

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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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.

No. 00-1322

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JAMES A. MATHES AND GAIL A. MATHES,

PLAINTIFFS-APPELLANTS,

**ROBERT W. ROTH AND BARBARA L. ROTH,
THOMAS J. DICRISTO AND MARY JO DICRISTO,
BERT KRIVEC, URSULA KRIVEC, LIDIA DUBINSKI,
MARC T. ERICKSON AND NANCY ERICKSON,
JACQUE R. SOMMERS AND CORINNE M. SOMMERS,
LEE A. LYCAN AND ELLEN L. LYCAN,
DOUGLAS L. ARENTS AND MARCIA A. ARENTS,
MARY MUELLER,**

PLAINTIFFS,

**JOHN DOE OR DOES, UNNAMED AFFECTED PROPERTY
OWNERS, AND JOHN DOE OR DOES, UNNAMED ADJACENT
PROPERTY OWNERS,**

PLAINTIFFS-APPELLANTS,

v.

ANR PIPELINE COMPANY,

DEFENDANT-RESPONDENT,

TOWN OF BROOKFIELD SANITARY DISTRICT #4,
DEFENDANT.

APPEAL from a judgment of the circuit court for Waukesha County:
JOSEPH E. WIMMER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. James and Gail Mathes appeal from the judgment dismissing their action seeking compensation for the harm they alleged they suffered as a result of the construction of a natural gas pipeline on their property. The issue on appeal is whether the Matheses stated a claim against ANR Pipeline Company. Because we conclude that the appropriate forum for the Matheses' claim is the direct condemnation proceeding currently pending, we affirm the judgment of the circuit court dismissing the Matheses' complaint.

¶2 In 1998, the Federal Energy Regulatory Commission (FERC) authorized the respondent, ANR Pipeline, to construct and operate a high-pressure gas pipeline on property owned by the appellants and others.¹ In January 1999, ANR made jurisdictional offers to the appellants pursuant to WIS. STAT. § 32.06(5) (1997-98).² In February 1999, the appellants and others began the underlying action against ANR seeking, among other things, to have construction

¹ The underlying action included named plaintiffs in addition to the Matheses, as well as unnamed affected property owners and unnamed adjacent property owners. Only the Matheses appeal.

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

of the pipeline enjoined,³ asserting that the plaintiffs were entitled to relief under inverse condemnation, and seeking to include certain unidentified adjacent landowners as parties to the action. In March 1999, ANR began a direct condemnation proceeding against the property.

¶3 Subsequently, ANR moved to dismiss the action brought by the Matheses and others, and the circuit court granted the motion. While the motion to dismiss was pending, the pipeline was completed and went into operation. It is from the judgment dismissing their complaint that the Matheses appeal.

¶4 ANR argues that the Matheses' claim for inverse condemnation under WIS. STAT. § 32.10 is improper because there is a direct condemnation action currently pending under WIS. STAT. § 32.06(7). We agree. The inverse condemnation statute, § 32.10, has two conditions. In order to bring an inverse condemnation action, the property owner must establish: (1) occupation of the property by a person with condemnation power, and (2) the failure of the condemnor to bring direct condemnation proceedings. *Id.* In this case, ANR brought a direct condemnation action. Consequently, the Matheses are unable to satisfy the second condition and the action must fail.

¶5 The Matheses respond that their action lies under WIS. STAT. § 32.06(5), part of the direct condemnation statute. ANR argues, however, that that statute is limited to a challenge to the right to condemn. The statute is entitled "Court action to contest right of condemnation." *Id.* The statute creates the right of the property owner to contest "the right of the condemnor to condemn the

³ Because the pipeline was completed before the final hearing on this matter, the issue was moot and is not an issue on appeal.

property described in the jurisdictional offer for any reason other than that the amount of compensation offered is inadequate....” *Id.*

¶6 The Matheses do not contest the right of ANR to condemn the property. Rather, they seek compensation for temporary taking caused by the construction of the pipeline, as well as the alleged diminution of the value of their property caused by the safety concerns associated with operation of the pipeline. These concerns, however, may be addressed in the direct condemnation proceeding. We agree with ANR that WIS. STAT. § 32.06(5) provides for a challenge only to the right of the condemnor to condemn and is not a catchall for any challenge to the condemnation proceeding. The section is limited by its language to a challenge to the right of the condemnor to condemn the property and consequently does not apply to the Matheses’ action.

¶7 Because we conclude that the direct condemnation proceeding is the proper forum for the challenge brought by the Matheses, we need not address the other issues raised in this appeal. Nonetheless, we will briefly address the other issues.

¶8 The Matheses assert that the trial court erred when it refused to impose certain safety restrictions on the project. They further argue that the circuit court could have done so as part of the equitable relief they requested from their claim for an injunction. The Matheses sought an injunction to prohibit ANR from constructing the pipeline. Once construction was completed, that request became moot.

¶9 Further, the argument that safety issues were not properly considered is a basis for challenging the right to condemn. The argument is, in essence, that the condemnation should not have taken place because the safety issues were not

properly addressed. In this action, however, the Matheses have not challenged the right of ANR to condemn, and, in fact, have acknowledged that right. Rather, the Matheses seek additional compensation. The appropriate forum for a challenge to the amount of compensation is in the direct condemnation action.

¶10 The Matheses attempted to assert the claims of certain third parties. The circuit court refused to allow the claims and the Matheses assert that this was error. The third parties' claims, however, are dependent upon the Matheses asserting a valid claim. Since the Matheses failed to state a valid claim for relief, the third parties' claims must fail as well.

¶11 Moreover, the attempt by the Matheses to bring Donald and Judith Mastaglio into the action as intervenors must fail because the statute requires that the Mastaglios move to intervene. WIS. STAT. § 803.09(3). Here, the Matheses moved to allow the Mastaglios to intervene. Further, the Mastaglios did not file their own complaint as required by the statute. *Id.* Similarly, the Matheses' claim to represent unnamed parties in this appeal must fail. The Matheses never moved to certify the class and never provided the circuit court with any basis to conclude that they are proper class representatives.

¶12 For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

