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ARGUMENT

THE TRIAL COURTS ORDER FOR RETURN OF PROPERTY
CANNOT OVERRIDE THE REQUIREMENTS OF S768.28 Fla.
STATS. AND CONVERT A CIVIL FORFEITURE PROCEEDING
INTO A TORT CLAIM AGAINST THE STATE.

Respondent and the Fourth District have shown no proper authority for an award of "incidental damages" against the Department without the necessity for compliance with S768.28 Fla. Stats. Their attempt to justify an award as an incident of the trial courts inherent authority to enforce its own orders is misplaced. The cases relied on by Respondent are not applicable to the facts of this case.

The case of Dade County v. Richter's Jewelry Company, 223 So.2d 375 (Fla. 2d DCA 1969), is limited to the general recognition of a trial courts jurisdiction to enter orders necessary to enforce its judgement. The Department does not disagree with that ruling. However, under the facts of this case, Respondent never sought enforcement of the order for return of property. She chose instead to move for the imposition of damages against the Department as a substitute for return of the truck. She never sought to compel the return through appropriate motions, sanctions or fines, all of which were within the inherent enforcement authority of the trial court.

The Department successfully thwarted this attempt to substitute damages for possession by bringing the Department of Transportation before the Court and ultimately achieving compliance with the order for return. When the Order for Return was entered in July, 1986, title and possession of the truck had

passed to the Department of Transportation. It is fundamental that an order is not binding on an entity which is not a party to the action, HCA Health Services of Florida Inc. v. Ratican, 475 So.2d 981 (Fla. 3d DCA 1985). Until the Department of Transportation was brought into the proceedings and directed to return the truck, Petitioner had a legal basis for not complying with the order for return.

The trial court properly recognized that it was without jurisdiction to award damages, if any exist, without compliance with the statutory conditions for suit against the state. As recognized by this Court in Menendez v. North Broward Hospital District, 537 So.2d 89 (Fla. 1988):

Subsection 768.28(6) requires three things prior to instituting an action against a state agency. First, the claimant must present the claim to the agency in writing. Second, the claimant must present the claim to the Department of Insurance in writing. Third, the claim proffered to the Department must be presented within three years after it accrues and the agency or the Department denies the claim in writing.

Respondents Motion to Determine Damages and the Fourth District's belief that "incidental damages" may be recovered are in direct conflict with the statutory conditions to suit against the Department, which conditions have not been waived.

Respondents cite to Lowther v. United States, 480 F. 2d 1031 (10th Cir. 1973) provides no support for their position. The Third District distinguished that case in Morton v. Gardner, 513 So.2d 725 (Fla. 3d DCA 1987) as follows:

Thus, Lowther stands for the proposition that where property is found not to be contraband, the owner is entitled to return of the property

or to its equivalent. Since the Morton's property was returned to them, Lowther is inapposite. (P.729)

It is equally inapplicable here, because the truck was returned to Respondent.

City of Miami Reach v. Bules, 479 So.2d 205 (Fla. 3d DCA) has been distinguished by this court in Wheeler v. Corbin, 546 So.2d 723 (Fla. 1989) as having no application to loss of use claims apart from its peculiar facts. In Bules, loss of use compensation was found to be in the nature of supersedeas, pursuant to the trial courts order entered under authority of Fla. R. App. P. 9.310(a). Clearly, the order for return in this case was not based on any supersedeas authority of the trial court.


Respondents reference to Forfeiture of 1978 Green Datsun Pickup Truck v. Kruysman, 475 So.2d 1007 (Fla. 2d DCA 1985), rev. den. 486 So.2d 598 (Fla 1986), is equally unavailing. The vehicle owner was permitted to file a "supplemental counterclaim" for loss of his truck, which had been sold to pay for accrued storage costs. The District Court held that the state had waived the need to comply with §768.28(6) by not raising the defense until after entry of final judgement. Here, the Department has raised the Respondents lack of compliance with the notice and service requirements in a timely manner. See Plaintiffs Motion To Strike Defendants Motion To Determine Damages and Response Thereto (A-47). The trial court properly recognized that Respondent could seek damages under §768.28, subject to compliance with its provisions. It is the Fourth District's failure to acknowledge this statute that requires reversal.

Finally, Respondent is not entitled to attorneys fees under §57.111 Fla. Stats. Such fees are not available in the absence of any showing that Respondent is a "prevailing small business party," and their failure to make timely application for any such fees. Furthermore, Petitioner had substantial justification on which to initiate this forfeiture and pursue this certified question, the presence of which precludes any such award.

CONCLUSION

The certified question must be answered in the negative and the Fourth District opinion reversed. The trial courts Final Order Should be affirmed. Respondents request for attorneys fees should be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular United States mail to Ray Sandstrom, Esquire, 429 South Andrews Avenue, Fort Lauderdale, Florida 33301, this 11th day of December, 1989.



JUDSON M. CHAPMAN
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