STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT I

BOSTCO LLC and PARISIAN, INC.,

Plaintiffs-Appellants-Cross-Respondents,

v. Appeals No. 2007AP221 & 2007AP1440

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant-Respondent-Cross-Appellant.

LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF

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).

Claire Silverman
(WBN 1018898)
Daniel Olson
(WBN 1021412)
LEAGUE OF WISCONSIN MUNICIPALITIES
122 West Washington Ave. (Suite 300)
Madison, WI 53703
608-267-2380
(fax) 608-267-0645

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STATEMENT OF INTEREST

The League of Wisconsin Municipalities (League) is a non-profit, voluntary association of 583 Wisconsin cities and villages cooperating to improve and aid the performance of local government. We sought to participate in this case because of the constitutional challenge to Wis. Stat. sec. 893.80(3), which limits municipal exposure for tort liability. A departure from existing precedent would jeopardize the already precarious financial state of Wisconsin municipalities and have disastrous consequences statewide.

The League also needs to be vigilant against creative attempts to transform tort actions so as to circumvent 893.80's protections. Such attempts threaten to improperly expand other areas of law (e.g., takings law) in ways that are dangerous and adverse to municipal interests. We participated in *EL Enterprises, Inc.,* at the Supreme Court because we feared the case's potential to greatly expand takings law and wanted to weigh in on the issue of whether uncaptured groundwater is owned by an overlying landowner. This case presents these same concerns.

ARGUMENT

FERDON PROVIDES NO BASIS FOR DEPARTING FROM MANDATORY PRECEDENT UPHOLDING THE DAMAGE LIMITATIONS IN 893.80(3).

In 1962, the Wisconsin Supreme Court abrogated the judicially-created doctrine of municipal immunity from tort liability, acknowledging the legislature's power to reinstate immunity or impose ceilings on the amount of

damages recoverable against municipalities if it deemed it better public policy. *Holytz v. City of Milwaukee,* 17 Wis.2d 26, 40, 115 N.W.2d 618, 625 (1962). The legislature swiftly enacted a law limiting recovery against municipalities in tort actions.[1] The legislature could have reinstated immunity, but chose to limit the amount of damages recoverable against municipalities to $25,000.

This initial limitation survived a challenge on equal protection grounds in *Stanhope v. Brown County*, 90 Wis.2d 823, 280 N.W.2d 711 (1979). Stanhope argued the limitation created two classes of plaintiffs (victims of governmental negligence and victims of non-governmental negligence) and two classes of defendants (governmental tortfeasors and non-governmental tortfeasors) and limited liability of governmental tortfeasors and recovery of victims of governmental tortfeasors. The Supreme Court held that the different classifications balanced two legislative purposes, compensating victims of government tortfeasors while at the same time protecting the public treasury. The court stated:

> We are unwilling to say that the legislature has no rational basis to fear that full monetary responsibility entails the risk of insolvency or intolerable tax burdens. Funds must be available in the public treasury to pay for essential governmental services; taxes must be kept at reasonable levels; it is for the legislature to choose how limited public funds will be spent. It is within the legitimate power of the legislature to take steps to preserve sufficient public funds to ensure that the government will be able to continue to provide those services which it believes benefits the citizenry. We conclude that the legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit.

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[1] See 1963 Laws of Wisconsin, ch. 198.

Stanhope v. Brown County, 90 Wis.2d 823, 842, 280 N.W.2d 711, 719) (1979).

One year later, the Court again upheld $25,000 limitations against equal protection challenges. *Sambs v. City of Brookfield*, 97 Wis.2d 356, 378, 293 N.W.2d 504, 515 (1980). Sambs contended that the legislature created improper classifications within the classification of "victims of public tort-feasors" by limiting the amount plaintiffs injured by reason of highway defects could recover while imposing no limit on the amounts recoverable where municipal motor vehicles were involved or where damage was caused by mobs or riots. Sambs also contended it was unreasonable to cap municipal liability at $25,000 while state liability was capped at $100,000.

The court concluded the legislature had a rational basis for such distinctions, stating:

> Government engages in activities of a scope and variety far beyond that of any private business, and governmental operations affect a large number of people. Municipal units of government have hundreds and thousands of employees. Municipal units of government maintain hundreds and thousands of miles of streets and highways and drains and sewers, subject to many hazards; they operate numerous traffic signals, parking lots, office buildings, institutions, parks, beaches and swimming pools used by thousands of citizens. 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 fundraising capacity, may lack the resources to withstand substantial unanticipated liability. Unlimited recovery to all victims may impair the ability of government to govern efficiently.

Sambs v. City of Brookfield, 97 Wis.2d 356, 377, 293 N.W.2d 504, 514 (1980). Although *Sambs* upheld the limitation, the court urged the legislature to periodically review statutory recovery limitations to insure that "inflation and political considerations do not lead to inequitable

disparities in treatment." *Sambs*, supra. The legislature responded to *Sambs* by increasing the limitation to $50,000.

Owners challenge the $50,000 limitation in 893.80(3) on equal protection grounds based on *Ferdon ex rel. Petrucelli*, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440. In *Ferdon*, the Supreme Court invalidated a $350,000 cap on noneconomic medical malpractice damages on equal protection grounds after concluding that it bore no rational relationship to the legislature's stated objectives.

Ferdon does not undermine *Stanhope* or *Sambs*. *Ferdon* emphasized that the case was "not about whether all caps ... are constitutionally permissible" and that the question before the court was a "narrow one." 2005 WI 125 ¶13. There are big differences between a cap protecting medical providers and one protecting local governments. *Sambs* expressly recognized that government is different from private business because of the breadth of activities government engages in and the number of people it deals with. Another critical difference is that medical providers profit from providing services while municipalities provide services to protect the public health, safety and general welfare. Local government services and liabilities are paid for by service fees or by levying property taxes.[2]

[2] The tax burden is not shared equitably. Residential taxpayers shoulder 71% of the property tax burden in Wisconsin while small business shoulders most of the remaining portion of the load at 21.1%. See *Property Tax Level in Wisconsin*, Wisconsin Legislative Fiscal Bureau Informational Paper 13 (Jan. 2009) at p. 4, available at http://www.legis.state.wi.us/lfb under Publications.

The legitimate concerns of ensuring funds are available to pay for essential municipal services and keeping property taxes at reasonable rates, validated in earlier cases, are even more pressing today. Municipalities are struggling to fund essential governmental services. State aid to municipalities has lagged. Municipalities must find ways to do more with less. Municipalities must comply with expensive unfunded state and federal mandates and the legislature has constrained their ability to raise property taxes imposing levy limits. Wisconsin faces an estimated budget deficit between 2.5 and 3.1 billion dollars[3] so municipalities will likely face major cuts in revenue.

Section 893.80(3) is presumed constitutional and Owners bear a heavy burden in overcoming the presumption. Any doubt must be resolved in favor of constitutionality and Owners must demonstrate the statute is unconstitutional beyond a reasonable doubt. See *Ferdon*, supra, at ¶¶ 67-68. Although the *Ferdon* court used "rational basis with bite" to examine the cap, that standard does not allow this Court to prove Owners case for them.

The *Ferdon* court reviewed many studies and reports in concluding that the cap in question bore no rational relationship to the legislature's stated objectives. Owners have not met their burden. Both *Stanhope* and *Sambs* recognized that whatever the monetary limitation on recovery, the amount will

[3] See Leg. Fiscal Bureau's Latest Estimate of the State's Budget Gap ($2.5 billion going into the 2011-2013 budget cycle.)
http://www.legis.state.wi.us/lfb/Misc/2010_07_09_WI%20Leg.pdf and criticism of Legislative Fiscal Bureau's analysis as being too low by Andrew Reschovsky, http://www.lafollette.wisc.edu/publications/workingpapers/reschovsky2010-016.pdf.

seem arbitrary because it's based on "imponderables." Although courts may disagree as to the wisdom of the amount, and may urge the legislature to reconsider it, the legislature determines the amount.

THIS COURT NEED NOT DECIDE WHETHER UNCAPTURED GROUNDWATER IS PRIVATE PROPERTY BECAUSE, REGARDLESS, *E-L* ESTABLISHES OWNERS HAVE NOT ALLEGED FACTS SUFFICIENT TO CONSTITUTE A TAKING OR INVERSE CONDEMNATION CLAIM.

Applying *E-L* to the case at hand, it is apparent that Owners have not alleged facts sufficient to constitute a taking or inverse condemnation claim. As in *E-L*, Owners claim the District "physically took" their property. But, as the court emphasized in *E-L*, "government action *outside* the owner's property that causes consequential damages within" does not constitute a taking. *E-L*, supra at ¶ 30 (emphasis added). There is no evidence in the record of any government action inside Owners' property. *E-L* distinguished *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 101 N.W. 706 (1904) and recognized similarities between the facts in *E-L* and those in *Wisconsin Power & Light v. Columbia County*, 3 Wis.2d 1, 87N.W.2d 279 (1958). Because the District's action was wholly outside Owners' property, any damages caused within were consequential. Accordingly, there is no taking. Owners' claim, like E-L's, is revealed to be a tort action clothed in takings language.

Because E-L was not really seeking compensation for the loss of its groundwater, the Supreme Court found it unnecessary to decide whether uncaptured groundwater is the property of the overlying landowner. We

submit that it is also unnecessary for this court to decide the issue because, regardless, *E-L* establishes that Owners have not alleged a taking or inverse condemnation claim.

IF THIS COURT DEEMS IT NECESSARY TO DECIDE WHETHER UNCAPTURED GROUNDWATER IS PRIVATE PROPERTY, THE LEAGUE SUBMITS SUCH GROUNDWATER RIGHTS ARE USUFRUCTUARY AND NOT POSSESSORY, WISCONSIN COMMON LAW DOES NOT RECOGNIZE OWNERSHIP RIGHTS IN UNCAPTURED GROUNDWATER AND PRIVATE OWNERSHIP IS AN UNSOUND CONCEPT.

Our *amicus* efforts in *E-L* emphasized that the groundwater in question was *uncaptured* groundwater. The same is true here. We explained why uncaptured groundwater is not privately owned. Although the Supreme Court ultimately decided it was unnecessary to resolve the issue and that its resolution was "better reserved for a future case,"[4] we repeat those arguments here lest this Court deem it necessary to decide that legal issue.

Groundwater Rights Are Usufructuary, Not Possessory

The usufructuary[5] nature of groundwater rights prohibits any claim or

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[4] *E-L Enters., Inc. v. Milwaukee Metropolitan Sewerage District*, 2010 Wis. 58 at ¶5 and nn. 16 and 20.

[5] A usufruct or *usus fructus* right is defined as: "The temporary right of using a thing, without having the ultimate property, or full dominion, of the substance." Black's Law Dictionary, 1385 (5th ed. 1979). "The right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use . . . The right is not in the *corpus* of the water, and only continues with its possession." *Eddy v. Simpson*, 3 Cal 249, 252 (1853) (emphasis in original). The usufructuary nature of water rights is part of Wisconsin riparian law. *Munninghoff v. Wisconsin Conservation Com'n*, 255 Wis. 252, 259, 38 N.W.2d 712 (1949) ("The owner of submerged soil of a running stream *does not own the running water*. . .")(emphasis added). Groundwater rights are also usufructuary; that is, they are rights to use, not own, uncaptured groundwater. *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 82, 638 P.2d 1324 (1981) (holding "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of

instruction that ownership of uncaptured groundwater is a property right. Although *E-L* did not resolve the groundwater ownership, the court unequivocally stated that the circuit court erred in instructing the jury that "groundwater is property of the person who owns the land under which it flows" because the instruction is inconsistent with its decision in *State v. Michels Pipeline*, 63 Wis.2d 278. 217 N.W.2d 339 (1974). *E.L. Enters., Inc.* 2010 Wis. 158 at n. 20. *Michels* concerned a *tort* action and adopted sec. 858A of the Restatement (Second) of Torts, providing that a landowner may not withdraw groundwater in a manner that causes unreasonable harm to another's property.

Wisconsin Common Law Does Not Recognize An Ownership Right In Uncaptured Groundwater.

There are only a handful of Wisconsin groundwater cases. However, review of key decisions shows agreement with the general principle that groundwater rights are usufructuary. They identify a qualified right to use uncaptured groundwater, not own it. In *Huber v. Merkel*,[6] the Court held:

> The right of a landowner to ***sink wells and gather and use*** percolating waters as he will, even though the flow in his neighbor's well be

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the overlying land is simply to the usufruct of the water."); *Village of Tequesta v. Jupiter Inlet Co.*, 371 So.2d 663, 668 (Fla. 1979) ("The right to use water does not carry with it ownership of the water lying underneath the land."); *Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962) ("the right of the plaintiff to groundwater underlying his land is to the usufruct of the water and not to the water itself.") and *Katz v. Walkinshaw*, 141 Cal. 116 (Ca. 1903); see *McNamara v. Rittman*, 107 Ohio St.3d 243, ¶28 , 838 N.E.2d 640 (2005) and *Chance v. BP Chems., Inc.*, 670 N.E.2d 985 (Ohio 1996) (property owners do not enjoy ownership of waters of state below their properties); see also *Pratt v. State Dept. of Natural Resources*, 309 N.W2d 767, 772 (Minn. 1981).

[6] 117 Wis. 355, 366 (emphasis added), 94 N.W. 354 (1903) *overruled by State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 288-89, 217 N.W.2d 339 (1974).

> diminished, is a property right, which cannot be taken away from him or impaired by legislation, unless by way of the exercise of the right of eminent domain or by the police power.

This holding specified an absolute right to gather and use uncaptured groundwater, not ownership of it. Moreover, *Huber* explained that the basic right to gather and use uncaptured groundwater arose "out of ownership of the *land*." *Huber,* 117 Wis. at 363 (emphasis added). Thus, *Huber* did not link the basic right to an underlying right of uncaptured groundwater ownership.

In *City of Fond du Lac v. Town of Empire*, 273 Wis. 333, 340, 77 N.W.2d 699 (1956) (emphasis added), the Court explained *Huber* as establishing "a right *to sink wells thereon and to use the water from them. . .*" Likewise, in *Michels*, the Court described the right as "an absolute right to the *use* of groundwater," *Michels*, 63 Wis. 2d at 290 (emphasis added), even though *Michels* understood *Huber* to reflect the "English Rule of absolute possession." *Michels*, 63 Wis.2d at 293. Despite the absolute possession or ownership terminology, the English Rule does not encompass ownership of the groundwater, as the Kansas Supreme Court recognized in *Williams v. City of Wichita*, 190 Kan. at 330:

> Much of the language in the cases pertaining to absolute ownership is obiter dicta and completely unnecessary to the respective decisions. . . . Thus, the use of the term "ownership" as applied to percolating water has never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself. . . . There is a right of use as it passes, but there is no ownership in the absolute sense.

Private Ownership of Uncaptured Groundwater Is An Unsound Concept That Would Increase Government Exposure For Takings, Threaten Groundwater Protection, And Deharmonize Wisconsin Water Law.

Groundwater is a vital natural resource for Wisconsin communities. In 2007, there were 11,493 public water systems, which ranked Wisconsin second nationally in the number of such systems, behind Michigan.[7] The vast majority of those systems relied on groundwater to supply drinking water and served about 2.1 million people.[8] Although substantial, Wisconsin's groundwater supplies are in trouble due to declines in groundwater level.[9] The legislature responded with 2003 Act 310, which regulates groundwater withdrawal of high capacity and some other wells. The legislation further establishes Groundwater Management Areas in northeast and southeast Wisconsin where plans will be developed and implemented to manage groundwater resources in a sustainable manner.

Grafting a right of private ownership to uncaptured groundwater threatens these and other public efforts to protect the quantity and quality of Wisconsin's groundwater. While such a property right may not eliminate protection, the financial risk of regulation will be higher, either preventing regulation or shifting massive compensation costs to the public.

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[7] *Safe Water on Tap*, Wis. Dept. of Nat. Resources (2007), available online at http:www.dnr.state.wi.us/org/water/dwg/report.pdf. Systems range from small gas stations to large cities.

[8] *Id.*

[9] *Groundwater Coordinating Council Report to the Legislature* (2008), available online at http://dnr.state.wi.us.org/dwg/gcc/rtl/2008report.pdf.

Finding such a right would also deharmonize Wisconsin Water Law. In *Michels*, the court noted "the interdependence of all water systems" and decried the "arbitrary distinction between the rules to be applied to water on the basis of where it happens to be found." *Michels*, 63 Wis. 2d at 292. It observed that "[t]here is little justification for property rights in ground water to be considered absolute while rights in surface streams are subject to a doctrine of reasonable use." *Id.* These statements show *Michels* intended to harmonize Wisconsin riparian and groundwater law.[10]

Michels' rationales for harmonizing groundwater and surface water law remain. Twenty-first century scientists do not report that groundwater and surface water are no longer part of the same hydrologic system. And, the rule that Wisconsin riparians do not own the uncaptured water touching their land is still good law.[11] There is no need to deharmonize groundwater law and surface water law in Wisconsin by ruling uncaptured groundwater is privately owned.

CONCLUSION

This court should affirm the circuit court's decision upholding sec. 893.80(3)'s limit on governmental tort damages and its summary judgment dismissal of Owners' inverse condemnation claim.

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[10] The proposition is further supported by *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), which harmonized Wisconsin diffused surface water law with riparian and groundwater law.

[11] *Munninghoff v. Wisconsin Conservation Com'n*, 255 Wis. at 259.

Respectfully submitted this 3rd day of November, 2010.

League of Wisconsin Municipalities

By: 

Claire Silverman (State Bar #1018898

By: 

Daniel Olson (State Bar #1021412)

Attorneys for League of Wisconsin Municipalities

122 W. Washington Ave. (Suite 300)
Madison, WI 53703
(608) 267-2380

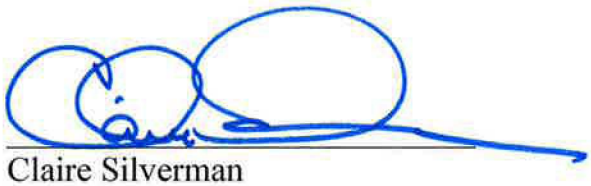
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2998 words.

I further certify that I have submitted an electronic copy of this brief which complies with the requirements of sec. 809.19(12) and that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated: November 3, 2010.



Claire Silverman