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

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

vs.

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

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

RESPONSE BRIEF OF MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. *Holytz v. City of Milwaukee* abrogated the judicially created tort immunity for governmental, as opposed to proprietary, acts, an immunity that predated Wisconsin's constitution. 17 Wis. 2d 26, 30–32, 39–40, 115 N.W.2d 618 (1962). The Court instructed, however, that "[i]f the legislature deems it better public policy, it is, of course, free to reinstate immunity" or, among other limitations, to "impose ceilings on the amount of damages." *Id.* at 40. In response, the legislature enacted what is now §893.80 of the Wisconsin Statutes. Subsection (3) of that statute provides, "the amount recoverable by any person for any damages, injuries, or death in any action founded on tort against any [governmental entity] . . . shall not exceed $50,000." The Court has twice held that this statutory limitation does not violate equal protection principles.[1] *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 293 N.W.2d 504 (1980); *Stanhope v.*

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[1] All statutory references are to "Wis. Stat.," 2012, unless otherwise indicated.

Brown Cnty., 90 Wis. 2d 823, 280 N.W.2d 711 (1979).

Issue: 1.a. Does §893.80(3)'s limitation on tort damages recoverable against governmental entities offend equal protection principles as described in *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, and, if so, should *Ferdon* be overruled?

The circuit court answered "no," and limited Owners' damages at $50,000 each.[2]

The court of appeals affirmed.

1.b. Whether the District's reliance on §893.80(3) in this case commenced in 2003 alleging damage to the Boston Store building's deep foundational piles is unconstitutional "as applied" because the District stood in the shoes of its construction contractor and paid some building owners more than $50,000 to resolve claims of

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[2] This response brief uses terms as defined in the Milwaukee Metropolitan Sewerage District's opening brief, such as "Owners" to refer collectively to plaintiffs Bostco LLC and Parisian, Inc., and "District" to refer to defendant Milwaukee Metropolitan Sewerage District.

façade and near-surface pile damage that happened when the tunnel was constructed in the early 1990s.

The circuit court answered, "no."

The court of appeals affirmed.

1.c. Does §893.80(3)'s $50,000 limitation on "the amount recoverable by any person for any damages, injuries or death in any action founded on tort" apply to a claim for damages caused by a continuing private nuisance when the plaintiff seeks recovery for all past and future damages resulting from the alleged nuisance in a single action?

The circuit court did not answer the question because it entered judgment dismissing the nuisance claim based on the jury's finding that the District's interference with Owners' use and enjoyment of the building did not result in significant harm.

The court of appeals, which rejected the jury's no-significant-harm finding, held that §893.80(3)'s per action damages limitation applied to Owners' nuisance action.

1.d. Does negligent damage to a commercial building's foundational piles necessarily entail

significant harm for nuisance liability so as to justify rejecting a jury's finding that the damage caused no significant harm in the building owners' use and enjoyment of the building when there was no evidence that repairing the damage interfered with the building's commercial use?

The circuit court in entering judgment on the verdict answered, "no."

The court of appeals answered, "yes."

2. After Judge Kremers, who presided at trial, ruled that §893.80(3) limited Owners' damages to $50,000 apiece, and after the time to file post-verdict motions had expired, Owners moved for an injunction requiring the District to line the tunnel with concrete. Owners' injunction motion was taken under consideration by Judge Jean DiMotto, who took over Judge Kremers' civil calendar as a result of judicial rotation. Judge Kremers, while aware of the injunction motion, entered a judgment on the jury verdict, which dismissed Owners' nuisance claim and amended damages on the negligence claim. Owners appealed the judgment. After Owners' appealed, Judge DiMotto, without holding a hearing to consider equitable factors, ordered the District to line a one-mile section of the

Deep Tunnel in the Boston Store vicinity with concrete.

Issue: 2.a. Can a circuit court in a tort action against a governmental entity pursuant to §893.80 order injunctive relief based solely on its conclusion that §893.80(3)'s damages limitation makes damages inadequate, even though §893.80 does not provide for injunctive relief and §893.80(5) states that the section's "provisions and limitations" are "exclusive," unless another statute provides for other "rights or remedies?"

The circuit court, which issued injunctive relief, answered, "yes."

The court of appeals, which reversed the injunction order, answered, "no."

2.b. Does the legislature's decision to exclude injunctive relief as an available remedy against governmental entities when a tort suit is authorized only by §893.80 unconstitutionally limit the circuit court's equitable authority, even though *Holytz* declared that the legislature may limit the extent to which governmental entities may be sued in tort?

The circuit court, which issued injunctive relief, did not address this issue.

The court of appeals did not address the issue.

2.c. Did the circuit court err in ordering the District to line a one-mile-long portion of the Deep Tunnel with concrete when §893.80(4) bars any "suit" for injunctive relief relating to the design and construction of sewer systems?

The circuit court, in ordering the injunction, answered, "no."

The court of appeals, which reversed the injunction on other grounds, did not reach the issue.

2.d. Did the circuit court err in ordering the District to line a one-mile-long portion of the Deep Tunnel with concrete when no statement of relief sought identified injunctive relief, as required by §893.80(1)?

The circuit court, in ordering the injunction, answered, "no."

The court of appeals, which reversed the injunction on other grounds, did not reach the issue.

2.e. Did the circuit court lack authority to enter an injunction long after §805.16's time limits on post-verdict relief had expired?

The circuit court, in ordering the injunction, answered, "no."

The court of appeals, which reversed the injunction on other grounds, did not address the issue.

2.f. Was the circuit court's injunction improper because (i) the circuit court had previously entered a final judgment that adjudicated all remaining claims, and (ii) Owners had perfected an appeal of that judgment before the circuit court issued the injunction?

The circuit court, in ordering the injunction, answered, "no."

The court of appeals, which reversed the injunction on other grounds, did not address the issue.

2.g. Did the circuit court erroneously exercise its equitable authority by ordering the District to line the Deep Tunnel (i) based solely on evidence presented to a jury in a trial presided over by a different judge, and (ii) without considering relevant equitable factors or affording the District and the Wisconsin Department of Natural Resources an opportunity to present evidence relating to those factors, as this Court required in

Hoffmann v. Wisconsin Electric Power Co., 2003 WI 64, 262 Wis. 2d 264, 664 N.W.2d 55?

The circuit court, in ordering the injunction and refusing the District an opportunity for a hearing, answered, "no."

The court of appeals, which reversed the injunction on other grounds, did not address the issue.

3. Owners' amended complaint claimed that the District was liable in inverse condemnation for having taken their building's foundation piles. The circuit court awarded summary judgment dismissing the inverse condemnation claim on the ground that the alleged damage to Owners' piles was not a "taking" actionable in inverse condemnation. Owners now contend that the circuit court's order should be reversed to allow them to pursue claims that the District took their groundwater.

Issue: 3.a. Have Owners forfeited their new inverse condemnation theory by failing to raise it in the circuit court?

The circuit court had no opportunity to address the issue.

The court of appeals ignored the forfeiture and affirmed the dismissal on its merits.

3.b. Do Owners' allegations that ground water infiltrating the Deep Tunnel hundreds of feet removed from their property caused damage to their foundation piles state a takings claim under Article I, §13 of the Wisconsin Constitution or an inverse condemnation claim under §32.10?

The circuit court, which dismissed the claim on summary judgment, answered, "no."

The court of appeals affirmed.

STANDARDS OF REVIEW

All of the issues arising from the court of appeals' ruling are questions of law that this Court reviews de novo. *See In re Country Side Rest., Inc.*, 2012 WI 46, ¶22 (statutory construction); *E-L Enterprises, Inc. v. Milwaukee Metro. Sewerage Dist.*, 2010 WI 58, ¶20, 326 Wis. 2d 82, 785 N.W.2d 409 (takings). Whether the circuit court properly entered injunctive relief, if it has the legal authority to do so, is a matter of discretion, but a circuit court erroneously exercises that discretion when it "(1) fails to consider and make a record of the factors relevant to its determination; (2) considers clearly irrelevant factors or improper

factors; and (3) clearly gives too much weight to one factor." *Hoffmann*, 2003 WI 64, ¶19.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

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

STATEMENT OF THE CASE

This statement supplements the statement of the case in the District's opening brief.

In 2003 Owners commenced this action against the District and its construction contractors to recover the cost of repairing the Boston Store building's wood piles. Owners alleged that the pile damage was caused by groundwater infiltrating the Deep Tunnel, as a result of it having been constructed without a complete concrete lining.

MMSD-Opening-Br.-7; R.51-33.[3] Owners dismissed the construction contractor in 2005. R.74. Their negligence, nuisance, and inverse condemnation claims against the District are at issue here.

A. The circuit court awarded summary judgment on Owners' inverse condemnation claims and limited the scope of Owners' tort claims.

The circuit court granted summary judgment to the District on Owners' inverse condemnation claims. R.157-2:MMSDApp-0279. The circuit court reasoned that Owners' allegation of pile damage is not an "occup[ation]" or taking of property for inverse condemnation purposes. R.374-39–40:MMSDApp-319–20.

Although the circuit court refused to grant summary judgment on Owners' negligence and nuisance claims, it held that those were barred by §893.80(4) governmental immunity to the extent

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[3] Record citations refer to both the record number and page ("R.__-__") and, where applicable, to the page of the opening brief's appendix ("MMSDApp-__"), of this brief's appendix ("MMSDSuppApp-__"), or of Owners' appendix to their opening brief ("A-Ap.-___").

they were premised on the tunnel's design or construction. R.374-40–42:MMSDApp-0320–22.

B. A jury found the District had not interfered significantly with Owners' use and enjoyment of the building.

Owners continuously operated the Boston Store building for commercial retail and residential leasing. R.385-1126:MMSDApp-387. They presented no evidence that their use of the building was ever interrupted, and the trial evidence showed that long before the tunnel's construction Owners and their predecessors had adopted a policy of simply repairing piles that failed. Owners' damages evidence consisted only of the $3 million cost of foundation repairs made in 1997 and 2001–2004 (replacing the wood piles with a form of concrete) (R.385-1216,1260–62:MMSDApp-393–94 R.351-1552-53:MMSDSuppApp-004) and an estimation of the cost to replace the remaining wood piles with concrete (even those repaired before 1997) (R.351-exs.1553-019 to 1553-021:MMSDSuppApp-005–007).

The jury found that both the District's negligence and Owners' negligence damaged the building. R.403-1:MMSDApp-0108. The jury also

found that the tunnel interfered with Owners' use and enjoyment of their property but that the interference did not result in significant harm, a necessary element of a nuisance claim. R.403-3:MMSDApp-0110. Asked how much money it would take to compensate Owners for "property damage," the only damages question on the verdict, the jury necessarily looked to Owners' claimed costs of repair and awarded $3 million for property damages "already suffered" and $6 million of property damages Owners "will suffer in the future." R.403-1-3:MMSDApp-0108–0110.

C. Post-verdict proceedings: Judge Kremers limits damages as required by §893.80(3) and enters judgment.

Both parties timely filed post-verdict motions. R.256–259. The District, among other things, requested that judgment be entered in its favor based on its §893.80(4) discretionary immunity (R.259–260, 262, 264); it also sought a new trial or application of §893.80(3)'s damages limitation (R.259–260, 262, 264).

Owners, among other things, asked Judge Kremers to change the no-substantial-harm finding in part to argue that §893.80(3)'s damages

limitation does not apply to nuisance claims. R.257–258. In response to the District's motions, Owners also argued that the damages cap was unconstitutional. R.271-21–35. Owners did not respond by proposing injunctive relief. R.271-21–35.

Judge Kremers ruled that the evidence supported the jury's finding that the District's conduct had not significantly harmed Owners' right to use and enjoy their building. R.394-25–29:MMSDApp-0085–89. He also applied §893.80(3)'s $50,000 damages limitation. R.394-45–46:MMSDApp-0105–06.

D. Owners' motion for injunctive relief.

After Judge Kremers ruled on the post-verdict motions, Owners moved for an injunction directing the District to line a mile-long section of the tunnel with concrete (R.280-1–7:A-Ap.-276–82)—an undertaking that Owners' tunnel expert speculated at trial would cost around $10 million

(R.382-523–24:MMSDApp-421).[4] As a result of judicial rotation, the injunction motion was heard by Judge Jean DiMotto. R.395:MMSDSuppApp-008.

Judge DiMotto told the parties that she would first resolve "the threshold issue of whether injunctive relief [was] available." R.395-9:MMSDSuppApp-016, *see also* R.395-5,23:MMSDSuppApp-012,030. She stated that, if she ruled that injunctive relief was available, then Owners' request would became "a trial issue." R.395-5:MMSDSuppApp-012. Although aware of Judge Kremers' intent to enter a written order incorporating his post-verdict rulings (R.395-5:MMSDSuppApp-012), Judge DiMotto failed to rule on Owners' injunction motion before October 25, 2006, the end of the 90-day deadline to decide post-verdict motions.

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[4] The court of appeals' suggestion that Owners "refiled [their] motion for injunctive relief," 2011 WI App 76, ¶124, misreads the record. Owners first filed their motion for injunctive relief on September 15, 2006 (R.280), after Judge Kremers' September 11, 2006, oral ruling on the parties' post-verdict motions (R.394).

E. The post-appeal award of injunctive relief.

1. Judge Kremers enters judgment and Owners appeal.

On October 25, 2006, Judge Kremers signed Owners' proposed "Order for Judgment," which provides, "judgment is entered in favor of Plaintiffs . . . and against Defendant . . . in the amount of $100,000, together with interest, plus the taxable costs, fees, and disbursements of this action" and it is further ordered "that Plaintiffs' nuisance claim is hereby dismissed." R.305-1–3:MMSDApp-0058–60. On November 7, Judge DiMotto purported to "modify" the October 25 judgment "insofar as it may be interpreted to be a final order." R. 315-1–2:A-Ap.316–17.

On January 19, 2007, Owners filed a notice of appeal. R.360.

2. Judge DiMotto orders the District to line the tunnel.

On January 30, 2007, Judge DiMotto granted Owners' request for affirmative injunctive relief based solely on her review of the trial transcript and without holding a hearing. R.399-1–39:A-Ap.520–28. She awarded the relief because "the remitted $100,000 is an inadequate remedy at law,

given the past and expected harm the Plaintiffs have suffered in this matter." R.399-10:A-Ap.-529. Her only other justification was that "there was unrebutted expert testimony at trial, . . . that the tunnel must . . . get a complete lining installed with all joints and cracks sealed to stop groundwater inflow and drawdown. . . . And . . . if the tunnel were lined, groundwater levels would rise to a level similar to the tunnel not being there." R.399-26–27:A-Ap.-545–46.

Judge DiMotto rejected the District's argument that no injunction could issue because no one served a statement of relief sought requesting an injunction. R.399-12:A-Ap.-531. She concluded that Owners had substantially complied with §893.80(1) because the statement served by Saks and WISPARK had identified damages in an amount similar to the estimated lining cost. R.399-12–14:A-Ap.-531–33. She did not address §893.80(4)'s prohibition on suits based on discretionary governmental conduct. Instead, Judge DiMotto remarked that, having ordered the $10 million tunnel reconstruction, she expected the parties to "talk turkey." R.399-33–34:A-Ap.-552–53.

At a May 30, 2007, "status conference," Judge DiMotto declined to consider several other issues that the District argued foreclosed her award of injunctive relief. R.400-42–45:MMSDSuppApp-072–075. Among other things, the District argued that injunctive relief was inconsistent with a previous court-approved stipulation between the DNR and the District and DNR's prior approval of the tunnel's construction with only a partial lining (R.400-49–50:MMSDSuppApp-079–080)—facts the District had submitted to Judge Kremers in the summary judgment proceedings before he ruled that the tunnel's design and construction were not properly at issue (R.119-59:A-Ap.137). Judge DiMotto rejected the District's argument, stating, "I'm not understanding as well why harm to the public, regulatory and water law restrictions on this [injunctive] relief were not front and central [sic] at trial." R.400-43:MMSDSuppApp-073. In response to the District's suggestion that the court obtain the views of the DNR before ordering that the tunnel be reconstructed, the court commented, "I don't know why they [the EPA and the DNR] weren't named in the matter. I don't know why that wasn't litigated. It should have been litigated.

. . . It's way too late." R.400-47–48:MMSDSuppApp-077–078.

Judge DiMotto incorporated her rulings into a "Final Order" entered on June 10, 2007. R.346-1–2:A-Ap.-324–25. Also on June 10, Judge DiMotto appointed a special master to oversee implementation of the injunctive relief and directed the special master to conduct or decide (1) an environmental impact appraisal; (2) whether the lining thickness should be 1 foot or 1.2 feet; (3) when the work will be commenced and completed; and (4) other technical issues involved in lining the tunnel, such as quality assurance, obtaining necessary permits, and "means and methods" of construction. R.347-1–3:MMSDSuppApp-001–003. Judge DiMotto stayed the special master order pending resolution of all appeals. R.347-3:MMSDSuppApp-003.

Owners filed a second notice of appeal on June 11, 2007. R.363. The District filed a notice of cross-appeal on June 14, 2007. R.365.

F. The court of appeals affirmed the judgment and vacated the post-appeal injunction.

The court of appeals affirmed Judge Kremers' judgment limiting Owners' total damages to

$100,000. *Bostco,* 2011 WI App 76, ¶¶38–65. It reversed Judge DiMotto's award of injunctive relief. *Id.* ¶¶123–37. The court of appeals held, that the absence of another statute affording relief, an action against a governmental entity is limited to the relief provided for by §893.80, and neither §893.80 nor any other statute authorizes the affirmative injunctive relief the circuit court ordered. *Id.*

The court of appeals affirmed the circuit court's award of summary judgment dismissing Owners' inverse condemnation claims. *Id.* ¶¶108–17. The appellate court held that Owners' claims are foreclosed by *E-L*, 2010 WI 58.

ARGUMENT

Owners' focus throughout this long litigation has been on recovering as damages the costs they incurred and expected to incur in the future to fix the Boston Store building's foundation. Owners moved for injunctive relief only after Judge Kremers ruled that §893.80(3) limited their damages to $50,000 apiece—a motion filed past the deadline to seek relief for which the verdict did not provide. R.280-1–6:A-Ap.276–81. They argued that the legislature had rendered damages

inadequate—that is, that the very statute protecting the fisc by limiting damages to $50,000 per plaintiff required the court to order the District to reconstruct a mile of the tunnel at an estimated cost of $10 million. R.280-1–6:A-Ap.276–81.

I. Section 893.80(3) Limits Governmental Tort Damages to $50,000 Per Plaintiff

Section 893.80(3) limits tort damages to $50,000 per plaintiff. Owners challenge the constitutionality of the statute and its application. This Court has already twice held that §893.80(3)'s limitation is constitutional, and, contrary to Owners' argument, the limitation's application here is not unconstitutional "as applied" because the District, standing in the shoes of its contractor, resolved different claims for more than $50,000 a decade earlier. Owners' additional argument—that the limitation does not apply to their nuisance claims because nuisances can give rise to multiple causes of action—is foreclosed by §893.80(3)'s text: "the amount recoverable . . . for any damages . . . *in any action* founded on tort . . . shall not exceed $50,000." §893.80(3) (emphasis added). Owners commenced a single tort action; the statute limits them to $50,000 apiece.

A. Section 893.80(3) is constitutional "on its face."

Owners' challenge to the constitutionality of §893.80(3) falls upon well plowed ground. This Court has twice upheld the pre-1981 $25,000 limitation from equal protection challenges. *Sambs*, 97 Wis. 2d at 358–61; *Stanhope*, 90 Wis. 2d 823.

1. The governmental tort damages limitation does not offend equal protection principles.

Sambs and *Stanhope* propound the principles governing Owners' equal protection challenge: "[A]ll legislative acts are presumed constitutional, [ ] a heavy burden is placed on the party challenging constitutionality, and [ ] if any doubt exists it must be resolved in favor of the constitutionality of a statute. When a statutory classification is challenged as violative of the equal protection clause, the challenger must prove abuse of legislative discretion beyond a reasonable doubt." *Sambs*, 97 Wis. 2d at 370.

"The basic test," *Sambs* establishes, "is not whether some inequality results from the classification, but whether there exists *any reasonable basis* to justify the classification." *Id.* at

371 (emphasis added). How well the classification accomplishes a reasonable basis is a legislative, rather than a judicial, determination: "[I]t is not [the Court's] task to determine the wisdom of the rationale or the legislation. The legislature assays the data available and decides the course to follow." *Id.*; *see also Stanhope*, 90 Wis. 2d at 371.

2. Protecting the public treasury justifies §893.80(3).

Holytz recognized the legislature's authority to protect the public fisc, either by making all governmental entities immune from tort liability or by limiting recoverable damages: "If the legislature deems it better public policy, it is, of course, free to reinstate immunity. *The legislature may also impose ceilings on the amount of damages . . . .*" *Holytz*, 17 Wis. 2d at 40 (emphasis added). A year later, the legislature did precisely that, placing a $25,000 limit on the amount a plaintiff can recover in tort from a governmental entity, *see* Laws of 1963, ch. 198, an amount that was increased to $50,000 in 1982, *see* Laws of 1981, ch. 63.

Sambs rejected a species of the equal protection argument Owners press here—that the then-$25,000 cap on municipal damages violated plaintiff's equal protection rights because the city

had negligently caused injuries far exceeding $25,000. The Court reasoned that the legislature's limitation satisfied rational basis scrutiny because it serves "a legitimate public purpose to prevent the disastrous depletion of municipal treasuries, thereby safeguarding public funds and the government's ability to discharge public responsibility." 97 Wis. 2d at 371. The legislature could reasonably conclude, *Sambs* held, that because governmental operations touch a large number of persons, allowing even modest damage recoveries might put governmental services at risk:

> Government engages in activities of a scope and variety far beyond that of any private business, and governmental operations affect a large number of people. Municipal units of government have hundreds and thousands of employees. Municipal units of government maintain hundreds and thousands of miles of streets and highways and drains and sewers, subject to many hazards; they operate numerous traffic signals, parking lots, office buildings, institutions, parks, beaches and swimming pools used by thousands of citizens. Damage actions against a governmental entity may arise from a vast scope and variety of activities. A claim against a government unit may range from a few dollars to a few million dollars. A

> municipal unit of government, limited in fund-raising capacity, may lack the resources to withstand substantial unanticipated liability. Unlimited recovery to all victims may impair the ability of government to govern efficiently.

Id. at 376–77. The Court explained further that setting a maximum amount recoverable is uniquely a legislative task, since it is necessarily based on a balancing of the public's interest in protecting the public fisc and its interest in reimbursing those harmed by governmental conduct. *Id.* at 377; *see also Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 31–32, 559 N.W.2d 563 (1997).

Sambs' reasoning governs here. Tort claims like those of the Owners, if not subject to the limitation of §893.80(3), could easily disrupt governmental entities' ability to provide services. Owners offer no proof that the limitation amount could be raised without any detrimental effect on municipal treasuries. Given an essentially one-to-one relationship between government expenditures and the imposition of taxes and fees, one cannot imagine what that proof would be.

The legislature also has done nothing to suggest that §893.80(3)'s limitation amount does

not serve this purpose. This is one of the ways in which this case differs from *Ferdon*, 2005 WI 125, on which Owners principally rely. Unlike the noneconomic damages cap in *Ferdon*, which the legislature had varied from $1 million, to no cap, to $410,322, the legislature has never eliminated or reduced the amount of the governmental tort damage limitation. Since *Holytz*, the legislature has consistently limited tort damages awards in order to protect municipal treasuries from potentially overwhelming damages exposure.

3. Neither *Ferdon* nor inflation alters the outcome required by *Sambs* and *Stanhope*.

Owners concede that the legislature constitutionally may limit the amount of tort damages that can be recovered from a governmental entity. Owners'-Opening-Br.-59. They contend that the passage of time and *Ferdon* justify disregarding *Sambs* and *Stanhope*, affording an opportunity to hold §893.80(3) unconstitutional because its $50,000 amount either is no longer reasonably related to protecting public treasuries or is too low in relation to the damages they sustained. Both contentions improperly seek to

substitute this Court's policy judgment for that of the legislature's.

Owners base their passage-of-time challenge on two statements in *Sambs*. First, they make much of *Sambs* having quoted a 1979 New Hampshire decision's statement that a $50,000 statutory limitation on tort damages was "'close to the boundary of acceptability.'" 97 Wis. 2d at 368 (quoting *Estate of Cargill v. City of Rochester*, 406 A.2d 704, 708, 709 (N.H. 1979)). Second, they find a judicially enforceable "affirmative duty of the legislature" (Owners'-Opening-Br.-61) in *Sambs*' suggestion that "it is the legislature's function to structure statutory provisions which will protect the public interest in reimbursing the victim and maintaining government services" (*id.*)(quoting *Sambs*, 97 Wis. 2d at 377).

Owners believe that the legislature should have added another cost-of-living increase by now and that, since the legislature has failed to do so, *Ferdon* authorizes the Court to nullify the statute altogether. This reasoning is defective both in its reading of *Ferdon* and its understanding of the

constitution's allocation of responsibility between the legislature and the Court.[5]

Ferdon cannot bear the weight Owners would place on it. *Ferdon* held that a cap on noneconomic damages recoverable by a plaintiff in a medical malpractice action from the Patients Compensation Fund was not rationally related to any legitimate state interest. *Id.* It relied on and reaffirmed *Sambs*. *See* 2005 WI 125, ¶180. Distinguishing *Sambs*, *Ferdon* explained that its holding did not call into question the constitutionality of §893.80(3)'s wholly unrelated limitation on tort damages against municipalities. As the Court explained, because of the long common-law history of governmental immunity, claims against municipalities are not analogous to medical malpractice claims: "[m]unicipalities were immune from suit at the adoption of the Wisconsin constitution, and concern about public finances as a result of numerous actions against municipalities . . . has justified the cap involved in that statute."

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[5] Owners do not argue that §893.80(3) offends either Article I, §5 or Article I, §9, of the Wisconsin Constitution.

Id. ¶180. This case, like *Sambs* but unlike *Ferdon*, involves the legislature's authorization of a limited monetary claim against a governmental entity when, at common law, as *Ferdon* explains, Owners would have been entitled to no recovery at all.[6]

Thus, Owners' argument that §893.80(3)'s limitation "is unreasonably low . . . in relation to the damages sustained" (Owners'-Opening-Br.-60) implicitly uses the wrong baseline. The proper baseline for considering whether the limitation is "too low" is not, as Owners suggest, the full recovery of damages as if they were suing a private party. Instead, as *Ferdon* recognizes, *see* 2005 WI 125, ¶180, the proper baseline for considering whether $50,000 is unreasonably low is the zero recovery available at common law—the recovery that *Holytz* acknowledges the legislature is free to impose, 17 Wis. 2d at 40.

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[6] In discussing *Sambs*, *Ferdon* mentioned only §81.15's limitation on tort damage awards against municipalities for highway defects, but *Sambs'* holding applied equally to §895.43—now §893.80(3)—which similarly limited the city's liability and was contested as unconstitutional. *Sambs*, 97 Wis. 2d at 365–66, 371, 376–77.

4. Whether the $50,000 limitation is too low is a question for the legislature.

Equal protection principles do not authorize the judiciary to re-weigh the public policy considerations involved in limiting governmental tort damages. As *Sambs* states, "whatever the monetary limitation on recovery, the amount will seem arbitrary . . . the legislature, not the court, must select the figure." 97 Wis. 2d at 367. *Stanhope* echoes the point: The "monetary limitation is one which the legislature determines balancing the ideal of equal justice and need for fiscal security." *Stanhope*, 90 Wis. 2d at 843. This balancing is for the legislature, not the Court:

> Courts are not equipped or empowered to make investigations into the financial resources of various public bodies in Wisconsin; the coverage, policy limits and costs of available liability insurance; or the number of victims of governmental tortfeasors and a profile of the losses they have suffered. Information derived from such investigation must necessarily precede any reasoned evaluation of either a limitation on recovery or a requirement of purchase of insurance.

Id. at 844. *See also Haferman v. St. Clare Healthcare Found., Inc.*, 2005 WI 171, ¶59 n.12,

286 Wis. 2d 621, 707 N.W.2d 853 ("court is not meant to function as a 'super-legislature'"); *Ferdon*, 2005 WI 125, ¶204 (Prosser, J., dissenting) (same).

5. Nothing demonstrates that the $50,000 limitation is "too low."

Even if the Court had authority to declare the $50,000 limit "too low," Owners do not begin to make a case for its exercise. Ignoring the essential role played by the economic data considered by the Court in *Ferdon*, *see, e.g.*, 2005 WI 125 ¶¶133–147, Owners offer none of the empirical evidence a legislator might consider in deciding whether to increase §893.80(3)'s limitation. They offer no information on the effect of a higher limitation on the various types of governmental entities covered by §893.80(3), no information on the frequency of tort claims against those governmental entities, no information on the extent to which the frequency of tort claims would increase if the §893.80(3) limitation were changed, no information on the types or frequency of claims that exceed the limitation amount, no information on the cost to insure against greater exposure, and no information on the estimated amount of tax increases that would be necessary if some higher

limitation were enacted or the likely economic and political costs of those higher taxes.

Absent this information, it is impossible to even begin to consider whether increasing the limitation would be sound public policy, much less what the amount of that increase should be. Under these circumstances, §893.80(3) could not be held unconstitutional without directly contravening *Sambs*' and *Stanhope*'s holdings that the limitation amount is uniquely an issue for the legislature.

The many factors that must be considered in setting the limitation amount also reveals the errors in Owners' argument that inflation alone deprives the $50,000 limitation of a rational basis. One cannot know *a priori* the costs of municipal services and the practical limitations on municipalities' ability to raise taxes and fees. Without this information, as well as information about the frequency and amount of municipal tort claims experience, one cannot begin to consider whether a higher damages limitation would offer the same fiscal protection today as the $50,000 limitation offered in 1982.

More importantly, rational basis analysis only asks whether the limitation *conceivably* serves

a rational purpose—here, whether the limitation protects public treasuries. Certainly, it is conceivable that §893.80(3)'s $50,000 limit protects those treasuries—indeed, the limit unquestionably protects municipal treasuries. Owners do not contest this. They contend only that changed times justify less taxpayer protection from damages awards in favor of greater compensation for tort victims. That is a policy question far beyond the scope of rational basis review. Formulating an "answer" to that question requires using empirical data about municipal tort claims experience and municipal finances to inform a normative decision about whether the risk to delivery of governmental services created by exposing municipalities to greater tort damage awards is outweighed by a perceived benefit of providing greater compensation to persons injured by governmental torts. Our constitution vests that task in the legislature, not in the courts. *Stanhope*, 90 Wis. 2d at 844.

6. The amount of Owners' damages does not provide grounds for diverging from *Sambs* and *Stanhope*.

Asking whether §893.80(3)'s limitation is "too low" as compared to Owners' damages in this action

transforms a facial challenge into an "as applied" challenge. Even Owners do not suppose that the limitation amount must be set at a level that provides them a complete recovery. The statutes from other states that Owners hold out as models would also provide them only a fraction of the jury's $6 million award. *See* Nev. Rev. Stat. §41.035 ($100,000 per claimant); S.C. Code Ann. §15-78-120 ($300,000 per claimant). As explained above, both this Court's precedent and adherence to the Court's proper constitutional role require leaving any decision about changing the amount of the limitation to the legislature.

Owners are also poor proponents of a claim that a statute protecting the provision of governmental services from "devastatingly high" tax burdens has worked a manifest injustice. *Stanhope*, 90 Wis. 2d at 842. Unlike *Sambs*, *Stanhope*, and even *Ferdon*, all of which dealt with personal injury claims by individuals, Owners are sophisticated commercial businesses claiming only economic injuries—repairable decay of their piles for which the jury found them 30% responsible. Bostco, the building's current owner, purchased the building (and a separate parking structure) with

$3 million provided by the City of Milwaukee Redevelopment Authority (and later sold the parking structure for $2.6 million). R.384-834. That Owners, rather than taxpayers, should pay for needed repairs results in no obvious hardship or injustice.

7. If *Ferdon* provides a basis for striking down §893.80(3), it should be overruled.

Sambs and *Stanhope* hold that §893.80(3)'s limitation survives rational basis scrutiny, which asks of a statutory discrimination only whether "any set of facts reasonably may be conceived to justify it." *Stanhope*, 90 Wis. 2d at 838 (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)). If *Ferdon* is read to call the constitutionality of §893.80(3) into doubt, *Ferdon* should be overruled.

B. Application of §893.80(3) is constitutional.

Owners contend that equal protection principles make unconstitutional the District's reliance on §893.80(3) as against them because the District paid other property owners who made construction-related claims in the early 1990s more than $50,000. Owners'-Opening-Br.-66–75. This argument is a non-starter.

Owners are not members of a protected class. Any argument that the District violates equal protection principles by invoking §893.80(3), if cognizable at all, requires Owners to show that they have "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). As Owners' authority makes clear, "[t]o be considered 'similarly situated,' a plaintiff and his comparators (those alleged to have been treated more favorably) must be identical or directly comparable in all material respects." *LaBella Winnetka, Inc. v. Vill. of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010); *see also State v. Nelson*, 2007 WI App 2, ¶19, 298 Wis. 2d 453, 464–65, 727 N.W.2d 364.

Village of Menomonee Falls v. Michelson, another case on which Owners rely, explains that a claim of unequal administration of law requires a showing of improper purpose: "The equal protection clause . . . is violated if an ordinance is administered with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar

circumstances, material to their rights." 104 Wis. 2d 137, 145, 311 N.W.2d 658 (Ct. App. 1981) (internal quotation marks omitted); *see also State ex rel. Murphy v. Voss*, 34 Wis. 2d 501, 510, 149 N.W.2d 595 (1967). "[E]vidence that a municipality has enforced an ordinance in one instance and not in others [will] not in itself establish a violation . . .[; t]here must be a showing of an intentional, systematic and arbitrary discrimination." *Michelson*, 104 Wis. 2d at 662. As with Owners "facial" challenge, any conceivable rationale will defeat their "as applied" equal protection challenge. *See State v. Smith*, 2010 WI 16, ¶¶16–17, 323 Wis. 2d 377, 780 N.W.2d 90.

1. The construction-related settlement damage claims the Program Management Office resolved in the early 1990s are dissimilar to Owners' claims.

Owners argue that their claims are directly comparable to claims made around the time the tunnel was mined in the late 1980s and early 1990s. During that mining, the contractor experienced unexpected and substantial inflows from the shallower groundwater aquifers in the soils hundreds of feet above the rock layers. R.123-5-6:MMSDApp-584–85. This differing site

condition encountered by the contractor during the construction was believed responsible for causing differential settlement and structural duress to buildings "without deep foundations and certain older buildings supported by relatively short timber piles." R.51-25:A-Ap.25. The District installed recharge wells, and, by 1994, had concluded that "[g]roundwater aquifers have stabilized," "[s]tructural settlements have stopped," and that "[i]t is not expected that damages will occur beyond those currently being evaluated." R.51-26:A-Ap.26.

The tunnel-construction contract allowed the contractor to obtain additional compensation from the District if the contractor incurred unforeseen costs as a result of differing site conditions. R.388-2027; R.124,ex.E-36:MMSDApp-0561. This is a standard arrangement in the construction industry. *See, e.g.*, *Metro. Sewerage Comm'n v. R.W. Constr., Inc.*, 72 Wis. 2d 365, 241 N.W.2d 371 (1976). Rather than have the contractor resolve the differential-settlement claims and pass the costs of repair on to the District, plus the expense of administering the claims, plus a reasonable markup, the District undertook to investigate and pay those claims itself—in effect standing in its

contractor's shoes. Claims made at the time were investigated by the Program Management Office's engineers, and, if the PMO concluded that the damage was caused by the differing site conditions, the District paid the claim. R.122-2–4:MMSDApp-0589–91; R.189-ex.14:A-Ap.257–58.

These settlement-related claims "were solely for building finishes and for buildings and ground floor slabs founded on shallow footings or directly on the ground surface; no repairs for damage to deep foundations, including wood pile foundations, were conducted or paid for by the District." R.122-4:MMSDApp-0591. The claims were paid between 1990 and 1995 (R.122-4:MMSDApp-0591), after which time the District's contractual obligation to pay its contractor had ended.

In 2001 when Saks and WISPARK first raised the pile damage claim at issue in this litigation, the tunnel construction contract had concluded and the District was not responsible for additional payments. *See* R.124-47:MMSDApp-0572. Owners made their claim for damage to the Boston Store building directly against the District, and the District handled it in the ordinary course, including defending the claim in part based on

§893.80(3)'s damages limitation. The statutory limitation would be similarly applied to all other direct claims.

2. Owners are not similarly situated to claimants at the time of construction and treating them differently is rational.

Owners are obviously differently situated from those who claimed before 1995 to have settlement-related damages caused by the tunnel's construction. Owners are not "identical or directly comparable in all material respects" to those claimants. *LaBella*, 628 F.3d at 942; *Srail v. Vill. of Lisle*, 588 F.3d 940, 945 (7th Cir. 2009).

Although the passage of time alone suffices to make Owners' claims dissimilar for equal protection purposes, Owners' mischaracterize Meinholz's testimony to suggest that their claims and those resolved before 1994 differ only as to timing. That is wrong. Meinholz testified that the earlier paid claims arose out of the changed-site-conditions provision in the District's construction contract. Those claims were investigated by the PMO and only paid to the extent that the PMO's engineers determined that the mining caused the damage. R.189-ex.14:A-Ap.257–58.

This is a far different set of circumstances than those here. The PMO evaluated the earlier claims based on joint investigations conducted by its own engineers and claimants' engineers. R.122-3–4:MMSDApp-0590–91. The PMO exercised its expertise in deciding whether the claimed damage was mining related. R.122-3–4:MMSDApp-0590–91; R.124-8:MMSDApp-0462; R.189-ex.14:A-Ap.257. Even putting public relations issues aside, claims arising close in time to the alleged cause and for which the PMO decided responsibility based on its expertise are not "directly comparable" to claims made years later decided by a lay jury choosing between competing trial experts.

Owners argue that the contractor's potential liability in the early 1990s makes no difference because the contractor also could have asserted the damages limitation. But, at the time the District decided to stand in the shoes of its contractor to defend the settlement-related claims, no court had held that §893.80 applied to a government contractor. *See Estate of Lyons v. CNA Ins. Cos.*, 207 Wis. 2d 446, 452–58, 558 N.W.2d 658, (Ct. App. 1996) (question of first impression whether §893.80 applies to independent contractors). And, even if

the District was incorrect in believing that its contractor could be held liable for construction damages, that error would not result in a forfeiture of §893.80's protection against future claims, especially ones directly against the District. *See Seven Star, Inc. v. United States,* 873 F.2d 225, 227 (9th Cir. 1989) ("[E]qual protection principles should not provide any basis for holding that an erroneous application of the law in an earlier case must be repeated in a later one.").

3. The District's discretionary decision to invoke §893.80(3) is not subject to equal protection scrutiny.

Owners' effort to attack the District's rationales for not invoking §893.80(3)'s limitation as to earlier claimants is methodologically erroneous. Any *conceivable* justification for treating Owners differently is sufficient. *Smith*, 2010 WI 16, ¶17. Certainly the District had far greater reason to believe credible claims of damage asserted soon after the water inflows during construction, than it had to believe claims raised a decade after construction had been completed.

In the absence of a wrongful motive, moreover, equal protection principles would not

force the District to waive application of the damages limitation, even if it had done so as to other similarly situated plaintiffs (which it had not). *See Vill. of Menomonee Falls*, 104 Wis. 2d at 662. Owners' "as applied" constitutional challenge is an invitation for the Court to second-guess a governmental entity's litigation strategies on a case-by-case basis. No case Owners cite, and no case of which the District is aware, suggests that this is properly the role of the judiciary. *Cf. Anderson*, 208 Wis. 2d at 30–32 (refusing to allow court-found implied waivers of governmental tort damages limitation). Whether to invoke or waive a damages limitation is a type of discretionary governmental decision that *Murphy*, 34 Wis. 2d at 509, and *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 603–05 (2008), put beyond the reach of equal protection principles.

C. Owners' action is subject to §893.80(3)'s limitation, even if it includes a nuisance claim.

1. Section 893.80(3)'s damages limitation applies "in any action."

Section 893.80(3) provides that "the amount recoverable by any person for any damages,

injuries or death in any action founded on tort against any . . . [governmental entity] . . . shall not exceed $50,000." Owners commenced an "action founded on tort"; the amount recoverable by them shall not exceed $50,000. *See Schwartz v. City of Milwaukee*, 54 Wis. 2d 286, 295, 195 N.W.2d 480 (1972); *Wood v. Milin*, 134 Wis. 2d 279, 285, 397 N.W.2d 479 (1986).

Owners argue that because courts have treated a continuing nuisance as a series of causes of action for statute of limitations purposes "a continuing nuisance is not a single 'action'" for purposes of §893.80(3). Owners'-Opening-Br.-76. This reasoning is faulty.

Section 893.80(3) unambiguously imposes a $50,000 damages limit per "action," not per "cause of action." *Wilmot v. Racine County*, 136 Wis. 2d 57, 66, 400 N.W.2d 917 (1987)(Abrahamson, C.J., concurring) ("The statute uses the word 'action,' not the phrase 'cause of action.'"). An "action" is a "civil or criminal judicial proceeding." BLACK'S LAW DICTIONARY 32 (9th ed. 2009); *see also* §801.01(1) ("Proceedings in the courts are divided into actions and special proceedings."). A "cause of action," on the other hand, is a claim. BLACK'S, *supra*, at 251.

A single action, of course, can encompass multiple causes of action. *See, e.g.*, §802.06(1) (increasing the allowed time to answer when "any cause of action raised in the original pleading . . . is founded in tort").

Section 893.80's structure and context further require that "action" encompass all of Owners' claims, including their nuisance claims. Other §893.80 subsections make clear that the legislature used "actions" to mean proceedings in which one alleges "causes of action" or "claims." Subsection (1d), e.g., provides that "no action may be brought" against certain entities "upon a claim or cause of action," unless certain notice requirements are met. Similarly, subsection (1g) provides that "No action on a claim under this section . . . may be brought after 6 months from the date of service of the notice of disallowance [of the claim]." Subsection (1m) provides, "With regard to a claim to recover damages for medical malpractice . . . time periods for commencing an action under this section . . . are the time periods under §§893.55(1m), (2), and (3) and 893.56." Subsection (1p) provides, "No action may be brought . . . with regard to a claim to

recover damages . . . for the negligent inspection of any property . . . ."

Numerous other sections in chapter 893 similarly make clear the distinction between an "action" and the legal claims or "causes of action" alleged in an action. Section 893.02 describes the "commencement of an action" as "when the summons naming the defendant and the complaint are filed in court." The "presentation of any claim . . . to the circuit court shall be deemed the commencement of an action." §893.03. The limitations period runs from "the time the cause of action accrues until the action is commenced." §893.04. These sections, indeed all of Chapter 893, require reading "action" to mean a proceeding in which a "cause of action" or "claims" are pleaded. *See also* §§893.05, 893.07, 893.11, 893.13, 893.14, 893.15, 893.16, 893.17, 893.18, 893.19, 893.22, 893.35, 893.43, 893.44, 893.50, 893.51, 893.52, 893.53, 893.57, 893.58, 893.585, 893.587, 893.61, 893.70, 893.82(2)(a)&(4), 893.86, 893.87, 893.89(2)&(3), 893.92, 893.925(2)(a), 893.93(1)–(3), & 893.981.

Owners' construction would also require ignoring the legislative purpose of imposing a

maximum per plaintiff recovery in order to protect governmental entities from "the burden of unlimited liability . . . and the danger of disrupting the functioning of local government by requiring payment of substantial damage awards." *Sambs*, 97 Wis. 2d at 377–78. Owners' suggestion that they will become serial litigants—burdening the courts and the District with multiple lawsuits over the same alleged infiltration into the tunnel—is contrary to this legislative purpose. And Owners, which chose to litigate in a single action all past and future damages, cannot bring another nuisance action for the same alleged tortious conduct and injuries. To allow Owners to relitigate a claim for the same damages would violate this Court's recent pronouncement that "[u]nder the doctrine of claim preclusion, a valid and final judgment in an action extinguishes all rights to remedies against a defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Kruckenberg v. Harvey,*

2005 WI 43, ¶25, 279 Wis. 2d 520, 694 N.W.2d 879.[7]

2. The jury's nuisance-defeating finding is supported by law and credible evidence.

The jury found that the District's interference with Owners' use or enjoyment of their building did not cause them significant harm. R.403:MMSDApp-100. This finding defeats Owner's nuisance claim. It is supported by credible evidence, and, contrary to the court of appeals' ruling, the jury's finding that the District caused property damage does not make this finding wrong as a matter of law.

A nuisance is an "unreasonable interference with the interests of an individual in *the use and*

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[7] Owners rely on decisions reasoning that for statute of limitations and other purposes, continuing nuisance conduct can give rise to a series of causes of action. *See Stockstad v. Town of Rutland*, 8 Wis. 2d 528, 99 N.W.2d 813 (1959); *Ramsdale v. Foote*, 55 Wis. 557, 13 N.W. 557 (1882); *Andersen v. Vill. of Little Chute*, 201 Wis. 2d 467, 549 N.W.2d 737 (Ct. App. 1996); and *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 469–70, 588 N.W.2d 278 (Ct. App. 1998). None of these decisions address §893.80(3) or in any way suggest that more than $50,000 can be recovered from a municipality in an action seeking damages for a continuing nuisance.

enjoyment of land." *Krueger v. Mitchell*, 112 Wis. 2d 88, 103, 332 N.W.2d 733 (1983) (emphasis added); *see also MMSD*, 2005 WI 8, ¶27. "Nuisance arises when [this] particular type of harm is suffered," *Butler v. Advanced Drainage Sys., Inc.*, 2006 WI 102, ¶29, 294 Wis. 2d 397, 717 N.W.2d 760, that is, "a nuisance exists if there is a condition or activity that unduly interferes with the private use and enjoyment of land," *id.* at ¶28 (quoting *MMSD*, 2005 WI 8, ¶30). To be an actionable nuisance, the unreasonable interference in the "enjoyment of land" must constitute "significant harm"—i.e., harm that ordinary persons in similar circumstances would regard as "substantially offensive, seriously annoying, or intolerable," *Hoffmann*, 2003 WI 64, ¶15 n.12 (quoting jury instruction).

The nuisance touchstone, which separates nuisances from ordinary negligence, is the significant interference with the property's "use and enjoyment" or the "usability" of the property. *See* RESTATEMENT (FIRST) OF TORTS, § 822, cmt. e (1939)(quoted in part in *Krueger v. Mitchell*, 106 Wis. 2d 450, 459–60, 317 N.W.2d 155 (Ct. App. 1982), *aff'd*, 112 Wis. 2d 88). Substantial property

damage may or may not result in significant interference with the property's use and enjoyment. These are distinct concepts. Otherwise, negligence and nuisance damages would be coextensive, which they are not. *See Vogel v. Grant-Lafayette Elec. Coop.*, 201 Wis. 2d 416, 421, 434, 548 N.W. 829 (1996) (upholding award of $240,000 for economic damages on negligence claim and $60,000 for annoyance and inconvenience damages on nuisance claim); *Allen v. Wis. Pub. Serv. Corp.*, 2005 WI App 40, ¶¶18, 22, 279 Wis. 2d 488, 694 N.W.2d 420 (award of $750,000 in economic damages on negligence claim and $1,000,000 in non-economic nuisance damages).

Findings on the essential nuisance elements are "particularly a matter for the jury." *Krueger*, 112 Wis. 2d at 105. Where, as here, the trial court approves the jury's finding, an appellate court should not lightly "upset the verdict on review." *Id.* at 105. This Court will "sustain the jury's verdict if there is any credible evidence which under any reasonable view, fairly admits an inference that supports [the] jury's finding." *Id.* at 104–05 (internal quotation marks and brackets omitted).

The court of appeals erred in upsetting the jury's finding of no significant harm.

a. Owners' presented no evidence of significant harm to their use or enjoyment of the building.

The circuit court, using WI-JI Civil 1920, instructed the jurors that "significant harm" looks to whether the defendant's interference with the use or enjoyment of land was "substantially offensive, seriously annoying or intolerable." R.392-2548-49:MMSDApp-352. Owners never contested that instruction. After the jurors requested a definition of "use and enjoyment," the circuit court instructed them *at Owners' request* that "[t]he phrase 'use and enjoyment of property' encompasses not only the interests that an owner may have in *the actual present use of the property*, but also *an interest in having the present use value* of the land unimpaired by changes in its physical condition," R.253; R.392-2736–37:A-Ap.-470 (emphasis added). *See also* RESTATEMENT (SECOND) OF TORTS, § 821D, cmt. b (1979) (similarly defining "use and enjoyment").

Owners presented no evidence of significant harm to "the actual present use of the property" or

to any interest in its "present use value." The building had been continuously used for retail space, commercial offices, apartments, and parking. R.383-836–37:MMSDApp-411. Owners' only proof of harm was limited to the cost of replacing all wood piles with concrete piles. R.385-1216,1260–62:MMSDApp-393–94; R.351-1552–53:MMSDSuppApp-004; R.351-exs.1553-019 to 1553-021:MMSDSuppApp-005–007. They presented no evidence that the claimed interference resulted in business interruptions, annoyance, discomfort, or any other type of "use and enjoyment" harm.

b. Property damage does not equate to significant harm to the Owners' use and enjoyment of the building.

The jury answered "yes" to verdict question 9, "[h]as the manner in which the District has operated or maintained the tunnel interfered with [Owners'] use and enjoyment of their building," but "no" to question 10, "[d]id the interference result in significant harm to the [Owners]." R.403:MMSDApp-110. The court of appeals held that the no-significant-harm finding could not stand in light of the jury's damage award, stating,

"the jury could not conclude that the harm was insignificant having also concluded that the District's negligence interfered with Bostco's use and enjoyment of its property to such an extent that Bostco was awarded $2.1 million in past damages." *Bostco*, 2011 WI App 76, ¶102.

But the jury was asked only to award compensation for "property damage." R.403:MMSDApp-109. Contrary to the court of appeals reasoning, the jury was free to find "property damage" to the piles—the cost of repairs—without finding significant harm to Owners' use and enjoyment of the building.[8] That is what the jury did: It awarded damages equal to the cost of repair sought by Owners; and it found no damages for interference with Owners' use of the building.

Those findings are easily reconciled. Owners, corporations involved in leasing space, submitted

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[8] The District agreed not to appeal the court's decision to give only one damage question. R.392-2522:MMSDApp-316. The single damage instruction, however, allows one to reconcile the jury's damage award with its finding of no significant harm to Owners' use and enjoyment of the building.

no evidence that having to repair the foundation was "inconvenient," "offensive," "annoying," or "intolerable," and they certainly did not try to quantify these unproved harms. Owners at all times continued to use and enjoy the building for business purposes—it has continuously housed the Boston Store retail operation and served other commercial and residential lessees. R.385-1126:MMSDApp-387.

Moreover, Owners and the predecessor-owners, whose conduct Owners agreed at trial could be attributed to them (R.376-63-64:MMSDApp-236–37), had for decades before the tunnel was constructed embraced a replace-on-failure approach to the building's piles. Many piles had been repaired before the tunnel's construction. R.351-ex.2258;R.384-1057–61:MMSDApp-405–06. Fixing the piles was an operating expense for these corporate lessors; one for which they hoped the District would be made to pay. The jury was entitled to find—and apparently found—that the need to make repairs was no more than a slight inconvenience and not so "substantially offensive, seriously annoying or intolerable," WIS JI-CIVIL

1922, as to significantly interfere with Owners' use and enjoyment of the building.

Krueger and *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969), the only two cases on which the court of appeals relied, are inapposite. Those decisions both involve demonstrated interferences with the use and enjoyment of property.

Mr. Krueger claimed that an expansion of an airport near his property "caused an increase in the noise level over [his] business thus *interfering* [significantly] with the operation of his business, and that this noise level was *personally offensive* to [him]." 112 Wis. 2d at 105 (emphasis added). Based upon these interferences with his business and the offensive nature of the plane noise, the Court had no difficulty concluding that Mr. Krueger had *pleaded* significant harm to the use and enjoyment of the property. Although *Krueger* states that, "[w]hen an invasion involves a detrimental change in the physical condition of land, there is seldom any doubt as to the significant character of the invasion," *id*. at 107, it must be understood in context as referring to an invasion that detrimentally changes the land's condition in a

way that impairs its use and renders it less enjoyable. *See id*. ("The focus in determining whether a particular nuisance is actionable depends on whether the interference with the use and enjoyment of land is unreasonable and substantial.").

Similarly, the *Jost* plaintiffs presented evidence that the defendant's sulfur fumes made the enjoyment and use of their farm impossible by damaging their crops and farm house. The Court held that the jury's finding that the crop damage was not "substantial" could not stand because it was inconsistent with the jury's finding of tangible damage to the crops. 45 Wis. 2d at 171–74. But, unlike here, the damage at issue in *Jost* was plainly to the farm's *use*—damage to the alfalfa crops the farm land was used to produce—and to plaintiffs' *enjoyment* of the farm—resulting in "flowers [that] could not be raised" and "screens [that] became rusty . . . and totally unusable within two years . . . [allowing] barn insects in[to] [plaintiffs'] home." *Id.* at 172.

Here, a finding of "property damage" can be (and was) based on evidence distinct from harm resulting from interference with Owners' "use and

enjoyment of their building." As a result, the jury's property damage finding does not amount to a finding of significant harm. *Cf. Gumz v. N. States Power Co.*, 2007 WI 135, ¶48, 305 Wis. 2d 263, 742 N.W.2d 271 (error to infer a finding from jury's answer on legally distinct issue).

II. The Circuit Court's Post-Judgment Injunction Requiring the District to Reconstruct the Tunnel at an Estimated Cost of $10 Million Was Improper

A. Section 893.80 forecloses injunctive relief.

1. Section 893.80(5) unambiguously limits remedies to the "provisions" of §893.80.

After Judge Kremers ruled that §893.80(3) limited Owners' recovery to $50,000 apiece, they moved for an injunction forcing the District to line the tunnel with concrete. R.280:A-Ap.276–282. Owners argued that the legislatively imposed sum was inadequate as a matter of law, thus entitling them to injunctive relief. *Id.* The only evidence on which Owners relied was their expert's trial testimony that lining a portion of the tunnel was "within the capability of the underground construction industry." *Id.* at 278; *see also* R.383-

458–59. He estimated that the lining would cost $10 million. R.383-523.

Owners offered no statutory support for their injunction request, and no statute authorizes it. Their action is one made under §893.80. *See* §893.80(3) ("action *under this section*" (emphasis added)). The plain text of §893.80(5) limits "all claims" against governmental entities made under §893.80 to "the provisions and limitations" that section contains: "Except as provided in this subsection, the *provisions and limitations of this section shall be exclusive and shall apply to all claims* against a . . . governmental [entity] . . ." §893.80(5) (emphasis added). Section 893.80 provides only for monetary remedies, limited in the amounts stated in subsection (3). The plain text controls: the statutory "provisions" afford the "exclusive" remedies, unless "rights or remedies . . . [are] provided for by any other statute." *See Bank Mut. v. S.J. Boyer Constr., Inc.*, 2010 WI 74, ¶24 326 Wis. 2d 521, 785 N.W.2d 462; *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

Section 893.80's structure and its legislative history support the text's direction that only the

remedies it provides are available in tort claims against governmental entities. *See Kalal,* 2004 WI 58, ¶¶48–51. Originally, what is now subsection (5) was subsection (4) of §331.43 (§893.80's predecessor), added by amendment to be the last subsection of the statute; the statute thus concluded with the direction that the foregoing "provisions and limitation of this section shall be exclusive and shall apply to all actions in tort against a . . . political corporation . . . ." Laws of 1963, ch. 198.

Owners' reliance on §893.80(3)'s prohibition on punitive damages to argue that legislative silence on other remedies should be equated with authorization to grant those remedies (Owners'-Opening-Br.-33) is misplaced. The legislature's authorization of tort damages (up to $50,000) in "any action under" §893.80 necessitated a separate limitation excluding *all* punitive damages. Nothing about either the provision of damages up to $50,000 or the exclusion of punitive damages speaks to the legislature's failure to provide for injunctive relief.

Owners' opening brief also refers to the fact that an early version of §331.43(4) made the statute's "rights and remedies" exclusive. Laws of

1963, ch. 198; A-Ap.-572, 575. Owners conclude from this that §893.80(5)'s "exclusive" "provisions and limitations" language serves only to qualify otherwise available common-law remedies. This reading, however, is belied by the statute's text and structure: "Provisions and limitations," the phrase that the legislature ultimately used, is necessarily broader in scope than the "rights and remedies" phrase it replaced. The statute *provides* a right to recover damages against the many governmental entities and persons it identifies. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 940 (10th ed. 1996) (defining "provision" as "1 a.: the act or process of providing" and defining "providing" as "2 a: to supply or make available"). The statute imposes "limitations" on that right in the form of various procedural and substantive constraints that apply in the absence of other overriding statutes. Owners' construction would read the exclusive "provisions" language completely out of the statute in favor of "limitations" on common-law remedies.[9]

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[9] Owners also argue that subsection (5) applies only to

The statute was intended to define the metes and bounds of actions against governmental entities in order to safeguard the pubic fisc. As this Court has explained, "[t]he legislature's goal after *Holytz* was to delineate the liability to which governmental units would be exposed as a result of *Holytz*, to reduce the financial strain, and to enable the governmental units to plan for the risk of such liability." *Sambs*, 97 Wis. 2d at 373. If plaintiffs could seek costly affirmative injunctive relief not provided for in §893.80 or in any other statute, the legislature's intent to protect the public fisc would be defeated whenever a plaintiff could suggest that the government should be ordered to provide a costly "fix." *Cf. United States v. White Mountain Apache Tribe*, 537 U.S. 465, 478 (2003)(reasoning

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damages relief based on a remark in an assistant Attorney General's memorandum commenting that a draft bill "limits the amount of damages recoverable by any person in tort commenced thereunder to $25,000." Owners'-Opening-Br.-40. The memorandum's comment does not limit the scope of subsection (5). While it is correct that the statute limits the amount of damages for which it provides, the legislature also made the statute's provisions exclusive, thereby excluding injunctive relief for which it does not provide.

that it is improper to presume legislature limited one remedy while allowing "the sky to be the limit" to other remedies for the same wrong); *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008) ("[t]he notion that Congress would limit liability to $500,000 with respect to one remedy while allowing the sky to be the limit with respect to another for the same violation strains credulity." (internal quotation marks and quoting citation omitted)).

Section 893.80(5) precludes this result. It allows that other statutes may afford injunctive relief not provided for in §893.80, but in the absence of other statutory authority the right to damages not in excess of $50,000 is the exclusive relief the legislature provided. §893.80(5) ("When rights or remedies are provided by any other statute against any . . . governmental [entity] . . . for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable."). Put differently, the legislature has exercised its constitutional authority—an authority blessed by this Court in *Holytz*—to legislate what constitutes an "adequate remedy at law" and not

make injunctions a generally available form of relief for tort claims against municipalities.[10]

Later legislative history further supports the plain reading of §893.80 as excluding injunctive relief. In 1978 the legislature eliminated a number of statutes providing a variety of procedures and remedies for claims against counties, towns, cities, school districts, and other municipalities. 1977 Assemb. Bill 375 (prefatory note):MMSDSuppApp-115. Under the revisions, all such claims would be made pursuant to §895.43, which later became what is now §893.80. *Id.*; Judicial Council Committee's Note (1979), *reprinted in* §893.80. An original draft limited the claims covered by the statute to those "when the only relief demandable

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[10] This Court has repeatedly held that even statutory claims against municipalities are subject to §893.80's provisions and limitations unless the legislature explicitly or implicitly provides otherwise. *Cf. E-Z Roll Off, LLC v. Cnty. of Oneida*, 2011 WI 71, 335 Wis. 2d 720, 800 N.W.2d 421 (claim for violation of state antitrust statute, ch. 133, which provides for injunctive relief, §133.16, subject to §893.80(1)). The reasoning in these cases logically entails subsection (5)'s directive that the statute's "provisions and limitations" define the scope of claims against governmental entities, unless the legislature has otherwise provided.

is a judgment for money," as was provided in some of the specific sections being eliminated. 1977 Assemb. Bill 375 (draft):MMSDSuppApp-132, 134–135, 137–138, 141. The purposeful deletion of that limitation from what has become §893.80(1) & (5) further demonstrates that §893.80 applies to all types of claims—not just ones traditionally sounding in law—but provides for a limited damages remedy.

That §893.80 does not provide injunctive relief to tort claimants is not surprising. Tort claimants typically seek damages to compensate for harm caused by past conduct, rather than seeking to enjoin on-going conduct. *See, e.g., Holytz*, 17 Wis. 2d at 28–29 (child injured by city's negligence in failing properly to secure steel trap door near bubbler at "tot lot"). Nuisance claims may be the sole exception. In the case of nuisances, the legislature has provided for injunctive relief in those instances where the legislature deemed it warranted. Section 30.294, for example, authorizes injunctive relief for unreasonable interference with the public's use of navigable waterways. *See Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998). And §823.01 allows generally for injunctive

relief against *public* nuisances. *See Lange v. Town of Norway*, 77 Wis. 2d 313, 253 N.W.2d 240 (1977). Section 823.01, does not aid Owners, of course, because their claim is for a private, not public, nuisance. *MMSD*, 2005 WI 8, ¶29 (public nuisance requires injury to a public right). No statute authorizes injunctive relief to remedy a private nuisance, and §893.80's motivating purposes "apply just as earnestly to an equitable action seeking injunctive relief against the agency or the official as they do to one for the recovery of money." *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 352, 558 N.W.2d 653 (Ct. App. 1996). Indeed, where, as here, governmental functions are at issue, the legislature has sensibly limited the extent to which those functions can be put at risk of being directed by a circuit court, which, unlike government agencies, have no expertise in regulating those functions and have not been delegated that task by the legislature.

2. No constitutional principle mandates equitable relief against governmental entities.

Owners' argument that the court of appeals' application of §893.80(5)'s exclusive "provisions and limitations" language "runs afoul of fundamental

separation of powers principles" (Owners'-Opening-Br.-41) fails for the same reason as their statutory argument. This Court has long recognized that the legislature is free to limit the availability of equitable relief. *See In re E.C.*, 130 Wis. 2d 376, 390–91, 387 N.W.2d 72 (1986).

Owners acknowledge this point. They argue that §893.80(5) does not restrict equitable relief because "nothing in §893.80 mentions the equitable powers of the courts." Owners'-Opening-Br.-46. This should remind one of Sherlock Holmes's "curious incident of the dog in the night-time."[11] Section 893.80(5) limits claims against governmental entities to those remedies §893.80 provides. That it does *not* mention injunctive relief among the exclusive provisions, like the dog not barking, provides an inescapable inference that the legislature did not provide for injunctive relief in §893.80—the only vehicle available to Owners for suing the District.

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[11] SIR ARTHUR CONAN DOYLE, SILVER BLAZE, *in* THE COMPLETE SHERLOCK HOLMES 347 (Christopher Morley, ed., Random House 1930).

No constitutional command requires equitable relief against governmental entities. "[J]udicial abrogation of common law immunity did not bind the legislature." *Sambs*, 97 Wis. 2d at 512. Again, "[t]he legislature's goal after *Holytz* was to delineate the liability to which governmental units would be exposed as a result of *Holytz*, to reduce the financial strain, and enable the governmental units to plan for the risk of such liability." *Id.* The legislature was free to provide exclusive remedies and exclude injunctive relief. *See Bentley v. Davidson*, 74 Wis. 420, 43 N.W. 139, 140–41 (1889) (the legislature "may prescribe a purely equitable or a purely legal procedure"); *see also Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 51, 357 N.W.2d 548 (1984) ("Sec. 893.80, when initially enacted by the legislature, applied only to tort claims, but, by ch. 285, Laws of 1977, the procedures were made generally applicable to any claims against the listed governments.").

B. Injunctive relief is barred by §893.80(4).

Section 893.80(4) bars any "suit"—at law or in equity—to challenge discretionary governmental acts. *See MMSD*, 2005 WI 8, ¶60 (§893.80(4) allows no suit to remedy discretionary acts

involving the "adoption, design, [or] implementation" of a public works); *see also* MMSD-Opening-Br.-34–62. No suit to redesign or reconstruct the tunnel can lie. *See Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, 235 Wis. 2d 409, 611 N.W.2d 693 (§893.80(4) applies to injunctive relief); *Johnson*, 207 Wis. 2d at 352 (same).

Owners' request for an injunction to reconstruct the tunnel is necessarily one that involves immune acts of design, construction, and implementation of a public work. In affording that relief, Judge DiMotto, through an act of judicial fiat, overrode the considered decisions of the DNR about lining the tunnel—decisions made after reviewing data collected during the mining process. MMSD-Opening-Br.-47–49. Those are exactly the types of discretionary governmental decisions that §893.80(4) immunizes. *MMSD*, 2005 WI 8, ¶60.

C. Injunctive relief is barred by §893.80(1).

Even when injunctive relief against a governmental entity is authorized by statute, §893.80(1)(b) requires that the claimant serve a statement of relief that gives notice of it. *See Figgs*, 121 Wis. 2d at 52. This limitation bars the tunnel-

lining injunction, since no one served a statement of relief sought mentioning an injunction. The only statement of relief sought, the one served by non-owners Saks and WISPARK, itemized damages based on repairs done in 1997, 2000, and expected future repairs as the sole relief requested. R.37-ex.B:MMSDApp-452–454.

Judge DiMotto ruled erroneously that Owners had "substantially complied" with §893.80(1). R.399-12–14:A-Ap.-531–33. She reasoned that the Saks-WISPARK statement of relief sought substantially provided notice of seeking injunctive relief. *Id.* She thought the statement's omission of an injunction irrelevant, reasoning that injunctive relief could be awarded because the statement identified a claim for $10.8 million of *damages*.[12] R.399-14:A-Ap.-533.

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[12] Owners make the assertion in their opening brief that "Bostco had initially filed [*sic*, served] a Notice of Claim and Itemization of Relief Sought." That is wrong. As shown by the document they cite, R.46, Saks and WISPARK, not Bostco, served this document. *See also* R.37-ex.B:MMSDApp-452–454(same document); R.292:A-Ap.-310–312(same).

A statement identifying damages as the relief sought by a claimant does not "substantially" give notice that the claimant seeks injunctive relief requiring reconstruction of a public work. It does not serve §893.80(1)'s purpose: Proper notice requires the claimant to identify the claims and relief sought so that the governmental entity can plan for the issues raised by the claims and type of relief requested. *E-Z Roll Off*, 2011 WI 71, ¶74. For purposes of planning and budgeting for litigation, damages and injunctive relief are not interchangeable. *See Figgs*, 121 Wis. 2d at 52. Thus, a notice of seeking damages cannot, as a matter of law, be treated as a notice of seeking injunctive relief.

D. Owners forfeited their request for injunctive relief by waiting until after the post-verdict deadline to request it.

Section 805.16 sets rigid deadlines for seeking relief different from that awarded in a jury verdict. Subsection (1) requires that "[m]otions after verdict shall be filed and served within 20 days after the verdict is rendered." §805.16(1). All such motions are denied unless the court signs an order resolving them "within 90 days after the verdict is rendered."

§805.16(3). These deadlines cannot be extended once the prescribed time period has passed. *See Fakler v. Nathan*, 214 Wis. 2d 458, 464, 571 N.W.2d 465 (Ct. App. 1997); *Ahrens-Cadillac Oldsmobile, Inc. v. Belongia*, 151 Wis. 2d 763, 766-67, 445 N.W.2d 744 (Ct. App. 1989).

Owners' motion for injunctive relief—a motion that sought additional relief based on the jury's liability findings—is unquestionably a post-verdict motion: It seeks relief different from that provided in the verdict based on the jury's findings. *See Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 230, 533 N.W.2d 746 (1995)(§805.16 governs "trial-related motions," rather than motions "separate from the underlying action," such as for attorneys' fees).

Owners' request for post-verdict injunctive relief was neither filed "within 20 days after the verdict [was] rendered," as required by §805.16(1), nor decided "within 90 days after the verdict [was] rendered," as required by §805.16(3). Injunctive relief was barred.

Owners have argued that they should be excused from these deadlines because (1) their motion did not "seek to change a verdict answer or

obtain a new trial" (R.291-3:A-Ap.285), and (2) their request did not "ripen" until Judge Kremers ruled post-verdict that §893.80(3) limited damages to $50,000 per plaintiff (*id.*). The first point is wrong: Section 805.16 does not cabin post-verdict motions to those that seek to alter the verdict or set it aside. It applies to all "trial-related motions," a category into which Owners' request for injunctive relief unquestionably falls, since it implicates the nature of the judgment. *See Gorton*, 194 Wis. 2d at 230. The rule's purpose is to ensure that a judgment finally resolving all claims will be entered within 90 days of a jury verdict. Owners' interpretation, which would allow, as here, proceedings to stretch on for many months after the jury verdict was rendered, is directly contrary to that purpose.

Owners' second point is specious. The District had long maintained its §893.80(3) defense, and Owners had consistently argued (incorrectly) that their nuisance claim avoided §893.80(3)'s $50,000 damages limit. Once the jury returned a verdict that failed to find the elements of a nuisance, Owners were on notice that, even under their own understanding of the law, any damages

recovery would be limited to $50,000 per plaintiff. Judge Kremers had told Owners before trial that he was reserving the issue of whether the §893.80(3) limitation would apply "until after verdict." R.376-76:MMSDApp-249. He also told Owners before trial that he would not award injunctive relief. R.376-21–24:MMSDApp-194–97. Under these circumstances, nothing barred Owners from requesting injunctive relief as an alternative remedy should the court apply §893.80(3)'s damages limitation. Owners' decision not to make a conditional request for injunctive relief can only be explained as a strategic decision to pursue damages exclusively. Regardless of the reason for not seeking timely injunctive relief, the failure to do so in the manner required by §805.16 bars the award.

E. The merger-and-bar doctrine and the vesting of appellate jurisdiction precluded injunctive relief.

1. Owners' claims merged into Judge Kremers' final order, foreclosing a later award of injunctive relief.

a. Judge Kremers' October 25, 2006 "Order for Judgment" was a final order. An order is final if it "explicitly dismiss[es] or adjudg[es] . . . an entire

matter in litigation as to one or more parties." *Wambolt v. W. Bend Mut. Ins. Co.*, 2007 WI 35, ¶34, 299 Wis. 2d 723, 728 N.W.2d 670. The October 25 order adjudicated both of Owners' remaining claims, awarding $100,000, interest, costs, and fees on their negligence claim and dismissing their nuisance claim; it provided:

> IT IS FURTHER ORDERED that ***judgment is entered*** in favor of Plaintiffs, BOSTCO LLC and Parisian, Inc., and against Defendant, Milwaukee Metropolitan Sewerage District, in the amount of $100,000, together with interest, plus taxable costs, fees, and disbursements of this action.
>
> IT IS FURTHER ORDERED that Plaintiffs' nuisance claim is hereby dismissed.

R.305-3:MMSDApp-060 (emphasis added).

Whether an order is final is a question of law that appellate courts must decide by examining whether the order "contains explicit language dismissing or adjudging the entire matter in litigation as to one or more parties." *Wambolt*, 299 Wis. 2d 723, ¶34 n.11. "A court disposes of the entire matter in litigation," this Court has explained, "in one of two ways: (1) by explicitly *dismissing* the entire matter in litigation as to one

or more parties or (2) by explicitly *adjudging* the entire matter in litigation as to one or more parties." *Tyler v. RiverBank*, 2007 WI 33, ¶17, 299 Wis. 2d 751, 728 N.W.2d 686 (emphasis added). Whether an order so disposes of the entire matter, *Tyler* instructs, depends on whether it includes "language related to the disposal of [the plaintiff's] *claims*." *Id.* ¶19 (emphasis added). Thus, where, as here, an order contains language that "dismisses or adjudges" all claims, it is final and subject to appeal under §808.03. *Id.* ¶3; *see also Admiral Ins. Co. v. Paper Converting Mach. Co.*, 2012 WI 30, ¶27, 339 Wis. 2d 291, -- N.W.2d -- ("To constitute a final order or judgment, the document must explicitly dismiss or adjudge the entire matter in litigation as to one or more parties."). Because the order enters "judgment" on each of Owners' remaining claims, it unambiguously disposes of the entire matter in litigation. *Compare id.* ¶¶32–35 (existence of unadjudicated counterclaim made dismissal order ambiguous for finality purposes).

"[T]he test of finality is not what later happened in the case but rather, whether the trial court contemplated the document to be a final judgment or order at the time it was entered. *This*

must be established by looking at the document itself, not to subsequent events." *Fredrick v. City of Janesville*, 92 Wis. 2d 685, 688, 285 N.W.2d 655 (1979) (emphasis added). The finality of the October 25, 2006, order is clear on its face. Like the final order in *Fredrick*, it adjudged the only remaining claims and awarded costs. The October 25 order "did not contemplate any further order or judgment and hence it was final and appealable." *Id.* at 689.

b. Judge Kremers' final order entering judgment foreclosed additional relief. Under the common-law doctrine of merger, when a valid, final judgment in favor of the plaintiff is entered, "[t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof." *Prod. Credit Ass'n of Madison v. Laufenberg*, 143 Wis. 2d 200, 205, 420 N.W.2d 778 (Ct. App. 1988)(internal quotation and quoting citation omitted). Once judgment is entered, the claims merge into the judgment, and any action must be maintained on the judgment. *Id.*; *see also Waukesha Concrete Prods. Co. v. Capitol Indem. Corp.*, 127 Wis. 2d 332, 343–44, 379 N.W.2d 333 (Ct. App. 1985).

Judge DiMotto thus erred in granting injunctive relief after the circuit court had entered judgment. The judgment dismissed the nuisance claim, which was the only remaining claim for which Owners pleaded injunctive relief. Owners did not (and could not) seek relief from the judgment under §806.07, which is the only proper procedural mechanism, other than appeal, for modification of a judgment. *See also* RESTATEMENT (SECOND) OF JUDGMENTS §18 (1982).[13]

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[13] On November 7, 2006, Judge DiMotto entered an order purporting to "modif[y]" the October 25 order "insofar as it may be interpreted to be a final order" and directed the clerk not to enter a separate "judgment" in addition to the October 25 order. As *Wambolt* and *Tyler* make clear, this order does not, and could not, deprive the October 25 order of finality. *See also Harder v. Pfitzinger*, 2004 WI 102, 274 Wis. 2d 324, ¶3, 682 N.W.2d 398. The November 7 order does not purport to vacate the October 25 order, and, at all events, it could not have done so, since Judge DiMotto had no basis for vacating that order and thereby extending the time to appeal. *See Eau Claire County v. Employers Ins. of Wausau*, 146 Wis. 2d 101, 111, 430 N.W.2d 579 (Ct. App. 1988); *cf. Edland v. Wis. Physicians Serv. Ins. Corp.*, 210 Wis. 2d 638, 647–48, 566 N.W.2d 519 (1997) ("circuit court has no authority to vacate and reenter" a final order absent a proper §806.07 motion).

2. Owners' appeal deprived the circuit court of jurisdiction.

Owners' January 19, 2007, appeal from the October 25, 2006, final order deprived the circuit court of jurisdiction to award injunctive relief. Even if the October 25 judgment could be understood as being ambiguous regarding finality (which it is not given its clear adjudication of the remaining claims), Owners' appeal would remove that ambiguity. Ambiguity's role in analyzing whether an order is final is to preserve the right to appeal. *Admiral Ins.*, 2012 WI 30, ¶27. Owners filed a timely appeal from the October 25, 2006, judgment. If there were ambiguity in the order, it should be construed as final to preserve Owners' appeal, not as ambiguous to preserve the circuit court's ability to continue the proceedings far past §805.16(3)'s 90-day deadline for entering judgment on a jury verdict. *Id.*

Under the well-established common-law rule incorporated into §808.075, the circuit court is authorized to act after the filing of a notice of appeal "until the record has been transmitted to the court of appeals." §808.075(3). The "record" to which that section refers is "a copy of the trial court record maintained pursuant to §59.40(2)(b) or (c)."

§809.11(2). Section 59.40(2)(b) (sub. (c) applies only to criminal cases) describes the docket sheet, which was filed with the court of appeals no later than January 25, 2007—five days before Judge DiMotto verbally ordered injunctive relief and fourteen days before the order was first reduced to writing. R.399:A-Ap.-520–559; R.336:A-Ap.-318–320. Consequently, the circuit court's later injunction orders are ineffective. *See Hengel v. Hengel*, 120 Wis. 2d 522, 355 N.W.2d 846 (Ct. App. 1984).

F. The circuit court could not award injunctive relief without holding a hearing and considering all relevant factors.

Judge DiMotto informed the parties on October 11, 2006, that in considering Owners' motion for injunctive relief, she was first going to decide whether injunctive relief was authorized and would then allow the parties to be heard on the issue of whether that relief was appropriate. R.395-5–6:MMSDSuppApp-012–013. Rather than follow this course, she announced on January 30, 2007 that she was awarding the requested injunction to line the tunnel because §893.80(3) rendered damages inadequate, and, based on her review of the trial transcript, Owners were entitled

to the form of abatement—lining the tunnel—for which they argued at trial in connection with their (at this point dismissed) nuisance claim. R.399-14,29:A-Ap.-533, 548. While circuit courts generally have broad discretion to grant an injunction, the circuit court's exercise of that discretion here was erroneous.

1. A successor judge cannot order injunctive relief based on evidence admitted in a trial presided over by her predecessor.

Judge DiMotto, as successor judge, could not properly award relief based on evidence presented at the trial before Judge Kremers. A judge who did not hear trial evidence cannot render a valid judgment based on it, even when a record of the trial is written down and preserved. *Cram v. Bach*, 1 Wis. 2d 378, 383, 83 N.W.2d 877 (1957); *see also In re Popp's Estate,* 82 Wis. 2d 755, 770–71, 264 N.W.2d 565 (1978); *Ladwig v. Ladwig*, 2010 WI App 78, ¶¶11, 325 Wis. 2d 497, 785 N.W.2d 664.

Cram prohibits a successor-judge from "giv[ing] approval to the jury's findings or making findings of h[er] own upon the evidence which [s]he read in the transcript." *Id.* Judge DiMotto did exactly that in awarding injunctive relief. She

concluded, for example, "Plaintiffs requested that the tunnel be lined for one half mile on either side of the Boston Store building because this is the only specific means of restoring the groundwater to levels that will prevent the otherwise likely future foundation damages *established in the record*." R.399-28:A-Ap.-547 (emphasis added); *see also* R.399-9–10:A-Ap.-528–29; R.291-10–12:A-Ap-292–94; R.399-15:A-Ap.-15.

Judge DiMotto, like the successor-judge in *Cram*, "was without power to adopt the jury's verdict." 1 Wis. 2d at 380. Parties are entitled to have a judge who presided over trial and heard testimony decide whether the evidence and balancing of interests justifies an injunction. Judge DiMotto's award of relief based on the jury's verdict and her review of the cold record "constituted an erroneous exercise of jurisdiction." *Id.* at 383.

2. *Hoffmann* precludes injunctive relief in the absence of a hearing and equitable findings.

Judge DiMotto's order requiring the District to line the tunnel is irreconcilable with *Hoffmann v. Wisconsin Electric Power Co.*, 262 Wis. 2d 264. In *Hoffmann*, a jury concluded that the defendant power company was liable in negligence and

nuisance for stray voltage that harmed plaintiffs' dairy herd. The circuit court ordered the defendant to install a specific type of electrical distribution system because it "believe[d] . . . plaintiffs [were] entitled to [the] relief . . . that they request[ed because] . . . they were the victors." *Id.* ¶26. Like Judge DiMotto, the *Hoffmann* circuit court "fail[ed] to take into account relevant factors in ordering a method of abatement." *Id.* ¶28.

This Court reversed. It held that ordering a specific form of electric distribution system without taking evidence and making findings about the merits of that system constituted an erroneous exercise of discretion. *Id.* ¶27. "The ordering of an electrical system," the Court explained, "must be based on the merits of the system *with a record to support that* order." *Id.* (emphasis added). Although "injunctive relief is addressed to the sound discretion of the trial court," *Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979), for a trial court to award that relief, "competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction," *id.*

The circuit court's injunction here replicates the fatal error in *Hoffmann*. Judge DiMotto resolved without a hearing questions about whether this tunnel section can safely be lined without risking sewer overflows and whether undertaking this work complies with DNR's requirements governing the Deep Tunnel's operation. She neither heard evidence nor made findings demonstrating that on balance equity favors lining the tunnel. As a result, the injunction cannot stand.

G. The circuit court lacks equitable authority to interfere with federal and state regulatory decisions.

Decisions about lining the tunnel were made by the DNR exercising its state-law authority and the state's delegated authority under the federal Clean Water Act. 33 U.S.C. §§1311, 1342(a), (b). The DNR approved each section of the tunnel constructed with a partial lining. R.351-ex.206:MMSDApp-687. The District operates the partially lined tunnel under a DNR permit, and only the DNR can modify the permit or authorize changes to the District's facilities. *See* §281.41(1)(c). DNR can only do so in compliance

with the Clean Water Act. *See City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 316–19 (1981).

DNR affidavits informed the circuit court of this fact: "WDNR must approve or disapprove any new plan, design, or construction proposed for the ISS [Deep Tunnel]." R.294-2:MMSDSuppApp-173. As those affidavits also explained, in order to accomplish the reconstruction ordered by the circuit court, "WDNR would have to issue a new plan approval for the lining," and it "has no present intention of approving the lining," R.294-2:MMSDSuppApp-173.

For this additional reason, injunctive relief to reconfigure the tunnel is unavailable. *See Krueger*, 112 Wis. 2d at 102 ("preemption of injunctive relief in aviation noise nuisance actions extends to all types of injunction"). As *Krueger* illustrates, courts, including this one, "traditionally have been reluctant to enjoin as a public nuisance activities which have been considered and specifically authorized by the government." *N.C. ex rel. Cooper v. TVA*, 615 F.3d 291, 309 (4th Cir. 2010) (quoting *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981)).

At a minimum, a circuit court cannot use its equitable power to abate a nuisance in a manner that upsets decisions of government agencies enforcing a complex environmental regulatory scheme. As the Seventh Circuit recently explained, "Environmental problems require the balancing of many complicated interests, and agencies are better suited to weigh competing proposals and select among solutions." *Mich. v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 797 (7th Cir. 2011). An "expert agency," the U.S. Supreme Court has cautioned, "is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions." *Am. Elec. Power Co. v. Conn.*, 131 S. Ct. 2527, 2539 (2011).

The injunction the circuit court entered has the prohibited effect of upsetting the DNR's decisions. The balancing of complex interests involved in the decision to construct the tunnel with a partial lining was the subject of both administrative and judicial proceedings. R.124-6–7:MMSDApp-0460–61. Under the terms of a court-entered stipulation, the District was required to submit lining reports to DNR providing detailed technical information obtained during mining,

which included detailed information about the effectiveness of grouting and groundwater inflow rates, and stating the District's position on what portions of the tunnel should be lined. *Id.* The District was also required to report on how effectively groundwater inflow was controlled in the sections that were lined for structural reasons. R.124-7:MMSD-App.0461. DNR was obliged to review the reports and issue its position in writing regarding what tunnel portions, if any, should be lined, together with DNR's reasons for its decision. *Id.* The governing federal agency, the Environmental Protection Agency, although not bound by the stipulation's terms, agreed to proceed under those terms that pertained to lining the tunnel. *Id.*

Judge DiMotto refused to consider any of this. R.400-47–48:MMSDSuppApp-077–078. (Although the District had raised all of these issues in its summary judgment briefing, she wrongfully concluded based on her review of the record that the DNR's involvement should have been litigated earlier. *Id.*) Consequently, even if the circuit court otherwise had authority to order the District to reconfigure the tunnel (which it did not), it was

error to issue such an order without holding a hearing and considering, among other things, whether the requested injunction would impermissibly conflict with preemptive decisions of the DNR—the agency that approved the tunnel's partially lined construction and is authorized by federal and state law to regulate it.

III. The Circuit Court Correctly Granted Summary Judgment on Owners' Inverse Condemnation Claims.[14]

A. Owners forfeited any claim for taking groundwater by not presenting it to the trial court.

Owners argue that they are entitled to compensation because the District's "operation and maintenance of the Deep Tunnel *physically took the groundwater* beneath Bostco's building without providing just compensation." Owners'-Opening-

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[14] Owners characterize their taking claim as one for "inverse condemnation," without distinguishing between inverse condemnation pursuant to §32.10 (which, as explained below, requires government occupation or a legal restriction on the property's use) and takings under Article I, §13, of the Wisconsin Constitution. Except where context otherwise requires, this brief similarly uses "inverse condemnation" to refer to both types of claims.

Br.-82. That is an entirely different legal theory of inverse condemnation than the one pleaded and presented to the trial court. Consequently, that theory has been forfeited. *See State v. Rogers*, 196 Wis. 2d 817, 826–27, 539 N.W.2d 897 (Ct. App. 1995); *State v. Holt*, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985).

Owners' amended complaint alleged that the District "physically took portions of the timber pilings which rendered them unusable and damaged the Boston Store Building and Parking Garage." R.51-33. In opposing the District's motion for summary judgment Owners stated, "[The District's] operation and maintenance of the deep tunnel physically took portions of the timber pilings which rendered them unusable and damaged the Boston Store building." R.134-69:A-Ap.-226. Their counsel similarly characterized their claim at the summary judgment hearing:

> THE COURT: But isn't it a question whether they have taken anything from you, as opposed to just damaged your property; inverse condemnation?
>
> MR. CAMELI: Absolutely. It's taken everything. ***They have taken the piles.*** That simple. They have physically, you said they did not physically remove them. Their actions

> have physically removed the piles in holding up the structure of the building.

R.374-28:MMSDApp-0308 (emphasis added). The circuit court then granted summary judgment dismissing the claim. R.374-39–40:MMSDApp-0319–20; R.157-2:MMSDApp-0279. At no point did Owners argue an inverse condemnation claim premised on a taking of Owners' groundwater.[15]

Owners have now waived the only takings claim they made in the circuit court. Their principal brief states, "Bostco is no longer pursuing its inverse condemnation claim as a taking of wood piles." *See* Owners'-Opening-Br.-82 n.23. That theory—the sole one presented to the circuit court—is indistinguishable from the pile-damage

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[15] Owners try to avoid this insurmountable hurdle by insisting that "the entire complaint was replete with factual allegations about the taking of groundwater," but in support of this proposition they cite only generally to pages 20–29 and 33–34 of the amended complaint. Owners'-Opening-Br.-82 n.23. None of these pages contains even a single allegation of a taking of Owners' groundwater. *See* R.51-20–29,33–34. Instead, these pages simply lay out Owners' general allegations underlying all of their legal theories regarding the alleged damage to the Boston Store building caused by the tunnel.

claim that *E-L Enterprises, Inc. v. Milwaukee Metropolitan Sewerage District* held not to be a taking. 2010 WI 58, ¶24–29.

Owners' attempt to switch horses comes too late. "A party seeking reversal may not advance arguments on appeal which were not presented to the trial court." *Rogers*, 196 Wis. 2d at 826. This rule of judicial efficiency, which avoids the need for serial hearings while parties test new theories, plainly applies and is a sufficient ground to affirm the circuit court's dismissal of Owners' inverse condemnation claim.

B. *E-L* defeats Owners' new inverse condemnation theories.

1. Owners' only claim is for consequential damage, which is not compensable as a taking.

E-L holds that if the government does "not physically occupy the property for which [the plaintiff] seeks compensation, and no government-imposed restriction deprived [the plaintiff] of all, or substantially all, of the beneficial use of its property . . . what remains are mere consequential damages to property resulting from governmental action, which are not compensable under constitutional takings law." 2010 WI 85, ¶5.

"[D]amage, without appropriation to the public purpose.' . . . is not recoverable in a takings claim." *Id.* ¶37. And "the public obtain[s] no benefit from [a] damaged building or wood piles." *Id.* ¶33.

These principles foreclose Owners' effort to recover the cost of repairing wood piles allegedly damaged by migration of groundwater—the exact harm Owners alleged here—as "inverse condemnation" or a "taking." *See* R.374-39–40:MMSDApp-0319–20. Most tellingly, Owners' March 11, 2009, supplemental brief to the court of appeals insisted that "the facts in the *E-L Enterprises* case and in the present case are nearly identical." Owners-Ct.-App.-Supp.-Br.-5.

Owners now incorrectly suggest that their situation is materially different than E-L's. They suggest the problem for the plaintiff in *E-L* was really just a problem of proof at trial, and that therefore Owners are entitled to a trial to determine the value of groundwater they now say was theirs and was taken. But E-L and Owners face the same critical question: Do the allegations amount to a takings claim or a tort claim for consequential damages? Because E-L's argument was focused on damage to its building's wood piles,

rather than the loss of intrinsically valuable groundwater, the Court rejected the groundwater-based takings claim without deciding whether uncaptured groundwater can be "taken" as a result of a neighbor's excessive use. *E-L*, 2010 WI 85, ¶24.

The same result is compelled here. Owners themselves concede that their inverse condemnation claim has been based on damages to wood piles and the cost of repairing the Boston Store building's foundation. *See* Owners'-Opening-Br.-82 n.23. Notably, Owners do not propose to prove at trial the value of the groundwater taken—because they cannot. Instead, Owners suggest that they will submit evidence of the diminution in the fair market value of their property. Owners'-Opening-Br.-97. This too reveals that their claim's true nature is for consequential damage to their building. There is no plausible claim that the property's value was even partially a result of a commercial use of groundwater. Any opinion on the building's "diminution in value" must be based on a need to repair the piles. Owners thus try to

recast the very consequential damages theory *E-L* rejects as a basis for establishing takings liability.[16]

In all events, Owners' attempt to invoke a §32.09 damages calculation is misplaced. *E-L* holds that §32.10, the inverse condemnation statute, applies only when the government either physically occupies the property or imposes a legal restriction on the property that deprives the owner of all, or substantially all, of the property's beneficial use. 2010 WI 58, ¶37. Owners can claim neither physical occupation nor a legal restriction depriving them of all beneficial use.

2. The District did not physically take Owners' property.

Owners contend that the District physically took "their" groundwater. Owners'-Opening-Br.-85. (They must argue a physical taking because they cannot claim the District deprived them of all, or substantially all, of the beneficial use of their property.) This goes nowhere, since they could not

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[16] The Saks-WISPARK itemization of damages on which Owners elsewhere rely is also telling. It lists the costs of 27 separate items of foundation-related repairs as the damages sustained. R.37-ex.B:MMSDApp-452–453.

own exclusively the uncaptured groundwater migrating under their land. Groundwater is not the "property of the person who owns the land under which it flows." *E-L*, 2010 WI 58, ¶29, n.20.

The only relevant factual distinction between this case and *E-L* shows that Owners could not claim a taking of groundwater, even if they could assert individual ownership of it (which they cannot). E-L based its claim on the District's contractor having pumped water out of a surface-dug trench immediately adjacent to E-L's building. 2010 WI 58, ¶23. Owners base their claim on the migration of groundwater from around the Boston Store building's foundation through hundreds of feet of different geological strata—soil, clay, and rock—located in property owned by Owners' neighbor, through which the District has an easement, and only then into the tunnel. R.387:MMSDApp-379; R.351-ex.2988-122; R.351-ex. 2988-53. Groundwater resides at each of these different strata, slowly advancing at a rate depending in part on the density of the compositional materials and replaced by groundwater entering the higher levels. *Id.* Under these indisputable circumstances, the District

cannot be found to have dispossessed Owners of "*their*" groundwater.

Groundwater is property of the state. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶23, 304 Wis. 2d 750, 738 N.W.2d 578; *Robert E. Lee & Assocs. v. Peters*, 206 Wis. 2d 509, 522, 557 N.W.2d 457 (Ct. App. 1996); *see also* §281.01 (defining "waters of the state" to include groundwater). Groundwater's constant movement and flux frees it from being the "property" of any landowner. As one court aptly recognized, "[i]t would be impossible to accord to each overlying landowner the right to the underlying, percolating water, as withdrawal by one owner necessarily interferes with the enjoyment of the like privilege of other owners." *Cherry v. Steiner*, 543 F. Supp. 1270, 1278 (D. Ariz. 1982).

No Wisconsin authority supports an ownership claim in groundwater that has migrated to another person's land. Indeed, Wisconsin law is to the contrary—bestowing only a right to use groundwater on one's own land. *See State v. Michels Pipeline*, 63 Wis. 2d 278, 301–03, 217 N.W.2d 339 (1974); *E-L*, 2010 WI 85, ¶29, n.20. *Michels*, contrary to Owners' reading, does not

recognize a compensable property right in groundwater; it recognizes a privilege to make reasonable use of groundwater. 63 Wis. 2d at 301–03. Wisconsin law resolves competing groundwater uses by employing nuisance law, rather than shared ownership rights. *See Michels*, 63 Wis. 2d at 302–03a. Like wild foxes, landowners can take ownership of groundwater only by capturing it, which they have a qualified privilege to do. *See Michels*, 63 Wis. 2d at 301–03; *see also* RESTATEMENT (SECOND) OF TORTS §858 & cmt. b.; *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

Landowners' right to use groundwater on their land is a fleeting right that exists only until the water flows past:

> The water and the right to use it belongs to the overlying owner in a limited sense only; when the water is reduced to his possession, it ceases to be percolating water and becomes his personal property, but when the water flows from his land to the land of another, he loses all right to it the instant it enters the land of his neighbor.

78 AM. JUR. 2D *Waters* §213 (2008) (footnotes omitted, emphasis added); *see also Ball v. United States*, 1 Cl. Ct. 180, 183 (1982) (reasonable use

privilege as to groundwater not a property right). *Michels* expressly rejected a so-called "correlative rights" rule under which all landowners are treated as having coequal rights in groundwater.[17] *Id.* at 299–302. *Michels* instead adopted the then-proposed RESTATEMENT (SECOND) OF TORTS rule, which imposes on each landowner a tort duty not to withdraw groundwater that unreasonably damages other property.[18] *Id.* at 302–03.

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[17] The correlative rights rule, which imposes liability when a "withdrawal of ground water exceeds the proprietor's share of the annual supply or total store of groundwater," governs in Ohio and Nebraska. Wisconsin, in contrast, does not afford landowners a vested right to ownership of a particular amount of groundwater. For this reason alone, the non-Wisconsin cases cited by Owners are inapposite. *See McNamara v. City of Rittman*, 838 N.E.2d 640, 643–44 (Ohio 2005); *Sorensen v. Lower Niobrara Natural Res. Dist.*, 376 N.W.2d 539 (Neb. 1985). In *McNamara*, moreover, the plaintiffs sought compensation for the removal of groundwater captured in domestic wells for private consumption. 838 N.E.2d at 642. Owners do not seek compensation for lost groundwater that they had captured or consumed. *Sorenson* is not on point because Nebraska's constitution, unlike Wisconsin's, expressly *requires* the government to compensate not merely for takings, but also for damage to property. 376 N.W.2d at 547-48.

[18] The rule *Michels* adopted applied riparian rights principles only to underground streams. 63 Wis. 2d at 303. No underground stream is at issue here.

Under *Michels*, a landowner might be liable in nuisance for misusing her property—e.g., by withdrawing excessive amounts of groundwater—if that use interferes with her neighbors' use of their property. *See id.* at 303–03a; *see also* RESTATEMENT (SECOND) OF TORTS, §858 cmt. c. But the excessive use cannot be conceived of as appropriating or invading the neighbors' property; the use is necessarily occurring on the extracting landowner's property, and the neighbors have no ownership rights to the groundwater under the extracting landowner's property. *Id.*

Owners' recast takings claim cannot be reconciled with *Michels*' reasonable use paradigm. The groundwater enters the tunnel from land through which the District has an easement, giving the District, among other rights, a right to reasonably use the groundwater. *See Michels*, 63 Wis. 2d at 303. The tunnel never entered Owners' land and the District never took groundwater that Owners had captured or extracted. Thus, the District cannot be said to have appropriated Owners' groundwater, even if Owners' could claim a property right rather than merely a reasonable

use privilege in groundwater residing under its building.

Owners reliance on *Huber* is misplaced. Before *Michels*, *Huber* stood for the proposition that landowners had the absolute privilege to extract groundwater from their land. *See Huber v. Merkel*, 117 Wis. 355, 94 N.W. 354 (1903), *overruled by Michels*, 63 Wis. 2d at 288–89. *Michels* qualified *Huber*'s privilege. While both decisions recognize a landowner's right to use groundwater, neither recognizes an ownership in groundwater that has flowed onto another's property, as here, nor do they recognize or support a groundwater takings claim.

In all events, *Michels*' rule, as applicable here, only imposes a duty restricting how the District uses its own land. The District's misuse of its land in violation of this duty—the most that Owners could prove—cannot, as a matter of law, be viewed properly as a *physical taking* of Owners' property. To say the District "physically took" a "property interest" or an "ability to use" is self-

defeating—akin to claiming a *physical* occupation of a circle or the number 8.[19]

This leaves only a takings claim premised on an allegation that the District's use of groundwater interfered with Owners' use of their property. Excessive groundwater use by a governmental entity that interferes with a neighboring property owner's use but does not deprive the neighbor of all beneficial use of her property is not a taking or an inverse condemnation. *E-L*, 2010 WI 85, ¶29 n.20; *see also Michels*, 63 Wis. 2d at 302–03. Moreover, because the DNR has permitted infiltration of groundwater into the tunnel (and Owners offer no proof of noncompliance with the permit's requirements (*see* MMSD-Opening-Br.-59)), the District's groundwater use could not, as a matter of law, be adjudged excessive or a taking. *See R.W. Docks & Slips v. State*, 2001 WI 73, ¶28, 244 Wis. 2d 497, 628 N.W.2d 781.

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[19] *E-L* also forecloses Owners' suggestion that the jury's negligence finding can somehow be converted into takings liability. The ultimate determination of whether there is a taking is a question of law, and questions of negligence, such as those found by the jury here, are not pertinent to a takings inquiry. *E-L*, 2010 WI 58, ¶27 n.18.

CONCLUSION

For these reasons and those given in the District's opening brief, the District is entitled to judgment dismissing Owners' claims on their merits, or, in the alternative, a ruling affirming the October 25, 2006, judgment and vacating the circuit court's injunction.

Respectfully submitted,

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STATUTORY ADDENDUM

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

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

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

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

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

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

. . .

(3) Except as provided in this subsection, the amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 181 or 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employees for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed $50,000. The amount recoverable under this subsection shall not exceed $25,000 in any such action against a volunteer fire company organized under ch. 181 or 213 or its officers, officials, agents or employees. If a volunteer fire company organized under ch. 181 or 213 is part of a combined fire department, the $25,000 limit still applies to

actions against the volunteer fire company or its officers, officials, agents or employees. No punitive damages may be allowed or recoverable in any such action under this subsection.

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

(5) Except as provided in this subsection, the provisions and limitations of this section shall be exclusive and shall apply to all claims against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employee thereof for acts done in an official capacity or the course of his or her agency or employment. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employee thereof for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable.

. . .

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) & (c) for a brief and appendix produced using proportional serif font and pursuant to this Court's May 8, 2012 order expanding the brief volume limitation in §809.19(8)(c) to 16,500 words. The length of this brief is 16,430 words.

Dated: May 14, 2012.

_____

G. Michael Halfenger

CERTIFICATE OF MAILING

I certify that this Response Brief of Milwaukee Metropolitan Sewerage District was deposited in the United States mail for delivery to the Clerk of the Supreme Court by first-class or priority mail, or other class of mail that is at least as expeditious, on May 14, 2012. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated: May 14, 2012.

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E-FILING CERTIFICATION

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

Dated: May 14, 2012.

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G. Michael Halfenger