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)

REPLY BRIEF OF MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

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INTRODUCTION

The District's decision to construct the tunnel with a partial concrete lining was authorized by the DNR following a court-approved procedure that allowed for administrative contest and judicial review. Few governmental decisions could be more plainly within §893.80(4)'s immunity for "legislative, judicial quasi-legislative, and quasi-judicial functions."[1]

The District has operated and maintained the tunnel just as it was designed and constructed. There is no evidence of disrepair. The tunnel's design and the DNR permit under which the District operates it require that the tunnel have a positive inward pressure gradient that results in groundwater infiltration.

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[1] Unless otherwise indicated, all statutory references are to the current version of the Wisconsin Statutes. This brief uses defined terms as described in the District's opening and response briefs, unless this brief's text or context requires a different reading. References to the record and appendices are in the form described in footnote 1 of the District's opening brief and footnote 3 of its response brief.

Owners' contention that the tunnel is in disrepair because it "leaks" is deceptive word play. Since the tunnel was not designed to be water tight (it could not be, as Owners' expert conceded), infiltration is not a function of defect or disrepair—it is not, in any negative sense, a result of a "leak."

As the District's opening brief explains (at 44–47), nothing supports the court of appeals' conclusion that the tunnel "leaks" (i.e., infiltrates) "excessively." The evidence showed only that the tunnel's infiltration rate has *decreased* since it began operation (R.388-2002–03:MMSDApp-0371) and, most important, Owners' expert conceded that the tunnel has met the only arguably applicable infiltration standard (R.382-574:MMSDApp-0684). Owners' response brief does not challenge these facts. Thus, the tunnel's infiltration rate cannot serve as a basis for concluding that the tunnel has been operated or maintained in a state of disrepair or defect, a necessary preliminary step to establishing the existence of a ministerial duty of repair.

Owners' effort to construct a new rationale for avoiding §893.80(4)'s immunity underscores their inability to demonstrate the required ministerial

duty of operation or maintenance. First, Owners misread precedent to allow immunity to be defeated by labeling the mere existence of a public work "operation or maintenance."

Second, in arguing that the District had a non-immune duty to repair the tunnel, Owners conflate groundwater inflows during construction, which had a known potential to cause settlement damage, with design- and permit-required operating infiltration, which had no known potential to cause harm. It is uncontested that construction conduct is immune and properly not at issue. (The District informed the DNR of the construction inflows and DNR approved the lining decisions. (R.124:MMSDApp.-0460–61; R.388-2125:MMSDApp-0378.)) The District's knowledge of infiltration that meets the tunnel's design and operating parameters cannot support an inference that there is a ministerial duty to "repair" the tunnel. There can be no duty of "repair" in the absence of *disrepair*, and there is no evidence that infiltration during tunnel operation exceeded any applicable standard or that the tunnel otherwise malfunctioned. Owners identify no such evidence and their expert conceded that the tunnel's

infiltration rate meets the only standard even argued to apply.[2]

Third, Owners' proposed exceptions to §893.80(4) are unavailing. There is no evidence that the tunnel's operation and maintenance as designed created a "known danger." As Owners conceded below (Owners'-Ct.-App.-Cross-Resp.-Br.-4 n.1), the known-danger exception only applies when "there exists a danger that is known and compelling enough to give rise to a ministerial duty on the part of a municipality or its officers." *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶4, 253 Wis. 2d 323, 646 N.W.2d 314. Owners do not and cannot show that the District had any reason to believe that the operation of the tunnel as required by its DNR-issued permit created some compelling danger demanding a specific and immediate response. *Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶14 n.7, 319 Wis. 2d 622, 769 N.W.2d 1.

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[2] For the reasons explained in the District's opening brief (at 44–46) and not disputed in Owners' response brief, the 200-standard of Wis. Admin. Code NR §110.13(2)(k)1 applies to near-surface sewer construction; it does not govern the tunnel's operational infiltration rate.

Nor does the professional discretion exception apply. The Court has rightly limited that exception to non-policy-making discretionary acts of government-employed medical professionals. *See Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶32, 262 Wis. 2d 127, 663 N.W.2d 715; *Kierstyn v. Racine Unified Sch. Dist.*, 228 Wis. 2d 81, ¶39, 596 N.W.2d 417 (1999); *Kimps v. Hill*, 200 Wis. 2d 1, 21, 546 N.W.2d 151 (1996). Engineering decisions about how the tunnel was operated or maintained, which Owners do not identify but concede were discretionary, cannot involve anything other than "governmental decisionmaking."

Fourth, Owners propose that the Court overrule its long line of decisions interpreting §893.80(4) immunity as applying to discretionary governmental conduct. Owners ignore the fact that the Court's interpretation of "legislative, quasi-legislative, judicial and quasi-judicial" as referring to discretionary acts is firmly rooted in the common-law use of those terms that the legislature utilized in enacting what is now §893.80(4). *Compare, e.g.*, *Geuder, Paeschke & Frey Co. v. City of Milwaukee*, 147 Wis. 491, 503–05, 133 N.W. 835

(1911); and *Kelley v. City of Milwaukee*, 18 Wis. 83, 85–86 (1864); *with Kierstyn*, 228 Wis. 2d at 90–91; and *Allstate Ins. Co. v. Metro. Sewerage Comm'n*, 80 Wis. 2d 10, 16–17, 258 N.W.2d 148 (1977). Owners also ignore the fact that the type of sewer-project-related conduct they challenge here was held immune both at common law, *see Geuder*, *supra*, and under §893.80(4)'s predecessor, *see Allstate*, 80 Wis. 2d at 16.

Finally, this dispute can (and should) be resolved in the District's favor based on Owners' uncontested failure to serve notices of claim and statements of requested relief. §893.80(1). [3] Owners argue that notices served by separate corporations that had no claim should be deemed substantial compliance with the statutory notice requirements. But, given Owners' concession that the corporations' officers (and by implication their lawyers) could not figure out which entities owned the claims, the non-owners' notices cannot be

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[3] Section 893.80(1) was renumbered as sub. §1d effective April 12, 2012. *See* 2011 Wis. Act. 162, §1g. The District's briefs cite to the pre-2012 numbering of the statute.

deemed to have provided the District with sufficient information to resolve the claims with the actual claimants—Bostco and Parisian.

ARGUMENT[4]

A long line of precedent holds that §893.80(4) affords governmental entities like the District with immunity from all claims based on discretionary conduct—conduct the statute refers to as "legislative, quasi-legislative, judicial or quasi-judicial." *See, e.g., Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶59 ("*MMSD*"); *see also Allstate*, 80 Wis. 2d at 16 (construction of sewer lines and allegation that

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[4] Owners contend that the District's opening brief "includes several misleading assertions, as well as a number of assertions made without an adequate record citation." Owners'-Resp.-Br.-2. Owners do not provide a single example, and each statement in the District's opening brief has a supporting record citation. Apparently, Owners' umbrage is with the District's providing the Court with a full description of the building's long history and the forces affecting it, as well as a full explanation of the proof focusing on tunnel design and construction that Owners submitted at trial and on which the jury depended in reaching its verdict. Rather than "retry[ing] the merits," this recitation provides an accurate and informative statement of the case.

sewerage commission knew or should have known that placement of manhole "would create a danger" held legislative and quasi-judicial acts immune under §895.43, now §893.80(4)). *MMSD* holds that the design, construction, implementation, and continued existence of public works, like a sewerage system, involve categorically immune discretionary acts. Acts of operation or maintenance are not *categorically* immune—i.e., they are not necessarily discretionary. But a government entity may be held liable for negligently performing an act of operation or maintenance only if the act is required by a ministerial duty—i.e., a duty that is "absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *MMSD*, 2005 WI 8, ¶61 (quoting *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976)).

The jury was not asked to find a ministerial duty—the verdict did not describe or inquire about any specific task of operation or maintenance.

Owners objected to asking the jury to find a ministerial duty (R.191-9), and Judge Kremers ruled that the ministerial duty inquiry was a question for the court to answer post-verdict (R.379-3–4:MMSDApp-0113–114). The circuit court, however, never identified a ministerial duty.

Owners attempt to avoid this shortcoming by misconstruing precedent and suggesting that the Court overrule numerous decisions interpreting §893.80(4). These arguments underscore the fact that their claims are based on discretionary conduct, thus barred by §893.80(4) immunity. Owners ultimately concede this: Their response brief states that the jury's finding of "negligent operation and maintenance . . . involved the exercise of engineering *discretion*." Owners'-Resp.-Br.-70 (italics added). Under any reading of this Court's precedents, the exercise of "engineering discretion" by governmental actors in the context of a public work like the Deep Tunnel is conduct immunized by §893.80(4).

I. The Tunnel Was Not Shown to Be in a Condition of Defect or Disrepair

Owners' experts theorized that the partially lined tunnel's construction and existence damaged the Boston Store building's foundation. *See*

MMSD-Opening-Br.-3–4, 20. They testified that groundwater was drawn away from the Boston Store's building as a result of water infiltrating the tunnel because the tunnel was constructed and exists without a complete concrete lining. R.382-540,586–87:MMSDApp-0422,0429; R.383-651–52:MMSDApp-0409; R.385-1271:MMSDApp-0395.

Owners do not contest that decisions about which tunnel sections to line fully were discretionary decisions made by the District and the DNR through an administrative procedure. That procedure was approved by the Milwaukee County Circuit Court to resolve litigation between DNR and the District over that issue. R.124-6–7:MMSDApp:0460–61. Nothing could more squarely fall within §893.80(4)'s immunity for discretionary "legislative, quasi-legislative, judicial or quasi-judicial" acts. As this Court has held, "Where, when and how to build sewer systems are legislative determinations imposed upon a governmental body. It is not for the court to be judge or jury to 'second guess' them in these determinations nor to find they are liable for negligence." *See Allstate*, 80 Wis. 2d at 16.

The District's opening brief again challenged Owners to identify a single ministerial *act* of operation or maintenance that damaged the building's piles. Owners do not (and cannot) meet this challenge. Their attempts to avoid this fatal deficiency are untenable.

A. *MMSD* limits governmental liability for operation and maintenance to ministerial acts.

Lacking a ministerial act of operation or maintenance on which to base their tort claims, Owners argue that the *MMSD* decision made all acts of operating and maintaining a sewerage system ministerial acts. Owners'-Resp.-Br.-24–31. This argument misreads *MMSD*, relies on principles this Court has rejected, and misunderstands pre-*Holytz* common-law immunity. Moreover, the lack of evidence that the tunnel failed to perform as designed or that the tunnel was ever in disrepair requires a holding that §893.80(4) bars liability.

1. Application of *MMSD*'s discretionary immunity principles requires reversal.

Owners contend that "a municipal entity is not immune under Wis. Stat. §893.80(4) for

negligence in operating or maintaining a sewerage system." Owners'-Resp.-Br.-24. This is wrong. As *MMSD* makes clear, whether a municipality is immune depends on whether "the negligence involves an act performed pursuant to a ministerial duty." 2005 WI 8, ¶59. In remanding for further proceedings, *MMSD* ruled that there are discretionary duties of operation and maintenance for which governmental entities have immunity:

> Since we cannot determine whether the City was on notice that its water main was leaking and could potentially interfere with the use and enjoyment of another's property, we cannot conclude whether its duty to repair the leaking water main with reasonable care before it broke was "*absolute, certain and imperative*" [i.e., ministerial] . . . or whether the City's decision not to repair the main before the break was *discretionary*. As such, we cannot determine whether the City is entitled to governmental immunity under §893.80(4).

Id. ¶62 (italics added). This ultimate conclusion is irreconcilable with Owners' contention that *MMSD* held that all acts categorized generally as "operation and maintenance" are ministerial and their conclusion that there is no need to specify a ministerial duty. *See also Scarpaci v. Milwaukee*

Cnty., 96 Wis. 2d 663, 685, 292 N.W.2d 816 (1980) ("court must inquire into the nature of the alleged wrongful act to determine if the *particular act* in question is quasi-judicial" (emphasis added)).

Owners erroneously contend that, in paragraph 56, *MMSD* "holds" that "the operation and maintenance of a sewerage system are ministerial duties, the breach of which is not protected by immunity." Owners'-Resp.-Br.-36; *see also id.* at 24. Paragraph 56 of *MMSD* describes *Lange v. Town of Norway*'s conclusion that "immunity did not extend to claims arising from negligence in operating or maintaining the existing dam." *MMSD*, 2005 WI 8, ¶56 (citing *Lange v. Town of Norway*, 77 Wis. 2d 313, 318–20, 253 N.W.2d 240 (1977). *Lange* did not hold that *all* operation and maintenance is ministerial, nor did *MMSD* attribute such a holding to *Lange*. *Lange* reversed dismissal of a complaint that alleged negligence in acquiring a too-small dam and in operating the dam's floodgate. 77 Wis. 2d at 315, 322. After holding that governmental immunity applied categorically to the dam's acquisition, the Court explained that there is "something less than a grant of *complete* governmental immunity in the

maintenance and operation of the dam." *Id.* at 319 (italics added). Noting that governmental immunity also barred any challenge to the floodgate's size, the Court reasoned that immunity would not categorically preclude a claim alleging "a failure to maintain as to a condition of *disrepair* or *defect* or a failure to properly operate said floodgate." *Id.* at 320. The Court remanded for repleading.

Three paragraphs after the *Lange* discussion on which Owners rely, *MMSD* summarizes the state of governmental immunity law, including *Lange*, by stating, "it is clear that under the law since *Holytz* and the enactment of the immunity statute that a municipality *may* be liable for . . . negligent acts." 2005 WI 8, ¶59 (italics in original). "Whether immunity exists . . . depends on the character of the negligent acts. If the acts complained of are legislative, quasi-legislative, judicial or quasi-judicial—that is discretionary—the municipality is protected by immunity under §893.80(4). Conversely, immunity does not apply if the negligence involves an act performed pursuant to a ministerial duty." *Id.* (citations omitted). The rule is clear as to acts of operation or maintenance:

immunity for discretionary acts, no immunity for ministerial acts.

Owners' attempt to distinguish all operation and maintenance from design and construction repeats the distinction between operational and planning conduct that *Kimps* rejected. 200 Wis. 2d at 23, n.14. *Kimps* ruled "unpersuasive" a suggestion that *Lange*'s "reference to the Town's duty to 'properly operate' the dam's floodgate constitutes an adoption of [a] planning/operational [immunity] distinction." *Id.* As *Kimps* stated, "[t]he critical distinction remains whether or not a public officer's acts are discretionary or ministerial."[5] *Id.* at 24.

The other authorities on which Owners rely in arguing that acts of operation and maintenance are categorically non-immune are all "not

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[5] Owners dismiss this holding from *Kimps* because the case involved common-law immunity for state officers (Owners'-Resp.-Br.-30 n.5), rather than §893.80(4)'s immunity for municipal officers. This Court long ago rejected that distinction, however, holding that "the test for the immunity of a state officer is similar to the test for the immunity of a municipal officer under [§893.80(4)]." *Scarpaci*, 96 Wis. 2d at 683 n.20; *Lifer v. Raymond*, 80 Wis. 2d 503, 511–12, 259 N.W.2d 537 (1977).

controlling on this point, as [their] holding[s were] based [directly or indirectly] on *Winchell v. City of Waukesha*, 110 Wis. 101, 109, 85 N.W. 668 (1901), which predated *Holytz* and the enactment of the immunity statute." *MMSD*, 2005 WI 8, ¶55 n.14. *MMSD* effectively overruled *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 431, 400 N.W.2d 493 (Ct. App. 1986), *Menick v. City of Menasha*, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996), and *Caraher v. City of Menomonie*, 2002 WI App 184, 256 Wis. 2d 605, 649 N.W.2d 344, when it identified them as among the decisions that created "confusion in the area of municipal immunity" because they (i) relied "on immunity jurisprudence that predated *Holytz* [such as *Winchell*], . . . [(ii)] employ[ed] separate analyses for negligence and nuisances, . . . [and (iii)] fail[ed] to stress that a municipality is liable for its negligent acts only if those acts are performed pursuant to a ministerial duty." 2005 WI 8, ¶59 n.17; *see also id.* ¶5.[6]

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[6] *Menick* and *Hillcrest* provided the basis for the court of appeals' immunity ruling that this Court

As *MMSD* explains, *Winchell* and other pre-*Holytz* decisions, such as *Christian v. City of New London*, 234 Wis. 123, 290 N.W. 621 (1940), and *Mitchell Realty Co. v. City of West Allis*, 184 Wis. 352, 199 N.W. 390 (1924), decided immunity questions "based on the rule that a governmental entity was generally immune from suits in tort unless it was deemed to be engaged in a 'proprietary function' or the relation between the governmental entity and the plaintiff was not that of 'governor to governed.'" 2005 WI 8, ¶52. This governor-to-governed rule was the one abandoned in *Holytz* and superseded by the enactment of §893.80(4). 17 Wis. 2d at 32, 36; *see also MMSD*, 2005 WI 8, ¶52. Whether governmental entities now enjoy immunity depends on whether the alleged misconduct was discretionary or ministerial. *MMSD*, 2005 WI 8, ¶59; *see also Scott*,

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reversed in *MMSD*. *See* 2003 WI App 209, ¶¶18–21. Their immunity rulings are dead letters, and *MMSD*'s statement that "the court of appeals in *Menick* . . . correctly noted that a negligence-based nuisance requires proof of causation," 2005 WI 8, ¶64, does not validate *Menick*'s erroneous immunity analysis.

2003 WI 60, ¶16; *Lodl*, 2002 WI 71, ¶25; *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, ¶25, 235 Wis. 2d 409, 611 N.W.2d 693; *Kierstyn*, 228 Wis. 2d at 88–89.[7]

One cannot sensibly ask whether all "operation or maintenance" is discretionary or ministerial. "Operation or maintenance" describes a category of acts, any one of which may or may not be ministerial. Again, Owners never identify a specific act of tunnel operation or maintenance—one involving "a duty that is absolute, certain and imperative . . . [and for which] the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion" (*MMSD*, 2005 WI 8, ¶54 (internal quotation marks and citations omitted))—that they contend

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[7] For reasons that are unclear, Owners' response brief (at 25) purports to quote the District's brief in *MMSD*. Putting aside the textual errors in the quote, of which there are several, Owners' "single paragraph" (mis)quote actually draws from text spanning 14 pages in the brief's original format and sections I and III of that brief's argument. The passages rely on *Hillcrest* and *Menick*, which, although apparently good law at the time, were effectively overruled in *MMSD*, *see* 2005 WI 8, ¶59 n.17.

damaged their building's piles. This alone requires a holding that Owners' tort claims are barred by §893.80(4) immunity.

2. No tunnel repair duty is shown by construction inflows or infiltration that meets DNR's operating requirements.

Owners make no effort to defend the court of appeals' ruling that the tunnel was not operated and maintained in accordance with its design and operating requirements because it allowed "excessive" "leaking." The tunnel cannot correctly be said to "leak"; it was designed and constructed to have a positive inward pressure gradient that allows groundwater infiltration. This is an uncontested, DNR-imposed operating requirement. R.351-ex.2563:MMSDApp-0623.

Groundwater infiltration into the tunnel complied with any applicable standard. Owners' tunnel expert conceded that point. R.382-573–74:MMSDApp-0427. Owners do not contend otherwise, thereby effectively confessing error in the court of appeals' premise that the tunnel "leaked" "excessively."

That the tunnel's operation has not been shown to violate some rule or standard should end

the immunity inquiry. There can be no duty to maintain or repair—ministerial or otherwise—if the public work functions as designed, constructed, and approved by the DNR, which is all that the evidence here shows. *See Allstate*, 80 Wis. 2d at 16 ("If the placement of the manhole was in compliance with the location set forth in the plan it was a nondiscretionary act in compliance with a legislative act and protected by governmental immunity. This is so even though the placement and subsequent use of the manhole may have created a danger.").

Owners' purported bases for justifying a finding of negligent operation or maintenance rely on a false premise that all operation and maintenance is non-immune. Owners'-Resp.-Br.-41. They then cite testimony and exhibits purporting to support the conclusion that "operation" of the tunnel caused foundation damage—that damage has occurred and will continue to occur because the tunnel in its current state "draws down" groundwater. Owners'-Resp.-Br.-42–44. To this Owners add references to evidence suggesting that the District knew that excessive inflows of water when the tunnel was

constructed could lead to building damage. Owners'-Resp.-Br.-44–46.

Again, the tunnel's infiltration during operation results from the DNR's requirements for design and permitting and has not exceeded allowable standards. There is no evidence that the District knew that infiltration during operation put the Boston Store building or any other structure at risk. But, if infiltration did create such a risk, the District is immune for any failure to decrease infiltration, because that infiltration results from discretionary policy choices inherent in the tunnel's design, construction, and the DNR-imposed operational requirements. *Allstate*, 80 Wis. 2d at 16.

Owners suggest that their expert's testimony about "surge" events causing "deterioration" can support a conclusion that their building was damaged by non-immune acts of operation or maintenance. Owners'-Resp.-Br.-47. But Owners' expert did not testify that surge events resulted in non-complying amounts of infiltration; to the contrary, he conceded both that infiltration rates met the argued standard (R.382-574:MMSDApp-0684) and that, even with the claimed surge events,

infiltration rates continued to decrease during the tunnel's operation:

> Q. . . . what we would see would be a trend over time of less water coming into the tunnel as time goes by; isn't that correct?
>
> A. That's correct.
>
> Q. Okay. And that's happening in spite of those surge events you talked about, correct?
>
> A. Yes

(R.382-561–62). Moreover, there is no evidence of a surge event causing deterioration needing grouting or lining, nor is there evidence of any deterioration in the specific tunnel area near the Boston Store building. In short, absolutely no evidence supports Owners' argument that the District failed to keep the tunnel in proper condition—i.e., the condition in which it was designed and constructed.

3. The District cannot be charged with knowledge of tunnel disrepair.

Owners argue that the District had a ministerial duty of maintenance because it knew the tunnel was in disrepair—"leaking"—and that the disrepair caused them harm. Owners'-Resp.-Br.-35. In so arguing, Owners take out of context a

statement from paragraph 73 of *MMSD*; they write, "There is no immunity for a nuisance that has 'existed long enough that Defendant knew or should have known of the condition and could have remedied it within a reasonable amount of time.'" Owners'-Resp.-Br.-35 (purporting to quote *MMSD*, 2005 WI 8, ¶73). Paragraph 73 of *MMSD* in fact discusses whether the circuit court properly granted summary judgment on the merits of the nuisance claim, not §893.80(4) immunity; it states, "*in an action for maintaining a nuisance, there must be proof that the condition causing the nuisance* existed long enough that the defendant knew or should have known of the condition and could have remedied it within a reasonable amount of time." 2005 WI 8, ¶73. By ignoring the quote's context (supplied by the italicized language), Owners invite the error this Court corrected in *MMSD* when it rejected "older cases [that] routinely found that governmental entities were liable in negligence or nuisance for damage caused by various public works." *Id.* ¶51.

As *MMSD* emphasizes, "Whether immunity exists for nuisance founded on negligence depends upon the character of the negligent acts. If the acts

complained of are legislative, quasi-legislative, judicial or quasi-judicial—that is discretionary—the municipality is protected by immunity." *Id.* ¶59. A governmental entity's notice of potential harm, therefore, can only give rise to nuisance liability if the entity has a ministerial duty to act. The "notice of draining the aquifer in downtown Milwaukee" argued by Owners (e.g., Owners'-Resp.-Br.-35) and suggested by the court of appeals, *see Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 76, ¶37, 334 Wis. 2d 620, 800 N.W.2d 518, is based on the District's awareness that groundwater inflows *during construction* could result in damaging settlement.[8] Conduct during

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[8] As Owners note, the design and construction of the tunnel was deemed to have been completed by August 7, 1992. Owners-Resp.-Br.-7. In support of its contention regarding the District's notice, Owners rely on: (1) a 1982 draft facilities plan document discussing the potential impact of the tunnel's *design and construction*, (2) a 1984 CH2M Hill memorandum analysis of the potential impact of *construction*, (3) an engineer's advising the District's legal department in 1988 that intake into the zone of the tunnel's *construction* might cause groundwater drawdowns, and (4) the District's knowledge of drawdowns that occurred during *construction* in 1990. *See* Owners-Opening-Br.-23-26. Owners' further references to post-construction knowledge of construction-related effects also do not reveal any duty of operation or

construction is protected by the categorical immunity afforded the design and construction of a sewerage system. *MMSD*, 2005 WI 8, ¶60. And Owners nowhere explain how these facts or any others create a ministerial duty to "repair" the tunnel after it became operational.

The District is aware that groundwater infiltrates the tunnel. The DNR-issued operating permit's inward pressure gradient makes that infiltration a necessity. R.124-8–9:MMSDApp-0462–63; R.351-Ex.2563-24:MMSDApp-0623. And, as Owners' tunnel expert conceded, infiltration could be halted only by pressurizing the tunnel—which would violate the operating permit—or filling it with concrete—which would make it *in*operable. R.382-585–86:MMSDApp-0428–29.

There is no evidence that the tunnel's post-construction infiltration rate exceeded any applicable standard. As explained above, Owners'

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maintenance, especially given that there is no evidence of an operational defect. *See* R.381-314,316:A-Ap.-404-05; R.390-2328-29:A-Ap.-408. None of this demonstrates that the District was aware of a danger to property caused by the tunnel's *operation*.

expert testified that the rate met the only standard potentially implicated. R.382-574:MMSDApp-0684. Thus, to equate the tunnel's infiltration with the leaking water main at issue in *MMSD* is a fallacy. Here, the tunnel *infiltrates* by design; in *MMSD* the water main *leaked* because it was in disrepair.

There may in some circumstances be a ministerial duty to fix a public work that is known to be in disrepair. That is the point of *MMSD*'s statement that the disputed question of fact over whether the city knew that the water main was leaking before it broke defeated the entry of summary judgment on immunity grounds. 2005 WI 8, ¶87. But there can be no ministerial duty to "fix" a public work that is functioning as designed. Since there is no evidence that the tunnel's infiltration violated any applicable standard, there can be no basis for imposing a ministerial duty to repair the tunnel. Even if the District knew that infiltration during operation put wood-pile buildings at risk (and there is no evidence of that), that risk would result only from the tunnel's design, for which *MMSD* enjoys

categorical immunity.[9] *MMSD*, 2005 WI 8, ¶ 60; *see also Lange*, 77 Wis. 2d at 318; *Allstate*, 80 Wis. 2d at 16.

4. Even if there were harm-causing, non-immune acts, the inability to determine whether the jury's verdict relies on immune acts requires reversal.

It is uncontested that (i) much of Owners' evidence related to the tunnel's design, construction and continued existence; (ii) *MMSD* holds that these are immune acts; and (iii) the circuit court failed to require the jury to separate harm caused by non-immune ministerial acts from harm caused by immune discretionary conduct.

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[9] The District's "notice" of drawdowns resulting from tunnel construction does not impose a ministerial duty to inspect the tunnel, as Owners' Response Brief suggests in passing at page 35. Although categorically immune from the effects of construction-related conduct, *MMSD*, 2005 WI 8, 59–60, the District installed recharge wells to address the groundwater drawdowns that occurred during construction and had a program of compensating building owners who suffered settlement damages as a result of those drawdowns (*see* MMSD-Resp.-Br.-38–39). Any drawdown resulting from permitted operational infiltration cannot impose a ministerial inspection duty for the reasons described in the text. *See also* MMSD-Opening-Br.-58–60.

Owners' only answer to the District's contention that this failure to disaggregate bars any recovery is to contend that all acts after the District began operating the tunnel are non-immune "operation or maintenance." *See* Owners'-Resp.-Br.-36–41. As explained above, however, that contention is wrong, as a matter of law. Thus, even if some evidence showed actionable ministerial acts of operation or repair, the verdict still could not stand. *See* MMSD-Opening-Br.-37–43.

B. The known-danger exception does not apply.[10]

The known-danger exception to §893.80(4) immunity applies only when "there exists a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion." *Lodl*, 2002 WI 71, ¶38 (quoting *C.L. v. Olson*, 143 Wis. 2d 701, 717, 422 N.W.2d 614 (1988)); *see also Cords v. Anderson*, 80 Wis. 2d 525, 259 N.W.2d 672 (1977). "[N]ot every dangerous situation will give rise to a duty that can be characterized as ministerial for purposes of

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[10] Owners' cross-petition did not raise the known danger exception. Consequently, this Court should hold that the issue is not properly preserved for presentation here. *See Tatera v. FMC Corp.*, 2010 WI 90, ¶19, 328 Wis. 2d 320, 786 N.W.2d 810 (issues not raised in response to petition and made for the first time are forfeited); *Marotz v. Hallman*, 2007 WI 89, ¶16, 302 Wis. 2d 428, 734 N.W.2d 411 ("'unless ordered otherwise by the supreme court,' a petitioning party is precluded from raising or arguing an issue not set forth in the petition. Wis. Stat. (Rule) §809.62(6)"); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988). Owners raised the known-danger issue in the court of appeals only in a footnote. *See* Owners'-Ct.-App.-Cross-Resp.-Br.-3 n.1. *Cf. State v. Hipler*, 2006 WI App 244, ¶20 n.4, 297 Wis. 2d 582, 724 N.W.2d 702 (court of appeals declining to address arguments not adequately briefed).

piercing immunity. . . . For the known danger exception to apply, the danger must be compelling enough that a self-evident, particularized, and non-discretionary municipal action is required. The focus is on the specific act the public office or official is alleged to have negligently performed or omitted." *Lodl*, 2002 WI 71, ¶42.

Owners claim no non-discretionary "specific act" compelled by a known danger. Owners suggest that the District should have kept groundwater levels high by either more fully lining the tunnel (Owners'-Resp.-Br.-5) or "grouting and lining" the tunnel" (*id.*) or, quoting a draft pre-design report, by performing the "removal of solid deposits, removal of fallen rock, repair of deteriorated linings and placement of concrete lining in deteriorated, unlined areas" (*id.*). None of this is a specific ministerial act.

Nor do Owners demonstrate a known danger that compels a specific ministerial act. They rely on pre-construction and construction documents identifying a potential risk to buildings with wood-pile foundations posed by the large inflows of water into the tunnel during mining. Owners'-Resp.-Br.-59. None of this evidence identifies an "Oh, my

gosh" moment in which one corrective course is obviously required. Instead, the very evidence on which Owners rely shows that several danger-preventing courses *were undertaken*—replenishing groundwater with recharge wells and grouting or lining areas that suffered unexpectedly large inflows. *See, e.g.*, R.123-5–7:MMSDApp-0584–86. R.351,ex.429:A-Ap.352 (June 1990 memorandum discussing the use of recharge wells and grouting to replenish groundwater reducing during mining).

In all events, a risk of building damage does not meet the known-danger standard. All of the instances in which this Court has applied the known-danger exception involved a substantial risk of death or serious bodily injury, rather than, as here, repairable property damage. *See Lodl*, 2002 WI 71, ¶38; *Cords*, 80 Wis. 2d at 259.

Owners argue further that "even if MMSD could have repaired the Deep Tunnel in more than one way does not mean that it had discretion not to act at all." Owners'-Resp.-Br.-58. *Lodl* rejected this argument, reversing a court of appeals' ruling that because "the officer nevertheless 'did nothing,' summary judgment on the immunity was improper." 2002 WI 71, ¶41. "The generic 'doing' of

'something,'" this Court held, "cannot possibly be characterized as a ministerial duty." *Id.* ¶43.

Owners conceded below that *Lodl*'s holding barred application of the known-danger exception in this case. Owners'-Ct.App.-Cross-Resp.-Br.-4 n.1 (stating that *Lodl* was wrongly decided but conceding that court of appeals is "not in a position to alter [*Lodl*'s] standard"). Owners now argue that *Lodl* should be reconsidered, calling *Lodl*'s rule a "rigid" one that "renders the known danger exception illusory and effectively collapses it into the ministerial duty exception." Owners'-Resp.-Br.-60 n.14. But *Lodl* has been repeatedly followed, and its specific-duty rule differs from the so-called "ministerial-duty exception" in the source of the non-discretionary duty.

Ministerial duties are typically imposed by an existing law or regulation—failure to perform the duty imposed is not a "legislative, quasi-legislative, judicial or quasi-judicial function"; thus it is not immune under §893.80(4). This has sometimes been referred to as a "ministerial-duty exception" (*see, e.g.*, *Lifer*, 80 Wis. 2d at 509), although the failure to perform such duties simply does not come within the scope of the immunity.

The known-danger doctrine is an exception to the requirement that a preexisting law, regulation, or other standard imposes a specific duty to act. *Lodl*, 2002 WI 71, ¶39. "In this [known-danger] context, the ministerial duty arises not by operation of law, regulation, or government policy, but by virtue of particularly hazardous circumstances." *Id.* Here, as in *Noffke v. Bakke*, "the danger does not give rise to a ministerial duty because there is no known and compelling danger of such force that the time, mode, and occasion for performance is evident with such certainty that nothing remains for the exercise of discretion." 2009 WI 10, ¶56, 315 Wis. 2d 350, 760 N.W.2d 156. Even examined after the fact, nothing about the risk to wood-foundation buildings required a single, corrective course of conduct.

C. No new "changed circumstances" immunity exception is warranted.[11]

Owners argue for a new §893.80(4) exception allowing plaintiffs to hold a governmental entity liable for harm caused by a public work's discretionary design, if a judge or jury finds that changed circumstances warrant a design change to avoid a risk of "actual and substantial danger." Owners'-Resp.-Br.-50. Nothing in §893.80(4)'s text, its history, or this Court's §893.80(4) jurisprudence supports such an exception, and the proposed exception would effectively defeat core §893.80(4) immunity.

First, there is no reason to believe that §893.80(4) incorporates a "changed circumstances" or "supervision of design" principle. As explained above, *Lodl* instructs that even when there are known dangerous circumstances, immunity turns "on whether the act negligently performed or omitted can be characterized as ministerial." 2002

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[11] Owners never raised this theory for the non-application of §893.80(4) before the trial court. It has therefore been forfeited. *See State v. Rogers*, 196 Wis. 2d 817, 826–27, 539 N.W.2d 897 (Ct. App. 1995).

WI 71, ¶42. Owners' request that this Court legislate a "changed conditions" exception to §893.80(4) ignores the controlling authority of *MMSD*, 2005 WI 8, ¶¶59–60 ; and *Lodl*, 2002 WI 71, ¶38.

Second, Owners' proposed new exception is inconsistent with §893.80(4)'s purpose of protecting public entities and their officers from litigation over discretionary planning decisions. *Lodl*, 2002 WI 71, ¶32. To the extent that the proposed "changed circumstances" exception is different than the known-danger doctrine, it lacks a limiting principle to restrain novice juries from second-guessing the planning, design, and construction of public works projects like the tunnel. Supervising whether the tunnel is continuing to operate properly is a task assigned by state and federal law to the DNR, which requires the District to renew the permit under which the District operates the tunnel every five years. 33 U.S.C. §§1311, 1342(a), (b); Wis. Stat. §§283.11, 283.13, 283.53. DNR regulatory action, rather than private damages suits, is both a more efficient and more effective way to ensure that the tunnel is safely providing the pollution

preventing wastewater storage function for which it was designed and constructed.

Third, *Baldwin v. California*, the 1972 California decision on which Owners rely for their new exception request, is nothing like this case. 491 P.2d 1121 (Cal. 1972). It involved a car accident allegedly caused by an inadequately controlled intersection. The plaintiff sued California, invoking a California statute making the state liable for dangerous conditions of which it had notice, relying on state surveys showing an increase in traffic and accidents four decades after the intersection had been designed. *Id.* at 1123–24. The state defended based on a California statute affording immunity for "injury caused by the plan or design of" an improvement to public property. *Id.* at 1124 & n.5. The court concluded that the statute should not apply based on a New York traffic signal decision, *Weiss v. Fote*, 167 N.E.2d 63 (N.Y. 1960), which, in *dicta*, suggested that "design immunity persists only so long as conditions have not changed." *Baldwin*, 491 P.2d at 1127.

Here, the tunnel was designed, constructed, and is operated as approved by the DNR. No facts suggest that the District "supervised" the tunnel's

design negligently because "subsequent experience or changed conditions demonstrate an actual and substantial danger to the property interests of another." Owners'-Resp.-Br.-54. Owners cannot show "changed conditions," "substantial danger," or any notice of specific post-construction injury risk that would bring this case within *Baldwin*'s principle.

Subsequent experience with the tunnel after it became operational has shown that groundwater infiltration has decreased. R.388-2002–03:MMSDApp-0371. There is no evidence that the District was aware that operating the tunnel consistent with all applicable infiltration standards posed "an actual and substantial danger." Ultimately, because no evidence justifies application of the proposed *Baldwin* exception, this case does not present an adequate vehicle to consider adopting it.[12] *See, e.g., Allstate*, 80 Wis. 2d at 16 n.5.

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[12] *Baldwin* is no guiding light. Other courts have rejected its principle, *see, e.g.*, *Thompson v. Newark Hous. Auth.*, 531 A.2d 734 (N.J. 1987), and California modified it by

D. The professional discretion exception, which applies only to medical professionals, has no role here.[13]

Owners ultimately concede that "the operation and maintenance of a sewerage tunnel involves highly technical engineering decision[-]making." Owners'-Resp.-Br.-67. They argue that "MMSD's negligent operation and maintenance of the Deep Tunnel . . . involved the exercise of professional engineering discretion, not governmental discretion, and, therefore, is not immune." Owners'-Resp.-Br.-70. Recognizing that the professional discretion exception has only been applied to physicians, Owners argue that this Court should expand the exception to cover all "acts not governmental in nature." Owners'-Resp.-Br.-65.

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statute, *see Cornette v. Dep't of Transp.*, 26 P.3d 332 (Cal. 2001).

[13] Owners also did not raise this argument in their response to the District's cross-petition and raised it only in a footnote in their court of appeals brief. Owners did not raise it in the circuit court. It has been forfeited. *See* nn.10–11, above.

This Court has repeatedly rejected attempts to expand the professional discretion exception beyond the medical setting. *See Scott*, 2003 WI 60, ¶32 (school guidance counselor); *Kierstyn*, 228 Wis. 2d at 81, ¶39 (school benefits specialist); *Kimps*, 200 Wis. 2d at 21 (professor); *see also Stann v. Waukesha Cnty.*, 161 Wis. 2d 808, 818, 468 N.W.2d 775 (Ct. App. 1991) (limiting rule to physicians).

The court of appeals, in a case Owners do not mention, has held that this Court's precedents foreclose extending *Scarpaci*'s professional discretion exception to engineers. *DeFever v. City of Waukesha*, 2007 WI App 266, ¶16, 306 Wis. 2d 766, 743 N.W.2d 848. *DeFever* is well reasoned. Any extension of *Scarpaci*'s governmental-versus-non-governmental distinction beyond the medical field would require the Court to administer the very type of dichotomy that *Holytz* rejected as unworkable. *Kimps*, 200 Wis. 2d at 20. There is no principled basis to distinguish governmental discretion from professional discretion in a field like engineering. As Owners contend, "It goes without saying that the operation and maintenance of such a complex, massive structure [as the Deep

Tunnel] requires technical expertise of professionals." Owners-Resp.-Br.-70. These professionals, however, are exercising discretion to perform *governmental* engineering tasks. *See Kimps*, 200 Wis. 2d at 21. The propriety of the conduct depends on governmental rules and the breadth of discretion allowed by their governmental employers. They are, therefore, properly within the scope of §893.80(4)'s immunity.

As *Kierstyn* correctly remarked about extending the professional discretion exception to a benefits specialist, to include engineers would make *Scarpaci* "the exception that would swallow the rule." 228 Wis. 2d at 81, ¶39. The planning, design, construction, operation, and maintenance of all significant public works projects involve engineering. "The purpose of the immunity is to insure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government . . . [when] such a policy decision, consciously balancing risks and advantages took place." *Scarpaci*, 228 Wis. 2d at 686 (quoting RESTATEMENT (SECOND) OF TORTS, §895B, cmt. d, 403 (1977)). Excepting all discretionary engineering decisions involving public works would

put courts in the role of passing judgment on the very governmental policy decisions that §893.80(4) immunity is designed to protect. *Scarpaci*'s professional discretion exception should not be so extended.[14]

E. "Quasi-legislative and quasi-judicial" have referred to discretionary governmental conduct for over a 150 years.

When the legislature provided government entities with statutory immunity for acts involving "quasi-legislative and quasi-judicial conduct," it used common-law terms carrying well established meanings. Those meanings inescapably inform the statute's application. *See Bank Mut. v. S.J. Boyer Constr., Inc.*, 2010 WI 74, ¶¶23–25, 326 Wis. 2d 521, 785 N.W.2d 462.

As early as 1864, this Court had held that a city could not be liable for failing to prevent harm

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[14] Even if engineering conduct could be exempt professional discretion, Owners' failure to identify any specific negligent engineering act makes application of that proposed exception impossible on this record. *See Scarpaci*, 96 Wis. 2d at 686–87 (immunity afforded decision to conduct or order an autopsy but not to acts in performing the autopsy procedure).

when it had only a discretionary, rather than a ministerial, duty to act. *See Kelley*, 18 Wis. at 85–86. By 1911, the Court had held that a municipality could not be held liable for negligently performing or failing to perform discretionary or "quasi-judicial" acts of sewerage system planning and construction. *Geuder*, 147 Wis. at 503–04.

In June, 1893, Geuder, Paeschke & Frey owned a warehouse building in Milwaukee. The city's sewer system in front of the building was not designed to take sufficient care of surface water and sewage. "The sewer was faultily designed and the system also, as used at such time, whereby it became overloaded and burst, resulting in a large quantity of the contents thereof going into plaintiff's basement and damaging its property." *Id*. at 493. Geuder sued the city claiming the sewer's insufficient construction and partially decayed state caused the damage. A jury returned a verdict for Geuder. This Court reversed.

The Court reasoned that under "settled doctrine" any error by the city was immune from the consequences of its sewerage plan. *Id.* at 503. Mistakes made by a municipality "clothed by law with discretionary authority," the Court ruled,

"have the same status as regards liability for negligence as mistakes of any person or body exercising quasi-judicial authority." *Id.* at 503–04. Thus, by at least the early twentieth century, discretionary municipal conduct was afforded the same immunity as "quasi-judicial" conduct.

What is more, *Geuder* makes clear that municipalities were not responsible for defects in a "duly adopted plan of sewerage" or "defective original construction inhering in the plan itself." *Id.* at 504–05. A municipality could be held liable if the plan of sewerage "becomes *out of repair* to the knowledge, actual or constructive, of the municipality, [then] the duty devolves upon it to remedy the matter." *Id.* at 505 (italics added). The District, however, could not here be held liable under even this early twentieth century standard. As explained above, there is no evidence that the tunnel is "out of repair."

The Court has subsequently used "quasi-legislative" and "quasi-judicial" as a shorthand for discretionary conduct. The policy of providing municipalities and their officers with immunity "in the discharge of legislative and quasi-judicial duties . . . [and t]he rules which are the expression

of this policy apply to officials in the performance of duties requiring the exercise of discretion and judgment." *See, e.g.*, *Wasserman v. City of Kenosha*, 217 Wis. 223, 226, 258 N.W. 857 (1935).

None of this was affected by *Holytz*. Before *Holytz* municipalities could not invoke immunity if their conduct was adjudged to have been the result of proprietary, rather than governmental, conduct. 17 Wis. 2d at 32. Decisions like *Winchell*, *Churchill*, and *Mitchell* were based on the conclusion that operating a sewerage system or utility were proprietary acts for which the municipality could be liable. *Holytz* abandoned this governmental-versus-proprietary rule because it "resulted in some highly artificial judicial distinctions," 17 Wis. 2d at 32, ultimately proving to be impossible to administer. *Holytz* stated, "In determining the tort liability of a municipality it is no longer necessary to divide its operations into those which are proprietary and those which are governmental." *Id.* at 39.

At the same time, the Court emphasized in *Holytz* that it was not abrogating common-law discretionary act immunity: "This decision is not to be interpreted as imposing liability on a

governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions." *Id.* at 40. The Court expressly left the legislature free to protect governmental entities through legislation, which the legislature did, in part by including the discretionary act immunity in what is now §893.80(4).

This Court has long construed §893.80(4)'s "legislative, quasi-legislative, judicial or quasi-judicial functions" provision as collectively referring to discretionary governmental acts, a construction that is consistent with those terms' common-law meaning. [15] *Kierstyn*, 228 Wis. 2d at 90–91;

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[15] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998), on which Owners' rely, *see* Owners-Reply-Br.-16–17, makes clear that the "legislative" and "judicial" acts that were afforded immunity at common law were discretionary, rather than ministerial. *See* 523 U.S. at 51. As a general matter, Owners' attempted comprehensive analysis of governmental immunity inaccurately distinguishes what they call "public official immunity under §1983" from "public official immunity for negligence." Rather than describing a separate substantive category of immunity created by Congress in enacting 42 U.S.C. §1983, the §1983 immunity jurisprudence explains which common-law immunities survived the civil rights' statute's enactment. Writing for the Court in *Bogan*, Justice Thomas explained that §1983 jurisprudence reflects the importance of the discretionary/ministerial distinction,

Allstate, 80 Wis. 2d at 16–17; That the legislature has left this Court's elaboration unchanged for almost 50 years, even though amending the governmental immunity statute several times over that period, demonstrates that both branches are aligned in the breadth of the immunity's scope. *See State v. Eichman*, 155 Wis. 2d 552, 556 & n.3, 456 N.W.2d 143 (1990).

In 1996, this Court rejected a similar "invitation to [ ] alter the [discretionary/ ministerial] test which [it had] employed for twenty years." *Kimps*, 200 Wis. 2d at 14. Nothing in the subsequent 16 years of consistently applying the test should lead to a different result in a case like this one in which Owners seek to recover from the effects of a large public works project. While one might reasonably debate the test's application to different circumstances where the exercise of discretion might be unclear, there should be no such debate here, since Owners identify no specific duty or act that they contend qualifies as

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such as the kind of immunity retained by *Holytz* and codified by §893.80(4). 523 U.S. at 51–52.

ministerial and have now conceded that acts involved with the tunnel's operation and maintenance involve engineering discretion.

Further seeking to justify a sea change in the scope of §893.80(4) immunity, Owners contend that the Court has wrongfully interjected a discretionary-ministerial test developed for government officer immunity and applied it in the governmental entity arena. But, as this Court has recognized, it was the *legislature* that equated public officer immunity with governmental entity immunity when it included them both in the same immunity-affording statute: "No suit may be brought against any . . . [governmental] corporation . . . or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." §893.80(4).

This Court almost a decade ago considered an argument that its §893.80(4) jurisprudence had "mistakenly broadened the grant of municipal immunity" and "erroneous[ly] mix[ed these] doctrines." *Scott*, 2003 WI 60, ¶34. The Court's rationale for rejecting the argument then continues to apply now—§893.80(4)'s governmental immunity

doctrine, as consistently interpreted, "reflects concern for 'protection of the public purse against legal action and . . . the restraint of public officials through political, rather than judicial means.'" *Id.* ¶35 (quoting *Kierstyn*, 228 Wis. 2d at 89–90); *see also Lister*, 72 Wis. 2d at 299. Those principles plainly favor applying immunity to Owners' claim that the District should be required to pay over $6 million for foundation repairs purportedly caused by the tunnel's partially lined existence and "operation."

Regardless of whether §893.80's "legislative, quasi-legislative, judicial or quasi-judicial function" provision covers all discretionary conduct, there should be no doubt that the only conduct truly at issue in this case falls within the statute's grant of immunity. As discussed above and in Owners' opening brief (at 22), the only District conduct that arguably resulted in lower groundwater levels involved the tunnel's design, construction, and existence with only a partial lining. All of this falls squarely within the definition of "quasi-legislative" and "quasi-judicial." The decision to construct the tunnel is just as "quasi-legislative" as the decision to acquire the dam in *Lange*. *See* 77 Wis. 2d at 318

("As to the acquisition of the existing dam and construction of a new dam, these are clearly legislative functions under the statute."); *see also Allstate*, 80 Wis. 2d at 16. And the tunnel's design and operation are the product of judicial or quasi-judicial decision-making. As the opening brief explains (at 12), the District agreed in a court-approved stipulation to construct the tunnel in order to settle a state-court lawsuit with the DNR over alleged violations of federal and state water pollution laws. Pursuant to the stipulation, the DNR oversaw the tunnel's design and construction.

The District and the DNR again litigated over whether the tunnel needed a full concrete lining. R.124-6–7:MMSDApp-0460–61. That dispute was resolved in a court-approved stipulation requiring the District to report infiltration levels for each unlined segment to the DNR along with a recommendation regarding the extent of lining; the DNR then made its decision on whether the segment should be lined or unlined; any disagreement about lining a particular section was subject to a contested case hearing under chapter 227. R.124-6–7:MMSDApp-0460–61. (The Boston Store building's owners could have, but did not,

request a hearing on whether the tunnel section near the building should be lined. *See* §227.42.)

The DNR also imposes operational standards for the tunnel, which are incorporated into every discharge permit the DNR has issued to the District since the tunnel went into operation. Thus, the tunnel's design, operation, and existence were the product of "judgment[s] made by a body clothed by law with discretionary authority, and have the same status as regards liability for negligence as mistakes of any person or body exercising *quasi*-judicial authority." *Geuder*, 147 Wis. at 503–04. Even a century ago the District would have been immune from negligence claims based on the adoption of the tunnel plan and the tunnel's operation in a proper state of repair. *Id.* at 504–05; *see also Allstate*, 80 Wis. 2d at 16. And, as emphasized above, there is no evidence that the tunnel was in disrepair or that it failed to meet any applicable infiltration standard. Consequently, any reasonable interpretation of §893.80(4) requires

ruling that the District is immune from Owners' negligence claims.[16]

II. Owners' Failure to Serve a Notice of Claim or Statement of Relief Sought Entitles the District to Judgment in Its Favor

Section 893.80(1) required Owners to serve the District with a notice of claim and itemization of relief. They indisputably failed to do so.

A. The District did not forfeit its well-pleaded §893.80(1) defense.

Owners' first-line effort to avoid judgment based on their failure to comply with §893.80(1) is to argue that the District waited too long to seek a dismissal on that ground. Owners'-Resp.-Br.-82–85. This Court has held in the analogous context of

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[16] The McQuillin treatise cited by Owners and referred to by Justice Prosser in his *Willow Creek* dissent, does not, as Owners contend, reject the discretionary/ministerial distinction as unworkable. It notes the challenges courts have faced in distinguishing between discretionary and ministerial conduct in certain difficult cases, but it acknowledges the basic rationale justifying immunity for discretionary acts. Indeed, the treatise recognizes the inseparable relationship between immunity for the exercise of municipal legislative and judicial functions and the discretionary-versus-ministerial distinction. *See* 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §53.04.10 & n.3 (3d ed. 2011).

the notice-of-claim requirement for suing state officials that "Where a plaintiff has failed to comply with the terms of the statute and this defect is properly raised by a motion for summary judgment, the defendant is entitled to prevail whether or not he has raised the matter of noncompliance in his responsive pleading. This rule is in accord with the general view that notice of injury requirements cannot be waived." *Mannino v. Davenport*, 99 Wis. 2d 602, 612, 299 N.W.2d 823 (1981); *see also Sambs v. Nowak*, 47 Wis. 2d 158, 167, 177 N.W.2d 144 (1970); *Ibrahim v. Samore*, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984). The District's §893.80(1) defense was well preserved merely by raising it in the circuit court, *Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶27, 273 Wis. 2d 76, 681 N.W.2d 190, which the District did by pleading it, *see Thorp v. Town of Lebanon,* 2000 WI 60, ¶24, 235 Wis. 2d 610, 612 N.W.2d 59; *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶18, 302 Wis. 2d 358, 735 N.W.2d 30, and then by moving to dismiss based upon it.

Moreover, the District moved for dismissal on §893.80(1) grounds before the circuit court's dispositive motion deadline. R.34. No case Owners

cite and none of which the District is aware has held that a party forfeits (or "waives") a defense pleaded in its answer and presented in a timely dispositive motion. This alone should defeat Owners' forfeiture argument.

Even so, the District's short delay in seeking dismissal on §893.80(1) grounds was justified. The District reasonably sought discovery on whether Saks and WISPARK, the non-owner entities that served the only notices, had assigned their rights to Owners.[17] Within a few months of receiving Owners' discovery responses that identified no assignment, the District sought dismissal under §893.80(1). The District filed its motion within 17 months of the action's commencement, before Owners amended their complaint, before Owners voluntarily dismissed the tunnel construction contractors, and more than a year before the dispositive motion deadline. R.34. The District

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[17] This explains the District's failure to raise the issue at the initial scheduling conference, as Judge Kremers suggested is the preferable practice when a party knows it has a potentially dispositive §893.80(1) motion.

plainly did not abandon its §893.80(1) defense through delay.

Figgs v. City of Milwaukee, 121 Wis. 2d 44, 357 N.W.2d 548 (1984), and *Strong v. Brushafer*, 185 Wis. 2d 812, 519 N.W.2d 668 (Ct. App. 1994), are the only cases on which Owners rely for their waiver argument. In *Figgs*, the Court did not reach waiver, even though the city dallied until after the second day of a jury trial to raise its notice of claim defense. 121 Wis. 2d at 48. In *Strong* the assistant city attorney moved for dismissal for failure to comply with §893.80(1) as the circuit court was seating a jury, some 15 months after the dispositive motion deadline. 185 Wis. 2d at 817. *Strong* also did not address waiver—the circuit court dismissed the complaint without prejudice and plaintiff had filed anew while the original case was on appeal. *Id.* at 817–18. Thus, neither *Figgs* nor *Strong* support Owners' waiver argument, and *Marnino*, *Sambs*, *Ibrahim*, and *Village of Trempealeau* foreclose it.

B. Notice by a non-claimant cannot satisfy a claimant's §893.80(1) notice obligation.

There is no question that Owners did not serve the notices of claim and statements of

requested relief required by §893.80(1) before commencing suit. The issue is whether the substantial compliance doctrine can be stretched so far as to allow a corporate claimant that never served a notice of claim or statement of requested relief to sue because other entities, which had no claim, served documents identifying the damage for which that claimant later sues.

The substantial compliance doctrine cannot be made that elastic without ignoring the statute's text and fundamental purpose. The notice and statement served by non-owners, Saks and WISPARK, does not identify Bostco's or Parisian's claims, nor were those documents "signed by" those entities, as §893.80(1) requires. As this Court has repeatedly held, legally distinct corporations are separate parties that must act and be acted upon in their own right. *See, e.g., Johnson v. Cintas Corp. No. 2*, 2012 WI 31, 339 Wis. 2d 493, 811 N.W.2d 756. The failure of notices to be served on behalf of Bostco and Parisian is a fundamental error.

The notice and statement of relief served by non-owners WISPARK and Saks did not allow the District to shorten the statute of limitations as to Owners by serving a claim denial on non-owners

under §893.80(1)(g). *See Pool v. City of Sheboygan*, 2007 WI 38, ¶20, 300 Wis. 2d 74, 729 N.W.2d 415. Owners do not contest this.

What is more, while non-owners' notice and statement identified the building and the alleged damage, it did not provide essential information needed to compromise the claim, namely, the identity of the entities actually owning the claims. Owners' counsel told the circuit court that non-owners (and apparently their counsel) did not know which entities had a claim: "The reason it [the notice of claim] wasn't brought in the correct name is that these companies are so inter-related, they are so married together that *even the people who are the directors of the company, the president of the company didn't even realize they had filed* the notice of claim or itemization of damages *on behalf of the wrong party* . . . when they captioned the notice of claim, WisPark and Saks, rather than Bostco and Parisian, *they didn't realize they were bringing it in the name of someone who was not the current title owner of the property*." R.369-8–9:MMSDApp-0333–34 (italics added).

This proves the point. The notice and statement were served by "the wrong part[ies]."

The mistake was not an obvious one—the corporate officers did not appreciate the error—and Owners do not (and cannot) contend that the District should have recognized "WISPARK" to mean "Bostco" and "Saks" to mean "Parisian." Owners, therefore, cannot now correctly contend that the error would have made no difference had the District attempted to settle the claims. Any effort at settlement would have been with WISPARK and Saks, which, presumably, would have continued to assert that the claims were theirs.

While perhaps the language of any release would have included these parties' affiliates, that happy occasion, should it have occurred, is no substitute for a release from Bostco and Parisian, the actual entities that own the claims. At most, such a provision would have given the District an argument that Bostco and Parisian were barred from pursuing the claims because entities with whom they were in privity executed a release purporting to extinguish the claims of "affiliates," including them. This litigation position, however, is no substitute for a release by the actual claimants. It does not offer the certainty §893.80(1) envisions—that the noticed claim is definitively

resolved. Consequently, this Court should hold that notices of claim and statements of relief must, at a minimum, identify the actual claimants.

C. The District did not have actual notice of Bostco's and Parisian's claims.

For the same reasons as those explained above in section II.B, the District did not have "actual notice of the claim"—that is, actual notice of Bostco's and Parisian's claims.

Section 893.80(1) allows a claimant to dispense with serving notice when the governmental defendant has actual notice of the claim. The actual notice, however, must provide the same essential information required of the statutory notice—most importantly it must identify the claimant. Owners do not (and cannot) contend that the District had actual notice that Bostco and Parisian, rather than WISPARK and Saks, had potential claims against it for damages. Therefore, actual notice did not excuse Owners' failure to serve proper notices of claim.

What is more, Owners offer no evidence that they met the statutory actual notice requirement of "show[ing] to the satisfaction of the court that the delay or failure to give the requisite notice has not

been prejudicial." §893.80(1)(a). In response, they offer only the court of appeals' wholly unsupported conclusion that the District was not "prejudiced by the fact that the wrong claimant was listed on the notice of claim." Owners'-Resp.-Br.-92 (quoting *Bostco*, 2011 WI App 76, ¶88)). The apparent basis for this assertion is the non-complying notice and the court of appeals' erroneous suggestion that the District had to prove prejudice. The non-complying notice cannot satisfy Owners' burden of showing affirmatively that the failure to provide written notice was not prejudicial. *See E-Z Roll Off, LLC v. Cnty. of Oneida*, 2011 WI 71, ¶¶48–53, 335 Wis. 2d 720, 800 N.W.2d 421. And the circuit court, which held the non-owners' notice to be substantially complying, did not consider the issue of prejudice. *See* R.369-1–19:MMSDApp-0326–344. In fact, Owners made no showing of actual notice allowing them to avoid their failure to serve a proper notice of claim and statement of requested relief.

CONCLUSION

Owners' failure to identify any failure of the tunnel to operate as designed requires judgment for the District under §893.80(4). In the absence of such a failure, there can be no duty to repair, whether discretionary or ministerial, and, thus, no harm caused by a breach of a duty of repair. *MMSD* and *Allstate* hold that the design, construction, and continued existence of the tunnel are categorically immune acts. While failure to perform a ministerial duty of operation or maintenance may be basis for liability, Owners identify no such failure.

The District would be entitled to judgment even under Owners' proposed reinterpretation of §893.80(4), as applying only to acts involving "the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed . . . [or] the exercise of discretion and judgment in the application of a rule to specific facts." Owners'-Resp.-Br.-80–81 (quotation marks omitted). Given the lack of any basis to conclude that the tunnel has malfunctioned, the only acts potentially involved necessarily relate to the design and construction of the tunnel. Those acts

unquestionably involved the exercise of discretion—among other things, in determining the policy of constructing the tunnel with only a partial concrete lining and in applying that policy to specific facts to determine which tunnel sections should be lined. These discretionary decisions were then approved by the DNR.

What is more, the circuit court's failure to ask the jury whether the District breached a duty for which there is no immunity makes the verdict fatally flawed. There is no way to determine whether the jury based its verdict on the effects of immune conduct of design, construction, or continued existence of the tunnel. Thus, even if the District were not entitled to judgment on immunity grounds, this procedural error would require a new trial.

Finally, Owners' failure to serve notices of claim and requests for relief sought that identify them as the owners of the claims should not be ignored as inconsequential. Because a "notice of claim" that fails to identify the claimant does not tell the municipality who to settle with or on whom to serve a statute-of-limitations-shorting claim denial, it does not serve §893.80(1)'s purposes.

Consequentially, such a "notice" cannot discharge the claimant's §893.80(1) duty to serve a notice of claim and request for relief sought.

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

Respectfully submitted,

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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 31, 2012 order expanding the brief volume limitation in §809.19(8)(c) to 12,000 words. The length of this brief is 11,027 words.

Dated: June 4, 2012.

_____

G. Michael Halfenger

CERTIFICATE OF MAILING

I certify that this Reply 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 June 4, 2012. I further certify that the brief was correctly addressed and postage was pre-paid.

Dated: June 4, 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 are identical to the text of the paper copies.

Dated: June 4, 2012.

_____

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