



9-27-2006

DEPARTMENT OF SAFETY vs. One 1992
Pontiac VIN: 1G2WJ14X7NF264989, Seized
From: Nathan Fisk, Date of Seizure: January 6,
2005, Claimant: Hollis Fisk

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

IN THE MATTER OF:]	
]	
DEPARTMENT OF SAFETY]	
]	
v.]	DOCKET # 19.05-093534J
]	D.O.S. Case # D8017
One 1992 Pontiac]	
VIN: 1G2WJ14X7NF264989]	
Seized From: Nathan Fisk]	
Date of Seizure: January 6, 2005]	
Claimant: Hollis Fisk]	

INITIAL DEFAULT ORDER

This matter was heard in Chattanooga, Tennessee on September 27, 2006, before J. Randall LaFevor, Administrative Judge assigned by the Secretary of State, Administrative Procedures Division, sitting for the Commissioner of the Tennessee Department of Safety. The Seizing Agency was represented by Mr. Will Lundy, Staff Attorney for the Department of Safety. The Claimant was not present either in person or through legal counsel.

This hearing was convened to consider the proposed forfeiture of the subject vehicle for its alleged operation by an individual whose driving privileges were revoked for driving a motor vehicle under the influence of an intoxicant. (*See*, TCA §§ 55-10-401 *et seq.*, 55-50-504 & 40-33-201 *et seq.*) Upon the Claimant's failure to appear at the hearing, counsel for the State made an oral motion for an order finding the Claimant to be in default, pursuant to TCA § 4-5-309. Upon full consideration of the evidence received at the hearing and the entire record in this case, the State's motion was granted. The Claimant was found to be in default, and the claim filed in this matter was stricken, as supported by the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Claimant's vehicle was seized pursuant to law, resulting in the issuance of a Property Forfeiture Warrant. The Claimant filed a claim seeking the return of the vehicle, and requesting that a hearing be scheduled to consider that claim.
2. A hearing on the claim was scheduled for hearing on September 27, 2006, and the State sent the Claimant's attorney notification of the hearing time and location by certified mail.
3. The U.S. Postal Service unsuccessfully attempted service of the State's Notice to the Claimant's attorney's address of record.¹
4. Neither the Claimant nor his attorney appeared at the hearing.² Based on the Claimant's failure to appear, the State made an oral motion for the entry of an Order of Default.

CONCLUSIONS OF LAW and ANALYSIS

1. Tennessee Code Annotated § 4-5-309(a) provides that "if a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge . . . may hold the party in default . . ." An order holding an absent party in default at the *second* setting of a forfeiture hearing is authorized by Rule 1340-2-2-.17(1)(a), TENN. COMP. R. & REGS., *Rules of Procedure for Asset Forfeiture Hearings*.
2. Department of Safety Regulations governing asset forfeiture hearings also provide:
 - (d) No default shall be entered against a claimant for failure to attend [the hearing] except upon proof by the filing of the return receipt card, that the legal division has given notice of the hearing per Rule 1340-2-2-.11(3).
 - (e) Upon default by a party, an administrative judge may enter either an initial default order or an order for an uncontested proceeding . . .

¹ See, *Hearing Exhibit #1*.

² This was the second (or subsequent) setting of this forfeiture hearing.

Rule 1340-2-2-.17(1), TENN. COMP. R. & REGS., *Rules of Procedure for Asset Forfeiture Hearings*.

And, that

Upon a default by a claimant, a **claimant's claim shall be stricken by initial default order**, or, if the agency requests, the agency may proceed uncontested.

See, Rule 1340-2-2-.17(2)(b), TENN. COMP. R. & REGS., *Rules of Procedure for Asset Forfeiture Hearings*. (Bold emphasis added.)

3. The legal impact of striking a claim is to render the claim void *ab initio*, as though it had never been filed.³ Failure to file a claim results in the forfeiture of the property for disposition as provided by law. *See*, Tennessee Code Annotated § 40-33-206(c).

4. In accordance with the law, as set forth above, it is determined that the State's motion is well-taken. The Claimant was notified of the hearing, as shown by the certified return receipt, and failed to appear at the hearing to pursue his claim. Pursuant to the cited authority, the Claimant is hereby found to be in default for failing to appear at the hearing scheduled to consider his claim.

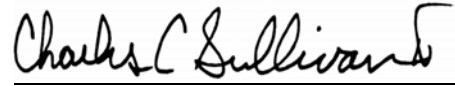
Accordingly, it is hereby ORDERED that the Claimant's claim is stricken from the record, and dismissed. The Claimant's interest in the subject vehicle is Ordered forfeited to the Seizing Agency, the McMinnville Police Department, for disposition as provided by law.

Entered and effective this 13th day of October, 2006.

J. Randall LaFavor, Administrative Judge

³ The effect of striking a pleading "is to posture the action as if [that pleading] had never been made." *See*, *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 404 (6th Cir. 1987).

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 13th day of October, 2006.

Handwritten signature of Charles C. Sullivan, II in black ink.

Charles C. Sullivan, II, Director
Administrative Procedures Division