and the forfeiture of real assets where a substantial nexus exists between the commercial production or sale of the substances and the real property will provide a significant deterrent to crime by removing the profit incentive of drug trafficking, and will provide a revenue source that will partially defray the large costs incurred by government as a result of these crimes. The legislature recognizes that seizure of real property is a very powerful tool and should not be applied in cases in which a manifest injustice would occur as a result of forfeiture of an innocent spouse's community property interest." [1989 c 271 § 211.]

To adopt a rule as advanced by Appellant places governmental agencies charged with enforcing the drug laws in a difficult position. Under the terms of RCW 69.50.505, the seizing agency cannot be a "claimant" eligible to seek attorneys' fees for defending legitimate enforcement actions. If the rule is adopted entitling any claimant who prevails on "any issue" to be awarded attorneys' fees (and costs) without any countervailing ability of the seizing agency to offset such claims by the "net affirmative judgment" methodology, or by changing the

established standard whereby there is no “prevailing party” if both parties prevail, the balance of equity has swung entirely to the benefit of claimants. This is contrary to the stated findings of the legislature recognizing that seizure and forfeiture of drug trafficking property will provide a significant deterrent to crime, will remove the profit incentive of drug trafficking, and partially defray costs of enforcement.

Maintaining the established definition and standards of *Hertz v. Riebe* with regard to “prevailing party” and “substantially prevailing” maintains a balance of fairness in the process. In “one asset” seizure cases, or in cases where all seized assets are found to have been wrongfully seized, the rules remain easy to apply. If the property was wrongfully seized, the claimant is eligible for an award of attorneys’ fees. If, on the other hand, the determination is made that, in fact, the property was properly seized and forfeited as drug trafficking property, the seizing agency rightly and correctly is found a prevailing party under the very purpose of the statute. The seizing agency, as a prevailing party in the case at bar, should not be penalized by a one-sided standard awarding attorneys’ fees to the claimant. To do so would unduly reward claimants of drug trafficking property and harm the ability of seizing agencies and taxpayers to defray costs of enforcement.

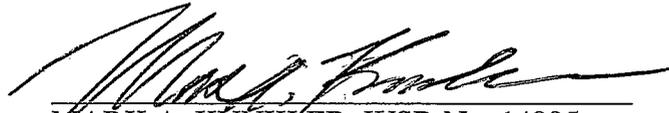
E. Conclusion

Principles of statutory construction require that statutory provisions apparently in conflict be read together so as to achieve a harmonious statutory scheme. Under Washington court decisions, the terms “prevailing party” and “substantially prevailing party” are synonymous. It is not necessary to engage in a lengthy analysis or discussion of federal court decisions, or decisions of courts of other states, construing different statutory schemes. The decisions of the courts of the State of Washington have already “harmonized” the two terms.

The City of Sunnyside does not challenge a determination that the Appellant prevailed on the issues relating to the BMW and the \$9,342.00. This represents two out of four items or issues. The relative value of the items is also instructive. The value of the \$57,990 constitutes approximately two-thirds of the total value of all seized properties. Moreover, the interests of justice counsel that no attorney fees or costs be awarded. As briefed and argued by the parties, the purpose of the civil forfeiture statute is to provide a deterrent to illegal drug activity and to defray costs of enforcing the Act. There is no question that the properties were involved in an illegal drug transaction in violation of Chapter 69.50 RCW. The seizure of all properties was substantially justified.

The City of Sunnyside requests that Appellant take nothing in attorney fees and costs, and that Appellant's request for attorneys' fees pursuant to RAP 18.1 be denied.

RESPECTFULLY SUBMITTED this 25th day of March, 2008.



MARK A. KUNKLER, WSB No. 14995
Attorney for Respondent

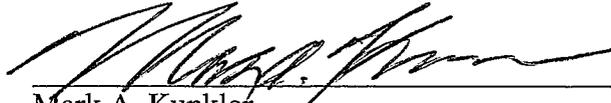
FILED

MAR 31 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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 First Class Mail, to Todd V. Harms, Attorney for Appellant, 503 Knight Street, Suite A, Richland, Washington 99352 by depositing in the mail of the United States of America on the 27th day of March, 2008.



Mark A. Kunkler