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SUPREME COURT OF WISCONSIN

03-17-2011

**CLERK OF SUPREME COURT
OF WISCONSIN**

MARK KLEMM and JEANNE KLEMM,

Plaintiffs-Respondents-Petitioners,

v.

Appeal No. 2009AP2784

AMERICAN TRANSMISSION
COMPANY, LLC,

Defendant-Appellant.

On Appeal from the Court of Appeals of Wisconsin, District III
Reversing the Circuit Court for Marathon County
The Honorable Greg Huber, Presiding

BRIEF OF AMICUS CURIAE

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
ARGUMENT	1
THE COURT OF APPEALS READING OF SEC. 32.28(3)(d), STATS., VIOLATES EQUAL PROTECTION.....	1
CONCLUSION	14
FORM AND LENGTH CERTIFICATION	
CERTIFICATE OF SERVICE	
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)	

TABLE OF AUTHORITIES

FEDERAL CASES	PAGE(S)
----------------------	----------------

<i>Harris v. McRae</i> , 448 U.S. 297 (1980)	5
--	---

STATE CASES	PAGE(S)
--------------------	----------------

<i>Acquisition of Certain Lands by Benson</i> , 101 Wis. 2d 691, 305 N.W.2d 184 (Ct. App.1981)	13
---	----

<i>Aicher v. Wis. Patients Comp. Fund</i> , 2000 WI 98, 237 Wis. 2d 99, 613 N.W.2d 849	5
---	---

<i>Gottsacker Real Estate Co., Inc. v. State</i> , 121 Wis. 2d 264, 359 N.W.2d 164 (Ct. App. 1984)	11
---	----

<i>In re Hezzie R.</i> , 219 Wis. 2d 848, 580 N.W.2d 660 (1998)	5
--	---

<i>Jackson v. Benson</i> , 218 Wis. 2d 835, 578 N.W.2d 602 (1998)	5
--	---

<i>Milwaukee Brewers v. DHSS</i> , 130 Wis. 2d 79, 387 N.W.2d 254 (1986)	6, 8
---	------

<i>Nankin v. Village of Shorewood</i> , 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141	8, 10
---	-------

<i>Reginald D. v. State,</i> 193 Wis. 2d 299, 533 N.W.2d 181 (1995).....	6
<i>Standard Theatres, Inc. v. Department of Transportation,</i> 118 Wis. 2d 730, 349 N.W.2d 661 (1984).....	12
<i>State v. Post,</i> 197 Wis. 2d 279, 541 N.W.2d 115 (1995).....	6, 7
<i>State ex rel. Grand Bazaar v. City of Milwaukee,</i> 105 Wis. 2d 203, 313 N.W.2d 805 (1982).....	8
<i>State ex rel. Watts v. Combined Community Servs.,</i> 122 Wis. 2d 65, 362 N.W.2d 104 (1985).....	5
<i>Tomczak v. Bailey,</i> 218 Wis. 2d 245, 578 N.W.2d 166 (1998).....	5
<i>Warehouse II v. DOT,</i> 2006 WI 62, 291 Wis. 2d 80, 715 N.W.2d 213	13

WISCONSIN STATUTES	PAGES
Section 32.05, Stats.	1, 2, 3, 10
Section 32.05(2a), Stats.	2, 3
Section 32.05(3), Stats.	2
Section 32.05(6), Stats.	2
Section 32.05(7), Stats.	2, 3

Section 32.06, Stats.	1, 2, 10
Section 32.06(2a), Stats.	2
Section 32.06(3), Stats.	2
Section 32.06(6), Stats.	2
Section 32.06(7), Stats.	2
Section 32.28, Stats.	passim
Section 32.28(3)(d), Stats.	passim

OTHER AUTHORITIES..... PAGES

Wisconsin Constitution Article I, Section 13	4
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ARGUMENT

THE COURT OF APPEALS READING OF SEC. 32.28(3)(d), STATS., VIOLATES EQUAL PROTECTION

Plaintiffs-Respondents-Petitioners have presented the correct approach to properly examine the language of sec. 32.28(3)(d), Stats. The statutory language cannot stand isolated by narrowly focusing on the single word “the,” because the statute is part of an extensive and cohesive set of interrelated statutes in Chapter 32, Wis. Stats. Amicus curiae agree that the fee shifting statute must be read as an integral component of the overall condemnation procedure contained in the statutes. In particular, sec. 32.28(3)(d), Stats., must be read in the context of the condemnation statutes’ required equality of treatment of all condemnees.

Under both sec. 32.05, Stats., and sec. 32.06, Stats.,¹ the vast majority of eminent domain acquisitions of private property are accomplished through a conveyance “in lieu of condemnation” at an early stage of the proceedings, and not after the completion of the full condemnation process, culminating with an involuntary taking.

¹ Section 32.05, Stats., the quick-take procedure, pertains largely to condemnations in transportation matters. Section 32.06, Stats., pertains largely to condemnations in other than transportation matters.

While there are some differences, both subchapters follow the same basic procedure. Each begins with an initial offer by the condemnor. If this offer is not accepted, the condemnor then proceeds to acquisition through good faith negotiations. secs. 32.05(2a) and 32.06(2a), Stats. If such negotiations are unsuccessful, the condemnor then issues a jurisdictional offer. secs. 32.05(3) and 32.06(3), Stats. The property owner may accept the jurisdictional offer. secs. 32.05(6) and 32.06(6), Stats. If the property owner does not accept the jurisdictional offer, the condemnor obtains transfer of title involuntarily by operation of law. secs. 32.05(7) and 32.06(7) et. seq., Stats.

Under both secs. 32.05 and 32.06, Stats., all condemnees are treated the same in appealing the amount of just compensation paid. A condemnee who conveys at an early stage of the proceedings has the right to appeal the amount of compensation paid just as does a property owner who loses title later by operation of law. Under sec. 32.06(2a), Stats., a condemnee who conveys property before the issuance of the jurisdictional offer is served with a “notice of the right to appeal the amount of compensation under this subsection” which right is identical to that of a property owner who extends the

process and requires the condemnor to complete the condemnation procedure. The condemnee has the right to pursue “the [appeal] procedures prescribed under subs. (9) (a) and (b), (10) and (12). . . .” sec. 32.06(2a), Stats. Similar provisions are found in sec. 32.05(2a), Stats., which provides that the condemnor must serve “a notice of the right to appeal the amount of compensation under this subsection” which appeal is “in the manner set forth in subs. (9) to (12) . . . [f]or purposes of any such appeal, the amount of compensation stated in the conveyance shall be treated as the award [of damages]. . . .”²

Thus, there are four different times when property is acquired under Chapter 32:

1. After the owner accepts the initial offer of the condemnor.
2. After the owner and condemnor negotiate, and the owner accepts a negotiated offer.
3. After the owner and condemnor negotiate unsuccessfully, and the condemnor issues a jurisdictional offer, which the owner accepts.

² Under sec. 32.05, Stats., the mechanism for transferring title by operation of law is the recording of an award of damages. sec. 32.05(7), Stats.

4. After the owner and condemnor negotiate unsuccessfully, and the condemnor issues a jurisdictional offer, which the owner rejects, and title transfers involuntarily by operation of law.

Under the two scenarios of conveyance prior to the issuance of a jurisdictional offer, the property owner retains the right to appeal for greater compensation. The Court of Appeals decision, however, discards the symmetrical operation of the statutes, by not allowing that property owner who successfully appeals to recover litigation expenses.

Amicus curiae believe the Court of Appeals application of the statute violates equal protection. Similarly situated property owners, all of whom have successfully challenged the amount paid for their property acquired by eminent domain, are not all treated the same under the Court of Appeals reading of the statute.

Under the Equal Protection clauses of Article I, Section 1 of the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution, respectively (Equal Protection Clauses), the State cannot enact legislation which discriminates between classes of citizens, in the absence of a rational basis for that

discrimination. Equal protection is guaranteed by Article I, Section 1 of the Wisconsin Constitution, which states:

All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

The Equal Protection Clauses of the United States and Wisconsin Constitutions are interpreted in an equivalent manner and Wisconsin courts apply the same legal analysis to equal protection claims. *In re Hezzie R.*, 219 Wis. 2d 848, 893, 580 N.W.2d 660 (1998); accord *State ex rel. Watts v. Combined Community Servs.*, 122 Wis. 2d 65, 77, 362 N.W.2d 104 (1985) (“The fundamental determination to be made when considering a challenge based upon equal protection is whether there is an arbitrary discrimination in the statute or its application”). The Equal Protection Clauses ensure that people will not be discriminated against with regard to “statutory classifications and other governmental activity.” *Jackson v. Benson*, 218 Wis. 2d 835, 901, 578 N.W.2d 602 (1998)(quoting *Harris v. McRae*, 448 U.S. 297, 322 (1980)).

A statute violates equal protection when it treats members of a similarly situated class differently. *Aicher v. Wis. Patients Comp.*

Fund, 2000 WI 98, ¶56, 237 Wis. 2d 99, 613 N.W.2d 849; *Tomczak v. Bailey*, 218 Wis. 2d 245, 261, 578 N.W.2d 166 (1998)(citing *State v. Post*, 197 Wis. 2d 279, 318, 541 N.W.2d 115 (1995)). A statute violates equal protection when “the legislature has made an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or a proper state policy.” *Milwaukee Brewers v. DHSS*, 130 Wis. 2d 79, 99, 387 N.W.2d 254 (1986). Equal protection requires that there exist reasonable and practical grounds for classifications created by the legislature. *Reginald D. v. State*, 193 Wis. 2d 299, 308, 533 N.W.2d 181 (1995). The court’s inquiry is to determine whether a classification scheme rationally advances a legitimate legislative objective. *State v. Post*, 197 Wis. 2d at 319.

There are three discrete issues in an equal protection analysis of legislation in Wisconsin. The first two are threshold issues: whether the legislation “create[d] a distinct classification of citizens” and treated one class “significantly differently from all others similarly situated.” *Milwaukee Brewers*, 130 Wis. 2d at 90. If both threshold tests are satisfied the court proceeds to the third issue of

determining whether there is a rational basis for the classification.
Id. at 98.

In the instant case, these threshold issues are met. The effect of the Court Appeals decision is to apply sec. 32.28(3)(d), Stats., so as to create two classes of condemnees who have successfully challenged the amount of the just compensation payment: (1) those whose property was acquired at a point in time after the issuance of a jurisdictional offer (favored class), and; (2) those whose property was acquired at a point in time prior to the issuance of a jurisdictional offer (disfavored class). The Court of Appeals decision goes on to treat the disfavored class of condemnees significantly differently than the favored class. The favored class recovers litigation expenses and preserves the just compensation funds intact. The disfavored class does not recover litigation expenses and is unable to preserve the just compensation funds intact. This treatment of the disfavored class is “significantly different” from the treatment of the favored class.

The question then arises as to whether there is a rational basis for this classificatory scheme. Where the government classification does not involve classifications based on a suspect class or a

fundamental right, the rational basis standard applies. *State v. Post*, 197 Wis. 2d at 319.³ The Wisconsin Supreme Court has observed that “the rational basis standard of review is not a toothless one.” *State ex rel. Grand Bazaar v. City of Milwaukee*, 105 Wis. 2d 203, 209, 313 N.W.2d 805 (1982). A court must not “blindly rubber stamp legislation . . . when careful review has revealed no logical link between the legislation and the objective it was enacted to effect.” *Id.* at 218.

To satisfy the rational basis test, a legislative classification must meet five criteria:

- (1) All classification[s] must be based upon substantial distinctions which make one class really different from another.
- (2) The classification adopted must be germane to the purpose of the law.
- (3) The classification must not be based upon existing circumstances only. [It must not be so constituted as to preclude addition to the numbers included within the class].
- (4) To whatever class a law may apply, it must apply equally to each member thereof.
- (5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

³ Arguably, sec. 32.28, Stats., involves just compensation, a fundamental right, and a higher standard applies.

Nankin v. Village of Shorewood, 2001 WI 92, ¶39, 245 Wis. 2d 86, 630 N.W.2d 141. In *Milwaukee Brewers*, the Wisconsin Supreme Court stated that the five part test is neither exclusive nor per se determinative in deciding whether a classification violates equal protection guarantees, but serves as a “useful analytical tool.” 130 Wis. 2d at 97-98. As explained by the Court, “[t]he basic question is whether there is a reasonable basis to justify the classification.” *Id.* at 98. We submit that there is no reasonable basis to justify the disparate treatment of the disfavored class in the instant case.

Absent from the Court of Appeals analysis is any suggested justification for drawing a line of demarcation between the favored and disfavored classes. Creating a distinction between classifications makes no logical sense. A property owner who conveys under threat of condemnation at an early stage of the condemnation procedure should not have lesser rights than a property owner whose property is taken by operation of law. From a timing standpoint, a property owner participating in an early conveyance thereby allows the condemnation process and the public improvement project to move forward in an expedited fashion. This saves the condemnor time and the expense of the additional

procedures. Thus, property owners should be encouraged to strongly consider the early conveyance, and not be penalized for doing so.

The Court of Appeals application of sec. 32.28(3)(d), Stats., fails the first and fifth criteria set out above, as the property owners are not so far different to justify substantially different legislative treatment. “The true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason, - some reason suggested by necessity, by such a difference in situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them.” *Nankin*, 2001 WI 92 at ¶43.

There are no “substantial distinctions” between the classes; the characteristics of the favored class and the disfavored class are not “so far different” from each other that they should be treated substantially differently. There is a symmetry in the procedures under both sec. 32.05, Stats., and sec. 32.06, Stats. Most notably, in terms of appeal rights, there is a similarity of treatment between the favored class and the disfavored class - - condemnees who convey property at an early stage of the proceedings have the same right to appeal for just compensation, just as those who lose title at the latest

stages of the proceedings. As a corollary, all property owners who are successful in meeting the statutory thresholds should be treated the same by being made whole through the payment of the litigation expenses associated with that recovery. There is no natural reason for interjecting disparate treatment of the disfavored class at the arbitrary point of recovery of litigation expenses.

The Court of Appeals application of sec. 32.28(3)(d), Stats., also fails the second criteria set out above. The classification adopted is not “germane to the purpose of the law.” The Court has already summarized the legislative intent of sec. 32.28, Stats.,:

The legislative intent in drafting sec. 32.28 was: (1) to discourage the condemnor from making inequitably low jurisdictional offers, and (2) to force the condemnor to indemnify the condemnee for attorney fees incurred by an appeal. . . . In allowing the condemnee to recover litigation expenses, the legislature sought to provide just compensation by ensuring that part of the award would not have to be used to pay for litigation expenses. . . .

Gottsacker Real Estate Co., Inc. v. State, 121 Wis. 2d 264, 268, 359 N.W.2d 164 (Ct. App. 1984). The classification set out in the Court of Appeals decision is not germane to the first stated purpose of sec. 32.28, Stats., - - to encourage condemnors to make fair offers. In fact, the decision actually undermines this articulated goal because a property owner will have no incentive to agree to a conveyance at

early stages of the proceedings and condemnors will cease making fair offers.

With reference to the second stated goal of making the property owner whole, the Court summarized in *Standard Theatres, Inc. v. Department of Transportation*, 118 Wis. 2d 730, 744-45, 349 N.W.2d 661 (1984), as follows:

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 the full value of the land, and then must pay for his or her attorney fees from this full value. The attorney 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 attorney 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 incurred in attempting to obtain this value.

The classification set out in the Court of Appeals decision simply is not true to the stated purposes of sec. 32.28, Stats. In fact, it is antithetical to the goal of making the condemnee whole because it removes the benefit of litigation expense reimbursement from a large group of condemnees.

Other decisions have emphasized as an additional policy of sec. 32.28, Stats., the encouraging of good faith negotiations. "The

legislative purpose in providing litigation expenses to a claimant who improves a municipality's highest written offer or jurisdictional offer by at least 15 percent is to encourage the municipality to engage in meaningful negotiations.” *Acquisition of Certain Lands by Benson*, 101 Wis. 2d 691, 697, 305 N.W.2d 184 (Ct. App.1981). Negotiations and the conveyances which result from them, are critically important to the condemnation process. The Court in *Warehouse II v. DOT*, 2006 WI 62, ¶1, 291 Wis. 2d 80, 715 N.W.2d 213, stated, “[g]ood faith negotiation prior to issuing a jurisdictional offer to purchase is not merely a technical obligation, but rather, it is a fundamental, statutory requirement necessary to validly commence condemnation and confer jurisdiction on the condemnation commission and the courts.” The Court emphasized the importance of negotiations as the foundation of the goal and purpose of providing just compensation, and as necessary for valid condemnations. *Id.* at ¶¶6, 7. The classification set out in the Court of Appeals decision is not germane to this stated purpose of sec. 32.28, Stats. In fact, the decision diminishes the importance of good faith negotiations because property owners will have no incentive to participate in acquisitions early in the process and good faith

negotiations will be relegated to the category of a mere technical step, and no longer be a fundament of the condemnation process.

The Court of Appeals decision should be reversed because it applies sec. 32.28(3)(d), Stats., in a manner which discriminates against condemnees who convey property prior to the issuance of a jurisdictional offer. There is no rational basis for providing a property owner whose property is acquired at an early stage of the proceedings with lesser rights than a property owner who forces the condemnor to take additional procedural steps. This is particularly true because the differential treatment actually undermines the judicially recognized purposes behind the statute - - encouraging condemnors to make fair initial offers, negotiating in good faith and making the successful property owner whole by not forcing them to pay for litigation expenses from the proceeds of the just compensation award. The Court of Appeals decision reads the statute in a manner which violates equal protection. It cannot stand.

CONCLUSION

For the reasons stated above and in the Brief of Plaintiffs-Respondents-Petitioners, amicus curiae ask this Court to reverse the

decision of the Court of Appeals.

Dated this 15th day of March, 2011.

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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), Stats., for a brief produced with a proportional serif font. The length of this brief is 2,885 words.

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**CERTIFICATE OF COMPLIANCE
WITH RULE 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 sec. 809.19(12), Stats. 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.

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 15th day of March, 2011.

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