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**SUPREME COURT
OF THE STATE OF WASHINGTON**

No. 82531-9

**LORENA CONTRERAS, guardian of-
JESUS JAIME TORRES, JR.,**

Petitioner.

vs.

JOSE GUILLEN, CITY OF SUNNYSIDE,

Respondent.

RESPONDENT CITY OF SUNNYSIDE'S BRIEF IN
RESPONSE TO BRIEF OF AMICUS CURIAE WASHINGTON
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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RCW 42.56.550

1

RCW 69.50.505

1-7,
10,11

A. ARGUMENT

1. Amicus has misstated the standard of review as de novo when in fact it is abuse of discretion.

The Amicus summarily references the Court of Appeals decision upon appeal and infers that the Court applied a “de novo” standard of review to the trial court’s decision. [Brief of Amicus Curiae Washington Association of Criminal Defense Lawyers, P. 3]. However, the Court of Appeals did not apply a de novo review and de novo is not the standard of review this Court should apply either.

It is true that the Court of Appeals recognized that whether a statute provides for an award of fees is a question of law that is reviewed de novo. Guillen v. Contreras, 147 Wn. App. 326, 330 – 31, 195 P.3d 90 (2008). However, later in its opinion the Court went on to explain that under RCW 69.50.505(6) it believed that the legislature’s use of the term “substantially” to modify “prevailing” implied that the trial judge had some discretion.¹ Id at 335. The Court then expressly found that the trial court’s decision was not an “abuse of discretion.” Id. It is clear that the Court of Appeals was reviewing the trial court’s decision for an abuse of

¹ The fact that the legislature did not use language stating that an award of attorney’s fees is mandatory upon the granting of any relief, as it does in RCW 42.56.550 relating to actions under the Public Records Act, also supports the Court’s conclusion that the award of fees under this statute is discretionary.

discretion, and that is the appropriate standard of review by this Court as well.

This Court has expressly recognized that awards of attorney's fees that are authorized by statute are left to the trial court's discretion and will not be disturbed "in the absence of a clear showing of abuse of discretion." Fluke Capital & Management Services Company v. Richmond, 106 Wn.2d 614, 625, 724 P.2d 356 (1986), quoting Marketing Unlimited, Inc. v. Jefferson Chemical Co., 90 Wn.2d 410, 412, 583 P.2d 630 (1978) overruled on other grounds by Scott Fetzer Co., Kirby Co. Div. v. Weeks, 114 Wn.2d 109, 786 P.2d 269 (1990) (concerning attorney fee awards under the state long arm statute).

It can not be disputed that RCW 69.50.505(6) authorizes a trial court to award attorney's fees. What is in dispute here is the trial court's exercise of its discretion to deny claimant fees under the statute. Abuse of discretion is the appropriate standard of review to be applied.

2. It was not error for the Sunnyside Municipal Court and the Yakima County Superior Court to address the claimant's two forfeiture appeals in the same hearing.

The Amicus appears to complain that the claimants were not afforded two separate hearings to contest the forfeitures in question. However, Amicus points to no evidence that the legislature intended for claimants to be entitled to multiple separate hearings under RCW

69.50.505. All that is required under the statute is notice and a reasonable opportunity to be heard. Claimants can not reasonably dispute that they were afforded both notice and a reasonable opportunity to be heard as relates to all of the seized property.

The Amicus infers that the City or the Municipal Court somehow nefariously joined two separate proceedings and that it was this joinder that resulted in the claimants' attorney's fees request being denied. However, a review of the record reveals otherwise. It can not be denied that claimants were timely served with a Notice of Seizure and Intended Forfeiture related to the \$9,943.00 in cash and the 1997 BMW. [CP 194]. It can also not be disputed that the claimants received notice that the City of Sunnyside intended to seize and forfeit the \$57,990.00 cash.² [CP 212]. The claimants contested both Notices pursuant to RCW 69.50.505. They enjoyed the representation of counsel, counsel presented argument, called and examined witnesses and submitted extensive briefing prior to the Municipal Court's disposition of the property.

There is no support in the record for the Amicus' assertion that the City somehow covertly "joined" two separate proceedings to gain some

² The claimants were not served with a Notice of Seizure and Intended Forfeiture related to the \$57,990.00 because the cash had no apparent connection to the claimants. Instead, only the persons with a traceable interest in the home where the cash was found were served with the Notice and they did not contest the Seizure and Intended Forfeiture. [CP 21 - 24].

tactical advantage under RCW 69.50.505(6). The record instead reveals that it was the claimants that filed Notices that they intended to contest the seizure and forfeiture of both the \$9,943.00 and BMW and the \$57,990.00. [CP 194, 212]. At the time of their statutory hearing pursuant to RCW 69.50.505(5) counsel for the claimants expressly invited the court to consider both claims during the same proceeding. [CP 104]. It certainly can not be argued that the claimants objected to the claims being considered and decided simultaneously.

Civil forfeiture statutes must strike a balance between deterring drug trafficking and protecting property owners innocent of any wrongdoing. The facts of each and every forfeiture case will be different. By using the phrase “substantially prevails” the legislature has permitted the trial court discretion to award attorney’s fees when and where appropriate.

In the present case, there is no evidence or contention that the police overreached or acted in bad faith. One question before the Sunnyside Municipal Court was whether a one-month old infant qualified as the “innocent owner” of a 1997 BMW under RCW 69.50.505(1)(ii). Another question concerned whether the \$9,943.00 found in Mr. Torres’ pocket – recall that he was shot and killed as a result of his involvement in a sizeable drug transaction – could have been “furnished” in exchange for

“a controlled substance” under RCW 69.50.505(g). Both questions involved legitimate factual and legal questions that required careful analysis by both the Municipal Court and the Superior Court. Arguably, the only dispute that facially lacked legal merit was the claimants’ claim to entitlement to the \$57,990.00 in cash found at the home where the drug transaction occurred.

As the facts underlying this case establish, law enforcement agencies confront a difficult decision when attempting to utilize the civil forfeiture provisions of RCW 69.50.505. The Amicus would have law enforcement bear the cost of every forfeiture that ultimately does not fully succeed. However, the legislature has acknowledged that civil forfeiture is a very powerful and important tool in the fight against drug trafficking. The legal position advocated by the Amicus would have a profound chilling effect upon the exercise of the powers that the legislature has expressly granted. This position is impossible to square with the purpose of the Uniform Controlled Substances Act.

The Amicus’ implication that the City somehow manipulated the proceedings to avoid having to pay the claimants’ attorney’s fees is wholly without merit. The reason that the claimants were denied attorney’s fees was because they sought to recover a substantial amount of drug tainted money that was not theirs. The City can agree with the Amicus on one

point. A party should indeed be careful when making claim to assets that they are not rightfully entitled to under RCW 69.50.505(6). The legislature has stated no preference for a party's attempt to unjustly enrich itself by making a claim that is not warranted under the statute. It would defeat the purpose of the statute to allow claimants to recover their attorney's fees even when their claims are without merit and a holding by this Court such as that offered by Amicus would encourage abuse of the claim's filing provisions of the statute.

3. The claimants were only entitled to one proceeding under RCW 69.50.505(5) and the fact that the proceeding was in rem is irrelevant to the question of whether the trial court abused its discretion in denying attorney's fees

The language the legislature selected to use in RCW 69.50.505(5) is clear. The legislature provided for "a hearing" wherein a person or persons shall be afforded a reasonable opportunity to be heard as to their claim or right to seized property. That unquestionably occurred in this instance. No where does the statute call for any form of bifurcated "hearings" depending on the type of property seized or number of items seized. Similarly, RCW 69.50.505(6) also references a singular "proceeding" or "hearing". The assertion by the Amicus that the hearing afforded the claimants in this case was somehow flawed is simply without merit. Under the statute the claimants were entitled to one (1) hearing

wherein they would have a reasonable opportunity to be heard as to their claim or right to all of the seized property. That occurred.

To obscure this fact the Amicus attempts to attribute intent to the legislature and the statute that does not exist. The legislature's purpose in enacting RCW 69.50.505 could not be any clearer:

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 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 seizures 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 interest. [1989 c. 271 § 211].

The legislature recognized the grave impacts that drug trafficking has on our society. In this specific case it directly resulted in the deaths of two individuals. Contrary to the Amicus' assertion, the purpose of the Uniform Controlled Substances Act is not to "give claimants the means to resist forfeitures of multiple items of property." [Brief of Amicus Curiae Washington Association of Criminal Defense Lawyers, P. 7]. Nor was the statute written to encourage individuals to try and recover seized assets that they have no right to and enrich them, or their attorneys, when their claim is denied. The purpose of the Uniform Controlled Substances Act is to deter drug trafficking.

The Act specifically enables law enforcement agencies to pursue deterrence, in part, through the seizure and forfeiture of assets. Once seized and forfeited these assets can then be used to offset the immense expense incurred in the fight against illegal drug trafficking. Although the Uniform Controlled Substances Act does provide procedural safeguards for challenging seizures of property believed to be related to drug trafficking, those safeguards were not the central purpose the legislature had in mind when it enacted the Uniform Controlled Substances Act.

The Amicus argues that the 2001 amendments to the Uniform Controlled Substances Act should be read as broadly as the federal Civil Asset Forfeiture Reform Act (CAFRA). However, the purpose of the

Uniform Controlled Substances Act, as stated above, is vastly different than the purpose of CAFRA which is to ensure that civil forfeitures are fair and to give owners innocent of any wrongdoing a means to make themselves whole after a wrongful government seizure. [Brief of Amicus Curiae Washington Association of Criminal Defense Lawyers, P. 14, n. 8].

Although the Governor commented on the 2001 amendment to the Uniform Controlled Substances Act, there is no indication of a legislative intent to change the primary focus of the Act from deterring drug trafficking to civil asset forfeiture reform and to do so would undermine the stated purpose of the Act.³ Had the legislature desired to enact a law such as CAFRA with its primary focus on protecting citizens innocent of wrongdoing from seizure of their assets and giving them a means to “make themselves whole” the legislature could have done that. Instead, the 2001 amendment appears to be merely an attempt by the legislature to afford claimants an opportunity to recoup attorney’s fees when their assets are improperly seized and the government is the only adverse party in a proceeding under RCW 69.50.505. See e.g. Deter v. Smith, 106 Wn.2d 376, 380, 721 P.2d 519 (1986). Under the amended statute claimants now

³ There is also no evidence of “widespread criticism” of a civil forfeiture “regime” in the State of Washington that the Amicus asserts lead to enactment of CAFRA. [Brief of Amicus Curiae Washington Association of Criminal Defense Lawyers, P. 15].

have that opportunity but they still must “substantially prevail” to recoup their fees.

The Amicus’ invitation to this Court to apply a CAFRA like reading to RCW 69.50.505(6) should be rejected.⁴ As indicated, the Uniform Controlled Substances Act and CAFRA have two very different underlying purposes. More importantly, there is no need to look to CAFRA, or the cases interpreting the federal law, as there is abundant precedent from the Courts of this State to understand what the legislature intended when it amended the Uniform Controlled Substances Act.

Our Courts have previously interpreted the meaning of the phrase “substantially prevails” and those interpretations are fully supportive of the discretion exercised by the trial court and the decision of the Court of Appeals. In McClarty v. Totem Electric, 157 Wn.2d 214, 137 P.3d 844 (2006), which was subsequently superseded in part by RCW 49.60.040, this Court found that since both parties had prevailed on “some issues” neither party had “substantially prevailed” overall. Id at 231. Similarly, the Court of Appeals has previously found that if both parties prevail on a “major issue”, then neither party has “substantially prevailed” overall.

⁴ The invitation to apply some kind of proportionality approach to the award of attorney’s fees should also be rejected as there is no indication in RCW 69.50.505(6) that the legislature intended for the award of attorney’s fees under the statute to be based on a proportionate recovery formula and the claimants consented to pursuing their claims as one.

Hertz v. Riebe, 86 Wn. App. 102, 105, 936 P.2d 24 (1997). When only one party “prevails” on the major issues then it has “substantially prevailed” overall. Northwest Television Club, Inc. v. Gross Seattle, Inc., 96 Wn.2d 973, 985-86, 634 P.2d 837, 640 P.2d 710 (1981). Applying this precedent to the present case, it is clear that the claimants did not “substantially prevail” as the City “prevailed” on the major issue of entitlement to the \$57,990.00. At a minimum, neither party “substantially prevailed” as both parties prevailed on “some issues.”

As noted by the Court of Appeals below, the legislature used very specific language in crafting RCW 69.50.505(6). The language, “substantially prevails”, has previously been used by the legislature and it has been interpreted by the Courts on numerous occasions. Just as the Court of Appeals found below, the claimants’ recovery of a fraction of the assets that they sought did not make them the “substantially prevailing” party. Put differently, the City was able to fend off the claimants’ unjustified attempt to recover a significant portion of the seized assets, thereby “substantially prevailing.”⁵

Had the legislature intended for claimants to receive an award of attorney’s fees under the statute based on a recovery regardless of value or

⁵ Although the City admittedly has no right to recover its attorney’s fees under the statute that fact does not make the City any less of a “prevailing party” in its litigation with the claimants.

quantity of assets the legislature most certainly could have explicitly stated that is what it intended to do. When the legislature has wanted to do so in other circumstances it has written statutes to ensure that attorney's fees are awarded when a party prevails to any degree. Guillen v. Contreras, 147 Wn. App. 326, 335, 195 P.3d 90 (2008). The Amicus ignores the simplicity with which the legislature, could have, but did not, amended the statute to award attorney's fees to a claimant that prevails "in any degree." The legislature's precise language selection, and our Court's interpretation of that specific language, fully supports the decision below.

B. CONCLUSION

The Superior Court did not abuse its discretion in denying attorney's fees to the claimants as they did not "substantially prevail." The Court of Appeals should be affirmed.

DATED this th29 day of April, 2010.

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By: 
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THE SUPREME COURT OF WASHINGTON

JOSE GUILLEN, CITY OF)
SUNNYSIDE,) NO. 82531-9
) C/A NO. 26432-7-III
Respondent,)
vs.) DECLARATION OF SERVICE
)
LORENA CONTRERAS, guardian of)
JESUS JAIME TORRES, JR.,)
)
Petitioner.)

KATHY S. LYCZEWSKI, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am a legal assistant for Menke Jackson Beyer Ehlis & Harper, LLP, attorneys for respondents herein. On the date and in the manner indicated below, I caused RESPONSE OF RESPONDENT CITY OF SUNNYSIDE TO AMICUS CURIAE BRIEF OF THE WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS to be served on:

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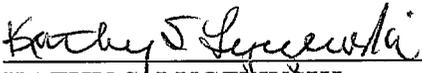
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DATED THIS 29th day of April, 2010, at Yakima, Washington.


KATHY S. LYCZEWSKI