

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 6, 2004**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-2865  
STATE OF WISCONSIN**

**Cir. Ct. No. 02CV000615**

**IN COURT OF APPEALS  
DISTRICT II**

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**THE WAREHOUSE II, LLC,**

**PLAINTIFF-APPELLANT,**

**v.**

**STATE OF WISCONSIN DEPARTMENT OF  
TRANSPORTATION,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Winnebago County:  
WILLIAM H. CARVER, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. The Warehouse II, LLC, appeals from the order of the circuit court that denied its motion for litigation expenses under WIS. STAT.

§ 32.28 (2001-02).<sup>1</sup> This is a condemnation action. Warehouse argues that it is entitled to an award of fees under the statute because it prevailed on a right to take action claim against the State of Wisconsin Department of Transportation (DOT). We conclude that Warehouse failed to prove that the DOT did not have the right to condemn its property, and therefore is not statutorily entitled to fees. *See* § 32.28(3)(b). We affirm the order of the circuit court.

¶2 The DOT is statutorily authorized to acquire private property for the purpose of building public highways. WIS. STAT. § 32.05. In this case, the DOT acquired Warehouse’s property. Warehouse then brought this action against the DOT, challenging the State’s right to condemn its property on the grounds that the DOT had not bargained in good faith. The circuit court agreed with Warehouse and ordered the DOT to rescind its jurisdictional offer and negotiate with Warehouse in good faith. Eventually, the circuit court entered an order denying Warehouse’s request to recover its litigation expenses under WIS. STAT. § 32.28. Warehouse appeals.

¶3 WISCONSIN STAT. § 32.28(1) allows for litigation expenses in any proceedings under the chapter. Under § 32.28(3), litigation costs are awarded to the condemnee if, among other things: “The court determines that the condemnor does not have the right to condemn part or all of the property described in the jurisdictional offer or there is no necessity for its taking.” Sec. 32.28(3)(b). Warehouse argues that it is entitled to attorneys’ fees under this section because it

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

established a jurisdictional defect in the condemnation. We disagree with this analysis.

¶4 We conclude that this case is governed by *Wieczorek v. City of Franklin*, 82 Wis. 2d 19, 260 N.W.2d 650 (1978). In that case, the supreme court held that the allowance of attorney’s fees in condemnation cases is a matter of policy determined by the legislature. *Id.* at 23. The language of the statute then in effect was similar to that contained in WIS. STAT. § 32.28(3)(b). The old statute allowed attorneys’ fees if “the final judgment of the court is that the condemnor cannot condemn the property described in the jurisdictional offer.” *Wieczorek*, 82 Wis. 2d at 23. The court went on to say that the language of that statute allowed recovery of fees only when the landowner prevailed on the merits. *Id.* at 25-26. In that case, the landowners were granted judgment on the grounds that the jurisdictional offer was defective because it did not state a proposed date of occupancy. *Id.* at 21. The trial court had also concluded that the city could reinstate the condemnation proceedings by making a valid jurisdictional offer. *Id.*

¶5 Here, Warehouse also did not prevail on the merits. Rather, it prevailed in its attempt to undo the DOT’s jurisdictional offer because the DOT had not negotiated in good faith. While Warehouse argues that the cases are distinguishable on their facts, we fail to see how the factual differences change the outcome. In *Wieczorek*, the city’s jurisdictional offer was defective because it did not contain required information. Here, it was defective because the DOT did not negotiate properly. The end result is the same in both cases: the jurisdictional offer is invalid and the government can begin again. The litigation costs statute allows fees when the landowner demonstrates that the government is not entitled to condemn its property. That did not happen here and Warehouse is not entitled to fees. For the reasons stated, we affirm the order of the circuit court.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE  
809.23(1)(b)5.

