

Case No. 2009AP003075

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State of Wisconsin

**In Court of Appeals**

District I

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State of Wisconsin

Plaintiff- Respondent,  
v.

Basil E. Ryan, Jr.,

Defendant-Appellant.

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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

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**REPLY BRIEF OF  
DEFENDANT-APPELLANT**

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Dated: May 13, 2010

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## ARGUMENT

Defendant Basil Ryan's ("Ryan") reply will respond to Plaintiff State of Wisconsin ("State") arguments on a point by point basis.

### **I. THE USE OF SUMMARY JUDGMENT IN THIS FORFEITURE PROCEEDING.**

The State makes an argument on page 10 (section B) of its brief with regards to §23.69 that makes language in that statute meaningless. The statute provides, "Any motion *which is capable of determination without the trial of the general issue* shall be made before trial" (emphasis added). If summary judgment motions that eliminate trials are allowed, there would be no need for the existence of the highlighted language, i.e. just eliminate the phrase from the statute. By including the phrase, though, it must have a meaning: trials are preserved and cannot be eliminated by motion.

The State's argument on page 14 (section G) about Wis. Stat. § 802.08 (summary judgment) also fails. The cardinal rule of statutory construction is that, when general and specific statutes relate to the same subject matter, the specific statute controls. The Landings LLC v. City of Waupaca, 287 Wis. 2d 120, 703 N.W.2d 689 (Wis.App.,2005) (specific condemnation service statute in 32.05 controls over general service statutes). Consequently, Wis. Stat. § 23.69 motion rules trump Wis. Stat. § 802.08.

The State argues that, since Chapter 23 allows for a complaint and answer like Wis. Stat. § 802, summary judgment is appropriate. However the procedural rules of Wis. Stat. §§ 23.50 to 23.85 make no such leap. See Wis. Stat. § 23.50(1). Nowhere is it stated that the general procedure rules in Wis. Stat. § 802 are to be adopted (to the contrary, by having its own set of rules, inconsistent general rules are disregarded). 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 defendant's 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

The State also argues that Ryan's application of State v. Schneck, 257 Wis.2d 704, 652 N.W.2d 434 (Wis.Ct.App.2002) is too broad. The State obviously ignores the following paragraph:

Finally, we take note that although Wis. Stat. ch. 345 forfeiture proceedings are civil proceedings such proceedings also have certain aspects of criminal proceedings The supreme court has noted many of the similarities in procedure between a forfeiture action and a criminal action, and the court has cautioned that "it is an oversimplification to treat forfeiture actions as purely civil in nature."

State v. Schneck, 257 Wis.2d 704, 652 N.W.2d 434 (Wis.Ct.App.2002) (citations omitted). The trial court should have heeded this Court's caution about oversimplification because the oversimplification has allowed the

State to ramrod a forfeiture conviction through the courts without ever addressing the merits. Ryan was found guilty on affidavits without having the chance to cross-examine the affiants.

In response, the State argues that summary judgment need not follow discovery and even if did, in this case it would not have made a difference. See the State's brief at pages 13-15. The fallacy of this argument is exposed by merely discussing the State's only causation witness, Don Reinbold, a Department of Transportation employee who was in charge of the employees who negligently secured the barge after the DOT acquired the site. His self-serving testimony was used to rebut Ryan's affirmative defense that it was the DOT's negligence in cutting cables and chains, which had secured the barge for fifteen years, that caused the barge to sink to the bottom. In his summary judgment affidavit, Reinbold testified:

In my professional opinion, the spuds were holding the barge. The trucks with the cables were not heavy or large enough to hold the barge.<sup>1</sup>

However, Reinbold *never inspected the barge, trucks or cables.*<sup>2</sup> He based his opinion *solely* on pictures. He wasn't even aware that chains anchored the barge to the trucks.<sup>3</sup> Despite 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

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<sup>1</sup> See Record at 15, Donald E. Reinbold Affidavit dated May 5, 2008.

<sup>2</sup> See Record at 89, Donald E. Reinbold testimony on October 5, 2009 at p.48, l.12-24.

<sup>3</sup> Id.

light to secure the barge. Reinbold even disqualified himself from giving an opinion as to whether cutting the chains and cables caused the problem.<sup>4</sup> This was the State's sole piece of evidence concerning why the barge sunk in contrast to Ryan's fifteen years of keeping the barge afloat. Obviously, this is not good enough for a clear and convincing standard nor was it adequate for granting a summary judgment 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.

The State also cites numerous cases on page 12, but none are on point (i.e. involve a forfeiture defendant challenging the applicability of summary judgment under Wis. Stat. §§ 23.50 to 23.85). The only Chapter 30 case is State v. Kelly, 244 Wis. 2d 286, 628 N.W. 2d 438 (Wis.App. 2001) and the issue of whether summary judgment was appropriate was never raised. Actually, the parties agreed to using summary judgment and stipulated to facts in that case. Certainly, the Defendant in this case opposed summary judgment and Ryan did not stipulate to the disputed facts (or to the use of summary judgment).

### **III. THE APPLICATION OF JUDICIAL ESTOPPEL.**

Ryan relies on its initial brief concerning the application of judicial estoppel, however, it must be noted that the State does not even attempt to

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<sup>4</sup> Id., at p.45, 1.4-9.



apply the facts to the elements of judicial estoppel (as Ryan has in his initial brief). If you apply law to the facts, judicial estoppel cannot be applied to this case as a matter of law because none of the alleged representations satisfy the judicial estoppel elements.

As for the questionnaire, the State states on page 18 of its brief, “if it were not Ryan’s barge, then Ryan could not claim assistance to relocate it.” This position by the State is preposterous. Ryan, through his companies, was in the storage business. Other than the few vehicles where certificates of title were actually in the name of his companies, the “ownership” by his companies was as a bailee where statutory lien rights existed. This was the same for the barge. That does not remove it or the vehicles from a relocation assistance claim. Ryan was storing the barge so it was perfectly acceptable for it to be moved, and further it would be consistent for Ryan to request to move the barge to preserve the lien rights he had for storing it.

The State also argues on page 21 that the ambiguous statements in the questionnaire “are akin to judicial admissions that are binding on Ryan” citing City of Wisconsin Dells v. Dells Fireworks, Inc., 197 Wis. 2d 1, 17, 539 N.W.2d 916 (Ct.App. 1995). The cite refers to the appellate court’s statement:

When a party or his counsel makes a clear, deliberate and unequivocal statement of fact, that is a judicial admission and is binding on the party. Cornellier's **testimony** was clear, deliberate and unequivocal. ....

We conclude that Cornellier's **testimony** is a judicial admission.

Id. (citations omitted)(emphasis added). Once again, the State is trying to stretch the doctrine of judicial estoppel. The Dells Fireworks case involves **testimony**. Judicial estoppel requires inconsistent positions *in cases before courts*. 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). The questionnaire involves neither. The questionnaire is not testimony in court, nor a representation to court. It is a document created outside of court.

The State even tries to bootstrap the questionnaire in as a court statement by making the ridiculous statement on page 21 that the questionnaire “set the condemnation case in motion”. Condemnation cases are set in motion when the government wants to take property, not by answers to questionnaires. Moreover, this Court must remember that the State is using the questionnaire to find someone guilty as a matter of law. If this is reversed, the State could still offer the questionnaire as evidence of ownership, but it cannot and should not be used to determine ownership and control as a matter of law.

At the bottom of page 21, the State also argues:

Ryan’s challenge fails because the court applied judicial estoppel only to find that Ryan or his corporate entities owned, possessed or controlled the barge....*The court went on to find Ryan’s personal liability independent of judicial estoppel based upon other evidence in a subsequent summary judgment decision.*”

This second sentence is a complete misrepresentation of the record. Judge Foley's letter order did find judicial estoppel, but afterwards only one issue remained to establish liability: whether Ryan was "the controlling principal of the corporate entities." The State then moved for summary judgment on this issue only. The resulting order addressed only this issue, too. There was no independent basis stated for Ryan's personal liability absent the judicial estoppel from the first order.

Interestingly, during the reconsideration motion that accompanied the second summary judgment motion, Judge Cooper expressed his reservations about Judge Foley's original order but felt he simply had no ability at the trial court level to correct it.

I agree completely, but it's not a question of how I would have decided the case or agreed with that argument. It's whether Judge Foley was so miss—so wrong in his analysis and his decision making that therefore you are entitled to reconsideration<sup>5</sup>....

I don't agree with Foley. I'm not sure I would have decided the same way...<sup>6</sup>

The reservations expressed by Judge Cooper can be corrected at this appellate level.

As for the Writ Order, Ryan relies on his initial brief at pages 28-30, but reminds the Court that even the State has already admitted in that case

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<sup>5</sup> See Record at 87, transcript from the November 10, 2008 hearing at p.29, l. 5-9.

<sup>6</sup> Id. At lines 12-13.

that its language carries no preclusive weight to the ownership issue in this case. Quite frankly, it is the State which is playing fast and loose with the judicial system. The State argues in one appeal that the Writ Order does not give preclusive effect on the ownership of the barge issue, then it argues in this case that the Writ Order precludes Ryan from arguing ownership. Equally egregious is the State's semantics arguments (pages 24-27) about its Writ Case admission concerning the "preclusive effect" of the Writ Order and how that is different than judicial estoppel.

The State also argues now, on appeal for the first time, that Ryan's ownership of the barge was based upon "the position Ryan took before the court" in the Writ Case. The State offers no evidence of that. The State makes similar assertions without citation in its brief.<sup>7</sup> These assertions are baseless. No document or testimony is shown where Ryan claims ownership to the barge in the Writ Case. To the contrary, the Record clearly shows that there is no such evidence because both Ryan and the State<sup>8</sup> agree that issue was never litigated.

As for the Marcuvitz letter, Ryan again relies on his initial brief (at pages 26-27) that this cannot establish judicial estoppel as a matter of law.

The State desperately needs to ramrod its judicial estoppel through the courts, because the underlying facts clearly show Ryan did not own or

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<sup>7</sup> See p. 27 ("the court adopted Ryan's claim of ownership") and p. 28 ("Ryan's claim of ownership or control of the barge in the eminent domain case").

control the barge. The title documents prove he is not the owner.<sup>9</sup> COMM 202 establishes that the DOT controlled the barge when it sank. At the very least, a jury should decide this matter.

#### **IV. RYAN'S ESTABLISHMENT OF DISPUTES AS TO OWNERSHIP OF THE BARGE.**

On page 29 of the State's brief, the State argues that "Ryan asserts without any basis that he established as undisputed someone else's ownership of the barge." The State is obviously ignoring the title documents.<sup>10</sup> The State says the remedy phase offered no further testimony on the issue, but it did. Webster confirmed Ryan's affidavit testimony concerning storing the barge for someone else.<sup>11</sup> The State never challenged either Ryan or Webster's testimony or the title documents. It just keeps on shouting "JUDICIAL ESTOPPEL!", "JUDICIAL ESTOPPEL!" "JUDICIAL ESTOPPEL!". The State has no time for the truth, it only wants its conviction to avoid its own liability for the sinking of the barge.

#### **V. RYAN'S ESTABLISHMENT OF DISPUTES AS TO MATERIAL FACTS.**

On pages 30-33, the State argues that Ryan produced no legal authority or evidence concerning the State's responsibility to store the

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<sup>8</sup> See -63, Affidavit of E. Kelly Keady at Exhibit E, the DOT's Appellate brief in the Writ case at p. 13.

<sup>9</sup> See Record at R-24 and R-28, Ryan Affidavits.

<sup>10</sup> See Record at R-24 and R-28, Ryan Affidavits.

<sup>11</sup> See Record at R-90, transcript from October 6, 2009 at p.43 l. 3-25.

barge. Ryan's initial brief (see pages 30-33) establishes otherwise, but a few points must be addressed about the State's brief.

On page 31 the State argues that COMM 202.52 only applies to reimbursing storage costs, not the State actually storing personal property.

However the State witnesses testified exactly the opposite:

- 16 Q Listen. Listen to the question closely.  
17 Based upon what you just said, is it fair for me  
18 to say that with regards to this barge if it's not going  
19 to actually be moved, even though the writ of assistance  
20 said it was supposed to, that it would still be the DOT's  
21 duty, or responsibility, or obligation, whatever word you  
22 want to use, to make sure that at least the barge is  
23 secured?  
24 A Yes. And my understanding is that it was. It was still  
25 sitting in the same spot where it had been for quite --  
  
1 for a number of years.  
2 Q All I'm getting at right now is that that's the duty to  
3 make sure it's secured.  
4 A And in the same condition it was in, yes.<sup>12</sup>

The State also argues that there was no evidence of a storage agreement or a request for storage. This misstatement ignores the testimony of Ryan's attorney Alan Marcuvitz ("Marcuvitz") who contacted the DOT to store personal property, including the barge<sup>13</sup>, pursuant to Administrative Rule COMM 202.52(1)(d)<sup>14</sup>. Marcuvitz testified at the post-verdict penalty hearing that:

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<sup>12</sup> See R-89, Transcript from October 5, 2009 at p. 79, l. 17-25, p. 80, 1-5.

<sup>13</sup> See R-81 at Trial Exhibit 15, DOT email to Marcuvitz dated July 20, 2005.

<sup>14</sup> 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 expenses...(d)

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.<sup>15</sup>

Marcuvitz also testified that he made this agreement with either the DOT's Larry Stein or Del Dettman on or about July 20, 2005.<sup>16</sup> Stein could not recall such a conversation.<sup>17</sup> Dettman did not testify. However, the DNR witness acknowledged that Marcuvitz told them that the DOT had responsibility to relocate personal property including the barge but "the State did not have a replacement location[.] [T]hat is why the barge remained where it was."<sup>18</sup>

On page 33 of the State's brief, it argues that Ryan's testimony that there was agreement should be excluded because he never produced evidence of an agreement. The preceding paragraph, above, shows otherwise. The references there corroborate the agreement. Nevertheless, as the earlier testimony by the State's witness confirms, COMM 202 doesn't require an agreement. It creates a statutory obligation.

The State also argues that there was no error in Judge Foley's dismissive treatment of Ryan's affirmative defense. In response to the

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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.

<sup>15</sup> See R-90, Transcript from October 6, 2009 at pp. 79, 1. 13-20.

<sup>16</sup> Id., at p. 95.

<sup>17</sup> See R-91, Transcript from October 7, 2009 at p. 10.

State's summary judgment motion, Ryan asserted the affirmative defense that, even if the State's allegations were true, the State's intervening negligence caused the violation.<sup>19</sup> The negligence consisted of the State removing the chains that held the barge in place with the two tow trucks and a concrete wall and failing to pump water from the barge.<sup>20</sup> Despite Ryan's affidavit stating that this procedure kept the barge afloat for the fifteen years that he controlled the property where it was attached, Judge Foley stated that the affirmative defense required expert testimony. The State's expert testimony came from Reinbold (discussed above) whose affidavit was allowed even though his opinion was highly suspect because it was based solely on a couple pictures and the barge sank on his watch. The fact that Ryan was in the storage business and kept the barge afloat for 15 years should have been enough foundation to create a factual dispute that is to be presumed in his favor for summary judgment.

On pages 34 and 35 of its brief, the State argues that Ryan offered no expert evidence that cutting the cables caused the barge to sink. There is no reason for the trial court's conclusion that expert testimony was required. Since he had kept the barge afloat for fifteen years, Ryan was the best expert available on the issue. In addition, the State argues that Ryan cannot rely on the testimony of Brian Webster who personally supervised the

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<sup>18</sup> See R-90, Transcript from October 6, 2009 at p. 10, l. 11-20.

<sup>19</sup> See R-22, Defendant's Memorandum of Law at p. 9.

<sup>20</sup> See R-59, pp 23 ,37, 59; R-90, pp 43, 44, 49, 56, 59, 123, 153.



storage of the barge on a day to day basis<sup>21</sup> or anyone else because the testimony occurred after the summary judgment hearing. First of all, Webster's testimony corroborates Ryan's affidavits, which is further evidence that the affidavits should not have been ignored. Second, the testimony at the remedy hearing shows that an injustice occurred in summarily finding Ryan guilty.

On page 36 of its brief, the State argues that Ryan's relocation assistance defense only confirms that Ryan was in control of the barge. Further, on pages 37 through 42, the State argues that, since Ryan was in control of his company that was storing the barge, he is personally liable. In response, Ryan does not dispute that he controlled the barge until May 2005 when he was still storing it. But when the State took possession of the property in July 19, 2005, he no longer had control of the property or the barge being stored on the property. The State physically had the barge and legally was required to store it. When the barge sank in 2006, it was on the State's watch, not Ryan's.

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<sup>21</sup> See R-91, Transcript from October 7, 2009 at pp. 33-4. Under Webster's supervision, the barge was secured to a three to four foot thick concrete wall by two tow trucks with leg extensions and four chains. See R-90, Transcript from October 6, 2009 at pp. 44-5, 49. Webster monitored the barge as part of securing and storing the barge. *Id.*, at p. 56. After a snow melt or three or four days of heavy rain, Webster pumped water out of the barge. See R-90, Transcript from October 6, 2009 at p. 57. Also, Ryan would adjust the chains as needed for any buoyancy concerns. *Id.*, at pp. 57-8.

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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 2,980 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12) & (13)

I hereby certify that:

I have submitted an electronic copy of this Appellant's Reply Brief which complies with the requirements of s. 809.19 (12) & (13).

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

A copy of this certificate has been served with the paper copies of this Appellant's Reply Brief filed with the court and served on all opposing parties.

Dated: \_\_\_\_\_

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