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May 2015

Alana Wigley vs. Safety

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State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

May 4, 2015

Commissioner Bill Gibbons
Tennessee Department of Safety
23rd Floor, William R. Snodgrass Tower
312 Rosa L. Parks Avenue
Nashville, Tennessee 37243-1102

Upgrade Auto Sales, LLC
ATTN: Legal Advisor
832 Mississippi Boulevard
Memphis, TN 38126

Alana Wigley
901 North Mendenhall Road
Memphis, TN 38122-4201

André Thomas, Esq.
Staff Attorney
Tennessee Department of Safety &
Homeland Security
Legal Division
6174 Macon Avenue
Memphis, TN 38134-7502

RE: In the Matter of: Alana Wigley (Q2997)

Docket No. 19.01-130828J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/aem
Enclosure

**BEFORE THE COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF SAFETY**

IN THE MATTER OF:

ALANA WIGLEY

DOCKET NO. 19.01130828J

NOTICE

ATTACHED IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. THE ENROLLEE FILES A WRITTEN APPEAL, OR EITHER PARTY FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **May 19, 2015**.

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 ROSA PARKS AVENUE, 8th FLOOR
NASHVILLE, TENNESSEE 37243-1102

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR 741-5042, FAX 615/741-4472**. PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

**BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT
OF SAFETY AND HOMELAND SECURITY**

IN THE MATTER OF:

DEPARTMENT OF SAFETY

v.

**One 2000 Nissan Maxima
VIN: JN1CA31DXYT725227
Seized From: Alana Wigley
Date of Seizure: October 9, 2014
Claimant: Alana Wigley
Lien Holder: Upgrade Auto Sales, LLC¹**

**DOCKET NO: 19.01-130828J
D.O.S. Case Nos. Q2997**

INITIAL ORDER AND NOTICE OF DEFAULT

This matter came for hearing in Memphis, Tennessee on April 14, 2015, before Steve R. Darnell, Administrative Law Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Safety. Attorney Andre Thomas represented the Department of Safety. No one appeared on Claimant's behalf.

This is an action to forfeit the subject property for its alleged use in violation of Tennessee law.

Since neither Claimant nor counsel appeared for the hearing, the Department moved for an initial order holding Claimant in **default** and striking Claimant's claim from the record. The motion was **granted** based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was sent notice of the hearing by certified mail to Claimant's address of record. The U.S.P.S. attempted to deliver the notice to Claimant, but no authorized recipient was available to accept the certified mail. The U.S.P.S. left notice at Claimant's residence of how to

¹ The Department also moved for default on the lienholder. This motion is denied and is address in another order entered contemporaneous with this order.

collect this mail or have it redelivered. When no one contacted the U.S.P.S. the notice of hearing was returned to the Department as unclaimed. Claimant has not provided the Department any other contact information. The Department has made all reasonable attempts to notify Claimant of the hearing.

2. Claimant failed to appear on the day of the hearing. Nor did an attorney appear on Claimant's behalf.

3. The Department had its witnesses available and was ready to go forward to prove its case.

CONCLUSIONS OF LAW AND ANALYSIS

1. Department of Safety Rule 1340-2-2-.11 provides as follows:

(1) At a reasonable time prior to a hearing, a "Notice of Hearing" shall be filed by the Legal Division and served on all parties, per Rule 1340-2-2-.03(4).

(2) In serving a "Notice of Hearing," the Legal Division shall rely upon the addresses of record as given by a claimant or by claimant's counsel. Proof of service per Rule 1340-2-2-.03(4) to the addresses of record shall establish a rebuttable presumption that claimant or claimant's counsel received notice of the hearing date.

(3) Notice of hearing for a second or subsequent setting of the hearing will be by certified mail, return receipt requested. The return receipt card may be filed with the Legal Division and serve as a record of notification.

(4) All claims filed against a specific seized property shall be consolidated for a single hearing.

2. Department of Safety Rule 1340-2-2-.17(1) provides, in relevant part:

(d) No default shall be entered against a claimant for failure to attend except upon proof, by the filing of the return receipt card, that the Legal Division has given notice of hearing.

(e) Upon default by a party, an administrative judge may enter either an initial default order or an order for an uncontested proceeding.

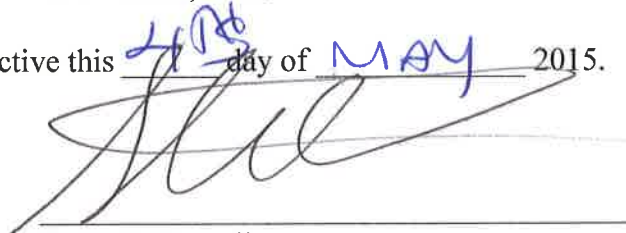
3. Department of Safety Rule 1340-2-2-.17(2) states, in relevant part:

Upon a default by a claimant, a claimant's claim shall be stricken by initial default order.

The Department's motion for default being granted, it is therefore **ordered** that Claimant's **claim be stricken**. The claim being stricken, it is as if no claim had ever been filed, which constructively evokes T.C.A. §40-33-206(c). That section states: "If a claim . . . is not filed with the applicable agency within the time specified . . . the seized property shall be forfeited and disposed of as provided by law."

IT IS THEREFORE ORDERED that the above described vehicle is forfeited to the seizing agency subject to the lien of Upgrade Auto Sales, LLC.

This Initial Order entered and effective this 4th day of MAY 2015.



Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 4th day of MAY 2015.



J. Richard Collier, Director
Administrative Procedures Division

**BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT
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IN THE MATTER OF:

DEPARTMENT OF SAFETY

v.

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**DOCKET NO: 19.01-130828J
D.O.S. Case Nos. Q2997**

ORDER DENYING MOTION FOR DEFAULT

This matter came for hearing in Memphis, Tennessee on April 14, 2015, before Steve R. Darnell, Administrative Law Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Safety. Attorney Andre Thomas represented the Department of Safety. No one appeared on behalf of Claimant or Lienholder (Upgrade Auto Sales, LLC). The Department moved that Claimant and Lienholder be held in default and their respective interestS in this vehicle be forfeited to the seizing agency. The Department's motion for default was granted as to Claimant and her interested was forfeited by an initial order entered contemporaneously with this order.

A review of the file reveals the following concerning Lienholder's claim:

1. This vehicle was seized on October 9, 2014.
2. Claimant filed a claim to have the vehicle returned. Lienholder was also given notice of the seizure, but that notice is not included in the technical record provided to APD by the

¹ The Department also moved for default on the lienholder. This motion is denied and is address in another order entered contemporaneous with this order.

Department. The Department's typical notice to lienholders requests the documentation filed in this case and **further advises the lienholder that further action is not necessary once these documents are filed.**

3. Lienholder filed a copy of the bill of sale, its retail installment contract, and a copy of the title showing its lien. This is what the Department typically requests from lienholders, but as previously noted the notice to lienholder is not in the technical record. The Department's stamp indicates these documents were received on October 30, 2014.

4. Documents filed by Lienholder indicate Claimant purchase this vehicle on September 12, 2014.

5. The Department's docketing sheet styled "Tennessee Department of Safety Confiscation Case" states that "lien[holder] was not perfected." It is unclear who made this determination and on what basis.

6. Notice of the instant hearing was sent to Lienholder and accepted by Y. Smith. However, this notice does not comply with the APA notice requirements found in T.C.A. sec. 4-5-307. Notifying lienholder of a hearing without some specifics that the Department is contesting Lienholder's claim is not adequate to put Lienholder on notice that the Department is seeking to forfeit its interest.

7. Whether Lienholder security interest is adequate must be determined after a hearing on the merits just like any other contested case under the APA. There is no authority under the Department's statutes or rules or the APA or APD's rules allowing the Department to unilaterally make this determination.

8. It is not clear from the record if Lienholder was ever made aware that the Department questioned Lienholder's interest in this vehicle or whether it was advised to file a bond to secure a hearing on the issue.

9. Finally, there is no requirement that a lienholder have a properly perfected lien under the U.C.C. to protect its interest in a seizure hearing. T.C.A. §40-33-205 (b) protects the claims of unperfected lienholders. T.C.A. §40-33-205 provides as follows:

(a) If a secured party **with a duly perfected security interest** receives notification pursuant to § 40-33-204(g) that a forfeiture warrant has been issued with regard to the secured property, the secured party must submit proof of the security interest to the applicable agency within thirty (30) days of receipt of the notification in order for the provisions of this subsection (a) to apply. A **secured party with a duly perfected interest** or any successor in interest to the secured party who does not receive notice of intent to forfeit the interest pursuant to § 40-33-204(b)(3), need not file a claim to preserve any right the party may have to the property.

(b) **Any secured party, other than one described in subsection (a)**, or any successor in interest to the secured party **may file a claim** for seized property by complying with the provisions of § 40-33-206, within thirty (30) days of the date the forfeiture warrant is issued.

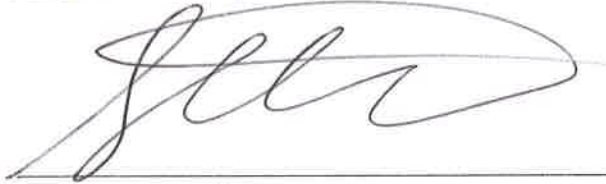
10. The Commissioner recognized the right of unperfected lienholder to protect their interest under T.C.A. §40-33-205 (b) in the case of In Re: James Ricker, Docket number 19.05-098953J.

11. There is no indication in the file that the Department notified Lienholder of any issue or dispute with the paperwork Lienholder submitted or the need for Lienholder to file a claim under T.C.A. §40-33-205 (b).

For the foregoing reasons, the Department's motion to hold Lienholder in default is denied. If the Department disputes Lienholder's lien it must provide Lienholder notice of the dispute and set the matter for a hearing on the merits.

IT IS SO ORDERED.

This Order entered and effective this 4TH day of MAY, 2015.

A handwritten signature in black ink, appearing to read 'S. Darnell', written over a horizontal line.

Steve R. Darnell
Administrative Law Judge

APPENDIX A TO INITIAL ORDER
NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.