STATE OF WISCONSIN
IN SUPREME COURT

No. 2009AP003075

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.

BASIL E. RYAN, JR.,
Defendant-Appellant-Petitioner.

APPEAL FROM JUDGMENT ENTERED IN MILWAUKEE COUNTY CASE NO. 2008-CX-4 BY JUDGE THOMAS COOPER ON NOVEMBER 3, 2009

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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The circuit court granted summary judgment finding Ryan liable for maintaining a sunken barge on the bed of the Menomonee River and obstructing navigation in the River in violation of Wis. Stat. ch. 30, based on 1) Ryan's assertion in a prior case of his or his corporate entities' ownership of and control over the barge under the doctrine of judicial estoppel; 2) the undisputed evidence that Ryan was the controlling officer of his corporate entities and responsible for their day-to-day operations; and 3) Ryan's failure to adduce any credible or expert evidence shifting the blame for the sinking to the State. The circuit court twice denied Ryan's motions for reconsideration and rejected Ryan's post-summary judgment defenses. The court of appeals affirmed the circuit court's applying judicial estoppel to preclude Ryan from arguing that he did not own or control the barge, and granting summary judgment as to Ryan's liability in this civil forfeiture action. The State asks this Court to affirm.

ISSUES PRESENTED

1. Did Ryan establish as undisputed that he did not own or control the barge, or establish disputes of material fact as to who owned and controlled the barge and as to whether the State caused the barge to sink?

Court of Appeals and Circuit Court answered: No. The Court of Appeals found that the State "established all of the elements necessary to succeed on its [statutory] claims . . . [and that] Ryan did not . . . set forth any issues of material fact." *State v. Ryan*, Ct. App. Decision dated January 11, 2011, ¶29; P-Ap.64. The circuit court found that Ryan was barred by judicial estoppel from arguing that he did not own the barge, and that Ryan failed to adduce either any facts showing that he did not control the barge or any credible and expert evidence that the State caused the barge to sink.

2. Did the circuit court properly apply judicial estoppel to bar Ryan from changing the position that he took in a prior eminent domain case that he or his corporate entities owned the barge and claimed it as their personal property, potentially eligible for relocation assistance, when the circuit court in that prior case issued an order adopting his position as to the ownership of the barge and its being his or his corporate entities' personal property?

Court of Appeals and Circuit Court answered: Yes. The Court of Appeals stated, "Ryan presents a textbook example of a litigant playing 'fast and loose' with the judicial system." *State v. Ryan*, Ct. App. Decision dated January 11, 2011, ¶27; P-Ap.62. The circuit court first held that judicial estoppel applies as to the issue of Ryan's or his corporate entities' ownership of the barge and then twice upheld that determination in response to Ryan's two motions for reconsideration. The court in addition held that the undisputed facts established Ryan's personal liability for the sunken barge.

3. Did the circuit court properly grant summary judgment in this Wis. Stat. ch. 30 civil enforcement action that the State commenced with a summons and complaint, and in which Ryan joined issue by filing an answer, pursuant to statutory provisions that expressly allow 1) for two forms of action including one begun by the filing of a summons and complaint and 2) for motions that are capable of determination without trial?

Court of Appeals and Circuit Court answered: Yes. The Court of Appeals held that "the plain language of the procedural statutes governing Wis. Stat. ch. 30 forfeiture actions allows for summary judgment, and . . . these statutes are consistent with summary judgment methodology." *State v. Ryan*, Ct. App. Decision dated January 11, 2011, ¶25; P-Ap.61. The circuit court so found twice in response to Ryan's two motions for reconsideration.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument may help present a true statement of facts and portray an accurate statement of law, and publication will help provide guidance as to the use of summary judgment in chapter 30 civil forfeiture actions.

STATEMENT OF THE CASE

A. Ryan's Appendix omits decision documents.

The State includes in its Appendix the following documents required by Wis. Stat. § 809.19(2)(a), which are missing from Ryan's Appendix:

August 6, 2008, Order granting in part State's motion for summary judgment (R-Ap.101-103);

January 8, 2009, Transcript of hearing at which summary judgment was granted as to Ryan's personal liability and Ryan's motion for reconsideration was denied (R-Ap.104-114);

January 27, 2009, Order granting summary judgment as to Ryan's personal liability and denying reconsideration (R-Ap.115-116);

October 7, 2009, Excerpts of transcript of hearing at which Ryan's second motion for reconsideration was denied and final judgment was entered (R-Ap.117-133).

B. The State commenced this action by filing a summons and complaint, and Ryan filed an answer.

The State (not DNR, Ryan Br.7) filed the summons and complaint commencing this civil action on February 4, 2008. R1; P-Ap.1-22.

The complaint stated two statutory claims against Ryan relating to a barge that sank in the Menomonee River on July 13, 2006.

Under Wis. Stat. § 30.10(2), "no . . . obstruction shall be made in or over [navigable streams] without the permission of the state." Under Wis. Stat. § 30.12(1)(a), "[u]nless an individual or a general permit has been issued . . . no person may . . . place any structure upon the bed of any navigable water where no bulkhead line has been established."

The complaint alleged that Ryan placed and maintained 1) an obstruction in, and 2) a structure on, the bed of the Menomonee River where no bulkhead was established, in the form of the barge that he owned or controlled when and since that barge sank on July 13, 2006, without any permit from the State. R1; P-Ap.3-22.

The complaint noted that Ryan owned the barge (Ryan Br.7), but did not charge that such ownership was the violation.

Ryan filed an answer on April 8, 2008. R2; P-Ap.28-30.

C. The State moved for summary judgment based on five undisputed material facts, and Ryan filed his affidavit in opposition.

The State (not DNR, Ryan Br.17) moved for summary judgment based on five undisputed material facts (R6-21, R25):

1. As of and since 2005, Ryan has owned, possessed and controlled the barge that was moored and then sank adjacent to real property at 260 N. 12th Street in Milwaukee. R7:4-6.

2. The barge sank on July 13, 2006, and remained on the bed of the Menomonee River since. R7:6.

3. The Menomonee River is a natural navigable, public stream, and no bulkhead was established on the stretch of the Menomonee River where the barge is located. R7:6.

4. The barge is an obstruction in and a structure on the bed of the Menomonee River. R7:7.

5. No permit was issued to Ryan to place a barge or obstruction on the bed of the Menomonee River. R7:7.

Ryan opposed the motion based on his own affidavit, which in part denied that he owned or controlled

the barge. R24; P-Ap.31-35. In reply, the State raised judicial estoppel (but had not initially moved on such grounds, Ryan Br.17). R25.

D. The circuit court issued an order on August 6, 2008, granting the State's summary judgment motion on all issues except Ryan's personal liability.

After briefing and a hearing on June 30, 2008, Judge Foley issued a letter decision dated July 11, 2008 (R29; P-Ap.44-46), finding that:

1. Ryan failed to support or to raise a material dispute preserving his affirmative defense, that the State was responsible for the barge's sinking.

2. The doctrine of judicial estoppel precluded Ryan from denying that he or a Ryan corporate entity owned and controlled the barge when and since it sank.

3. "Absent proof of individual ownership or individual control of the day to day operations of the potential corporate owners, the basis of personal liability is still in material dispute."

Judge Foley granted partial summary judgment and denied summary judgment as to Ryan's individual liability.

After judicial rotation, Judge Cooper signed the Order consistent with Judge Foley's decision on August 6, 2008. R36; R-Ap.101-103.

E. The State filed a second motion for summary judgment as to Ryan's personal liability, and Ryan submitted his second affidavit in opposition and moved for reconsideration.

The State filed its second motion for summary judgment, as to Ryan's personal liability, on July 31, 2008, and submitted evidence, including Ryan's prior case deposition testimony, showing that Ryan was the only controlling principal officer of the relevant corporate entities, and the only person responsible for his corporate entities' affairs and day-to-day operations. R31-34.

Ryan opposed the motion and moved for reconsideration contesting the application of judicial estoppel and the use of summary judgment, and submitted his second affidavit dated November 7, 2008, before a hearing on the motion on November 10, 2008. R39, R40; P-Ap.36-41. The court denied Ryan's motion for reconsideration and ordered additional briefing on the law regarding personal liability. R87:32-33.

F. Ryan submitted his third affidavit after additional briefing, and the circuit court granted the State's second motion for summary judgment and denied Ryan's motion for reconsideration in January 2009.

Judge Cooper held a second hearing after two rounds of briefing on January 8, 2009. R88; R-Ap.104-114. Ryan submitted his third affidavit at that hearing. P-Ap.42-43. Judge Cooper issued an Order granting the State's second motion for summary judgment, finding that summary judgment was appropriate in this ch. 30 enforcement action and that Ryan was personally liable

for the ch. 30 violations related to the sunken barge, on January 27, 2009. R52:1-2; R-Ap.115-116.

Judge Cooper decided Ryan's responsibility on summary judgment: "I am granting the summary judgment of the State of Wisconsin . . . . I think he's responsible. And there is no factual dispute of that nature." R88; R-Ap.111.

Judge Cooper deferred the issue of control for the remedy hearing: "I think the issue of the fact [whether DOT] took over the barge and, therefore, Ryan or the corporate entity were not in control of the barge, I think that's more particularly an issue for the remedy phase of the proceeding." R88; R-Ap.110.

G. The circuit court denied Ryan's second motion for reconsideration and rejected Ryan's control defense after a 3-day remedies hearing on October 7, 2009.

Ryan moved again for reconsideration of the summary judgment decisions. R61-63. Judge Cooper denied that motion at the conclusion of the remedies hearing on October 7, 2009, R91:36, 51-53; R-Ap.118, 119-121 ("Judge Foley's decision on judicial estoppel I agree with and is correct"), and signed the Order for Judgment including that denial on November 3, 2009. R79:1-3; R-Ap.134-136.

Beyond summary judgment, Judge Cooper saw "no factual support for" or "legal basis for" Ryan's expectation that DOT took control of the barge, finding, "He's the one legally responsible under the enforcement . . . I'm satisfied Ryan was the owner. He received notice to move [the barge]. He didn't. He made a decision to not move it because he was trying to make a better deal, get a better

price for it. Well, he didn't and it sank. He's responsible. $25 per day." R91:70-72, R-Ap.126-128.

STATEMENT OF FACTS

The material facts are those stated in section C above. This appeal concerns the first fact only. In attempting to show that the circuit court erroneously found that the first fact was undisputed in favor of Ryan's liability, Ryan improperly includes immaterial facts that are not supported by any record citations or are not supported by his record citations, and immaterial facts that are purported to be supported by citations to testimony at the remedies hearing that took place after the summary judgment decisions that he appeals but that misrepresent that testimony. The State addresses these misstated facts as necessary below, particularly in the course of setting forth what the true, record-supported facts are in Sections II and III.

ARGUMENT

The lower courts properly ruled that Ryan failed to create any disputes of material fact as to his liability for the sunken barge, that judicial estoppel barred Ryan, who had claimed ownership and control of the barge in a previous case when doing so would benefit him, from disowning the barge in this case when it became his liability, and that summary judgment is allowed by statute in this ch. 30 case.

I. THIS COURT REVIEWS THE CIRCUIT COURT'S SUMMARY JUDGMENT DECISION, AND WHETHER JUDICIAL ESTOPPEL AND SUMMARY JUDGMENT PROPERLY APPLY, DE NOVO.

This Court reviews a motion for summary judgment de novo, using the same methodology as the trial court and valuing its decision. *State v. Town of Linn*, 205 Wis. 2d 426, 434, 556 N.W.2d 394 (Ct. App. 1996).

Summary judgment is required "if the pleadings . . . together with [any] affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). The court looks first to the complaint to see if a cause of action is stated. If it is, it examines the moving party's affidavits, if any, to see if they show the moving party is entitled to judgment as a matter of law. If that showing is made, the court examines the opposing party's affidavits, if any, to see if a defense is raised or a factual issue exists. If no defense is successfully shown and no factual issue exists, summary judgment for the moving party is granted.

While the invocation of judicial estoppel is discretionary, this Court reviews de novo whether the facts satisfy the elements of judicial estoppel. *Olson v. Darlington Mut. Ins. Co.*, 2006 WI App 204, ¶3, 296 Wis. 2d 716, 723 N.W.2d 713 (citing *Salveson v. Douglas County*, 2001 WI 100, ¶38, 245 Wis. 2d 497, 630 N.W.2d 182) ("Whether to invoke judicial estoppel is left to the discretion of the circuit court. . . . A reviewing court determines de novo, however, whether the elements of judicial estoppel apply to the facts . . . .").

Whether summary judgment may be used in this ch. 30 enforcement action is also a question of law that this Court reviews de novo. *See State v. Hyndman*, 170 Wis. 2d 198, 205, 488 N.W.2d 111 (Ct. App. 1992) ("Whether sec.

802.08, Stats. (summary judgment) is applicable to a criminal proceeding via sec. 972.11 is a question of law that this court decides without deference to the trial court.").

II. RYAN DID NOT ESTABLISH AS UNDISPUTED THAT SOMEONE ELSE OWNED THE BARGE IN AND SINCE 2005-2006.

Ryan asserts without any basis that he established as undisputed someone else's ownership and control of the barge (Ryan Br.34-5). The summary judgment record refutes his assertion, and the court of appeals properly rejected his assertion as unsupported by any competent evidence.

On summary judgment, in his first affidavit, Ryan stated that someone else did own the barge at one time, but that Ryan had since controlled the barge and kept that person from taking the barge away, and that Ryan did so as an employee of his corporate entities. R24; P-Ap.31-35. Notably, Ryan's assertion of control (reasserted at Ryan Br.9, "[Ryan's] Corporation maintained possession of the barge" since the barge's prior owner stopped paying storage fees (emphasis added)) would have sufficed to establish as undisputed his responsibility for the barge when it was afloat and his liability for the barge when it sank, had the court not granted summary judgment based on judicial estoppel.

After the court granted partial summary judgment, ruling that Ryan was judicially estopped from making the defense that he or his corporate entities did not own or control the barge, Ryan submitted a second affidavit in support of his motion for reconsideration, to which he attached a certificate of documentation (erroneously called a title by Ryan, Ryan Br.8), which showed that KO OP Marine, Inc. owned the barge in 1996 and which expired in April 1997. R40:6; P-Ap.39. This certificate does not in any way establish that someone other than Ryan or his

corporate entities owned, possessed, and controlled the barge in and since 2005/2006 (and Ryan tellingly cites to nothing else in the record to establish that Ryan did not own the barge). As shown below, the competent evidence produced to the court established quite the contrary.

III. RYAN DID NOT ESTABLISH DISPUTES OF MATERIAL FACT AT SUMMARY JUDGMENT OR ANY CONTRARY COMPETENT EVIDENCE AT THE REMEDIES HEARING AS TO HIS OWNERSHIP, POSSESSION AND CONTROL OF THE BARGE, AS TO THE CAUSE OF ITS SINKING, OR AS TO HIS PERSONAL LIABILITY FOR THE SUNKEN BARGE.

Ryan asserts as fact or argument that DOT was in charge of the barge in 2005/2006 as a matter of law and promise to his attorney, that DOT caused the barge to sink when it removed two pick-up trucks tied to the barge with chains or cables, and that he could not be personally liable because he was only an employee of his corporate entities. None of his arguments has any basis in the law or the record.

A. DOT had no legal obligation to, and did not, take control of the barge or its storage.

Ryan continues to contend both that he does not own or control the barge, and that he does and DOT was responsible for storing it as part of the eminent domain transaction during the time that it sank (Ryan Br.9, 12). As shown below, the lower courts correctly rejected the former argument under the doctrine of judicial estoppel. As shown in this section, the law that Ryan cites provides no support for the latter argument of DOT responsibility,

nor do the undisputed facts on summary judgment. In addition, the evidence that came in at the remedies hearing only confirmed the absence of DOT control.

1. No law imposed an obligation on DOT to take possession or control of, or to store or to pay to store, Ryan's barge.

The law on which Ryan hangs his hat is titled "Relocation Assistance" (Wis. Admin. Code ch. COMM 202), and more specifically, "Standard for actual and reasonable moving expense" (Wis. Admin. Code § COMM 202.52). Nowhere does this law obligate DOT to take control of and store property that must be moved; rather it obligates DOT to reimburse a person for the "actual and reasonable cost" of "[s]torage of personal property . . . for a period not to exceed 12 months." Wis. Admin. Code § COMM 202.52(1) and 202.52(1)(d).

The provisions cited above obligate DOT to pay storage costs of personal property for up to one year, § COMM 202.52, upon the submission of claims for reimbursement of storage charges under Wis. Stat. § 32.20. Ryan has yet to identify any law authorizing or requiring DOT to jump over the claims procedure set forth in the Code and to take control of the barge and store it for Ryan where Ryan left it. The law is expressly to the contrary.

First, the barge was not eligible for relocation assistance because it was not part of an operating business under Wis. Admin. Code § COMM 202.56. R12:2.

Second, the barge was not eligible for relocation assistance because it was not on real property, and so it was not eligible as personal property under Wis. Admin. Code § COMM 202.52. Section COMM 202.52(1)(d)

addresses "Storage of Personal Property;" § COMM 202.01(30) defines personal property as "tangible property located on real property;" and § COMM 202.01(34) defines real property as "land and improvements on and to the land." The barge was never on real property as defined by the Code, and so it was not personal property eligible for assistance under the Code. *See* R89:84 (noting the problem was that the barge was not on the site but in the river).

Third, even if the barge were eligible for relocation assistance, the only claims allowed under ch. COMM 202 are claims for reimbursement for moving or storage expenses already incurred.

Ryan never submitted any moving expense claim for moving and storing the barge because he never moved or stored it. R89:82. Ryan never obtained relocation assistance for the barge (R12:2) after DOT acquired the real property adjacent to which the barge was moored. DOT witnesses testified at the remedies hearing that they might have considered helping Ryan pay to store his barge regardless of the absence of any legal obligation to do so, but Ryan never submitted such a request. R89:11-12, 78, 82; R91:14-15, 24, 30.

DOT witnesses also testified that DOT did pay a contractor directly for moving Ryan's personal property from buildings on the real property. But DOT did so only because Ryan had refused to move the property himself, DOT needed the property for the interchange work, and Ryan refused to pay the bills. R89:26-28, 30-31, 73-74, 77-78, 81.

One DOT witness testified that DOT is obligated to ensure that personal property on acquired real property is secure (Ryan Br:14), but she expressly declined to extend that obligation to the barge. R89:85; R-Ap.174.

In sum, Ryan's assertion that there is law that supports his affirmative defense of DOT control is without merit.

2. Ryan's attorney's advising Ryan that DOT was nevertheless responsible for the barge was unsubstantiated hearsay on summary judgment and unsupported by any law or evidence of agreement at the remedies hearing.

Ryan contends that his attorney advised him that DOT took, or was obligated to take, control of the barge for one year from July 19, 2005, so DOT is responsible for the sunken barge. Ryan never produced any evidence of such an agreement to support the hearsay statements of his attorney, and the law and the unrefuted factual assertions of the DOT staff involved establish precisely the contrary.

On summary judgment, Ryan's reference to his then attorney's advice was hearsay that did not dispute the averments by DOT affiants that DOT had not been obligated to and had not taken control of the barge. R12:2-3, R15:3.

At the remedies hearing, Ryan's then attorney did testify in support of that advice, but he cited no supporting law and produced no evidence of any agreement or action by DOT to store the barge for or otherwise take control of the barge from Ryan. R90:91-92, 95; R91:10-11. As the court found, "Everything was preliminary negotiations. Marcuvitz got out of the case, for whatever reason he never reached—in his testimony he never reached a final

conclusion. He had his view of what should happen and—but it never got finalized." R91:69; R-Ap.125.

In sum, Ryan proffered neither law nor evidence to dispute that the barge was not eligible for any relocation assistance and that DOT never assumed storage, or otherwise took control, of the barge in 2005/2006.

B. Ryan provided no expert testimony to refute the State's expert testimony on summary judgment that the removal of two light-weight trucks and the cutting of slack cables from the trucks to the barge in October 2005 could not have caused the barge to sink in July 2006.

Ryan argues that DOT caused the barge to sink when its contractor cut the cables connecting the barge to two vehicles that were removed pursuant to a court order in the eminent domain action. The circuit court in its August 2008 Order rejected that argument, because Ryan proffered no expert affidavits to refute the State's expert affidavits showing that cutting the visibly slack cables connected to two small trucks too light to hold up the barge (which was anchored by spuds and filling with water), did not cause the barge to sink nine months later. R36:1-3; R-Ap.101-103; R14:2-3; R15:3.

The court heard additional testimony about the trucks and the cables at the remedies hearing in October 2009, as a potential mitigating factor pertaining to forfeitures. R89, R90, R91. At that hearing, Ryan's expert testified from photographs, just as the State's expert had, because the barge had already sunk and only photographs remained of the trucks and the cables. R89:48; R90:111-112.

The testimony and photographs at the hearing showed that, consistent with the DOT expert affidavits, the cables were inoperative and only one set of chains was connected to one light truck with no winching capacity to support the barge, and the barge sank at a slant consistent with its being somewhat tethered to the shore. *See* counsel's summation of this evidence at R91:55-56. Even as a potential mitigating factor, Ryan's blaming DOT's cutting of non-functioning cables and one set of chains from one light-weight truck with 12,500 pounds towing capacity and no winching capability nine months before the 200-ton barge sank at an angle into the river, was defeated by the actual facts. *See* R90:62-63, 69, 128, 130, 134, 136-137.

Ryan's expert testified that pumping water out of the barge was necessary to keep it afloat, R90:123, and Ryan said he told DOT to empty the barge of water (Ryan Br.14-15), which no DOT witness could recall (R91:16). Regardless, it was Ryan's responsibility to tend to the barge and to keep it from filling up with water, not DOT's. And Ryan could have asked DOT to access the barge to do so. R89:11-12; R-Ap.172-173; Ryan Br.36.

C. Ryan proffered no evidence to refute the evidence showing his personal liability for the sunken barge.

In its decision partially granting and denying the State's first summary judgment motion, the court stated:

> If, in fact, it is established that Mr. Ryan is the controlling principal of the corporate entities (assuming personal ownership cannot be established), I agree that Mr. Ryan is liable pursuant to Wisconsin Statutes sec. 30.292(1) and (2)(a) . . . Absent proof of individual ownership or individual control of the day to day operations of the potential corporate owners, the basis of personal liability is still in material dispute.

R29:3; P-Ap.46.

The court had found that Ryan or one of his corporate entities was the barge's owner and possessor at the time the barge sank and since, as a matter of judicial estoppel. As directed by the court, the State subsequently produced evidence showing that Ryan or one of his corporate entities, also controlled the barge from at least 2005, based on the undisputed facts that he was a controlling officer (as president or managing officer or managing partner) of the businesses named as owners of the barge in *State v. 260 N. 12th St.*, Milwaukee County Case No. 05-CV-5593, and that he had individual control of the day-to-day operations of those corporate entities. R31-34.

Ryan proffered no evidence in response to refute his personal liability except for self-serving assertions in his affidavit that he was merely a shareholder and employee (R24:1; P-Ap.31), contrary to corporate documents and, most importantly, to statements in his prior deposition.

The circuit court properly relied on prior deposition testimony, corporate documents and DOT affidavits showing that B.E. Ryan Enterprises and Ryan Marina own the barge, that Ryan is a controlling and principal officer of those entities, and that Ryan was the only person acting on behalf of those and his other corporate entities in their day-to-day operations, to find Ryan personally liable for the sunken barge.

1. As a principal who controlled the day-to-day operations of the corporate entities in possession and control of the barge, Ryan was liable for compliance with environmental laws.

The basis for personal liability is found both in the statutes and in case law. The statutory basis is found in Wis. Stat. §§ 30.15 and 30.292 (emphasis added):

> **30.15** . . .
>
> **(1)** . . . Any person who does any of the following shall forfeit not less than $10 nor more than $500 for each offense:
>
> (a) Unlawfully obstructs any navigable waters and thereby impairs the free navigation thereof. . . .
>
> . . . .
>
> (d) Constructs or places any structure or deposits any material in navigable waters in violation of s. 30.12 or 30.13.
>
> **30.292** . . .
>
> **(1)** Whoever is concerned in the commission of a violation of this chapter for which a forfeiture is imposed is a principal and may be charged with and convicted of the violation . . . .
>
> **(2)** A person is concerned in the commission of the violation if the person does any of the following:
>
> (a) Directly commits the violation.

Under environmental protection statutes that make a person who commits a certain act liable for violating the statutes, as Wis. Stat. §§ 30.10(2) (obstructing a river

without a permit), 30.12(1)(a) (depositing material on a riverbed without a permit) and 30.15(1) ("Any person who" obstructs or violates § 30.12) do here, a person's liability "is dependent on his own act . . . and, therefore, is not vicarious liability in the traditional sense." *State v. Rollfink*, 162 Wis. 2d 121, 140 n.17, 469 N.W.2d 398 (1991). In *Rollfink*, Justice Ceci based a corporate officer's liability on his being "responsible for the overall operation of the corporation's [violating] facility." *Id.*, 162 Wis. 2d at 140. *See also State v. C. Spielvogel & Sons*, 193 Wis. 2d 464, 469, 474-76, 535 N.W.2d 28 (Ct. App. 1995) (holding liable person who was president, director and one-third shareholder, and who was also responsible for the overall operation of the violating pit).

In its second summary judgment motion, the State showed that Ryan was the controlling officer of the corporate entity, which Ryan himself stated owned the barge, and that no one but Ryan had dealt with DOT or DNR concerning that corporate entity or the barge in the years immediately before and since it sank. R31-34. Thus, regardless of corporate ownership, Ryan directly committed the violations of obstructing and depositing material in the river, because Ryan himself controlled the entity that owned the barge. As Ryan was responsible for the overall operation and servicing of the barge owned by his corporate entities, he was personally liable under the case law cited above.

Accordingly, the court properly found Ryan personally liable as a person concerned with the violation under Wis. Stat. § 30.292(2), as owner, possessor, and controller of the barge, because regardless of what caused the barge to sink, whoever possessed and controlled the barge when it sank is strictly liable under Wis. Stat. §§ 30.10(2) (because he had no permit to allow the barge that he possessed and controlled to sink and obstruct the river), 30.12(1)(a) (because he had no permit to allow the barge that he possessed and controlled to be placed on the river bed), and 30.15(1)(a) and (d) (making liable any

person who unlawfully obstructs a river or places a structure in a river).

> 2. Ryan's prior testimony, corporate reports, city permits, DOT staff averments, and counsel's statements, all establish indisputably that Ryan was and is the only officer and controlling principal of the businesses that owned the barge and controlled the day-to-day operations of those businesses.

The State proffered the following evidence to establish that Ryan or one of his businesses named in *State v. 260 N. 12th St.*, Milwaukee County Case No. 05-CV-5593, possesses and controls, and since at least 2005, has possessed and controlled, the barge that has been lying on the bed of the Menomonee River in Milwaukee since it sank on July 13, 2006.

1. Ryan testified that he is the president or managing officer or managing partner of certain enterprises including B.E. Ryan Enterprises and Ryan Marina. R34:21. Ryan testified that the barge was part of Ryan Marina. R34:29. Accordingly, Ryan is a controlling and principal officer of B.E. Ryan Enterprises and Ryan Marina, of which the barge is a part. This alone provided the evidence that the court ruled was required to be established to hold Ryan personally liable for the sunken barge.

2. Ryan's counsel stated in court that Ryan Marina is owned by B.E. Ryan Enterprises, Inc. R34:121,

R86:31; R-Ap. 167. Ryan is the President and sole Director of B.E. Ryan Enterprises, Inc. R34:125, R34:26. Ryan is the majority shareholder of B.E. Ryan Enterprises, Inc. R34:26.

3. In 1990, the City of Milwaukee issued Ryan a certificate allowing for the outdoor storage of boats. R34:16-18. Ryan testified that the business of Ryan Marina is the storage of boats. R34:27. Ryan testified that the barge was part of Ryan Marina. R34:29. His personally having been issued the certificate for the Ryan Marina business, of which the barge was a part, showed his personal involvement in Ryan Marina's affairs and in the barge.

4. Also showing Ryan's personal involvement in Ryan Marina's affairs and in the barge was his testimony that the barge was part of Ryan Marina, that Ryan Marina was storing the barge as of March 30, 2005, and that he, Ryan, had not leased the barge to anyone for the ten years prior. R34:29, 44, 45.

5. Ryan testified that Ryan Marina was "his" entity, and that the barge was part of Ryan Marina, and so part of his entity. R34:53.

6. Ryan testified that he personally had authorization to use the Ryan Marina boat launch and that the barge was part of Ryan Marina. R34:27.

7. Ryan testified that he personally handled contracting for B.E. Ryan Enterprises. R34:4, 8, 12. He personally dealt with the City of Milwaukee on B.E. Ryan Enterprises business. R34:5, 6. He personally submitted the application for the occupancy permit. R34:7.

8. During the long course of negotiations with DOT concerning Ryan's and his businesses' property and operations, DOT staff dealt only with Ryan and his counsel, and understood that they were to deal only with Ryan and his counsel. R33:1-2; *see also* R34:9, 10, 11,

13, all describing Ryan's personal communications with DOT.

In sum, the State established that it was Ryan personally who operated and operates his several businesses, in particular Ryan Marina and B.E. Ryan Enterprises, of which the barge is part; he was and is the president, sole director and managing shareholder of those businesses; and he was and is the person involved in those businesses' day-to-day operations.

3. Ryan's averments in his affidavits that he was only an employee of the corporate entities in possession and control of the barge are barred by the sham affidavit rule.

Ryan offered no competent evidence to counter the evidence described above. His averments that he was only an employee of the corporate entities in possession and control of the barge did not dispute the documentary evidence of his being a controlling and principal officer of those entities, or the unrefuted evidence of his being the only one who acted on their behalf. Moreover, his averments were flatly contradicted by his prior deposition testimony, as cited above, and so failed to create a dispute so as to survive summary judgment. *Yahnke v. Carson*, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102 ("an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial").

4. Post-summary judgment testimony did not dispute the material fact of Ryan's personal liability for the sunken barge.

Ryan points to post-summary judgment testimony by Webster who monitored the barge (Ryan Br.10), but Webster testified that he was a supervisor for Ryan who "work[ed] for him" from 1999 until the last time he looked at the barge in May 2005. R91:33. Webster's testimony only confirmed Ryan's control over the barge.

5. DNR properly investigated the barge's ownership.

Ryan faults DNR for not investigating the barge's ownership (Ryan Br.16). To the contrary, the court found DNR properly went forward with enforcement after looking to the DOT record based on the many determinations in the DOT case that Ryan owned and controlled the barge. R.91:51-2, 70.

6. The court properly granted summary judgment finding Ryan personally liable for maintaining an obstruction and structure in the form of his businesses' barge on the bed of the Menomonee River in violation of Wis. Stat. §§ 30.10(2) and 30.12(1)(a), under Wis. Stat. § 30.292.

The circuit court properly found that, because Ryan was the only officer and controlling principal of the businesses that owned the barge, he was liable under Wis. Stat. § 30.292, for maintaining an obstruction and structure in the form of the barge on the bed of the Menomonee River in violation of Wis. Stat. §§ 30.10(2) and 30.12(1)(a). Ryan's continuing argument for relocation expenses for the barge as his personal property only confirms that the barge was in his possession and control.

IV. THE CIRCUIT COURT PROPERLY APPLIED JUDICIAL ESTOPPEL TO BAR RYAN FROM ARGUING THAT HE AND HIS CORPORATE ENTITIES DID NOT OWN AND CONTROL THE BARGE.

In its initial summary judgment motion, the State produced evidence showing that the barge was owned and controlled by Ryan. R7, citing to affidavits and attached documents in R8-21. Ryan responded with his first affidavit, in which he stated that someone else owned the barge, that Ryan had been storing the barge for that person, and that Ryan had prevented that person from taking the barge away because that person owed Ryan

storage fees and Ryan had been holding the barge as a lien ever since. R24; P-Ap.31-35. The State replied that Ryan was barred by judicial estoppel from now arguing that he did not own, possess and control the barge, because he had claimed the barge belonged to him or his corporate entities in an earlier DOT eminent domain action and the court had accepted his claim in the writ of assistance issued in that action. R25.

The court in this action agreed and applied judicial estoppel to find that Ryan or his corporate entities owned, possessed or controlled the barge before, when, and since it sank, in its first order dated August 6, 2008. R36:1-3; R-Ap.101-103. Ryan moved for reconsideration, challenging the court's reliance on the earlier documents and the writ, and arguing that the difference in burdens of proof precluded judicial estoppel. R39-41. The court rejected Ryan's challenges and denied his motion at the hearing in November 2008. R87:31-33.

Ryan again moved for reconsideration based on the State's argument in a brief opposing Ryan's unsuccessful appeal of the writ (where Ryan sought to excise the language about the barge), stating that the language in the writ was not itself a preclusive factual finding. R61-63. The court denied that motion in November 2009. R79:1-3; R-Ap.134-136.

The court stated at the hearing on the motion, "There is ample evidence that Mr. Ryan was asserting ownership of the barge during the whole DOT acquisition process and funding, and those kinds of things. So there's been a determination made by Judge Foley in the writ. That is final because it wasn't appealed ultimately . . . . Judge Foley's decision on judicial estoppel I agree with and is correct." R91:51-52; R-Ap.120.

This Court should similarly reject Ryan's judicial estoppel challenges as without merit.

A. Judicial estoppel protects the courts from manipulation by parties taking inconsistent positions.

Judicial estoppel is an equitable remedy to be invoked at the court's discretion, to protect the judiciary from intentional manipulation. *Harrison v. LIRC*, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994); *State v. Fleming*, 181 Wis. 2d 546, 557-58, 510 N.W.2d 837 (Ct. App. 1993).

> The equitable doctrine of judicial estoppel, as traditionally applied in this state, is intended "to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions." *Fleming*, 181 Wis. 2d at 557 (quoting *Yanez v. United States*, 989 F.2d 323, 326 (9th Cir. 1993)).

State v. Petty, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996).

Ryan claimed the barge as his personal property potentially eligible for relocation assistance in the eminent domain case, yet disavowed the barge as potentially the source of liability in this enforcement case. As the court of appeals noted, "Ryan presents a textbook example of a litigant playing 'fast and loose' with the judicial system." *State v. Ryan*, Ct. App. Decision dated January 11, 2011, ¶27; P-Ap.62.

B. For judicial estoppel to apply, the facts must be the same between two cases, the later position must be inconsistent with the earlier position, and the court must have adopted the earlier position.

> The trial court has the prerogative to invoke judicial estoppel at its discretion because estoppel "is not directed to the relationship between the parties, but is

> intended to protect the judiciary as an institution from the perversion of judicial machinery." *State v. Petty*, 201 Wis. 2d 337, 346-47, 548 N.W.2d 817, 820 (1996) (quoted source omitted). 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–a litigant is not forever bound to a losing argument." *Id.* at 348, 548 N.W.2d at 821.

Sea View Estates Beach Club, Inc. v. DNR, 223 Wis. 2d 138, 162-63, 588 N.W.2d 667 (Ct. App. 1998).

Here, the common fact in the eminent domain case and this case is the possession and control of the barge. Ryan represented that the barge was his personal property potentially eligible for moving or storage assistance in the eminent domain case, and denies the barge is his in this case. The eminent domain court adopted his earlier position, ordering Ryan and his corporate entities to remove their barge from the river.

C. Ryan represented, and the court adopted his representation, that he or his corporate entities owned and controlled the barge in the previous action.

The State proffered several documents in which Ryan had prior to this action claimed the barge as his or his corporate entities' personal property. The circuit court relied on two documents in the earlier DOT eminent domain action—a Relocation Business Questionnaire and an Order for Writ of Assistance—plus a confirming subsequent letter to DNR, to hold that Ryan was judicially estopped from denying liability by arguing that someone else owned the barge or that the State controlled the barge when it sank. R12:4-6, R1:11-14, R29; P-Ap.23-25, 11-14, 44-46.

1. Ryan claimed ownership of the barge at the start of the eminent domain proceeding.

DOT exercised its eminent domain powers to acquire Ryan's real property on the Menomonee River to support the Marquette Interchange project. R15:1-2. In the Relocation Business Questionnaire that Ryan submitted to DOT at the start of that acquisition process, Ryan stated, "currently, single barge is stored by owner (Ryan)," and in the section "List Equipment, Fixtures, Property to be Moved" Ryan listed "barge" as part of the potential relocation benefits involved in the acquisition of the real property. R12:4-6; A.Ap.23-25.

Ryan argues that the first excerpt quoted above identifies Ryan as the owner of the property where the barge is moored, not as the owner of the barge. Ryan Br.29. His interpretation is inconsistent with the second excerpt's listing of the barge as property subject to relocation benefits—if it were not Ryan's barge, then Ryan could not claim assistance to relocate it. His interpretation is also inconsistent with the writ's ordering that Ryan and his corporate entities move "their" barge (*see* section 2 below). The court more reasonably interpreted the questionnaire entries as reflecting Ryan's claim of ownership of the barge.

2. The court in the eminent domain proceeding accepted Ryan's claim of ownership and control of the barge.

When Ryan had vacated the real property after DOT had acquired it, DOT petitioned for a writ of

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-005593, filed July 1, 2005. In ¶5, DOT stated:

> Although requested by WISDOT, Respondent BASIL E. RYAN JR. (d/b/a Ryan Marina) has provided no evidence of a marina business being operated at this location on or since October 20, 2004. WISDOT was advised that Ryan Marina had some purpose with regard to an old barge adjacent to the property that was not in use. There is common ownership and control by Basil Ryan and representation by the same counsel.

Acting on the petition, the court issued the Order for Writ of Assistance in that case on July 19, 2005, stating on page 2:

> IT IS FURTHER ORDERED, that all Respondents will remove all of their personal property, including the barge . . . on or before August 1, 2005 . . . .

R1:12; P-Ap.12.[1]

The docket entry dated July 19, 2005, in the eminent domain case reads, "Attorney Alan Marcuvitz contacted the court by phone and indicated that he had no objection to the form of the order and writ submitted for signature by Asst. Attorney General Phillip Ferris." R29:2 n.2; P-Ap.45.

[1] While DOT never ordered Ryan to remove the barge (Ryan Br.13), the court so ordered in this writ. If Ryan needed to enter the property acquired by DOT to do so (Ryan Br.14), he could have asked DOT for permission. R89:11-12.

3. Ryan asserted possession and control of the barge in a subsequent letter to DNR.

When DNR notified Ryan of the violation involving the sunken barge, his attorney wrote:

> With full reservation rights of the barge owner, we are nonetheless willing to address the matter by floating and removing the barge, thus eliminating the problem, while still leaving for resolution on another day, both cost placement and responsibility for damage experienced.
>
> To assist us in this regard, we ask for copies of the bids obtained by DNR for floating the barge. In this way, we can work with the low bidder to remove the problem.

R11:7.

While the DNR letter was not part of the DOT case (Ryan Br.28), it is a part of the record leading to this action (and it is not a protected settlement document (Ryan Br.27), but is a public record in DNR files). While the letter alone cannot support a judicial estoppel determination, the court properly considered it as confirmation, through Ryan's own perpetuation, of the position he espoused and convinced the court to take in the eminent domain action.

D. The circuit court properly relied on the eminent domain questionnaire and writ to estop Ryan from disavowing ownership, possession and control of the barge in this action.

The court found that as a defendant in the DOT action, "Ryan and his corporate concerns affirmatively asserted ownership of the barge as personal property,"

based on the above-quoted excerpts from the Relocation Business Questionnaire and, "most importantly," the Order for Writ of Assistance. R29:2; P-Ap.45.

Ryan faults the court for relying on the questionnaire, asserting that his attorney prepared the questionnaire without his input or review and that it is inaccurate (Ryan Br.29). His attorney's statement in the relocation questionnaire, which set the condemnation case in motion, that the barge was Ryan's personal property, and his attorney's agreement to entry of the Order for Writ of Assistance, which accepted the questionnaire's identification of the barge as the personal property of Ryan or a Ryan entity, are akin to judicial admissions that are binding on Ryan. *See City of Wisconsin Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 17, 539 N.W.2d 916 (Ct. App. 1995). These are clear, deliberate and unequivocal listings of the barge as Ryan's personal property relevant to potential relocation assistance.

Similarly, Ryan is also bound by his attorneys' claims in this case that DOT should have stored and controlled the barge in 2005/2006 for him as part of the eminent domain action (claims that are refuted in III.A. above). His arguing in this case that Wis. Admin. Code ch. COMM 202 so required indicates that he continues to claim ownership of the barge, now with full knowledge of the consequences of that claim.

Ryan also challenges the court's reliance on the writ because the respondents to whom "their barge" refers included both Ryan and his corporate entities. 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, consistent with the caption and language in the writ. R29; P-Ap.44-46. The court went on to find Ryan's personal liability independent of judicial estoppel, based on other evidence in a subsequent summary judgment decision. R52:1-2; R-Ap.115-116.

E. Ryan got what he wanted in the DOT action, acknowledgement of the barge as his personal property.

"[A]lthough we permit a party to argue inconsistent positions in the alternative, 'once it has sold one to the court it cannot turn around and repudiate it in order to have a second victory.' . . . It is enough that the defendant achieves what he or she sought in the first proceeding." *State v. Johnson,* 2001 WI App 105, ¶¶10, 17, 244 Wis. 2d 164, 628 N.W.2d 431 (citations omitted).

The court in the DOT proceeding recognized in the writ Ryan's and his corporate entities' possession and control of the barge. Ryan asserted that position related to the potential for relocation assistance for the barge, and the court adopted his position. Ryan agreed with the writ, and his failure to object suffices to judicially estop him from asserting an inconsistent position here. *See State v. Magnuson*, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998) (failure to object to proposed sentence).

Ryan correctly notes that the writ did not make a preclusive finding of ownership of the barge (Ryan Br.19), but the writ did adopt Ryan's position as to the barge's possession and control. Judicial estoppel is based on a court's adopting a party's position, and prevents that party from taking a different position in a later case. "[J]udicial estoppel focuses on protecting the judiciary from the 'perversion of judicial machinery.'" *Johnson*, 244 Wis. 2d 164, ¶21 (citation omitted). The court's decision here found that Ryan owned, possessed, and controlled the barge not because the court in the earlier case had so found, but because Ryan had so argued and had convinced the court in the earlier case to adopt that position, and Ryan is estopped from arguing differently here.

F. Ryan proffers no evidence of mistake or inadvertence when he claimed in the eminent domain action to own the barge.

In the eminent domain action, Ryan claimed to own and control the barge. In this action, he argues on the one hand that DOT was required to store the barge as his personal property for him for a year, and on the other hand that it is not his at all. His flip-flopping in this case indicates that he made no mistake in the eminent domain case, and that he is here "playing 'fast and loose with the courts' by asserting inconsistent positions." *Fleming*, 181 Wis. 2d at 557. Such "cold manipulation" does not evince the inadvertence or mistake that may block the application of judicial estoppel. *See Petty*, 201 Wis. 2d at 347.

G. The burden of proof in this case does not preclude the application of judicial estoppel to a position that Ryan took and to which Ryan agreed in the eminent domain case.

Ryan's resort to principles of preclusion is neither relevant nor meritorious, because the court's decision is based on judicial estoppel.

Ryan's reliance on non-Wisconsin case law that prohibits applying issue or claim preclusion to a prior case with a lower burden of proof is misplaced here. First, the decisions do not bind this Wisconsin court. Second, the decisions do not apply to judicial estoppel, but to issue or claim preclusion. Third, ownership of the barge was not litigated in the eminent domain case, a prerequisite for preclusion. Rather, it was stated and agreed to by Ryan, and adopted by the court; no finding on disputed facts was required by the judge or jury.

The whole point of judicial estoppel is that it binds a party to a position previously taken by the party, unlike in the case law cited by Ryan where the courts determined whether claim or issue preclusion bound a court to a position previously taken by the court. In sum, Ryan relies on nonprecedential and inapposite case law relating to issue and claim preclusion rather than to judicial estoppel, and any difference in burden of proof between the eminent domain case and this case is irrelevant.

H. DOT's appellate argument as to preclusion pertaining to what was established does not invalidate the court's application of judicial estoppel pertaining to what was argued.

Ryan challenges the court's application of judicial estoppel based on DOT's argument in its brief opposing Ryan's appeal in the eminent domain case. DOT argued that language in the writ is not preclusive as to Ryan's ownership or control of the barge. Ryan's challenge misses the boat, because the decision here is based on judicial estoppel, not preclusion. While the language in the writ may not bind future courts as to Ryan's ownership or control of the barge under principles of preclusion, Ryan himself is barred from arguing that he does not own or control the barge under principles of judicial estoppel.

The distinction that sinks Ryan's argument is the difference between establish (Ryan Br.32) and argue. The barge's ownership may not have been established by an explicit finding in the writ issued by the court (and the State has never so asserted, Ryan Br.32), but it was adopted by the court based on the position that Ryan took before the court, and Ryan may not argue differently now.

As Ryan himself states (Ryan Br.21), the doctrine of equitable estoppel bars a party from taking a

contradictory position without examining the truth of either statement. That is precisely the situation here.

1. The writ has no preclusive effect on this action, but it does bar inconsistent arguing under judicial estoppel.

Ryan appealed the dismissal of the writ in order to reopen the writ proceeding and remove from the writ the following language: "IT IS FURTHER ORDERED, that all Respondents will remove all of their personal property, including the barge . . . on or before August 1, 2005 . . . ." R1:12; P-Ap.12. That writ followed the submission of the Relocation Business Questionnaire in which Ryan claimed the barge as his personal property to be moved. R12:4-5; P-Ap.23-24.

DOT in its appellate brief correctly noted that the writ issued in the eminent domain action has no preclusive effect on this environmental action, and does not contain any formal finding of fact as to ownership of the barge. Rather, the writ adopted the parties' positions and required Ryan and his companies to remove their personal property, including the barge, from the property. The court here, referencing that writ and other documents related to it, found that Ryan is judicially estopped from now arguing that the barge is not personal property under the ownership or control of Ryan or his companies. That finding does not implicate the doctrine of preclusion (nor does the subsequent, independent, finding that Ryan is personally liable for his companies' ownership or control of the barge).

2. Preclusion, which does not apply here, is distinct from judicial estoppel, which does.

Claim preclusion bars relitigation of a claim where there is "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits . . . ." *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W. 2d 723 (1995). Claim preclusion does not apply here because there is no identity between the causes of action in the writ proceeding, brought by DOT to obtain possession of property it acquired through eminent domain, and in this environmental enforcement action to obtain forfeitures for and compliance with state waterway regulation statutes.

"Issue preclusion addresses the effect of a prior judgment on the ability to re-litigate an identical issue of law or fact in a subsequent action," where that issue was actually litigated in the previous action and was necessary to the judgment. *Mrozek v. Intra Financial Corp.*, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54. The issue of Ryan's or Ryan's companies' ownership or control of the barge was not actually litigated; rather, it was assumed by the circuit court, and never challenged by Ryan, in issuing the writ requiring that Ryan and his companies remove their barge. Accordingly, issue preclusion does not apply here, and none of the elements of the "fairness analysis" that must be conducted before applying issue preclusion, *Mrozek*, 281 Wis. 2d 448, ¶17, including any difference in burden of persuasion, applies either.

The principles of preclusion and judicial estoppel are distinct. *Badger III Ltd. v. Howard, Needles*, 196 Wis. 2d 891, 900 n.2, 539 N.W.2d 904 (Ct. App. 1995) ("'The term claim preclusion replaces res judicata; the term issue preclusion replaces collateral estoppel.' [citation omitted] Judicial estoppel prohibits a party from asserting in

litigation a position that is contrary to, and inconsistent with, a position asserted previously in the litigation by that party. *Godfrey Co. v. Lopardo*, 164 Wis. 2d 352, 363, 474 N.W.2d 786, 790 (Ct. App. 1991)").

In *Badger III Ltd.*, 196 Wis. 2d at 900-901, judicial estoppel did not apply because objections and disputes that were relevant to the claim for withheld rent in the current action had expressly been raised in the earlier action. Here, Ryan has proffered nothing showing that he raised any objections or disputes as to his or his companies' being in charge of the barge in the writ proceeding. To the contrary, he agreed to issuance of the writ, and in documents setting in motion the writ proceeding he had claimed the barge as his personal property. The writ was issued by the court, meaning that the court adopted Ryan's claim of ownership or control of the barge in the record before the court in the writ proceeding.

DOT's arguments in its appellate brief as to the preclusive effect of language in the writ are not relevant to whether Ryan is judicially estopped from arguing contrary to the position reflected by that language.

I. The circuit court correctly applied judicial estoppel to prevent Ryan from playing fast and loose with the judicial system.

Judicial estoppel is applied "to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions." *Petty*, 201 Wis. 2d at 347 (citation omitted); *Mrozek*, 281 Wis. 2d 448, ¶22. Ryan's claim of ownership or control of the barge in the eminent domain case is directly inconsistent with his attempt to deny such ownership or control in this case. The only possible reason for taking such inconsistent positions is just such

manipulation of the judicial system against which judicial estoppel is intended to protect.

Ryan claimed the barge as his property when it was possible that DOT might pay for him to store or relocate the barge as part of his business or his personal property. Indeed, he still advances the argument that DOT was required to manage the barge for him even in this lawsuit. At the same time, he disavows any ownership or control of the barge when faced with the prospect of having to pay both the costs of removing it and forfeitures for not having yet removed it. This is just the sort of gamesmanship that judicial estoppel is designed to prevent.

As the DOT litigation shows, Ryan is an experienced litigator and aware of the significance of the positions he takes. *See also American Transmission Co., LLC v. Basil E. Ryan, Jr.*, 2005AP1039 (copy attached, R-Ap.175-195) (unpublished court of appeals decision cited not for precedent or authority but as an example of Ryan's litigation experience). There is nothing unintentional about the position that he took in the eminent domain action, where DOT relocation assistance might have extended to the barge, and about the contrary position he takes here, where he is liable to pay penalties and removal costs for the barge that he left in place despite being ordered to remove it. The circuit court properly ruled that he is judicially estopped from taking this contrary position.

V. THE CIRCUIT COURT PROPERLY UPHELD THE USE OF SUMMARY JUDGMENT IN THIS ACTION.

After the circuit court issued its first order granting in part the State's motion for summary judgment, Ryan moved for reconsideration arguing that summary judgment is not allowed in ch. 30 actions. The court denied Ryan's motion for reconsideration and upheld the use of summary judgment in this case.

Summary judgment is authorized by the plain language of Wis. Stat. § 23.69 and is consistent with the complaint and answer procedure permitted under Wis. Stat. §§ 23.52 and 23.55 and followed in this case. Ryan's argument against summary judgment in ch. 30 cases, based on the absence of discovery that enables the cross examination of witnesses, ignores the plain statutory language and the reality that Ryan may oppose summary judgment with facts within his knowledge, and with his own expert and non-sham assertions, regardless of the absence of discovery.

A. The procedures in Wis. Stat. §§ 23.50-23.85 govern this ch. 30 action.

Under Wis. Stat. § 23.50, the procedures in Wis. Stat. §§ 23.50-23.85 govern civil (not criminal, Ryan Br.39) actions including this ch. 30 action.

B. The plain language of Wis. Stat. § 23.69 authorizes summary judgment motions.

Wisconsin Stat. § 23.69 provides, "Any motion which is capable of determination without the trial of the general issue shall be made before trial." By statutory definition, summary judgment disposes of issues that do not need to be tried. Wis. Stat. § 802.08(2) ("The judgment sought shall be rendered if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."). Consistent with the prescription in Wis. Stat. § 23.69, summary judgments "avoid trials where there is nothing to try." *Hunter of Wisconsin, Inc. v. Hamilton,* 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981). By its plain language, Wis. Stat. § 23.69 authorizes summary judgment motions.

C. Summary judgment is consistent with the complaint and answer form of action allowed by Wis. Stat. §§ 23.52 and 23.55.

Wisconsin Stat. § 23.52 provides, "Two forms of action. Actions under this chapter may be commenced by a citation, or by a complaint and summons." The citation form of action is described in §§ 23.53-54, and the summons and complaint form of action is described in § 23.55. Wisconsin Stat. § 23.55(1) and (2) prescribe the contents of the complaint and summons, and that the summons direct the defendant to answer (not to plead, "as in a criminal matter," Ryan Br.40).

The form of action commenced by a complaint and summons and answer under Wis. Stat. § 23.55 is an action that can be subject to disposition by summary judgment under the methodology set forth in Wis. Stat. § 802.08. That methodology, which begins with an examination of the complaint and answer, is consistent with the complaint and answer form of action allowed by Wis. Stat. § 23.55 and followed in this case.

The State commenced this civil (not criminal, Ryan Br.16) action by a complaint and summons under Wis. Stat. § 23.55, and Ryan responded with an answer. These two pleadings properly set the stage for a motion for summary judgment under Wis. Stat. § 23.69, according to the methodology in Wis. Stat. § 802.08.

D. Unlike Wis. Stat. ch. 345 traffic cases, this ch. 30 action followed procedures consistent with summary judgment procedure.

Ryan cites *State v. Schneck* too broadly. In *State v. Schneck*, 2002 WI App 239, ¶16, 257 Wis. 2d 704, 652 N.W.2d 434, the court held that summary judgment is not

appropriate in ch. 345 traffic cases, because "[s]ummary judgment procedure is inconsistent with, and unworkable in, a Wis. Stat. ch. 345 forfeiture proceeding." The court reasoned that summary judgment methodology begins with examination of the pleadings to determine whether issues are joined, but in ch. 345 traffic cases there are no responsive pleadings joining the issues, only citations and pleas. *Schneck*, 257 Wis. 2d 704, ¶¶8-12.

Unlike in *Schneck*, this ch. 30 action was commenced by a complaint and summons and answer under Wis. Stat. §§ 23.52 and 23.55. These pleadings enabled the court to take the first step in the summary judgment procedure prescribed in Wis. Stat. § 802.08.

E. Summary judgment is appropriate in civil environmental enforcement actions.

Ryan argues that summary judgment is too drastic a procedure for enforcement actions that may result in judgments of liability (not convictions) and forfeitures (not fines). There is no law so stating. Published examples of summary judgment dispositions of civil enforcement actions indicate to the contrary. *See Rollfink*, 162 Wis. 2d 121; *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 580 N.W.2d 203 (1998); *State v. Block Iron & Supply Co., Inc.*, 183 Wis. 2d 357, 515 N.W.2d 332 (Ct. App. 1994); *State v. Menard, Inc.*, 121 Wis. 2d 199, 358 N.W.2d 813 (Ct. App. 1984); *Oneida County v. Converse*, 180 Wis. 2d 120, 508 N.W.2d 416 (1993); *State v. Land Concepts, Ltd.*, 177 Wis. 2d 24, 501 N.W.2d 817 (Ct. App. 1993).

One published example of summary judgment in a ch. 30 action is found in *State v. Kelley*, 2001 WI 84, 244 Wis. 2d 777, 629 N.W.2d 601. In that case, the Wisconsin Supreme Court reversed a summary judgment finding a ch. 30 violation because the parties had not

sufficiently developed the legal analysis underpinning their respective positions. *Id.*, ¶¶42-43. The supreme court reviewed without challenge the summary judgment procedure followed by the parties and the circuit court, at the initiative of the circuit court. *Id.*, ¶¶17-19.

F. Summary judgment need not follow discovery.

That there is no discovery in ch. 30 actions does not diminish the propriety of summary judgment.

A summary judgment opponent does not need discovery to create disputes of material fact based on evidence known to the opponent or the opponent's experts. In addition, defendants in state actions may (and Ryan did) obtain all relevant documentary evidence through open records requests.

While defendants cannot cross examine affiants, there is no requirement in Wis. Stat. § 802.08 that summary judgment be withheld until witnesses may be deposed. Indeed, summary judgment may often be sought before the expense of depositions is incurred. If so, as in a non-ch. 30 civil case, a party would have a right to cross examine a witness (at trial rather than in deposition) only if there were disputed facts precluding summary judgment as a matter of law. A party need not resort to cross-examination of a movant's affiants in order to create disputes of material fact based on the party's own affiants' knowledge and averments.

Here, the State's expert affidavit stated not why the barge sank (Ryan Br.43) but why DOT's cutting the cables did not cause it to sink. Ryan's ability to dispute that opinion with an expert affidavit of his own was not in any way encumbered by any impediment to discovery or cross examination.

The decision in *Town of Geneva v. Tills*, 129 Wis. 2d 167, 384 N.W.2d 701 (1986) does not help Ryan. In that case, the court held that the circuit court erroneously allowed the prosecution's expert witness to testify by telephone when the witness used documents that had not been provided to, and so could not be seen by, defense counsel. *Id.*, at 180, 182. This decision does not apply to summary judgment and does not bar the use of summary judgment in this civil forfeiture action. Unlike at trial, there is no right to cross examine an affiant who presents facts in support of a summary judgment motion. Those opposing summary judgment must rely on their own affidavits to show factual disputes in order to proceed to trial.

G. Summary judgment may properly determine liability.

As in other civil actions, summary judgment does not interfere with the right to trial because it is granted only where there is nothing to try. Under Wis. Stat. § 802.08(2), summary judgment may be rendered on the issue of liability alone.

H. Discovery and cross examination would not help Ryan overcome the sham affidavit rule, judicial estoppel, or his failure to oppose summary judgment with his own expert testimony.

Ryan objects to the circuit court's reliance on his earlier deposition testimony, corporate documents and court orders to find him personally liable, rather than on his most recent assertions by affidavit. R61, R62. His objection is defeated by controlling case law concerning and rejecting "sham affidavits." *See Yahnke*, 236 Wis. 2d 257, ¶¶20-21 (adopting the federal "sham affidavit" rule and holding that "for purposes of evaluating motions for summary judgment pursuant to Wis. Stat. § 802.08, an

affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial"). Discovery and cross examination would not help him nullify his own prior testimony and corporate documents, all containing information within his own knowledge.

Ryan also objects to the circuit court's findings that Ryan was held by judicial estoppel to his positions in earlier litigation and that he had failed to defend against summary judgment with expert testimony as to the sinking of the barge. R44-45. Discovery and cross examination would not help Ryan vis-à-vis his own previous positions, the plain language of the writ, or his failure to proffer his own expert testimony.

In sum, the lower courts properly found that summary judgment procedure is allowed, workable, and appropriate in this ch. 30 action.

CONCLUSION

The State asks that this Court affirm the court of appeals and the circuit court for all the reasons stated above.

Respectfully submitted this 12th day of July, 2011.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,962 words.

Dated this 12th day of July, 2011.

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JoAnne F. Kloppenburg
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 12th day of July, 2011.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 12th day of July, 2011.

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