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**STATE OF WISCONSIN
SUPREME COURT**

**CLERK OF SUPREME COURT
OF WISCONSIN**

MARK KLEMM and JEANNE KLEMM,

Plaintiffs-Respondents-Petitioners,

Appeal No.

2009AP002784

vs.

Circuit Court Case No.

2008CV000432

**AMERICAN TRANSMISSION COMPANY,
LLC,**

Defendant-Appellant.

PLAINTIFFS-RESPONDENTS-PETITIONERS' REPLY BRIEF

**Appeal From The Circuit Court Of Marathon County,
The Honorable Greg Huber, Presiding**

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ARGUMENT

The Task of Statutory Construction Has Constitutional Implications

Article I, Section 13 of the Wisconsin Constitution states:

The property of no person shall be taken for public use
without just compensation therefor.

While this may be “a case of pure statutory interpretation”, it also is one with constitutional underpinnings. Response Brief, p. 2. This Court has acknowledged the constitutional underpinnings of the litigation expense statute in eminent domain:

[T]his court has recognized that the exercise of the power of eminent domain is an ‘extraordinary power’ and requires that a rule of strict construction be employed to benefit the owner whose property is taken against his or her will.

Redevelopment Authority of the City of Green Bay v. Bee Frank, Inc., 120 Wis.2d 402, 409, 355 N.W.2d 240 (1984) (Other citations omitted).

ATC Fails To Give Reasonable Effect To Every Word In Wis. Stat. §32.28(3)(d)

At pp. 11-12 of the Response Brief ATC discusses rules of statutory construction. Klemms have addressed those rules in their Brief. However, ATC’s premise fails to perceive the three factual scenarios in which Wis. Stat. §32.28(3)(d) mandates the recovery of litigation expenses. That is, when, “The award ... exceeds the jurisdictional offer *or* the highest written offer prior to the jurisdictional offer....” Emphasis added.

1. The first scenario involves an offer followed by a lower or higher jurisdictional offer. *See e.g., Dairyland Power Coop v. Nammacher*, 110 Wis.2d 377, 328 N.W.2d 903 (Ct. App. 1982) (written offer of \$500,000 followed by a jurisdictional offer of \$375,000); *City of LaCrosse v. Benson*, 101 Wis.2d 691, 305 N.W.2d 184 (Ct. App. 1981) (written offer \$32,000, jurisdictional offer of \$32,384 and verdict of \$37,500).

2. Another scenario is where no “written offer” is made prior to the jurisdictional offer. *See e.g., Village of Shorewood v. Steinberg*, 174 Wis.2d 191, 496 N.W.2d 57 (1993) (initial written offer of \$650,000 contingent upon appraisals and withdrawn).

3. Finally, the third scenario involves a “written offer” without any jurisdictional offer. That is the scenario here. This scenario gives crucial importance to the word “or” between the words “jurisdictional offer” and “the highest written offer” in Wis. Stat. §32.28(3)(d).

Simply because there is no published decision (other than this case), does not mean that the last scenario is outside of the statutory mandate of recovery of litigation expenses.

**The Absence Of A Jurisdictional Offer
Does Not Create Surplusage In Wis. Stat. §32.28(3)(d)**

At pp. 16-17 of the Response Brief, ATC spins a hypothetical which concludes:

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.' The phrase 'prior to the jurisdictional offer' would serve no discernible purpose in the statute.

The condemnor is always free to make new offers. See i.e., *Village of Shorewood v. Steinberg*, *supra*. To be entitled to litigation expenses, the offer(s) must be in writing. Wis. Stat. §32.28(3)(d).¹ These offers are "prior to" a jurisdictional offer, just like they are "prior to" the condemnation commission and "prior to" the award of litigation expenses. It is an unfolding of events.

It is unclear how ATC concludes that if the condemnor submits multiple settlement offers it can avoid paying litigation expenses. Ultimately, either the property owner will accept one of the written offers or the condemnor will issue a jurisdictional offer and the matter will continue under Wis. Stat. §32.06(7).

Likewise, litigation expenses are recoverable when a condemnor makes no written offer prior to a jurisdictional offer. The language of Wis. Stat. §32.06(2a) states that "the condemnor shall attempt to negotiate....". It does not require written offer. Yet, if the condemnor is unsuccessful in negotiations, it issues a jurisdictional offer and petitions under Wis. Stat. §32.06(7).

¹ To the extent ATC argues the sufficiency of the form of the written offer, that argument has not been previously raised and is thus waived. *Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140 (1980).

The legislature chose the word “or” between the words “jurisdictional offer” and “highest written offer” in Wis. Stat. §32.28 because of the two alternate routes to the condemnation commission and three scenarios in which an award of expenses can be made. The word “or” is a conjunctive word that presents alternative situations.

Under ATC’s construction, litigation expenses can only be awarded when there is a rejected written offer followed by a rejected jurisdictional offer. Thus leaving only a Wis. Stat. §32.06(7) situation. If this were the case, Wis. Stat. §32.28(3)(d) should state, “The award ... under ... or 32.06(8) *from an appeal under s.32.06(7)....*”

In sum, “prior to the jurisdictional offer” logically encompasses property owners who accept pre-jurisdictional offers and exercise their option to appeal under Wis. Stat. §32.06(8).

Cross-References Link
Wis. Stat. §§32.06(2a) and 32.28(3)(d)

ATC erroneously concludes that, “Notably, that section [Wis. Stat. §32.06(2a)] does not provide that Wis. Stat. §32.28 applies.” Response Brief, p. 15. These sections are connected by cross references in Wis. Stat. §32.06(8).

Wis. Stat. §32.06(2a) states:

The judge shall forthwith assign the matter to the chairperson of the county condemnation commissioners *for hearing under sub. (8)*. (Emphasis added).

Wis. Stat. §32.06(8) states:

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

Wis. Stat. §32.28(3)(d) states:

The award of the condemnation commission under s. 32.05(9) or **32.06(8)**.... (Emphasis added).

While Wis. Stat. §32.28 is not “stated” in Wis. Stat. §32.06(2a), it is incorporated by reference in Wis. Stat. §32.06(8). This analysis led the circuit court to correctly conclude, “And, once arriving at that destination [condemnation commission] the parties are entitled to have costs awarded under Wis. Stat. §32.28.” R-18. P-App-85.

**The Statutory Structure Of Wis. Stat. §§32.06 and 32.28
Supports The Circuit Court’s Plain Reading**

ATC comments that the word “condemnee” does not appear in Wis. Stat. §32.06 until sub. (6). This statement coupled with the various assertions throughout the Response Brief reflect that ATC’s position is that there must be a jurisdictional offer to formally commence proceedings. See Response Brief, pp.17-21; 48-52.

First a minor note. The word “condemnor” appears repeatedly throughout Wis. Stat. §32.06 starting with sub. (2)(a). The test, is not “condemnee” but “anticipated proceedings”.

More importantly, Wis. Stat. §32.06(2a) sets out the equivalent of anticipated proceedings without a jurisdictional offer. Wis. Stat. §32.28(1).

Wis. Stat. §32.06(2a) states:

The condemnor shall record any conveyance ...executed as a result of negotiations ... with the register of deeds....The condemnor shall also record a certificate of compensation stating the identity of all persons having an interest ... , the legal description ..., the nature of the interest acquired and the compensation ***The date the conveyance is recorded shall be treated as the date of taking and the date of evaluation.*** (Emphasis added).

The other trigger to anticipate actual proceedings is the jurisdictional offer. Like the certificate of compensation in Wis. Stat. §32.06(2a), the jurisdictional offer requires substantially the same information, including the interest acquired, the property owner, and amount of compensation. Wis. Stat. §§32.06(3) and 32.05(3).

According to Wis. Stat. §32.06(7):

The date of filing the lis pendens is the ‘date of evaluation’ of the property for the purpose of fixing just compensation....

Wis. Stat. §32.28(1) states:

In this section, ‘litigation expenses’ means the sum of costs ... necessary to prepare for or participate in ***actual or anticipated proceedings*** before the condemnation commissioners(Emphasis added).

By the express language of Wis. Stat. §32.06(2a), the property owner has six months to appeal from the date of recording. This is the point when a property owner becomes a “condemnee”.

Klemms seek no litigation expenses prior to when actual proceedings before the condemnation commissioners were anticipated. The accepted offer/Easement and the Certificate of Compensation were filed with the Register of Deeds on January 16, 2008 and counsel for Klemms began to anticipate proceedings on March 26, 2008. R-20. P-App-94.

Another crucial aspect of the structure of Wis. Stat. §32.06(2a) is the use of the word “compensation” to describe what is to be placed in the certificate and what an owner may appeal from: “the amount of compensation.” However, the purpose of the appeal is for a determination of “just compensation.”

ATC cites *Village of Shorewood v. Steinberg*, 174 Wis.2d 191, 210, 496 N.W.2d 57 (1993) to support its theory that the jurisdictional offer and Wis. Stat. §32.06(7) are the only path to Wis. Stat. §32.28 litigation expenses. But, it is a case where there was a jurisdictional offer which did not involve the Wis. Stat. §32.06(2a) path to the condemnation commission.

ATC also cites two inverse condemnation cases which are red herrings. *E-L Enterprises, Inc. v. Milw. Metro. Sewerage*, 2010 WI 58, 326 Wis.2d 82, 785 N.W.2d 409, ATC attempts to support its argument that prior to a jurisdictional offer there has been no taking and no condemnee exists. Response Brief, p. 18. This inverse condemnation case only demonstrates another situation where condemnation proceedings occur

without a jurisdictional offer. See Wis. Stat. §32.10. ATC further relies on *Howell Plaza, Inc. v. State Highway Comm’n*, 66 Wis.2d 720, 226 N.W.2d 185 (1975) for the proposition that the likelihood of a condemnation is not the same as the condemnation itself. Response Brief, p. 18.

Here, there was an official triggering act after which the parties could anticipate condemnation proceedings—the filing of the Easement and certificate of compensation. In sum, the statutory context and structure of Wis. Stat. §§32.06 and 32.28 supports the circuit court’s determination.

Cases Involving Jurisdictional Offers Are Not Controlling For Agreed Price Cases

ATC relies on case law that litigation expenses are not recoverable prior to a jurisdictional offer which is a prerequisites for litigation expenses. Response Brief, pp. 27-30. The circuit court answered this argument decisively in its discussion of *Kluenker*, in describing the trigger or “completive action” needed to anticipate Wis. Stat. §32.06(8) proceedings:

In *Kluenker v. State*, 109 Wis.2d 602, 327 N.W.2d 145 (Ct. App. 1982), the court identified the jurisdictional offer as the point at which proceedings could be anticipated, before which no attorney’s fees or other expenses could be awarded -but it must be noted that *Kluenker* was a case in which a jurisdictional offer was actually made. As such, all it stands for is the proposition that ***when a jurisdictional offer has been made***, that is the starting point for measuring litigation expenses.

But what does *Kluenker* have to say about a situation like this one, where litigation commenced with an appeal under §32.06(2a)? Some of the court’s reasoning is illuminating. The reason that the court cited for selecting the jurisdictional offer as the point from which

litigation expenses can be awarded was this: ‘Since there is no official complete action in a condemnation case until the jurisdictional offer, it follows that a condemnee cannot be certain of a condemnor’s position until that juncture. Only then does the expectation of appeal to the commission accrue, not when the preliminary negotiations are set in motion which may or may not ultimately prove unsatisfactory.’ *Kluenker*, 109 Wis.2d at 606. Thus, under the court’s reasoning, the point at which proceedings before the commission may be ‘anticipated’... is the point when the some ‘official complete action’ has occurred, 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. R-18. P-App-87.

Further, ATC cites only jurisdictional offer cases: *D.S.G. Evergreen F.L.P. v. Town of Perry*, 2007 WI App 115, ¶¶14-15, 300 Wis.2d 590, 731 N.W.2d 667, *Dairyland Power Coop v. Nammacher*, 110 Wis.2d 377, 328 N.W.2d 903 (Ct. App. 1982), *City of LaCrosse v. Benson*, 101 Wis.2d 691, 305 N.W.2d 184 (Ct. App. 1981) and *Kluenker v. DOT*, 109 Wis.2d 602, 327 N.W.2d 145 (Ct. App. 1982). These cases are irrelevant to cases under Wis. Stat. §32.06(2a).

In *D.S.G.*, the Town of Perry served a jurisdictional offer. 2007 WI App 115, ¶2. The court was called upon to determine whether litigation expenses were appropriate when the Town abandoned proceedings under Wis. Stat. §32.28(3)(a). *Dairyland Power*, as discussed above, involved a situation of a jurisdictional offer. 110 Wis.2d at 379. The Court in *Benson* noted that either under the written offer or jurisdictional offer the

condemnee was entitled to expenses. *Benson* was not a case under Wis. Stat. §32.06(2a) like the case at bar.

**The 1977 Amendment To Wis. Stat. §32.06
And Creation Of Wis. Stat. §32.28 Created The
Agreed Price Fee-Shifting Provisions**

In the Response Brief at p. 32 ATC argues that the 1977 Amendments to Chapter 32 did allow litigation expenses in cases with inequitably low jurisdictional offers but did not allow litigation expenses under Wis. Stat. §32.06(2a) cases.

This is not true as demonstrated by comparing the relevant statutes prior to 1977 to those after 1977. According to Wis. Stat. §32.06(2a) **(1975-1976):**

Agreed Price. Before making the jurisdictional offer under sub. (3), the condemnor shall attempt to negotiate personally with the owner or one of the owners of his personal representative of the property sought to be taken for the purchase of the same. In such negotiation the condemnor may contract to pay the items of compensation enumerated in §§32.09 and 32.19 where shown to exist.

With full knowledge of what it wanted to accomplish the legislature *created* Wis. Stat. §32.28. In addition, the legislature substantially revamped Wis. Stat. §32.06(2a) **(1977-78):**

The condemnor shall record any conveyance ... by the owner of the property ... executed as a result of negotiations ... with the register of deeds The condemnor shall also record a certificate of compensation stating the identity of all persons having an interest ... in the property..., the legal description ..., the nature of the interest acquired and the compensation for such acquisition... .Any person named in the certificate may, within 6 months after the date of its

recording, appeal from the amount of compensation ...to determine the amount of just compensation.... The judge shall forthwith assign the matter to the county condemnation commissioners for hearing under sub. (8). The procedures prescribed under subs. (9) (a) and (b), (10), (12) and (13) shall govern such appeals. The date the conveyance is recorded shall be treated as the date of taking and the date of evaluation.

The legislature, upon the policy considerations discussed, specifically chose to give owners the right to appeal negotiated settlements when they had no such right prior to 1977 and award litigation expenses in the creation of Wis. Stat. §32.28.

The substantial changes to Chapter 32 cannot be minimized.

Klemms “Policy Considerations” Are Reflected In The Legislative History of the 1977 Changes To Chapter 32.

Throughout the Response Brief ATC makes its own policy arguments while dismissing Klemms’ arguments as mere policy considerations. For example, that a negotiation is a consensual sale (pp. 18-21) and that initial offers will have to be higher (pp. 21-25) and the excess monies paid will be shouldered by the rate payers.

First, while litigation expenses are not “just compensation” in and of themselves, this Court has recognized the legislature’s directive that they should be awarded in order to preserve the just compensation fund and to make the owner whole. *Standard Theatres, Inc. v. DOT*, 118 Wis.2d 730, 744, 349 N.W.2d 661 (1984). Whether a negotiation results in a signed offer is irrelevant. Wis. Stat. §32.06(2a) does not restrict the right to appeal

to situations where negotiations fail. Moreover, this Court has made clear that sales in lieu of condemnation are never voluntary. *Pinczkowski v. Milwaukee County*, 2005 WI 161, ¶¶17-22, 286 Wis.2d 339, 706 N.W.2d 642.

The arguments about legislative history become more concrete and less abstract in the context of a hypothetical “small” dollar condemnation. Assume, for instance, the condemnor wishes to take a small parcel of land with a value of \$2,000. The condemnor offers \$500. The owner agrees, either not wanting to hold up the project or not appreciating the true value. Subsequently the owner discovers that the property’s fair value is \$2,000. The owner may appeal to obtain just compensation within the six months.

A \$2,000 award would satisfy the basic dollar (\$700) and percentage requirements (15%) of Wis. Stat. §32.28(3)(d), but owners will struggle to find counsel. The cost of litigation expenses will exceed the amount of “just compensation”—the added \$1,500. The likelihood is that there will be no appeal and the owner will never receive just compensation.

That is what happened here. Klemms accepted \$7,750 as compensation. Klemms timely discovered that this sum was not just compensation. In the end, Klemms’ received \$30,000 as just compensation. This amount is almost four times more than ATC compensated them in the Agreed Price. If Klemms were also required to compensate counsel, they would incur approximately \$22,000 in litigation

expenses. R-20, P-App-98. The net to Klemms would be approximately \$8,000 or \$250 more than when the process began.

This is not what the legislature intended. The parties' bargaining powers and knowledge are unequal. Condemnors will not be forced to offer excessive amounts. The burden is on the condemnor to retain appraisers who do a satisfactory job in determining the fair value. Neither the rate payers or Klemms created this situation. ATC did when it relied upon its choice of appraiser. All ATC has to offer is what is constitutionally mandated -- "just compensation."

When forced to litigate, Klemms are entitled to be made whole.

CONCLUSION

For the reasons stated herein and the Brief of Amicus Curiae, Klemms request this Court to reverse the decision of the Court of Appeals.

Respectfully submitted this 29th day of March, 2011.

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CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font (Times New Roman 13 pt for body text and 11 pt for quotes and footnotes). The length of this brief, including the statement of the case, the argument, and the conclusions and excluding other content, is 2,992 words.

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of March, 2011.

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**CERTIFICATE OF COMPLIANCE
WITH RULE WIS. STAT. §809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 29th day of March, 2011.

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