



1-19-2007

DEPARTMENT OF SAFETY vs. One 1990  
Cadillac DeVille VIN: 1G6CD5337L4361925,  
Seized from: Theodore Cunningham, Date of  
Seizure: August 12, 2002, Claimant: Constance  
Starks, Lienholder: NA

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

**IN THE MATTER OF:**

**DEPARTMENT OF SAFETY**

**v.**

**One 1990 Cadillac DeVille  
VIN: 1G6CD5337L4361925  
Seized from: Theodore Cunningham  
Date of Seizure: August 12, 2002  
Claimant: Constance Starks  
Lienholder: NA**

**DOCKET NO: 19.01-079225J  
DOS NO: B4136**

**INITIAL DEFAULT ORDER**

This matter was heard on January 19, 2007, before Ann M. Johnson, Administrative Judge, assigned by the Secretary of State, and sitting for the Commissioner of the Tennessee Department of Safety. Jason Bergeron, Metropolitan Attorney, represented the State. The Claimant was represented by Frank Thompson-McLeod, of the Nashville bar.

The subject of this hearing was the proposed forfeiture of the captioned vehicle, pursuant to TENN. CODE ANN. §§ 53-11-201 *et seq.* and 40-33-201, *et seq.*

Since the Claimant's attorney did not appear for the hearing, counsel for the State made an oral motion pursuant to TENN. CODE ANN. § 4-5-309 and DEPARTMENT OF SAFETY RULE 1340-2-2-.17, requesting that the Claimant be held in default. In support of its motion, the State introduced evidence that the notice of the hearing was sent to the Claimant's attorney of record

by certified mail, and was received at the address of record. A copy of the certified mail return receipt was introduced as EXHIBIT 1 at the hearing. Based upon this evidence, it is **concluded** the Claimant received proper notice of the proceeding. Accordingly, the State's motion for default is **granted** and the Claimant is held in **default**, based upon the following Findings of Fact and Conclusions of Law.

### **FINDINGS OF FACT**

1. The Claimant's property was seized pursuant to law, resulting in the issuance of a Property Forfeiture Warrant. The Claimant filed a claim seeking the return of the property, and requesting that a hearing be scheduled to consider that claim.

2. The parties reached a settlement agreement, under which administrative costs in the amount of \$175.00 were due to be paid to the State.

3. The Claimant's counsel had agreed to act as surety for any administrative costs, but failed to remit these amounts as required under the agreement.

4. Hearings were scheduled for a determination of this issue, but the Claimant's counsel refused to participate. No motion to withdraw as counsel is contained in the file, and none has been granted by the administrative judge.

5. The hearing scheduled for January 19, 2007, is the tenth setting of this case. The Claimant's counsel was notified of the hearing time and location by certified mail sent to his address of record. EXHIBIT 1.

6. Based upon the failure of Claimant's counsel 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 or subsequent 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. In order for a claim to proceed to a contested case, the claimant must file a cost bond for administrative costs. A valid cost bond includes a surety signed by a licensed attorney: “The commissioner may accept a surety signed by an attorney licensed to practice in the State of Tennessee . . . .” Rule 1340-2-2-.07(5)(d).

3. According to Rule 1340-2-2-.24(c), “[n]o final order shall be issued to a claimant until all administrative costs of that claimant have been satisfied.”

4. Rule 1340-2-2-.08(7) states that “[a]fter appearance of counsel, all pleadings and other items shall be served by the parties upon counsel and not the claimant.”

5. Rule 1340-2-2-.08(8) provides that “[c]ounsel cannot withdraw except upon motion granted by the administrative judge.”

6. Any attorney representing a claimant must maintain current contact information with the Department of Safety: “After appearance, it is the affirmative duty of counsel to keep the Legal Division notified of a current address and telephone number where counsel can be reached by mail and phone.” Rule 1340-2-2-.08(6).

7. According to Rule 1340-2-2-.11(2), the Department of Safety is entitled to rely upon the address of record in providing notice to a claimant or claimant’s counsel:

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.

8. Rule 1340-2-2-.11(3) provides as follows:

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.

9. Rule 1340-2-2-.17(1) contains the following provisions:

(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 . . .

10. Rule 1340-2-2-.17(2)(b) specifies possible results when a claimant is held in default:

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.

(Emphasis added.)

11. The legal impact of striking a claim is to render the claim void *ab initio*, as though it had never been filed.<sup>1</sup> 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).

12. In accordance with the law, as set forth above, it is determined that the State's motion is well taken. The Department notified the Claimant's counsel according to the rules cited above, as shown by the certified return receipt. Counsel failed to appear at the hearing to pursue the claim. Pursuant to the cited authority, the Claimant is hereby found to be in default.

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<sup>1</sup> 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).

Accordingly, it is hereby **ordered** that the Claimant's claim is stricken from the record, and dismissed. The Claimant's interest in the subject property is forfeited to the seizing agency for disposition as specified by law.

This Initial Order entered and effective this 29th day of January, 2007.

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Ann M. Johnson  
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 29th day of January, 2007.



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Charles C. Sullivan, II, Director  
Administrative Procedures Division