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STATE OF WISCONSIN
SUPREME COURT

BOSTCO LLC and PARISIAN, INC.,

Plaintiffs-Appellants-Cross-Respondents-Petitioners,

v. Appeals No. 2007AP221 & 2007AP1440

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant-Respondent-Cross-Appellant-Petitioner.

LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF

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

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).

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Wisconsin Statutes and Constitutional Provisions

STATEMENT OF INTEREST

The League of Wisconsin Municipalities (League) is a non-profit, voluntary association of 583 Wisconsin cities and villages cooperating to improve and aid the performance of local government. We sought to participate in this case because we disagree with Plaintiffs-Appellants-Cross-Respondents-Petitioners' (Bostco's) assertion that Wis. Stat. sec. 893.80(3), which limits municipal exposure for tort liability, is unconstitutional. Binding precedent clearly establishes otherwise. We also strongly disagree with Bostco's assertion that this Court's decision in *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440, provides a basis for departing from existing precedent. *Ferdon* is readily distinguishable and in no way undermines existing precedent. The concerns that motivated the legislature to enact 893.80(3) and its predecessors, protecting the public treasury from insolvency and preventing intolerable tax burdens, are undiminished and, in fact, even heightened in this difficult economy. A departure from existing precedent would jeopardize the already precarious financial state of Wisconsin municipalities and have disastrous consequences for municipalities statewide.

The League also believes municipalities must vigilantly guard against plaintiffs' attempts to disguise tort actions by dressing them in takings clothing in an effort to circumvent the protections afforded municipalities by sec. 893.80. Such attempts threaten to improperly expand other areas of law (e.g.,

takings law) in ways that are dangerous and adverse to municipal interests. It was because we feared its potential to greatly expand takings law and wanted to weigh in on the issue of whether uncaptured groundwater is owned by an overlying landowner that we participated as *amicus* in *E-L Enterprises, Inc., v. Milwaukee Metropolitan Sewerage District*, 2010 WI 58, 362 Wis.2d 82, 785 N.W.2d 409. This Court recognized E-L Enterprises' claim as one for consequential damages to property resulting from governmental action rather than a compensable taking and concluded that it was unnecessary to address the issue of uncaptured groundwater ownership. It should recognize Bostco's inverse condemnation claim as the same and treat it accordingly.

ARGUMENT

This Court has twice upheld statutory limitations on the amount of damages recoverable against municipalities in tort actions. Bostco provides no basis for departing from existing precedent and this Court's decision in *Ferdon* is readily distinguishable and inapplicable to the cap on recoverable damages set forth in Wis. Stat. sec. 893.80(3).

Additionally, like the claim in *E-L Enterprises, Inc.*, Bostco's inverse condemnation claim is a claim for consequential damages to property clothed in takings garb. This Court should recognize it as such and, as it did in *E-L Enterprises*, deal with it accordingly. As in *E-L*, it should be unnecessary for the Court to decide whether uncaptured groundwater is the private property of the person under whose ground it flows. If, however, the Court should decide

that it is necessary to deal with the issue, the League fully agrees with the Milwaukee Metropolitan Sewerage District (MMSD) that uncaptured groundwater is not the "property" of the person who owns the land under which it flows. See MMSD Response Brief at pp. 94-100. Additionally, we submit that private ownership of uncaptured groundwater is an unsound concept that would substantially increase government exposure for takings, threaten groundwater protection, and deharmonize Wisconsin water law.

THIS COURT HAS TWICE UPHELD THE DAMAGE LIMITATION IN WIS. STAT. SEC. 893.80(3) BASED ON THE LEGISLATURE'S DETERMINATION THAT IT'S NECESSARY TO PROTECT THE PUBLIC TREASURY AND AVOID INTOLERABLE TAX BURDENS; *FERDON,* READILY DISTINGUISHABLE, PROVIDES NO BASIS FOR DEPARTING FROM EXISTING MANDATORY PRECEDENT.

In 1962, the Wisconsin Supreme Court abrogated the judicially-created doctrine of municipal immunity from tort liability, acknowledging the legislature's power to reinstate immunity or impose ceilings on the amount of damages recoverable against municipalities if it deemed it better public policy. *Holytz v. City of Milwaukee,* 17 Wis.2d 26, 40, 115 N.W.2d 618, 625 (1962). The legislature swiftly enacted a law limiting recovery against municipalities in tort actions.[1] The legislature could have reinstated immunity, but instead chose to limit the amount of damages recoverable against municipalities to $25,000.

[1] See 1963 Laws of Wisconsin, ch. 198.

This initial limitation survived a challenge on equal protection grounds in *Stanhope v. Brown County*, 90 Wis.2d 823, 280 N.W.2d 711 (1979). Stanhope argued the limitation created two classes of plaintiffs (victims of governmental negligence and victims of non-governmental negligence) and two classes of defendants (governmental tortfeasors and non-governmental tortfeasors) and limited liability of governmental tortfeasors and recovery of victims of governmental tortfeasors. This Court held that the different classifications balanced two legislative purposes, compensating victims of government tortfeasors while at the same time protecting the public treasury. It stated:

> We are unwilling to say that the legislature has no rational basis to fear that full monetary responsibility entails the risk of insolvency or intolerable tax burdens. Funds must be available in the public treasury to pay for essential governmental services; taxes must be kept at reasonable levels; it is for the legislature to choose how limited public funds will be spent. It is within the legitimate power of the legislature to take steps to preserve sufficient public funds to ensure that the government will be able to continue to provide those services which it believes benefits the citizenry. We conclude that the legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit.

Stanhope v. Brown County, 90 Wis.2d 823, 842, 280 N.W.2d 711, 719) (1979).

One year later, this Court again upheld $25,000 limitations against equal protection challenges. *Sambs v. City of Brookfield*, 97 Wis.2d 356, 378, 293 N.W.2d 504, 515 (1980). Sambs contended that the legislature created improper classifications within the classification of "victims of public tort-feasors" by limiting the amount plaintiffs injured by reason of highway defects

could recover while imposing no limit on the amounts recoverable where municipal motor vehicles were involved or where damage was caused by mobs or riots. Sambs also contended it was unreasonable to cap municipal liability at $25,000 while state liability was capped at $100,000.

This Court concluded the legislature had a rational basis for such distinctions, stating:

> Government engages in activities of a scope and variety far beyond that of any private business, and governmental operations affect a large number of people. Municipal units of government have hundreds and thousands of employees. Municipal units of government maintain hundreds and thousands of miles of streets and highways and drains and sewers, subject to many hazards; they operate numerous traffic signals, parking lots, office buildings, institutions, parks, beaches and swimming pools used by thousands of citizens. Damage actions against a governmental entity may arise from a vast scope and variety of activities. A claim against a government unit may range from a few dollars to a few million dollars. A municipal unit of government, limited in fundraising capacity, may lack the resources to withstand substantial unanticipated liability. Unlimited recovery to all victims may impair the ability of government to govern efficiently.

Sambs v. City of Brookfield, 97 Wis.2d 356, 377, 293 N.W.2d 504, 514 (1980). Although *Sambs* upheld the limitation, the court urged the legislature to periodically review statutory recovery limitations to insure that "inflation and political considerations do not lead to inequitable disparities in treatment." *Sambs*, supra. The legislature responded to *Sambs* by increasing the limitation to $50,000.

Bostco challenges the $50,000 limitation in 893.80(3) on equal protection grounds based on the same arguments this Court rejected in *Stanhope* and *Sambs* and claims that this Court's decision in *Ferdon ex rel. Petrucelli*, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440 provides a basis for

overturning the limits. In *Ferdon*, the Supreme Court invalidated a $350,000 cap on noneconomic medical malpractice damages on equal protection grounds after concluding that it bore no rational relationship to the legislature's stated objectives.

Ferdon does not undermine *Stanhope* or *Sambs*. *Ferdon* emphasized that the case was "not about whether all caps ... are constitutionally permissible" and that the question before the court was a "narrow one." 2005 WI 125 ¶13. Clearly, there are big differences between a cap protecting medical providers and one protecting local governments. *Sambs* expressly recognized that government is different from private business because of the breadth of activities government engages in and the number of people it deals with. Another critical difference is that medical providers provide medical services for profit while municipalities provide the public with police and fire protection, well-maintained streets, garbage disposal, safe drinking water and sewage systems and transportation systems not for profit, but to protect the public health, safety and general welfare. Local government services and liabilities are paid for by service fees or by levying property taxes.[2]

The legitimate concerns of ensuring funds are available to pay for essential municipal services and keeping property taxes at reasonable rates,

[2] The tax burden is not shared equitably. Residential taxpayers shoulder 69.8% of the property tax burden in Wisconsin while small business shoulders most of the remaining portion of the load at 22.1%. See *Property Tax Level in Wisconsin*, Wisconsin Legislative Fiscal Bureau Informational Paper 13 (Jan. 2011) at p. 4, available at http://www.legis.state.wi.us/lfb under Publications.

validated in earlier cases, are even more pressing today. Municipalities are struggling to fund essential governmental services. State aid to municipalities was reduced in the last budget[3] with the end result being that municipalities are forced to find ways to do more with less. Municipalities must comply with expensive unfunded state and federal mandates. The legislature has constrained municipal ability to raise property taxes by imposing levy limits. See Wis. Stat. sec. 66.0602. These levy limits were introduced in 2003 and were made permanent in the last legislative session. Levy limits not only constrain municipal ability to raise funds to deal with liability through taxes, but clearly demonstrate that the Legislature is still concerned about keeping property taxes down.

Section 893.80(3) is presumed constitutional and Bostco bears a heavy burden in overcoming the presumption. Any doubt must be resolved in favor of constitutionality and Bostco must demonstrate the statute is unconstitutional beyond a reasonable doubt. See *Ferdon*, supra, at ¶¶ 67-68. Although the *Ferdon* court used "rational basis with bite" to examine the cap, that standard does not allow this Court to prove Bostco's case for them.

The *Ferdon* court reviewed many studies and reports in concluding that the cap in question bore no rational relationship to the legislature's stated

[3] The legislature reduced shared revenues by about 7 percent and decreased funding for the general transportation aids by 6 percent in 2012. Funding for the Mass Transit Operating Assistance program was decreased by 10 percent in 2012 and funding for the recycling grant program was also reduced. See 2011-2012 State Budget Makes Major Changes Affecting Municipalities, *the Municipality* (August 2011).

objectives. Bostco has not met its burden. Both *Stanhope* and *Sambs* recognized that whatever the monetary limitation on recovery, the amount will seem arbitrary because it's based on "imponderables." Although courts may disagree as to the wisdom of the amount, and may urge the legislature to reconsider it, the legislature determines the amount.

THIS COURT NEED NOT DECIDE WHETHER UNCAPTURED GROUNDWATER IS PRIVATE PROPERTY BECAUSE *E-L* ESTABLISHES BOSTCO HAS NOT ALLEGED FACTS SUFFICIENT TO CONSTITUTE A TAKING OR INVERSE CONDEMNATION CLAIM.

Applying *E-L* to the case at hand, it is apparent that Bostco has not alleged facts sufficient to constitute a taking or inverse condemnation claim. As in *E-L*, Bostco claims the District "physically took" their property. But, as this Court emphasized in *E-L*, "government action *outside* the owner's property that causes consequential damages within" does not constitute a taking. *E-L*, supra at ¶ 30 (emphasis added). There is no evidence in the record of any government action inside Bostco' property. *E-L* distinguished *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 101 N.W. 706 (1904) and recognized similarities between the facts in *E-L* and those in *Wisconsin Power & Light v. Columbia County*, 3 Wis.2d 1, 87N.W.2d 279 (1958). Because the District's action was wholly outside Bostco's property, any damages caused within were consequential. Accordingly, there is no taking. Bostco's claim, like E-L's, is revealed to be a tort action clothed in takings language.

Because E-L was not really seeking compensation for the loss of its groundwater, this Court found it unnecessary to decide whether uncaptured groundwater is the property of the overlying landowner. We submit that the Court should do the same in this case because, regardless, *E-L* establishes that Bostco has not alleged a taking or inverse condemnation claim.

IF THIS COURT DEEMS IT NECESSARY TO DECIDE WHETHER UNCAPTURED GROUNDWATER IS PRIVATE PROPERTY, THE LEAGUE SUBMITS THAT MMSD'S RESPONSE BRIEF CORRECTLY EXPLAINS WHY UNCAPTURED GROUNDWATER IS NOT PRIVATE PROPERTY AND WE FURTHER SUBMIT THAT PRIVATE OWNERSHIP IS AN UNSOUND CONCEPT.

Our *amicus* efforts in *E-L* emphasized that the groundwater in question was *uncaptured* groundwater. The same is true here. We agree with MMSD's Response Brief at pp. 94-100 that uncaptured groundwater is not privately owned. Although *E-L* did not resolve the groundwater ownership, this Court unequivocally stated that the circuit court erred in instructing the jury that "groundwater is property of the person who owns the land under which it flows" because the instruction was inconsistent with its decision in *State v. Michels Pipeline*, 63 Wis.2d 278. 217 N.W.2d 339 (1974). *E.L. Enters., Inc.* 2010 Wis. 158 at n. 20. We submit that private ownership of uncaptured groundwater is an unsound concept because it would increase government exposure for takings, threaten groundwater protection, and deharmonize Wisconsin water law.

Groundwater is a vital natural resource for Wisconsin communities. In 2007, there were 11,493 public water systems, which ranked Wisconsin second nationally in the number of such systems, behind Michigan.[4] The vast majority of those systems relied on groundwater to supply drinking water and served about 2.1 million people.[5] Although substantial, Wisconsin's groundwater supplies are in trouble due to declines in groundwater level.[6] The legislature responded with 2003 Act 310, which regulates groundwater withdrawal of high capacity and some other wells. The legislation further establishes Groundwater Management Areas in northeast and southeast Wisconsin where plans will be developed and implemented to manage groundwater resources in a sustainable manner.

Grafting a right of private ownership to uncaptured groundwater would threaten these and other public efforts to protect the quantity and quality of Wisconsin's groundwater. While such a property right may not eliminate protection, the financial risk of regulation will be markedly higher, either preventing regulation or shifting massive compensation costs to the public.

Finding such a right would also deharmonize Wisconsin Water Law. In *Michels*, the court noted "the interdependence of all water systems" and decried the "arbitrary distinction between the rules to be applied to water on

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[4] *Safe Water on Tap*, Wis. Dept. of Nat. Resources (2007), available online at http:www.dnr.state.wi.us/org/water/dwg/report.pdf. Systems range from small gas stations to large cities.

[5] *Id.*

[6] *Groundwater Coordinating Council Report to the Legislature* (2008), available online at http://dnr.state.wi.us.org/dwg/gcc/rtl/2008report.pdf.

the basis of where it happens to be found." *Michels*, 63 Wis. 2d at 292. It observed that "[t]here is little justification for property rights in ground water to be considered absolute while rights in surface streams are subject to a doctrine of reasonable use." *Id.* These statements show *Michels* intended to harmonize Wisconsin riparian and groundwater law.[7]

Michels' rationales for harmonizing groundwater and surface water law remain. Twenty-first century scientists do not report that groundwater and surface water are no longer part of the same hydrologic system. And, the rule that Wisconsin riparians do not own the uncaptured water touching their land is still good law.[8] There is no need to deharmonize groundwater law and surface water law in Wisconsin by ruling uncaptured groundwater is privately owned.

CONCLUSION

This Court should follow existing precedent established in *Stanhope* and *Sambs* and affirm the trial court and court of appeals' decisions regarding the applicability and constitutionality of Wis. Stat. sec. 893.80(3)'s limit on governmental tort damages. This Court should also recognize Bostco's inverse condemnation claim as a claim for consequential damages to property which is subject to the limits in sec. 893.80(3).

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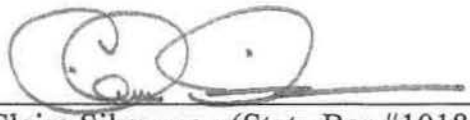
[7] The proposition is further supported by *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974), which harmonized Wisconsin diffused surface water law with riparian and groundwater law.

[8] *Munninghoff v. Wisconsin Conservation Com'n*, 255 Wis. 252 at 259 (1949).

Respectfully submitted this 11th day of June, 2012.

League of Wisconsin Municipalities

By: 

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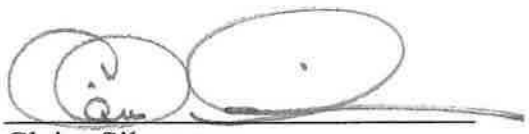
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2710 words.

I further certify that I have submitted an electronic copy of this brief which complies with the requirements of sec. 809.19(12) and that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated: June 11, 2012.



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