IN THE SUPREME COURT
OF WISCONSIN
Nos. 2007AP221 & 2007AP1440

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

vs.

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

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)

# OPENING BRIEF OF MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

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## INTRODUCTION

Plaintiffs, Bostco LLC and Parisian Inc., are the present and a past owner of downtown Milwaukee's nineteenth-century Boston Store building (collectively, "Owners"). R.51-3–4; R.383-833–34:MMSDApp-0410.[1] They sued the Milwaukee Metropolitan Sewerage District claiming that the 300-foot-deep Inline Storage System, colloquially known as the "Deep Tunnel," had damaged the building's wood foundation piles. R.51:1-40. The piles had suffered decay for decades (R.385-1196–202:MMSDApp-0390–91), but additional piles were found in need of shoring up with concrete around the time the current owner used municipally supplied redevelopment funds to buy the building with plans to add condominiums and in-building parking. R.51-26–27; R.383-0842–52:MMSDApp-0412–15; R.385-1124–26,1312–13:MMSDApp-0387,0397. Owners commenced this suit in 2003, more than a decade after the tunnel's construction, to recover

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[1] Record citations refer to both the record number and page ("R.__-__") and, where applicable, page of the appendix to this brief ("MMSDApp-__").

from the District the cost of upgrading the foundation, as well the projected cost of having to replace the remaining wood piles with concrete in the future. R.51-1–40.

As a municipal entity the District is statutorily immune from liability for all conduct except that for which the law imposes a ministerial duty. §893.80(4).[2] As this Court has held, §893.80 provides immunity for all acts involving the design, construction, implementation, and continued existence 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*"). A municipality *may* be liable for negligence in operating or maintaining a public work, but only if the municipality breaches a ministerial duty of operation or maintenance and has notice of the breach. *Id.* ¶54. On this basis, the circuit court directed the parties that the tunnel's design and construction would not be at issue, a ruling that foreclosed evidence of the tunnel's actual design parameters and the detailed

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[2] All statutory references are to "Wis. Stat.," 2012, unless noted.

reports of infiltration levels that the District submitted to the DNR during construction to obtain the required DNR approval of unlined tunnel sections. R.124:6–7:MMSDApp-0460–61.

At trial, Owners' experts testified that the tunnel served as a "drain" for the area's groundwater (R.383-651–52:MMSDApp-0409; R.385-1271:MMSDApp-0395)—in reality, a slow "drain" located beneath 300 feet of earthen strata that surface water takes over 250 years to reach (R.350-Ex.74-31; R.351-Ex.1551-019). The fact that water entered the tunnel was not an operational or structural failure. The permit DNR issued to the District to authorize the tunnel's operation *requires* groundwater infiltration into the tunnel in order to protect against possible exfiltration of wastewater into surrounding rock and groundwater. R.124-8–9:MMSDApp-0462–63; R.351-Ex.2563-24:MMSDApp-0623.

Regardless of the circuit court's ruling that design and construction were not at issue (R.376-18:MMSDApp-0191; R.382-498–99:MMSDApp-0420), as well as DNR's approval of a partially lined tunnel (R.124-6&Ex.B:MMSDApp-0460,511), Owners' tunnel expert testified that the tunnel

should have been constructed with a complete concrete liner (R.382-586–87:MMSDApp-0429). This liner, he opined, would have lessened the infiltration of groundwater to the tunnel near the Boston Store building. R.382-540–41:MMSDApp-0422.

Owners' expert conceded, however, that groundwater entering the tunnel met even the stringent (and inapplicable) infiltration standard for construction of near-surface sewers as adjusted to account for the tunnel's depth. R.382-574:MMSDApp-0427. Owners proposed no other regulation, standard, or specific duty that the District failed to meet in operating or maintaining the tunnel. They instead labeled the continuing existence of the tunnel without a full concrete liner, "operation and maintenance" of the tunnel. R.382-586:MMSDApp-0429;Owners-Ct.App.-Resp.-Br.-17–18.

At Owners' request (R.247-1), the jury was asked only whether the District was negligent in the operation or maintenance of the tunnel (R.403-1:MMSDApp-0108). It was neither asked to find nor found that the District breached a ministerial duty. R.403:1–3:MMSDApp-0108–10. The trial judge never identified such a duty, first reserving

the issue for post-verdict motions and then leaving it unresolved for the appellate courts. R.379-3–5:MMSDApp-0113–15; R.394-29–30:MMSDApp-0089–90.

The court of appeals ignored the jury's actual finding and combed the record to postulate a ministerial duty of operation or maintenance the breach of which the jury *might* have found. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 76, ¶¶20–24, 30–33, 334 Wis. 2d 620, 800 N.W.2d 518. In so doing, the court of appeals characterized tunnel infiltration as "excessive" (*id.* ¶16), even though the evidence was that the infiltration met all arguable standards (R.382-574:MMSDApp-0427). It also relied on a document identifying a risk to the building when mining the tunnel in the building's vicinity, which occurred in 1990, and general groundwater infiltration throughout the tunnel's almost 20-mile length five years after that mining had concluded. *Id*. ¶¶30, 33. From these facts and a draft early planning document that proposed addition of a lining among the possible alternatives for fixing the tunnel should it deteriorate (though there was no evidence of deterioration), the court of appeals concluded that the District had breached a

ministerial duty of operation or maintenance. *Id.* ¶¶36–37.

The court of appeals' attempt to meld discrete bits of evidence into a ministerial duty that has no basis in the jury's finding distorts the record and ignores reality—that the tunnel operates today (and has operated since 1992) as it was designed, constructed, and approved by the Department of Natural Resources (DNR). R.124-4:MMSDApp-0458; R.351-ex.2563:MMSDApp-0595; R.388-2013–18,2125–26:MMSDApp-0372–73,0378. No evidence shows that the District has violated some ministerial operating parameter: Owners' expert conceded that the infiltration rate met the operative standard for which Owners argued. R.382-574:MMSDApp-0427. Nor does any evidence show that the tunnel condition has changed in any way that could accurately be described as requiring maintenance. That the tunnel broke down after construction was not even the Owners' theory; they contended that lack of a complete liner had allowed "excessive" infiltration since construction. R.382-457:MMSDApp-0417.

This Court's holding in *MMSD* that acts of design, construction, implementation, and exis-

tence of public works are entitled to immunity controls; the District is entitled to judgment on Owners' negligence and nuisance claims on immunity grounds. The court of appeals' contrary ruling allows what the legislature forbid—liability to be imposed ad hoc on municipalities by juries asked to conduct their own weighing of the perceived costs and benefits of discretionary public works decisions.

The District here raises one other issue. The Owners failed to comply with §893.80(1)'s notice of claim and itemization of damages provisions. The courts below held that a notice and itemized statement served by other entities falsely claiming to have owned the Boston Store building and asserting a claim for damage in their own names put the plaintiffs in substantial compliance with §893.80(1). 2011 WI App 76, ¶91; R.369-15–17:MMSDApp-0340–42. But a notice by a person who actually has no claim does not serve the statutory purpose of affording a municipality a chance to settle the claim or to disallow it and shorten the statute of limitations period as to the actual claimant. *Cf. E-Z Roll Off, LLC v. County of Oneida,* 2011 WI 71, 335 Wis. 2d 720, 800 N.W.2d 421.

Consequently, Owners' failure to serve a notice of claim and itemization of relief also requires judgment in the District's favor.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARDS OF REVIEW

1. The jury found the District negligent in the operation or maintenance of the Deep Tunnel, but it made no finding (and was not charged to find) that the District breached any ministerial duty of operation or maintenance. Owners' experts contended that the District was responsible for damage caused by groundwater infiltration, which they labeled "excessive," resulting from the tunnel being constructed and existing without a complete concrete lining. Owners' tunnel expert conceded that the amount of infiltration met the infiltration rate standard and their experts collectively identified no change in condition or "malfunction" of the tunnel since its construction.

Issue: Under these circumstances, can judgment be entered against the District based on the jury's general negligence finding when the District is entitled by §893.80(4) to immunity for its discretionary conduct, including the design, construction, implementation, operation, and maintenance of public works?

The circuit court, in denying the District's post-verdict motion and entering judgment on the jury's verdict, answered, "yes." In doing so, however, Judge Kremers indicated that he "remained troubled" by whether his ruling on the discretionary act immunity issue was correct.

The court of appeals affirmed.

This Court reviews de novo whether the jury's finding is based on a breach of ministerial duty. *See Miesen v. DOT*, 226 Wis. 2d 298, 304, 594 N.W.2d 821, 825 (Ct. App. 1999).

2. Neither plaintiff served a notice of claim or itemized statement of relief required by §893.80(1). Plaintiffs rely on a notice of claim and an itemized statement of relief served by different entities—ones related through common ownership. In these documents, the non-owners identified themselves as "claimants" falsely stating that they owned the building.

Issue: Does a notice of claim or itemized statement of relief served by an entity having no claim against the municipality "substantially comply" with §893.80(1)'s notice requirements if the entity without any claim employs the same lawyer as

a legally distinct entity that actually has the claim and later commences suit?

The circuit court, in denying the District's motion to dismiss, answered, "yes."

The court of appeals affirmed.

This Court reviews these rulings de novo. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 189, 515 N.W.2d 888, 892 (1994), *overruled on other grounds by State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 547 N.W.2d 587 (1996).

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents important issues involving the municipal protections afforded by the legislature in §893.80, as well as restrictions on the ability of circuit courts to interfere with public policy decisions that the legislature has left to municipalities and state agencies. Consistent with this Court's customary practice, oral argument should be heard, and the decision should be published.

## STATEMENT OF THE CASE

### I. Statement of Facts

The District is a municipal corporation that provides sewerage services to all communities in Milwaukee County (except South Milwaukee) and

to communities in surrounding counties. R.124-1-2:MMSDApp-0455–56. In 1977, the District's predecessor created the Water Pollution Abatement Program in order to comply with state and federal court orders directing it to remedy sewer overflows. R.124-2–3:MMSDApp-0456–57; R.381-260–61:MMSDApp-0435. A central component of the Abatement Program was the construction of the Deep Tunnel, a series of 260–300-feet-deep tunnels designed to hold wastewater until it can be treated at the District's treatment facilities. R.124-5:MMSDApp-0459; R.381-257,260:MMSDApp-0434–35. The Deep Tunnel extends for almost 20 miles and was able to contain 405 million gallons of wastewater when it was put into full operation in 1994. R.381-257:MMSDApp-0434.

CH2M Hill, the lead engineering firm for the District's Water Pollution Abatement Program, established the "program management office" (PMO) in the late 1970s; the PMO was responsible for the Deep Tunnel's design. R.124-4–5:MMSDApp-0458–59; R.381-261–63:MMSDApp-0435–36. After the PMO conducted geological surveys of the area, it concluded that concrete should only be used to line the tunnel where needed to maintain the tunnel's

structural integrity. R.123-3–4:MMSDApp-0582; R.124-6:MMSDApp-0460; R.388-2033–34:MMSDApp-0374.

The DNR, however, which had conditionally approved an earlier plan calling for lining the tunnel with concrete, opposed the design change. R.124-6:MMSDApp-0460. The opposition was resolved in 1986 by a stipulation filed in litigation between the District and DNR. *Milwaukee Metro. Sewerage Dist. v. WDNR*, No. 594-623 (Milw. County Cir. Ct.). The stipulation required the District to provide the DNR with "lining reports"—detailed technical information obtained during mining, including information on groundwater infiltration, which formed the basis for the District's position on lining each segment of the tunnel system. R.124-7:MMSDApp-0461; R.123-4–5:MMSDApp-0583–84. The DNR, after reviewing the reports, approved all lining recommendations for the tunnel. R.388-2125:MMSDApp-0378.

The tunnel segment at issue—the North Shore—was designed to have only a partial lining and to use grout during construction to control excess infiltration. R.388-2013,2033:MMSDApp-0372,0374. The District hired Traylor Bros.,

Inc./Frontier-Kemper Constructors to construct the segment. R.382-368:MMSDApp-0416.

Water inflows and rock instability halted construction of the North Shore segment about three miles north of downtown. R.123-5–7:MMSDApp-0584–86. Because the tunnel had not yet reached downtown, these water inflows had little or no impact on the downtown area. *Id.* Construction proceeded with a redesign that employed significant surface grouting and a temporary support structure for the tunnel opening. *Id.* Some additional unexpected and substantial water inflows occurred, leading to minor surface settlement along Third Street in the downtown area. *Id.* The District installed recharge wells to restore the water table. *Id*.

As finally completed in 1992, the North Shore segment runs under Third Street—about a block east of the Boston Store building. R.123-7:MMSDApp-0586. That segment is about 45,000 feet long of which 25,100 feet has a concrete liner, in accordance with the DNR-approved plan. *Id.*

Since 1992, the District has operated the tunnel under the terms of a Water Pollution Discharge Elimination System permit issued by the

DNR. R.351-Ex.2563:MMSDApp-0595. The permit requires that the tunnel have a positive inward gradient—that water flows into the tunnel—in order to prevent the possible exfiltration of wastewater. R.351-Ex.2563-24:MMSDApp-0623.

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

During the tunnel's construction in the early 1990s, some property owners, principally those who owned buildings directly over the tunnel on Third Street, reported architectural and cosmetic damage to buildings that they attributed to construction of the Deep Tunnel. R.122-2:MMSDApp-0589. The reported damage, which was limited to façade damage, shallow foundation repairs, and ground floor slab repairs, diminished away from Third Street. R.122-2–4:MMSDApp-0589–91.

The Program Management Office investigated these claims when they were made. R.122-2–3:MMSDApp-0589–90. The PMO had an engineer inspect the reportedly damaged properties and investigate when the damage occurred, including, in some instances, investigating the building's history and maintenance record. R.122-3:MMSDApp-0590. The District authorized the payment of repairs

where the investigation substantiated the claim. R.122-3–4:MMSDApp-0590–91. It did so in order to avoid having to reimburse its construction contractor. R.394-41:MMSDApp-0101. During this entire period, no one made a claim for deep foundation damage. R.122-4:MMSDApp-0591. All of these claims were investigated and resolved by 1995—eight years before Owners commenced this action. *Id*.

### B. The Boston Store building had a long history of foundation problems.[3]

The Boston Store "building" consists of five buildings built over a forty-year period beginning in the 1880s. R.385-1193–96:MMSDApp-903–04. The buildings were built on wood pile foundations. R.384-965:MMSDApp-0401. These piles are clus-

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[3] Some of these background facts are included to provide a full picture of the events made relevant ultimately by the lower courts' refusal to identify a post-construction ministerial duty, as well as by the circuit court's post-judgment imposition of injunctive relief, an issue presented by Owners' petition for review. The circuit court's pre-trial rulings inconsistently foreclosed full development at trial of matters pre-dating the tunnel's initial operation in 1992. R.211-4:MMSDApp-0276.

ters of upside-down trees that were driven thirty or more feet into the ground to support the building's columns and transfer the weight of the building into stable ground. R.384-962–65:MMSDApp-0401. A concrete or stone pile cap connected the pile cluster to the columns. R.381-198:MMSDApp-0431. At the time of the building's construction, the tops of the piles were located below the water table, which would have protected the piles' integrity by keeping them saturated. *See* R.385-1282–83:MMSDApp-0396; R.386-1423–24:MMSDApp-0384. When the water table drops below the pile tops, they become subject to decay and lose their structural integrity.[4] R.381-198–99:MMSDApp-0431–32.

As Milwaukee's industrial use of groundwater increased in the 1950s and 1960s, the water table was stressed and depleted. R.387-1789–

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[4] Beginning in 1936, Boston Store's owners operated a well on the property that drew roughly 800 gallons per minute from groundwater that saturated its piles. R.387-1820:MMSDApp-0382. During this time nothing was done to monitor the groundwater level or protect the piles. R.384-1070:MMSDApp-0408. Even after well use stopped in 1962, building owners left the well in place, which, evidence showed, continued to drain groundwater from beneath the building. R.387-1816–25:MMSDApp-0381–83.

90:MMSDApp-0379–80. The marsh deposits were drawn down substantially, such that, as early as the 1950s, other building owners underpinned their buildings anew or constructed wetting systems. R.386-1532–33:MMSDApp-0385. Since at least the early 1950s, Boston Store building engineers were aware that the wood piles were decaying because building owners had not maintained the water table below the building by, for example, flooding the piles using a recharge pump.[5] R.384-1069–70:MMSDApp-0407–08; R.386-1540:MMSDApp-0386. Rather than keep the piles saturated, building owners chose to monitor column movement and repair only those piles that were causing instability. R.384-1039:MMSDApp-0404.

Evidence still available to the litigants showed that since 1976, pile decay was identified and repaired several times before the tunnel's con-

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[5] In 1954, a Milwaukee Journal article reported insect infestation in the Boston Store building's piles resulting from a significant drop in groundwater levels having exposed the piles. Lloyd D. Gladfelter, *Worms Undermine Buildings in Milwaukee Downtown Area*, MILWAUKEE J., Feb. 21, 1954, at 1. (A copy of this article is included at MMSDApp-0591.)

struction; e.g., two sets of piles were repaired in 1979 and additional repairs were made in 1980 and 1982. R.351-ex.2258; R.384-1057–61:MMSDApp-0405–06. A 1978 urban renewal inspection of the Boston Store building identified deterioration and differential settlement around the base of many columns. R.388-2065,2069–74:MMSDApp-0375–76. A building engineer also noted ongoing settlement in several columns throughout the 1980s. R.351-ex.421. The piles identified for repair in the early 1980s—still a decade before tunnel construction—were rotted away at the top and were disconnected from the pile caps. *Id.*

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

In 1997, Carson Pirie Scott, the building's then-owner, decided to underpin nine columns using a jet grouting method that involves shooting grout under the pile caps, essentially replacing the wood pile foundation with a new concrete founda-

tion. R.351-ex.697; R.384-1015–16:MMSDApp-0402. Contemporaneous observations revealed the same type of decay as reported in earlier years. R.384-1037–1038:MMSDApp-0403–04. Rather than further investigate or address the cause of column settlement, Owners continued to pursue a replace-on-failure policy. R.384-1039:MMSDApp-0404.

### C. In 2001, Boston Store was redeveloped into condominiums and retail space.

In 2001, as part of a redevelopment agreement, the City of Milwaukee Redevelopment Authority agreed to give $3 million to Bostco, a wholly owned limited liability company of Wisconsin Electric Power Company, to purchase the Boston Store building from its then-owner, Parisian. R.383-834:MMSDApp-0401; R.385-1127–28:MMSDApp-0387–88. In exchange for the $3 million from the City, Parisian, a Carson successor entity, transferred ownership of the building and a nearby parking structure to Bostco. R.385-1127–28:MMSDApp-0387–88; R.383-834–36,846–47:MMSDApp-0410,0413–14. (According to press reports, Bostco recently sold the parking structure alone for $2.6 million. Sean Ryan, *Zilber Buys*

*Wispark Parking Structure Near Grand Avenue*, MILWAUKEE BUS. J., Apr. 6, 2012, at A3.) Bostco entered into a retail lease with Parisian and undertook to convert part of the Boston Store building into condominiums and the lower levels into underground parking. R.385-1126–28:MMSDApp-0387–88. As part of this redevelopment, Bostco underpinned 15 additional columns. R.385-1203:MMSDApp-0391.

On June 5, 2003, Owners commenced this action. R.51. They claimed that the District was liable for all foundation repairs. R.51-1–16. They did not, however, present any evidence that the pile decay had resulted in any business interruptions or had at any time interfered with the building's use.

Instead, Owners presented column monitoring records, which they contended revealed greater column movement since the tunnel's operation. R.385-1203–05:MMSDApp-0391–92. Their damages expert then testified that the cost of replacing some wood piles and other repairs in 1997 and foundation repair during the 2001–2004 building renovation was $3 million. R.385-1216,1260,1334–36:MMSDApp-0393–94,0398–99; R.351-exs.1553. He proposed future damages of $9 million based on

the cost of jet grouting all remaining columns (even those repaired before 1997). R.351-exs.1553-018 to 1553-021.

## II. The Procedural History of the Case

This case has two distinct procedural components. First, the case proceeded through a jury trial in which Owners sought to recover damages. Judge Kremers, who presided over this component, ruled on post-verdict motions and entered a final order adjudicating the only remaining claims by awarding damages on Owners' negligence claim and dismissing their nuisance claim. R.305:MMSDApp-0058. Second, Judge DiMotto, who acquired the case from Judge Kremers after he had ruled on the parties' post-verdict motions, decided to consider a motion for injunctive relief that Owners filed in response to Judge Kremers' ruling that §893.80(3) limited recoverable damages to $50,000 per plaintiff. R.395-13. After Owners appealed Judge Kremers' judgment, Judge DiMotto, without any further hearing to consider equitable factors, ordered the District to line the tunnel near the Boston Store building. R.399-26.

### A. Owners' claims attack tunnel design and construction.

Owners' amended complaint, filed more than 18 months into the litigation, reveals the nature of their case. It repeatedly emphasizes the tunnel's design and construction—specifically, the lack of a full concrete lining—as the cause of reduced groundwater levels that damaged the building's pile foundation. For example, they allege:

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

As to operation and maintenance, Owners' amended complaint makes only the conclusory statement that the District's "inspection, operation or maintenance" of the tunnel caused harm. R.51-28. They did not plead that any failure of "inspection, operation, or maintenance" caused a distinct

harm from that of the alleged negligence in the tunnel's design and construction. *See, e.g.*, R.51-28.

The District sought summary judgment based on the immunity provided by §893.80(4) for intentional and discretionary conduct, arguing specifically that this Court held in *MMSD* that §893.80(4) immunizes governmental entities from liability for all "decisions regarding the adoption, design and implementation of public works," 2005 WI 8, ¶60. R.119-56–60. Judge Kremers declined to award summary judgment on the negligence and nuisance claims. R.374-40–41:MMSDApp-0320–21. He concluded that the immunity issue went "to the scope of what is going to be allowed at trial" (R.374-42:MMSDApp-0322), but recognized that the District's "points are well taken with respect to the scope of governmental immunity versus the acts that they may not have immunity for and, again, we are going to have to be . . . very vigilant in making sure people follow what is allowed and what isn't" (*id.*). He cautioned that the District's discretionary act immunity would require the verdict to be phrased in a way that confined the jury to considering only actionable breaches of ministerial duties. R.374-41:MMSDApp-0321.

Before trial, Owners contended that they could prove a ministerial duty of "operation and maintenance" by evidence that the tunnel as designed or constructed allowed water to infiltrate and the District did not take corrective measures; as their counsel argued at the pre-trial conference, their case was about the tunnel's unaltered existence:

> [This case] has to do with the mere existence of [the tunnel] and the fact that it is being maintained with these porous holes and it has dewatered the area and has started this cascade of building damage to the Boston Store.

R.376-38:MMSDApp-0211.

Ultimately, Judge Kremers ruled that the District could not be liable for conduct involving the tunnel's design or construction, but could only be liable for conduct occurring after it took over responsibility for the tunnel's operation.[6] R.376-18–19:MMSDApp-0191–92. He allowed Owners to

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[6] Again, this ruling foreclosed the District's ability to prove at trial that the DNR expressly approved the design and construction of the tunnel with only a partial concrete liner. R.124-6–7:MMSDApp-0460–61; R.388-2125:MMSDApp-0378.

submit evidence about the tunnel's design and construction, however, because Owners argued that whether the District was earlier on notice of potential harm from groundwater infiltration was relevant to whether the District had an actionable ministerial duty in the later operation, maintenance, or inspection of the tunnel. R.377-12–13:MMSDApp-0147–48. Judge Kremers also told the parties that he would "allow the plaintiffs to put on their evidence that they believe supports those particular ministerial standards and at the end of the plaintiff's case [he would] decide whether in fact [he thought] they appl[ied] and whether [he thought] the plaintiff[s] ha[d] met their burden with respect to that." R.379-3–4:MMSDApp-0113–14.

Even in making these allowances, however, Judge Kremers identified the Owners' problem in presenting evidence of design and construction conduct, saying, "I suspect that the Plaintiffs['] position in this case will ultimately come back or may come back to defeat [their] claim because . . . [it] lays the problem at the feet of the construction people for which the district has immunity. And the fact that they are constructing something . . . seems to me to go to the design and construction,

not to maintenance." R.377-13–14:MMSDApp-0148–49. Echoing this point, the court cautioned Owners at trial that "[w]hat you're claiming in this lawsuit is about whether or not as [the District] operated, maintained, and inspected this tunnel post '92 it caused harm to Boston Store. . . . If it didn't, you lose." R.381-245:MMSDApp-0433; *see also* R.382-494–99:MMSDApp-0419–20.

The Owners' evidence did not provide a basis for finding harm caused by any ministerial duty in the operation, maintenance, or inspection of the tunnel after the tunnel was put into operation in 1992. Their tunnel expert conceded that the tunnel's infiltration rate met the 200-gallons-per-day-per-diameter-inch-per-mile standard—the only arguably applicable infiltration standard—when adjusted for the tunnel's depth. R.382-573–74:MMSDApp-0427. He testified that any effort to apply the 200-standard to a tunnel 300 feet underground, where the external pressure is much greater, requires a depth conversion and that when converted the tunnel met the 200-standard. R.382-573–74:MMSDApp-0427.

After this testimony, the court declined to instruct the jury on the relevance of the 200-

standard. R.392-2516–21:MMSDApp-0345–46. The circuit court never ruled on whether the 200-standard applied to the tunnel at all, to its operation or maintenance, or whether, if it does apply, it must be adjusted for depth. R.389-2252–58:MMSDApp-0368–69. After the testimony that the tunnel met the 200-standard, the Owners abandoned that standard as itself establishing a ministerial duty. R.246-12:MMSDApp-0366; R.392-2516–17:MMSDApp-0345. Rather than identify any ministerial duty, Owners told the jury they could find the District liable based on a general negligence balancing of costs and benefits. R.392-2600–01:MMSDApp-0354.

### B. Jury's verdict: both parties were negligent.

The jury was asked to answer 11 special verdict questions—including whether either party was negligent. R.403-1–3:MMSDApp-0108–10. After two days of deliberations, the jury found both that the District had "operated or maintained" the Deep Tunnel negligently and that Owners had maintained the building negligently. R.403-1–3:MMSDApp-0108–10. The jury allocated 70% responsibility to the District and 30% to Owners. R.403-3:MMSDApp-0110. Asked how much money

it would take to compensate Owners for "property damage," the jury answered $3 million for property damages "already suffered" and $6 million for property damages Owners "will suffer in the future." R.403-3:MMSDApp-0110.

### C. Neither plaintiff served a notice of claim.

Neither Bostco nor Parisian served the notice of claim or itemized statement of relief §893.80(1) imposes as prerequisites to suing a political corporation. In 2001, two other entities, WISPARK Holdings LLC and Saks Incorporated, served a notice of claim and itemization of relief. R.37-exs.A–B:MMSDApp-0449–54. Neither of these entities owned the building; they are both legally distinct from plaintiffs Bostco and Parisian: Saks is a Tennessee corporation that owned the stock of Carson Pirie Scott & Co. (Carson), a former owner of the Boston Store building, and, after 1996, the stock of Parisian, which acquired the Boston Store building through a 1999 merger with Carson. R.383-842–54:MMSDApp-0409–15. Bostco is a single-member ch. 183 limited liability company created in September 2000 by Wisconsin Electric Power Company. R.37-48; R.383-842–54:MMSDApp-0409–15. Bostco bought the Boston Store building from Pari-

sian in January 2001. R.383-834:MMSDApp-0410. WISPARK is a separate limited liability company formed by Wisconsin Energy Corporation in July 2000. R.37-28–31. WISPARK contracted with Bostco to redevelop the Boston Store building, but it never owned the property. R.383-834–46:MMSDApp-0410–13.

In the notice of claim served in 2001, non-owners WISPARK and Saks asserted that they, as the sole "Claimants," owned the Boston Store building: "At all material times, Claimants have owned the Boston Store Retail/Office property located at 331 W. Wisconsin Avenue, Milwaukee, Wisconsin." R.37-ex.A:MMSDApp-0449–51. According to the WISPARK-Saks notice, WISPARK's and Saks's property was damaged by the District's "construction activities, and installation of and/or maintenance of (or lack thereof) the deep tunnel project." R.37-ex.A:MMSDApp-0449–51. The notice stated that WISPARK and Saks "have repaired and must make additional repairs to the wooden timber piles, reinforce the foundation and repair the structural damage." R.37-ex.A:MMSDApp-0450. It stated further that WISPARK and Saks "are seeking monetary relief from [the District] to offset the

damages caused by [the District]." R.37-ex.A:MMSDApp-0450.

Almost a year later, non-owners WISPARK and Saks served a "Notice of Claim (Itemization of Relief Sought)." R.37-ex.B:MMSDApp-0452–54. It too identified WISPARK and Saks as the only "Claimants." R.37-ex.B:MMSDApp-0452–54. It "itemizes the damages that the *Claimants incurred* as a result of the injury described in the Notice of Claim previously served on the [District] on July 19, 2001." R.37-ex.B:MMSDApp-0452. (emphasis added). This itemization describes various claimed "damages sustained" totaling $10,877,912.01. R.37-ex.B:MMSDApp-0453. It neither requests reconstruction of the tunnel nor makes any mention of injunctive relief. R.37-ex.B:MMSDApp-0452–54.

Owners conceded that WISPARK and Saks had unknowingly "filed the notice of claim [and] itemization of damages on behalf of the wrong part[ies]." R.369-8–9:MMSDApp-0333–34. Owners argued that these non-owners' notices substantially complied with §893.80(1) because Owners employed the same attorneys and "are so interrelated . . . that even the people who are the directors of the company, the president of the company

didn't even realize . . . that when they captioned the notice of claim, WisPark and Saks, rather than Bostco and Parisian, . . . they were bringing it in the name of someone who was not the current title owner of the property," R.369-8–9:MMSDApp-0333–34.

Judge Kremers was "not very impressed by [Owners'] argument that, well there is a lot of interrelated companies and even the directors don't know which company they are working for or who is what any more." R.369-14:MMSDApp-0339. But, after noting that the issue would eventually be heard on appeal, he ruled that Owners substantially complied with the notice of claim statute because the non-owners' notices made the District aware that someone asserted a claim related to the Boston Store building. R.369-15–17:MMSDApp-0340–42.

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

Both parties filed timely post-verdict motions challenging aspects of the verdict and seeking judgment in their favor. R.256-1–13; R.259-1–4. The District sought judgment notwithstanding the verdict on the basis of its statutory immunity for discretionary conduct, including conduct involving

the design and construction of public works projects, as well as other discretionary acts, including the timing of inspections and the fact that no duty of "maintenance" required adding a concrete lining. R.262-1–10:MMSDApp-0439–48. Judge Kremers denied the motion, but he never identified any ministerial duty violation. R.394-29–31:MMSDApp-0089–91. Instead he left the issue for the appellate courts:

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

R.394-29–30:MMSDApp-0089–90.

But Judge Kremers granted the District's motion to limit damages to $50,000 per plaintiff, as required by §893.80(3). R.394-46:MMSDApp-0106. And, on October 25, 2006, Judge Kremers signed an order entering judgment on Owners' remaining claims—awarding $100,000 on their negligence claim and dismissing their nuisance claim. R.305:MMSDApp-0058–60. Owners appealed on January 19, 2007. R.360.

On January 30, 2007, Judge DiMotto, based only on her review of the trial record, orally granted an injunction motion Owners filed after Judge Kremers' September 11, 2006 post-verdict ruling limited plaintiffs' damages to $100,000. R.399-26. The injunction required the District to construct a full concrete tunnel lining near the Boston Store building at an estimated cost in excess of $10 million. R.382-523–24:MMSDApp-0421.

## IV. The Court of Appeals Upholds Liability Based on a General Negligence Finding and Reverses the Injunction Order

The court of appeals affirmed the circuit court's damages award and reversed its order of injunctive relief. In ruling that the District's discretionary-act immunity did not apply, the court of appeals characterized tunnel infiltration as "excessive" and in need of "repair" despite the testimony of Owners' expert that the infiltration rate met the only arguable standard and despite there being no evidence that the tunnel's condition was changed at all from that originally approved by the DNR. The court of appeals concluded that the District's general duty to operate the tunnel alleviated any need to "show any additional law or rule violation to establish the District's ministerial duty." *Bostco LLC*

*v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 76, ¶36, 334 Wis. 2d 620, 800 N.W.2d 518.

The appellate court also ruled that the notice of claim and itemization of relief served by legally distinct non-owners put Owners in substantial compliance with §893.80(1)'s notice of claim requirements.

Owners petitioned this Court for review. The District cross-petitioned. This Court granted both petitions.

## ARGUMENT

### I. This Action Is Barred By §893.80(4)'s Municipal Immunity for Discretionary Acts

#### A. Municipal entities, such as the District, can be liable for negligence only in the performance of ministerial duties.

Following the Court's 1962 abandonment of common-law governmental immunity, the legislature enacted §893.80(4)'s predecessor to provide municipalities immunity from judicial second-guessing of their discretionary acts. Since that enactment, "[n]o suit may be brought against any . . . political corporation . . . for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions"—that is, for discretionary

acts. *MMSD*, 2005 WI 8, ¶53. The District is a municipality entitled to §893.80(4)'s discretionary-act immunity. *Allstate Ins. Co. v. Milwaukee Metro. Sewerage Comm'n*, 80 Wis. 2d 10, 15–16, 258 N.W.2d 148, 150–51 (1977).

*MMSD* clarified the scope of §893.80(4) municipal immunity in a context closely related to the one here. The Court there considered whether the City of Milwaukee enjoyed immunity from negligence and nuisance claims after one of the City's water mains broke causing the collapse of MMSD's interceptor sewer. Surveying the law since §893.80(4)'s enactment, the Court explained that §893.80(4) "immunizes against . . . *any act that involves the exercise of discretion and judgment*." *MMSD*, 2005 WI 8, ¶54 (internal quotation marks and quoting citation omitted; emphasis added).

This immunity, the Court held, applies to all municipal conduct except that based on conduct that is non-discretionary or "ministerial"; that is, conduct involving the performance of tasks so specifically required by law that *no* judgment or discretion plays a role:

> A ministerial act, in contrast to an immune discretionary act***, involves a duty that is absolute, certain and***

> ***imperative*,** involving merely the performance of a specific task ***when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion*.**

*Id.* (internal quotation marks and quoting citation omitted; emphasis added). By limiting municipal liability to injuries resulting from ministerial acts, the legislature left the benefits and costs of policy choices—the subject of discretionary conduct—to municipalities and allowed courts (and juries) to adjudge only whether municipalities act in accordance with definitive standards imposed by law.

In the specific context of public works, like sewer systems, *MMSD* ruled that §893.80(4) categorically bars all liability for their planning, design, and implementation:

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

*Id.* ¶60 (internal citations and quoting citation omitted; emphasis added). This categorical immu-

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

Applied here, as the court of appeals correctly stated, *MMSD*'s reasoning requires a holding that the District is immune from all claims that the design, construction, and continued existence of the Deep Tunnel harmed the Boston Store building. *MMSD*, 2005 WI 8, ¶60; 2011 WI App 76, ¶27. As explained below, Owners' evidence related only to these immune claims.

The issue presented here is whether there is a basis for ruling that the jury's verdict is supported by a breach of ministerial duty involving the tunnel's operation or maintenance. The jury made no finding that the District failed to perform a ministerial duty. Nor does the evidence admit of such a finding. Because *MMSD* limits the Districts' liability to breaches of a ministerial duty, the District is entitled to judgment, or minimally, a new trial. *Id.* ¶¶60–61.

Moreover, Owners' witnesses attributed damage to the Boston Store building's foundation to the

tunnel without making any effort to separate harm caused by non-immune conduct (which was never identified), from harm caused by immune conduct, such as designing and constructing the tunnel or performing discretionary acts of operation or maintenance. R.382:586–88:MMSDApp-0429; R.385-1340:MMSDApp-0400. Because the District cannot be held liable for immune acts, Owners' failure to disaggregate would bar any damages recovery, even if there were some evidence that could support a finding that the District breached an unspecified ministerial duty of operation or maintenance. *See, e.g., Blue Cross & Blue Shield v. Marshfield Clinic*, 152 F.3d 588 (7th Cir. 1998) (plaintiff must show harm caused by actionable conduct).

As this Court has held, a plaintiff cannot recover unless there is "a causal connection between the conduct and the injury; and . . . an actual loss or damage as a result of the injury." *Martindale v. Ripp*, 2001 WI 113, ¶33, 246 Wis. 2d 67, 629 N.W.2d 698. The "mere possibility" that some non-immune conduct caused harm is inadequate to support an award when, as here, neither the court, the jury, nor Owners identified a ministerial duty; thus a damage award attributable to non-immune

conduct "remains one of pure speculation or conjecture." *Merco Distrib. Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 460, 267 N.W. 652 (1978) (internal quotation marks and quoting citation omitted). Under these circumstances, "it becomes the duty of the court to direct a verdict for the defendant." *Id.* (internal quotation marks and quoting citation omitted).

### B. The jury found only negligence in operation or maintenance, not breach of a ministerial duty.

*MMSD* makes clear that duties of operation and maintenance can, but need not, be ministerial. *See* 2005 WI 8, ¶9. Acts of operation and maintenance are often discretionary: everything from decisions about when and how much water to allow into the tunnel to what maintenance to conduct in the tunnel requires the exercise of judgment. *Ministerial* duties are limited to specific tasks compelled by law as to "time, mode and [the] occasion for [their] performance." *Id.* ¶61.

The jury was neither asked to find nor did it find a breach of a ministerial duty. Although the District consistently asserted its discretionary-act immunity, the circuit court allowed the jury to answer a general negligence question—whether the

District was "negligent in the manner in which it operated or maintained the tunnel near the Boston Store" building. R.403-1:MMSDApp-0108. The court instructed the jury that it should decide whether the District generally failed to exercise ordinary care that created an unreasonable risk of harm:

> An entity is negligent when it fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances.
>
> An entity is not using ordinary care and is negligent if without intending to do harm does something or fails to do something that a reasonable person in its position would recognize as creating an unreasonable risk of damage to property.

R.392-2539–40:MMSDApp-0349–50. The circuit court did not limit the jury to considering any specific act of operation or maintenance.

Nor does anything else suggest that the jury based its negligence finding on a breach of a ministerial duty. Owners told the jury it could rely on several acts to find the District liable under a general negligence balancing of costs and benefits. None of those acts were ministerial. As their counsel put it at closing argument:

> You're going to be asked the first question. "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?" I'm going to ask you to put "yes". And the reason I am is for all the reasons that we talked about. They turned off the recharge wells. They didn't notify the Boston Store it was a critical structure. They didn't revisit the critical structures report. They didn't go in there and line additional sections of the tunnel, and all the other reasons I talked about, I'm going to ask you to write "yes".

R.392:2600–01:MMSDApp-0354. None of these acts—turning off recharge wells, not telling "Boston Store" that it was on a construction-era list of buildings founded on wood piles and located near the tunnel's construction, "revisiting" that list at some later date, or lining additional sections of the tunnel—are "specific task[s] [for which] the law imposes, prescribes and defines the time, mode and occasion for [their] performance with such certainty that nothing remains for judgment or discretion." *MMSD*, 2005 WI 8, ¶54 (internal quotation marks and quoting citation omitted).

The trial court reserved the question of whether Owners proved that the District breached

a ministerial duty for decision after verdict. R.379-3–4:MMSDApp-0113–14. That was inappropriate; it should have determined at the outset, as a pure question of law, what sort of ministerial duty the District might have and then asked the jury to determine whether that ministerial duty was breached. *See Kimps v. Hill*, 187 Wis. 2d 508, 513, 523 N.W.2d 281, 284 (Ct. App. 1994) ("[A] determination of what is imposed by a ministerial duty is a question of law."). Instead, the trial court impermissibly allowed the jury to find negligence based on the jury's own weighing of costs and benefits about the District's conduct in operating and maintaining the tunnel. This alone requires that the verdict be set aside.

As explained above, the presence of just one immune act among those thrown into Owners' supposed hodgepodge of "reasons" for finding the District negligent defeats the entry of judgment based on the verdict. On appeal Owners have argued only that the District had a ministerial duty to line the tunnel section near the Boston Store building—abandoning the majority of negligence rationales it argued to the jury. Because the jury was free to have made its liability finding on any of those ra-

tionales that are barred by discretionary-act immunity, Owners have effectively abandoned the verdict. The complete absence of proof of any ministerial duty, moreover, requires judgment in the District's favor.

### C. Owners' evidence was insufficient as a matter of law to prove breach of a ministerial duty.

After reserving the question whether Owners had proved the existence of a ministerial duty for resolution after verdict, the trial court denied the District's post-verdict motion without identifying a ministerial duty breach that could support liability. R.379-3–5:MMSDApp-0113–15; R.394-29–30:MMSDApp-0089–90. Judge Kremers told the parties that his ministerial duty rulings troubled him, but he would pass the issue to the appellate courts. R.394-29:MMSDApp-0089.

The court of appeals concluded that the District was not entitled to immunity. It based this conclusion on varying formulations of a duty to "repair" the tunnel or "stop" the tunnel from "leaking" "excessively." 2011 WI App 76, ¶¶16, 19. Even if an effort to construct a ministerial duty about which the jury was never asked were procedurally justified (and it is not), neither the record, the law,

nor the real-world facts supports a conclusion that the District had a ministerial duty to re-construct the tunnel in the Boston Store building's vicinity in order to prevent harm from "excessive leaking."

1. There is no evidence that the tunnel "leaks" "excessively."

Nothing supports the linchpin of the court of appeals' reasoning—that "excessive" amounts of groundwater have been entering the tunnel since it became operational in August 1992. The only infiltration standard Owners proposed was Wisconsin Administrative Code NR §110.13(2)(k)1, a sewer-pipe construction standard requiring groundwater infiltration not to exceed 200 gallons per inch of pipe diameter per mile per day ("200-standard").

To begin with, the standard in NR §110.13(2)(k)1 applies to traditional near-surface sewer *construction*. Thus, the District is categorically immune from the acts to which NR §110.13(2)(k) applies. *See MMSD*, 2005 WI 8 ¶58 (quoting *Allstate*, 80 Wis. 2d at 18).

The Deep Tunnel, moreover, is not a traditional near-surface sewer. It is a massive storage tunnel for wastewater flows. R.381-257,259–60:MMSDApp-0434–35. Its design, construction, and operation were all approved and specifically

permitted by the DNR. R.124-4:MMSDApp-0458; R.351-ex.2563:MMSDApp-0595. As *designed* and *constructed*, the groundwater in rock surrounding the tunnel is subject to a greater pressure (hydraulic head) (R.382-591:MMSDApp-0430), than inside the tunnel, resulting in infiltration (R.382-584:MMSDApp-0428). Under the terms of the District's DNR-issued permit, the tunnel must be operated and maintained to keep this "positive" hydraulic head, which allows water to infiltrate in order to avoid wastewater escaping into surrounding groundwater. R.351-ex.2563:MMSDApp-0623.

The court of appeals ruled that too much groundwater is entering the tunnel, reasoning that "the DNR required a limited inward flow of not more than 200 gallons per day adjusted for the depth of the tunnel." 2011 WI App 76, ¶22. But, as explained above, the jury made no finding that tunnel infiltration rates exceeded the 200-standard. R.403-1–3:MMSDApp-0108–110. And the NR §110.13(2)(k)1 construction standard, on which the court of appeals relied for this ruling, by its terms, does not impose any duty of operation or maintenance. NR §110.13(2)(k)1 ("Tests for infiltration shall be specified in the *construction specifications*."

(emphasis added)). The DNR permit, which allows and requires the Deep Tunnel's operation, does not refer to NR §110.13(2)(k)1 or to the 200-standard. R.382-557–59:MMSDApp-0423–24; R.388-2126:MMSDApp-0378.

Because the trial court correctly ruled that design and construction were immune acts excluded from trial, the District had no opportunity to prove the tunnel's actual design and construction criteria or DNR's approval of those criteria. Even so, Owners' evidence showed that the tunnel has ***met*** the 200-standard. Owners' tunnel expert explained that the standard on which NR § 110.13(2)(k)1 is based requires adjusting the amount of allowable infiltration for depth. R.382-574:MMSDApp-0427. So adjusted, as Owners' expert testified, the tunnel meets the inapplicable construction standard:

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

A: Yes, it does.

Q: Meets the 200 limit when you convert it to depth, doesn't it?

A: It does.

R.382-574:MMSDApp-0684. No evidence contradicts this testimony. But the court of appeals in suggesting that the District had a ministerial duty to "repair" the tunnel ignored the concession.

2. The District breached no ministerial duty of maintenance or repair.

In ruling that the District had a ministerial duty to "repair" a tunnel that did not work as designed and constructed, the court of appeals also ignored the fact that by limiting the trial to the District's liability for post-operation conduct (R.211-4–5:MMSDApp-0276–77), the trial court's pretrial ruling had precluded the District's submission of the tunnel's *actual* design and construction criteria. In the absence of the actual design and construction criteria, the court of appeals created its own design standard from a statement plucked out of a pre-design planning document; based on that statement, the court of appeals ruled that the District operated the tunnel as to a condition of disrepair or defect:

> The February 1982 Inline Storage Facilities Plan ("the ISFP") setting forth the initial planning for the Deep Tunnel and approved by the District, shows that the Deep Tunnel was *not designed* to dewater the alluvial soils around the tunnel. In fact, the District called this a "worst case scenario[]." The Deep Tunnel was designed "to have no significant short- or long-term effect on the local hydrogeologic system."

2011 WI App 76, ¶22.[7] The court of appeals reasoned that if the tunnel was not designed to dewater alluvial soils, Owners' experts' testimony that it had that result shows that the tunnel is broken and that the District has a ministerial duty to repair it. This reasoning is flawed.

First, no evidence demonstrates that this preconstruction aspiration applies to the tunnel as actually constructed and operated. The evidence provides only that the DNR, which approved the lining plan for each section, mandated that groundwater flow *into* the tunnel. As explained above, no evi-

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[7] The trial court allowed the Owners to submit the 1982 ISFP over the District's objection that it was irrelevant to the trial of post-operation liability. R.381-282–83:MMSDApp-0437–38.

dence supports the suggestion that the tunnel has not performed up to DNR (or any other) requirements.

Second, Owners' experts did not testify that the tunnel began malfunctioning *after* it was put into operation. They testified that the tunnel *as constructed* lowered groundwater levels. The court of appeals' recitation flags this fact:

> Dr. Charles Nelson [plaintiffs' tunnel expert] . . . testified that "[b]ecause the tunnel was not fully lined with a watertight lining, the excessive loss of groundwater under Boston Store continues more than 14 years after construction" and that "[t]he tunnel must have a complete lining installed with all joints and cracks sealed to stop groundwater inflow and drawdown."

2011 WI App 76, ¶32. In fact, Nelson conceded at trial both that he was not opining on the tunnel's operation and that the decision not to line the entire tunnel was made during design and construction:

> Q: You have no professional opinion about the operation of the tunnels.
>
> A: No, I have none.
>
> Q: Your opinion, as I understand it, as we've seen and you delivered it earlier today, is that as a matter of main-

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

R.382-586–87:MMSDApp-0429.

*MMSD* holds that the design, construction, implementation, and continued existence of public works projects are categorically immune acts. 2005 WI 8, ¶60. As this Court held in *Allstate*, municipalities are immune from claims based on the use of public works as originally implemented, even if the use creates a danger to others. 80 Wis. 2d at 16; *see also MMSD*, 2005 WI 8, ¶60. In the absence of a change in the tunnel's condition (of which there

is here no evidence), there can be no ministerial duty to "repair" it.

The fact that the decision not to line the tunnel completely was made at the design and construction stages (and approved by DNR) defeats the court of appeals' reliance on *MMSD*'s principle that a municipality may be liable for a "failure to maintain as to a condition of disrepair or defect or a failure to operate." 2011 WI App 76, ¶27 (quoting *MMSD*, 2005 WI 8, ¶56). Here, there is no fact analogous to the broken water main in *MMSD*. The City's water main in *MMSD* was obviously neither designed nor constructed to leak. All agreed that the water main broke; the question was whether the City had a ministerial duty to fix it before the water it released damaged the sewer. *See MMSD*, 2005 WI 8, ¶61 (leaving for the circuit court on remand the task of determining whether the City's duty to fix the leaking water main before it broke was ministerial); *see also id.* ¶¶8–9. In contrast, there is no evidence here that the tunnel is broken, i.e., not functioning as constructed—either in the Boston Store building's vicinity or anywhere else. The Owners' experts opined about water infiltration near the building based on cracks mapped

at the time the tunnel was mined (R.382-485,570:MMSDApp-0418,0426), two years *before* the tunnel was put into operation. R.382-570:MMSDApp-0426. The report from the 2002 tunnel inspection—that is, after the tunnel had been operating for ten years—showed that the inflows had *decreased* by approximately 40%.[8] R.388-2002–03:MMSDApp-0371.

Under these circumstances, lining the tunnel—the act Owners and the court of appeals iden-

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[8] As of trial in 2006, the tunnel had been inspected twice, once before it was put into operation and once in 2002. R.388:2002–03:MMSDApp-0371. The District adopted a 10-year inspection cycle after the 2002 inspection, conducted at a cost of $1.25 million, revealed no structural problems and that the level of infiltration was about 40% less than observed during the pre-operation inspection. R.388:1970–71,2002–03:MMSDApp-0370–71. There is no evidence that DNR imposed or the District undertook a duty to inspect the 300-feet deep tunnel annually. The court of appeals statement that the 1982 ISFP suggested that the tunnel be inspected annually, 2011 WI App 76, ¶31, is unfounded. The draft ISFP document suggest only that the tunnel will be inspected "periodically" and that "[n]ear surface conveyance facilities," as opposed to the Deep Tunnel, "should be inspected at 2– to 5–year intervals." R.351-Ex.206-8-12:MMSDApp-0684. In all events, even if an inspection duty existed, it could not support a conclusion that the District has a ministerial duty to alter the tunnel's design or construction.

tify as required to stop "excessive" infiltration—is *not* a matter of "maintenance." This Court has defined "maintenance" as "'[t]he work of keeping something in proper condition; upkeep.'" *Hocking v. City of Dodgeville*, 2010 WI 59, ¶48, 326 Wis. 2d 155, 785 N.W.2d 398 (quoting THE AMERICAN HERITAGE DICTIONARY 1084 (3d ed. 1992)).[9] The tunnel's proper condition (as constructed in accordance with DNR approval) does not include a lining in the Boston Store building's vicinity.[10]

Adding a lining does not become an act of "maintenance," even if one presumes, as did the

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[9] Other dictionaries similarly define "maintenance" as something that "maintains" or keeps a thing in its original state. *See* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1993) ("1: to keep in an existing state (as of repair, efficiency, or validity)"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1160 (2d ed. 1987)("1: to keep in existence or continuance; preserve; retain").

[10] In this context, maintenance might include ensuring that gates and other mechanicals remain in proper working order. *See, e.g.*, *Lange v. Town of Norway*, 77 Wis. 2d 313, 319–20, 253 N.W.2d 240 (1977); *see also* R.351-Ex.206-8-11:MMSDApp-0683 (suggesting that maintenance include testing all "mechanical components such as gates, valves, and pumps"). Owners made no attempt to prove that any such act damaged their building.

court of appeals, that the tunnel as constructed failed to meet an aspiration that it would not act as "a drain of the aquifer underneath downtown Milwaukee." 2011 WI App 76, ¶24. "Maintenance"—keeping a public work in its original state—does not include improving the public work, even if an improvement is necessary to avoid harm. *Allstate*, 80 Wis. 2d at 15–16; *cf. Hocking*, 2010 WI 59, ¶45.

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

> Construing the phrase "maintenance, operation or inspection of an improvement to real property" to mean maintenance or operation of a nuisance would create an exception that swallows the rule. This is so because every im-

> provement that is negligently designed could be considered an ongoing nuisance that the owner or operator negligently maintains by failing to correct.

*Id.* ¶47. So too here. Because the evidence is only that the tunnel exists and is operating in its original, partially lined state, failure to line the tunnel is not an act of "maintenance," ministerial or otherwise. Thus, contrary to the court of appeals' conclusion, 2011 WI App 76, ¶56, the District's duty to operate and maintain the tunnel cannot include a ministerial duty to reconstruct it to add a concrete lining or otherwise decrease its infiltration rate.

Ultimately all of Owners' evidence related to design, construction, implementation, and continued existence of the tunnel—that is, evidence of categorically immune acts. *MMSD*, 2005 WI 8, ¶60. Owners' hydrogeologist opined that the "tunnel system's" existence in its unlined state caused the reduction in groundwater to which Owners' attribute their injuries. R.383-652:MMSDApp-0409. And, as Owners stated post-verdict, their tunnel expert testified that the tunnel "continues to drain groundwater from the soil and rock below the Boston Store . . . because the tunnel was not fully lined with a water tight lining." R.271-3. As Owners'

counsel remarked at the pre-trial conference: This case "has to do with the mere existence of [the tunnel] and the fact that it is being maintained with these porous holes." R.376-37–38:MMSDApp-0210–11. *MMSD*'s and *Allstate*'s holdings (and *Hocking*'s reasoning) require that the District is categorically immune for the "act" of maintaining the tunnel in its original state.

3. The draft Inline Storage Facilities Plan document's statement that maintenance "may" include lining deteriorated tunnel sections does not give rise to a ministerial duty.

The "technical document" referred to by the court of appeals, a 1982 draft Inline Storage Facilities Plan, also does not provide a basis for inferring a ministerial duty. Portions of the document, a predesign draft plan document, were read to the jury by Owners' counsel without any witness explication. R.392-2554:MMSDApp-0353. This draft planning report cannot establish a ministerial duty of maintenance because it lacks any indicia of embodying or imposing a *rule* of law. *MMSD*, 2005 WI 8, ¶¶60–61.

Also, the statement on which Owners' rely—that "[m]aintenance *may* include removal of solids deposits, removal of fallen rock, repair of deterio-

rated linings and placement of concrete lining in deteriorated, unlined areas" (R.381-284:MMSDApp-0438 (emphasis added); *see also* R.351,Ex.206:MMSDApp-0682–87)—does not meet the ministerial duty criterion. Because the statement refers only to what maintenance "may" include, not what it *must* include, it does not create "a duty to act *in a particular way* . . . [that] is explicit as to time, mode, and occasion for performance." *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶44, 253 Wis. 2d 323, 646 N.W.2d 314; *see also Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶46, 315 Wis. 2d 350, 760 N.W.2d 156. "May," as this Court has explained in construing statutes using the term, is generally understood "as permissive." *See Heritage Farms, Inc. v. Markel Ins. Co.*, 2012 WI 26, ¶32, 339 Wis. 2d 125; *cf. Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶16, 319 Wis. 2d 622, 769 N.W.2d 1 (ministerial duty created by OSHA regulation providing that platforms "*shall* be guarded by a standard railing" (emphasis added)). In listing several non-exclusive maintenance options, the statement provides a context that makes clear that its use of "may" is permissive, rather than mandatory.

Moreover, the draft suggests only that lining may be necessary in the future if structural support is threatened or erosion protection is needed: "Lining will be included only as necessary to maintain structural support or to protect the tunnels from erosion . . . [otherwise] grouting will be sufficient to protect the groundwater from impacts resulting from infiltration or exfiltration." R.351-ex.206-8–34:MMSDApp-0687. No evidence suggests that the tunnel portion near the Boston Store building is deteriorated, eroded, or in need of structural support.

#### 4. "Notice of harm" did not create a ministerial duty to inspect or to decrease infiltration near the Boston Store building.

The court of appeals also reasoned that the District's knowledge that the Boston Store building could be harmed by groundwater reductions when the tunnel was mined in its vicinity in 1990 and that 5–8 million gallons of water were pumped daily from the tunnel in May 1995 (an admission read to the jury without elaboration), created a duty to inspect the tunnel. 2011 WI App 76, ¶¶33–34. This reasoning also does not support the judgment.

First, no one testified that the 1995 infiltration rate violated any standard applicable to the tunnel or was inconsistent with infiltration rates approved by the DNR at the time of construction.

Second, no one testified that a failure to inspect had any bearing on Owners' claimed injury. As explained above, Owners' experts based their opinions on the tunnel being constructed without a concrete lining. Even if an inspection had revealed unexpectedly excessive infiltration (which no post-construction inspection in fact revealed, see above at n.8), any harm would have resulted from the tunnel's design and construction (categorically immune acts), not from a failure to inspect.

Third, inferring a duty to inspect on a more frequent basis from pumping rates in 1995 is a logical fallacy. There is no evidence that removal of 5–8 million gallons a day from the entire 19.4-mile long, 32-foot wide tunnel suggests a risk to buildings along any particular tunnel section or a need to conduct a million-dollar inspection of the entire tunnel. On the contrary, the most current evidence based on the 2002 inspection showed that infiltration rates were decreasing when compared to the

rates measured during construction. R.388-2002–03:MMSDApp-0371.

Again, Owners' own tunnel expert testified that the tunnel complied even with the 200- standard as adjusted for its depth. R.382-574:MMSDApp-0427. Thus, neither the District's identification of the building as potentially at risk during the construction nor later infiltration into the entire tunnel gives rise to a ministerial duty to line the tunnel near the Boston Store building. There is also nothing to suggest that this cobbled together set of facts was a basis for the jury's negligence finding.[11]

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[11] Nor is this a case like *Cords v. Anderson* in which this Court held that a park ranger breached a ministerial duty when he failed to warn hikers of a known risk of serious bodily injury or death from hiking on trails along a 90-foot gorge, resulting in several of them being severely injured. 80 Wis. 2d 525, 259 N.W.2d 672 (1977). The District cannot similarly be charged with knowledge of certain and imminent harm that demanded a single corrective course of action. As explained above, neither the District's knowledge that the building could be at risk during construction nor its knowledge of later general infiltration rates throughout the entire tunnel length revealed a risk of imminent harm to the Boston Store building. And, even if the District had known of an imminent risk to the building as a result of groundwater infiltration, that knowledge would not have demanded a single course of

### 5. The District's general duty to operate and maintain the tunnel does not create a ministerial duty to line it.

The court of appeals also suggested that the District's obligation to operate and maintain the tunnel "was an 'absolute, certain and imperative' duty that is imposed by law," such that Owners "need not show any additional law or rule violation to establish the District's ministerial duty." 2011 WI App 76, ¶36. This suggestion is wrong as a matter of law.

*MMSD* effectively overruled cases like *Menick v. City of Menasha*, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996), to the extent that they hold that all acts of operating and maintaining a sewer system lack immunity. *MMSD*, 2005 WI 8, ¶59 (holding that municipalities have immunity for discretionary acts of operation or maintenance). *MMSD* made clear in the analogous context of operating and maintaining a water works that a mu-

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action. It might under those circumstances (never proven to have existed) have been more cost effective to install recharge wells in the building's vicinity, to add additional grouting to that tunnel section, or both.

nicipality is immune from suit from "negligent acts that are discretionary in nature." *Id.* ¶8. The court of appeals failed to follow *MMSD* to the extent that it imposed liability based only on the District's general duty to operate and maintain the tunnel—an obligation arising from the District's DNR-issued permit—rather than on a specific ministerial duty of operation or maintenance.

Indeed, even if one were to accept Owners' incorrect theory that the District should have "maintained" the tunnel so as to lessen groundwater infiltration, there can be no ruling that any such duty was ministerial. Owners' tunnel expert testified that the only way to stop infiltration is to completely fill the tunnel. He agreed that as long as there is an inward pressure gradient, which is a regulatory requirement, there will be infiltration, even through a concrete liner. R.382-585–86:MMSDApp-0428–29. Consequently, any decision to add a liner to reduce infiltration requires acts of judgment—how far to line and at what thickness to achieve some unspecified reduction in infiltration—inconsistent with a ministerial duty.

This point is underscored by Judge DiMotto's attempt to impose injunctive relief. To implement

her order to line the tunnel near the Boston Store building, she found it necessary to appoint a special master to conduct an environmental impact assessment, decide the exact thickness of the concrete, and to resolve other issues, such as quality assurance, obtaining permits, and selecting the "means and methods" of construction. R.347. All these decisions require some measure of judgment. None of them would be necessary if the court was ordering the District to carry out a ministerial duty—an "absolute, certain and imperative" duty to line the tunnel that "prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *MMSD*, 2005 WI 8, ¶54 (internal quotation marks and quoting citation omitted).

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

Section 893.80(1) requires that persons with claims against the District provide it with a notice of claim identifying the claimant and an itemized statement of the relief sought. *See, e.g.*, *E-Z Roll Off, LLC*, 2011 WI 71, ¶20. By requiring pre-suit notice of the claim and the relief requested, the statute allows a government entity to decide

whether to pay the claim without incurring litigation expense or to deny the claim. Failure to provide notice precludes litigation. *Id.* ¶34.

Owners never served written notice of the circumstances of their claims and never presented to the District any itemized statement of relief. This undisputed fact requires dismissal. *See Colby v. Columbia County*, 202 Wis. 2d 342, 362, 550 N.W.2d 124 (1996).

### A. A notice of claim served by non-claimants does not substantially comply with §893.80(1)'s requirements.

The courts below ruled that Owners substantially complied with §893.80(1) because two other corporations—Saks and WISPARK—served a notice of claim and a statement of relief. These non-owners identified themselves as "Claimants," stating that they owned the Boston Store building, and claimed that the District was liable to them:

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

R.37-ex.A:MMSDApp-0449. Saks and WISPARK are distinct legal entities related to Owners: Saks is a corporation that owned Parisian, and WISPARK is a separate limited liability company that is owned ultimately by the same holding company as Bostco. R.383-833–48:MMSDApp-0410–14. Neither Saks nor WISPARK has ever owned the Boston Store building. R.383-834:MMSDApp-0410.

These non-owners also served a separate Notice of Itemized Relief Sought in which they again identified themselves as "Claimants" and purported to "itemize[ ] the damages that Claimants incurred as a result of the injury described in the Notice of Claim previously served on the MMSD on July 19, 2001." R.37-ex.B:MMSDApp-0452.

Owners' counsel confessed to the circuit court that confusion about the actual ownership of the Boston Store building caused notices to be sent on behalf of the wrong persons: "The reason [the notice and claim] wasn't brought in the correct name is that these companies are so inter-related . . . that even the people who are the directors of the company, the president of the company didn't realize they had filed the notice of claim [and] itemization of damages on behalf of the wrong party." R.369-8–

9:MMSDApp-0333–34. Owners argued that non-owners' notice and statement of relief put Owners in "substantial compliance" with §893.80(1), because Owners and non-owners had the same street address (R.369-8–17:MMSDApp-0333–42)—although, actually, WISPARK and Bostco did not (*compare* R.37-ex.A:MMSDApp-0449–51, *with* R.51-3)—and used the same law firm, although the law firm was then acting as agent for Saks and WISPARK, not Bostco and Parisian.

The court of appeals accepted this argument by ignoring corporate formalities:

> The record clearly demonstrates that all three corporations were overlapping entities who shared executive employees. In fact, the District acknowledges that Saks owned Parisian, who is a party in this case, and WISPARK is owned by the same holding company as Bostco. Moreover, the notice of claim set forth the name and address of the attorneys representing the injured party, and an attorney's address is considered the equivalent of the claimant's address for the purpose of the notice of claim statute.

2011 WI App 76, ¶90 (internal quotation marks and quoting citation omitted).

But this Court has long maintained that related but separate corporate entities are legally dis-

tinct. *See, e.g., Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶40; *DOR v. River City Refuse Removal, Inc.*, 2007 WI 27, ¶43, 299 Wis. 2d 561, 729 N.W.2d 396 (explaining that this court "treat[s] wholly owned subsidiaries as independent legal entities"). And this Court recently ruled that deciding whether a notice substantially complies with §893.80(1) requires an examination of the notice in light of the two statutory purposes: (1) affording the governmental entity an opportunity to investigate and evaluate claims and (2) allowing it an opportunity to budget for and compromise those claims. *See E-Z Roll Off*, 2011 WI 71, ¶34. The notice here, which falsely states the claimant's identity, fails this test.

One cannot settle a claim with a person who has no legal right to it. Owners' counsel's own confession about the confusion of Owners' president and directors on the identity of the correct legal entities dramatically highlights the potential risk to the District of not requiring precision in the identification of claimants. The District should have been able to rely on the notice if it had been inclined to settle or had it been inclined to disallow the claim in order to get the benefit of

§893.80(1)(g). Section 893.80(1)(g) requires that the claim be brought within six months of the municipality's disallowance in order to permit the municipality to budget for potential exposure, consistent with §893.80(1)'s purpose; to gain the benefit of this shortened limitations period, however, the municipality must serve notice of the disallowance on the actual claimant.[12] *See Pool v. City of Sheboygan*, 2007 WI 38, ¶20, 300 Wis. 2d 74, 729 N.W.2d 415. By not serving claims in their own names, Owners stood to avoid the effects of any action the District might have taken on the notices.

This Court should not signal to potential corporate claimants that they may be excused for their own confusion and sloppiness in correctly identifying themselves to a government entity. Doing so would discourage diligence and caution in preparing the notice of claim and undermine the legislative mandate. The resulting uncertainty will drive

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[12] Section 893.80(1)(g) provides: "Notice of disallowance of the claim submitted under sub. (1) shall be served on the claimant . . . . No action on a claim under this section . . . may be brought after 6 months from the date of service of the notice of disallowance . . . ."

up the costs municipalities will have to incur in dealing with all notices of claims served by legal entities—shifting to the municipality the costs of verifying which of related corporations owns the claim, even though the claimant is in the far better position to know.

The Court should make clear what is presumed by the statute: To comply with §893.80(1), notices of claims must minimally identify the actual claimant. That the actual claimant's identity matters is further underscored here by the fact that the non-owners' notice of itemized damages asserts injuries that occurred in 1997 and 2000, before Bostco owned the property. A municipality's settlement calculus is obviously different if it knows that the claimant did not own the property during a significant portion of the time for which damages are sought.

No precedent supports the court of appeals' ruling that a notice by a non-claimant substantially complies with §893.80(1). The court relied on *DNR* and *Thorp v. Town of Lebanon*, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59. Neither case holds that a notice of claim or statement of relief complies with §893.80(1) when those items misidentify the

claimant. *DNR* held that a notice sent on behalf of the actual claimant was not defeated by listing the claimant's lawyer's address, rather than its own. *DNR*, 184 Wis. 2d at 198. *Thorp* addressed whether a letter *sent by the claimants* substantially complied with §893.80(1)(b)'s four requirements. In both cases the question was whether notice served on behalf of the actual claimant contained enough information to comply substantially with the statutory requirements—neither suggests that claimant A's notice that it has a claim can serve as a notice of claim by claimant B.

*Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 220–21, 556 N.W.2d 326, 330 (Ct. App. 1996), holds that §893.80(1) requires that all persons who intend to sue municipalities must first identify themselves to the municipality in a notice of claim. *Markweise* held that a reference to unidentified persons "does not satisfy the 'written notice of the circumstances of the claim' requirement of §893.80(1)(a)." *Id.* at 219. So too here. The court of appeals, like Owners' appellate brief, ignored *Markweise*—a telling omission, given the District's substantial reliance on it.

### B. Owners did not, and could not, establish that the District had actual notice of their claims.

Section 893.80(1)(a) excuses a claimant's failure to give written notice of her claim if, within 120 days of the occurrence, (1) the government defendant had actual notice of the claimant's claim, and (2) the claimant shows that failure to provide the statutory notice has not prejudiced the government defendant. Neither of these elements is met here.

Contrary to the court of appeals' reasoning, Owners must show the District had actual notice that *they* had claims, not simply that there was an "injury to the downtown Boston Store in the timeframe required by the statute." 2011 WI App 76, ¶88. Section 893.80(1) unambiguously requires that the governmental defendant have actual notice of the claimant's *claim*—not actual notice of injury that another person alleges in support of its claim. Even persons who suffer identical injuries have distinct claims. *See Wood v. Milin*, 134 Wis. 2d 279, 284–85, 397 N.W.2d 479, 481 (1986). Owners produced no evidence that the District had timely actual notice "of both the claimant and his or her claim." *Markweise*, 205 Wis. 2d at 221. This alone

defeats a ruling that the District had actual notice satisfying §893.80(1).

Nor did Owners introduce affirmative evidence that the District was not prejudiced by Owners' failure to comply with the statute (R.43), as they are required to do. *See E-Z Roll Off*, 2011 WI 71, ¶¶48–53. The court of appeals wrongly suggested that the burden to introduce evidence of prejudice fell to the District. *See* 2011 WI App 76, ¶88 ("[T]here is no evidence that the District was prejudiced by the fact that the wrong claimant was listed on the notice of claim.").

This Court made clear in *E-Z Roll Off* that a claimant "'must set forth specific facts showing that there is a genuine issue for trial' on the issue of prejudice." 2011 WI 71, ¶49. Because Owners "bore the burden to produce evidence that the delayed notice of claim did not harm [the District's] ability to adequately defend its case," but did not introduce such evidence, the "actual notice" exception also does not apply for this independent and sufficient reason. *Id.* ¶51.

## CONCLUSION

For these reasons, the decision below should be reversed and the case remanded with instructions that the circuit court enter judgment on the merits dismissing all claims with prejudice, or, in the alternative, that the circuit court conduct further proceedings to determine whether, and to what extent, the Boston Store building was damaged by the District's breach of a specific ministerial duty of operation or maintenance.

Respectfully submitted,

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## STATUTORY ADDENDUM

**Wis. Stat. §893.80. Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits**

(1) Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the

defendant fire company, corporation, subdivision or agency and the claim is disallowed.

(1g) Notice of disallowance of the claim submitted under sub. (1) shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. Failure of the appropriate body to disallow a claim within 120 days after presentation of the written notice of the claim is a disallowance. No action on a claim under this section against any defendant fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employee, may be brought after 6 months from the date of service of the notice of disallowance, and the notice of disallowance shall contain a statement to that effect.

. . .

(4) No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

## FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) & (c) for a brief and appendix produced using proportional serif font and pursuant to this Court's April 11, 2012 order expanding the brief volume limitation in §809.19(8)(c) to 15,000 words. The length of this brief is 13,045 words.

Dated: April 16, 2012.

_____

G. Michael Halfenger

**CERTIFICATE OF MAILING**

I certify that this Opening Brief of Milwaukee Metropolitan Sewerage District was deposited in the United States mail for delivery to the Clerk of the Supreme Court by first-class or priority mail, or other class of mail that is at least as expeditious, on April 16, 2012. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated: April 16, 2012.

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## E-FILING CERTIFICATION

Pursuant to Wis. Stat. §809.19(12)(f), I hereby certify that the text of the electronic copies of this brief and any appendix are identical to the text of the paper copies.

Dated: April 16, 2012.

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G. Michael Halfenger

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