COURT OF APPEALS OF WISCONSIN
DISTRICT I
Nos. 2007AP221 & 2007AP1440

BOSTCO LLC and PARISIAN, INC.,
Plaintiffs-Appellants-Cross-Respondents,

vs.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
Defendant-Respondent-Cross-Appellant.

Appeal from the Circuit Court for
Milwaukee County
No. 03-CV-005040
Hon. Jeffrey A. Kremers
(presiding through judgment on jury verdict) and
Hon. Jean W. DiMotto
(presiding after judgment on jury verdict)

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

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INTRODUCTION

Built between 1988–1992, the Milwaukee Metropolitan Sewerage District's ("District's") Inline Storage System—the "Deep Tunnel"—was one of the largest public works projects in Milwaukee area history. Constructed as part of an extensive, court-mandated water pollution abatement program that was overseen and approved by the Wisconsin Department of Natural Resources ("WDNR"), the Deep Tunnel provides a means of conveying and storing sewerage flows during wet weather. It consists of a series of tunnels that are up to 32 feet in diameter mined out of the bedrock 300 feet below the surface.

More than a decade after the Deep Tunnel was constructed, plaintiffs, owners of the nineteenth-century Boston Store building, sued the District and the contractor that built the portion of the Deep Tunnel that runs under North Third Street in downtown Milwaukee. They alleged that the design, construction, and operation of the Tunnel damaged the building's wood-pile foundation by decreasing the groundwater under the building. In July 2006 a jury trial, presided over by Judge Kremers, adjudicated plaintiffs'

negligence and nuisance claims, the only claims that remained for trial.

This trial never should have happened. As explained in the cross-appeal portion of the District's combined brief, plaintiffs' claims were barred by the legislative grant of governmental immunity in Wis. Stat. §893.80(4) and by plaintiffs' failure to serve notices of claim as required by §893.80(1). After trial, Judge Kremers applied the legislative limitation on tort damages, §893.80(3). Plaintiffs' challenge to that ruling on constitutional and other grounds is discussed in this response, as are claims plaintiffs presumably pleaded in an effort to avoid that limitation but that the court dismissed on summary judgment—an inverse condemnation claim and a claim based on the statutory protection from excavation hazards. This response additionally addresses plaintiffs' two attacks on the jury's verdict: (a) that the jury's finding of property damage is inconsistent with its finding of no significant harm to plaintiffs' use and enjoyment of the building; and (b) the jury's finding that plaintiffs were 30% causally negligent, which plaintiffs contest even though the evidence showed that they knowingly failed to protect their wood

foundation from pre-Tunnel reductions in groundwater caused by their onsite well.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Wis. Stat. §893.80(3) provides that "the amount recoverable by any person for any damages . . . in any action founded on tort against any . . . political corporation . . . shall not exceed $50,000."

Question: Is §893.80(3)'s limit on governmental tort damages (a) unconstitutional because it limits plaintiffs' recovery; or (b) waived, even though plaintiffs make no express waiver argument and the limitation cannot be waived by implication?

The circuit court answered that the §893.80(3) damages limitation was constitutional, and that the District had not waived the limitation.

2. Plaintiffs' only evidence of harm was the cost of replacing the building's wood-pile foundation with concrete. They presented no damages evidence based on any interference with the building's use. The jury found money damages for past and future property damage. But the jury also found that the Tunnel's interference with plaintiffs' use and enjoyment of the building did not

result in significant harm, which negated an essential element of plaintiffs' nuisance claim.

Question: Under these circumstances, should a court change the jury's finding of no significant harm and enter judgment on plaintiffs' nuisance claim?

The circuit court, denying plaintiffs' motion to change the jury's finding that the interference did not result in significant harm, held that the evidence supported the jury's finding.

3. Plaintiffs knew for many years before the construction of the Deep Tunnel that the wood piles were susceptible to rot if not kept saturated and were aware of groundwater decreases potentially exposing the piles. Plaintiffs also operated and kept open a well on the property that drew down groundwater, did not use their hydration system to keep the wood-pile foundation properly saturated, and failed to perform necessary building maintenance.

Question: Under these circumstances, was the jury's finding that plaintiffs were causally negligent for the building's foundation damage supported by credible evidence?

The circuit court, denying plaintiffs' motion to change the jury's finding, concluded that the finding was well supported by the evidence.

4. Wis. Stat. §32.10 provides the means by which persons can challenge as an "inverse condemnation" government occupation of their property in violation of Article I, §13 of the Wisconsin Constitution. The Wisconsin Supreme Court held in *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District* that consequential damage to wood-pile foundations caused by removal of groundwater on neighboring property could give rise to neither a statutory §32.10 claim nor an Article I, §13, constitutional claim. 2010 WI 58, 326 Wis. 2d 82, 785 N.W.2d 409.

Question: Whether plaintiffs can maintain the same type of inverse condemnation claim the Supreme Court rejected in *E-L Enterprises*: a claim that the District negligently caused groundwater levels to decrease resulting in damage to plaintiffs' property under circumstances where the District neither occupied of the plaintiffs' property nor deprived plaintiffs of the beneficial use the property?

The circuit court, which granted the District's motion for summary judgment on this claim, held that plaintiffs' inverse condemnation claim failed as a matter of law.

5. Wis. Stat. §101.111 provides protections for owners of buildings that adjoin excavations from grade.

Question: Whether plaintiffs can maintain a §101.111 excavation claim against the District even though plaintiffs' property is not adjoining to the District's Tunnel?

The circuit court, which granted a motion for summary judgment on this claim, held that plaintiffs could not maintain a §101.111 claim because the Tunnel, which does not run beneath the Boston Store building and is over 300 feet away from it, does not adjoin plaintiffs' property.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case involves important issues regarding the scope of governmental liability provided in Wis. Stat. §893.80. Plaintiffs challenge as unconstitutional the limitation on governmental tort damages provided in §893.80(3). The District, in its cross-appeal, explains that a proper application of §893.80(4)'s governmental immunity

from suit based on the design, construction, and implementation of public works projects properly precludes this action in its entirety. A proper application of §893.80(1)'s notice of claim provision also precludes all relief.

Additionally, this case implicates issues dealing with the fair administration of justice. Judge DiMotto, who presided as a result of judicial rotation after the case had been tried, entered an injunction requiring the District to reconstruct a portion of the Deep Tunnel, even though Judge Kremers, who presided over the trial and decided the post-verdict motions, had already issued a final order fully adjudicating plaintiffs' claims. Judge DiMotto's subsequent proceedings raise substantial issues involving whether a circuit court lacks the authority to enter injunctive relief requested after the expiration of the post-verdict motion deadlines, after entry of judgment adjudicating all claims, and after an appeal from that judgment had been perfected. What is more, Judge DiMotto ordered the Tunnel to be lined with concrete based only on her review of the jury trial transcript and without affording the District or the WDNR, which regulates the Tunnel's operation, an opportunity to

be heard on the equities. Her decision to award injunctive relief thus raises additional issues relating to the separation of powers, and to the circumstances, if any, under which a circuit court can order injunctive relief without considering the many countervailing equitable factors and without allowing government agencies with regulatory authority over the ordered conduct an opportunity to be heard.

Given the complexity of the substantive and procedural issues involved, oral argument is warranted. The importance of the legal issues justifies publication.

STATEMENT OF THE CASE

I. Nature of the Case and Procedural History.

Almost a decade after the Deep Tunnel's construction, Bostco LLC and Parisian Inc., the present and a past owner of Milwaukee's 100-year-old Boston Store building (collectively "Owners"), sued the District alleging that groundwater infiltrating into the Deep Tunnel caused increased deterioration of the building's wood-pile foundation, a foundation that had for decades required vigilant maintenance and monitoring

often left neglected by these and prior owners. R.384-1039:MMSDApp-0738; R.388-2072–73:MMSDApp-0794.[1] None of Owners' claims should have been tried. Owners' two statutory claims were legally deficient: As the circuit court held in awarding summary judgment to the District, Owners' allegations of pile damage is not an "occup[ation]" or taking of property for purposes of Wis. Stat. §32.10's inverse condemnation remedy, and their allegations did not implicate Wis. Stat. §101.111's protection from excavation on adjoining property because the Tunnel excavation was 260–300 feet below the ground in an easement 160 feet away from the Boston Store. R.351-ex.2988-122:MMSDApp.-0442A; R.351-ex. 2988-53;MMSDApp.-0442B; R.143-1, 13:A-Ap.442, 454.

Owners' common-law claims are barred by §893.80 because they failed to serve a notice of

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[1] Record citations refer to both the record number and page and, where applicable, appendix page of either Plaintiffs-Appellants-Cross-Respondents' Appendix ("A-App") or Defendant-Respondent-Cross-Appellant's Appendix ("MMSDApp"). The District has endeavored not to include in its appendix material in Owners' appendix, but some duplication occurs because, e.g., Owners included only excerpts of many hearing transcripts.

claim, *see* Wis. Stat. §893.80(1), and they based their right to relief on discretionary conduct for which the Legislature has provided governmental immunity, *see* Wis. Stat. §893.80(4). But the circuit court ruled otherwise—concluding that a notice of claim served by other entities falsely claiming to own the building satisfied §893.80(1)'s notice and claim requirements and, although "troubled by [this] issue more than anything," accepted Owners' argument that they could avoid the District's governmental immunity by proving that the District "operated" or "maintained" the Deep Tunnel in a harmful way. R.394-29:MMSDApp-0838.

II. Statement of Facts.

The District is a municipal corporation that provides sewerage services to all communities in Milwaukee County (except South Milwaukee) and to communities in surrounding counties. In 1977 the District's predecessor created the Water Pollution Abatement Program in order to comply with state and federal court orders directing it to remedy sewer overflows. R.124-2–3:MMSDApp-0113–14; R.381-257:MMSDApp-0658. A central component of the abatement program was the

construction of the Deep Tunnel, a series of underground tunnels designed to hold wastewater until it can be treated at the District's treatment facilities. R.124–25:MMSDApp-0116; R.381-257,260:MMSDApp-0658,0660. The Deep Tunnel, 260–300 feet below the surface, extends for almost 20 miles and was able to contain 405 million gallons of wastewater when it was put into full operation in 1994. R.381-257:MMSDApp-0658. *See also Friends of Milwaukee's Rivers & Alliance for Great Lakes v. Milwaukee Metro. Sewerage Dist.*, 556 F.3d 603, 605 (7th Cir. 2009).

The District contracted with CH2M Hill, the lead engineering firm for the District's Water Pollution Abatement Program, and CH2M Hill established the "Program Management Office" that was responsible for the Deep Tunnel's design. R.124-5–6:MMSDApp-0115–16; R.381-261–63:MMSDApp-0661–63. After the Program Management Office conducted geological surveys of the area, it concluded that concrete should only be used to line the Tunnel where needed to maintain the Tunnel's shape. R.123-3–4:MMSDApp-0106–07; R.124-6:MMSDApp-0117; R.388-2033–34:MMSDApp-0789–90.

The WDNR, however, which had conditionally approved an earlier plan calling for lining the Tunnel with concrete, opposed the design change. The opposition was resolved in 1986 by a stipulation filed in litigation between the District and WDNR. *Milwaukee Metro. Sewerage Dist. v. WDNR*, No. 594-623 (Milw. County Cir. Ct.). The stipulation required the District to report detailed technical information obtained during mining, including information on groundwater infiltration, and to state the District's position on lining other parts of the Tunnel system. R.123-4–5:MMSDApp-0107–08. The WDNR, after reviewing the information, approved all the contracts for the tunnel system. R. 388-2125:MMSDApp-0794D.

The tunnel section at issue—the North Shore Segment—was designed only to have a partial lining and to use grout to control excess water infiltration. R.388-2013, 2033:MMSDApp-0787, 0789. The District separately hired Traylor Bros., Inc./Frontier-Kemper Constructors to construct the segment. R.382-368:MMSDApp-0666.

Water inflows and rock instability halted construction of the Tunnel about three miles north of downtown. R.123-5–7:MMSDApp-0108–10.

Because the Tunnel had not yet reached downtown, these water inflows had little or no impact on the downtown area. *Id.* The design contractor proposed, and the District accepted, a redesign that employed significant surface grouting and a temporary support structure for the Tunnel opening. *Id.* When construction proceeded, some additional unexpected and substantial water inflows occurred, leading to minor surface settlement along Third Street in the downtown area. *Id.* The District installed recharge wells to restore the surface water table. *Id*.

As finally completed, the North Shore segment runs under Third Street—about a block east of the Boston Store building.[2] R.123-7:MMSDApp-0110. The Tunnel is about 45,000 feet long of which 25,000 feet has a concrete liner. *Id*. Since 1994, the District has operated the Tunnel, which was substantially completed by

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[2] Owners have acknowledged that the Tunnel does not run under the Boston Store, but rather Third Street. R.376-89:MMSDApp-0642. See also R.351-exs.1550-028 to 1550-032; MMSDApp-0325–55 (Owners' exhibits depicting position of Boston Store relative to Deep Tunnel).

August 1992, under the terms of a Water Pollution Discharge Elimination System permit issued by the WDNR. This operating permit requires that the Tunnel have a positive inward gradient—that water flows into the Tunnel—in order to prevent the exfiltration of wastewater. R.382-560:MMSDApp-0683.

A. Tunnel-related property damage claims were made, investigated, and resolved in the early 1990s.

In the early 1990s, during Tunnel construction, some property owners, principally those who owned buildings directly over the Tunnel on North Third Street, reported architectural and cosmetic damage to buildings that they attributed to construction of the Deep Tunnel. R.122-2:MMSDApp-0101. The reported damage, which was limited to façade damage, shallow foundation repairs, and ground floor slab repairs, diminished away from North Third Street. *Id.*; R.122-4:MMSDApp-0103.

The Program Management Office investigated these claims when they were made. R.122-2–3:MMSDApp-0101–02. It had a geological engineer inspect the reportedly damaged properties and investigate when the damage occurred,

including, in some instances, investigating the building's history and maintenance record. R.122-3:MMSDApp-0102. The District authorized the payment of repairs where the investigation substantiated the claim. R.122-3–4:MMSDApp-0102–03. It did so in order to avoid having to reimburse its Tunnel construction contractors under the terms of their contracts for the contractor resolving the claims itself. R.394-41:MMSDApp-0850. During this entire period, no one made a claim for deep foundation damage. R.122-4:MMSDApp-0103. All of these claims were investigated and resolved by 1995—eight years before Owners commenced this action. *Id*.

B. The Boston Store building and its long history of foundation problems.

The Boston Store "building" consists of five buildings built over a forty-year period beginning in the 1880s. R.385-1193–96:A-Ap.903–04. The buildings were built on wood-pile foundations. R.384-965:MMSDApp-0714. These piles are clusters of long, wood poles that were driven thirty or more feet into the ground to support the building's columns and transfer the weight of the building into stable ground. R.384-962–65. A concrete or stone pile cap connected the pile cluster

to the columns. R.381-198:MMSDApp-0655. At the time of construction, the tops of the piles were located below the surface water table, which would have protected the piles' structural integrity by keeping them saturated. *See* R.385-1282–83:MMSDApp-767A–767B. When, however, the water table drops below the pile tops, they become subject to decay and lose their structural integrity. R.381-198–99:MMSDApp-0655.

Beginning in 1936, Boston Store operated a well on its property that drew roughly 800 gallons per minute from groundwater that saturated its piles. R.387-1820:MMSDApp-0780. During this time Owners did nothing to monitor the groundwater level or protect the piles. R.384-1070:MMSDApp-0746. Even after well use stopped in 1962, Owners left the well in place, which continued to drain groundwater from beneath the building. R.387-1816–17:MMSDApp-0778–79.

As Milwaukee's industrial use of groundwater increased in the 1950s and 1960s, the water table was stressed and depleted. R.387-1789–90:MMSDApp-0776–77. The marsh deposits were drawn down substantially, such that, as early as the 1950s, other building owners underpinned their

buildings anew or constructed wetting systems. R.386-1532–33:MMSDApp-0772–73. Since at least the early 1950s, the Boston Store's building engineers were aware that the wood piles were decaying because the owners had not maintained the water table below the building by, for example, flooding the piles using a recharge pump. R.384-1069–70:MMSDApp-0745–46; R.386-1540:MMSDApp-0773A. Rather than keep the piles saturated, building owners chose to monitor column movement and repair only those piles that were causing instability. R.384-1039:MMSDApp-0738.

Evidence still available to the litigants showed that since 1976, the building's pile decay was identified and repaired several times before the Tunnel's construction; e.g., two sets of piles were repaired in 1979 and additional repairs were made in 1980 and 1982. R.351-45, ex. 2258:MMSDApp-0355A; R.384-1058–59:MMSDApp-0744–0744A. A 1978 urban renewal inspection of the Boston Store building identified deterioration and differential settlement around the base of many columns. R.388-2065, 2069–74:MMSDApp-0792–0794B. A building engineer

also noted ongoing settlement in several columns throughout the 1980s. R.351-1–5, ex.421:MMSDApp-0312–16. The piles identified for repair in the early 1980s—still a decade before Tunnel construction—were rotted away at the top and were disconnected from the pile cap. *Id*.

In the early 1980s, still several years before the Tunnel was dug, substantial settling and cracking was observed in the southwest side of the first and second floors. R.128-26–29, ex.M:MMSDApp-0147–51. Seventy-two of the building's 169 columns were underpinned before the Tunnel was constructed and 11 were underpinned twice. R.120-4, ex.B:MMSDApp-0098.

An engineering firm survey completed in 1990 and 1991 showed more building settlement at the time of Tunnel construction. R.128-18–22, ex.K:MMSDApp-0138–42. But, between 1992, around the time one building engineer left, and 1995, when his successor was hired, Owners left its column settlement unmonitored, leaving the extent of the settlement unknown. R.384-1039:MMSDApp-0738; R.385-1330:A-Ap.937.

In 1995, when Joseph Zdenek was hired as the building engineer, Owners resumed monitoring

column settlement. R.384-1005:MMSDApp-0723. Zdenek was informed of the underpinning history of the building, R.384-1004–05:MMSDApp-0722–23, but it was not until January 9, 1997 that Zdenek inquired into a probable cause for column movement, only to reject his consultant's recommendation that the store install a groundwater recharge system to combat lower groundwater levels and preserve the piles. R.351-8–9, ex.697-1–2:MMSDApp-0319–20; R.384-1040–41:MMSDApp-0739–40. Instead, Owners' policy was to allow the piles to rot and then replace them as they failed. R.384-1039:MMSDApp-0738.

In 1997 Carson Pirie Scott, the building's then-owner, decided to underpin nine columns using a jet grouting method that involves shooting grout up to 40 feet under the pile caps, essentially replacing the wood-pile foundation with a new concrete foundation. R.384-1015–16:MMSDApp-0727–28. Contemporaneous observations revealed the same type of decay as reported in earlier years. R.384-1037–1038:MMSDApp-0736–37. Rather than further investigate or address the cause of column settlement, Owners continued to pursue

their replace-on-failure policy. R.384-1039:MMSDApp-0738.

C. Boston Store's 2001 redevelopment into condominiums and retail space.

In 2001, as part of a redevelopment agreement, the City of Milwaukee Redevelopment Authority agreed to give Bostco, a wholly-owned limited liability company of Wisconsin Electric Power Company, $3 million to purchase the Boston Store building from its then-owner, Parisian. R.384-834:MMSDApp-0703; R.385-1127–28:MMSDApp-0752–53. In exchange for the City's $3 million, Parisian, a Carson successor entity, transferred ownership of the building and a nearby parking structure. R.385-1127–28:MMSDApp-0752–53; R.384-834–36,846–47:MMSDApp-0703–05, 0707–08. Bostco entered into a retail lease with Parisian and undertook to convert part of the structure into condominiums and the lower levels into underground parking. R.385-1126–28:MMSDApp-0751–53. As part of this redevelopment, Bostco underpinned 15 additional columns. R.385-1203:MMSDApp-0758.

On June 5, 2003, Owners commenced this action, (R.1), alleging that the District was liable for all foundation repairs. They presented no

evidence at trial allowing a comparison of pile conditions before and after Tunnel construction or during the time since the Tunnel was put in service. Nor did they present any evidence that the pile decay had at any time interfered with the building's use: there was no testimony regarding business interruption or any inability to use the building for a particular purpose caused by pile decay.

Instead, Owners presented column monitoring records, which they contended revealed greater column movement since the Tunnel had been in operation. R.385-1203–05:MMSDApp-0758–60. Their damages expert then testified that the cost of replacing some wood piles and other repairs in 1997 and foundation repair during the 2001–2004 building renovation was $3 million. R.385-1216,1260, 1334–36:A-Ap.909, 920, 938; R.351-exs.1553:MMSDApp-0335A–35B. He proposed future damages of $9 million based on the cost of jet grouting all remaining columns (even those repaired before 1997). R.351-exs.1553-018–021:A-Ap.1336–39.

D. Jury's verdict: both parties were negligent.

The jury was asked to answer 11 special verdict questions—including whether either party was negligent, whether the District had interfered significantly with Owners' use of their property, and whether Owners should reasonably have known of their claim more than six years before they sued. R.403-1–3:A-Ap.585–87.

After two days of deliberations, the jury found both that the District had "operated or maintained" the Deep Tunnel negligently and that Owners had maintained the building negligently. *Id*. The jury allocated 70% responsibility to the District and 30% to Owners for damage to the building foundation. *Id*. The jury also found that Owners should have known of or discovered outside the statute of limitations period that the Tunnel had caused building damage. *Id*. It further found that the Tunnel interfered with Owners' use and enjoyment of their property but that the interference did not result in significant harm. *Id*. Asked how much money it would take to compensate Owners for "property damage," the jury answered $3 million for property damages "already suffered" and $6

million of property damages Owners "will suffer in the future." R.403-1–3:A-Ap.585–87.

III. Both Parties Challenged the Verdict and Sought Judgment in Their Favor.

Both parties filed timely post-verdict motions challenging aspects of the verdict and seeking judgment in their favor. R.256-1-13:MMSDApp0189–0201; R.259-1–4:MMSDApp-0218–21. Judge Kremers, who retained the post-verdict motions even though he had recently rotated to a felony calendar, changed the jury's answer to the statute of limitations question. R.394-29:MMSDApp-0838. He concluded that there was insufficient evidence to support the finding, reasoning in part that evidence submitted by the District in support of its summary judgment motion had not been presented to the jury. R.394-26–29:MMSDApp-0835–38. Judge Kremers also refused to direct a verdict in the District's favor based either on Owners' failure to serve a notice of claim or on the District's discretionary act immunity—issues addressed in the cross-appeal portion of this combined brief. R.394-29–31:MMSDApp-0838–40. But Judge Kremers granted the District's motion to limit damages to

$50,000 per plaintiff, as required by Wis. Stat. §893.80(3). R.394-46:MMSDApp-0855.

On October 25, Judge Kremers signed an order entering judgment on the negligence claim for $100,000 and dismissing the nuisance claim. R.305:A-Ap.708. Owners appealed on January 19, 2007. R.360. On January 30, 2007, Judge DiMotto, based only on her review of the trial record, orally granted an injunction motion Owners filed after Judge Kremers' September 11, 2006 ruling that the damages limitation applied. R.399-26:MMSDApp-0905. The injunction required the District to construct a concrete Tunnel lining near the Boston Store at an estimated cost in excess of $10 million. R.382-523–24:MMSDApp-0678–80. The propriety of that order is also addressed in the District's cross-appeal brief.

ARGUMENT

I. The Legislative Cap on Governmental Tort Damages—the Constitutionality of Which Our Supreme Court Has Upheld—Limits Total Damages to $100,000.

Judge Kremers properly ruled that Wis. Stat. §893.80(3) limited each plaintiff to tort damages of $50,000. Owners do not contest that the §893.80(3)

damages cap, if constitutional and not waived, so limits recovery on their negligence claim.

Owners challenge the constitutionality of the statute and its application.[3] The Supreme Court has already held, however, that §893.80(3)'s limitation is constitutional and, contrary to Owners' argument, the District's refusal to waive its application here cannot render it unconstitutional "as applied." Additionally, the District's accurate statement during the litigation that if Owners' prevailed, they would recover their damages is not, and could not be, a waiver of the statutory damages limitation.

Owners' additional argument—that if they are entitled to recover on their nuisance claim, they should be awarded $50,000 per day—is foreclosed by the statutory text. The statute provides for a "per tort action" limitation, stating that "the amount recoverable . . . for any damages . . . *in any*

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[3] Whether Wis. Stat. §893.80(3) is unconstitutional or waived is a question of law that this Court reviews de novo. *Kohn v. Darlington Cmty. Sch.*, 2005 WI 99, ¶12, 283 Wis. 2d 1, 698 N.W.2d 794.

action founded on tort . . . shall not exceed $50,000." Wis. Stat. §893.80(3) (emphasis added).

A. Wis. Stat. §893.80(3) is constitutional "on its face."

"For almost ninety years prior to 1962, [the Wisconsin Supreme Court] held that municipalities in Wisconsin were exempt from tort liability under the doctrine of municipal tort immunity." *Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 26, 559 N.W.2d 563 (1997). In 1962, the Court abrogated this judicially-created immunity. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962). Contrary to Owners' unsupportable assertion that *Holytz* "makes clear that the government has no legitimate interest" in limiting municipal liability in tort, Owners-Br. 46, *Holytz* expressly invited the Legislature to assume its proper role and impose limits on municipal liability if it deemed limitations to be in the public interest:

> If the legislature deems it better public policy, it is, of course, free to reinstate immunity. ***The legislature may also impose ceilings on the amount of damages*** or set up administrative requirements which may be preliminary to the commencement of judicial proceedings for an alleged tort.

Holytz, 17 Wis. 2d at 40 (emphasis added). A year later, the Legislature did precisely that, limiting the amount a plaintiff can recover from a municipality in a tort action to $25,000, *see* Laws of 1963, ch. 198, an amount that was increased to $50,000 in 1979, *see* Laws of 1981, ch. 198.

In 1980, the Wisconsin Supreme Court upheld the Legislature's limitation on municipal tort damages in *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 358–59, 293 N.W.2d 504 (1980), when the cap was still $25,000. *Sambs* controls this case and precludes a ruling that §893.80(3) is unconstitutional on equal protection grounds.

In *Sambs*, the Court rejected the arguments Owners press here—that the then-$25,000 cap on municipal damages violated the equal protection rights of a plaintiff to whom Brookfield had negligently caused almost $1 million of personal injury damages. The Court reasoned that the Legislature's cap satisfied rational basis scrutiny because it serves "a legitimate public purpose to prevent the disastrous depletion of municipal treasuries, thereby safeguarding public funds and the government's ability to discharge public responsibility." *Id.* at 371. Surveying a selection of

different governmental damages provisions then in force, the Court concluded that the Legislature could reasonably determine that, given the broad number of persons touched by governmental operations, allowing even modest damage recoveries could put governmental services at risk. As then-Justice Abrahamson wrote for the Court:

> Damage actions against a governmental entity may arise from a vast scope and variety of activities. A claim against a government unit may range from a few dollars to a few million dollars. A municipal unit of government, limited in fund-raising capacity, may lack the resources to withstand substantial unanticipated liability. Unlimited recovery to all victims may impair the ability of government to govern efficiently.

Id. at 376-77. The Court explained that balancing the public policies of protecting the public fisc and reimbursing those harmed by government conduct is the province of the Legislature. *Id.* at 377; *see also Anderson*, 208 Wis. 2d at 31–32.

"[T]he legislature," the Court explained, "could reason that a maximum should be imposed on the amount recoverable in those situations where the burden of unlimited liability may be substantial and the danger of disrupting the

functioning of local government by requiring payment of substantial damage awards may be great." 97 Wis. 2d at 377–78.

The same reasoning applies here. Claims like those of Owners, if not subject to the limitation of §893.80(3), could easily disrupt governmental entities' ability to provide services. The Legislature was, therefore, well within its constitutional authority to enact the legislation. *See also Stanhope v. Brown County*, 90 Wis. 2d 823, 842, 280 N.W.2d 711 (1979) ($25,000 limit on recovery against governmental tortfeasors did not deny equal protection or violate the "certain remedy" clause of the Wisconsin Constitution) (Abrahamson, J.).

Owners' only answer to *Sambs* is to suggest that the mere passage of time justifies disregarding it. That suggestion does not survive *Zarder v. Humana Insurance Co.*'s prohibition on overruling, modifying, or withdrawing" statements of the Supreme Court. 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

Owners hang tightly to the fact that in 1980, *Sambs* quoted a decision of the New Hampshire Supreme Court in which a $50,000 statutory

limitation on tort damages was described as "close to the boundary of acceptability," *see In re Estate of Cargill v. City of Rochester*, 406 A.2d 704, 708, 709 (N.H. 1979). Although, since *Sambs*, the Wisconsin Legislature raised the limitation in §893.80(3) to $50,000, Owners contend that the mere fact of inflation justifies raising the cap and ignoring *Sambs*. Believing that the Legislature should have authorized another cost-of-living increase in the cap by now, Owners turn to the judicial branch to provide the nullification they seek, a course of action that they believe is sanctioned by *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 440, 701 N.W.2d 440.

Ferdon, which approvingly cited *Sambs* and expressly reaffirmed that caps on municipal liability are justifiable because of concern for public finances, *see id.* ¶180, does not aid Owners. *Ferdon* held that a cap on noneconomic damages recoverable by a plaintiff in a medical malpractice action from the Patients Compensation Fund was not rationally related to any legitimate state interest. *Id.*

Distinguishing *Sambs*, *Ferdon* explained why its holding does not provide license for this Court to strike down §893.80(3)'s wholly unrelated limitation on tort damages against municipalities. Because of the long common-law history of government immunity, claims against municipalities are not analogous to medical malpractice claims: "[m]unicipalities were immune from suit at the adoption of the Wisconsin constitution, and concern about public finances as a result of numerous actions against municipalities . . . has justified the cap involved in that statute."[4] *Id.* ¶180.

Ferdon involved the Legislature's effort to limit damages that would have otherwise been available in a common-law tort suit. By contrast, this case, like *Sambs*, involves the Legislature's authorization of a limited monetary claim against a

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4 In discussing her earlier opinion for the Court in Sambs, Chief Justice Abrahamson mentioned only Wis. Stat. §81.15's limitation on tort damage awards against municipalities for highway defects, but Sambs' holding applied equally to §895.43—now §893.80(3)—which also was contested by Sambs as unconstitutional. See Sambs, 97 Wis. 2d at 365-66, 371, 376-77.

governmental entity when, at common law, Owners would have been entitled to no recovery at all. Equal protection principles do not authorize the judiciary to re-balance the public policy considerations involved in determining the extent to which taxpayer-supported government entities should be open to damages claims. *See Anderson*, 208 Wis. 2d at 27 ("The court thus placed the doctrine of municipal immunity in the hands of the legislature."); *see also Sambs v. City of Brookfield*, 66 Wis. 2d 296, 317, 224 N.W.2d 592 (1975).

Owners further argue that the §893.80(3) limitation "is unreasonably low . . . in relation to the damages sustained." Owners-Br. 47. But as the legal trajectory described in *Holytz* and elsewhere shows, that analysis is upside-down. The proper baseline for considering whether the limitation is "too low" is not, as Owners suggest, the full recovery of damages as if they were suing a private party. Instead, as *Ferdon* recognizes, *see* 284 Wis. 2d 440, ¶180, the proper baseline for considering whether $50,000 is unreasonably low is the zero recovery available at common law—the recovery that *Holytz* acknowledges the Legislature is free to impose, 17 Wis. 2d at 40. Whether greater

recoveries should be allowed based on the size of typical claims against governmental entities and the need to protect those entities' ability to provide services is precisely the kind of public policy question that *Holytz* and the cases since have left to the Legislature's discretion, unless no set of facts can justify it. As *Ferdon* itself explained:

> A statute will be upheld against an equal protection challenge if a plausible policy reason exists for the classification and the classification is not arbitrary in relation to the legislative goal . . . The party challenging the classification has the burden of demonstrating that the classification is arbitrary and irrationally discriminatory.

Ferdon, 284 Wis. 2d 440, ¶73 (footnote omitted). The Legislature is not required to use the "wisest" means of accomplishing its goal—here, to protect the public fisc to ensure ongoing governmental functions—"[d]eference to the means chosen is due even if the court believes that the same goal could be achieved in a more effective manner." *Id.* ¶76.

In apparent response to the "patently arbitrary" language of *Ferdon*, Owners contend that the $50,000 limit was "selected arbitrarily," Owners-Br. 50, and that inflation alone has

rendered it too low to be constitutional. *Id.* at 67. Neither point justifies holding §893.80(3) unconstitutional. First, our Supreme Court long ago rejected this very argument. In *Stanhope* the Court explained that any amount the Legislature selects as the limit will seem arbitrary, but this provides no grounds on which a court can hold the limitation constitutionally infirm:

> As to the specific monetary limitation on recovery we recognize that whatever figure is selected will be arbitrary in the sense that it is based on imponderables. This monetary limitation is one which the legislature determines balancing the ideal of equal justice and the need for fiscal security.
>
> . . .
>
> We cannot conclude in this case that the $25,000 cut-off point adopted by the Wisconsin legislature in secs. 81.15 and 895.43 [now §893.80(3)] is arbitrary or unreasonable or violates state and federal constitutional guarantees.

Stanhope, 90 Wis. 2d at 843–44. This point was reiterated in *Sambs*: "[W]hatever the monetary limitation on recovery, the amount will seem arbitrary . . . the legislature, not the court, must select the figure." 97 Wis. 2d at 367.

Even if the judiciary had the authority to declare the $50,000 limit "too low," Owners do not begin to make a case for its exercise. Ignoring the essential role played by the economic data considered by the Court in *Ferdon*, *see, e.g.*, 284 Wis. 2d 440, ¶¶133–147, Owners do not present any evidence of the type a legislator would consider in deciding whether to increase the governmental tort damages limitation. For example, the Court has no information on the effect of a higher limitation on the various types of governmental entities covered by §893.80(3); it has no information on the frequency of tort claims against those governmental entities; no information on the extent to which the frequency of tort claims would increase if the §893.80(3) limitation were removed; no information on the types or frequency of claims that exceed the limitation amount; no information on the cost to insure against the greater exposure; and no information on the estimated amount of tax increases that would be necessary if some higher limitation were enacted, or the likely economic and political costs of those higher taxes. *See Stanhope*, 90 Wis. 2d at 844. Absent this information, it is impossible to determine whether increasing the

limitation would be sound public policy, much less what the extent of that increase should be. No court under these circumstances is equipped with anything close to the information needed to hold the limitation unconstitutional without directly contravening the holdings of *Sambs* and *Stanhope*.

Nor does consideration of the damages sustained, as Owners urge, Owners-Br. 49, provide grounds for diverging from *Sambs* and *Stanhope*. Unlike *Sambs*, *Stanhope*, and even *Ferdon*, all of which dealt with personal injury claims by individuals, Owners are sophisticated commercial businesses that allege only economic injuries—repairable decay of their pile foundation for which the jury found them 30% responsible. That Owners should pay for needed repairs, rather than the District's taxpayers, works no obvious hardship or injustice. Owners' argument that the damages limitation shifts the cost of government negligence "to a small handful of victims, who cannot, standing alone, hold the negligent government official(s) accountable through ordinary political means, and away from the public at large, who can," Owners-Br. 50, is at best an inapposite distraction. Owners do not lack a political voice.

Bostco is a wholly-owned subsidiary of a utility holding company that presumably does not lack political influence. Indeed, as a result of its ability to secure a public development grant, Bostco acquired the Boston Store building without using its own funds. R.383-846–47:MMSDApp-0707–08; R.385-1127–28:MMSDApp-0752–53. No claim of inequity or disenfranchisement can support Owners' request that this Court ignore controlling precedent or Owners' suggestion that the constitution requires the judiciary to set aside the Legislature's governmental damages limitation in order to force the District's taxpayers to fund reconstruction of the Boston Store's foundation.

B. Wis. Stat. §893.80(3) is constitutional "as applied."

Owners argue that the District's reliance on §893.80(3)'s damages limitation is unconstitutional "as applied" because the District settled earlier claims made by other property owners for amounts greater than $50,000. This argument fails because (1) governmental conduct having any reasonable purpose survives the applicable rational basis review, *see Nankin v. Vill. of Shorewood*, 2001 WI 92, ¶11, 245 Wis. 2d 86, 630 N.W.2d 141; and (2) equal protection does not apply because Owners are

not "similarly situated" to the claimants from the mid-1990s and before. *See id.*

1. The District's decision to pay claims made close in time to the construction and for which the District would have been required to reimburse its contractor was reasonable.

The resolved claims to which Owners refer were claims that buildings were damaged as a result of the Tunnel's construction in the downtown area in the late 1980s. During that construction, the contractor, Traylor Brothers, experienced unexpected and substantial inflows from the shallower groundwater aquifers in the soils above the rock layers 200–300 feet below ground surface. R.123-3,5–6:MMSDApp-0106, 0108–09. This differing site condition encountered by the contractor during the construction was believed responsible for causing differential settlement and structural duress to buildings "without deep foundations and certain older buildings supported by relatively short timber piles." R.51-25:A-Ap.1364. The District installed recharge wells, and, by 1994, had concluded that "[g]roundwater aquifers have stabilized," "[s]tructural settlements have stopped," and that "[i]t is not expected that

damages will occur beyond those currently being evaluated." R.51-26:A-Ap.1365.

Under Traylor Brothers' contract with the District to construct the Tunnel, Traylor Brothers was entitled to modify the contract and obtain additional compensation from the District if it incurred unforeseen costs as a result of differing site conditions. R.388-2027:MMSDApp-0788. Such an arrangement is standard in the construction industry. *See, e.g.*, *Metro. Sewerage Comm'n v. R.W. Constr., Inc.*, 72 Wis. 2d 365, 241 N.W.2d 371 (1976). Rather than have Traylor Brothers resolve those claims and pass on to the District the cost of repairing the damage, plus the expense of administering the claims, and a reasonable markup, the District undertook to investigate and pay these claims itself—in effect standing in the shoes of its contractor.

These payments thus did not resolve tort claims against the District; the District compensated building owners for settlement damages in the 1990s in order to avoid having to pay a greater amount under its contract with Traylor Brothers. This reasonable course of action also allowed the District to maintain favorable

relations with the building owners whose claims, after investigation, appeared to have been plausibly caused by the construction problems. These claims were substantially resolved by 1994, and the District's contractual obligation to pay Traylor Brothers ended around the same time.

By contrast, in 2001 when Saks and WISPARK first raised the damages claim at issue in this litigation, the District's contract with Traylor Brothers had concluded and the District was not responsible for additional payments under that contract. By that time, any claim relating to the Boston Store building was necessarily a claim directly against the District, which it handled in the ordinary course, including defending the claim in part based on the damages limitation in §893.80(3). Far from violating equal protection, the statutory limitation would be applied similarly to all other direct claims.

Owners' argument that it is arbitrary and therefore unconstitutional to deny their claim based on when it was asserted is a non-starter. Certainly, the District had far greater reason to believe credible claims of settlement damage asserted soon after the water inflows during

construction than it had to believe claims raised a decade after construction had been completed. To accept Owners' time-is-arbitrary argument would strip all government actors of a statute of limitation defense: No court could constitutionally apply a statute of limitations without depriving the plaintiff "arbitrarily" of a claim. The absurdity of this conclusion requires the argument's rejection.

Even putting the actual events showing the reasonableness of the District's method aside, Owners' "as applied" constitutional challenge is an invitation for the Court to judge a government entity's settlement strategies on a case-by-case basis. No case Owners cite, and no case of which the District is aware, suggests that this is properly the role of the judiciary. *Cf. Anderson*, 208 Wis. 2d at 30–32 (refusing to allow court-found implied waivers of governmental tort damages limitation).

2. Equal protection cannot be violated by application of §893.80(3) because Owners and earlier claimants are not "similarly situated."

Even if an "as applied" equal protection challenge authorized a court to compare the similarity of claims and settlement amounts, such an undertaking would not aid Owners. "A party

challenging a statute on equal protection grounds must 'demonstrate that the state unconstitutionally treats members of similarly situated classes differently,'" *In re Nelson*, 2007 WI App. 2, ¶19, 298 Wis. 2d 453, 727 N.W.2d 364 (Ct. App. (2006) (quoting *State v. Post*, 197 Wis. 2d 279, 318, 541 N.W.2d 115 (1995)), and Owners have not demonstrated that they were "similarly situated" to the claimants who settled for more than $50,000.

Nor could Owners so prove. Owners made their claim several years after the Tunnel was constructed and claimed damage to century-old foundation piles resulting from migrating groundwater. The paid claims to which Owners compare their deep pile foundation claim involved shallow piles and façade and surface damages. R.122-4:MMSDApp-0103. These distinctions are more than adequate to provide a rational basis for treating the claims differently, thus satisfying any "as applied" equal protection challenge.

C. The District did not waive the §893.80(3) damages limitation nor does judicial estoppel preclude its application.

Owners next contend that the District waived the caps or—using the same argument relabeled—

is judicially estopped from relying on them. They base this argument solely on an exchange made in the context of a May 2, 2005 hearing (R.371-4, 9:MMSDApp-0472, 0477), which took place after the District filed its answer to the amended complaint again pleading the §893.80(3) damages limitation. R.75-29:A-Ap.159. This exchange, however, cannot be a waiver. First, any waiver of the damages limitation must be made expressly. Second, even if an implied waiver was possible, the exchange on which Owners rely could not constitute an implied waiver.

1. The damages limitation was not waived.

Our Supreme Court "has repeatedly held that the [governmental] damage limitation can be waived only if the legislative purposes of §893.80(3) are met, and a public entity expressly waives the damage limitation." *Anderson*, 208 Wis. 2d at 32. Waiver in this context is "a 'voluntary and intentional relinquishment of a known right.' Intent to waive is regarded as an essential element of waiver.'" *Gonzalez v. City of Franklin*, 137 Wis. 2d 109, 128, 403 N.W.2d 747 (1987) (citations omitted). *Gonzalez* held that a city did not implicitly waive damages caps by purchasing

insurance coverage in excess of the cap amount, reasoning that *Sambs requires* "express policy language indicating that a waiver was intended." *Id.* at 131. The statements on which Owners rely do not meet this standard.

Owners cite no authority, and the District is aware of none, that has deemed municipal immunity waivable by implication. On the contrary, the Court has repeatedly emphasized the opposite. In *Anderson*, for example, the Court ruled that Milwaukee had not waived §893.80(3)'s damage limitation even though the City had neither pleaded nor raised the issue at any time before or after the jury verdict. 208 Wis. 2d at 33–34. Since the District pleaded the §893.80(3) limitation and never expressly waived it, Owners' waiver argument fails.

a. The exchange at the May 2, 2005 hearing was no waiver of the cap.

At issue on May 2 was whether Owners should be entitled to name a tunnel construction expert, whose opinions appeared to be either irrelevant or redundant. R.371-1–40:MMSDApp-0469–0508. The District argued that the expert was unnecessary because Owners had already

named a damages expert and, if they recovered the damages they sought, reconstruction of the tunnel was unnecessary. R.371-3–4:MMSDApp-0471–72.

Owners' characterization of this argument as a waiver of the damages limitation is untenable. Counsel's argument—that "*if* plaintiffs win, they will be made whole based on their damages claim," R.371-4:MMSDApp-0472, and "[t]hey can have complete and whole relief *based on what they have already* alleged," R.371-9:MMSDApp-0477 (emphasis added)—plainly did not constitute an express waiver of the §893.80(3) limitation. The statutory limitation was not mentioned. Because only an express waiver of §893.80(3) can be effective, *see Anderson,* 208 Wis. 2d 18, Owners' implied waiver argument is without merit.

In fact, the District's counsel expressly said it was *not* waiving its legal defenses. R.371-31–32:MMSDApp-0499–0500. Because the Court's inquiries at the hearing were premised on the fact that Owners were seeking damages rather than injunctive relief, the District's counsel made clear that he was not waiving the District's legal defenses in addressing the Court's hypothetical scenarios:

> in addition to the other caus[ation] defenses I mentioned to you a moment ago, we have legal defenses that we will raise, which we don't want to waive here in discussing what would happen if [plaintiffs] were able to prove the facts you suggested. . . . I don't want to suggest to you by participating in the colloquy as I am, as any of us are, that we are waiving certain legal aspects.

R.371-31–32:MMSDApp-0499–0500. The Court expressly allowed the reservation, stating: "I understand. I'm not suggesting that you are [waiving defenses]." R.371-32:MMSDApp-0500. When Owners' counsel later suggested that the District had "stipulated" to an issue in the course of the argument, the Court made clear that nothing said in the colloquy would be treated as preclusive, stating in response to the District's counsel's clarification that he had not stipulated: "I know you didn't. I didn't see the word stipulation. Unless it is signed by you or agreed by you, there are no stipulations." R.371-39:MMSDApp-0507. *See Robinson v. McNeil Consumer Healthcare*, No. 09-4011, --- F.3d ----, 2010 WL 3156548, at *10 (7th Cir. Aug. 11, 2010) ("in order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous").

b. No waiver can here be enforceable because it would not satisfy the statutory purpose.

Even if counsel had made an express statement that the District was not relying on the statutory limitation, it would not be an enforceable waiver because, under the circumstances here, it would not "satisfy the purposes of this statute—protecting the public treasury and allowing for fiscal planning." *Anderson*, 208 Wis. 2d at 34. The Supreme Court has only upheld §893.80(3) waivers when the municipality purchased insurance coverage that expressly provides that the insurance company will not invoke the damages limitation and has sufficiently high limits to protect the municipal treasury. *See id.* at 30; *compare Sambs*, 66 Wis. 2d at 315; and *Gonzalez*, 137 Wis. 2d at 128-29, with *Stanhope*, 90 Wis. 2d at 846-47.

c. The circuit court expressly found no waiver.

In any event, in ruling on motions after verdict, the circuit court expressly rejected Owners' waiver argument by finding that the District had not waived reliance on the §893.80(3) limitation, stating: "I find no waiver of the caps." R.394-

45:MMSDApp-0854. In the absence of a compelling reason to disregard this finding, which Owners do not, and cannot, present, this Court should adhere to the circuit court's conclusion.

2. Equitable estoppel is inapplicable.

Owners also contend that the same conduct on which they base their waiver argument constitutes judicial estoppel. The argument is no better in different clothing. *Cf. In re C.L.F.*, 2007 WI App 6, ¶17, 298 Wis. 2d 333, 727 N.W.2d 334 (2006) (treating judicial estoppel rule like waiver rule because both are rules of judicial administration). First, Owners did not raise estoppel below; thus, it is waived. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶23, 303 Wis. 2d 258, 735 N.W.2d 93.

Second, judicial estoppel is an "equitable doctrine . . . [that] is intended to protect against a litigant playing fast and loose with the courts by asserting inconsistent positions." *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54 (internal quotation marks and quoting citation omitted). "The doctrine is not directed to the relationship between the parties, but is intended to protect the judiciary as an institution

from the perversion of judicial machinery." *Feerick v. Matrix Moving Sys., Inc.*, 2007 WI App 143, ¶16, 302 Wis. 2d 464, 736 N.W.2d 172 (internal quotation marks and quoting citation omitted). Here, given the District's express reservation of its legal defenses, which was acknowledged by the circuit court, the District cannot be characterized correctly as "playing fast and loose" with the court in arguing that if Owners won on their claims, which sought damages, they would be compensated at law. This alone defeats estoppel.

Additionally, a party asserting judicial estoppel must show: "(1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." *Id.* ¶34. The District's argument that damages are limited by §893.80(3) is not "clearly inconsistent" with its argument for why a tunnel construction expert was irrelevant—that, *if* plaintiffs prevailed, they would recover compensatory damages. Plaintiffs claimed $13 million of damages. If they prevailed, i.e., if they recovered damages based on their apparent belief that a nuisance claim would

allow them to avoid the damages cap, they would have been fully compensated. There is no inconsistency. For the same policy reasons as discussed in connection with Owners' waiver argument, it would be improper to hold that the District is estopped from asserting the statutory limitation based on a lawyers' colloquy on a different topic in which the §893.80(3) limitation was never mentioned and the District's counsel emphasized, and the circuit court acknowledged, that counsel was not waiving any legal defenses. *See Kennedy v. Wis. Dep't of Health & Soc. Servs.*, 199 Wis. 2d 442, 544 N.W.2d 917 (Ct. App. 1996) (judicial estoppel inapplicable to blunder, inadvertence, or mistake); *see also Robinson*, 2010 WL 3156548, at *10.

Finally, only official acts by a government entity, and not statements like those here, can give rise to estoppel. *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶51, 235 Wis. 2d 409, 611 N.W.2d 693 (statement of Town chairman insufficient basis for estoppel of immunity defense).

D. Even if Owners could recover in nuisance, Wis. Stat. §893.80(3) limits each plaintiff to $50,000 damages.

Owners argue that if the Court disregards the jury's finding that defeats their nuisance claims, then they "ought not be limited by Wis. Stat. §893.80(3)" "[b]ecause continuing nuisances give rise to continually recurring causes of action." Owners-Br. 58. This argument ignores the statute's text, its purpose, and the case law construing it.

Section 893.80(3) limits the amount any person can recover in any action founded on tort, stating, "the amount recoverable by any person for any damages, injuries or death in any action founded on tort against any . . . political corporation, governmental subdivision or agency . . . shall not exceed $50,000." Owners commenced an "action founded on tort"; the amount recoverable by them shall not exceed $50,000. *See Schwartz v. City of Milwaukee*, 54 Wis. 2d 286, 295, 195 N.W.2d 480 (1972) (the limitation applies to "each person asserting a cause of action for damages"); *Wood v. Milin*, 134 Wis. 2d 279, 285, 397 N.W.2d 479 (1986) (quoting citation omitted) (when two plaintiffs "each qualify as a 'person' who has suffered

'damages . . . in any action founded on tort . . .' as required by sec. 893.80(3)" both can recover up to the statutory limit).

Owners argue that because courts have recognized that a continuing nuisance is construed as a series of causes of action for statute of limitations purposes, "a continuing nuisance is not a single 'action'" for purposes of §893.80(3). Owners-Br. 57. This reasoning is faulty. Section 893.80(3) imposes a $50,000 damages limit per "action," not per "cause of action." An "action" is a "civil or criminal judicial proceeding." BLACK'S LAW DICTIONARY 32 (9th ed. 2009); *see also* Wis. Stat. §801.01(1) ("Proceedings in the courts are divided into actions and special proceedings."). A "cause of action," on the other hand, is a claim. BLACK'S, *supra*, at 251. A single action, of course, can encompass multiple causes of action. *See, e.g.*, Wis. Stat. §802.06(1) (increasing the allowed time to answer when "any cause of action raised in the original pleading . . . is founded in tort"). Section 893.80(3)'s text could not be clearer: in this "action," Owners are entitled to no more than $50,000.

The Supreme Court has used the "cause of action" concept in construing §893.80(3) only as a limiting principle—that is, it has asked of two separate plaintiffs whether they are only entitled to one $50,000 limit because they share a single cause of action. *See Wilmot v. Racine County*, 136 Wis. 2d 57, 400 N.W.2d 917 (1987) (subrogated plan not entitled to separate $50,000 recovery). As Chief Justice Abrahamson, who would not use "cause of action" even to limit recovery by multiple plaintiffs, explained: "The statute uses the word 'action,' not the phrase 'cause of action,' and not the phrase 'a person who has a cause of action.'" *Id.* at 66 (Abrahamson, C.J., concurring). To accept Owners' multiple-cause-of-action theory and allow plaintiffs unbridled recovery for nuisance claims would ignore the legislative purpose of imposing a maximum per plaintiff recovery "where the burden of unlimited liability may be substantial and the danger of disrupting the functioning of local government by requiring payment of substantial damage awards may be great." *Sambs*, 97 Wis. 2d at 377–78.

Nor does Owners' suggestion that they will become serial litigants—burdening the courts and

the District with multiple lawsuits over the same alleged infiltration into the Tunnel—justify abandoning the Legislature's damage limitation. Owners cannot bring another action after they chose here to litigate all past and future damages. *See Jost v. Dairyland Power Coop.*, 45 Wis. 2d 164, 178, 172 N.W.2d 647 (1969) (successive action for continuing nuisance possible only when complete damages unavailable in first action because degree of continuing nuisance increases); *compare also City of Chicago v. Harris Trust & Sav. Bank*, 371 N.E.2d 1182, 1186 (Ill. App. Ct. 1977)(rejecting argument that "continuing nuisance would prevent the application of res judicata").[5] No case Owners

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[5] Section 893.80(3) was not at issue in *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 588 N.W.2d 278 (Ct. App. 1998). There, a City and its insurer were sued for damage to a mill caused by repairs to a canal bank alleged to constitute a nuisance. After a jury found damages of $10,000, the circuit court ruled this amount inadequate and granted injunctive relief to accomplish effectively the same result as additur. In upholding that relief, the court suggested in dicta that injunctive relief in the same proceedings would avoid re-litigation by the plaintiff. *Stockstad v. Town of Rutland*, on which Owners also rely, is even less applicable. 8 Wis. 2d 528, 99 N.W.2d 813 (1959). *Stockstad*, which was decided before *Holytz*, is silent on statutory damages limitations. The Supreme Court has explained that pre-*Holytz* authorities,

cite (and none of which the District is aware) allows a plaintiff to commence a second nuisance action after it litigates all of its future damages and obtains a jury verdict, like the one here, that answers the question "[w]hat sum of money, if any, will fairly and reasonably compensate [plaintiffs] for damages they will suffer in the future?" To allow Owners to relitigate a claim for the same damages would violate the Wisconsin Supreme Court's pronouncement that, "[u]nder the doctrine of claim preclusion, a valid and final judgment in an action extinguishes all rights to remedies against a defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Kruckenberg v. Harvey,* 2005 WI 43, ¶25, 279 Wis. 2d 520, 694 N.W.2d 879. Allowing the Owners' claimed do-over would also offend the District's right to have a single jury decide all of the issues

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like *Stockstad*, have been "rendered obsolete" and have no bearing on the scope of the Legislature's post-*Holytz* immunities. See *MMSD*, 277 Wis. 2d 635, ¶52, n.12.

between the parties. *See Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 226, 556 N.W.2d 326 (Ct. App. 1996).

II. The Jury's Nuisance-Defeating Finding—That the Tunnel Did Not Significantly Harm Owners' Use and Enjoyment of Their Building—Is Supported by Credible Evidence.

Owners ask this Court to save their nuisance claim from the jury's fatal finding that an interference with their use or enjoyment of the building did not cause significant harm. As in the circuit court, they pursue this claim in a misguided effort to avoid limitations on their negligence claim, such as the damages cap of §893.80(3) and the accrual of their negligence claim outside the limitations period. *See supra* Part I.D.; *infra* MMSD-Cross-App.-Br. Part II. But, as the jury found, they never proved (or even pleaded) the "particular type of injurious consequence," *MMSD v. City of Milwaukee*, 2005 WI 8, ¶26, 277 Wis. 2d 635, 691 N.W.2d 658, that is the essence of a nuisance claim.

A nuisance is an "unreasonable interference with the interests of an individual in *the use and enjoyment of land*." *Krueger v. Mitchell*, 112 Wis. 2d 88, 103, 332 N.W.2d 733 (1983) (emphasis

added); *see also MMSD*, 277 Wis. 2d 635, ¶27 ("The essence of a private nuisance is an interference with the use and enjoyment of land."). "Nuisance arises when [this] particular type of harm is suffered." *Butler v. Advanced Drainage Sys., Inc.*, 2006 WI 102, ¶29, 294 Wis. 2d 397, 717 N.W.2d 760. "[A] nuisance exists if there is a condition or activity that unduly interferes with the private use and enjoyment of land." *Id.* ¶28 (quoting *MMSD*, 277 Wis. 2d 635, ¶30). To be an actionable nuisance, the unreasonable interference in the "usability of land" must constitute "significant harm"—i.e., harm that ordinary persons in similar circumstances would regard as "substantially offensive, seriously annoying, or intolerable," *Hoffmann v. Wis. Elec. Power Co.*, 2003 WI 64, ¶15 n.12, 262 Wis. 2d 264, 664 N.W.2d 55 (quoting jury instruction) (emphasis added).

A. Owners' failure to present any evidence of significant harm resulting from the Tunnel's interference with their use or enjoyment of the building justifies the jury's finding.

Using WI-JI Civil 1920, the circuit court instructed the jurors that "significant harm" looks to whether the defendant's interference with the

use or enjoyment of land was "substantially offensive, seriously annoying or intolerable." R.392-2548–49:MMSDApp-0800–01. Owners do not contest that instruction. Moreover, after the jurors requested a definition of "use and enjoyment," the circuit court instructed them *at Owners' request* that "[t]he 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.392-2737:MMSDApp-0803 (emphasis added); *see also* R.253-1:A-Ap.582. *See also* RESTATEMENT (SECOND) OF TORTS §821D, cmt. b (1979) (similarly defining "use and enjoyment").

Owners, however, presented no evidence of significant harm to "the actual present use of the property" or to any interest in its "present use value." Owners' proof of harm was limited to their past and expected future costs of replacing all wood piles with concrete piles. They presented no evidence that the claimed interference resulted in business interruptions, annoyance, discomfort, or any other type of "use and enjoyment" harm. Instead, they showed that the building had been

continuously used for retail space, commercial offices, apartments, and parking, and is sound enough for Wisconsin Electric Power Company to invest tens of millions of dollars in it. R.383-836–37:MMSDApp-0705–06.

Based on this evidence and the unchallenged instructions, the jury answered "yes" to verdict question 9, "[h]as the manner in which the District has operated or maintained the tunnel interfered with [Owners'] use and enjoyment of their building," but "no" to question 10, "[did the interference result in significant harm to the [Owners]." R.403-3:A-Ap.587.

These findings on the essential nuisance elements are "particularly a matter for the jury." *Krueger*, 112 Wis. 2d at 105. This Court will "sustain the jury's verdict if there is any credible evidence which under any reasonable view, fairly admits an inference that supports [the] jury's finding." *Id.* at 104–05 (internal quotation marks and brackets omitted). Where, as here, a lower court approves the jury's finding, an appellate court will not lightly "upset the verdict on review." *Id.* at 105.

B. Property damage does not equate to significant harm to the Owners' use and enjoyment of the building.

Owners' request that this Court upset the verdict is based on a refusal to acknowledge the fundamental difference between negligent damage to property (their actual claim) and nuisance. Rather than contend that there was evidence of significant harm resulting from the interference with their use and enjoyment of the property, they argue that the jury's finding that Owners had suffered "property damage" necessarily constitutes significant harm. Owners mix negligence-damage apples with nuisance-harm oranges.

Damage to the property itself, no matter how great, is not the kind of harm against which nuisance protects. *See MMSD*, 277 Wis. 2d 635, ¶49. Otherwise, as Judge Kremers noted, R.394-18–19:MMSDApp-0827–28, every negligent injury to property would be a nuisance: a nuisance is simply an interference with the use and enjoyment of property that is either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent . . . conduct." *MMSD*, 277 Wis. 2d 635, ¶32. But not every negligent act damaging

property is a nuisance. The nuisance touchstone, which separates nuisances from ordinary negligence, is the significant interference with the property's "use and enjoyment" or the "usability" of the property. *See* RESTATEMENT (FIRST) OF TORTS §822, cmt. e (1939), *quoted in part in Krueger v. Mitchell*, 106 Wis. 2d 450, 459–60, 317 N.W.2d 155 (Ct. App. 1982), *aff'd*, 112 Wis. 2d 88, 332 N.W.2d 733 (1983).

Substantial property damage may or may not result in significant interference with the property's use and enjoyment. These concepts, contrary to Owners' contention, are distinct. Otherwise, negligence and nuisance damages would be coextensive, and they are not. *Compare Vogel v. Grant-Lafayette Elec. Coop.*, 201 Wis. 2d 416, 421, 434, 548 N.W. 829 (1996) (upholding award of $240,000 for economic damages on negligence claim and $60,000 for annoyance and inconvenience damages on nuisance claim); *Allen v. Wis. Pub. Serv. Corp.*, 2005 WI App 40, ¶¶18, 22, 279 Wis. 2d 488, 694 N.W.2d 420 (award of $750,000 in economic damages on negligence claim and $1,000,000 in non-economic nuisance damages). Owners submitted neither evidence of

interference with the property's use or a resulting decrease in the market value of the building, which Owners had years before the Tunnel construction adopted a repair and replace approach to the piles. *See Costas v. City of Fond du Lac*, 24 Wis. 2d 409, 415, 129 N.W.2d 217 (1964) ("finding that the plaintiffs were substantially injured in their use and enjoyment of their property *and* that the value of the property was affected" satisfied substantial interference prong of nuisance (emphasis added)). Owners' argument—that any damage necessarily equates to "significant harm" to enjoyment or use—is inconsistent with Wisconsin law and would impermissibly render the significant harm element superfluous in every nuisance action in which damages are sought.

Neither *Krueger* nor *Jost*, 45 Wis. 2d at 172, the only two cases on which Owners rely, suggests otherwise. In addition to the fact that these cases long pre-date the Supreme Court's later clarification of nuisance law in *MMSD*, *Krueger* and *Jost* both involve alleged interferences with the use and enjoyment of property.

Mr. Krueger claimed that an expansion of an airport near his property "caused an increase in the

noise level over [his] business thus interfering [significantly] with the operation of his business, and that this noise level was personally offensive to [him]." 112 Wis. 2d at 105. Based upon evidence of these interferences with his business and the offensive nature of the plane noise, the Court had no difficulty concluding that Mr. Krueger had pleaded significant harm to the use and enjoyment of the property. Thus, *Krueger*'s statement 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," *id*. at 107, must be understood in context as referring to an invasion that detrimentally changes the land's condition in a way that impairs its use and renders it less enjoyable. *See id*. ("The focus in determining whether a particular nuisance is actionable depends on whether the interference with the use and enjoyment of land is unreasonable and substantial.").

Similarly, the *Jost* plaintiffs alleged that the defendant's sulfur fumes made use and enjoyment of their property impossible by damaging their crops and farm homes. The jury found hundreds of dollars of crop damage but concluded that the

farmers' harm had not been "substantial," even though the circuit court had defined "substantial damage" as "a sum, assessed by way of damages, which is worth having . . . [and] are considerable in amount and intended as a real compensation for a real injury." 45 Wis. 2d at 171. The Supreme Court concluded that, under these circumstances, including importantly the trial court's definition of "substantial" to include any "sum assessed by way of damages," *id.*, the jury's finding that the crop damage was not "substantial" could not stand because it was inconsistent with the jury's finding of tangible damage to the crops. *Id.* at 171–74.

Because *Jost* addressed "substantial damage" and involved the meaning of the trial court's instruction that "substantial damage" meant any "sum . . . intended as real compensation," *Jost* has no direct application here. *Id.* at 171. More important, the damage at issue in *Jost* was plainly to the farm property's *use*—to the land's use to produce alfalfa crops—and also to plaintiffs' *enjoyment* of that property—damage resulting in "flowers [that] could not be raised" and "screens [that] became rusty . . . and totally unusable within

two years . . . [allowing] barn insects in[to] [plaintiffs'] home." *Id.* at 172.

Here, a finding of "property damage" can be (and was) based on evidence distinct from harm resulting from interference with Owners' "use and enjoyment of their building." As a result, the property damage finding does not amount to a finding of significant harm. *Cf. Gumz v. N. States Power Co.*, 2007 WI 135, ¶48, 305 Wis. 2d 263, 742 N.W.2d 271 (noting error to infer a finding from jury's answer on legally distinct issue).

Contrary to Owners' suggestion, Owners-Br. 40–41 & n.28, the District did not stipulate that negligence damages would be treated as nuisance damage, a point Judge Kremers confirmed on the record. R.392-2522:A-Ap.1049. The District simply agreed not to appeal the Court's decision to give only one damage question. R.392-2522–23:A-Ap.1049.

The jury's damages finding was based solely upon evidence of the cost to repair the building's foundation piles. Owners submitted no evidence of business interruption losses, inconvenience, or annoyance. To equate the damages finding with a

finding of significant harm would therefore be factually, as well as logically, erroneous.

The factual error is revealed by Owners' failure to point to any evidence of harm from the Tunnel that is similar to the significant use and enjoyment harm caused by the planes in *Krueger* or the sulfur fumes in *Jost*. All the evidence is to the contrary: Owners continued to use and enjoy the building for business purposes—it has continuously housed the Boston Store retail operation and served other commercial and residential lessees. R.385-1126:MMSDApp-0751.

Moreover, Owners and the predecessor-owners, whose conduct Owners agreed at trial could be attributed to them, R.376-63–64:MMSDApp-0616–17, had for decades before the Tunnel was constructed embraced a replace-on-failure approach to the building's piles. Even if one were to accept Owners' claims that the District's conduct resulted in a greater need of pile replacement, nothing about that evidence suggests a significant harm to their use or enjoyment of the building. Owners and their predecessors-in-interest long ago accepted the need to replace piles, and they continued to use the building after the

Tunnel's alleged interference in the same way as before.

Consequently, the jury's finding that the Tunnel's interference with Owners' use and enjoyment of the building did not result in significant harm is supported by credible evidence. The circuit court's refusal to change the verdict answer should be affirmed.

III. The Record Is Replete With Evidence Supporting the Jury's Finding That Owners Were Negligent.

Owners also appeal the circuit court's refusal to change the jury's finding that Owners were 30% causally negligent for the damage to the Boston Store building's foundation. R. 403-2:A-Ap.586; R.256-1:MMSDApp-0189; R.394-1–42:MMSDApp-0810–51. While this Court need not reach this argument if it agrees with the District on application of any of the §893.80 issues addressed here and on cross-appeal, Owners' contention that there is no credible evidence to support the jury's

finding of contributory negligence bears no scrutiny.[6]

Owners argue against a straw man—contending that the "thrust of [the District's] contributory negligence defense is that Boston Store had a well that contributed to depressed water levels . . . [b]ut *without more*, a possible alternate cause for damage does not impute contributory negligence to [Owners]." Owners' Br. 62–63 (emphasis added). There is "more": Owners had a long history of neglecting maintenance, including knowing neglect of the piles and improper use of the building's well. This conduct provides the basis for the jury's negligence finding.

At the final pre-trial conference, Judge Kremers ruled *on Owners' own motion*, R.167-27-28:MMSDApp-0186-87, that "Boston Store" would refer to the "collective representation of the plaintiffs in this case and *all predecessors in*

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[6] As noted above, this Court will only reverse the circuit court's decision not to change a jury answer if the court was "clearly wrong" and no credible evidence supports the verdict. *See Weiss v. United Fire & Cas. Co.,* 197 Wis. 2d 365, 390, 541 N.W.2d 753 (1995).

interest on the title of this property." R.376-63:MMSDApp-0616 (emphasis added). Judge Kremers went on to instruct that "plaintiffs are responsible for their actions and their predecessors in interest on the title of that property at all times relevant to the lawsuit, whatever relevant to the lawsuit turns out to mean." R.376-64:MMSDApp-0617. The trial court then specifically stated, "the fact that there was a different owner in place at the time who paid for those damages or acknowledged that some other condition was causing the damages, that is chargeable against the plaintiffs." R.376-66:MMSDApp-0619. Owners do not, and could not, challenge this stipulated case management ruling.

Owners' own witnesses testified to Owners' (and their predecessors-in-interests') long history of problems with the building's wood piles. Their testimony established the Boston Store's foundational pile problems were known for more than two decades before the Tunnel was constructed.

James Feit, who worked at the Boston Store from the late 1960s until 1982, R.385-1134–35:MMSDApp-0754–55, testified that when he first

arrived he was told that there were problems with the columns that made up the Boston Store's foundation. R.385-1140. Ray Bolton, a Boston Store employee from 1976 until 1995, R.384-1055:MMSDApp-0743, similarly testified that he was aware from his first day that the building was experiencing settlement problems due to fluctuations of the water table beneath the building. R.384-1069:MMSDApp-0745. Rudy Visser, an independent inspector who inspected the building in 1978, R.388-2065:MMSDApp-0792, reported that during his inspection, Mr. Bolton told him the Boston Store was having a problem with the wood-pile foundation underneath the building. R.388-2070:MMSDApp-0793. The foundation problem was so extensive that Mr. Visser reported the foundation as a "major deficiency." R.388-2072–73:MMSDApp-0794–95;R.351-1–4,ex.2992: MMSDApp-0443–46. Despite this knowledge, the Boston Store's owners did nothing to protect its foundation.

The evidence also revealed that the building's owners at a minimum contributed to lowering the water table and drying out the piles long before the Tunnel's construction. A well was drilled at the

Boston Store building in 1936 and began pumping at 800 gallons per minute R.387-1820–21:MMSDApp-0780–81.[7] After the Boston Store's owners ceased pumping its well in 1962, they took no steps to ensure that the well was properly abandoned. Instead, the well was left in place and continued to draw water out from below the building.[8] R.387-1825, 1830:MMSDApp-0784–85.

Although the water pumped out of the Boston Store's well was used primarily for air conditioning, the well was also connected to a pile hydration system. R.388-2496–98:MMSDApp-0795A–0795C. The presence of this system makes clear that building owners appreciated the need to keep the piles saturated, but they rarely turned the system on. R.383-810–14:MMSDApp-0698–02; R.384-1040–42:MMSDApp-0739–41.

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[7] The District's expert, Dr. Douglas Cherkauer, opined during these twenty-six years of pumping, the well drew groundwater out of the ground beneath Boston Store. R.387-1822–23:MMSDApp-0782–83.

[8] Judge Kremers instructed the jury with regard to the contributory negligence of a building owner. R.392-2540–41:MMSDApp-0798–99. Owners do not contest that instruction.

Despite the knowledge that the piles needed to remain saturated, R.384-1069–70:MMSDApp-0745–46, and the fact the settlement problems were due to fluctuations in the water table, R.384-1069:MMSDApp-0745, the Owners did nothing between 1936 and 1962 to protect the piles from rot by keeping them saturated. R.384-1070:MMSDApp-0746. Nor did the Boston Store owners do anything to monitor the groundwater level beneath the building. R.384-1070:MMSDApp-0746. This negligent operation and maintenance continued after 1962 through at least 2003 when the well was finally sealed. R.387-1816–17:MMSDApp-0778–79. And, even later, when specifically told by their hired third-party engineers to use a wetting system on their wood piles, Owners failed to do so. R.384-1041:MMSDApp-0740. Owners refused the advice because they were concerned that someone would forget to open the spigot to turn the water on. R.384-1041–42:MMSDApp-0740–41.

Without saturation, the Boston Store's foundation timber piles were exposed to conditions conducive to rot, and they rotted, while owners did nothing. R.384-982–83:MMSDApp-0716–17; R.390-

2418–19. Thus, Owners' negligence is evidenced by the combination of the well's effect on the groundwater—the lowering of which Owners were aware—*and* the Owners' failure to ensure that the piles remained saturated.

Owners suggest in a footnote that their failure to use a pile wetting system "is, if anything, a question of failure to mitigate damages and not contributory negligence." Owners' Br. 59 n.35. But Owners' awareness of the pile rot problem long preceded the Tunnel's construction. R.384-1069:MMSDApp-0745; R.385-1134–35:MMSDApp-0754–55. Their failure to keep the piles saturated before the Tunnel was built is evidence of contributory negligence in the building's maintenance.[9] Even after the Tunnel's construction, the existence of the well and Owners' continuing failure to ensure that the piles were

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[9] Owners have suggested that their negligence in failing to keep the piles wet should be excused because there is evidence that wetting increases downdrag. But Owners' own expert witness testified that it would be incumbent on the owner of a building with a wood-pile foundation to keep the piles wet. R.384-981–82:MMSDApp-0715–16. The evidence thus easily allows the jury to conclude that Owners' negligence caused part of the damage.

saturated are all facts from which the jury could have found Owners' negligence was a cause of the pile damage. *See Jankee v. Clark County*, 2000 WI 64 ¶53, 235 Wis. 2d 700, 612 N.W.2d 297 (acting or failing to act when a reasonable person would have foreseen that their actions or failure to act subjected their property to an unreasonable risk of damage establishes negligence); *Connar v. W. Shore Equip.*, 68 Wis. 2d 42, 45, 227 N.W.2d 660 (1975) (proper to submit contributory negligence jury question when reason to believe there is "evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person or other legal entity [being] inquired about.").

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In fact, having heard all of the evidence, Judge Kremers remarked that given the building's long history of pile problems that pre-dated the Tunnel's construction, he would have understood a verdict not finding the District at all responsible for the claimed damage:

> But I thought the District put on some pretty strong evidence to suggest that Boston Store had been experiencing foundation problems from the beginning of the construction of the building or at least going back a hundred years, 80 years or something, that there was this on-going necessity to replace some of the, some of the piles and some of the foundation of the Boston Store, that they had continuing problems that pre-existed the tunnel. I thought that was pretty persuasive.

R.394-27:MMSDApp-0836. The evidence shows that these problems were caused by Owners' negligent building maintenance, and the jury's finding that Owners were 30% negligent is well-founded.

IV. Owners' Inverse Condemnation Claim Was Appropriately Dismissed, as Confirmed in *E-L Enterprises*.

Owners' amended complaint includes a claim for inverse condemnation based on Wis. Stats. §32.10. R.51-33:A-Ap. 133. "Wisconsin Stat. §32.10

is based on Article I, Section 13 of the Wisconsin Constitution, which provides that "[t]he property of no person shall be taken for public use without just compensation therefor." *E-L Enters., Inc.*, 326 Wis. 2d 82, ¶¶21, 36 (internal quotation marks and quoting citation omitted). Because damage to foundational wood pilings incidental to sewer construction is not a taking under Wisconsin law, *see id.* ¶36, the circuit court properly granted summary judgment dismissing the claim. R.374-39–40:MMSDApp-0477–48. Owners now appeal this decision, which this Court reviews de novo. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 316–17, 401 N.W.2d 816 (1987).

E-L requires affirmance. It holds that, as a matter of law, damaging some portion of a building's wood piles by off-property conduct affecting groundwater levels cannot give rise to takings or inverse condemnation liability unless the plaintiff lost all or substantially all of the value of the property. The Supreme Court made clear that neither the Wisconsin constitution nor §32.10 require the District to compensate building owners for repairs necessitated by wood pile damage—the exact harm Owners claim here.

As the Supreme Court explained, if the government does "not physically occupy the property for which [the plaintiff] seeks compensation, and no government-imposed restriction deprived [the plaintiff] of all, or substantially all, of the beneficial use of its property . . . what remains are mere consequential damages to property resulting from governmental action, which are not compensable under constitutional takings law." 326 Wis. 2d 82, ¶5.

E-L further concluded that consequential damage to piles cannot meet the compensable taking standard because "the public obtain[s] no benefit from the damaged building or wood piles." *Id.* ¶33. As the Court explained, the District did not "use the building or wood piles in connection with the sewer installation." *Id.* E-L sought damages "for the cost to repair its building and the loss of use of the wood piles," but "the wood piles were damaged as a result of the Sewerage District's alleged negligent construction of the sewer"—all of the damage, in other words, was consequential. *Id.* "[D]amage, without appropriation to the public purpose.' . . . is not recoverable in a takings claim." *Id.*

Owners have alleged the same type of §32.10 claim that *E-L* expressly rejects. They pleaded—and repeated in opposition to Defendant's request for summary judgment—that "MMSD's operation and maintenance of the Deep Tunnel physically took portions of the timber pilings which rendered them unusable and damaged the Boston Store Building and Parking garage." R.51:A-Ap.133; R.134-69:A-Ap.367.

Judge Kremers ruled that Owners' allegations of damage were consequential damages not actionable as an inverse condemnation. *See* R.374-39–40:A-Ap.723–24. In their March 11, 2009 supplemental brief Owners insist that "the facts in the *E-L Enterprises* case and in the present case are nearly identical." Owners-Supp.-Br. 5.

After the Supreme Court rejected the similar claim in *E-L*, Owners now contend that their inverse condemnation claim should be viewed differently. Owners admit that they pleaded their inverse condemnation claim only in terms of the "taking of wood piles," Owners-Br. 66, but argue that *E*-L's rejection of that claim requires that they be permitted an opportunity to try a different

claim—that the District took groundwater that belonged to them.

It is far too late for that. This Court has announced as a "fundamental appellate precept . . . that [it] will not . . . blindside trial courts with reversals based on theories which did not originate in their forum." *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (internal quotation marks and quoting citation omitted.) Even an argument that might result in the same relief sought in the trial court is forfeited "by failing to raise it with sufficient prominence and by failing to object when the circuit court did not address it." *Bilda v. Milwaukee County*, 2006 WI App 159, ¶42, 295 Wis. 2d 673, 722 N.W.2d 116 (takings argument forfeited). In this case, as explained above, Owners always alleged damages to the foundational wood pilings and never offered for the trial court's consideration any "cost of lost groundwater" theory of damages.

Even if Owners could so fundamentally change their theory of recovery after summary judgment, *E-L* also precludes this new theory. In all events, like Owners here, the plaintiff in *E-L* came around to the idea of re-characterizing its

"taking of wood pilings" theory as a "taken groundwater" theory. *E-L*, 326 Wis. 2d 82, ¶23. Before the Supreme Court, E-L argued that the District "physically took E-L's groundwater and deprived E-L of the use of that groundwater, resulting in the diminished value of E-L's property." *Id*.

The Supreme Court rejected this argument, because it was clear upon a review of the history of the case and the plaintiff's approach to it throughout that notwithstanding E-L's repackaging, E-L was not really seeking damages for extracted groundwater, but rather for "the cost to repair its building and for the loss of use of its wood piles." The Court pointed to several supporting indicia:

- "In its opening argument, E-L claimed that the Sewerage District took E-L's groundwater but consistently spoke of damage to E-L's wood piles and building" (*id.* ¶26);
- "[I]n its closing argument, E-L reiterated to the jury that E-L was seeking damages for the cost to repair its building" (*id.* ¶27); and
- "E-L introduced no proof as to the value of the extracted groundwater" (*id.* ¶29).

Owners argue that the Supreme Court's reference to the absence of proof at trial suggests

that they too should be afforded an opportunity to try their inverse condemnation claim. But the critical question in *E-L* was whether plaintiff was alleging a takings claim or a tort claim for consequential damages. The absence of proof at trial that plaintiff was dispossessed of property having intrinsic value was merely indicative of the fact that the claim was of the latter type. Because everything the *E-L* plaintiff had ever argued was focused on damage to its building's wood piles rather than the loss of intrinsically valuable groundwater, the Court rejected the groundwater-based takings claim without deciding whether uncaptured groundwater can be "taken" as a result of a neighbor's excessive use. *E-L*, 326 Wis. 2d 82, ¶24.

The same result is compelled here. Owners themselves concede that their inverse condemnation claim throughout has been based on damages to wood piles and the cost of repairing the Boston Store building foundation.

Owners' new promise to prove the value of groundwater at trial reveals their claim's true nature—a claim for consequential damage to their building. Owners propose to prove (i) the value of

the wood piles, (ii) the difference between the fair market value of the Boston Store property before the taking versus after the taking, and (iii) the cost of installing a recharge well. Each of these seeks to claim the cost of lost groundwater on the property, rather than claiming value inherent in the groundwater itself. This is true even of the proposal to measure the change in market value where there is no plausible claim that property's value was even partially a result of a commercial use of groundwater. This is exactly the type of consequential damages theory that *E-L* rejects as a basis for establishing inverse condemnation liability.

Nor are Owners entitled to severance damages for the affected wood piles. If a plaintiff has not been deprived of all or substantially all of the value of their property, takings compensation is only available in the event of an actual physical occupation of the property. *Id.* ¶22. Owners were never deprived of substantially all of the use of their property—Owners, like E-L, continuously leased the Boston Store building for commercial and residential use. *Compare* R.385-1126:MMSDApp-0751 with 326 Wis. 2d 82, ¶35.

And Owners do not and could not claim that the District physically invaded or occupied their property.

Even if *E-L* somehow did not preclude recovery, the only relevant factual distinction between the two cases cuts against Owners' recovery. E-L based its claim on the District's contractor having pumped water out of a surface-dug trench immediately adjacent to its building. Owners base their claim on the Tunnel's existence and the migration of groundwater from around the Boston Store building's foundation through hundreds of feet of different geological strata—soil, clay, and rock—and into the Tunnel. R.387:A-Ap.993; R.351-ex.2988-122:MMSDApp.-0442A; R.351-ex. 2988-53;MMSDApp.-0442B. Groundwater resides at each of these different strata, slowly advancing at a rate depending in part on the density of the compositional materials and replaced by groundwater entering the higher levels. *Id.* The District cannot be found under any set of facts to have dispossessed Owners of "*their*" groundwater.

Indeed, groundwater is property of the state. *See United Coop. v. Frontier FS Coop.*, 2007 WI

App 197, ¶23, 304 Wis. 2d 750, 738 N.W.2d 578; *Robert E. Lee & Assocs., Inc. v. Peters*, 206 Wis. 2d 509, 522, 557 N.W.2d 457 (Ct. App. 1996); *see also* Wis. Stat. §281.01 (defining "waters of the state" to include groundwater). Landowners have a right to use the groundwater, subject to tort liability for excessive use that harms their neighbors' property use. *E-L*, 326 Wis. 2d 82, ¶29 n.20. Excessive groundwater use by a government entity that interferes with a neighboring property owner's use but does not deprive the neighbor of all beneficial use of her property is, therefore, not a taking of property actionable in inverse condemnation. *Id.*; *see also State v. Michels Pipeline*, 63 Wis. 2d 278, 302–03, 217 N.W.2d 339 (1974). Moreover, because the WDNR has permitted infiltration of groundwater into the Tunnel, the District's "use" of the groundwater could not be adjudged unreasonable for inverse condemnation-law purposes. *See R.W. Docks & Slips v. State*, 2001 WI 73, ¶28, 244 Wis. 2d 497, 628 N.W.2d 781.

E-L requires affirmance of the circuit court's dismissal of Owners' inverse condemnation claim.

V. Summary Judgment Was Correctly Granted on Owners' §101.111 Claim.

Owners allege that the District's construction of the Deep Tunnel violated Wis. Stat. §101.111. That statute provides in relevant part:

> (2) **Cave-in Prevention**. Any excavator shall protect the excavation site in such a manner so as to prevent the soil of adjoining property from caving in or settling.
>
> (3) **Liability for Underpinning and Foundation Extensions**. . . . (b) If the excavation is made to a depth in excess of 12 feet below grade, the excavator shall be liable for the expense of any necessary underpinning or extension of the foundations of any adjoining buildings below the depth of 12 feet below grade. . . .
>
> (4) **Notice**. Unless waived by adjoining owners, at least 30 days prior to commencing the excavation the excavator shall notify, in writing, all owners of adjoining buildings of his or her intention to excavate . . . .

Wis. Stat. §101.111. Incorrectly presuming this statute applies to the Deep Tunnel, Owners argue that the District failed to provide the requisite and excavated "below grade" in a manner that caused the Boston Store property's soil to settle. But the statute does not apply. The Boston Store building

and property is not "adjoining" to the Deep Tunnel project site, and §101.111 was not in any event intended to apply to projects like the Deep Tunnel. Even if it did, Owners' claim is barred as a result of their failure to provide notice as required by Wis. Stat. §893.80(1), and because the District is categorically immune from §101.111 under §893.80(4). The circuit court properly awarded summary judgment dismissing the claim.[10]

A. The Deep Tunnel is not "adjoining" the Boston Store building or its property.

Section 101.111 defines the relationship between two independent spaces: (1) an excavation site, and (2) "adjoining" buildings or property. While an excavation site is easily located, "adjoining" property or buildings by their nature can only be found by reference to some other space. The language of §101.111 establishes the excavation site as the space of reference. Subsection (2), for example, instructs the

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[10] This Court reviews de novo the circuit court's ruling. *Cuellar v. Ford Motor Co.*, 2006 WI App 210, ¶8, 296 Wis. 2d 545, 723 N.W.2d 747.

"excavator" to "protect the excavation site" with an eye toward the soil of "adjoining property." Wis. Stat. §101.111(2). Subsection (3) makes the "excavator" liable for an "excavation" more than 12 feet below grade that requires the "underpinning or extension of the foundations of any adjoining buildings." *Id.*, sub.(3). Subsection (4) requires the "excavator" to notify "adjoining owners." *Id.* at sub.(4). Throughout §101.111, an "excavation" and its "adjoining" property or buildings are continuously placed in juxtaposition.

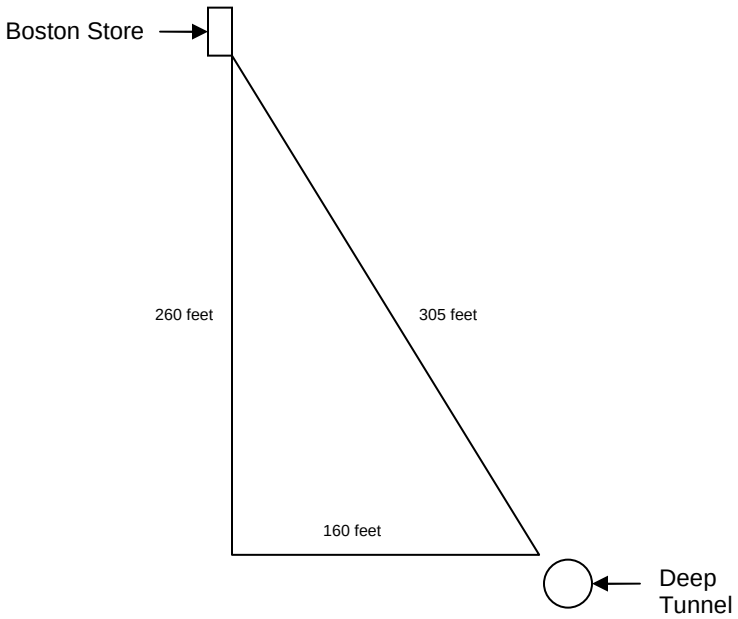
Section 101.111 does not expressly define "adjoining," but for over 100 years the Wisconsin Supreme Court has consistently taken the Legislature's use of the word to mean "so joined or united that no third body intervenes . . . touching or contiguous, as distinguished from lying near or adjacent." *State ex rel. Badtke v. Sch. Bd. of Joint Common Sch. Dist. No. 1*, 1 Wis. 2d 208, 211, 83 N.W.2d 724 (1957) (quoting *Hennessy v. Douglas County*, 99 Wis. 129, 136-37, 74 N.W. 983 (1898)); *see also Superior Steel Prods. Corp. v. Zbytoniewski*, 270 Wis. 245, 247, 70 N.W.2d 671 (1955) (explaining that use of "adjacent" in statute "does not imply actual physical contact as do the words

'adjoining' or 'abutting'"). The Wisconsin Supreme Court's interpretation of "adjoining" is consistent with the consensus legal definition of the term. BLACK'S LAW DICTIONARY defines "adjoining" to mean "[t]ouching, sharing a common boundary." *See* BLACK'S, *supra*, at 47. Webster's defines "adjoining" as "touching or bounding at a point or line." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 15 (10th ed. 1996).

No Wisconsin court has interpreted §101.111. But *Kimberly-Clark Corp. v. Power Authority*, which addressed a similar provision, is instructive. 316 N.Y.S.2d 68 (App. Div. 1970). *Kimberly-Clark* arose out of the construction of the Niagara Power Project and involved conduits constructed to carry water from intake structures near Niagara Falls to a nearby hydroelectric plant. *Id.* at 71. The Appellate Division affirmed the trial court's dismissal of the plaintiff's claim that the Power Authority was liable for its resulting building damage under a City of Niagara Falls ordinance that required excavators "to prevent the adjoining earth from caving in." *Id.* at 73. It concluded that plaintiff's property was not "adjoining" the excavation because "[t]he nearest building was

roughly 300 feet from the excavation while most were 500 to 1000 feet therefrom." *Id.*

Applying the Wisconsin Supreme Court's definition of "adjoining," the circuit court, like *Kimberly Clark*, concluded that neither the Boston Store building nor its property are "adjoining" to the District's Tunnel, because the Boston Store building is more than 300 feet away from the Tunnel, which lies below Third Street, 160 feet east of the Boston Store property:



R.351-ex.2988-122:MMSDApp.-0442A; R.351-ex. 2988-53;MMSDApp.-0442B.[11]

As a matter of law, the Tunnel and the Boston Store building are not "adjoining" because they do not "touch" and are not "contiguous." The Boston Store building is not an "adjoining building" and Owners are not "adjoining owners." Section §101.111 is inapplicable.

Notwithstanding the unambiguous language of the statute, Owners insist that the Boston Store building is "adjoining" to the Tunnel because the Boston Store building adjoins the Grand Avenue Mall property, and the District's property interest—a written easement giving rights only to the area in which the Tunnel lies—is found within the Grand Avenue Mall property. Effectively, Owners propose that to be an "adjoining" property or building under §101.111, the property or building need only adjoin the outer boundary of a parcel of property within which an excavation is

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[11] 260 feet is the estimated distance from the bottom of Boston Store building's piles to the top of the Tunnel. R.351-ex.2988-122:MMSDApp.-0442A.

taking place, regardless of whether the property or building actually adjoins the excavation site.

Owners' proposal is unsupported by the language of §101.111 or common sense. "Adjoining" can be given meaning only by reference to the positioning of two spaces. As noted above, §101.111 makes clear throughout that its concern is the relationship between the excavation site and "adjoining" properties or buildings. The statute refers to "adjoining property" or "adjoining buildings" only after referring first to the "excavator," "excavation," or "excavation site." The statute does not, for example, refer in the first place to anything like "property on which the excavation is taking place."

Common sense reveals that Owners' proposed application of the statute would yield absurd results. If it is the boundaries of the titled real property upon which an excavation is being conducted that matters more than the boundaries of the excavation site itself, it would follow that the statutory requirements would apply to a farmer or other large property owner who digs a small excavation thousands of feet from his property line.

Owners insist that the Legislature's choice of the word "adjoining" and the use throughout the statute of "adjoining" to refer to the excavation site should be ignored because "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 excavation boundary were an inch or less away from the damaged property." Owners-Br. 78.

But Owners dramatically misunderstand the statute's proper application.[12] First, nothing in §101.111 suggests that it is solely within the discretion of an excavator to define the size of an "excavation site" for purposes of determining which property or buildings may be "adjoining." Court's are well-equipped to evaluate competing descriptions of the boundaries of an "excavation site" to determine in a close case—unlike this one—whether buildings or property adjoin an excavation site. A prudent prospective excavator expecting to

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[12] The complete absence of any case law interpreting §101.111 underscores this reality.

work close to property or buildings of another will comply with the notice requirement of §101.111(4). Owners' problem here is that no one could conclude that an excavation occurring 160 feet over and 260 feet down fits the bill.

Moreover, the Legislature's choice of the more restrictive "adjoining" rather than "adjacent" standard is consistent with the strict liability for underpinning expenses established by the statute. Nongovernmental excavators who negligently damage the property and buildings of another will continue to be exposed to liability separate and apart from the application of §101.111. It is reasonable to assume that the Legislature wanted to make additional provision for the highest-risk excavations, those nearby property and buildings, while limiting that liability to the most applicable situations.

The Legislature's choice of the word "adjoining" (rather than "adjacent," *see Badtke*, 1 Wis. 2d at 211 (distinguishing "adjacent" and "adjoining")) precludes precisely the kind of overbroad application that Owners champion. Owners have never disputed that the District's Tunnel is over 300 feet away from the Boston Store

building—260 feet below an area at the surface that is no closer than 160 feet from their property line. On a correct reading of the statute, therefore, the Tunnel does not adjoin their building or their property.

B. The Deep Tunnel construction was not an "excavation" under §101.111.

Even if "adjoining" could be interpreted—in direct contrast to *Kimberly-Clark*—to include a situation in which two bodies are separated by more than 300 feet, §101.111 does not apply because the Deep Tunnel is not an "excavation" covered by the statute.

"Excavation" is not defined in §101.111, but the liability-imposing provisions in §101.111(3) make clear that the focus of the statute is on projects "made to a depth . . . below grade," that is, dug from the surface. Section 101.111(3)(a) precludes liability for "excavations made to a depth of 12 feet or less," while §101.111(3)(b) imposes liability for necessary underpinning and foundation extensions of any adjoining buildings for an excavation "made to a depth in excess of 12 feet below grade." The description of an excavation as "made to" a particular depth rather than merely "at" such a depth entails excavations going into the

ground from above and confirms the statute's focus on surface-originating activities. The "excavations" §101.111 refers to are those dug from the surface. The District's Tunnel was not of this type.[13]

C. Owners' §101.111 claim is barred by §893.80(1).

1. Owners gave no notice of a §101.111 claim as required by §893.80(1).

Section 893.80(1), Stats., provides that "no action may be brought" against the District, unless the claimant provides timely notice of claim and itemization of the requested relief. Wis. Stat. §893.80(1). As the District's cross-appeal brief explains, *see infra* Part III, Owners did not comply with these requirements. The only notices were provided by two entities that did not own the building during the claimed period. MMSD-Cross-

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[13] Consistent with this understanding of "excavation," all of the parties in the *Kimberly-Clark* case simply assumed that construction of a diversion tunnel would not have implicated the Niagara ordinance at issue as did the controversial surface-dug conduit. *Kimberly-Clark*, 316 N.Y.S.2d at 71.

App.-Br. Part III, *infra*. And even these non-owners' notices failed to identify a §101.111 claim.

Owners have argued previously that their §101.111 claim does not require compliance with §893.80(1)'s notice provision because §101.111's procedure trumps §893.80(1). That is incorrect.

Addressing §893.80(1), our Supreme Court has directed that "Wisconsin Stat. §893.80 provides a set of rules specifically for claims against governmental bodies . . . which broadly applies to all causes of action unless a further, more specific rule says otherwise." *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶37, 302 Wis. 2d 358, 735 N.W.2d 30. Statutes, like §101.111, that provide for remedies to be enforced through generally available procedural mechanisms are not excepted from §893.80 if there is no procedural conflict. *Id.* ¶¶37–38. Owners' §101.111 claim creates no conflict with §893.80(1).

Given that the Tunnel was constructed long ago, this is not a case in which a party seeks to use §101.111 to enjoin an excavation. Owners do not seek an injunction authorized by statute to be awarded prior to, and in anticipation of, future

harm, as in *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

Nor does Owners' §101.111 claim meet this Court's three-part test for creating an implied exemption from §893.80(1). *See Nesbitt Farms v. City of Madison*, 2003 WI App 122, ¶9, 265 Wis. 2d 422, 665 N.W.2d 379. First, Owners' claim for damages does not involve a "specific statutory scheme" and Owners' affirmative injunctive relief to line the Tunnel is not authorized by §101.111. Second, the legislature has not provided for expedient resolution of Owners' claims for damages caused by alleged post-construction ground water infiltration. Thus, requiring compliance with §893.80 does not hinder a legislative preference for prompt resolution. Third, there is no doubt that §893.80(1)'s policies of affording municipal entities an opportunity to investigate, settle, or disallow claims and to budget for their allowance or litigation apply fully to Owners' §101.111 claim.

2. Section 893.80(4) applies to Owners' §101.111 claim.

Owners' §101.111 claim is also barred by §893.80(4). Section 893.80(4) allows "No suit . . . for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

Wis. Stat. §893.80(4). Owners' claim that Tunnel construction was an excavation in violation of §101.111 necessarily comes within this immunity because construction involves categorically immune acts. *See MMSD*, 277 Wis. 2d 635, ¶60; *see also infra* MMSD-Cross-Br. Part I.

None of the authorities on which Owners have relied previously establishes that a §101.111 claim is exempt from §893.80(4)'s directive that "[n]o suit" can be maintained based on immune conduct. *Busse v. Dane County Regional Planning Commission* holds only that sovereign immunity does not bar a constitutional takings claim. 181 Wis. 2d 527, 540, 511 N.W.2d 356 (Ct. App. 1993). And *Crawford v. Whittow* involved a claim that government personnel had violated §11.33 by using state funds to circulate nomination papers. 123 Wis. 2d 174, 179, 366 N.W.2d 155 (Ct. App. 1985). This Court reasoned that the legislature could not have intended §11.33's *specific* prohibition on *official* conduct to be completely negated by application of §893.80(4). *Id.* at 183.

Neither rationale governs this case. Section 101.111 applies generally to owners of land. It is not constitutional trump. Unlike §11.33, it is not

directed at official conduct. Consequently, §101.111 and §893.80 do not conflict, and there is no basis to imply an exception to §893.80(4) for §101.111 claims. *See Dep't of Natural Res. v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994) ("sec. 893.80 applies to all causes of action"), *overruled in part by State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996) (all actions language of *DNR v. City of Waukesha* does not apply when legislation specifically affords a remedy for governmental conduct).

CONCLUSION

None of the issues Owners raise justify vacating the judgment below. This Court should direct entry of judgment as described in the District's cross-appeal brief, or, in the alternative, should affirm Judge Kremers' judgment awarding only the limited damages on Owners' negligence claim and dismissing all of their remaining claims and requests for relief.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I certify that this cross-appeal brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) for a brief and appendix produced using proportional serif font and pursuant to this Court's August 30, 2010, order expanding the brief volume limitation in §809.19(8)(c) by 50%. The length of this brief is 16,454 words.

Dated: October 5, 2010.

_____

G. Michael Halfenger

E-FILING CERTIFICATION

Pursuant to Wis. Stat. §809.19(12)(f), I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated: October 5, 2010.

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G. Michael Halfenger

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INTRODUCTION

As the Milwaukee Metropolitan Sewerage District's ("District's") response brief explains, plaintiffs-appellants-cross-respondents ("Owners") are a current and a past owner of the Boston Store building in downtown Milwaukee. Owners sued the District claiming that infiltration of groundwater into the Deep Tunnel harmed the building's wooden foundation piles. Owners tried two claims—negligence and nuisance. The jury found the District liable in negligence but not in nuisance. Judge Kremers entered a judgment that applied Wis. Stat. §893.80(3)'s cap on governmental tort damages and dismissed the nuisance claim. Owners' challenge to that judgment is addressed in the response brief.

This brief addresses: (1) The circuit court's failure to grant judgment to the District based on the discretionary act immunity provided by Wis. Stat. §893.80(4), which the Supreme Court has held immunizes all decisions about the adoption, design, and implementation of public works projects, such as sewer systems; (2) the circuit court's decision to change the jury's finding that Owners should have discovered their claim outside the statute of

limitations period; (3) the circuit court's failure to dismiss the action based on Owners' failure to comply with §893.80(1)'s requirement that before suing a governmental entity, a claimant must serve notice of claim and an itemized statement of relief; and, (4) the circuit court's post-judgment entry of an injunction requiring the District to line a one-mile-long section of the Tunnel with concrete.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Owners' case consisted of presenting expert testimony and other evidence to show that, because the Deep Tunnel lacks a concrete liner, groundwater infiltrates, resulting in harm to Owners' building's wood-pile foundation. Plaintiffs characterized this evidence as showing that Tunnel "operation, inspection, or maintenance" harmed their building. But the Tunnel was designed and constructed without a complete concrete liner. It was also designed so that groundwater would infiltrate in order to prevent wastewater from exfiltrating, and the Wisconsin Department of Natural Resources' permit, under which the Tunnel operates, requires infiltration. Owners presented no evidence of a ministerial duty to line the Tunnel, nor did they

present evidence from which a jury could reasonably find that the District failed to perform any other ministerial act that caused them harm.

Question: Whether the District is entitled to judgment as a matter of law because the evidence that Owners submitted at trial pertained only to the District's discretionary decisions to adopt, design, construct, and implement the Deep Tunnel public works project for which the District is immune from suit under Wis. Stat. §893.80(4), as the Supreme Court held in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*?

The circuit court, in denying the District's post-verdict motion for judgment, answered, "no." In doing so, however, Judge Kremers indicated that he "remained troubled" by whether his ruling on the discretionary act immunity issue was correct.

2. The evidence showed that Owners had requested an engineering firm's report on the cause of their building damage outside the limitations period. The evidence further showed that the Deep Tunnel's existence, to which Owners attribute their injury, was generally well known, and Owners never presented any evidence of a later date by which they claimed to have determined the cause of

their injuries or that they ever considered any potential cause other than the Tunnel.

Question: Whether, under these circumstances, the jury's finding that Owners should have known or discovered their claim outside the statute of limitations period was supported by credible evidence?

The circuit court in ruling on Owners' post-verdict motion to change the jury's finding on the statute of limitations question answered, "no," and changed the jury's finding.

3. Neither Owner served a notice of claim or itemized statement of relief required by Wis. Stat. §893.80(1). Owners rely on a notice of claim and an itemized statement of relief served by different entities that never owned the property at issue. In that notice and itemization of relief, these non-owners identified themselves as the "claimants" and falsely stated that they owned the property.

Question: Whether, under these circumstances, Owners' failure to serve a notice of claim or itemized statement of relief before commencing an action entitles the District to judgment as a matter of law?

The circuit court, in denying the District's motion to dismiss, answered "no."

4. Judge Kremers presided through trial and decided the parties' timely post-verdict motions. After Judge Kremers ruled that Owners' damages were limited by the $50,000-per-plaintiff cap provided in Wis. Stat. §893.80(3) for tort claims against governmental entities, and after the time to file post-verdict motions had expired, Owners filed a motion for an injunction requiring the District to line the Tunnel with concrete. Owners' injunction motion was taken under consideration by Judge Jean DiMotto, who took over Judge Kremers' civil calendar as a result of judicial rotation. Judge Kremers, while aware of the injunction motion, entered a judgment on the jury verdict, which dismissed Owners' nuisance claim and entered damages in the capped amount on their negligence claim. Owners appealed the judgment. After Owners' appealed, Judge DiMotto, without holding a hearing to consider equitable factors, ordered the District to line with concrete the one-mile section of the Deep Tunnel in the Boston Store vicinity.

Questions: (a) Did the circuit court err in ordering the District to line a mile-long portion of

the Deep Tunnel with concrete when §893.80(4) bars any "suit" for injunctive relief relating to the design and construction of sewer systems?

The circuit court, in ordering the injunction, answered, "no."

(b) Did the circuit court err in ordering the District to line a mile-long portion of the Deep Tunnel with concrete when that order circumvents the governmental tort damages limitation in Wis. Stat. §893.80(3), which §893.80(5) makes the "exclusive" relief available?

The circuit court, in ordering the injunction, answered, "no."

(c) Did the circuit court err in ordering the District to line a mile-long portion of the Deep Tunnel with concrete when no itemized statement of relief ever identified injunctive relief, as required by §893.80(1)?

The circuit court, in ordering the injunction, answered, "no."

(d) Did the circuit court lack authority to enter the injunction because it acted long after Wis. Stat. §805.16(3)'s 90-day limit on granting post-verdict relief had passed?

The circuit court, in ordering the injunction, answered, "no."

(e) Did the circuit court lack authority to enter the injunction because it had entered a final judgment that adjudicated all remaining claims and Owners had perfected an appeal of that judgment before the circuit court issued the injunction?

The circuit court, in ordering the injunction, answered, "no."

(f) Did the circuit court erroneously exercise its equitable authority by ordering the District to line the Deep Tunnel (i) based solely on evidence presented to a jury in a trial presided over by a different judge, and (ii) without considering relevant equitable factors or affording the District and the Wisconsin Department of Natural Resources an opportunity to present evidence relating to those factors, as the Supreme Court required in *Hoffmann v. Wisconsin Electric Power Co.*?

The circuit court, in ordering the injunction and refusing the District an opportunity for a hearing, answered, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The District's appeal in this case involves important issues of governmental immunity from suit based on the design, construction, and implementation of public works projects. It also implicates important issues dealing with the fair administration of justice, because a second circuit court judge ordered injunctive relief mandating the reconstruction of a portion of the District's "Deep Tunnel"—the Inline Storage System that stores sewerage flows during wet weather until those flows can be treated and promptly discharged—when a first circuit court judge had already issued a final order fully adjudicating Owners' claims, when the circuit court lacked the authority to enter the requested relief, and when the successor circuit court judge ordered that relief based on evidence she did not hear and without considering the many countervailing equitable factors.

Given the complexity of the substantive and procedural issues involved, oral argument is warranted and is requested. The importance of the legal issues justifies publication.

STATEMENT OF THE CASE

I. Nature of the Case and Procedural History

As described more fully in the response portion of this brief, Owners alleged that groundwater infiltrating the Deep Tunnel damaged their building's wood-pile foundation. R.51-26–29:A-Ap.126–29. The District pleaded two complete defenses under §893.80: (a) Owners' suit was premised on discretionary acts for which the District has immunity under §893.80(4), and (b) Owners failed to serve the notice of claim and itemization of relief required by §893.80(1). R.75-29:A-Ap.169. The District also defended on the ground, among others not relevant to this cross-appeal, that the Owners, who sued in June 2003, commenced their claim outside the statute of limitations period because they should have discovered their claim on or before June 4, 1997, a date long after the Tunnel went into service in 1994. R.75-30–31:A-Ap.170–71.

This case has two distinct procedural components: First, the case proceeded through a jury trial in which Owners sought to recover damages. Judge Kremers, who presided over this component, ruled on post-verdict motions and

entered a final order adjudicating the only remaining claims by awarding damages on Owners' negligence claim and dismissing their nuisance claim. R.305:A-Ap.708. Second, Judge DiMotto, who acquired the case from Judge Kremers after he had ruled on the parties' post-verdict motions, decided to consider a motion for injunctive relief that Owners filed in response to Judge Kremers' ruling that the statutory damages limitation capped recoverable damages at $50,000 per plaintiff. R.399-26:MMSDApp-0905. After Owners appealed Judge Kremers' judgment, Judge DiMotto, without any further hearing to consider equitable factors, ordered the District to line the Tunnel near the Boston Store building. R.399-26:MMSDApp-0905.

II. Procedural History and Statement of Facts About Trial-Related Cross-Appeal Issues

While recognizing that the District had immunity from Owners' allegations that the Tunnel was improperly designed or constructed, Judge Kremers declined to grant the District summary judgment under §893.80(4). R.374-42:MMSDApp-0550. He allowed Owners to try to a jury whether the District was liable in negligence or nuisance for

acts relating to the Tunnel's "operation, inspection or maintenance." R.374-39:MMSDApp-0547.

Judge Kremers also had denied summary judgment on statute of limitations grounds because he agreed with Owners' position that there were material facts in dispute and submitted to the jury the question of when Owners should have discovered their claim. R.403-2:A-Ap.586. The jury found that the claim should have been discovered more than six years before Owners commenced suit, but the circuit court changed the answer after verdict. R.403-2:A-Ap.586; R.394-29:MMSDApp-0838.

Finally, Judge Kremers denied the District's motion to dismiss based on Owners' failure to serve a notice of claim and claim with itemization of relief sought. R.374-40:MMSDApp-0548. He excused the statutory non-compliance because separate entities that never owned the building had served a notice claiming that they owned the building and were injured by the acts Owners allege in this case. *Id.*

A. Owners' Claims Attack Tunnel Design and Construction.

Owners' amended complaint, filed more than 18 months into the litigation, reveals the true

nature of their case: it repeatedly emphasizes the Tunnel's design—specifically, the lack of a concrete lining—and construction as the cause of reduced groundwater levels that damaged the building's pile foundation. For example, they alleged:

- "[i]nadequate [p]re-construction and [d]esign of the Deep Tunnel System," (R.51-6:A-Ap.106);
- "massive amounts of water [ ] were encountered on a sustained basis and prolonged basis during construction" (R.51-8:A-Ap.108); and
- the District's "refusal to line its deep tunnel has created a drain under downtown Milwaukee that continuously depresses the water table, damaging buildings in the process" (R.51-10:A-Ap.110)(capitalization modified).

Owners' amended complaint only conclusorily contended that the District's "inspection, operation and maintenance" of the Tunnel caused harm. R.51-28:A-Ap.128. They did not plead a distinct harm from "operation and maintenance," rather than from Tunnel construction. *See, e.g.*, R.51-28:A-Ap.128. Nor did Owners allege facts showing a ministerial duty. They based the alleged breach of "inspection, operation, or maintenance" on a failure "to exercise ordinary care in inspecting,

repairing, maintaining and operating the Deep Tunnel." R.51-31:A-Ap.131.

The District sought summary judgment based on the immunity provided by Wis. Stat. §893.80(4) for intentional and discretionary conduct, arguing specifically that the Wisconsin Supreme Court held in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee* that §893.80(4) immunizes governmental entities from liability for all "decisions regarding the adoption, design, and implementation of public works." 2005 WI 8, ¶60, 277 Wis. 2d 635, 691 N.W.2d 658 ("*MMSD*"). R.119-56–60:A-Ap.275–79. Judge Kremers declined to award summary judgment on the negligence and nuisance claims. R.374-40:MMSDApp-0548. He concluded that the immunity issue went "to the scope of what is going to be allowed at trial" (R.374-42:MMSDApp-0550), but recognized that the District's "points are well taken with respect to governmental immunity versus the acts that they may not have immunity for and, again, we are going to have to be . . . very vigilant in making sure people follow what is allowed and what isn't." *Id*. He cautioned that the District's discretionary act immunity would require

the verdict to be phrased in a way that confined the jury to considering only actionable breaches of ministerial duties:

> It will be, I think, a tricky business for all of us at the trial to sort of sort out how we go about presenting the evidence to the jury and how the verdict is going to get phrased with respect to some of these ministerial duties and what is a ministerial duty and what is not and what amounts to knowledge on the part of the people acting on behalf of the District versus intentional accusations of intentional torts.

R.374-41:MMSDApp-0549.

Before trial, Judge Kremers ruled that the District's conduct relating to the design and construction of the Deep Tunnel was not relevant. R.376-75:MMSDApp-0628;R.381-245:MMSDApp-0656. But Owners contended that they could prove a ministerial duty of "operation and maintenance" by evidence that the tunnel as designed or constructed allowed water to infiltrate and the District did not take corrective measures; as their counsel argued at the pre-trial conference, Owners' case was about the Tunnel's unaltered existence:

> [This case] has to do with the mere existence of [the Tunnel] and the fact that it is being maintained with these porous holes and it has dewatered the

> area and has started this cascade of building damage to the Boston Store.

R.376-37–38:MMSDApp-0590–91.

Ultimately, Judge Kremers ruled that the District could not be liable for conduct involving the Tunnel's design or construction, but could only be liable for conduct occurring after it took over responsibility for the Tunnel's operation. R.381-245:MMSDApp-0650. But he allowed Owners to submit evidence from the Tunnel's design and construction because Owners argued that whether the District was earlier on notice of potential harm from groundwater infiltration was relevant to whether the District had an actionable ministerial duty in the later operation, maintenance, or inspection of the Tunnel. R.377-12–13. He also told the parties that he would "allow the plaintiffs to put on their evidence that they believe supports those particular ministerial standards and at the end of the plaintiff's case [he would] decide whether in fact [he thought] they appl[ied] and whether [he thought] the plaintiff[s] ha[d] met their burden with respect to that." R.379-3–4.

Even in making these allowances, however, Judge Kremers identified the Owners' problem in presenting evidence of design and construction

conduct, saying, "I suspect that the Plaintiffs[']
position in this case will ultimately come back or
may come back to defeat [their] claim because . . .
[it] lays the problem at the feet of the construction
people for which the district has immunity. And
the fact that they are constructing something . . .
seems to me to go to the design and construction,
not to maintenance." R.377-13–14. At trial, the
court cautioned Owners that "[w]hat you're
claiming in this lawsuit is about whether or not as
[the District] operated, maintained, and inspected
this tunnel post '92 it caused harm to Boston Store.
. . . If it didn't, you lose." R.381-245:MMSDApp-
0656; *see also* R.382-494–99:MMSDApp-0670–75.

But the Owners' evidence did not provide a basis for finding harm caused by any ministerial duty in the operation, maintenance, or inspection of the Tunnel after 1992. Their evidence was that the operation of the Tunnel as designed and constructed resulted in the movement of groundwater away from the Boston Store building's foundation.

Dr. Turk, the expert on whom Owners relied to establish a link between the District's conduct and the building's foundation problems, repeatedly

attributed decreases in groundwater levels to the Tunnel's presence and construction. *See, e.g.*, R.383-650–52:MMSDApp-0689–91. Dr. Turk's summary of his opinions highlighted that they were based on the Tunnel's existence. Although he remarked that the "processes . . . will continue as long as the MMSD tunnel system is operated and maintained in the same manner as it its today" (R.383-652:MMSDApp-0691), all of his opinions are founded on the Tunnel's construction and existence, rather than on the effect of any specific operation or maintenance activities. His testimony stating his first three opinions is representative:

> In the first place, it's my opinion that the MMSD tunnel system drains water from the shallow dolomite aquifer beneath downtown Milwaukee. The second opinion is that the same MMSD tunnel system is now the primary discharge zone, or a sink, in other words a drain, for shallow groundwater beneath Milwaukee. Third, the drainage of groundwater into the tunnel system has caused the dewatering of the upper part of the shallow dolomite aquifer in the vicinity of the Boston Store.

R.383-651–52:MMSDApp-0690–91.

The rest of his testimony amplified his opinion that the Tunnel's existence, as designed

and constructed, caused a reduction in groundwater levels. Dr. Turk testified, for example, that it was his opinion that "a major impact on the water levels in the dolomite [w]as a result of the *tunnel going through*" (R.383-741:MMSDApp-0695 (emphasis added)), and that it caused a greater drawdown effect than earlier drawdowns from wells, (R.383-740:MMSDApp-0694). "We had some impact before from the leaky wells," he testified, but "[w]e had a much greater impact from the tunnel." R.383-741:MMSDApp-0695. He readily conceded on cross-examination that the activities he referred to occurred "during and after" construction and that, with the exception of noting some groundwater level recovery after Tunnel construction, he had not separated the effects of construction of the Tunnel from activities after its construction. R.383-751:MMSDApp-0696. The fall in dolomite water levels below the Boston Store building, according to Dr. Turk, "was initiated during the construction of the . . . tunnel, but it's still true today." R.383-754:MMSDApp-0697. Neither Dr. Turk nor any other witness testified that the District's post-construction activities had an identifiable effect on the Boston

Store building's piles other than the general reduction in groundwater that Dr. Turk attributed to the Tunnel's construction and continuing existence.

Owners' Tunnel expert, Dr. Nelson, also opined that the design and construction of the Tunnel with only a partial lining resulted in excess water infiltration. R.382-457:MMSDApp-0668; *see also* R.382-508:MMSDApp-0676. He testified that it is "[b]ecause the tunnel was not fully lined with a watertight lining, [that] the excessive loss of groundwater under the Boston Store continues more than 14 years after construction. . . . [And] more rock grouting in the unlined tunnel sections is unlikely to reduce inflows." R.382-457:MMSDApp-0668. Instead of replacing the grouting, he opined, the "tunnel must have a complete lining installed with all joints and cracks sealed to stop groundwater inflow and drawdown" (*id.*), and that "[a]ction is required now . . . because of the time . . . [t]hat has elapsed from tunnel excavation to the present [and the] time required to engineer and construct the tunnel liner" (R.382-458:MMSDApp-0669).

On cross-examination, Dr. Nelson conceded that "the question of lining the tunnel or not was one considered during the design phase and the construction phase." R.382-587:MMSDApp-0686. He admitted that, as long as the pressure outside the Tunnel is greater than the pressure inside (as the District's WDNR permit requires), "the only way to stop water from flowing toward the deep tunnel[] is to *not have the deep tunnel* or fill it up with concrete completely." R.382-586:MMSDApp-0685 (emphasis added). He acknowledged that he had no opinion about the Tunnel's operation. *Id.*

Based on this evidence, the jury answered verdict question number 1, "yes": "On or after August 7, 1992,[1] was the District negligent in the manner in which it operated or maintained the tunnel near the Boston Store?"; and answered question number 2, "yes": "Was such negligence a cause of the claimed damage to the Boston Store foundation?" R.403-1:A-Ap.585.

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[1] The circuit court adopted August 7, 1992 as the date the Tunnel went into service.

The District timely moved for judgment notwithstanding the verdict on the basis of its statutory immunity for discretionary conduct, including conduct involving the design and construction of public works projects, as well as other discretionary acts, including the timing of inspections and the fact that no duty of "maintenance" required adding a concrete lining. R.262-1–10:MMSDApp-0220–29. Judge Kremers denied the motion, but he never identified any ministerial duty the violation of which injured Owners. R.394-1–47:MMSDApp-0810–56. Instead he left the issue for the Court of Appeals:

> One comment on the ministerial duty thing. I remain troubled by that issue more than anything, any other decision I have made in this case. . . . [I]n terms of my decision at the summary judgment, on the ministerial duties, I have concerns about that. We'll see what the appellate court does with that.

R.394-29–30:MMSDApp-0838–39.

B. Statute of Limitations: The Jury Found That Owners' Claim Accrued Outside the Limitations Period.

The evidence showed that Owners were aware of accelerating column settlement beginning in the early 1990s, (R.385-1211–16:MMSDApp-

0761–66), around the same time that the Tunnel was completed. In 1996, Owners' building engineer consulted with an outside engineering firm about the foundation issues. R.384-1008–09:A-Ap.858. In January 1997, six months beyond the limitations period, he wrote to make a request of the "utmost importance" for the engineering firm immediately to report the causes of the problem and make recommendations about corrective measures. R.351-9,ex.697:MMSDApp-0320.

Owners presented evidence that the underpinning called for in the requested engineering report was performed in 1997. R.384-1037:MMSDApp-0736. But Owners presented no evidence that they pursued or evaluated any potential cause other than the Tunnel between the expected engineering report and the time they sued the District alleging that the Tunnel caused the injury.

During deliberations, the jury specifically asked to review all of the engineer's documents, including the "utmost importance" correspondence requesting the report on foundation causes. R.391-1, 10:MMSDApp-0809A–09B. The jury then found that Owners "should have known or discovered on

or before June 4, 1997 that the tunnel as operated or maintained by the District had caused damage to the Boston Store building." R.403-2:A-Ap.586. Judge Kremers changed the finding in ruling on motions after verdict. R.394-29:A-Ap.732.

C. Notice of Claim: Neither Plaintiff Served a Notice of Claim.

Neither Bostco nor Parisian served a notice of claim and itemized statement of relief, as required by Wis. Stat. §893.80(1) in suits against political corporations. In 2001, two other entities, WISPARK Holdings LLC and Saks Incorporated, served a notice of claim and relief itemization. R.46-1-ex.A:MMSDApp-0088. These entities are both legally distinct from Bostco and Parisian, the only entities who ever owned the building: Saks is a Tennessee corporation that owned the stock of Carson Pirie Scott & Co. (Carson), a former owner of the Boston Store building, and, after 1996, the stock of Parisian, which acquired the Boston Store building through a 1999 merger with Carson. R.37-1–76:MMSDApp-0001–76.

Bostco is a single-member ch. 183 limited liability company created in September 2000 by Wisconsin Electric Power Company. R.37-52:MMSDApp-0052. Bostco bought the Boston

Store building from Parisian in January 2001. R.383-834:MMSDApp-0703. WISPARK is a separate limited liability company formed by Wisconsin Energy Corporation in July 2000. R.37-28–31:MMSDApp-0028–31. WISPARK contracted with Bostco to redevelop the Boston Store building, but it never owned the property. R.383-834:MMSDApp-0703.

In their 2001 notice of claim, non-owners WISPARK and Saks asserted that they, as the sole "Claimants," owned the Boston Store building:

> At all material times, Claimants have owned the Boston Store Retail/Office property located at 331 W. Wisconsin Avenue, Milwaukee, Wisconsin . . . .

R.46-5:MMSDApp-0088. According to the WISPARK-Saks notice, *their* property was damaged by the District's "construction activities, and installation of and/or maintenance of (or lack thereof) the deep tunnel project." R.46-6:MMSDApp-0089. The non-owner claimants' notice stated that they "have repaired and must make additional repairs to the wooden timber piles, reinforce the foundation and repair the structural damage." *Id*. They stated further that they "are

seeking monetary relief from [the District] to offset the damages caused by [the District]." *Id.*

Almost a year later, non-owners WISPARK and Saks served a "Notice of Claim (Itemization of Relief Sought)." It too identifies WISPARK and Saks as the only "Claimants," and states that it "itemizes the damages that the *Claimants incurred* as a result of the injury described in the Notice of Claim previously served on the [District] on July 19, 2001." R.46-9–11:MMSDApp-0092–94 (emphasis added). This claim describes various claimed "damages sustained" totaling $10,877,912.01. *Id.* It neither requests reconstruction of the Tunnel nor makes any mention of injunctive relief. *Id.*

Although Owners later alleged an agency relationship between themselves and the non-owners, (R.51-3:A-Ap.103; R.44-1–2:MMSDApp-0081–82), they conceded that the non-owners had unknowingly "filed the notice of claim [and] itemization of damages on behalf of the wrong part[ies]," (R.369-8–9:MMSDApp-0457–58). Owners argued that the non-owners' notices substantially complied with §893.80(1) because Owners employed the same attorneys and "are so

inter-related that even the people who are the directors of the company, the president of the company didn't realize . . . that when they captioned the notice of claim WisPark and Saks, rather than Bostco and Parisian, . . . they were bringing it in the name of someone who was not the current title owner of the property," *id.*

Judge Kremers was "not very impressed by the argument that, well there is a lot of interrelated companies and even the directors don't know which company they are working for or who is what anymore." R.369-14:MMSDApp-0463. But, after noting that the issue would eventually reach the Court of Appeals, he ruled that Owners substantially complied with the notice of claim statute because the non-owners' notices made the District aware that someone asserted a claim related to the Boston Store building. R.369-17:MMSDApp-0466.

III. Procedural History and Statement of Facts About Judge DiMotto's Post-Judgment Order to Line the Deep Tunnel

Judge Kremers granted the District's post-verdict motions to apply Wis. Stat. §893.80(3)'s $50,000 damages limitation in actions against

governmental entities. R.394-45–46:MMSDApp-0854–55. In response, Owners filed a motion for injunctive relief requesting an order forcing the District to line a mile-long section of the Tunnel with concrete—an undertaking that Owners' Tunnel expert speculated at trial would cost around $10 million. R.280-1–8:MMSDApp-0253–60; R.382-523–24:MMSDApp-0678–79. Because Judge Kremers had rotated to a criminal calendar, the injunction motion, which was filed 50 days after the jury verdict, was heard by Judge Jean DiMotto, who succeeded to his civil calendar.

Judge DiMotto, although aware of Judge Kremers' intent to enter a written order incorporating his rulings on the post-verdict motions (R.395-5:MMSDApp-0861), failed to rule on Owners' injunction motion before the end of the 90-day cut-off for ruling on the timely-filed post-verdict motions. On October 25, 2006, acting within the 90-day period, Judge Kremers entered a written order resolving those motions when he signed Owners' proposed "Order for Judgment." That order provides, "judgment is entered in favor of Plaintiffs . . . and against Defendant . . . in the amount of $100,000, together with interest, plus

the taxable costs, fees, and disbursements of this action" and it is further ordered "that Plaintiffs' nuisance claim is hereby dismissed."[2] R.305-1–3:A-Ap.708–10. On January 19, 2007, Owners filed a notice of appeal from Judge Kremers' judgment.

On January 30, 2007, Judge DiMotto, without holding a hearing to consider equitable factors, granted Owners' request for affirmative injunctive relief based solely on her review of the trial transcript. She held that the injunction motion was not a post-verdict motion for purposes of Wis. Stat. §805.16's 20-day post-verdict filing deadline because it did not "ripen" until Judge Kremers reduced the jury's damage award to $100,000. R.399-7–8:MMSDApp-0886–87. She concluded that the relief should be awarded because "the remitted $100,000 is an inadequate remedy at law, given the past and expected harm the Plaintiffs have suffered

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[2] A day earlier, Judge Kremers mistakenly signed and entered the District's proposed order, which similarly dismissed plaintiffs' nuisance claim and amended judgment on their negligence claim. R.302-1–3:A-Ap.705–07. The parties had previously agreed that Judge Kremers should enter Owners' proposed order, which he signed on October 25, 2006.

in this matter." R.399-10:MMSDApp-0889. Her only other justification was that "there was unrebutted expert testimony at trial, . . . that the tunnel must . . . get a complete lining installed with all joints and cracks sealed to stop groundwater inflow and drawdown. . . . And . . . if the tunnel were lined, groundwater levels would rise to a level similar to the tunnel not being there." R.399-26–27:MMSDApp-0905–06.

Judge DiMotto rejected the District's argument that Owners' failure to serve a notice of claim for injunctive relief—even the non-owners' claim and itemized statement of relief did not request that remedy—and the fact that they had never pleaded injunctive relief as a remedy for negligence barred an order to line the Tunnel. She concluded that Owners had substantially complied with §893.80(1) because they had itemized damages in an amount similar to the estimated lining cost. R.399-12–14:MMSDApp-0891–93. She did not address the basis for awarding injunctive relief when the only claims for which Owners had pleaded such relief had been dismissed. Nor did she address §893.80(4)'s prohibition on suits based on discretionary conduct in running public works.

Instead, Judge DiMotto remarked that, having ordered the $10 million tunnel reconstruction, she expected the parties to "talk turkey." R.399-33–34:MMSDApp-0912–13.

In the injunction order, Judge DiMotto also directed the District to identify issues that remained to be litigated and directed Owners to "respond to [the District's] submission, arguing matters such as issue preclusion."[3] R.336-1–2:A-Ap.713–15. After the District informed the court that none of the issues central to injunctive relief had been litigated—indeed, the court had never held a hearing on the propriety of injunctive relief and the trial had been limited to damages claims—Owners filed a brief arguing that the issues identified by the District were either "(1) already litigated and decided; (2) should have been raised earlier and [are] now waived; (3) irrelevant or unnecessary; or (4) stipulated." R.343-

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[3] Judge DiMotto entered two written orders, one on February 9, 2007 and an amended order on February 16, 2007, incorporating the January 30, 2007 directive to line the Tunnel. R.336-1–3:A-Ap.713–15; R.339-1–3:A-Ap.716–18.

3:MMSDApp-0291. Judge DiMotto did not afford the District a response. R.400-1–83:MMSDApp-0920–1002.

At a May 30, 2007 "status conference," Judge DiMotto ruled, without providing the District an opportunity to respond to the preclusion and waiver arguments Owners raised in their brief, that the District already litigated or abandoned the issues it identified by failing to raise them during the jury trial. In the circuit court's view, the District should have interjected into the jury trial issues relating to whether lining the Tunnel would exacerbate future harm, the cost of lining the Tunnel, and the harm lining the Tunnel would cause the public. R.400-30–34:MMSDApp-0949–53. Judge DiMotto held that the District waived issues relating to whether equitable relief should issue, stating, for example, "I'm not understanding as well why harm to the public, regulatory and water law restrictions on this [injunctive] relief were not front and central [sic] at trial." R.400-43:MMSDApp-0962. Similarly, although the effect of Tunnel lining on the public was not at issue in the damages trial and the court did not hold a hearing before issuing the injunction, Judge DiMotto remarked, "Nothing was

proffered by the District about the tunnel being lined as harmful to the public or being precluded by the restrictions. . . . The District had ample opportunity to raise those issues during the trial and/or to raise them in the injunctive relief litigation." R.400-44:MMSDApp-0963. In response to the District's suggestion that the court should consider whether primary jurisdiction to line the tunnel lies with the Wisconsin Department of Natural Resources before requiring the District to line the tunnel, the court commented, "I don't know why they [the EPA and the WDNR] weren't named in the matter. I don't know why that wasn't litigated. It should have been litigated. . . . It's way too late." R.400-47–48:MMSDApp-0966–67.

Judge DiMotto incorporated her rulings into a "Final Order" entered on June 10, 2007. R.346-1–2:A-Ap.0719–20. Also on June 10, Judge DiMotto appointed a special master to oversee implementation of the injunctive relief and directed the special master to oversee or resolve (1) an environmental impact appraisal; (2) whether the lining thickness should be 1 foot or 1.2 feet; (3) when the work will be commenced and completed; and (4) other technical issues involved in lining the

tunnel, such as quality assurance, obtaining necessary permits, and "means and methods" of construction. R.347-1–3:MMSDApp-0286–88. Judge DiMotto stayed the special master order pending resolution of all appeals. R.347-3:MMSDApp-0288.

Owners filed a second notice of appeal on June 11, 2007. R.363. The District filed another notice of cross-appeal on June 14, 2007. R.365.

ARGUMENT

I. All Relief Is Barred by Wis. Stat. §893.80(4)'s Governmental Immunity for Discretionary Acts, Including the Design and Construction of Sewer Systems.

The District enjoys governmental immunity under Wis. Stat. §893.80(4) and the common law for all discretionary acts[4]. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658 ("*MMSD*"); *see also Pries v. McMillon*, 2010 WI 63, 326 Wis. 2d 37, 784 N.W.2d 648. This discretionary act immunity

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[4] Section 893.80(4) provides, "[n]o suit may be brought against any . . . political corporation . . . for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

covers (1) all acts of sewerage system planning, designing, and implementation; *MMSD*, 277 Wis. 2d 635, ¶60, and (2) all discretionary acts of sewerage system operation or maintenance, including all operation and maintenance not required by "a duty that is absolute, certain and imperative, . . . and prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion," *id.* at ¶54.

MMSD clarified §893.80(4) governmental immunity law in the context of a water main break. The Court considered whether the City of Milwaukee enjoyed immunity from negligence and nuisance claims after one of the City's water mains ruptured causing the collapse of an interceptor sewer. Surveying the law since §893.80(4)'s enactment, the Court explained that §893.80(4) "immunizes against liability for legislative, quasi-legislative, judicial, and quasi-judicial acts, which have been collectively interpreted to include *any act that involves the exercise of discretion and judgment*." *MMSD*, 277 Wis. 2d 635, ¶54 (internal quotation marks omitted). Section 893.80(4) immunity thus applies to all governmental conduct

except conduct that is non-discretionary or "ministerial"; that is, conduct involving the performance of tasks so specifically required by law that *no* judgment or discretion plays a role:

> A ministerial act, in contrast to an immune discretionary act, ***involves a duty that is absolute, certain and imperative***, involving merely the performance of a specific task ***when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.***

Id. (internal quotation marks omitted; emphasis added).

MMSD held that planning, design, and implementation of public works, such as sewer systems, are discretionary acts categorically immune under §893.80(4):

> decisions regarding the adoption, design, and implementation of public works are discretionary, legislative or quasi-legislative acts subject to immunity. . . . "Even if the system is poorly designed, a municipal government is immune for this discretionary act."

Id. ¶60 (internal citations omitted). A government actor is immune, "from suit relating to its decisions

concerning the adoption of a waterworks system, the selection of the specific type of pipe, the placement of the pipe in the ground, and the continued existence of such pipe. These are discretionary legislative decisions." *Id.*

MMSD also addressed municipal immunity for acts of system operation and maintenance, which, although not categorically immune, are immune if discretionary, rather than ministerial. *Id.* ¶¶54, 59 n.17. *MMSD* instructed the circuit court to examine on remand whether the law imposed a clear duty on the City—unrelated to the adoption, selection, placement or continued existence of its water main—to fix the main at a certain time before the main broke and damaged District's interceptor tunnel. To recover for negligent operation or maintenance, the Court held, the plaintiff had to establish a negligent breach of a ministerial duty, requiring proof that (1) the City knew the water main was leaking before it broke; and (2) that knowledge gave rise to an "absolute, certain, and imperative" duty to repair the water main, and the "law impose[d], prescribe[d] and define[d] the time, mode and occasion for [the City's] performance with such

certainty that nothing remain[ed] for judgment or discretion." *Id.* ¶54 (internal quotation marks omitted).

Owners' evidence provides no basis on which to hold the District liable for non-immune conduct. First, Owners' evidence of harm was all based on acts of design, construction, and implementation of the Deep Tunnel for which the District is categorically immune. Second, even if some of the District's conduct at issue could be construed as involving operation, maintenance, or inspection of the Deep Tunnel, there is no evidence that the District breached a ministerial duty of operation, maintenance, or inspection that caused the claimed damages. Third, each of the specific attempts Owners made to identify a breach of a ministerial duty failed to provide a basis for liability. And, fourth, Owners made no attempt to prove what portion of the claimed harm to their foundation piles was caused by non-immunized conduct, rather than by other causes, including immunized conduct. The District is accordingly entitled to judgment as a matter of law.

A. The District's decision not to line the Tunnel completely—the only act on which Owners base their harm—is a design and construction decision for which the District is categorically immune.

As Owners conceded below, whether the District has immunity is a question of law. R.271-4-5:A-Ap. 657–58 (whether "decisions regarding [tunnel] lining were negligently made or of ministerial nature . . . are both legal conclusions"). Review of the circuit court's decision not to direct a verdict on this ground is therefore de novo. *See Miesen v. State DOT*, 226 Wis. 2d 298, 304, 594 N.W.2d 821 (Ct. App. 1999).

Based on *MMSD*, the circuit court correctly ruled that the District could not be held liable for damages caused by the design or construction of the Deep Tunnel. R.381-245:MMSDApp-0656. But it accepted Owners' theory that the District could be held liable for "operation and maintenance" of the Tunnel if there was evidence suggesting that the District knew that its "operating or maintaining" the Tunnel was harming Owners' property. R.376-18–19:MMSDApp-571–72.

Based on this theory, the circuit court allowed Owners' witnesses to testify repeatedly about the effect the Tunnel's design and construction had on groundwater levels. *See, e.g.*, R.382-457:MMSDApp-0668 (Owners' expert, Dr. Nelson, opining that design of Tunnel has led to "excess loss of groundwater under the Boston Store [which] continues more than 14 years after construction"); R.382-458:MMSDApp-0669 (Dr. Nelson testifying that water levels have not returned to their "pre-construction levels"); R.382-458:MMSDApp-0669, 69A. (Dr. Nelson testifying that "[t]he design and construction of a watertight tunnel is well within the capability of the underground construction industry."). Indeed, rather than testifying that the District breached some ministerial duty of "operation," "maintenance," or "inspection" that resulted in harmful amounts of groundwater entering the Tunnel, the Owners' experts testified that the harm resulted from the fact of the Tunnel's unlined existence. *See, e.g.*, R.383-652:A-Ap.768; R.385-1275–76:A-Ap.-923–24. As Dr. Turk, Owners' hydrogeologist opined, the "tunnel system's" existence in its unlined state caused the

reduction in groundwater to which Owners' attribute their injuries; he testified:

> [I]t's my opinion that ***the MMSD tunnel system drains water*** from the shallow dolomite aquifer beneath downtown Milwaukee.
>
> The second opinion is that ***the same MMSD tunnel system*** is now the primary discharge zone, or a sink, in other words a drain, for shallow groundwater beneath Milwaukee.
>
> Third, the drainage of groundwater ***into the tunnel system has caused the dewatering*** of the upper part of the shallow dolomite aquifer in the vicinity of Boston Store. . . .
>
> number four, the ***drainage of groundwater into the tunnel system*** has caused the lowering of water levels. . . .
>
> And also, number five, the lowering of the water levels . . . has, in turn, caused water to drain from the shallow marsh deposits in the vicinity of the Boston Store . . .
>
> The sixth opinion . . . is that ***the tunnel system*** and not the well at the Boston Store ***has caused the fall in water*** . . .
>
> And, finally, my opinion is that the processes that I describe . . . will continue as long as ***the MMSD tunnel***

> ***system is operated and maintained in the same manner*** as it is today.

R.383-652:A-Ap.768 (emphasis added). By "operated and maintained in the same manner," Dr. Turk meant only "unlined"—that is, the way the Tunnel was designed and constructed.

Owners' post-verdict arguments highlighted that their evidence depended on matters of Tunnel design and construction. Owners contended that their tunnel expert, Dr. Nelson, provided testimony that supported liability for negligence in the "inspection, operation or maintenance of the tunnel," R.271-2:A-Ap.655, because he opined that:

> (1) The North Shore Interceptor ***continues to drain groundwater*** from the soil and rock below the Boston Store[;]
>
> (2) That "***because the tunnel was not fully lined*** with water tight lining, the excessive loss of groundwater under the Boston Store continues more than 14 years after construction[]"[;]
>
> (3) . . . ***a design and construction of a water tight tunnel*** is well within the capability of the underground and construction industry"[; and]
>
> (4) . . . ***installing the concrete liner*** for half a mile on each side of Boston

> Store would stop excessive inflows of water in to [sic] the tunnel.

R.271-3:A-App. (transcript citations omitted, emphasis added). All Owners' experts did was criticize the Tunnel's design, construction, and continuing existence.

Owners give this purported cause of their injury the fictional label "negligent operation or maintenance of the Deep Tunnel." *See* Owners-Br. 12–13 (relying on Nelson and Turk). But they never proved any ministerial act of operation or maintenance, instead limiting their proof to the Tunnel's non-concrete-lined existence. Owners argue only that this non-concrete-lined existence "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." *Id.* at 11.

B. Owners have not demonstrated and could not demonstrate that non-immune Tunnel-related conduct damaged their building.

The Deep Tunnel—properly, the "Inline Storage System"—is a massive storage tunnel for sewerage flows. R.381-257,259–60:MMSDApp-

0658–60. Its design, construction, and operation were all approved and permitted by the Wisconsin Department of Natural Resources. R.124-4:MMSDApp-0115; R.351-44,ex.2563:MMSDApp-0356. Water flows into the Tunnel *by design*—surrounding water sources have a greater pressure (hydraulic head) (R.382-591:MMSDApp-0687A)—and by the laws of physics (R.382-584:A-Ap.765). Under the terms of the District's operating permit from the WDNR, the Tunnel must be operated and maintained to allow water to infiltrate in order to avoid wastewater exfiltrating the Tunnel and contaminating surrounding groundwater. R.351-ex.2563:MMSDApp-0356.

One of Owners' experts, Dr. Nelson, admitted that he had no opinion on the proper operation of the Tunnel itself; his only view was that it should have been lined with concrete. R.382-586–87:MMSDApp-0685–86. Notwithstanding Owners' efforts to characterize the absence of a concrete lining as "maintenance," this was a quintessential design and construction choice—one that was considered and rejected, as Dr. Nelson conceded:

> Q: You have no professional opinion about the operation of the tunnels.
>
> A: No, I have none.

> Q: Your opinion, as I understand it, as we've seen and you delivered it earlier today, is that as a matter of maintenance, the tunnel should be lined to some extent with concrete; is that right?
>
> A: That's right.
>
> Q: And lining a tunnel with concrete or not is something that the designers considered in this case, didn't they?
>
> A: I'm sure they did.
>
> Q: And it was also a question raised during construction by the construction contractor; isn't that correct?
>
> A: That's correct.
>
> Q: So that the question in this—for this tunnel, in this case, the question of lining the tunnel or not was one considered during the design phase and the construction phase; isn't that correct?
>
> A: It was.

R.382-586–87:MMSDApp-0685–86.

None of Owners' witnesses identified any basis for finding a duty to add a concrete liner as a matter of maintenance or otherwise. Indeed, lining the tunnel is *not* a matter of "maintenance." "Maintenance" is something that "maintains" or keeps a thing in its original state. *See* MERRIAM

WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1993)("1: to keep in an existing state (as of repair, efficiency, or validity)); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1160 (2d ed. 1987)("1: to keep in existence or continuance; preserve; retain"). Just last term our Supreme Court relied on a similar dictionary definition to interpret "maintenance" in an analogous context, stating, "The AMERICAN HERITAGE DICTIONARY defines 'maintenance' as '[t]he work of keeping something in proper condition; upkeep." *See Hocking v. City of Dodgeville*, 2010 WI 59, ¶48, 326 Wis. 2d 155, 785 N.W.2d 398 (quoting AMERICAN HERITAGE DICTIONARY 1084 (3rd ed. 1992)).[5]

The Supreme Court's reasoning in *Hocking* squarely rejects the principal argument Owners advance here to avoid *MMSD*'s categorical immunity—that the District's use of the Tunnel and its failure to add a concrete liner can be considered "operation and maintenance." *Hocking*

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[5] In this context, maintenance might include ensuring that gates and other mechanicals remain in proper working order. *See, e.g.*, *Lange v. Town of Norway*, 77 Wis. 2d 313, 319–20, 253 N.W.2d 240 (1977).

considered whether a negligent failure to correct roadways alleged to be a nuisance because they caused the flooding of plaintiff's property could be negligence in the "maintenance, operation or inspection of an improvement to real property" for purposes of §893.89(4)(c)'s exception to the 10-year period of repose applicable to claims arising out of the "design . . . [or] the construction of . . . [an] improvement to real property," §893.89(1). The Court held that failure to correct a negligent design choice could not be conflated with negligent "maintenance" without rendering the distinction between design and maintenance meaningless:

> Construing the phrase "maintenance, operation or inspection of an improvement to real property" to mean maintenance or operation of a nuisance would create an exception that swallows the rule. This is so because every improvement that is negligently designed could be considered an ongoing nuisance that the owner or operator negligently maintains by failing to correct.

Id. ¶47.

To accept Owners' invitation to call the Tunnel's continued existence and use "operation" or "maintenance" similarly threatens *MMSD*'s distinction between (i) categorically immune acts of

design, construction, and implementation; and (ii) acts of operation or maintenance, the negligent performance of which can give rise to liability, if, and only if, their performance is required by a ministerial duty. All of Owners' evidence of causal negligence relates to the Tunnel's design, construction, implementation, and existence. As Owners' counsel characterized it at the pre-trial conference: This case "has to do with the mere existence of [the Tunnel] and the fact that it is being maintained with these porous holes." R.376-37–38:MMSDApp-0590–91. *MMSD*'s holding entails that the District is categorically immune for the effects of the Tunnel's existence, and *Hocking*'s reasoning forecloses Owners' efforts to found liability on the District's maintaining the Tunnel in its designed state. Since Owners proved nothing else, the District is entitled to judgment as a matter of law dismissing the case in its entirety.

C. Even if the District's conduct were not categorically immune, Owners failed to present evidence of harm resulting from breach of a ministerial duty.

MMSD is clear that even when municipal conduct is not categorically immune, that conduct can only give rise to liability when it constitutes a

breach of a *ministerial duty*. *MMSD*, 277 Wis. 2d 635, ¶59 n.17. "[A] municipality is liable for its negligent acts ***only if those acts are performed pursuant to a ministerial duty***. Focusing the immunity analysis on the character of the tortious acts . . . is important [because] . . . Wis. Stat. §893.80(4) does not immunize municipalities for certain *results*; rather, immunity is provided for certain *acts*." *Id.* (first emphasis added; second emphasis in original; internal citations omitted).

Here, there is no evidence that the District performed any act—of "operation, maintenance, inspection" or otherwise—that amounts to a breach of ministerial duty. Nothing demonstrates that the District was negligent in its "performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Id.* ¶54 (quoting *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶27, 235 Wis. 2d 409, 611 N.W. 2d 614); *see also Pries*, 326 Wis. 2d 37, ¶22.

Because Owners presented no evidence that the District breached a ministerial duty of operation or maintenance (or anything else), the

jury's conclusion that the District was "negligent in the manner in which it operated or maintained the tunnel" fails to provide a basis for liability.

1. The District's operation of the Tunnel was neither shown to be negligent nor ministerial.

The Tunnel is an enormous storage cavern dug out of bedrock. The record shows only that the District operated and maintained the Tunnel as it was designed and as its Wisconsin Department of Natural Resources permit requires—i.e., with a positive inward head allowing clear water to enter and preventing wastewater from exiting. R.351-74, ex.2563:MMSDApp-0384. Designed to allow infiltration, there is no "source of law or policy imposing a ministerial duty,"[6] to line the Tunnel or otherwise alter its construction to prevent infiltration.[7]

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[6] *Pries*, 326 Wis. 2d 37, ¶31.

[7] Owners' argument in the circuit court, that there is no evidence that the Tunnel was designed to infiltrate at a particular level, is another impermissible argument from *results*; "immunity is provided for certain acts," *MMSD*, 277 Wis. 2d 635, ¶59 n.17; and among those acts is the design and construction of an infiltrating Tunnel.

2. The draft plan document does not give rise to ministerial duties.

Owners have previously argued that a pre-construction draft plan document shows that lining the Tunnel is a matter of maintenance, because it states, among other things, "[m]aintenance *may* include removal of solids deposits, removal of fallen rock, repair of deteriorated linings and placement of concrete lining *in deteriorated*, unlined areas." R.381-284–85 (emphasis added). First, this statement, which Owners read into the trial record without further comment, does not establish a *ministerial duty* of maintenance: Even if it were not a draft, it refers only to what maintenance "may" include, not what it *must* include. It does not create "a duty to act *in a particular way* . . . [that] is explicit as to time, mode, and occasion for performance," *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶44, 253 Wis. Wd 323, 646 N.W.2d 314. The draft's language leaves to the District's discretion the choice of whether to remedy deterioration by adding a lining. *Compare id.* ¶¶46–47. *See generally Pries*, 326 Wis. 2d 37, ¶22.

Second, this draft document limits its lining suggestion to places where structural support is

threatened or erosion protection is needed: "Lining will be included only as necessary to maintain structural support or to protect the tunnels from erosion . . . [otherwise] grouting will be sufficient to protect the groundwater from impacts resulting from infiltration or exfiltration." R.351-ex.206 at 8–34. No evidence suggests that the Tunnel portion near the Boston Store building is deteriorated, eroded, or in need of structural support.

3. Owners' notice of harm argument is legally unsupported.

Owners have also argued that the District was on notice that the Tunnel was "leaking," which gave rise to a non-immune affirmative duty to take affirmative steps to repair the leak because the "leak" might cause harm. This is wrong.

Notice of potential harm does not alone create a ministerial duty. *See MMSD*, 277 Wis. 2d 635, ¶62. Nothing shows that the District has a duty—especially a non-discretionary duty—to *prevent* water from infiltrating the Tunnel. Instead, it has a duty under its WDNR permit to *maintain* infiltration. R.351-74,ex.2563:MMSDApp-0384. This required infiltration of water into the Tunnel

is not a "leak" as *MMSD* used that word to describe the broken water main.

Moreover, the "notice of harm" evidence on which Owners have relied is evidence that the District was aware that ground water infiltration *during Tunnel construction* might damage buildings in the construction zone. This risk of water entry during construction was of a substantially greater quantity than the minimal infiltration occurring during Tunnel operation. *See* R.350,ex.53-2:A-Ap.1163 (describing 1400–1500 gallons per minute construction inflow). Regardless, the District's awareness of that risk involves, at most, categorically immune construction conduct and does not support a ministerial duty of post-construction operation or maintenance.

4. Owners failed to prove any ministerial duty.

Owners did not ask the jury to find that the District violated any ministerial duty. Instead, the jury was asked only whether the District was "negligent in the manner in which it operated or maintained the tunnel." This question obviously finds no breach of a ministerial duty—i.e., one that "is absolute, certain and imperative." *MMSD*, 277

Wis. 2d 635, ¶54. This failure is fatal: Under §893.80(4), the District may only be sued for ministerial acts.

In response to the District's motion for judgment notwithstanding the verdict, Owners argued that the jury's general negligence verdict could be sustained as long as the evidence could possibly support the violation of some ministerial duty. This approach, however, misunderstands the nature of discretionary act immunity: the immunity is intended to protect government actors performing discretionary conduct from later second-guessing based on vague, ill-defined standards of conduct like "negligence," which requires the fact-finder to balance the conduct's perceived costs and benefits. Government actors are instead only liable for harms caused by breaches of ministerial duties—i.e., duties so clear cut that no factor-finder has to decide for itself whether the conduct should have been performed at all or in some other way or at some other time. *See MMSD*, 277 Wis. 2d 635, ¶54; *Pries*, 326 Wis. 2d 37, ¶22.

a. No ministerial duty is created by §NR 110.13(2)(k)(1).

Owners argued below that NR §110.13(2)(k)1, a "construction quality" standard in the administrative code relating to the placement of sewer "*pipe*," should be held to create a ministerial maintenance duty for the Deep Tunnel. This provision, which states, "[t]he leakage outward or inward (exfiltration or infiltration) may not exceed 0.19 cubic meters *per centimeter pipe diameter* per kilometer per day (*200 gallons per inch of pipe diameter per mile per day*) for any section of the system." *Id.* (emphasis added). This 200-gallons-per-inch-of-pipe-diameter-per-mile-per-day standard is wholly inapplicable: The Tunnel is not made of pipe. This code provision, therefore, cannot properly be read to create an "absolute, certain and imperative" duty for construction of the enormous storage cavern that is the Tunnel. *See MMSD*, 277 Wis. 2d 635, ¶61.

The actual design criteria for the Deep Tunnel were not presented at trial. But even the Owners' Tunnel expert explained that the standard on which this code provision for construction of pipe sewers is based requires adjusting the amount of

allowable inflow for depth. R.382-574:MMSDApp-0684. Thus, while the 200 gallons-per-inch-of-pipe-diameter-per-mile-per-day standard applies accurately to traditional pipe sewer construction, the standard would require adjustment to account for the Deep Tunnel's 300-foot depth. *Id.* So adjusted, as Owners' expert testified, the Tunnel meets this inapplicable standard:

> Q: Have you done the calculation to see whether or not the Milwaukee Metropolitan Sewerage District's deep tunnels meet the standard once you apply the conversion factor for depth?
>
> A: I have.
>
> Q: And it meets it, doesn't it?
>
> A: Yes, it does.
>
> Q: Meets the 200 limit when you convert it to depth, doesn't it?
>
> A: It does.

R.382-574:MMSDApp-0684.

More important, §110.13(2)k deals with traditional sewer pipe *construction* for which our Supreme Court has held there is categorical immunity. *MMSD*, 277 Wis. 2d 635, ¶58; *see also Allstate Ins. Co. v. Metro. Sewerage Comm.*, 80 Wis. 2d 10, 258 N.W.2d 148 (1977). And NR

§110.13(2)(k)1 provides that "[t]ests for infiltration shall be specified in the construction specifications." Thus, it does not purport to impose any duty of operation or maintenance and certainly no such duty that is "absolute, certain, and imperative." In all events, the WDNR discharge permit, which governs the Deep Tunnel's operation, does not refer to this provision. R.382-557–59:MMSDApp-0680–82;R.388-2126:MMSDApp-0795.

b. No ministerial duty to inspect is required by law.

Owners also contended below that liability could rest on negligent inspection of the Deep Tunnel. But Owners did not, and cannot, establish that the District has a ministerial duty to inspect the Tunnel: Owners identified no law, regulation, or applicable standard that would require inspections. At trial, Owners presented only a former consultant's testimony that he had suggested that the District inspect the Tunnel annually. R.386-1438:MMSDApp-0770. That testimony does not establish a ministerial duty, a fact Owners conceded in post-verdict briefing when they characterized the testimony as "simply

evidence of negligence, not existence of a duty; the duty is imposed by law." R.270-9:MMSDApp-0238.

There is no such law. The only authority Owners identified, *Freitag v. City of Montello*, 36 Wis. 2d 409, 153 N.W.2d 505 (1967), does not establish it. *Freitag* upheld, without any discussion of statutory immunity, a finding that the municipality was *not* liable for negligently causing a sewer backup. The Court cited an *American Jurisprudence* entry that identified a municipality's duty to keep sewers in good repair as including the duty to use "reasonable diligence to keep its sewers and drains from becoming clogged . . . [and] to exercise a reasonable degree of watchfulness to ascertain the condition of sewers and drains from time to time so as to prevent them from becoming obstructed." *Id.* at 413 (quoting 38 Am. Jur., *Municipal Corporations* §636, at 341–42 (internal quotation marks omitted)). This duty, which the Court recognized as an expansion of liability under the pre-*Holytz* common-law immunity, *id.* at 414, is not ministerial. A "reasonable diligence" and "reasonable degree of watchfulness" plainly do not satisfy the definition of ministerial duty—one that

"is absolute, certain and imperative." *MMSD*, 277 Wis. 2d 635, ¶54.

Nothing suggests, moreover, that, even at common law, this inspection duty for ordinary transport sewers would apply to a tunnel 300 feet below the ground. The burdens of inspections and the expected benefits are obviously very different. While the District has inspected the Tunnel, no law, regulation or standard suggests that the District had a ministerial duty to do so or to do so more frequently.[8]

Separately dispositive of Owners' "inspection" theory is that they presented no evidence linking a failure to inspect with their claimed injury, and there is no jury finding that even mentions inspections. There is no evidence suggesting that an inspection would have revealed a blockage or some other maintenance issue resulting in harm. And nothing an inspection might have shown would have advanced Owners' theory of harm

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[8] The District has twice inspected the Tunnel. Once in 1992 before it was put into operation and once in 2002. Neither inspection revealed substantial infiltration of groundwater. R.388-1971:MMSDApp-0786F.

resulting from a failure to line the Tunnel near the Boston Store building. Even if an inspection had revealed unexpected infiltration (which no post-construction inspection in fact revealed), the harm would not have resulted from the failure to inspect.[9] The act of harm would have been the failure to design or construct the Tunnel with a lining—acts for which §893.80(4) affords categorical immunity. *MMSD*, 277 Wis. 2d 635, ¶60.

c. The District's discharge permit does not create a ministerial duty to line the Tunnel.

Owners also argued that exfiltration caused by occasional overfilling of the Tunnel in the last decade avoids the immunity bar. But this occurrence does not create a ministerial duty of the District to Owners. Owners' harm allegedly resulted from foundation damage, not contamination, and from the infiltration of water

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[9] In fact, groundwater infiltration reduced about 40% from the time construction was completed to the time of the 2002 inspection. R.388-1965:MMSDApp-0786D. This reduction is due to "self-healing" as groundwater leaves behind mineral deposits, filling gaps in the rock. R.388-1966:MMSDApp-0786E.

into the Tunnel, not the exfiltration of *water out of* the Tunnel. Thus, exfiltration cannot create a duty to Owners.

This is true even accepting Owners' expert's suggestion that the exfiltration and infiltration of sewerage might make infiltration and drawdown more likely. The permit requirements were intended to protect against contamination through exfiltration, not greater future infiltration that Owners' expert speculates follows exfiltration. Owners' evidence, at best, showed that this phenomenon was a result of the Tunnel's design and construction. In other words, on Owners' own theory, only redesign and reconstruction of the Deep Tunnel with a new concrete liner would effectively avoid this potential exfiltration/infiltration effect. As noted above, these issues are at the very core of immune conduct under *MMSD*. 277 Wis. 2d 635, ¶60.

More important, exfiltration is an effect, not an act—an effect resulting from discretionary decisions about how long sewer flows can be allowed to enter the Tunnel before it overflows. These operational decisions unquestionably require judgments about, among other things, the rate of

the flows, the expected precipitation rate, the amount of rainfall that will be absorbed into the ground, and the rate at which the Tunnel can be emptied to the treatment plants. These decisions are judgmental, not ministerial, and thus exfiltration—an occasional effect of misjudgments about these factors—cannot give rise to liability consistent with §893.80(4).

D. Owners' failure to link their damages to any ministerial duty breach required a verdict in the District's favor.

Even if Owners had presented evidence that the District breached a ministerial duty, recovery is precluded by their failure to link that breach to the Deep Tunnel's effect on Owners' foundation. Owners' witnesses argued that "the Tunnel" damaged the Boston Store's foundation without ever linking the harm caused by non-immune conduct, rather than from the immune conduct of designing and constructing the Tunnel. In fact, Owners' hydrogeologist, Dr. Turk, conceded that he did not segregate the effects of Tunnel construction from Tunnel existence; speaking of a fall in water levels beneath the building, he testified, "it was initiated during construction . . . of the tunnel, but

it's still true today." R.383-754:MMSDApp-0697. Because the District cannot be held liable for immune acts, Owners' failure to disaggregate damage caused by non-immune conduct bars any damages recovery. *See*, *e.g.*, *Blue Cross & Blue Shield v. Marshfield Clinic,* 152 F.3d 588 (7th Cir. 1998)(plaintiff must show harm caused by actionable conduct).

A plaintiff cannot recover unless there is "a causal connection between the conduct and the injury; and . . . an actual loss or damage as a result of the injury." *Martindale v. Ripp*, 2001 WI 113, ¶33, 246 Wis. 2d 67, 629 N.W.2d 698 (internal quotation marks and quoting citation omitted). The "mere possibility" that some non-immune conduct caused harm is inadequate to support an award when, as here, neither the court nor Owners identified a ministerial duty and thus damages attributable to non-immune conduct "remains one of pure speculation or conjecture." *Merco Distrib. Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 460, 267 N.W. 652 (1978). Since Owners' evidence emphasized the harm allegedly caused by the design and construction of the Tunnel—neither of which can be the proper source of liability—"it

becomes the duty of the court to direct a verdict for the defendant." *Id.*

II. The Jury's Finding That the Claim Arose Outside the Limitations Period Is Supported by Credible Evidence.

Credible evidence supported the jury's finding that the Owners should have discovered before June 4, 1997, the facts on which they based their claim. The circuit court's decision to overturn the jury's verdict on Question 6 was therefore erroneous. *See* Wis. Stat. §805.14(1).[10]

A cause of action accrues when a plaintiff discovers or, in the exercise of reasonable diligence, should have discovered both the injury and that the defendant's conduct probably caused the injury. *Schmidt v. N. States Power Co.*, 2007 WI 136, 305 Wis. 2d 538, ¶27, 742 N.W.2d 294. When a plaintiff objectively should have discovered facts sufficient to plead the claimed cause of his injury presents a jury question. *See Schmidt,* 305 Wis. 2d 538, ¶ 45.

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[10] This Court will reverse the circuit court's decision to change a jury answer as "clearly wrong" if its review of the record reveals any credible evidence supporting the verdict. *See Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 390, 541 N.W.2d 753 (1995).

The jury answered that question by finding that Owners knew, or should have discovered, facts sufficient to plead their claim before June 4, 1997—a date more than six years before they commenced this action (R.403-2:A-Ap.586) and thus beyond the limitations period of Wis. Stat. §893.52.

The evidence showed that Owners became aware of accelerating column settlement beginning in the early 1990s (R.385-1211–16:MMSDApp-0761–66), around the same time that the Tunnel was completed. Joseph Zdenek, who was responsible for maintenance and upkeep at Boston Store from August 1995 through November 1998, testified that he became aware of column settlement in the winter of 1995 when a building consultant from Graef Anhalt Schloemer (GAS) told him about past column monitoring, settlement, and underpinning. R.384-997, 1004–05, 1008–09, 1035:MMSDApp-0702A, 0722–23, 0723A–B, 0735A. Zdenek read to the jury a passage from a 1996 letter in which the consultant warned that columns that had been stable before 1990 were sinking, resulting in cracks in upper floors and the probable need for future underpinning. R.351-ex.691:MMSDApp-0317. Zdenek testified that

cracking from settlement became worse in 1995 (R.384-1010–11:MMSDApp-0723A–0723B) and that, around that time, he saw "acceleration in the condition of cracking and doors jamming throughout the building and the floor variances" (R.384-1015:MMSDApp-0727).

On January 9, 1997, Zdenek wrote GAS and stated that "there continues to be movement along [the building's] column line." R.351-8, ex.697:MMSDApp-0319. Emphasizing that "time is of the utmost importance" and that the project "must be undertaken immediately" (R.351-9, ex.697:MMSDApp-0320), he asked GAS for "an immediate response" to his request that it "survey . . . this structure locating ALL major cracks in the interior partitions and columns *and a probable cause for each*" (R.351-8–9, ex.697:MMSDApp-0319–20 (emphasis added)). The requested report would "also need to indicate which cracks can be repaired & which must remain unaddressed for further monitoring" and must provide a "written time table . . . indicating priority areas of attention and the order in which repairs should proceed." R.351-8, ex.697:MMSDApp-319. He wrote that his "level of confidence in this structure [was] slipping"

and he required that GAS "in their best professional opinion state the current status of this structure in a report due by early Feb., 1997." R.351-8–9, ex.697:MMSDApp-319–20.

Owners presented evidence that the underpinning called for in Zdenek's "utmost importance" letter was performed in 1997. R.384-1012–23:MMSDApp-0724–35. They did not present GAS's opinion on the "probable cause" for the building damage, but they also presented no evidence that they explored any potential cause other than the Tunnel—the existence of which was well-known—between the Zdenek-GAS correspondence and the time they filed suit alleging the Tunnel caused the damage.[11] Zdenek testified that, during his tenure, the only thing that owners did was to monitor the columns and underpin on an

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[11] Owners' failure to pursue any other cause makes cases such as *Kolpin v. Pioneer Power & Light Co.,* 162 Wis. 2d 1, 25, 469 N.W.2d 595 (1991), inapplicable. In *Kolpin*, the plaintiffs' diligent efforts to evaluate causes other than the defendant's stray voltage made unreasonable the jury's finding that they should have discovered their claim outside the statute of limitations period. *See Gumz v. N. States Power Co.*, 2007 WI 135, ¶34–41, 305 Wis. 2d 263, 742 N.W.2d 271.

as-needed, as recommended basis. R.384-1039:A-Ap.866. These are the same facts on which they ultimately alleged that the District had caused damage to the Boston Store building.

The testimony of Ray Bolton, Zdenek's immediate predecessor, and Richard Stehly also likely informed the jury's conclusion. Bolton testified that in his 19 years, Owners ignored the pile problems, including GAS's suggestion of a wetting system. R.384-1040,1069–79:MMSDApp-0739,0745–46. And Stehly, Owners' principal expert, testified that the Tunnel's construction in 1990 was the trigger for the increased settlement. R.385-1340:A-Ap.940. Owners submitted no evidence that Stehly's opinion was unavailable until after June 4, 1997.

Thus, the evidence, including the Zdenek documents the jury requested during deliberations (R.391-1, 10:MMSDApp-0809A–09B), allow the jury's finding that Owners should have known before June 4, 1997 (R.403-2:A-Ap.586) of the same facts on which they relied in 2003 to accuse the District of causing damage to the building. The circuit court therefore erred in changing the jury's answer on claim accrual.

III. Owners' Failure to Serve a Notice of Claim and Itemization of Relief Requires Judgment for the District.

Owners did not serve either a notice of claim or an itemization of relief sought, as required by Wis. Stat. §893.80(1) (emphasis added), which provides:

> (1) ***[N]o action may be brought*** **or maintained** ***against any . . . political corporation***,. . . ***unless***:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, ***written notice of the circumstances of the claim signed by the party, agent or attorney is served*** on the . . . political corporation . . .; ***and***
>
> (b) A ***claim containing the address of the claimant and an itemized statement of the relief sought is presented*** to . . the defendant . . . and the claim is disallowed.

The Owners' failure to meet these requirements bars this litigation. *See Colby v. Columbia County*, 202 Wis. 2d 342, 362, 550 N.W.2d 124 (1996).[12]

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[12] This Court reviews de novo the circuit court's application of the §893.80(1) to the uncontested facts. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 189, 515 N.W.2d 888, 892 (1984), *overruled on other grounds by*

A. A notice of claim served by different entities, which never owned the building but falsely assert that they are the claimants, does not satisfy §893.80(1).

Saks, a distinct corporation that owned Parisian, and WISPARK, a distinct limited liability company that is owned ultimately by the same holding company as Bostco, are the only entities that served a notice of claim relating to the Boston Store building. R.46-5–7:MMSDApp-0088–90. Neither Saks nor WISPARK ever owned the building. R.383-834:MMSDApp-0703. But they served a notice of claim on July 19, 2001, in which they identified themselves as "Claimants," stated that they owned the Boston Store building, and claimed that the District was liable to them:

> PLEASE TAKE NOTICE that WISPARK Holdings LLC . . . and Saks Incorporated . . . (together 'Claimants') by their attorneys . . . present . . . this Notice of Claim. . . .
>
> At all material times, Claimants have owned the Boston Store . . .

State ex rel. Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 547 N.W.2d 587 (1996).

> Because of the damage MMSD caused, Claimants have repaired and must make additional repair to the wooden timber piles . . . at substantial cost. Consequently, Claimants are seeking monetary relief from MMSD to offset the damages caused by MMSD.

R.46-5–6:MMSDApp-0088–89. These non-owners also served a separate Notice of Itemized Relief Sought in which they again identify themselves as "Claimants" and purported to "itemize[ ] the damages that Claimants incurred as a result of the injury described in the Notice of Claim previously served on the MMSD on July 19, 2001." R.46-7–8:MMSDApp-0092–93.

Owners argued that Saks and WISPARK were undisclosed agents and that the notice was "intended to be on behalf of" Parisian and Bostco. R.44-2:MMSDApp-0081; R.45-2:MMSDApp-0083. Owners' counsel, however, candidly confessed that confusion resulted in the notices and claims erroneously being sent on behalf of the wrong entities: "The reason [the notice and claim] wasn't brought in the correct name is that these companies are so inter-related . . . that even the people who are the directors of the company, the president of the company didn't realize they had

filed the notice of claim [and] itemization of damages on behalf of the wrong party . . . ." R.369-8–9:MMSDApp-0457–58.

Owners also argued, and the circuit court accepted, that non-owners' notice and statement of relief put Owners in "substantial compliance," because Owners and non-owners had the same street address (R.369-9–17:MMSDApp-0458–66)—which WISPARK and Bostco did not (*compare* R.37-6:MMSDApp-0006, *with* R.51-3:A-Ap.103)—and used the same law firm.. Owners and the circuit court relied on *Thorp v. Town of Lebanon*, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59. But *Thorp* requires substantial compliance with §893.80(1)(b)'s four requirements—(i) claimant's address, (ii) itemized statement of relief, (iii) presented to the appropriate clerk, and (iv) disallowed by the governmental entity. The Thorps' letter identified themselves as the claimants, provided the address of their attorneys, and substantially complied with §893.80(1)(b)'s service-on-the-clerk requirement because it was sent to several government officials involved in the challenged rezoning. *Id.* ¶32.

Neither *Thorp* nor any other case holds that a notice of claim or claim complies with §893.80(1) when those items are filed by entities that falsely assert they are claimants and falsely assert they are owners of allegedly damaged property. To "substantially comply" with §893.80(1), the Supreme Court has held, a "written claim must be definite enough to fulfill the purpose of the claim statute—to provide the municipality with the information necessary to decide whether to settle the claim. The municipality must be furnished with sufficient information so that it can budget accordingly for either a settlement or litigation." *DNR*, 184 Wis. 2d at 198 (citation omitted). A written claim that falsely states the claimant's identity fails this test: The identity of the claimant is always material to the decision whether to settle or budget for litigation.

The circuit court's decision requires the District to divine that when Saks and WISPARK untruthfully defined themselves as "Claimants" and untruthfully asserted they owned the Boston Store building, they really meant they were only Owners' agents. The law does not require government entities to guess at their peril about

who is the actual claimant. This Court has held that in addition to providing notice of the claim, the notice must identify the actual claimant so that the government entity can identify the claim's merits: "unless the government entity has 'actual knowledge' of both the claimant and his or her claim, the investigation and evaluation envisioned by the statute is impossible." *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 220–21, 556 N.W.2d 326 (Ct. App. 1996)(emphasis added).

While *Markweise* was a case in which the barred undisclosed claimants were class members, its principle applies equally here. Just as the individual class members in *Markweise* were separate persons, WISPARK, Saks, Parisian and Bostco are each separate legal entities that must individually comply with notice of injury and notice of claim requirements. That the actual claimant's identity matters is evidenced here by the fact that the non-owners' notice of itemized damages assert injuries that occurred in 1997 and 2000, before Bostco owned the property. One's settlement calculus is obviously different if one knows that the claimant did not own the property during a significant portion of the time for which damages

are sought. And the statutory notice is intended to identify the claimants to facilitate resolution of claims: Allowing persons with no interest to file notices defeats this purpose, since governmental bodies will be forced to conduct due diligence in each instance to ensure that they are settling claims with those persons who actually are potential claimants.

B. Owners also did not establish actual notice.

No actual notice excuses Owners' failure to provide written notice. If a claimant does not provide timely written notice, the claim may be preserved if the government entity is shown to have "had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to [the government entity]." Wis. Stat. §893.80(1)(a).

But the section unambiguously requires that the government have actual notice of the claimant's claim within 120 days of the occurrence. Owners produced no evidence the District had timely actual notice "of both the claimant and his or her claim." *Markweise*, 205 Wis. 2d at 221. Nor could Owners show that the District had timely actual notice of a

damaged foundation at the Boston Store building. Actual notice, therefore, does not remedy their failure properly to serve a notice of claim.

IV. The Post-Judgment Order to Line the Tunnel Is Barred by §893.80, by Procedural Fault, and by the Court's Failure to Consider Equitable Factors.

A. Injunctive relief is barred by Wis. Stat. §893.80.

1. Section 893.80(4) bars injunctive relief relating to the discretionary design and construction of the Tunnel.

Section 893.80(4) bars any "suit"—at law or in equity—to challenge discretionary governmental acts. No suit to redesign and reconstruct the Tunnel—that is, no suit of the type into which Owners and Judge DiMotto converted this one after Judge Kremers applied the §893.80(3) damages limitation—can lie.

Section 893.80(4) allows no suit—including this one—to remedy discretionary acts of tunnel "adoption, design, [or] implementation." *See MMSD*, 277 Wis. 2d 635, ¶60. There can be no question that Judge DiMotto ordered the District to line the Tunnel with concrete as relief for acts of Tunnel design or construction (or for the Tunnel's

very existence)—acts for which the District is immune. *Id.*

Judge DiMotto erred in her suggestion that she could ignore the §893.80(4) bar "to injunctive relief . . . [on grounds that it] was an issue that should have been brought up earlier." R.400-58:MMSDApp-0977. The District had consistently opposed Owners' entire action on §893.80(4) grounds. *See, e.g.*, R.14-1–33. Judge Kremers had ruled early on that the case was *not* about "actually seeking injunctive relief for lining a portion of the tunnel" (R.371-18:MMSDApp-0486):

> The Court: … We are not going to have a trial about whether, how a lined tunnel performs as opposed to an unlined tunnel. That is not relevant in my view.

R.371-23–24:MMSDApp-0491–92.

In response to Owners' belated injunction request, the District again raised immunity, arguing, "Granting Plaintiffs injunctive relief strips the District of immunity and usurps the authority of the agencies involved in the decision-making process. *See also* §893.80(4)." R.288-8:MMSDApp-0267. There was no waiver.

Owners argued post-verdict that Wis. Stat. §893.80(4) did not bar their claims because "[t]here

is no immunity for negligent operation and maintenance of a public works project and the *only* question regarding [the District's] negligence put to the jury was whether it operated or maintained the deep tunnel negligently." R.291-2 (emphasis in original). While this analysis is wrong for reasons explained above, it underscores an error. Judge DiMotto did not enjoin the District from a particular manner of operating the Tunnel or conducting a particular method of maintenance: She ordered the Tunnel's redesign and reconstruction, even though §893.80(4) plainly bars any suit to obtain that relief. *See MMSD*, 277 Wis. 2d 635, ¶60.

2. Section 893.80(3) & (5) limit relief to $50,000, and do not allow an affirmative injunction costing the public millions of dollars.

Owners sought an injunction forcing the District to line the Tunnel with concrete because, after the damages trial, Judge Kremers ruled that §893.80(3) limited each plaintiff's recovery to $50,000. To provide evidence that the claimed nuisance could be abated, Owners' expert testified at trial that lining a portion of the Tunnel was "within the capability of the underground

construction industry" (R.383-458–59:MMSDApp-0669–69A), but estimated that it would cost $10 million (R.383-523:MMSDApp-0678). Judge DiMotto's later award of that injunctive relief thus impermissibly exceeds the Legislature's limit on relief available from government entities.

As explained in the District's Response Brief, *supra*, §893.80 sets the metes and bounds of governmental liability. Section 893.80(5) makes exclusive the relief allowed under §893.80's provisions, including §893.80(3)'s damages limitation, unless the Legislature specifically provides by statute for greater relief:

> Except as provided in this subsection, the provisions and limitations of this section ***shall be exclusive*** and shall apply to all claims against a . . . governmental subdivision or agency. . . . When rights or remedies are provided by any other statute against [a governmental entity] . . . for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable.

Wis. Stat. §893.80(5)(emphasis added). The clear text of the statute does not allow for injunctive relief when damages are at issue unless such relief is specifically authorized by another statute.

The legislative policy §893.80 embodies requires an interpretation that precludes Owners' attempt to end-run the governmental damages cap by seeking injunctive relief that would impose costs far in excess of the limited damages award. To accept Judge DiMotto's reasoning that the damages cap justifies affirmative injunctive relief whenever its operation precludes an award of damages in excess of $50,000 would, as a practical matter, nullify the damages limitation in many nuisance or negligence cases where the damages exceed that amount. The Legislature's intent to protect the public fisc would be defeated whenever a plaintiff could plausibly suggest that the government should be ordered to provide a costly "fix." *Cf. Andrews v. Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2864 (2009) ("[t]he notion that Congress would limit liability to $500,000 with respect to one remedy while allowing the sky to be the limit with respect to another for the same violation strains credulity" (internal quotation marks omitted)).

Section 893.80(5) precludes this result. Unless another statute affords a right to injunctive or greater monetary relief (not the case here) the

right to damages not in excess of $50,000 is the exclusive relief provided by the Legislature. Judge DiMotto's injunction order must therefore be vacated.[13] *Cf. United States v. White Mountain Apache Tribe*, 537 U.S. 465, 478 (2003)(reasoning that it is improper to presume legislature limited one remedy while allowing "the sky to be the limit" to other remedies for the same wrong).

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[13] Owners argued below that the District had waived §893.80(5)'s application. The circuit court, without affording the District any opportunity to respond, agreed. R.401-1–7. This was legal error. In opposition to Owners' motion for injunctive relief, the District argued that the motion improperly sought relief not allowed in light of §893.80(3)'s damages limitation. R.288-1:MMSDApp-0260. The §893.80(5) issue is the same: can the circuit court award injunctive relief in addition to the capped damages award? As a result, the District was not required to cite §893.80(5) earlier to preserve the issue. *See Gansch v. Nekoosa Papers*, *Inc.*, 158 Wis. 2d 743, 463 N.W.2d 682 (1990). The "shall be exclusive" language in §893.80(5) merely augments the issue raised below.

Even if the issue were "new," this Court should address it. Whether the Legislature has prohibited the end-run around the damages limitation involves a pure question of law and an important public policy matter that would be properly considered even had it been waived below (which it was not). *See, e.g., Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶¶16–17, 284 Wis. 2d 264, 700 N.W.2d 158.

3. Section 893.80(1) bars injunctive relief when no itemized statement of relief gave notice of it.

As discussed above, §893.80(1) bars recovery against governmental entities unless the claimant timely gives notice of claim and the relief sought. Wis. Stat. §893.80(1)(b). The non-owner's notice of claim on which Owners rely made no mention of injunctive relief. Thus, injunctive relief is barred.

Judge DiMotto, however, ruled that Owners had "substantially complied" with the notice provision. R.399-12–14:MMSDApp-0891–93. In doing so, she adopted Judge Kremers' erroneous decision that ignored the fact that Owners had never served a notice of a claim. She further concluded that the non-owners' statement of itemized relief substantially provided notice of injunctive relief—of which it made no mention—by itemizing $10.8 million of *damages* for the cost of repairing the building's foundation. R.399-14:MMSDApp-0893.

Notice of damages, however, does not "substantially" comply with giving notice of injunctive relief ordering a new public works project. Proper notice of an intent to seek

injunctive relief allows the government entity to plan for the issues that litigating and complying with an injunction order would entail. Damages and injunctive relief are not transferable concepts.

B. Injunctive relief was procedurally improper.

1. Owners did not seek, and the court did not award, injunctive relief until after the expiration of §805.16's post-verdict deadlines.

Section 805.16 sets rigid deadlines for seeking relief different from that awarded in a jury verdict. Subsection (1) requires that, absent an exception not applicable here, "[m]otions after verdict shall be filed and served within 20 days after the verdict is rendered." Wis. Stat. §805.16. Subsection (3) provides that all such motions are denied unless the court signs an order resolving them "within 90 days after the verdict is rendered." *Id.* These deadlines are strictly construed and cannot be extended. *See Fakler v. Nathan*, 214 Wis. 2d 458, 464, 571 N.W.2d 465 (Ct. App. 1997); *Ahrens-Cadillac Oldsmobile, Inc. v. Belongia*, 151 Wis. 2d 763, 766-67, 445 N.W.2d 744 (Ct. App. 1989).

Owners' motion for injunctive relief—a motion that sought additional relief based on the

jury's liability findings—is unquestionably a post-verdict motion: It seeks relief different from that provided in the verdict based on the jury's findings. *Compare Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 230, 533 N.W.2d 746 (1995)(§805.16 governs "trial-related motions," rather than motions "separate from the underlying action," such as for attorneys' fees); *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 588 N.W.2d 278 (Ct. App. 1998)(request for injunctive relief based on perceived inadequacy of the nuisance award made in post-verdict motion). It is uncontested that Owners' request for post-verdict injunctive relief was neither filed "within 20 days after the verdict [was] rendered," as required by §805.16(1), nor decided "within 90 days after the verdict [was] rendered," as required by §805.16(3). Thus, that relief was barred.

Owners have argued that they should be excused from these deadlines because (1) their motion did not "seek to change a verdict answer or obtain a new trial" (R.291-3:MMSDApp-0271), and (2) their request did not "ripen" until Judge Kremers' ruled post-verdict that §893.80(3) limited damages to $50,000 per plaintiff (*id.*). The first

point is wrong: Section 805.16 does not cabin post-verdict motions to those that seek to alter the verdict or set it aside. It applies to all "trial-related motions," a category into which Owners' request for injunctive relief unquestionably falls since it implicates the nature of the judgment. *See Gorton*, 194 Wis. 2d at 230. The rule's purpose is to ensure that a judgment finally resolving all claims will be entered within 90 days of a jury verdict. Owners' interpretation of the rule, which would allow, as here, proceedings to stretch on for many months after the jury verdict was rendered, is directly contrary to that purpose.

Owners' second point is irrelevant: The District had long maintained its §893.80(3) defense, and Owners had consistently argued (incorrectly) that their nuisance claim avoided the $50,000 damages limit. *See supra* MMSD-Resp.-Br. Part I.D. Moreover, Owners told Judge Kremers before trial that the nuisance claim—their only remaining claim for which they pleaded injunctive relief—was necessary if the jury award did not fully compensate them for their claimed injuries. R.376-9–10:MMSDApp-0562–63. Judge Kremers rejected this suggestion as a "back door" means of getting

more money than a jury might find justified and stated that he would not grant injunctive relief. R.376-21–24:MMSDApp-0574–77. He reserved "until after verdict" a ruling on the District's motion for application of §893.80(3). R.376-76:MMSDApp-0629. Given this notice, Owners' decision not to make a conditional request for injunctive relief must be presumed to have been a strategic decision to pursue damages exclusively. Having chosen to ride a damages horse, Owners should not feign surprise that §805.16 precludes an untimely request for injunctive relief.

At all events, Owners should have realized that the jury verdict's nullification of their nuisance claim rendered irrelevant their erroneous contention that serial nuisance damages were available notwithstanding §893.80(3).[14] No rule or court order precluded Owners from filing a timely post-verdict motion requesting injunctive relief in the alternative should the court grant the District's

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[14] Owners' counsel acknowledged to Judge DiMotto that the District had raised the caps before trial but Judge Kremers had deferred ruling on §893.80(3) until after trial. R.395-9–10.

request to apply §893.80(3)'s damages limitation. Perhaps Owners did not want to highlight the applicability of the cap, but, regardless of the reason for not seeking timely injunctive relief, having made the decision not to do so, §805.16 bars the award.

2. Owners' claims merged into the final judgment precluding additional equitable relief.

a. Judge Kremers' October 25, 2006 "Order for Judgment" was a final order. An order is final if it "explicitly dismiss[es] or adjudg[es] . . . an entire matter in litigation as to one or more parties." *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶34, 299 Wis. 2d 723, 728 N.W.2d 670; *Tyler v. Riverbank*, 2007 WI 33, ¶17, 299 Wis. 2d 751, 728 N.W.2d 686. The October 25 order adjudicated both of Owners' remaining claims, awarding $100,000, interest, costs, and fees on their negligence claim and dismissing their nuisance claim; it provided:

> IT IS FURTHER ORDERED that ***judgment is entered*** in favor of Plaintiffs, BOSTCO LLC and Parisian, Inc., and against Defendant, Milwaukee Metropolitan Sewerage District, in the amount of $100,000, together with

> interest, plus taxable costs, fees, and disbursements of this action.
>
> IT IS FURTHER ORDERED that Plaintiffs' nuisance claim is hereby dismissed.

R.305-1–3:A-Ap.708–10 (emphasis added).

Whether an order is final is a question of law that appellate courts must decide by examining whether the order "contains explicit language dismissing or adjudging the entire matter in litigation as to one or more parties." *Wambolt*, 299 Wis. 2d 723, ¶34 n.11. "A court disposes of the entire matter in litigation," the Court explained in *Tyler*, "in one of two ways: (1) by explicitly ***dismissing*** the entire matter in litigation as to one or more parties or (2) by explicitly ***adjudging*** the entire matter in litigation as to one or more parties." *Tyler,* 299 Wis. 2d 751, ¶17 (emphasis added). Whether an order so disposes of the entire matter, *Tyler* instructs, depends on whether it includes "language related to the disposal of [the plaintiff's] ***claims***." *Id.* ¶19 (emphasis added). Thus, where, as here, an order contains language that "dismisses or adjudges" all claims, it is final and subject to appeal under §808.03. *Id.* ¶3.

b. Judge Kremers' final order adjudicating Owners' remaining claims foreclosed additional relief. Under the common-law doctrine of merger, when a valid, final judgment in favor of the plaintiff is entered, "[t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof." *Prod. Credit Ass'n of Madison v. Laufenberg*, 143 Wis. 2d 200, 205, 420 N.W.2d 778 (Ct. App. 1988)(internal quotation and quoting citation omitted). Once judgment is entered, the claims merge into the judgment, and any action must be maintained on the judgment. *Id.*; *see also Waukesha Concrete Prods. Co. v. Capitol Indem. Corp.*, 127 Wis. 2d 332, 343–44, 379 N.W.2d 333 (Ct. App. 1985).

Judge DiMotto thus erred in granting injunctive relief after the circuit court had entered judgment on Owners' claims, merging the claims into the judgment. The judgment dismissed the nuisance claim, which was the only remaining claim for which Owners pleaded injunctive relief. Owners did not (and could not) seek relief from the judgment under §806.07, which is the only proper procedural mechanism, other than appeal, for

modification of a judgment. *See also* RESTATEMENT (SECOND) OF JUDGMENTS §18 (1982).[15]

3. Owners' appeal of the final judgment barred a later injunction.

Owners' January 19, 2007 appeal from the October 25, 2006 final order deprived the circuit court of jurisdiction to award injunctive relief. Owners' appeal was perfected on January 24, 2007, the day the §59.20(2)(b) "record"—i.e., the docket sheet—was transmitted to this Court.

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[15] On November 7, 2006, Judge DiMotto entered an order purporting to "modif[y]" the October 25 order "insofar as it may be interpreted to be a final order" and directed the clerk not to enter a separate "judgment" in addition to the October 25 order. As *Wambolt* and *Tyler* make clear, this order does not, and could not, deprive the October 25 order of finality. *See also Harder v. Pfitzinger*, 2004 WI 102, 274 Wis. 2d 324, ¶3, 682 N.W.2d 398. Indeed, the November 7 order does not even purport to vacate the October 25 order, and, at all events, it could not have done so, since Judge DiMotto had no basis for vacating the October 25 final order and thereby extending the time to appeal. *See Eau Claire County v. Employers Ins.*, 146 Wis. 2d 101, 111, 430 N.W.2d 579 (Ct. App. 1988); *cf. Edland v. Wis. Physicians Serv. Ins. Corp.*, 210 Wis. 2d 638, 647–48, 566 N.W.2d 519 (1997) ("circuit court has no authority to vacate and reenter" a final order absent a proper §806.07 motion).

Under the well-established common-law rule incorporated into §808.075, the circuit court is authorized to act after the filing of a notice of appeal "until the record has been transmitted to the court of appeals." Wis. Stat. §808.075(3). The "record" to which that section refers is "a copy of the trial court record maintained pursuant to §59.40(2)(b) or (c)." Wis. Stat. §809.11(2). Section 59.40(2)(b) (sub. (c) applies only to criminal cases) describes the docket sheet, which was filed with this Court no later than January 25, 2007—five days before Judge DiMotto announced her order of affirmative injunctive relief and fourteen days before the order was first reduced to writing.[16] Consequently, the circuit court's later injunction orders are ineffective. *See Hengel v. Hengel*, 120 Wis. 2d 522, 355 N.W.2d 846 (Ct. App. 1984).

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[16] As Owners have candidly conceded, §808.07(2), which allows circuit courts to stay judgment pending appeal, "when read in context . . . does not appear to contemplate the type of injunctive relief" that Owners sought from Judge DiMotto. Appellants' Mot. for Determination of Finality, No. 2007AP000221, p.10.

C. The circuit court's failure to hold a hearing and consider all relevant factors before awarding injunctive relief was improper.

At an October 11, 2006, status conference, Judge DiMotto informed the parties that in considering Owners' motion for injunctive relief, she was first going to decide whether injunctive relief was authorized under the circumstances, and would then allow the parties to be heard on the issue of whether such relief was appropriate. R.395-5–6:MMSDApp-0861–62. Rather than follow this course, she announced on January 30, 2007 that she was awarding the requested injunction to line the Tunnel because §893.80(3) rendered damages inadequate and, based on her review of the trial transcript, Owners were entitled to the form of abatement—lining the tunnel—for which they argued at trial in connection with their (at this point dismissed) nuisance claim. R.399-14,29:MMSDApp-0893, 0908. While circuit courts generally have broad discretion to grant an injunction, the circuit court's exercise of that discretion here, even if it were not otherwise foreclosed, was erroneous.

1. Judge DiMotto, as a successor judge, could not order injunctive relief based on the trial evidence.

Judge DiMotto, as successor judge, could not properly award relief based on evidence presented at the trial before Judge Kremers:

> A judge who did not hear the evidence cannot render a valid judgment in a cause notwithstanding the testimony may have been written down and preserved. He cannot make any finding of fact in a cause tried before his predecessor.

Cram v. Bach, 1 Wis. 2d 378, 383, 83 N.W.2d 877 (1957); *see also In re Popp's Estate,* 82 Wis. 2d 755, 770–71, 264 N.W.2d 565 (1978). *Cram* prohibits a successor-judge from "giv[ing] approval to the jury's findings or making findings of h[er] own upon the evidence which [s]he read in the transcript." *Id.* Judge DiMotto did exactly that in awarding injunctive relief. For example, in granting the relief she explained that she relied on the evidence submitted at the jury trial presided over by Judge Kremers:

- "it is in fact a no-brainer to conclude that the remitted $100,000 is an inadequate remedy at law . . . ***It is amply supported in the record, in***

the trial of this matter in particular" (R.399-9–10:MMSDApp-0888–89 (emphasis added));

- "The District has asserted misconduct, unclean hands, . . . based on the issue of the well. . . . ***The well issue came up in expert testimony during trial***. I adopt Plaintiffs' argument [that Owners' expert testimony of the well's effect should be credited over the District's expert] (R.291-10–12:MMSDApp-0278–80; R.399-15:MMSDApp-0894 (emphasis added));

- "***there was unrebutted expert testimony at trial*** . . . that the tunnel must . . . get the complete lining installed with all joints and cracks sealed to stop groundwater inflow and drawdown." (R.399-26–27:MMSDApp-0905–06 (emphasis added));

- "Plaintiffs requested that the tunnel be lined for one half mile on either side of the Boston Store building because this is the only specific means of restoring the groundwater to levels that will prevent the otherwise likely future foundation damages ***established in the record***" (R.399-28:MMSDApp-0907(emphasis added)).

Judge DiMotto, like the successor-judge in *Cram*, "was without power to adopt the jury's verdict." 1 Wis. 2d at 380. Her award of relief

based on the jury's findings and her review of the record "constituted an erroneous exercise of jurisdiction," *Id.* at 383.

2. Judge DiMotto could not award injunctive relief without hearing and making findings on the equities.

Judge DiMotto's order requiring the District to line the Deep Tunnel is also irreconcilable with *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, 262 Wis. 2d 264, 664 N.W.2d 55. In *Hoffmann*, a jury concluded that the defendant power company was liable in negligence and nuisance for a deteriorating electric distribution cable that resulted in stray voltage that harmed plaintiffs' dairy herd. The circuit court ordered the power company to install a specific type of electrical distribution system at the plaintiffs' farm because it "believe[d] that the plaintiffs [were] entitled to [the] relief . . . that they request[ed because] . . . they were the victors." *Id.* ¶26. Like Judge DiMotto, the *Hoffmann* circuit court "fail[ed] to take into account relevant factors in ordering a method of abatement." *Id.* ¶28.

The Supreme Court reversed. It held that ordering a specific form of electric distribution

system without taking evidence and making findings about the merits of that system constituted an erroneous exercise of discretion. *Id.* ¶27. "The ordering of an electrical system," the Court explained, "must be based on the merits of the system ***with a record to support that*** order." *Id.* (emphasis added). Although "injunctive relief is addressed to the sound discretion of the trial court," *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979), for a trial court to award that relief, "competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction," *id.*

Thus, the circuit court could not properly order injunctive relief affecting the Deep Tunnel's construction without hearing evidence about matters such as the competing equitable considerations and considering the merits of the proposal in light of that evidence. The circuit court could not have resolved without a hearing questions about whether this section of the Deep Tunnel can safely be lined without risking sewer overflows and whether undertaking this work

complies with WDNR's requirements governing the Deep Tunnel's operation.

3. The District did not "waive" opposition to injunctive relief by not arguing equitable considerations to the jury.

Judge DiMotto ruled that she would not entertain any additional argument on why injunctive relief was inappropriate or on the specific form of relief, and held that the District had "waived" all offsetting equitable considerations by not submitting evidence of them during the jury trial for damages. R.399-29–30:MMSDApp-0908–09.

A litigant does not intelligently and knowingly waive a right to submit evidence on equitable factors by not addressing those factors in a trial where the only relief at issue is damages. Judge Kremers had stated before trial that he would not consider awarding injunctive relief, which seemed to him merely a tactic for seeking more in settlement than the jury might award. R.376-21–26:MMSDApp-0574–79. The District consequently could not have anticipated a need to dispute the cost or feasibility of lining the tunnel in order to demonstrate that injunctive relief was

improper. Judge DiMotto's subsequent ruling that the District "waived" its right to submit evidence of equitable factors was an abuse of discretion that deprived the District of its fundamental opportunity to be heard on those issues.

Judge DiMotto's ruling also replicated another error made by the circuit court in *Hoffmann*. As in *Hoffmann*, Judge DiMotto awarded plaintiffs' preferred form of injunctive relief without requesting and considering evidence about whether such relief can be afforded in compliance with state (and, in this case, federal) regulations. As in *Hoffmann*, the court below used its equitable power to order construction in an area in which it lacks expertise without considering the views of the state regulatory agency, here the WDNR, that has that expertise.

One relevant consideration the circuit court refused to entertain is the federal Clean Water Act's prohibitions on the discharge of pollutants not authorized by a permit. 33 U.S.C. §§1311, 1342(a), (b). The District's WDNR permit governs when discharges are allowed, and governs operation of the Tunnel. Only the WDNR can modify the permit or authorize changes to the

District's facilities, *see* Wis. Stat. §281.41(1)(c), and it can only do so in compliance with the Clean Water Act. WDNR affidavits submitted to the circuit court informed it of this fact: "WDNR must approve or disapprove any new plan, design, or construction proposed for the ISS [Deep Tunnel]." R.294-2:MMSDApp-0448. As the WDNR affidavits also explained, in order to accomplish the circuit court's injunctive relief, "WDNR would have to issue a new plan approval for the lining," *id.*, and WDNR "has no present intention of approving the lining." *Id.*

Remarkably, the circuit court concluded that any issues requiring WDNR's involvement should have been litigated earlier, even though Owners did not seek injunctive relief until *after* trial. Judge DiMotto was of the view that the environmental regulatory agencies should have been joined as parties:

> I don't know why [WDNR and EPA] weren't named in the matter. I don't know why that wasn't litigated. It should have been litigated. That had everything to do with whether this—whether the proper parties were joined in this lawsuit in the first instance.

R.400-47–48:MMSDApp-0966–67. Until Owners' belated post-verdict motion for injunctive relief, however, there was no basis for these agencies to be involved with this private damages action.

The circuit court's failure to consider the many equitable factors implicated by an order to line the Tunnel provides an independently sufficient ground for vacating the injunction.

CONCLUSION

The circuit court's judgment and its order of injunctive relief should be vacated and the case remanded with instructions to enter judgment in the District's favor dismissing all of Owners' claims with prejudice. Should the Court conclude that the circuit court had authority to consider equitable relief, the injunction order should be vacated and the case remanded for further proceedings affording the District a full and fair opportunity to be heard and present evidence, including evidence of equitable factors and regulatory restrictions, relating to the propriety of ordering the Deep Tunnel to be lined.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I certify that this cross-appeal brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) for a brief and appendix produced using proportional serif font and pursuant to this Court's August 30, 2010 order expanding the brief volume limitation in §809.19(8)(c) by 50%. The length of this brief is 16,420 words.

Dated: October 5, 2010.

_____

G. Michael Halfenger

CERTIFICATE OF SERVICE

I hereby certify that I will today cause a copy of 1) the foregoing response brief of the Milwaukee Metropolitan Sewerage District; and 2) the foregoing cross-appeal brief of the Milwaukee Metropolitan Sewerage District, to be delivered to:

Mark A. Cameli, Esq.
1000 N. Water Street, Suite 2100
Milwaukee, WI 53202

Dated: October 5, 2010.

_____
G. Michael Halfenger

CERTIFICATE OF MAILING

I certify that this Combined Brief of Respondent-Cross-Appellant and the separate appendix of Respondent-Cross-Appellant Milwaukee Metropolitan Sewerage District were deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class or priority mail, or other class of mail that is at least as expeditious, on October 5, 2010. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated: October 5, 2010.

_____

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E-FILING CERTIFICATION

Pursuant to Wis. Stat. §809.19(12)(f), I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

Dated this 5th day of October, 2010.

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G. Michael Halfenger