

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

MARK KLEMM AND
JEANNE KLEMM,

Plaintiffs-Respondents,

v.

AMERICAN TRANSMISSION
COMPANY LLC,

Defendant-Appellant.

Appeal No.
2009AP2784

Circuit Court Case No.
2008CV432

DEFENDANT-APPELLANT'S REPLY BRIEF

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

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ARGUMENT

I. A KEY PURPOSE OF WIS. STAT. § 32.06(2A) IS TO ENCOURAGE NEGOTIATION, WHICH PURPOSE WILL BE DEFEATED UNDER THE KLEMMS' INTERPRETATION OF WIS. STAT. § 32.28(3)(D).

The Klemms entered into a contract with ATC. The Klemms have referred to their reasonable belief that they could sign the contract and still exercise their right to appeal the amount of the compensation contained in it. And undisputedly, the Klemms can appeal the amount of the compensation. However, that is a separate and distinct question from whether condemnees may, under Wis. Stat. § 32.28(3)(d) or any other provision, recover their expenses incurred in doing so. On that question, the Klemms' arguments overlook a key purpose of the AGREED PRICE statute, Wis. Stat. § 32.06(2a): to encourage negotiation. ATC replies to the Klemms' arguments below.

A. Wis. Stat. § 32.06(2a) is intended to encourage negotiation, which purpose will be defeated under the Klemms' interpretation of Wis. Stat. § 32.28(3)(d).

Throughout their brief, the Klemms argue that the legislature could not have intended to "penalize" cooperative property owners. This argument has enormous emotional and political appeal. However, it is contrary to the negotiation and compensation provisions contained in Chapter 32 and to public policy.

1. Under the Klemms' interpretation of Wis. Stat. § 32.28(3)(d), condemnors will be compelled to make initial offers far in

excess of fair market value out of fear of litigation expenses,
not because of evidence of fair market value.

Government entities, public utilities, and other condemning authorities must balance their obligations to individual landowners during the condemnation process with their obligations to rate payers or taxpayers. Chapter 32 as a whole recognizes that whenever a condemnor pays for a taking, it is the taxpayer, not the condemnor, who really pays. Accordingly, just compensation is determined based on “fair market value.” *See* Wis. Stat. § 32.09. Generally, a condemnor must pay fair market value for the property taken, but not more. *See id.*

Under the Klemms’ interpretation of Wis. Stat. § 32.28(3)(d), condemnors could be required to pay litigation expenses based on their first offer. Thus, the condemnor will be compelled to make initial offers far in excess of fair market value out of fear of litigation expenses – not because of any evidence of higher fair market value. The Klemms’ interpretation allows no opportunity for the condemnor to learn more about the condemnee’s property, reevaluate its opinion regarding fair market value, and make a higher offer to the condemnee.

2. The statutes evince an intent to encourage mutual negotiation, and the condemnee is not “forced” to litigate until he or she receives the jurisdictional offer.

The statutes set forth a different approach: negotiation. *See* Wis. Stat. § 32.28(2)-(2d). The Wisconsin Supreme Court has described the purpose of the negotiation stage as follows:

As we have explained, a primary purpose of negotiation is to achieve a consensual sale of the property with fair compensation to the property owner. Good faith negotiation facilitates sales that are not forced by a court decision based on the power of eminent domain, but rather, consensual sales arrived at through negotiation.

Warehouse II v. Dept. of Transportation, 2006 WI 62, ¶ 13, 291 Wis. 2d 80, 91-92, 715 N.W.2d 213. Only when a condemnee is “forced” to litigate can the condemnee recover litigation expenses. *Id.* at ¶ 31.

At the negotiation stage, the condemnee is not “forced” to litigate. Upon receiving the condemnor’s opening offer, the condemnee may accept the offer, reject the offer, or negotiate. They have 60 days to obtain their own appraisal at the condemnor’s expense. Wis. Stat. § 32.06(2)(b). If the condemnee shares his or her appraisal with the condemnor, the condemnor is *required* to consider it in negotiation. *Id.* In short, Wis. Stat. § 32.06(2a) presupposes mutual, two-way exchange of information.¹

When this process is successful, the result is a “consensual sale arrived at through negotiation.” *See Warehouse II*, 2006 WI at ¶ 13. In fact, the statutes contemplate that the result is a “contract.” *See* Wis. Stat. § 32.06(2a) (noting that “in such negotiation the condemnor...may contract to pay the items of compensation enumerated in s. 32.09...where shown to exist”). Whatever a

¹ Indeed, a condemnee may recover litigation expenses when the condemnor fails to negotiate in good faith during this period. *Warehouse II*, 2006 WI at ¶ 1.

party's subjective intent may be, a contract is an objective manifestation of the meeting of the minds as to the terms set forth in the contract.²

Contrast this with a condemnee's options after a jurisdictional offer. A jurisdictional offer is unilateral. The condemnor issues it. The condemnee may accept or reject it within 20 days. Wis. Stat. § 32.06(3). If not accepted within 20 days, the condemnor can petition for a determination of just compensation by the county condemnation commission. Wis. Stat. § 32.06(7). If the condemnee is unsatisfied with the amount of the jurisdictional offer, the condemnor has one option only: present his case to the condemnation commission. The condemnee is truly "forced" to litigate at that point.

Correspondingly, Wis. Stat. § 32.28(3)(d) permits recovery of litigation expenses at that point. However, nothing in the statutes expressly permits recovery of litigation expenses after a condemnee has entered into a consensual contract, pursuant to good faith negotiations.

B. Under *Standard Theatres* and *Bee Frank*, Wis. Stat. § 32.28(3)(d) is intended to discourage the condemnor from making inequitably low jurisdictional offers and to make whole condemnees who meet the statutory requirements.

Consistent with the negotiation provisions described above, Wis. Stat. § 32.28(3)(d) is intended to discourage the condemnor from making inequitably

² The Klemms have not argued that any term in the contract, i.e. the Easement and associated materials, entitles them to recover litigation expenses. The issue is whether they may do so under Wis. Stat. § 32.28(3)(d).

low *jurisdictional* offers and to make whole condemnees *who meet the statutory requirements*. The Klemms emphasize two Wisconsin cases. (See Plaintiffs-Respondents’ Brief and Appendix (“Resp. Br.”) at 4-8, citing *Standard Theatres, Inc. v. DOT*, 118 Wis. 2d 730, 349 N.W.2d 661 (1984) and *Redevelopment Auth. of Green Bay v. Bee Frank, Inc.*, 120 Wis. 2d 402, 355 N.W. 2d 240 (1984).) However, those cases underscore a critical concept: the purpose of § 32.28(3)(d) is not to simplistically make a condemnee “whole” or to discourage low offers at just any point in the condemnation proceedings. Rather, the purpose is to “1) discourage the condemnor from making inequitably low *jurisdictional offers* and 2) to make the condemnee, *who meets the statutory requirements*, whole.” *Bee Frank, Inc.*, 120 Wis. 2d at 411 (italics added).

The Klemms point out that condemnation statutes are to be read together and harmonized. (See Resp. Br. at 9.) Here, the Klemms refer to the circuit court’s Decision, which points out that the statutes provide “two different routes to the same destination”: the condemnation commission hearing. (See *id.*, citing R. 18, p. 3. A-App. 79.) However, it does not follow that a party is entitled to litigation expenses merely because the party has participated in a commission hearing. Focusing on the commission hearing ignores the other language in Wis. Stat. § 32.28(3)(d) expressly referencing “the jurisdictional offer.”

Again, the legislature knows how to draft provisions instructing parties to proceed assuming that a jurisdictional offer has been made when it actually has

not. *See, e.g.*, Wis. Stat. § 32.10 (in inverse condemnation matters, instructing court to “treat the matter in accordance with the provisions of this subchapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same”). When no jurisdictional offer has been made or is required, Wis. Stat. § 32.28(3)(d) cannot apply.

In sum, the Klemms overlook the key qualifiers in *Bee Frank*: “jurisdictional offers” and “statutory requirements.” These qualifiers are consistent with the statutes as written and with the policy of encouraging mutual negotiation.

C. Wis. Stat. § 32.06(10)(b) and other statutes regarding compensation are irrelevant.

The Klemms also argue that ATC is protected from paying more than just compensation by Wis. Stat. § 32.06(10)(b) (if a jury verdict amount does not exceed the commission award, the condemnor can obtain a judgment for the difference). However, that statute has nothing to do with whether a party is entitled to litigation expenses under § 32.28.³

³ In support of this argument, the Klemms cite *Dorschner v. DOT*, 183 Wis. 2d, 236, 515 N.W.2d 311 (Ct. App. 1994). As the Klemms point out, *Dorschner* involved an appeal from a negotiated agreement under Wis. Stat. § 32.05(2a). However, litigation expenses were not before the court in *Dorschner*. The parties did not brief the issue, and the court did not address it. The only issue before the court was just compensation. In addition, the condemnation process in § 32.05 differs materially from the process in § 32.06, making meaningful comparison difficult. In fact, the decision in *Dorschner* is based in part on language in Wis. Stat. § 32.05(2a) that does not appear in Wis. Stat. § 32.06(2a). *See id.* at 242-43 (noting that § 32.05(2a) provides that for purposes of appeal, “the amount of compensation in the conveyance shall be treated as the award...”). *Dorschner* is irrelevant.

Here, the Klemms conflate “just compensation” and “litigation expenses.” In a partial takings case like this one, just compensation is based on fair market value of the property taken, with due consideration to specific factors enumerated in Wis. Stat. § 32.09(6). Litigation expenses are not an element of just compensation. *See* Wis. Stat. § 32.09(6).

Litigation expenses are only available to parties who meet the statutory criteria set forth in Wis. Stat. § 32.28. *D.S.G. Evergreen F.L.P. v. Town of Perry*, 2007 WI App 115, ¶ 17, n.5, 300 Wis. 2d 590, 602, 731 N.W.2d 667 (condemnees may expend money that is not recoverable under any circumstances); *Bee Frank, Inc.*, 120 Wis. 2d at 411 (purpose of § 32.28 is “to make the condemnee “who meets the statutory requirements” whole); *Kluenker v. DOT*, 109 Wis. 2d 602, 606, 327 N.W.2d 145, 148 (Ct. App. 1982) (“we cannot assume the legislature intended attorney’s fees be recoverable in circumstances other than those expressly mentioned” in the statute). Thus, Wis. Stat. § 32.06(10)(b) and other statutes regarding just compensation are immaterial.

D. Prior to 1978, Wisconsin did not permit recovery of costs when the purchase price was negotiated; that was not changed in the 1978 amendments to the statutes.

The Klemms look to legislative history to support their view.⁴ The Klemms cite excerpts from the Legislative Council Study and report summarizing the policy rationales for fee-shifting statutes. (*See* Resp. Br. at 14-15.) At most, however, the excerpts establish that legislators were aware of policy concerns such as unequal bargaining power between the parties. To be sure, Chapter 32 now contains several provisions intended to equalize the bargaining positions between the parties: for example, condemnors must share their appraisal with the landowner, pay for a second appraisal by a qualified appraiser of the landowner's choosing, and provide the names of other landowners to whom offers have been made. *See* Wis. Stat. § 32.06(2)-(2a). And the statutes expressly provide for recovery of litigation expenses when the jurisdictional offer is exceeded by the requisite threshold. *See* Wis. Stat. § 32.28(3)(d).

However, the Klemms' arguments do not change this fundamental fact: despite the legislature's awareness of various policy concerns, the legislature did not adopt a formulation expressly permitting recovery of litigation expenses for appeals from negotiated agreements under Wis. Stat. § 32.06(2a). Prior to 1978,

⁴ The Klemms take ATC to task for relying on legislative history without clearly taking the position that § 32.28(3)(d) is ambiguous. However, legislative history can be consulted to confirm or verify a plain-meaning statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 667, 681 N.W.2d 110.

the statutes did not permit recovery of costs when the purchase price was negotiated; that has not changed.

E. The “liberally construe” approach cannot justify creating new provisions to benefit landowners when the legislature has declined to do so.

Ultimately, the Klemms’ argument rests on the principle that provisions regarding compensation are to be liberally construed in favor of landowners. However, the “liberally construe” approach cannot justify ignoring the plain language and history of a statute. It cannot justify creating new provisions that benefit landowners whenever the legislature has declined to do so. The court’s first duty is to apply the law as written. *See In re Commitment of Smith (State v. Smith)*, 229 Wis. 2d 720, 730, 600 N.W.2d 258 (Ct. App. 1999). The court erred by awarding litigation expenses to the Klemms under Wis. Stat. § 32.28(3)(d) when no jurisdictional offer was made or required.

II. THE CIRCUIT COURT ERRED IN AWARDING LITIGATION EXPENSES FROM THE DATE OF THE RECORDING OF THE CERTIFICATE OF COMPENSATION.

No Wisconsin appellate court has ever authorized recovery of litigation expenses for an appeal from a certificate of compensation negotiated through the AGREED PRICE procedure in Wis. Stat. § 32.06(2a). Thus, few meaningful standards exist regarding what litigation expenses are recoverable, and more precisely, from what event or time.

As the Klemms concede, Wisconsin courts have repeatedly held that litigation expenses incurred prior to a jurisdictional offer are not recoverable under Wis. Stat. § 32.28. *See D.S.G. Evergreen*, 2007 WI App at ¶¶ 14-17 (expenses incurred prior to jurisdictional offer not recoverable under Wis. Stat. § 32.28(3)(a)); *Dairyland Power Coop. v. Nammacher*, 110 Wis. 2d 377, 380-81, 328 N.W.2d 903 (Ct. App. 1982) (expenses prior to jurisdictional offer not recoverable under Wis. Stat. § 32.28(3)(d)); *Kluenker*, 109 Wis. 2d at 607 (expenses prior to jurisdictional offer not recoverable under Wis. Stat. § 32.28(1)).

The Klemms argue that *D.S.G. Evergreen*, *Dairyland Power*, and *Kluenker* are inapposite because in those cases, a jurisdictional offer had been issued. Interestingly, that is precisely the same circumstance present in both *Bee Frank* and *Standard Theatres*, upon which the Klemms heavily rely for their earlier arguments. (*See Resp. Br.* at 4-8.) Regardless, that circumstance only serves to highlight that no Wisconsin appellate court has ever authorized recovery in the absence of a jurisdictional offer.

The Klemms acknowledge that the time when litigation expenses commence was an issue before the circuit court. (*See Resp. Br.* at 19.) However, they go on to state that the issue was “resolved” in the Stipulation and Order Entering Final Judgment and “clarified” somehow in the jurisdictional memo submitted to this Court by the parties. (*Id.*) This argument seems to be that ATC is raising an issue not raised in the court below. However, the issue of the time or

event when litigation expenses commenced was briefed by ATC in the court below. (*See* R. 15 at 9-10; A-App. 41-42.) The circuit court addressed that issue in its April 28, 2009, Decision on Motion for Litigation Expenses. (R. 18 at 4-6; A-App. 80-82.)

For the above reasons, and as argued more fully in ATC's opening brief, the circuit court erred in awarding litigation expenses from the date of the recording of the Certificate of Compensation.

CONCLUSION

For the reasons set forth herein and in ATC's opening brief, the circuit court erred in awarding litigation expenses following an appeal from an AGREED PRICE transaction in Wis. Stat. § 32.06(2a). The circuit court also erred in awarding litigation expenses from the date of recording of the certificate of compensation. Thus, ATC respectfully requests that the Court reverse the circuit court's April 28, 2009, Decision granting the Klemms their litigation expenses under Wis. Stat. § 32.28(3)(d), vacate the judgment, and remand to the circuit court for further proceedings. Furthermore, if the Court affirms the circuit court's ruling that the Klemms are entitled to litigation expenses, ATC requests that the Court clarify the standards regarding when and from what time litigation expenses are recoverable when a condemnee appeals from a negotiated agreement pursuant to Wis. Stat. § 32.06(2a).

Respectfully submitted this 22nd day of February, 2010.

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FORM AND LENGTH CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in § 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 argument and the conclusion and excluding other content, is 2,383 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 22nd day of February, 2010.

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