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CLERK OF COURT OF APPEALS
OF WISCONSIN

No. 2009AP003075

State of Wisconsin

In Court of Appeals

District I

State of Wisconsin

Plaintiff- Respondent,
v.

Basil E. Ryan, Jr.,

Defendant-Appellant.

An appeal from a judgment entered in
Case No. 2008-CX-000004 on
November 3, 2009 in Milwaukee County,
Judge Thomas R. Cooper, Branch 28

BRIEF OF DEFENDANT-APPELLANT

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Dated: March 30, 2010

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STATEMENT ON THE ISSUES

Did the trial court err as a matter of law in ruling that Appellant was liable under the forfeiture statutes on the grounds of judicial estoppel?

The Circuit Court answered in the negative

Did the trial court error in finding liability in a summary judgment motion when the quasi-criminal forfeiture proceedings do not provide for such summary proceedings?

The Circuit Court answered in the negative.

Did the undisputed facts on the record establish that if judicial estoppel had not been applied, Appellant neither owned nor controlled the barge to be liable under the forfeiture statutes?

The Circuit Court accepted Judge Foley's opinion on liability as a matter of law.

If judicial estoppel had not been applied, is there a dispute as to material fact that precludes summary judgment as to whether Appellant owned or controlled the barge to be liable under the forfeiture statutes?

The Circuit Court accepted Judge Foley's opinion on liability as a matter of law.

STATEMENT ON ORAL ARGUMENT

Given that this is a complex forfeiture where Appellant was charged and convicted without a trial, Appellant believes oral argument is necessary.

STATEMENT ON PUBLICATION

This is a complex forfeiture involves the misapplication of the doctrine of judicial estoppel by both the State and the Trial Court, consequently, Appellant recommends publication of this Courtôs decision on this appeal to clarify the doctrine.

STANDARDS OF REVIEW

When the facts are undisputed, this Court decides the remaining question of law independent of earlier court decisions. State v. Trentadue, 180 Wis. 2d 670, 673, 510 N.W. 2d 727 (Ct.App.1993).

Determining the elements and considerations involved before invoking the doctrine of judicial estoppel are questions of law which this Court decides independently and without deference. Schaeffer v. State Personnel Comm'n, 150 Wis.2d 132, 138, 441 N.W.2d 292, 295 (Ct.App.1989)

STATEMENT OF THE FACTS AND OF THE CASE

This is a forfeiture action pursuant to a complaint by Plaintiff Department of Natural Resources charging Basil Ryan (ñRyanò) with violations under Chapter 30 alleging he owned a barge and placed it at the bottom of the Menomonee River.[1] Although Ryan denied the allegations, which effectively was a not guilty plea, the State brought a summary judgment motion to find as a matter of law that Ryan was guilty of the violations enumerated in the complaint on the grounds of judicial estoppel. The circuit court granted the Stateôs summary judgment motion[2] leaving only the penalty/remedy phase of this forfeiture action where the circuit court imposed a penalty of $37,691.25 under the forfeiture statute against Ryan.[3]

If you avoid conclusory labels such as ñwho owned the bargeò or ñwho sunk the bargeò, the underlying facts are undisputed.

Basil E. Ryan, Jr. (ñRyanò) was the previous owner and one the occupants of the property located at 260 North 12th Street, in the City of Milwaukee, Milwaukee County, Wisconsin southwest of the Milwaukee Interchange (ñPropertyò) (Ryan had sold the Property to 260 North 12 Street LLC before Petitioner-Respondent State of Wisconsin Department of

[1] Record (ñRò)-1, Summons and Complaint.
[2] See Appendix (ñAPPò) at APP-44, letter decision by Judge Foley and order signed by Judge Cooper on January 27, 2009; see also R-36.

took the Property through eminent domain (ñDOT Taking[3]).

The barge at issue in this case is a spud barge that is partially sunk in the Menomonee River adjacent to the Property.[4]

The title to the barge is not under Ryanôs name, nor under any entity that he is related to. The title to the barge is under KO OP Marine, Inc.[5] The registered agent for KO OP Marine, Inc. is Richard Schumacher.[6] The owner of the barge is a corporation controlled by Richard Schumacher (ñSchumacherò).[7] Schumacher approached Ryanôs company, B.E. Ryan Enterprises, Inc. (hereinafter known as ñCorporationò) about storing the barge for him by docking it to the property at 26 N. 12th St. which was the property from which the Corporation conducted its storage business.[8] The Corporation conducted business under two trade names (ñVehicle Towingò and ñRyan Marinaò) from time to time as well as its corporate name.[9] Vehicle Towing and Ryan Marina were not independent legal entities. Any revenues received or expenses incurred by Vehicle Towing and Ryan Marina were wholly included in the operations of the Corporation and the

[3] See APP-47, Judgment dated November 3, 2009.
[4] See Trial Exhibit 1, a picture of the Property with an arrow pointing at the barge and APP-15 to 17, pictures labeled ñExhibit Bò and ñExhibit Cò to Plaintiffôs Complaint.
[5] See APP-36, Second Affidavit of Basil Ryan at ¶2 and at Exhibit A, KO OP Marine, Inc. title document (at APP-39).
[6] Id., at Exhibit B (APP-40).
[7] See APP-32, Affidavit of Basil Ryan at ¶ 3.
[8] Id.
[9] Id.

tion.[10] The Corporation was in the business of storing vehicles under the name of Vehicle Towing and collected storage charges for providing this service.[11]

The Corporation agreed to store the barge for Schumacher as part of its business of storing vehicles.[12] Storage charges for the barge were paid to the Corporation by Schumacher in exchange for the storage service provided by the Corporation.[13] After a period of time Schumacher quit paying the barge storage fees to the Corporation.[14]

When the barge storage fees went unpaid by Schumacher, the Corporation maintained possession of the barge and corresponding lien rights for the unpaid storage fees.[15] When the Corporation refused to release the barge to Schumacher until he paid the unpaid storage fees, Schumacher attempted to wrongfully tow the barge from the Corporationôs business location without paying the storage fees. This attempt was thwarted by actions of the Coast Guard. The corporation has not heard from Schumacher since the Coast Guard incident.[16]

Under the state statute providing storage lien rights, a storage company can foreclose its lien rights to obtain title to a vehicle against

[10] See APP-32, Affidavit of Basil Ryan at ¶ 3.
[11] Id.
[12] See APP-32, Affidavit of Ryan at ¶¶ 3-5.
[13] Id.
[14] Id.
[15] Id.
[16] Id.

Corporation has done this from time to time for vehicles that have been stored at its business location. Most of the time the Corporation does not exercise this right to obtain title to the vehicle.[17] The corporation has never foreclosed its lien rights against the barge to gain title to it.[18] To the best of Basil Ryanôs knowledge, ownership of the barge still belongs to Schumacher and KO OP Marine, Inc.[19] More importantly, Basil Ryan has never personally owned or controlled the barge in any way.[20] Ryan has never had any relationship to the barge other than as an employee of the Corporation.[21]

From 1999 until May 2005, Ryanôs employee (who then became an independent contractor) Brian Webster personally supervised the storage of the barge on a day to day basis.[22] Under Websterôs supervision, the barge was secured to a three to four foot thick concrete wall by two tow trucks with leg extensions and four chains. [23] Webster monitored the barge as part of securing and storing the barge.[24] After a snow melt or three or four days of heavy rain, Webster pumped water out of the barge.[25] Also, Ryan would adjust the chains as needed for any buoyancy concerns.[26]

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[17] See APPENDIX at APP-32-33, Affidavit of Ryan at ¶¶7-9.
[18] Id.
[19] Id.
[20] Id.
[21] Id.
[22] See R-91, Transcript from October 7, 2009 at pp. 33-4.
[23] See R-90, Transcript from October 6, 2009 at pp. 44-5, 49.
[24] Id., at p. 56.
[25] See R-90, Transcript from October 6, 2009 at p. 57.
[26] Id., at pp. 57-8.

at the barge never sunk under Websterôs care through all the years it was stored by the Corporation (through May/June 2005)[27], and it was still afloat through July 2005 (when the DOT took over the property).

Meanwhile, the Department of Transportation targeted the Ryan property for acquisition by eminent domain for the Marquette Interchange project. By filing the Award of Damages recorded March 30, 2005, the DOT took title to Ryanôs property.[28]

Because he did not have a comparable replacement property to move his storage business to, Ryan stayed on the Property after title transferred to the DOT.

On July 1, 2005, the DOT filed its Petition for Writ of Assistance to remove Ryan from the Property (ñWrit Caseò). On or about July 14, 2005, the trial court held a two day hearing on the DOTôs Petition. The sole issue to be tried at the hearing was whether the DOT made available a comparable replacement property. The issue of the ownership of the barge was never litigated in the Writ Case. On or about July 19, 2005, the trial court issued its Order for Writ of Assistance (ñWrit Orderò).[29] The Writ Order stated,

> ñIT IS FURTHER ORDERED, that all Respondents will remove all of their personal property, including

[27] See R-90, Transcript from October 6, 2009 at p. 67.
[28] See R-81 at Trial Exhibit 2, Award of Damages recorded March 30, 2005.
[29] See R-81 at Trial Exhibit 12, Order for Writ of Assistance dated July 19, 2005.

nd will vacate the premises located at 260 Street, Milwaukee, Wisconsiné ò[30]

The DOTôs interpretation of the above language is that:

> the circuit court in this case [the Writ Case] did not make a finding that Ryan was the owner of the barge. The court merely implied Ryan owned the barge at including it as part of the personal property the respondents were ordered to remove. The ownership of the barge was not an adjudicated fact deserving of any preclusive effect. If another court were to give that language preclusive effect on the issue of ownership of the barge, Ryan should challenge that courtôs decision directly.[31]

Shortly after the issuance of the Writ Order, Ryanôs attorney Alan Marcuvitz (ñMarcuvitzò) contacted the DOT to store personal property, including the barge[32], pursuant to Administrative Rule COMM 202.52(1)(d)[33]. Marcuvitz testified at the post-verdict penalty hearing that:

> I wound up in a conversation with the DOT about where did they want to store the barge that was moored on the edge of the property during the 12-month period, and it was the State that decided it was too expensive to try to move it and that they would just store it right there it was for the period of time that they were responsible to provide storage.[34]

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[30] Id., at p. 2 of the order.
[31] See R-63 Affidavit of E. Kelly Keady at Exhibit E, the DOTôs appellate brief in the Writ Case (citations omitted) at p. 13.
[32] See R-81 at Trial Exhibit 15, DOT email to Marcuvitz dated July 20, 2005.
[33] Administrative COMM.202.52(1)(d) states:

> A person who claims a moving payment based upon actual and reasonable cost shall be eligible for the following expensesé (d) Storage of personal property, except on property owned by a displaced person, for a period not to exceed 12 months unless a longer period is determined necessary by the agency.

[34] See R-90, Transcript from October 6, 2009 at pp. 79, l. 13-20.

hat he made this agreement with either the DOTôs Larry Stein or Del Dettman on or about July 20, 2005.[35] Stein could not recall such a conversation.[36] Dettman did not testify. Since Ryan was denied a trial, none of this testimony was heard by a jury.

Although the parties dispute whether the DOT agreed to store the barge for the 12 month period from July 20, 2005 to July 20, 2006, Administrative Rule COMM 202.52(1)(d) states nothing about a requirement that the DOT has to agree to store the property.[37] Even so, the following facts are not in dispute:

- the barge remained on the Property until it partially sunk into Menomonee River on July 13, 2006;
- the DOT never instructed Ryan to remove the barge during the 12 month period of time between from July 20, 2005 to July 20, 2006;
- the DOT stored some of Ryanôs vehicles on the during the same 12 month period of time between mid from July 20, 2005 to July 20, 2006[38];

[35] Id., at p. 95.
[36] See R-91, Transcript from October 7, 2009 at p. 10.
[37] Administrative COMM.202.52(1)(d) states:

> A person who claims a moving payment based upon actual and reasonable cost shall be eligible for the following expensesé (d) Storage of personal property, except on property owned by a displaced person, for a period not to exceed 12 months unless a longer period is determined necessary by the agency.

[38] See R-81 at Trial Exhibit Trial Exhibit 14.

T moved and paid for the storage of some of Ryanôs other personal property (office equipment, furniture, records and fixtures) the during the same 12 month period of time between from July 20, 2005 to July 20, 2006[39]; and,

- even the DNR acknowledged that Marcuvitz told them that the DOT had responsibility to relocate personal property including the barge but ñthe State did not have a replacement location[.] [T]hat is why the barge remained where it was.ò[40]

None of the above evidence was ever considered by a jury, because Ryan was denied the right to a trial.

It is also undisputed that the DOT agreed that in its application of moving and storing property that it has a duty and obligation to ensure that the personal property is safe, secure, and not destroyed.[41] The DOT representative agreed that this same duty and obligation applies to personal property that the DOT stored on the Property.[42] This evidence was elicited under cross examination at the penalty hearing. Because no trial occurred in this case, no jury heard this evidence.

During the 12 month period after the DOT gained possession of Ryanôs real property, neither Ryan nor Webster had access to the barge

[39] See R-81 at Trial Exhibit Trial Exhibit 15; see also R-89, Transcript from October 5, 2009 at pp. 27, 32, 40, 76-7.
[40] See R-90, Transcript from October 6, 2009 at p. 10, l. 11-20.
[41] See R-89, Transcript from October 5, 2009 at p. 80.
[42] Id., at pp.80-81.

icted and the DOT maintained the Property as a staging ground for the Marquette Interchange Project. Despite being told otherwise[43], the DOT never pumped any water from the barge that naturally accumulated in its hull.[44] Moreover, the DOT cut the chains and removed the two tow trucks that had secured the barge to the cement wall for years.[45] None of this evidence was ever heard by a jury.

On or about July 13, 2006, the barge partially sank into the Menomonee River and became moored on the river bed. This leads to the second factual dispute. Ryan presented evidence that since the chains, tow trucks, and water pumping maintenance had kept the barge floating on the Menomonee River for over fifteen years, it was the DOTôs cutting the chains, removing the tow trucks, and failure to pump water that accumulated in the barge is what caused the barge to sink.[46] Since no jury trial occurred in this case, this was never considered by a jury.

The State wrung its hands of any blame by presenting its own expert, former DOT employee, Don Reinbold. Reinbold testified that he was qualified to testify in this matter because he was bridge and highway engineer. He also testified that he never inspected the Property or the barge

[43] See R-90, Transcript from October 6, 2009 at p. 153.
[44] See R-89, Transcript from October 5, 2009 at p. 37.
[45] Id., at p.23, l. 9-17.
[46] See R-90, Transcript from October 6, 2009 at pp. 59, 117, & 123; see also APP-33, 34, & 37.

ely on pictures.[47] Despite the more than fifteen years of fact otherwise, Reinbold testified that the tow trucks were too light to secure the barge.[48] No jury ever heard the cross examination of Reinbold.

The DNR did not investigate who owned the barge or who was responsible for it being partially sunk and resting on the bed of the Menomonee River.[49]

After dismissing without prejudice a similar action the year before, on or about February 4, 2008 the DNR served a complex forfeiture Summons and Complaint against Ryan for alleged violations of Wis. Stat. § 30.10(2), § 30.12(1)(a), and § 30.292(2). The Summons provides in pertinent part:

> A complaint, copy of which is attached, having been filed with the court accusing BASIL E. RYAN, JR. of the offense of ñ unlawfully placing and maintaining an obstruction in the form of a sunken barge o the bed of the Menomonee River, which is a navigable stream, in violation of Wis. Stat § 30.10(2),
>
> You, Basil E. Ryan, Jr. are therefore summoned and required to appear before the Circuit Court of Milwaukee County at the Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin, to answer said complaint on the 17th day of March, 2008, at 9:15 in the a.m., and in case of your failure to appear, judgment may be rendered against you according to the demand of the complaint.[50]

[47] See R-89, Transcript from October 5, 2009 at p. 48.
[48] Id., at p. 44.
[49] See R-90, Transcript from October 6, 2009 at p. 15.
[50] See APP-1, Summons and Complaint.

Ryan to appear before the court as in a criminal matter.

On May 6, 2008, the DNR filed and served a summary motion on the issue of liability. The grounds for the motion were that Ryan was judicially estopped from arguing that he was not the owner of the barge. At the summary judgment motion on liability, the DOT argued that three pieces of evidence established Basil Ryanôs ownership:

- a business relocation questionnaire;[51]
- the order for writ of assistance in the Writ Case assistance in *State v. 260 North 12th Street, LLC, Ryan Management, LLC, B.E. Ryan Enterprises, Inc. d/b/a Vehicle Towing, Irish Stone and Rock CO. (Trade Name of B.E. Ryan, Jr.), Basil E. Ryan Jr. d/b/a Ryan marina, et al.,* Milwaukee County Case No. 05-CV-5593, filed July 1, 2005 (the ñWrit Caseò)[52], and
- a letter from Basil Ryanôs previous attorney, Alan Marcuvitz.[53]

It must be noted that the Stateôs witness (Hutnick), who offerred an affidavit concerning the unsigned questionnaire, did not verify that this is Basil Ryanôs writing on the document. Ryan testified that the writing was

[51] See APP-23, business relocation questionnaire.
[52] See APP-11, order from the Writ Case.

he first time he saw the document was in this litigation." Again, no jury ever heard this evidence.

The order states that ñall Respondents will remove all their personal property, including the bargeé ò[55] Recalling the fact that the issue of barge ownership was not litigated in the Writ Case, the language in the Writ Order merely provides removal instructions for personal property following courtôs resolution of the issue of possession of the real property, which was the only issue actually litigated in the Writ Case. In the present case, the State and the Trial Court relied on this language to claim that Ryanôs ownership of the barge was established in the Writ Case by judicial estoppel. In the appeal of the Writ Case, the State took the total opposite position. In the appeal, the State claimed the ownership of the barge was never established in the Writ Case.[56]

The last piece of evidence that the State and Trial Court relied on for judicial estoppel was the Marcuvitz letter. Once again, the plain language of letter does not say that Basil Ryan in the barge owner.[57] The letter does not even state that his client is the owner. Even if it did say client, it doesnôt specify which one (the Corporation was also represented by Marcuvitz). Equally important, the letter also states, ñ[w]e do not agree that there is any

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[53] See APP-26, Marcuvitz letter
[54] See APP-34, Ryan Affidavit at ¶13.
[55] See APP-11, order from the Writ Case (specifically p.2 of the order at APP-12).
[56] See text for footnote 31 above and R-63 Affidavit of E. Kelly Keady at Exhibit E, the DOTôs appellate brief in the Writ Case (citations omitted) at p. 13.

the position of your departmentò and that the factual allegations regarding contacts with me are substantially incorrecté ò[58]

In spite the above, the Trial Court relied on the above three documents to find judicial estoppel on the ownership issue to find Ryan liable in the forfeiture action as a matter of law leaving only the penalty phase for trial.[59]

Ryan moved the Trial Court to reconsider the liability issue on several grounds, but the trial court denied the motions.[60]

The hearing on the forfeiture penalty phase lasted three days, October 5, 6, and 7, 2009, before the Honorable Judge Thomas R. Cooper.[61]

Judgment was entered on November 3, 2009.[62]

Appellant appealed the matter on December 11, 2009.[63]

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[57] See APP-26, Marcuvitz letter.
[58] See APP-26, Marcuvitz letter
[59] See APP-44 to 46, letter decision by Judge Foley and order signed by Judge Cooper on January 27, 2009.
[60] See R-39, R-44, R-61.
[61] See R-89, R-90, R-91, transcripts from hearings on October 5, 6, & 7, 2009.
[62] See R-80, Judgment.
[63] See R-83, Notice of Appeal.

ARGUMENT

I. SUMMARY JUDGMENT WAS INAPPROPRIATE IN THESE QUASI CRIMINAL PROCEEDINGS.

Violations of Wis. Stat. § 30.10(2), § 30.12(1)(a), and § 30.292(2) are governed by the procedural rules of Wis. Stat. §§ 23.50 to 23.85. See Wis. Stat. § 23.50(1). Nowhere in these rules is there any reference to the use of summary judgment. Rather, these rules discuss procedures relating to criminal matters. For example, a defendantôs withdrawal of a no contest plea becomes a plea of not guilty. Similarly, where the State successfully prosecutes a complaint, the result is a guilty verdict. See Wis. Stat. §§ 23.55, 23.70, 23.71, 23.72, and 23.75; see also Schaeve v. Van Lare, 125 NW.2d 40, 370 N.W.2d 271 (Wis.Ct.App.1985) citing City of Milwaukee v. Wuky, 26 NW.2d 555, 562, 133 N.W.2d 356, 360 (1965).

This forfeiture action was commenced by the service of a Summons and Complaint upon Basil Ryan. Summons provides in pertinent part:

> A complaint, copy of which is attached, having been filed with the court accusing BASIL E. RYAN, JR. of the offense of ñ unlawfully placing and maintaining an obstruction in the form of a sunken barge o the bed of the Menomonee River, which is a navigable stream, in violation of Wis. Stat § 30.10(2),
>
> You, Basil E. Ryan, Jr. are therefore summoned and required to appear before the Circuit Court of Milwaukee County at the Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin, to answer said complaint on the 17th day of March, 2008, at 9:15 in the a.m., and in case of your failure to

gment may be rendered against you according to of the complaint.[64]

The Summons required Ryan to appear before the court as in a criminal matter. It did not demand an answer as would be required in a civil matter. Furthermore, the complaint seeks to enforce financial penalties, or fines, against Ryan. Given that this is a forfeiture action where Ryan can be found guilty and have to pay a substantial fine under rules that do not provide the same safeguards as in civil actions, summary judgment has no place in such matters. This Court obviously agrees and prohibits summary judgment in forfeitures actions. State v. Schneck, 257 Wis.2d 704, 652 N.W.2d 434 (Wis.Ct.App.2002).

The forfeiture rules do allow for motions, but only for a motion ñwhich is capable of determination without the trial of the general issueò, i.e. trial is expressly preserved. See Wis. Stat. § 23.50(1). In other words, the right to trial is preserved. Allowable motions that do not interfere with the right to trial include a motion for reconsideration and any motion to dismiss the Complaint for lack of probable cause. The Stateôs summary judgment motion precluded a trial because the motion decided the ultimate issue in this case, i.e. whether Ryan violated Wis. Stat. § 30.10(2), §30.12(1)(a), and § 30.292(2). Therefore it was inappropriate for the circuit court to grant the Stateôs motion, even in part.

The prohibition against the use of summary judgment in forfeiture

[64] See APPENDIX at APP-1, Summons and Complaint.

m Rule 23.73 which prohibits any discovery in a forfeiture proceeding. Since discovery is prohibited, the accused has no ability to cross examine witnesses unless and until the matter goes to trial. The right of cross examination is a common law right that has been codified in the Rules of Evidence (Rule 906.11(2)). See Town of Geneva v. Tillis, 129 Wis.2d 167, 179, 384 N.W.2d 701, 706 (Wis.1985). In Tillis a forfeiture judgment was reversed on the grounds that the cross examination at trial was inadequate because it was conducted over the phone rather than in person. Id. The facts before this Court are much more egregious because the use of summary judgment, when combined with no discovery, results in no cross examination at all. As the Supreme Court aptly stated:

> Cross-examination may thoroughly dispel the factfinderôs perception of the truth after hearing only one side of a witnessôs story. Indeed, cross-examination has been characterized as "**the greatest legal engine ever invented for the discovery of truth**...ò.

Id., (quoting 5 Wigmore On Evidence, sec. 1367, p. 32 (Chadbourn Rev. 1974)(emphasis added). If summary judgment is not reversed, Ryan has been charged and convicted without the right of cross examination which our Supreme Court has said is **“the greatest legal engine ever invented for the discovery of truth”.**

ÌL COURT MISAPPLIED THE DOCTRINE IAL ESTOPPEL TO THIS CASE.

Judicial estoppel is to be applied with caution and only in the narrowest of circumstances so as to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement. John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26 (4th Cir.,1995); Vowers & Sons, Inc. v. Strasheim, 254 Neb. 506, 576 N.W.2d 817 (Neb.,1998). It is inappropriate, therefore, to apply the doctrine when a partyôs prior position was based on inadvertence or mistake. Johnson Service Co. v. Transamerica Ins. Co., 485 F.2d 164, 175 (5th Cir.1973); *accord* Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C.Cir.1980). For judicial estoppel to apply, the following criteria must be satisfied: ñFirst, the later position must be clearly inconsistent with the earlier position; second, the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position.ò Sea View Estates Beach Club, Inc. v. State Dept. of Natural Resources, 223 Wis.2d 138, 588 N.W.2d 667 (Wis.Ct.App.1998).

In this case, the State argued that the doctrine of judicial estoppel barred Ryan from challenging that he owned the barge. The State argued (and the circuit court agreed) that Ryan has taken inconsistent positions based upon the following three pieces of evidence:

siness relocation questionnaire used in the Stateôs
the writ of assistance in the Writ Case;
- the order for writ of assistance in the Writ Case; and,
- a letter from Basil Ryanôs previous attorney, Alan Marcuvitz in response to a notice for violation in this case.

As noted above, judicial estoppel requires inconsistent positions in two separate actions, however even if all the Stateôs arguments are accepted on their face, there is fundamental problem in the application to this case. The Writ Case relied on by the State and the trial court for two of the above alleged inconsistent legal positions was a civil case with the burden of proof using the preponderance of evidence standard. In this case, there is a higher burden of proof. The burden in this case is a clear and convincing standard. See Wis. Stat. § 23.76. Consequently, the State is asking this Court to apply estoppel from facts under a lower standard of proof to a case where a higher standard is required. Estoppel can only be applied where the first case has an equal or higher standard of proof. State v. Yelli, 247 Neb. 785, 530 N.W.2d 250 (Neb.,1995); see also 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4422 (1981). Consequently, a party who has carried the burden of establishing an issue by a preponderance of the evidence is not entitled to assert preclusion in a later action that requires proof of the same issue by a higher standard. Id. Therefore, even if the State is correct on one hundred percent of their argument concerning judicial estoppel, the doctrine still cannot be used in this case because it involves a higher standard of proof than in the Writ

n v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) (a judgment won by preponderance of evidence standard would not support preclusion in proceedings to establish nondischargeability if standard in subsequent bankruptcy proceedings required proof by clear and convincing evidence); In re Braen, 900 F.2d 621 (3d Cir.1990), cert. denied 498 U.S. 1066, 111 S.Ct. 782, 112 L.Ed.2d 845 (1991)(preclusion not available if state jury finding based on preponderance of evidence rested on lower standard of proof than judgment creditor must meet in establishing malice to avoid discharge of debt in bankruptcy).

We also know that the undisputed underlying facts do not support that contention that Ryan was the owner of the barge.[65] The undisputed record establishes Richard Schumacherôs company KO OP Marine, Inc. as the owner of the barge,[66] consequently, the application of judicial estoppel on its face is creating the perversion of justice that the doctrine was created to correct.

In addition, for judicial estoppel to apply, the following criteria must be satisfied: ñFirst, the later position must be clearly inconsistent with the earlier position; second, the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the first court to

[65] See at APP-31 to 43 (all three Ryan affidavits).
[66] See APP-36 Second Ryan Affidavit.

nt is not forever bound to a losing argument.ò Sea View Estates Beach Club, Inc. v. State Dept. of Natural Resources, 223 Wis.2d 138, 588 N.W.2d 667 (Wis.Ct.App.1998). Judicial estoppel requires inconsistent positions ***in cases before courts***, not just between parties. Even accepting every meaning that the State ascribes to the evidence (which is the exact opposite of the summary judgment standard), the questionnaire and letters referenced by the court were not positions taken in pending cases. The relocation questionnaire occurred prior to the filing of the petition in the Writ Case.[67] The letters concerning the barge occurred prior to filings in the forfeiture cases.[68]

But letôs look at the Marcuvitz letter and the questionnaire more closely. Even a cursory review of the Marcuvitz letter[69] reveals that it is obviously a settlement negotiation that cannot be used against Ryan. See Wis. Stat. Sec. 904.08; Production Credit Ass'n of Green Bay v. Rosner, 78 Wis.2d 543, 255 N.W.2d 79 (Wis. 1977). In addition, that same cursory review shows that the statements made in the letter *were not made to the court*, but to the opposing party. After a thorough review of the letter, Marcuvitz never states Ryan is the owner of the barge. He states only ñwith full reservation of the rights of the barge ownerò which is consistent with

[67] Paragraph 6 of the Hutnik affidavit (R-18) states that the questionnaire was received by the DOT in March 2005 while the petition in the writ case was not filed until four months later on July 1, 2005.
[68] Compare the October 16, 2006 Marcuvitz letter (APP-26) to the February 4, 2008 filing in this case (APP-1).

was not the owner but only employed by Ryan Corp. to store the barge on behalf of the owner, Schumacher and KO-OP. Also, if you read the letter, Marcuvitz affirmatively states that ñwe do not agree that there is any justification whatever to the position of your departmentò which is hardly a mea culpa. Consequently, even if you were able to overcome the fact that the letter predated any court action and that it was not a representation made to the court, the statements contained in the letter cannot be deemed as a matter of law to be clearly inconsistent with Ryanôs position in this case that he does not own the barge.

As for the questionnaire[70], the Stateôs witness (Hutnick), who offers an affidavit concerning the unsigned questionnaire, does not verify that this is Basil Ryanôs writing on the document. The reason why she cannot testify to this fact is that Basil Ryan testifies that:

> I have reviewed the Relocation Business Questionnaire attached as Ex. A to the Hutnik Affidavit. The Questionaire was one of many documents which were presented to my former attorney, Alan Marcuvitz (ñMarcuvitzò) to the state at a meeting in March, 2005. **This Questionaire was prepared without any input from me and was never shown or discussed with me before it was delivered to the State.** I have only examined it for the first time as part of my preparation of this affidavit. **As this affidavit explains, the information in the questionnaire is not accurate. Ownership of the barge remains with Schumacher, and I personally had no relationship to the barge except as an employee of the Corporation.**[71]

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[69] See APP-26, Marcuvitz letter.
[70] See APP-23, relocation questionnaire.
[71] See APP-34, Ryan Affidavit at ¶ 13.

t even establish that Ryan made the statements. In addition, there is the problem that the questionnaire is not a statement that was made to the court (it was a statement to the DOT that predated the Writ case).

But letôs look further at what the State is relying on in the questionnaire. The State is relying on the handwritten statement ñcurrently, single barge is stored by owner (Ryan).ò It does not state that Ryan owns the barge. The State is assuming that ñownerò means ñowner of the bargeò. However there is an equally compelling explanation that ñownerò means ñowner of the property where the barge was storedò, especially given the fact that Ryan is the property owner who the DOT was dealing with at the time. Consequently again, even if you were able to overcome the fact that the questionnaire predated any action, was not a statement made to the court, the statement contained in the letter cannot be deemed as a matter of law to be clearly inconsistent with Ryanôs position in this case that he does not own the barge.

This leaves the July 19, 2005 Order for Writ of Assistance. Under the Sea View decision (which was relied upon by the trial court), the latter position with the Court must be ñclearly inconsistent with the earlier positionò. The July 19, 2005 Order for Writ of Assistance does not rise to the level of ñclearly inconsistent with the earlier positionò. The Writ Order states that ñall Respondents will remove all their personal property,

will vacate the premisesé ò. First of all, the Sate already agrees that this language carries no preclusive weight:

> the circuit court in this case [the Writ Case] did not make a finding that Ryan was the owner of the barge. The court merely implied Ryan owned the barge at including it as part of the personal property the respondents were ordered to remove. The ownership of the barge was not an adjudicated fact deserving of any preclusive effect. If another court were to give that language preclusive effect on the issue of ownership of the barge, Ryan should challenge that courtôs decision directly.[72]

Second, this cannot be judicial estoppel because it is not a representation by a party, but an order by the court. More importantly, ñall Respondentsò in that case included 260 N 12th Street LLC, Ryan Management, LLC, B.E. Ryan Enterprises, Inc., Irish Stone and Rock Co., Ryan, as well as Steven K. Pushing and, Honeycreek, Inc. (who are not Ryan entities or partners), consequently, there was no definitive finding that Ryan was the owner of the barge. As acknowledged by the State, the ownership of the barge was never litigated in that case (why would it be-the only issue in a writ case is for the DOT to gain control of the property) and the State provided no evidence that it was in fact litigated (in fact the State admitted that the issue was not litigated).[73]

In addition, as argued above, even if the ownership issue was litigated, you still have the problem with differing burdens of proof (you

[72] See R-63 Affidavit of E. Kelly Keady at Exhibit E, the DOTôs appellate brief in the Writ Case (citations omitted) at p. 13.
[73] Id.

m a case with a lower burden of proof to a higher burden). Therefore, just like the questionnaire and the Marcuvitz letter, judicial estoppel should never have been applied to the Writ Order as to the ownership issue in this case.

III. INAPPROPRIATELY USING A SUMMARY METHOD TO DISPOSE OF THIS CASE AS WELL AS MISAPPLYING THE DOCTRINE OF JUDICIAL ESTOPPEL HAS ALLOWED A FORFEITURE TO BE RAMRODDED THROUGH THE JUDICIAL SYSTEM WITHOUT A CAREFUL CONSIDERATION OF THE FACTS.

Even if control, rather than ownership, of the barge is the benchmark for application of the forfeiture statute, facts were presented on the record to conclusively show that Ryan did not have control of the Property when the barge sank. The control issue is governed by Administrative Rule COMM 202.52(1)(d) which provides in pertinent part:

> A person who claims a moving payment based upon actual and reasonable cost shall be eligible for the following expensesé (d) Storage of personal property, except on property owned by a displaced person, for a period not to exceed 12 months unless a longer period is determined necessary by the agency.

Under this rule a condemning authority is responsible for storage of personal property for up to one year after it gains control of the acquired real estate. In this case, that one year period commenced on July 19, 2005,

[74] See argument above at pp. 25-26.

issued and the DOT was granted possession and control of the real estate.

On that same date Ryan and all of the other Ryan employees lost control of the real estate and the personal property still located on the Property. Access to personal property was only possible through the DOT. Unlike the other personal property on the site, the barge was not moved because storage fees were expensive and the DOT did not want to pay these expenses when continued storage on the subject property did not interfere with its work. Based on the testimony of the DNR witnesses, the barge then sank on July 13, 2006. This was during the one year period when the DOT was obligated to store the barge for the Ryan storage business under COMM. 202.52 (1)(d). Consequently, Ryan was not involved with the day to day operations of storing the barge when the violation occurred. It was the DOT that was in charge of the day to day operations of storing the barge when the violation occurred. Consequently, under any strict liability arguments, the DOT is strictly liable:

- under Wis. Stat. § 30.10(2) because the DOT allowed the barge that it possessed and controlled to sink and obstruct the river;
- under § 30.12(1)(a) because the DOT allowed the barge that it possessed and controlled to be placed on the river bed; and,
- under Wis. Stat. § 30.15(1)(a) and 9(d) because the DOT placed the barge it controlled in the river.

ecord, Ryan has committed no affirmative act to violate the forfeiture statutes cited by the State. Ryan did not deposit or place the barge on the bed of the Menomonee River[75] (even the bargeôs spuds were raised and locked when the State took control of the property)[76]. At the very least, under a summary judgment standard, these facts should have been enough to defeat the Stateôs motion. Schuster v. Germantown Mut. Ins. Co., 40 Wis.2d 447, 162 N.W.2d 129 (Wis. 1968).

At a trial on liability, the State would not be able to meet its clear and convincing burden of proof, and it certainly did not meet a summary judgment standard (the trial court only granted summary judgment by misapplying judicial estoppel). Basil Ryan, through Ryan Corporation, had fifteen years of experience with the storing the barge on the Menomonee River. The record clearly explains the effect of the DOTôs cutting the cables and chains to the barge and failing to pump water from the barge hull. When the barge was sitting in calm water on the river, the chains and cables were loose as the State described. They were purposely left loose so the barge could float up and down when the river level changed without damaging the wall or the barge. The chains would only tighten if the barge

[75] Whether he had a permit to do so is irrelevant because he did not do it. Moreover, it further evidences that he could not have obtained a permit because neither he nor any entity associated with him was an owner of the barge and ownership is a prerequisite to obtaining such a permit (see permit application attached to E. Kelly Keadyôs affidavit and Second Ryan affidavit).

[76] See APP-37 Second affidavit of Ryan at ¶4, and at APP-33-34, first Ryan affidavit at ¶¶ 10-12.

e river wall or if it tried to sink. In either case, the chains would tighten and prevent the barge from floating way or sinking, however, when the chains and cables were cut, there was no longer protection against sinking. The protection against sinking was provided by the weight of the two tow trucks *in addition to the three to four foot thick cement wall*. The trucks acted as ñhooksò on the end of the chains and cables. Consequently, cutting the chains and cables from the trucks removed the protection the barge received from the three foot high/four foot thick wall anchored into the earth. The State, not surprisingly, does not agree with Ryanôs fifteen years of experience in storing the barge but it never offered a definitive reason as to why the barge sank.

The best the State can do, and did, was former DOT employee Don Reinbold who has a vested interest in his former employer (and himself) not being blamed for the sinking of the barge. Reinbold testified that he was qualified to testify in this matter because he was a former bridge and highway engineer even though he never inspected the Property nor the barge. He based his opinion *solely* on pictures. Despite of the fact that for more than fifteen years the Ryan Corporation safely stored the barge on the river by attaching it to the trucks by chains and cables, Reinbold testified that the tow trucks were too light to secure the barge. This was the Stateôs sole piece of evidence concerning why the barge sunk. Obviously, this is not good enough for a clear and convincing standard nor was it adequate

udgment motion. At a very minimum, though, all of this evidence must at least be heard by a jury before convicting someone of these forfeiture violations. That never occurred in this case.

CONCLUSION

The trial courtôs use of judicial estoppel is grounds alone for reversal. Given this, the trial court should never have convicted Ryan for violations of Wis. Stat. § 30.10(2), § 30.12(1)(a), and § 30.292(2) as a matter of law. Consequently, this matter should reversed on this ground.

In addition, the liability in this quasi-criminal case should never have been resolved in a summary judgment motion without Ryan having the ability to conduct discovery or even cross-examining those State witnesses who submitted affidavits. The rules do not allow for such a summary resolution, nor should this Courtôs sense of justice.

Finally, when this case was further explored at the penalty phase, it became clear that Ryan was not the owner of the barge. The title holder undisputedly is Richard Schumacher. In addition, given that it was the Stateôs duty and obligation to safely store the barge for the twelve month period from July 20, 2005 to July 20, 2006, the barge was under the Stateôs control when it sunk into the Menomonee River. Moreover, the State caused the barge to sink. Ryan had been keeping the barge safely afloat for over fifteen years by chaining it to two tow trucks and a cement wall while pumping water from the hull when necessary. The DOT cut the chains,

and failed to pump water from the barge. Clearly, the DOT not only had control of the barge but caused it to sink.

For all the reasons set forth above, this Court respectfully should reverse the lower courtôs decision on liability in this case.

Dated: _____

_____

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §(Rule) 809.19(8)(b) and (c) for a brief produced using the following font: Times New Roman, 13 point. The word count for the brief is 6,342 words.

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NCE WITH RULE 809.19 (12) & (13)

I hereby certify that:

I have submitted an electronic copy of this Appellantôs Brief and Appendix which complies with the requirements of s. 809.19 (12) & (13).

I further certify that: This electronic Appellantôs Brief and Appendix is identical in content and format to the printed form of the Appellantôs Brief and Appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this Appellantôs Brief and Appendix filed with the court and served on all opposing parties.

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AFFIDAVIT OF SERVICE

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E. Kelly Keady being duly sworn and on oath, does certify:

1. That on the 30th day of March, 2010, I caused to be served by hand three true and complete copies of Appellantôs Brief and Appendix to Respondentôs counsel at the following addresses:

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FURTHER AFFIANT SAYETH NOT.

_____
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Subscribed to and sworn before me
this ____ day of _____ 2010.

_____
Notary Public