COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal Nos. 2007AP00221, 2007AP1440

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-Cross-
Appellant.

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

COMBINED BRIEF OF APPELLANTS AND CROSS-RESPONDENTS BOSTCO LLC AND PARISIAN, INC.

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STATEMENT ON THE FACTS

Throughout MMSD's combined brief, MMSD makes factual assertions without providing adequate record citation, contrary to the requirement in Wis. Stat. § 809.19(1)(e). Due to word limitations, an exhaustive recitation of every inaccurate or insufficient record citation is impossible. The following are examples:

- MMSD asserts that it authorized payment of repairs to other building owners "in order to avoid having to reimburse its Tunnel construction [sic] under the terms of their contract for the contractor resolving the claims itself" and cites to the argument of its counsel in a post-verdict motion hearing as "evidence" in support of the proposition. MMSD Resp. Br. at 14.

- Two of MMSD's statements are supported only by citations to opening statements at trial. MMSD Resp. Br. at 15-16 (citing R.381 p.61-62).[1]

- The record pages cited on pages 15-19 offer no support for many of MMSD's statements regarding the history of repairs or damage to the Boston Store building foundation and well, underpinning or constructing of rewetting systems by other building owners or that it was Boston Store's policy "to allow the piles to rot."

- With respect to a fact relevant only to trial issues, MMSD cites to several pages of a deposition transcript of a witness who did

[1] MMSD cites to page numbers of electronic versions of the trial transcripts. The official record pagination is different. Where applicable, Boston Store has included references to the official record and MMSD's appendix for ease of reference. In other cases, MMSD's record cites do not match the citations to its supplemental appendix.

not testify at trial and whose testimony was not read at trial. MMSD Resp. Br. at 17-18.

- Many of the statements made on page 20-21 are not facts but argument.

ARGUMENT

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

Contrary to MMSD's suggestion, Boston Store is not arguing that any time a party suffers property damage it establishes a nuisance claim. Instead, Boston Store contends that the jury's finding that Boston Store suffered millions of dollars in damage constitutes *per se* "significant harm," R.403 p.2, A-Ap.586; *Jost v. Dairyland Power Coop.*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969), and that this conclusion combined with the jury's other findings—that MMSD was negligent, that the manner in which MMSD maintains and operates the Deep Tunnel has interfered with Boston Store's use and enjoyment of its property and that the interference is abatable, R.403 p.3, A-Ap.587, gives rise to liability for a continuing nuisance. The sole question before this Court is whether Boston Store suffered significant

harm as a matter of law. MMSD has presented no compelling argument to the contrary.[2]

Because MMSD cannot find a successful way to distinguish the holding in *Jost*, MMSD has attempted to recategorize the issue as one it would rather argue.[3] But, the jury did *not* find that Boston Store "never proved (or even pleaded) the 'particular type of injurious consequence,' that is the essence of a nuisance claim." MMSD Resp. Br. at 56. In fact, the jury found that the particular type of harm required for nuisance exists here—it found the manner in which MMSD has operated or maintained has interfered with Boston Store's use and enjoyment of its property. *See* R.403 p.3, A-Ap.587.

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[2] MMSD's assertion that Boston Store failed to prove an interference with the use and enjoyment of its property ignores the jury's finding on that very issue, which MMSD never challenged. Further, MMSD has provided no authority for its suggestion that Boston Store was required to prove a decrease in the market value of its building to satisfy the significant harm element. *See* MMSD Resp. Br. at 61-62. To the extent it can be read to refer to the meaning of "significant harm" element, the only case MMSD cites holds the opposite. *See Costas v. City of Fond du Lac*, 24 Wis. 2d 409, 414, 129 N.W.2d 217 (1964) ("Such injury is usually a material and unreasonable impairment of the right of enjoyment or the individual's right to the reasonable use of his property or the impairment of its value."). MMSD's attempt to confuse the two elements, interference and significant harm, exemplifies its attempt to evade the real issue presented.

[3] MMSD inexplicably implies that because *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658 was decided after both *Jost* and *Krueger v. Mitchell*, 112 Wis. 2d 88, 332 N.W.2d 733 (1983), *Jost* and *Krueger* are limited or nullified by the holding in *City of Milwaukee*. *See* MMSD Resp. Br. at 62. The latter opinion did not discuss the significant harm element. *See* 277 Wis. 2d 635. The fact that it was decided after *Jost* and *Krueger* is irrelevant.

A. Damage To Property Is Recoverable Under Nuisance.

Property damages are a type of nuisance damage separate and distinct from damages for personal discomfort, annoyance, and inconvenience, but both types of damages are independently recoverable under a nuisance cause of action. *See Krueger v. Mitchell*, 112 Wis. 2d 88, 105-06, 332 N.W. 2d 733 (1983). Contrary to MMSD's uncited proposition that Boston Store had to prove "business interruption losses," *see* MMSD Resp. Br. at 65, the Wisconsin Supreme Court has held that:

> it is inappropriate to decide whether a nuisance is actionable based on the type of damages alleged, *e.g.*, actual physical injuries or property damages as contrasted to annoyance, inconvenience or discomfort. Rather, the touchstone is whether the injuries are substantial.

Id. at 107-08.

Moreover, MMSD's suggestion that Boston Store cannot recover for property damage under a nuisance claim should be rejected because it specifically stipulated that the answer to the past damage question would stand as the damages for both negligence and nuisance:

> THE COURT: … [M]y understanding is the parties agree that I would not ask the jury to answer a separate set of damage questions with respect to the nuisance claim, that the answers on

> the damage questions to the negligence claim would stand as the answers to the nuisance claim…
>
> MR. LYONS: That's right.

See R. 392 pp. 16-17, 210, A-Ap.1049, 1098.[4] MMSD cannot now argue that Boston Store did not prove nuisance damages or that none of the damages can be tied to the nuisance.

B. The Harm Suffered By Boston Store Is Significant As A Matter Of Law.

In Wisconsin, tangible injury to property is recoverable under nuisance law and as particularly relevant here, the Wisconsin Supreme Court has explained:

> *Substantial injury is defined as 'tangible' injury, or as a 'discomfort perceptible to the senses of ordinary people.' …*
> Here the damage was to tangible property. The damage was apparent and undisputed.…*We conclude that the injury was substantial as a matter of law, since … the injury was obvious injury to tangible property. Moreover, it was, in fact, of such a nature that the jury placed more than a nominal value upon the injury done.*

Jost, 45 Wis. 2d at 172 (emphasis added) (citations omitted). The nuisance harm here has ultimately manifested itself as property damage, much like the harm in *Jost.* 45 Wis. 2d 164. The Josts were not required to plead or prove that their house was uninhabitable at some point before succeeding. *Id*.

[4] Boston Store submitted a proposed special verdict with separate damage questions for nuisance and negligence. *See* R.247 pp.2, 4, A-Ap. 552, 554.

In contrast to the holding in *Jost*, MMSD suggests that Boston Store would have had to essentially "shut its doors" to prove significant harm. MMSD Resp. Br. at 65. There is no support in Wisconsin's case law for such a proposition and the notion that ongoing damage to a building's foundation is not significant harm is not rational. The record here establishes that the jury heard considerable testimony explaining how, and found that, MMSD's negligent actions caused dewatering of the ground, triggering pile rot and downdrag, eliminating the foundation's ability to support the building, resulting in millions of dollars of property damage. Boston Store Br. at 12-19.

Attempting to confuse the issue by evasion is non-responsive. Boston Store suffered significant harm as a matter of law; this Court should reverse the trial court and change the jury's answer to Question No. 10.

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

The trial court erred in reducing Boston Store's recoverable damages under Wis. Stat. § 893.80(3) to less than one percent[5] of the

[5] This 1% figure is based on a $6 million award.

damages the jury found were caused by MMSD's negligent conduct. There are four independent reasons why § 893.80(3) should not limit recoverable damages in this case: (1) the $50,000 cap is unconstitutional on its face; (2) it is unconstitutional as applied; (3) MMSD waived the cap and should be estopped from invoking it; and (4) the cap does not apply to continuing nuisances.

A. Section 893.80(3) Violates Equal Protection on its Face.

MMSD does not dispute that that under § 893.80(3), governmental tort victims who suffer over $50,000 in damages are treated differently than those who suffer less or that § 893.80(3) is subject to "rational basis with teeth" standard of review.

Under rational review with teeth, a court "need not, and should not, blindly accept the claims of the legislature" but must instead conduct an independent inquiry to determine whether the unequal treatment of citizens is "relevant to the purpose of motivating the classification." *Ferdon v. Wisconsin Patients Comp. Fund*, 2005 WI 125, ¶¶ 72, 77, 284 Wis. 2d 573, 701 N.W.2d 440.

Municipal damage caps serve the legitimate governmental interest of preventing disruptions in local government functions that

unlimited liability may threaten. *See Sambs v. City of Brookfield*, 97 Wis. 2d 356, 377, 293 N.W.2d 504 (1980). The first issue is whether the *specific* cap set forth in § 893.80(3) furthers the government's interest in preventing disruptions in local government functions. *Ferdon*, 284 Wis. 2d 573, ¶¶ 77-78. Second, this Court must determine whether the cap "is harsh and unreasonable, that is, if the limitation is too low when considered in relation to the damages sustained." *Ferdon*, 284 Wis. 2d 573, ¶ 111. This second inquiry is required because the legislature must balance the need for fiscal security against the ideal of equal justice. *See Stanhope v. Brown County*, 90 Wis. 2d 823, 843, 280 N.W.2d 711 (1979).

As explained in Boston Store's initial brief, the damage cap does not meet either standard. The legislative history of § 893.80(3) gives no indication of the justification for the $50,000 figure when it was adopted in 1981, and whatever justification there may have been in 1981 cannot continue to justify this figure three decades later.[6] Its

[6] MMSD suggests that the outcome of *Sambs*, wherein the Supreme Court upheld municipal damage caps, must be the outcome in this case, notwithstanding the passage of thirty years, in light of the holding in *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 58, 324 Wis. 2d 325, 782 N.W.2d 682. *Zardener* reconfirms the uncontroversial proposition that the Court of Appeals may not overrule the Supreme Court. As *Sambs* specifically invites revisitation and contemplates the

application is harsh and unreasonable as it limits Boston Store's recovery to less than 1% of the damages the jury found MMSD negligently caused.

In response to Boston Store's constitutional challenge to § 893.80(3), MMSD advances three unavailing arguments. MMSD's first argument can and should be rejected summarily: Boston Store has never argued that the legislature cannot enact a municipal damage cap. But the fact that the legislature may enact a cap of some sort does not inoculate the cap amount from constitutional review. *See generally Ferdon*, 284 Wis. 2d 573; *Sambs*, 97 Wis. 2d 356.

MMSD's second argument—that the constitutional review begins and ends with the identification of a legitimate governmental interest—is not legally accurate. "[F]or judicial review under rational basis to have any meaning, there must be … a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose." *Ferdon*, 284 Wis. 2d 573, ¶ 77.[7]

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possibility of a different outcome in a future case, *Sambs*, 97 Wis. 2d at 368, the Court need not overrule it to find the cap unconstitutional today.

[7] MMSD argues that statements by the supreme court acknowledging that any cap amount will inevitably involve some degree of arbitrariness strips the judiciary of its ability to review the constitutionality of a specific cap amount. While the supreme court has acknowledged that any cap amount must involve an element of

MMSD attempts to distinguish *Ferdon*, arguing that:

> 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 governmental entity when, at common law, as *Ferdon* explains, Owners would have been entitled to no recovery at all.

MMSD Resp. Br. at 31.[8] But the supreme court abrogated municipal sovereign immunity in 1967 and without § 893.80, MMSD would be subject to full liability; if this was not the case, MMSD would have no motive in defending its constitutionality.

MMSD also argues that in determining whether $50,000 is unconstitutionally low, the comparison figure should be $0 instead of damages suffered. MMSD Resp. Br. at 32. But "a statutory limit on tort recoveries may violate equal protection guarantees if … the limitation is too low *when considered in relation to the damages sustained*." *Ferdon*, 284 Wis. 2d 573, ¶ 111 (emphasis added).

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arbitrariness, it has made clear that this does *not* strip the judiciary of its obligation to insure that the limitation is not "too low when considered in relation to the damages sustained." *Ferdon*, 284 Wis. 2d 573, ¶ 111.

[8] MMSD goes on to argue that in paragraph 180 of the *Ferdon* opinion, the Court tacitly overruled the holding in *Sambs* that the *amount* of the municipal damage cap is subject to judicial review. MMSD Resp. Brief at 31. Paragraph 180 simply recites that the government has a legitimate interest in municipal damage caps, an uncontested proposition. This does not answer the question presented in this case: whether the *$50,000 amount* remains constitutional *today*. Although courts do not have the power to determine what a new cap amount should be, *Sambs* holds, and nothing in *Ferdon* overrules, that courts have not only the right, but a duty to strike down caps when they do not meet constitutional minimums.

MMSD's final argument, that there is no hardship or injustice in requiring Boston Store to pay for the damages MMSD caused, is inconsistent with supreme court precedent rejecting the notion that shifting the costs of government negligence to a few victims rather than to the public at large is a legitimate governmental interest. *Holytz v. City of Milwaukee,* 17 Wis. 2d 26, 115 N.W.2d 618 (1962).[9] Caps do not alleviate the burden of governmental negligence on the public but rather shift those costs unevenly and arbitrarily. MMSD's argument that Boston Store is a worthy victim has no place in a facial constitutional analysis.

B. Section 893.80(3) Would Violate Equal Protection if Applied in this Case.

Even if the damage cap was facially constitutional, its application in this case would violate equal protection. Equal protection is denied when a public body selectively enforces a law in

[9] MMSD wrongly asserts that Boston Store has argued that *Holytz* stands for the proposition that the government has *no* legitimate interest in limiting municipal immunity and that the legislature's enactment of § 893.80 legislatively reversed the *Holytz* holding. First, the enactment of § 893.80 was intended as a *codification* of *Holytz*. *MMSD v. Milwaukee*, 2005 WI 8, ¶53, 277 Wis. 2d 635, 691 N.W.2d 658. In any event, the legislature has no role in determining what constitutes a "legitimate" governmental interest for constitutional purposes. The legislature can no more pronounce arbitrary victimization to be a "legitimate governmental interest" than it could pronounce racial discrimination to be a "legitimate governmental interest."

a manner that is intentional, systemic and arbitrary. *State ex rel. Murphy v. Voss*, 34 Wis. 2d 501, 510, 149 N.W.2d 595 (1967). MMSD waived the cap with respect to building owners who discovered and reported their damage prior to June 30, 2004 but invoked it against owners who discovered damage thereafter.

On appeal, MMSD argues that it waived the cap with respect to the earlier payments because Traylor Brothers, the construction company, had a contractual right to seek compensation from MMSD if *it* incurred unforeseen costs resulting from differing site conditions. MMSD Resp. Br. at 39. This argument might be more convincing if the dates matched up: Traylor Brothers was required to submit the full amount it was claiming within thirty days after MMSD's determination of a differing site condition. R.124 p.108. June 30, 1994 was years after Traylor Brothers' contractual rights expired.[10]

MMSD also argues that time is not arbitrary because it is a basis for denying relief under statutes of limitation. MMSD Resp. Br. at 40. But the statutes of limitations applicable to Boston Store's

[10] MMSD contends Boston Store's as-applied challenge threatens its ability to deal with settlement on a case-by-case basis. Had MMSD actually been approaching the issue on a case-by-case basis, Boston Store would not have an as applied equal protection challenge. The MMSD representative charged with administering payments testified that the decision was not made on a case-by-case basis and that is the problem. *See, e.g.*, R.272 p.7-11, A-Ap.695-99.

claims are legislatively set and MMSD does not have the authority to move them or abrogate the discovery rule. Moreover, MMSD's policy is not analogous to a statute of limitations, which because of the discovery rule, punish only those who knowingly sit on their rights.

Alternately, MMSD suggests that unequal treatment was justified because Boston Store had a deep pile foundation while the other property owners had shallow foundations. MMSD neither explains why that distinction is material, nor disputes that this is not actually the reason for the differential treatment. *See* R.189 pp.95-96, A-Ap.1370-71 (if Boston Store had submitted its damage claim on or before June of 1994, MMSD would have accepted full responsibility).

C. Waiver and Estoppel.

The application of § 893.80(3) is barred by both waiver and estoppel. At a May 2, 2005 hearing, MMSD's counsel explicitly stated in successfully opposing discovery relevant to injunctive relief that "if the plaintiffs win, they will be *made whole* based on their damage claim alone … [t]hey can have *complete and whole relief* based on what they have already alleged in this case." R.371 pp.4, 9, 19, 24 A-Ap.182, 187, 197, 202.

MMSD relies on the fact that MMSD's counsel later, after prevailing on the argument, announced that he "[did not] *want* to waive" any legal defenses. *See* R.371 p.31, A-Ap.209. MMSD's statement does not constitute a retraction. Instead of conceding that Boston Store would not be able to recover all of its damages—such that MMSD had no basis for opposing the discovery sought—MMSD simply announced that it did not wish to be bound by its statements. MMSD next argues that its statement is not a valid waiver under the holding of *Anderson v. City of Milwaukee,* 208 Wis. 2d 18, 33-34, 559 N.W.2d 563 (1997). This argument is unavailing for the reasons set forth on page 55, footnote 35, of Boston Store's brief-in-chief.

Finally, MMSD should be estopped from taking a position now contrary to their position during litigation.[11] Under judicial estoppel, a party who convinces a court to adopt a particular position is not permitted to argue the contrary unless there has been a material change in facts. *State v. Johnson*, 2001 WI App 105, ¶ 10, 244 Wis. 2d 164, 628 N.W.2d 431. MMSD argues that it has not made inconsistent statements. But it is unclear how MMSD's statement that

[11] MMSD asserts that Boston Store did not raise estoppel with the trial court. MMSD is mistaken. *See* R.280 p.4, MMSDApp-2056.

"[i]f the plaintiffs win, they will be made whole based on their damage claim alone" is consistent with its position here that Boston Store should not be made whole.[12] As MMSD convinced the court that Boston Store would be made whole in damages and, therefore, that discovery should be limited, MMSD should be barred from arguing that Boston Store should not be able to recover fully.[13]

D. Continuing Nuisances Are Not Limited by § 893.80(3).

Finally, the full damage award should be reinstated if this Court concludes that Boston Store prevailed on its continuing nuisance claim. Section 893.80(3) caps damage at $50,000 for "any *action* founded on tort" and a continuing nuisance is a constantly recurring "action." *Stockstad v. Town of Rutland,* 8 Wis. 2d 528, 534, 99 N.W.2d 813, 817 (1959) ("every continuance of a nuisance …

[12] MMSD also advances the untenable position that what it actually meant by its statement "if the plaintiffs win" was win on its argument that the damage cap does not apply. This position cannot be reconciled with MMSD's statement shortly thereafter that Boston Store "can have complete and whole relief based on what they have already alleged." R.371 p.9, A-Ap.187.

[13] MMSD suggests that estoppel should not apply because it was mistake by an unauthorized person. However, MMSD contemporaneously recognized its statement was inconsistent with the invocation of the cap but failed to correct the "misstatement." Moreover, the statement was made by MMSD's attorneys who are authorized to make binding legal representations.

gives rise to a new cause of action."), *superseded in irrelevant part by* Wis. Stat. § 88.87.

MMSD argues, relying on *Wilmot v. Racine County*, 136 Wis. 2d 57, 400 N.W.2d 917 (1987), that while continuing nuisances may be recurring *causes of action* (i.e. claims), § 893.80(3) limits damages to $50,000 per action. *Wilmot* uses the phrases action and causes of action interchangeably. And MMSD does not address the problem of serial causes of action. Its position would encourage successive filings; this cannot be the correct interpretation of the relationship between the caps and continuing nuisance claims.

For any one of the foregoing independent reasons, this Court should find that the trial court erred in reducing Boston Store's damages to $100,000.

III. THERE IS NO CREDIBLE EVIDENCE TO SUPPORT MMSD'S "CONTRIBUTORY NEGLIGENCE" DEFENSE.

Judge DiMotto was correct when she questioned the basis for the jury's finding of contributory negligence. See R.399 p.7, A-Ap.114. Whether Boston Store knew that it had some foundation trouble due to fluctuating water levels and repaired some piles before MMSD's negligent conduct is not the question here. Boston Store is

not seeking to recover damages for having to replace piles over two decades ago.[14] Instead, the question is whether Boston Store was contributorily negligent and, if so, whether that negligence caused any of the *claimed* damage. Because MMSD erroneously conflated concepts of causation and negligence, the jury mistakenly concluded that the answer to that question is "yes." But there is no basis to uphold that conclusion for at least two reasons.

MMSD has not pointed to any record evidence suggesting Boston Store was, or should have been, aware of any effect its well allegedly had on the groundwater levels. There is none. Without evidence of such notice or knowledge or evidence suggesting that an ordinary building owner would have foreseen this complex hygrogeological cause and effect and the resulting potential for harm, MMSD has provided nothing to support its suggestion that Boston Store was negligent in the "operation and maintenance" of its well. And without such a conection, MMSD's evidence shows only an alternate cause, but not negligence.

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[14] In its Statement of Facts, MMSD includes a section entitled "The Boston Store building and its long history of foundation problems[,]" riddled with inaccurate statements and/or citations to the record. *See* MMSD Resp. Br. at 15-19. *See supra* pp. 1-2. MMSD should not be rewarded for failing to provide proper citations.

Boston Store also cannot be deemed negligent for not rewetting the ground; it was at trial and remains undisputed that adding water to the upper levels of soil under the Boston Store would have *exacerbated* the destructive downdrag forces that were pulling the timber piles from and destroying the foundation of the Boston Store. *See* R.385 pp.72-73, A-Ap.900; R.385 pp.174-75, A-Ap.926.

MMSD attempts to gloss over the issue of "downdrag" in a footnote, refusing to acknowledge that the damages Boston Store suffered were primarily due to downdrag, not pile rot. *See, e.g.*, R.385 pp.49-53,63-77, A-Ap.894-95, 898-901; R.351 (Trial Exs. 1552-018 to 025), A-Ap.1289-96. MMSD does not dispute that a building owner can do nothing to prevent downdrag—a wetting system presents a "Catch 22" situation in that it actually exacerbtaes the effect of downdrag. *See* R.385 pp.72-73, A-Ap.900; R.385 pp.174-75, A-Ap.926. MMSD's only real defense to downdrag was its theory that none of the reported settlement ever happened but the jury rejected that argument.

As there is no credible record evidence supporting MMSD's contributory negligence defense, this Court should reverse and change the jury's answer to Questions Nos. 4 and 5.

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

It is beyond dispute that where there is a "taking," just compensation is a constitutional mandate. *Eberle v. Dane County Bd. of Adjustment*, 227 Wis. 2d 609, 622, 595 N.W.2d 730 (1999). Boston Store alleged in its Amended Complaint, and has argued ever since, that MMSD's operation and maintenance of the Deep Tunnel physically took certain wood piles by draining the groundwater beneath the Boston Store building.

MMSD does not dispute that Boston Store has a property interest in its wood piles but disputes that Boston Store has a property interest in underlying groundwater. This Court previously found that citizens have a property interest in the groundwater beneath their property, *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage Dist.*, 2008 WI App 15, ¶ 11, 316 Wis. 2d 280, 763 N.W.2d 231, and the supreme court specifically declined to address the issue on appeal. *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58, ¶ 29, 326 Wis. 2d 82, 785 N.W.2d 409.

MMSD also does not dispute that an inverse condemnation claim may be predicated on "some direct and physical interference

with *some part* of the particular piece of property in question." *Heiss v. Milwaukee & L.W.R. Co.*, 69 Wis. 555, 558, 558, 34 N.W. 916 (1887), and that a claim for the taking of wood piles and groundwater falls under the partial taking doctrine.

Third, MMSD does not contest that a taking occurs when governmental actions "practically or substantially renders … property useless for all reasonable purposes." *Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 476, 549 N.W.2d 737 (Ct. App. 1996). Instead, MMSD summarily contends that there is no evidence to meet this standard, disregarding Boston Store's prior citation to such evidence. Boston Store Br. at 69 (citing record evidence demonstrating groundwater underlying Boston Store infiltrated into Deep Tunnel causing downdrag and pile rot such that certain timber piles were no longer able bear any meaningful weight and thereby rendered useless).

The supreme court recently addressed an inverse condemnation claim "that arose from a set of facts similar, although not identical, to those here" in *E-L Enterprises, Inc.*, 2010 WI 58. Boston Store Br. at

70.[15] In *E-L*, the court reversed a jury verdict in favor of the plaintiff who claimed that MMSD took its groundwater because the plaintiff had adduced no evidence of the value of the property taken—the groundwater—but instead, sought to recover the resulting cost of repair. *Id.*, ¶¶ 6-7, 23-24.

Where Boston Store's claim materially differs from *E-L* is in its procedural posture—Boston Store's claims were dismissed on summary judgment—and there is no reason why Boston Store should not be given an opportunity to try its claim, submitting evidence related to a proper measure of damage. Boston Store outlined three measures of damages recognized to be proper in takings cases and identified sample evidence that it would use in support of such measures. Boston Store Br. at 70-71. MMSD does not contest the propriety of the measures of damages identified but instead asserts that Boston Store has "conceded" that it will pursue repair costs as its measure of damages, although it provides no citation to where this

[15] MMSD charges Boston Store with "fundamentally changing" its theory and positions: Boston Store has consistently asserted that MMSD has taken, by rendering useless for all reasonable purposes, its wood piles and the groundwater beneath its building, that these facts are similar to those in *E-L*, that this Court's holding *E-L* supported its takings claim and that the supreme court's holding does not mandate its dismissal. Boston Store has never changed these positions and there is nothing inconsistent about them.

"concession" was allegedly made. MMSD Resp. Br. at 81. This is not an argument why Boston Store should be deprived of an opportunity to try its claim, submitting evidence of a proper measure of damages.

MMSD disagrees that *E-L* does not require dismissal of Boston Store's claim. It argues that under *E-L,* a constitutional taking will never arise from destruction of wood pilings caused by sewer related negligence. MMSD Br. at 76. However, nothing in *E-L* so holds; to the contrary, the court's repeated notation that the plaintiff's claim failed for lack of evidence about the inherent value of the property taken suggests that the claim would have been viable had such evidence been presented (and argued as the appropriate measure of damages). *E-L*, 326 Wis. 2d 82, ¶¶ 5, n.5, 24, 25, 27, n.17, 29, 41. Any concerns that Boston Store might pursue an "improper" measure of damages, although its motives for doing so would be unclear, can be remedied easily with particular remand instructions.

V. THE TRIAL COURT ERRED IN DISMISSING BOSTON STORE'S WIS. STAT. § 101.111 CLAIM.

This Court should reverse the trial court's order dismissing Boston Store's Wis. Stat. § 101.111 claim. Boston Store's property is

protected by the statute because it adjoins the property through which MMSD's excavation runs. MMSD does not dispute that Boston Store's property adjoins the property on which MMSD had an easement and through which MMSD excavated. Instead, MMSD argues that the statute does not apply because the excavation does not "touch" the Boston Store, and the Deep Tunnel is not an "excavation." *See* MMSD Resp. Br. at 85-95. Both arguments misinterpret the statute.

Section 101.111 does not require that the excavation site itself "touch" Boston Store's property; instead, the statute protects property owners from damage caused by excavations on property adjoining theirs. MMSD suggests its argument is guided by common sense, but under MMSD's interpretation, the statute would only apply if the excavation was made to the limits of a lot line, and not an inch or a yard removed. The Legislature would not have intended to protect only those neighboring properties actually "touched" by an excavation, but not those adjoining properties *affected* by an excavation.

Indeed, *Kimberly-Clark Corp. v. Power Authority*, the New York case cited by MMSD, suggests the same regarding the ordinance

MMSD finds "similar" to § 101.111—"fairly construed, the enactment applies to structures near to or in close proximity to the excavation, as well as those touching the excavated premises or 'to any land within the natural zone of support.'" 316 N.Y.S.2d 68, 73 (N.Y. App. Div. 1970).[16] Similarly, another New York court has held that an ordinance covering "adjoining structures" should be construed to protect property "within the natural zone of support[,]" and not restricted to protect only structures that "touch the excavated premises." *Victor A. Harder Realty & Construction Co. v. City of New York*, 64 N.Y.S.2d 310, 318-20 (N.Y. Sup. Ct. 1946) (holding city statutorily liable for damage to plaintiff's property separated from excavated premises by other land). Here, Boston Store's property both adjoins the property where the excavation took place and is located within the natural zone of support.

[16] The *Kimberly-Clark* case is also distinguishable on other grounds. While the court may have found that, under the circumstances of that case, the "plaintiff's structures did not come within these requirements"—being near to, in close proximity to, touching, or "within the natural zone of support" of the excavation or excavated premises—it did not hold that this "similar provision" applied only when the structures "touch" the excavation. *See* 316 N.Y.S.2d at 73. Further, the *Kimberly-Clark* jury concluded that the movement caused by the defendant did not extend to the plaintiff's property and cause damage to the plaintiff's buildings. *See* 316 N.Y.S.2d at 73-74. Here, the jury concluded that Boston Store's property was affected by MMSD's actions.

MMSD's response to the problems posed by its "touching" interpretation demonstrates that MMSD "misunderstand[s]" the statute. *See* MMSD Resp. Br. at 92. Conceding that it is not within excavator's discretion "to define the size of an 'excavation site'" to determine "which property or buildings may be 'adjoining[,]'" MMSD argues, instead, that "[c]ourt's [sic] are well-equipped to evaluate competing descriptions of the boundaries of an 'excavation site' to determine in a close case...whether buildings or property adjoin an excavation site." *See id.* But excavators are required to give notice to adjoining property owners *before* they excavate, and will be liable for any damage caused by their excavations. MMSD's interpretation leaves excavators to guess whether a court might some day conclude their excavations 'adjoin' another property or to try to litigate the issue before excavating. It could also leave property owners without due notice if excavators decide their excavations are "far enough" away, and therefore, not "adjoining." The legislature could not have intended for the application of the statute to be so uncertain.

Captioned as "protection of adjoining property and buildings," the statute's protection is not limited to those properties that "touch" excavation sites. This does not impose unreasonable burdens on large

property owners who undertake small excavations, as MMSD implies, *id.* at 91-92, as there would be no liability for prevention or underpinning because the excavation would not affect the adjoining property.

Further, § 101.111 applies to the Deep Tunnel. MMSD does not dispute that it is an "excavator," and concedes that the statute does not define "excavation." *See id*. at 94. Nonetheless, MMSD argues that § 101.111 does not apply to it because it did not engage in "traditional" from-surface excavation. *See id.* at 94-95. But the statute applies to all excavators and is not limited to so-called "traditional" excavation. If meant to apply to only "from-surface" excavations, the Legislature would have used the words "from grade" instead of "below grade." § 101.111(3)(b) ("If the excavation is made to a depth in excess of 12 feet below grade, the excavator shall be liable...") It did not. And this litigation position is directly at odds with MMSD's pre-litigation documents explicitly recognizing the application of the statute to the Deep Tunnel. *See, e. g.*, R.350 (Ex. 112), A-Ap.1262 (correspondence to contractors advising "[b]e further advised that § 101.111 … specifically governs this situation

…"). As MMSD has recognized, §101.111 applies to excavations like the Deep Tunnel.[17]

Finally, Boston Store's § 101.111 claim is not subject to municipal immunity as explained on pages 19-20 of Boston Store's Response Brief.

The trial court's decision has no basis in the language or the purpose of the statute. Because Boston Store's property adjoins the property through which the excavation runs, it is protected by § 101.111. The trial court's grant of summary judgment should be reversed.

CONCLUSION

For the foregoing reasons, Boston Store respectfully requests that this Court rule in its favor on the issues raised on appeal.

[17] *Kimberly-Clark* also does not address, on any level, whether the ordinance would have applied had tunnels been used, as opposed to the cut and cover conduit method. Nothing in the opinion suggests that the parties "simply assumed" that the ordinance would not have applied if tunnels were used, as MMSD asserts. *See* MMSD Resp. Br. at 95 n.13.

Dated this 8th day of November, 2010.

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COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal No. 2007AP00221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-Cross-
Appellant.

FORM AND LENGTH CERTIFICATION

I hereby certify this brief conforms to the rules contained in section 809.19(8)(b) of the Wisconsin Statutes for a brief and appendix produced with a proportional serif font, and pursuant to order of this Court dated August 30, 2010, this brief exceeds the length of this brief is 5,986 words.

Dated this 8th day of November, 2010.

BY s/Rebecca Kennedy
Rebecca F. Kennedy

COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-Cross-Respondents,

v. Appeal No. 2007AP002211_

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-Cross-Appellant.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of November, 2010.

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RESPONSE TO MMSD'S STATEMENT ON THE FACTS

It is the responsibility of the party advancing an argument or fact to provide this court with proper references to the record. *Anic v. Board of Review*, 2008 WI App 71, ¶ 2, n.1, 311 Wis. 2d 701, 751 N.W.2d 870. "[W]here a party fails to comply with the rule, 'th[e] court will refuse to consider such an argument …'" *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶ 6, 239 Wis. 2d 406, 620 N.W.2d 463 (additional citation omitted).

Many of MMSD's factual assertions do not meet the requisite standard but due to limited space, a detailed listing of every inadequacy is not possible. Boston Store has incorporated some specific examples that have particular bearing on the issues presented within the context of its argument below. Other facts germane to these appeals also have been set forth in Boston Store's other appellate briefs.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT BOSTON STORE'S CLAIMS ARE NOT BARRED BY THE IMMUNITY FOR LEGISLATIVE AND JUDICIAL ACTS SET FORTH IN WIS. STAT. § 893.80(4).

MMSD's principal argument on appeal is that it is immune from liability to Boston Store under Wis. Stat. § 893.80(4). MMSD's argument fails for several independent reasons:

First, it is well-established that under Wisconsin's municipal immunity law, a municipality is not immune from tort liability for the negligent operation and maintenance of a sewerage system. MMSD advanced its municipal immunity defense with the trial court and the trial court, agreeing only in part, ordered that Boston Store would be limited to presenting only evidence related to MMSD's operation and maintenance of the Deep Tunnel and that the jury would be asked only about negligent operation and maintenance. MMSD even chose the specific date its liability would attach—August 7, 1992—over Boston Store's objection that the date should be earlier. The jury found, based on voluminous trial evidence, that as of August 7, 1992, MMSD was negligent in its operation and maintenance of the Deep Tunnel.

Second, if this Court reinstates Boston Store's inverse condemnation claim or its claim under Wis. Stat. § 101.111, MMSD's immunity argument necessarily fails with respect to those claims as § 893.80(4) applies to neither.

Finally, even if MMSD were correct that Boston Store's evidence of harm was and is "all based on acts of design, construction, and implementation of the Deep Tunnel," MMSD Cross-Appeal Br. at 37, this does not establish that it is entitled to immunity. What differentiates this case from a traditional "construction" immunity case, aside from the fact that it isn't a construction case at all, is that MMSD was on notice that the Deep Tunnel was causing and continues to cause damage to the Boston Store.[1]

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[1] In addition to these three bases for finding liability, both the known danger and professional discretion doctrines should apply in this case. The known danger doctrine applies where dangerous circumstances give rise to a ministerial duty to act. *Cords v. Anderson*, 80 Wis. 2d 525, 538-42, 259 N.W.2d 672 (1977) (park manager who was aware of unguarded gorge that presented danger to hikers but who failed to place a warning sign or advise his supervisors of the condition was not immune); *Domino v. Walworth County*, 118 Wis. 2d 488, 490-93, 347 N.W.2d 917 (Ct. App. 1984) (sheriff's department dispatcher liable for failing to have the department investigate a nighttime report of a downed tree or notifying the town so it could investigate); *Voss v. Elkhorn Area Sch. Dist.*, 2006 WI App 234, ¶ 22, 297 Wis. 2d 389, 724 N.W.2d 420 (teacher using vision distorting goggles liable for failing to take any precautions to prevent injury).

The professional discretion doctrine applies when negligence relates to an act of a professional, rather than governmental nature. *See Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 686-87, 292 N.W.2d 816 (1980). To date, Wisconsin courts have

A. MMSD is Not Entitled to Immunity Because It Negligently Operated and Maintained the ISS.

1. Wisconsin Does Not Provide Municipal Immunity for Negligent Operation and Maintenance of a Sewerage Utility.

Wis. Stat. § 893.80(4) provides that "[n]o suit may be brought against any [municipal entity] for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." MMSD contends that its conduct in this case falls under one of these four categories—it does not specify which one.

It is well-established in Wisconsin law that a municipal entity is not immune under Wis. Stat. §893.80(4) for any negligence in

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only applied the professional discretion doctrine in the context of medical discretion and this Court has indicated that arguments that the doctrine should be expanded further should not be directed to this Court. *DeFever v. City of Waukesha*, 2007 WI App 266, ¶ 16, 306 Wis. 2d 766, 743 N.W.2d 848 ("Because the supreme court has refused to recognize a 'professional' exception beyond the medical context, we will not do so.") (additional citation omitted). Accordingly, the issue need not be belabored, but in order to preserve the issue for appeal, the rationale for the professional discretion doctrine is not limited to the medical field and therefore, the doctrine should not be either.

Similarly, the known danger doctrine was limited in *Lodl v. Progressive Northern Ins. Co.*, 2002 WI 71, ¶ 39, 253 Wis. 2d 323, 646 N.W.2d 314, to only those circumstances that are "sufficiently dangerous to require an explicit, non-discretionary municipal response." Although this Court is bound by the conclusions of the Wisconsin Supreme Court and therefore, not in a position to alter this standard, for the purpose of preserving the argument, Boston Store, like the dissent in *Lodl*, contends that this limiting standard in effect eviscerates the known danger doctrine by rendering it superfluous with liability for ministerial acts. *See id.*, ¶¶ 49-73 (Bradley, J., dissenting).

operating or maintaining a sewerage system. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 56, 277 Wis. 2d 635, 691 N.W.2d 658 [hereinafter *MMSD v. Milwaukee*] (municipal immunity "[does] not extend to claims arising from negligence in operating or maintaining" a public works project); *Menick v. City of Menasha*, 200 Wis. 2d 737, 745, 547 N.W.2d 778 (Ct. App. 1996) ("[w]hile the decision to install and provide a sewer system in a community is a discretionary decision, there is no discretion as to maintaining the system so as not to cause injury to residents").

MMSD disputes that *MMSD v. Milwaukee* recognizes that the negligent operation or maintenance of a sewer is not entitled to immunity. In that case, MMSD found itself on the other side of the issue—MMSD alleged that it was the victim of a municipal tort and specifically, that it suffered damage when the city failed to repair a leaky main. 2005 WI 8, ¶ 9. In arguing to this Court that the City should not be found immune for negligent maintenance of its pipe, MMSD argued as follows:

> It is clear that the City has a ministerial duty to maintain its water main system. This duty reflects the public's reasonable expectation that, once the government exercises its discretion to construct public works, it will not thereafter permit those public works to become unsafe for use by the public for whom such works were constructed…Municipal liability for property

> damage caused by municipal property is hardly unreasonable. It is consistent with Wisconsin law with regard to sewers and highways and roads.

Appellant's Br., *MMSD v. Milwaukee*, No. 02-2961, 2003 WL 23837290, at *21, 31 (citing *Menick*, 200 Wis. 2d at 745 and *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 431, 400 N.W.2d 493 (Ct. App. 1986)). Had MMSD not prevailed on these arguments, which it also made to the Supreme Court, 2004 WL 3636647, ¶¶ 27, 31-32, its arguments would be irrelevant but that was not what happened.

In the supreme court's opinion, the court noted that it would first address whether the negligence alleged was subject to municipal immunity before turning to the question whether a *prima facie* case had been established. 277 Wis. 2d 635, ¶ 50. In doing so, the court noted, with approval, that its prior precedent had established that "immunity 'would not include a failure to maintain as to a condition of disrepair or defect or a failure to operate'" a dam floodgate, *id.*, ¶ 56 (quoting *Lange v. Town of Norway*, 77 Wis. 2d 313, 320, 253 N.W.2d 240 (1977)), though it would include decisions regarding the design of public works projects. *Id.*, ¶ 58.

Based on its overview of its prior precedent, none of which the court criticized, it concluded that "when analyzing claims of immunity under § 893.80(4)…the proper inquiry is to examine the *character* of the underlying tortious acts" and that "the City may be potentially liable [for] its failure to repair the leaking water main." *Id*., ¶¶ 59, 61 (emphasis added). The court then remanded for further proceedings, reasoning as follows: "Since we cannot determine whether the City was on notice that its water main was leaking and could potentially interfere with the use and enjoyment of another's property, we cannot conclude whether its duty to repair the leaking main was 'absolute certain and imperative.'" *Id*., ¶ 62 (citation omitted).

MMSD pins its argument that it is not subject to the court's finding of potential liability for negligent operation or maintenance on this last passage. But the most notable distinction between this case and the one in *MMSD v. Milwaukee* is that in this case, the record is replete with evidence that MMSD knew that the Deep Tunnel was leaking and not only could potentially, but was actually interfering with the use and enjoyment of another's property.[2]

[2] As a number of judges have noted, jurisprudence relating to the interpretation of Wis. Stat. § 893.80(4), outside of the context of public works projects which are

2. The Evidence Submitted at Trial Supports the Jury's Finding that MMSD Negligently Operated and Maintained the ISS.

In addition to its erroneous argument that the holding in *MMSD v. Milwaukee* forecloses liability in this case, MMSD also argues Boston Store did not actually prove negligent operation or maintenance but that all of the evidence presented at trial related to the design and construction of the Deep Tunnel. What MMSD does not address is that it specifically stipulated just the opposite. The trial court asked both parties if they would agree to delineate operation and maintenance from design and construction by setting a date when the

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governed by the holdings in *MMSD* and *Menick*, has evolved in a manner that has reached the point of near diametric opposition to the original legislative intent—which was to codify the abrogation of municipal immunity but for acts of the legislature or judiciary. *Pries v. McMillon*, 2010 WI 63, ¶ 91, 326 Wis. 2d 37, 784 N.W.2d 648 (Gableman, J., dissenting); *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶¶ 61-64, 75-82, 262 Wis. 2d 127, 663 N.W.2d 715 (Prosser, J., dissenting; Bablitch and Crooks concurring); *see also Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F.Supp.2d 800, 809 (W.D. Wis. 2007) (describing judicial construction of Wis. Stat. § 893.80(4) as "a curious and expansive exercise of statutory construction").

If municipal immunity was still a common law doctrine, the court would be free to set the standard. But this immunity, to the extent it still exists in this state, derives from statute and courts may not overrule the legislature's policy choice set forth therein under the guise of statutory interpretation. However, this argument is not appropriately addressed to this Court and accordingly, is raised only to prevent an argument of waiver.

design and construction phase ended and the operation and maintenance phase began:

> The Court: Let me ask this question. Do both sides agree that the date at which, upon which the District began operating, maintaining and inspecting the tunnel is a critical start date for the fact finder to use in determining what, if any acts of negligence the MMSD committed in furtherance of those duties? Seems like posing the questions (sic) raises the answer.
>
> Mr. Lyons [counsel for MMSD]: Yes.
>
> The Court: So, you agree with that, Mr. Cameli?
>
> Mr. Cameli [counsel for Boston Store]: I do.

R.376 p.4, MMSD-App-0597.

MMSD later proposed to use August 7, 1992, the date on which the construction contractors provided MMSD with a certificate of substantial completion, as the date that would distinguish what acts were part of design and construction and what acts were part of operation and maintenance. R.377 pp.8-9. Over Boston Store's objection that immunity should have ended at the point MMSD was on notice that the Deep Tunnel was causing significant property damage to Boston Store or at a minimum, October 1990, the date on which MMSD had previously indicated construction ended, R.377 pp.3-7; R.376 p.41, MMSDApp-0594, the court accepted MMSD's proposal and ordered that the Boston Store would be barred from

presenting evidence of events that occurred before August 7, 1992, except for the limited purpose of proving notice. R.377 pp.10-13.

Although the court initially indicated it would permit pre-1992 evidence to prove notice, it changed that position at trial. The court repeatedly ruled against Boston Store's efforts to submit evidence of pre-August 1992 events to show that MMSD was on notice that groundwater infiltration into the Deep Tunnel would cause and was causing significant damage to the foundation of the Boston Store building. *See, e.g.*, R.381 p.153-62; R. 382 pp.132-39, MMSDApp-0670-75.[3] Thus, the evidence put before the jury at trial related to conduct that MMSD stipulated would constitute operation and maintenance.

Even had MMSD not stipulated that the evidence presented at trial constituted evidence related to operation and maintenance—presumably to keep out damning evidence pre-dating that time—the jury made a specific finding that MMSD's negligence related to the

[3] On page 15 of its brief-in-chief, MMSD asserts that Judge Kremers told the parties that Boston Store would be permitted to put on whatever evidence Boston Store believed related to a ministerial duty of MMSD and he would decide at the end of trial whether such conduct was immune or not. Although Judge Kremers made such a statement prior to trial with respect to certain ministerial duties, he did not follow it at trial.

operation and maintenance of the Deep Tunnel and this conclusion is amply supported by the trial record. At the conclusion of trial, the court instructed the jury that "[t]he claims in this case involve claims for negligence based on the operation, maintenance and inspection of the tunnel on or after August 7, 1992[; e]vidence of events prior to August 7, 1992, was admitted and may be considered by you insofar as it bears on the knowledge of the parties and actions of the parties after August 7, 1992." R.392 p.44, A-Ap.1056. The verdict submitted to the jury asked only about MMSD's negligence in the operation or maintenance of the Deep Tunnel and again, specified MMSD's date of August 7, 1992:

QUESTION No. 1:	On or after August 7, 1992 was the District negligent in the manner in which it operated or maintained the tunnel near the Boston Store?
QUESTION No. 2:	Answer the following question ONLY if you answered Question No. 1 "YES": Was such negligence a cause of the claimed damage to the Boston Store foundation?

R. 403 p.1, A-Ap.585.

The jury answered "yes" to both questions, finding that MMSD negligently operated or maintained the Deep Tunnel and that MMSD's negligent operation or maintenance of the Deep Tunnel was

a cause of the damage to the Boston Store building. R.403 p.1, A-Ap.505; R.393 p.20, A-Ap.1109. The jury did not find that MMSD designed, constructed, or "implemented" the Deep Tunnel in a negligent way.

MMSD's argument on appeal is in essence that even though the jury said that it found that MMSD was negligent for operation or maintenance after August 1992, what it actually found was that MMSD was negligent for design and construction prior to August 1992. More specifically, MMSD argues that the evidence submitted at trial was insufficient to support the jury's unanimous conclusion that MMSD had been negligent in its operation or maintenance of the Deep Tunnel. MMSD Cross-Appeal Br. at 16.

In reviewing the sufficiency of evidence on appeal, the relevant inquiry is whether, under any reasonable view, there is any credible evidence that leads to an inference supporting the jury's finding. *Morden v. Cont'l AG*, 2000 WI 51, ¶ 38, 235 Wis. 2d 325, 611 N.W.2d 659; *see also* Wis. Stat. § 805.14(1) (motion challenging sufficiency of evidence to support a verdict, or an answer in a verdict, may not be granted unless there is no credible evidence to sustain

finding).[4] The evidence at trial easily meets this standard. For example:

- Richard Stehly, a civil engineer with wide experience in soil and materials engineering, testified that "[t]he Boston Store has experienced large structural column movements as a result of the *operation* of the North Shore Tunnel."[5] Mr. Stehly also testified that "[i]f the *operation* of the North Shore Tunnel continues under the current conditions, the Boston Store will experience large structural column movements requiring future repair." R.385 p.43, A-Ap.893; R.385 pp.33-38, A-Ap.891-92; R.351 (Trial Exs. 1552-003 to 005), A-Ap.1285-87.

- Another expert witness, Dr. Thomas Quirk, observed the deterioration of the piles in 2001 and opined that the rot could have occurred in a time period of approximately ten years, also coinciding with the Deep Tunnel's operation. *See* R.384, pp.55-57, 88-89, A-Ap.846, 854; *but see* R.384 pp.83-85, A-Ap.853 (discussion of 10-12 year time period during cross-examination).

- Further evidence of MMSD's negligent operation of the Tunnel came from Mr. Stehly, who opined that during the period of 1990-2001, with regard to columns at equal elevation, three times as many columns were repaired and there was nearly twice as much movement in the columns than in the previous twenty-six year time period. R.385, pp.93-94, A-Ap.905-06; R.351 (Trial Ex. 1552-041), A-Ap.1298.[6]

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[4] While it is an issue of law that a municipality is not immune for negligent operation and maintenance of a public works project, the substance of MMSD's challenge is to the sufficiency of the evidence to support the jury's conclusions.

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

[6] Mr. Stehly also discussed how the foundation had been altered or repaired on several occasions prior to 1990—between the late 1940's or early 1950's and 1990. *See* R. 385 pp. 94-95, A-Ap. 906; R. 351 (Trial Ex. 1552-042), A-Ap. 1299. However, several of the column repairs or alterations were attributed to changes in

- Mr. Stehly also explained how the settlement data relating to the two sets of columns repaired in 1997 and 2001 reflect that the columns were relatively stable until the early 1992, when they suffered large settlements and were eventually jet-grouted and stabilized, R.385 pp.98-105, 138-43, A-Ap.907-08, 917-18; R.351 (Trial Exs. 1552-043-051 and 054 to 068), A-Ap.1300-08; R.385 pp.138-43, A-Ap.917-18, and how a topographical survey of the second floor of the building, drawn in 2000, corroborates the settlement of the columns repaired in 1997 and 2001, *see* R.385 pp.144-48, A-Ap.918-19; R.351 (Trial Exs. 1552-071 to 074), A-Ap.1325-28. This movement was contemporaneous with the operation of the Deep Tunnel and Mr. Stehly opined that the large movement was due to the operation of the tunnel. *See* R.385 pp.42-43, A-App893; R.385 pp.42-43, A-Ap.893; R.351 (Trial Ex. 1552-006), A-Ap.1345.

- Expert testimony also demonstrated that due to MMSD's continued negligent operation of the Deep Tunnel, the Boston Store would likely continue to suffer damage in the future, because the conditions that caused the past damages continue—"[t]he drawdown from the tunnel continues to draw the water down and make this building vulnerable"—and sooner or later, the remainder of the columns are going to need to be repaired. R.385, pp.160-61, A-Ap.922; *see also* R.383, pp.50-51 (hydrogeology expert opining same general conditions exist today); R.382 p.97, A-Ap.742; R.351 (Trial ex. 1550-009),A-Ap.1277.[7]

In addition to this expert testimony, the record evidence is more than sufficient to show that MMSD was on notice that the Deep Tunnel was leaking, that the leaking could potentially cause

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the use of the building including, for example, lowering the basement for use as retail space. R. 385 pp. 87-88, A-Ap. 904-05. Several column changes were also done for unknown reasons. R. 385 pp. 94-95, A-Ap. 906.

[7] This evidence is also discussed in great detail in Boston Store's brief-in-chief. *See, e.g.*, Boston Store Br. at 12-20.

substantial damage to Boston Store's property, and that the leaking had been occurring long enough that MMSD knew or should have known of the condition and could have remedied it in a reasonable period of time. As noted above, when a municipality is "on notice that its [public utility] [is] leaking and could potentially interfere with the use and enjoyment of another's property," it has a non-immune affirmative duty to take affirmative steps to repair the leak. *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 62.

For example, MMSD admitted that the resident engineer advised MMSD's legal services division "that groundwater intake into the tunnel construction zone might cause groundwater drawdowns to occur in the future." R.381 pp.167-68, A-Ap.737. Boston Store also introduced evidence indicating that MMSD was on notice of the potential for harm to buildings and structures. Michael McCabe, the Director of Legal Services for MMSD, confirmed that a portion of a Deep Tunnel planning document referenced potential effects that the it could have on various utilities and structures "under certain conditions." R.381 pp.144-45, A-Ap.736.

MMSD also admitted that it was "understood that too great a drawdown of groundwater from a zone wherein wooden piles are

located might have a deleterious effect on such wooden piles if the wooden piles were otherwise in sound condition." R.390 pp.15-16, A-Ap.1041. MMSD was also aware that the "drainage of water from the alluvial layer causes drainage from the overlaying marsh deposits which, in turn, leads to settlement" and that "[i]f the drainage remained uncontrolled, then subsequent settlement could lead to building damage[.]" R.381 pp.171-73, A-Ap.738; R. 351 (Trial Ex. 429).

MMSD was aware that "[o]ther potential effects are downdrag on piles, which means that the downward movement of the settling soil creates a downward force on the pile, and this is of most concern for older buildings founded on timber piles, the condition of which is not known." *Id.* MMSD once even "indicate[d] that liability for downtown settlement due to water drawdown form a great distance away will be accepted by MMSD." R.351 (Trial Ex. 359), A-Ap.1342 (minutes from a May 26, 1988 meeting statement); R.382 pp.36-38. MMSD has also identified structures at risk as a result of dewatering from the Deep Tunnel, designating them as "critical structures," and included Boston Store by name:

> This category includes those structures that are underlain by soft compressible soils such as the estuarine deposits. The structures identified are located within …the effective dewatering through of 1,000 feet of the tunnel alignment.

R.351 (Trial Ex. 290), A-Ap.1374; R.381 P.163.

MMSD cites to the testimony of two of Boston Store's four expert witnesses and characterizes their testimony as being related to construction and the Deep Tunnel's existence. *See* MMSD Cross-Appeal Br. at 16-20, 38-41. First, MMSD's contention that the fact that Boston Store' expert witnesses' conclusions depend on the existence of the Deep Tunnel advances nothing. Operation and maintenance are necessarily predicated on existence.

Second, with respect to construction, MMSD focuses on statements that the damage to Boston Store would have been far less likely had the Deep Tunnel been lined. In doing so, MMSD assumes that tunnel lining is exclusively a matter of design. However, this litigation position is directly at odds with MMSD's planning documents related to the Deep Tunnel. According to MMSD's technical documents, "[m]aintenance may include removal of solid deposits, removal of fallen rock, repair of deteriorated linings and placement of concrete lining in deteriorated, unlined areas." R.381

pp.145-48; R.351 (Trial Ex. 206). MMSD may have immunity to chose a tunnel design that provides that no lining will be installed in certain areas initially but as a matter of maintenance, will be installed upon deterioration of the rock; but this immunity does not extend to a failure to actually undertake such maintenance when necessary.[8]

Nothing in *Hocking v. City of Dodgeville*, 2010 WI 59, 326 Wis. 2d 155, 785 N.W.2d 398 holds otherwise. In *Hocking*, the court held that a statute, inapplicable here, that sets forth an exception to a statute of repose for actions resulting from negligent maintenance of a roadway improvement would not encompass claims in which maintenance had been proper but the design of the improvement caused the damages claimed. *Id.*, ¶ 49. In so doing, the court noted that this holding was consistent with the generally understood meaning of "maintenance" as "'the work of keeping something in proper condition.'" *Id.*, ¶ 48 (citation omitted). But Boston Store's argument in this case is that MMSD failed to keep the Deep Tunnel in proper condition.

[8] MMSD contends that the use of the word "may" in this document has some significance, but *MMSD v. Milwaukee* makes clear that a ministerial duty to perform corrective maintenance is triggered upon notice of leakage and potential resulting interference with the use and enjoyment of another's property. 277 Wis. 2d 635, ¶ 62.

The mere fact that something is designed with certain anticipated maintenance requirements does not render such requirements elements of design; a car may be designed with the anticipation that an owner will change the oil periodically but if damage results from a failure to do so, it is not reasonable to insist that the true cause was the car's "design flaw" of needing changes.

Finally and most important, MMSD's argument is misplaced: when an appellant challenges the sufficiency of the evidence to support a jury's finding, "appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." *Morden*, 235 Wis. 2d 325, ¶ 39. Accordingly, whether the testimony of Doctors Turk and Nelson can be said to encompass design and construction is beside the point; the relevant inquiry is whether there is evidence to support the jury's finding that MMSD was negligent in operation or maintenance. *See id*. Here, there is.

B. Wis. Stat. § 893.80(4) Does Not Apply to Either Inverse Condemnation or Statutory Causes of Action.

In the event that this Court reinstates Boston Store's claim for inverse condemnation and/or its cause of action under Wis. Stat.

§ 101.111, Boston Store respectfully requests that this Court make clear in its order for remand that the municipal immunity provided for in Wis. Stat. § 893.80(4) does not apply. *See Busse v. Dane County Reg'l Planning Comm'n*, 181 Wis. 2d 527, 540, 511 N.W.2d 356 (Ct. App. 1993) ("Claims based on the taking of private property for public use without just compensation are not barred by sovereign immunity …") (citing *Zinn v. State*, 112 Wis. 2d 417, 435, 334 N.W.2d 67 (1983)); *Crawford v. Whittow*, 123 Wis. 2d 174, 183-84, 366 N.W.2d 155 (Ct. App. 1985) (specific statutory prohibition trumps municipal immunity conferred in Wis. Stat. § 893.80(4)).[9]

[9] In its response brief, MMSD contends that the *Crawford* holding would not be applicable to claims brought under Wis. Stat. § 101.111 because the statutory provision at issue in *Crawford* was directed to government officers while Wis. Stat. § 101.111 applies universally. However, the court's reasoning in *Crawford* had nothing to do with the fact that the statute before it pertained to government officers; instead, the court found that because the statute created a *specific* obligation, it trumped the *general* immunity provided for under Wis. Stat. § 893.80(4). *Crawford*, 123 Wis. 2d at 183-84 ("the specific prohibition against such conduct in sec. 11,33, Stats., [] prevail[s] over the general immunity granted in sec. 893.80(4)"). There can be no reasonable doubt as to the specificity of Wis. Stat. § 101.111's requirements. Moreover, MMSD is equally obliged to comply with statutes that apply universally as it is obliged to comply with statutes specifically directed at government officials.

C. MMSD Had Knowledge That It Was Causing Harm, and Should Enjoy No Immunity For The Harm It Knew It Would Cause Under WIS. STAT. § 893.80(4).[10]

Even if MMSD was correct that Boston Store's evidence of harm was and is "all ultimately based on the design, construction, and implementation of the Deep Tunnel," MMSD Cross-Appeal Br. at 36, this still does not establish that it is entitled to immunity. In this state, it is an undecided question of law "whether municipal immunity attached to the planning function should persist in view of subsequent experience or changed conditions which demonstrate an actual and substantial danger." *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 60 n.19 (citation omitted); *Allstate Ins. Co. v. Metropolitan Sewerage Comm'n*, 80 Wis. 2d 10, 17n.5, 258 N.W.2d 148 (1977) (noting that court would express no opinion as to "whether municipal immunity attached to the planning function should persist in view of subsequent experience or changed conditions which demonstrate an actual and substantial danger").[11]

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[10] If the Court concludes that there was evidence in the record to support the jury's finding that MMSD was negligent in its operation or maintenance of the Deep Tunnel from August 1992 forward, the Court need not address this issue.

[11] To the extent that this Court feels that it lacks the authority to resolve this issue—and as the Wisconsin Supreme Court has expressly noted that it has never

Although the Wisconsin Supreme Court has twice deferred on this issue, *see id.*, it has cited to the holding of the Supreme Court of California in *Baldwin v. California*, 491 P.2d 1121 (Cal. 1972). In *Baldwin*, the court concluded that a public entity does not retain its statutory immunity from liability for injury caused by the plan or design of a public works project where the plan or design "although approved in advance as being safe, nevertheless in its actual operation becomes dangerous under changed physical conditions." *Id*. at 1122. Or, in other words, "that the Legislature did not intend that public entities should be permitted to shut their eyes to the operation of a plan or design once it has been transferred from blueprint to blacktop." *Id*.

In reaching this conclusion, the court adopted the following reasoning from the Court of Appeals of New York in *Weiss v. Fote*, 167 N.E.2d 63, 66-7 (N.Y. 1960):

> design immunity persists only so long as conditions have not changed. Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity

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ruled on the issue, Boston Store believes that it is well within this Court's authority to rule on this issue—the default is no immunity. First, immunity is an affirmative defense and as such, does not apply unless MMSD proves its application. Second, it is well settled that under Wis. Stat. § 893.80(4), liability is the rule and immunity the exception. *Pries*, 326 Wis. 2d 37, ¶ 20, n.11.

> has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard.

Baldwin, 491 P.2d at 1127.

In addition, the court reasoned that its conclusion was consistent with its prior decision abrogating common law immunity and the default presumption that where there is negligence, the rule is liability and immunity is the exception. *Id*. at 1128.

Finally, the court reasoned that this conclusion was consistent with other case law recognizing immunity for design and liability for maintenance:

> The purpose of … immunity is to keep the judicial branch from reexamining the basic planning decisions made by executive officials or approved by legislative bodies. However, supervision of the design after it has been executed is essentially operational or ministerial. Consequently, it is consistent to find liability for negligence at that level when, as in the instant case, the actual operation of the planning decision is examined in the light of changed physical conditions.

Id. at 1129 n.9.

The holding in *Baldwin* is instructive here. Similar to the Supreme Court of California, the Wisconsin Supreme Court abrogated the common law doctrine of municipal immunity, under which municipalities were held immune from tort damages "unless it was deemed to be engaged in a 'proprietary function' or the relation

between the governmental entity and the plaintiff was not that of 'governor to governed,'" *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 52 (citation omitted), save for acts by a municipality in the "exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions." *Holytz v. City of Milwaukee,* 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962).

Wis. Stat. § 893.80(4) is a legislative codification of the *Holytz* opinion, s*ee MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶53,[12] and as such, it is clear that the legislature intended § 893.80(4) to confer only a narrow scope of immunity, leaving in place a presumption of liability.[13] Also similar to *Baldwin*, Wisconsin recognizes immunity for design but liability for maintenance. As noted in *Baldwin*,

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[12] Given that MMSD would not have enjoyed immunity for negligent maintenance even under the broad common law doctrine of immunity, *see Christian v. City of New London* , 234 Wis. 123, 129, 290 N.W. 621 (1940) (noting that "[t]he doctrine of the cases dealing with municipally owned waterworks is that the municipality must use proper care in maintaining the means of storage and distribution, or respond in damages to anyone injured"), it would be anomalous to find it immune for such conduct under the narrowed scope of Wis. Stat. §893.80(4).

[13] Because municipal immunity is conferred by statute rather than common law, *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 53, the answer to this question is one of statutory construction. "The goal of statutory interpretation is to determine and give effect to the legislature's intent." *State v. Greene*, 2008 WI App 100, ¶ 6, 313 Wis. 2d 211, 756 N.W.2d 411. A construction that "fulfill[s] the intent of a statute or a regulation [is favored] over a construction that defeats its manifest object." *Stuart v. Weisflog's Showroom Gallery, Inc*., 2008 WI 22, ¶ 11, 308 Wis. 2d 103, 746 N.W.2d 762.

"supervision of the design after it has been executed is essentially operational or ministerial." 491 P.2d at 1129 n.9. There is simply nothing in the history of § 893.80(4) to suggest that the legislature intended to grant municipalities free license to "ostrich-like, hide [their] head[s] in the blueprints, blithely ignoring the actual operation of [their] plan[s]." *See Baldwin*, 491 P.2d at 1127. Accordingly, municipal immunity for designing a public works project should not be found to persist when subsequent experience or changed conditions demonstrate an actual and substantial danger to the property interests of another.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT MMSD FAILED TO SUBMIT ANY EVIDENCE AT TRIAL TO SUPPORT ITS STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE.

Having decided for strategic reasons to abandon all of the evidence it had relied on before trial to support its statute of limitations argument, MMSD now appears to regret that decision.[14] But it knew then, as it does now, that it could not defend the case factually by arguing that none of this settlement ever really occurred, and even if it did, it was not caused by MMSD, while simultaneously

[14] Of course, Boston Store does not concede in any manner that this evidence actually did support MMSD's position.

arguing that Boston Store was on notice that MMSD caused the damage a long time ago. At the post-verdict hearing, the trial court emphasized the stark change from what MMSD argued before trial with respect to the statute of limitations, and the utter lack of evidence in the trial record to support the defense:

> I heard a lot about that [the statute of limitations] at the summary judgment motion and a lot of references to some other folks. Most notably Bud [Zomboracz]. Then we didn't hear about him at trial and I'm not going to get into speculating as to why that it. But it comes back to the question I asked the District at the beginning of this hearing.
>
> I think it's pretty difficult to understand how the Boston Store could be responsible for figuring out or knowing that which, to this very day, the District maintains wasn't happening. Which was that the tunnel in any of its applications; either design, construction, operation, maintenance, whatever you want to call it, was causing damage to the Boston Store's foundation.
>
> ...
>
> So, by analogy, here, with the evidence that the jury had to rely on, the only relevant evidence I think was from Joe Zdenek, ... who testified that no one ever suggested to him that the tunnel was the cause of Boston Store's settlement problems. Instead, the only testimony I recall regarding other possible causes were pile driving at the Marriott, the building immediately to the east of the Boston Store, and there was a great deal of focus on that by MMSD during Mr. Zdenek's cross-examination.
>
> ....
>
> So that in 1997, I think it is fair to say the the most anyone could claim with respect to Mr. Zdenek is that he didn't even have a hunch that MMSD was the cause of this damage. ...
>
> So, I really am at a loss to find anything in the record to support the jury's verdict.

R.394 pp.26-29, MMSD-App-0835-38.

The burden was on MMSD to prove its own affirmative defense, which it failed to do. As the trial court properly concluded, there was no evidence in the record upon which the jury could base a finding that Boston Store discovered, or in its exercise of reasonable diligence should have discovered, both the fact of the injury *and that the injury was probably caused by MMSD's conduct*. MMSD has not pointed to any evidence of any objective indication, of which Boston Store was aware or should have been aware, of such a casual relation prior to June 1997. In reality, MMSD spent all of its time arguing that none of this settlement really happened, but even if it did, it had nothing to do with MMSD. The date, June 4, 1997, was not even mentioned by MMSD. The statute of limitations special verdict question should not have been submitted to the jury, *see* R.252 pp. 4-5 (Boston Store objecting to statute of limitations question); R.392 pp. 202-204 (Boston Store moving for directed verdict on statute of limitations defense), and the trial court was correct to change the jury's answer to it.

A. MMSD Had The Burden Of Proving Its Own Affirmative Defense; It Was Not Boston Store's Burden To Disprove MMSD's Theory.

MMSD seems to suggest that the onus was on Boston Store to *disprove* MMSD's theory that Boston Store should have discovered its injury and the cause of that injury before June of 1997, instead of on MMSD to *prove* it. *See* MMSD Cross-Appeal Br. at 63-67. But as an affirmative defense, the burden of proving that the statute of limitations expired was MMSD's and MMSD failed to supply the jury with the necessary evidence to meet that burden. *See* Wis. Stat. § 802.03(3).

MMSD needed to prove that Boston Store's claim accrued on or prior to June 4, 1997, and in tort actions, a statute of limitations period "will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury *but also that the injury was probably caused by the defendant's conduct or product*." *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 411, 388 N.W. 2d 140 (1986) (emphasis added). "Discovery occurs when the plaintiff has information that would constitute the basis for an objective belief as to [the] injury *and* its cause." *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶ 27, 305 Wis. 2d 538, 742 N.W.2d

294 (emphasis added). A subjective suspicion is not enough. *Jacobs v. Nor-Lake, Inc.*, 217 Wis. 2d 625, 636-37, 579 N.W.2d 254 (Ct. App. 1998). Moreover, an "ordinary person" cannot be expected "to take extraordinary steps" in investigating the cause of his or her injury. *Id.* at 636.

MMSD failed to introduce and has failed to point this Court to any evidence of "objective information" suggesting that Boston Store should have discovered the complex, hydrogeological cause of its damages, and MMSD's responsibility for it, on or before June 4, 1997. What the trial record *does* show is that Boston Store's employee, Joseph Zdenek, was diligently seeking guidance from an engineering firm as to the root cause of the settlement problem in 1997, shortly after Boston Store received a report indicating that there had been settlement in several columns that had been relatively stable before 1990. *See* R.384 pp.103-106, 108-110, A-Ap.858-60. But there is no evidence indicating that either the engineering firm or anyone else suggested to Mr. Zdenek that MMSD could be a cause of the harm before he left in 1998. *See* R.384 p.139, A-Ap.867. In fact, Mr. Zdenek specifically testified that no one ever told him that the Deep Tunnel could have been a cause of the Boston Store settlement

problems while he was employed by Boston Store. *Id*. Instead, the record reflects that, as late as September 2008, the engineering firm believed that pile driving at the nearby Marriott could be a cause of column settlement. R.351 (Trial Ex. 2156); R.384 pp.140-42, A-Ap.867-88.

MMSD attempts to gloss over the absence of any evidence of objective information suggesting that Boston Store should have discovered the cause of its damages before June 1997 by arguing that evidence that Boston Store had foundation problems in the past, and "the Zdenek documents the jury requested during deliberations," support the jury's finding. But evidence of awareness of past damage is not equivalent to awareness of the cause of the damage at issue, and the jury requested a wide variety of documents: " the Jaques exhibit, purchase agreement … any Zdenek exhibits and the critical structures agreement.'" R.393 p.10. The jury could have asked for these exhibits for any number of reasons, and MMSD's speculation as to the jury's motivation for requesting these exhibits is all that it is—speculation. Indeed, none of the Zdenek exhibits support MMSD's argument, as outlined above. MMSD's arguments do nothing but

attempt to sidestep the reality that there is no evidence in the record to support its statute of limitations defense.

B. Evidence Of Boston Store's Awareness Of The Damage Prior To June 1997 Does Not Prove That Boston Store Should Have Been Aware That MMSD Was The Cause.

Evidence that Boston Store was aware of the damage prior to June 1997 does not prove that Boston Store knew or should have known that it was caused by MMSD by June 1997.[15] And while MMSD attempts to tell the story as if Boston Store knew of the settlement for years and did nothing to figure out what was causing it, the record (and portions of MMSD's own brief) belie such a suggestion. Contrary to MMSD's statement that "[t]he evidence showed that [Boston Store] became aware of accelerating column settlement beginning in the early 1990s ... around the same time that

[15] MMSD includes a considerable discussion of repairs made to other buildings in the 1990's in the factual background portion of its response brief. *See* MMSD Resp. Br. at 14-15. While MMSD does not reference this evidence in its argument, it must be made clear that *none* of this evidence was admitted at trial or known to the jury. Indeed, it was MMSD who objected to Boston Store's request to admit evidence of other building damage at trial and, as a result, by party stipulation before trial, all evidence of damage to other buildings was *excluded* at trial. *See* R.211pp.4-5, A-Ap.793-04 (order excluding evidence of damage to other buildings).

the Tunnel was completed[,]"[16] the evidence introduced at trial actually showed that Boston Store learned of the settlement at issue in 1996, not the early 1990's. *See* R.384 pp.103-106, A-Ap.858-59; R.351 (Trial Ex. 691), MMSD App-0317 (letter from engineering firm reporting settlement, dated June 20, 1996; columns "were all very stable before 1990"); *see also supra* p. 30. Moreover, as noted above, the evidence shows that in 1997, Boston Store sought guidance from the engineering firm that was monitoring the columns as to what could be causing the settlement. And, as noted above, MMSD's suggestion that no other causes of settlement at Boston Store were discussed is refuted by evidence MMSD itself admitted at trial. *See* R.384 pp.140-42, A-Ap.867-68 (discussion of pile driving as potential cause); R.351 (Trial Ex. 2156).

MMSD's attempt to distinguish *Kolpin v. Pioneer Power & Light Co.* 162 Wis. 2d 1, 469 N.W.2d 595 (1991), does not help its cause. In both *Kolpin* and *Gumz v. Northern States Power Co.*, 2007

[16] MMSD's citation to Boston Store's expert's testimony concerning his pre-trial analysis of the column monitoring records does not support its proposition that Boston Store was aware of accelerating column settlement in the early 1990's. The records analyzed by Boston Store's expert were not complied until the mid- to late 1990's. *See, e.g.*, R.351 (Trial Ex. 691), MMSD-App.0317; R.385 p.220, A-Ap.937.

WI 135, ¶¶ 7, 41, 305 Wis. 2d 263, 742 N.W.2d 271, there was evidence that the plaintiffs either had "hunches" or were told that stray voltage might be the cause of their problems well outside the statute of limitations period, yet the court in each case still concluded that the plaintiffs were exercising reasonable diligence and could not have objectively known or discovered the actual cause and identity of the defendant more than six years before suit was filed. *See Kolpin*, 162 Wis. 2d at 26-27; *Gumz*, 305 Wis. 2d 263, ¶¶ 51-55. While here, as in *Kolpin* and *Gumz*, there was evidence of Boston Store seeking a probable cause of its foundation trouble, unlike in *Kolpin* and *Gumz*, there was no evidence of any "hunch" or suggestion made to Boston Store that dewatering caused by the Deep Tunnel or MMSD might be the cause prior to June 1997. *See Kolpin*, 162 Wis. 2d at 12, 26; *Gumz*, 305 Wis. 2d 263, ¶¶ 7, 41. And contrary to MMSD's suggestions in its attempt to distinguish *Kolpin*, the only evidence in the record suggests that Boston Store *was* seeking to discover the cause of its foundation trouble.[17]

[17] While MMSD appears to base much of its argument on whether Boston Store exercised reasonable diligence, the issue of Boston Store's exercise of reasonable diligence was never presented to the jury, and as such, the jury answered a question that was not based on the proper legal standard. *See* R.403 p.2, A-

C. The Trial Court Was Not Clearly Wrong In Changing The Jury's Answer.

When including the statute of limitations question on the special verdict, the trial court thought the jury "would do … the right thing, which was to say, there just isn't any evidence here that Boston Store knew or should have known with reasonable diligence prior to June 4, 1997 that the tunnel was what was causing them problems." R.394 p.26, MMSD-App-0838. The trial court keenly noted that "it's pretty difficult to understand how the Boston Store could be responsible for figuring out or knowing that which, to this very day, [MMSD] maintains wasn't happening[,]" *id.*, before concluding, "I really am at a loss to find anything in the record to support the jury's verdict[,]" and changing the answer to the statute of limitations question from "yes" to "no." R.394, p.29. The trial court was not clearly wrong in doing so.

Ap.586. Boston Store moved for a directed verdict with respect to the statute of limitations question and objected to the inclusion of the question on the special verdict. *See* R.392 pp.202-04, A-Ap.1096; R.252 pp.4-5, A-Ap.579-80. But Boston Store also objected to a statute of limitations question on the ground that the inquiry must address the exercise of "reasonable diligence." R.252 p.5, A-Ap.580. Should this Court reverse the trial court on this issue, notwithstanding the fact that there is no credible evidence in the record to support the jury's answer, this Court must also grant Boston Store a new trial because the question asked of the jury did not accurately present the proper legal standard.

MMSD's emphasis on Boston Store's alleged failure to present evidence "that they explored any potential cause other than the tunnel … between the Zdenek-GAS correspondence and the time they filed suit alleging the Tunnel caused the damage" is misplaced. *See* MMSD Cross-Appeal Br. at 66. Failure to bring a claim within the applicable statute of limitations is an affirmative defense; it was MMSD's burden to put sufficient evidence in the record for the jury to conclude that Boston Store discovered or should have discovered not only its injury, but also that the injury was probably caused by MMSD's conduct by June 1997.[18] And as delineated above, the evidence in the record shows that Boston Store was exercising reasonable diligence in trying to ascertain the cause of its damages and the correct responsible party. Indeed, evidence elicited by MMSD shows that other causes were suggested well into the statutory period. Given the scientific complexity of connecting tunnel

[18] Similarly, MMSD's suggestion that Boston Store "submitted no evidence" that Boston Store's ligitation expert's opinion—that MMSD's conduct cause the damage to the Boston Store—was not available until June 1997 does not support its cause. *See* MMSD's Cross-Appeal Br. at 67. First, if anything, it was MMSD's burden to prove that it was availabe *before* June 1997. But, more importantly, MMSD did not do that because it cannot. *See, e.g.,* R.91 p.10. Impliedly suggesting to this Court that there was any basis in the record for the jury to conclude that Boston Store had the benefit of Mr. Stehly's opinion before June 1997, or June 2004 for that matter, is unwarranted. *See id.* (Stehly testifying that he was retained in August 2004).

infiltration to the foundation damage, this was not a simple matter of common sense for Boston Store. Unlike MMSD, which knew of the danger its tunnel posed to downtown buildings from its commissioned studies, Boston Store did not have such information concerning MMSD's conduct, nor did MMSD even disclose the risk of harm to Boston Store. There was no evidence in the record to enable the jury to determine that Boston Store discovered or should have discovered by June 4, 1997 that MMSD caused the damage to the foundation. MMSD failed to meet its burden. The trial court properly recognized the failure and was not "clearly wrong" when it changed the jury's answer.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT BOSTON STORE'S NOTICE OF CLAIM SATISFIES THE NOTICE OF CLAIM REQUIREMENTS OF WIS. STAT. § 893.80(1).

A. MMSD Waived The Notice Of Claim Defense.

The case law is clear that a party may not raise a notice of claim defense under Wis. Stat. § 893.80 after the parties have undertaken substantial pretrial preparation:

> The timeliness of [raising a notice of claim defense after submitting to jurisdiction] … has previously been criticized by this court and the Wisconsin Supreme Court as "unseemly" … [It is] not only violative of "fundamental fairness," but waste[s] the resources of the parties and of the court by requiring all to

> continue preparing the matter for a trial when the party eventually moving for dismissal knows that the matter may warrant disposition short of a full-blown trial, and yet fails to alert the court until the proverbial eleventh hour. We continue to condemn such practices.

Strong v. Brushafer, 185 Wis. 2d 812, 824 n.8, 519 N.W.2d 668 (Ct. App. 1994) (citations and quotation marks omitted).

MMSD litigated this case for almost a year and a half before filing a motion to dismiss based on the alleged defect in the notice of claim.[19] *See* R.1; R.34; R.35. During that time, MMSD filed an Answer and an Amended Answer, made several court appearances, filed for and obtained a substitution of the presiding judge, and overall caused the parties and the court system to expend substantial resources on the substantive facts and law of the case. *See* R.8, R.10, R.20, R.26, R.28, R.43 p.3. MMSD not only appeared before the trial court on several occasions, it even moved the court to permit it additional time to prepare its substantive expert reports. R.43 p.3. It was only then that MMSD claimed the case should not be before the court. R.34.

[19] The Complaint was filed in June of 2003, and it was not until litigating the case through October 2004 that MMSD filed its motion to dismiss raising the notice of claim issue. *See* R.1; R.34; R.35.

By its conduct, MMSD waived the notice of claim defense. *See, e.g., Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 56, 357 N.W.2d 548 (1984) (stating that a motion to dismiss based upon section 893.80 is "unseemly" after the parties have expended large sums of money in litigation). As the trial court stated with respect to MMSD's litigation of the case and late claim of a defect in the notice of claim:

> I think that the defendants in a situation like this should notify the court at the scheduling conference [that] we have an issue here that we think potentially knocks this case out right now … so we can verify that either we have a serious challenge to the competency of the court or jurisdiction of the court … but let's get that out of the way before we go down the road of having a regular scheduling order and all of that.

R.369 p.15, MMSDApp-0464; *cf.* Wis. Stat. § 802.06(2)(b) ("a motion making [the defense of lack of capacity to sue or be sued] *shall be made before pleading*." (emphasis added)).[20]

As this Court has admonished, litigating a case and expending private and public resources in such a situation "not only violates the concept of 'fundamental fairness,' it wastes the resources of the parties and the trial court. Requiring all participants to prepare the stage for trial while waiting in the wings with a potentially dispositive motion

[20] When MMSD first filed a petition for leave to appeal in this case, it characterized the alleged defect in the notice of claim as creating a lack of capacity to sue. *See Bostco LLC v. Milwaukee Metropolitan Sewerage District*, Appeal No. 2005AP000134-LV.

need not gain judicial acquiescence." *Strong*, 185 Wis. 2d at 825 (internal citations omitted). The pursuit of the notice of claim issue at such a late date is both "abusive and wasteful." *Id*. By its decision to litigate the case for nearly a year and a half, MMSD waived any objection based on any alleged defect in the notice of claim.

B. The Trial Court Correctly Concluded That Boston Store Substantially Complied With The Notice Of Claim Requirements.

The overall purpose of the notice of claim statute is to provide the municipality with "the information necessary to decide whether to settle the claim" without litigation. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 198, 515 N.W.2d 888 (1994) (citations omitted), *abrogated on other grounds in State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 594, 547 N.W.2d 587 (1996). Two principles are used to measure fulfillment of this purpose. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 28, 235 Wis. 2d 610, 612 N.W.2d 59. First, the notice must provide enough information to apprise a governmental entity of the budget it will need to set aside in case of litigation or settlement. *Id*. Second, the court should "construe[] [the notice] so as to preserve bona fide claims." *Id*.

To that end, "'only substantial, and not strict, compliance with notice statutes is required.'" *City of Waukesha*, 184 Wis. 2d at 198 (citation omitted). The notice of claim must substantially comply with the following four requirements: "1) state a claimant's address, 2) include an itemized statement of the relief sought, 3) be presented to the appropriate clerk, and 4) be disallowed by the governmental entity." *Thorp*, 235 Wis. 2d 610, ¶ 28.

The main thrust of MMSD's argument is that the notice of claim listed as claimants the parent corporations of the subsidiaries that actually owned the building. The reason for this error was that the companies were so interrelated that even their officers and directors got them mixed up. In any event, the facts here more than meet the substantial compliance standard and MMSD was in no way prejudiced.

On July 19, 2001, MMSD was served with the notice of claim, stating that the downtown Boston Store building located at 331 West Wisconsin Avenue in Milwaukee had been damaged by MMSD's nearby Deep Tunnel system. R.46 pp.5-7. MMSD was then served with the itemized statement of relief on June 22, 2002. R.46 pp.9-11.

To begin, MMSD had actual notice of the circumstances giving rise to the claim. The record is replete with evidence that MMSD had actual knowledge that it was damaging the foundations of buildings, including the Boston Store, along West Wisconsin Avenue. *See, e.g.*, R.46 pp.16-55. Regardless, there is no dispute that the notice and the itemized statement of relief together put MMSD on notice of the claim asserted by the owners of the downtown Boston Store. MMSD was provided with the address (331 West Wisconsin Avenue, Milwaukee), was provided with an itemized statement of relief, and was provided with the address of the counsel of record. The trial court found:

> The subject of the claim, that is the property damage that they were seeking recompense for is the same property that the plaintiffs in this lawsuit are seeking compensation for. That is, damage to the same piece of property, alleging that your clients damaged that property.

R.369 p.4

Because the underlying purpose of the notice of claim is to provide the municipality the opportunity to negotiate a settlement, "[t]he attorney's address is considered the equivalent of the claimant's address for the purpose of the notice of claim statute." *City of Waukesha*, 184 Wis. 2d at 198. Given the opportunity to explain how

the name and address of the attorney in the notice of claim was insufficient, coupled with the fact that both the notice and the lawsuit alleged continuing damage to the foundation of the downtown Boston Store building, MMSD's attorney argued that he did not know who to call because the Plaintiffs' firm "is a large firm and they have lots of clients." R.369 p.2. Presumably, MMSD could have started with the attorney who signed the notice.

There is no question that the notice "provide[d] enough information to apprise [MMSD] of the budget it [would] need to set aside in case of litigation or settlement." *Thorp,* 235 Wis. 2d 610, ¶ 28. MMSD has always been aware of the claim for damages by the owners of the Boston Store, and has always been aware of the identity and address of their attorneys. There is no question that the trial court properly construed the notice "'so as to preserve [Boston Store's] bona fide claims.'" *Id*. (citation omitted). This is clearly a case of substantial compliance, justifying the trial court's construction of the notice in a way that preserved the Boston Store's bona fide claims.

C. The Notice of Claim Statute Does Not Apply to Boston Store's Claim under WIS. STAT. 101.111.

Boston Store's claim under Wis. Stat. § 101.111 is not subject to any notice of claim requirement, because the specific procedure set forth in § 101.111 displaces the generalized procedure set forth in Wis. Stat. § 893.80. *See, e.g., Gillen v. City of Neenah*, 219 Wis. 2d 806, 822-23, 580 N.W.2d 628 (1998); *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶ 28, 265 Wis. 2d 422, 665 N.W.2d 379. Because MMSD itself had a statutorily imposed duty under § 101.111 to provide written notice to adjoining property owners that its excavation could harm the foundations of their respective buildings, *see* Wis. Stat. § 101.111(4), the notice of claim statute is in conflict and is inapplicable. *Gillen*, 219 Wis. 2d at 822. Additionally, because § 101.111 provides for immediate injunctive relief for MMSD's failure to comply with the statute, *see* Wis. Stat. § 101.111(6), the waiting period that would be imported by the notice of claim statute is in conflict and is inapplicable. *Nesbitt Farms,* 265 Wis. 2d 422, ¶ 28 (refusing to "layer" the requirements of § 893.80(1) onto specific statutory relief). Regardless of the court's analysis

regarding the notice of claim defense generally, Boston Store's claim under § 101.111 is not subject to any notice of claim requirement.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING BOSTON STORE'S REQUEST FOR EQUITABLE RELIEF.

The decision whether to grant injunctive relief is vested to the discretion of the trial court. *Allen v. Wisconsin Pub. Serv. Corp.*, 2005 WI App 40, ¶ 29, 279 Wis. 2d 488, 694 N.W.2d 420. A trial court's decision to grant injunctive relief will be affirmed so long as the court applied the correct law to the facts of record and used a rational process to reach a reasonable result. *City of Wisconsin Dells v. Dells Fireworks, Inc.*, 197 Wis. 2d 1, 15, 539 N.W.2d 916 (Ct. App. 1995).

A. The Trial Court Did Not Abuse its Discretion in Finding that Boston Store Had No Adequate Remedy at Law and a Sufficient Likelihood of Irreparable Harm.

There are two elements a court must find in order to grant injunctive relief: "(1) the movant has no adequate remedy at law; and (2) the movant will suffer irreparable harm if the injunction is not granted." *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461,

472, 588 N.W.2d 278 (Ct. App. 1998). In this case, the trial court found both of these elements to be satisfied.

Because the jury concluded that Boston Store would likely suffer $6,000,000 in future damage and because Boston Store would, at most, be compensated for less than 2% of that amount, the trial court found Boston Store's remedy at law to be inadequate. R.399 p.10, MMSD-App-0889; *see also Allen*, 279 Wis. 2d 488, ¶¶ 30-32 (an award of some amount of money is not enough; the award must be adequate).

The trial court also concluded that there was a sufficient likelihood that MMSD's future conduct would cause Boston Store irreparable harm. R.399 pp.10-12, MMSDApp-0889-91 (citing *Allen*, 279 Wis. 2d 488, ¶ 30). MMSD tacitly conceded that it had no intention of doing anything to prevent or limit the groundwater infiltration into the Deep Tunnel that had caused and was expected to continue to cause significant damage to the Boston Store building. "Irreparable harm" does not mean harm that cannot be fixed, but instead means harm that is not adequately compensable in damages. *Allen*, 279 Wis. 2d 488, ¶ 30. The approximated cost of future repairs is $9,000,000 while compensable damages were limited to $100,000.

R.383 pp.238-42, A-Ap.825-26; R.351 (Trial Ex. 1553-018), A-Ap.1336.

On appeal, MMSD relies on immunity and procedural based challenges and does not contend that the evidence is insufficient to support the court's findings. None of MMSD's arguments merit reversal of the trial court's conclusions.

B. The Trial Court's Injunction Ruling is Not Barred by WIS. STAT. § 893.80.

First, MMSD argues that the trial court's order granting Boston Store's motion for injunctive relief is barred by various subsections of Wis. Stat. § 893.80. But these arguments do not even make it out of the gate. Wis. Stat. § 802.06(7) provides in relevant part as follows:

> CONSOLIDATION OF DEFENSES IN MOTIONS … If a party makes a motion under this section but omits therefrom any defense or objection then available to the party which this section permits to be raised by motion, the party *shall not thereafter make a motion based on the defense or objection so omitted.*

(Emphasis added).

There are limited exceptions to this rule, but immunity is not among them. *See* Wis. Stat. §§ 802.06(8)(b)-(d); *cf.* Wis. Stat. § 802.02(3) (setting forth "immunity" as an affirmative defense). A party does not "retain[] the option of asserting the defense at his

leisure, to the detriment of both the plaintiff and the courts." *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 734 (7th Cir. 1991) (finding waiver under Fed. R. Civ. P. 12 based upon a party's continuing participation in the litigation); *see also Albany Ins. Co. v. Almancenadora Somex S.A.*, 5 F.3d 907, 909-910 (5th Cir. 1993) (holding that a party who files a motion to dismiss waives specified defenses not included in the first motion); *American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106-1107 (9th Cir. 2000); *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 996-97 (1st Cir. 1983) (defendant had caused "the very delay which Rule 12 was designed to prevent" where defendant filed an appearance, attended numerous depositions and four years later, presented defense).

MMSD's claim that it is immune or exempt from injunction is belied by the actions MMSD has taken in this action. MMSD filed a motion to dismiss in this case in October 2004 but did not include any defense based on discretionary immunity in that motion, and did not include any argument that § 893.80(5) barred Boston Store's claim for equitable relief. *See* R.35. Irrespective of the merits of MMSD's argument that § 893.80 exempts it from injunction, the law required

MMSD to include those defenses in its motion to dismiss years ago. MMSD failed to do so and offers no explanation why.

Even were the Court to consider MMSD's arguments related to § 893.80, each one fails on the merits for the reasons explained below.

1. Wis. Stat. § 893.80(4).

First, MMSD argues that injunctive relief is barred under Wis. Stat. § 893.80. Specifically, MMSD contends that the trial court's equitable power to order a portion of the tunnel to be lined is barred by § 893.80(4), which as noted above provides that "no suit may be brought against any [municipal entity] for acts done in the exercise of legislative, quasi−legislative, judicial or quasi−judicial functions." For the reasons set forth above, this suit does not challenge actions MMSD took in the exercise of "legislative, quasi−legislative, judicial or quasi−judicial functions."

Moreover, according to MMSD's own documents, installing concrete lining as needed and not called for in the original construction plans *is* part of tunnel maintenance. R.381 pp.145-48 ("[m]aintenance may include removal of solid deposits, removal of fallen rock, repair of deteriorated linings and placement of concrete lining in deteriorated, unlined areas."); R.351 (Trial Ex. 206). MMSD

does not and cannot dispute that there is no immunity under § 893.80(4) for tunnel maintenance. *Menick*, 200 Wis. 2d at 745 ("there is no discretion as to maintaining the [sewerage] system so as not to cause injury to residents").

Finally and most fundamentally, nothing in the plain language of § 893.80(4) can be read as a limit on a court's inherent power to fashion equitable relief so as to prevent future damage to a movant's property. By its clear terms, § 893.80(4) is a limitation on the conduct for which a municipality may be held liable, not on the form of remedy. As MMSD itself stresses, this section limits "suits" not remedies.

2. Wis. Stat. §§ 893.80(3) and (5).

Next, MMSD argues that the trial court's order, which requires MMSD to line a portion of its Deep Tunnel, violates Wis. Stat. § 893.80(3) because it may cost MMSD $10,000,000 to comply with that order. Section 893.80(3) provides in relevant part as follows:

> Except as provided in this subsection, the amount recoverable by any person for any damages, injuries or death in any action founded on tort against any [municipal entity] shall not exceed $50,000. … No punitive damages may be allowed or recoverable in any such action under this subsection.

The plain language of § 893.80(3) limits only "the amount recoverable by any person." The amount it may cost MMSD to comply with the trial court's order is not an "amount recoverable by any person." *Id*.

Even if the language of § 893.80(3) was less clear, MMSD's proposed construction that the $50,000 should be read to refer to the cost a municipality may spend is not reasonable. If the legislature truly meant that no lawsuit should burden a municipality with more than $50,000 in costs to it, plaintiffs would rarely collect anything; a municipality can easily incur $50,000 in administrative costs and attorney fees alone. To the extent that MMSD believes that the policy for the cap cannot be satisfied unless it limits total costs of a lawsuit to a municipal entity to $50,000, it must address that issue with the state legislature. As written, § 893.80(3) does not provide such a limitation.

Finally, as noted above, the last sentence of § 893.80(3) specifies that punitive damages are not recoverable against a municipal entity. Clearly, the legislature knew how to bar specific types of remedies; it did not do so with respect to injunctive remedies.

MMSD's reliance on the exclusivity provision of Wis. Stat. § 893.80(5) does not improve its argument. Section 893.80(5) provides in relevant part as follows:

> Except as provided in this subsection, the provisions and limitations of this section shall be exclusive and shall apply to all claims against a [municipal entity].

Id. The parties disagree as to whether § 893.80(3) ought to apply in this case at all but what is not in dispute is that there is no other damage cap other than § 893.80(3) that would potentially apply. Accordingly, § 893.80(5) is not at issue.

3. Wis. Stat. § 893.80(1).

MMSD contends that the notice of claim is defective because it does not specify an intention to seek injunctive relief. Boston Store is not now and never has sought an injunction in addition to adequate monetary relief but always as an alternative. The notice of claim itemized damages totaling $10.8 million dollars and specified that the itemization "does not constitute an election of remedy and shall not preclude or prohibit Claimants from taking any other legal action or bringing any other legal claims it ... deems necessary to seek redress from matters related to the program construction activities of MMSD." R.46 pp.6-7, 10, MMSD-App-0089-90,0093.

Although conceding that strict compliance is not required and instead, that the standard is "substantial compliance," *Thorp*, 235 Wis. 2d 610, ¶ 28, MMSD nonetheless argues that substantial compliance is not satisfied because the notice of claim did not state that Boston Store would seek an order for a "new public works project." *See* MMSD Cross-appeal Br. at 75. As an initial matter, performing repair and maintenance work on the Deep Tunnel hardly qualifies as a "new public works project"; the Deep Tunnel has been in existence since the early 1990s.

More to the point, MMSD's argument relies on a construction of the phrase "substantial compliance" that is inconsistent with the past holdings of the Wisconsin Supreme Court. As noted above, in determining whether a notice of claim meets the "substantial compliance" standard, the court applies a two-part test. First, "[t]he notice must provide enough information to apprise a governmental entity of the budget it will need to set aside in case of litigation or settlement." *Thorp*, 235 Wis. 2d 610, ¶ 28. The damage in the notice totals $10.8 million, which approximates the estimated cost of the injunctive relief sought and the $100,000 actually awarded. *See* R.46 p.10, MMSD-App-0093; R.382 pp.163-64, A-Ap.757-58; R.3005 p.3,

A-Ap.710. Second, "[t]he notice should also 'be construed so as to preserve bona fide claims.'" *Thorp*, 235 Wis. 2d 610, ¶ 28 (citation omitted). Holding the notice invalid because it fails to use an inaccurate description, such as "new public works project" is not a construction that preserves bona fide claims.

C. The Trial Court's Injunction Ruling was Procedurally Proper.

MMSD next attempts to avoid the trial court's injunction order by arguing that Boston Store's motion and the trial court's order were procedurally improper. For the reasons set forth below, none of MMSD's three arguments is availing.

1. Wis. Stat. § 805.16.

MMSD first contends that Boston Store's motion for injunctive relief is barred under Wis. Stat. § 805.16, which sets the deadline for parties to file post-verdict motions. This argument necessarily fails because Boston Store's motion for injunctive relief is not a post-verdict motion subject to the filing requirements set forth in § 805.16 and in fact, did not ripen until such motions had been decided. "[Section] 805.16 contemplates trial-related motions – new trial, evidentiary considerations, etc." *Gorton v. American Cyanamid*

Co., 194 Wis. 2d 203, 230, 533 N.W.2d 746, 757 (1995). It does not apply to verdict-related motions. *Id*. (petition for attorney fees not subject to § 805.16 because it "is not trial-related; rather, it is verdict-related as it is predicated on a party's prevailing party status").

The motion for injunctive relief was not predicated on any ruling made during trial but on the trial court's ruling with regard to the damage cap. *See generally* R.280. At the time post-verdict motions were due, there was no basis for asserting that Boston Store had no adequate remedy at law because the damage cap had not yet been applied. Had Boston Store filed its motion for injunctive relief with its post-verdict motions, MMSD would no doubt be arguing that the trial court's injunction order must be reversed because Boston Store's motion was premature. Noteably, in addition to praying for injunctive relief in its Complaint and seeking and producing information related to injunctive relief throughout discovery, Boston Store specifically noted in its post-verdict submissions and at the post-verdict hearing that it would seek injunctive relief if the damage cap was applied. R.257 p.4 n.1, A-Ap.620; R.394 p.44, MMSDApp-0853.

Particularly troubling about MMSD's argument that Boston Store erred in waiting until after all trial issues were resolved is that MMSD explicitly agreed to this arrangement. At a hearing on July 15, 2005, the trial court asked MMSD if it had "any problem with us sort of putting off the issue of the scope of an equitable relief until after we have a trial on the underlying claims?" and counsel for MMSD responded, "I don't, your Honor." R.372 pp.27-28. Having agreed to leave the issue of injunctive relief until after resolution of the underlying claims, MMSD cannot now complain that Boston Store delayed improperly in doing so.[21]

When a motion, such as this, does not seek to change a verdict answer or obtain a new trial, it is not a post-trial motion subject to § 805.16. *See Gorton*, 194 Wis. 2d at 203. Boston Store's motion did not become ripe until the trial court decided the parties' post-verdict motions and remitted Boston Store's $ 6,000,000 damage award to

[21] MMSD contends that Boston Store should have made a "conditional" request for injunctive relief at the time the court deferred a ruling on the application of the damage. But it does not explain how or why such a "conditional" motion would have made sense: Because equitable relief requires a showing of no adequate remedy at law and the court had just announced that it would defer a ruling on that very issue, making some kind of conditional motion would have been bizarre. The fact that Boston Store intended to seek injunctive relief as an alternate remedy was established when it filed its Complaint. R.1 pp. 12, 18-19 ,23-24. Boston Store was not required to renew each of its claims each time the court made a scheduling determination.

$100,000. Accordingly, the time limits set forth in § 805.16 are inapplicable and Boston Store's motion was not late.

2. Judge Kremers' October 25, 2006 Order was Not Final.

Next, MMSD argues that Judge DiMotto's injunction order was foreclosed because of Judge Kremers' October 25, 2006 order. MMSD contends that the October 25, 2006 order was final and therefore, determined all of the rights of the parties in the case.

A judgment or order is final only if it "disposes of the entire matter in litigation." Wis. Stat. § 808.03(1). As used in this section, the phrase, "disposes of the entire matter in litigation" turns on: "(1) whether the document is final in the sense of substantive law in that it disposes of all of the claims brought in the litigation as to one or more of the parties; and (2) whether the document is final in the sense that it is the last document that the trial court intended to issue in the litigation." *Harder v. Pfitzinger*, 2004 WI 102, ¶ 12, 274 Wis. 2d 324, 682 N.W.2d 398. True finality cannot be manufactured, *Cascade Mountain. Inc. v. Capitol Indemnity Corp.*, 212 Wis. 2d 265, 270, 569 N.W.2d 45 (Ct. App. 1997), and how an order is titled is not dispositive of the issue of finality. *Harder*, 274 Wis. 2d 324, ¶ 13;

Wamboldt v. West Bend Mut. Ins. Co., 2007 WI 35, ¶ 29, 299 Wis. 2d 723, 728 N.W.2d 670.

The October 25, 2006 order satisfies neither of the two factors used to determine whether an order is final. First, it did not dispose of all of the claims brought in the litigation. Boston Store's motion for injunctive relief had been pending for over a month at the time the October 25, 2006 was signed. *See* R.280, MMSDApp-0253-59; R.305, A-Ap.708-10. The order also was clearly not the last document that the trial court intended to issue in the litigation. Neither the parties nor the court anticipated that the order would be dispositive of the Boston Store's motion for injunctive relief; to the contrary, it was understood at that point that the motion for injunctive relief would be handled by Judge DiMotto and not Judge Kremers pursuant to regular judicial rotations. *See* R.397 pp.3-4, 26 (Judge DiMotto notifying parties that she was not yet ready to rule on Boston Store's injunctive relief and that Judge Kremers had signed the order for judgment in order to preserve his post trial motion rulings); *see also* R.315 (Order Modifying Post-Verdict Order for Judgment), A-Ap. 711-12. MMSD has not pointed to any statement by Judge Kremers indicating that he intended that his October 25, 2006 order

would operate to dismiss or deny Boston Store's motion as no such statement exists.

As it is clear that the October 25, 2006 was not final in the legal sense, it does not invalidate the trial court's ruling granting Boston Store's motion for injunctive relief.

3. Boston Store's January 19, 2007 Appeal does not Require Reversal.

MMSD makes a last ditch challenge to the trial court's injunction order, arguing that the order was barred by Boston Store's precautionary January 19, 2007 notice of appeal. As Boston Store made abundantly clear in the motion accompanying that notice of appeal, Boston Store did not believe that the October 25, 2006 order was final such that an appeal could be taken from it but nonetheless, filed its notice to preserve its right to an appeal in the event that any court might find that the October order was in fact final. *See* Appellant-Cross-Respondent's Motion for Determination of Finality, or in the Alternative for Remand of the Trial Court for the Limited Purpose of Deciding the Pending Motion for Injunctive Relief (Jan. 19, 2007).

In advancing this argument, MMSD contends that the trial court lost jurisdiction when the record was transferred to this Court. Adopting the deductively unsound reasoning that because the Wisconsin Statutes require that a record include a docket sheet, *see* Wis. Stat. § 59.40(2)(b), that the record is the docket sheet, MMSD identifies the date the "record" (i.e. the docket sheet) was transferred as January 25, 2007. MMSD is mistaken. The record is not the docket sheet alone and the record was not transferred until, according to this Court's own records, September 10, 2007, long after the injunction ruling.

D. MMSD Has Had Ample Opportunity to be Heard.

Citing *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, 262 Wis. 2d 264, 664 N.W.2d 55, MMSD argues that the trial court abused its discretion by failing to consider evidence relevant to the injunction. The primary problem with MMSD's argument is that MMSD failed to present the trial court with the evidence that MMSD argues the trial court failed to "hear."

MMSD had numerous opportunities to present evidence related to any alleged difficulty with tunnel lining both at trial and during the injunction proceedings before Judge DiMotto. First, MMSD had both

opportunity and motive at trial to rebut Boston Store's evidence that the harm at issue reasonably could be abated with one mile of tunnel lining. MMSD complains that injunctive relief was not at issue at trial and while that is true, the issue of abatement was relevant to both nuisance and injunctive relief alike. *See* R.403 p.3, A-Ap.587 (jury asked whether MMSD could abate interference by reasonable means at a reasonable cost).

But MMSD's ability to present evidence related to the propriety of injunctive relief was not limited to the trial, as MMSD would have this Court believe. MMSD had an opportunity to present evidence on this issue in responding to Boston Store's motion for injunctive relief, but MMSD did not take that opportunity to do so, instead favoring arguments that the motion was improper legally. *See generally* R.288; MMSDApp-0260-67. After a telephonic hearing held after briefing should have been completed, MMSD filed a letter with the trial court, arguing that an injunction would be improper and enclosing two affidavits in support, which were accepted by the trial court. *See generally* R.293; R.294, MMSDApp-0447-49; R.295. The trial court also was prepared to consider a submission that MMSD filed without permission and outside the normal course of briefing,

but MMSD voluntarily withdrew its submission for risk of sanction. *See* R.397 pp.27-37; R.303; R.304.

Neither *Hoffman*, nor any of the other cases MMSD cites, stands for the proposition that the trial court errs by not "hearing evidence" that is not presented to it. Nor do any of the cases cited suggest that a trial court is obligated to give a party a fifth opportunity to present evidence simply because it has refrained from doing so in response to the first four. To the extent that there was evidence bearing on the propriety of the trial judge's order that she did not adopt, fault lies not with the judge but with MMSD.

E. Judge DiMotto Did Not Exceed Her Authority As A Successor Judge.

Finally, MMSD complains that Judge DiMotto exceeded her authority as a successor judge and cites in support of its argument to *Cram v. Bach*, 1 Wis. 2d 378, 383, 83 N.W.2d 877 (1957). In *Cram*, the plaintiff brought a claim in equity for the nullification of a contract. *Id*. at 379. The case was tried to a jury, but as the court noted, at that time, "[t]he verdict of a jury in an equity case is merely advisory." *Id*. at 382. The jury found that the contract had been signed under duress but the presiding judge held that the jury's

conclusion should be set aside. *Id*. Shortly thereafter, a successor judge took over the case, granted a motion to vacate the presiding judge's order and enter judgment based on the jury's finding. *Id*. The appellate court held that the successor judge had exceeded his authority, noting that because he was not in a position to have weighed the evidence, he was without authority to approve the jury's conclusion. *Id*. at 383.

The holding in *Cram* is inapplicable because Judge DiMotto did not engage in weighing the evidence. On pages 92-93 of its cross-apeal brief, MMSD lays out four examples of statements that Judge DiMotto allegedly made that it contends violates *Cram*. The last two can be summarily rejected; in the passages quoted, Judge DiMotto made findings that certain facts were undisputed. When facts are not disputed with conflicting evidence, no weighing is necessary. As such, courts can (and frequently do in ruling on summary judgment motions) make determinations that certain facts are undisputed and thus, may be relied on without live testimony.

However, the first two bullets require more attention as they are substantively misleading. The first bullet point includes the following quotation:

> 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***.

MMSD Br., at 92-93 (emphasis in brief). However, when this statement is read in context, it is clear that Judge DiMotto was comparing the $100,000 remedy with the $6 million damage finding *made by the jury*, and was not herself not making an independent assessment about the damages sustained. R.399-9–10:MMSDApp-0888-89.

Judge DiMotto acted well within her authority in accepting findings of the jury, which unlike those in *Cram* are not merely advisory, in making a *legal* determination about the adequacy of the legal remedy based on the jury's finding of *fact* and in noting that the jury's finding—the "it" in the passage above—was adequately supported by the record such that she was without authority to disregard it. Although judges who did not hear evidence cannot fairly weigh credibility, they are certainly permitted to determine whether a jury's finding is supported by admissible evidence; appellate judges are asked to do so all the time.

Finally, the second bullet point is perhaps most troubling. In it, MMSD provides the following heavily doctored quotation:

> 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].

MMSD Cross-Appeal Br. at 92-93 (emphasis in brief). The most troubling part of this alleged quotation is the portion MMSD made up. What the Court actually said was "I adopt Plaintiffs' argument in their reply brief to the instant motion at pages 10 through 12," and in turn, the argument set forth on those pages was that the expert testimony related to the well was not *relevant* to the issue of unclean hands in the context of an injunction. R.291 pp.10-12, MMSD-App-0278-80; R. 399 p.15, MMSD-App-894.

As explained on pages 10 through 12 of the reply brief, injunctions are inherently forward looking and thus, evidence of past alleged wrong doing is "not the kind of 'misconduct' that bears on the appropriateness of injunctive relief" where there is no evidence that such past conduct would contribute to future harm.[22] *Id.* Making determinations about relevancy is certainly not an act of fact-finding subject to the holding in *Cram.*

[22] MMSD had argued that it had submitted evidence that the well could contribute to future harm and in reply, Boston Store detailed how the evidence MMSD cited did not bear out its assertion; Boston Store did not reference any of its own experts or suggest that its expert should be credited over MMSD's expert.

MMSD presumably combed the transcript of Judge DiMotto's ruling and was unable to locate a single instance in which Judge DiMotto actually weighed conflicting evidence and made credibility determinations. Instead, she deferred to the factual findings of the jury and made only legal determinations. Although some of her legal conclusions *relate* to the evidence—such as whether facts are in dispute and whether evidence is relevant—this does not bring them within the prohibition in *Cram*.

CONCLUSION

For the foregoing reasons, Boston Store respectfully requests that this Court affirm the trial court's conclusions that MMSD is not immune from liability to Boston Store under Wis. Stat. § 893.80(4), that MMSD failed to present any evidence to prove its statute of limitations affirmative defense, and that Boston Store's notice of claim is legally sufficient to meet the statutory requirement set forth in Wis. Stat. § 893.80(1), and rule that the trial court did not abuse its discretion in ordering equitable relief.

Dated this 8th day of November, 2010.

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COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal No. 2007AP00221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-Cross-
Appellant.

FORM AND LENGTH CERTIFICATION

I hereby certify this brief conforms to the rules contained in section 809.19(8)(b) of the Wisconsin Statutes for a brief and appendix produced with a proportional serif font, and pursuant to order of this Court dated August 30, 2010, the length of this brief is 14,694 words.

Dated this 8th day of November, 2010.

BY s/Rebecca Kennedy
Rebecca F. Kennedy

COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-Cross-Respondents,

v. Appeal No. 2007AP00221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-Cross-Appellant.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8th day of November, 2010.

BY s/Rebecca Kennedy
Rebecca F. Kennedy (No. 1047201)

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CERTIFICATE OF SERVICE

Copies of the Combined Brief of Appellants and Cross-Respondents Bostco LLC and Parisian, Inc. were sent by mail this 8th day of November, 2010, to:

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