SUPREME COURT OF WISCONSIN

Bostco LLC and Parisian, Inc.,
Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v.

Appeal Nos. 2007AP221
2007AP1440

Milwaukee Metropolitan Sewerage District,
Defendant-Respondent-Cross-Appellant-Petitioner.

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS-PETITIONERS' BRIEF

On Petition for Review of the Decision of the Court of Appeals, District I

On Appeal from the Order of the Milwaukee County Circuit Court Case No. 2003CV005040, The Honorable Jeffrey A. Kremers and Jean W. DiMotto, Presiding

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ISSUES PRESENTED FOR APPEAL

(1) Whether the plain language of the municipal damage cap and related provisions in Wis. Stat. § 893.80(3) and (5)—"the amount recoverable by any person for any damages . . . shall not exceed $50,000" and "the provisions and limitations of this section shall be exclusive"—restrict the judiciary's equitable power to award injunctive relief.

Answered by the circuit court: No.

Answered by the court of appeals: Yes. As a matter of first impression, the court of appeals concluded that, "[a]s applied here, § 893.80(3) and (5) modify the availability of injunctive relief." The court held that "the cap on municipal torts set forth in § 893.80(3) provides the exclusive remedy for a plaintiff, namely, a limited $50,000 damage award, and prohibits the trial court from ordering injunctive relief."

(2) Whether damages recoverable on a continuing nuisance claim—caused by an ongoing

interference with the use and enjoyment of property that is abatable—are limited by § 893.80(3)'s damage cap.

The circuit court did not reach this issue, although it was raised in post-verdict briefing. R.271 pp.32-33.

Answered by the court of appeals: Yes. The court of appeals concluded it "need not determine whether Bostco's claim here is a continuing nuisance or whether a continuing nuisance amounts to multiple causes of action, that is, multiple claims[,]" because it determined that only one action was before the court, and the damage cap applied to that action.

(3) Whether the damage cap in § 893.80(3) violates the equal protection clause (1) on its face—whether $50,000 is unconstitutionally low—or (2) as applied to Bostco LLC and Parisian Inc. (collectively, "Bostco"), by the Milwaukee Metropolitan Sewerage District's ("MMSD's") disparate treatment of those

suffering more than $50,000 for damage incurred before June 30, 1994 and those who did not discover or incur damages until after June 30, 1994, without a legitimate government interest therefor.

Answered by the circuit court: No.

Answered by the court of appeals: No. The court of appeals concluded that "[g]iven the case law and our deference to the legislature in this matter, we cannot say that the $50,000 damage cap is 'very wide of any reasonable mark.'" The court also concluded that "the payments [MMSD] made to property owners who asserted claims prior to June 30, 1994, were rationally based on a legitimate government interest."

(4) Whether a taking of groundwater contained within a claimant's land by the government without just compensation gives rise to an inverse condemnation claim and, if so, what the proper measure of damages in such a case would be.

Answered by the circuit court: No.

Answered by the court of appeals: No. The court of appeals concluded Bostco does not have an actionable claim for MMSD's taking of its groundwater under this Court's holding in *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58, 326 Wis. 2d 82, 785 N.W.2d 409.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court should grant oral argument and publish its decision. This appeal involves issues that will likely clarify existing rules of law, are of substantial and continuing interest to the public, and may contribute to the legal literature by collecting case law or reciting legislative history.

STATEMENT OF THE CASE

Bostco LLC and Parisian, Inc. (collectively, "Bostco") brought a claim against the Milwaukee Metropolitan Sewerage District ("MMSD"), seeking recovery for damages caused by MMSD's negligent operation and maintenance of the Deep Tunnel, a thirty-two foot diameter tunnel running 300-feet below downtown Milwaukee. Currently before this Court are Bostco's challenges to (1) the circuit court's decision to grant MMSD's motion for summary judgment on Bostco's inverse condemnation claim and the court of appeal's affirmation of that decision; (2) the circuit court's decision to reduce the jury's $6.3 million damage award to $100,000, and the court of appeal's affirmation of that decision; and (3) the court of appeal's decision to vacate the circuit court's order granting Bostco equitable injunctive relief given the inadequacy of the $100,000 damage award.

RELEVANT PROCEDURAL HISTORY

In its Amended Complaint, filed on November 16, 2004, Bostco asserted negligence, continuing nuisance, inverse condemnation, and Wis. Stat. § 101.111 claims against MMSD, seeking recovery for extensive damage to its retail and office building located at 331 West Wisconsin Avenue in downtown Milwaukee caused by groundwater infiltration into MMSD's Deep Tunnel, as well as for future damages expected to be incurred as a result of ongoing infiltration.[1] *See* R.370 pp.14-15; R.68 p.2; R.51 pp.30-35, A-Ap.30-35.

On December 20, 2005, MMSD filed a summary judgment motion, seeking dismissal of all of Bostco's claims. R.118, 119. The circuit court granted the motion with respect to Bostco's inverse condemnation and § 101.111 claims and denied it with respect to the

[1] Bostco had initially filed a Notice of Claim and Itemization of Relief Sought with MMSD on July 19, 2001 and June 19, 2002, respectively, R.46 pp.4-11, and its original Complaint on June 5, 2003, R.1.

negligence and nuisance claims. R.157, A-Ap.241-43.

The jury trial started on July 11, 2006 and ended on July 27, 2006. *See generally* R.381; R.392; R.393; R.403, A-Ap.560-62 (special verdict). Among other things, the jury found that MMSD had been negligent in the manner that it operated or maintained the Deep Tunnel, that Bostco's past damages were $3 million and future damages were $6 million, and that MMSD's negligence was 70% responsible for these damages. R.403.

The jury also found all but one element of the continuing nuisance claim. The jury concluded that the manner in which MMSD operated or maintained the Deep Tunnel has interfered with Bostco's use and enjoyment of the building and that the interference is abatable. R.403 p.3, A-Ap.562; R.393 pp.21-22. In post-verdict motions and on appeal, Bostco argued that the final element—whether Bostco suffered "significant harm"—was established as a matter of law in light of

the jury's award of over $2 million in damages. *See Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 76, ¶¶ 94, 98, 334 Wis. 2d 620, 800 N.W.2d 518. The court of appeals agreed, holding that the jury's conclusion that MMSD's negligence caused Bostco millions of dollars in past damages establishes "significant harm" as a matter of law, *id.*, ¶¶ 94-104, which means Bostco succeeded in proving its continuing nuisance claim at trial as well.

On September 11, 2006, the circuit court granted MMSD's request to remit the jury's $6.3 million damage award (70% of $ 9 million) to $100,000, pursuant to Wisconsin's municipal damage cap. R.394 pp.31-46, A-Ap.503-18; R.305, A-Ap.313-15. In response to this decision, Bostco moved for injunctive relief, arguing that the remittitur denied it an adequate remedy at law. R.280, A-Ap.276-82; R.291, A-Ap. 283-99; R.292, A-Ap.300-12. On January 30, 2007, after reviewing the

entire case record, Judge Jean DiMotto[2] granted Bostco's motion and ordered MMSD to line a one-mile stretch of the Deep Tunnel near Bostco's building. R.399, A-Ap.520-59; R.336, A-Ap.318-20; R.339, A-Ap.321-23.

STATEMENT OF FACTS

I. THE CIRCUIT COURT GRANTED MMSD SUMMARY JUDGMENT ON BOSTCO'S INVERSE CONDEMNATION CLAIM.

In its motion for summary judgment, MMSD argued that Bostco had failed to state a viable cause of action for inverse condemnation because it had "not allege[d] that MMSD has used or appropriated [Bostco's] property for a public purpose, nor . . . that MMSD has imposed any legal restrictions on [Bostco's] property." R.119 p.60, A-Ap. 138. MMSD also asserted that Bostco had alleged only property damage. R.119 pp.60-64, A-Ap.138-42.

[2] After the post-verdict hearing, Judge DiMotto rotated into Judge Kremers' docket.

In its Amended Complaint, Bostco alleged that (1) MMSD had drained significant volumes of groundwater from beneath Bostco's downtown building, causing the groundwater level to decline; (2) MMSD failed to install recharging wells to restore groundwater levels; and (3) the declines in groundwater levels beneath Bostco's building had caused, and were continuing to cause, both a destructive phenomenon known as "downdrag," which is caused by soil compression, and the building's timber pile foundation to rot, rendering many of the timber piles completely useless.[3] R.370 pp.20-28. In responding to MMSD's motion for summary judgment, Bostco submitted extensive evidence bearing out each of these allegations. *See* R.134 pp.12-20, 50-55, A-Ap.169-177, 207-12; *see also* R.140 exs.15, 33, 34, 43, 51-70..

[3] Timber pile foundations have an indefinite life when kept wet below or near the water table; however, they rot when subsequently allowed to dry out. *See* R.134 pp.30, A-Ap.187; *see also* R.140 ex.30 at p.315, 324.

Nonetheless, the circuit court granted MMSD summary judgment, noting "I do not believe this to be a taking." R.374 pp.39-40, A-Ap.392-93. The court of appeals affirmed, reasoning that this Court's holding in *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58, 326 Wis. 2d 82, 785 N.W.2d 409, required the pre-trial dismissal of Bostco's claim.

II. BOSTCO'S EVIDENCE AT TRIAL.

Throughout the course of the trial, Bostco introduced evidence showing that MMSD had maintained and operated the Deep Tunnel negligently, that MMSD's negligent operation or maintenance of the Deep Tunnel had caused and continues to cause significant groundwater drawdowns, which in turn have caused and will continue to cause damage to Bostco's property through downdrag and pile rot, and that MMSD has long known about both the significant infiltration of groundwater into the Deep Tunnel and

the resulting risk of damage to the foundation of Bostco's building. Bostco also submitted evidence proving that it was within MMSD's power to abate future interference with and damage to Bostco's property.[4]

A. MMSD's Negligent Maintenance or Operation of the Deep Tunnel Has Caused Damage to Bostco's Property.

1. The Dewatering of the Ground.

At trial, Bostco's tunneling expert, Dr. Charles Nelson, testified at length about how large volumes of groundwater infiltrate into the Deep Tunnel through cracks in the geologic material through which the tunnel runs. *See, e.g.,* R.382 pp.99-121; *see also* R.351 (Trial Exs. 1550-029 to 032). Bostco also presented the testimony of hydrogeologist Dr. Jan Turk, who explained how drainage of groundwater into the Deep

[4] The defense theory MMSD elected to pursue was that MMSD had nothing to do with the settlement at Bostco's building. Accordingly, it offered no testimony to rebut Bostco's evidence that it was within MMSD's power to abate the interference with Bostco's building.

Tunnel lowered the water levels beneath Bostco's property, and will continue to do so as long as the Deep Tunnel is operated and maintained in the same manner as it has been. *See* R.383 pp.6-7; *see also* R.383 pp.11-24, 24-32, 37-43 (explaining how water moves and drains through various rock and soil layers); R.383 pp.44-50, 63-73 (discussing how monitoring well-data shows that Deep Tunnel drew down groundwater levels near Bostco's building); R.383 pp.50-51 (water levels have not restored); R.383 pp.51-52 (if leaks were sealed, water levels would recover).

The jury was also shown a 2004 United States Geological Survey showing that 73% of all recharge to groundwater (from rainfall and other sources) was discharged into the Deep Tunnel. R.383 pp.55-57; R.351 (Trial Exs. 1551-027 to 028).

2. The Effect of the Dewatering on the Foundation.

Bostco's next expert witness, Richard Stehly, a

civil engineer with wide experience in soil engineering and materials engineering, testified that Bostco's building "has experienced large structural column movements as a result of the operation of the North Shore Tunnel";[5] and "[i]f the operation of the North Shore Tunnel continues under the current conditions, [Bostco's building] will experience large structural column movements requiring future repair." R.385 p.43, *see, e.g.,* R.385 pp.33-38; R.351 (Trial Exs. 1552-003 to 005).

Bostco also submitted evidence showing that drawdowns in the groundwater trigger soil consolidation, and soil consolidation affects the foundation of Bostco's building through both downdrag and pile rot. *See, e.g.*, R.385 pp.49-53, 63-77; R.351 (Trial Exs. 1552-018 to 025). With respect to downdrag, the desaturation of the deepest marsh deposit "triggers

[5] "Deep Tunnel" and "North Shore Tunnel" are interchangeable for purposes of this brief.

a large amount of movement, downdrag, and then column movement." R.385 pp.68-69; R.351 (Trial Exs. 1552-010, 1552-018 to 026).[6] The end result is building settlement; piles and columns settle and unsupported floors sag. *See* R.385 p.69; R.351(Trial Exs. 1552-018 to 023).

With respect to pile rot, when the water table is lowered, allowing oxygen to reach the surface of the wood, fungus grows and decays the wood. *See* R.384 pp.71-72; *see also* R.351 (Trial Exs. 1554-012 to 019). Bostco's wood expert, Dr. Thomas Quirk, testified that if the water table had reached the top of the wooden pilings, they would not have rotted. *See* R.384 pp.56-57; *see also* R.351 (Trial Ex. 1554-003).

Although keeping the piles wet using a wetting system will help prevent rot, there is really nothing a

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[6] Downdrag occurs when the deeper soil in the lower marsh deposits starts to move downward, and as the timber pile tries to support the soil, the pile gains load and is forced downward as well—it is an "interaction between the soil . . . and the pile." *See* R.385 pp.68-69; R.385 pp.341-42.

building owner can do to mitigate downdrag. R.385 pp.72-73. In fact, a wetting system presents a "Catch-22" situation because it actually makes downdrag worse: "you're going to lift the water level up as high as you can to keep the pile tops moist, and that gives you the maximum column stress onto the deep soil." R.385 pp.174-75; *see also* R.385 p.73.

3. Building Settlement Data.

For over 50 years prior to the trial, Bostco had been monitoring the movement of its columns.[7] *See, e.g.,* R.385 pp.88-105. Bostco presented evidence at trial showing that there was nearly twice as much movement in columns at equal elevation during 1990-2001 than there had been in the previous twenty-six years. R.385 pp.93-94; R.351 (Trial Ex. 1552-041).

Similarly, the settlement data relating to two sets

[7] Although there was no column monitoring data from 1992, 1993, 1994, or 1995 and some monitoring points had been lost on occasion throughout the history of the monitoring, the opinions of Bostco's structural engineering expert accounted for the absence of this data. *See* R.385 p.220; R.385 pp.90-91, 211-12.

of columns repaired in 1997 and 2001 reflected that they had been relatively stable until the early 1990's, when they suffered large settlements requiring expensive jet grouting repairs. R.385 pp.98-105, 138-43; R.351 (Trial Exs. 1552-043 to 051 and 054 to 068); R.385 pp.138-43. The settlement of the columns was also corroborated by a topographical survey of the second floor of the building drawn in 2000. *See* R.385 pp.144-48; R.351 (Trial Exs. 1552-071 to 074). Ultimately, Mr. Stehly opined that Bostco's building experienced large column movement due to the operation of the Deep Tunnel. *See* R.385 pp.42-43; R.351 (Trial Ex. 1552-006).

4. Bostco Discovers and Repairs Its Foundation Damage.

In May 2001, following the significant column settlement reflected in the monitoring data, Bostco excavated test pits and discovered that there were

several inch annuluses[8] between some of the piles and their concrete pile caps, and several inch voids between the soil and the bottom of the concrete pile caps. R.384 pp.182-97;[9] *see also* R.351 (Trial Ex. 2242-A). In some instances, there were voids between the tops of the piles and the bottom of the pile caps. *See* R.384 p.188. Structural damage was also uncovered when finish materials were removed during a 2000 renovation; in some areas, the building had moved so much that wood joists were pulled off their bearings. *See* R.385 pp.353-55, 358-71; R.386 p.6.

In 1997, and again in 2001, Bostco undertook extensive repairs to fix the damage. The cost of the 1997 repairs, which included both jet-grouting under the columns and other repairs to the floors and walls

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[8] An annulus "is a space around the circumference of the pile between the wood of the pile and the concrete impression that the pile once made. So it is really the amount of wood that is no longer there that was once part of the pile around a circumference." R.384 p.185.

[9] The handwritten numbering of R.384 skips page 154. The numbers cited above correspond with the handwritten numbers.

was approximately $625,000. *See* R.351 (Trial Ex. 1552-053); *see also* R.385 pp.153-55. The cost to repair fifteen more columns in 2001 was approximately $2,200,000. *See* R.385 pp.149-52; R.351 (Trial Ex. 1552-076).

B. Bostco Will Likely Suffer Damages in the Future.

In addition to establishing past damages, Bostco's experts opined that the water table will remain depressed if MMSD does nothing to prevent infiltration into the Deep Tunnel or restore the water table levels using other methods[10] and as a result, the remainder of the columns will eventually need repair. R.385 pp.160-61; *see also* R.383 pp.50-51; R.382 p.97; R.351 (Trial Ex. 1550-009).

The estimated cost for repairing the remaining columns in a fashion similar to the repairs done in 1997

[10] Since MMSD has taken over operation of the Deep Tunnel, it has turned off the recharge wells, and done nothing to minimize infiltration or restore groundwater. R.385 p.347.

and 2001 is approximately $9,000,000. R.383 pp.238-42; R.351 (Trial Ex. 1553-018).

C. MMSD Can Abate Its Interference With Bostco's Use and Enjoyment of Its Property.

In addition to showing that MMSD's lowering of the water table had caused, and was continuing to cause, significant harm to Bostco's property, Bostco also addressed extensive evidence showing that it was within MMSD's power to stop the ongoing harm to Bostco's property. *See* R.383 pp.6-7, 50-51 (conditions generally same; dewatering continues); R.382, p.97; R.351 (Trial Ex. 1550-009) (loss of groundwater continues fourteen years after construction); R.383 pp.51-52 (if tunnel was sealed water levels would start to recover); R.382 pp.159-62; *see also* R.351 (Trial Exs. 1550-42 to 43) (comparison of inflows, pre- and post-lining, in segments of tunnel near Bostco show that flow in lined segments was 4.9% of what it was prior to lining and grouting); R.382 pp.162-63 (substantially

watertight tunnels well within capability of underground construction industry; "it's common practice now to—for lining in wet tunnels and seal any joints between the pores and seal any other leaks that are in the concrete until they're substantially waterproof"); R.382 pp.163-64 (tunnel must have complete lining installed with all joints and cracks sealed to stop groundwater inflow and drawdown; it would cost approximately $10 million to line and grout the tunnel for one-half mile on either side of store); R.390 p.7, A-Ap.406 (stipulated cost of North Shore Tunnel from Capitol Drive to connection with Crosstown was approximately $146-49 million); R.382 pp.180-81 (if the cracks in the tunnel were sealed, the groundwater level would rise over time); R.351 (Trial Ex. 1550-10); R.382 p.181 (adding recharge wells would speed up that process); R.382 pp.222-23 (not necessary to shut down entire system to line parts of tunnel).

D. MMSD Had Knowledge of the Potential for Harm and Was on Notice of the Potential Harm to Bostco.[11]

In addition to all of the foregoing, Bostco submitted extensive evidence showing that MMSD had knowledge of the potential harmful effects infiltration into the tunnel could have on groundwater levels and area buildings. *See, e.g.*, R.390 pp.11-12, A-Ap.407 (MMSD "[a]dmit[s] the analysis of worst case scenarios discussed the possibility of permanent lowering of the dolomite aquifer . . . ."); R.381 pp.167-68, A-Ap.401 (MMSD admitted that it had been advised "that groundwater intake into the tunnel construction zone might cause groundwater drawdowns to occur in the future."); R.381 pp.144-45, A-Ap.400 (MMSD planning document noting that "[s]ettlement of the magnitude

[11] Over Bostco's objection, the trial court excluded substantial evidence related to MMSD's knowledge that the Deep Tunnel was leaking substantial amounts of groundwater and that this infiltration was likely to cause property damage to others. Although Bostco believes this evidence was wrongly excluded, the recitation of facts relates only to the evidence that was presented at trial.

predicted may have detrimental effects on utilities, structures on shallow foundations, and *structures founded on piles. Negative skin friction may increase loads on the piles possibly stressing them beyond the point of their capacity or inducing differential settlements.*") (emphasis added); R.390 pp.15-16, A-Ap.408 (MMSD "admit[s] the program management office understood that too great a drawdown of groundwater from a zone wherein wooden piles are located might have a deleterious effect on such wooden piles if the wooden piles were otherwise in sound condition."); R.381 pp.171-73, A-Ap.402; R.351 (Trial Ex. 429), A-Ap.351-53 (document received by MMSD indicating that the "drainage of water from the alluvial layer causes drainage from the overlaying marsh deposits which, in turn, leads to settlement"; "[i]f the drainage remained uncontrolled, then subsequent settlement would lead to building damage"; "[o]ther potential effects are downdrag on piles, which means

that the downward movement of the settling soil creates a downward force on the pile[; t]his is of most concern for older buildings founded on timber piles, the condition of which is not known"); R.382 pp.36-38; R.351 (Trial Ex. 359), A-Ap.350 (minutes from a May 26, 1988 meeting state "PMO/MMSD indicates that liability for downtown settlement due to water drawdown from a great distance away will be accepted by MMSD").

MMSD had specifically identified structures at risk as a result of dewatering from the Deep Tunnel in a "North Shore Critical Structures Analysis." *See* R.381 p.163; R.351 (Trial Ex. 290), A-Ap.347-49. Bostco was identified as a critical structure in the report. R.381 pp.163-64; R.351 (Trial Ex. 290), A-Ap.347-49.

Finally, MMSD was also on notice that infiltration of water into the tunnel had caused groundwater drops. *See, e.g.*, R.390 p.15, A-Ap.408 (MMSD "admits the program management office was

aware that there were groundwater drops in the alluvial level due to groundwater intake into the . . . tunnel."); R.381 p.169, A-Ap.401 (same); R.390 pp.16-17, A-Ap.408 ("[P]laintiffs requested that MMSD admit the following: Admit that with respect to the [Deep Tunnel], as of April 24, 1995, MMSD knew that the permanent drawdown in groundwater levels that was noted in some monitoring wells was expected. MMSD's response to that request was as follows: Admit [MMSD] was told this on April 24, 1995."); R.381 p.177, A-Ap.403 (MMSD admitted that "by November 1992, [fourteen] recharge wells along the alignment of the . . . tunnel were deactivated before such time that the alluvial water levels were restored to pretunnel construction levels."); R.381 p.179, A-Ap.404 (As of June 14, 1993, MMSD "admits the Program Management Office was aware that the alluvial aquifer was drawn down in the area of downtown Milwaukee that includes the physical location of the Bostco . . . .").

III. STIPULATION TO TREAT DAMAGE RESPONSES AS APPLICABLE TO BOTH NEGLIGENCE AND NUISANCE CLAIMS.

During the process of finalizing the form of the special verdict, Bostco twice placed on the record a stipulation the parties and the court had reached off the record to treat the damages found by the jury as the damages applicable to both the negligence and nuisance claims. R.392 pp.16-17, A-Ap.416; R.392 p.210, A-Ap.465.

IV. THE JURY'S SPECIAL VERDICT.

On July 27, 2006, the jury returned its verdict, finding that MMSD's negligence was a cause of the damage to the building's foundation, that Bostco's owners were also negligent in their maintenance of the building's foundation, and that that negligence was a cause of the damage to the foundation. R.403 p.1, A-Ap.560. The jury apportioned 70% of the causal negligence to MMSD and 30% to Bostco. R.403 p.2, A-Ap.561. The jury awarded $3 million in past

damages and $6 million in future damages. R.403 p.2, A-Ap.561.

The jury also found all but one element of the continuing nuisance claim: specifically, it found that the manner in which MMSD has operated or maintained the Deep Tunnel interfered with Bostco's use and enjoyment of the building and that the interference is abatable, but that the interference did not result in significant harm to Bostco. R.403 p.3, A-Ap.562. Finally, the jury also found that Bostco should have discovered before June 4, 1997 that the Deep Tunnel was causing damage to its building. R.403 p.2, A-Ap.561.

V. RELEVANT POST-VERDICT EVENTS.

Both MMSD and Bostco filed a variety of post-verdict motions. *See* R.256-265. The circuit court denied: (1) Bostco's motion to change the jury's answer on the comparative negligence question (R.256); (2) Bostco's motion to change the jury's answer on the

issue of significant harm (R.257, A-Ap.260-64);
(3) MMSD's motion for judgment on the verdict (R.260);
(4) MMSD's motion for judgment notwithstanding the verdict (R.262); and (5) MMSD's motion to change the jury's answers finding that MMSD had been negligent, that its negligence had been 70% at fault for Bostco's damages, that Bostco had suffered $3 million in past damages and will suffer $6 million in future damages, and that MMSD had the power to abate its interference with Bostco's use and enjoyment of its property (R.259). R.394, A-Ap.473-519. The circuit court granted Bostco's motion to change the jury's answer with respect to the statute of limitations question (R.258) and MMSD's motion to remit the damage award to $100,000 (R.264). R.394, A-Ap.473-519.

In response to the court's order remitting the damage award to $100,000, Bostco moved for injunctive relief, arguing that the remittitur deprived it of an adequate remedy at law. R.280, A-Ap.276-82; R.291,

A-Ap.283-99; R.292, A-Ap.300-12. On January 30, 2007, the circuit court granted Bostco's motion and ordered MMSD to line a one-mile stretch of the Deep Tunnel near Bostco's building. R.399, A-Ap.520-59; R.336, A-Ap.318-20; R.339, A-Ap.321-23.

On appeal, the court of appeals affirmed all of the circuit court's rulings except that it found that Bostco had established the "significant harm" element of a nuisance claim as a matter of law and held that Wis. Stat. § 893.80 barred the circuit court from awarding injunctive relief. *See Bostco*, 334 Wis. 2d 620.

ARGUMENT

Each of Bostco's four issues presented for review is subject to de novo review. *See, e.g.*, *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶ 10, 325 Wis. 2d 135, 785 N.W.2d 302 (interpretation and application of statute to undisputed set of facts are questions of law subject to de novo review); *GMAC Mortg. Corp. of Pa. v. Grisvold*, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998); *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 36, 328 Wis. 2d 469, 787 N.W.2d 22 (constitutionality of statute is question of law that supreme court reviews de novo); *Borek Cranberry Marsh, Inc. v. Jackson Cnty.*, 2010 WI 95, ¶ 11, 328 Wis. 2d 613, 785 N.W.2d 615 (supreme court reviews grant of a motion for summary judgment de novo).

I. WIS. STAT. § 893.80 DOES NOT LIMIT THE COURT'S EQUITABLE POWER TO GRANT INJUNCTIVE RELIEF.

Summary: The court of appeals erred in concluding that Wis. Stat. § 893.80(3)

> and (5)[12] barred the circuit court from granting injunctive relief. The court's construction of that statute is contrary to its plain language, contrary to its legislative history, and contrary to separation of powers principles under which "a circuit court's equitable authority may not be limited absent a clear and valid legislative command." *GMAC*, 215 Wis. 2d at 480.

The court of appeals erred in concluding that § 893.80(3) and (5) "provides the exclusive remedy for a plaintiff," thereby "prohibit[ing] a trial court from ordering injunctive relief[,]" *Bostco*, 334 Wis. 2d 620, ¶ 130, and reversing the circuit court's order requiring MMSD to install concrete lining in a portion of the Deep Tunnel to prevent continuing damage to Bostco's building.

[12] All references to Wis. Stat. § 893.80 are to the 2005-06 version. However, there have been no intervening statutory changes to the relevant subsections of § 893.80 that would alter the disposition of this case.

A. The Plain Language of Wis. Stat. § 893.80 Does Not Limit the Circuit Court's Equitable Power.

The court of appeals concluded that the "plain language" of Wis. Stat. § 893.80 barred the circuit court from ordering equitable relief. But the plain language of the statute simply does not support that construction; it limits only "the amount recoverable by any person for any damages" and makes exclusive only the statute's "provisions and limitations." § 893.80(3), (5). Specifically, § 893.80 states in relevant part:

> (3) Except as provided in this subsection, *the amount recoverable by any person for any damages*, injuries or death in any action founded on tort against any . . . governmental subdivision or agency thereof . . . shall not exceed $50,000. . . . No punitive damages may be allowed or recoverable in any such action under this subsection.
>
> . . .
>
> (5) Except as provided in this subsection, *the provisions and limitations of this section shall be exclusive* and shall apply to all claims against a . . . governmental subdivision . . . .

Id. (emphasis added).

As written, § 893.80 does not place any limit on the court's equitable power. Subsection (3) does not reference or govern equitable remedies that may be available to a plaintiff. Instead, it limits the "amount recoverable" from the government. Because the language of the statute contains no express limitation on the circuit court's exercise of equity jurisdiction, the circuit court properly awarded injunctive relief.

Contrary to the court of appeals' decision, subsection (3) does not provide an exclusive remedy, or any remedy at all; rather, the damage cap limits one available remedy, money damages, to $50,000. Had the legislature intended to place limits on other forms of remedies, it clearly knew how to do so: as noted above, subsection (3) specifically excludes recovery of punitive damages against a municipal entity.

Bostco's interpretation is further supported by subsection (5)'s statement that "the provisions and

limitations" in subsection (3) shall be exclusive. The only "limitations" provided for in subsection (3) are the cap on recoverable money damages and the ban on punitive damages. It is contrary to both logic and the plain language of the statute to construe an express limit on money damages as a bar to all other remedies available by the court's inherent equitable authority.[13]

Further, § 893.80 does not bar the injunctive relief awarded simply because MMSD will incur costs exceeding $50,000 in complying with it. The costs a municipality may incur in complying with an injunction do not fit within the statutory phrase "amount[s] recoverable by any person." Indeed, Bostco will not recover from MMSD the estimated $10 million it will cost to line the Deep Tunnel. If the legislature truly meant that no lawsuit should burden a municipality

[13] The United States Supreme Court has stated that "immunity from damages does not ordinarily bar equitable relief." *See Wood v. Strickland*, 420 U.S. 308, 314 n. 6 (1975); *Denius v. Dunlap*, 209 F.3d 944, 959 (7th Cir. 2000) ("The doctrine of qualified immunity does not apply to claims for equitable relief.").

with more than $50,000 in costs, plaintiffs would rarely collect anything because a municipality can easily incur $50,000 in administrative costs and attorneys' fees alone. Moreover, if § 893.80(3) operates to limit a municipality's costs to $50,000 in every suit, the municipality would have no incentive to fix a persistent problem it created if it would cost more than $50,000 to do so.

Finally, contrary to the court of appeals' decision, concluding that injunctive relief is not barred by § 893.80 would not undermine the purpose of the statute. As the court correctly noted, in imposing the damage caps in § 893.80 the legislature attempted to strike a balance "'[t]o compensate victims of government tortfeasors while at the same time protecting the public treasury.'" *Bostco*, 334 Wis. 2d 620, ¶ 133 (quoting *Stanhope v. Brown Cnty.*, 90 Wis. 2d 823, 842, 280 N.W.2d 711 (1979)). This purpose is not undermined, but in fact advanced, in those relatively rare

circumstances, such as those here, where injunctive relief is appropriate.

The power of the courts to issue injunctive relief is not unbounded: the damages suffered by the plaintiff must be so substantial that a $50,000 recovery is regarded as fundamentally inadequate; the harm must be subject to abatement; and finally, the court must, in balancing the equities, weigh the cost of the injunction against the harm to the plaintiff.[14] *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979) ("[I]njunctive relief is addressed to the sound discretion of the trial court; competing

[14] Here, the circuit court properly exercised its discretion to grant injunctive relief. The circuit court considered the jury's verdict that Bostco would likely suffer $6,000,000 in future damage, but would, at most, be compensated for less than 2% of that amount. R.399 p.10, A-Ap.529. Based on this, the circuit court concluded Bostco had no adequate remedy at law. *Id.* (noting that "[i]n my view, it is in fact a no-brainer to conclude that the remitted $100,000 is an inadequate remedy at law, given the magnitude of the past and future harm the Plaintiffs have suffered in this matter"). Additionally, the irreparable harm is caused by continuous groundwater infiltration into the Deep Tunnel, which has continued to cause significant damage to Bostco's building. Absent injunctive relief, Bostco will be continuously damaged by MMSD and left without any remedy for this harm.

interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction."). Thus, construing the statute to preserve the equitable powers of the court is in no way inconsistent with the legislature's purpose.

In short, the method of statutory interpretation set forth by this Court demands that it "focus primarily on the language of the statute" by "assum[ing] that the meaning of the statute is expressed in the words the legislature chose." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 54, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "[T]he court is not at liberty to disregard the plain, clear words of the statute." *Id.*, ¶ 46. If the meaning of the statute is plain, the inquiry ends and the court need not consult extrinsic sources. *Brunton*, 325 Wis. 2d 135, ¶ 16.

B. The Legislative History Confirms Bostco's Statutory Interpretation.

Although the statutory meaning is plain, the legislative history confirms Bostco's reading of the statute. *See Kalal*, 271 Wis. 2d 633, ¶ 51. Wisconsin Stat. § 893.80 was formerly numbered Wis. Stat. § 331.43, which was created by 1963 Chapter 198. *See generally* Legislative Drafting Record for 1963 Chapter 198, A-Ap.563-88. The drafting records for this bill indicate that § 331.43(4)—now § 893.80(5)—was drafted as follows: "The *rights and remedies* provided under this section shall be exclusive . . . ." This proposed language was rejected. *Id.*, A-Ap.572, 575. The bill passed into law stated, as § 893.80(5) does today: "[T]he *provisions and limitations* of this section shall be exclusive . . . ." 1963 Chapter 198. This confirms that § 893.80(3) does not provide a remedy, but merely limits money damages recoverable against a municipality. The legislature purposefully rejected the use of the term

"remedy" in the statute and replaced it with "limitation." The limitation imposed in § 893.80(3) is on "damages" recoverable, not all other available remedies.

Another item in the drafting record is particularly instructive in confirming that the limit placed on the "amount recoverable" refers to the amount of money damages recoverable, not a limit on the costs incurred in complying with equitable remedies. A memorandum explaining the intent of the legislation states: "In its present form, this bill . . . limits *the amount of damages recoverable* by any person in a tort action commenced thereunder to $25,000." Legislative Drafting Record for 1963 Chapter 198, Memorandum of James McDermott, Asst. Att'y Gen. (May 20, 1963) (emphasis added), A-Ap.565. Accordingly, the legislative history confirms that the court of appeals erred in concluding § 893.80(3) was the "exclusive remedy" and limits recovery of money damages as well as equitable relief. *See Kalal*, 271 Wis. 2d 633, ¶ 46.

C. Under Separation of Powers Principles, the Equitable Powers of a Court May Not be Limited Absent a Clear and Valid Legislative Command.

Not only is there no support in the plain language of the text of Wis. Stat. § 893.80 for the court of appeals' construction, but the court's interpretation also runs afoul of fundamental separation of powers principles. It is well-settled that one branch of government will not be found to have stripped another of its constitutionally-derived powers absent an unmistakably clear statement of intent to do so.

A court's equitable authority is derived from the court's inherent authority granted by the Wisconsin Constitution. *Brier v. E.C.*, 130 Wis. 2d 376, 388, 387 N.W.2d 72 (1986); *see also Syring v. Tucker*, 174 Wis. 2d 787, 804, 498 N.W.2d 370 (1993). Specifically, Article VII, § 2 of the Wisconsin Constitution establishes "that the judicial power of the state, both as to matters of law and equity, shall be vested in the

various courts." *City of Janesville v. Carpenter*, 77 Wis. 288, 302, 46 N.W. 128 (1890); *Syring*, 174 Wis. 2d at 804 ("Circuit courts have the power to apply equitable remedies as necessary to meet the needs of the case.").

This constitutionally-derived equitable authority empowers courts to "grant equitable remedies to private litigants in situations in which there is no explicit statutory authority or in which the available legal remedy is inadequate to do complete justice." *Brier*, 130 Wis. 2d at 388. In highlighting the potency of this power, this Court has noted that in every case where "'legal remedies afforded are inadequate or none are afforded at all,'" the courts have "'the never-failing capacity of equity to adapt itself to all situations.'" *Syring*, 174 Wis. 2d at 805 (quoting *Harrington v. Gilchrist*, 121 Wis. 127, 235, 99 N.W. 909 (1904)).

Because the equitable power of circuit courts derives from constitutional allocation of powers and because of the fundamental role that it plays in

ensuring complete justice, both this Court and the United States Supreme Court have long recognized that the historic equitable jurisdiction of the courts is to be limited only in rare circumstances:

> "[T]he comprehensiveness . . . of equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. '*The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction*.'"

Id. (quoting *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946)) (alterations in original) (further internal citation omitted). The rule that "a circuit court's equitable authority may not be limited absent a 'clear and valid' legislative command" is well-established. *GMAC*, 215 Wis. 2d at 480; *see, e.g.*, *State v. Excel Mgmt. Servs.*, 111 Wis. 2d 479, 490, 331 N.W.2d 312 (1983); *McFarland State Bank v. Sherry*, 2012 WI App 4, ¶ 32, 338 Wis. 2d 462, 809 N.W.2d 58.

This Court has clarified how clear the legislative mandate must be to be deemed an express limit on the judiciary's equitable authority. In *Excel*, this Court was asked to determine whether Wis. Stat. §§ 100.18(11)(d) and 100.20(6) allow the State to join as a party-defendant the assignee of allegedly illegally-obtained contracts. 111 Wis. 2d at 480-82. This Court found significant that plaintiff could not be granted complete relief without the inclusion of the assignee because the existing defendant was without financial resources to cover the obligations arising from the contracts. *Id.* at 490, 484.

The plain "language of the statutes neither expressly authorize[d] nor denie[d] the state the right to join [the assignee] as a party defendant." *Id.* at 488. And, while the statutes explicitly authorized only one equitable remedy—injunctive relief—this was not construed as prohibiting a court from exercising its full scope of equitable remedies. *Id.* at 490. Accordingly,

this Court concluded that because the language of the relevant statutes in that case contained no express limitation on the circuit court's exercise of equity jurisdiction, "the trial court ha[d] the full scope of equitable remedies available to it to fashion relief for the parties injured." *Id.*

In *Syring*, this Court confronted whether, under Wis. Stat. §§ 804.12 and 804.10, the circuit court had the equitable authority to compel a party to undergo a physical exam. 174 Wis. 2d at 804. The court concluded that despite § 804.12 expressly forbidding a court from treating a refusal to comply as a contempt of court, the court still retained "the power in equity" to compel the exam. *Id.* at 803-04. The court so concluded because courts "do not lightly assume the legislature intended to limit courts' historic equitable jurisdiction" and "[n]othing in § 804.10 or § 804.12 implies a limit on the court's equitable jurisdiction." *Id.* at 806.

Similarly, nothing in § 893.80 mentions the equitable powers of the courts, let alone places any limits on them. As such, it is difficult to conceive how it could possibly qualify as a "clear legislative command" to strip those powers completely.

D. Even if Wis. Stat. § 893.80 Is Interpreted as "Clearly" Prohibiting All Equitable Relief, Such a Limitation Would be Unconstitutional.

Finally, "it is a cardinal rule that courts should avoid interpreting a statute in a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional." *State v. Hamdan*, 2003 WI 113, ¶ 27 n.9, 264 Wis. 2d 433, 665 N.W.2d 785. As interpreted by the court of appeals, Wis. Stat. § 893.80 would violate the separation of powers doctrine under Article VII, § 2 of the Wisconsin Constitution.

"The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is

implicit in the division of governmental powers among the judicial, legislative and executive branches." *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995). Under the doctrine, each co-equal branch is prohibited from exercising the "core zone of exclusive authority" committed to another. *Joni B. v. State*, 202 Wis. 2d 1, 8, 549 N.W.2d 411 (1996) (quoting *State ex rel. Fiedler v. Wis. Senate*, 155 Wis. 2d 94, 10, 454 N.W.2d 770 (1990)). In areas in which the judiciary and legislature share authority, "'[t]he legislature is prohibited from unreasonably burdening or substantially interfering with the judicial branch.'" *Id.* (quoting *Fiedler*, 155 Wis. 2d at 100).

A three-part test is used to determine whether a legislative enactment unconstitutionally intrudes on judiciary power. First, the court must determine whether the subject matter of the challenged statute falls within the power constitutionally-granted to the

judiciary. *Id.* at 9. Second, the court must make the same inquiry as to the legislature. *Id.* Third, if both inquiries are answered in the affirmative, the statute is "constitutional only if it does not unduly burden or substantially interfere with the judicial branch." *Friedrich*, 192 Wis. 2d at 15.

This Court has described the limits on legislative power over the judiciary as follows:

> "In Wisconsin the jurisdiction and power of the courts is conferred, not by act of the Legislature, but by the Constitution itself. While the Legislature may regulate in the public interest the exercise of the judicial power, it cannot, under the guise of regulation, withdraw that power or so limit and circumscribe it as to defeat the constitutional purpose."

State v. Holmes, 106 Wis. 2d 31, 69, 315 N.W.2d 703 (1982) (quoting *John F. Jelke Co. v. Hill*, 208 Wis. 650, 660, 242 N.W. 576 (1932)).

This Court has established that a statute places an undue burden on and substantially interferes with the judicial branch's authority when it deprives courts

of *all* discretion to exercise its inherent authority. *See Joni B.*, 202 Wis. 2d at 10; *State v. Chavala*, 2003 WI App 257, ¶¶ 19-21, 268 Wis. 2d 451, 673 N.W.2d 401. In *Joni B.*, this Court struck down a statute for violating the separation of powers doctrine because the statute's "complete non-discretionary bar to appointment of counsel" unreasonably burdened and substantially interfered with "the judicial branch's inherent power to appoint counsel." 202 Wis. 2d at 8, 10. Similarly, in *Chavala*, the court rejected the appellant's interpretation of Wis. Stat. § 753.13 because construing it to remove *all* of the court's discretion in determining whether to deny a continuance or adjournment would impose an undue burden on the judiciary's inherent authority to ensure the courts function efficiently and effectively in violation of the separation of powers doctrine. 268 Wis. 2d 451, ¶¶ 19-21.

The Wisconsin Constitution confers on the judiciary the inherent authority to grant equitable relief. *See supra* Part I.C.; *Syring*, 174 Wis. 2d at 804 ("Circuit courts have the power to apply equitable remedies as necessary to meet the needs of the case."); *Banach v. City of Milwaukee*, 31 Wis. 2d 320, 331, 143 N.W.2d 13 (1966) ("A court of equity has inherent power to fashion a remedy to the particular facts. Continued failure to do so would render equity as sterile and as arbitrary in its relief as the old common law courts, the inadequacy of which historically gave rise to the courts of chancery."). Accordingly, as interpreted by the court of appeals, § 893.80 would restrict an inherent power constitutionally-granted to the legislature.

In this case, the Court need not determine whether the inherent authority to grant equitable relief is exclusive to the judiciary or shared with the legislature because "the level of intrusion here is impermissible under either scenario." *Joni B.*, 202

Wis. 2d at 10. As interpreted by the court of appeals, § 893.80 would strip the judiciary of *all* discretionary authority to grant equitable relief, which unreasonably burdens and substantially interferes with the judiciary's inherent equitable powers in violation of the separation of powers doctrine. *See Bostco*, 334 Wis. 2d 630, ¶ 130 (Section 893.80(3) "provides the exclusive remedy for a plaintiff, namely, a limited $50,000 damage award, and prohibits the trial court from ordering injunctive relief.").[15] Failing to conclude that a flat prohibition on exercising the court's equitable powers by the legislature is an undue burden or substantial interference would effectively gut the separation of powers doctrine because there is no

[15]The court of appeals noted that "the common law requirements for obtaining injunctive relief may be modified by statutes." *Bostco*, 334 Wis. 2d 620, ¶ 127. It reasoned that its interpretation of § 893.80 was proper as it merely "modif[ies] the availability of injunctive relief." *Id.*, ¶ 130. That the requirements for obtaining injunctive relief may be modified by statute is inapposite here because the court of appeals' interpretation of § 893.80 does not merely "modify" the common law requirements for injunctive relief, but instead completely eliminates the availability of injunctive relief in violation of the separation of powers doctrine.

greater burden or interference than a complete usurpation of the court's equitable power.

"[I]f there are two possible constructions of a statute, one of which would be constitutional and the other unconstitutional, preference is to be given that construction which is constitutional." *Smith v. Burns*, 65 Wis. 2d 638, 644-45, 223 N.W.2d 562 (1974) (rejecting appellant's construction of the statute because it "would cause the statute to be unconstitutional under Article VII, § 2 of the Wisconsin Constitution as a violation of the principle of separation of powers"). Accordingly, the Court must reject the court of appeals' interpretation of § 893.80 because it would be unconstitutional under the separation of powers doctrine and instead, give preference to Bostco's interpretation which maintains the statute's constitutionality.

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

Summary: The court of appeals erred in affirming the remittitur of the jury's $6.3 million damage award under Wis. Stat. § 893.80(3) because: (1) the statute is unconstitutional on its face; (2) the statute is unconstitutional as applied in this case; and (3) the statute does not limit damages for a continuing nuisance.

The court of appeals erred in concluding that Bostco's damages were properly remitted to $100,000 under § 893.80(3). First, the damage cap is unconstitutional on its face as it violates the equal protection clause of the Wisconsin Constitution by treating differently victims of governmental torts who suffer less than $50,000 and victims who suffer more than $50,000. Second, because the cap was not applied to other similarly situated property owners suffering damages exceeding $50,000, it would be unconstitutional as applied to Bostco. Finally, the full

damage award should be reinstated as the damage cap should not apply to continuing nuisances.

A. The Damage Cap Violates the Equal Protection Clause of the Wisconsin Constitution.

The fact that the circuit court found that the application of the damage cap left Bostco without an adequate remedy at law is hardly surprising. Not only does $50,000 represent less than one percent of the damages that the jury attributed to municipal action in this case, but Wisconsin's $50,000 municipal damage cap is the lowest such cap in the country. *See* A-Ap.647-50 (chart reflecting municipal damage cap limits in other states with citations). While this alone does not render the cap unconstitutional, the legislature's failure to review and adjust this figure in over three decades,[16] coupled with the inflationary

[16] The fact that the legislature left the $50,000 cap sitting unreviewed for over thirty years is particularly surprising in light the previously recognized need "'to review periodically all statutory limitations of recovery . . . to insure that inflation and political considerations do not lead to inequitable disparities in

forces that have caused the value of $50,000 to drop by more than one-half during that time, does.

1. Rational Basis with Teeth Analysis.

When analyzing equal protection challenges, courts apply different levels of scrutiny depending on the nature of the classification at issue. *Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 59, 284 Wis. 2d 573, 701 N.W.2d 440. When there is no allegation that the discriminatory treatment at issue deprives the plaintiff of a fundamental right or discriminates on the basis of a suspect classification, as is the case here, courts apply a rational basis "with teeth standard." *Id.*, ¶¶ 65, 77-78.

Although the rational basis standard does not require that all individuals be treated identically, it does require that distinctions be relevant to the purpose

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treatment,'" coupled with the fact that a $50,000 cap had already been declared "'precariously close to the boundary of acceptability'" at the time it was enacted. *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 368, 293 N.W.2d 504 (1980) (quoting *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 669, 406 A.2d 704 (1979)).

motivating the classification. *Id.*, ¶ 72. "'The state may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.'" *Id.*, ¶ 78 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 446 (1985)). In exercising judicial review, courts are tasked with the duty of conducting an inquiry to determine "whether the classification scheme rationally advances the legislative objective." *Id.*, ¶ 81.

2. Wis. Stat. § 893.80(3) Violates Equal Protection on Its Face.

Wisconsin Stat. § 893.80(3) treats differently governmental tort victims who suffer over $50,000 in damages and those who suffer less: Victims who suffer relatively minor injuries are made whole while the severely injured are limited to recovering only a small fraction of the damages they have suffered.

This Court's decision in *Ferdon*, in which the Court found Wisconsin's $350,000 medical malpractice

cap to be a violation of the Wisconsin Constitution's guarantee of equal protection, outlines the constitutional standards by which a municipal damage cap ought to be judged. 284 Wis. 2d 573. Like the medical malpractice cap in *Ferdon*, the municipal damage cap in § 893.80(3) creates two classifications of claimants, treating differently those government tort victims whose injuries fall below the $50,000 threshold and the severely harmed whose injuries exceed the cap.

That the municipal liability cap creates two classifications of claimants and treats them differently is undisputed, and therefore, the constitutionality of the cap depends on two questions: (1) what legitimate government interest is advanced by this unequal treatment and (2) whether that objective is, in fact, rationally advanced by the $50,000 limit.

The legislature enacted the predecessor to § 893.80(3) and established a municipal liability cap in the wake of this Court's abrogation of common law

immunity in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), *codified by* § 893.80(4).

In *Holytz*, this Court ruled that there was no longer any viability to the archaic notion underlying sovereign immunity, noting that it "'is better that an individual should sustain an injury than that the public should suffer an inconvenience.'" *Holytz*, 17 Wis. 2d at 31 (quoting *Russel v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 (1788)). In its briefing to the court of appeals, Bostco noted that this Court's holding in *Holytz* demonstrated that the government has no legitimate interest in shifting the costs of governmental negligence from the public at large to a handful of individual victims. The court of appeals rejected this argument, pointing to language in *Holytz* that "the legislature may also impose ceilings on the amount of damages." *Bostco*, 334, Wis. 2d 620, ¶ 50 n.9 (citing *Holytz*, 17 Wis. 2d at 40).

Bostco, however, does not contend that the legislature may not establish a cap at a constitutionally-appropriate level. And such a cap may still *result* in a shifting of the costs of municipal negligence from the public to individual victims. But as this Court's decision in *Holytz* demonstrated, there is no independent government interest in unequally burdening citizens *for its own sake*. *Holytz*, 17 Wis. 2d at 34 (citation omitted) ("'It is almost incredible that in this modern age of comparative sociological enlightenment . . . that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community . . . where it could be borne without hardship upon any individual, and where it justly belongs.'").

This Court has instead concluded that the government's interest in municipal damage caps is to

prevent disruptions in local government functions that unlimited liability could threaten. *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 377, 293 N.W.2d 504 (1980). Thus, the legislature may not set a figure that is not rationally related to the goal of preventing the governmental disruptions or is unreasonably low when considered in relation to the damages sustained. *See Ferdon*, 284 Wis. 2d 573, ¶ 111 (noting that "a statutory limit on tort recoveries may violate equal protection guarantees if the limitation is harsh and unreasonable, that is, if the limitation is too low when considered in relation to the damages sustained"). In setting this figure, the legislature must balance the need for fiscal security against the ideal of equal justice. *Stanhope*, 90 Wis. 2d at 843.

In *Sambs*, this Court dealt with a challenge that the municipal damage cap statute was unreasonably low in 1980 when the cap was set at $25,000. *See generally Sambs,* 97 Wis. 2d 356. Although this Court

was unwilling to conclude that the cap was unconstitutional, it acknowledged that the $25,000 cap appeared low at that time and admonished the legislature of the need "'to review periodically all statutory limitations of recovery . . . to insure that inflation and political considerations do not lead to inequitable disparities in treatment.'" *Id.* at 368 (quoting *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 669, 406 A.2d 704 (1979)). In addition, this Court referenced as persuasive the 1979 opinion of the New Hampshire Supreme Court, which declared "'that a $50,000 statutory limitation on tort recoveries is precariously close to the boundary of acceptability.'" *Id.* (quoting *Cargill*, 119 N.H. at 669). This Court outlined an affirmative duty of the legislature in setting such caps:

> It is the legislature's function to structure statutory provisions which will protect the public interest in reimbursing the victim and maintaining government services and which will be fair and reasonable to the

> victim and at the same time will be realistic regarding the financial burden to be placed on taxpayers.

Id. at 377.

In response to *Sambs*, the state legislature raised the damage cap to $50,000, although the increase initially proposed was $100,000 and nothing in the legislative record indicates what, if any, rationale there may have been for this reduction to $50,000. 1981 Chapter 63; AB 85, 1981 Leg., Reg. Sess. (Wis. 1981), A-Ap.592; AB 85, A. Am. 1, 1981 Leg., Reg. Sess. (Wis. 1981), A-Ap.595; Legislative Drafting Record to 1981 Chapter 63, A-Ap.589-646.

In the past quarter century, the $50,000 cap, which was suggested to be "'precariously close to the boundary of acceptability'" at the time it was adopted, *see Sambs*, 97 Wis. 2d at 368 (quoting *Cargill*, 119 N.H. at 669), has not been reviewed by the legislature, has not been adjusted for inflation, and has not been adjusted for changes in political considerations in order

to protect against "inequitable disparities in treatment," *id.* The legislature has breached the duty this Court articulated in *Sambs* to balance fairness to victims with safeguarding the financial condition of municipalities. The failure to review and update the liability cap has resulted in a limitation that is unduly harsh and substantially "wide of any reasonable mark." *Id.* at 367.

By 1986, only two other states—Nevada and South Carolina—had limits on municipal tort liability of $50,000 or less, *see* Laurence Ulrich, *Wisconsin Recovery Limit for Victims of Municipal Torts: A Conflict of Public Interest*, 1986 Wis. L. Rev. 155, 169, and in the 25 years since, both have raised those limits above Wisconsin's cap.[17] *See* A-Ap.647-50 (multi-state chart). In that same period of time, inflation in the United States has risen approximately 125%, and the

[17] Nevada has since raised its liability cap to $100,000 per claimant. *See* Nev. Rev. Stat. § 41.035. South Carolina has raised its limit to $300,000 per claimant. S.C. Code Ann. § 15-78-120.

consumer price index has doubled. As a result, the value of $50,000 today is less than the value of $25,000 at the time *Sambs* was decided. *See* Inflation Calculator, http://www.bls.gov/cpi/#data/inflation_ calculator.htm (last visited March 2012) (value of $50,000 in February 2012 is the equivalent of $18,096.92 in 1980).

The conclusion that the statutory cap is unreasonably low becomes even clearer when the cap is considered in relation to the damages sustained; $50,000 is less than one percent of the damages that the jury attributed to municipal action in this case.[18]

Equal protection requires that there be some rationale for the figure selected. *Ferdon*, 284 Wis 2d 573, ¶ 112. There is no indication in the legislative record of what, if any, rationale there was for the

[18] An unreasonably low damage cap not only leaves the most seriously harmed victims of government negligence without a meaningful remedy, it also inhibits meaningful public oversight. Such a cap simply shifts costs to a small handful of victims who cannot, standing alone, hold the government accountable.

$50,000 limit at the time it was enacted. Even if had not been arbitrarily selected in 1981, the value of $50,000 has changed so dramatically over the past three decades that whatever reasoning there may have been then no longer provides a rationale for the continued existence of the $50,000 limit today. As this Court has recently noted, "[a] statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies." *Id.*, ¶ 114. Whatever rationale the $50,000 figure may have had in 1981, it no longer carries weight given the cap's decline in value over the last 30 years.

While it must be assumed that the legislature based the $50,000 limit on a balancing between "the public interest in reimbursing the victim and in maintaining government services" back in 1981, *see Sambs,* 97 Wis. 2d at 377, the fact that a dollar today is

worth only 36% of what it was worth then means that the once balanced scales have now been tipped.[19]

3. Application of the Damage Cap in This Case Would Violate Equal Protection.

Even if the damage cap were constitutional on its face, MMSD has invoked its protection with an unequal hand in violation of the Wisconsin constitutional guarantee of equal protection of the law.

> The aim of the "equal protection of the laws" clause is to assure that every person within the state's jurisdiction will be protected against intentional and arbitrary discrimination, whether arising out of the terms of a statute *or the manner in which the statute is executed by officers of the state*.

State ex rel. Murphy v. Voss, 34 Wis. 2d 501, 510, 149 N.W.2d 595 (1967) (emphasis added).

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[19] To the extent that this Court finds that Wis. Stat. § 893.80 is facially unconstitutional, the proper recourse is to declare it so. The legislature has had decades to address the issue and it would be fundamentally unjust to subject Bostco to an unconstitutional statute simply to allow the legislature yet another opportunity to address the matter.

Equal protection is denied when a public body selectively enforces a law in a manner that is intentional, systemic, and arbitrary. *Id.*; *see also Vill. of Menomonee Falls v. Michelson*, 104 Wis. 2d 137, 145, 311 N.W.2d 658 (Ct. App. 1981). Although this Court presumes a statute is constitutional, it does not presume the State applies statutes in a constitutional manner. *Soc'y Ins. v. Labor & Indus. Review Comm'n*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385. "Because the legislature plays no part in enforcing our statutes, 'deference to legislative acts' is not achieved by presuming that the statute has been constitutionally applied." *Id.* (internal citation omitted).

In this case, MMSD intentionally set an arbitrary date after which it would no longer pay any damage claims exceeding the cap. Prior to June 30, 1994, it was the policy of MMSD to pay building owners for the cost of professional repair of any damage caused by the Deep Tunnel, without regard to whether those costs exceeded

$50,000. *See, e.g.,* R.272, p.7, A-Ap.271. Consistent with this policy, MMSD paid numerous owners of nearby downtown buildings several times that limit. *See, e.g.*, R.272 p.11, A-Ap.275 ($365,064 payment to Hyatt Regency Hotel; $298,416 payment to Mecca; $56,157 payment to Marshall Fields; $283,811 payment to Bradley Center); R.189 p.93, A-Ap.255 ($378,883.77 payment to Hyatt).

However, MMSD decided to change course in November 1993, when it discontinued reimbursing property owners for building damage caused by the Deep Tunnel if the damage was repaired after June 30, 1994. R.272 p.2, A-Ap.266. In his deposition, Fred Meinholz, MMSD's official charged with responsibility for processing damage claims, suggested that timing is the only reason MMSD was not accepting full responsibility for all of the damage it is found to have caused. R.189 pp.95-97, A-Ap.257-59. He testified that if Bostco had submitted its damage claim on or before

June of 1994, MMSD would have accepted full responsibility for repair costs if the investigation had led to the conclusion that the damage at issue was caused by the Deep Tunnel. R.189 pp.95-97, A-Ap.257-59. Mr. Meinholz's testimony undercuts any distinction drawn between Bostco and the earlier claimants who were made whole. The only differentiation is the arbitrarily-selected date of June 30, 1994. Bostco is "similarly situated" to those claimants for whom MMSD waived the cap, and MMSD has never disputed the accuracy of Mr. Meinholz's assertion. *See generally LaBella Winnetka, Inc. v. Vill. of Winnetka*, 628 F.3d 937, 941 (7th Cir. 2010) (constitutional guarantee of equal protection requires that similarly situated persons be treated similarly unless there is a rational reason for treating them differently).

MMSD's policy of selectively enforcing the damage cap is not only intentional and systemic, it is also arbitrary. Disparate treatment is considered

arbitrary when it "bears no rational relationship to a legitimate government interest." *See, e.g.*, *State v. Smet*, 2005 WI App 263, ¶ 26, 288 Wis. 2d 525, 709 N.W.2d 474. Only if the policy of differential treatment advances some legitimate government interest will it pass constitutional muster. *See Vill. of Menomonee Falls,* 104 Wis. 2d at 145.

While the government may have a legitimate interest in protecting the public purse, the interest is not advanced by applying the damage cap *unevenly*. It is not enough that there be a legitimate government interest in applying a law against a party; the legitimate government interest must justify treating parties differently. *See, e.g.*, *State ex rel. O'Neil v. Town of Hallie*, 19 Wis. 2d 558, 567, 120 N.W.2d 641 (1963). As the damage to the public purse for a particular claim is the same regardless whether it is made before or after an artificially selected date, the

government's interest in protecting the public purse also does not pass the rational relationship standard.

MMSD advanced, and the court of appeals accepted, three specious explanations for the unequal application of the cap: (1) that over time, it would become more difficult to establish those damages caused by MMSD's conduct and those damages resulting from naturally-occurring events, *Bostco*, 334 Wis. 2d 620, ¶ 56; (2) that MMSD "sought to create a bright line between claims for damages caused by construction and those caused by non-construction related events," *id.*, ¶ 58; and (3) that the June 30, 1994 deadline was rationally related to the end of the District's potential liability to the tunnel excavation contractor, *id.*, ¶ 59. Not one of these explanations satisfies the rational relationship test.

First, paying more than $50,000 for damages repaired before June 30, 1994 and asserting a cap with respect to those repaired thereafter bears no rational

relationship to the concern that causation may be increasingly difficult to prove over time. The cap is never applied unless and until causation has already been proven. Proof of causation was required before June 30, 1994 and proof of causation has been required since June 30, 1994—the relative difficulty in establishing this proof bears no rational relationship to the assertion of the cap.

The court of appeals' second conclusion—that the disparate treatment was justified because MMSD "sought to create a bright line between claims for damages caused by construction and those caused by non-construction related events"—fares no better. *Id.*, ¶ 58. First, the court made no attempt to explain, and there is no explanation, why or what legitimate governmental interest is advanced by this construction versus non-construction distinction. Because MMSD was arguably immune from all liability for damages related to construction, *see Milwaukee Metropolitan*

Sewerage District v. City of Milwaukee, 2005 WI 8, ¶¶ 56, 60, 277 Wis. 2d 635, 691 N.W.2d 658, this distinction is not only irrational but counter-rational.

Second, even if there were some legitimate governmental interest advanced by treating construction damages differently from other damages, this is not actually the distinction MMSD made. MMSD waived the caps with respect to damages repaired by June 30, 1994; it did not waive the caps with respect to damages repaired thereafter but caused by construction. Accordingly, it is moot whether such a distinction would have been rational.

Third, the court of appeals erred in accepting MMSD's argument that it waived the cap with respect to the earlier payments because Traylor Brothers, the construction company that drilled the Deep Tunnel under contract with MMSD, had a contractual right to seek compensation from MMSD if it (Traylor Brothers)

incurred unforeseen costs resulting from differing site conditions.

But in Wisconsin, the independent contractors of governmental entities are accorded the protections of Wis. Stat. § 893.80, provided they conform their conduct to the reasonably precise specifications of the governmental entity and notify such the government of any associated dangers known to the contractor but not the government. *Estate of Brown v. Mathy Constr. Co.*, 2008 WI App 14, ¶ 17, 313 Wis. 2d 497, 756 N.W.2d 417 (contractor granted immunity under § 893.80(4) where its work conformed to specifications of governmental agency which knew of associated dangers); *Estate of Lyons v. CNA Ins. Cos.*, 207 Wis. 2d 446, 457, 558 N.W.2d 658 (Ct. App. 1996) (same).[20] Accordingly, the

[20] Although a contractor will be accorded protection only if its work conforms to specifications from the governmental agency who is aware of any associated known dangers, *Mathy*, 313 Wis. 2d 497, ¶ 9, Traylor Brothers would have easily satisfied these standards. *See, e.g.,* R.124 pp. 72-126. Moreover, although the holdings in *Lyons* and *Mathy* arise under § 893.80(4), and the issue here is whether Traylor Brothers would be entitled to

pass-through liability that MMSD might have arguably had under its contract with Traylor Brothers would have been capped at $50,000 per claimant. Moreover, Traylor Brothers was required to submit the full amount it was claiming within thirty days after MMSD's determination of a differing site condition; June 30, 1994 was years after Traylor Brothers' contractual rights expired. R.124 p.108.

The efficacy of the judicial review process requires that there be a real and meaningful analysis whether disparate application of the law rationally advances a government interest. The court of appeals' opinion does not contain such an analysis; instead, the court appears to have been satisfied that MMSD articulated some explanation without regard to whether its explanations were rational. Judicial review is meaningless when such a deferential standard is applied.

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protection under subsection (3) of that statute, it is unclear why a party would be deemed an agent under subsection (4) but not subsection (3).

B. Continuing Nuisances are Not Limited by Wis. Stat. § 893.80(3).

Even if this Court determines that the damage cap does not violate equal protection, either on its face or as applied, it should nonetheless conclude that Wis. Stat. § 893.80(3) does not and cannot apply to continuing nuisance claims.

Although § 893.80(3) caps a claimant's damage at $50,000 for "any action founded on tort," a continuing nuisance is not a single "action." This Court has long recognized that an individual action arises from each and every continuance of a nuisance and thus, that a continuing nuisance gives rise to constantly recurring actions. *Stockstad v. Town of Rutland*, 8 Wis. 2d 528, 534, 99 N.W.2d 813 (1959) ("It is well settled that every continuance of a nuisance is in law a new nuisance and gives rise to a new cause of action."), *superseded with respect to claims for flooding caused by road construction by* Wis. Stat. § 88.87; *see also Sunnyside*

Feed Co. v. City of Portage, 222 Wis. 2d 461, 473, 588 N.W.2d 278 (Ct. App. 1998) ("[B]ecause this case involves a continuing nuisance, Sunnyside can repetitively sue the City.").

The conclusion that continuing nuisances are not limited by § 893.80(3) is consistent with how Wisconsin courts have treated continuing nuisances in relation to other subsections of Wis. Stat. Chapter 893. For example, in *Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 487, 549 N.W.2d 737 (Ct. App. 1996), the court determined that the plaintiff's continuing nuisance action was not subject to dismissal under the six-year statute of limitations set forth under Wis. Stat. § 893.52 given the recurring nature of a continuing nuisance. *Andersen*, 201 Wis. 2d at 487-88 (citing *Ramsdale v. Foote*, 55 Wis. 557, 559, 13 N.W. 557 (1882)).

The nuisance in this case was continuing rather than permanent. *See Sunnyside Feed*, 222 Wis. 2d at

466, 469-70. A nuisance is continuing rather than permanent if it is: (1) an ongoing or repeated interference that (2) can be discontinued or abated. *Id.* at 470. The jury found that the nuisance in this case is a continuing one—it can be abated. R.403 p.3, A-Ap.562. Because continuing nuisances give rise to continually recurring causes of action, it ought not be limited by § 893.80(3). Limiting damages under § 893.80(3) for continuing nuisances merely invites serial lawsuits—a result that would undermine judicial economy and encourage unnecessary waste of public and private resources.[21] Taken to its extreme, Bostco could file a new action against MMSD each day the nuisance continues and, under the damage cap, recover up to $50,000 in damages for each action. But filing a new action every single day would produce absurd

[21] This result is compounded by the court of appeals' conclusion that continuing nuisance victims may not obtain an injunction to prevent future harm or interference caused by a municipality's negligence, by virtue of its holding that § 893.80 prohibits injunctive relief.

results. *See Kalal*, 271 Wis. 2d 633, ¶ 46 ("[S]tatutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results.").

The court of appeals failed to address this argument by concluding it "need not determine whether . . . a continuing nuisance amounts to multiple causes of action" because, in its view, only one nuisance action was before the court. *Bostco*, 334 Wis. 2d 620, ¶ 107.

This approach is misguided for at least two reasons. First, the court of appeals ignored settled, binding precedent, holding that continuing nuisance amounts to multiple causes of action. *See Sunnyside Feed*, 222 Wis. 2d at 473. Second, the court of appeals' approach undermines the very purpose of the cap. If the damage cap applies because there is only one action before the court, Bostco must file a second cause of action tomorrow and each day thereafter to be properly compensated for its continuing nuisance. Such a result would not be unique to the cap's application to Bostco's

claims. Given how unreasonably low the cap is in relation to potential damage awards, applying it in cases involving continuing nuisances encourages serial litigation against government entities, forcing municipalities to repeatedly defend successive actions and draining the very resources that the damage cap is purportedly designed to safeguard.

Rather, the more reasonable interpretation of the damage cap in light of this scenario is that it does not—indeed, it cannot—apply to continuing nuisances, thereby eliminating the incentive to file successive claims to be appropriately compensated for each continuance of the same nuisance. By its express terms, this statute limits damages only with respect to single tort actions. Accordingly, the full damage award should also be reinstated because Bostco prevailed on its continuing nuisance claim.

III. THE TRIAL COURT ERRED IN DISMISSING BOSTCO'S INVERSE CONDEMNATION CLAIM.

Summary: The court of appeals erred in affirming the dismissal of Bostco's inverse condemnation claim on MMSD's motion for summary judgment because Bostco adduced ample evidence from which a jury could conclude that MMSD had taken Bosco's groundwater.

The Wisconsin Constitution prohibits the government from taking private property for public use without providing just compensation. Wis. Const. art. I, § 13.[22] The purpose of this requirement is to ensure that the costs of public projects are redistributed to fall on the public at large rather than wholly upon those who happen to lie in the path of the project. *See United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). When a property owner has suffered a taking and just compensation has not been made, the property

[22] Inverse condemnation claims under Article I, § 13 of the Wisconsin Constitution are analyzed similarly to claims under the Fifth Amendment of the United States Constitution. *See, e.g.*, *Wis. Med. Soc'y,* 328 Wis. 2d 469, ¶ 38; *Eternalist Found., Inc. v. City of Platteville*, 225 Wis. 2d 759, 773, 593 N.W.2d 84 (Ct. App. 1999).

owner may bring an inverse condemnation claim. Wis. Const. art. I, § 13; Wis. Stat. § 32.10.

As this Court recently discussed, Wisconsin recognizes two types of takings that are actionable as inverse condemnation claims: (1) permanent physical occupations ("physical takings"); and (2) government-imposed regulations depriving owners of all, or substantially all, of the beneficial use of their property ("regulatory takings"). *E-L*, 326 Wis. 2d 82, ¶ 22. The taking at issue in this case is "physical": MMSD's operation and maintenance of the Deep Tunnel physically took the groundwater beneath Bostco's building without providing just compensation.[23] The resulting partial taking of the property caused damages

[23] Although Count III of Bostco's Amended Complaint notes the taking of wood piles, the entire complaint was replete with factual allegations about the taking of groundwater. R.51 pp.20-29, 33-34, A-Ap. 20-29, 33-34; *see also Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d 136, 146, 293 N.W.2d 897 (1980) ("[I]t is the operative facts that determine the unit to be denominated as the cause of action, not the remedy or type of damage sought."). Bostco is no longer pursuing its inverse condemnation claim as a taking of the wood piles.

to the remainder of the property, as measured by the diminution in the property's overall value.[24]

The court of appeals' conclusion that Bostco failed, as a matter of law, to demonstrate a physical taking appears to be based on a misreading of *E-L*. *See Bostco*, 334 Wis. 2d 620, ¶¶ 112-13. In *E-L*, this Court reversed a jury verdict in favor of a property-owner plaintiff, who claimed that MMSD was liable on an inverse condemnation claim for damage caused to the plaintiff's building resulting from MMSD's pumping of groundwater nearby, because the plaintiff had adduced no evidence of the value of the property taken—the groundwater—but instead, sought to recover certain resulting cost of repair:

> The groundwater was indeed that which was extracted by the Sewerage District, but E-L introduced no proof as to the value of the extracted groundwater. . . . E-L instead seeks damages for the cost to repair its

[24] Wisconsin has long-recognized partial takings. *See, e.g., Spiegelberg v. State*, 2006 WI 71, ¶ 9, 291 Wis.2d 601, 717 N.W.2d 641.

> building and for the loss of use of its wood piles. However, the Sewerage District did not physically occupy the property *for which E-L seeks compensation* . . . .

E-L, 326 Wis. 2d 82, ¶ 24 (emphasis added); *see also id.*, ¶¶ 6-7, 23, 25, 27, 41.[25]

E-L's holding, therefore, concerned a failure of proof at trial, while Bostco's claim was dismissed on summary judgment. Although this Court's conclusion that E-L's failure to submit evidence of the value of the groundwater taken rendered unnecessary a determination whether landowners have a property interest in the groundwater within their land, *id.*, ¶ 29 n.20, such a right does exist here. Accordingly, Bostco

[25] Contrary to the conclusion of the court of appeals, this Court did not hold that E-L's physical taking claim failed because MMSD "removed the groundwater by way of a trench that was not located or constructed on E-L's property." *Cf. Bostco*, 334 Wis. 2d 620, ¶ 113. Such a rule would fly in the face of fundamental principles of takings laws. *See, e.g.*, *Dugan v. Rank*, 372 U.S. 609, 625 (1963) (physical occupation occurred upstream, off the landowners' property); *Ball v. United States*, 1 Cl. Ct. 180, 181-82 (1982) (private property owners had viable inverse condemnation claim against federal government where water table under claimant's property was allegedly lowered as a result of dewatering by government on adjoining parcel).

should be given an opportunity to try its claim, submitting evidence the Court found lacking in *E-L*—namely, evidence related to the proper measure of damages.

A. Bostco Has a Property Right in the Groundwater Below Its Building.

Over a century ago, this Court recognized landowners' property rights in the groundwater below their land. *Huber v. Merkel*, 117 Wis. 355, 357, 94 N.W. 354 (1903). In unequivocally confirming the existence of property rights in groundwater, the *Huber* court concluded that the theory identifying the origin of these rights was immaterial:

> Whether this right results from an absolute ownership of the water itself . . . or from a mere right to use and divert the water while percolating through the soil, . . . *it is a property right*, arising out of [the] ownership of the land, and is protected by the common law as such.

Id. at 357 (emphasis added). Accordingly, to impair or take this legally protected property right, the

government must exercise its police power or its right of eminent domain. *Id.* at 358.

Subsequent Wisconsin case law reaffirmed landowners' property rights in groundwater. In companion cases, this Court declined to overrule *Huber*'s holding—that landowners have an absolute right to use groundwater below their land, notwithstanding a malicious or wasteful intent. *City of Fond du Lac v. Town of Empire*, 273 Wis. 333, 339, 77 N.W.2d 699 (1956); *Menne v. City of Fond du Lac*, 273 Wis. 341, 77 N.W.2d 703 (1956). Although Chief Justice Fairchild, who dissented in *Menne*, would have overruled *Huber* in favor of a "reasonable use" rule, he acknowledged the landowners' property rights in the groundwater. *See* 273 Wis. at 346 ("The plaintiffs in this case seek the aid of equity in protecting their property rights in the percolating waters from which they draw their water supply.").

Later, in *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339 (1974), this Court overruled *Huber*'s "absolute ownership" rule in favor of a reasonable use rule in the context of nuisance actions. Specifically, this Court established a non-liability-for-reasonable-use rule, adopting proposed § 858A of the Restatement (Second) of Torts. *Michels*, 63 Wis. 2d at 301-02.[26]

However, nothing in the *Michels'* decision debated or refuted the principle that landowners have some

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[26] The reasonable use standard adopted in *Michels* is a slight variant on the reasonable use standard that a number of other states had previously adopted. 63 Wis. 2d at 301. Under proposed § 858A of the Restatement (Second) of Torts, a landowner

> who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless (a) [t]he withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure, (b) [t]he ground water forms an underground stream, in which case the rules stated in sec. 850A to 857 are applicable, or (c) [t]he withdrawal of water has a direct and substantial effect upon the water of a watercourse or lake, in which case the rules stated in secs. 850A to 857 are applicable.

Id. at 302 (internal punctuation omitted).

form of property interest in groundwater. *See id.* at 296 (noting that the "proposed change [was] not confiscatory in nature"). To the contrary, by giving landowners "more or less unrestricted freedom . . . to develop and use groundwater,"[27] the *Michels* rule preserves the property rights first recognized by this Court in *Huber*—property rights that may result from the "mere right to use and divert the water while percolating through the soil." *See Huber*, 117 Wis. at 357. In fact, the rule set forth in § 858A of the Restatement (Second) of Torts—like its predecessor—presumes pre-existing property rights in groundwater. *See* Restatement (Second) of Torts § 858 cmt. b ("This Section retains the property basis of the common law rules pertaining to groundwater . . . ."). Thus, not surprisingly, references to landowners' property rights in groundwater permeate the *Michels* decision:

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[27] *Michels*, 63 Wis. 2d at 302 (quoting analysis section of Restatement (Second) of Torts § 858A (Tent. Draft No. 17, Apr. 26, 1971)).

> There is little justification for property rights in ground water to be considered absolute while rights in surface streams are subject to a doctrine of reasonable use. The *Huber v. Merkel* case certainly gives no explanation of why a property right in ground water should be an exception to the general maxim—sic utere tuo ut alienum non laedas.[28]
>
> . . .
>
> [The Court's decision] merely brings this type of property (percolating ground water) in line with the general limitations on all use of property embodied in the law of nuisance.

63 Wis. 2d at 292, 296.

The conclusion that the *Michels* decision is consistent with the existence of a property interest in groundwater by landowners is also supported by case law in other jurisdictions adopting the Restatement's modified "reasonable use" rule. *See, e.g.*, *McNamara v. City of Rittman*, 107 Ohio St. 3d 243, 245, 838 N.E.2d 640 (2005) (noting that Ohio has adopted the

[28] Latin for "use your own property in such a manner as not to injure that of another." *Michels*, 63 Wis. 2d at 292 n.26.

Restatement (Second) of Torts § 858). For example, in *McNamara*, the Ohio Supreme Court held "that landowners have a property interest in the groundwater underlying their land and that governmental interference with that right can constitute an unconstitutional taking." *Id.* at 245. The court reasoned that the right to use groundwater is included in the title to the overlying land. *Id.* at 246-47. And although an action for the unreasonable use of groundwater "sounds in tort, it is based upon the property right of the landowner making the claim." *Id.* at 247.

The *McNamara* court's reasoning is particularly persuasive here. Like Wisconsin courts, the Ohio Supreme Court concluded that the property interest in groundwater is derived from landowners' right to

reasonable use, not their correlative rights.[29] *See id.* at 246-47; *see also id.* at 249 (Moyer, C.J., concurring). In fact, following *McNamara*, Ohio amended its constitution to confirm that landowners' property rights in groundwater are derived from their right to reasonably use that groundwater. *See* Ohio Const., art. I, § 19(b)(C).

Furthermore, in several other contexts, Wisconsin recognizes the "right to use" as a property right, the taking of which gives rise to a right to just compensation. For example, this Court has long held that riparian rights—the right to reasonably use the shoreline and abutting waters—are property rights and thus, cannot be taken for the public good without just compensation. *Bino v. City of Hurley*, 273 Wis. 10, 21-22, 76 N.W.2d 571 (1956); *Lathrop v. City of Racine*, 119 Wis. 461, 97 N.W. 192, 196 (1903); *see also Stop the*

[29] "Correlative rights" generally require "strict proportional sharing" amongst landowners. 3 *Waters and Water Rights* § 21.01, at 21-5 (Robert E. Beck et al. eds. 2009).

Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 130 S. Ct. 2592, 2601 (2010) ("The Takings Clause . . . applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land.").

Similarly, the right to just compensation is also granted to easement holders who own a private right-of-way across another's land—another non-possessory use right. *United States v. Welch*, 217 U.S. 333, 339 (1910); *see also Hastings Realty Corp. v. Texas Co.*, 28 Wis. 2d 305, 310-12, 137 N.W.2d 79 (1965) (right of access to-and-from a public highway is a property right appurtenant to land); Wis. Stat. § 32.09(6)(b) (taking existing right of access is compensable). Given Wisconsin's stance on other "rights to use" appurtenant to land ownership, landowners' groundwater rights should be deemed "property" for takings law purposes. *Michels*, 63 Wis. 2d at 292 ("It makes very little sense to make an arbitrary distinction between the rules to be

applied to water on the basis of where it happens to be found.").

In sum, as demonstrated by long-standing Wisconsin law, and as further supported by analogous case law in other jurisdictions, Bostco has a property interest in the groundwater beneath its building and its taking ought to be held actionable in inverse condemnation.

B. MMSD Took the Groundwater Below Bostco's Building Without Providing Just Compensation.

As noted above, when the government takes private property for public use pursuant to its eminent domain powers, just compensation is constitutionally mandated. Wis. Const. art. I, § 13. That the taking in this case relates only to the groundwater, and not Bostco's entire building, is immaterial. It has long been established that citizens are entitled to just compensation for a physical taking of a *part* of a larger piece of property; destruction of the whole is

unnecessary. *See, e.g., Spiegelberg v. State,* 2006 WI 71, ¶ 9, 291 Wis. 2d 601, 717 N.W.2d 641; *Heiss v. Milwaukee & L.W.R. Co.*, 69 Wis. 555, 558, 34 N.W. 916 (1887) ("It is not necessary that the owner should be divested of all estate in the whole."); Wis. Stat. § 32.09(6) (providing just compensation requirements for partial takings). Instead, an inverse condemnation claim may be predicated on "some direct and physical interference with *some part* of the particular piece of property in question." *Heiss*, 69 Wis. at 558 (emphasis added). And that actionable interference includes extracting groundwater from beneath a landowner's property. *See Hage v. United States*, 35 Fed. Cl. 147, 156, 172 (Fed. Cl. 1996); *McNamara*, 107 Ohio St. 3d at 245; *Sorensen v. Lower Niobrara Natural Res.*, 221 Neb. 180, 191-92, 376 N.W.2d 539 (1985), *superseded by statute as stated in Springer v. Kuhns*, 6 Neb. App. 115, 571 N.W.2d 323 (1997).

On remand, only a trial on damages is necessary. It is already established that MMSD took large volumes of groundwater from Bostco's property and that Bostco was thereby stripped of the reasonable use of that groundwater (to keep its piles wet and prevent soil consolidation) it once enjoyed. The jury could not have reached its verdict without having necessarily found both of these things.[30] Not only is no trial necessary on the issue of liability because the taking has already been established as a matter of fact, but also because "the ultimate determination of whether government conduct constitutes a taking is a question of law that is not properly placed before a jury." *E-L*, 326 Wis. 2d 82, ¶ 29 n.20. The record in this case leaves no room for doubt that MMSD took groundwater from Bostco's property—and took so much of it that Bostco was deprived of its ability to use the groundwater for the

[30] In addition, MMSD took Bostco's groundwater to operate and maintain the Deep Tunnel and the Deep Tunnel clearly has and had a public use.

unmistakably reasonable purposes of keeping piles saturated and preventing soil consolidation. *See supra*, section II of Statement of Facts.

With respect to the calculation of the amount of just compensation due, an issue that "a jury may properly be asked to determine," *E-L*, 326 Wis. 2d 82, ¶ 29 n.20, Bostco is entitled to damages in an amount calculated pursuant to § 32.09(6). Section 32.09(6), which sets forth the standards for assessing just compensation in partial takings situations, provides in relevant part:

> [T]he compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken as of the date of evaluation or the sum determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation . . . .

Bostco should therefore receive as compensation the greater of either (1) the fair market value of the groundwater taken or (2) the diminution in the fair market value of the property as a whole as a result of the taking—sometimes referred to as "severance damages." *See Alsum v. Wis. Dep't of Transp.*, 2004 WI App 196, ¶ 12, 276 Wis. 2d 654, 689 N.W.2d 68. The property's fair market value is "that amount which can be realized on sale by an owner willing, but not compelled, to sell to a purchaser willing and able, but not obliged, to buy." *Arents v. ANR Pipeline Co.*, 2005 WI App 61, ¶ 14, 281 Wis. 2d 173, 696 N.W.2d 194. Because Bostco has not yet tried its inverse condemnation claim, it has not yet had the opportunity to submit evidence as to the diminution in the fair market value of its property.[31]

[31] As an owner, Bostco attempted to put in this evidence at trial, but the circuit court erroneously found this testimony inadmissible. R.383 p.198-99 (sustained objection); R.385 p.9-11 (offer of proof and citation to case law).

CONCLUSION

For the foregoing reasons, Bostco respectfully requests that this Court reinstate the full damage award found by the jury or alternately, reinstate the trial court's issuance of equitable relief, and reverse the court of appeals' affirmation of the circuit court's order granting MMSD summary judgment on Bostco's inverse condemnation claim and remand for a trial on the issue of damages.

Dated this 16th day of April, 2012.

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SUPREME COURT OF WISCONSIN

Bostco LLC and Parisian, Inc.,
Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v. Appeal Nos. 2007AP221
2007AP1440

Milwaukee Metropolitan Sewerage District,
Defendant-Respondent-Cross-Appellant-Petitioner.

FORM AND LENGTH CERTIFICATION

I hereby certify this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) for a brief and appendix produced with a proportional serif font, and pursuant to this Court's April 11, 2012 order, this brief exceeds the length limitations set forth in Wis. Stat. § 809.19(8)(c), containing no more than 15,000 words. The length of this brief is 14,797 words.

Dated this 16th day of April, 2012.

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SUPREME COURT OF WISCONSIN

Bostco LLC and Parisian, Inc.,
Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v. Appeal Nos. 2007AP221
2007AP1440

Milwaukee Metropolitan Sewerage District,
Defendant-Respondent-Cross-Appellant-Petitioner.

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

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

Dated this 16th day of April, 2012.

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CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that, pursuant to Wis. Stat. § 809.80(3)(b), on April 16, 2012, Plaintiffs-Appellants-Cross-Respondents-Petitioners Bostco LLC and Parisian, Inc.'s Brief and Appendix was delivered to Federal Express for delivery to the Clerk of the Supreme Court of Wisconsin within three calendar days. I further certify that the brief was correctly addressed.

Dated this 16th day of April, 2012.

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