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Case No. 2009AP003075

State of Wisconsin

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

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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Dated: July 25, 2011

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ARGUMENT

I. SUMMARY JUDGMENT DOES NOT REQUIRE THE NON-MOVANT TO PROVE A FACT AS UNDISPUTED.

The State argues that Ryan did not establish as undisputed that someone else owned the barge. The record is clear that the title to the barge is not under Ryan's name, nor under any entity that he is related to.[1] Moreover, the standard of review under summary judgment does not require the non-movant to prove that there are no issues of fact. Pursuant to § 802.08(2), summary judgment is entitled only if the movant proves that there is no genuine issue as to any material fact. Siebert v. Wisconsin American Mut. Ins. Co., 2011 WI 35, ¶ 27, 797 N.W.2d 484, 489-90. Even if courts disagree as to whether Ryan's affidavits establish ownership in the barge in an entity unrelated to Ryan, the evidence certainly demonstrates that the State has not met its burden on the issue.

[1] See the following undisputed facts:

- The title to the barge is under KO OP Marine, Inc. (see APP-36, Second Affidavit of Basil Ryan at ¶2 and at Exhibit A, KO OP Marine, Inc. title document (at APP-39);
- The registered agent for KO OP Marine, Inc. is Richard Schumacher (Id., at Exhibit B (APP-40));
- The owner of the barge is a corporation controlled by Richard Schumacher ("Schumacher") (See APP-32, Affidavit of Basil Ryan at ¶ 3); and,
- 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 260 N. 12th St. which was the property from which the Corporation conducted its storage business (Id.).

II. THE SUMMARY JUDGMENT STANDARD WAS NOT MET ON THE CONTROL ISSUE BECAUSE THE STATE HAD A DUTY TO STORE THE BARGE WHEN RYAN INVOKED HIS RIGHTS UNDER COMM 202.52

The State argues on pages 12-16 that the DOT had no duty to store the barge. The argument simply ignores a substantial part of the record [2], specifically the testimony of Alan Marcuvitz ("Marcuvitz") who testified that shortly after the issuance of the Writ Order he, pursuant to Administrative Rule COMM 202.52(1) (d)[3], contacted the DOT to store personal property, including the barge[4].

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 (which encompasses the time the barge sunk), Administrative Rule COMM

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[2] See footnote 5.

[3] 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.

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

See R-90, Transcript from October 6, 2009 at pp. 79, l. 13-20. Marcuvitz also testified that he made this agreement with either the DOT's Larry Stein or Del Dettman on or about July 20, 2005. Id., at p. 95.Stein could not recall such a conversation. See R-91, Transcript from October 7, 2009 at p. 10. Dettman did not testify.

202.52(1) (d) states nothing about a requirement that the DOT has to agree to store the property. Moreover, the undisputed facts are consistent with the DOT knowing it was responsible for storing the barge because Ryan requested it to store the barge.[5]

As for the State's argument that COMM 202.52 only applies to reimbursing storage costs, not the State actually storing personal property, the State witnesses testified exactly the opposite.[6]

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[5] These facts include:

- 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 which is consistent with the DOT storing the barge on the property too (see R-81 at Trial Exhibit Trial Exhibit 14);
- 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 which is consistent with the DOT storing the barge (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); and,
- 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." (see R-90, Transcript from October 6, 2009 at p. 10, l. 11-20.)

[6] The State's witness testified:

Q Listen. Listen to the question closely.
Based upon what you just said, is it fair for me to say that with regards to this barge if it's not going to actually be moved, even though the writ of assistance said it was supposed to, that it would still be the DOT's duty, or responsibility, or obligation, whatever word you want to use, to make sure that at least the barge is secured?
A Yes. And my understanding is that it was. It was still sitting in the same spot where it had been for quite --

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.[7] The DOT representative agreed that this same duty and obligation applies to personal property that the DOT stored on the Property.[8] Again all of the above facts are consistent with the DOT knowing it was responsible for storing the barge. And again, Ryan as the non-movant in a summary judgment motion is required only to present facts that show there was a dispute as to material facts.

III. THE COURTS HAVE IGNORED RYAN'S AFFIRMATIVE DEFENSE AND IF EXPERT TESTIMONY WAS REQUIRED, THE COURTS SHOULD HAVE LISTENED TO THOSE WHO KEPT THE BARGE AFLOAT.

The State argues on pages 16-17 that there was no error in Judge Foley's dismissive treatment of Ryan's affirmative defense. In response to the State's summary judgment motion, Ryan asserted the affirmative defense that, even if the State's allegations were true, the State's intervening negligence caused the violation.[9] The negligence consisted of the State removing the chains that held the barge in place with the two tow

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1 for a number of years.
2 Q All I'm getting at right now is that that's the duty to
3 make sure it's secured.
4 A ***And in the same condition it was in, yes***

See R-89, Transcript from October 5, 2009 at p. 79, l. 17-25, p. 80, 1-5.

[7] See R-89, Transcript from October 5, 2009 at p. 80.

[8] Id., at pp.80-81.

trucks and a concrete wall and failing to pump water from the barge.[10] Despite Ryan's affidavit stating that this procedure kept the barge afloat for the fifteen years that he controlled the property where it was attached, Judge Foley stated that the affirmative defense required expert testimony. The State's expert testimony came from its employee Reinbold whose affidavit was allowed even though his opinion was highly suspect because it was based solely on a couple pictures[11] (not to mention the barge sank on his watch). The fact that Ryan was in the storage business and kept the barge afloat for 15 years should have been enough foundation to create a factual dispute that is to be presumed in his favor for summary judgment.

The State also argues that Ryan offered no expert evidence that cutting the cables caused the barge to sink. There is no reason for the trial court's conclusion that expert testimony was required. Since he had kept the barge afloat for fifteen years, common sense dictates that Ryan was the best expert available on the issue. In addition, the State argues that Ryan cannot rely on the testimony of Brian Webster who personally supervised the storage of the barge on a day to day basis[12] or anyone else because the

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[9] See R-22, Defendant's Memorandum of Law at p. 9.
[10] See R-59, pp 23 ,37, 59; R-90, pp 43, 44, 49, 56, 59, 123, 153.
[11] See R-89, Transcript from October 5, 2009 at p. 48.
[12] See R-91, Transcript from October 7, 2009 at pp. 33-4. Under Webster's supervision, the barge was secured to a three to four foot thick concrete wall by two tow trucks with leg extensions and four chains. See R-90, Transcript from October 6, 2009 at pp. 44-5, 49. Webster monitored the barge as part of securing and storing the barge. Id., at p. 56. After a snow melt or three or four days of heavy rain, Webster pumped water out of the barge. See R-90, Transcript from October 6, 2009 at p. 57.Also, Ryan would adjust the chains as needed for any buoyancy concerns. Id., at pp. 57-8.

testimony occurred after the summary judgment hearing. However, Webster's testimony corroborates Ryan's affidavits, which is further evidence that the affidavits should not have been ignored. Moreover, the testimony at the remedy hearing shows that an injustice occurred in summarily finding Ryan guilty of the sunken barge.

IV. THE CORPORATE ENTITY ISSUE IS IRRELEVANT GIVEN THAT RYAN NEITHER OWNED OR CONTROLLED THE BARGE WHEN IT SUNK.

The State argues on pages 17-25 extensively that Ryan is personally liable and is not shielded by the corporate entity. However, given that Ryan neither owned the barge (Argument I above) nor controlled the barge when it sunk (Argument II above), whether the corporate shield of Ryan Corporation can be pierced is irrelevant.

V. THE MISAPPLICATION OF JUDICIAL ESTOPPEL.

The State argues on pages 26-39 that the trial court correctly applied the doctrine of judicial estoppel. 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[13]. 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.[14] The letters concerning the barge occurred prior to filings in the forfeiture cases.[15]

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 has clearly and consistently argued that the questionnaire and letters referenced by the trial court were not positions taken in pending cases before courts therefore could not be used for judicial estoppel.[16]

The State argues in page 28 its briefing (without citing to any evidence or the record) that "Ryan represented that the barge was his

[13] "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)

[14] 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.

[15] Compare the October 16, 2006 Marcuvitz letter (APP-26) to the February 4, 2008 filing in this case (APP-1).

personal property potentially eligible for moving or storage assistance in the eminent domain case, and denies the barge is his in this case." The State fails to identify representations, but for argument sake let's assume that it is the same letter, relocation questionnaire, and the July 19, 2005 order in the Writ Case[17] that was relied upon by the circuit court. If that is the case, this Court can simply review Ryan's initial briefing at pages 21-35 to defuse the State's application of judicial estoppel to these facts (however, it must be noted that the State does not even attempt to apply the facts to the elements of judicial estoppel).

Some of the specific distortions in the State's brief need to be addressed. As for the questionnaire, the State states on page 29 of its brief, "if it were not Ryan's barge, then Ryan could not claim assistance to relocate it." This position by the State is preposterous. Ryan, through his companies, was in the storage business. Other than the few vehicles where certificates of title were actually in the name of his companies, the "ownership" by his companies was as a bailee where statutory lien rights existed. This was the same for the barge. That does not remove it or the vehicles from a relocation assistance claim. Ryan was storing the barge so it was perfectly acceptable for it to be moved, and further it would be

[16] 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.

[17] *State v. 260 North 12th Street LLC*, Milwaukee County Circuit Court File 2005CV005593 ("Writ Case").

consistent for Ryan to request to move the barge to preserve the lien rights he had for storing it.

The State also argues on page 32 that the ambiguous statements in the questionnaire "are akin to judicial admissions that are binding on Ryan" citing City of Wisconsin Dells v. Dells Fireworks, Inc., 197 Wis. 2d 1, 17, 539 N.W.2d 916 (Ct.App. 1995). The cite refers to the appellate court's statement:

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

Id. (citations omitted)(emphasis added). Once again, the State is trying to stretch the doctrine of judicial estoppel. The Dells Fireworks case involves **testimony**. Judicial estoppel requires inconsistent positions ***in cases before courts.*** Sea View Estates Beach Club, Inc. v. State Dept. of Natural Resources, 223 Wis.2d 138, 588 N.W.2d 667 (Wis.Ct.App.1998). The questionnaire involves neither. The questionnaire is not testimony in court, nor a representation to court. It is a document created outside of court nor presented to a court.

The State even tries to bootstrap the questionnaire in as a court statement by making the ridiculous statement on page 32 that the questionnaire "set the condemnation case in motion". Condemnation cases

are set in motion when the government wants to take property, not by answers to questionnaires. Moreover, this Court must remember that the State is using the questionnaire to find someone guilty as a matter of law. If this is reversed, the State could still offer the questionnaire as evidence of ownership, but it cannot and should not be used to definitely determine ownership and control as a matter of law.

At the bottom of page 32, the State also argues that the trial court "went on to find Ryan's personal liability independent of judicial estoppel based upon other evidence in a subsequent summary judgment decision" This is a complete misrepresentation of the record. Judge Foley's letter order did find judicial estoppel, but afterwards only one issue remained to establish liability: whether Ryan was "the controlling principal of the corporate entities." The State then moved for summary judgment on this issue only. The resulting order addressed only this issue, too. There was no independent basis stated for Ryan's personal liability absent the judicial estoppel from the first order. In fact, Judge Cooper expressed his reservations about Judge Foley's original order but felt he simply had no ability at the trial court level to correct it.[18]

[18] Judge Cooper said, "I agree completely, but it's not a question of how I would have decided the case or agreed with that argument. It's whether Judge Foley was so miss—so wrong in his analysis and his decision making that therefore you are entitled to reconsideration…." See Record at 87, transcript from the November 10, 2008 hearing at p.29, l. 5-9. And he added, "I don't agree with Foley. I'm not sure I would have decided the same way…" Id., at lines 12-13.

As for the Writ Order, Ryan relies on his initial brief at pages 32-35, but reminds the Court that the State admits that order carries no preclusive weight to the ownership issue in this case (isn't the State the one is playing fast and loose with the judicial system?[19]). Equally dumbfounding are the State's semantics arguments (pages 35-38) about its Writ Case admission concerning the "preclusive effect" of the Writ Order and how that is different than judicial estoppel.

The State also argued on appeal (not at trial court), that Ryan's ownership of the barge was based upon "the position Ryan took before the court" in the Writ Case. The State offers no evidence in support of the statement (and has made similar assertions without citation in its brief [20]). These assertions are baseless. No document or testimony is shown where Ryan claims ownership to the barge in the Writ Case. To the contrary, the Record clearly shows that there is no such evidence because both Ryan and the State[21] agree that issue was never litigated.

As for the Marcuvitz letter, Ryan again relies on his initial brief (at pages 28-29) that this cannot establish judicial estoppel as a matter of law since it predated any court action and was not a representation made to the

[19] The State argues in one appeal that the Writ Order does not give preclusive effect on the ownership of the barge issue then it argues in this case that the Writ Order precludes Ryan from arguing ownership.
[20] See p. 27 ("the court adopted Ryan's claim of ownership") and p. 28 ("Ryan's claim of ownership or control of the barge in the eminent domain case").
[21] See R-63, Affidavit of E. Kelly Keady at Exhibit E, the DOT's Appellate brief in the Writ case at p. 13.

court.

The State desperately needs to ramrod its judicial estoppel through the courts, because the underlying facts clearly show Ryan did not own or control the barge. The title documents prove he is not the owner.[22] COMM 202 establishes that the DOT controlled the barge when it sank.[23] At the very least, a jury should decide this matter.

VI. THE MISAPPLICATION OF SUMMARY JUDGMENT IN THIS FORFEITURE PROCEEDING.

Ryan rests on his previous briefing (pages 35-44) on this issue, but still must clarify a few misstatements of law and fact.

The State argues on page 40 (section B) of its brief with regards to §23.69 that makes language in that statute meaningless. The statute provides, "Any motion *which is capable of determination without the trial of the general issue* shall be made before trial" (emphasis added). If summary judgment motions that eliminate trials are allowed, there would be no need for the existence of the highlighted language, i.e. just eliminate the phrase from the statute. By including the phrase, though, it must have a meaning: trials are preserved and cannot be eliminated by motion.

The State's argument on page 44 (section G) about Wis. Stat. § 802.08 (summary judgment) also fails. The cardinal rule of statutory construction is that, when general and specific statutes relate to the same

[22] See Record at R-24 and R-28, Ryan Affidavits.

subject matter, the specific statute controls. The Landings LLC v. City of Waupaca, 287 Wis. 2d 120, 703 N.W.2d 689 (Wis.App., 2005) (specific condemnation service statute in 32.05 controls over general service statutes). Consequently, Wis. Stat. § 23.69 motion rules trump Wis. Stat. § 802.08.

The State argues that, since Chapter 23 allows for a complaint and answer like Wis. Stat. § 802, summary judgment is appropriate. However the procedural rules of Wis. Stat. §§ 23.50 to 23.85 make no such leap. See Wis. Stat. § 23.50(1). Nowhere is it stated that the general procedure rules in Wis. Stat. § 802 are to be adopted (to the contrary, by having its own set of rules, inconsistent general rules are disregarded). Nowhere in these rules is there any reference to the use of summary judgment. Rather, these rules discuss procedures relating to criminal matters. For example, a defendant's withdrawal of a no contest plea becomes a plea of not guilty. Similarly, where the State successfully prosecutes a complaint, the result is a guilty verdict. See Wis. Stat. §§ 23.55, 23.70, 23.71, 23.72, and 23.75

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

> Finally, we take note that although Wis. Stat. ch. 345 forfeiture proceedings are civil proceedings such proceedings also have certain aspects of criminal

[23] See Brief of Defendant-Appellant-Petitioner at pp.35-39.

> proceedings The supreme court has noted many of the similarities in procedure between a forfeiture action and a criminal action, and the court has cautioned that "it is an oversimplification to treat forfeiture actions as purely civil in nature."

State v. Schneck, 257 Wis.2d 704, 652 N.W.2d 434 (Wis.Ct.App.2002) (citations omitted). The trial court should have heeded this Court's caution about oversimplification because the oversimplification has allowed the State to ramrod a forfeiture conviction through the courts without ever addressing the merits. Ryan was found guilty on affidavits without having the chance to cross-examine the affiants.

In response, the State argues that summary judgment need not follow discovery and even if did, in this case it would not have made a difference. See the State's brief at pages 43-44. The fallacy of this argument is exposed by merely discussing the State's only causation witness, Don Reinbold, a Department of Transportation employee who was in charge of the employees who negligently secured the barge after the DOT acquired the site. His self-serving testimony was used to rebut Ryan's affirmative defense that it was the DOT's negligence in cutting cables and chains, which had secured the barge for fifteen years that caused the barge to sink to the bottom. In his summary judgment affidavit, Reinbold testified:

> In my professional opinion, the spuds were holding the barge. The trucks with the cables were not heavy or large enough to hold the barge.[24]

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

However, Reinbold *never inspected the barge, trucks or cables*.[25] He based his opinion *solely* on pictures. He wasn't even aware that chains anchored the barge to the trucks and a concrete wall.[26] Despite the fact that for more than fifteen years the Ryan Corporation safely stored the barge on the river by attaching it to the trucks by chains and cables, Reinbold testified that the tow trucks were too light to secure the barge. Reinbold even disqualified himself from giving an opinion as to whether cutting the chains and cables caused the problem.[27] This was the State's sole piece of evidence concerning why the barge sunk in contrast to Ryan's fifteen years of keeping the barge afloat. Obviously, this is not good enough for a clear and convincing standard nor was it adequate for granting a summary judgment motion. At a very minimum, though, all of this evidence must at least be heard by a jury before convicting someone of these forfeiture violations. That never occurred in this case.

The State also cites numerous cases on page 42, but none are on point (i.e. involve a forfeiture defendant challenging the applicability of summary judgment under Wis. Stat. §§ 23.50 to 23.85). The only Chapter 30 case is State v. Kelly, 244 Wis. 2d 286, 628 N.W. 2d 438 (Wis.App. 2001) and the issue of whether summary judgment was appropriate was never raised. Actually, the parties *agreed* to use summary judgment and

[25] See Record at 89, Donald E. Reinbold testimony on October 5, 2009 at p.48, l.12-24.

stipulated to facts in that case. Certainly, the Defendant in this case opposed summary judgment and Ryan did not stipulate to the disputed facts (or to the use of summary judgment).

Dated: _____ _____

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

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced using the following font: Times New Roman, 13 point. The word count for the brief is 2,989 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 Reply Brief which complies with the requirements of s. 809.19 (12) & (13).

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

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

Dated: _____ _____

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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

Betsy Hickok being duly sworn and on oath, does certify:

1. That on the 25th day of July, 2011, I mailed by United States mail three true and complete copies of Defendant-Appellant-Petitioner's Reply Brief to Respondent's counsel at the following address:

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FURTHER AFFIANT SAYETH NOT.

_____
Betsy Hickok

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

_____
Notary Public