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OF WISCONSIN

Case No. 2009AP003075

State of Wisconsin

In The Supreme Court

State of Wisconsin

Plaintiff-Respondent,
v.

Basil E. Ryan, Jr.,

Defendant-Appellant-Petitioner

An appeal from a judgment in
Case No. 2008-CX-000004 on
November 3, 2009 in Milwaukee County,
Judge Thomas R. Cooper, Branch 28
Which was affirmed by the Court of Appeals
On January 11, 2011

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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Dated: June 22, 2011

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Can a defendant be found guilty under the forfeiture statutes on the grounds of judicial estoppel where Defendant-Appellant-Petitioner made no statement to a court?

The Court of Appeals answered in the affirmative.

The Circuit Court answered in the affirmative.

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

The Court of Appeals answered in the affirmative.

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 Defendant-Appellant-Petitioner owned or controlled the barge to be liable under the forfeiture statutes?

The Court of Appeals answered in the affirmative.

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

Can a defendant be found guilty under the forfeiture statutes by summary judgment motion?

The Court of Appeals answered in the affirmative.

The Circuit Court answered in the affirmative.

STATEMENT ON ORAL ARGUMENT

Given that this is a complex forfeiture where Defendant-Appellant-Petitioner was charged and convicted without a trial, Defendant-Appellant-Petitioner believes oral argument is necessary to answer any questions the Court may have.

STANDARDS OF REVIEW

When the facts are undisputed, this Court decides the remaining question of law independent of earlier court decisions. Ball v. District No. 4, Area Bd. of Vocational, Technical and Adult Educ., 117 Wis.2d 529, 345 N.W.2d 389 (Wis.,1984).

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 State of Wisconsin Department of Natural Resources ("State") charging Basil Ryan ("Ryan") 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 moving the Trial Court to find Ryan guilty of the violations enumerated in the complaint as matter of law on the grounds of judicial estoppel. The Trial Court granted the State's 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]

Basil E. Ryan, Jr. ("Ryan") 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 ("Property") (Ryan had sold the Property to 260 North 12 Street LLC before Petitioner-Respondent State of Wisconsin Department of Transportation ("DOT") took the Property through eminent domain ("DOT Taking")).

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

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 Ryan's 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 ("Schumacher").[7] Schumacher approached Ryan's company, B.E. Ryan Enterprises, Inc. (hereinafter known as "Corporation") 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 ("Vehicle Towing" and "Ryan Marina") 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 tax return of the Corporation.[10] The Corporation was in

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[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 "Exhibit B" and "Exhibit C" to Plaintiff's 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.
[10] See APP-32, Affidavit of Basil Ryan at ¶ 3.

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] The corporation has never foreclosed its lien rights against the barge to gain title to it.[16] To the best of Basil Ryan's knowledge, ownership of the barge still belongs to Schumacher and KO OP Marine, Inc.[17] More important, Basil Ryan has never personally owned or controlled the barge in any way.[18]

Ryan has never had any relationship to the barge other than as an employee of the Corporation.[19]

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

From 1999 until May 2005, Ryan's employee (who then became an independent contractor) Brian Webster personally supervised the storage of the barge on a day to day basis.[20] 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. [21] Webster monitored the barge as part of securing and storing the barge.[22] After a snow melt or three or four days of heavy rain, Webster pumped water out of the barge.[23] Also, Ryan would adjust the chains as needed for any buoyancy concerns.[24]

It is undisputed that the barge never sunk under Webster's care through all the years it was stored by the Corporation (through May/June 2005)[25], and it was still afloat through July 2005 when the DOT took over possession of the Property.

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 Ryan's property.[26]

[20] See R-91, Transcript from October 7, 2009 at pp. 33-4.
[21] See R-90, Transcript from October 6, 2009 at pp. 44-5, 49.
[22] Id., at p. 56.
[23] See R-90, Transcript from October 6, 2009 at p. 57.
[24] Id., at pp. 57-8.
[25] See R-90, Transcript from October 6, 2009 at p. 67.
[26] See R-81 at Trial Exhibit 2, Award of Damages recorded March 30, 2005.

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 in *State v. 260 North 12th Street LLC et. al.*, Milwaukee County Circuit Court File 2005CV005593 ("Writ Case"). On or about July 14, 2005, the circuit court held a two day hearing on the DOT's Petition. The sole issue to be tried at the hearing was whether the DOT made available a comparable replacement property.[27]

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 ("Writ Order").[28] The Writ Order stated,

> "IT IS FURTHER ORDERED, that all Respondents will remove all of their personal property, including the barge, and will vacate the premises located at 260 North 12th Street, Milwaukee, Wisconsin…"[29]

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[27] In fact, the trial court in the Writ Case stated:

> We're back on the record in the State versus 260 North 12th Street again. And as I think it's clear from the record made in chambers with the lawyers and parties the sole remaining issue for resolution, hopefully this afternoon, is whether or not the State has complied with 32.05(8) which is a requirement that they provide a comparable replacement property for Mr. Ryan and his business entities in order to secure a Writ of Assistance and I believe that that's the sole issue.

See APP-65-89 excerpts from the Transcript of July 14, 2005 hearing in *State v. 260 North 12th Street LLC et. al.*, Milwaukee County Circuit Court File 2005CV005593 ("Writ Case") at APP-88 (p. 61 of the transcript) at 1. 11-21, as well as APP-76 and APP- 87 (pp. 49 and 60 from the same transcript).

[28] See R-81 at Trial Exhibit 12, Order for Writ of Assistance dated July 19, 2005.

[29] Id., at p. 2 of the order.

Shortly after the issuance of the Writ Order, Ryan's attorney Alan Marcuvitz ("Marcuvitz") contacted the DOT to store personal property, including the barge[30], pursuant to Administrative Rule COMM 202.52(1)(d)[31]. Marcuvitz testified at Trial Court 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.[32]

Marcuvitz also testified that he made this agreement with either the DOT's Larry Stein or Del Dettman on or about July 20, 2005.[33] Stein could not recall such a conversation. [34] 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.[35]

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[30] See R-81 at Trial Exhibit 15, DOT email to Marcuvitz dated July 20, 2005.
[31] 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) 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.

[32] See R-90, Transcript from October 6, 2009 at pp. 79, l. 13-20.
[33] Id., at p. 95.
[34] See R-91, Transcript from October 7, 2009 at p. 10.
[35] Administrative COMM.202.52(1)(d) states:

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 which is consistent with the DOT knowing it was responsible for storing the barge;

- 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 which is consistent with the DOT knowing it was responsible for storing the barge;

- the DOT kept some of the vehicles that Ryan stored on the property on the property during the same 12 month period of time between mid from July 20, 2005 to July 20, 2006[36] which is consistent with the DOT storing the barge on the property too;

- the DOT moved and paid for the storage of some of Ryan's 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[37] which is consistent with the DOT storing the barge; and,

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> A person who claims a moving payment based upon actual and reasonable cost shall be eligible for the following expenses…(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.

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

[37] 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.

- even the DNR 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."[38]

None of the above evidence was ever considered by a jury, because Ryan was denied the right to a trial when the trial granted the summary judgment motion on judicial estoppel grounds.

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 all personal property is safe, secure, and not destroyed.[39] The DOT representative agreed that this same duty and obligation applies to personal property that the DOT stored on the Property.[40] Again this is consistent with the DOT knowing it was responsible for storing the barge.

During the 12 month period after the DOT gained possession of Ryan's real property, neither Ryan nor Webster had access to the barge because they had been evicted and the DOT maintained the Property as a staging ground for the Marquette Interchange Project.

As for the DOT's maintenance of the barge, despite being told otherwise[41], the DOT never pumped any water from the barge that naturally

[38] See R-90, Transcript from October 6, 2009 at p. 10, l. 11-20.
[39] See R-89, Transcript from October 5, 2009 at p. 80.
[40] Id., at pp.80-81.
[41] See R-90, Transcript from October 6, 2009 at p. 153.

accumulated in its hull.[42] Moreover, the DOT cut the chains and removed the two tow trucks that had secured the barge to the cement wall for years.[43] Again, none of this evidence was ever heard by a jury because Ryan was denied the right to a trial when the trial granted the summary judgment motion on estoppel grounds.

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 DOT's cutting the chains, removing the tow trucks, and failure to pump water that accumulated in the barge is what caused the barge to sink.[44]

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 and based his opinion *solely* on pictures.[45] Despite the more than fifteen years of fact otherwise, Reinbold testified that the tow trucks were too light

[42] See R-89, Transcript from October 5, 2009 at p. 37.
[43] Id., at p.23, l. 9-17.
[44] See R-90, Transcript from October 6, 2009 at pp. 59, 117, & 123; see also APP-33, 34, & 37.
[45] See R-89, Transcript from October 5, 2009 at p. 48.

to secure the barge.[46] No jury ever heard the cross examination of Reinbold because Ryan was denied the right to a trial when the trial granted the summary judgment motion on estoppel grounds.

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.[47]

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 " 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.[48]

The Summons also required Ryan to appear before the court as in a criminal matter.

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

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 Ryan's ownership:

- a business relocation questionnaire;[49]
- 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 "Writ Case")[50], and
- a letter from Basil Ryan's previous attorney, Alan Marcuvitz.[51]

It must be noted that the State's witness (Hutnick), who offered an affidavit concerning the unsigned questionnaire, did not verify that this is Basil Ryan's writing on the document. Ryan testified that the writing was not his handwriting and the first time he saw the document was in this litigation.[52] Again, no jury ever heard this evidence.

[49] See APP-23, business relocation questionnaire.
[50] See APP-11, order from the Writ Case.
[51] See APP-26, Marcuvitz letter
[52] See APP-34, Ryan Affidavit at ¶13.

In paragraph 12 of its decision, the Court of Appeals incorrectly stated that "Ryan affirmatively asserted ownership in the barge via the Business Relocation Questionnaire". However, the unsigned questionnaire predated the Writ Case.[53] According to the DOT, the March 2005 questionnaire was used to "facilitate relocation efforts"; it was not a part of a pleading or motion Ryan represented to the court in the Writ Case.[54] In fact, the March 2005 questionnaire even predated the Writ Case which was not commenced until July 1, 2005. There is no evidence on the record that Ryan took the position that he owned the barge in the Writ Case other than the trial court's mistake in its order discussed below.

The Writ Order states that "all Respondents will remove all their personal property, including the barge…"[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 court's 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, the Trial Court, and the Court of Appeals relied on this language to claim that Ryan's ownership of the barge was established in the Writ Case by judicial estoppel. However, in the

[53] See Record at R-12, Affidavit of Margaret Hutnik at ¶ 6 who alleges the questionnaire was provided to her in March 2005 however the Writ case was not even filed until July 1, 2005.
[54] Id.
[55] See APP-11, order from the Writ Case (specifically p.2 of the order at APP-12).

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 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 court's decision directly.[57]

Again, the State even agrees that ownership of the barge was not an issue in the Writ Case and the language in the Writ Order concerning the barge should not be given preclusive effect.

The last piece of evidence that the State, Trial Court, and Court of Appeals relied on for judicial estoppel was the Marcuvitz letter. Once again, the plain language of letter does not say that Basil Ryan is the barge owner.[58] The letter does not even state that his client is the owner. Even if it did say client, it doesn't specify which one (the Corporation was also represented by Marcuvitz). Equally important, the letter also states, "[w]e do not agree that there is any justification whatever to the position of your

[56] See text for footnote 31 above and R-63 Affidavit of E. Kelly Keady at Exhibit E, the DOT's appellate brief in the Writ Case (citations omitted) at p. 13.
[57] See R-63 Affidavit of E. Kelly Keady at Exhibit E, the DOT's appellate brief in the Writ Case (citations omitted) at p. 13.
[58] See APP-26, Marcuvitz letter.

department" and that the "factual allegations regarding contacts with me are substantially incorrect…"[59]

In spite the above, the Trial Court (and Court of Appeals) 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.[60]

Ryan moved the Trial Court to reconsider the liability issue on several grounds, but the trial court denied the motions.[61]

The hearing on the forfeiture penalty phase lasted three days, October 5, 6, and 7, 2009, before the Honorable Judge Thomas R. Cooper.[62]

Judgment was entered on November 3, 2009.[63]

Defendant-Appellant-Petitioner appealed the matter on December 11, 2009.[64]

The Court of Appeals affirmed the trial court on January 11, 2011.[65]

This Court granted Defendant-Appellant-Petitioner's Petition for Review on May 24, 2011.

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[59] See APP-26, Marcuvitz letter
[60] See APP-44 to 46, letter decision by Judge Foley and order signed by Judge Cooper on January 27, 2009.
[61] See R-39, R-44, R-61.
[62] See R-89, R-90, R-91, transcripts from hearings on October 5, 6, & 7, 2009.
[63] See R-80, Judgment.
[64] See R-83, Notice of Appeal.
[65] See APP-49, decision of the Court of Appeals dated January 11, 2011.

ARGUMENT

I. THE COURT OF APPEALS MISAPPLIED THE DOCTRINE OF JUDICIAL ESTOPPEL.

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).

For judicial estoppel to apply, Wisconsin Courts have held that the following criteria must be satisfied: "First, 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." 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 position in Sea View is consistent with the United States Supreme Court which has held:

> several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception

> that either the first or the second court was misled," Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750-1, 121 S.Ct. 1808, 1814-15, 149 L.Ed.2d 968, 01 Cal. Daily Op. Serv. 4303, 2001 Daily Journal D.A.R. 5265, 14 Fla. L. Weekly Fed. S 283, 2001 DJCAR 2605 (citations omitted).

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 and Court of Appeals agreed) that Ryan has taken inconsistent positions based upon the following three pieces of evidence:

- a business relocation questionnaire used in the State's petition for the writ of assistance in the Writ Case;
- the order for writ of assistance in the Writ Case; and,
- a letter from Basil Ryan's previous attorney, Alan Marcuvitz in response to a notice for violation in this case.

A. The differing burdens of proof.

As noted above, judicial estoppel requires inconsistent positions in two separate actions, however even if all the State's arguments are accepted on their face, there is fundamental problem to its application in this case: there are differing burdens of proof.

The Writ Case, relied on by the State, the Trial Court, and Court of Appeals 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 courts to apply estoppel from facts under a lower standard of proof to a case where a higher standard is required.

However, 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 Case. Id., see also Grogan 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).

The Court of Appeals simply dismissed the above argument concerning the differing burdens of proof as applicable only to issue and claim preclusion, but not to judicial estoppel because the former estops courts while the latter estops parties.[66] Ryan respectfully disagrees. All three doctrines bar the parties from doing something, but the difference is that judicial estoppel is discretionary as to its application if the elements are met while issue and claim preclusion are not. State v. White, 2008 WI App 96, 312 Wis.2d 799, 754 N.W.2d 214. Although, the Court of Appeals curtly dispensed with Ryan's argument on the application of judicial estoppel where the burden of proof is different, other courts have not been so quick. See Old West Annuity and Life Ins. Co. v. Apollo Group, Slip Copy, 2009 WL 462721 at footnote 2 (M.D.Fla.,2009)(" differences in the legal analysis and evidentiary burdens between California and Florida law governing alter ego status are substantial enough that even if Coast had made a statement in this case that Apollo was not the alter ego of Travel America, the Court could not automatically conclude that such a statement

was directly contradictory of Coasts' arguments in the California case and, therefore, that judicial estoppel would have applied").

Even so, the undisputed underlying facts do not support that contention that Ryan was the owner of the barge.[67] The undisputed record establishes Richard Schumacher's company KO OP Marine, Inc. as the owner of the barge,[68] consequently, the application of judicial estoppel on its face is creating the perversion of justice that the doctrine was created to correct. The Court of Appeals calls the documents submitted by Ryan "highly suspect" in its opinion (at ¶ 27) without citing *any* basis in fact from the Record. Moreover, the Court of Appeals states that "Ryan does not explain how they establish Schumacher's ownership" when paragraph 2 of Ryan's November 7, 2008 affidavit clearly state how the documents establish Schumacher's ownership of the barge[69] especially when you read them in context of paragraphs 3 to 8 June 5, 2008 affidavit explaining how

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[66] See at APP-_, Decision of Court of Appeals at ¶ 28.
[67] See at APP-31 to 43 (all three Ryan affidavits).
[68] See APP-36 Second Ryan Affidavit at Exhibit A (Certificate of Documentation for the barge) at APP-39, and Exhibit B (Wisconsin Dept. of Financial Institutions printout) at APP-40.
[69] See APP-36, Affidavit of Ryan dated November 7, 2008 at ¶ 2 which states:

> As I have repeatedly stated, I have never personally owned the barge. I have never had any relationship to the barge other than as an employee of the Corporation and the Corporation only had lien rights in the barge for storing it. Attached as Exhibit A is a copy of the barge's certificate of title listing the owner as KO OP Marine Inc. Attached as Exhibit B is the Wisconsin Department of Financial Institution's listing for KO OP Marine Inc. showing that Richard Schumacher is the registered agent for the company. These two exhibits further support my previous affidavit as to ownership of the barge.

he stored the barge for Schumacher[70]. These facts have never been disputed and the lower courts' dismissive treatment of them only perpetrates the injustice that judicial estoppel is designed to avoid.

B. The elements of judicial estoppel have not been met.

As acknowledged by the Court of Appeals, for judicial estoppel to apply, the following criteria must be satisfied: "First, 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…" 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 ("the party to be estopped must have convinced the first court to adopt its position"). 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. They were not used by Ryan, or any party, to convince the first court to adopt its position. The relocation questionnaire occurred *prior* to the filing of the petition in the Writ Case.[71] The letters concerning the barge

[70] See APP-32-33, Affidavit of Ryan dated June 8, 2008 at ¶¶3-8.
[71] 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.

occurred prior to filings in the forfeiture cases.[72]

The Court of Appeals did not address this point, stating in ¶ 27 of the decision that they "do not find persuasive Ryan's unsubstantiated contention that because Ryan's assertions of ownership did not take place within a motion or brief or other filing directly related to the civil litigation process that they do not amount to "positions."" However, Ryan used the same footnotes as above substantiating that the questionnaire and letters referenced by the court were not positions taken in pending cases therefore could not be used for judicial estoppel.[73]

Be that as it may, the argument is simple. If a criminal defendant writes a letter to his neighbor saying that he killed his wife, he is not later estopped from arguing at trial that he did not kill his wife. He may have some credibility problems, but judicial estoppel would not apply. However, if a criminal defendant pleads guilty and admits that he killed his wife to avoid lethal injection, he cannot claim later in a civil court case that he did not kill his wife to avoid civil liability.

Now let's again look at the Marcuvitz letter and the questionnaire more closely. Even a cursory review of the Marcuvitz letter[74] reveals that it is obviously a settlement negotiation that cannot be used against Ryan. See

[72] Compare the October 16, 2006 Marcuvitz letter (APP-26) to the February 4, 2008 filing in this case (APP-1).
[73] See Petitioner's initial brief before the Court of Appeals dated March 30, 2010 at pp. 25-28; see also Petitioner's reply brief before the Court of Appeals dated May 13, 2010 at pp. 9-10.

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 and long after the Writ Case (the letter is dated October 16, 2006 while the Writ Order is dated July 19, 2005). So again, this is not evidence of trying to convince a court of a position. After a thorough review of the letter, Marcuvitz never states Ryan is the owner of the barge. He states only "with full reservation of the rights of the barge owner" which is consistent with Ryan's testimony that he 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 "we do not agree that there is any justification whatever to the position of your department" 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 Ryan's position in this case that he does not own the barge.

As for the questionnaire[75], the State's witness (Hutnick), who offers an affidavit concerning the unsigned questionnaire, does not verify that this

[74] See APP-26, Marcuvitz letter.
[75] See APP-23, relocation questionnaire.

is Basil Ryan's 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 ("Marcuvitz") 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.**[76]

Therefore the State cannot 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 let's look further at what the State is relying on in the questionnaire. The State is relying on the handwritten statement "currently, single barge is stored by owner (Ryan)." It does not state that Ryan owns the barge. The State (and the lower courts) are assuming that "owner" means "owner of the barge". However there is an equally compelling explanation that "owner" means "owner of the property where the barge was stored", 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 and 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 Ryan's position in this case that he does not own the barge because the statement could also mean "owner of the property where the barge was stored".

Despite the above, the State will argue that the ambiguous statements in the questionnaire "are akin to judicial admissions that are binding on Ryan" and cite City of Wisconsin Dells v. Dells Fireworks, Inc., 197 Wis. 2d 1, 17, 539 N.W.2d 916 (Ct.App. 1995). However Dells Fireworks states:

> 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** which was "clear, deliberate and unequivocal". Further, 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). This questionnaire involves

[76] See APP-34, Ryan Affidavit at ¶ 13.

neither. The unsigned, ambiguous questionnaire is not testimony in court, nor a representation to court. It was a document created outside of court not for use in court and cannot be deemed as a matter of law to be "clearly inconsistent" with Ryan's 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 lower courts), the latter position with the court must be "clearly inconsistent with the earlier position". The July 19, 2005 Order for Writ of Assistance does not rise to the level of "clearly inconsistent with the earlier position". The Writ Order states that "all Respondents will remove all their personal property, including the barge, and will vacate the premises…". 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 court's decision directly.[77]

Given the above statement by the State in the Writ case, the irony of the State advocating for judicial estoppel should not be lost on the Court where

[77] See R-63 Affidavit of E. Kelly Keady at Exhibit E, the DOT's appellate brief in the Writ Case (citations omitted) at p. 13.

in the Writ case the State argued that barge ownership was merely implied, but in this case the State emphatically states that the same order clearly establishes Ryan's ownership of the barge.

Second, this cannot be judicial estoppel because it is not a representation by a party to convince a court, but an order *by* the court. There is no evidence that Ryan said anything to the circuit court that would cause it to issue such an order. More importantly, "all Respondents" in the Writ 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 personally was the owner of the barge. As acknowledged by the State, the ownership of the barge was never litigated in the Writ 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 (to the contrary the State has admitted that the issue was not litigated).[78]

In addition, as argued above, even if the ownership issue was litigated, you still have the problem with differing burdens of proof (you cannot apply estoppel from a case with a lower burden of proof to a higher burden).[79] Therefore, just like the questionnaire and the Marcuvitz letter,

[78] Id.
[79] See argument above at I. A.

judicial estoppel should never have been applied to the Writ Order as to the ownership issue in this case.

The Court of Appeals ignored the above arguments and found in ¶27 "the facts at issue in the instant case, whether Ryan and/or one of its corporate is responsible for relocating the barge as part of the Marquette Interchange project, are the same". The Court of Appeals does not explain, but one can only assume it is comparing the Writ Case to the Barge Case. In addition to the preceding arguments that establish that judicial estoppel is inapplicable and that the Court of Appeals has erred, the Court of Appeals ignores one important fact: *that after the Writ Order, the DOT agreed to store the barge on the property*. How can it be in the interest of justice to apply judicial estoppel when the State agreed to store the barge and the barge sunk on the State's watch (see Argument II below)?

Finally, the Court of Appeals states that the trial court was convinced that Ryan was the owner of the barge because the judge was the same in both cases. Even so, "the party to be estopped must have convinced the court to adopt its position". 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). No document or testimony is shown from the Record where Ryan tried to convince the court that it owned 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 agree that issue was never

litigated and the language in the order should not be given preclusive effect.[80] If the trial court was convinced, then it was because of its own inadvertence or mistake because the questionnaire was not before the court before the Writ Order, the Marcuvitz letter occurred after the Writ Order, and the ownership of the barge was never litigated in the Writ Case. Consequently, at best and as agreed by the State in the appeal of the Writ Order, the trial court may have mistakenly *implied* that Ryan was the owner of the barge.[81] However, this does not rise to the level of judicial estoppel. It is inappropriate to apply the doctrine when a party's 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). If the trial court mistakenly *implied* that Ryan was the owner of the barge, as the State argued in the appeal of the Writ Case[82], judicial estoppel is not proper in this case.

II. THE MISUSE OF THE DOCTRINE OF JUDICIAL ESTOPPEL HAS ALLOWED A FORFEITURE TO BE RAMRODDED THROUGH THE JUDICIAL SYSTEM WITHOUT A CAREFUL CONSIDERATION OF THE FACTS.

Whether control or ownership of the barge is the benchmark for application of the forfeiture statute, facts were presented on the record to

[80] See R-63, Affidavit of E. Kelly Keady at Exhibit E, the DOT's Appellate brief in the Writ case at p. 13 of the brief.
[81] See R-63 Affidavit of E. Kelly Keady at Exhibit E, the DOT's appellate brief in the Writ Case at p. 13.
[82] Id.

conclusively show that Ryan did not own the barge or have control of it when the barge sank.

The undisputed underlying facts do not support that contention that Ryan was the owner of the barge.[83] The undisputed record establishes Richard Schumacher's company KO OP Marine, Inc. as the owner of the barge.[84] The barge's certificate of title lists the owner as KO OP Marine Inc. and the Wisconsin Department of Financial Institution's listing for KO OP Marine Inc. shows that Richard Schumacher is the registered agent for the company.[85] Ryan had stored the barge for Schumacher for years.[86] The State never disputed these facts other than by using judicial estoppel.

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 expenses…(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.

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[83] See at APP-31 to 43 (all three Ryan affidavits).

[84] See APP-36 Second Ryan Affidavit at Exhibit A (Certificate of Documentation for the barge) at APP-39, and Exhibit B (Wisconsin Dept. of Financial Institutions printout) at APP-40.

[85] See APP-36, Affidavit of Ryan dated November 7, 2008 at ¶ 2 which states:

> As I have repeatedly stated, I have never personally owned the barge. I have never had any relationship to the barge other than as an employee of the Corporation and the Corporation only had lien rights in the barge for storing it. Attached as Exhibit A is a copy of the barge's certificate of title listing the owner as KO OP Marine Inc. Attached as Exhibit B is the Wisconsin Department of Financial Institution's listing for KO OP Marine Inc. showing that Richard Schumacher is the registered agent for the company. These two exhibits further support my previous affidavit as to ownership of the barge.

[86] See APP-32-33, Affidavit of Ryan dated June 8, 2008 at ¶¶3-8.

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, when the Writ Order was 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.

As shown by the record, 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[87] (even the barge's spuds were raised and locked when the State took control of the property)[88]. At the very least, under a summary judgment standard, these facts should have been enough to defeat the State's motion. Schuster v. Germantown Mut. Ins. Co., 40 Wis.2d 447, 162 N.W.2d 129 (Wis. 1968).

If there was 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, specifically the testimony of Ryan and Webster[89], clearly explains the effect of the DOT's cutting the cables and chains to the barge and failing to pump water from the barge hull. When the

[87] 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 Keady's affidavit and Second Ryan affidavit).

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

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 were pulled away from the 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 "hooks" 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 Ryan's 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

[89] See above at pages 10-11, specifically footnotes 20-25.

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 State's 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 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.

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

At the outset, it must be noted that if this Court finds that the doctrine of judicial estoppel was misapplied to this case, then the issue of summary judgment becomes moot since the Trial Court used judicial estoppel to dispense with any disputed facts (i.e. ownership or control of the barge).

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 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; 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 " 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.[90]

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. The Court of Appeals[91] has previously prohibited

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

[91] In its decision (¶ 24), the Court of Appeals states that summary judgment has been used in Ch. 30 forfeiture cases citing State v. Kelly, 244 Wis. 2d 286, 628 N.W. 2d 438 (Wis.App. 2001) however the issue of whether summary judgment was appropriate was

summary judgment in forfeitures actions because they do not provide the same safeguards as in civil 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 "which is capable of determination without the trial of the general issue", 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 State's 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 State's motion, even in part.

The prohibition against the use of summary judgment in forfeiture proceedings emanates from 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

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never raised in Kelly where the parties agreed to using summary judgment and stipulated to facts in that case.

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 this Court has aptly stated:

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

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 this Court has said is **"the greatest legal engine ever invented for the discovery of truth".**

In its opinion, the Court of Appeals (at ¶ 23) states that the parties can still submit affidavits, which Ryan did. However, the loss of cross-examination illustrates the injustice in this case. 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 submitted an affidavit where he stated:

> 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.[92]

[92] See Record at 15, Donald E. Reinbold Affidavit dated May 5, 2008.

However on cross-examination at the penalty phase[93], Reinbold admitted that he *never inspected the barge, trucks or cables*.[94] His opinion was based *solely* on pictures. He wasn't even aware that chains anchored the barge to the trucks.[95] Reinbold even disqualified himself from giving an opinion as to whether cutting the chains and cables caused the problem.[96] Reinbold 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 adequate for granting a summary judgment motion and cross-examination would have ferreted out these truths. Unfortunately, Ryan was never allowed to cross-examine Reinbold concerning his affidavit for the determination of liability since no discovery is allowed. Even more egregious is the fact that Reinbold's affidavit was accepted on its face and the trial court granted summary judgment based on his testimony.

The State in its previous briefing and the Court of Appeals in its opinion cite numerous cases (see ¶ 24 of the Court of Appeals decision), but none of these cases 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

[93] The trial court heard testimony at the penalty phase after it had already determined guilt as a matter of law by summary judgment.
[94] See Record at 89, Donald E. Reinbold testimony on October 5, 2009 at p.48, l.12-24.
[95] Id.

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 the use of summary judgment and stipulated to facts in that case. In this case, Ryan has opposed the use of summary judgment and definitely did not stipulate to the disputed facts.

CONCLUSION

The Record is clear that Ryan was not the owner of the barge. The title holder is undisputedly a corporate entity run by Richard Schumacher, who hired Ryan's company to store the barge. However, after the taking of Ryan's property, it was the State's duty and obligation to safely store the barge for the twelve month period from July 20, 2005 to July 20, 2006. So, the barge was under the State's 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, removed the tow trucks, and failed to pump water from the barge. Clearly, the DOT not only had control of the barge but caused it to sink. Both the Trial Court and Court of Appeals hid behind judicial estoppel and summary judgment to avoid these facts. Ryan respectfully requests this Court to reverse the lower courts so all the facts can be presented at trial.

[96] Id., at p.45, l.4-9.

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 8,431 words.

Dated:_____ _____

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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 Defendant-Appellant-Petitioner's Brief and Appendix which complies with the requirements of s. 809.19 (12) & (13).

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

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

Dated: _____ _____

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

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

1. That on the 22nd day of June, 2011, I caused to be served by hand three true and complete copies of Defendant-Appellant-Petitioner's Brief and Appendix to Respondent's counsel at the following addresses:

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FURTHER AFFIANT SAYETH NOT.

_____
E. Kelly Keady

Subscribed to and sworn before me
this ____ day of _____ 2011.

_____
Notary Public