

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 8, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2008AP616
2010AP394**

**Cir. Ct. Nos. 2003GF1
2008CV191**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 2008AP616

**IN THE MATTER OF THE ACQUISITION OF THE PROPERTY OF WILLIAM AND
DEBRA MEIS, CONDEMNEE, BY THE STATE OF WISCONSIN, CONDEMNOR:**

WILLIAM J. MEIS AND DEBRA M. MEIS,

PETITIONERS-APPELLANTS,

V.

STATE OF WISCONSIN, DEPARTMENT OF TRANSPORTATION,

RESPONDENT-RESPONDENT.

No. 2010AP394

WILLIAM J. MEIS AND DEBRA M MEIS,

PETITIONERS-APPELLANTS,

V.

STATE OF WISCONSIN, DEPARTMENT OF TRANSPORTATION,

RESPONDENT-RESPONDENT,
BRUCE SHANLEY, JACK SCHMIT AND LOUIS OKEY,
RESPONDENTS.

APPEAL from an order of the circuit court for Grant County:
ROBERT P. VAN DE HEY, Judge. *Reversed and cause remanded with
directions.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. William Meis and Debra Meis appeal an order barring them from returning to a condemnation commission for further proceedings. We reverse and remand with directions to order the commission to hold a hearing and issue an award.

¶2 We provide only a summary of this case’s long history. The Meises filed a request in circuit court for a condemnation commission under WIS. STAT. § 32.05(9) (2007-08).¹ The court referred the matter to a commission. The commission dismissed the case because the Meises did not appear. The Meises then filed an “appeal” in circuit court under WIS. STAT. § 32.05(10). The court held a jury trial. The Department of Transportation appealed the jury award, and we held that the circuit court lacked competency for the appeal because no award was issued by the commission. *Meis v. DOT*, No. 2005AP259, unpublished slip

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

op. (Wis. Ct. App. Oct. 4, 2007). We directed the circuit court to dismiss the appeal.

¶3 After the remand, the circuit court issued an order on February 5, 2008, denying the Meises' attempt to continue with further proceedings before the commission. The Meises appealed to this court, and that became appeal No. 2008AP616. Meanwhile, the Meises also filed a mandamus petition in circuit court, asking the court to order the commission to proceed. After we questioned the court's competency to issue the order on February 5, 2008, the court denied the mandamus petition with an order that was textually identical to the previous order. The Meises then appealed from the order in the mandamus case, which became appeal No. 2010AP394.

¶4 Mandamus is an extraordinary legal remedy, and the petitioner must show: (1) a clear, specific legal right which is free from substantial doubt; (2) that the duty sought to be enforced is positive and plain; (3) that substantial damage will result if the duty is not performed; and (4) that no other adequate remedy at law exists. *Lake Bluff Housing Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995).

¶5 The Meises argue that the condemnation commission lacked the authority to dismiss its proceeding. In mandamus terms, the Meises argue that the condemnation commission had a clear, plain legal duty to issue an award. Their argument is based on statutes, mainly WIS. STAT. § 32.08(6)(b) ("the commission shall make a written award"). The Department does not dispute this part of the Meises' argument. We take that as a concession. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (respondents on appeal cannot complain if propositions of appellants are

taken as confessed which they do not refute). Nor was the Meises' argument rejected by the circuit court in the order now under review. As we describe below, the circuit court had previously concluded that the commission was required to issue an award. Therefore, based on the Department's concession and the circuit court's earlier view, we conclude that the commission had a duty to issue an award.

¶6 The remaining issues relate to whether there is a reason the Meises should not be allowed to proceed to the commission at this time. The circuit court concluded, and the Department now argues, that the Meises are judicially estopped from further proceedings. Judicial estoppel applies when a litigant's later position is clearly inconsistent with the earlier position, the facts at issue are the same in both cases, and "the party to be estopped ... convinced the first court to adopt its position -- a litigant is not forever bound to a losing argument." *State v. Petty*, 201 Wis. 2d 337, 348, 548 N.W.2d 817 (1996) (citation omitted) .

¶7 The Department asserts that the Meises are now taking a position contrary to that taken earlier in circuit court. According to the Department, when the Meises originally filed their appeal to the circuit court to obtain a jury trial, they argued that the court should construe the commission's dismissal as an award, but now the Meises argue that the commission must instead issue an actual monetary award.

¶8 We do not agree that this situation is a proper one for estoppel. On the issue now being argued (whether the commission was required to issue an award), the Meises have taken a consistent position throughout the case. This is not a case where a party made one argument in circuit court and then a contrary one on appeal. What changed is that the Meises no longer argue that the dismissal

should be construed as an award. However, this change occurred only because we rejected that position on appeal. Returning to the above legal standard from *Petty*, this is where the quoted language about a party not being forever bound to a losing argument becomes significant. The Meises changed direction on remand only because, on appeal, their position became a losing argument. The *Petty* standard recognizes that parties can properly abandon losing arguments and make others. The Meises are now doing what parties normally do after a reversal – they are trying to move the case forward in light of the changed legal environment we created. This is not an extraordinary situation that supports estoppel.

¶9 The Department also makes arguments based on issue preclusion or claim preclusion principles. It argues that the previous litigation, including our appeal decision, somehow already decided the issue the Meises now argue, or that the earlier litigation gave the Meises the opportunity to raise this issue, but they failed to do that. One strand of this argument is that, if the Meises wanted further proceedings before the commission, they should have asked for that relief in the previous appeal. But there is no reason to believe we would have addressed that question. We properly granted only the relief sought by the Department, namely, dismissal of the Meises’ appeal from the commission to the circuit court. There was no need for us to specify what might happen next.

¶10 Another strand of the Department’s argument is that the Meises could have raised their current issue in the previous appeal. However, in the first appeal the Meises had no reason to argue that the commission must issue an award. That is because the circuit court *agreed with them* “that the Condemnation Commission did not have the authority to not issue an award.” If any party was required to raise that issue in the first appeal, it was the Department.

¶11 The Department also argues that the Meises are time-barred from proceeding to the commission now because they had only six months to file the “appeal” that would trigger a commission proceeding under WIS. STAT. § 32.05(2a). However, there is no dispute that the Meises’ original request for a commission was timely. The Department apparently sees the Meises as trying to start a new appeal but, in a mandamus context, it is clear the Meises are actually attempting to compel the commission to properly finish the appeal that was timely started.

¶12 Finally, the Meises ask that we order a new circuit judge for further proceedings. We deny this request because the Meises have not cited any legal authority for such an order.

¶13 In summary, we conclude that the commission had a duty to issue an award, and there is nothing about the earlier litigation that precludes the Meises from seeking mandamus relief against the commission at this time, or from returning to the commission for further proceedings. Therefore, we reverse the circuit court order and remand with directions to order the condemnation commission to hold a hearing and issue an award.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

