IN THE SUPREME COURT OF FLORIDA

PONDELLA HALL FOR HIRE, INC.,

Petitioner,

CASE NO. SC-04-604

v.

LAWSON LAMAR, State Attorney
for the Ninth Judicial Circuit,

Respondent,

_____

PETITIONER'S JURISDICTIONAL BRIEF

ON REVIEW FROM THE DISTRICT COURT

OF APPEAL, FIFTH DISTRICT

STATE OF FLORIDA

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STATEMENT OF THE CASE AND FACTS

This Defendant has an extensive appellate record, including appearances before this Court and before other courts of appeal. See Department of Legal Affairs v. Bradenton Group, Inc., 727 So.2d 199 (Fla. 1998); Pondella Hall for Hire, Inc. v. Lamar, 860 So. 19 (Fla. 5th DCA 2003); Pondella Hall for Hire, Inc. v. Croft, 844 So.2d 696 (Fla. 5th DCA 2003); Pondella Hall for Hire, Inc. v. City of St. Cloud, 837 So.2d 510 (Fla. 5th DCA 2003); Eight Hundred, Inc. v. State, 781 So.2d (2001). Except for the decision of this Court, all the appeals involve claims for return of seized property or compensation for damages. There are many appeals, because in 1994 and 1995 a number of agencies filed separate lawsuits for forfeiture, all of which ended in judgments for the Defendant, including the criminal cases, which were not subject to appeal.

This case started on May 11, 1994, when the State Attorney of the Ninth Judicial Circuit, Lawson Lamar, filed a complaint for forfeiture, damages and injunctive relief. The complaint was styled a forfeiture proceeding In re. Forfeiture of Property Seized, April 26, 1994 from Orlando Bingo-Pondella Hall for Hire, Inc., 4621 South Orange Blossom Trail, Orlando, FL.

This case was initiated solely as a civil proceeding. It targeted both the personal and real property of the business located on Orange Blossom Trail on April 26, 1994. In its Petition, it stated

three causes of action; one count under Florida RICO, pursuant to Section 895.95, Fla.Stat., for a money judgment; one count under Sections 932.704, 849.36 and 895.05, Fla.Stat., for forfeiture; and one count for an injunction pursuant to Section 823.05, 60.05 and 60.06, Fla.Stat. Pondella obtained a final judgment against Lawson Lamar on its claims, which was not appealed.

Lawson Lamar did not use the RICO Lien notice provisions of Section 895.07, Fla.Stat., nor did it follow the provisions of the Contraband Forfeiture Act, and place a notice of lis pendens on the property pursuant to Section 932.703(2)(b), Fla.Stat. Rather, in violation of Section 932.703, Fla.Stat., Lawson Lamar sought and obtained an injunction pursuant to Sections 823.05, 60.05, 60.06, Fla.Stat. on the real estate. That injunction was subsequently issued by the court as a final injunction, and it named the property owner, and those persons leasing from him. That would be this Petitioner. That final injunction is still in effect. The trial court refused to hear Petitioner's motion to dissolve it.

Pondella filed counterclaims against the State Attorney, including a count for damages pursuant to Section 60.07, Fla.Stat., a claim for damages pursuant to Section 932.704, Fla.Stat., and a claim for inverse condemnation, due to the constitutional taking by the State of Florida of the business enterprise.

Pondella also asked for attorney's fees and costs pursuant to

Section 60.05(5), Fla.Stat., (1995), for attorney's fees and costs pursuant to Section 57.111, Fla.Stat., (1995), and finally, Pondella sought damages for the loss of the business, fees and costs due to the wrongful forfeiture seizure under Section 932.704, Fla.Stat., (1995).

The trial court granted judgment as to Count I on June 27, 2002, and on December 9, 2002, the trial court entered an order dismissing all counterclaims and all other claims of Pondella for fees, costs and damages. This decision was entered nine years after closing of the business, and was done without evidence of any sort.

The trial court denied all claims for damages, including the ones that were statutorily allowed and the claim for a constitutional taking. It did this for two reasons. First, as part of the ruling the Court found that,

> "Moreover, it is apparent on the face of the counter-complaint that any such loss of use damages would be purely speculative, and it would be impossible for any court to determine in what amount, if any, Defendants were damaged for loss of use of the seized property".

It is unknown how the court came to this finding of fact. The State Attorney in its motion to dismiss had not even raised this as an argument.

Secondly, the trial court ruled that it would follow the provisions of Section 932.704, Fla.Stat. as written in 1993. Under those provisions, the loss of use or business damages "may" be awarded to a prevailing defendant. As written in 1993, Florida's Civil

Contraband Forfeiture Act did not make the payment of damages to a prevailing Defendant mandatory. The statute stated that,

> The trial court may require the seizing agency to pay to the claimant the reasonable loss of value of the seized property...

See Section 932.704(9)(b), Fla.Stat., (1993). In 1995, the act was amended to make the award of damages for loss of income and value mandatory.

> The trial court shall require the seizing agency to pay to the claimant the reasonable loss of value of the seized property when the claimant prevails at trial or on appeal...(emphasis added).

The trial court, as well as the appellate court, held that the forfeiture act, Section 932.701 et.seq., barred, as a matter of law, all taking claims, even where it seemed to effectively denied any claim. This holding, therefore, violates another provision of the Florida Constitution by denying access to courts.

The trial court dismissed the inverse condemnation counterclaim, by ruling that as a matter of law, a party subject to seizure of its property is only entitled to inverse condemnation damages where the State of Florida ignores the court order to return the property, citing In re. Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So.2d 261 (Fla. 1990). That is, of course, not the holding of that case. In Kenworth this Court did not address the issue entitlement to damages prior to the court order, since it was not raised.

Still pending before the trial court was Pondella's Motion to

Dissolve the Injunction which has not been heard or ruled upon. Similarly pending before the court was Pondella's Motion for Award of Damages pursuant to Section 932.704, Fla.Stat. Finally, all claims pending against the individual Philip Furtney, a defendant in this case, were left unresolved. Judgment was not entered either against him or for him.

The Fifth District Court of Appeal affirmed the decision of the lower court in whole. A copy of that opinion styled, Pondella Hall for Hire, Inc. v. Lamar, 866 So.2d. 719 (Fla. 5th DCA 2004) is attached. That affirmation was in error and in conflict with the decisions of this Court, as set out below.

SUMMARY OF THE ARGUMENT

In its opinion, the Pondella court held that all takings and seizures of property by governmental agencies, where legal at the outset, were as a matter of law, not subject to compensation. This was so even where the property, that is the business, was destroyed by the seizure. Nowhere in its opinion did the Appellate Court consider the constitutional issue of just compensation. Yet as this Court, and the Fifth District Court of Appeal have held, the seizure of a citizens property by a governmental agency is fundamentally a constitutional issue. Department of Law Enforcement v Real Property, etc., 588 So.2d 957 (Fla. 1991) Lamar v. Universal Supply, 479 So. 109 (Fla. 1995); Lamar v. Universal Supply, 452 So.2d 627 (Fla. 5th DCA 1984).

Pondella has lost all its equipment and its property, in short, its business and this litigation has continued for nine years. It's leasehold was terminated by an injunction in violation of the very law under which it's property was seized. Nonetheless, it prevailed in this racketeering and forfeiture case. It prevailed in all criminal proceedings brought against it, and it prevailed before this Court. It had a right to compensation under both the Florida and United States Constitution, as well as Florida case law. In matters of forfeiture, the provisions of the Constitution govern over the provisions of the forfeiture law, See Tramel v. Stewart, 697 So.2d 821 9 (Fla. 1997).

To get to this result, the Appellate Court construed the provisions of Section 932.704 Fla.Stat. in such a way that it denied all claims for compensation for the taking of property for the years 1994-2003. This construction of the statute, expressly violates most of the statutory rules of construction. More importantly for this appeal, it conflicts with all the decisions of
this Court that require that in construing provisions of the forfeiture statute, that construction must render it consistent with the provisions of the Florida and the United States Constitution. It's construction is so contrived that it conflicted its own recent opinion that this same Petitioner had a remedy for damages pursuant to Section 932.704, Fla.Stat. See Pondella Hall for Hire, Inc. v Croft, 844 So.2d 696 (Fla. 5th DCA 2003).

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to Rule 9.030, Fla.R.App.P. This appeal is discretionary where the appeal involves a decision of a District Court of Appeal that conflicts directly and expressly with the decisions of this Court or with other courts of appeal.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN THE FOLLOWING CASES

The Constitutions Protects a Citizen From Even Lawful Takings

The Fifth District Court of Appeal held that the seizure of Pondella's leasehold interest, and therefore its business, could not constitute a compensable loss, that is a taking. It did so with the following reasoning.

> While the State certainly seized Pondella's personal property and obtained an injunction against the property owners from operating illegal bingo games on the property, it did not take Pondella's lease. Pondella's loss of the lease was incidental to lawful government action based on probable cause.

866 So.2d at 824. This misstated the record. The injunction prohibited any bingo from being played in the hall, and was entered, ex parte, on stipulation of the owner with the State Attorney.

Nonetheless, the Pondella Court takes the position that because the seizure and injunction were legally done, it is not compensable.

This is contrary to the express provisions of both the Florida and United States Constitutions. Whether the seizure is lawful or unlawful is immaterial, except to establish the date of the taking. Where the seizure is lawful, as supposedly this was, compensation is to be awarded as of the time of the lawful taking. See Yoder v. Sarasota County, 81 So.2d 219 (Fla.1955), Stainger v. Jacksonville Expressway Authority, 182 So.2d 483 (Fla. 1st DCA 1966).

In any case, at issue before the trial court was an unlawful taking. Section 932.703(2)(b), Fla.Stat., both in 1993 and 1995, expressly prohibits any restraint of real property in conjunction with forfeiture proceedings, except by way of lis pendens. By obtaining a permanent injunction against the further use of the real property by Pondella, Lawson Lamar violated the express language of the statute, rendering the seizure in violation of the very law that it was seeking to enforce.

Conflict with Other District Courts

The Pondella Court held that during the pendency of a forfeiture action, an owner is not entitled to any compensation for loss of use, even if he/she prevails. This is contrary to its own decisions, see Gay v. Beary, 758 So.2d 1242 (Fla. 5th DCA 2000), but also in conflict with decisions of other district courts of appeal. See e.g. Yoder v. City of Miami Beach, 479 So.2d 205 (Fla. 3rd DCA 1985), In Re Forfeiture of One 1980 53 Foot Hatteras, 642 So.2d 1106 (Fla. 4th DCA 1994). All

the courts appear to agree that if during the pendency of the forfeiture proceedings the property is damaged or lost, as here, the wronged owner is entitled to damages.

This Court's decisions in Wheeler v. Corbin, 546 So.2d 723 (Fla. 1989) and In Re Forfeiture of 1976 Kenworth Tractor Trailer, 576 So.2d 261 (Fla. 1990) do not apply to this case. In Kenworth, the forfeiture Defendant limited it's claim for damages to the taking, only after the State refused to honor a court order and return the property. Id. at 262. In Corbin, the forfeiture Defendant asked for damages in tort, and did not make a taking claim. In all cases, the claim by Pondella below was for the taking of the business, both the seizure of the personal property and the destruction of the leasehold. This taking claim involves more than loss of use damages, but rather the loss of a business.

Statutory Construction

As to one claim for damages, pursuant to Section 932.704(9), Fla.Stat., the lower court held that the 1993 provision of the statute governed, since it was in effect at the time of the initial closure of the business. It ruled that the 1995 version of the same statute, which made the award of damages mandatory to a forfeiture Defendant, constituted a substantive change, since "they expanded the right of property owners to collect damages in cases that did not get appealed. Pondella, supra. at 725. Lawson Lamar was on notice of this Amendment, but continued to maintain the injunction and seizure for another seven years.

In reaching this conclusion, the lower court expressly violated the directives of this Court, that all courts should construe the language of the forfeiture act consistent with the due process clause of the United States Constitution and the Florida Constitution. Department of Law Enforcement v. Real Property, 588 So.2d 957, 959 (Fla. 1991); Crepage v. City of Lauderhill, 744 So.2d 61 (Fla. 4th DCA 2000). Although raised in the trial court and the lower court, these constitutional claims were assiduously avoided in its opinion.

As this Court stated in its decision, Tramel v. Stewart, 697 So.2d 1997), an analysis scope of the forfeiture begins with the question of whether the constitutionally protected right, provides for an exception for forfeiture. If it does not, the forfeiture must fail. The lower

court held that where a forfeiture proceeding exists, there is no constitutionally protected right to just compensation under Florida's constitution.

This construction also expressly conflicts with the decisions of Districts Courts of Appeal. Where a statute is amended, to correct problems resulting from unclear language, it is considered a remedial re-enactment. See Ziccardi v. Strother, 570 So.2d 1319 1321 (Fla. 2nd DCA 1990)(finding Section 772.104 a remedial re-enactment); Senfield v. Bank of Nova Scotia, 450 So.2d 1157 (Fla. 2nd DCA 1984).

CONCLUSION

As shown above, the decision of the Fifth District Court of Appeal affirmed the denial of Petitioner to any and all claims for damages arising out of the seizure of its equipment and the termination of its leasehold. This was so even where the seizure and injunction violated the forfeiture law. This holding violates the Petitioners right to compensation. The Pondella court refused to address that issue. As the decisions of this Court show, the constitutionality of the taking is the first and fundamental issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief has been mailed by regular U.S. Mail delivery this _____ day of April, 2004 to Steven G. Mason, Esq., 1643 Hillcrest Street, Orlando, FL 32803 and Joseph A. Cocchiarella, Assistant State Attorney, 250 N. Orange Avenue, Suite 1600, Orlando, FL 32801.

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