SUPREME COURT OF WISCONSIN

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

v.

Appeal Nos. 2007AP221
2007AP1440

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

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS-PETITIONERS' REPLY BRIEF

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

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

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INTRODUCTION

The questions before the Court in this appeal ultimately turn on the issue of accountability. The sum total of MMSD's various and sundry arguments is that it should not be held accountable to those it harms–not in this case and not in any others–and that there should be no meaningful checks or balances on its otherwise unbridled ability to destroy property without meaningful consequence. And the reason MMSD contends it should not be held responsible to account to those it harms is that it is the government and therefore, should be subject to less, and not more, accountability. MMSD has long since foregone any suggestion that it did not cause millions of dollars in damage to Bostco's building. The only real question for the Court is whether it matters.

MMSD's contempt for accountability is reflected not only in the substance of its arguments but also in the manner it makes those arguments. Littered

throughout its Response Brief are misleading characterizations and in some instances outright falsehoods, which would be more remarkable were it not consistent with MMSD's conduct throughout this entire litigation. *See* R.347 pp.1-2 (order finding necessary appointment of special master to make factual investigation in light of "the remarkable breadth and depth of [MMSD]'s resistance and intransigence" and its "utter resistance to any reality it finds unacceptable and adherence to its own wishful thinking"). Although many of MMSD's misleading factual representations are specifically addressed in the context of the arguments on appeal, many others must go unaddressed due to word limitations.

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING BOSTCO'S REQUEST FOR EQUITABLE RELIEF.

A. Wis. Stat. § 893.80 Does Not Limit the Court's Equitable Power to Grant Injunctive Relief.

1. The Plain Language of Wis. Stat. § 893.80 Permits Circuit Courts to Grant Injunctive Relief.

MMSD's argument that Wis. Stat. § 893.80 forecloses injunctive relief runs afoul of this Court's established method of statutory interpretation as set out in *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. It is well-established that in construing a statute, the court is not at liberty to disregard the plain, clear words of the statute. *Id.*, ¶ 46. Contrary to MMSD's assertion, § 893.80(3) does not provide for any remedies but rather, limits one available remedy—money damages: "[T]he amount recoverable by any person for damages . . . shall not exceed $50,000." As such, the

statute's plain language does not limit any other available remedies, including injunctive relief.

MMSD's statutory construction errs in several respects. First, MMSD reads into the statute the word "remedies" in place of "amount" to support its cobbled-together interpretation that the statute provides for the remedy of $50,000 in money damages and then makes this remedy exclusive. *See MMSD Response Br.* at 58. The actual plain language of the statute does not state that its remedies shall be exclusive. Rather, it provides that "the provisions and limitations . . . shall be exclusive." § 893.80(5). This is significant in that § 893.80 is the exclusive limit on money damages and punitive damages. Nothing in the statute's plain language purports to limit other available remedies.

Second, MMSD 's interpretation conflates the terms "provisions" and "limitations." MMSD interprets the statutory phrase "the amount recoverable by any person for any damages . . . shall not exceed $50,000" as

both a "provision of damages up to $50,000" and also a limitation of money damages to $50,000. *MMSD Response Br.* at 59, 60 & n.9. Provisions provide while limitations limit; they are opposing concepts. The language in § 893.80(3) is clearly a limitation, but in order to prevail on its argument, MMSD necessarily casts it as a provision. The plain language does not support MMSD's reading. There is no language to suggest that the statute itself provides the remedy of money damages: The availability of money damages in tort actions arises from common law. Section 893.80(3) simply limits those damages to $50,000.

Finally, the legislative history cited by MMSD does nothing to bolster its interpretation. *See MMSD Response Br.* at 59 (quoting 1963 Chapter 198). Bostco does not quarrel with the fact that the $50,000 damages limitation applies to all actions in tort against a municipality.

MMSD argues that to interpret this phrase as only a limitation on money damages (as Bostco does) "would read the exclusion 'provisions' language completely out of the statute in favor of 'limitations.'" *MMSD Response Br.* at 60. Not so. Section 893.80 sets out numerous "provisions": It *provides* the time periods that apply for commencing a medical malpractice action under this section, § 893.80(1m); it *provides* that a claimant may accept payment of a portion of a claim without waiving the right to recover the balance, § 893.80(2); it *provides* for an award of costs in certain situations, *id.* Accordingly, there is no merit to MMSD's suggestion that Bostco's interpretation reads language out of the statutory test.

2. Wis. Stat. § 893.80 Does Not Place a Clear Limit on the Court's Equitable Authority and, Even if it Did, Such a Limit Would be Unconstitutional.

MMSD's misreading of the statute also plagues its argument that Wis. Stat. § 893.80 places a

constitutional limit on the judiciary's equitable authority to grant injunctive relief. MMSD argues that because $50,000 is the exclusive remedy provided by § 893.80, the absence of any reference to injunctive relief must limit the judiciary's equitable authority. But "a circuit court's equitable authority may not be limited absent a 'clear and valid' legislative command." *GMAC Mortg. Corp. of Pa. v. Gisvold*, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998). Because § 893.80 does not even mention the judiciary's equitable powers, let alone place any limits on those powers, it cannot reasonably be construed as a clear legislative command to strip the court of its equitable powers.

Even assuming that MMSD's statutory interpretation is correct in that § 893.80 "clearly" strips the circuit court of all equitable authority, such a limitation would be unconstitutional. Wisconsin case law establishes that a statute is unconstitutional for violating the separation of powers doctrine when it

deprives courts of *all* discretion to exercise its inherent authority to grant equitable relief.[1] *See Joni B. v. State*, 202 Wis. 2d 1, 10, 549 N.W.2d 411 (1996); *Banach v. City of Milwaukee*, 31 Wis. 2d 320, 331, 143 N.W.2d 13 (1966); *State v. Chavala*, 2003 WI App 257, ¶¶ 19-21, 268 Wis. 2d 451, 673 N.W.2d 401. As this Court noted in *Banach*, stripping the courts of equitable authority "would render equity as sterile and as arbitrary in its relief as the old common law courts, the inadequacy of which historically gave rise to the courts of chancery." 63 Wis. 2d at 331. MMSD's interpretation of § 893.80 would unconstitutionally strip the circuit court of its constitutionally-derived equitable authority.

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[1] MMSD cites no authority to the contrary. The argument mounted in its response brief to this Court fails to grasp the distinction between statutes that place clear limits on the court's equitable authority and those that constitute a complete usurpation of that authority. The former may, in some instances, be constitutional, the latter is an unconstitutional violation of the separation of the powers doctrine. *See, e.g.*, *Joni B.*, 202 Wis. 2d at 10; *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 13-15, 531 N.W.2d 32 (1995); *Banach*, 31 Wis. 2d at 331.

B. Wis. Stat. § 893.80(1), the Notice of Claim Requirement, Did Not Limit the Circuit Court's Equitable Authority.

As explained on pages 82-93 of Bostco's response brief to this Court, MMSD's argument that Bostco failed to meet Wis. Stat. § 893.80(1)'s notice of claim requirements is meritless. MMSD now mounts a new argument[2] that the requested injunctive relief is barred because Bostco's notice of claim failed to "contain an itemized statement of the relief sought," that listed an injunction. *MMSD Response Br.* at 68-70. Aside from its waiver problems, MMSD's argument fails for two reasons.

First, Bostco's notice of claim and related itemized statement of relief fulfilled the purpose of the statute by providing MMSD enough information to (1) "investigate and evaluate potential claims" and (2)

[2] MMSD only previously argued that claimants were properly identified in the notice. *See Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 76, ¶ 90, 334 Wis. 2d 620, 800 N.W.2d 518. As such, this argument has been waived.

"compromise and budget for potential settlement or litigation." *See E-Z Roll Off, LLC v. Cnty. of Oneida*, 2011 WI 71, ¶ 34, 335 Wis. 2d 720, 800 N.W.2d 421. MMSD was provided with the address of Bostco's building, a statement that the building had been damaged by MMSD's nearby Deep Tunnel system, an itemized statement of damages totaling $10.8 million, and the address of Bostco's counsel of record. R.37 pp.5-10, MMSDApp-449-54.

Second, Bostco's itemized statement of relief, which set forth a list of damages resulting from dewatering the ground beneath Bostco's building totaling $10.8 million did not constitute an election of remedy and cannot be construed to preclude Bostco from pursuing remedies to which it is otherwise legally entitled. The notice of claim specifically noted that it should not be construed as an election of remedy. R.37 p.5, MMSDApp-449 ("Further, this Notice of Claim does not constitute an election of remedy and shall not

preclude or prohibit Claimants from taking any other legal action or bringing any other legal claims its deems necessary to seek redress from matters related to the program construction activities of MMSD.").

Bostco is not now and never has sought an injunction in addition to adequate monetary relief, but instead, seeks injunctive relief in the alternative.[3] The undisputed cost of the injunction ($10 million), plus the $100,000 in monetary damages is *less* than the $10.8 million in damages listed on Bostco's itemized statement of relief and as a result, MMSD has been fully aware of its exposure to liability since it received Bostco's notice of claim. R.399 p.13-14, A-Ap.532-33;

[3] In the event the Court finds that Bostco's nuisance claim is not subject to the municipal damage cap because of its constantly recurring nature, *see infra*, this outcome would not alter Bostco's right to an injunction. Monetary damages for a continuing nuisance relate only to past damages, while the injunction was awarded on the basis of the jury's future damage finding. R.399 pp.11-12, A-Ap.530-31; *see also Allen v. Wis. Pub. Serv. Corp.*, 2005 WI App 40, ¶ 32, 279 Wis. 2d 488, 694 N.W.2d 420 (prevailing plaintiff in a nuisance action may recover both past damages and injunction to prevent future harm). Of course, Bostco would not be entitled to an injunction if it were to recover fully for its future damages.

R.382 p.163 ; R.291 p.12. Moreover, Bostco did not know that it would be required to resort to injunctive relief as an alternative when it filed its notice of claim and itemization of relief. As such, Bostco substantially complied with the notice of claim requirements in § 893.80(1).

C. Wis. Stat. § 893.80(4) Did Not Limit the Circuit Court's Equitable Authority.

As explained at length in Bostco's response brief to this Court, Bostco's suit against MMSD, including the requested injunctive relief, is not barred by the governmental immunity provision in subsection (4): MMSD is not immune because it negligently operated and maintained the Deep Tunnel, *Bostco Response Br.* at 24-55 (section I.B); the known danger exception to municipal immunity applied, *id.* at 55-60 (section I.C); immunity does not apply because any discretion exercised by MMSD was professional, *id.* at 60-71 (section I.D); and Wisconsin's government immunity

doctrine is contrary to clear legislative intent and, therefore, cannot stand, *id.* at 71-82 (section I.E).

D. The Circuit Court's Injunction Ruling was Procedurally Proper.

MMSD next argues that the circuit court's injunction should be reversed based on various alleged procedural defects. None of MMSD's three arguments is availing.

1. Wis. Stat. § 805.16 does not bar Bostco's motion for injunctive relief.

MMSD first contends that Bostco's motion for injunctive relief is barred by the post-verdict motion filing deadline in Wis. Stat. § 805.16. This argument is without merit because Bostco's motion for injunctive relief is not a "post-verdict motion" within the meaning of the statute. In fact, Bostco's motion for injunctive relief did not ripen until after the circuit court decided the post-verdict motions.

Under § 805.16, not every single motion filed in a case after the jury renders its verdict is a "post-verdict

motion." *See Gorton v. Am. Cyanamid Co.*, 194 Wis. 2d 203, 230, 533 N.W.2d 746 (1995). Rather, "§ 805.16 contemplates trial-related motions—new trial, evidentiary considerations, etc." and not "verdict-related [motions]" that are "predicated on a party's prevailing party status." *Id.* (holding a petition for attorneys' fees not subject to § 805.16's filing requirements because it is "not trial-related; rather, it is verdict-related").

The motion for injunctive relief is not subject to the timing requirements of § 805.16 because it is not a trial-related motion, but is instead based on the circuit court's post-verdict remittitur of damages. *See generally* R.280, A-Ap.276-82.

Bostco did not even have a basis for moving for injunctive relief at the time post-verdict motions were due. Bostco was not deprived of an adequate remedy at law until after the circuit court ruled on post-verdict motions and in so doing, remitted the money damages.

See R.399 pp.7-8, A-Ap.526-27 ("At that moment when [the circuit court] remitted the damage award and not one moment before, the instant motion [for injunctive relief] ripened."). Bostco even specifically noted in its post-verdict submissions and at the post-verdict hearing that if the court applied the damage cap it would then seek injunctive relief. R.257 p.4 n.1, A-Ap.263; R.394 p.38, A-Ap.510.

Moreover, at a hearing on July 15, 2005, the circuit court asked MMSD if it had "any problem with us sort of putting off the issue of scope of an equitable relief until after we have a trial on the underlying claims?" R.372 pp.27-28. MMSD's counsel responded, "I don't, your honor." *Id.* Accordingly, MMSD ought to be precluded from now complaining that Bostco improperly delayed its motion for injunctive relief.[4]

[4] Bostco did earlier note in its post-verdict submissions and at the post-verdict hearing that if the court applied the damage cap, it would then seek injunctive relief. R.257 p.4 n.1, A-Ap.263; R.394 p.38, A-Ap.510.

2. Judge Kremers Did Not Issue a Final Order Foreclosing Injunctive Relief.

Next, MMSD argues that Judge DiMotto's injunction order was foreclosed because of Judge Kremers' October 25, 2006 order, which MMSD contends was final and, therefore, determined all of the rights of the parties in the case. Not so. The October 25, 2006 order was not final because it did not dispose of Bostco's then-pending substantive motion for injunctive relief and because the circuit court intended to issue a subsequent order regarding that motion.

On page 74 of its Response Brief, MMSD quotes at length from the October 25, 2006 order. What MMSD fails to mention is that on November 7, 2006, the court issued an order modifying the October 25, 2006 order for the single purpose of clarifying that it was not intended to be final:

> WHEREAS the Order for Judgment is not a final order for appellate purposes; IT IS THEREFORE ORDERED that the Order for Judgment is modified, insofar as it may be interpreted to be a final order or to direct the Clerk to enter final

> judgment, and entry of final judgment is hereby stayed until further order of this court.

R.315 p.2.[5] This order was entered shortly after the court learned that MMSD had pressuring the judgment clerk to enter a judgment on the basis of the October 25, 2006 order without copying the judge on its communications with the clerk. R.398 p.2-4.

Even if the order had not been modified to specify that it was not final, a judgment or order is final only if it "disposes of the entire matter in litigation." Wis. Stat. § 808.03(1). Whether a document "disposes of the entire matter in litigation" requires a showing of two components: (1) "the document is final in the sense of substantive law in that it disposes of all of the claims brought in the litigation as to one or more of the parties"; and (2) "the document is final in the sense that

[5] This was not an oversight. MMSD made a vague reference to the November 7, 2006 order on page 16 of its response brief (away from the relevant section of the argument), describing it as only "purporting" to modify the October 25, 2006 order and without noting that it stated unequivocally that the October 25, 2006 order was "not a final order for appellate purposes."

it is the last document that the trial court intended to issue in the litigation." *Harder v. Pfitzinger*, 2004 WI 102, ¶ 12, 274 Wis. 2d 324, 682 N.W.2d 398.

The October 25, 2006 order, particularly as modified, satisfies neither of the two factors used to determine whether an order is final. First, it did not dispose of all of the claims brought in the litigation. Bostco's motion for injunctive relief had been pending for over a month at the time the October 25, 2006 order was signed. *See* R.280, A-Ap.276; R.305, A-Ap.313. Second, the order also was clearly not the last document that the circuit court intended to issue in the litigation. Although the finality test focuses "not [on] 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," *Harder*, 274 Wis. 2d 324, ¶ 12 (internal quotation marks omitted), neither the parties nor the court anticipated that the order would be dispositive of Bostco's motion for injunctive

relief. To the contrary, as of October 25, 2006, it was understood that the circuit court would handle the motion for injunctive relief via Judge DiMotto and not Judge Kremers pursuant to regular judicial rotations. *See* R.397 pp.3-4, 26; *see also* R.393 p.6; R.315, A-Ap.316-17.

Because the October 25, 2006 was not final in the legal sense, it does not invalidate the circuit court's ruling granting Bostco's motion for injunctive relief.

3. Bostco's Precautionary January 19, 2007 Notice of Appeal Did Not Deprive the Circuit Court of Jurisdiction to Grant Injunctive Relief.

MMSD makes a last ditch challenge to the circuit court's injunction order, arguing that the order was barred by Bostco's precautionary January 19, 2007 notice of appeal. As Bostco made abundantly clear in the motion accompanying that notice of appeal, it did not believe that the October 25, 2006 order was final such that an appeal could be taken from it but

nonetheless, filed its notice to preserve its right to an appeal in the event that any court might find that the October order was in fact final. *See* Appellant-Cross-Respondent's Motion for Determination of Finality, or in the Alternative for Remand of the Trial Court for the Limited Purpose of Deciding the Pending Motion for Injunctive Relief, App. No.2007AP221 (Jan. 19, 2007).

This Court has acknowledged the confusion in the area of finality of judgments, which has forced parties to be overly-cautious in their efforts to preserve the right to appeal. *See Wambolt*, 299 Wis. 2d 723, ¶¶ 42-43 (noting that confusion as to the finality of documents has created "traps for the unwary"). For this reason, the Court created a bright-line rule requiring that final orders and judgments state that they are final for purposes of appeal. *Id.*, ¶ 44. Because Bostco did not have the benefit of such rule at the time (if it had, MMSD's argument would necessarily fail), it cautiously preserved its notice of appeal. This preservation of

right, however, does not and cannot convert a nonfinal order into a final one.

In advancing this argument, MMSD contends that the circuit court lost jurisdiction when the "record" was transferred to this Court. Adopting the deductively unsound reasoning that because the Wisconsin Statutes require that a record include a docket sheet, *see* Wis. Stat. § 59.40(2)(b), that the record *is* the docket sheet, MMSD identifies the date the "record" (i.e. the docket sheet) was transferred as January 25, 2007. *MMSD Response Br.* at 78-79. MMSD is mistaken. The record is not the docket sheet alone and the record was not transferred until, according to the court of appeals' own records, September 10, 2007, long after the injunction ruling.

E. Judge DiMotto Did Not Exceed Her Authority as Successor Judge in Granting Bostco Injunctive Relief.

1. MMSD Had Ample Opportunity to be Heard.

Citing *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, 262 Wis. 2d 264, 664 N.W.2d 55, MMSD argues that the circuit court abused its discretion by failing to consider evidence relevant to the injunction. The primary problem with MMSD's argument is that it failed to present the circuit court with the evidence that MMSD argues the court failed to "hear." MMSD had numerous opportunities to present evidence related to any alleged difficulty with tunnel lining both at trial and during the injunction proceedings before Judge DiMotto.

First, MMSD had both opportunity and motive at trial to rebut Bostco's evidence that the harm at issue reasonably could be abated with one mile of tunnel lining. MMSD complains that injunctive relief was not

at issue at trial and, while that is true, the issue of abatement was relevant to Bostco's nuisance claim, which was a trial issue. *See* R.403 p.3, A-Ap.562 (jury asked whether MMSD could abate interference by reasonable means at a reasonable cost). As Judge DiMotto noted on the record, she read and considered the entire trial transcript prior to ruling on the motion. R.396 pp.16-18.

But MMSD's ability to present evidence related to the propriety of injunctive relief was not limited to the trial, as MMSD would have this Court believe. MMSD had numerous opportunities to present evidence on this issue in responding to Bostco's motion for injunctive relief, but MMSD did not take that opportunity to do so and instead, limited its arguments to why the motion was allegedly improper legally. First, MMSD filed a letter brief with the court. R.287. Then, MMSD filed a formal brief in opposition to the motion along with an affidavit attaching exhibits. R.288; R.289. Then

MMSD filed another letter brief and two more affidavits. R.293; R.294; R.295. Then, MMSD filed yet another brief, *see* R.301, although it later voluntarily withdrew the submission after the circuit court held that it would award Bostco its attorneys' fees in responding thereto because of MMSD's serial unauthorized filings. *See* R.397 pp.27-37; R.303; R.304. In short, the court did accept MMSD's first three filings and was willing to accept the fourth, but MMSD chose to withdraw it, presumably because it found the filing unnecessary or was unwilling to accept the consequences of failing to make a timely submission to the court.

Neither *Hoffman*, nor any of the other cases MMSD cites, stand for the proposition that it is error for the circuit court not to "hear evidence" not presented to it. Nor do any of the cases cited suggest that a circuit court is obligated to give a party a fifth opportunity to present evidence simply because it has refrained from

doing so in its first four. To the extent that there was evidence bearing on the propriety of the circuit court's order not adopted, fault lies with MMSD for not timely presenting it.

2. Judge DiMotto Did Not Weigh Conflicting Evidence or Make Credibility Determinations in Granting Injunctive Relief.

MMSD complains that Judge DiMotto exceeded her authority as a successor judge and cites in support of its argument to *Cram v. Bach*, 1 Wis. 2d 378, 383, 83 N.W.2d 877 (1957). But the holding in *Cram* is inapplicable because Judge DiMotto did not engage in weighing conflicting evidence. As MMSD implied in its last argument, it never put before the court evidence relating to whether future harm could be abated to contradict Bostco's evidence. MMSD cites four examples of statements that Judge DiMotto allegedly made that it contends violates *Cram*. *MMSD Response Br.* at 81 (citing R.399 p.28, A-Ap-547; R.399 pp.9-10, A-

Ap.528-29; R.291 pp.10-12, A-Ap.292-94; R.399 p.15, A-Ap.534). None succeed.

The first citation must be summarily rejected. MMSD quotes the following passage from the circuit court's oral ruling on the injunction: "'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 groundwater to levels that will prevent the otherwise likely future foundation damages *established in the record*.'" *Id.* (quoting R.399 p.28, A-Ap.547). Though not noted by MMSD, the circuit court was actually quoting from a footnote in Bostco's reply brief; it was not independently analyzing an issue. R.291 p.17 n.15, A-Ap.299. Even to the extent the court adopted Bostco's argument, Judge DiMotto merely made findings that certain facts were undisputed. When facts are not disputed with conflicting evidence, no weighing is necessary. As such, courts can (and frequently do in ruling on summary

judgment motions) make determinations that certain facts are undisputed and thus, may rely on them.

The second record citation, when read in context, is an instance in which Judge DiMotto relied on findings made by the jury. Specifically, Judge DiMotto compared the $100,000 remedy with the $6 million damage finding *made by the jury*, and was not herself making an independent assessment about the damages sustained. R.399 pp.9-10, A-Ap.528-29. In relying on the *jury's* findings of fact, Judge DiMotto acted well within her authority to make a *legal* determination about the adequacy of the legal remedy based on the jury's finding of *fact*. Although Judge DiMotto noted that the jury's finding was adequately supported by the record such that she was without authority to disregard it, judges are certainly permitted to determine whether a jury's finding is supported by admissible evidence; appellate judges are asked to do so all the time and this

does not amount to an improper weighing of conflicting testimony.

The last two citations, dealing with a single issue, are similarly unavailing. MMSD cites to a passage from Bostco's reply brief in support of its motion for injunctive relief, which the court adopted in its oral ruling. In its ruling the court stated: "The well issue came up in expert testimony during trial. In that respect, I adopt Plaintiffs' argument in their reply brief to the instant motion at pages 10 through 12." R.399 p.15, A-Ap.534. The argument set forth on those pages was that the expert testimony related to the well was not *relevant* to the issue of unclean hands in the context of an injunction because the testimony referred to a past alleged wrong, not about its likely effect in the future. R.291 pp.10-12, A-Ap.292-94; R.399 p.15, A-Ap.534.

As explained on pages 10 through 12 of the cited reply brief, injunctions are inherently forward-looking

and thus, evidence of past alleged wrongdoing (and Bostco does not concede that having a well on its property constituted wrongdoing) is "not the kind of 'misconduct' that bears on the appropriateness of injunctive relief" where there is no evidence that such past conduct would contribute to future harm. R.291 pp.10-12, A-Ap.292-94. Making determinations about relevancy is certainly not an act of fact-finding subject to the holding in *Cram.*

MMSD presumably combed the transcript of Judge DiMotto's ruling and was unable to locate a single instance in which Judge DiMotto actually weighed conflicting evidence and made credibility determinations. Instead, she deferred to the factual findings of the jury and made only legal determinations. Although some of her legal conclusions *relate* to the evidence—such as whether facts are in dispute and

whether evidence is relevant—this does not bring them within the prohibition in *Cram*.[6]

F. MMSD's New Argument that the Circuit Court's Injunction Interferes With Federal and State Regulatory Decisions is Without Merit.

1. MMSD's Argument that the Circuit Court Lacks Equitable Authority to Interfere with Regulatory Decisions is Waived as it Was Not Raised at the Court of Appeals.

For the first time on appeal, MMSD argues that the circuit court lacks equitable authority to interfere with decisions made, supposedly, by the DNR about lining the Deep Tunnel. First, this argument was not raised in the court of appeals and is therefore waived. *See State v. Margaret H.*, 2000 WI 42, ¶ 37 n.5, 234 Wis. 2d 606, 610 N.W.2d 475 (argument not raised

[6] After the circuit court granted Bostco's motion for injunctive relief, MMSD submitted a laundry list of issues that it contended had not been litigated and on May 30, 2007, the circuit court addressed the list on the record, explaining that MMSD had both motive and opportunity to litigate the issues MMSD identified and that she had found the evidence to be undisputed with respect to nearly all of the factual issues raised. *See generally* R.400; *see also* R.343.

before the court of appeals deemed waived by the supreme court).

2. The DNR Did Not Make the Decision Not to Line the Portion of the Deep Tunnel Running Beneath Downtown Milwaukee.

To the extent that the Court overlooks MMSD's waiver and considers this argument, MMSD's argument still fails. MMSD's argument is premised on its assertion that "[d]ecisions 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." *MMSD Response Br.* at 83. But the DNR did not actually make the decision not to line the tunnel.

As outlined in the affidavit of MMSD's former Director of Legal Services, the DNR initially conditioned its approval of the construction of the Deep Tunnel on its entire 19-mile length being lined with a foot of concrete. R.124 p.6, MMSDApp-460. MMSD

then sued the DNR, asking the judiciary to overturn the DNR's insistence on concrete lining. *Id.* After two successive lawsuits by MMSD against the DNR relating to the DNR's lining requirement, MMSD finally wrested control over lining decisions from the DNR under a settlement agreement that, in the words of MMSD's legal director, "left the decision as the use of lining to the discretion of the PMO [MMSD's Program Management Office]." *Id.*

Although the DNR retained final approval authority, it could hardly be more misleading to describe the decision *not* to line the segment of the Deep Tunnel running below downtown Milwaukee as a "decision . . . made by the DNR exercising its state-law authority." *MMSD Response Br.* at 83. MMSD made the decision after challenging the authority of the DNR and the fact that MMSD apparently thought it perfectly appropriate to ask the judiciary to overturn the lining

decision of the DNR significantly undercuts its position here that the judiciary has no business in this sphere.

3. A Circuit Court's Equitable Power to Grant Injunctive Relief is Not Limited Because No Agency Has Taken Any Action to Prevent Continuing Damage to Bostco's Building.

Even if the initial decision not to line the portion of the Deep Tunnel running below downtown Milwaukee could accurately be attributed to the DNR, a circuit court's equitable authority to abate nuisances is limited only when governmental agencies have taken affirmative action to solve the problem using a complex regulatory scheme. Neither the DNR, MMSD, nor any other state or federal agency has taken any action to prevent or slow the dewatering of the ground beneath Bostco's building despite being aware of the problem for at least a decade.

If MMSD's argument that a court is powerless to prevent a public agency from harming a citizen because a state or federal agency has authority over certain

aspects of a public works project were true, governmental agencies, run by unelected boards such MMSD, would be permitted to cause continuous harm to its citizens without any checks on their authority.

MMSD cites *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2532 (2011), *Michigan v. United States Army Corps. of Engineers*, 667 F.3d 765, 797 (7th Cir. 2011), and *North Carolina ex rel. Cooper*, 615 F.3d 291, 298 (4th Cir. 2010), in support of its proposition that the circuit court interfered with the WDNR's authority in granting injunctive relief. Broadly stated, these cases stand for the proposition that injunctive relief is limited in circumstances in which the legislature or other expert agency has passed a series of rules and regulations aimed at remedying a very specific, complex problem. *See United States Army Corps*, 667 F.3d at 796-97 ("there is nothing that any preliminary injunction from the court could add" to agencies' "elaborate measures"); *Cooper*, 615 F.3d at

298 (reversing injunction requiring immediate installation of emissions controls because there is already a comprehensive regulatory structure in place to control emissions); *Am. Elec.*, 131 S. Ct. at 2540 (holding that federal judges may not set limits on greenhouse gas emissions in the face of the EPA's complex regulatory scheme setting such limits).

Here, there is no comprehensive regulatory scheme regulating the Deep Tunnel's drawdown of groundwater. This is in stark contrast to *Cooper*, *American Electric*, and *United States Army Corps*. Instead, neither the WDNR nor any other regulatory agency has taken any affirmative action to prevent the dewatering of the ground beneath Bostco's building despite knowledge of such problem.

MMSD admits that to abate the nuisance "'the WDNR would have to issue a new plan approval for the lining,' and it 'has no present intention of approving the lining.'" *MMSD Response Br.* at 84 (quoting R.294 p.2,

MMSDSuppApp-173). Wisconsin authority is consistent on this point: In determining whether to issue an injunction, a court need not defer to the decisions of any agency that may, but has not yet, regulated the subject of the injunction. *See Hoffman*, 262 Wis. 2d 264, ¶ 29 ("Only a court has the authority to grant an injunction; therefore, it was not an erroneous exercise of discretion for the circuit court not to defer its jurisdiction to the [Public Service Commission]."); *accord Krueger v. Mitchell*, 112 Wis. 2d 88, 101-02, 332 N.W.2d 733 (1983) (holding injunction to abate aircraft noise nuisance preempted by the Federal Aviation Act, which extensively regulates air commerce).

The only affirmative action by regulatory agencies cited by MMSD was the very decision that caused the dewatering in the first place—MMSD's decision prior to construction of the Deep Tunnel to line only a portion of it. *Id.* at 85 (citing R.124 pp.6-7, MMSDApp-0460-61).

This does not constitute agency efforts to abate the infiltrations sufficient to limit the court's equitable authority. *See United States Army Corps*, 667 F.3d at 797 ("How much the equitable power of the court has been limited by agency action will be a factual question that turns on the quality and quantity of the agency's . . . efforts.").

In short, cases holding that a court should abstain from using its equitable powers to provide solutions to a problem where another agency is simultaneously working to provide solutions to the same problem have no relevancy to the power of a court to use its equitable power to remedy a problem *caused* by a decision (unwillingly) approved by an agency.

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

The court of appeals also erred in concluding that Bostco's damages were properly remitted to $100,000 under Wis. Stat. § 893.80(3). As stated in Bostco's

initial brief, there are three independent reasons why § 893.80(3) should not be held to limit recoverable damages in this case: (1) the $50,000 cap is unconstitutional on its face; (2) were it not unconstitutional on its face, it would be unconstitutional as applied to Boston Store in this case—the cap was not applied to other similarly situated property owners suffering damages exceeding $50,000; and (3) the damage cap does not apply to continuing nuisances and the jury's findings make clear that they found a continuing nuisance.

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

As noted in Bostco's opening brief, Wisconsin's municipal damage cap is not simply low in relation to the damages that the jury attributed to MMSD's conduct in this case. It is the lowest municipal damage cap *in the country*—100% lower than the next lowest

municipal damage cap.[7] There is no evidence that the exceptionally low cap is a product of unique budgetary constraints of Wisconsin municipalities and no such rationale is advanced by MMSD. What is clear is that the legislature has left the $50,000 cap unreviewed for over thirty years, despite this Court's imperative "'to review periodically all statutory limitations of recovery . . . to insure that inflation and political considerations do not lead to inequitable disparities in treatment,'" and the fact that a $50,000 cap had already been declared "'precariously close to the boundary of acceptability'" thirty years ago when the value of the dollar was twice what it is today. *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 368, 293 N.W.2d 504 (1980) (quoting *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 669, 406 A.2d 704 (1979)).

[7] *See* A-Ap.647-50 (chart reflecting municipal damage cap limits in other states with citations).

In its response brief, MMSD does not dispute the basis for Bostco's facial challenge—that under Wis. Stat. § 893.80(3), governmental tort victims who suffer over $50,000 in damages are treated differently than those who suffer less, with victims who suffer relatively minor injuries being made whole while the severely injured are limited to recovering only a fraction of the damages they have suffered. Nor does MMSD dispute that because § 893.80(3) treats differently governmental tort victims who suffer over $50,000 in damages from those who suffer less, the statute must pass "rational basis with teeth" standard of review.

Instead, MMSD's response to Bostco's facial challenge centers on a single contention—that § 893.80(3) is constitutional because there is a legitimate governmental interest that justifies the $50,000 damage cap, and that it is not the role of this Court to say otherwise. MMSD's argument, however, misstates the law and the role of this Court and

completely ignores the erosive effect of inflation on any government interest that once justified the $50,000 figure.

1. Whether the $50,000 Limitation of § 893.80(3) is Rationally Related to a Legitimate Government Purpose is a Question Properly Considered by This Court.

As noted in Bostco's opening brief, rational basis with teeth "does not require that all individuals be treated identically, but any distinctions must be relevant to the purpose motivating the classification." *Ferdon v. Wis. Patients Comp. Fund*, 2005 WI 125, ¶ 72, 284 Wis. 2d 573, 701 N.W.2d 440 (citing *Doering v. WEA Ins. Group,* 193 Wis. 2d 118, 131-32, 532 N.W.2d 432 (1995)). Contrary to MMSD's assertion that the manner in which the classification accomplishes the stated purpose is irrelevant to the inquiry, *MMSD Response Br.* at 22, "rational basis with teeth" "focuses on the legislative means used to achieve the ends." *Id.*, ¶ 78. Courts must conduct an

examination "of not only the legislative purpose, but also the relationship between the legislation and the purpose." *Id.*, ¶ 77. Under rational review with teeth, a court "need not, and should not, blindly accept the claims of the legislature … [but must] conduct an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose." *Id.*, ¶¶ 77-78.

As Bostco acknowledged in its initial brief, municipal damage caps do serve a legitimate governmental interest: preventing disruptions in local government functions that unlimited liability may threaten. *Sambs*, 97 Wis. 2d at 377.[8] To that end,

[8] In practice, municipal damage caps have the effect of shifting the costs of municipal negligence from all of the municipality's constituents to an individual victim who happens to be in the wrong place at the wrong time. As noted in Bostco's initial brief, this Court rejected the notion that the government has any legitimate interest in forcing an individual to suffer injury so as to prevent the many from suffering an inconvenience in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 31, 115 N.W.2d 618 (1962) *superseded by* Wis. Stat. § 893.80(4). Accordingly, the municipal damage cannot be justified on the basis that it shifts that burden, without further purpose.

Bostco is not arguing that ALL municipal damage are unconstitutional. Instead, Bostco's challenge is to the $50,000 limit.

In its response brief MMSD argues that the inquiry should end there, reasoning that "[t]ort claims like those of the Owners . . . could easily disrupt governmental entities ability to provide services" and that how well "the classification accomplishes a reasonable basis" is not a judicial determination. *MMSD Response Br.* at 23-25. In other words, MMSD wants to take the rational out of rational basis review.

But this Court has recognized that it is not enough that the government has a legitimate interest in municipal damage caps. "For judicial review under rational basis to have any meaning, there must be … a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose." *Ferdon*, 284 Wis. 2d 573, ¶ 77. Thus, the *specific* cap set forth in Wis. Stat.

893.80(3) must have more than a speculative tendency to further the government's interest in preventing disruptions in local government functions. *Id.*, ¶¶ 77-78. Moreover, because the legislature is required to balance the need for fiscal security against the ideal of equal justice, *Stanhope v. Brown Cnty.*, 90 Wis. 2d 823, 843, 280 N.W.2d 711 (1979), "a statutory limit on tort recoveries may violate equal protection guarantees if the limitation is harsh and unreasonable, that is, if the limitation is too low when considered in relation to the damages sustained," *see Ferdon*, 284 Wis. 2d 573, ¶ 111.

Responding to Bostco's argument that the "$50,000 amount . . . is no longer reasonably related to protecting public treasuries," MMSD states that such a contention "improperly seek[s] to substitute this Court's policy judgment for that of the legislature's." *MMSD Response Br.* at 26-27. But, that judgment is precisely what is required of this Court under a rational basis

"with teeth" review. Because MMSD posits that "protecting the public treasury justifies § 893.80(3)," *MMSD Response Br.* at 23, it is this Court's role to examine the relationship between the $50,000 figure and that stated purpose. *See Ferdon*, 284 Wis. 2d 573, ¶ 77.

2. Protecting the Public Treasury No Longer Justifies the $50,000 Limitation.

MMSD's argument that the $50,000 limitation of Wis. Stat. § 893.80(3) is still justified by the need to protect the public fisc fails to address the erosive effect that a quarter-century of inflation[9] has had on any justification for the $50,000 figure.

As explained in greater detail in Boston Store's opening brief, the legislative history of § 893.80(3) gives

[9] As noted in Bostco's opening brief, inflation in the United States has risen approximately 125% since 1981, and the consumer price index has doubled. As a result, the value of $50,000 today is less than the value of $25,000 at the time *Sambs* was decided. *See* Inflation Calculator, http://www.bls.gov/cpi/#data/inflation_calculator.htm (last visited March 2012) (value of $50,000 in February 2012 is the equivalent of $18,096.92 in 1980).

no indication what the justification for the $50,000 figure was when it was adopted in 1981—it was reduced by amendment from the initially proposed $100,000—nor why it has been maintained at that figure for the following thirty-one years. *See* 1981 Chapter 63; AB 85, 1981 Leg., Reg. Sess. (Wis. 1981), A-Ap.592; AB 85, A. Am. 1, 1981 Leg., Reg. Sess. (Wis. 1981), A-Ap.595; Legislative Drafting Record to 1981 Chapter 63, A-Ap.589-646. The 1981 bill was a legislative response to this Court's opinion in *Sambs*, and it is possible that the $50,000 figure was simply a reflection of the recognition in *Sambs* "'that a $50,000 statutory limitation on tort recoveries is precariously close to the boundary of acceptability.'" *Sambs,* 97 Wis. 2d at 368 (quoting *Estate of Cargill*, 406 A.2d at 708-09).

MMSD argues in its response that this Court cannot find the limitation in § 893.80(3) unconstitutional absent a laundry list of information that a legislator would consider in evaluating the

appropriate figure. *MMSD Response Br.* at 31. Yet, the legislative history for the municipal damage cap reveals that such data neither informed the original bill, nor is meaningfully available:

> Because it is not possible to calculate the number of claims which would exceed the present maximum or how many such cases local entities or volunteer fire companies would lose, the precise fiscal effect is *indeterminable*.

See Legislative Drafting Record to 1981 Chapter 63, A-Ap.615 (Feb. 1981 Fiscal Estimate) (emphasis added).

MMSD also inaccurately argues that the proper comparison "for considering whether $50,000 is unreasonably low is the zero recovery available at common law." *MMSD Response Br.* at 29. MMSD is wrong. This Court abrogated municipal sovereign immunity in 1967 and without § 893.80(3), MMSD would be subject to full liability to its tort victims; were this not the case, MMSD would have no motive in defending the statute's constitutionality.

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

Even if the damage cap was facially constitutional, its application in this case would violate equal protection. Equal protection is denied when a public body selectively enforces a law in a manner that is intentional, systemic and arbitrary. *State ex rel. Murphy v. Voss*, 34 Wis. 2d 501, 510, 149 N.W.2d 595 (1967). MMSD's arbitrarily established date of June 30, 1994, after which it would no longer pay any damage claims exceeding the cap, constitutes disparate treatment of similarly situated claimants in violation of equal protection.

MMSD has previously advanced a number of different arguments for its disparate application of the damage cap: the difficulty in differentiation between damage caused by the tunnel and damage otherwise caused, *Bostco*, 334 Wis. 2d 620, ¶ 56, the desire to create a bright line between construction and non-

construction related claims, *id.*, ¶ 58, and MMSD's potential liability to the tunnel excavation contractor, *id.*, ¶ 59. As explained in Bostco's opening brief, these arguments fail, respectively, because proof of causation bears no rational relationship to the assertion of the cap, there is no legitimate governmental interest advanced by the construction versus non-construction distinction, and the date selected by MMSD as the cut-off was years after the excavation contractor's contractual rights expired and as a matter of historical accuracy, MMSD's contractors did not sue MMSD for reimbursement of payments made to other building owners but instead, MMSD sued one of its contractors and recovered $24 million in part to pay for claims made by damaged building owners. R.168; R.189 pp.108-09.

In its response brief, MMSD now contends that Bostco is dissimilar from claimants with whom MMSD

settled prior to its arbitrary cut-off date.[10] The first distinction MMSD makes—that settlement claims "were solely for building finishes and for buildings and ground floor slabs founded on shallow footings or directly on the ground surface," as opposed to damage to deep pile foundations—fails to establish any reason for differential treatment based on the arbitrarily established date. *MMSD Response Br.* at 39. MMSD neither explains why that distinction is material, nor disputes that this is not actually the reason for the differential treatment. *See* R.189 pp.95-96 (if Boston Store had submitted its damage claim on or before June of 1994, MMSD would have accepted full responsibility). Even the evidence that MMSD cites in making this argument makes clear that the shallow versus deep

[10] MMSD asserts that Bostco's claims were not simply distinguished by their timing and that its witness, Mr. Meinholz did not so state. But despite their attempt to contextualize his statement, Meinholz did in fact state that if the Boston Store had submitted its damage claim on or before June of 1994, MMSD would have accepted full responsibility for repair costs if the investigation lead to the conclusion that the damage at issue was caused by the Deep Tunnel. R.189 pp.95-96.

foundation distinction is nothing more than random coincidence that had nothing to do with the differential treatment. R.122 p.4 ("if the owners of the Boston Store had advised the District that the District's tunneling activities had caused foundation settlement, a PMO engineer would have jointly investigated the alleged conditions with the owner and its engineer.")

MMSD next repeats its contention that Bostco's claim for pile damage came after the tunnel contract had concluded, an argument which, as stated above, fails to account for the fact that MMSD paid other claims after the contractor's contractual rights expired.[11]

The second distinction that MMSD offers in its response brief is that the claims settled prior to 1994 were evaluated by engineers with the District's

[11] Traylor Brothers was required to submit the full amount it was claiming within thirty days after MMSD's determination of a differing site condition; June 30, 1994 was years after Traylor Brothers' contractual rights expired. R.124 p.108.

Program Management Office who decided MMSD's responsibility, whereas Bostco's claims were "decided by a lay jury choosing between competing trial experts." *MMSD Response Br.* at 40. This argument on how the claims were decided fails to draw any dissimilarity between the claimants, or even the claims themselves, and fails to establish what legitimate government interest was advanced by MMSD's decision not to apply the damage to cap to the earlier claims. MMSD makes no contention that its engineers could not evaluate Bostco's claims even though they were made after 1994, and the choice to not do so was MMSD's.

In short, nothing in either distinction advanced by MMSD alters the basic fact that MMSD treated differently those claims made before and after the arbitrary date of June 30, 1994.

C. Bostco's Nuisance Claim is Not Subject to the Limitation of Wis. Stat. § 893.80(3).

Finally, even if this Court rejects all of the foregoing arguments, the full damage award should be reinstated because Bostco's continuing nuisance claim is not subject to the limitation of Wis. Stat. § 893.80(3). MMSD, in its response brief, now challenges Bostco's continuing nuisance claim by asking this Court to reverse the court of appeals finding that Bostco suffered significant harm as a matter of law. This challenge to the court of appeals' adverse ruling was waived, however, because MMSD failed to raise it in their cross-petition.

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

As Bostco argued in its opening brief, even if this Court does not find the statute unconstitutional on its face or as applied, it should nonetheless conclude that Wis. Stat. § 893.80(3) does not and cannot apply to continuing nuisance claims because a continuing

nuisance is a constantly recurring cause of action. Because an individual action arises from each and every continuance of a nuisance, a continuing nuisance gives rise to constantly recurring actions. *Stockstad v. Town of Rutland*, 8 Wis. 2d 528, 534, 99 N.W.2d 813 (1959) ("every continuance of a nuisance is in law a new nuisance and gives rise to a new cause of action."), *superseded with respect to claims for flooding caused by road construction by* Wis. Stat. § 88.87; *see also Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 473, 588 N.W.2d 278 (Ct. App. 1998) ("[B]ecause this case involves a continuing nuisance, Sunnyside can repetitively sue the City.").

MMSD attempts to get around this conclusion arguing that continuing nuisances may be recurring causes of action while § 893.80(3) limits the damages recoverable to $50,000 per action. In making this argument, MMSD relies on *Wilmot v. Racine Cnty.*, 136 Wis. 2d 57, 400 N.W.2d 917 (1987). However, *Wilmot*

actually uses the phrases action and causes of action synonymously in analyzing § 893.80(3). In fact, the rule set forth in *Wilmot* to determine whether two parties can each recover $50,000 in a single lawsuit is whether the parties have "separate causes of action." 136 Wis. 2d at 62.

The jury found that the nuisance in this case is a continuing one—it can be abated. R.403 p.3, A-Ap.562. In response to Bostco's argument that limiting damages under § 893.80(3) for continuing nuisances would invite serial lawsuits, MMSD argues that Bostco itself could not become a serial litigant because it has been awarded a jury verdict for all past and future damage. *MMSD Response Br.* at 47. This argument confuses an award with a verdict. Bostco obtained a verdict indicating that it was likely to suffer $6 million in future damages, but because of MMSD's efforts, Bostco was not *awarded* damages for these future harms. Instead, the award Bostco received did not even make it

anywhere close to whole as it was awarded only a small fraction of its past damages.

By MMSD's logic, Bostco should have forsaken judicial economy and litigated only past damages in this action, leaving itself the option to bring repeated lawsuits to recover the continuing cost of the Deep Tunnel's nuisance and avoid the limitations of § 893.80(3). This absurd scenario is not limited to Bostco's claims. Applying the extraordinarily low damage cap in cases involving continuing nuisances encourages serial litigation and such a costly drain on government resources would defeat the purpose of the damage cap limitation.

Because continuing nuisances are, by definition, constantly recurring causes of action, the $50,000 limitation should not be applied to them, just as

statutes of limitations do not apply to them. *Sunnyside*, 222 Wis. 2d at 466.[12]

2. MMSD Waived Review of the Court of Appeals Finding of Significant Harm by Failing to Raise it in its Cross-Petition.

In its response brief, MMSD argues that the court of appeals erred in reversing the jury's finding of no significant harm. Because MMSD failed to raise this issue in its cross-petition, and this Court did not grant review of the significant harm decision in its February 23, 2012 order, the issue may not be raised now.

If a party fails to raise an issue in its petition to this Court, the party waives consideration of the issue. Wis. Stat. § 809.62(6); *see also Doyle v. Engelke*, 219 Wis. 2d 277, 294, 580 N.W.2d 245 (1998) (holding that where an invasion of privacy claim was not raised on petition, the appellants waived the court's consideration

[12] As noted in footnote 4, supra, a prevailing plaintiff in a continuing nuisance action may be entitled to both monetary damages for past harms, as well as injunctive relief to prevent future damage. *Allen*, 2005 WI App 40 at ¶ 32.

of the claim); *Jankee v. Clark Cnty.*, 2000 WI 64, ¶ 7, 235 Wis. 2d 700, 612 N.W.2d 297 (citation omitted) ("If an issue is not raised in the petition for review or in a cross petition, 'the issue is not before us.'"). More specifically, "a party cannot raise a new issue in this court that will cause a modification of the decision of the court of appeals without filing a petition for review or cross review." *Ranes v. Am. Family Mut. Ins. Co.*, 219 Wis. 2d 49, 54 n.4, 580 N.W.2d 197 (1998).

The Court's February 23, 2012 order cited to § 809.62(6), which states:

> If the petition is granted, the petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court. The supreme court may limit the issues to be considered on review.

Likewise, § 809.62(3)(m) makes clear that a party "who seeks to reverse, vacate, or modify an adverse decision of the court of appeals shall file a petition for cross-review." The decision of the court of appeals to change the jury's finding on "significant harm" was clearly

adverse to MMSD and any request to reverse, vacate, or modify it should have been made in the petition for review.

3. The Court of Appeals Correctly Held that Bostco Suffered Significant Harm as a Matter of Law.

Though waived by MMSD, should this Court choose to review the court of appeals' decision that Bostco suffered significant harm, it should uphold the ruling because the jury's conclusions that MMSD's operation or maintenance of the Deep Tunnel interfered with Bostco's use and enjoyment and that this interference caused $2.1 million in damages directs the conclusion that Bostco suffered significant harm as a matter of law.

"[T]raditional nuisance harms" have been described as, among other things, "physical injury to land and fixtures [and] depreciation of property value[.]" *Krueger v. Mitchell*, 106 Wis. 2d 450, 456, 317 N.W.2d 155 (Ct. App. 1982), *aff'd* 112 Wis. 2d 88. The

nuisance harm here ultimately manifested itself as property damage, much like the harm at issue in *Jost v. Dairyland Cooperative*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969). The Josts, whose property was disturbed by sulfur dioxide gas from a nearby power cooperative, were not required to plead or prove that their house was uninhabitable. *Id.* MMSD's argument that Boston Store would have had to "shut its doors" to prove significant harm is not supported by Wisconsin law:

> It is inappropriate to decide whether a nuisance is actionable based on the type of damages alleged, *e.g.*, actual physical injuries or property damages as contrasted to annoyance, inconvenience or discomfort. Rather, the touchstone is whether the injuries are substantial.

See Krueger, 112 Wis. 2d at 107-08.

MMSD argues that "[h]ere, 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,'" but provides no citation to any authority or evidence to support such a statement. *See MMSD Response Br.* at 55. Not only is

MMSD' s position contrary to the law, it is contrary to the position MMSD took in the trial court. MMSD specifically stipulated to treat the damage figure awarded by the jury as the damages for both negligence and for nuisance. R.392 pp. 16-17, A-Ap. 416; *see also Bostco's Opening Br.* at 27.

The record establishes that the jury heard considerable testimony explaining how MMSD's negligent actions have caused the dewatering of the ground, which triggers destructive pile rot and downdrag, ultimately eliminating the foundation's ability to support the building, and resulting in millions of dollars of property damage. *See Bostco's Opening Br.* at 12-22. The suggestion by MMSD that such damages were "no more than a slight inconvenience," *see MMSD Response Br.* at 54, is patently absurd.

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

It is beyond dispute that when the government takes private property for public use, just compensation is due. Wis. Const. art. I, § 13; Wis. Stat. §§ 32.09-10. *See also Zinn v. State*, 112 Wis. 2d 417, 433, 334 N.W.2d 67 (1983) (explaining that § 32.10 "is based on Art. I, sec. 13 . . . and is the legislative direction as to how the mandate of the just compensation clause is to be fulfilled"). That is the case here: MMSD's operation and maintenance of the Deep Tunnel physically took the groundwater below Bostco's building—groundwater that is vital to the building's structural support. To be justly compensated for this partial taking, Bostco should be entitled to damages measured by the reduction in the fair market value of their property. *See* § 32.09(6).

A. The Issue of Whether MMSD Took Bostco's Groundwater is Properly Before this Court.

MMSD first contends that Bostco failed to claim a taking of groundwater beneath their building in the trial court and therefore, ought to be denied the right to a trial on that claim. But Bostco alleged extensive facts in its Amended Complaint detailing MMSD's taking of its groundwater. Bostco alleged that MMSD drained significant volumes of groundwater from below Bostco's building, causing the groundwater level to decline; that MMSD failed to install recharging wells to restore groundwater levels; and that the decline in groundwater levels beneath Bostco's building caused, and was continuing to cause, both downdrag and pile rot. R.51 pp.20-34, A-Ap. 20-34.

Not only did Bostco allege facts supporting a claim of taking groundwater, it also submitted extensive evidence bearing out these allegations. *See* R.134 pp.12-20, 50-55, A-Ap.169-177, 207-12; *see also*

R.140 exs.15, 33, 34, 43, 51-70. If inverse condemnation had been before the jury, the evidence would have shown, as it did here, that it was MMSD's taking of Bostco's groundwater that resulted in severance damages to the remainder of the building as measured by the calculation standard set forth in Wis. Stat. § 32.09(6).

Although Count III of Bostco's Amended Complaint notes the taking of wood piles, the factual allegations are replete with allegations about the taking of groundwater, *id.,* and "it is the operative facts that determine the unit to be denominated as the cause of action, not the remedy or type of damage sought." *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d. 136, 146, 293 N.W.2d 897 (1980). "It is the sufficiency of the facts alleged that control the determination of whether a claim for relief is properly pled." *Strid v. Converse,* 111 Wis. 2d 418, 422-23, 331 N.W.2d 350 (1983).

Because Bostco alleged ample facts to support a claim for taking of its groundwater, and because it adduced extensive evidence to bear out those allegations on summary judgment, the claim is properly before the Court.

B. Bostco Has a Property Right in the Groundwater Beneath Its Building.

As explained on pages 85-93 of Bostco's Opening Brief, Wisconsin case law confirms landowners' property rights in the groundwater below their land. *See, e.g.*, *Huber v. Merkel*, 117 Wis. 355, 357, 359, 94 N.W. 354 (1903); *State v. Michels Pipeline Constr., Inc.*, 63 Wis. 2d 278, 292, 296, 217 N.W.2d 339 (1974). These property rights are derived from the landowners' rights to reasonably use that groundwater. *See Huber*, 117 Wis. at 357; *Michels*, 63 Wis. 2d at 292; *see also Bino v. City of Hurley*, 273 Wis. 10, 16, 76 N.W.2d 571 (noting that riparian owners' "right to the reasonable use of the water of the lake . . . is a property right"); *McNamara v.*

City of Rittman, 107 Ohio St. 3d 243, 246-47, 838 N.E.2d 640 (2005).[13]

Despite this precedent, MMSD argues that Wisconsin does not "recognize[] an ownership in groundwater *that has flowed onto another's property*." *MMSD Response Br.* at 95, 99 (emphasis added). This argument distorts the issue: a property owner's interest in groundwater is not an ownership right as to particular buckets of water. The relevant interest is the right to reasonably use the groundwater *below land*—a right that was taken when MMSD dewatered the aquifer beneath Bostco's building. *See Huber*, 117 Wis. at 357 (concluding that landowner's property right in

[13] MMSD attempts to distinguish the Ohio Supreme Court's holding in *McNamara* by arguing that the plaintiffs in that case "sought compensation for the removal of groundwater captured in domestic wells." *MMSD Response Br.* at 97 n.17. But the plaintiffs in *McNamara* also alleged that the City's well field lowered the groundwater levels in the aquifer, thereby reducing the amount of groundwater that could enter their wells. *See McNamara v. City of Rittman,* 125 Ohio App. 3d 33, 36, 707 N.E.2d 967 (Ct. App. 1998).

groundwater may result "from a mere right to use and divert the water while percolating through the soil.").

Contrary to MMSD's argument, the rule of capture underpinned the common-law rule that *Michels* expressly rejected. *See* 63 Wis. 2d at 298-99, 301; *see also* 93 C.J.S. *Waters* § 202 ("The absolute dominion rule provides that . . . landowners have the right to take all the water they can capture under their land . . . ."). The rule *Michels* did adopt "broaden[ed] the protection of the 'reasonable use' rule". 63 Wis. 2d at 302; *see also McNamara*, 107 Ohio St. 3d at 246-47 (noting that § 858 "greatly expanded water rights protection"). By providing landowners with a cause of action for a neighbor's unreasonable use, *Michels* implicitly recognized a property right in groundwater for all landowners. *See id.* at 296; *see also McNamara*, 107 Ohio St. 3d at 247 ("Although a cause of action for unreasonable use of water sounds in tort, it is based

upon the property right of the landowner making the claim.").

Accordingly, contrary to MMSD's argument, groundwater is not exclusively the "property of the state." *See MMSD Response Br.* at 95. And neither case MMSD cites stands for this proposition. Instead, those cases address whether insurance policies provided coverage for groundwater contamination. *United Coop v. Frontier FS Coop.*, 2007 WI App 197, ¶¶ 21-28, 304 Wis. 2d 750, 738 N.W.2d 578; *Robert E. Lee & Assocs., Inc. v. Peters*, 206 Wis. 2d 509, 514-15, 557 N.W.2d 457 (Ct. App. 1996).

Specifically, the court in *Peters* relied on a legislative definition of the "waters of the state" as evidence that groundwater is "public property." 206 Wis. 2d at 522 (citing *Patz v. St. Paul Fire & Marine Ins. Co.*, 817 F. Supp. 781, 783 (E.D. Wis. 1993) (relying on what is now Wis. Stat. § 281.01(18))). But given the

definition's all-encompassing nature, MMSD's reliance on this statute is misplaced:

> "Waters of the state" includes . . . all lakes, bays, rivers, streams, ponds, wells, impounding reservoirs, marshes, watercourses, drainage systems and other surface water or groundwater, natural or artificial, public *or private*, within this state or its jurisdiction.

Wis. Stat. § 281.01(18) (emphasis added). This misplaced reliance is further evident from the chapter's purpose—that is, to provide the Department of Natural Resources with the authority and means to "protect, maintain and improve the quality and management" of all waters, both "public and private." Wis. Stat. § 281.11.

The State's authority to regulate waters does not preclude private property rights in groundwater. *See, e.g.*, *Huber*, 117 Wis. at 359 (holding that laws limiting landowners' rights to use groundwater with impunity were unconstitutional because they took "*private property* for private use . . . without compensation" (emphasis added)). Rather, landowners' property rights

in groundwater exist alongside the State's interest therein. *See, e.g.*, *W.H. Pugh Co. v. State*, 157 Wis. 2d 620, 628, 460 N.W.2d 787 (Ct. App. 1990) (noting that "a riparian owner's private rights give way . . . to public measures in aid of navigation" (emphasis omitted)). And, as with riparian rights, exclusive ownership (or the right to exclude) is not necessary to support a takings claim. *Bino*, 273 Wis. at 21-22; *W.H. Pugh*, 157 Wis. 2d at 628-29.

C. MMSD Physically Took Bostco's Groundwater Without Just Compensation.

MMSD does not—and cannot—dispute that partial, permanent takings are actionable as inverse condemnation claims. *See, e.g.*, *Spiegelberg v. State*, 2006 WI 74, ¶ 9, 291 Wis. 2d 601, 717 N.W.2d 641. Instead, MMSD relies on *E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.*, 2010 WI 58, 326 Wis. 2d 82, 785 N.W.2d 409, arguing that Bostco's taking claim is an

attempt to recover consequential damages. *MMSD Response Br.* at 90-94. This argument fails.

As a preliminary matter, this case differs materially from *E-L* in its procedural posture. *See* 291 Wis. 2d 601, ¶¶ 25-29. Unlike E-L's inverse condemnation claim, which was tried to a jury, Bostco's claim was dismissed on summary judgment. In *E-L*, this Court held that the plaintiffs' inverse condemnation claim failed because MMSD "did not physically occupy the property for which E-L [sought] compensation, *its building or the wood piles*, and no government-imposed restriction deprived E-L of all, or substantially all, of the beneficial use of its property. 326 Wis. 2d 82, ¶ 39 (emphasis added). The Court did not address, therefore, whether MMSD physically occupied the extracted groundwater, as it has done here. *See id.*, ¶¶ 5, 24, 39.

A government entity, like MMSD, may physically "occupy" or "take" private property without entering the

property owner's land.[14] *See, e.g.*, *Dahlman v. City of Milwaukee*, 131 Wis. 427, 677, 111 N.W. 675 (1907) (holding that removal of lateral support through street grading, which caused plaintiff's soil to fall in abutting street, was a taking); *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 708, 101 N.W. 706 (1904) (holding that street grading, which occurred alongside a strip of land not owned by plaintiff, was a taking when it caused a substantial portion of plaintiff's land to subside); *Wikel v. Dep't of Transp.*, 2001 WI App 214, 247 Wis. 2d 626, 635 N.W.2d 213; *Dugan v. Rank*, 372 U.S. 609, 625 (1963) ("A seizure of water rights need not necessarily

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[14] For inverse condemnation claims, plaintiffs must "show there has been an occupation of its property under [§ 32.10], or a taking, which must be compensated under the terms of the Wisconsin Constitution." *Howell Plaza, Inc. v. State Highway Comm'n*, 66 Wis. 2d 720, 723, 226 N.W.2d 185; *see also Vivid, Inc. v. Fiedler*, 174 Wis. 2d 142, 149, 497 N.W.2d 153 (Ct. App. 1993) ("It is well established that an owner of property may maintain an action under sec. 32.10 if he or she demonstrates a taking which must be compensated for under article I, section 13, of the Wisconsin Constitution."). The only meaningful difference between an "occupation" and a "taking" is that, unlike an occupation, a taking may be temporary. *See Zinn*, 112 Wis. 2d at 427-28, 433. The "occupation" or "taking" here, however, is permanent—the groundwater level was never restored. *See* R.383 pp. 6-7, 50-52; R.382 p. 97; R.351 (Trial Ex. 1550-009).

be a physical invasion of land. It may occur upstream . . . ."); *see also McNamara*, 107 Ohio St. 3d at 249 (holding that "government interference with [property interest in groundwater] can constitute an unconstitutional taking"). This rule is particularly necessary where, as here, a governmental entity is capable of appropriating private property without physically entering the owner's land.

Because MMSD directly appropriated the groundwater (the property for which Bostco seeks compensation),[15] Bostco's inverse condemnation claim is not based on consequential damages. *See E-L*, 326 Wis. 2d 82, ¶¶ 24, 33. Contrary to MMSD's assertion, Bostco has not "concede[d] that their inverse condemnation claim has been based on damages to wood piles and the cost of repairing the Boston Store."

[15] Throughout its response brief, MMSD asserts that the groundwater merely migrated onto neighboring land. *See MMSD Response Br.* at 94-96, 98. That is simply not true: the groundwater did not migrate naturally; MMSD dewatered the aquifer below Bostco's building by operating and maintaining the Deep Tunnel. *See* R.383 pp. 6-7, 11-43.

Compare MMSD Response Br. at 92 *with Bostco Opening Br.* at 82 n.23 (noting that Bostco was "no longer pursing its inverse condemnation claim *as a taking* of the wood piles" (emphasis added)).

Bostco's claim is based on the taking of its groundwater. *Bostco Opening Br.* at 82-83, 95-97. The proper measure of damages for the groundwater taken is severance damages (the change in fair market value as a result of the taking) as measured under Wis. Stat. §32.09(6), but this method of measuring the value of the groundwater does not alter the fact that the claim is for its taking of groundwater.[16]

CONCLUSION

For the foregoing reasons and the reasons set forth in Bostco's Brief in Chief, Bostco respectfully requests that this Court reinstate the full damage

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

award or reinstate the trial court's issuance of equitable relief, and reverse the court of appeals' affirmation of the circuit court's order granting MMSD summary judgment on Bostco's inverse condemnation claim.

Dated this 4th day of June, 2012.

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SUPREME COURT OF WISCONSIN

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v. Appeal Nos. 2007AP221
2007AP1440

Milwaukee Metropolitan Sewerage District,
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FORM AND LENGTH CERTIFICATION

I hereby certify this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) for a brief and appendix produced with a proportional serif font, and pursuant to this Court's May 31, 2012 order, this brief exceeds the length limitations set forth in Wis. Stat. § 809.19(8)(c), containing no more than 12,000 words. The length of this brief is 11,927 words.

Dated this 4th day of June, 2012.

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

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

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CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that, pursuant to Wis. Stat. § 809.80(3)(b), on June 4, 2012, Plaintiffs-Appellants-Cross-Respondents-Petitioners Bostco LLC and Parisian, Inc.'s Reply Brief was delivered to Federal Express for delivery to the Clerk of the Supreme Court of Wisconsin within three calendar days. I further certify that the brief was correctly addressed.

Dated this 4th day of June, 2012.

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