

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 12, 2013**

Diane M. Fremgen  
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 No. 2012AP471**

**Cir. Ct. No. 2007CX2**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

**V.**

**STEVEN HANSON,**

**DEFENDANT-APPELLANT-CROSS-RESPONDENT,**

**HANSON MANAGEMENT, INC.,**

**DEFENDANT-CO-APPELLANT-CROSS-RESPONDENT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Reversed and cause remanded for further proceedings.*

¶1 HOOVER, P.J.<sup>1</sup> Steven Hanson and Hanson Management, Inc., (collectively, Hanson)<sup>2</sup> appeal a summary judgment in favor of the State on its claims of illegal wetland fill and disturbing more than one acre of land without a storm permit, contrary to WIS. STAT. §§ 281.36(2) (2009-10) and 283.33, respectively. Hanson argues summary judgment procedure is not available for complex forfeiture actions involving §§ 281.36(2) and 283.33. He also asserts that, even if summary judgment is available, the circuit court erred in its grant of summary judgment because it improperly determined his response to the State's summary judgment motion was untimely and it did not employ the proper summary judgment methodology. Finally, Hanson argues the circuit court erred in its imposition of an alternative jail sentence for failure to pay the forfeitures. The State cross-appeals, arguing the circuit court erred as a matter of law by imposing forfeitures against only one defendant, instead of both.

¶2 We conclude summary judgment procedure is not available for the WIS. STAT. § 283.33 storm water violation. We therefore reverse judgment on the storm water violation and remand for further proceedings. As for the WIS. STAT. § 281.36(2) illegal wetland fill violation, we conclude Hanson's response to the State's summary judgment motion was not untimely. We also cannot determine what materials the court considered in making its summary judgment determination, and therefore reverse judgment on the wetland fill violation and remand for further proceedings.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. All references to WIS. STAT. § 281.36(2) are to the 2009-10 version.

<sup>2</sup> When referring to the parties individually, we use Hanson Management and Steven.

## BACKGROUND

¶3 In July 2007, the State filed a complaint against Hanson Management, alleging Hanson Management obstructed a lake bed without a permit, filled a wetland without a permit, and disturbed more than one acre of land without a storm water permit, contrary to WIS. STAT. §§ 30.12(1)(a), 281.36(2), and 283.33, respectively. Steven, pro se, answered the complaint on Hanson Management's behalf, and the State successfully moved to strike the answer.

¶4 Steven then retained counsel, who filed an amended answer on behalf of both Hanson Management and Steven. In December 2007, the State amended its complaint to add Steven as a defendant. Hanson's counsel answered the amended complaint.

¶5 Because Steven was also charged criminally with respect to the WIS. STAT. § 30.12(1)(a) lake bed violation, this case was stayed pending resolution of the criminal charge. In 2010, after Steven was found guilty of obstructing a lake bed, the State moved to dismiss the lake bed violation and Steven from the lawsuit.

¶6 The circuit court dismissed the WIS. STAT. § 30.12(1)(a) allegation. However, Steven objected to being dismissed from the lawsuit, and the case simply proceeded against both Steven and Hanson Management.<sup>3</sup>

¶7 On June 17, 2010, the circuit court entered a scheduling order that provided, in relevant part, that any summary judgment motions needed to be filed

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<sup>3</sup> The court never ruled on whether Steven should be dismissed from the lawsuit.

by October 15, 2010. The scheduling order was silent on when the nonmovant was required to respond to a summary judgment motion. However, Polk County Circuit Court Rule 303 provides that, after a party moves for summary judgment, the nonmoving party must respond within thirty days or will be deemed to have waived his or her right to respond.

¶8 The State moved for summary judgment on October 15. On November 30, 2010, the State wrote to the court, advising it that Hanson had failed to respond to its summary judgment motion. The State requested that the court not consider any response from Hanson.

¶9 On December 15, Hanson moved to extend the time to reply to the State's summary judgment motion. It cited excusable neglect based on a "crush of business" for failing to respond to the State's motion within the time established by Polk County Circuit Court Rule 303. On February 2, 2011, Hanson filed a brief and affidavits in opposition to the State's summary judgment motion.

¶10 On February 16, 2011, the court, in a written decision, denied Hanson's motion to extend time to respond to the State's summary judgment motion. It reasoned that the local rule required Hanson to respond to the State's motion within thirty days and Hanson's failure to do so did not amount to excusable neglect. In the same decision, the court also granted the State's motion for summary judgment, simply stating, "I am adopting in their entirety, the proposed Findings of Fact and Conclusion of Law submitted by the State and grant Summary Judgment as to the Defendants' liability on both of the remaining claims in the complaint."

¶11 On March 4, 2011, Hanson moved for reconsideration, arguing that, because the local circuit court rule was not incorporated into the scheduling order,

and because the local rule set a time for responding to a summary judgment motion that was different from the time prescribed in WIS. STAT. § 802.08(2), the statute controlled, and the circuit court should have deemed his response timely under § 802.08(2). Hanson also argued, in the alternative, that the court failed to utilize proper summary judgment methodology.

¶12 On May 4, 2011, the court denied Hanson's motion for reconsideration. It then imposed \$14,142.60 in forfeitures against Hanson.

## DISCUSSION

### I. Availability of summary judgment procedure

¶13 Hanson first argues summary judgment procedure is not available for the State's WIS. STAT. §§ 281.36(2) and 283.33 claims. In support, Hanson relies on *State v. Ryan*, 2012 WI 16, 338 Wis. 2d 695, 809 N.W.2d 37. There, our supreme court reversed a summary judgment in favor of the State, holding summary judgment procedure is not permitted in forfeiture actions for violations of WIS. STAT. ch. 30. *Id.*, ¶¶1, 69.

¶14 To reach its determination, the *Ryan* court analyzed WIS. STAT. §§ 23.50-23.85. *Id.*, ¶¶ 60, 63. Those statutes govern the prosecution of various forfeitures, including the WIS. STAT. ch. 30 violation at issue in *Ryan*. *Id.*, ¶45; *see also* WIS. STAT. § 23.50. The *Ryan* court determined that, because the §§ 23.50-23.85 statutory schedule did not expressly authorize summary judgment, and because the court could not reconcile the relevant procedural statutes with summary judgment procedure, summary judgment was unavailable for the chapter 30 forfeiture action. *Ryan*, 338 Wis. 2d 695, ¶¶60, 63, 69. The court also observed that, despite the parties' agreement and filings, "consistency and

predictability” mandated that summary judgment not be used in forfeiture actions for violations of chapter 30. *Id.*, ¶¶67-68. It stated that “an agreement cannot provide the basis to impose upon the statutory scheme a summary judgment procedure that does not otherwise exist.” *Id.*, ¶69.

¶15 Here, Hanson argues that, similar to *Ryan*, summary judgment is not available because WIS. STAT. §§ 281.36(2) and 283.33 are also governed by WIS. STAT. §§ 23.50-23.85. WISCONSIN STAT. § 23.50(1) provides, in relevant part:

The procedure in ss. 23.50 to 23.85 applies to all actions in circuit court to recover forfeitures, plus costs, fees, and surcharges imposed under ch. 814, for violations of ss. 77.09, 90.21, 134.60, 167.10 (3), 167.31 (2), 281.48 (2) to (5), 283.33, 285.57 (2), 285.59 (2), (3) (c) and (4), 287.07, 287.08, 287.81 and 299.64 (2), subch. VI of ch. 77, this chapter, and chs. 26 to 31, ch. 169, and ch. 350, and any administrative rules promulgated thereunder ....

¶16 We agree with Hanson that the WIS. STAT. § 283.33 storm water violation is governed by WIS. STAT. §§ 23.50-23.85. Because *Ryan* established that summary judgment is unavailable for forfeitures governed by §§ 23.50-23.85, we conclude that summary judgment on the storm water violation was improper. We also reject the State’s argument that Hanson forfeited his right to make this argument on appeal because he agreed to summary judgment in the circuit court. As the *Ryan* court stated, “an agreement cannot provide the basis to impose upon the statutory scheme a summary judgment procedure that does not otherwise exist.” *Ryan*, 338 Wis. 2d 695, ¶69. Because summary judgment was unavailable, we therefore reverse the court’s judgment on the storm water violation and remand for further proceedings.

¶17 However, we disagree with Hanson that the WIS. STAT. § 281.36(2) wetland fill violation is governed by WIS. STAT. §§ 23.50-23.85. Section

281.36(2) is not included in the list of statutes covered by the §§ 23.50-23.85 statutory scheme. Because Hanson has offered no other argument explaining why summary judgment was unavailable for the wetland fill violation, we will not consider it further. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). We therefore assume summary judgment was available for the State's § 281.36(2) claim.

## II. Summary judgment procedure

¶18 Hanson next objects to the circuit court's summary judgment procedure. He argues the circuit court erred because it improperly determined his response to the State's motion was untimely and the court did not employ the proper summary judgment methodology.

¶19 Hanson first argues the circuit court erred by determining his response to the State's summary judgment motion was untimely. He concedes that, pursuant to the Polk County Circuit Court Rule 303, his response to the summary judgment motion was untimely. He contends, however, the local rule is invalid because it conflicts with WIS. STAT. § 802.08(2). *See Hefty v. Strickhouser*, 2008 WI 96, ¶64, 312 Wis. 2d 530, 752 N.W.2d 820 (local court rule that required nonmovant to respond in twenty days "establishes a time for responding to a summary judgment motion that is different from the time set out in ... § 802.08(2) [and] is invalid."); *see also* WIS. STAT. § 802.08(2) ("Unless earlier times are specified in the scheduling order, the motion shall be served at least 20 days before the time fixed for the hearing and the adverse party shall serve opposing affidavits, if any, *at least 5 days before the time fixed for the hearing.*") (emphasis added). Hanson argues that, because the local rule conflicts with § 802.08(2), the statute controls, and his response was therefore timely.

¶20 The State does not dispute Hanson’s contentions that his response was timely under WIS. STAT. § 802.08(2) or that, if compared, the times established in the local rule conflict with § 802.08(2). Instead, the State argues Hanson remained bound by the local rule because the times fixed in § 802.08(2) are inapplicable in this case and, as a result, there was no conflict between § 802.08(2) and the local rule.

¶21 The State argues WIS. STAT. § 802.08(2) only applies if either party requests or the court schedules a hearing on a summary judgment motion. It asserts nothing in the summary judgment statute mandates that a hearing be held on a summary judgment motion and points to three foreign cases where a court has decided a motion for summary judgment without a hearing. The State intimates that, if Hanson wanted to be subject to the time established in § 802.08(2), he should have requested a hearing on the State’s summary judgment motion. Because Hanson never requested a hearing, the State argues he was required to file a response to the State’s summary judgment motion within thirty days.

¶22 We disagree with the State that the court is not required to hear summary judgment motions and, as a result, WIS. STAT. § 802.08(2) does not apply to this case. First, § 802.08(2), which outlines summary judgment procedure, clearly contemplates a hearing on a summary judgment motion will be held. Further, WIS. STAT. § 801.15(4) provides, in relevant part: “All written motions *shall be heard* on notice unless a statute or rule permits them to be heard *ex parte*.” (Emphasis added.) The State’s summary judgment motion was a written motion that would, following notice, be *heard* by the court. *See id.* Because the State’s motion would be heard, Hanson was not required to request a hearing in order to invoke the time for a response established in § 802.08(2). We conclude § 802.08(2) is applicable in this case.



¶23 Because Polk County Circuit Court Rule 303 establishes a time for responding to a summary judgment motion that is different from the time set out in WIS. STAT. § 802.08(2), the deadline in § 802.08(2) controls. *See Hefty*, 312 Wis. 2d 530, ¶¶46, 64. Here, Hanson responded to the State’s motion on February 2 and the court ruled on the State’s motion on February 16. The court should have determined Hanson’s response to the State’s summary judgment motion was timely under § 802.08(2).

¶24 That being said, we cannot determine whether the court nevertheless considered Hanson’s response in its summary judgment determination. In its grant of summary judgment, the court simply stated: “I am adopting in their entirety, the proposed Findings of Fact and Conclusion of Law submitted by the State and grant Summary Judgment as to the Defendants’ liability on both of the remaining claims in the complaint.” Hanson and the State dispute whether the court used the proper summary judgment methodology. From the court’s reasoning, however, we cannot determine whether the court used the proper summary judgment methodology or what materials the court considered in making its determination. We do not know if the court considered Hanson’s February 2 response even though it deemed it untimely or whether the court actually examined “the pleadings, affidavits, depositions, answers to interrogatories, and admissions on file to determine whether a genuine issue exists as to any material fact, or whether reasonable conflicting inferences may be drawn from undisputed facts, therefore requiring a trial.” *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶25 We therefore reverse the circuit court’s grant of summary judgment on the State’s WIS. STAT. § 281.36(2) wetland fill claim and remand for further proceedings consistent with this opinion.

### III. Remaining argument and cross-appeal

¶26 Because we have already reversed the court's summary judgment determination, and as a result, its imposition of forfeitures, we need not consider Hanson's remaining argument that the court erred in its imposition of a six month jail sentence as an alternative to paying the forfeitures. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938). Additionally, we need not address the State's cross-appeal that the court erred by failing to impose forfeitures against both Steven and Hanson Management. *See id.*

*By the Court.*—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

