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

BOSTCO LLC and PARISIAN, INC.,

Plaintiffs-Appellants-Cross-Respondents,

vs.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant-Respondent-Cross-Appellant.

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

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF CROSS-APPELLANT MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

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I. Section 893.80(4) Immunity Bars Owners' Claims.

Section 893.80(4) immunizes the District from liability based upon discretionary acts, including, categorically, all "decisions regarding the adoption, design, and implementation of public works." *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶60, 277 Wis. 2d 635, 691 N.W.2d 658 ("*MMSD*"). While a municipality can be liable for negligently operating or maintaining public works, liability is available only when the municipality negligently performs a ministerial act. *Id.* ¶54; *see also id.* ¶59 n.17; *Allstate Ins. Co. v. Metro. Sewerage Comm'n*, 80 Wis. 2d 10, 17–18, 258 N.W.2d 148, 151 (1977).

A. All of Owners' evidence is of the categorically immune type.

Owners' experts testified that the construction, placement, and continued existence of an unlined Tunnel damaged the Boston Store building's foundational piles. *See* MMSD-Cross-Br.-16–20. Owners argue that their experts testified about operation and maintenance—offering examples of testimony that column movement would continue to occur if "the operation of the . . . Tunnel contin-

ues under the current conditions"; that the piles could have deteriorated after the Tunnel went into operation; that the building's columns moved more than previously after the Tunnel went into operation; and that the Boston Store building would likely suffer future damage as a result of continuing operation of an unlined Tunnel. Owners-Resp.-Br.-13–14 (emphasis omitted).

All of this testimony describes *results* of the Tunnel's unlined existence, rather than *acts* of operation or maintenance. Municipalities are only liable for the negligent performance of ministerial *acts*. *MMSD*, 2005 WI 8 at ¶59 n.17. "[M]inisterial act[s] . . . involve[] a duty that 'is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.'" *Id.* ¶54; *see also Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶21, 253 Wis. 2d 323, 646 N.W.2d 314.

Unable to demonstrate any act of this type, Owners suggest broadly that "[i]t is well-established in Wisconsin law that a municipal entity is not immune under Wis. Stat. §893.80(4) for

any negligence in operating or maintaining a sewerage system." Owners-Resp.-Br.-4–5. This is wrong. In considering whether the city had immunity for its negligent failure to repair a broken water main, *MMSD* emphasized that immunity depended on whether "the City was under a ministerial duty to repair." *MMSD*, 2005 WI 8, ¶61 (internal quotation marks omitted).

Owners' suggestion misreads paragraph 56 of *MMSD*. That paragraph describes *Lange v. Town of Norway*, 77 Wis. 2d 313, 253 N.W.2d 240 (1977). *MMSD*'s discussion of *Lange* emphasizes the distinction between types of acts deemed always discretionary and those that can be discretionary or ministerial depending on the act's character. For some acts, including acts of operation and maintenance, immunity is not categorical but applies unless there is a ministerial duty to perform the act. *Compare MMSD*, 2005 WI 8, ¶60 (immunity afforded to all acts of design, construction and continued existence of "waterworks system"); *with id.* at ¶61 (where liability claimed for failure to repair

"the question then becomes whether the City was under a ministerial duty to repair").[1]

B. Owners established no ministerial duty of operation or maintenance.

1. Owners' brief, like their evidence at trial, identifies no ministerial act of operation or maintenance that the District negligently failed to perform. Owners are not aided by the parties' agreement that the District began operating the Tunnel in August 1992, because they identify no ministerial duty during that time (or any other) that could give rise to liability. Nor does the jury's conclusion that the District was "negligent in the manner in which it operated or maintained the tunnel" (Owners-Resp.-Br.-11) provide a basis for ignoring the immunity bar. No evidence of a ministerial duty of operation or maintenance—or a negligent breach of such duty—supports this finding.

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[1] To the extent *Menick v. City of Menasha*, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996), or *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 431, 400 N.W.2d 493 (Ct. App. 1986), allow liability in the absence of a ministerial duty, they are superseded by *MMSD*.

2. Owners emphasize that their experts called the Tunnel's existence without a concrete liner "operation" and "maintenance." But labels do not create specific ministerial acts of operation and maintenance when nothing suggests that the District had a ministerial duty to "operate" or "maintain" the Tunnel differently.

The record shows only that the District operated and maintained the Tunnel as it was designed and as the District's Wisconsin Department of Natural Resources permit requires—i.e., with a positive inward head allowing clear water to enter and preventing wastewater from exiting. R.382-560; R.351-ex.2563:MMSDApp-0384. Owners do not contest this.

3. Owners argue that the District lacks immunity because it was on notice that the Tunnel was "leaking." They purport to find in *MMSD* "a non-immune affirmative duty to take affirmative steps to repair the leak." Owners-Resp.-Br.-15 (citing *MMSD*, 2005 WI 8, ¶62). This is wrong for three reasons.

First, unlike the broken water main in *MMSD*, which was designed and constructed to contain the water that was leaking from it, the

Tunnel was designed to allow water to infiltrate, as required by District's WDNR operating permit. R.351-ex.2563:MMSDApp-0384. Infiltration of water into the Tunnel, therefore, is not a "leak" as *MMSD* used that word to describe the broken water main, and knowledge of infiltration can give rise to no duty of repair. Owners' argument that knowledge of infiltration should give rise to a maintenance duty to add a concrete liner is a species of the argument *Hocking v. City of Dodgeville* rejects: that allowing undesired effects of a design choice to continue constitutes negligent "maintenance." 2010 WI 59, ¶47, 326 Wis. 2d 155, 785 N.W.2d 398.

Second, the "notice of harm" evidence on which Owners rely relates only to ground water infiltration *during Tunnel construction*. Owners-Resp.-Br.-14–16. This risk of water entry during construction was of a substantially greater quantity than the minimal infiltration occurring during Tunnel operation. *See* R.350,ex.53-2:A-Ap.-1163 (describing 1400–1500 gallons per minute construction inflow). Regardless, the District's awareness of that risk involves, at most, immune construction conduct and does not support a ministerial duty of post-construction operation or maintenance.

Third, *MMSD* makes clear that even when there is knowledge of harm deriving from an actual failure of maintenance, a municipality is not liable unless the failure constitutes a breach of a ministerial duty. Unless a repair decision is ministerial, a municipality is "entitled to governmental immunity under §893.80(4)," 2005 WI 8 at ¶62, even if it has knowledge of a malfunction. Here, there is neither evidence of a ministerial repair decision nor knowledge of a malfunction.

4. The pre-construction draft planning document on which Owners rely (Owners-Cross-Resp.-Br.-17–18) does not create a ministerial duty to line the Tunnel. This draft document, a portion of which Owners simply read into the record, states that Tunnel "[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.381-284–85 (emphasis added)). This draft document with handwritten markups creates no absolute duty imposed by law. *MMSD*, 2005 WI 8 at ¶54. But, even if it could, it refers only to what maintenance "may" include, not what maintenance *must* include. Consequently, the draft could not create "a duty to act *in a par-*

ticular way . . . [that] is explicit as to time, mode, and occasion for performance," *Lodl*, 2002 WI 71, ¶44. The draft's language leaves the choice of whether to remedy deterioration by adding a lining to the District's discretion. *See id.* at ¶¶46–47.

Also, there is no evidence, and Owners do not argue, that the Tunnel near the Boston Store building was "deteriorated" or in need of structural support. The draft, however, expressly refers only to "placement of concrete lining in deteriorated, unlined areas" and even then only for structural support: "Lining will be included only *as necessary to maintain structural support* or to protect the tunnels from erosion . . . [otherwise] grouting will be sufficient to protect the groundwater from impacts resulting from infiltration or exfiltration." R.351-ex.206 at 8–34 (emphasis added). Consequently, the draft is not evidence of a ministerial duty to line the Tunnel to prevent infiltration.

C. Owners' argument for changing immunity law underscores the law's application.

Owners next argue inapplicable California law. Relying on *Baldwin v. California*, 491 P.2d 1121 (Cal. 1972), they contend that the District "should enjoy no immunity for the harm it knew it

would cause." Owners-Resp.-Br.-21 (title case omitted).

Baldwin is nothing like this case. It involved a car accident allegedly caused by an inadequately controlled intersection. Relying on state surveys showing an increase in traffic and accidents four decades after the intersection had been designed, the plaintiff sued under a California statute making the state liable for dangerous conditions of which it had notice. The state defended based on a California statute affording immunity for "injury caused by the plan or design of" an improvement to public property. The court interpreted the California immunity statute to incorporate a New York traffic signal decision, *Weiss v. Fote*, 167 N.E.2d 63 (N.Y. 1960), which, in *dicta*, suggested that "design immunity persists only so long as conditions have not changed." *Baldwin*, 491 P.2d at 1127.

There is no reason to believe that §893.80(4) incorporates this principle. To the contrary: *Lodl* instructs that even when there are known dangerous circumstances, immunity turns "on whether the act negligently performed or omitted can be characterized as ministerial." 2002 WI 71, ¶24. Owners' request that this Court legislate a "changed condi-

tions" exception to §893.80(4) ignores the controlling authority of *MMSD*, *Allstate*, and *Lodl*.

Owners also ignore the facts. They cannot show "changed conditions," "substantial danger," or any notice of specific post-construction injury risk that would bring this case within *Baldwin*'s inapplicable principle. Other courts, moreover, have rejected that principle, *see, e.g.*, *Thompson v. Newark Hous. Auth.*, 531 A.2d 734 (N.J. 1987), and California modified it by statute, *see Cornette v. Dep't of Transp.*, 26 P.3d 332 (Cal. 2001).

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

Contrary to Owners' argument (Owners-Resp.-Br.-19–20), §893.80(4) bars their §101.111 claim. Section 893.80(4) allows "[n]o suit" based on discretionary municipal conduct, and Owners' §101.111 claim is premised on categorically immune acts of sewer design and construction.

The authorities Owners cite in response are inapposite. Section 101.111 is neither constitutional trump nor an implied exception from §893.80. *See State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996); MMSD-Resp.-Br.-98–99 (discussing cases cited by Owners).

II. Credible Evidence Supports the Jury's Statute of Limitations Finding.

The jury's finding that Owners' claim accrued outside the limitations period gets lost in Owners' effort to justify the circuit court's refusal to accept that answer. Owners emphasize that the District had the burden to prove a limitations defense. The jury's finding, however, requires only some credible evidence to render the answer change "clearly wrong." *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 390, 541 N.W.2d 753 (1995).

The jury was entitled to conclude from Zdenek's "utmost importance" letter (*see* R.384-1012–23:MMSDApp-0724–35) that by the limitations date, June 4, 1997, Owners should have possessed enough information to allege the same claim against the District that they filed years later.

Owners suggest (Owners-Resp.-Br.-32, n.16) that their experts' analysis of column movement in the 1990s does not show their knowledge of those movements. This is incorrect. Owners' expert testified about how Boston Store's records demonstrated accelerating column settlement in the early 1990s. *See* R.385-1198 (GAS survey records of settlement); *id.* 1211-16:MMSDApp-0761-66. Owners' purported failure to review their own records before

litigation does not preclude the jury's finding that Owners' possessed information sufficient to state a claim before June 1997.

Owners rely on the circuit court's mistaken reasoning that the District's denial of liability precluded a finding that the claim accrued years earlier: "[I]t's pretty difficult to understand," the court stated, "how [Owners] could be responsible for figuring out or knowing that which, to this very day, the District maintains wasn't happening." R.394-26:MMSDApp-835. The correct question, however, is whether Owners were aware of information sufficient to plead their claim before June 4, 1997. While Owners argue that they lacked information, the jury found otherwise; and the Zdenek-GAS correspondence, the general awareness of the Tunnel's existence, and Owners' failure to explain any other probable time of accrual adequately support the finding.

III. Failure to Serve a Notice of Claim Bars Owners' Action.

Section 893.80(1) required Owners to serve the District with a notice of claim and itemization of relief. They indisputably failed to do so.

A. The District did not forfeit the notice of claim bar by pursuing related discovery.

Owners argue that the District waived §893.80(1) by pursuing discovery before seeking dismissal. A §893.80(1) defense is preserved by raising it in the circuit court, *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶27, 273 Wis. 2d 76, 681 N.W.2d 190, which the District did by pleading it, *see Thorp v. Town of Lebanon,* 2000 WI 60, ¶24, 235 Wis. 2d 610, 612 N.W.2d 59; *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶18, 302 Wis. 2d 358, 735 N.W.2d 30. Compliance with §893.80(1), moreover, is a precondition to recovery. *See Sambs v. Nowak*, 47 Wis. 2d 158, 167, 177 N.W.2d 144 (1970); *Ibrahim v. Samore*, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984).

No case holds that §893.80(1) is waived by failing to seek dismissal on that ground immediately. Neither *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 357 N.W.2d 548 (1984), nor *Strong v. Brushafer*, 185 Wis. 2d 812, 519 N.W.2d 668 (Ct. App. 1994), support Owners' waiver argument. In *Figgs*, the Court did not reach waiver, even though the city dallied until after the second day of a jury trial to raise its notice of claim defense. 121 Wis.

2d at 48. In *Strong*, the same assistant city attorney who had moved belatedly in *Figgs* orally moved for dismissal for failure to comply with §893.80(1) as the circuit court was seating a jury some 15 months after the dispositive motion deadline. *Id*. at 817. *Strong* also did not address waiver—the circuit court dismissed the complaint without prejudice and plaintiff had filed anew while the original case was on appeal. *Id.* at 817–18.

The District reasonably sought discovery on whether Saks and WISPARK, the non-owner entities that served the only notices, had assigned their rights to Owners. Within a few months of receiving Owners' response that there was no assignment, the District sought dismissal under §893.80(1). The District filed its motion within 17 months of the action's commencement, before Owners amended their complaint, before Owners voluntarily dismissed the Tunnel construction contractors, and more than a year before the dispositive motion deadline. The District timely raised its §893.80(1) defense.

B. Owners did not "substantially comply" with §893.80(1).

Owners argue "substantial compliance" with §893.80(1) based on notices served by entities that

never owned the Boston Store building. Owners'-Resp.-Br.-39–42. As the District's principal cross-appeal brief explains, §893.80(1) requires notices that identify the actual claimants. MMSD-Cross-Br.-73 (citing *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 556 N.W.2d 326 (Ct. App. 1996)).[2] Owners' response brief ignores *Markweise*, effectively conceding this point.

"Substantial compliance" does not eliminate the claimant identification requirement. Substantial compliance minimally requires (1) "actual notice of the claim," *Thorp*, 2000 WI 60, ¶27, and (2) enough information to "afford[] a municipality the opportunity to compromise and settle [the] claim," *id.* at ¶28. The non-owners' notices did not give actual notice of *Owners'* claims or provide the District a meaningful opportunity to settle those claims because they did not identify Owners as claimants. Paying non-owners or denying non-

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[2] *See also Hicks v. Milwaukee Cnty.*, 71 Wis. 2d 401, 407, 238 N.W.2d 509, 514 (1976); *Carpenter v. Comm'r of Public Works*, 115 Wis. 2d 211, 216-217, 339 N.W.2d 608 (Ct. App. 1983).

owners' (non-)claims would have had no effect on Owners' claims.

The District could not, for example, have properly denied Owners' claim and availed itself of §893.80(1g)'s six-month statute of limitations by sending a denial notice to anyone other than Owners. Wis. Stat. §893.80(1g); s*ee also Pool v. City of Sheboygan*, 2007 WI 38, ¶20, 300 Wis. 2d 74, 729 N.W.2d 415; *Cary v. City of Madison*, 203 Wis. 2d 261, 266–67, 551 N.W.2d 596 (Ct. App. 1996). Thus, the notices' failure to identify the actual claimants is a dispositive omission. Courts "must respect a governmental entity's . . . legislatively mandated right to have a claim presented to it before it is forced into costly and expensive litigation." *C. Coakley Relocation Sys., Inc. v. City of Milwaukee*, 2008 WI 68, ¶22, 310 Wis. 2d 456, 750 N.W.2d 900 (internal quotation marks omitted).

There can be no question that non-owners' notices did not contain information sufficient to identify, settle, or deny Owners' claims when even Owners' own managers and lawyers did not know that the non-owners had no claims. Owners' continue to argue that corporate management did not know which entities had the claim—a point that

cuts against their substantial compliance argument. Owners-Resp.-Br.-40; R.369-8–9:MMSDApp-0457–58. Even on appeal Owners misdescribe the entities' relationship, stating, "the notice of claim listed as claimants the parent corporations of the subsidiaries that actually owned the building" (Owners-Resp.-Br.-40): WISPARK, which served a notice, is neither plaintiff's parent. R.352:MMSD-SuppApp-0001.[3] Just as plaintiffs cannot properly sue a corporation by naming a related entity, *Johnson v. Cintas Corp. No. 2*, No. 2009AP2549, 2010 WL4630329, at *5 (Ct. App. Nov. 17, 2010) (recommended for publication), they also cannot give proper §893.80(1) notice of one corporation's claim by naming another, *cf. Markweise,* 205 Wis. 2d at 216.

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

Even the non-owners' notices failed to identify a §101.111 claim or a claim for injunctive relief. The circuit court awarded summary judgment to

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[3] The District's Supplemental Appendix ("MMSD-SuppApp") is bound with this brief.

the District on the §101.111 claim on grounds other than Owners' failure to comply with §893.80(1). R.374-38–39:MMSDApp-0546–47.

Owners argue that their §101.111 claim does not require compliance with §893.80(1) because "the specific procedure set forth in §101.111 displaces the generalized procedure set forth in section 893.80." Owners-Resp.-Br.-43. But "Wisconsin Stat. §893.80 provides a set of rules specifically for claims against governmental bodies . . . which broadly applies to all causes of action unless a further, more specific rule says otherwise." *Rouse*, 2007 WI 87, ¶37. Statutes, like §101.111, that provide for remedies to be enforced through generally available procedural mechanisms are not excepted from §893.80 if there is no procedural conflict. *Id.* at ¶¶37–38. Owners' §101.111 claim creates no conflict with §893.80(1). The Tunnel was constructed long ago. This is not a case in which a party seeks to use §101.111 to enjoin excavation in anticipation of future harm, as in *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

Nor does Owners' §101.111 claim meet this Court's three-part test for creating an implied exemption from §893.80(1). *See Nesbitt Farms, L.L.C.*

v. City of Madison, 2003 WI App 122, ¶9, 265 Wis. 2d 422, 665 N.W.2d 379. First, Owners' claim for damages does not involve a "specific statutory scheme," and Owners' affirmative injunctive relief to line the Tunnel is not authorized by §101.111. Second, the legislature has not provided for expedient resolution of Owners' claims for damages caused by alleged post-construction ground water infiltration. Thus, compliance with §893.80 would not hinder a legislative preference for prompt resolution. Third, there is no doubt that §893.80(1)'s policies of affording municipal entities an opportunity to investigate, settle, or disallow claims and to budget for their allowance or litigation apply fully to Owners' §101.111 claim.

IV. The Post-Judgment Injunction Must Be Vacated.

A. Section 893.80 deprived the circuit court of competency to award injunctive relief.

1. The District did not "waive" application of §893.80.

Owners argue that §802.06(7) nullifies §893.80's application to their requested injunctive relief. Section 802.06(7)—the Wisconsin analog of Federal Rule of Civil Procedure 12(g)(2)—is de-

signed to prevent delay caused by multiple motions to dismiss. *See* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, §1385 (3d ed. 2004). It provides that if a party moves to dismiss under §802.06 "but omits therefrom any defense . . . *then available to the party* which [that] section permits to be raised by motion, the party shall not thereafter make a motion based on the defense . . . so omitted." Wis. Stat. §802.06(7) (emphasis added). Owners argue that this provision bars application of §893.80 to their request for injunctive relief because the District filed a post-answer motion on §893.80(1) grounds but did not argue other §893.80 defenses in the motion.

Owners' argument has glaring flaws. (1) §893.80 did not arise in the context of a second motion to dismiss. The District made its argument that §893.80 precludes Owners' request for injunctive relief in response to *Owners*' motion for an injunction.

(2) §802.06(7) provides for waiver of procedural rights to bring certain types of motions provided for in §802.06—not *substantive rights*, such as the assertion of a legal bar to relief. *See* 3 Jay E. Grenig, *Wisconsin Practice Series, Civil Procedure*

§206.5 at 294 (3d ed. 2003); *see also* 3B Jay E. Grenig & Daniel D. Blinka, *Wisconsin Practice Series, Civil Rules Handbook* §802.06:5 at 118 (2008 ed.). The District preserved its §893.80 defenses by pleading them.

(3) the District's motion invoking §893.80(1) asserted matters outside the pleading. R.35. Thus, it was a §802.08 motion to which §802.06(7) does not apply. *See* Wis. Stat. §802.06(2)(b).

(4) §802.06(7) would not have precluded the District from moving to bar an award of injunctive relief. Owners did not plead that relief until they amended their complaint *after* the District sought judgment on the original complaint. R.34; R.51. Section 802.06 reserves a party's right to file a motion to dismiss for failure to state a claim upon which relief can be granted. Wis. Stat. §802.06(8). *See Canadian Overseas Ores Ltd. v. Compania de Acero Del Pacifico S.A.*, 528 F. Supp. 1337, 1344–45 (S.D.N.Y. 1982); *see also* 5C Wright & Miller, *supra*, §1385.

(5) courts retain the authority to allow subsequent motions to dismiss based on grounds that could have been earlier asserted. *See Thorn v. New York City Dep't of Social Servs.*, 523 F. Supp. 1193,

1196 (S.D.N.Y. 1981). Thus, even if §802.06 applied (which it does not), it would not prevent invoking §893.80 to bar injunctive relief.[4]

2. Section 893.80(4) bars an injunction to reconstruct the Tunnel.

Owners contend that "§893.80(4) is a limitation on the conduct for which a municipality may be held liable, not on the form of remedy." Owners-Resp.-Br.-49. But §893.80(4) allows "No suit" based on a municipal entity's discretionary conduct. In explaining the basis for her injunction to line the Tunnel, Judge DiMotto stated, "[t]he tunnel's *presence* . . . created a drawdown on dewatering the soil, in which the pilings of the foundation of Boston Store sit, causing them to rot." R.399-27:MMSDApp-0906 (emphasis added).

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[4] *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 734 (7th Cir. 1991), and *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994 (1st Cir. 1983), cited by Owners, hold only that motions for insufficient process and personal jurisdiction can be waived by extensive participation in the litigation. *Albany Ins. Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907 (5th Cir. 1993), makes the District's point that the waiver principle applies only to subsequent motions to dismiss, rather than other types of motions.

The Tunnel's "presence" cannot be the proper basis for a suit at law or in equity. *MMSD*, 2005 WI 8, ¶60; *see above* at pp. 1–8. The injunction is barred by §893.80(4). That Owners' suit also sought damages for the same alleged immune conduct makes no difference.

3. No notice identified injunctive relief.

Even *non-owners'* itemization of relief did not mention injunctive relief. R.46-ex.A:MMSDApp-0088–90. If injunctive relief is requested, §893.80(1)(b) requires the claimant's statement to "clearly define[] the equitable relief sought." *DNR v. City of Waukesha*, 184 Wis. 2d 178, 199, 515 N.W.2d 888 (1994). Non-owners' identification of $10.8 million of damages does not satisfy §893.80(1)(b)'s requirement that the claimant provide a "statement of the relief sought."

Notices, like non-owners', that do not refer to equitable relief cannot, as a matter of law, comply with §893.80(1)(b) for a claim seeking injunctive relief. *Id.* From the controlling perspective of pre-litigation settlement, a claim seeking damages is materially different from one seeking an injunction forcing the District to reconstruct a mile of the

Tunnel. *Compare id.* (notice defined the equitable relief sought).

4. The $100,000 damage award provides the exclusive remedy.

Section 893.80(5) states that "the provisions and limitations of this section shall be exclusive and shall apply to all claims," unless additional "rights and remedies" are provided by another statute. Where, as here, a damage remedy is sought and §893.80(3)'s damages limitation applies, a court cannot, consistent with §893.80(5), end-run that limitation by awarding costly injunctive relief based on a judicial conclusion that the legislative limit renders the damages inadequate. Judge DiMotto did exactly that, stating, "In my view, it is in fact a no-brainer to conclude that the remitted $100,000 is an inadequate remedy at law." R.399-10:MMSDApp-0889.

Affirmative orders to rebuild are an "economic (but perhaps cumbersome) equivalent of damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 478 (2003). "The notion that [a legislature] would limit liability . . . with respect to one remedy while allowing the sky to be the limit with respect to another for the same violation strains credulity." *Andrews v. Chevy*

Chase Bank, 545 F.3d 570, 575 (7th Cir. 2008). Properly applied, §893.80(3)&(5) preclude an affirmative injunction to line the Tunnel.

B. Affirmative injunctive relief is procedurally barred.

1. Owners requested injunctive relief too late.

Post-verdict motions must be filed within 20 days of the verdict and are denied if not ruled on within 90 days of the verdict. Wis. Stat. §805.16. The motion for injunctive relief was neither filed nor granted within these time constraints.

Owners argue their motion for injunctive relief was not a post-verdict motion, relying on *Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 533 N.W.2d 746 (1995). *Gorton* holds that a petition for attorney's fees is not governed by §805.16 because (1) fee awards are solely "predicated on a party's prevailing party status," and (2) a "fee determination is separate from the underlying action" *Id.* at 230. Neither rationale applies to Owners' post-verdict injunction motion.

First, *Hoffmann v. Wisconsin Electric Power* holds that injunctions requiring changes in public utility service *do not* follow from prevailing party status. 2003 WI 64, ¶27, 262 Wis. 2d 264, 664

N.W.2d 55. Before ordering an injunction, a court must hear evidence and make findings about the merits of the proposed changes. *Id.*

Second, injunctive relief, unlike a fee award, is not separate from the resolution of the underlying claims. *Id.* Fee petitions are not trial-related motions because fee awards "are not compensation for the injury giving rise to an action." *Nw. Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 297, 528 N.W.2d 502 (Ct. App. 1995). Owners, in contrast, requested injunctive relief to remedy their claimed injury.

Owners' additional contention that their request is not governed by §805.16 because it was not "ripe" until Judge Kremers ruled that damages were limited by §893.80(3) is empty rhetoric. That the availability of injunctive relief might depend on other rulings is not dispositive of whether that relief is separate from the underlying action. An award of adequate damages will always preclude injunctive relief, but Owners cite no authority suggesting that a party, having tried only claims for damages, can seek injunctive relief *after the circuit court decides post-verdict motions*. Owners' "ripeness" test would allow serial post-verdict motions:

The application of §893.80(3)'s damages limitation, for example, could similarly be viewed as unripe until Judge Kremers changed the jury's statute of limitations answer.

Moreover, §805.16's deadlines cannot be extended by agreement. *See Ahrens-Cadillac Oldsmobile, Inc. v. Belongia*, 151 Wis. 2d 763, 767, 445 N.W.2d 744 (Ct. App. 1989). Thus, Owners' argument that the District "explicitly agreed" to allow an untimely motion for injunctive relief (Owners-Resp.-Br.-55) fails on legal grounds.

It is also factually incorrect. Judge Kremers took up the injunction issue at a March 31, 2006 pretrial conference—well after the statements made at the July 2005 hearing on which Owners base their claimed "agreement." At the pretrial, the District argued that Owners were not entitled to injunctive relief and Judge Kremers expressed skepticism at Owners' suggestion that the judge could award injunctive relief if the jury verdict did not make Owners whole. R.376:MMSDApp-0573–78. Judge Kremers then reserved ruling on the District's §893.80(3) motion to cap damages "until after the verdict." R.376:MMSDApp-0629. Given this notice, Owners' decision not to request injunc-

tive relief conditionally in a timely post-verdict motion reflects their strategic decision to pursue only damages. Having so chosen, there is nothing "troubling" about applying §805.16 to bar the untimely motion for injunctive relief.

Finally, *Gorton* provides that §805.16 governs "trial-related motions," including those that implicate the nature of the judgment. 194 Wis. 2d at 230. The fact that the injunctive relief necessarily altered the nature of the relief awarded in the judgment makes the motion "trial related" under *Gorton*'s test.

2. Entry of judgment precluded injunctive relief.

Owners do not dispute that if Judge Kremers' October 25 order for judgment is final, then the merger doctrine prevents an award of injunctive relief (*see* MMSD-Cross-Br.-86–89). They instead argue that the order is not final because it did not (1) dispose of a party's claims, and (2) was not the last order the court intended to issue. *Harder v. Pfitzinger*, 2004 WI 102, ¶12, 274 Wis. 2d 324, 682 N.W.2d 398.

The October 25 order was final. It disposed of Owners' claims. R.305:A-Ap.-708–10. It entered judgment on Owners' negligence claim and dis-

missed Owners' nuisance claim—the only claims remaining.

Given the clear adjudicative language of the order, Owners' argument that their pending injunction motion defeats finality is unavailing. The entry of the order disposing of the claims effectively denied the injunction motion. *See Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶34 & n.11, 299 Wis. 2d 723, 728 N.W.2d 670; *see also Strong*, 185 Wis. 2d at 817–18.

As *Wambolt* clarified, "the effect of *Harder*'s holding is to dispense with the 'intent' part of the finality test. Under *Harder* disposing of all substantive issues with respect to a party indicates that the circuit court intended the document to be final as a matter of law." 2007 WI 35, ¶30, n.9. The October 25 order disposed of all substantive issues by adjudicating the negligence claim and dismissing the nuisance claim. *See Tyler v. River-Bank*, 2007 WI 33, ¶17, 299 Wis. 2d 751, 728 N.W.2d 686. Owners' only recourse was to appeal.

3. Owners' appeal deprived the circuit court of jurisdiction to enter injunctive relief.

Owners do not contest that transfer of jurisdiction upon appeal divests the circuit court of au-

thority. They incorrectly argue that jurisdiction did not transfer until the full trial court record was prepared and transmitted to this Court.

In allowing the circuit court to act until the clerk "transfers the record," §808.075 incorporates the "perfecting the appeal" rule, under which jurisdiction transfers when the circuit court transmits "the notice of appeal, the docketing fee *and a copy of the trial court docket entries to the court of appeals*." 6 Edwin E. Bryant, *Wisconsin Pleading and Practice* § 52:2 (4th ed. 2006) (emphasis added); *see also Douglas v. Dewey*, 147 Wis. 2d 328, 337, 433 N.W.2d 243 (1989). Perfection is carried out through §809.11(2), which provides:

> The clerk of the trial court shall forward to the court of appeals, within 3 days of the filing of the notice of appeal, a copy of the notice of appeal, the filing fee, and a copy of the trial court *record* of the case *maintained pursuant to s. 59.40(2)(b) or (c)*.

Wis. Stat. §809.11 (emphasis added).

The "record" to which §808.075 refers, therefore, is that maintained pursuant to §59.40—the circuit court docket entries. When this Court received those entries on January 25, 2007, the circuit court lost jurisdiction to enter injunctive relief.

C. The successor circuit court judge erred in ordering injunctive relief without a hearing.

As successor judge, Judge DiMotto was disabled from entering relief based upon evidence presented at trial before her predecessor. *Cram v. Bach*, 1 Wis. 2d 378, 83 N.W.2d 877 (1957). In awarding injunctive relief, Judge DiMotto both erroneously relied on that evidence and repeated the course rejected in *Hoffmann*: She awarded Owners' requested injunctive relief without "tak[ing] into account relevant factors," 262 Wis. 2d at ¶28, and without basing the order "on the merits of [lining the Tunnel] with a record to support that order," *id.* at ¶27.

Owners attempt to justify the injunction by arguing that Judge DiMotto awarded equitable relief as a matter of course because the $100,000 judgment that Judge Kremers entered deprived them of an adequate legal remedy and left them irreparably harmed. Owners-Resp.-Br.-44–46. But injunctive relief is not so readily awarded: "[I]njunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the in-

junction." *Pure Milk Prods. Coop v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). As Owners tacitly concede, Judge DiMotto did not reconcile competing interests or balance the equities. Under *Cram* and *Hoffmann*, Judge DiMotto could not have done so without hearing evidence.

Judge DiMotto instead relied on trial evidence presented before her predecessor. Not only did she consider evidence of the "need" for a lining, she "adopt[ed] Plaintiffs' argument in their reply brief . . . at pages 10 through 12." R.399-15:MMSDApp-0894. There, responding to the District's suggestion that the court should consider Owners' unclean hands, Owners replied, *inter alia*, that the evidence did not prove unclean hands because, although the District's expert "Dr. Cherkauer had suggested that [Boston Store's] well had not been plugged properly, Plaintiffs moved into evidence exhibit 1836, 'which is a well construction report from the DNR setting forth that the lower part of the Boston Store well was abandoned per DNR requirements'" R.291-11:MMSDApp-0279. "Adoption" of that argument obviously required reliance on trial evidence.

Owners' contention that the District waived its right to present evidence on the competing interests and equities by not presenting that evidence at trial is defeated by their own concession that they did not seek injunctive relief until Judge Kremers limited their damages *after* trial. Owners-Resp.-Br.-53–56. And neither the District's "opportunity" at trial to disprove one element of Owners' nuisance damages claim—the reasonableness of abatement—nor its opportunity to submit briefs on whether equitable relief was available to Owners after post-verdict proceedings provided the evidentiary "injunction proceeding" mandated by *Hoffmann*. R.399-14,29:MMSDApp-0893,0908.

CONCLUSION

This Court should order entry of judgment dismissing Owners' action on the merits and affording them no relief. Alternatively, the award of injunctive relief should be vacated and either Judge Kremers' judgment should be affirmed with the entry of no additional relief, or further proceedings should be conducted to afford the District a full opportunity to be heard on the request for injunctive relief.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I certify that this reply brief conforms to the rules contained in §809.19(8)(b) for a brief and appendix produced using proportional serif font and pursuant to this Court's August 25, 2010, order expanding the brief volume limitation in §809(8)(c) to 6,000 words. The length of this response brief is 5,944 words.

Dated: November 23, 2010.

_____

G. Michael Halfenger

E-FILING CERTIFICATION

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

Dated: November 23, 2010.

_____

William J. Katt, Jr.

SUPPLEMENTAL APPENDIX CERTIFICATION

The supplemental appendix attached to this brief complies with the confidentiality requirements of Rule 809.19(2) and contains a copy of a decision of the court of appeals cited in this brief that is currently unpublished, although recommended for publication.

Dated: November 23, 2010.

_____

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CERTIFICATE OF MAILING

I certify that this Reply Brief of Cross-Appellant Milwaukee Metropolitan Sewerage District was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class or priority mail, or other class of mail that is at least as expeditious, on November 23, 2010. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated: November 23, 2010.

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SUPPLEMENTAL APPENDIX

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