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' RESPONSE 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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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.

Bostco's initial brief in this appeal included an extensive recitation of the procedural history and underlying facts relevant to this appeal. Bostco relies on that recitation in support of this response brief in opposition to MMSD's appeal. In addition, Bostco notes that MMSD's recitation of the facts includes several misleading assertions, as well as a number of assertions made without an adequate record citation. However, due to word count limitations, an exhaustive list is impossible.

In short, many of MMSD's statements of fact appear to be an attempt to retry the element of causation. For example, on pages 15-19 of MMSD's opening brief, MMSD argues that historic causes unrelated to the Deep Tunnel were the real reason for the damage at the Boston Store building. MMSD was permitted to put on evidence of these supposed other causes[1] and it did so, *see, e.g.*, R.352 (Trial Exs. 2991-005-06); R. 390 pp.18-94, although much of the evidence cited in its brief was not submitted at trial and, in the case of the article cited in footnote 5, not even part of the record at all.

But in finding that MMSD was 70% responsible for the damage, the jury apparently found more convincing the evidence showing that the building's columns settled far more rapidly and dramatically in

[1] The "cause" theories were conflated with a contributory negligence theory and the trial court erred in permitting the contributory negligence instruction and special verdict over Bostco's objection. *See* R.192; R.250 pp.1-3; R.252 pp.1-2; R. 256; R.394 pp.24-25, A-Ap.496-97. However, Bostco is no longer pursuing an appeal related to that error.

the 1990's than they had in the many decades monitored previously. *See* R.385 pp.93-94; R.351 (Trial Ex. 1552-041) (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.98-105, 138-43; R.351 (Trial Exs. 1552-043 to 051 and 054 to 068); R.385 pp.138-43 (settlement data for columns repaired in 1997 and 2001 reflected that they had been relatively stable until the early 1990's, when they suffered large settlements); R.385 pp.42-43; R.351 (Trial Ex. 1552-006) (Expert testimony that large column movement at Bostco's building due to the operation of the Deep Tunnel). Moreover, the jury concluded that MMSD's ongoing harm would cause substantial future damage to the building. R.403 p.2, A-Ap.561.

In addition to attempting to retry the merits of the case, MMSD also attempts to recast the trial as having been fundamentally about the design and construction of the Deep Tunnel, and not its operation

and maintenance. For example, MMSD asserts on pages 3-4 of its opening brief that Bostco's tunnel expert "testified that the tunnel should have been constructed with a complete concrete liner," but in the testimony cited, Bostco's tunneling expert opined that some extent of concrete lining should be added to the tunnel "as a matter of maintenance." R.382 pp.586-87.

Similarly, MMSD attempts to cast any reference to tunnel lining or grouting as an issue of design and/or construction, but MMSD's own technical documents indicate that as the Deep Tunnel was designed, grouting and lining were part of tunnel maintenance: "[m]aintenance may include removal of solid deposits, removal of fallen rock, repair of deteriorated linings and placement of concrete lining in deteriorated, unlined areas." R.381 pp.145-48; R.351 (Trial Ex. 206). Although MMSD asserted that "there was no evidence of deterioration," *MMSD Br.*, at 5, this too is simply not true. The fact that there had been post-construction

deterioration was one of the topics addressed by Bostco's tunneling expert. *See, e.g.*, R. 382, pp. 166-71, 202, 229-31 (three surge events between 1992 and 2002; surge events are violations of MMSD permit and cause significant deterioration by making rock walls more porous and permeable). The court of appeals correctly identified that the evidence presented at trial showed negligent operation and maintenance. *See Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 76, ¶¶ 16, 20-24, 334 Wis. 2d 620, 800 N.W.2d 518. Nonetheless, MMSD continues its revisionist efforts by mischaracterizing much of the evidence and these efforts ought to be rejected.

Finally, in direct contradiction to its attempt to spin the trial as having been all about design and construction, MMSD also contends that the trial court wrongfully *excluded* design and construction evidence that MMSD claims would have shown that it was not negligent in operating and maintaining the Deep

Tunnel. The circuit court did in fact order that all design and construction related evidence be excluded from trial—specifically, it granted MMSD's own motion in limine requesting as much. R.172, pp.9-10, 31-36 (MMSD motions in limine seeking exclusion of design and construction related evidence, arguing irrelevance and unfair prejudice); R.211, pp. 2-3 (granting MMSD's motion in limine with respect to pre-August 7, 1992 conduct); R. 377, pp.11-12 (MMSD stipulates that August 7, 1992 is date it became responsible for Deep Tunnel's operation and maintenance). Having successfully persuaded the court to exclude design and construction related evidence, MMSD cannot prevail on an argument that it was prejudiced because the jury never heard evidence MMSD made no attempt to introduce.

ARGUMENT

I. THE CIRCUIT COURT AND COURT OF APPEALS CORRECTLY CONCLUDED THAT BOSTCO'S CLAIMS ARE NOT BARRED BY WIS. STAT. § 893.80(4).

Summary: The court of appeals correctly determined that MMSD was not entitled to immunity under Wis. Stat. § 893.80(4) and this decision should be affirmed because MMSD's conduct in negligently operating and maintaining a sewer was ministerial and accordingly, not entitled to immunity. Alternately, MMSD's conduct should be found to fall under the known danger or professional discretion exceptions to Wis. Stat. § 893.80(4) or as not immune because it is not legislative, quasi-legislative, judicial or quasi-judicial.

Wis. Stat. § 893.80(4) provides that "[n]o suit may be brought against any [municipal entity] for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." MMSD contends that its conduct in this case falls under one of these four categories without specifying which one.

Section 893.80(4) is a legislative codification of this Court's opinion in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 53, 277 Wis. 2d 635, 691 N.W.2d 658 [hereinafter *MMSD v. Milwaukee*]. Because § 893.80(4) is a codification of judicial case law, its meaning is best understood when considered in light of that context.

A. Overview of Immunity Law.

Historically, the law of immunity has developed along four separate lines: (1) sovereign immunity from suit; (2) governmental immunity from liability; (3) immunity of public officials individually for injuries caused by the negligent performance of their official duties; and (4) immunity of public officials individually for violating constitutional rights of citizens under 42 U.S.C. § 1983. Each line of immunity derives from a different source and each provides a different scope of immunity.

Sovereign immunity derives from article IV, § 27 of the Wisconsin Constitution and the Eleventh Amendment of the United States Constitution. It operates as an absolute immunity from suit and exceptions to it exist only where and to the extent it has been abrogated by statute. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Lister v. Bd. of Regents of University Wis. Sys.*, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976). Only states and state entities have sovereign immunity; neither the article IV, § 27 of the Wisconsin Constitution nor the Eleventh Amendment of the United States Constitution provides sovereign immunity to municipalities. *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 691 n.54 (1978); *Lister*, 72 Wis. 2d at 291.

Governmental immunity is not immunity from suit, but immunity from liability for damages. *Scarpaci v. Milwaukee Co.*, 96 Wis. 2d 663, 681, 292 N.W.2d 816 (1980). It derives from common law and, unlike

sovereign immunity, extends to municipal entities. *Owen v. City of Independence*, 445 U.S. 622, 644 (1980).

At common law, there were two exceptions to the rule of governmental immunity. *Id.* at 644; *see also Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 300, 340 N.W.2d 704 (1983). "The first sought to distinguish between a municipality's 'governmental' and 'proprietary' functions; as to the former, the city was held immune, whereas in its exercise of the latter, the city was held to the same standards of liability as any private corporation." *Owen*, 445 U.S. at 644. "The governmental-proprietary distinction owed its existence to the dual nature of the municipal corporation[;] [o]n the one hand, the municipality was a corporate body, capable of performing the same 'proprietary' functions as any private corporation, and liable for its torts in the same manner and to the same extent, as well." *Id.* at 645.

The second common law exception immunized municipalities for their "'discretionary' or 'legislative' activities, but not for those which were 'ministerial' in nature." *Id.* As observed by the United States Supreme Court, "although many, if not all, of a municipality's activities would seem to involve at least some measure of discretion, the influence of this doctrine on the city's liability was not as significant as might be expected." *Id.* at 648. The rule applied only to "'discretionary powers of a public or legislative character.'" *Id.* (quoting 2 J. Dillon, *Law of Municipal Corporations* § 753, at 862 (2d ed. 1873)). By way of example, the Court noted that under this exception, a "municipality would be immune from liability for damages resulting from its decision where to construct sewers, since that involved a discretionary judgment as to the general public interest; but city would be liable for neglect in the construction or repair of any particular sewer, as such activity is

ministerial in nature." *Id.* at 649 (citing *Hill v. Boston*, 122 Mass. 344, 358-59 (1877)).

In 1962, this Court took up the issue whether Wisconsin should continue to recognize common law governmental immunity in *Holytz*, 17 Wis. 2d 26. After concluding that this immunity could be judicially abrogated because it had been judicially created, this Court held that immunity reflected bad public policy and accepted the plaintiff's invitation to abrogate it, noting "henceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity." *Id.* at 33-39.[2] This Court then carved out a narrow exception, holding

[2] The abrogation of governmental immunity was held to apply not only to municipalities, but "all public bodies within the state: the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivisions of the state." *Holytz*, 17 Wis. 2d at 40. However, because the state itself is entitled to sovereign immunity from suit in addition to governmental immunity, this Court was careful to note that "[t]he decision in the case at bar removes the state's defense of nonliability for torts, but it has no effect upon the state's sovereign right under the Constitution to be sued only upon its consent." *Id.* at 41.

that the opinion should not be "interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions." *Id.* at 40.

Although this Court concluded that governmental immunity reflected bad public policy, it noted that "[i]f the legislature deems it better public policy, it is, of course, free to reinstate immunity." *Id.* The legislature did not deem it better policy, but instead, codified the holding in *Holytz* in what is today numbered as § 893.80(4). *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 53.

This Court did not define the terms "legislative or judicial or quasi-legislative or quasi-judicial functions" in the *Holytz* opinion but did cite to *Hargrove v. Cocoa Beach*, 96 So. 2d 130, 133 (Fla. 1957). *Hargrove* in turn cited *Elrod v. City of Daytona Beach*, 180 So. 378 (Fla. 1938) and *Akin v. City of Miami*, 65 So. 2d 54 (Fla. 1953), as examples of cases illustrating the rule of non-

liability for legislative, judicial, quasi-legislative, and quasi-judicial conduct. In *Elrod*, the Supreme Court of Florida concluded that a city should not be liable for passing or enforcing an allegedly unconstitutional statute, 180 So. at 380-81, while in *Aiken*, the same court held that a city should not be held liable for damages alleged to have resulted from the city's decision not to issue a building permit. 65 So. 2d at 55.

Shortly after the state legislature codified the holding in *Holytz*, Wisconsin courts began developing standards for determining whether conduct qualified as quasi-legislative or quasi-judicial. These standards deemed an act quasi-legislative if it "involve[d] the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed" and quasi-judicial if it "involve[d] the exercise of discretion and judgment in the application of a rule to specific facts." *Lifer v. Raymond*, 80 Wis. 2d 503, 511-12, 259 N.W.2d 537 (1977).

These definitions were and are consistent with the standards applied in determining public official immunity from suit under 42 U.S.C. § 1983. Immunity from liability under § 1983 is two-tiered. *Buckley v. Fitzsimmons,* 509 U.S. 259, 268 (1993). The first tier is absolute immunity, which provides government officials with complete and total immunity for certain types of acts, most notably judicial and legislative acts. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (absolute immunity for legislative acts); *Butz v. Economou*, 438 U.S. 478, 511-12 (1978) (absolute immunity for judicial acts).

A functional test is used to determine whether an act qualifies as judicial or legislative. *Bogan*, 523 U.S. at 54; *Butz*, 438 U.S. at 512. Under the functional test, much like the standards for determining quasi-legislative and quasi-judicial acts, courts are to look to the nature of the act at issue and not the defendant's job title. *See, e.g.*, *Bogan*, 523 U.S. at 55 (mayor

entitled to immunity for role in passing ordinance even though not a member of legislature); *Butz*, 438 U.S. at 513-14 (administrative law judges enjoy absolute judicial immunity even though members of the executive branch).

The second tier is qualified immunity. "Most public officials are entitled only to qualified immunity" because the scope of what qualifies as judicial or legislative conduct is relatively narrow, even when the functional test is applied. *Buckley*, 509 U.S. at 268. Under qualified immunity, "government officials are not subject to damages liability for the performance of their discretionary functions when 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Thus, cases analyzing public official immunity from liability under § 1983 reflect that while most actions of governmental officials involve the

exercise of discretion, only a small segment of discretionary acts are functionally legislative or judicial. *See, e.g.*, *Miller v. Gammie*, 335 F.3d 889, 898 (9th Cir. 2003) ("To the extent, however, that social workers also make discretionary decisions and recommendations that are not functionally similar to prosecutorial or judicial decisions, only qualified, not absolute immunity, is available.").

Public official immunity for negligence is slightly different from public official immunity under § 1983. In Wisconsin, the common law rule regarding public official immunity for negligence provided that a public official would be held liable if he or she negligently failed to perform a ministerial duty, but would be entitled to immunity for discretionary acts. *Clausen v. Eckstein*, 7 Wis. 2d 409, 413, 97 N.W.2d 201 (1959).[3]

[3] The term "discretionary" in this context (public official immunity) is defined differently than it was defined under common law governmental immunity. Under common law governmental immunity, discretionary act immunity applied only to the exercise of "discretionary powers of a public or legislative

This broad personal immunity provided to public officers does not derive from sovereign immunity but from public policy consideration which "have been variously identified in the cases as follows: (1) The danger of influencing public officers in the performance of their functions by the threat of lawsuit; (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service; (3) the drain on valuable time caused by such actions; (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates; and (5) the feeling that the ballot and removal procedures

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character." *Owen*, 445 U.S. at 644; Restatement (Second) of Torts § 895C, cmt. G ("[A] local governmental entity is immune in the exercise of those administrative functions that involve the making of a basic policy decision[;] [s]ometimes referred to as the exercise of a 'discretionary function,' as decisions made at the planning level or as the forming of an executive judgment, these are to be distinguished from the routine administrative activities in the operation of the government."). In the context of public official immunity, there is no such limitation; any action for which the official has discretion as to time, place, or manner is deemed "discretionary" for immunity purposes. *E.g.*, *Kimps v. Hill*, 200 Wis. 2d 1, 10, 546 N.W.2d 151 (1996).

are more appropriate methods of dealing with misconduct in public office." *Lister*, 72 Wis.2d at 299.

Although this common law rule immunity for public officials was not abrogated in *Holytz*, *see, e.g.*, *Lister*, 72 Wis. 2d at 300-01 (post-*Holytz* recognition of doctrine), the legislature extended immunity for legislative, quasi-legislative, judicial, and quasi-judicial acts to both municipal entities and their "officers, officials, agents or employees." *See* Wis. Stat. § 893.80(4). Accordingly, after the enactment of this statute, public officials retained their common law immunity for non-ministerial acts and added statutory immunity for legislative, quasi-legislative, judicial, and quasi-judicial acts. *See, e.g.*, *Lifer*, 80 Wis. 2d at 512.

Because these two immunities—common law immunity for non-ministerial acts and statutory immunity for legislative, quasi-legislative, judicial, and quasi-judicial acts—were both implicated any time a plaintiff sued a public officer in tort, they were

frequently analyzed side-by-side. *See, e.g.*, *Scarpaci*, 96 Wis. 2d at 682-83; *Lifer*, 80 Wis. 2d at 512. For reasons that remain unclear, this Court and the court of appeals began to blur the line between the two distinct tests and, eventually, erroneously grafted onto statutory immunity the ministerial/discretionary standards that had once governed only common law public official immunity. *See Lifer*, 80 Wis. 2d at 512 (noting that all acts that qualify as legislative or judicial would qualify as discretionary and then referring to standards as synonymous); *see also Scarpaci*, 96 Wis. 2d at 683 n.20 (citing *Lifer* for proposition that standards are synonymous; noting that this conclusion was contrary to other secondary sources); *Linville v. City of Janesville*, 174 Wis. 2d 571, 584, 497 N.W.2d 465 (Ct. App. 1993) (citing *Scarpaci* for rule that standards are synonymous).

Three members of this Court have recognized this mix-up and its effect of construing § 893.80(4) in a

manner that effectively reinstates common law governmental immunity, rather than codifying its near total abrogation. *Pries v. McMillon*, 2010 WI 63, ¶ 91, 326 Wis. 2d 37, 784 N.W.2d 648 (Gableman, J., dissenting); *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶¶ 61-64, 75-82, 262 Wis. 2d 127, 663 N.W.2d 715 (Prosser, J., dissenting; Bablitch and Crooks, JJ., concurring); *see also Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F. Supp. 2d 800, 809 (W.D. Wis. 2007) (describing judicial construction of § 893.80(4) as "a curious and expansive exercise of statutory construction").

Although this case presents an opportunity to correct this error, the Court need not reach that issue. Even if the ministerial/discretionary standard were the correct one, the negligence at issue in this particular case is ministerial. As noted above, and in greater detail below, the historic rule with respect to public works is that design and construction are discretionary

while operation and maintenance are ministerial. The jury in this case found that MMSD had negligently operated and maintained the Deep Tunnel, putting MMSD's negligence squarely within the ministerial category. Even were that not so, there are also two separate exceptions that ought to apply here: the known danger exception and the professional discretion exception. Finally, for the reasons set forth above and below, *see infra* section I.E., if this Court were to conclude that MMSD's conduct was discretionary and not ministerial, and also not subject to either the known danger or professional discretion exception, this Court should conclude that MMSD is not entitled to immunity for discretionary acts at all, but only for legislative, quasi-legislative, judicial, and quasi-judicial acts, as those terms were defined in *Lifer*, 80 Wis. 2d at 511-12, and, that as properly defined, operation and maintenance of a sewerage system is neither legislative nor judicial in nature.

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

1. Wisconsin does not provide municipal immunity for negligent operation and maintenance of a sewerage utility.

It is well-established in Wisconsin law that a municipal entity is not immune under Wis. Stat. § 893.80(4) for negligence in operating or maintaining a sewerage system. *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 56 (citing *Lange v. Town of Norway*, 77 Wis. 2d 313, 318-20, 253 N.W.2d 240 (1977)) (municipal immunity "[does] not extend to claims arising from negligence in operating or maintaining" a public works project); *see also Menick v. City of Menasha*, 200 Wis. 2d 737, 745, 547 N.W.2d 778 (Ct. App. 1996) ("[w]hile the decision to install and provide a sewer system in a community is a discretionary decision, there is no discretion as to maintaining the system so as not to cause injury to residents"). With respect to municipal sewerage systems, this Court concluded that

only decisions "regarding the adoption, design, and implementation" are entitled to that immunity. *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 60.

Though MMSD now disputes that *MMSD v. Milwaukee* recognizes that the negligent operation or maintenance of a sewer is not immune—now arguing that not *all* operation and maintenance are subject to liability—in that case, MMSD found itself firmly on the other side of the issue, alleging that it was the victim of a municipal tort and specifically, that it suffered damage when the city failed to repair a leaky water main. 277 Wis. 2d 635, ¶ 9. In arguing to this Court that the City should not be found immune for negligent maintenance of its pipe, MMSD asserted:

> It is clear that the City has a ministerial duty to maintain its water main system. This duty reflects the public's reasonable expectation that, once the government exercises its discretion to construct public works, it will not thereafter permit those public works to become unsafe for use by the public for whom such works were constructed. . . . Municipal liability for property damage caused by municipal property is hardly unreasonable. It is consistent with Wisconsin law with regard to sewers and highways and roads.

Appellant's Br., *MMSD v. Milwaukee*, No. 02-2961, 2003 WL 23837290, at *20, 31 (citing *Menick*, 200 Wis. 2d at 745; *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 431, 400 N.W.2d 493 (Ct. App. 1986)). MMSD's characterization of the City's duty in that case was wholly accurate, and nothing in this Court's decision rejected that argument.

In its opinion, this Court noted with approval that its prior precedent had established that "immunity 'would not include a failure to maintain as to a condition of disrepair or defect or a failure to operate'" a dam floodgate, *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 56 (quoting *Lange*, 77 Wis. 2d at 320), though it would include decisions regarding the design of public works projects, *id.*, ¶ 58. After reviewing its prior precedent, none of which this Court criticized, it concluded that "when analyzing claims of immunity under § 893.80(4) . . . the proper inquiry is to examine the *character* of the

underlying tortious acts." *Id.*, ¶ 59 (emphasis added). The court recognized that legislative decisions concerning the adoption, design, and implementation of public works were traditionally discretionary and therefore immune, but negligent acts performed pursuant to a "ministerial" duty were not and, thus, "the City may be potentially liable [for] its failure to repair the leaking water main." *Id.*, ¶¶ 59, 61.

The court then remanded for further proceedings, reasoning as follows: "Since we cannot determine whether the City was on notice that its water main was leaking and could potentially interfere with the use and enjoyment of another's property, we cannot conclude whether its duty to repair the leaking main with reasonable care before it broke was 'absolute, certain and imperative.'" *Id.*, ¶ 62 (quoting *Lister*, 72 Wis. 2d at 301). If the City *was* on notice that its main was leaking and could potentially interfere with the use and enjoyment of another's property, then its obligation to

operate and maintain the system meant it had a ministerial duty—one which was "absolute, certain and imperative"—to repair the leak. *See id.*

MMSD now claims that "acts of operation and maintenance are often discretionary" and asserts that municipalities are immune for "discretionary acts of operation or maintenance." MMSD Br. at 61. In doing so, MMSD misreads this Court's decision in *MMSD v. Milwaukee*. Contrary to MMSD's arguments, this Court did not characterize certain acts of operation and maintenance of a sewer system as "discretionary" for immunity purposes. MMSD points to paragraph 59 of the opinion for support, but that paragraph simply restates the language of the statute. *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 59 ("If the acts complained of are legislative, quasi-legislative, judicial, or quasi-judicial—that is discretionary—the municipality is protected by immunity."). Nothing in paragraph 59, or the remainder of the opinion, suggests

that acts of operating and maintaining a sewer system are discretionary.

Nor did this Court overrule the numerous courts of appeals decisions holding that acts of operation and maintenance of sewer systems are ministerial and, therefore, lack immunity, contrary to MMSD's assertion. *See e.g., Menick*, 200 Wis. 2d 737; *see also Caraher v. City of Menomonie*, 2002 WI App 184, 256 Wis. 2d 605, 649 N.W.2d 344 ("sewer system maintenance is a ministerial act not protected by governmental immunity"). If the Court intended to overrule the appellate courts on the operation and maintenance distinction, it could have,[4] but it instead followed the same line of reasoning to conclude that if the City was on notice of a leaking water main, it had a ministerial duty to repair the main that was not

[4] The Court, in fact, directly addressed the *Menick* decision and affirmed its reasoning on other grounds. *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 64.

protected by immunity. *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 62.

Maintaining municipal liability for negligent acts in operation and maintenance of sewer systems is also consistent with the abrogation of government immunity in *Holytz* and the codification of that abrogation in § 893.80(4).[5] Even at common law, prior to this state's judicial and legislative rejection of government immunity, the rule was that the operation of sewer system that created a nuisance was not shielded by immunity:

> The great weight of authority, American and English, supports the view that legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance, and that it matters not whether such nuisance results from negligence or from the plan adopted.

[5] Though this Court declined to "create a planning/operational distinction to be utilized in the analysis of state employee immunity," in *Kimps*, 200 Wis. 2d at 9, it carefully noted the distinction between public officer immunity and municipal immunity: "The general rule of immunity for state public officers stands in contrast to that for municipalities where, 'the rule is liability—the exception is immunity.'" *Id.* at 10, n.6.

Winchell v. City of Waukesha, 110 Wis. 101, 85 N.W. 668, 670 (1901) (citing an "an almost unlimited array of decisions" from other states); *see also Christian v. City of New London*, 234 Wis. 123, 129, 290 N.W. 621 (1940) (noting that "[t]he doctrine of the cases dealing with municipally owned waterworks is that the municipality must use proper care in maintaining the means of storage and distribution, or respond in damages to anyone injured"); *Mitchell Realty Co. v. City of West Allis*, 184 Wis. 352, 199 N.W. 390, 393 (1924) ("In creating a nuisance" in its sewage disposal plant, the defendant city "must respond in damages."). It is absurd for MMSD to suggest that activities that enjoyed no immunity in the context of common law immunity should now find broader protection under a statute codifying its near total abrogation.

2. MMSD had a ministerial duty to operate and maintain the Deep Tunnel so as to not interfere with the use and enjoyment of another's property

Once a municipal entity is on notice that its sewer or waterworks is leaking and could "potentially interfere with the use and enjoyment of another's property," the municipality has a duty to repair that is "absolute, certain and imperative." *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 62 (citing *Lister*, 72 Wis. 2d at 301). This Court remanded the issue of notice back to the trial court in *MMSD v. City of Milwaukee*, but there is no such uncertainty in this case.

The most notable distinction between this case and the one in *MMSD v. Milwaukee* is that the record here is replete with evidence that MMSD knew the Deep Tunnel was leaking and not only could potentially interfer, but was *actually* damaging and interfering

with the use and enjoyment of another's property.[6] *See generally* Section II.D. of the Statement of Facts in Bostco's Brief in Chief (citing R.351 (Trial Exs. 290, 429), A-Ap.347-49, 351-53, 351-53; R.381 pp. 144-45, 163-64, 167-73, 177-79, A-Ap.400-04; R.382 pp.36-38; R.351 (Trial Ex. 359), A-Ap.350; R.390 pp.11-17, A-Ap.407-08).

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[6] MMSD disputes that such a ministerial duty existed because it claims the Deep Tunnel was functioning as constructed, in contrast to the broken water main in *MMSD v. City of Milwaukee*. MMSD Br. at 51. But *MMSD v. City of Milwaukee* did not consider whether the City had a ministerial duty to repair the water main *after* it broke and was causing property damage—that was never in doubt—the question was whether the City had a duty to repair the pipe when it was leaking, but not yet broken. 277 Wis. 2d 635, ¶¶ 61-62 ("[T]he question then becomes whether the City was under a ministerial duty to repair the leaking main *before* it broke.") Neither MMSD nor the City disputed that the 4:45 a.m. call "that water was entering the basement of a home" created an absolute, certain and imperative duty for a City of Milwaukee Waterworks employee to respond and shut off the flow of water. *Id.* That is the situation here.

The question is not whether MMSD had a ministerial duty to repair the Deep Tunnel *before* it dewatered the aquifer below downtown and threatened critical structures—though it may well have—the question is whether a ministerial duty to act existed when MMSD knew that it was draining the aquifer and interfering with the property of downtown businesses and what actions that duty compelled. As set forth *infra* at pp. 40-43 and Section D of the Statement of Facts in Bostco's Brief in Chief, there is no question that MMSD knew that it was draining the aquifer and interfering with the property of downtown businesses.

The sewer in this case not only could "potentially interfere with the use and enjoyment of another's property," the jury found that it actually did interfere with Bostco's use and enjoyment of its property. R.403 p.3, A-Ap.562.[7]

Adhering to this Court's holding in *MMSD v. Milwaukee*, the court of appeals examined the underlying tortious act and determined that it was MMSD's failure to stop the Deep Tunnel from excessively leaking. *Bostco*, 334 Wis. 2d 620, ¶ 19. The court then looked to whether MMSD had notice, after taking over the maintenance and operation of the Deep Tunnel on August 7, 1992, that the Deep Tunnel was dewatering the area around the Boston Store such that it had an "absolute, certain and imperative" duty to repair the tunnel. *Id.*, ¶¶ 28-29.

[7] The court of appeals found that the interference with Bostco's use and enjoyment of its property resulted in significant harm as a matter of law. *See Bostco*, 334 Wis. 2d 620, ¶¶ 92-104.

Comparing the case to *MMSD v. Milwaukee*, the court of appeals concluded that MMSD did, in fact, have notice that it was draining the aquifer in downtown Milwaukee to the detriment of property owners, including "critical structures" such as the Boston Store, and had a ministerial duty to repair the Deep Tunnel. *Id.*, ¶ 37. The notice itself imposed the ministerial duty upon the District to inspect the Deep Tunnel and to remedy the harm. *Id.* There is no immunity for a nuisance that has "existed long enough that Defendant knew or should have known of the condition and could have remedied it within a reasonable amount of time." *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 73.

3. The evidence submitted at trial supports the jury's finding that MMSD negligently operated and maintained the Deep Tunnel.

As outlined above, this Court has held that the operation and maintenance of a sewer system are ministerial duties, the breach of which is not protected by immunity under Wis. Stat. § 893.80(4). MMSD's argument that the jury was not asked specifically to find a "breach of a ministerial duty" is inapposite as it ignores this Court's holding in *MMSD v. Milwaukee*. *See* 277 Wis. 2d 635, ¶ 56. Because negligent acts of operation and maintenance are not subject to immunity under the statute, the only question is whether the evidence submitted at trial supports the jury's finding that MMSD negligently operated and maintained the Deep Tunnel. As the court of appeals correctly held, it does.

There is no question that the evidence heard and considered by the jury related to the negligent operation

and maintenance of the tunnel, rather than potentially discretionary acts of construction and design. To insure that the jury was presented with evidence regarding only the operation and maintenance of the Deep Tunnel, the circuit court asked both parties if they would agree to delineate operation and maintenance from design and construction by setting a date when the design and construction phase ended and the operation and maintenance phase began:

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

R.376 p.4.

MMSD later proposed to use August 7, 1992, the date on which the construction contractors provided MMSD with a certificate of substantial completion, as

the date that would distinguish what acts were part of design and construction and what acts were part of operation and maintenance. R.377 pp.8-9. Over Bostco's objection that immunity should have ended at the point MMSD was on notice that the Deep Tunnel was causing significant property damage to Boston Store or at a minimum, October 1990, the date on which MMSD had previously indicated construction ended, R.377 pp.3-7; R.376 p.41, the court accepted MMSD's proposal and ordered that Bostco would be barred from presenting evidence of events that occurred before August 7, 1992, except for the limited purpose of proving notice, R.377 pp.10-13.

Although the court initially indicated it would permit pre-1992 evidence to prove notice, it changed that position at trial. The court repeatedly ruled against Bostco's efforts to submit evidence of pre-August 1992 events to show that MMSD was on notice that groundwater infiltration into the Deep Tunnel

would cause and was causing significant damage to the foundation of the Boston Store building. *See, e.g.*, R.381 p.153-62; R. 382 pp.132-39. The evidence put before the jury at trial related to conduct that occurred at a time MMSD stipulated was after construction was complete and the Deep Tunnel was in operation.

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

maintenance of the Deep Tunnel and again specified MMSD's date of August 7, 1992:

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

R. 403 p.1.

The jury answered "yes" to both questions, finding that MMSD negligently operated or maintained the Deep Tunnel and that MMSD's negligent operation or maintenance of the Deep Tunnel caused the damage to the Boston Store building. R.403 p.1, A-Ap.560; R.393 p.20. The jury did not find that MMSD designed, constructed, or "implemented" the Deep Tunnel in a negligent manner.

MMSD's argument now is that even though the jury's verdict found that MMSD was negligent in its

operation or maintenance after August 1992, the jury did not base this decision on breach of any ministerial duty. MMSD Br. at 39. Because this Court has held acts of operation and maintenance of a sewerage system are not discretionary, and therefore not immune from liability, *MMSD. v. Milwaukee*, 277 Wis. 2d 635, ¶ 56, the only relevant inquiry is whether, under any reasonable view, there is any credible evidence that leads to an inference supporting the jury's finding. *See Morden v. Cont'l AG*, 2000 WI 51, ¶ 38, 235 Wis. 2d 325, 611 N.W.2d 659; *see also* Wis. Stat. § 805.14(1) (motion challenging sufficiency of evidence to support a verdict, or an answer in a verdict, may not be granted unless there is no credible evidence to sustain finding).[8]

The evidence at trial easily meets this standard. For example:

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

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

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

- Further evidence of MMSD's negligent operation of the Tunnel came from Mr. Stehly, who opined that during the period of 1990-2001, with regard to columns at equal elevation, three times as many columns were repaired and there was nearly twice as much movement in the columns than in the previous twenty-six year time period. R.385, pp.93-94; R.351 (Trial Ex. 1552-041).[9]

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[9] Mr. Stehly also discussed how the foundation had been altered or repaired on several occasions prior to 1990—between the late 1940's or early 1950's and 1990. *See* R. 385 pp. 94-95; R. 351 (Trial Ex. 1552-042). However, several of the column repairs or alterations were attributed to changes in the use of the building including, for example, lowering the basement for use as retail space. R. 385 pp. 87-88. Several column changes were also done for unknown reasons. R. 385 pp. 94-95.

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

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

- MMSD's own expert witness testified that there was approximately a thirty-foot drop in the dolomite water table after the Deep Tunnel went through. R.387 pp.204-06. This was six times more than the five-foot drop that had been

predicted in MMSD's planning documents. R.351 (Trial Ex. 291) and the calculation was derived from averaging well readings, many of which came from wells far removed from the Deep Tunnel's location. R.387, pp.202-10. Using well readings closer to the tunnel and Bostco's building, Bostco's expert opined that that the drop was somewhere between 145 and 175 feet. R.383 pp.44-47.

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

MMSD admitted that the resident engineer advised MMSD's legal services division "that groundwater intake into the tunnel construction zone might cause groundwater drawdowns to occur in the future." R.381 pp.167-68. Bostco also introduced evidence indicating that MMSD was on notice of the potential for harm to buildings and structures. Michael

McCabe, the Director of Legal Services for MMSD, confirmed that a portion of a Deep Tunnel planning document referenced potential effects that it could have on various utilities and structures "under certain conditions." R.381 pp.144-45.

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

MMSD was aware that "[o]ther potential effects are downdrag on piles, which means that the downward

movement of the settling soil creates a downward force on the pile, and this is of most concern for older buildings founded on timber piles, the condition of which is not known." R.381 p. 173. MMSD once even "indicate[d] that liability for downtown settlement due to water drawdown from a great distance away will be accepted by MMSD." R.351 (Trial Ex. 359) (minutes from a May 26, 1988 meeting statement); R.382 pp.36-38. MMSD has also identified structures at risk as a result of dewatering from the Deep Tunnel, designating them as "critical structures," and included Boston Store by name:

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

R.351 (Trial Ex. 290); R.381 p.163.

MMSD cites to the testimony of Bostco's expert witnesses and characterizes their testimony as being related to construction and the Deep Tunnel's existence,

and that MMSD is "categorically immune for the 'act' of maintaining the tunnel in its original state." *See* MMSD Br. at 49-56. These contentions overlook the obvious fact that operation and maintenance are necessarily predicated on existence. Moreover, as noted *supra* at p. 6, the tunnel was not in its "original state" but had experienced significant deterioration as a result of surge events. *See* R. 382, pp. 166-71, 202, 229-31.

Second, MMSD cites testimony that highlights the fact that the Deep Tunnel's designers considered lining the tunnel with concrete during the design phase and argues that it could not have had a ministerial duty to line the Deep Tunnel. In doing so, MMSD mistakenly assumes that Deep Tunnel's lining is exclusively a matter of design. However, this litigation position is directly at odds with MMSD's planning documents related to the Deep Tunnel. According to MMSD's technical documents, "[m]aintenance may include removal of solid deposits, removal of fallen rock,

repair of deteriorated linings and placement of concrete lining in deteriorated, unlined areas." R.381 pp.145-48; R.351 (Trial Ex. 206). MMSD may have immunity to choose a tunnel design that provides that no lining will be installed in certain areas initially, but as a matter of maintenance, will be installed upon deterioration of the rock; but this immunity does not extend to a failure to actually undertake the ministerial duty of such maintenance when necessary.[10]

Nothing in *Hocking v. City of Dodgeville*, 2010 WI 59, 326 Wis. 2d 155, 785 N.W.2d 398, holds otherwise. In *Hocking*, the court held that a statute, inapplicable here, which sets forth an exception to a statute of repose for actions resulting from negligent maintenance of a roadway improvement, would not encompass claims in which maintenance had been proper but the design of

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

the improvement caused the damages claimed. *Id.*, ¶ 49. In so holding, the court noted that the generally understood meaning of "maintenance" is "'the work of keeping something in proper condition.'" *Id.*, ¶ 48 (citation omitted). MMSD contends that under *Hocking* it could not be negligent in failing to improve the Deep Tunnel. Bostco's argument, however, is that MMSD failed to keep the Deep Tunnel in proper condition, not that it failed to make or negligently made certain improvements.[11]

In any event, even if some of the testimony presented at trial was deemed relevant to construction, that proves nothing. The issue is whether the jury's verdict was unsupported. In this case, there is clearly more than enough evidence to support the jury's finding of negligent operation and maintenance.

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

4. MMSD knew that the Deep Tunnel's design was causing an actual and substantial danger, and thus it should not be perpetually immune under Wis. Stat. § 893.80(4).[12]

Even if Bostco's evidence of harm was based only on the "design, construction, implementation, and continued existence of the [Deep Tunnel]," (MMSD Br. at 55), MMSD should not be entitled to perpetual immunity. In *MMSD v. Milwaukee*, this Court reserved judgment on the question "whether municipal immunity attached to the planning function should persist in view of subsequent experience or changed conditions which demonstrate an actual and substantial danger." 277 Wis. 2d 635, ¶ 60 n.19 (citation and internal quotation marks omitted); *see also Allstate Ins. Co. v. Metro. Sewerage Comm'n*, 80 Wis. 2d 10, 17 n.5, 258 N.W.2d 148 (1977) (declining to express an opinion

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

as to "whether municipal immunity attached to the planning function should persist in view of subsequent experience or changed conditions which demonstrate an actual and substantial danger").

Although this Court deferred on this issue, it has cited to the holding of the Supreme Court of California in *Baldwin v. California*, 6 Cal. 3d 424, 491 P.2d 1121 (1972). *Allstate*, 80 Wis. 2d at 17 n.5. In *Baldwin*, the court concluded that a public entity does not retain its statutory immunity from liability for injuries caused by the plan or design of a public works project where the plan or design "although approved in advance as being safe, nevertheless in its actual operation becomes dangerous under changed physical conditions." *Id.* at 1122. Or, in other words, "that the Legislature did not intend that public entities should be permitted to shut their eyes to the operation of a plan or design once it has been transferred from blueprint to blacktop." *Id.*

In reaching this conclusion, the court adopted the

following reasoning from New York's high court in *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 66-67 (1960):

> [D]esign immunity persists only so long as conditions have not changed. Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard.

Baldwin, 491 P.2d at 1127 (citing *Weiss*, 167 N.E.2d 63).

In addition, the court reasoned that its conclusion was consistent with its prior decision abrogating common law immunity and the default presumption that where there is negligence, the rule is liability and immunity is the exception. *Id.* at 1128. Finally, the court reasoned that this conclusion was consistent with other case law recognizing immunity for design and liability for maintenance:

> The purpose of . . . immunity is to keep the judicial branch from reexamining the basic planning decisions made by executive officials or approved by

> legislative bodies. However, supervision of the design after it has been executed is essentially operational or ministerial. Consequently, it is consistent to find liability for negligence at that level when, as in the instant case, the actual operation of the planning decision is examined in the light of changed physical conditions.

Id. at 1129 n.9.

The holding in *Baldwin* is instructive here. Similar to the Supreme Court of California, this Court abrogated the common law doctrine of municipal immunity, save for acts by a municipality in the "exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions," *Holytz,* 17 Wis. 2d at 40. Wis. Stat. § 893.80(4) is a legislative codification of the *Holytz* opinion, s*ee MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶53, and as such, it is clear that the legislature intended § 893.80(4) to confer only a narrow scope of immunity, leaving in place a presumption of liability.[13]

[13] Because municipal immunity is conferred by statute rather than common law, *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 53, the answer to this question is one of statutory construction. "The goal of statutory interpretation is to determine and give effect to the legislature's intent." *State v. Greene*, 2008 WI App 100, ¶ 6, 313 Wis. 2d 211, 756 N.W.2d 411. A construction that "fulfill[s] the

Also similar to *Baldwin*, Wisconsin recognizes immunity for design but liability for maintenance. *Id.*, ¶ 56. And as noted in *Baldwin*, "supervision of the design after it has been executed is essentially operational or ministerial." 491 P.2d at 1129 n.9. There is simply nothing in the history of § 893.80(4) to suggest that the legislature intended to grant municipalities free license to "ostrich-like, hide [their] head[s] in the blueprints, blithely ignoring the actual operation of [their] plan[s]." *See Baldwin,* 491 P.2d at 1127. Accordingly, municipal immunity for designing a public works project should not be found to persist when subsequent experience or changed conditions demonstrate an actual and substantial danger to the property interests of another.

Because the evidence supporting the jury's verdict clearly relates to the negligent operation and

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intent of a statute or a regulation [is favored] over a construction that defeats its manifest object." *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶ 11, 308 Wis. 2d 103, 746 N.W.2d 762.

maintenance of the Deep Tunnel—a set of acts this Court has recognized are not immune—and not the design and construction of the tunnel, MMSD is not entitled to immunity under § 893.80(4).

C. The Known Danger Exception to Municipal Immunity Permits Bostco to Recover from MMSD.

Even if operating and maintaining a sewerage system so as not to cause harm were not ministerial, municipal immunity under Wis. Stat. § 893.80(4) does not apply to ministerial duties arising out of a known and compelling danger. *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 24, 253 Wis. 2d 323, 646 N.W.2d 314; *Cords v. Anderson*, 80 Wis. 2d 525, 542, 259 N.W.2d 672 (1977).

In *Cords*, the seminal case for the known danger exception, this Court held a park manager liable for injuries sustained when visitors fell into a gorge off of a hiking trail that passed within one foot of the bluff's

edge. 80 Wis. 2d at 534-35. In concluding that the park manager was liable, this Court reasoned:

> There comes a time when "the buck stops." [The park manager] knew the terrain at the glen was dangerous particularly at night; he was in a position . . . to do something about it; he failed to do anything about it. He is liable for the breach of this duty.

Id. at 541; *see also Heuser v. Cmty. Ins. Corp.*, 2009 WI App 151, ¶ 17, 321 Wis. 2d 729, 774 N.W.2d 653 ("The teacher could have exercised her discretion in any number of ways. . . . But she did nothing."). Like the park manager, MMSD knew that the infiltration of groundwater into the Deep Tunnel posed a danger to surrounding buildings; it was the only party in a position to alleviate that danger; yet it failed to do anything.

This Court more recently examined the known danger exception in *Lodl*, 253 Wis. 2d 323., in which the plaintiff argued that the actions of an officer who called for backup and requested that portable stop signs be brought to an intersection where a storm had caused

the traffic lights to go out were not enough and that he had a ministerial duty to manually control traffic at the intersection. *See id.*, ¶¶ 2, 4, 8. The court concluded that there was no "ministerial" duty to manually control traffic and, as such, there was immunity. *See id.*, ¶ 47.

MMSD's failure to do anything to reduce groundwater infiltration into the Deep Tunnel distinguishes this case from *Lodl*. *See* 253 Wis. 2d 323, ¶ 8; *see also Heuser*, 321 Wis. 2d 729, ¶ 28 (distinguishing *Lodl* from *Cords* on this basis). As the known danger exception is a rule that recognizes that, under certain circumstances, public officers have "no discretion not to act," *C.L. v. Olsen*, 143 Wis. 2d 701, 715, 422 N.W.2d 614 (1988), it was not implicated in *Lodl* because there was no dispute that the officer had taken some action in response to the situation. *Lodl*, 253 Wis. 2d 323, ¶ 8. Instead, the issue was the viability of a claim challenging the manner and

sufficiency of the particular response the officer chose. *Id.*, ¶ 47.

Similarly, even if MMSD could have repaired the Deep Tunnel in more than one way does not mean that it had discretion not to act at all. *See, e.g.*, *C.L.*, 143 Wis. 2d at 715; *Cords*, 80 Wis. 2d at 542 ("[T]he duty to *either* place warning signs *or* advise superiors of the conditions is . . . a duty so clear and so absolute that it falls within the definition of a ministerial duty.") (emphasis added); *Heuser*, 321 Wis. 2d 729, ¶ 1 ("While the teacher had the option to pick one precautionary measure over another, she certainly did not have the option to do nothing."); *Voss ex rel. Harrison v. Elkhorn Area School Dist.*, 2006 WI App 234, ¶ 20, 297 Wis. 2d 389, 724 N.W.2d 420 (concluding that teacher had an absolute duty to "stop the activity the way it was presently conceived"); *Domino v. Walworth Cnty.*, 118 Wis. 2d 488, 491, 347 N.W.2d 917 (Ct. App. 1984) ("[S]imply allowing for the exercise of discretion does

not suffice to bring the actions under the blanket of immunity provided by [§ 893.80(4)], when the facts . . . reveal a duty so clear and absolute that it falls within the concept of a ministerial duty."); s*ee also Pries*, 326 Wis. 2d 37, ¶ 45 n.4 (Abrahamson, C.J., concurring) ("The availability of several possible ways to fulfill an absolute duty arising from a known danger does not bring a defendant within the scope of governmental immunity.").

In sum, faced with a known and compelling danger of significant and widespread private property damage, MMSD had an absolute duty to act. *See generally* Section II.D. of the Statement of Facts in Bostco's Brief in Chief (citing R.351 (Trial Exs. 290, 429), A-Ap.347-49, 351-53; R.381 pp. 144-45, 163-64, 167-73, 177-79, A-Ap.400-04; R.382 pp.36-38; R.351 (Trial Ex. 359), A-Ap.350; R.390 pp.11-17, A-Ap.407-08). Its failure to attempt to reduce infiltrations into the

Deep Tunnel renders it subject to liability under the known danger rule.[14]

D. MMSD is Not Entitled to Immunity Because any Discretion Exercised on Its Part Was Professional.

Third, even if the known danger exception does not apply and even if MMSD's negligent operation and maintenance of the Deep Tunnel was discretionary in nature, MMSD's acts are still not immune because any discretion exercised was professional in nature and not governmental.

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[14] To the extent *Lodl* holds that a duty is ministerial only if it requires the performance of a single, specific act, it should be overruled. Such a rigid rule renders the known danger exception illusory and effectively collapses it into the ministerial duty exception. *See Lodl*, 253 Wis. 2d 323, ¶ 49 (Bradley, J., dissenting); *see also Domino*, 118 Wis. 2d at 492 (noting that "nearly every human action involves the exercise of some discretion"). It also contradicts a long-line of precedent, dating back to *Cords*, *see, e.g.*, 80 Wis. 2d at 542, and, in so doing, it immunizes public entities and officers for conduct this Court has already found actionable, *see Lodl*, 253 Wis. 2d 323, ¶ 68 (Bradley, J. dissenting). Moreover, a "specific act" rule has not been followed by court of appeals' decisions, either pre- or post-*Lodl*. *See, e.g.*, *Heuser*, 321 Wis. 2d 729, ¶ 1; *Voss*, 297 Wis. 2d 389, ¶ 20; *Domino*, 118 Wis. 2d at 491. The continued co-existence of conflicting authorities leaves litigants and courts with no direction—a problem that may be resolved by returning the known danger exception to its original state.

This Court has developed a professional discretion exception to governmental immunity under Wis. Stat. § 893.80(4). *See Scarpaci*, 96 Wis. 2d at 685-87. Under this exception, negligent acts that are professional, rather than governmental, are not immune as § 893.80(4) protects only acts exercising governmental—"legislative, quasi-legislative, judicial or quasi-judicial"—functions. § 893.80(4).

"The professional discretion exception to governmental immunity originated in *Scarpaci v Milwaukee County* . . . ." *Scott*, 262 Wis. 2d 127, ¶ 31. In *Scarpaci*, plaintiffs sued Milwaukee County and individuals employed by Milwaukee County alleging negligence in the performance of an autopsy. 96 Wis. 2d at 665. On appeal from the circuit court's denial of defendants' motion to dismiss on governmental immunity grounds, the Court affirmed holding the acts were not immune. *Id.* at 665-66. This Court noted a distinction between the medical

examiner's "decision whether to conduct or order an autopsy," from "misconduct in the manner in which the autopsy was performed." *Id.* at 685, 686. The former is quasi-judicial in nature and therefore immune, but the latter act is not immune "although involving judgment and discretion," "the discretion [was] medical, not governmental." *Id.* at 686.

The Court refused to extend immunity to cover "the exercise of normal medical discretion during an autopsy" because it was not justified by the purpose underlying governmental immunity—"foster[ing] the fearless, vigorous and effective administration of policies of the government." Making immune "the medical decisions of medical personnel employed by a governmental body" does not further this purpose as the standard of care in performing an autopsy is not dictated by the government, but by the medical profession, nor is it performed for a governmental purpose, but rather a medical one.

The Court has applied the professional discretion exception in two other instances. *See Gordon v. Milwaukee Cnty.*, 125 Wis. 2d 62, 370 N.W.2d 803 (Ct. App. 1985); *Protic v. Castle Co.*, 132 Wis. 2d 364, 392 N.W.2d 119 (Ct. App. 1986). In *Gordon*, the Court held that because the diagnostic procedures employed by government psychiatrists involve only medical discretion, and not governmental discretion, negligent acts in examining, testing, and diagnosing persons detained at a county mental health or medical complex are not immune under § 893.80(4). 125 Wis. 2d at 63-64. Similarly, in *Protic*, the Court concluded that negligence committed by medical professionals during postsurgical medical care was not immune as this task did not involve "governmental decisionmaking," but instead was a task involving professional decision-making derived from specialized medical training. 132 Wis. 2d at 370.

While no case has applied the professional discretion exception outside the medical context, the rationale for the doctrine—to be immune an act must involve governmental, not professional, discretion—is not limited to the medical profession and, therefore, the doctrine should not be either. Such an arbitrary distinction is not supported by logic or the language of the statute.

To interpret *Scarpaci* as limited to the medical profession ignores its reliance on the statutory language in § 893.80(4). Interpreting § 893.80(4)'s predecessor, Wis. Stat. § 895.43(4),[15] *Scarpaci* held that the doctrine of immunity does not apply to the negligent performance of an autopsy because such a professional task "does not involve the judgment and discretion encompassed in the term 'quasi-judicial' as used in § 895.43(4)." 96 Wis. 2d at 686. Indeed, § 893.80(4)

[15] Wis. Stat. § 895.43(4) was renumbered by 1979 Chapter 323, § 29 as § 893.80(4).

contains no reference to the medical profession or any profession at all; instead, the statutory language provides immunity from suits arising from "the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions," namely, acts involving discretion of a governmental character.

As such, the focus of the analysis was not on the medical profession, but rather that the statute does not provide immunity for negligent acts not governmental in nature. *See Kierstyn v. Racine Unified School Dist.*, 221 Wis. 2d 563, 570, 585 N.W.2d 721 (Ct. App. 1998) (Brown J., dissenting), *aff'd* 228 Wis. 2d 81, 596 N.W.2d 417 (1999) ("[T]here is nothing magical about physicians that limits the *Scarpaci* result."). The professional discretion doctrine reflects the recognition that government-employed professionals have duties and standards of conduct imposed by their profession in performing professional tasks wholly separate from their duties as a government employee. In such

situations, government employment is incidental to the professional standards of conduct and, therefore, immunity should not apply. *See id.* ("[I]mmunity does not protect nongovernmental decisions made by professionals within their business arena just because they happen to be employed by the government."); *accord Spring v. Constantino*, 168 Conn. 563, 362 A.2d 871, 875 (1975), *abrogated by* Conn. Gen. Stat. § 4-165 ("The public defender when he represents his client is not performing a sovereign function and is therefore not a public or state official to whom the doctrine of sovereign immunity applies."); *Nusbaum v. Cnty. of Blue Earth*, 422 N.W.2d 713, 722 (Minn. 1988) ("The protection afforded by the discretionary function exception does not extend to professional or scientific judgment where such judgment does not involve a balancing of policy objectives.").

The jury found MMSD negligent in the manner in which it operated and maintained the Deep Tunnel.

R.403 p.1, A-Ap.560. The jury based its finding on significant evidence presented at trial demonstrating how drainage of groundwater into the Deep Tunnel lowered, and will continue to lower, the water levels beneath Bostco's property, a condition which MMSD was aware. *See generally* Section II of the Statement of Facts in Bostco's Brief in Chief. As reflected in that testimony, the operation and maintenance of a sewerage tunnel involves highly technical engineering decision making. *See generally id.* at § II.A.1-2 and II.C; *see also* R.351 (Trial Exs. 1550-0009 to 0010; 1550-029 to 032; 1550-42 to 43; 1551-027 to 028; 1552-0006; 1552-010; 1552-018 to 026; 1552-043 to 051; 1552-054 to 068; 1552-071 to 074); R.382 pp.99-121, 159-64, 180-81, 222-23; R.383 pp.6-7, 11-24, 24-32, 37-73, 50-52; R.385 pp.49-53, 63-77, 88-105, 138-43, 174-75. Accordingly, MMSD's negligent acts are not protected from liability under § 893.80(4).

Engineers are properly classified as "professionals" under Wisconsin case law and statutes. *See* Wis. Stat. § 443.01(6)-(7) (defining "practice of professional engineering" and "professional engineer"). In *Vivian v. Examining Board of Architects*, 61 Wis. 2d 627, 213 N.W.2d 359 (1974), this Court stated that the engineering profession has "[e]xperience, competence and specialized knowledge." *Id.* at 639. Moreover, professional engineers are governed by registration requirements, *see* Wis. Stat. § 443.04 (registration requirements for professional engineers), and are subject to standards of conduct applicable to the exercise of professional engineering services for which disciplinary proceedings may be started for a violation of such standards. *See* Wis. Stat. § 443.11 (engineer may be punished in disciplinary proceedings for gross negligence, incompetency, or misconduct and for violation of rules of professional conduct), and are required to achieve a standard of care for their work on

a project, for which professional negligence claims may be instituted for violating, *see Milwaukee Partners v. Collins Engineers*, 169 Wis. 2d 355, 364, 485 N.W.2d 274 (Ct. App. 1992) (discussing statute of limitations applicable to professional negligence claims against engineers).

These standards of conduct and the enforcement structure for the same makes professional engineers similar to medical professionals, as described in *Scarpaci*, *Gordon*, and *Protic*, and unlike school guidance counselors, employee benefits specialists, and park planning specialists. *See Scott*, 262 Wis. 2d 127, ¶ 32 (concluding that a school guidance counselor does not perform professional discretionary acts); *Kierstyn*, 228 Wis. 2d at 98 (same for benefits specialist); *Stann v. Waukesha Cnty.*, 161 Wis. 2d 808, 818, 468 N.W.2d 775 (Ct. App. 1991) (same for park planning specialist). Thus, *Scott*, *Kierstyn*, and *Stann* are distinguishable as they did not involve the exercise of true "professional"

discretion dictated by an independent duty to meet a professional standard of care. Those cases did not involve, as there is here, professionals performing negligent acts during the exercise of their discretion pursuant to their specialized training and expertise. This distinction, along with a case-by-case analysis of the professional discretion exception, guards against the exception swallowing the rule. *See Kierstyn*, 228 Wis. 2d at 98 (warning that a too-expansive view of "professional" risks creating an "exception that would swallow the rule").

Here, MMSD's negligent operation and maintenance of the Deep Tunnel, which was a finding of the jury, involved the exercise of professional engineering discretion, not governmental discretion, and, therefore, is not immune. It almost goes without saying that operation and maintenance of such a complex, massive structure requires technical expertise of professionals.

E. Wisconsin's Government Immunity Doctrine is Contrary to Clear Legislative Intent and, Therefore, Cannot Stand.

Finally, if this Court rejects Bostco's foregoing argument, it respectfully asks this Court to revisit its interpretation of Wis. Stat. § 893.80(4) and the circumstances under which local governments and local officials are immune from tort liability. As noted above, *see supra* Section I.A., the current state of the doctrine is contrary to clear legislative intent and has produced decades of harsh, unjust, and inequitable results depriving private citizens of legal remedies simply because they were harmed by a government entity.

In 1962, in a boldly-worded opinion, this Court abrogated the doctrine of governmental immunity. *Holytz*, 17 Wis. 2d 26. This landmark decision in no uncertain terms declared: "[W]e are now of the opinion that it is appropriate for this court to abolish [governmental] immunity." *Id.* at 37. The Court's reasoning was no secret either. It stated that "[t]here

are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine." *Id.* at 33. Recognizing the injustice of a broad rule of government immunity, the court limited the doctrine, allowing government immunity only for "the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions." *Id.* at 40 (citing *Hargrove*, 96 So. 2d at 133).

Despite *Holytz*'s express invitation, the legislature did not reinstate immunity by statute. To the contrary, it promptly enacted 1963 Chapter 198l, which codified *Holytz*. *Lodl*, 253 Wis. 2d 323, ¶ 22. "Chapter 198 created Wis. Stat. § 331.43, which in time became Wis. Stat. § 895.43 (1975-76) and is now Wis. Stat. § 893.80 . . . ." *Scott*, 235 Wis. 2d 409, ¶ 63 (Prosser, J., dissenting). Section 893.80 and its predecessors have been amended numerous times; however, "the language in subsection (4) exempting

local governments and local officials from suits 'for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions' has always remained in-tact." *Id.*, ¶ 71; *compare* § 331.43 (1963) *with* § 893.80 (2005-06).

This Court has interpreted this statutory phrase as imposing immunity for "any act that involves the exercise of discretion and judgment." *Lodl*, 253 Wis. 2d 323, ¶ 21. As explained in section I.A., this appears to have been the result of this Court and the court of appeals grafting common law public official immunity standards onto statutory municipal immunity.

Four "exceptions" to government immunity have been recognized. *Kierstyn*, 228 Wis. 2d at 90-97 ((1) ministerial duty exception; (2) known danger exception; (3) professional discretion exception; and (4) exception for malicious, willful, and intentional actions). Use of the word "exceptions" is revealing in its patent contradiction to the *Holytz* maxim "that the rule is

liability—the exception is immunity." *Holytz*, 17 Wis. 2d at 39. These limited exceptions for liability have, in practice, caused immunity to become the rule: immunity applies unless private citizens meet the heavy burden of demonstrating that their action fits into one of four narrow, judicially-created exceptions that have been grafted onto § 893.80(4). *See, e.g.*, *Kierstyn*, 228 Wis. 2d at 84, 99-100 (holding the municipality and its employees immune from suit under § 893.80(4) because "Kierstyn has not shown that Farrell's conduct fits any of the exceptions to public officer immunity"). It seems not much has changed as a result of *Holytz*'s abrogation of immunity as it remains true today that "the judiciary engraft[s] exceptions on the rule of municipal immunity from tort claims." *Holytz*, 17 Wis. 2d at 36.

This methodology has turned the statute on its head and made immunity the rule, liability the exception. *Accord Kierstyn*, 228 Wis. 2d at 90

("[I]mmunity under § 893.80 is not absolute. Over the years, this court has recognized four exceptions to public officer immunity."); *Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶ 41, 315 Wis. 2d 350, 760 N.W.2d 156 (Wis. Stat. § 893.80(4) "provides broad immunity from suit to municipalities and their officers and employees."); *Scott*, 262 Wis. 2d 127, ¶ 79 (Prosser, J., dissenting) ("[T]his methodology has made the rule become immunity—the exception, liability."); *Baumgardt*, 475 F. Supp. 2d at 809 ("Thus, it appears that immunity is now the rule in Wisconsin rather than the exception."). This is in direct contradiction to the clear legislative intent expressed in enacting 1963 Chapter 198—to codify *Holytz* and create a rule of liability for government. Legislative Drafting Record for 1963 Chapter 198, Memorandum of James McDermott, Asst. Att'y Gen. (May 20, 1963) (emphasis added), A-Ap.565 ("[T]he above-mentioned bill is a result of *Holytz*, which case abrogated the doctrine of

governmental immunity from liability for tort claims in this state. In the *Holytz* case, the Court made crystal-clear the scope of its abrogation of the above-mentioned governmental immunity from liability for tort claims.").

This Court's "jurisprudential chaos" surrounding governmental immunity has provoked members of this Court to call for a reexamination of the doctrine. *Pries*, 326 Wis. 2d 37, ¶ 91 (Gableman, J., dissenting) ("Seven years ago, Justice Prosser issued a call for this court to reexamine its jurisprudence in this area. I now join this call."); *Scott*, 262 Wis. 2d 127, ¶ 58 (Abrahamson, C.J., concurring) ("One need only review a handful of this court's recent decisions on the limits of governmental immunity to appreciate the jurisprudential chaos surrounding the phrase 'legislative, quasi-legislative, judicial or quasi-judicial functions' in § 893.80(4)."); *Id.*, ¶ 62 (Bablitch, J., concurring) (joined by Justice Crooks) ("This court should revisit these past [immunity] cases for the reasons so well stated in the dissent of Justice

Prosser. A doctrine of governmental immunity that has caused such injustice and inequity, in this case and others, cannot, and I predict, will not, stand much longer."). Bostco now answers this call and asks this Court to re-examine its governmental immunity jurisprudence.

First, to comport with *Holytz* and § 893.80, this Court must return to liability as the rule, immunity the exception. If this principle is faithfully applied by the courts, judicially-created exceptions to immunity will be wholly unnecessary. Instead, the court should set forth a new, workable interpretation of "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." § 893.80(4). This Court's current interpretation of this phrase as encompassing all activities "involving the exercise of discretion" has proved unworkable and far too expansive. *See Kierstyn*, 228 Wis. 2d at 90.

In fact, as Justice Prosser astutely noted in his *Willow Creek Ranch, LLC v. Town of Shelby* dissent, Wisconsin's discretionary vs. ministerial test can be traced back to a treatise which has since withdrawn the language, now explicitly recognizing that the distinction is artificial and unworkable. *See* 2000 WI 693, ¶¶ 135-36, 235 Wis. 2d 409, 611 N.W.2d 693 (Prosser, J., dissenting); *Lister*, 72 Wis. 2d at 300-01 (citing *Meyer v. Carman*, 271 Wis. 329, 332, 73 N.W.2d 514 (1955) for its ministerial duty test) (quoting 18 McQuillin, *Municipal Corporations* § 53.33 (3d ed.))). McQuillin's commentary now states:

> "[T]he difference between 'discretionary' and 'ministerial' is artificial. An act is said to be discretionary when the officer must exercise some judgment in determining whether and how to perform an act. The problem is that '[i]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.'"

Willow Creek, 235 Wis. 2d 409, ¶ 136 (Prosser J., dissenting) (quoting McQuillin, *Municipal Corporations*

§ 53.04.10 (rev. 3d ed.) (alterations in original) (internal citation omitted).

Bostco concedes that to now interpret § 893.80(4) to adhere to the legislature's intent to codify *Holytz*'s limited governmental immunity doctrine will require overruling this Court's past precedent. Such action, however, would not violate stare decisis. This Court has explained that "prior decisions should not be perpetuated if they were wrongly decided in the first place." *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶ 93, 295 Wis. 2d 1, 719 N.W.2d 408. This is so because "more damage [is done] to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decisions." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 100, 264 Wis. 2d 60, 665 N.W.2d 257.

Predictability is the primary goal of strict adherence to stare decisis. This goal is undermined by

adhering to a bad rule "'since courts will be inclined to engraft exceptions upon it.'" *Id.*, ¶ 108 (quoted source omitted). This is particularly true here where the Court's judicially-created exceptions have swallowed the rule and undermined the legislative intent. "The legislature is not responsible for the reenactment of governmental immunity"; rather, it is this Court's responsibility to end its adherence to its erroneous interpretation of § 893.80(4), which has produced profoundly harsh, wrong, and unjust results for nearly forty years. *Scott*, 262 Wis. 2d 127, ¶ 80 (Prosser, J., dissenting).

As noted above, this Court initially developed standards for determining whether an act qualified as quasi-judicial and quasi-legislative. Under these standards an act was deemed quasi-legislative if it "involve[d] the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed" and quasi-judicial if it "involve[d] the exercise

of discretion and judgment in the application of a rule to specific facts." *Lifer*, 80 Wis. 2d at 511-12. These definitions, which are consistent with, and therefore, can be informed by federal case law governing absolute immunity from suit under 42 U.S.C. § 1983, reflect a reasonable construction of the statutory language and a reasonable extrapolation of what the legislature likely intended when it codified *Holytz*. As such, Bostco respectfully requests that this Court disavow the discretionary/ministerial dichotomy that has led to so many problems, reconfirm these standards, and conclude that as defined, MMSD is not entitled to immunity under § 893.80(4).

III. THE LOWER COURTS CORRECTLY CONCLUDED THAT BOSTCO SATISFIED THE NOTICE OF CLAIM REQUIREMENTS OF WIS. STAT. § 893.80(1).[16]

Summary: The court of appeals correctly determined that Bostco satisfied the notice of claim requirement of Wis. Stat. § 893.80(1). MMSD waived this defense and even if it hadn't, the notice of claim and itemization of damages in this case meets the substantial compliance standard.

A. MMSD Waived Their Notice Of Claim Defense.

Although the court of appeals did not address this issue, the case law is clear that a party may not raise a notice of claim defense under Wis. Stat. § 893.80 after the parties have undertaken substantial pretrial preparation:

> The timeliness of [raising a notice of claim defense after submitting to jurisdiction] . . . has previously been criticized by this court and the Wisconsin Supreme Court as "unseemly" . . . [It is] not only violative of "fundamental fairness," but waste[s] the resources of the parties and of the court by requiring all to continue preparing the matter for a trial when the party eventually moving for dismissal knows that the matter may warrant disposition short of a full-blown trial, and yet fails

[16] Although Wis. Stat. § 893.80(1) has been recently renumbered § 893.80(1d), 2011 Wis. Act. 162, § 1g (effective Apr. 12, 2012), this brief will cite the notice of claim statute as it existed at the times relevant to this case.

> to alert the court until the proverbial eleventh hour. We continue to condemn such practices.

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

MMSD litigated this case for almost a year and a half before filing a motion to dismiss based on the alleged defect in the notice of claim.[17] *See* R.1; R.34; R.35. During that time, MMSD filed an Answer and an Amended Answer, made several court appearances, filed for and obtained a substitution of the presiding judge, and overall caused the parties and the court system to expend substantial resources on the substantive facts and law of the case. *See* R.8, R.10, R.20, R.26, R.28, R.43 p.3. MMSD not only appeared before the trial court on several occasions, it even moved the court to permit it additional time to prepare

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

its substantive expert reports. R.43 p.3. It was only then that MMSD claimed the case should not be before the court. R.34.

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

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

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

pleading." (emphasis added)).[18] By its decision to litigate the case for nearly a year and a half, MMSD waived any objection based on any alleged defect in the notice of claim.

B. Bostco Substantially Complied With the Notice of Claim Requirements.

This Court has long held that Wis. Stat. § 893.80(1) requires "only substantial, and not strict, compliance." *Figgs*, 121 Wis. 2d at 55. This relaxed standard furthers a fundamental principle of construing notices—that is, "the preservation of *bona fide* claims." *Id.* at 54-55. The remaining principle of construction is that the notices must fulfill the purposes of the statute: They must afford the municipal entity with an opportunity to (1) "investigate and evaluate potential claims" and (2) "compromise and budget for potential settlement or litigation." *See E-Z Roll Off, LLC v. Cnty.*

[18] When MMSD first filed a petition for leave to appeal in this case, it characterized the alleged defect in the notice of claim as creating a lack of capacity to sue. *See Bostco LLC v. Milwaukee Metropolitan Sewerage District*, Appeal No. 2005AP000134-LV (Jan. 28, 2008).

of Oneida, 2011 WI 71, ¶ 34, 335 Wis. 2d 720, 800 N.W.2d 421. As both lower courts held, the notice of claim and itemized statement of relief provided here satisfy this standard. *See Bostco*, 334 Wis. 2d 620, ¶¶ 7, 91.

The crux of MMSD's argument is that the notice of claim and itemized statement of relief listed as claimants the parent and affiliate corporations of the companies that actually owned the Boston Store—namely, WISPARK LLC and Saks, Inc. (*See* MMSD Br. 64-72.)[19] According to MMSD, this error renders Bostco's notice of claim invalid under both § 893.80(1)(a) and § 893.80(1)(b). But MMSD has not argued, nor can it, that (1) the notice of injury was

[19] Parisian, Inc. is a subsidiary of Saks, Inc. while WISPARK LLC was the Development Manager of Bostco LLC. R.44-45. While the court of appeals recognized the "complex relationship between WISPARK, Saks, and Bostco," *Bostco*, 334 Wis. 2d 620, ¶ 90, it did not, as MMSD argues, ignore corporate formalities. Its decision merely identified the reality of the situation: Had MMSD been inclined to settle, it would have been able to do so had it merely contacted the companies named as claimants or their counsel of record.

untimely served, (2) the notice of claim did not include an itemized statement of relief, (3) the notice of claim was not presented to the appropriate clerk, or (4) the claim had not been disallowed. *See Bostco*, 334 Wis. 2d 620, ¶¶ 88 n.15, 89-90; *see also Thorp v. Town of Lebanon*, 2000 WI 60, ¶¶ 23, 28, 235 Wis. 2d 610, 612 N.W.2d 59 (listing requirements under § 893.80(1)(a), (b)). Moreover, the facts here demonstrate that Bostco substantially complied with these provisions.

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

The information provided in the notice of claim and itemized statement of relief together were more than sufficient to provide MMSD an opportunity to

investigate the claim and to budget for settlement or litigation. As the circuit court found:

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

R.369 p.4. Not only was MMSD aware of the identity of the damaged property, but it also knew that the claim was being asserted on behalf of the Boston Store's owners; that the property was located at 331 West Wisconsin Avenue; and the contact information for the owners' attorneys. R.46 pp.5-11.

Moreover, the notice of claim substantially complied with § 893.80(1)(b), even though it did not contain Bostco's address. *See State Dept. of Natural Res. v. City of Waukesha*, 184 Wis. 2d 178, 198, 515 N.W.2d 888 (1994), *abrogated on other grounds in State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 594, 547 N.W.2d 587 (1996). For purposes of the notice of claim statute, "[t]he attorney's address is

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

Holding that the notices at issue here substantially comply with the notice of claim statute is in no way precluded by the court of appeals' decision in *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 556 N.W.2d 326, 330 (Ct. App. 1996). In *Markweise*, the court held that the notices brought on behalf of named class members and "'other persons similarly situated'" failed to comply with § 893.80(1)(a) because they did not

provide "notice of the circumstances of the claim" for the unidentified class members. *Id.* at 219.

In support of its holding, the court reasoned that the notices did not allow the City to "investigate and evaluate the claims of those yet unknown." *Id.* at 221. But this reasoning does not apply here. MMSD was not confronted with a notice identifying an unknown number of unknown claimants suffering from varying degrees of personal injuries; it was served with a notice identifying the exact property that was damaged.

In sum, there is no question that the notices provided MMSD with sufficient information to "investigate and evaluate the claim" and to "budget for potential settlement or litigation." *See E-Z Roll Off*, 335 Wis. 2d 720, ¶ 34. MMSD has always been aware of the claim for damages by Boston Store's owners and has always been aware of the identity and address of their attorneys. This is clearly a case of substantial compliance, justifying the lower courts' construction of

the notice in a way that preserved Bostco's bona fide claims. *See id.*

C. MMSD Had Actual Notice of Bostco's Claim and Was Not Prejudiced by Any Failure to Provide the Requisite Notice.

Substantial compliance with Wis. Stat. § 893.80(1)(a) is not necessary when the municipal entity (1) has "actual notice of the claim" and (2) is not prejudiced by the "failure to give the requisite notice." *See* § 893.80(1)(a). That is the case here.

The record is replete with evidence that MMSD had actual notice of the claim. Not only did MMSD know that infiltration into the Deep Tunnel was dewatering the acquifer downtown, causing damage to the foundations of buildings along West Wisconsin Avenue, it was served with a notice of claim that explicitly identified the damage to the Boston Store. *See, e.g.*, R.46 pp.16-55. Regardless of whether that notice named the correct owners, MMSD was provided

with "written notice of the circumstances of the claim." *See* § 893.80(1)(a).

MMSD argues that the court of appeals erred by concluding that "actual notice of injury to the Boston Store in the timeframe required by the statute," *Bostco*, 334 Wis. 2d 620, ¶ 88, was sufficient to satisfy § 893.80(1)(a). (MMSD Br. at 71.) In so arguing, MMSD conflates § 893.80(1)(a)'s notice of *injury* provision into § 893.80(1)(b)'s notice of *claim* provision. The purpose of the notice of injury provision, as opposed to the notice of claim provision, is to afford municipal entities the opportunity to "'investigate and evaluate' potential claims." *Thorp*, 235 Wis. 2d 610, ¶ 23. The notice served on MMSD did just that.

In addition, as the court of appeals concluded, MMSD was in no way "prejudiced by the fact that the wrong claimant was listed on the notice of claim." *See Bostco*, 334 Wis. 2d 620, ¶ 88. The notice was timely

filed,[20] described the circumstances giving rise to the claim, identified the location of the damaged property, and provided the contact information for Bostco's counsel. R.46 pp.5-11. The notice, therefore, contained all the information necessary for MMSD to investigate the claim and to budget for settlement or litigation.

[20] This case is not *E-Z Roll Off*, where the claimant failed to show any evidence that the governmental entity was not prejudiced by a delay of at least 19 months. *See* 335 Wis. 2d 720, ¶¶ 43, 53.

CONCLUSION

For the foregoing reasons, Bostco respectfully requests that this Court affirm the conclusions of the circuit court and the court of appeals that MMSD is not immune from liability under Wis. Stat. § 893.80(4) and that Boston Store's notice of claim is legally sufficient to meet the statutory requirement set forth in § 893.80(1).

Dated this 14th day of May, 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 produced with a proportional serif font, and pursuant to this Court's May 8, 2012 order, this brief exceeds the length limitations set forth in Wis. Stat. § 809.19(8)(c), containing no more than 16,500 words. The length of this brief is 15,326 words.

Dated this 14th day of May, 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 14th day of May, 2012.

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CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that, pursuant to Wis. Stat. § 809.80(3)(b), on May 14, 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 14th day of May, 2012.

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