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62933-6

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SNOHOMISH REGIONAL DRUG TASK FORCE &
SNOHOMISH COUNTY,

Respondents,

-v-

REAL PROPERTY KNOWN AS 414 NEWBERG ROAD,

Defendant In Rem,

AND

BRIAN A. PEARSON, EXECUTOR OF THE EST-
TATE OF RODNEY J. PEARSON, DECEASED,
SUSAN J. FURMAN, DEREK J PEARSON, JUST-
IN N. PEARSON, LEVI S. YODER, BY RANDAL
BIRD, HIS GUARDIAN AD LITEM, DYLAN J.
PALM & DEVIN PALM, BY ALICIA C. PALM,
THEIR GUARDIAN AD LITEM,

Appellants,

AND

BANK OF AMERICA,

Respondent.

No. 62933-6-1

APPELLANTS' REPLY BRIEF

ORIGINAL

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STATE OF WASHINGTON
DIVISION ONE
2009 JUN -30 PM 10:35

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Appendix 6 Principles & Guidelines/Forfeitures

ACRONYMS & ABBREVIATIONS

- BAC - Bank of America
- BOA - Brief of Appellants
- BOR - Brief of Respondents
- LEA - Law Enforcement Agency
- MFSJ - Motion for Summary Judgment
- SC - Snohomish County
- SRDTF - Snohomish Regional Drug Task Force

PRAECIPE (FOR EVIDENCE) CP 216-311

This praecipe, with 26 separate documents, designated Items 8 thru 33, inclusive, filed in support of Claimants' MFSJ, CP 312, P.7, is listed as a single document in the Clerk's Papers. For ease of reference these documents are referred to by reference to the Clerk's page number coupled with the item number, e.g., Decedent's Last Will & Testament, referred to as CP 216, Item 8.

Declaration of Service

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on this day I deposited or caused to be deposited in the U.S. Mail a properly stamped & addressed envelope directed to attorneys of record for

SRDTF & S.C. & BAC - respondents

containing a copy of the document to which this declaration is affixed.

Dated this 2nd day of June, 2009

[Signature]
WSR 585

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1. Issues. The table of contents is argumentative and, as will be seen, unsupported by the evidence or the record and by any apposite legal authority.

Like wise the issues. For example, what when this action was started and argued in the trial court the LEA called the little brown shed "immediately adjacent to the south side of the house," CP 390, L.1 & 2, "near the house," "very near the house," CP 85, L.9 & 13, and "near the main residence," CP 387, L.18, with the odors of marijuana and fan noises emanating therefrom discovered "during the protective sweep," CP 388, L.1-3, CP 387, L.16-21, has become the shed "between the house and the barn which was the subject of the search warrant," so respondents can argue the odors and noises emanating therefrom were discovered during the search authorized by the warrant issued, e.g., BOR 4 & 13.

They contend, erroneously, claimants have not controverted the (allegations) the property was used for commercial purposes.

Also, the LEA ignores, fails even to mention, the controlling issue in this case: Has the LEA proved (1) the right to a decree; forfeiture/ AND (2) the present owners (claimants) had knowledge of and consented to the illicit acts and omissions.

2. Statement of the Case. Respondents have not so much as mentioned anything in appellants' statement of the case or in the appendices thereto let alone deny, controvert or dispute

anything therein.

They suggest the investigation of the suicide in 2002 revealed Rodney J. Pearson (herein RJPearson or decedent) "kept a loaded gun in his night stand," BOR 3, based upon his statement in 2002 his daughter (the suicide) "must have taken his 9 m.m. handgun from his nightstand next to his bed," CP 113.

They do not dispute or controvert the fact that both the then deputy prosecutor representing the LEA and counsel representing RJPearson believed the plea was an "Alford" plea.

They now contend the LEA and BAC entered into an agreement of some kind, BOR 5 & 6, citing the unsigned agreement submitted by claimants, 2 CP 278-282 (cf. CP 216, Item 25). Their agreement is nowhere mentioned in anything the LEA or BAC submitted to the trial court, not in evidence or the record.

They say the decedent in his will "appointed Brian ... as his personal representative" (Emp.Added). In fact, his will said "I nominate and appoint Brian ... as executor" and direct him to settle my estate..." etc. CP 216, Item 8, P.2.

They suggest the LEA and BAC joined in objections to a determination of attorney fees and other issues "because they involved disputed issues of fact," BOR 7, citing CP 74-94, i.e., both the LEA's (CP 78-94) and BAC's (CP 74-77) response, without saying where in those 20 pages they raised that issue. BAC's response nowhere suggests any factual disputes and it quoted and relied upon the same Paragraphs 4 and 5 in the first deed

of trust and Paragraph 4.7 in the second deed of trust quoted and relied upon by claimants in their motion. Cf. CP 76 & 327. The LEA contended any issues other than "innocent owners" relied upon disputed facts, citing attorney fees as an example, but nowhere identified any genuine issues of material fact, i.e., nothing but an unsupported argumentative assertion.

And significantly, nowhere in their statement of the case will the court find any suggestion the alleged dangers to the officers were not known to the officers at the time they applied for the warrant; or any suggestion they did not have adequate time to apply for a warrant to search the house.

3. Property Admittedly Used To Manufacture Marijuana. The respondents rightly concede real property may be forfeited only if the marijuana is possessed for commercial purposes but add "as evidenced by five or more plants or one or more pounds of marijuana," BOR 9. THAT IS NOT WHAT THE STATUTE SAYS:

(iii) The possession of marijuana shall not result in the forfeiture of real property unless the marijuana is possessed for commercial purposes, the amount possessed is five or more plants or one pound of marijuana, and a substantial nexus exists between the possession of marijuana and the real property.

RCW 69.50.505 (1) (h) (iii), Emp. Added. In addition, the statute requires "...a substantial nexus exists between the commercial production or sale of the controlled substance and the real property." RCW 69.50.505(1) (h).

Contrary to their contentions the LEA has not produced any

evidence of commercial use or activity, except the inculpatory material or equipment in the little brown shed discovered during during the unconstitutional pretextual protective sweep and the speculations and conjectures of commercial use by the officers. See Lewis Dec., CP 390-391, Paras. 9-12; BOA, App. 4; & Brian A. Pearson Dec., CP 216, Item 33, Paras. 3, 4 & 5.

Respondents forget also and must concede the Uniform Controlled Substances Act is penal and must be applied and construed strictly against the LEA and in favor of the claimants, Kahler v. Kernes, 42 Wn.App. 303, 308, 711 P.2d 1049 (1985), and see several other cases cited at BOA 16-17. In addition, forfeitures are not favored and should be enforced only when within both the letter and spirit of the law, Bruett v. 18328 11th Ave. N.E., 93 Wn.App. 290, 295, 968 P.2d 913 (1998).

Respondents for the first time contend (i.e., an issue not raised below) "A protective sweep exception should be applied to the service of a search warrant," citing State v. Boyer, 126 Wn.App. 593, 102 P.3d 833 (2-04), Review Denied, 155 Wn.2d 1004 (2005), BOR 11. The court there discussed (and refused to adopt) a "protective sweep" exception to the rule that warrantless searches inside a home are presumptively (i.e., per se) unreasonable, from which respondents conclude and contend "No Washington case has yet addressed a protective sweep incident to the execution of a search warrant," BOR 11. That may have been true before Boyer but not after Boyer.

Recognizing the "protective sweep" exception in Maryland and what is called the Buie case or rule pursuant to which the trial court had approved the "protective sweep," the court reversed the trial court, saying:

No Washington case has addressed a protective sweep incident to execution of a search warrant.... However, given the weight of authority specifically limiting protective sweeps to arrests or to executions of arrest warrants, we find that the trial court erred as a matter of law in concluding that the warrantless search of the basement rooms behind door no. 2 was justified as a protective sweep. Even those jurisdictions—such as the First Circuit—that have extended Buie to the execution of a search warrant would find the sweep here unjustified because the officers articulated no specific facts that would support a prudent officer's belief that the area harbored a dangerous person.

State v. Boyer, 124 Wn.App. @ 602.

In Washington the rule is clear and concise. A search for weapons for officers' safety may be within what we know as an exigent circumstances exception. The LEA chose not to try to legitimate the unconstitutional and pretextual protective sweep under this exception, knowing they knew of the potential dangers at the time of the application for the warrant (both of which said HOUSE NOT TO BE SEARCHED) and had more than adequate time to apply for a search or sweep of the house. See BOA 30.

In addition, the LEA made no effort to show the officers had to go through the house to access the subject matter of the search, the barn on the south end, which they admittedly could have accessed without going near the house. See Lewis Dec., CP 387, L.21-26.

Respondents contend also the officers would have likely gone to the house at some point to notify them of the search or give them a copy of the warrant and a receipt for property taken and in so doing would have made the observations leading to the second search. However, there is nothing to suggest they could not simply have rapped on the door and left those papers with the occupants, without entering the house.

Respondents went to great length to try to legitimate the pretextual protective sweep and sell the fiction that the little brown shed was discovered during the course of the outdoor search under the warrant. They cannot identify any tangible evidence of commercial activity, save the material and equipment in the little brown shed, so they conclude it is immaterial.

Respondents headlined this section of their brief with what they contend entitled them to the forfeiture decree, i.e.:

B. THERE WAS NO GENUINE ISSUE OF MATERIAL FACT THAT THE SUBJECT PROPERTY WAS USED FOR THE MANUFACTURING OF CONTROLLED SUBSTANCES WITH THE OWNER'S KNOWLEDGE.

Even if claimants were to concede what this says (assuming controlled substances means marijuana), it falls far short of the statutory requirements for forfeiting real property, i.e.,
PROOF OF THE RIGHT TO FORFEITURE AND KNOWLEDGE OF AND CONSENT TO THE ILLICIT ACTS ON THE PART OF THE PRESENT OWNERS. BOA 30.

4. Alleged "Circumvention" of Forfeiture Action. The LEA contends the decedent could not "circumvent" the forfeiture action; i.e., he had no right to die seized with title to the

property; the claimants, his heirs and devisees, may be the owners of the property without knowledge of or consent to the illicit acts and omissions and came into title because of their father's demise but have no right to claim their inheritance or the protections afforded them under the statute. No authority is cited for these novel contentions.

The LEA argues "the forfeiture action was a charge against the estate at the time of" death and the heirs had no "vested interest" in the property, BOR 15. No authority is cited, and it emasculates the principles underlying our drug forfeiture cases, e.g., In Re 1980 Porsche, 54 Wn.App. 496, 501, 774 P.2d 528, 1889, (LEA is not a creditor or lienholder.); State v. Hendrickson, 129 Wn.2d 61, 75, 917 P.2d 563, 1989 (Until forfeiture decree is entered title to seized property resides in person from whom seized; under statute rights of innocent parties in chain of title are expressly protected.); & State v. Brown, 92 Wn.App. 586, 595, 965 P.2d 1102, 1998 (Because the government's title to seized property does not vest until forfeiture is decreed, an innocent transferee can acquire ownership rights during the period between the illegal acts and entry of the decree.)

The LEA argues the executor and heirs could not be an interested party in the forfeiture action because the time period for filing a claim had expired. The LEA forgets, the time period it refers to begins with the service of notice of the seizure and forfeiture. The LEA relies on KeyBank v. Everett, 67 Wn.App. 914,

841 P.2d 800, 1992. There "KeyBank was timely served with notice pursuant to RCW 69.50.505(d) and did not respond to that notice," 67 Wn.App. @ 916. Claimants treated with that issue (including that case), BOA 12-15, which the LEA ignores.

The LEA contends the appellants could not become a party to the forfeiture action pursuant to RCW 69.50.505(5), BOR 16. No authority is cited.

The LEA is unable to come up with any legal authority to controvert or rebut the principles underlying our drug forfeiture cases, e.g., 1980 Porsche, 54 Wn.App.498, 501, supra; Hendrickson, 129 Wn.2d 61, 75, supra; Brown, 92 Wn.App. 586, 595, supra; and see also People v. Estate of Kawa, 152 Ill.App.3d 792, 504 N.E.2d 1987; & People v. \$234,000, 217 Mich.App. 320, 551 N.W.2d 444 (1996).

The LEA argues at length (BOR 15-18) because appellants were unable to file a claim in their own right they are limited to the claims of the decedent could have made under the original claim he filed. No authority is cited.

The LEA contends appellants became parties in the forfeiture action by virtue of CR 25 and the order substituting the executor, BOR 17. No authority is cited. 1/ They also contend

1/ In the trial court the LEA took the position the heirs and devisees could not be "claimants." Even though their Notice of Claims & Petition for Relief was filed by the heirs, devisees and executor jointly and their MFSJ entitled "CLAIMANTS' MOTION" etc., the LEA referred throughout their response and MFSJ to "Claimant's" instead of "Claimants." See, e.g., CP 81, L.1 & 6. See also the ludicrous recitals in the final order they presented and had entered, CP 22, L.1-7. .

appellants "as substitutes" for the decedent they must track the position of the original litigant and may (only) assert the defenses available to the original parties. All the authority cited pertains to civil actions or proceedings of various kinds. Not so much as a single case relating to forfeitures.

The LEA keeps forgetting THE LEA'S RIGHTS TO FORFEITURE DO NOT ARISE OUT OF ANY COMMON LAW OR OTHER LEGAL CONCEPTS—SUCH RIGHTS ARISE OUT OF AND ARE GOVERNED BY THE ACT, ALL OF AND ONLY THE ACT,

BOA 18, which they totally ignore.

The LEA also forgets it had the burden of proving the property was subject to forfeiture (which required it to prove some commercial activity); the burden of proving the present owners (undisputably the claimants) had knowledge of and consented to the illicit acts and omissions (not just constructive notice of the pending seizure action), under Subsection (h) (i); and the duty promptly to return the property to the "present owners," i.e., the appellants, under Subsection (5).

5. The Lis Pendens. In the trial court the LEA contended the claimants had guilty knowledge because of the seizure, this lawsuit, and the lis pendens. (BOA 24); i.e., they conflated and equated constructive knowledge of the lis pendens with actual knowledge of the illicit acts and omissions. They now contend because of the lis pendens the heirs' interest in the property was limited by any rights the decedent had in the property and because he could not assert the innocent owner defense
BQR 20-21.
neither can they/No forfeiture case is cited to support this

contention; they rely (as they did below) on Dennis v. Godfrey,
122 Wash. 207, 210 P. 507 (1936). 2/

Claimants cited and distinguished this case at BOA 11 & 12 and included an extensive quotation therefrom showing a decree had been entered in App. 5. The LEA ignores that and focuses upon the court's response to contentions by one of the parties relating to the right to a decree without an order of default before the date of death. At the risk of being repetitious:

...The sixty-day period for her appearance expired on the 23rd day of December, 1919; four months thereafter, and on the 23rd day of April, 1920, she died.... She did not make any appearance whatsoever in the case, nor, at the time of her death, had any default or judgment been taken against her.... However, before any decree was taken, an administrator of the estate of Mrs. Hanby was appointed and, with permission of the court, he intervened in the action and joined in the request of the plaintiffs for partition. Such were the facts, so far as the Hanby interest is concerned, when the court made its decree finding it was impractical to divide the lands and ordering them sold....

122 Wash. @ 210; Emp. Added.

...Doubtless, those heirs would have had a right to intervene in the action at any time before default or decree was taken, but there was no duty devolving upon the appellants to bring them into the case or to serve process upon them....

123 Wash. @ 213, Emp. Added. The court concluded:

We hold that the heirs of Mrs. Hanby, deceased, were, under the circumstances related, bound by the decree entered by the court in the partition suit, and that it

2/The LEA cited this case in the trial court to support its "inescapable conclusion" the heirs, devisees, and executor "are bound by the results of the forfeiture trial between" the LEA and the decedent (CP 78, P.12,L.23) and "may inherit whatever interest" the decedent "has left after these forfeiture proceedings are concluded" (CP 78, P.13,L.22).

was not necessary that the plaintiffs in that action should make them parties thereto.

122 Wash. @ 214 Emp. Added.

The LEA cites no authority for the contention the lis pendens limited the rights and interests of the heirs to any rights or interests of the decedent nor for the contention the heirs cannot assert the innocent owner defense because the decedent could not successfully do so; and Dennis v. Godfrey certainly did not say anything like that. AND AGAIN, UNLIKE THE HEIRS IN THAT CASE CLAIMANTS FILED THEIR NOTICE OF CLAIM BEFORE ANY DEFAULT OR DECREE WAS ENTERED.

6. Heirs' Interests v. LEA's Claims. The LEA, citing the well known (statutory) rule that the ownership rights of heirs and devisees in real property is subject to "any charges" against the property contends it stood "in the position of a creditor who had an interest in the property at the time of" death and the seizure "establishes an inchoate interest in the property" realized when it proves the right to forfeiture, and it was thus a charge against the property, BOR 21-22.

That is not so and the LEA has not cited a single forfeiture case so holding. It bears repeating:

THE LEA IS NOT A CREDITOR, LIENHOLDER, BONA FIDE PURCHASER, OR OWNER OF THE PROPERTY SEIZED; THE SEIZURE MERELY COMMENCES THE FORFEITURE PROCEEDING.

And the forfeiture cases treating with this issue (including ours) uniformly so hold. See In Re 1980 Porsche, 54 Wn.App. @

501, supra, and the cases there cited, Hallman v. State, 141 Ga. App. 527, 528, 233 S.E.2d 839 (1977), State v. Sewell, 155 Ga. App. 734, 735, 272 S.E.2d 514 (1980), and Farmers & Merchants Bank v. State, 167 Ga.App. 77, 306 S.E.2d 11, 13-14 (1983); See also Habit v. Stephenson, 217 N.C. 477, 8 S.E.2d 245 37 C.J.S., Forfeitures, Sec. 4, P. 8; and

...It is the policy of this and other courts to construe forfeiture statutes strictly against a forfeiture and liberally in favor of the person whose property rights are to be affected.... A reading of ... (the forfeiture statutes)... manifests that it was the intention of the Legislature to protect the interests of innocent parties in the property to be forfeited and sold....

Bratcher v. Ashley, ___ Ky.App. ___, 243 S.W.2d 1011 (1951), Cits. Omitted, Ellipsis Added.

The LEA cites Tellevik v. Real Property, aka Tellevik One, 120 Wn.2d 68, 86, 838 P.2d 111, 845 P.2d 1325 (1992) to support its claim to be a "lienholder," is in the position of a "creditor," holds a "charge" against the property, and holds some sort of "proprietary interest" in the property.

There is nothing in Tellevik One suggesting the seizure is a "charge" or lien against the property in the context of "charges" as used in our probate code or any other rights or interests until after an adversarial hearing and decree. It is well established seizure does not create an ownership interest or even a lien or creditor's right against the property and the LEA cites no authority for such a contention. If the LEA were right an innocent party acquiring title to the property after

the seizure could never recover his/her property; i.e., they emasculate our case law on forfeitures, e.g., State v. Brown, supra; State v. Hendrickson, supra; Bellevue v. Cashier's Check, supra; State v. Brown, supra; Estate of Kawa, supra; People v. \$234,000, supra; and, especially, In Re 1980 Porsche, supra, and the cases there cited.

In addition, Tellevik One supports claimants, not the LEA. There our supreme court reviewed two cases involving the seizure of real property. In one the LEA applied ex parte for a warrant of arrest in rem and when informed the court would not issue the warrant filed a complaint for forfeiture in rem and a lis pendens, 120 Wn.2d @ 73. In the other, the LEA filed a complaint for forfeiture in rem and a lis pendens, 120 Wn.2d @ 75. In due course the trial judge in each case (both highly regarded) quashed the warrant for arrest, dismissed the complaint, and cancelled the lis pendens, holding the statute (i.e., RCW 69.50.505) on its face unconstitutional for lack of due process, i.e., notice and an opportunity to be heard prior to deprivation of a property interest, 120 Wn.2d @ 79. The supreme court reversed in both cases and remanded for trial:

First, in order to preserve the constitutionality of the statute, we construe the term "seizure," as used in the context of seizure of real property in RCW 69.50.505, to establish only an inchoate property interest in the seizing agency.... The effect of a seizure is to commence the forfeiture proceeding. RCW 69.50.505(c). 4/

4/ Webster defines "inchoate" as: 1 just begun, in the early stages, incipient, rudimentary 2 not yet clearly or completely formed or organized; disordered 3 Law not yet completed or made effective; pending. Webster's New World College Dictionary, Third Edition. (Emp. Partly Added.)

Thus, while the private and governmental interests are significant in this case, the risk of erroneous deprivation is slight given the documentary nature of the bases for probable cause. Therefore, the balance of interests does not create a need for a full evidentiary hearing prior to seizure.... Rather, in these circumstances, an ex parte probable cause hearing is sufficient to meet minimum due process requirements....

Tellevik One, 120 Wn.2d @ 85-87, Cits. Omitted. Compare:

In the event of seizure pursuant to subsection (2) of this section, proceedings for forfeiture shall be deemed commenced by the seizure.

RCW 69.50.505(3).

Thus there is nothing in Tellevik One (or in any other case cited by the LEA) to suggest it acquired any charge or interest in the property; to have done so would have been unconstitutional, i.e., without due process.

The LEA, first representing that claimants rely upon Bellvue v. Cashier's Check, 70 Wn. App. 697, 855 P.2d 330 (1993), Review Denied, 123 Wn.2d 1008 (1994), BOR 22, devote five pages to that case to contend it is not authority supporting Claimants' right to assert the innocent owner defense, BOR 21-26, forgetting, both at bar and below:

...Claimants do not and need not rely upon that case for that purpose, BUT THE LEA CANNOT ESCAPE THE PRINCIPLES UNDERLYING THAT CASE REGARDING OWNERSHIP AND SAID DEFENSE.

BOA 23; and See CP 71, L.5-8.

Claimants cited that case also to show this court has allowed a miscreant owner to walk away from tainted property and another succeed to it and assert the innocent owner defense, BOA

22; but the LEA does not mention that. Instead of acknowledging the miscreant PR "resigned" they say he was "replaced." BOR 23.

The LEA, forgetting its rights to forfeiture are derived solely from the statute instead of common law or other legal concepts, BOA 18, contends equitable considerations weigh against giving the disclaimers any effect to permit the heirs asserting the innocent owner defense, BOR 26. They cite two Washington cases saying the "relation back doctrine is never allowed to defeat the collateral rights of third persons lawfully acquired," BOR 27, forgetting the LEA has not acquired any collateral rights (i.e., nocreditor's rights, lien or ownership) in the property other than the right to pursue and prove its claims and demands in accordance with and pursuant to the statute.

Neither of the cases cited involves forfeiture. In the first case cited a husband, after beating up and severely injuring his wife, after she had filed a personal injury action against him, and on the date of his conviction of first degree assault, executed an instrument "purporting to disclaim 'any and all interest' he 'may have' in" his mother's estate. Four months later the wife was awarded \$2.75 million in her personal injury action. A week later he filed a petition for Chapter 7 Bankruptcy Relief. A few months after that the mother died and the husband's two sons petitioned the probate court for an order declaring the "disclaimer" valid. Our Supreme Court said:

The issue in this case involves statutory construction.

. . . .

We hold that as a matter of law the instrument executed by James Baird . . . is invalid under RCW 11.86 because at that time he did not have an "interest," nor was he a "beneficiary." In sum, RCW does not authorize anticipatory disclaimers of expectancy interests.

Estate of Baird, 131 Wn.2d 514, 515 & 522, 936 P.2d 1123 (1997).

The court's remarks on the "relation back" doctrine pertained to the common law right to disclaim, not statutory.

The other case cited was a suit by the state against King County contending the county was not entitled to two years taxes assessed against real property while waiting for 18 months to elapse for entry of an order escheating the property to the state. The supreme court held:

We are satisfied, from a careful analysis of the statutes applicable to the situation here presented, that the title of the state of Washington to the property left by Mr. Graley, as declared by the decree of escheat, insofar as the general taxes for 1932 and 1933 are concerned, dates from the entry of the decree, and does not relate back to the date of Mr. Graley's death, so as to defeat the county's lien....

In Re Graley's Estate, 183 Wash. 268, 278, 48 P.2d 634 (1935), Emphasis Added. Note, first, the county had a lien (the LEA does not); and second, here again, the statutes controlled.

The LEA first appropriates some non-existent "collateral rights ... lawfully acquired," i.e., makes itself a creditor, lienholder, and owner, which clearly it is not. Then it denigrates the admittedly innocent heirs and devisees for accepting or receiving rights or benefits clearly and unequivocally.

cally granted or permitted by statute, RCW Ch. 11.86, with no evidence of impropriety or invalidity.

The LEA contends that even if the claimants are entitled to assert the innocent owner defense the court was not required to accept the averments in the heirs' affidavits "in light of other evidence," citing Escamilla v. Tri-City Task Force, 100 Wn.App. 742, 999 P.2d 625 (2000), BOR 28.

First, what "other evidence" are they talking about? They haven't submitted so much as a scintilla to suggest any of the claimants had knowledge of the illicit acts and omissions.

Second, Division Three there rejected the LEA contention the wife could not assert the innocent owner defense "because she cannot by definition be the owner of the illegal proceeds," saying this argument was expressly rejected in Bellevue v. Cashier's Check, Escamilla, 100 Wn.App. @ 753.

Third, the wife had the burden of proof on the issue.

And fourth, the hearing officer made a finding of fact on the issue, finding the wife knew or should have known the money was illegal proceeds.

At bar, this case involving real property, the burden of proof on the innocent owner issue is upon the LEA (the LEA has not and does not contend otherwise), and it has not submitted so much as a scintilla to meet that burden.

The LEA closes its argument saying the claimants cannot

rely upon State v. Brown or U.S. v. Buena Vista, because the circumstances are so different, BOR 29. Again, the LEA cannot escape the impact of the principles underlying those cases, viz., title to the property does not vest in THE LEA until a decree of forfeiture, the LEA is not the owner, lien holder or even a creditor, and by reason of the foregoing an innocent owner-transferee can acquire ownership rights during the period between the illegal acts and entry of a decree of forfeiture.

If the LEA is right, no innocent transferee acquiring title after the seizure could ever assert the innocent owner defense and recover his/her property. The LEA forgets, the provisions of the Uniform Controlled Substances Act, especially RCW 69.50.505 are intended as much to protect innocent owners of property as it is to enrich the LEA, Tellévik One, supra.

7. The Warrantless & Illegal Search. The LEA makes no effort to qualify the pretextual "protective sweep" under our state's "exigent circumstances" exception, knowing it can hardly do so, what with the officers' knowledge of the alleged dangers or hazards at the time they applied for the warrant, the more than just adequate time even after the issuance of the warrant to apply for a warrant to search the house for weapons, especially in light of both the application and the warrant emphasizing HOUSE NOT TO BE SEARCHED.

Instead they want this court to adopt a new rule, i.e., a "protective sweep exception," allowed in a very few states

when officers are making an arrest or serving an arrest warrant, to our long standing rule warrantless searches are per se unreasonable. This in the face of repeated decisions by our supreme court declining any inclinations to vest police officers with more discretion to decide when to make a warrantless search. Cf. BOR 10 et seq. & BOA 30 et seq.

8. What Evidence Should Have Been Suppressed. When the LEA initiated this forfeiture action they informed the court

Deputy Leyda applied for an addendum to his search warrant to include the brown shed and Robert King's bedroom since the smell of marijuana had been detected from both of those areas during the protective sweep of the property and residence....

Lewis Dec., CP 388, L.1-3; & see CP 387, L.16-21.

As indicated above, P.1., (and uncontroverted) the LEA now seek first to re-locate the little brown shed from "near the main residence" to "between the barn and the house" (BOR 4 & 13) and then to change "during the protective sweep" to "during the search authorized by the warrant," BOR 4 & 13.

This court should accordingly order the tangible evidence discovered in the little brown shed suppressed and disregarded in determining the critical issue of whether the LEA has adduced any tangible evidence of "commercial activities," as required under the forfeiture statute.

9. The Motion To Amend. Here again the LEA sets up a "straw" contention and then tries to knock it down. They suggest Claimants rely upon the trial judge's failure to state

any reason for denying the motion and Walla v. Johnson, 50 Wn.App. 879, 751 P.2d 334 (1988), BOR 30. This is misleading and deceptive.

The court on motion at any stage of an action may order or give leave to amend or alter any pleading, process, affidavit or any other document, to the end that the real matter in dispute and all matters in dispute between the parties may be determined as far as possible in a single proceeding. The order or leave should be refused if the motion is made with intent to delay the action, occasioned by lack of diligence, or would unduly delay the action or embarrass any other party, or if for any other reason granting the order or leave would be unjust.

And,

We have allowed amendments of complaints... with the utmost liberality...and even over the strenuous objections of the adverse party.

O'Malley & Co. v. Lewis, 176 Wash. 195, 199, 28P.2d 283 (1934).

Claimants' MFSJ, CP 312, P.8, L.8-23 (regrettably by inadvertence cited as CP 312, P.5, L.8-23), BOA 28.

Claimants make reference to and incorporate herein the legal authorities and principles cited and discussed in their MFSJ, CP 312, P.5 (sic) P.5,L.8-23.

BOA 28. Walla was cited to show Division I agrees fully with Caruso, 100 Wn.2d 343, 349, 670 P.2d 240 (1988).

Reference is made to BOA 28, emphasizing the absence of any factual or legal defense to the motion; to Claimants' MFSJ CP 312-325, Page 8, L.8-23 (regrettably inadvertently cited as Page 5); and "nothing, absolutely nothing, will be found in the record to justify denial ... neither factual or legal."

BOA 30. It bears repeating, neither the LEA nor BAC suggested any factual or legal basis for denying the motion.

10. Attorneys' Fees-RAP 18-1(b). The LEA contends the Claimants are only one claimant so even if they had prevailed they would not be entitled to reasonable attorneys fees, citing Bruett v. Real Property, 93 Wn.App. 290, 303, 966 P.2d 913 (1988), under what was then a part of RCW 69.50.505(e):

...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....

RCW 69.50.505(e), Laws of 1984 c 258.

That section is now RCW 69.50.505(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 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. (Emp. Added.)

The LEA cites Guillen v. Contreras, 147 Wn.App. 326, ___ P.3d ___ (2008), not just once, twice, at BOR 28 & 33. Claimants submit the LEA contention a single claimant is not entitled to reasonable attorneys' fees under the current version of the statute is frivolous and an imposition on both the court and the undersigned. Of course, at last count there were six claimants, seven counting the executor, (eight counting BAC).

11. Conclusion. This is a case in which the LEA seeks to acquire real property by forfeiture under the Uniform Controlled Substances Act. In the trial court the LEA cited only two cases involving such forfeitures, Bellevue v. Cashier's Check,

supra, and a totally inapposite Florida federal case, 41. F.3d 1448, (1995), CP 93. Not so much as a single case was there (or here) cited to support the trial court's conclusion that the heirs and devisees stand in the shoes of the decedent.

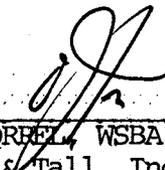
In their BOA Claimants listed the principles and guidelines generated by our appellate courts in a large body of law involving what seems to have become a cottage industry, i.e., forfeitures of properties, real and personal, belonging to persons using same for illegally dealing with controlled substances, i.e., drugs. Those principles and guidelines, for ease of reference, are listed in Appendix 6, attached hereto.

The LEA does not even mention those principles and guidelines, let alone cite cases to refute or controvert them.

Claimants's rights are clearly spelled out in the statutes and said principles and guidelines, as are the rights, limitations and restrictions of the LEA, with any doubts, ambiguities or uncertainties resolved in favor of the Claimants and against the LEA. AND THE LEA HAS YET TO CITE EVEN A SINGLE CASE TO SUPPORT THE CONTENTION/CONCLUSION THAT THE HEIRS AND DEVISEES "STAND IN THE SHOES" OF THE DECEDENT.

Claimants ask for relief in accordance with the conclusion in their opening brief, Section 10.

Respectfully Submitted this 2nd day of June, 2009.


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APPENDIX 6
Reply Brief of Appellants
SRDIF/SC v.414 Newberg Road et al
UNCONTROVERTED PRINCIPLES & GUIDELINES

THE 90 DAY PERIOD IN SUBSECTION (5) WITHIN WHICH TO FILE NOTICE OF A CLAIM IS OBVIOUSLY AND NECESSARILY COUPLED WITH THE DUTY TO SERVE NOTICE OF THE SEIZURE AND INTENDED FORFEITURE, I.E., NOTICE AND AN OPPORTUNITY TO BE HEARD, WITHOUT WHICH THE STATUTE WOULD BE UNCONSTITUTIONAL.

ALL RELEVANT PARTS OF SUBSECTIONS (1) AND (5) OF THE ACT SHOULD BE INTERPRETED AND APPLIED—NOT JUST THE PARTS CREATING THE LEA'S RIGHT TO FORFEITURE BUT ALSO THE PARTS PROTECTING THE PROPERTY OWNERS' RIGHTS.

THE PROVISIONS OF RCW 69.50.505 ARE INTENDED AS MUCH TO PROTECT INNOCENT OWNERS OF PROPERTY AS TO ENRICH THE LEA.

THE UNIFORM CONTROLLED SUBSTANCES ACT IS PENAL AND MUST BE APPLIED AND CONSTRUED STRICTLY AGAINST THE LEA AND FAVORABLY FOR THE OWNERS.

THE LEA'S RIGHTS TO FORFEITURE DO NOT ARISE OUT OF ANY COMMON LAW OR OTHER LEGAL CONCEPTS—SUCH RIGHTS ARISE OUT OF AND ARE GOVERNED BY THE ACT, ALL OF & ONLY THE ACT.

FORFEITURES ARE NOT FAVORED; THEY SHOULD BE ENFORCED ONLY WHEN WITHIN BOTH THE LETTER AND SPIRIT OF THE LAW.

BECAUSE SOMEONE MUST OWN THE PROPERTY BETWEEN THE TIME THE ILLEGAL ACTS OCCUR AND THE TIME FORFEITURE IS DECREED IT IS POSSIBLE FOR AN INNOCENT OWNER TO OBTAIN AN OWNERSHIP INTEREST IN THE PROPERTY DURING THAT PERIOD AND THEN CONTEST THE FORFEITURE, THEREBY PREVENTING THE LEA'S TITLE FROM VESTING AND THE RELATIONSHIP BACK DOCTRINE FROM COMING INTO PLAY.

THE LEA IS NOT A CREDITOR, LIENHOLDER, BONAFAIDE PURCHASER OR OWNER OF THE PROPERTY SEIZED AND ACQUIRES NO PROPERTY INTEREST IN OR CHARGE AGAINST THE PROPERTY SEIZED UNTIL AFTER AN ADVERSARIAL HEARING AND A DECREE; SEIZURE MERELY COMMENCES THE FORFEITURE ACTION.