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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

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Appeal No. 2021-AP-1589  
Circuit Court Case No. 2020-CV-101

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Sojenhomer LLC,

Plaintiff-Appellant,

vs.

Village of Egg Harbor,

Defendant-Respondent.

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**APPEAL FROM THE CIRCUIT COURT  
FOR DOOR COUNTY,  
THE HONORABLE DAVID L. WEBER,  
CIRCUIT JUDGE, PRESIDING**

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**BRIEF OF PLAINTIFF-APPELLANT**

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## **INTRODUCTION**

This dispute is the result of the Village of Egg Harbor's (Defendant-Respondent) taking of Sojenhomer LLC's (Plaintiff-Appellant) property by condemnation solely for a sidewalk. Sojenhomer LLC challenged the right of the Village of Egg Harbor to condemn Sojenhomer LLC's property for such a purpose. The circuit court held that the condemnation by the Village of Egg Harbor was allowed under state statutes. As shown below, the Village of Egg Harbor's condemnation violates Wisconsin Statutes and, therefore, the circuit court's decision must be reversed.

## **STATEMENT OF ISSUES**

1. Whether a sidewalk is a pedestrian way under Wis. Stat. Sec. 32.015.

The Circuit Court held that a sidewalk is not a pedestrian way.

2. Whether the Village of Egg Harbor violated Wis. Stat. Sec. 32.015 when condemning Sojenhomer LLC's property.

The Circuit Court held that the Village of Egg Harbor did not violate Wis. Stat. Sec. 32.015 because a sidewalk is not a pedestrian way and the establishment of a sidewalk connecting to an existing pedestrian way is not an extension of a pedestrian way.

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

This case presents an opportunity to confirm and clarify Wisconsin Statutes regarding the interpretation of a pedestrian way as it is defined by statute and the ability of a municipality to condemn subject to the limitations of Wis. Stat. Sec. 32.015. This has not been addressed in a published decision to date. While oral argument is unnecessary because the issues and arguments are adequately addressed in the briefs, publication is recommended.

### **STATEMENT OF THE CASE**

#### **I. Background.**

This is an appeal of the condemnation of property under Wis. Stat. Sec. 32.05. The Plaintiff-Appellant, Sojenhomer LLC (“Sojenhomer”), is the owner of real property located at 7791 State Highway 42, Egg Harbor, Wisconsin 54209 which contains the building known as Shipwrecked Brew Pub and Restaurant (“Sojenhomer’s Property”). The Defendant-Respondent, Village of Egg Harbor (the “Village”) is one of the parties participating in reconstructing County Highway G (“CTH G”) which abuts the western edge of Sojenhomer’s Property. CTH G is a narrow right of way. (R. 77. p. 3.)

In 2015, the Village retained engineers, McMahon and Associates, to determine what additional right-of-way improvements the Village wished to install on CTH G. (R. 83 at p. 2.) The engineers emphasized there was no

continuous sidewalk for pedestrians on CTH G to access the trail known as the Bird Trail. (R. 77 at p. 3.) The Bird Trail runs along CTH G but ends before the business center of Egg Harbor. At the end of the Bird Trail, pedestrians could continue walking along the east side of CTH G or cross CTH G in a designated crosswalk and walk along the west side of CTH G in order to get to the business center. A sidewalk is available immediately before the business center for pedestrians who cross to the west side of CTH G from the Bird Trail. (R. 77 at p. 3.)

The Village decided to construct a new sidewalk on the east side of CTH G to eliminate the crossing. (*Id.* at p. 3.) “And the goal was to find one consistent, safe corridor for people to access the trail.” (R. 88 at p. 19, A. App. p. 96.)

On January 26, 2018, the Village submitted an application for a grant through the Transportation Alternatives Program (“TAP”). (R. 82, A. App. pp. 123-151.) The project title submitted by the Village is “Walk, Bike & Eggsplare Egg Harbor”. (*Id.* at p. 3., A. App. p. 125.) The Village’s application states that Door County (not the Village) had scheduled its milling and resurfacing for CTH G in 2018 and 2019. (*Id.* at p. 6., A. App p. 128.) The TAP application further states Door County and the Village worked to coordinate Door County’s work to occur concurrently “with the Village’s proposed bike and pedestrian improvements on CTH G.” (*Id.*) The TAP application also states as follows: “A

small area of right-of-way is needed at the corner of CTH G and STH 42 in order to construct the proposed bike and pedestrian improvements on CTH G.” (*Id.*) The Village’s engineer, Michael Simon confirmed at his deposition that this area is Sojenhomer’s Property. (R. 88 at p.27, A. App p. 98) In short, the TAP application reveals that Sojenhomer’s Property was condemned for the proposed bike and pedestrian improvements.<sup>1</sup>

The reconstruction plans of CTH G show that the Village is condemning a portion of Sojenhomer’s Property for the project. (R. 2 at pp. 79-96., A. App pp. 105-122.) The reconstruction plans depict that the portion of Sojenhomer’s Property the Village seeks to condemn will be used exclusively for a sidewalk running along County Highway G. (*Id.*)

Mr. Simon, the Village’s engineer, testified at his deposition that the Village only needs to condemn Sojenhomer’s Property for a sidewalk. (R. 88 at p. 25, A. App. p. 97.) Mr. Simon also testified that the true intent of the Village from the beginning was to create an extension of Bird Trail to connect to the center of the Village. (*Id.* at p. 9, A. App p. 95.)

On February 19, 2020, the Village’s agent sent Sojenhomer a proposed written Offer to Purchase with respect to the condemnation of Sojenhomer’s

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<sup>1</sup> The Village was denied TAP funds. The Village decided to fund its portion of the improvements that are separate from the roadway of the CTH G project itself.

Property pursuant to Wis. Stat. Sec. 32.05. (R. 2 at pp. 7-8.) Sojenhomer rejected the offer.

On July 27, 2020, the Village served Sojenhomer with a Jurisdictional Offer. (R. 3 at pp. 96-100, A. App. pp. 100-104.)

On August 11, 2020, Sojenhomer signed the form rejecting the Village's Jurisdictional Offer.

### **PROCEDURAL STATUS**

On August 18, 2020, Sojenhomer filed a Summons and Complaint. (R. 2.) The Village was served on August 19, 2020. (R. 4.)

On September 15, 2020, seven days late, the Village filed its answer and a motion for judgment on the pleadings. (R. 9 and R. 7.)

On September 24, 2020, Sojenhomer filed a motion to strike the Village's Answer and motion for judgment on the pleadings and filed a motion for default judgment.

On November 24, 2020, a hearing was held and the court issued an oral ruling. At the November 24, 2020, hearing, the circuit court ruled that the Village was in default and struck the Village's answer. (R. 39, p. 25, A. App. p. 25.) However, even though the circuit court ruled the Village was in default, the circuit court analyzed substantive arguments of the parties.

But I find that the motion for judgment on the pleadings is effectively a motion to dismiss. I don't know of any reason why it's not timely. I don't know that it

has to be filed within the time period for the answer. I could be wrong about that.

But I will find – I will rule secondarily even if I’m wrong about that, and even if she – all of her pleadings are stricken, and all of her papers are stricken, affidavits or anything else, I still have to determine - - I still have to determine, it seems to me, independently of all of that, whether the complaint states a claim under Wisconsin law. And that means under the context of this case whether the plaintiff’s interpretation of 30.015 [*sic*] is accurate.

(R. 39 at p. 26, A. App. p. 26) Based on this ruling, the circuit court held as follows:

I find that Section 32.015 does not prohibit condemnation under the undisputed facts presented here. This section does not prohibit a Village from acquiring land to expand a highway. And what they do from that point on, even if it’s to put in a sidewalk, I think that’s clearly permitted under the statutes and not prohibited under Section 30.015 [*sic*].

(*Id.* at pp 39-40, A. App. p. 39-40)<sup>2</sup>

On January 12, 2021, Sojenhomer filed an Amended Complaint. (R. 47.)

On January 25, 2021, the Village filed an Answer to the amended complaint. (R. 61.)

On April 23, 2021 both parties filed separate motions for summary judgment.

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<sup>2</sup> The day after the oral ruling, the court contacted the parties and requested a status conference with the parties. The court requested briefs regarding what evidence the court may consider when an untimely answer is stricken and a party moves for default judgment.

The parties then briefed whether default judgment should be granted. The court ruled that the complaint failed to state a claim upon which relief could be granted. (R. 44, p. 35.) While this is not the subject of the appeal, it provides background as to why there are two oral rulings in this case.

On June 21, 2021, the circuit court held a hearing regarding both motions for summary judgment. (R. 90, A. App. pp. 50-92.) The court, incorporating its reasoning from the November 24, 2020, hearing granted summary judgment in favor of the Village. In support of its decision to dismiss Sojenhomer's Amended Complaint, the court stated as follows when addressing specific paragraphs in the Amended Complaint:

Twenty-two, the Village intends to acquire by condemnation Sojenhomer's property in order to establish or extend a pedestrian way I deny as a matter of law. I think that that's incorrect as a matter of law.

Twenty-three, Sojenhomer's property is only needed by the Village in order establish or extend a pedestrian way I deny as a matter of law.

...

And 25, a sidewalk is a pedestrian way I deny as a matter of law. I think they are fundamentally different things. As I said last time.

Twenty-six, the Village's condemnation of Sojenhomer's property in order to establish or extend a pedestrian way violates Section 32.015, and 27, the Village does not have the right to condemn Sojenhomer's property because said condemnation violates Wisconsin Statutes 32.015; I deny those as a matter of law.

(R. 90, pp. 40-41, A. App. pp. 89-90.)

### **STANDARD OF REVIEW**

The interpretation of a statute is a question of law subject to de novo review. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74 ¶36, 319, Wis. 2d 1, 768 N.W.2d 615. This case involves a municipality's use of the power of condemnation under Wis. Stat. Sec. 32.05.

The rule of strict construction applies to the power of the condemnor and to the exercise of such power. It is a rule intended for the benefit of the owner who is

deprived of his property against his will. It follows, therefore, that the converse of this rule is also true. Statutory provisions in favor of an owner, such as provisions regulating the remedies of such owner and the compensation to be paid to him, are to be liberally construed.” 1 Nichols, Eminent Domain § 3.213 [4] (rev. 3d ed. 1976); See *Lenz v. Chicago & Northwestern Railway Co.*, 111 Wis. 198, 206, 86 N.W. 607 (1901).

*Aero Auto Parts, Inc. v. Dept. of Transp.*, 78 Wis.2d 235, 241, 253 N.W.2d 896 (1977).

This Court is very familiar with the standards for summary judgment. The standards have been enunciated numerous times. Those standards will not be reiterated in this Brief.

The parties in this action agree summary judgment is appropriate. The parties disagree about to whom summary judgment should be granted.

### **ARGUMENT**

#### **I. THE CIRCUIT COURT ERRED IN DETERMINING THAT SIDEWALKS ARE NOT PEDESTRIAN WAYS UNDER WIS. STAT. SEC. 32.015.**

The main issue in this case involves the interpretation and application of Wis. Stat. Sec. 32.015. The statute deals with the limitations of eminent domain and is direct and straightforward. It states as follows:

**Limitations.** Property may not be acquired by condemnation to establish or extend a recreational trail; a bicycle way, as defined in s. 340.01(5s); a bicycle lane, as defined in s. 340.01(5e); or a pedestrian way, as defined in s. 346.02(8)(a).

Wis. Stat. Sec. 32.015.

In this case, regarding establishment, the key term at issue is “pedestrian way”. Wis. Stat. Sec. 346.02(8)(a) states as follows:

APPLICABILITY TO PEDESTRIAN WAYS. (a) All of the applicable provisions of this chapter pertaining to highways, streets, alleys, roadways and sidewalks also apply to pedestrian ways. A pedestrian way means a walk designated for the use of pedestrian travel.

The circuit court made the incorrect conclusion that in order to avoid surplusage in subsection (a), a sidewalk cannot be a pedestrian way.

To conclude that sidewalks are mere subsets of pedestrian ways would be to render the language about sidewalks in Section 346.02(8)(a) - - and (b), by the way – superfluous. The fact that this section uses the term “sidewalks” and “pedestrian ways” implies that one is not simply a subset of the other, but that the two are qualitatively different from one another.

(R. 39. p. 35, A. App. p. 35.)

If the Village were attempting to take property to establish a sidewalk unconnected to any street, then it would be prohibited by Section 32.015. And in that event, the sidewalk would be considered a pedestrian way. At least in this Court’s mind. Because by definition a sidewalk cannot be separated from a street.

A pedestrian way, it seems to this Court, is a walk for pedestrians, but is not part of any highway or street. So both the sidewalk and a pedestrian way are walks, for use by pedestrians, but a sidewalk is part of a street and a pedestrian way is not.

(*Id.* at pp. 33-34, A. App. pp. 33-34.)

The Circuit Court erred when reading the two statutes *in pari materia* and superimposing the first part of 346.02(8)(a) onto Wis. Stat. Sec. 32.015. The first sentence of 346.02(8)(a) does not define pedestrian way, but merely emphasizes that all provisions pertaining to highways, streets, alleys, roadways and sidewalks also apply to pedestrian ways within the chapter. There are no specific

provisions regarding pedestrian ways in Chapter 346, which is consistent with the first sentence. The first sentence is limited in that it only applies within the chapter (chapter 346) and, therefore, cannot be imposed onto Sec. 32.015. *See generally County of Dane v. Racine County*, 118 Wis. 2d 494, 498, 347 N.W.2d 622 (Ct. App. 1984). (A limitation of a definition to a specific section prevents the court from superimposing that definition to another statute).

The second sentence of 346.02(8)(a) defines a pedestrian way and must be applied to 32.015. When the language of 346.02(8)(a) is applied to 32.015, it is clear that property may not be acquired by condemnation to establish a walk designated for the use of pedestrian travel. The location or classification of the pedestrian way is not an exception to 32.015. There is no exception for where a walk designated for the use of pedestrian travel is located.

Further, The United States Supreme Court and the Wisconsin Court of Appeals have explicitly rejected the holding by the circuit court that it must avoid surplusage.

The directive that we endeavor to give meaning to all parts of statutes so as to avoid surplusage **is not a directive that we give different terms different meanings, regardless where that leads.** As the United States Supreme Court has explained, the "preference for avoiding surplusage constructions is not absolute." See *Lamie v. United States Trustee*, 540 U.S. 526, 536, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004); see also *Marx v. General Revenue Corp.*, 568 U.S. 371, 385, 133 S. Ct. 1166, 185 L. Ed. 2d 242 (2013) ("The canon against surplusage is not an absolute rule ...."). We understand these pronouncements to mean that sometimes the most reasonable reading of a statute, one that gives it the legislatively intended effect, is one that renders some language in the statute surplusage. See *Kalal*, 271 Wis. 2d 633, ¶¶44, 46 (to determine what the statute means to give its full, proper, and intended effect, "[s]tatutory

language is read where possible to give reasonable effect to every word, in order to avoid surplusage").

*State v. Mason*, 2018 WI App 57, ¶26, 384 Wis. 2d 111, 918 N.W.2d 78. Arguing that a sidewalk is not a statutorily defined type of pedestrian leads to an absurd result.

Pedestrian way is broadly defined because it encompasses both sidewalks and other walks used for pedestrian travel. Sidewalks are statutorily defined pedestrian ways. Wis. Stat. Sec. 340.01(58) defines a sidewalk as “a portion of a highway between the curb lines, or lateral lines of a roadway, and the adjacent property lines, **constructed for use of pedestrians.**” (Emphasis added.)

If a sidewalk is constructed for use of pedestrians and a pedestrian way is a walk designated for the use of pedestrian travel, a sidewalk clearly falls within the definition of pedestrian way under Sec. 346.02(8)(a). This is consistent with the first sentence of 346.02(8)(a). Chapter 346 of the Wisconsin statutes is titled “RULES OF THE ROAD”. A sidewalk is a type of pedestrian way and is specifically defined to be a portion of a highway. Wis. Stat. Sec. 340.01(58). For example, a pedestrian way could be a skyway, a path or walking track on public property (such as a local park) that is not adjacent to or a portion of a highway. Such a path or walking track is not a sidewalk as defined by 340.01(58), but it is a pedestrian way as defined by 346.02(8)(a). Those other examples of pedestrian ways are not automatically part of the highway and, therefore, do not fit within

Chapter 346. However, the Legislature wished for the provisions of the chapter to apply to the broader pedestrian way instead of just a specific pedestrian way, a sidewalk.

The circuit court's holding that sidewalks are not pedestrian ways under 32.015 allows for absurd results not intended by the Legislature. A sidewalk by definition has to be between the curb lines and the adjacent property lines. If a municipality wanted to condemn property to establish a walk for pedestrians, a three-foot-wide walk that was not located between the curb lines and the adjacent property lines would be barred by the statute; but under the circuit court ruling, a municipality could simply extend the walk from the curb to the property line creating a fifteen-foot wide "sidewalk", and it would not be prohibited because it is part of the street. That is clearly not the intent of the Legislature in enacting this statute.

The condemnation of Sojenhomer's Property solely to construct a sidewalk upon the condemned property clearly violates 32.015 because condemning property specifically for a sidewalk is an establishment of a pedestrian way.

## II. WIS. STAT. SEC. 32.015 SPECIFICALLY LIMITS THE VILLAGE'S CONDEMNATION AUTHORITY.

The circuit court took the position that a sidewalk is part of a street and, therefore, not a pedestrian way.

There's no question, again, at least to this Court, that a municipality may acquire land through eminent domain for streets. See Section 61.34(3) and 32.05 Wisconsin Stat.

It seems to me that once the municipality acquires the land for street purposes, then it may lay out a sidewalk as part of that street under Section 66.0907.

(R. 39 pg. 33, A. App. p. 33.)

The Village's power under Wis. Stat. Sec. 61.34(3) states, in relevant part, as follows:

- (a) Except as provided in par. (b), the village board may acquire property...for...streets...and for any other public purpose..."
- (b) The village board may not use the power of condemnation to acquire property for the purpose of establishing or extending a recreational trail; a bicycle way, as defined in s. 340.01(5s); a bicycle lane, as defined in s. 340.01(5e); or a pedestrian way, as defined in s. 346.02(8)(a).

Wis. Stat. Sec. 61.34(3) (emphasis added.)

"'Street' means every highway within the corporate limits of a city or village except alleys." Wis. Stat. Sec. 340.01(64). Sidewalks are statutorily defined to be a portion of highways. Wis. Stat. Sec. 340.01(58). Therefore, a sidewalk is a portion of a street.

Seemingly, Wis. Stat. Sec. 61.34(3)(a) supports the circuits court's analysis that sidewalks are separate from pedestrian ways and allows the Village to acquire real property through condemnation for a street, including a sidewalk.

**However**, the acquisition of property through condemnation under the guise of a street in Wis. Stat. Sec. 61.34 is specifically limited by statute. Wis. Stat. Sec. 990.01(2) defines "acquire." Under Wis. Stat. Sec. 990.01(2), "acquire" is defined as follows:

"Acquire," when used in connection with a grant of power to any person, includes the acquisition by purchase, grant, gift or bequest. It includes the power to condemn only in the cases specified in s. 32.02 **and subject to the limitations under s. 32.015.**"

(Emphasis added.) This statutory definition reveals that the Village's ability to acquire property by condemnation for streets is limited by Wis. Stat. Sec. 32.015. The court must analyze what is being placed within condemned property for the street.

Pursuant to the opening sentence of Wis. Stat. Sec. 340.01, the definition of sidewalk (found at 340.01(58)) only applies "[i]n s. 23.33 and chs. 340 to 349 and 351 . . . ." Wis. Stat. Sec. 340.01. It does not apply in Wis. Stat. Sec. 32.015. *See County of Dane v. Racine County*, 118 Wis. 2d 494, 498, 347 N.W.2d 622 (Ct. App. 1984). (A limitation of a definition to a specific section prevents the court from superimposing that definition to another statute.)

The question is whether the condemnation is for a walk designated for the use of pedestrian travel. This Court should not fall into the same trap as the circuit court and look at whether this walk is within a street or outside of a street. That determination is a red herring to the analysis under Wis. Stat. Sec. 32.015.

The Village cannot use 61.34(3)(a) to condemn property for a street and then argue that since a sidewalk is part of a street, the sidewalk is not a pedestrian way. Such an argument flies in the face of Wis. Stat. Secs. 32.015 and 346.02(8).

### **III. THE LEGISLATIVE HISTORY OF WIS. STAT. SEC. 32.015 SUPPORTS SOJENHOMER'S INTERPRETATION.**

In 2018, 2017 Assembly Bill 967 was introduced to specifically amend Wis. Stat. Sec. 32.015. The bill proposed to amend the statute specifically to address the issue of sidewalks. The proposed bill stated as follows:

**Section 7.** 32.015 of the statutes, as created by 2017 Wisconsin Act 59, is amended to read:

**32.015 Limitations.** Property may not be acquired by condemnation to establish or extend a recreational trail; a bicycle way, as defined in s. 340.01(5s); ~~a bicycle lane, as defined in s. 340.01(5e);~~ or a pedestrian way, as defined in s. 346.02(8)(a), that is not a sidewalk, as defined in s. 340.01(58).

2017 Assembly Bill 967, February 2018. The analysis by the Wisconsin Legislative Reference Bureau was clear:

This bill eliminates the prohibition against certain entities, such as a county board, a village board, or the Department of Transportation, using the power of condemnation to acquire land or interests in land for the purpose of establishing or extending bicycle lanes or certain pedestrian ways.

2017 Assembly Bill 967, February 2018. (Emphasis added.)

In *County of Dane v. Racine County*, the Wisconsin Court of Appeals discussed the applicability of unadopted legislation to interpret legislative intent.

However, previously proposed, but unadopted, legislation containing essentially the same language does provide such history. We disagree with Dane County that consideration of these unadopted items of proposed legislation are off limits in seeking the legislative intent as to the adopted legislation. To so hold would deprive us of informative and helpful legislative thinking as to legislative intent. Such a rule would limit our consideration only to the ambiguous language of the statute without any legislative history.

*County of Dane v. Racine County*, 118 Wis. 2d 494, 499, 347 N.W.2d 622 (Ct. App. 1984). The court in *County of Dane* specifically reviewed the Wisconsin Legislative Reference Bureau analysis of a bill in determining the intent of the Legislature. *Id.* at 500-501.

While the Court of Appeals in *County of Dane* analyzed legislation proposed before the adoption of the ultimate legislation, the court's theory and analysis holds true in this case given the timeframe of the legislative acts. Wis. Stat. Sec. 32.015 was created by the 2017 budget bill and enacted on September 21, 2017. Assembly Bill 967 was introduced on February 12, 2018, less than five months after the enactment of 32.015. The Wisconsin Legislature clearly and quickly determined that under 32.015, a sidewalk was considered a pedestrian way and, therefore, the right of condemnation for purposes of a sidewalk was barred by 32.015. The Legislature attempted to revise the statute to specifically exclude sidewalks. However, Assembly Bill 967 failed to pass and 32.015 is still the law in Wisconsin today.

The Legislature acknowledged that a sidewalk is included within pedestrian way under the current law and failed to pass any amendments to the law. Therefore, condemnation for purposes of a sidewalk continues to be barred by Wis. Stat. Sec. 32.015.

The circuit court refused to consider the failed bill. The circuit court stated as follows:

There's the argument that, you know, there was a piece of legislation that didn't pass, and it contained language that supports the plaintiff's position.

I can't - - I can't infer anything from that, from legislation that never passed. I think there's a lot of different reasons why legislation doesn't pass. And if my reading of the statutes is correct, it didn't pass because they didn't need to include that language.

(R. 39 at p. 37, A. App. p.37.)

Legislative intent for me comes from the language of the statutes themselves.

I have no idea what the legislative intent of the legislators was, if there was any such intent at any one given time. And especially I don't know what it is for legislation that has not passed.

(*Id.* at p. 36, A. App. p.36.)

The circuit court's holding unilaterally bypasses Assembly Bill 967 and now allows for condemnation for a sidewalk. The circuit court has no authority to rewrite the law and, therefore, its decision must be reversed.

#### **IV. THE SIDEWALK IS AN EXTENSION OF THE BIRD TRAIL AND, THEREFORE, BARRED UNDER WIS. STAT. SEC. 32.015.**

The undisputed fact is that the Village's project connects to the already established Bird Trail which is an undisputed pedestrian way.

The circuit court gives two reasons as to why the Village is not extending the Bird Trail: (1) the sidewalk is definitionally not an extension of or an establishment of a pedestrian way; and (2) for contextual reasons the area itself is different from the Bird Trail, which is a pedestrian way. (R. 90, p. 35.)

When asked about the scope of the sidewalk for the CTH G project, Mr. Simon stated the Village's intent as follows:

Q Okay. With these preliminary concepts talked about reconstructing the road, doing sidewalk and storm sewer. What did the sidewalk entail, given those preliminary concepts on G?

A **Well, the intent was always to provide a connection to -- they've got a -- the name varies, but I think it's called the Bird Trail. It's kind of a nature trail they have. It originates probably 900 feet south of 42 on the east side of the roadway.**

(R. 88, p. 9, A. App p. 95.) (Emphasis added.)

Bird Trail is a recreational trail and/or a pedestrian way. Therefore, as Mr. Simon conceded, the Village's intent was to extend a recreational trail and/or pedestrian way by creating a sidewalk through condemnation. Sec. 32.015 precludes extending a pedestrian way.

Even if the Village claims it is condemning for a sidewalk and claims it is part of the street, the statute does not allow for exceptions based on how the extension occurs. To allow for such an exception would not only add language to 32.015, but would also violate the statutory definition of "acquire". As previously stated, the Village's ability to acquire real property by condemnation for streets is limited by 32.015 pursuant to Wis. Stat. Sec. 990.01(2). The

statutory language of 32.015 is clear that any condemnation of property that “extends” a recreational trail and/or pedestrian way is barred.

The context of the new extension similarly is irrelevant to the determination. Whether the condemned area is different or not from the Bird Trail should have no effect on the ultimate conclusion which is that this is an extension of the trail. The circuit court’s discussion of safety, economic, environmental and public health reasons is irrelevant under the statute. To create some sort of test of the context of the extension would create a subjective analysis for a court to undertake. Further, it goes against the established law of the restrictive nature of condemnation.

The Village’s acquisition of Sojenhomer’s Property for a street is not allowed if the condemnation is used to extend a recreational trail and/or pedestrian way. According to the Village’s engineer, that is exactly what is occurring in this case.

### **CONCLUSION**

A pedestrian way under Wis. Stat. Sec. 32.015 includes a sidewalk. A pedestrian way that is extended through condemnation by a sidewalk violates Wis. Stat. Sec. 32.015. To hold otherwise would violate the very nature and intent of the statute. Sojenhomer requests the appellate court to reverse the decision of the circuit court to grant summary judgment in favor of the Village. Sojenhomer

requests the appellate court to reverse the decision by the circuit court to deny summary judgment in favor of Sojenhomer. The taking of Sojenhomer's property for a sidewalk by condemnation under Wis. Stat. Sec. 32.05 is prohibited under Wis. Stat. Sec. 32.015.

Dated and respectfully submitted this 12<sup>th</sup> day of November, 2021.

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**CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in s. [809.19 \(8\) \(b\)](#), [\(bm\)](#), and [\(c\)](#) for a brief. The length of this brief is 4,780 words.

Dated: November 12, 2021.

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