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**STATE OF WISCONSIN  
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DISTRICT III**

**02-05-2010**

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OF WISCONSIN**

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**MARK KLEMM AND  
JEANNE KLEMM,**

**Plaintiffs-Respondents,**

**v.**

**Appeal No.  
2009AP2784**

**Circuit Court Case No.  
2008CV432**

**AMERICAN TRANSMISSION  
COMPANY LLC,**

**Defendant-Appellant.**

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**PLAINTIFFS-RESPONDENTS' BRIEF AND APPENDIX**

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**Appeal from the Circuit Court of Marathon County,  
The Honorable Gregory Huber, Presiding**

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### **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The Respondents, Mark Klemm and Jeanne Klemm, hereinafter the “Klemms”, do not request oral argument. The arguments are adequately set forth in the briefs of the parties. Publication is requested as the resolution of this matter clarifies and applies established rules of law to a factual situation significantly different than that in published opinions, as well as provides a decision which is of substantial and continuing public interest.

### **ISSUE PRESENTED**

Whether litigation expenses under Wis. Stats. §32.28(3)(d) are to be awarded to a property owner when the property owner executes an easement to the condemnor, contemporaneously receives a certificate of compensation which contains a notice of a right to appeal pursuant to Wis. Stats. §32.06(2a), timely appeals the amount of just compensation, and receives an award of \$2,250.00 and 22.5% more from the condemnation commission than the amount of compensation in the certificate of compensation?

Answer by the circuit court:            Yes

## **STANDARD OF REVIEW**

The issue presented on appeal requires the Court to interpret statutes whose meaning is in dispute to a set of undisputed facts. The interpretation of statutes is reviewed independently. However, this Court can benefit from the analysis of the circuit court. *Spiegelberg v. State of Wisconsin and Department of Transportation*, 2006 WI 75, ¶8, 291 Wis.2d 601, 717 N.W.2d 641; *See also Star Direct, Inc. v. Dal Pra*, 2009 WI 76, ¶18, 319 Wis.2d 274, 767 N.W.2d 898, *Warehouse II, LLC v. DOT*, 2006 WI 62, ¶4, 291 Wis.2d 80, 715 N.W.2d 213.



## **STATEMENT OF THE CASE**

The Appellant, American Transmission Company, LLC, hereinafter “ATC” generally sets forth the accurate procedural process in its Brief In Chief. Additionally however, it is to be noted that subsequent to the execution of the Easement and recording of the certificate of compensation, the Klemms timely appealed to the condemnation commission pursuant to Wis. Stats. §32.06(2a). R.1, A-App. 1-9. After a contested hearing, the condemnation commission awarded the Klemms \$10,000.00. R. 6, R-App. 1-2.

On April 28, 2009, the circuit court made its Decision On Motion For Litigation Expenses awarding the Klemms litigation expenses under Wis. Stats. §32.28. ATC and the Klemms subsequently entered into a Stipulation and Order Entering Final Judgment. R-21, A-App. 84-86. This Stipulation and Order Entering Final Judgment was in response to the Klemms’ Motion for Litigation Expenses Regarding Amount. R.19, R.20, A-App. 87-107, R-App. 3-25. This appeal follows.

## **STATEMENT OF FACTS**

ATC generally sets forth an accurate recitation of the facts and procedural posture in its Brief In Chief. As clarification for the Court, on December 27, 2007, upon receipt of the Steigerwaldt appraisal from ATC, the Klemms executed the Electric Transmission Line Easement, hereinafter “Easement”, which included a certificate of compensation. The Klemms executed the Easement based on their belief that ATC wanted to commence construction of the electric transmission line across their property as soon as practical. R. 14, A-App. 21. At the time of execution of the Easement, the Klemms reasonably believed that they could execute the Easement and still exercise their right to contest the amount of the compensation. R. 14, Exhibit C attached to Exhibit 1, A-App. 28. The certificate of compensation, expressly states in bold print, “Notice of Right to Appeal” and specifically set forth the six month time period and other requirements for an appeal from the amount of compensation. *Id.* Consistent with the certificate of compensation, the Klemms timely appealed.

After the condemnation commission awarded the Klemms \$2,250.00 and 22.5% more than the dollar amount in the certificate of compensation, the parties negotiated a settlement. R. 14, Exhibit 3, A-App. 31-32. According to the settlement agreement, the Klemms would forego additional appeals in exchange for the payment of \$30,000.00 as just compensation for the Easement. As set forth in the settlement agreement, ATC did reserve the right to contest whether it was responsible for

payment of litigation expenses under Wis. Stats. §32.28. R. 14, Exhibit 3, A-App. 31-32.

On April 28, 2009 the circuit court granted litigation expenses to the Klemms. R. 18, A-App. 77-83.

On July 21, 2008, the Klemms filed a Motion For Litigation Expenses Regarding Amount with supporting Affidavit. R. 19, R. 20. R-App. 3-25. In response, the parties agreed to a Stipulation And Order Entering Final Judgment. R. 21, A-App. 84. The Stipulation And Order Entering Final Judgment became the subject of an Order by this Court.

On appeal now, ATC presents the Court with two issues. The Klemms submit that the proper issue before this Court is as set forth in their Issue Presented. Issue Presented II by ATC was resolved by way of a Stipulation and Order Entering Final Judgment. R.21, A-App. 84-86. That Stipulation was clarified to this Court in the parties Joint Memorandum Of Law Re: The Applicability *Of Cascade Mountain Inc. v. Capitol Indem. Corp.* To The Judgment In This Case.

### **ARGUMENT**

#### **THE CIRCUIT COURT PROPERLY AWARDED LITIGATION EXPENSES EVEN THOUGH THERE WAS NO JURISDICTIONAL OFFER**

#### **Liberal Construction Of The Statutes Are To Be Afforded The Property Owners**

ATC is incorrect in its assertion that the circuit court's ruling is based on what Wis. Stats. §32.06 "should say". After an analysis of Wis. Stats. §32.06 and §32.28, the circuit court stated,

However, even if the Respondent's interpretation were equally as plausible as the court's reading, it would have to be rejected as contrary to the rule that the courts must 'liberally construe statutory provisions regarding compensation for eminent domain takings to favor the property owner whose property is taken against his or her will.' *Warehouse II v. DOT*, 2006 WI 62, ¶32, 291 Wis.2d 80, 715 N.W.2d 213. The legislature authorized awards of litigation expenses to discourage condemnors from making inequitably low offers and to make condemnees whole when they are forced to litigate the issue of just compensation. *Id.* at ¶33. *See also Green Bay Redevelopment Authority v. Bee Frank, Inc.* 120 Wis.2d 402, 411, 355 N.W.2d 240 (1984); *Standard Theatres, Inc. v. DOT*, 118 Wis.2d 730, 744-45, 349 N.W.2d 661 (1984).... R. 18, p. 6, A-App. 82.

The United States Supreme Court has consistently held in condemnation cases that property owners are to be "...put in as good a position pecuniarily as if his property had not been taken." *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *See also Phelps v. United States*, 274 U.S. 341 47 S.Ct. 611, 71 L.Ed. 1083 (1927), *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893).

As cited by the circuit court, the two cases which set the stage for an award of litigation expenses are *Standard Theatres, Inc. v. State Dept. of Transp., Div. of Highways*, 118 Wis.2d 730, 349 N.W. 2d 661 (1984) and *Green Bay Redevelopment Authority v. Bee Frank Inc.*, 120 Wis.2d 402, 355 N.W.2d 240 (1984).

The facts in *Standard Theatres* are similar to this case. Neither case is a million dollar contingency case, both involve comparatively small amounts.

In *Standard Theatres* the Wisconsin Supreme Court discussed the liberal interpretation in favor of property owners with respect to Chapter 32, Stats.

When we consider the policy behind ch. 32, which is to justly compensate the condemnee for any lands taken by the condemnor by the condemnor's exercise of the power of eminent domain, the position taken by the state is unreasonable. When the owner is deprived of property against his or her will, it is obvious that the owner is not justly compensated for his or her property if the owner must initially be forced to litigate in order to obtain full value of the land, and then must pay for his or her attorney fees from this full value. *The attorneys fees incurred here were, after all, necessitated by the owner's attempt to get the fair value of the owner's real estate. Therefore, one must start from the premise that the owner is to be compensated for the attorneys fees. In other words, the purpose behind the statute is to make the owner 'whole' through compensating the owner for the value of the property taken and for the attorney fees it occurred in attempting to obtain this value. Standard Theatres, 118 Wis.2d. at 744. Emphasis added.*

As the *Standard Theatres* Court found,

Initially, we note that this court has recognized that the rule of strict construction should be applied to the condemnor's power and to the exercise of this power. [internal citations omitted]. This is because the exercise of the power of eminent domain has been characterized as an 'extraordinary power,' and the rule of strict construction is intended to benefit the owner whose property is taken against his or her will. Nichols, *Eminent Domain* section 3.213[3] and [4] (rev. 3d ed. 1981). **Conversely, statutory provisions in favor of the owner, such as those which regulate the compensation to be paid him or her, are to be afforded liberal construction.** [internal citations omitted]." *Id.* at 742. Italics in original, bold added.

In *Standard Theatres*, as a result of the expansion and relocating of Highway 70 in Vilas County, Wisconsin, the State offered to pay Standard Theatres, the property owner, \$36,000.00 for the property and damages sustained by Standard. *Id.* at 731-732. Because Standard was not satisfied with this amount of compensation it applied to the Vilas County circuit court for assignment to the condemnation commission pursuant to Wis. Stats. §32.05. The condemnation commission hearing

was held pursuant to Wis. Stats. §32.08(6). *Id.* at 731. The condemnation commission awarded Standard an additional \$55,000.00. *Id.* at 732. Subsequently the State filed an appeal of the commission's award. However, because of the State's failure to continue prosecution of its appeal, the trial court dismissed it. Thereafter, Standard's counsel filed a motion for litigation expenses pursuant to Wis. Stats. §32.28. *Id.* at 735. The circuit court awarded Standard the sum of \$29,410.00 for attorneys fees and \$3,608.87 for other litigation expenses. *Id.* at 737.

In its decision the Wisconsin Supreme Court stated that,

We observe in the instant case, although the state appealed the award of the condemnation commission, the case did not ever proceed to trial. Therefore there never was a jury verdict to be approved by the court. In essence, then, the instant case is identical on the one hand to one where neither party appeals the commission's award. *Id.* at 738.

In analyzing the legislative intent of the words "reasonable and necessary attorney fees" in Wis. Stats. §32.28, the Court noted that,

The formula [in Wis. Stat. §32.28(3)(d)] indicates that the legislature meant to discourage the condemnor from making inequitably low jurisdictional offers. The lowest allowable limit set by the legislature upon these offers is \$700 and 15% below the final award. Should the condemnor exceed this limit and offer an amount which ultimately turns out to be at least \$700 and 15% below the final award, the condemnor is forced to indemnify the condemnee for the attorneys fees incurred by an appeal. This is the obvious intent behind the formula set up by the legislature.... *Therefore, we find that the language clearly and unambiguously indicates an intention to award fees based on the condemnor's action in making an offer....*" *Id.* at 741. Emphasis added.

Consequently, the Supreme Court affirmed the trial court in its award of attorney fees and other litigation expense to Standard's counsel. *Id.* at 752.

This philosophy of liberal construction in favor of property owners is also found in another Wisconsin Supreme Court decision. In *Redevelopment Authority of the City of Green Bay v. Bee Frank, Inc.*, the Supreme Court found “...that statutory provisions which favor an owner regarding the compensation to be paid to him or her are to be liberally construed. *Aero Auto Parts, Inc. v. Dept. of Transp.*, 78 Wis.2d 235, 241, 253 N.W.2d 896 (1977) (citing 1 Nichols, *Eminent Domain*, sec. 3.213[4](rev. 3d ed. 1976)).” 120 Wis.2d at 409-10.

In *Bee Frank*, the Wisconsin Supreme Court again further enunciated the legislature’s dual intent in enacting Wis. Stat. §32.28(3)(d), “1) to discourage the condemnor from making inequitably low jurisdictional offers and 2) to make the condemnee, who meets the statutory requirements, whole.” Internal citations omitted. *Id.* at 411. More recently the Wisconsin Supreme Court in reviewing an issue relative to how property is to be valued in a partial taking condemnation agreed that, “...just compensation is to take into account the principle of Standard Theatres:.... *statutory provisions in favor of the owner, such as those which regulate the compensation to be paid to him or her, are to be afforded liberal construction.* [internal citations omitted]” *Spiegelberg v. State of Wisconsin and Department of Transportation*, 2006 WI 75, ¶31, 291 Wis.2d 601, 717 N.W.2d 641. Italics in original.

In other words, the circuit court's analysis with respect to the liberal construction in favor of property owners in condemnation proceedings is well grounded in the law of this State. That construction requires the Klemms to be made 'whole' by compensating them not only for the value of the property taken but also for the attorney fees they incurred when the attorney obtains an award greater than \$700.00 and 15% of the offer.

**The Klemms Have Satisfied All Statutory  
Requirements For An Award Of  
Litigation Expenses**

To buttress its argument concerning statutory construction, ATC argues that certain conditions must be satisfied in order for an award of litigation expenses under Wis. Stats. §32.28. While the plain language of the statutes require certain steps (i.e., a timely appeal, an award from the commission of more than \$700.00 and 15% of the certificate of compensation), ATC's reliance on *D. S. G. Evergreen, F.L.P. v. Town of Perry*, 2007 WI App 115, 300 Wis.2d 590, 731 N.W.2d 667 is misplaced.

The issue before the *D.S.G. Evergreen* Court was an interpretation of Wis. Stats. §32.28(3)(a). The present case seeks the Court to interpret Wis. Stats. §32.06(2a) and Wis. Stats. §32.28(3)(d). *D.S.G. Evergreen* concerned an instance where the condemning authority abandoned the proceedings during the condemnation commission hearing. Here, the condemnation commission made an award. Finally, in *D.S.G. Evergreen*, a jurisdictional offer was issued. The Court of Appeals was not



confronted with a situation such as occurred here where, the offer was accepted before a jurisdictional offer was made. 2007 WI App 115 at ¶2.

**Condemnation Statutes Are To  
Be Read Together And Harmonized**

ATC's primary argument is that no jurisdictional offer was made and therefore litigation expenses cannot be awarded under Wis. Stats. §32.28(3)(d). In other words, if there is no "jurisdictional offer", there can be no litigation expenses. As support, ATC relies on the language of Wis. Stats. §32.28(3)(d) and the fact that there are no appellate court decisions. However there is the cannon of statutory construction which requires statutes to be construed *in pari materia*, together with related statutes on the same subject. *Pulsfus Poultry Farms, Inc. v. Town of Leeds*, 149 Wis.2d 797, 804, 440 N.W.2d 329 (1989).

Without repeating it here, the Klemms refer this Court to the circuit court's decision On Motion For Litigation Expenses which succinctly set out the procedure of seeking just compensation and recovery of litigation expenses under Wis. Stats. §32.06(2a) and Wis. Stats. §32.28(3)(d). R. 18, pp. 1-3, A-App. 77-79.

As the circuit court stated:

Regardless of which method is used to commence the just compensation litigation -- an appeal under sub. (2a) or a petition under sub. (7) --the result is a condemnation commission hearing under §32.08. In other words, the statutory condemnation procedure offers two different routes to the same destination.

And, once arriving at that destination, the parties are entitled to have costs awarded under Wis. Stats §32.28. R. 18, p. 3. A-App. 79.

With respect to the language in Wis. Stats. §32.28(3)(d) concerning the jurisdictional offer, the circuit court correctly stated that,

The reference to the jurisdictional offer contained in the phrase ‘the highest written offer prior to the jurisdictional offer’ does not require that a jurisdictional offer actually be made -- it merely specifies a particular point in the condemnation procedure: the negotiation stage of §32.06(2a). In fact, the ‘prior to’ language of §32.28(3)(d) echoes the beginning of §32.06(2a), which requires that negotiation be attempted ‘[b]efore making the jurisdictional offer.’” R. 18, pp 3-4. A-App. 79-80.

Wis. Stats. §32.06(2a) incorporates the allowance of litigation expenses. That statutes states in relevant part:

...The judge shall forthwith assign the matter to the chairman of the county condemnation commissioners *for hearing under sub. (8)*. The procedures prescribed under subs. (9) (a) and (b), (10) and (12), and chs. 808 and 809 shall govern such appeals. The date the conveyance is recorded shall be treated as the date of taking and the date of evaluation. Italics added.

As relevant, Wis. Stats. §32.06(8) provides:

Thereafter the commission shall proceed in the manner and the rights and duties as specified in s. 32.08 to hear the matter and make and file its award with the clerk of the circuit court....

Consistently, Wis. Stats. §32.28(3)(d) then states that attorney fees and costs should be allowed when:

The award of the condemnation commission **under s. 32.06(8)** exceeds the jurisdictional offer **or the highest written offer prior to** the jurisdictional offer by at least \$700 and at least 15% and neither party appeals the award to the circuit court. Bold added.

This is exactly what happened here. The Klemms timely appealed pursuant to Wis. Stats. §32.06(2a). R. 1, A-App 1-9. The circuit court referred the matter to the condemnation commission for hearing pursuant to Wis. Stats. §32.06(8). R.5. The

condemnation commission held a hearing pursuant to Wis. Stats. §32.08 and made an award which was \$2,250.00 and 22.5% greater than the award set forth in the certificate of compensation. R. 6, R-App. 1-2.

Thus, if the highest written offer is “accepted” there logically is no subsequent jurisdictional offer. As the circuit court’s Decision evidences when the statutes are read together, the clear plain context of the statutes support the conclusion that the Klemms are entitled to litigation expenses. Therefore, one reason that there may be no appellate court decisions on point is because the reading of the statutes by the Klemms and the circuit court is correct.

**The Burden Is Not On The Property Owner To  
Ensure A Just Offer Of Compensation,  
The Language In the Easement Itself Affords  
The Property Owner The Right To Seek  
Just Compensation.**

ATC argues that the absence of a jurisdictional offer makes a condemning authority potentially liable for litigation expenses based on its opening offer if it is accepted by the property owner. There is an “initial offer”, according to ATC, which then shifts the burden to the property owner to counter offer or present added evidence to the condemning authority. Brief In Chief, pp. 10-12. ATC then states that, “In fact, additional litigation could have simply been avoided had the Klemms shared additional information with ATC and availed themselves of their statutory right to obtain their own appraisal during the negotiation stage”. Brief In Chief, p. 12.

This approach is completely contrary to the legislative intent of Chapter 32. As discussed above, “..the legislature meant to discourage the condemnor from making inequitably low jurisdictional offers.” *Standard Theaters, supra.* at 741.

In point of fact here, the Klemms executed the Easement not because they believed that the compensation being paid to them was fair or adequate but because they knew that the project was going to proceed and they did not want to be an impediment to the project itself. The Klemms reasonably believed that they could continue to challenge their right to fair compensation under the statute even if they signed the Easement.

The Easement itself states in bold immediately following the amount of compensation **NOTICE OF RIGHT OF APPEAL.** R. 14, Exhibit C to Exhibit 1. A-App. 28. The language thereafter paraphrases Wis. Stats. §32.06(2a). The Klemms timely did exactly what the Notice authorized -- appeal to the condemnation commission.

Then, the Klemms transmitted their appraisal to ATC on August 2, 2008. R. 20 at 304. A-App. 89-90. Despite this “new information”, the Klemms still had to litigate the matter in front of the condemnation commission . R. 6, R-App.1-2. The condemnation commission awarded the Klemms a dollar amount 22.5% greater than that which was offered in the Easement.

With the Klemms prepared to further appeal to the circuit court, they were able to negotiate with ATC for the payment of the Easement at nearly four times the amount set forth in the certificate of compensation. R. 14, Exhibit 3, A-App. 31. Consequently, neither party appealed that award.

The burden is not on the Klemms simply because the “initial” offer was too low by ATC. That is the purpose of Wis. Stats. §32.28.

**Wis. Stats. §32.06(10)(b) Prevents ATC From  
Paying More Than Just Compensation**

There is statutory protection for ATC from paying more than just compensation. See Wis. Stats. §32.06(10)(b) (if a verdict amount does not exceed commission award condemnor has judgment for difference). *Dorschner v. Dept. Of Transportation*, 183 Wis.2d 236, 515 N.W.2d 311 (Ct. App. 1994), involved a transportation condemnation under Wis. Stats. §32.05. Ironically, *Dorschner* involved an appeal from a negotiated settlement under Wis. Stats. §32.05(2a). 183 Wis.2d at 239. In *Dorschner*, the Court found that based on Wis. Stats. §32.05(11)(a), the State is entitled to recover the difference between the negotiated award and the jury award. To determine the amount of recovery owed to the State, the Court interpreted the amount in the negotiated settlement as the “award” and subtracted the amount of the verdict. *Id.* at 242-243.

Here, ATC simply refuses to accept the fundamental constitutional precept that when condemnors take private property they must provide just compensation. Only

when a property owner is forced to appeal to seek just compensation that litigation expenses become an issue under Wis. Stats. §32.28(3)(d). What happened here --- a too low offer --- is exactly what the legislature and courts were seeking to prevent. As enunciated by the *Standard Theatres* Court, "... the purpose behind the statute is to make the owner 'whole' through compensating the owner for the value of the property taken and for the attorney fees incurred in attempting to obtain this value." 118 Wis.2d. at 744. Wis. Stats. §32.06(10)(b) provide protection to ATC from paying more than just compensation.

**The Legislative History Of Wis. Stats. § 32.28 Supports  
An Award Of Litigation Expenses**

Ordinarily the Court will not consider legislative history unless there is an ambiguity in the statute. *Heritage Farms v. Markel Ins. Co*, 2009 WI 27, 316 Wis.2d 47, 762 N.W.2d 652. ATC does not take the position that the statutes at issue are ambiguous. Nevertheless ATC cites the Legislative Council Staff Brief 77-7 (June 13, 1977) in support of its argument that the legislative history of Wis. Stats. §32.28 does not support an award of litigation expenses. This legislative history is directly contrary to ATC's position. The Legislative Council Staff Brief 77-7 (June 13, 1977) pointed out about the then current law at pages 3-4,

Present Wisconsin Statutes do not permit recovery of any costs or expenses *where the purchase price is negotiated* or where the award of the condemnation commissioners is accepted by the condemnee....

A recent law review note put the argument succinctly:

‘It is axiomatic that ‘just compensation’ less the costs of litigation no longer equals ‘just compensation.’ It follows that any landowner who is forced into court to obtain a fair award is penalized the amount of his expenses of litigation. Note, Attorney’s Fees in Condemnation Proceedings, 20 *Hast. L. J.* 694, 696-97 (1969).’

Because of the court’s reluctance to recognize ‘just compensation’ as the basis for a condemnee’s constitutional right to attorney fees and other legal expenses, other legislative remedies have been sought. The theory of such approaches is that the condemnee holds an inherently inferior bargaining position in the condemnation process which the award of attorney fees will partially rectify....

The theory is that the condemning authority, knowing that the condemnee must incur litigation expenses to prove the true value of his property, will neither offer nor settle for full value. Since the condemning authority is already armed with one or more appraisals and ready access to staff litigation counsel at the outset of negotiations, it appears to be much less eager to avoid court action than the condemnee. The psychological disadvantage of the condemnee is compounded by his unfamiliarity with the process and the shock of having to plan for the sudden relocation of his home or business simultaneously with the price negotiations. Under such duress, many landowners settle out of court for less than full compensation, in the knowledge that the cost of obtaining a fair price may exceed the difference between such price and the condemnor’s offer. R. 17, Ex. A. A-App. 46-47.

As a result of the Legislative Council Study and report, the legislature revised and adopted various fee shifting statutes, including Wis. Stats. §32.28, effective October 1, 1978. Subsequently, as cited previously, the Wisconsin Supreme Court ratified the precept that, “...the purpose behind the statute [Wis. Stats. §32.28] is to make the owner ‘whole’ through compensating the owner for the value of the property taken and for the attorney fees incurred in attempting to obtain this value.” *Standard Theaters*, 118 Wis.2d at 744-745.

Consistent with the Legislative Council Staff Brief, in 1984 the Wisconsin Supreme Court further enunciated the legislature’s dual intent in enacting Wis. Stat.

§32.28, “(1) to discourage the condemnor from making inequitably low jurisdictional offers and (2) *to make the condemnee, who meets the statutory requirements, whole.*” *Redevelopment Auth. of Green Bay v. Bee Frank, Inc.*, 120 Wis.2d at 411. Italics added.

It is unreasonable to argue that the legislature intended to *penalize* a property owner who *cooperates* in the negotiations. This cooperation permitted the project to move forward, by allowing ATC early occupancy of the land to facilitate construction. Then when that property owner avails himself of the statutory provisions to obtain just compensation and in fact does so, is told, according to ATC, he must assume his own litigation expenses.

Compare the cooperating property owner with a property owner who is *antagonistic and contentious* with the condemning authority thereby requiring the condemning authority to jump through all of the requirements of Wis. Stats. §32.06 which include issuing a jurisdictional offer, and etc. When an antagonistic property owner succeeds like the cooperating property owner in obtaining just compensation, litigation expenses are available to make him “whole”. Surely this is not what the legislature envisioned. However, ATC would have the Court determine this is the law.

In addition, referring to the legislative history also involves the cannon of construction that remedial statutes are to be liberally construed to accomplish their



purposes. *City of Madison v. Hyland, Hall & Co.*, 73 Wis.2d 364, 373, 243 N.W.2d 422 (1976) (“under accepted law in Wisconsin ... remedial statutes should be liberally construed to suppress the mischief and advance the remedy which [the statute] intended to afford”). See also *Szleszinski v. LIRC*, 2005 WI App 229, 287 Wis.2d 775, 706 N.W.2d 345.

In summary, the legislative history supports the granting of litigation expenses in this matter to the Klemms.

### **AWARDING LITIGATION EXPENSES FROM THE DATE OF THE CERTIFICATE OF COMPENSATION**

#### **The Cases Cited By ATC Do Not Apply To The Facts In This Case**

In its Brief In Chief, ATC argues at various points that litigation expenses are not recoverable prior to the jurisdictional offer and/or the date of filing of the certificate of compensation. Brief In Chief, p. 13, 18-20.

In support ATC cites *D. S. G. Evergreen, F.L.P. v. Town of Perry*, 2007 WI App 115, 300 Wis.2d 590, 731 N.W.2d 667, *Dairyland Power Coop. v. Nammacher*, 110 Wis.2d 377, 328 N.W.2d 903 (Ct. App. 1982) and *Kluenker v. DOT*, 109 Wis.2d 602, 327 N.W.2d 145 (Ct. App. 1982) for the proposition that litigation expenses cannot be awarded if they are incurred prior to a “jurisdictional offer”. These cases do not support ATC’s argument on the issue before this Court. As discussed above, in *D.S.G., supra*, the Court was construing Wis. Stats. §32.28(3)(a). As the circuit

court here noted about the *Kluenker* decision, it “..was a case in which a jurisdictional offer was actually made. As such all it stands for is the proposition that ***when a jurisdictional offer has been made***, that is the starting point for measuring litigation expenses.” R. 18, p. 5. A-App. 81. *Dairyland Power* also involved a situation where the appeal to a condemnation commission was from a jurisdictional offer. 110 Wis.2d 377, 328 N.W.2d 901 (Wis. App. 1983).

In a case where the issue was litigation expenses pursuant to Wis. Stats. §32.28(3)(b), the Supreme Court in *Warehouse II, LLC v. DOT*, explained the different subsections of Wis. Stats. §32.28(3) as follows:

The occasions where the property owner is awarded more expenses incurred in contesting an action taken by a condemnor are all directed at actions that significantly short-change the property owner in some respect. *For example, in paras. (3)(d)-(I), the compensation offered by the condemnor was at least \$700.00 and 15% too low, the condemnee ‘shall’ be awarded the reasonable litigation expenses incurred.* In paras. (3) (a) and (3) (c), litigation expenses are awarded when the condemnor either started condemnation it later determined should not have begun or the condemnor did not commence condemnation proceedings when it should have done so. Paragraph (3) (b) is part of that legislative decision to fee-shift, but it sets out circumstances that trigger fee-shifting in more general terms, e.g., when a court concludes that the condemnor lacks the ‘right to condemn’ or that there is ‘no necessity for its taking’. These paragraphs of sub sec. (3) level the playing field by shifting the obligation to pay expenses that may have been unnecessary if the condemnor had shouldered its responsibilities properly. 2006 WI 62, ¶22, 291 Wis.2d 80, 715 N.W. 2d 213. Italics added.

As the Court more pointedly stated later in the opinion, “As we explained above, paras. (3)(d)-(i) of §32.28 all involve inadequate compensation. Paragraphs (3) (a)-(c) do not.” *Id.* at ¶ 24.

The Klemms acknowledge that the *time when litigation expenses commence* was an issue before the circuit court. That issue however was resolved by way of a Stipulation and Order Entering Final Judgment. R.21, A-App. 84-86. That Stipulation was clarified to this Court in the parties Joint Memorandum Of Law Re: The Applicability Of *Cascade Mountain Inc. v. Capitol Indem. Corp.* To The Judgment In This Case. In the Joint Memorandum at p. 4, ATC and the Klemms jointly submitted to this Court,

In this case, the issue on appeal is whether the Klemms are entitled to litigation expenses. Consistent with Wis. Stat. §§ 808.08 and 808.09, in the event of a remand after reversal or modification of the Decision granting litigation expenses, further proceedings in the circuit court may be appropriate to ascertain the impact of the reversal or modification on the amount of the litigation expenses. Conversely, in the event that the Decision is affirmed, further proceedings will be necessary to address additional litigation expenses incurred by the Klemms during this appeal.

ATC cannot bootstrap this argument to construe Wis. Stats. §32.28(3)(d) to require a jurisdictional offer before any litigation expenses are paid when just compensation is achieved. This is a situation of inadequate compensation where there was no jurisdictional offer, but where the property owner was forced to seek an award from the condemnation commission to obtain just compensation. As the circuit court discussed, there are two avenues to reach the condemnation commission. R. 18, pp. 1-3, A. App. 77-79. The cases cited by ATC to support the issue here concern the one avenue which this case did not take.

## **CONCLUSION**

As the circuit court concluded, “Condemnees who choose to cooperate and opt for the appeal process of Wis. Stats. §32.06(2a) are in no less need of being made whole than condemnees who hold out for a jurisdictional offer.” R. 18, p. 6, A-App. 82. The purpose of Wis. Stats. §32.28 borne out by the legislative history and case law is to discourage condemnors from making inequitably low offers and make condemnees whole when they are forced to litigate the issue of just compensation. The Klemms did not want to hold up the project. The Klemms “agreed to” a price for compensation with the express understanding that they retained their right to appeal as set out in the certificate of compensation and Wis. Stats. §32.06(2a). Even after receiving the Klemms appraisal, the Klemms were forced to litigate before the condemnation commission. Ultimately, they settled on an amount of just compensation almost four times the amount set out in the certificate of compensation. The Klemms should not be penalized for their cooperation.

Accordingly, the Klemms request the Court to affirm the Decision of the circuit court.

Respectfully submitted this \_\_\_\_ day of February, 2010.

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## **CERTIFICATION**

I hereby certify that:

This brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief, including the statement of the case, the argument, and the conclusions and excluding other content, is 5,308 words.

The text of the electronic copy of this brief is identical to the text of the paper copy.

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 \_\_\_\_ day of February, 2010.

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## **CERTIFICATE OF COMPLIANCE WITH RULE WIS. STATS. §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. §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.

Dated this \_\_\_\_ day of February, 2010.

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