COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal No. 2007AP00221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-
Cross-Appellant.

APPEAL FROM THE ORDER OF THE CIRCUIT COURT OF MILWAUKEE COUNTY CASE NO. 2003cv005040 THE HONORABLE JEFFREY A. KREMERS AND JEAN W. DIMOTTO PRESIDING

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS' BRIEF

Mark A. Cameli, WI SBN 1012040
Rebecca Frihart Kennedy, WI SBN1047201
Lisa Nester Kass, WI SBN 1045755
Joseph W. Voiland, WI SBN 1041512
Attorneys for Bostco LLC and Parisian, Inc.
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 2100
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Mailing Address:
P.O. Box 2965
Milwaukee, WI 53201-2965
Attorneys for Plaintiffs-Appellants-Cross-Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Legislative History

Secondary Sources

ISSUES PRESENTED FOR APPEAL

(1) Whether the jury's award of $3 million in past damages is, as a matter of law, significant harm under *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969), and Wisconsin's nuisance jurisprudence, and thus whether the answer to Question No. 10 on the special verdict should be changed.

The trial court did not directly address the *Jost* holding in its ruling that there was "ample evidence instructive from which the jury could decide that either this presence of the tunnel and manner in which it was being operated ... by the [Milwaukee Metropolitan Sewerage District ("MMSD")] was causing substantial harm and there was ample evidence for them to decide it wasn't. They decided it was not and I think that is the end of the analysis as far as this Court is concerned." R.394 p.24, A-Ap.730.

(2) Whether the Wis. Stat. § 893.80(3) damage cap is unconstitutional on its face or as applied in this case, or in the alternative, whether MMSD waived or is estopped from asserting the protection of the damage cap.

The trial court held: "I find no waiver of the caps. I do not find a basis for finding the caps unconstitutional on this record." R.394 p.45, A-Ap.733.

(3) Whether Bostco LLC and Parisian, Inc. (collectively "Boston Store") were entitled to a directed verdict on MMSD's contributory negligence defense, whether there is any evidence in the trial record to support the jury's answers to the contributory negligence questions on the special verdict, and thus whether the answers to Question Nos. 3, 4 and 5 should be changed.

The trial court held:

> And while there certainly are limits to everyone's duty to do things, I think the testimony in this case, the evidence was such that a reasonable jury could conclude that the Boston Store was negligent in the manner in which they took care of the well once they weren't using it and manner in which they shut it down for a period of time and that, coupled with their failure to actively monitor their foundation, I think were all grounds upon which the jury could and apparently did assess some contributory negligence to, with respect to the damages that the Boston Store was suffering in their, in the area of their foundation.
> R.394 p.25, A-Ap.731.

(4) Whether MMSD was entitled to summary judgment on Boston Store's inverse condemnation claim.

The trial court granted MMSD summary judgment, holding that if Boston Store proved its case, all it would prove is that the

building was damaged to some extent and "[i]t hasn't resulted in a taking as required for condemnation." R.374 pp.39-40, A-Ap.723-24.

(5) Whether MMSD was entitled to summary judgment on Boston Store's Wis. Stat. § 101.111 claim.

The trial court granted MMSD summary judgment with respect to Boston Store's Wis. Stat. § 101.111 claim, concluding that the statute does not apply because "the property interest of the MMSD for this tunnel was separated from the Boston Store property by 160 feet of someone else's property…the land where the excavation for the tunnel took place was not adjoining to Boston Store's property." R.374 pp.38-39; A-Ap.722-23.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Although Boston Store does no request oral argument, the opinion in this case will likely meet the criteria for publication set forth in Wis. Stat. § 809.23 in that this case involves issues that will likely clarify existing rules of law and that are of substantial and continuing interest to the public and may contribute to the legal literature by collecting case law or reciting legislative history.

STATEMENT OF THE CASE

Bostco LLC and Parisian, Inc. (collectively "Boston Store") brought a claim against the Milwaukee Metropolitan Sewerage District ("MMSD") for damage sustained by Boston Store as a direct result of MMSD's ongoing negligent operation and maintenance of the Deep Tunnel, a thirty-two foot diameter tunnel running 300 feet below downtown Milwaukee. This appeal concerns errors that occurred before, during and after the trial of this matter. Before trial, the trial court denied Boston Store the opportunity to prosecute two viable causes of action. During trial, the court improperly provided the jury with an instruction and special verdict question regarding MMSD's unsubstantiated contributory negligence defense. After trial, notwithstanding the jury's finding that MMSD had negligently caused Boston Store millions of dollars in damage, the court erroneously: (1) rejected Boston Store's argument that it suffered "significant harm" as a matter of law; (2) failed to change the jury's special verdict answers regarding Boston Store's alleged contributory negligence; and (3) reduced Boston Store's $9 million damage award to $100,000.[1]

[1] The $100,000 constituted $50,000 for each plaintiff.

These errors should be corrected and MMSD should be held accountable for its past and ongoing tortious conduct.

I. RELEVANT PROCEDURAL HISTORY

Boston Store filed its original complaint on June 5, 2003. R.1.[2] In it, Boston Store asserted claims of negligence, continuing nuisance, and inverse condemnation against MMSD, alleging that MMSD's actions and inactions with respect to the Deep Tunnel caused and continues to cause harm to Boston Store's foundation.[3] *See* R.1. MMSD answered the complaint on August 18, 2003 and unsuccessfully sought its dismissal. R.14; R.26; R.34; R.35; R.369 pp.16-17; R.67.

With leave of the court, Boston Store amended its complaint, alleging claims of negligence, continuing nuisance, inverse condemnation and violation of Wis. Stat. § 101.111. *See* R.370 pp.14-15; R.68 p.2; R.51 pp.30-35, A-Ap.130-35. On February 23,

[2] Boston Store filed a Notice of Claim and Itemization of Relief Sought with MMSD on July 19, 2001 and June 19, 2002, respectively. *See* R.46 pp.4-11.

[3] In both the original Verified Complaint and Amended Complaint, Boston Store asserted claims against another set of defendants—Traylor Brothers, Inc./Frontier Kemper Constructors, Inc., a Joint Venture, and their separate entities—who were later dismissed from the action. *See* R.74.

2005, MMSD answered the Amended Complaint. R.75, A-Ap.141-78.

MMSD filed a summary judgment motion on December 20, 2005. R.118, 119, A-Ap.219-97. Although MMSD sought dismissal of the entire action, the trial court dismissed only two of Boston Store's claims—those based on inverse condemnation and Wis. Stat. § 101.111. R.157, A-Ap.479-81.

After receiving MMSD's proposed jury instructions and special verdict, Boston Store filed a brief opposing MMSD's proposed instruction and question related to contributory negligence; the court ultimately, albeit not expressly, denied the motion. *See* R.192, A-Ap.525-37.

The jury trial started on July 11, 2006 and ended on July 27, 2006, when the jury returned its special verdict. *See generally* R.381; R.392; R.393; R.403, A-Ap.585-87 (special verdict).

The parties filed and briefed various post-trial motions, *see* R.256-65; R.268-78, and on September 11, 2006, the trial court granted Boston Store's motion to change the jury's special verdict answer concerning the statute of limitations and MMSD's request to remit the damage award to $100,000, pursuant to Wisconsin's

municipal damage cap, R.394 pp.29, 46, A-Ap.732, 734; R.305, A-Ap.708-10.

In response to the latter decision, Boston Store moved for injunctive relief, arguing that the remittitur denied it an adequate remedy at law. R.280; R.291; R.292. On January 30, 2007, after reviewing the entire case record, Judge Jean DiMotto[4] granted Boston Store's motion and ordered MMSD to line a one-mile stretch of the Deep Tunnel near the Boston Store. R.399 p.26, A-Ap.1125; R.336, A-Ap.713-15; R.339, A-Ap.716-18.

II. STATEMENT OF FACTS

A. Boston Store's inverse condemnation and Wis. Stat. § 101.111 claims are dismissed on summary judgment.[5]

In moving for summary judgment on Boston Store's inverse condemnation claim, MMSD argued that Boston Store had "not allege[d] that MMSD has used or appropriated [Boston Store's] property for a public purpose, nor … that MMSD has imposed any

[4] After the post-verdict hearing, Judge DiMotto rotated into Judge Kremers' docket.

[5] MMSD filed a summary judgment motion seeking dismissal of the entire case, *see* R.118; R.119, but because the trial court granted MMSD's motion only with respect to Boston Store's inverse condemnation and Wis. Stat. § 101.111 claims, only those rulings are relevant here. *See* R.157 pp.2-3, A-Ap.480-81.

legal restrictions on [Boston Store's] property." *See* R.119 p.60, A-Ap.279. MMSD also asserted that Boston Store has only alleged property damage and that "damage to property is insufficient to constitute a takings claim." *See* R.119 pp.60-64, A-Ap.279-283.

In response, Boston Store argued that evidence gathered in discovery showed that MMSD's negligent operation and maintenance of the Deep Tunnel has dewatered the soil beneath the building to such an extreme degree that Boston Store has lost all beneficial use of the timber pilings and that property can be "taken" in the constitutional sense without actual occupancy or seizure. *See* R.134 pp.70-71, A-Ap.367-68. Boston Store also argued that "[i]t is an undisputed fact that the [D]eep [T]unnel project was created for the benefit of the public and to be used for public use." *See* R.134 p.70, A-Ap.367.

The trial court granted MMSD summary judgment, holding that if Boston Store proved its case, all it would prove is that the building was damaged to some extent, and "[i]t hasn't resulted in a taking as required for condemnation." R.374 pp.39-40, A-Ap.723-24.

In moving for summary judgment on Boston Store's Wis. Stat. § 101.111 claim, MMSD argued that the excavation statute does

not apply because Boston Store's property "does not 'adjoin' [MMSD's] easement." R.119 p.66, A-Ap.285. Boston Store argued that the language of the statute "applies to the protection of buildings 'on adjoining *properties*,' … and both the Boston Store building and MMSD's excavation are on adjoining properties." R.134 p.67, A-Ap.364 (citing Wis. Stat. § 101.111(3)(a); R.138 p.3, A-Ap.384). The trial court concluded the statute does not apply, holding that "the property interest of the MMSD for this tunnel was separated from the Boston Store property by 160 feet of somebody else's property…the land where the excavation for the tunnel took place was not adjoining to Boston Store's property." R.374 pp.38-39, A-Ap.722-23.

The remainder of MMSD's summary judgment motion, including its immunity argument, was denied. R.157 pp.2-3, A-Ap.480-81.

B. Boston Store seeks to prohibit MMSD from pursuing a contributory negligence defense.

During final pretrial proceedings, Boston Store filed a brief requesting that the trial court prohibit MMSD from asserting a contributory negligence defense, R.192, A-Ap.525-37, arguing MMSD's theory—that Boston Store was negligent in failing to

institute a weeping system or take other measures to ensure that the wood pile foundation remained moist—presented a failure to mitigate damages rather than a contributory negligence defense. *See* R.192 pp.3-5, A-Ap.527-29. Boston Store also argued that MMSD failed to plead failure to mitigate and therefore, waived the defense. *See* R.192 p.5, A-Ap.529. Boston Store's request was ultimately denied.

C. Boston Store's evidence at trial.

Throughout the course of the trial, Boston Store introduced evidence showing that MMSD had maintained and operated the Deep Tunnel negligently, that MMSD's negligent operation or maintenance of the Deep Tunnel has caused and continues to cause significant groundwater drawdowns, which in turn have damaged and will continue to damage the Boston Store's timber pile foundation through the mechanisms of downdrag and pile rot, and that MMSD had notice of significant infiltration of groundwater into the Deep Tunnel. Boston Store also submitted testimony explaining that it was within MMSD's power to abate future interference with and damage to Boston Store's property.

Boston Store's witnesses[6] testified to the following:

1. MMSD's negligent maintenance or operation of the Deep Tunnel has caused damage to Boston Store's property.

    (a) The dewatering of the ground.

Dr. Nelson explained how groundwater infiltrates into the Deep Tunnel through cracks in the geologic material through which the tunnel runs. *See, e.g.*, R.382 pp.99-100, A-Ap.743-44 (water moves through cracks in rock); R.382 pp.112-14, A-Ap.748-50 (how the features in the tunnel were mapped after excavation); R.382 pp.120-21, A-Ap.751-52 (water inflow through cracks noted on logs); *see also* R.351 (Trial Exs. 1550-029 to 032), A-Ap.1279-82.

Dr. Turk testified that the drainage of groundwater through the different soil and rock layers into the Deep Tunnel, not Boston Store's well,[7] lowered the water levels beneath the Boston Store, and will

[6] Boston Store's expert witnesses included Dr. Charles Nelson, a tunnel expert, Dr. Jan Turk, a hydrogeologist, Mr. Richard Stehly, a civil engineer with wide experience in soil engineering and materials engineering, Dr. Thomas Quirk, an expert on wood rot, and Mr. Steven Jaques, Boston Store's damages expert. The testimony of these experts was corroborated by Samuel Eppstein, an architect involved in a major renovation of the Boston Store's foundation, and Charles Winter, a geotechnical engineer, who participated in an excavation of portions of the Boston Store's foundation.

[7] The well at the Boston Store had existed since 1936. R.387 p.160, A-Ap.999. Boston Store's owners stopped using it. R.387 p.160, A-Ap.999. Evidence analyzed by Boston Store experts showed foundation stability for decades and no

continue to do so as long as the Deep Tunnel is operated and maintained in the same manner as it is today. *See* R.383 pp.6-7, A-Ap.768; *see also* R.383 pp.11-24, 24-32, 37-43, A-Ap.769-777 (explaining how water moves and drains through each of the various rock and soil layers, which have varying porosity and permeability, and how layers interact with each other); R.383 pp.44-50, 63-73, A-Ap.777-779, 782-784 (discussing how monitoring well data shows that Deep Tunnel drew down groundwater levels near Boston Store); R.383 pp.50-51, A-Ap.779 (same general conditions exist today); R.383 pp.51-52, A-Ap.779 (if the tunnel were sealed, water levels would start to recover). According to the United States Geological Survey, in 2004, seventy-three percent of all recharge to groundwater (from rainfall and other sources) was discharged into the Deep Tunnel. R.383 pp.55-57, A-Ap.780; R.351 (Trial Exs. 1551-027 to 028), A-Ap.1343-44.

(b) The effect of the dewatering on the foundation.

Mr. Stehly testified that "[t]he Boston Store has experienced large structural column movements as a result of the operation of the

---

remarkable or systemic drop in columns before the 1990's. *See, e.g.,* R.385 pp.98-105, A-Ap.907-08; R.351 (Trial Exs. 1552-043 to 051), A-Ap.1300-08.

North Shore Tunnel";[8] and "[i]f the operation of the North Shore Tunnel continues under the current conditions, the Boston Store will experience large structural column movements requiring future repair." R.385 p.43, A-Ap.893; *see, e.g.*, R.385 pp.33-38, A-Ap.891-92; R.351 (Trial Exs. 1552-003 to 005), A-Ap.1285-87.

Drawdowns in the groundwater trigger soil consolidation and soil consolidation affects the foundation of the Boston Store building through the primary mechanism of downdrag, and secondarily, from pile rot. *See, e.g.*, R.385 pp.49-53, 63-77, A-Ap.894-95, 898-901; R.351 (Trial Exs. 1552-018 to 025), A-Ap.1289-96. Specifically, the desaturation of the deepest marsh deposit "triggers a large amount of movement, downdrag, and then column movement." R.385 pp.68-69, A-Ap.899; R.351 (Trial Exs. 1552-010, 1552-018 to 026), A-Ap.1288, 1289-97.

(i) The mechanisms of downdrag and pile rot.

Downdrag occurs when the deeper soil in the lower marsh deposits starts to move downward, and as the timber pile tries to support the soil, the pile gains load and is forced downward as well—

[8] For purposes of this appeal, "Deep Tunnel" and "North Shore Tunnel" may be used interchangeably.

it is an "interaction between the soil … and the pile." *See* R.385 pp.68-69, A-Ap.899; R.385 pp.341-42, A-Ap.942-43.[9] This movement is triggered by a drop in water pressure causing a dewatered zone under the marsh soil. R.385 pp.66-69, A-Ap.899. This dewatering under the marsh soil creates large pressure on the soils resulting in greater downdrag force. R.385 pp.66-69, A-Ap.899. The end result is building settlement; piles and columns settle and unsupported floors sag. *See* R.385 p.69, A-Ap.899; R.351(Trial Exs. 1552-018 to 023), A-Ap.1289-94.

Pile rot occurs when the water table is lowered, allowing oxygen to reach the surface of the wood, which causes fungus to grow and decay the wood. *See* R.384 pp.71-72, A-Ap.850; *see also* R.351 (Trial Exs. 1554-012 to 019), A-Ap.1349-56. Boston Store's wood expert testified that if the water table had reached the top of the wooden pilings, they would not have rotted. *See* R.384 pp.56-57, A-Ap.846; *see also* R.351 (Trial Ex. 1554-003), A-Ap.1348. The rot that was observed on the Boston Store's timber piles in 2001 could have occurred in a time period of approximately ten years. *See* R.384

[9] It appears that the handwritten numbering in R.385 skips approximately 100 numbers at page 234 (*i.e.*, the numbering goes from 234 to 335 instead of 234 to 235).

pp.55-57, 88-89, A-Ap.846, 854; *but see* R.384 pp.83-85, A-Ap.853 (discussion of ten- to twelve-year time period during cross-examination).[10]

While keeping the piles wet will help prevent rot, there is really nothing a building owner can do to mitigate downdrag; there is no preventative maintenance that can be done. R.385 pp.72-73, A-Ap.900. A wetting system presents a "Catch-22" situation—with the wetting system, "you're going to lift the water level up as high as you can to keep the pile tops moist, and that gives you the maximum column stress onto the deep soil." R.385 pp.174-75, A-Ap.926; *see also* R.385 p.73, A-Ap.900.

(ii) The building settlement data**.**

Boston Store has been monitoring the movement of its columns for over fifty years; that data was discussed and interpreted by Boston Store's expert.[11] *See, e.g.,* R.385 pp.88-105, A-Ap.904-08. Mr. Stehly opined that during the period of 1990-2001, with regard to

[10] The trial court, over Boston Store's objection, decided shortly before trial that MMSD began "operating" and maintaining the Deep Tunnel, for purposes of liability, on August 7, 1992. *See* R.377 pp.10-13; R.211.

[11] Although there was no column monitoring data from 1992, 1993, 1994 or 1995 and some monitoring points had been lost on occasion throughout the history of the monitoring, Boston Store's expert acknowledged the absence of this data. *See* R.385 p.220, A-Ap.937; R.385 pp.90-91, 211-12, A-Ap.905, 935.

columns at equal elevation, three times as many columns were repaired and there was nearly twice as much movement in the columns than in the previous twenty-six-year time period. R.385 pp.93-94, A-Ap.905-06; R.351 (Trial Ex. 1552-041), A-Ap.1298.[12]

The settlement data relating to the two sets of columns repaired in 1997 and 2001 reflect that the columns were relatively stable until the early 1990's, when they suffered large settlements and were eventually jet-grouted and stabilized. R.385 pp.98-105, 138-43, A-Ap.907-08, 917-18; R.351 (Trial Exs. 1552-043 to 051 and 054 to 068), A-Ap.1300-08; R.385 pp.138-43, A-Ap.917-18. The settlement of the columns was corroborated by a topographical survey of the second floor of the building drawn in 2000. *See* R.385 pp.144-48, A-Ap.918-19; R.351 (Trial Exs. 1552-071 to 074), A-Ap.1325-28. Ultimately, as noted above, Mr. Stehly opined that the Boston Store experienced large column movement due to the operation of the Deep

[12] The foundation had been altered or repaired on several occasions prior to 1990—between the late 1940's or early 1950's and 1990. *See* R.385 pp.94-95, A-Ap.906; R.351 (Trial Ex. 1552-042), A-Ap.1299. However, several of the column repairs or alterations were attributed to changes in the use of the building including, for example, lowering the basement for use as retail space. R.385 pp.87-88, 94, A-Ap.904-05. Several column changes were also done for unknown reasons. R.385 pp.94-95, A-Ap.906.

Tunnel. *See* R.385 pp.42-43, A-Ap.893; R.351 (Trial Ex. 1552-006), A-Ap.1345.

(iii) Damage observed to the foundation and building.

When excavation test pits were dug in May 2001, there were several inch-annuluses[13] between some of the piles and their concrete pile caps, and several-inch voids, or air pockets, between the soil and the bottom of the concrete pile caps in some of the excavations. R.384 pp.182-97,[14] A-Ap.875-79; *see also* R.351 (Trial Ex. 2242-A). In some instances, there were voids between the tops of the piles and the bottom of the pile caps. *See* R.384 p.188, A-Ap.877.

Structural damage was also uncovered when the finish materials were removed during a 2000 renovation of the building, including areas where the building had moved so much that wood joists were pulled off their bearings. *See* R.385 pp.353-55, 358-71, A-Ap.945-950; R.386 p.6, A-Ap.957.

---

[13] An annulus "is a space around the circumference of the pile between the wood of the pile and the concrete impression that the pile once made. So it is really the amount of wood that is no longer there that was once part of the pile around a circumference." R.384 p.185, A-Ap.876.

[14] The handwritten numbering of R.384 skips page 154. The numbers cited above correspond with the handwritten numbers.

(iv) Repairing the Foundation**.**

The cost of the 1997 repairs, which included both jet-grouting under the columns and other necessary repairs for the floors and walls, among other things, was approximately $625,000. *See* R.351 (Trial Ex. 1552-053), A-Ap.1309; *see also* R.385 pp.153-55, A-Ap.920-21. The cost incurred as a result of the fifteen columns that settled and were repaired in 2001 was calculated to be approximately $2,200,000. *See* R.385 pp.149-52, A-Ap.919-20; R.351 (Trial Ex. 1552-076), A-Ap.1347.

2. Boston Store will likely suffer damages in the future.

In addition to establishing past damage, Boston Store's experts opined that the conditions still remain—"[t]he drawdown from the tunnel continues to draw the water down and make this building vulnerable"—and sooner or later, the remainder of the columns are going to need to be repaired. R.385 pp.160-61, A-Ap.922; *see also* R.383 pp.50-51, A-Ap.779 (hydrogeology expert opining same general conditions exist today); R.382 p.97, A-Ap.742; R.351 (Trial Ex. 1550-009), A-Ap.1277 (tunnel expert opining that loss of groundwater continues fourteen years after construction).

Mr. Stehly explained that "[t]he soil conditions are different as you move to different parts of the building, and it's going to take the soils some time to respond, but [the columns] are going to need repair." R.385 p.160, A-Ap.922. With regard to the compressible soils and the effects of the drawdown, he also opined that conditions are actually getting worse, because the head in the dolomite keeps going down. R.385 pp.345-46, A-Ap.943-44.[15]

Although Boston Store would probably have to repair 12 columns, out of 169, over the course of time, because it had done so in the past, *see* R.385 pp.162-63, A-Ap.923, the estimated cost for repairing the remaining columns in a fashion similar to the repairs done in 1997 and 2001 is approximately $9,000,000. R.383 pp.238-42, A-Ap.825-26; R.351 (Trial Ex. 1553-018), A-Ap.1336.

3. MMSD's negligent maintenance or operation of the Deep Tunnel has interfered with Boston Store's use and enjoyment of its property and MMSD can abate that interference.

Boston Store introduced evidence at trial to show that MMSD's negligent maintenance or operation of the Deep Tunnel (and

[15] Indeed, Mr. Stehly noted that since MMSD has taken over operation of the Deep Tunnel, it has turned off the recharge wells, and done nothing to minimize infiltration or restore groundwater. R.385 p.347, A-Ap.944.

corresponding dewatering of the ground) has interfered with Boston Store's use and enjoyment of its property, *see* R.403, A-Ap.587, and that this interference can be abated. *See id.*; R.392 pp.43-44, A-Ap.1056. Specifically, Boston Store's experts testified that the conditions are generally the same now, and the dewatering of the ground continues, but also provided testimony showing that the condition could be abated. *See* R.383 pp.6-7, 50-51, A-Ap.768, 779 (conditions generally same; dewatering continues); R.382, p.97, A-Ap.742; R.351 (Trial Ex. 1550-009), A-Ap.1277 (loss of groundwater continues fourteen years after construction); R.383 pp.51-52, A-Ap.779 (if tunnel was sealed water levels would start to recover); R.382 pp.159-62, A-Ap.753-756; *see also* R.351 (Trial Exs. 1550-42 to 43), A-Ap.1283-84 (comparison of inflows, pre- and post-lining, in segments of tunnel near Boston Store show that flow in lined segments was 4.9% of what it was prior to lining and grouting); R.382 pp.162-63, A-Ap.756-57 (substantially watertight tunnels well within capability of underground construction industry; "it's common practice now to—for lining in wet tunnels and seal any joints between the pores and seal any other leaks that are in the concrete until they're substantially waterproof."); R.382 pp.163-64, A-Ap.757-58 (tunnel

must have complete lining installed with all joints and cracks sealed to stop groundwater inflow and drawdown; it would cost approximately $10 million to line and grout the tunnel for one half mile on either side of store); R.390 p.9, A-Ap.1039 (stipulated cost of North Shore Tunnel from Capitol Drive to connection with Crosstown was approximately $146-49 million); R.382 pp.180-81, A-Ap.760-61 (if the cracks in the tunnel were sealed, the groundwater level would rise over time); R.351 (Trial Ex. 1550-10), A-Ap.1278; R.382 p.181, A-Ap.761 (adding recharge wells would speed up that process); R.382 pp.222-23, A-Ap.763-64 (not necessary to shut down entire system to line parts of tunnel).

4. MMSD had knowledge of the potential for harm and was on notice of the potential harm to Boston Store.[16]

MMSD had knowledge of the potential harmful effects infiltration into the tunnel could have on groundwater levels. *See*, *e.g.*, R.390 pp.11-12, A-Ap.1040 (in an admission read to the jury,

[16] Over Boston Store's objection, the trial court excluded substantial evidence related to MMSD's knowledge that the Deep Tunnel was leaking substantial amounts of groundwater and that this infiltration was likely to cause property damage to others. Although Boston Store believes this evidence was wrongly excluded, the recitation of facts relates only to the evidence that was presented at trial.

MMSD "[a]dmit[s] the analysis of worst case scenarios discussed the possibility of permanent lowering of the dolomite aquifer…"); R.381 pp.167-68, A-Ap.737 (MMSD admitted that it had been advised "that groundwater intake into the tunnel construction zone might cause groundwater drawdowns to occur in the future").

MMSD was also on notice of the potential for harm to buildings and structures generally. For example, a 1982 planning document referenced potential effects that the Deep Tunnel could have on various utilities and structures "under certain conditions."[17] R.381 pp.144-45, A-Ap.736; *see also, e.g.,* R.390 pp.15-16, A-Ap.1041 (MMSD "admit[s] the program management office understood that too great a drawdown of groundwater from a zone wherein wooden piles are located might have a deleterious effect on such wooden piles if the wooden piles were otherwise in sound condition."); R.381 pp.171-73, A-Ap.738; R.351 (Trial Ex. 429) (document received by MMSD indicating that the "drainage of water

[17] The passage referenced read: "Settlement of the magnitude predicted may have detrimental effects on utilities, structures on shallow foundations, and *structures founded on piles. Negative skin friction may increase loads on the piles possibly stressing them beyond the point of their capacity or inducing differential settlements.*" R.381 p.144, A-Ap.736 (emphasis added).

from the alluvial layer causes drainage from the overlaying marsh deposits which, in turn, leads to settlement"; "[i]f the drainage remained uncontrolled, then subsequent settlement would lead to building damage"; "[o]ther potential effects are downdrag on piles, which means that the downward movement of the settling soil creates a downward force on the pile[; t]his is of most concern for older buildings founded on timber piles, the condition of which is not known."); R.382 pp.36-38; R.351 (Trial Ex. 359), A-Ap.1342 (minutes from a May 26, 1988 meeting state "PMO/MMSD indicates that liability for downtown settlement due to water drawdown from a great distance away will be accepted by MMSD").

MMSD had identified structures at risk as a result of dewatering from the Deep Tunnel in a "North Shore Critical Structures Analysis." *See* R.381 p.163; R.351 (Trial Ex. 290), A-Ap.1374. Critical structures included "those structures that are underlain by soft compressible soils such as the estuarine deposits … [and] located within … the effective dewatering trough of 1,000 feet of the tunnel alignment." R.381 p.163; R.351 (Trial Ex. 290), A-Ap.1374. Boston Store was identified as a critical structure in the report. R.381 pp.163-64; R.351 (Trial Ex. 290), A-Ap.1375.

Finally, MMSD was also on notice that infiltration of water into the tunnel had caused groundwater drops. *See, e.g.*, R.390 p.15, A-Ap.1041 (MMSD "admits the program management office was aware that there were groundwater drops in the alluvial level due to groundwater intake into the … tunnel"); R.381 p.169, A-Ap.737 (same); R.390 pp.16-17, A-Ap.1041 ("plaintiffs requested that MMSD admit the following: Admit that with respect to the [ISS], as of April 24, 1995, MMSD knew that the permanent drawdown in groundwater levels that was noted in some monitoring wells was expected. MMSD's response to that request was as follows: Admit [MMSD] was told this on April 24, 1995."); R.381 p.177, A-Ap.739 (MMSD admitted that "by November 1992, [fourteen] recharge wells along the alignment of the … tunnel were deactivated before such time that the alluvial water levels were restored to pretunnel construction levels"); R.381 p.179, A-Ap.740 (as of June 14, 1993, MMSD "admits the Program Management Office was aware that the alluvial aquifer was drawn down in the area of downtown Milwaukee that includes the physical location of the Boston Store….").

D. MMSD'S Evidence at Trial.

Dr. Cherkauer, MMSD's hydrogeology expert, stated that Boston Store's well "has had a longer effect and greater effect on water levels in the vicinity of the Boston Store than the tunnel." R.387 p.162, A-Ap.1000.[18] Dr. Cherkauer also testified that there was approximately a thirty-foot drop in the dolomite water table after the Deep Tunnel went through. R.387 pp.204-06, A-Ap.1010-11. This thirty-foot calculation was derived from averaging well readings, many of which came from wells far removed from the Deep Tunnel's location. R.387, pp.202-10, A-Ap.1010-12. The affected areas would see a substantial increase in the drawdown the closer they came to the tunnel itself. R.387 pp.206-08, A-Ap.1011.

With regard to the water table, MMSD's expert Steven Hunt testified that there were several other "influences on the Boston Store water table" including: the well; nearby wells; historical borings; steam tunnels; underpinning pits; Boston Store underdrain; other nearby underdrains; Lake Michigan and river levels; precipitation;

[18] However, Dr. Cherkauer also described a number of other factors that his computer model did not take into account, such as fluctuating river and lake levels, a nearby steam tunnel, and other multi-aquifer wells, and estimated their probable effects on the water levels beneath the Boston Store. *See* R.387 pp.183-88, A-Ap.1005-06.

and ground water flow. R.352 (Trial Exs. 2991-005-06), A-Ap.1340-41. MMSD's tunnel expert, Steven Fradkin, also testified that steam tunnels and other utility trenches could affect the groundwater table levels. R.388 pp.74-75, A-Ap.1033. However, Roger Ilsley testified that when he investigated the steam tunnel underneath Wisconsin Avenue in 1984 he observed seepage of water into the steam tunnels. R.388 pp.100-01, 112-13, A-Ap.1034, 1035. He also testified that when they drilled down at that depth, water flowed into the tunnels through those holes. R.388 pp.112-13, A-Ap.1035.

Dr. Albert DeBonis, MMSD's wood expert, testified that his review of a variety of documents indicated that "there had been ongoing investigations of settlement and decay of [the] wooden piles beneath the Boston Store[,]" for the period of time from approximately 1950 through the late 1980's, and opined that "soft rot"—a very slow progressing organism—was the "predominant decay organism" found in the samples taken from some of the Boston Store pilings. *See* R.390 pp.104-109, A-Ap.1042-43. He suggested that the evidence gathered, specifically, for example, observations

"made by" Duncan Williams,[19] indicates that there was rot in the 1950's. *See* R.390 pp.118-20, A-Ap.1044. Ultimately, Dr. DeBonis concluded that the piles had been decaying for years before MMSD began the tunneling work. R.390 p.121, A-Ap.1044.

MMSD's experts appeared to attribute this to, among other things, Boston Store's well, *see supra* page 26, and the absence of a pile hydration system. *See, e.g.*, R.387 p.195, A-Ap.1008; *but see* R.385 pp.72-73, A-Ap.900; R.385 pp.174-75, A-Ap.926 (wetting system presents "Catch-22").[20] MMSD's expert, Dr. Brumund also agreed, however, that a pile hydration system would not have substantially restored any potential drawdown in the alluvial aquifer. *See* R.386 p.213.

On the other hand, Dr. Johnson, MMSD's structural engineering expert, opined that the application of several mathematic

[19] Although MMSD's experts were permitted to testify about Duncan Williams' "observations," Boston Store objected to the introduction of Duncan Williams' thesis (written in the 1950's) and deposition testimony as inadmissible hearsay and lacking foundation. *See, e.g.*, R.222; R.379 pp.7-17; R.391 p.52.

[20] However, the undisputed evidence at trial was that the lower part of the well was abandoned according to the Department of Natural Resources requirements. R.351 (Trial Ex. 1836), A-Ap.1376-77; R.391 p.53. In fact, MMSD never offered any evidence that the well was in violation of any ordinance, code, regulation, or law. Dr. Cherkauer acknowledged that the well had been in existence since 1936 and was last used in 1962. R.387 pp.160-61, A-Ap.999. He also acknowledged that Boston Store attempted to abandon its well in 2003. R.387 pp.160-61, A-Ap.999.

formulas to the settlement numbers reported in the column monitoring surveys indicate that the reported settlements could not have happened, because if they had, walls would have shattered and beams collapsed, and he did not see any evidence of such major problems. *See, e.g.*, R.387 pp.15-18; 46-48. Essentially, Dr. Johnson opined that the reported settlement could not have happened, and thus did not occur. *See, e.g.*, R.387 pp.28-33.[21]

E. Post-Evidence Objections.

Near the end of trial, the parties submitted revised and amended proposed jury instructions and special verdicts. R.244-47, A-Ap.538-64. In its written objections to MMSD's proposed jury instructions and special verdict, Boston Store objected to MMSD's instructions relating to contributory negligence and failure to mitigate on the basis that MMSD had not submitted evidence to support the former defense and had not pled the latter. *See* R.250 pp.1-3, A-Ap.568-70; R.250 pp.5-6, A-Ap.572-73. (The instruction conference was held off the record.)

[21] Dr. Brumund also testified that settlement data was unreliable, but he admitted on cross-examination that if a monitoring benchmark had been moved on a column, he plotted that movement as column movement. *See* R.386 p.240.

On the morning of July 26, 2006, Boston Store filed several written objections to the expected final special verdict and jury instructions, including standing objections to the inclusion of contributory or comparative negligence, statute of limitations and duty to mitigate instructions and verdict questions. *See* R.252 pp.1-4, A-Ap.576-79. After giving the parties the instructions and verdict form it intended to use, the trial court asked whether there were "any mistakes" or if the instructions and verdict form were "different from what you think I said I would do yesterday." R.392 p.3, A-Ap.1046. The trial court informed the parties that they would be given an opportunity to put objections to the substance of the instructions and special verdict on the record later in the day. R.392 p.3, A-Ap.1046.

At this point, Boston Store sought to confirm that the parties agreed to a single set of damage questions for both negligence and nuisance. R.392 pp.16-17, A-Ap.1049; R.392 p.17, A-Ap.1049 ("That's right.").

While the jury was deliberating, the trial court gave the parties an opportunity to make motions at the close of evidence. Both parties unsuccessfully moved for a directed verdict. R.392 pp.200-201, A-Ap.1095. Boston Store also unsuccessfully moved for a directed

verdict on MMSD's contributory negligence affirmative defense. *See* R.392 pp.205-208, A-Ap.1096-97.

The trial court invited the parties to put their objections to the special verdict and jury instructions on the record, "keeping in mind that the record already consists of what you each submitted in the form of what you wanted for a verdict and what instructions you wanted me to give." R.392 p.209, A-Ap.1097. Boston Store reiterated that the parties had stipulated to the consolidation of the damage questions and that Boston Store objected to the inclusion of the comparative negligence questions. R.392 p.210, A-Ap.1098.[22]

F. Deliberations and the Return of the Special Verdict.

During its deliberations, the jury asked for a definition of "use and enjoyment" (a phrase used in the special verdict in a question related to Boston Store's nuisance claim). R.392 p.231, A-Ap.1103. After the jury was told to rely on common experience and common sense, Boston Store requested that the trial court give a definition that it had proposed initially because, as the trial court explained, "they [felt] that to not give that leaves the jury with a misrepresentation that

[22] Boston Store also objected to the trial court's inclusion of the statute of limitations question, but that answer was subsequently changed and is not at issue here.

simply because they can use the Boston Store, the plaintiffs aren't being denied the use and enjoyment of their land, but it encompasses something more than that." R.392 pp.231-32, A-Ap.1103.

The next morning, Boston Store filed a formal request asking the trial court to give the following instruction, in light of the jury's inquiry from the previous afternoon: "The phrase 'use and enjoyment of property' encompasses not only the interests that an owner may have in the actual present use of the property, but also an interest in having the present use value of the land unimpaired by changes in its physical condition." R.253 p. 1, A-Ap.582. Boston Store argued that the instruction was necessary in light of an argument made by MMSD's counsel in closing argument suggesting that the phrase is far more limited in scope:

> I'd like to move now -- thank you, Bruce -- to the claims. You're going to have to deal with a nuisance claim request. For nuisance, the plaintiffs have to prove that they have lost the use and enjoyment of the building. We think they have not shown any loss of the use or enjoyment of the building. There's no evidence that the building was ever closed for a moment or that Parisian or any of its predecessors ever did anything except do their usual retail work. No evidence of that whatsoever.

R.253 p.3, A-Ap.584; R.392 pp.145-46, A-Ap.1081-82. Over MMSD's objection, the trial court instructed the jury accordingly, with a sentence added at MMSD's request.[23] R.393 p.9, A-Ap.1107.

Shortly thereafter, the jury rendered its verdict. *See* R.403, A-Ap.585-87; R.393 pp.19-22, A-Ap.1108-11. The jury found that MMSD's negligence was a cause of the damage to the building's foundation, that Boston Store's owners were also negligent in their maintenance of the building's foundation and that that negligence was a cause of the damage to the foundation. R.403 p.1, A-Ap.585; R.393 p.20, A-Ap.1109. The jury apportioned seventy percent of the causal negligence to MMSD, and thirty percent to Boston Store. R.403 p.2, A-Ap.586; R.393 pp.20-21, A-Ap.1109-10. The jury answered "yes" to the statute of limitations question, and awarded $3 million in past damages and $6 million in future damages. R.403 p.2, A-Ap.586; R.393 p. 21, A-Ap.1110. The jury also found that the manner in which MMSD has operated or maintained the Deep Tunnel interfered with Boston Store's use and enjoyment of the building and that the interference is abatable, but that the interference did not result in

[23] The additional sentence read as follows: "Interest in use and enjoyment also comprehends that pleasure, comfort and enjoyment that a person normally derives from occupancy of land." R.393 p.9, A-Ap.1107.

significant harm to Boston Store. R.403 p.3, A-Ap.587; R.393 pp.21-22, A-Ap.1110-11.

G. Post-Verdict Motions and Hearing.

Boston Store filed three post-verdict motions on August 16, 2006, only two of which are relevant here: (1) the motion to change the jury's answers to the comparative negligence questions; and (2) the motion to change the jury's answer with regard to the issue of significant harm. *See generally* R.256, A-Ap.588-616; R.257, A-Ap.617-21.

In its contributory negligence motion, Boston Store argued that the evidence adduced at trial did not support a conclusion that Boston Store either acted negligently or unreasonably failed to mitigate damages. R.256 p.1, A-Ap.588. MMSD opposed the motion with little citation to the record. R.273 pp.2-3, A-Ap.629-30.

In its motion to change the answer to the significant harm question, Boston Store cited *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969), arguing that $3 million in past damages is, as a matter of law, significant harm. *See generally* R.257. MMSD opposed this as well. R.277 pp.2-3, A-Ap.623-24.

MMSD also filed several alternate post-verdict motions on August 16, 2006, including a motion to have the damages awarded by the jury remitted to $50,000 per plaintiff, pursuant to the Wis. Stat. § 893.80(3) damage cap. *See* R.264 p.9, A-Ap.643. In response, Boston Store raised both facial and as-applied constitutional challenges to Wis. Stat. § 893.80(3), *see* R.271 p.21, A-Ap.674, and argued, in the alternative, that the damage cap would not apply to a continuing nuisance claim and that MMSD had, in any event, previously waived the cap. R.271 pp.32-35, A-Ap.685-88.

At the post-verdict hearing on September 11, 2006, the trial court granted two of MMSD's motions in part by "affirming the jury's verdict answers on all other questions" (except the statute of limitations question), and reducing the damage award by applying the Wis. Stat. § 893.80 damage cap. *See* R.394 pp.29, 45-46, A-Ap.732-34; *see also* R.302, R.305. The court denied Boston Store's contributory negligence and significant harm motions on the basis that, according to the court, there was sufficient evidence to support both findings. R.394 pp.24-25, A-Ap.730-31.

ARGUMENT

I. BOSTON STORE SUFFERED SIGNIFICANT HARM AS A MATTER OF LAW.

Summary: The trial court erred in failing to grant Boston Store's post-verdict motion to change the jury's answer regarding the significant harm question in light of its award of $2.1 million in past damages under the Wisconsin Supreme Court's holding in *Jost v. Dairyland Power Cooperative*, 172 Wis. 2d 164, 172 N.W.2d 647 (1969).

The jury's findings that MMSD's negligence caused an ongoing interference with Boston Store's use and enjoyment of its property and over $2 million in past property damage constitute significant harm as a matter of law under the supreme court's holding in *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 171-72, 172 N.W.2d 647 (1969) (award of more than nominal damages is irreconcilable with a finding of no substantial injury). The four elements of a continuing nuisance claim are: (1) negligent conduct; (2) that causes an interference with another's use and enjoyment with their property; (3) the interference results in significant harm to the other; and (4) the interference can be abated in a reasonable time and manner. *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 470, 588 N.W.2d 278 (Ct. App. 1998); *see also* Wis. JI-CIVIL 1922 (2009); R.392 pp.42-44, A-Ap.1056. The jury found in favor of Boston Store on elements one, two, and

four, and although it found that MMSD's negligence caused Boston Store $2.1 million[24] in past damages, it concluded that MMSD's interference had not resulted in "significant harm." R.403 pp.1, 3, A-Ap.585, 587. But as *Jost* makes clear, an award of more than nominal damages is significant harm as a matter of law. 45 Wis. 2d at 171-72.

Because the issue is whether the facts found by the jury fulfill a particular legal standard, the applicable standard of review is *de novo*. *Kersten v. H.C. Prange Co.*, 186 Wis. 2d 49, 56, 520 N.W.2d 99 (Ct. App. 1994).

A. Harm is "significant" so long as it involves "more than a slight inconvenience."

"[P]hysical injury to land and fixtures [and] depreciation of property value" are "traditional nuisance harms[,]" *Krueger v. Mitchell*, 106 Wis. 2d 450, 456, 317 N.W.2d 155 (Ct. App. 1982), and "virtually any disturbance of the enjoyment of the property may amount to a nuisance[,]" *Krueger v. Mitchell*, 112 Wis. 2d 88, 106, 332 N.W.2d 733 (1983). In addressing the nature of the "significant harm" element of a continuing nuisance claim, the Wisconsin

[24] The jury assessed $3 million in past damages and apportioned thirty percent of the total negligence to Boston Store; thus, $2.1 million of damage is attributable to the negligent conduct of MMSD. The contributory negligence special verdict question and answer are also being challenged in this appeal.

Supreme Court observed that harm is deemed significant so long as it involves "'more than slight inconvenience or petty annoyance'"; all that is required is "'a real and appreciable interference with the plaintiff's use or enjoyment of his land.'" *Krueger*, 112 Wis. 2d at 106-08 (citation omitted). And, of particular relevance here, the supreme court recognized that "[w]hen an invasion involves a detrimental change in the physical condition of land, there is seldom any doubt as to the significant character of the invasion." *See id.* at 106-07 (quoting RESTATEMENT (2D) OF TORTS § 821F, cmts. c, d).

B. An award of monetary damages establishes significant harm as a matter of law so long as the amount is more than nominal.

Consistent with these minimal requirements, the supreme court has held that an award of monetary damages in a more than nominal amount constitutes substantial harm as a matter of law. *See Jost*, 45 Wis. 2d at 171-72. In *Jost*, several farmers sought to recover damages against a power cooperative under a nuisance theory for injury to their crops and a loss of market value of their farm lands allegedly resulting from the power cooperative's ongoing release of sulfur fumes. *Id.* at 167-68. The jury found that the defendant's actions had caused a continuing nuisance to the farmers, that the

diminution in land values was $500, and that the crop damage totaled $540 per year. *Id*. at 170-71. Notwithstanding these damage calculations, the jury also indicated that the continuing nuisance had not caused substantial damage. *Id.* at 170.

The supreme court held that the jury's answer to the substantial damage question was irrational in light of its damage award and therefore, that the trial court had properly changed the jury's answer. *See id.* at 171-72. After noting that the term "substantial damage" means "a sum, assessed by way of damages, which is worth having [as] opposed to nominal damages, which are assessed to satisfy a bare legal right" and that "where the invasion involves physical damage to tangible property, the gravity of the harm is ordinarily regarded as great even though the extent of the harm is relatively small," the court held that "by no rationalization can it be concluded that the sums properly payable did not constitute 'substantial damage.'" *Id.* at 171-72. Accordingly, the court concluded that "that the injury was substantial as a matter of law, since … the injury was obvious injury to tangible property … [and was] of such a nature that the jury placed

more than a nominal value upon the injury done." *Id*. at 172 (emphasis added). [25]

C. The jury's $2.1 million damage award is significant harm as a matter of law.

There is no basis in the trial record for the jury's finding that the interference did not result in significant harm. The jury found that as a result of MMSD's negligent maintenance or operation of the Deep Tunnel, MMSD had interfered with Boston Store's use and enjoyment of its property and caused Boston Store several million dollars in property damage. *See* R.403 pp.2-3, A-Ap.586-87. These conclusions are supported by the record evidence,[26] but cannot be rationalized with the jury's finding that the interference with Boston Store's property did not result in significant harm.[27] The harm—millions of dollars in property damage[28]—is, as a matter of law,

---

[25] Similarly, the Wisconsin Civil Jury Instructions note that "[t]here may be some cases in which the damages found by the jury would be so high or so low that the damages found in themselves would disclose whether or not the jury concluded the nuisance caused significant harm." Wis. JI—CIVIL 1922, n. vii (2009).

[26] *See supra* pp. 12-19.

[27] One possible explanation for the jury's apparently irrational answer to the substantial harm question is the inaccurate description of the nature of the element that MMSD's counsel conveyed during closing arguments. *See supra* pp. 32-33; *see also* R.392 pp.145-46, A-Ap.1081-82.

[28] Because MMSD had stipulated that the damage answer would be treated as the damages attributed to Boston Store's nuisance claim, R.392 pp.16-17, A-Ap.1049,

significant harm under *Jost*; to conclude otherwise would require this Court to implicitly overrule *Jost*.[29] And as noted above, "'[w]hen an invasion involves a detrimental change in the physical condition of land, there is seldom any doubt as to the significant character of the invasion.'" *See Krueger*, 112 Wis. 2d at 107 (citation omitted).

II. THE TRIAL COURT ERRONEOUSLY REDUCED THE JURY'S $6.3 MILLION DAMAGE AWARD TO $100,000.

Summary: The trial court erred in remitting the jury's $6.3 million damage award under Wis. Stat. § 893.80(3) because: (1) the statute is unconstitutional on its face or as applied; (2) MMSD waived its right to invoke the statute and/or should be estopped from doing so; and (3) the statute does not limit damages for a continuing nuisance.

After the jury awarded Boston Store $6.3 million (i.e., $9 million minus its 30% contributory negligence finding) in past and future damages, the trial court granted MMSD's motion to reduce the damages to $50,000 for each plaintiff pursuant to Wis. Stat.

---

it cannot now argue that the $2.1 million in past property damage the jury found had been caused by MMSD's negligent operation or maintenance of the tunnel somehow should not be treated as nuisance damages.

[29] Although Judge DiMotto held that she would not sit in review of Judge Kremer's decision to deny Boston Store's motion to change the jury's answer on significant harm after the judicial rotation, she indicated that had the issue been before her initially, she likely would have granted it, noting that we will never know "how the jury came to answer question number 10 [significant harm] no, despite their answers on question number 7 [past damages] and number 8 [future damages]. It seems to me completely inconsistent, particularly … under the following two circumstances in this case. … [One] is $9 million with the … answers to the damage questions. How that's not significant is really hard for me to justify or to reconcile. I'm flummoxed." R.399 p.19; A-Ap.1118.

§ 893.80(3). *See* R.394 p.46, A-Ap.734. Section 893.80(3) provides that victims of governmental negligence may recover only $50,000 against the negligent party in an action founded on tort.

Wisconsin Stat. § 893.80(3) should not limit recoverable damages in this case. First, the cap is unconstitutional on its face; it violates the equal protection clause of the Wisconsin Constitution by treating differently victims of governmental torts who suffer less than $50,000 and victims who suffer more than $50,000. Moreover, because the cap was not applied to other similarly situated property owners suffering damages exceeding $50,000, it would be unconstitutional as applied to Boston Store. Third, MMSD waived and/or should be estopped from invoking the damage limitation. Finally, if this Court concludes that Boston Store prevailed on its continuing nuisance claim, the full damage award should be reinstated as the damage cap does not apply to continuing nuisances.

A. Equal Protection

1. Standard of Review.

The court of appeals reviews a constitutional challenge to a statute *de novo*. *Bethke v. Lauderdale of La Crosse, Inc.*, 2000 WI App 107, ¶ 15, 235 Wis. 2d 103, 612 N.W.2d 332. When analyzing

equal protection challenges, courts apply different levels of scrutiny depending on the nature of the classification at issue. *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶ 59, 284 Wis. 2d 573, 701 N.W.2d 440. When there is no allegation that the discriminatory treatment at issue deprives the plaintiff of a fundamental right or discriminates on the basis of a suspect classification, as is the case here, courts apply a rational basis "with teeth standard." *Id*., ¶¶ 65, 77-78.

Although the rational basis standard does not require that all individuals be treated identically, it does require that distinctions be relevant to the purpose motivating the classification. *Id*., ¶ 72. "The state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.'" *Id*., ¶ 78 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985)). In exercising judicial review, courts are tasked with the duty of conducting an inquiry to determine "whether the classification scheme rationally advances the legislative objective." *Id*., ¶ 81.

2. The supreme court's opinion in *Ferdon v. Wisconsin Patients Compensation Fund.*

The Wisconsin Supreme Court recently dealt with an equal protection challenge to a statutory damage cap in *Ferdon*. *See* 284 Wis. 2d 573. The court's opinion in that case is instructive here. The court found Wisconsin's $350,000 medical malpractice damage cap provision to be a violation of the Wisconsin Constitution's guarantee of equal protection. *Id.*, ¶ 10. In doing so, it reasoned that shifting the economic burden of medical malpractice to a small group of severely injured persons did not withstand even rational basis scrutiny. *Id.*, ¶¶ 106-176.

In analyzing the plaintiff's equal protection challenge, the court's first step was to determine the legislature's objective for the cap, which it concluded was to "ensure the quality of health care for the people of Wisconsin." *Id.*, ¶ 89.[30] In determining whether treating tort victims who suffer damages in excess of $350,000 differently from those who suffer lesser injuries rationally advances the government's interest in ensuring the quality of health care for people

[30] The legislature had reasoned that "malpractice lawsuits raise the cost of medical malpractice insurance for providers … higher medical malpractice insurance costs, in turn, harm the public because they result in increased medical costs for the public and because health care providers might leave Wisconsin." *Id.*, ¶ 87.

of Wisconsin, the court concluded that "when the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational." *Id.*, ¶ 101.

In determining whether there was a rational basis for the $350,000 figure specifically, the court concluded that there was not because there was no evidence that bore out the hypothesis that the cap would manifest itself in lower medical malpractice premiums, lower assessments to the Wisconsin Patients Compensation Fund, or lower insurance premiums. *See id.*, ¶¶ 106-176.[31]

3. Wisconsin Stat. § 893.80(3) violates equal protection on its face.

Wisconsin Stat. § 893.80(3) treats differently governmental tort victims who suffer over $50,000 in damages and those who suffer less: Victims who suffer relatively minor injuries are made whole

[31] Two of the four justices forming the majority noted in a concurring opinion that a damage cap that would cause a plaintiff to loose more than forty-one percent of his or her damage award is per se unreasonably low, and thus violates Sections 5 and 9 of Article I of the Wisconsin Constitution. *Id.*, ¶ 192 (Crooks, J. and Butler, J., concurring).

while the severely injured are limited to recovering only a fraction of the damages they have suffered.

Thus, the next question is what legitimate governmental interest is advanced by this unequal treatment. The legislature enacted the predecessor to Wis. Stat. § 893.80(3) in the wake of the Wisconsin Supreme Court's abrogation of common law immunity in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) *codified by* Wis. Stat. § 893.80(4). In *Holytz*, the court ruled that there was no longer any viability to the archaic notion underlying sovereign immunity that it "'is better that an individual should sustain an injury than that the public should suffer an inconvenience.'" *Id*. at 31 (quoting *Russel v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 539 (1788)). *Holytz* makes clear that the government has no legitimate interest in shifting the costs of governmental negligence from the public at large to a handful of victims. [32]

[32] One recently published ethics text has also suggested that governmental immunity actually promotes reckless conduct by insulating government actors from the consequences of their actions. *See generally* JAMES R. OTTESON, ACTUAL ETHICS (2006). Interestingly, the book's author, Professor Otteson, cites MMSD's conduct as an example of this phenomenon. *See id.* at 55.

Instead, the Wisconsin Supreme Court has concluded that the government's interest in municipal damage caps is to prevent disruptions in local government functions that unlimited liability may threaten. *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 377, 293 N.W.2d 504 (1980). Thus, the legislature may not set a figure that is not rationally related to the goal of preventing the governmental disruptions or is unreasonably low when considered in relation to the damages sustained. *See Ferdon*, 284 Wis. 2d 573, ¶ 111 (noting that "a statutory limit on tort recoveries may violate equal protection guaranties if the limitation is harsh and unreasonable, that is, if the limitation is too low when considered in relation to the damages sustained."). In setting this figure, the legislature must balance the need for fiscal security against the ideal of equal justice. *Stanhope v. Brown County*, 90 Wis. 2d 823, 843, 280 N.W.2d 711 (1979).

The supreme court dealt with a challenge that the municipal immunity statute was unreasonably low in 1980 when the cap was set at $25,000. *See Sambs*, 97 Wis. 2d 356. Although the court was unwilling to conclude that the cap was unconstitutionally low at that time, it admonished the legislature of the need "'to review periodically all statutory limitations of recovery … to insure that inflation and

political considerations do not lead to inequitable disparities in treatment.'" *Id*. at 368 (quoting *Estate of Cargill v. City of Rochester*, 406 A.2d 704, 708-09 (N.H. 1979)). In addition, the court referenced as persuasive the 1979 opinion of the New Hampshire Supreme Court "'that a $50,000 statutory limitation on tort recoveries is precariously close to the boundary of acceptability.'" *Id*.

In response to the *Sambs* opinion, the state legislature raised the damage cap to $50,000, although the increase initially proposed was $100,000 and nothing in the legislative record indicates what, if any, rationale there may have been for this reduction. 1981 Assembly Bill No. 85 (February 1981); Assembly Amendment No. 1 to Assembly Bill No. 85 and 1981 Wis. Laws c. 63; *see also* Laurence Ulrich, *Wisconsin Recovery Limit for Victims of Municipal Torts: A Conflict of Public Interest*, 1986 WIS. L. REV. 155, 169 (1986).

In the past quarter century, the $50,000 cap, which was suggested to be "'precariously close to the boundary of acceptability'" at the time it was adopted, *see Sambs*, 97 Wis. 2d at 368 (quoting *Cargill*, 406 A.2d at 708-09), has not been reviewed by the legislature, has not been adjusted for inflation and has not been adjusted for changes in political considerations. In that same period

of time, inflation in the United States has risen approximately 125% and the consumer price index has doubled according to the United States Department of Labor, Bureau of Labor Statistics, and as a result, the value of $50,000 today is less than the value of $25,000 at the time *Sambs* was decided. *See* United States Department of Labor, Bureau of Labor Statistics, Consumer Price Indexes, http://www.bls.gov/cpi/#data (follow "inflation calculator" hyperlink). (As of August 17, 2010, $50,000 in 2010 is the equivalent of $18,898.13 in 1980.) As the Wisconsin Supreme Court has recently noted, "[a] statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies." *Ferdon*, 284 Wis. 2d 573, ¶ 114.

The conclusion that the statutory cap is unreasonably low becomes even more clear when the cap is considered in relation to the damages sustained. This $50,000 damage cap represents less than one percent of the damages that the jury attributed to municipal action in this case.[33] An unreasonably low damage cap not only leaves the

[33] Because of the jury's allocation of 30% contributory negligence to Boston Store, this 1% figure is based on a $6 million award rather than the full $9 million. By using this more conservative figure, Boston Store in no way means to suggest that it believes that the question of contributory negligence was proper.

most seriously harmed victims of government negligence without a meaningful remedy, it also inhibits meaningful public oversight. The effect of an unreasonably low damage cap is simply to shift costs to a small handful of victims, who cannot, standing alone, hold the negligent government official(s) accountable through ordinary political means.

Equal protection requires that there be some rationale for the figure selected. *Id*., ¶ 112. The $50,000 figure appears to have been selected arbitrarily; even if had not been arbitrarily selected in 1981, the value of $50,000 has changed so dramatically that whatever reasoning there may have been no longer provides a rationale for the continued existence of the cap at the same rate nearly thirty years later.

4. Application of the damage cap in this case would violate equal protection.

Even if the damage cap were constitutional on its face, MMSD has invoked its protection with an unequal hand in violation of the Wisconsin constitutional guarantee of equal protection of the law. "The aim of the 'equal protection of the laws' clause is to assure that every person within the state's jurisdiction will be protected against

intentional and arbitrary discrimination, whether arising out of the terms of a statute *or the manner in which the statute is executed by officers of the state*." *State ex rel. Murphy v. Voss*, 34 Wis. 2d 501, 510, 149 N.W.2d 595 (1967) (emphasis added). Equal protection is denied when a public body selectively enforces a law in a manner that is intentional, systemic and arbitrary. *Id.*; *see also Village of Menomonee Falls v. Michelson*, 104 Wis. 2d 137, 145, 311 N.W.2d 658 (Ct. App. 1981).

In this case, MMSD intentionally set an arbitrary date after which it would no longer pay any damage claims exceeding the cap. Prior to June 30, 1994, it was the policy of MMSD to pay building owners for the cost of professional repair of any damage caused by the Deep Tunnel, without regard to whether those costs exceeded $50,000. *See, e.g.*, R.272, p.7, A-Ap.695. Consistent with this policy, MMSD paid numerous owners of nearby downtown buildings several times that limit. *See, e.g.*, R.272 p.11, A-Ap.699 ($365,064 payment to Hyatt Regency Hotel; $298,416 payment to Mecca; $56,157 payment to Marshall Fields; $283,811 payment to Bradley Center); R.189 p.93, A-Ap.1368 ($378,883.77 payment to Hyatt).

However, MMSD decided to change course in November 1993, when it decided to discontinue reimbursing property owners for building damage caused by the Deep Tunnel if the damage was repaired after June 30, 1994. R.272 p.2, A-Ap.690. In his deposition, Fred Meinholz, MMSD's official charged with responsibility for processing damage claims, suggested that timing is the only reason MMSD was not accepting full responsibility for all of the damage it is found to have caused. R.189 pp.95-96, A-Ap.1370-71. He testified that if the Boston Store had submitted its damage claim on or before June of 1994, MMSD would have accepted full responsibility for repair costs if the investigation lead to the conclusion that the damage at issue was caused by the Deep Tunnel. R.189 pp.95-96, A-Ap.1370-71.

MMSD's policy of selectively enforcing the damage cap is not only intentional and systemic, it is also arbitrary. Disparate treatment is considered arbitrary when it "bears no rational relationship to a legitimate government interest." *See, e.g., State v. Smet,* 2005 WI App 263, ¶ 26, 288 Wis. 2d 525, 709 N.W.2d 474. Only if the policy of differential treatment advances some legitimate government

interest will it pass constitutional muster. *See Village of Menomonee Falls,* 104 Wis. 2d at 145.

Neither MMSD's stated reason for discontinuing its reimbursement program—the difficulty in differentiation between damage caused by the tunnel and damage otherwise caused, *see, e.g.,* R.272 p.2, A-Ap.690—nor the government's general interest in protecting the public purse, s*ee, e.g., Yao v. Chapman,* 2005 WI App 200, ¶ 26, 287 Wis. 2d 445, 705 N.W.2d 272, rationally relates to MMSD's policy of treating property owners differently depending on whether they discovered and repaired their damages before or after June 30, 1994. Paying damages exceeding $50,000 if proved and repaired before June 30, 1994 and asserting a cap with respect to those proved and repaired thereafter bears no rational relationship to the concern that causation may be difficult to prove; the cap is never applied unless and until causation has already been proved.

Similarly, applying the cap unevenly does not protect the public purse. It is not enough that there be a legitimate government interest in applying a law against a party; the legitimate government interest must justify treating parties differently. *See, e.g., State ex rel. O'Neil v. Town of Hallie,* 19 Wis. 2d 558, 567, 120 N.W.2d 641

(1963). As the damage to the public purse for a particular claim is the same regardless whether it is made before or after an artificially selected date, the government's interest in protecting the public purse also does not pass the rational relationship standard.

B. Waiver and Estoppel.

Even if application of Wis. Stat. § 893.80(3) in this case would not violate the constitutional guarantee of equal protection, it is barred under both the doctrines of waiver and judicial estoppel. As part of an effort to preclude Boston Store from seeking injunctive relief, MMSD's counsel explicitly stated the following on the record at a May 2, 2005 hearing:

> *If the plaintiffs win, they will be made whole based on their damage claim alone. …*
>
> ….
>
> If their damages allow them to recover and get a new foundation that is built and addresses the underlying soil conditions, which is what their damage claim is in this case; lining the tunnel adds nothing. *It is not necessary for them. They can have complete and whole relief based on what they have already alleged in this case.*

R.371 pp.4, 9, A-Ap.182, 187 (emphasis added).

The trial court agreed with MMSD that discovery into matters relevant only to the possibility of injunctive relief should be curtailed

based in part on MMSD's insistence that Boston Store would be fully entitled to all damages they could prove at trial.

> If they choose not to line the tunnel, if you prove that the tunnel as currently constructed has damaged your building to the point that you have had to do all the remedial measures so far, clearly you are entitled to whatever it cost to do that. If you prove that, if the situation remains unchanged it is going to cost you a hundred million dollars in the future to do additional remedial measures or rebuild the building or whatever it is you prove and you do that to the satisfaction of the requisite burden of proof, requisite of the burden of proof, you will be awarded that.

R.371 p.19, A-Ap.197.[34]

It is well-settled that the municipal statutory damage cap is subject to waiver. *See*, *e.g. Stanhope*, 90 Wis. 2d at 849-52; *see also Marshall v. City of Green Bay*, 18 Wis. 2d 496, 500, 118 N.W.2d 715 (1963) (authority to waive tort immunity need not rest upon an express grant of statutory authority).[35] It is not necessary that a party

---

[34] After the Court granted MMSD's request to bar Boston Store from offering expert testimony related to tunnel lining, R.371 p.19, 24, A-Ap.197, 202, MMSD's counsel apparently recognized that its previous comments might have amounted to waiver of the right to rely on the damage cap. *See* R.371 p.31, A-Ap.209. However, rather than retract the prior comment or otherwise indicate that it did not at all believe that the Boston Store would be entitled to recover whatever damages it proved, MMSD's counsel simply announced that he "[did not] *want* to waive" "legal defenses that we *will* raise." *See id.* (emphasis added). (MMSD's counsel refrained from identifying for the court the legal defense to which he was referring.) Simply announcing that it did not want to be held to its representations falls significantly short of a retraction.

[35] In *Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 33-34, 559 N.W.2d 563 (1997), the court suggested that there might be a requirement that a waiver is valid only in circumstances in which the purpose of Wis. Stat. § 893.80 of protecting the public purse and allowing for fiscal planning are satisfied. In this case, MMSD

use the word waiver expressly. *See, e.g.*, *Stanhope*, 90 Wis. 2d at 847-51 (cap waived in insurance policy containing provision stating insurer would not invoke immunity defense).

Even if MMSD's express representation to the trial court that Boston Store would be made whole in this case did not constitute waiver, MMSD should be estopped from taking a contrary position now. Under the doctrine of judicial estoppel, a party who succeeds in convincing a court to adopt a particular position is not permitted to argue the contrary unless there has been a material change in facts. *State v. Johnson*, 2001 WI App 105, ¶ 9, 244 Wis. 2d 164, 628 N.W.2d 431. As MMSD convinced the court that Boston Store would be made whole in damages and, therefore, that discovery related to injunctive relief should be limited, MMSD should be barred from arguing that Boston Store should not be able to recover its full damages.

---

apparently determined that the risk of being forced to pay for the costs of injunctive relief exceeded the potential costs of waiving. It is not necessary that the decision to waive actually result in ultimate savings to the public; a municipality that waives the damage cap in an insurance policy may end-up paying more in insurance premiums than it would have in damages exceeding $50,000 entered against it in tort actions. Finally, the waiver in this case did not make fiscal planning any more difficult. It was made approximately one year before trial was scheduled so any judgment would not have been entered until the following fiscal year.

C. Continuing nuisances are not limited by Wis. Stat. § 893.80(3).

Finally, even if this Court determines that the damage cap does not violate equal protection, either on its face or as applied, and MMSD has not waived or is not estopped from invoking the damage cap, the full damage award should be reinstated if this Court concludes that Boston Store prevailed on its continuing nuisance claim.

Although Wis. Stat. § 893.80(3) caps damage at $50,000 for "any *action* founded on tort," a continuing nuisance is not a single "action." Courts of this state have long recognized that an individual action arises from each and every continuance of a nuisance and thus, that a continuing nuisance gives rise to constantly recurring actions. *Stockstad v. Town of Rutland*, 8 Wis. 2d 528, 534, 99 N.W.2d 813, 817 (1959) ("It is well settled that every continuance of a nuisance is in law a new nuisance and gives rise to a new cause of action."), *superseded with respect to claims for flooding caused by road construction by* Wis. Stat. § 88.87; *see also Sunnyside Feed*, 222 Wis. 2d at 473 ("because this case involves a continuing nuisance, Sunnyside can repetitively sue the City").

The conclusion that continuing nuisances are not limited by Wis. Stat. § 893.80(3) is consistent with how Wisconsin courts have treated continuing nuisances in relation to other subsections of Wis. Stat. ch. 893. For example, in *Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 487, 549 N.W.2d 737 (Ct. App. 1996), the court determined that the plaintiff's continuing nuisance action was not subject to dismissal under the six-year statute of limitations set forth under Wis. Stat. § 893.52 given the recurring nature of a continuing nuisance. *Id.* at 487-88 (citing *Ramsdale v. Foote*, 55 Wis. 557, 559, 13 N.W. 557 (1882)).

The nuisance in this case was continuing rather than permanent. *See Sunnyside Feed*, 222 Wis. 2d at 466, 469-70 (nuisance is continuing rather than permanent if it is an ongoing or repeated interference and can be abated); *see also* R.403 p.3, A-Ap.587 (jury concluded interference can be abated). Because continuing nuisances give rise to continually recurring causes of action, it ought not be limited by Wis. Stat. § 893.80(3). Limiting damages under § 893.80(3) for continuing nuisances merely invites serial lawsuits—a result that would undermine judicial economy and encourage unnecessary waste of public and private resources. By its

express terms, this statute limits damages only with respect to single tort actions. Accordingly, given the parties' stipulation on the damage questions, the full damage award should also be reinstated if this Court concludes that Boston Store prevailed on the continuing nuisance claim.

III. THE SPECIAL VERDICT ERRONEOUSLY CONTAINED A QUESTION REGARDING BOSTON STORE'S "CONTRIBUTORY NEGLIGENCE" AND THE TRIAL COURT SHOULD HAVE CHANGED THE ANSWER TO "NO."

Summary: The trial court erred in failing to grant Boston Store's post-verdict motion to change the jury's finding of contributory negligence when the evidence MMSD submitted at trial did not demonstrate any causal negligence by the Boston Store. *Zak v. Zieferblatt,* 2006 WI App 79, ¶ 10, 292 Wis. 2d 502, 715 N.W.2d 739; *Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen,* 129 Wis. 2d 129, 151, 384 N.W.2d 692 (1986).

To prove its contributory negligence defense, MMSD bore the burden of proving that Boston Store violated a duty of reasonable care—a duty that hinges on foreseeability. Although MMSD suggested several causes for Boston Store's damage other than its own actions, implicitly advancing the legally inaccurate notion that "causes" are tantamount to contributory negligence, and although the jury apparently adopted this legal fallacy, MMSD did not actually

adduce any credible evidence showing that Boston Store was causally negligent.

When addressing Boston Store's request for injunctive relief after reviewing the record, Judge DiMotto commented that "there was at best paltry evidence to support a contributory negligence apportionment." R.399 p.7, A-Ap.1114. Judge DiMotto was generous in assessing the existence of such evidence; in fact, there was no such evidence.

Because there was no evidence of *causal negligence*, even when the evidence is construed in the light most favorable to MMSD, the contributory negligence defense should not even have been submitted to the jury.[36] Similarly, as there was no credible evidence to support the special verdict answer, the trial court should have reversed the jury's determination.

[36] Before submitting the issue of contributory negligence to the jury, Wisconsin law requires a court to make a finding that the defendant has submitted some evidence of negligence by the plaintiff. *Zak v. Zieferblatt,* 2006 WI App 79, ¶ 10, 292 Wis. 2d 502, 715 N.W.2d 739 (citing *Connar v. West Shore Equip. of Milwaukee, Inc.*, 68 Wis. 2d 42, 45, 227 N.W.2d 660 (1975)). Nonetheless, the trial court agreed to include the contributory negligence questions and the instruction, although no finding of possible negligence by Boston Store was (or could be) made by the trial court.

When reviewing the denial of a motion for a directed verdict, this Court must consider whether, taking into account "all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion was made, there is any credible evidence to sustain a finding in favor of that party." *Re/Max Realty 100 v. Basso*, 2003 WI App 146, ¶ 7, 266 Wis. 2d 224, 667 N.W.2d 857. "On review, th[e] [c]ourt [of appeals] must apply the same standard and a trial court will not be reversed unless the decision is clearly wrong." *Haase v. Badger Mining Corp.*, 2003 WI App 192, ¶ 16, 266 Wis. 2d 970, 669 N.W.2d 737.

A. None of the evidence introduced at trial shows that Boston Store acted negligently.

In Wisconsin, a person acts negligently when "'he or she does something or fails to do something under circumstances in which a reasonable person would foresee that by his or her action or failure to act, he or she will subject a person or property to an unreasonable risk of injury or damage.'" *Jankee v. Clark County*, 2000 WI 64, ¶ 53, 235 Wis. 2d 700, 612 N.W.2d 297 (citation omitted). As the duty of reasonable care "arises 'when it can be said that it was foreseeable that his act or omission to act may cause harm to someone' … the

existence of a duty hinges on foreseeability." *Smaxwell v. Bayard*, 2004 WI 101, ¶ 32, 274 Wis. 2d 278, 682 N.W.2d 923 (quoting *Antwaun A. v. Heritage Mut. Ins. Co.*, 228 Wis. 2d 44, 55-56, 596 N.W.2d 456 (1999)); *but see Behrendt v. Gulf Underwriters Ins. Co.*, 2009 WI 71, ¶ 43, 318 Wis. 2d 622, 768 N.W.2d 568 (no breach because of lack of foreseeable risk, not no duty). Regardless of whether it is an issue of duty or breach, a lack of foreseeability is fatal to a negligence claim. *See, e.g., Maypark v. Securitas Security Servs. USA, Inc.*, 2009 WI App 145, ¶¶ 15-17, 321 Wis.2d 479, 775 N.W.2d 270 (holding no negligence as a matter of law due to lack of foreseeability); see also *Behrendt*, 2009 WI 71, ¶ 43 (no negligence as a matter of law due to lack of foreseeability). And a "'[f]ailure to guard against the bare possibility of injury is not actionable negligence.'" *Maypark*, 321 Wis.2d 479, ¶ 13. The same standards apply to allegations of contributory negligence, *see Jankee*, 235 Wis. 2d 700, ¶ 53, and "[t]he burden of proof to establish contributory negligence is upon the defendant." *Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 121, 362 N.W.2d 118 (1985).

MMSD alleges that Boston Store had a well that contributed to the depressed water levels beneath the building. But without more, a

possible alternate cause for damage does not impute contributory negligence to Boston Store. The fundamental problem with the reasoning advanced by MMSD and later seemingly adopted by the trial court is that it erroneously conflates causation and negligence, making the existence of the former sufficient to establish the latter. Adopting this approach would reduce the contributory negligence analysis to a single question of causation. Wisconsin law requires more.

It is not enough to act or fail to act in a way that in fact caused or may have caused harm; the action or failure to act must constitute negligence in order to invoke a contributory negligence defense. *See Brown v. Dibbell*, 227 Wis. 2d 28, 41, 595 N.W.2d 358 (1999) (defining contributory negligence as "conduct by an injured party that falls below the standard to which a reasonably prudent person in that injured party's position should conform for his or her own protection and that is a legally contributing cause of the injured party's harm."). As the trial court recognized, simply owning a well does not constitute negligence. R.392 pp.206-207, A-Ap.1097. In fact, MMSD argued the well only as a *cause* of dewatering; MMSD failed to introduce any evidence that there was anything wrong with Boston

Store's use and maintenance of the well. MMSD had the opportunity to call witnesses from the DNR to explain how or why Boston Store may have been negligent with respect to the well, but chose not to do so. *See* R.392 p.206, A-Ap.1097. To establish that Boston Store was negligent, MMSD would have had to show that a reasonable person would have known the geologic strata underlying the building, that the marsh soils would compress if drained, which would trigger damage to the piles, that the well was drilled through two confined aquifers beneath the compressible soils, and that the well could drain water from these aquifers, causing the overlying marsh soils to drain and compress. Instead, it took the testimony of multiple experts to draw all of those connections. Without more, the mere ownership of a well cannot support a contributory negligence defense.[37]

[37] Although not well developed, MMSD has in the past advanced the idea that the Boston Store's decision not to utilize a pile rewetting system constitutes contributory negligence. *See, e.g.*, R.392 pp.120-21, A-Ap.1075. But not utilizing a rewetting system is, if anything, a question of failure to mitigate damages and not contributory negligence. And, here, MMSD waived the mitigation defense by failing to plead it in any of its answers or move to amend the pleadings before the close of evidence. *See* R.14; R.26; R.75. Nonetheless, the trial court improperly amended the pleadings and erroneously included a mitigation instruction. *See* R.392 p.213, A-Ap.1098; R.403, A-Ap.585-87. (Having been instructed, improperly, to reduce damages to account for any alleged failure to mitigate, the jury's damage award presumably already accounted for any negligence there may have been relating to Boston Store's decision not to use a pile rewetting system. Allowing this decision to also serve as the basis for contributory negligence would improperly result in a double reduction for the same alleged wrong.)

IV. THE TRIAL COURT ERRED IN DISMISSING BOSTON STORE'S INVERSE CONDEMNATION CLAIM.

Summary: The trial court erred in dismissing Boston Store's inverse condemnation claim on MMSD's motion for summary judgment because Boston Store adduced ample evidence from which a jury could conclude that MMSD had taken several of Boston Store's timber piles by rendering then practically or substantially useless for all reasonable purposes and had further taken Boston Store's groundwater. *Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 476, 549 N.W.2d 737 (Ct. App. 1996).

The Wisconsin Constitution requires that the government may not take the property of a private citizen without providing just compensation for such property. Wis. Const. art. I, § 13.[38] Where there is a "taking," just compensation is a constitutional mandate.

But even if the failure to mitigate defense had been pled properly, there are two independent reasons why the evidence introduced at trial was insufficient to support a jury finding in MMSD's favor on that issue: (1) "'[I]t is not reasonable to expect the plaintiff to avoid harm if at the time for action it appears that the attempt may cause other serious harm[,]'" *Sprecher v. Weston's Bar, Inc.*, 78 Wis. 2d 26, 44, 253 N.W.2d 493 (1977) (*quoting* RESTATEMENT OF CONTRACTS § 336(1), cmt. a); and (2) Wisconsin does not recognize a duty to expend money in mitigating their injuries unless it is shown that the "amount is small in comparison to the possible losses." *Crest Chevrolet*, 129 Wis. 2d at 149 (citing *Sprecher*, 78 Wis. 2d at 45) ("a court generally will not reduce recoverable damages based upon the expenditure of an amount necessary to minimize damages … unless such amount is small in comparison to the possible losses."). The undisputed evidence in this case showed that while implementing a rewetting system might have mitigated pile rot, it would have exacerbated pile downdrag. *See* R.385 pp.72-73, A-Ap.900. Moreover, MMSD failed to produce any evidence to meet its burden to show that the cost of installing and maintaining a rewetting system would have been small in comparison to any damage such a system may have prevented.

[38] Inverse condemnation claims under Section 13 of the Wisconsin Constitution are analyzed similarly to claims under the Fifth Amendment of the United States Constitution. *See, e.g., Eternalist Found, Inc.. v. City of Platteville*, 225 Wis. 2d 759, 773, 593 N.W.2d 84 (Ct. App. 1999).

Eberle v. Dane County Bd. of Adjustment, 227 Wis. 2d 609, 622, 595 N.W.2d 730 (1999). The purpose of this requirement is to ensure that the costs of public projects are redistributed to fall on the public at large rather than wholly upon those who "happen to lie in the path of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). When a property owner has suffered a taking for which just compensation is constitutionally due but has not been made, the property owner may maintain a civil cause of action for inverse condemnation under Wis. Stat. § 32.10.

As noted in Boston Store's Amended Complaint, MMSD's operation and maintenance of the Deep Tunnel physically took certain of the wood piles beneath the Boston Store building. As further established through evidence presented both in Boston Store's summary judgment briefing and at trial, the taking of these wood piles was caused by another taking—that of the groundwater beneath the Boston Store building.[39] In analyzing the merits of an inverse

[39] Although Boston Store noted only the taking of the wood piles under the concluding section relating specifically to Inverse Condemnation, its Amended Complaint was replete with factual allegations about the taking of groundwater. *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d 136, 146, 293 N.W.2d 897 (1980) ("it is the operative facts that determine the unit to be denominated as the cause of action, not the remedy or type of damage sought").

condemnation claim, courts "first determine whether a property interest exists, and next, whether the property interest has been taken." *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶ 14, 292 Wis. 2d 212, 713 N.W. 2d 661. Because the trial court dismissed Boston Store's inverse condemnation claim on summary judgment, the applicable standard of review is *de novo* and the trial court should be affirmed only if MMSD's motion for summary judgment "demonstrate[d] a right to a judgment with such clarity as to leave no room for controversy." *Cody v. Dane County*, 2001 WI App 60, ¶ 19, 242 Wis. 2d 173, 625 N.W.2d 173.

First, Boston Store has a property interest in the beneficial use of the timber piles providing a foundation for its building. Real property and fixtures thereto are both forms of property protected by the just compensation clause. *See* Wis. Stat. § 32.01(2). Moreover, as previously recognized by this Court, Boston Store has a property interest in the groundwater beneath its building.[40]

[40] This Court found that citizens have a property interest in the groundwater beneath their property. *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage Dist*., 2008 WI App 15, ¶ 11, 316 Wis. 2d 280, 763 N.W.2d 231. Although the Supreme Court reversed, it specifically declined to address the issue. *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58, ¶ 29, ___ Wis. 2d ___, 785 N.W.2d 409.

That the taking in this case relates only to certain timber piles and the groundwater rather than Boston Store's entire building is of no consequence. It has long been established that citizens are entitled to just compensation for a government taking of a *part* of a larger piece of property; destruction of the whole is unnecessary. *Heiss v. Milwaukee & L.W.R. Co.*, 69 Wis. 555, 558, 34 N.W. 916, 917 (1887); *United States v. Cress*, 243 U.S. 316, 328-29 (1917). As the Wisconsin Supreme Court recognized over 120 years ago, "[i]t is not necessary that the owner should be divested of all estate in the whole." *Heiss*, 69 Wis. at 558. Rather, an inverse condemnation claim may be predicated on "some direct and physical interference with *some part* of the particular piece of property in question." *Id*. (emphasis added).

Second, there is record evidence that MMSD's actions "took" Boston Store's piles. A taking does not depend on a literal occupation or appropriation. *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177-78 (1871). As the United States Supreme Court recognized long ago,

> [i]t would be a very curious and unsatisfactory result if … it [was] held that if the government refrains from the absolute conversion of real property … [it] can destroy

> its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.

Id. The test is whether the government's actions "practically or substantially renders the property useless for all reasonable purposes." *Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 476, 549 N.W.2d 737 (Ct. App. 1996). The mere fact that an owner is still able to make some reasonable use of his or her property does not mean that there has been no taking nor that there is no right to just compensation. *Noranda Exploration, Inc. v. Ostrom*, 113 Wis. 2d 612, 629, 335 N.W.2d 596 (1983).

In this case, Boston Store submitted voluminous expert witness testimony detailing how groundwater underlying the Boston Store building has for years infiltrated into the Deep Tunnel causing declines in ground water levels which in turn lead to downdrag and pile rot such that certain of the building's timber piles that had previously been providing foundational support were no longer able bear any meaningful weight and were thereby rendered useless. *See* R.134 pp.50-53, A-Ap.347-50; R.138 pp.1-3, A-Ap.382-84; R.137 pp.1-3, A-Ap.404-06; R.112, A-Ap.1250-57.

The Wisconsin Supreme Court recently addressed an inverse condemnation claim that arose from a set of facts similar, although not identical, to those here. In *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58, ___ Wis. 2d ___, 785 N.W.2d 409, the court reversed a jury verdict in favor of the plaintiff who claimed that MMSD was liable on an inverse condemnation claim for having taken its groundwater as a result of seventeen days of pumping during MMSD's construction of a near surface sewer line. *Id.*, ¶¶ 6-7, 23. The court held that the jury's finding had to be reversed because the plaintiff had adduced no evidence of the value of the ground water allegedly taken but, instead, sought to recover certain resulting cost of repair. *Id.*, ¶ 24.

But the holding in *E-L Enterprises* is inapplicable here because it dealt with a failure of proof at trial, while Boston Store's claim was dismissed on summary judgment. Boston Store should be given an opportunity to try its claim, submitting evidence that the court found lacking in the *E-L Enterprises* case—namely, evidence related to a proper measure of damage. In this case, there are three such categories of evidence. As noted in the *E-L Enterprises* opinion, the standard proper measure of damages in an inverse condemnation

action is the value of the property taken. In this case, that includes both those piles that have been practically or substantially rendered useless for all reasonable purposes, *see Andersen*, 201 Wis. 2d at 476, as well as the groundwater itself.[41]

In addition to the value of the piles rendered substantially useless and the groundwater, Boston Store should and will be permitted to adduce evidence under the doctrine of severance damages. The doctrine of severance damages applies in cases such as this, where the taking involves one part of a larger property estate, and provides that in such circumstances, a proper measure of damages is "the difference between the fair market value of the whole property before the taking and the fair market value of the remaining property immediately after the taking." *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶ 14, 281 Wis. 2d 173, 696 N.W.2d 194. (Pursuant to Wis. Stat. § 32.09(6), Boston Store should be entitled to the larger of either the severance damages or the value of the property taken.) Because Boston Store has not yet tried its inverse condemnation claim, the *E-L Enterprises* holding that an inverse condemnation claim must fail

[41] Evidence that Boston Store will be able to produce at trial relating to the value of groundwater includes the cost of installing a recharge well to replace the groundwater taken.

when no trial evidence is submitted as to a proper measure of damages is inapplicable.

Finally, in order to make out an inverse condemnation claim, it must be shown that the government "took" the property at issue pursuant to its eminent domain rather than police power; or in other words, the taking must have resulted from the government's actions made for the benefit of the public rather than in confiscation of a harmful substance. *See Just v. Marinette County*, 56 Wis. 2d 7, 16, 201 N.W.2d 761 (1972). In this case, there can be no reasonable debate that the taking was a result of government actions made for the purpose of advancing a public purpose. MMSD cannot reasonably argue, and there is no evidence to suggest, that it took Boston Store's timber piles as a confiscation of harmful property.

For the reasons set forth above, Boston Store should be entitled to a trial on its inverse condemnation claim: there is record evidence that MMSD has "taken" in the constitution sense both its groundwater and certain of its wood piles. That a different litigant with similar claims may have failed to produce evidence as to the value of the property taken in a different case is of no consequence; Boston Store

should be given an opportunity to try its claim and submit such evidence here.

V. THE TRIAL COURT ERRED IN GRANTING MMSD SUMMARY JUDGMENT ON BOSTON STORE'S WIS. STAT. § 101.111 CLAIM.

Summary: The trial court erred in dismissing Boston Store's statutory claim under Wis. Stat. § 101.111 because the undisputed facts showed that MMSD was an "excavator" as that term is statutorily defined, the Boston Store is an "adjoining building," and MMSD's excavation has caused Boston Store to incur the expense of underpinning. *See* Wis. Stat. § 101.111.

The trial court granted MMSD summary judgment on Boston Store's Wis. Stat. § 101.111 claim, Wisconsin's excavation statute, ruling that the Boston Store and the land through which the Deep Tunnel runs are not "adjoining properties" under the statute. This conclusion is legal error and should be reversed.

Because the trial court dismissed this claim on a motion for summary judgment, the standard of review is *de novo*. *See Hoida, Inc. M&I Midstate Bank*, 2006 WI 69, ¶ 15, 291 Wis. 2d 283, 717 N.W.2d 17. Reversal is appropriate if the trial court incorrectly decided a legal issue. *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2001 WI App 148, ¶ 7, 246 Wis. 2d 933, 632 N.W.2d 59.

A. MMSD has violated its ministerial duty under Wis. Stat. § 101.111 to protect its excavation site so as to prevent Boston Store's soil from settling.

There are three elements to a claim under Wis. Stat. § 101.111 and each was established by Boston Store both on summary judgment and at trial:

(i) MMSD was an excavator;

(ii) Boston Store's building is an "adjoining building" under the statute; and

(iii) MMSD's excavation caused the Boston Store to incur the expense of necessary underpinning.

See § 101.111. When those three elements are satisfied, the statute provides for strict liability "for the expense of any necessary underpinning or extension of the foundations of any adjoining buildings below the depth of 12 feet below grade" and injunctive relief "directing such excavator to comply with this section and restraining the excavator from further violation thereof." § 101.111(3)(b), (6).[42]

[42] The statute also required MMSD to provide written notice to adjoining landowners, Wis. Stat. § 101.111(4), which MMSD admits it failed to do. *See infra* p.79.

1. MMSD is an "excavator."

Under this statute, "'excavator' means any owner of an interest in land making or causing to be made an excavation." Wis. Stat. § 101.111(1). It is undisputed that MMSD had an easement under the property adjoining Boston Store's property, the Grand Avenue property, through which it excavated the Deep Tunnel. R.119 p.66, A-Ap.285; *see also Turner v. Taylor*, 2003 WI App 256, ¶ 10, 268 Wis. 2d 628, 673 N.W.2d 716 ("An easement is, among other attributes, an 'interest in another's land....'"). The first element is thus satisfied and was not contested in MMSD's motion for summary judgment.

2. The Boston Store building is an "adjoining building."

Although Boston Store submitted a sworn affidavit indicating that the Boston Store building adjoins the property through which MMSD excavated, s*ee* R.138 p.3, A-Ap.384, the trial court concluded that it was not an adjoining property under the statute because MMSD's easement, or the excavation itself, did not adjoin Boston Store's property. R.374, pp.38-39, A-Ap.722-23. In its motion for summary judgment, MMSD argued that although the Deep Tunnel

excavation runs through property adjoining the Boston Store, the easement itself does not "touch" Boston Store's property, and therefore is not "adjoining." R.119 p.66, A-Ap.285. [43] The trial court, implicitly adopting this argument, held that: "the property interest of the MMSD for this tunnel was separated from the Boston Store property by 160 feet of someone else's property…the land where the excavation for the tunnel took place was not adjoining to Boston Store's property." R.374 pp.38-39, A-Ap.722-23.[44]

This understanding of the term "adjoining building" is contrary to the plain language of the statute and is inconsistent with the

---

[43] Prior to filing its motion for summary judgment, MMSD had previously recognized the application of Wis. Stat. § 101.111 to the Deep Tunnel excavation and dewatering and settlement caused thereby:

In correspondence to contractors, MMSD warned: "Be further advised that § 101.111 of the Wisconsin Statutes specifically governs this situation and provides for specific duties, responsibilities and liability..." *See* R.350 (Ex. 112), A-Ap.1262.

MMSD quoted the language of the statute, which differentiates liability for the first twelve feet below grade, in adopting "a policy of accepting responsibility for costs from grade to twelve feet below associated with support of critical structures as specified in the contract documents." *See* R.350 (Ex. 67), A-Ap.1248.

In prior litigation related to the construction of the Deep Tunnel, MMSD submitted an affidavit indicating that "[i]f this drainage [into the Deep Tunnel] remains uncontrolled, the resulting settlement will lead to building damage [such as] downdrag on piles [which] … is of greatest concern for older buildings founded on timber piles." R.350 (Ex. 112), A-Ap.1252-53.

[44] The trial court noted its uncertainty: "But even if I'm wrong in that regard, I don't think the statute provides a remedy that the plaintiff is seeking to use." R.374 p.39, A-Ap.723.

statute's purpose of protecting adjoining properties from caving in or settling. As noted above, the statute requires excavators to protect against soil settlement on "adjoining properties." Wis. Stat. § 101.111(2). The statute does not use the words "adjoining excavation," but instead uses the words "adjoining properties" four times, "adjoining owners" once, and "adjoining building" twice. *See* Wis. Stat. §§ 101.111(1), (2), (3)(a), (3)(b), (4). Thus, for the statute to apply, the property containing the excavation site that must adjoin the damaged property. There is no dispute that the Grand Avenue property (the location of the excavation) adjoins the Boston Store.[45]

Although the exact rationale for the trial court's conclusion is unclear, it appears to have adopted a construction of the statute under which liability could never occur because the actual boundary of excavation could never adjoin the precise point of one's damaged property; an excavator could harm property with impunity if the

[45] Wis. Stat. § 101.111 mandates that excavators protect the excavation site so as to "prevent the soil of adjoining *property* from caving in or settling." (Emphasis added.) MMSD has advanced the theory that because its easement does not adjoin the Boston Store's property, the adjoining property element is not satisfied. However, MMSD's easement is not a separate piece of property from the Grand Avenue property. An easement is simply the *right* to use the property of another. The statute speaks clearly to adjoining properties, not property rights. The Grand Avenue property includes the land through which MMSD excavated and it adjoins Boston Store's property.

excavation boundary were an inch or less away from the damaged property. MMSD's construction, if adopted, would render the statute's notice and liability provisions a legal nullity. *See generally City of Milwaukee v. Washington*, 2007 WI 104, ¶ 30 n.10, 304 Wis. 2d 98, 735 N.W.2d 111 (statutes should not be construed in a manner rendering any word or provisions meaningless surplusage). The legislature clearly intended, by including both strict liability for the costs of underpinning damaged foundations and a right to injunctive relief, that the statute would have teeth; the trial court's interpretation, however, renders it virtually unenforceable.

3. MMSD's excavation caused the Boston Store to incur the expense of necessary underpinning.

The third and final element is also satisfied here: Boston Store submitted extensive evidence and expert opinion, both in responding to MMSD's motion for summary judgment and at trial, showing that groundwater infiltration into the Deep Tunnel that MMSD excavated caused Boston Store to incur the costs of underpinning; not only did Boston Store submit evidence to support this causal link, but the jury's verdict answers require this conclusion. *See, e.g.*, R.134 pp.50-53, A-Ap.347-50; R.137, A-Ap.404-06; R.138 pp.1-3, A-Ap.382-84; R.350

(Ex. 112), A-Ap.1250-57; *see also supra* pp.12-20. Not only is the evidence sufficient to support a reasonable conclusion of causation, the jury in fact has already made this finding. *See* R.403 p.1, A-Ap.585. And in addition to causing damage to Boston Store's foundation, MMSD failed to give Boston Store notice of the potential need to take preventive measures as required under the statute. *See, e.g.*, R.134 p.61 n.24, A-Ap.358 (citing R.51 p.34, A-Ap.134; R.75 pp.26-27, A-Ap.166-67).

For the foregoing reasons, the trial court improperly granted MMSD summary judgment on Boston Store's Wis. Stat. § 101.111 claim; this conclusion must be reversed with directions to enter judgment under § 101.111 in favor of Boston Store.

CONCLUSION

For the foregoing reasons, Boston Store respectfully requests that this Court reverse the trial court's dismissal of Boston Store's inverse condemnation and Wis. Stat. §101.111 claims,[46] reverse the trial court and hold that Boston Store established it suffered

[46] Based on the trial court record and the jury's verdict, this Court should direct that judgment be entered in favor of Boston Store on its Wis. Stat. § 101.111 claim consistent with the damages assessed in the verdict, plus fees and costs as provided for in the statute.

significant harm as a matter of law, reverse the trial court's decision to submit MMSD's contributory negligence defense to the jury and ultimately uphold the jury's conclusion, and finally, reinstate the full damage award found by the jury.

Dated this 2nd day of September, 2010.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 2100
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Mailing Address:
P.O. Box 2965
Milwaukee, WI 53201-2965

BY s/ Mark A. Cameli
Mark A. Cameli
WI State Bar ID No. 1012040
Rebecca Frihart Kennedy
WI State Bar ID No. 1047201
Lisa Nester Kass
WI State Bar ID No. 1045755
Joseph W. Voiland
WI State Bar ID No. 1041512
Attorneys for Bostco LLC and Parisian, Inc.

COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal No. 2007AP00221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-
Cross-Appellant.

FORM AND LENGTH CERTIFICATION

I hereby certify this brief conforms to the rules contained in section 809.19(8)(b) of the Wisconsin Statutes for a brief and appendix produced with a proportional serif font, and pursuant to order of this Court dated August 30, 2010, this brief exceeds the length limitations set forth in Wis. Stat. Rule 809(8)(c) by 50%. The length of this brief is 16,198 words.

Dated this 2nd day of September, 2010.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 2100
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Mailing Address:
P.O. Box 2965
Milwaukee, WI 53201-2965

By s/ Mark A. Cameli
Mark A. Cameli
WI State Bar ID No. 1012040
Rebecca Frihart Kennedy
WI State Bar ID No. 1047201
Lisa Nester Kass
WI State Bar ID No. 1045755
Joseph W. Voiland
WI State Bar ID No. 1041512
Attorneys for Bostco LLC and Parisian, Inc.

COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal No. 2007AP00221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-
Cross-Appellant.

CERTIFICATE OF COMPLIANCE WITH 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. 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 September 2, 2010.

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 2100
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Mailing Address:
P.O. Box 2965
Milwaukee, WI 53201-2965

BY s/ Mark A. Cameli
Mark A. Cameli
WI State Bar ID No. 1012040
Rebecca Frihart Kennedy
WI State Bar ID No. 1047201
Lisa Nester Kass
WI State Bar ID No. 1045755
Joseph W. Voiland
WI State Bar ID No. 1041512
Attorneys for Bostco LLC and Parisian, Inc.