STATE OF WISCONSIN
SUPREME COURT

MARK KLEMM AND
JEANNE KLEMM,

Plaintiffs-Respondents-Petitioners,

v.

AMERICAN TRANSMISSION
COMPANY LLC,

Defendant-Appellant.

Appeal No.
2009AP2784

Circuit Court Case No.
2008CV432

RESPONSE BRIEF OF DEFENDANT-APPELLANT AMERICAN TRANSMISSION COMPANY LLC

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

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ISSUES PRESENTED

1. Does Wis. Stat. § 32.28(3)(d), which allows condemnees to recover litigation expenses when the award of a condemnation commission exceeds "the jurisdictional offer or the highest written offer prior to the jurisdictional offer" by a certain threshold, allow owners to recover litigation expenses in an appeal from a negotiated agreement under Wis. Stat. § 32.06(2a), under which no jurisdictional offer is required or made?

Answered by the circuit court: Yes.

Answered by the court of appeals: No.

STANDARDS OF REVIEW

Whether a circuit court properly interpreted the relevant statute and applied it to the facts of a case are questions of law that the court of appeals reviews de novo. *D.S.G. Evergreen F.L.P. v. Town of Perry*, 2007 WI App 115, ¶ 6, 300 Wis. 2d 590, 596, 731 N.W.2d 667. When considering a question of law, no deference is owed to the circuit court's decision. *Maxey v. Redevelopment Auth. of the City of Racine*, 120 Wis. 2d 13, 18, 353 N.W.2d 812 (Ct. App. 1984).

A circuit court's award of attorney fees is subject to review under an erroneous exercise of discretion standard. *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶ 14, 308 Wis. 2d 103, 115, 746 N.W.2d 762. However, the "failure to apply the correct legal standards is an erroneous exercise of discretion." *LeMere v. LeMere*, 2003 WI 67, ¶ 14, 262 Wis. 2d 426, 436, 663 N.W.2d 789.

STATEMENT OF THE CASE

This case involves review of a published Court of Appeals opinion in *Klemm v. American Transmission Company LLC*, 2010 WI App 131, 329 Wis. 2d 415, 791 N.W.2d 233.

This is a case of pure statutory interpretation. Pursuant to the procedures in Chapter 32 of the Wisconsin Statutes, ATC sought an easement from Mark and Jeanne Klemm for purposes of constructing an electric transmission line.[1] Following negotiation, the Klemms entered into an agreement for the easement pursuant to the "Agreed Price" procedure in Wis. Stat. § 32.06(2a). ATC never issued a "jurisdictional offer," and none was required in light of the negotiated agreement.

Citing Wis. Stat. § 32.28(3)(d), the Klemms now seek to recover litigation expenses, including actual attorney fees, for costs incurred in appealing the amount of the compensation in the agreement. As the Court of Appeals

[1] American Transmission Company LLC is referred to variously in the circuit court record as "Defendant" or "Respondent," and hereinafter as "ATC." Mark and Jeanne Klemm are referred to variously in the circuit court record as "Plaintiffs" or "Petitioners," and hereinafter as "the Klemms."

correctly held, § 32.28(3)(d) permits recovery of litigation expenses only in cases in which a condemnor has issued a jurisdictional offer. Therefore, it does not apply here.

This interpretation of Wis. Stat. § 32.28(3)(d) is consistent with the history and structure of Chapter 32, as well as decades of well-settled case law interpreting Wis. Stat. § 32.28. The Klemms ask this Court to do what the legislature did not. This Court should affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 2007, pursuant to Wis. Stat. § 32.06,[2] ATC sought to acquire an easement from the Klemms for purposes of constructing a transmission line across a portion of the Klemms' property. (*See* R. 14, Ex. 1; Plaintiffs-Respondents-Petitioners' Appendix ("P-App.") 27-34.) The parties engaged in negotiation as set forth in Wis. Stat. § 32.06(2) and (2a). (*See id; see also* R. 13, P-App. 18-20.)

As required under Wis. Stat. § 32.06(2), ATC retained Steigerwaldt Land Services to appraise the property owned by the Klemms. (R. 14 at 1; P-App. 27.) The appraisal report concluded that the transmission line easement would result in a loss of value to the Klemm property of $7,750. (*See* R. 14 at 1; P-App. 27.) ATC provided a copy of the appraisal report to the Klemms. (R. 14 at 1; P-App. 27.) It is undisputed that the Klemms did not obtain a second appraisal at ATC's expense at that time. *See* Wis. Stat. § 32.06(2).

[2] Unless otherwise indicated, all references to Wisconsin Statutes are to the version 2007-2008.

On December 27, 2007, pursuant to the procedure in Wis. Stat. § 32.06(2a), the Klemms signed an Electric Transmission Line Easement and Certificate of Compensation ("Easement").[3] (R. 1, Ex. 1; P-App. 34.). The Easement conveyed certain easement interests to ATC in exchange for $7,750. (R. 14, Ex. 1; P-App. 29-34.) On January 15, 2008, ATC recorded the Easement with the Register of Deeds in Marathon County as required under Wis. Stat. § 32.06(2a). (*See* R. 14, Ex. 1 at 1; P-App. 29.) No jurisdictional offer was made or required.

On April 2, 2008, the Klemms appealed the amount of compensation in the Easement to the Marathon County Condemnation Commission. (R. 1; P-App. 5-7) They retained an appraiser, Jim Rawson, immediately thereafter. (R. 20 at 3; P-App. 94.)

On August 4, 2008, through their attorney, the Klemms first transmitted a copy of their appraisal to ATC. (R. 20 at 3-4; P-App. 94-95.)

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[3] Wis. Stat. § 32.06(2a) requires both a "conveyance" and a "certificate of compensation." In this case, the conveyance document (i.e. the Electric Transmission Line Easement) and the certificate of compensation are integrated into a single document, hereinafter referred to as the Easement. (*See* R. 14, Ex. 1; P-App. 29-34.)

The Condemnation Commission hearing took place on August 25, 2008. (R. 20 at 4; P-App. 95.) Following the hearing, the Condemnation Commission awarded the Klemms $10,000, or $2,250 more than the amount of compensation in the Easement. (R. 14, Ex. 2; P-App. 35-36.) The parties subsequently settled for a sum of $30,000. (R. 14, Ex. 3; P-App. 37-38.) Under the terms of that settlement, neither party appealed the Condemnation Commission's award. (R. 14, Ex. 3; P-App. 37-38.)

However, the parties disagreed about whether the Klemms were entitled to reimbursement under § 32.28 for "litigation expenses" incurred in appealing the amount of compensation paid for the Easement. (R. 14, Ex. 3; P-App. 37.) The parties agreed to allow the circuit court to decide that sole issue. (R. 14, Ex. 3; P-App. 37.)

On November 19, 2008, the Klemms moved the circuit court for litigation expenses under Wis. Stat. § 32.28(3)(d). (R. 12; P-App. 16-17.) The Klemms argued they were entitled to litigation expenses under Wis. Stat. § 32.28(3)(d). (R. 13; P-App. 20.) ATC filed a brief in opposition, arguing that the statute only entitles condemnees to litigation

expenses in cases when a jurisdictional offer had been made. (R. 15; P-App. 39-48.) ATC also pointed to case law holding that litigation expenses arising prior to a jurisdictional offer are not recoverable. (R. 15; P-App. 43, 47-48.) In this case, no jurisdictional offer was made or required. Instead, the compensation in the Easement was the result of a negotiated agreement pursuant to Wis. Stat. § 32.06(2a).

In an April 28, 2008, Decision on Motion for Litigation Expenses, the circuit court found that Wis. Stat. § 32.28(3)(d) authorized the Klemms to recover litigation expenses. (R. 18 at 6-7; P-App. 88-89.) The court held that under Wis. Stat. § 32.06, there are two ways that the issue of just compensation can be litigated: (1) an appeal from an Agreed Price under § 32.06(2a); or (2) a jurisdictional offer and petition under §§ 32.06(3) and (7). (R. 18 at 1; P-App. 89.) The court found that litigation expenses are available to condemnees, including the Klemms, who appeal via either scenario. (R. 18 at 2-4; P-App. 84-86.) The court also ruled that the Klemms were entitled to any litigation expenses arising after the recording of the Easement, finding that event

to be analogous to a jurisdictional offer. (R. 18 at 4-6; P-App. 86-88.)

In part, the circuit court based its Decision on the requirement that "statutory provisions which favor an owner regarding the compensation to be paid to him or her are to be liberally construed." (R. 18 at 6; P-App. 88.) The court stressed that the legislature authorized 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." (R. 18 at 6; P-App. 88.)

In light of the court's April 28, 2008, Decision, the parties stipulated to an amount of litigation expenses, and the circuit court entered final judgment for the Klemms. (R. 21; P-App. 113-15.) ATC timely appealed.

In an August 10, 2010, decision, the Court of Appeals reversed. *See Klemm*, 2010 WI App 131, ¶ 1. The Court of Appeals concluded that Wis. Stat. § 32.28(3)(d) only permits recovery of litigation expenses when a jurisdictional offer has been made. *Id.* Because the Klemms voluntarily entered into a negotiated agreement under Wis. Stat. § 32.06(2a), and

consequently, there was no jurisdictional offer, the Klemms were not entitled to recover their litigation expenses under Wis. Stat. § 32.28(3)(d). *Id.*

This Court granted the Klemms' Petition for Review.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY APPLIED THE PLAIN LANGUAGE OF WIS. STAT. § 32.28(3)(D).

A. Deviation from the American Rule requires explicit statutory authority.

Wisconsin follows the American Rule regarding attorneys' fees. *Elliott v. Donahue*, 169 Wis. 2d 310, 324-25, 485 N.W.2d 403 (1992). Under the American Rule, litigants must pay their own attorneys' fees unless there is a statute or enforceable contract providing otherwise. *Id.* at 323; *Kremers-Urban Co. v. American Emp'rs Ins. Co.*, 119 Wis. 2d 722, 744-45, 351 N.W.2d 156 (1984). Departures from the American Rule require explicit statutory authority. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶ 17, 275 Wis. 2d 1, 13, 683 N.W.2d 58).

B. The Court of Appeals correctly concluded that the plain text of Wis. Stat. § 32.28(3)(d) does not permit recovery of litigation expenses unless a "jurisdictional offer" has been made.

Under Wis. Stat. § 32.28(3)(d), litigation expenses[4] including attorneys fees shall be awarded to a "condemnee" if:

> (d) The award of the condemnation commission under…[section] 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.

Wis. Stat. § 32.28(3)(d) (emphasis added). Based on the plain text, the Court of Appeals correctly concluded that this statute does not permit recovery of litigation expenses unless a jurisdictional offer has been made.

1. Principles of statutory interpretation.

The court's purpose is to "faithfully give effect to the laws enacted by the legislature." *D.S.G. Evergreen F.L.P. v. Town of Perry*, 2007 WI App 115, ¶ 9, 300 Wis. 2d 590, 731 N.W.2d 667. Courts defer to the policy choices of the legislature and assume that the legislature's intent is

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[4] "Litigation expenses" means "the sum of the costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before the condemnation commissioners, board of assessment or any court under this chapter." Wis. Stat. § 32.28(1).

expressed in the statutory language it chose. *Id.* If the statutory language, structure, and context yield a plain and clear meaning, the statute is unambiguous. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. If the statute is unambiguous, the court applies its plain meaning without further inquiry or resort to extrinsic aids. *Id.*

Statutory language also should be read "to give reasonable effect to every word, in order to avoid surplusage." *Id.* at ¶ 44.

If a statute is ambiguous, courts may turn to extrinsic sources, such as legislative history, to ascertain the meaning of the statute. *Id.* at ¶ 48. However, statutory interpretation "involves the ascertainment of meaning, not a search for ambiguity." *Id.* at ¶ 46; *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 25, 260 Wis. 2d 633, 647, 660 N.W.2d 656.

2. Overview of the § 32.06 acquisition and condemnation statutes.

The conveyance in this matter was the result of an Agreed Price transaction pursuant to § 32.06(2a). When parties agree on a price pursuant to this section, no jurisdictional offer is made nor required. Instead, § 32.06

contemplates a period of negotiation prior to issuance of a jurisdictional offer.

The first step in the acquisition process is for condemnors to obtain a full narrative appraisal of the property to be acquired. Wis. Stat. § 32.06(2)(a). In obtaining the appraisal, the condemnor is required to confer with the owners "if reasonably possible." *Id.* The condemnor must provide the owner with a copy of the full appraisal. Wis. Stat. § 32.06(2)(b).

Furthermore, the condemnor is required to inform the owner of the owner's right to obtain his or her own appraisal by a qualified appraiser, at the condemnor's cost. *Id.* The owner has sixty days to submit his or her own appraisal to the condemnor. *Id.* The appraisal can be used "in any subsequent appeal" if the owner "does not accept a negotiated offer under sub. (2a) or the jurisdictional offer under sub. (3) *Id.*

There is no dispute that ATC followed the above procedures in this case.

Wis. Stat. § 32.06(2a) is titled "Agreed Price." This subsection sets forth the requirements for a valid "negotiated

offer." *See* Wis. Stat. § 32.06(2a)-(2)(b). Under (2a), the condemnor is required to "negotiate personally with the owner…of the property sought to be taken for the purchase of the same." Wis. Stat. § 32.06(2a). If the parties agree on a price, the condemnor is required to record any conveyance executed as a result of the negotiations. *Id.*

However, if the parties are not able to agree on a price, the next step is for the condemnor to make a "jurisdictional offer." Wis. Stat. § 32.06(3). If the jurisdictional offer is accepted, then the amount offered will be paid, title is conveyed, and no further litigation is necessary. *See* Wis. Stat. § 32.06(6). If the jurisdictional offer is not accepted, then the condemnor may petition the court for an assignment to the county condemnation commission for a hearing on the issue of just compensation. Wis. Stat. § 32.06(3).

In a negotiated agreement or "Agreed Price" transaction, "any person named" in the Certificate of Compensation may appeal the amount of compensation paid. Wis. Stat. § 32.06(2a). This right to appeal, however, is statutory and limited. The right to appeal in Wis. Stat. § 32.06(2a) provides a narrow basis for owners to alter a

provision of a negotiated, contractual agreement between two parties. The owner has six months from the date of the recording of the Certificate of Compensation to appeal. *Id.* The person appealing must file a petition in circuit court, which then assigns the matter to the county condemnation commission procedure for hearing. *Id.*

Wis. Stat. § 32.06(2a) provides that "the procedures prescribed under subs. (9)(a) and (b), (10) and (12) and chs. 808 and 809 shall govern such appeals." Notably, that section does not provide that Wis. Stat. § 32.28 applies.

3. The Court of Appeals properly applied the plain language of Wis. Stat. § 32.28(3)(d), giving reasonable effect to each word.

Applying the plain text in this case, the Court of Appeals found that Wis. Stat. § 32.28(3)(d) applies only when a jurisdictional offer is made. *Klemm*, 2010 WI App 131, ¶ 10. Because the text was so plain, there was no need to harmonize the statute with other provisions in Chapter 32. *Id.* The Court of Appeals explained:

> The use of the article "the" anticipates that there is, in fact, a jurisdictional offer. For example, the statute does not say prior to "any jurisdictional offer" or "the jurisdictional offer, if any," nor does it expressly reference the "agreed price" under subsec. (2a).

Id. at ¶ 10.

If no jurisdictional offer was made, then clearly the basis for litigation expenses cannot be the amount of the jurisdictional offer. Nor can the basis be the amount of the highest offer "prior to" the jurisdictional offer: when no jurisdictional offer exists, then the highest offer is not "prior to" anything.

Under any other interpretation, the phrase "prior to the jurisdictional offer" becomes surplusage. *See Kalal*, 2004 WI 58, ¶ 46 (statutes should be read "to give reasonable effect to every word, in order to avoid surplusage"). In cases like this one, there will never be a jurisdictional offer. Under the circuit court's interpretation, a condemnor could simply make a new settlement offer, thereby evading litigation expenses, because every offer is "prior to the jurisdictional offer." Conversely, it would be unclear whether expenses are recoverable when a condemnor made no formal written offer prior to the execution of an agreement under Wis. Stat.

§ 32.06(2a).[5] The phrase "prior to the jurisdictional offer" would serve no discernible purpose in the statute.

In short, Wis. Stat. § 32.28(3)(d) quickly unravels if the highest written offer need not be *prior to* anything. The Court of Appeals properly interpreted the plain meaning of the statute, permitting recovery of litigation expenses only when a jurisdictional offer has been made.

C. The statutory structure and context of Wis. Stat. § 32.28 and 32.06 support the Court of Appeals' plain text interpretation.

The statutory structure and context of Wis. Stat. § 32.28 and 32.06 support the Court of Appeals' plain text interpretation.

1. The jurisdictional offer is the formal commencement of condemnation proceedings.

The jurisdictional offer is "the formal commencement of condemnation proceedings." *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 210, 496 NW 2d 57 (1993). Notably, the word "condemnee" does not even appear in Wis. Stat. § 32.06 until § 32.06(6), when discussing acceptance of the jurisdictional offer. The preceding subsections use the

[5] Indeed, the record here does not contain any written offer from ATC to the Klemms. The signed Easement materials are not the same as a "written offer."

term "owner" or "person." Prior to a jurisdictional offer, there has been no taking. *See E-L Enterprises, Inc. v. Milw. Metro. Sewerage*, 2010 WI 58, ¶ 37, 785 N.W.2d 409 (no compensable taking occurs unless there is "an actual physical occupation by the condemning authority" or "a government-imposed restriction" that "deprived the owner of all, or substantially all, of the beneficial use of his property"). Only after the jurisdictional offer does an owner become a "condemnee."

The likelihood or possibility of condemnation is not the same as condemnation itself. *See Howell Plaza, Inc. v. State Highway Comm'n*, 66 Wis. 2d 720, 226 N.W.2d 185 (1975) (no taking occurred when condemnor negotiated for and acquired other properties in anticipation of public project, gave notice to owners of imminence of condemnation, and urged owner to forego development due to imminence of project).

2. <u>The purpose of negotiation is to achieve a consensual sale that is not "forced" by a court.</u>

Consistent with the recognition that the jurisdictional offer commences formal condemnation proceedings, Chapter

32 is designed to encourage mutual negotiation prior to the jurisdictional offer. This 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. State Dept. of Trans., 2006 WI 62, ¶ 13, 291 Wis. 2d 80, 91-92, 715 N.W.2d 213. Conversely, a condemnee can recover litigation expenses when the condemnee is "forced to litigate in order to obtain the full value of the land." *See id.* at ¶ 31.

At the negotiation stage, the owner is not "forced to litigate." Upon receiving the condemnor's opening offer, the owner may accept the offer, reject the offer, or negotiate. The owner has 60 days to obtain his or her own appraisal at the condemnor's expense. Wis. Stat. § 32.06(2)(b). If the owner shares his or her appraisal with the condemnor, the condemnor is *required* to consider it in negotiation. *Id.*

Thus, Wis. Stat. § 32.06(2a) presupposes mutual, two-way exchange of information.[6]

When this process is successful, the result is a "consensual sale arrived at through negotiation." *See Warehouse II*, 2006 WI 62, ¶ 13. 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 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.

In contrast, consider 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

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[6] Indeed, a condemnee may recover litigation expenses when the condemnor fails to negotiate in good faith during this period. *Warehouse II*, 2006 WI 62, ¶ 1.

the amount of the jurisdictional offer, the condemnor has one option only: present his or her case to the condemnation commission. At that point, the condemnee is truly "forced to litigate."

As the Court of Appeals found, the Klemms were not "forced to litigate" the issue of compensation. *See Klemm*, 2010 WI App 131, ¶ 12. ATC had not yet commenced formal condemnation proceedings by issuing a jurisdictional offer. Rather, the Klemms "contractually agreed to the amount of compensation and voluntarily conveyed the easement. It was the Klemms who chose to subsequently litigate the amount of just compensation." *Id.*

3. Under the circuit court's 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.

The Klemms argue that that the purpose of Chapter 32 is to make condemnees whole. However, Chapter 32 does not reflect a singular policy purpose, but rather a myriad of competing concerns. *See, e.g., Milwaukee Post No. 2874 VFW v. Redev. Auth. of Milwaukee*, 2009 WI 84, ¶¶ 50-51, 319 Wis. 2d 553, 581, 768 N.W.2d 749 (noting that

compensation must be just in regard to both individual owners and the public).

Government entities, public utilities, and other condemning authorities must balance their obligations to individual owners during the condemnation process with their prudence obligations. Acquisition costs for eminent domain are passed on to rate payers and taxpayers. Unnecessary litigation places burdens on scarce judicial resources. Thus, everyone benefits when the condemnor and owner negotiate in good faith and agree on compensation without the need for litigation.

However, under the circuit court's interpretation of Wis. Stat. § 32.28(3)(d), condemnors will be potentially liable for litigation expenses based on their first and opening offer. The circuit court's interpretation allows no opportunity for the condemnor to learn more about the owner's property, reevaluate its opinion regarding fair market value, and make a higher offer to the owner.

Initial offers are frequently modified if an owner brings additional facts to light. During the negotiation stage, owners have the right to obtain their own appraisal at the

condemnor's expense. *See* Wis. Stat. § 32.06(2)(b). A condemnor may learn of new facts about a property through the owner or the owner's appraisal that lead to a revised, higher offer. However, when an owner accepts the first offer without explanation or fails to obtain and share a second appraisal, the condemnor has no chance to consider additional information and revise the initial offer.

Moreover, once an owner has incurred attorney fees, there is a disincentive for the owner to settle prior to the condemnation commission hearing for any amount that does not also cover the attorney fees already expended.

This case is a case in point. The Klemms did not avail themselves of their statutory right to obtain a second appraisal, at ATC's expense, during the negotiation period in 2007. *See* Wis. Stat. § 32.06(2)(b). Instead, the Klemms accepted the amount of compensation reflected in the first appraisal obtained by ATC and provided to the Klemms. (*See* P-App. 27; P-App. 34.) The appeal to the condemnation commission resulted in a $10,000 award, or $2,250 more than ATC's initial offer. (*See* P-App. 15.) However, by the time the Klemms first transmitted *their* appraisal to ATC in August

2008, it would not have been in their interest to settle for $10,000. By then, the Klemms had incurred more than $2,250 in litigation expenses. (*See* P-App. 92-95, 99-104, 108.)

Ultimately, the parties here were able to reach a settlement for a higher compensation amount, but only because they agreed to temporarily set aside the issue of litigation expenses. (*See* P-App. 37-38.) As the Court of Appeals recognized:

> [H]ad the Klemms initially negotiated a price they were satisfied with, there would have been substantially less delay, no need for a jurisdictional offer, and no unnecessary litigation.

Klemm, 2010 WI App 131, ¶ 13 n.7 (emphasis in original).

Punishing condemnors based on initial offers makes it impossible for condemnors to balance their obligations both to owners and to taxpayers and ratepayers. It invites inflated initial offers unrelated to fair market value, *see* Wis. Stat. § 32.09, essentially forcing condemnors to pay preemptive litigation expenses to avoid the risk of having to pay them later. And because every acquisition under Chapter 32 begins with an initial offer, condemnors will be required to pay those costs for every property affected by a public project. Nothing

in Wis. Stat. § 32.06 or 32.28 evinces a legislative purpose to impose such obligations during the negation stage. Instead, the legislature chose to allow litigation expenses after a jurisdictional offer. At that point, an owner is truly "forced to litigate."

D. The Court of Appeals' interpretation does not render superfluous the language "or the highest written offer prior to the jurisdictional offer."

The Klemms argue also that the Court of Appeals' interpretation makes the phrase "or the highest written offer prior to the jurisdictional offer" surplusage. However, Wisconsin courts expressly addressed the application of this phrase in *City of La Crosse v. Benson*, 101 Wis. 2d 691, 305 N.W.2d 184 (Ct. App. 1981). The phrase is not superfluous, and *Benson*'s application of the phrase supports ATC's position here.

As in this case, the issue in *Benson* was recovery of litigation expenses under Wis. Stat. § 32.28(3)(d). The city acquired property for a parking lot. *Id.* at 693. The city's highest written offer prior to the jurisdictional offer was $32,000, followed by a jurisdictional offer in the amount of $32,841. *Id.* at 693-94. When the condemnee failed to accept

the jurisdictional offer, the city petitioned the circuit court for a determination of just compensation pursuant to Wis. Stat. § 32.06(3). *Benson*, 101 Wis. 2d at 693. Following a hearing, the commission awarded $37,500. *Id.* The condemnee moved for litigation expenses. *Id.* at 694.

The court of appeals held that for a condemnee to recover litigation expenses, the commission award must exceed *either* the jurisdictional offer *or* the highest written offer prior to the jurisdictional offer by 15 percent and $700. *See id.* at 695-97. The court found that the commission award exceeded the highest written offer prior to the jurisdictional offer (i.e. $32,000) by $5,500. *Id.* at 698. This was more than 15 percent and more than $700 of $32,000. *Id.* The condemnee was therefore entitled to litigation expenses under Wis. Stat. § 32.28(3)(d). *Id.* *Benson* therefore illustrates how the phrase "or the highest written offer prior to the jurisdictional offer" applies.

Benson is consistent with ATC's position and with the Court of Appeals' decision here. Under *Benson*, a condemnee may recover litigation expenses pursuant to § 32.28(3)(d) based on *either* the jurisdictional offer *or* the

highest written offer prior to the jurisdictional offer. This interpretation discourages litigation by encouraging resolution through meaningful negotiation. *See Benson*, 101 Wis. 2d at 697. Allowing recovery based on "the highest written offer prior to the jurisdictional offer" encourages condemnors to make a written offer that is close to or as high as the amount of the jurisdictional offer. In turn, owners gain another chance to accept a higher offer and avoid litigation. As *Benson* illustrates, the phrase "or the highest written offer prior to the jurisdictional offer" is not surplusage.

E. The Court of Appeals' decision is consistent with case law holding that litigation expenses incurred prior to a jurisdictional offer are not recoverable in any condemnation case.

The Court of Appeals' decision is also consistent with decisions holding 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 115, ¶¶ 14-15 (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 v. DOT*,

109 Wis. 2d 602, 607, 327 N.W.2d 145 (Ct. App. 1982) (expenses prior to jurisdictional offer not recoverable under Wis. Stat. § 32.28(1)) (abrogated in part on other grounds by *Standard Theatres, Inc. v. State Dept. of Transp.*, 118 Wis. 2d 730, 349 N.W.2d 669 (1984)).

Moreover, "litigation expenses are only recoverable after the date of the jurisdictional offer *in all condemnation cases*." *D.S.G. Evergreen*, 2007 WI App 115, ¶ 15 (emphasis added). An attorney can "charge for time and expenses prior to the jurisdictional offer. That, however, is solely between attorney and client. A condemnor is not responsible for those fees." *Id.* at ¶ 17, n.5.

In its Decision, the circuit court stated that 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." (R. 18 at 6; P-App. 82.) The circuit court concluded that those goals are just as important at the negotiation stage as they are at the jurisdictional offer stage. *(Id.)*

In support of these assertions, the Klemms and the circuit court emphasize two cases: *Standard Theatres, Inc. v. State DOT*, *supra*, 118 Wis. 2d 730, and *Redev. Auth. of Green Bay v. Bee Frank, Inc.*, 120 Wis. 2d 402, 355 N.W. 2d 240 (1984).

However, those two 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." *See Bee Frank, Inc.*, 120 Wis. 2d at 411 (emphasis added). A statutory requirement of Wis. Stat. § 32.28(3)(d) is a jurisdictional offer.

Significantly, the legislature has never adopted a rule making condemnees whole in *all* instances. The *Dairlyand Power* Court recognized this:

> The inflexible rule established in *Kluenker* will in some cases cause inequities that the legislature could not have intended. Under this rule, recovery for fees based on an attorney's, appraiser's, or engineer's work product developed prior to a jurisdictional offer and subsequently used at a condemnation proceeding could be unfairly limited.

Dairyland Power, 110 Wis. 2d at 381, n.1.

Litigation expenses "are available to a condemnee only if certain conditions are met." *See Wisconsin Mall Properties, LLC v. Younkers, Inc.*, 2006 WI 95, ¶ 42, 293 Wis. 2d 573, 589, 717 N.W.2d 703. Condemnees may expend money in a condemnation case that will not be recoverable under Wis. Stat. § 32.28. *D.S.G. Evergreen*, 2007 WI App 115, ¶ 17, n.5. Nonetheless, courts "cannot assume the legislature intended attorney's fees be recoverable in circumstances other than those expressly mentioned" in the statute. *Kluenker*, 109 Wis. 2d at 606; *In re: Estate of Wolf*, 2009 WI App 183, ¶ 16, 322 Wis. 2d 674, 689, 777 N.W.2d 19.

In summary, the Court of Appeals' decision is consistent with long-standing case law holding that litigation expenses incurred prior to a jurisdictional offer are not recoverable in any condemnation case.

F. The Court of Appeals' decision is consistent with the legislative history of Wis. Stat. §§ 32.28 and 32.06(2a).

The Klemms cite a 1977 Legislative Council Staff Brief ("Staff Brief") in support of their argument that the

legislature intended litigation expenses to be recoverable here. (*See* Legislative Council Staff Brief 77-7 (June 13, 1977), available at P-App. 49-71.) Because the Court of Appeals found that § 32.28(3)(d) was unambiguous, it was unnecessary for the court to examine legislative history. *See Kalal*, 2004 WI 58, ¶ 51 (traditionally, "resort to legislative history is not appropriate in the absence of a finding of ambiguity"). In this case, however, legislative history confirms the Court of Appeals' plain meaning interpretation.

1. Prior statutes did not permit recovery when a purchase price was negotiated; that did not change in 1977.

The current § 32.28 was enacted in 1977. Prior to that time, Wisconsin Statutes permitted recovery of costs and attorney's fees under § 32.06 only when a condemnor abandoned the condemnation proceeding after the commission's award. *See* Wis. Stat. § 32.06(6)(a) (1975-76). (*See also* Staff Brief, P-App. 52).

As explained in the Staff Brief, prior to 1977, statutes did not permit recovery of expenses when: 1) a purchase price was negotiated, or 2) a jurisdictional offer was unconscionably low. (P-App. 52.) Thus, the legislature was

well aware of concerns that the then-existing statutes contained no mechanism for recovery under these two circumstances. (*See id.*)

With the enactment of the current § 32.06(2a) and § 32.28, the legislature adopted language expressly addressing the second scenario – inequitably low jurisdictional offers. *See* Wis. Stat. § 32.28(3)(d), (e), (f), (g), and (h). Significantly, however, the legislature did *not* adopt language addressing recovery when a purchase price was negotiated. Instead, when the legislature drafted the current fee-shifting provisions in Wis. Stat. § 32.28, the legislature chose to award damages using a formula defined in relation to a "jurisdictional offer."[7]

The Klemms cite excerpts from the Staff Brief summarizing various policy rationales for fee-shifting statutes. (*See* Klemm Brief at 17-18.) The legislature did not adopt any of these policy rationales in any statement of purpose. At most, the excerpts establish that legislators *were*

[7] Nor did the legislature incorporate any reference to litigation expenses into the Agreed Price provisions in Wis. Stat. § 32.06(2a). *See* Wis. Stat. § 32.06(2a) (noting that "the procedures prescribed under subs. (9)(a) and (b), (10) and (12) and chs. 808 and 809 shall govern such appeals").

aware of policy concerns, such as unequal bargaining power between condemnors and owners.

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 owner, pay for a second appraisal by a qualified appraiser of the owner's choosing, and provide the names of other owners to whom offers have been made. *See* Wis. Stat. § 32.06(2)-(2a). In addition, the statutes now allow owners to recover litigation expenses in more (but not all) cases. *See* Wis. Stat. § 32.28(3).

However, the policy concerns 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). The Court's task here is not to decide which policy is most compelling, but rather to apply the law as written. Prior to 1977, the statutes did not permit recovery

of costs when the purchase price was negotiated. That did not change with the 1977 amendments.[8]

> 2. Prior to the 1977 changes, the legislature was aware of provisions in other states that allowed for recovery of expenses without reference to a jurisdictional offer.

In fact, in 1977, many other states maintained statutes that allowed for recovery of expenses, including attorney fees, *without* reference to a jurisdictional offer. (*See* P-App. 65-71.) As the Staff Brief illustrates, the legislature was aware of these other possible recovery formulations.

For example, Iowa permitted recovery of costs and attorney's fees "if the award of the commissioners exceeds one hundred ten percent of the final offer of the [condemnor] prior to condemnation." (P-App. 66, citing Iowa Code Ann. § 472.33.)

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[8] A 1979 *Wisconsin Bar Bulletin* article contains a concise summary of the 1977 changes to Chapter 32. *See* James S. Thiel, "New Developments in Law of Eminent Domain, Condemnation and Relocation," *Wisconsin Bar Bulletin*, 23-27 (June 1979). Of relevance to this matter, the author noted:

> The phrase "certificate of compensation" is not mentioned under sec. 32.28, Stats., as a basis for measuring increased amounts triggering condemnor payment of litigation expenses.

Id. at 25.

Oregon awarded costs and attorney fees if the amount of compensation by a trial court "exceeds the highest written offer in settlement… at least 30 days prior to commencement of said trial," or if the court finds that "the first written offer made by condemnor…in settlement prior to filing of the action did not constitute a good faith offer." (P-App. 66, citing Or. Rev. Stats. § 35.346.) Washington code contained a similarly worded provision. (P-App. 69, citing Wash. Rev. Code § 8.25.070(1)(b).)

Alaska awarded costs and attorney fees if "the award of the court was at least ten percent larger than the amount deposited by the condemning authority" or if "allowance of costs and attorney's fees appears necessary to achieve a just and adequate compensation of the owner." (P-App. 68, citing Ala. Civ. Rule 72.)

Finally, the Uniform Eminent Domain Code awarded costs if the compensation award "is equal to or greater than the amount specified in the last offer of settlement made by the [condemnor]." (P-App. 71, citing UEDC § 1205.)

3. The legislature's intent is expressed in the statutory language it chose in 1977, which expressly refers to a jurisdictional offer.

When drafting Wis. Stat. § 32.28 in 1977, the legislature could have based Wis. Stat. § 32.28(3)(d) upon the "jurisdictional offer or the highest written offer prior to *a* jurisdictional offer, *if any*." The legislature could have provided that litigation expenses "shall be awarded to the condemnee if the award of the condemnation commissioners exceeds *the compensation for acquisition as recorded in the Certificate of Compensation*," or "exceeds the *Agreed Price*," or "exceeds the *price negotiated pursuant to § 32.06(2a)*" by a particular amount.

Indeed, under the current Wis. Stat. § 32.10, the legislature instructs courts how to proceed in cases of inverse condemnation, when no jurisdictional offer is made or required. That statute provides:

> If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall 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…*

Wis. Stat. § 32.10 (emphasis added). Thus, the legislature knows how to draft a provision instructing a court to proceed

as if a jurisdictional offer has been made when it actually has not.

In drafting Wis. Stat. § 32.28(3)(d), the legislature could have chosen one of these formulations or any of the standards in the statutes from other states it considered during the drafting process. It did not. Instead, the legislature chose a formulation expressly referencing a jurisdictional offer. The legislature's intent is expressed in the words it chose. *See D.S.G. Evergreen*, 2007 WI App 115, ¶ 9; *Kalal*, 2004 WI 58, ¶ 44. If the legislature had intended courts to proceed from Wis. Stat. § 32.06(2a) as if a jurisdictional offer had been made, the legislature would have said so, just as it did in Wis. Stat. § 32.10.

As outlined above, the legislative history of § 32.28 confirms the Court of Appeals' plain-text interpretation.

G. Wis. Stat. § 32.06(10)(b) is irrelevant.

The Klemms also argue that ATC is protected from paying more than just compensation by Wis. Stat. § 32.06(10)(b). That statute provides that if a jury verdict amount does not exceed the "commissioner's award," the condemnor can obtain a judgment for the difference.

However, that statute has nothing to do with whether a party can recover litigation expenses under § 32.28.

Here, the Klemms rely on *Dorschner v. State 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), which contains some of the same procedures as § 32.06(2a). The precise issue was whether Wis. Stat. § 32.05(11)(a) allowed the condemnor to recover the amount of compensation it overpaid in the negotiated agreement. *Id.* at 238. The court held that the condemnor could recover the overpayment. *Id.* at 242. To determine the amount, the court interpreted the amount in the negotiated agreement as the "award" and subtracted the amount of the jury verdict. *Id.* at 242-43. The *Dorschner* court also noted, "The fact that the condemnation may be achieved via a purchase agreement under § 32.05(2a) does not render the rest of the provisions of ch. 32 inapplicable." *Id.* at 241.

Based on this language, the Klemms argue that all of the rights in Chapter 32 apply to appeals from a negotiated purchase price, including the right to recover litigation

expenses under § 32.28(3)(d). (*See* Plaintiffs-Respondents-Petitioners' Brief ("Klemm Br.") at 20.)

However, *Dorschner* is inapplicable for at least three reasons. First, litigation expenses under § 32.28 were not before the court in *Dorschner*. The only issue was whether Wis. Stat. § 32.05(11)(a) authorized the condemnor to recover the amount of compensation it overpaid to the condemnee. *See Dorschner*, 183 Wis. 2d at 238. Litigation expenses and compensation are separate and distinct concepts. Section 32.05(11)(a), and its counterpart § 32.06(10)(b), are irrelevant here.

Second, *Dorschner* interpreted the condemnation procedures in § 32.05, which differ materially from the procedure in § 32.06. The differences make meaningful comparison difficult. For example, the holding 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 stated in the conveyance shall be treated as the award…"). Thus, it is doubtful whether *Dorschner* has any application in § 32.06 cases.

Finally, unlike here, the condemnor in *Dorschner* sought to apply a subsection that was expressly incorporated under the negotiated agreement provisions in Wis. Stat. § 32.05(2a). Section 32.05(2a) provides: "Any person named in the conveyance may…appeal from the amount of compensation…in the manner set forth in [§ 32.05] subs. (9) to (12)." *See* Wis. Stat. § 32.05(2a); *cf.* Wis. Stat. § 32.06(2a). In *Dorschner*, the condemnor sought to apply sub. (11), which was one of the subsections incorporated into § 32.05(2a). In contrast, the Klemms seek to apply Wis. Stat. § 32.28, which is *not* incorporated or mentioned in § 32.06(2a).

In sum, Wis. Stat. § 32.06(10)(b), *Dorschner* and the other statutes discussed therein are not relevant here.

H. The Court of Appeals' decision does not conflict with Wis. Stat. § 32.28(2) or § 814.02.

Amici curiae, consisting of several attorneys who routinely represent owners in condemnation litigation, filed two briefs with this Court. In one of their briefs, amici curiae argue that the Court of Appeals' interpretation of Wis. Stat. § 32.28(3)(d) conflicts with Wis. Stat. §§ 32.28(2) and 814.02. (*See* Br. of Amicus Curiae in Support of Petition for

Review at 9.) Wis. Stat. § 814.02 makes discretionary statutory costs generally available, while § 32.28(2) makes litigation expenses and statutory costs available to certain classes of condemnees. There is no conflict here.

Section 32.28(2) states:

> **(2)** Except as provided in sub. (3), costs shall be allowed under ch. 814 in any action brought under this chapter. If the amount of just compensation found by the court or commissioners of condemnation exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer, the condemnee shall be deemed the successful party under s. 814.02 (2)

Amici argue that if this subsection is interpreted pursuant to the Court of Appeals' decision here, owners like the Klemms would not be entitled to statutory costs. This conclusion, amici curiae assert, "obviously conflicts with the general rules of civil procedure found in Chapter 814." (*Id.*) However, there is no conflict here.

First, statutes are not presumed to be in conflict, and courts must make every effort to harmonize them. *See, e.g.*, *State v. Fischer*, 2010 WI 6, ¶ 24, 322 Wis. 2d 265, 778 N.W.2d 629; *State Dept. of Corrections v. Schwarz*, 2005 WI 34, ¶ 28, 279 Wis. 2d 223, 693 N.W.2d 703. When "confronted with an apparent conflict between statutes," courts must "construe sections on the same subject matter to

harmonize the provisions and to give each full force and effect." *Fischer*, 2010 WI 6, ¶ 24; *see also Bingenheimer v. Wis. Dep't of Health & Soc. Servs.*, 129 Wis. 2d 100, 107-08, 383 N.W.2d 898 (1986).

It is a cardinal rule that "conflicts between different statutes, by implication or otherwise, are not favored and will not be held to exist if they may otherwise be reasonably construed" in a manner that serves each statute's purpose. *Town of Clayton v. Cardinal Const. Co., Inc.*, 2009 WI App 54, ¶ 14, 317 Wis. 2d 424, 435, 767 N.W. 2d 605 (internal citations omitted).

In this case, §§ 32.28(2) and 814.02 can be reasonably construed in a manner that serves each statute's purpose. The first sentence of § 32.28(2) provides: "Except as provided in sub. (3), costs shall be allowed under ch. 814 in any action brought under this chapter." This sentence, together with the reference to § 814.02(2) in the next sentence, makes clear that § 814.02(2) applies to condemnation proceedings. Section 814.02(2) makes statutory costs and disbursements available "to any party, in whole or in part, in the discretion of the court…" Wis. Stat. § 814.02(2).

Sections 32.28(2) and 32.28(3) modify the application of § 814.02(2) such that costs are no longer discretionary under some circumstances. Section 32.28(2) provides that the condemnee "shall be deemed the successful party" if "the amount of just compensation found by the court or commissioners of condemnation exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer." Thus, the treatment of the condemnee as the successful party is mandatory, not discretionary, under those circumstances. In addition, § 32.28(3) identifies additional circumstances in which litigation expenses "shall be awarded" to the condemnee in lieu of statutory costs. *See* Wis. Stat. § 32.28(3). The award of costs or litigation expenses is no longer discretionary under those circumstances.

However, courts still retain discretionary authority under Wis. Stat. § 814.02(2) to award costs under *other* circumstances. Namely, courts retain discretion to award costs to an owner who successfully appeals from an Agreed Price transaction under Wis. Stat. § 32.06(2a). Thus, the

Court of Appeals' interpretation of § 32.28(3)(d) does not conflict with § 32.28(2) or Chapter 814.

I. Liberal construction does not negate the Court's duty to apply the law as written.

Both the Klemms and the circuit court stress that courts are to "liberally construe statutory provisions regarding compensation for eminent domain takings to favor the property owner." *D.S.G. Evergreen*, 2007 WI App 115, ¶ 12. This principle was a significant factor in the circuit court's decision to grant litigation expenses to the Klemms. (*See* R. 18 at 6; P-App. 15.) However, the Court of Appeals properly declined to apply this principle here.

As a preliminary matter, litigation expenses are not "just compensation." *See* Wis. Stat. § 32.09; *see also Wieczorek v. Franklin*, 82 Wis. 2d 19, 23, 260 N.W.2d 650 (1978); *Martineau v. State Conservation Comm'n*, 54 Wis. 2d 76, 85, 194 N.W.2d 664 (1972); *Warehouse II*,, 2006 WI 62, ¶ 37 (J. Abrahamson, dissenting).

Wisconsin courts have long held that the constitutional requirement of "just compensation" does not compel the condemnor to pay attorney's fees in eminent domain proceedings. *W.H. Pugh Coal Co. v. State*, 157 Wis. 2d 620,

634-35, 460 N.W.2d 787 (Wis. App. 1990); *Leathem Smith Lodge, Inc. v. State*, 94 Wis. 2d 406, 420, 288 N.W.2d 808 (1980); *Wieczorek*, 82 Wis. 2d at 23.

The allowance of attorney's fees in condemnation cases "is a matter of policy to be determined by the legislature and not a matter of constitutional right." *Leathem Smith*, 94 Wis. 2d at 420; *Wieczorek*, 82 Wis. 2d at 23. Thus, the Court's sole task is to interpret Wis. Stat. § 32.28(3)(d) and related statutes as written. The Court of Appeals properly did so here.

Moreover, the "liberally construe" approach alone is a principle without meaningful boundaries. In construing or interpreting a statute, "the court is not at liberty to disregard the plain, clear words of the statute." *Kalal*, 2004 WI 58, ¶ 46; *State v. Pratt,* 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967). 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). Application of the plain meaning of § 32.28 therefore does not depend on whether the interpretation of the statute is based on a strict or

liberal construction. *See D.S.G. Evergreen*, 2007 WI App 115, ¶ 14.

Wis. Stat. § 32.28(3)(d) is not ambiguous. Therefore, the Court of Appeals concluded, it would be "improper to alter its plain meaning through liberal construction." *Klemm*, 2010 WI App 131, ¶ 12. Liberal construction does not authorize courts to create new provisions to benefit owners when the legislature has expressly declined to do so. Liberal construction cannot justify contorting the plain language and history of a statute to resolve every debated issue in favor of owners. Liberal construction does not negate the Court's first duty to apply the law as written.

J. To the extent the Klemms raise valid public policy concerns, those concerns are properly addressed to the legislature.

In their briefing here and in the courts below, the Klemms have advanced various policy arguments as to why they should be permitted to recover their litigation expenses. Foremost among them is that owners should not be penalized for cooperating, while antagonistic owners have the opportunity to recover litigation expenses. While this argument has emotional and political appeal, it is contrary to

the negotiation provisions contained in Chapter 32 and other public policy considerations. Regardless, to the extent that the Klemms raise valid public policy concerns, those concerns are more appropriately addressed to the legislature.

The Court of Appeals rejected the Klemms' policy arguments, summarizing:

> [H]ad the Klemms initially negotiated a price they were satisfied with, there would have been substantially less delay, no need for a jurisdictional offer, and no unnecessary litigation. While the Klemms' conveyance allowed prompt entry, a condemnor who proceeds with a jurisdictional offer need not wait until the conclusion of the proceedings to enter into possession. *See* Wis. Stat. § 32.12 ("At any stage of the proceedings the court in which they are pending may authorize the person, if in possession, to continue in possession, and if not in possession to take possession and have and use the lands during the pendency of the proceedings."). Further, the route the Klemms used to arrive before the condemnation commission is not significantly less burdensome or time-consuming for a condemnor than the alternative route involving an appeal from a jurisdictional offer. Indeed, because an owner may appeal an agreed price up to six months later, that route might easily be the slower of the two. Moreover, the Klemms' route might be viewed as *more* burdensome to the condemnor, who believes the matter has already been resolved.

Klemm, 2010 WI App 131, ¶ 13 n.7 (emphasis in original).

The Court of Appeals acknowledged that condemnees will not be "made whole" under the holding in this case. *Id.* at ¶ 13. While "these policy arguments certainly have

appeal," the court found, "they are properly directed to the legislature, not the courts." *Id.*

II. IF THE COURT FINDS THAT WIS. STAT. § 32.28(3)(D) APPLIES HERE, THE COURT MUST SELECT AN EVENT ANALOGOUS TO THE JURISDICTIONAL OFFER, AFTER WHICH EXPENSES ARE RECOVERABLE.

Even if the Court finds that Wis. Stat. § 32.28(3)(d) applies in this case, the Klemms cannot necessarily recover all of their expenses. The Klemms are not entitled to litigation expenses incurred prior to the need to "prepare for or participate in actual or anticipated proceedings before the condemnation commission." *See* Wis. Stat. § 32.28(1); s*ee also D.S.G. Evergreen,* 2007 WI App at ¶ 17; *Kluenker,* 109 Wis. 2d at 606.

Wisconsin courts have found that the date that satisfies this requirement is the jurisdictional offer. *See D.S.G. Evergreen*, 2007 WI App 115, ¶ 14 (expenses incurred prior to jurisdictional offer not recoverable under Wis. Stat. § 32.28(3)(a)); *Dairyland Power*, 110 Wis. 2d at 380-81 (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)). Thus, if this Court decides that Wis. Stat. § 32.28(3)(d) applies here, the Court will be required to choose some date or event that is analogous to a jurisdictional offer.

Because the Court of Appeals found that the plain text of Wis. Stat. § 32.28(3)(d) precluded award of litigation expenses under the circumstances here, it was not necessary for the court to address the issue of when litigation expenses began to accrue for the Klemms.

The circuit court found that the point at which proceedings may be "anticipated" within the meaning of § 32.28(1) is the point when some "official completive action" has occurred, "by which the condemnee can be certain of the condemnor's position." (P-App. 87.) The circuit concluded that in an appeal under § 32.06(2a), that point occurs

> when the parties agree on a price and the condemnor records the conveyance and the certificate of compensation; from that point, the condemnee has 6 months to file an appeal; at that point, proceedings before the commission can be anticipated.

(P-App. 87.) The court acknowledged that the recording of the conveyance and the recording of the certificate of compensation could happen at different times. (P-App. 87,

n.2.) Nonetheless, the circuit court allowed expenses beginning with the recording of the certificate of compensation. (*See* P-App. 87.)

In reality, no "official completive action" occurred here by which anyone could be certain of ATC's position. Because the Klemms did not provide an appraisal or other meaningful information to ATC until long after the Klemms appealed from the negotiated agreement, there was never a point at which ATC could take a clear position that it would offer a certain sum and no more. The initial offer is the only event under § 32.06(2a) that remotely resembles a "jurisdictional offer." Yet use of the initial offer as the triggering event is problematic for the host of reasons discussed earlier. At the point of the initial offer, the condemnor has only limited information upon which to base an offer. The condemnor has had no opportunity to consider additional information, such as the owner's own appraisal, and revise the initial offer. This is akin to imposing prejudgment interest on a party based on the party's initial demand letter rather than a more informed statutory

settlement offer, which typically takes place later in the litigation process and after discovery has occurred.

Setting aside the policy dimensions of use of various dates, the only "official completive action" identified in Wis. Stat. § 32.28(3)(d) is a jurisdictional offer.

If this Court reverses the Court of Appeals' decision, the Court will be required to select a date that is analogous to a jurisdictional offer, prior to which the Klemms could not incur expenses "necessary to prepare for or participate in actual or anticipated" proceedings before the commission. Several dates might be selected: the date of signing the Easement, the date the Easement was recorded, the date when the Klemms subjectively knew they did not agree with the compensation offered by ATC (whether before or after the date they signed the Easement), the date the Klemms filed their appeal, or the date that preparation for the proceedings before the condemnation commission actually commenced. Whatever date the Court selects, it must be consistent with Wis. Stat. § 32.28(1) and the holdings of *D.S.G. Evergreen*, *Dairyland Power*, and *Kluenker*. However, the only triggering event identified in Wis. Stat. § 32.28(3)(d) is a

jurisdictional offer. Selecting any other date or event will amount to rewriting the statute.

III. THE KLEMMS HAVE WAIVED ANY ARGUMENT RELATING TO THE IMPACT OF THIS HOLDING ON CASES ARISING UNDER WIS. STAT. § 32.05.

The Klemms' Petition raised a second issue for review pertaining to the impact of this holding on cases arising under Wis. Stat. § 32.05 (condemnations for transportation and sewer). However, the Klemms did not brief that issue in the courts below nor in its principal brief in this Court. Thus, the issue is waived. *See Adler v. D & H Indus., Inc.*, 2005 WI App 43, ¶ 18, 279 Wis. 2d 472, 483, 694 N.W.2d 480; *Post v. Schwall*, 157 Wis. 2d 652, 657, 460 N.W.2d 794 (Ct. App. 1990). In any event, this case does not arise under § 32.05, Stat., and therefore, this Court need not address that issue. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (an appellate court should decide cases on the narrowest possible grounds).

IV. THE EQUAL PROTECTION ISSUES RAISED BY AMICI CURIAE ARE MERITLESS.

Amici curiae contend that failure to interpret § 32.28(3)(d) as they suggest violates the Equal Protection

Clause of the United States and Wisconsin Constitutions. However, amici curiae overlook the high level of deference afforded to statutes that do not contain suspect classification. In addition, amici curiae disregard the many rational bases for allowing a condemnee to recover litigation expenses after successfully litigating the amount of compensation contained in a jurisdictional offer, but not after appeal from a voluntarily negotiated agreement.

All statutes are presumed constitutional, and it is the challenger's burden to "prove unconstitutionality beyond a reasonable doubt." *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health & Soc. Servs.*, 130 Wis. 2d 79, 99, 387 N.W.2d 254 (1986).

Contrary to the suggestion of amicus curiae, a statute does not violate equal protection anytime it "treats members of a similarly situated class differently." (Amicus Curiae Br. at 5.) Rather, equal protection "requires that there exist reasonable and practical grounds for classifications created by the legislature." *State v. Hezzie R.*, 219 Wis. 2d 848, 893, 580 N.W.2d 660 (1998). This Court has been clear that mere

unequal treatment is insufficient to render a statute constitutionally void:

> The fact that a statutory classification results in some inequity does not provide sufficient grounds for invalidating a legislative enactment. Indeed, equal protection does not deny a state the power to treat persons within its jurisdiction differently.

Nankin v. Village of Shorewood, 2001 WI 92, ¶ 12, 245 Wis. 2d 86, 98, 630 N.W.2d 141 (internal citations omitted).

Statutes challenged on equal protection grounds are reviewed under the deferential rational basis test, unless a fundamental right or suspect class is involved. *Aicher v. Patients Compensation Fund*, 2000 WI 98, ¶ 56, 237 Wis. 2d 99, 128, 613 N.W.2d 849.

While amici curiae suggest that the ability to recover attorney fees in a condemnation appeal involves a "fundamental right," they offer no support for this assertion and, in fact, the law is the opposite. For instance, in *United States v. 16.92 Acres of Land*, 670 F.2d 1369, 1373 (7th Cir. 1982), the court held that statutes affecting property rights subject to eminent domain are reviewed under the rational basis test:

> [P]roperty interests are protected by the equal protection guarantee to the extent that legislative classifications cannot adversely affect the property interests of a class

> unless the classification is rationally related to a legitimate legislative goal.

See also Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1015-16 (8th Cir. 2006) (statute allegedly interfering with right to acquire, own, and dispose of property did not implicate a fundamental right); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1580 (10th Cir.1995) (state regulations restricting property rights are not subject to strict scrutiny and do not implicate fundamental rights).

The rational basis standard "has been described as a relatively relaxed standard reflecting an awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *16.92 Acres of Land*, 670 F.2d at 1374. Thus, the test "requires only that [the court] locate some reasonable basis for the classification made." *Tomczak v. Bailey*, 218 Wis. 2d 245, 269 n.17, 578 N.W.2d 166 (1980). If the court cannot locate an express legislative rationale for the distinction at issue, "it is the court's obligation to construct one." *Nankin*, 2001 WI 92, ¶ 12.

The statute "must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate

government interest." *State v. McManus*, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989). While some cases employ a five-factor test to evaluate legislation under the rational basis test, the five-factor test "is not the exclusive standard" and "is not *per se* determinative. The basic question is whether there is a reasonable basis to justify the classification." *Milwaukee Brewers*, 130 Wis. 2d at 97-98.

In this case, there is a rational basis for allowing an owner to recover litigation expenses following a jurisdictional offer, but not following an appeal from a negotiated agreement under Wis. Stat. § 32.06(2a). An owner who voluntarily conveys an easement via a negotiated agreement is not in the same position as an owner who has been served with a jurisdictional offer.

An agreement under § 32.06(2a) is intended to be the result of a "consensual sale" "arrived at through negotiation" between the owner and condemnor. *Warehouse II*, 2006 WI 62, ¶ 13. In contrast, the jurisdictional offer is "the formal commencement of condemnation proceedings." *Village of Shorewood v*, 174 Wis. 2d at 210. An owner receiving a jurisdictional offer faces a unilateral, take-it-or-leave it

proposition by a condemning authority. To obtain higher compensation, the owner must show up at the commission hearing and present his or her case.

The owner who must show up at the commission hearing is in a different position than one who second-guesses a voluntary decision to convey an easement at an agreed price following negotiation. The owner is also in a different position from one who second-guesses a decision to convey property at some price without negotiating at all.

The legislature could have reasonably concluded that allowing litigation expenses only after a jurisdictional offer would encourage parties to share information and negotiate in good faith during the negotiation stage. Hence, Wis. Stat. § 32.06(2) and (2a) impose specific obligations to negotiate and share information, including requiring the condemnor to pay for a second appraisal for the owner by an appraiser selected by the owner. The process contemplates the two-way exchange of information. Encouraging voluntary sales without the need for litigation is a legitimate governmental objective.

Not allowing litigation expenses from an Agreed Price transaction also encourages owners to accept only offers that they truly view as reasonably reflecting fair market value. *See* Wis. Stat. § 32.09. If litigation expenses are recoverable following any successful challenge to a negotiated price sale, an owner would have little incentive to negotiate, knowing that he or she could challenge the price to which the parties have agreed without risk of incurring costs in doing so. Furthermore, as discussed *supra* at § I.C.3., initial offers from condemnors could bear little relationship to fair market value, with higher acquisition costs being passed on to taxpayers and rate payers.

Regardless of the wisdom or correctness of the legislature's choices, these are rational policy choices the legislature legitimately could have made. *See Czapinski v. St. Francis Hospital, Inc.*, 2000 WI 80, ¶ 28, 236 Wis. 2d 316, 334, 613 N.W.2d 120 (courts are "not concerned with the wisdom or correctness of the legislative determination" in applying rational basis review).

In short, the equal protection arguments are without merit. There are rational bases for distinguishing between

owners who voluntarily enter into a negotiated agreement pursuant to Wis. Stat. § 32.06(2a), and those who are forced to litigate following an unconscionably low jurisdictional offer. The plain text of Wis. Stat. § 32.28(3)(d) only allows owners to recover litigation expenses after a jurisdictional offer has been made. Only at that time is an owner truly "forced" to litigate. Thus, the equal protection claims fail.

CONCLUSION

This is a case of pure statutory interpretation. The plain language of Wis. Stat. § 32.28(3)(d) does not permit recovery of litigation expenses unless a jurisdictional offer has been made. Because the Klemms entered into a negotiated agreement, no jurisdictional offer was made or required. Liberal construction cannot negate the Court's duty to apply the law as written. Therefore, the Klemms cannot recover their litigation expenses.

The Court of Appeals' plain-meaning interpretation is consistent with the structure and legislative history of Wis. Stat. §§ 32.06 and 32.28. The decision is also consistent with long-standing case law holding that litigation expenses incurred prior to a jurisdictional offer are not recoverable in

any condemnation proceeding. To the extent that the Klemms present compelling policy arguments for making litigation expenses available here, those arguments are more appropriately directed to the legislature.

If this Court finds that Wis. Stat. § 32.28(3)(d) applies to Agreed Price transactions, the Court must then select a date or event analogous to a jurisdictional offer, from which litigation expenses are recoverable. There are a range of possible events to choose from; however, the only triggering event identified in the statutes is a jurisdictional offer. If the legislature had intended courts to proceed from Agreed Price transactions as if a jurisdictional offer had been made, the legislature would have so provided, just as it provided in the inverse condemnation provisions in Wis. Stat. § 32.10.

Accordingly, ATC respectfully requests that the Court affirm the Court of Appeals' decision in its entirety.

Respectfully submitted this 21st 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) 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, statement of facts and procedural history, the argument, and the conclusion, and excluding other content, is 10,454 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.

Respectfully submitted this 21st day of March, 2011.

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