COURT OF APPEALS OF WISCONSIN
DISTRICT I
Nos. 2007AP221 & 2007AP1440

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

vs.

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

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)

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

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INTRODUCTION

Built between 1988-1992, the Milwaukee Metropolitan Sewerage District's ("District's") Inline Storage System—the "Deep Tunnel"—was one of the largest public works projects in Milwaukee area history. Constructed as part of an extensive, court-mandated water pollution abatement program that was overseen and approved by the Wisconsin Department of Natural Resources ("WDNR"), the Deep Tunnel provides a means of conveying and storing sewerage flows during storms and other wet weather events. It consists of a series of tunnels that are up to 32 feet in diameter mined out of the bedrock 300 feet below the surface.

More than a decade after the Deep Tunnel was constructed, plaintiffs, owners of the nineteenth century Boston Store building, sued the District and the contractor that built the portion of the Deep Tunnel that runs under downtown Milwaukee's Third Street. They alleged that the design, construction, and operation of the Tunnel damaged the building's wood pile foundation by decreasing the groundwater under the building.

Judge Kremers held a jury trial in July 2006 to adjudicate plaintiffs' negligence and nuisance claims, the only claims that remained for trial.

This trial never should have happened. As explained in the cross-appeal portion of the District's combined brief, plaintiffs' claims were barred by the Legislative grant of governmental immunity in Wis. Stat. § 893.80(4) and by plaintiffs' failure to serve notices of claim as required by § 893.80(1). After trial, Judge Kremers applied the Legislative limitation on tort damages, § 893.80(3). Plaintiffs' challenge to that ruling on constitutional and other grounds is discussed in this response, as are claims plaintiffs presumably pleaded in an effort to avoid that limitation but that the court dismissed on summary judgment—an inverse condemnation claim and a claim based on the statutory protection from excavation hazards. This response additionally addresses plaintiffs' two attacks on the jury's verdict: (a) that the jury's finding of property damage is inconsistent with its finding of no significant harm to plaintiffs' use and enjoyment of the building; and (b) the jury's finding that plaintiffs were 30% causally negligent, which plaintiffs contest even

though the evidence showed that they knowingly failed to protect their wood foundation from pre-Tunnel reductions in groundwater caused by their onsite well.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Wis. Stat. § 893.80(3) provides that "the amount recoverable by any person for any damages . . . in any action founded on tort against any . . . political corporation . . . shall not exceed $50,000."

Question: Is § 893.80(3)'s limit on governmental tort damages (a) unconstitutional because it limits plaintiffs' recovery; or (b) waived, even though plaintiffs make no express waiver argument and the limitation cannot be waived by implication?

The circuit court answered that the § 893.80(3) damages limitation was constitutional, and that the District had not waived the limitation.

2. Wis. Stat. § 32.10 provides the means by which persons can challenge as an "inverse condemnation" government occupation of their property in violation of Article I, § 13 of the Wisconsin Constitution.

Question: Whether plaintiffs can maintain an inverse condemnation claim where the only alleged

harm is negligent damage to property that did not result from a government occupation of the land and did not deprive plaintiffs of beneficial use the property?

The circuit court, which granted District's motion for summary judgment on this claim, held that plaintiffs' inverse condemnation claim failed as a matter of law.

3. Wis. Stat. § 101.111 provides protections for owners of buildings that adjoin excavations from grade.

Question: Whether plaintiffs can maintain a § 101.111 excavation claim against the District even though plaintiffs' property did not adjoin the land excavated by the District?

The circuit court, which granted a motion for summary judgment on this claim, held that plaintiffs could not maintain a § 101.111 claim because the Tunnel, which does not run beneath the Boston Store building and is 160 feet away from it, does not adjoin plaintiffs' property.

4. Plaintiffs' only evidence of harm was the cost of replacing the building's wood pile foundation with concrete. They presented no damages evidence based on any interference with

the building's use. The jury found money damages for past and future property damage. But the jury also found that the Tunnel's interference with plaintiffs' use and enjoyment of the building did not result in significant harm, which negated an essential element of plaintiffs' nuisance claim.

Question: Under these circumstances, should a court change the jury's finding of no significant harm and enter judgment on plaintiffs' nuisance claim?

The circuit court, denying plaintiffs' motion to change the jury's finding that the interference did not result in significant harm, held that the evidence supported the jury's finding.

5. Plaintiffs knew for many years before the construction of the Deep Tunnel that the wood piles were susceptible to rot if not kept saturated and were aware of groundwater decreases potentially exposing the piles. Plaintiffs also operated and kept open a well on the property that drew down groundwater, did not use their hydration system to keep the wood pile foundation properly saturated, and failed to perform necessary building maintenance.

Question: Under these circumstances, was the jury's finding that plaintiffs were causally negligent for the building's foundation damage supported by credible evidence?

The circuit court, denying plaintiffs' motion to change the jury's finding, concluded that the finding was well supported by the evidence.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case involves important issues regarding the scope of governmental liability provided in Wis. Stat. § 893.80. Plaintiffs challenge as unconstitutional the limitation on governmental tort damages provided in § 893.80(3). The District, in its cross-appeal, explains that a proper application of § 893.80(4)'s governmental immunity from suit based on the design, construction, and implementation of public works projects properly precludes this action in its entirety. A proper application of § 893.80(1)'s notice of claim provision also precludes all relief.

Additionally, this case implicates issues dealing with the fair administration of justice. Judge DiMotto, who presided as a result of judicial rotation after the case had been tried, entered an injunction requiring the District to reconstruct a

portion of the Deep Tunnel, even though Judge Kremers, who presided over the trial and decided the post-verdict motions, had already issued a final order fully adjudicating plaintiffs' claims. Judge DiMotto's subsequent proceedings raise substantial issues involving whether a circuit court lacks the authority to enter injunctive relief requested after the expiration of the post-verdict motion deadlines, after entry of judgment adjudicating all claims, and after an appeal from that judgment had been perfected. What is more, Judge DiMotto ordered the Tunnel to be lined with concrete based only on her review of the jury trial transcript and without affording the District or the WDNR, which regulates the Tunnel's operation, an opportunity to be heard on the equities. Her decision to award injunctive relief thus raises additional issues relating to the separation of powers, and to the circumstances, if any, under which a circuit court can order injunctive relief without considering the many countervailing equitable factors and without allowing government agencies with regulatory authority over the ordered conduct an opportunity to be heard.

Given the complexity of the substantive and procedural issues involved, oral argument is warranted. The importance of the legal issues justifies publication.

STATEMENT OF THE CASE

I. Nature of the Case and Procedural History.

Almost a decade after the Deep Tunnel's construction, Bostco LLC and Parisian Inc., the present and a past owner of Milwaukee's 100-year-old Boston Store building (collectively "Owners"), sued the District alleging that groundwater infiltrating into the Deep Tunnel caused increased deterioration of the building's wood pile foundation, a foundation that had for decades required vigilant maintenance and monitoring often left neglected by these and prior owners. R.384-1039:MMSDApp-0738; R.388-2072-73:MMSDApp-0794. [1] None of Owners' claims

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[1] Record citations reference both the record number and page and, where applicable, appendix page of either Plaintiffs-Appellants-Cross-Respondents' Appendix ("A-App") or Defendant-Respondent-Cross-Appellant's Appendix ("MMSDApp"). The District has endeavored not to include in its appendix material in Owners' appendix,

should have been tried. Owners' two statutory claims were legally deficient: As the circuit court held in awarding summary judgment to the District, Owners' allegations of pile damage is not an "occup[ation]" or taking of property for purposes of Wis. Stat. § 32.10's inverse condemnation remedy, and their allegations did not implicate Wis. Stat. § 101.111's protection from excavation on adjoining property because the Tunnel excavation was 260-300 feet below the ground in an easement 160 feet away from the Boston Store. R.381-257:MMSDApp-0658.

Owners' common law claims are properly barred by § 893.80 because they failed to serve a notice of claim, *see* Wis. Stat. § 893.80(1), and they based their right to relief on discretionary conduct for which the Legislature has provided governmental immunity, *see* Wis. Stat. § 893.80(4). But the circuit court ruled otherwise—concluding that a notice of claim served by other entities falsely claiming to own the building satisfied the

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but some duplication occurs because, e.g., Owners included only excerpts of many hearing transcripts.

notice and claim requirements and, although "troubled by that issue more than anything," accepted Owners' argument that they could avoid the District's governmental immunity by proving that the District "operated" or "maintained" the Deep Tunnel in a harmful way. R.394-29:MMSDApp-0838.

II. Statement of Facts.

The District is a municipal corporation that provides sewerage services to all communities in Milwaukee County (except South Milwaukee) and to communities in surrounding counties. In 1977, the District's predecessor created the Water Pollution Abatement Program in order to comply with state and federal court orders directing it to remedy sewer overflows. R.381-260-61:MMSDApp-0660-61. A central component of the abatement program was the construction of the "Deep Tunnel," a series of underground tunnels designed to hold wastewater until it can be treated at the District's treatment facilities. R.381-257:MMSDApp-0658. The Deep Tunnel, 260-300 feet below the surface, extends for almost 20 miles and was able to contain 405 million gallons of wastewater when it was put into full operation in 1994. *Id.*

The District contracted with CH2M Hill, the lead engineering firm for the District's Water Pollution Abatement Program, and CH2M Hill established the "program management office" (PMO) that was responsible for the Deep Tunnel's design. R.381-263:MMSDApp-0663. After the PMO conducted geological surveys of the area, it concluded that concrete should only be used to line the Tunnel where needed to maintain the Tunnel's shape. R.388-2033-34:MMSDApp-0789-90.

The WDNR, however, which had conditionally approved an earlier plan calling for lining the Tunnel with concrete, opposed the design change. The opposition was resolved in 1986 by a stipulation filed in litigation between the District and WDNR. *Milwaukee Metro. Sewerage Dist. v. WDNR*, No. 594-623 (Milw. County Cir. Ct.). The stipulation required the District to report detailed technical information obtained during mining, including information on groundwater infiltration, and to state the District's position on lining other parts of the Tunnel system. R.123-4-5:MMSDApp-0107-08. The WDNR, after reviewing the information, approved all the contracts for the tunnel system. R. 388-2125.

The Tunnel section at issue—the North Shore Segment—was designed only to have a partial lining and to use grout to control excess water infiltration. R.388-2013:MMSDApp-0787. The District separately hired Traylor Bros., Inc./Frontier-Kemper Constructors to construct the segment. R.382-368:MMSDApp-0666.

Water inflows and rock instability halted construction of the Tunnel about three miles north of downtown. R.123-5-7:MMSDApp-0108-10. Because the Tunnel had not yet reached downtown, these water inflows had little or no impact on the downtown area. *Id.* The design contractor proposed, and the District accepted, a redesign that employed significant surface grouting and a temporary support structure for the Tunnel opening. *Id.* When construction proceeded, some additional unexpected and substantial water inflows occurred, leading to minor surface settlement along Third Street in the downtown area. *Id.* The District installed recharge wells to restore the surface water table. *Id.*

As finally completed, the North Shore segment runs under Third Street—about a block east of the Boston Store building.[2] R.123-7:MMSD App-0110. It is about 45,000 feet long of which 25,000 feet has a concrete liner. R.123-7:MMSDApp-0104. Since 1994, the District has operated the Tunnel, which was substantially completed by August 1992, under the terms of a Water Pollution Discharge Elimination System permit issued by the WDNR. The operating permit requires that the Tunnel have a positive inward gradient—that water flows into the Tunnel—in order to prevent the exfiltration of wastewater. R.382-560:MMSDApp-0683.

A. Tunnel-related property damage claims were made, investigated, and resolved in the early 1990s.

In the early 1990s, during Tunnel construction, some property owners, principally those who owned buildings directly over the Tunnel

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[2] Owners have also conceded that the Tunnel does not run under the Boston Store, but rather Third Street. R.376-89:MMSDApp-0642. *See also* R.351-exs.1550-028 to 1550-032; MMSDApp-0325-55 (Owners' exhibits depicting position of Boston Store relative to Deep Tunnel).

on Third Street, reported architectural and cosmetic damage to buildings that they attributed to construction of the Deep Tunnel. R.122:MMSDApp-0100. The reported damage, which was limited to façade damage, shallow foundation repairs, and ground floor slab repairs, diminished away from Third Street. *Id.*

The Program Management Office (PMO) investigated these claims when they were made. *Id.* The PMO had a geological engineer inspect the reportedly damaged properties and investigate when the damage occurred, including, in some instances, investigating the building's history and maintenance record. The District authorized the payment of repairs where the investigation substantiated the claim. *Id.* It did so in order to avoid having to reimburse its Tunnel construction under the terms of their contract for the contractor resolving the claims itself. *Id.* During this entire period, no one made a claim for deep foundation damage. *Id.* All of these claims were investigated and resolved by 1995—eight years before Owners commenced this action. *Id.*

B. The Boston Store building and its long history of foundation problems.

The Boston Store "building" consists of five buildings built over a forty-year period beginning in the 1880s. R.385-1193:MMSDApp-0757. The buildings were built on wood pile foundations. *Id.* These piles are clusters of long, wood poles that were driven thirty or more feet into the ground to support the building's columns and transfer the weight of the building into stable ground. R.384-962-65. A concrete or stone pile cap connected the pile cluster to the columns. R.381-198:MMSDApp-0655. At the time of construction, the tops of the piles were located below the surface water table, which would have protected the piles' integrity by keeping them saturated. *See* R.385-1282-83:MMSDApp-767A-767B. When, however, the water table drops below the pile tops, they become subject to decay and lose their structural integrity. R.381-198-99:MMSDApp-0655.

Beginning in 1936, Boston Store operated a well on its property that drew roughly 800 gallons per minute from groundwater that saturated its piles. R.387-1820:MMSDApp-0780. During this time, Owners did nothing to monitor the

groundwater level or protect the piles. R.384-1070:MMSDApp-746. Even after well use stopped in 1962, Owners left the well in place, which continued to drain groundwater from beneath the building. R.387-1816-17:MMSDApp-778-79.

As Milwaukee's industrial use of groundwater increased in the 1950s and 1960s, the water table was stressed and depleted. R.387-1789-90:MMSDApp-0776-77. The marsh deposits were drawn down substantially, such that, as early as the 1950s, other building owners underpinned their buildings anew, or constructed wetting systems. R.386-1532-33:MMSDApp-0772-73. Since at least the late 1960s, the Boston Store's building engineers were aware that the wood piles were decaying because the owners had not maintained the water table below the building by, for example, flooding the piles using a recharge pump. R.384-1069-70:MMSDApp-0745-46. Rather than keep the piles saturated, building owners chose to monitor column movement and repair only those piles that were causing instability. R.384-1039:MMSDApp-0738.

Evidence still available to the litigants showed that since 1976, pile decay was identified

and repaired several times before the Tunnel's construction; e.g., two sets of piles were repaired in 1979 and additional repairs were made in 1980 and 1982. R.384-1058:MMSDApp-0744. A 1978 urban renewal inspection of the Boston Store building identified deterioration and differential settlement around the base of many columns. R.388-2065:MMSDApp-0792. A building engineer also noted ongoing settlement in several columns throughout the 1980s. *Id.*; R.351-ex.421:MMSDApp-0312-16. The piles identified for repair in the early 1980s—still a decade before Tunnel construction—were rotted away at the top and were disconnected from the pile cap. R.351-ex.421:MMSDApp-0312-16.

In the late 1980s, still several years before the Tunnel excavation, substantial settling and cracking was observed in the southwest side of the first and second floors. R.128-2 ex.M:MMSDApp-0143. Seventy-two of the building's 169 columns were underpinned before the Tunnel was constructed and 11 were underpinned twice. R.120-2, ex.B:MMSDApp-0098.

An engineering firm survey completed in 1990 and 1991 showed more building settlement at

the time of Tunnel construction. R.128-2, ex.K:MMSDApp-0127. But, between 1992, around the time one building engineer left, and 1995, when his successor was hired, Boston Store left its column settlement unmonitored, leaving the extent of the settlement unknown. R.384-1039:MMSDApp-0738.

In 1995, when Joseph Zdenek was hired as its engineer, Boston Store resumed monitoring column settlement. R.384-1000:MMSDApp-074. Zdenek was informed of the underpinning history of the building, R.384-1004-05:MMSDApp-0722-23, but it was not until January 9, 1997 that Zdenek inquired into a probable cause for column movement; only to reject his consultant's recommendation that the store install a groundwater recharge system to combat lower groundwater levels and preserve the piles. R.384-1040-41:MMSDApp-0740-41. Instead, Boston Store's policy was to allow the piles to rot and then replace them as they failed. R.384-1039:MMSDApp-0738.

In 1997, Carson Pirie Scott, the building's then-owner, decided to underpin nine columns using a jet grouting method that involves shooting grout up to 40 feet under the pile caps, essentially

replacing the wood pile foundation with a new concrete foundation. R.384-1015-16:MMSDApp-0727-28. Contemporaneous observations revealed the same type of decay as reported in earlier years. R.384-1037-1038:MMSDApp-0736-37. Rather than further investigate or address the cause of column settlement, Owners continued to pursue their replace-on-failure policy. R.384-1039:MMSDApp-0738.

C. Boston Store's 2001 redevelopment into condominiums and retail space.

In 2001, as part of a redevelopment agreement, the City of Milwaukee Redevelopment Authority agreed to give $3 million to Bostco, a wholly-owned limited liability company of Wisconsin Electric Power Company, to purchase the Boston Store building from its then-owner, Parisian. R.385-1128:MMSDApp-0753. In exchange for the $3 million from the City, Parisian, a Carson successor entity, transferred ownership of the building and a nearby parking structure. R.384-834-36,846-47:MMSDApp-0703-05, 0767-08. Bostco entered into a retail lease with Parisian and undertook to convert part of the structure into condominiums and the lower levels into

underground parking. R.385-1126:MMSDApp-0751. As part of this redevelopment, Bostco underpinned 15 additional columns. R.385-1203:MMSDApp-0758.

On June 5, 2003, Owners commenced this action. R.1. They alleged that the District was liable for all foundation repairs, but they presented no evidence at trial allowing a comparison of pile conditions before and after Tunnel construction or during the time since the Tunnel was put in service. R.1-1-16. Nor did they present any evidence that the pile decay had at any time interfered with the building's use: there was no testimony regarding business interruption or any inability to use the building for a particular purpose caused by pile decay.

Instead, Owners presented column monitoring records, which they contended revealed greater column movement since the Tunnel had been in operation. R.385-1203-1205:MMSDApp-0758-60. Their damages expert then testified that the cost of replacing some wood piles and other repairs in 1997 and foundation repair during the 2001-2004 building renovation was $3 million. R.385-1216,1260:MMSDApp-0767; R.351-1552-

53,76:MMSDApp-0325. He proposed future damages of $9 million based on the cost of jet grouting all remaining columns (even those repaired before 1997). R.351-exs.1553-019 to 1553-021:A-Ap.1337-1339.

D. Jury's verdict: both parties were negligent.

The jury was asked to answer 11 special verdict questions—including whether either party was negligent, whether the District had interfered significantly with Owners' use of their property, and whether Owners should reasonably have known of their claim more than six years before they sued. R.403-1:A-Ap.585.

After two days of deliberations, the jury found both that the District had "operated or maintained" the Deep Tunnel negligently and that Owners had maintained the building negligently. *Id.* The jury allocated 70% responsibility to the District and 30% to Owners for damage to the building foundation. *Id.* The jury also found that Owners should have known of or discovered outside the statute of limitations period that the Tunnel had caused building damage. *Id.* It further found that the Tunnel interfered with Owners' use and enjoyment of their property but that the interference did not

result in significant harm. *Id.* Asked how much money it would take to compensate Owners for "property damage," the jury answered $3 million for property damages "already suffered" and $6 million of property damages Owners "will suffer in the future." R.403-1-3:A-Ap. 585-87.

III. Both Parties Challenged the Verdict and Sought Judgment in Their Favor.

Both parties filed timely post-verdict motions challenging aspects of the verdict and seeking judgment in their favor. R.256-1-13; R.259-1-4. Judge Kremers, who retained the post-verdict motions even though he had recently rotated to a felony calendar, changed the jury's answer to the statute of limitations question. R.394-26:MMSDApp-0835. He concluded that there was insufficient evidence to support the finding, reasoning in part that evidence submitted by the District in support of its summary judgment motion had not been presented to the jury. R.394-26-29:MMSDApp-0835-38. Judge Kremers also refused to direct a verdict in the District's favor based either on Owners' failure to serve a notice of claim or on the District's discretionary act immunity—issues addressed in the cross-appeal portion of this combined brief. R.394-29-

31:MMSDApp-0838-40. But Judge Kremers granted the District's motion to limit damages to $50,000 per plaintiff, as required by Wis. Stat. § 893.80(3). R.394-46:MMSDApp-0855.

On October 25, Judge Kremers signed an order entering judgment on the negligence claim for $100,000 and dismissing the nuisance claim. R.305:A-Ap. 708. Owners appealed on January 19, 2007. R.360. On January 30, 2007, Judge DiMotto, based only on her review of the trial record, orally granted an injunction motion Owners filed after Judge Kremers' September 11, 2006 ruling that the damages limitation applied. R.399-26:MMSDApp-0945. The injunction required the District to construct a concrete Tunnel lining near the Boston Store at an estimated cost in excess of $10 million. R.382-523-24:MMSDApp-0678-80. The propriety of that order is also addressed in the District's cross-appeal brief.

ARGUMENT

I. The Legislative Cap on Governmental Tort Damages—the Constitutionality of Which Our Supreme Court Has Upheld—Limits Total Damages to $100,000.

Judge Kremers properly ruled that Wis. Stat. § 893.80(3) limited each plaintiff to tort damages of

$50,000. Owners do not contest that the § 893.80(3) damages cap, if constitutional and not waived, so limits recovery on their negligence claims.

Instead, Owners challenge the constitutionality of the statute and its application.[3] The Supreme Court has already held, however, that § 893.80(3)'s limitation is constitutional and, contrary to Owners' argument, the District's refusal to waive its application here cannot render it unconstitutional "as applied." Additionally, the District's accurate statement during the litigation that if Owners' prevailed, they would recover their damages is not, and could not be, a waiver of the statutory damages limitation.

Owners' additional argument—that if they are entitled to recover on their nuisance claim, they should be awarded $50,000 per day—is foreclosed by the statutory text. The statute provides for a "per tort action" limitation, stating that "the

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[3] Whether Wis. Stat. § 893.80(3) is unconstitutional or waived is a question of law that this Court reviews de novo. *Kohn v. Darlington Cmty. Sch.*, 2005 WI 99, ¶12, 283 Wis. 2d 1, 698 N.W.2d 794.

amount recoverable . . . for any damages . . . *in any action* founded on tort . . . shall not exceed $50,000." Wis. Stat. § 893.80(3) (emphasis added).

A. Wis. Stat. § 893.80(3) is constitutional "on its face."

"For almost ninety years prior to 1962, [the Wisconsin Supreme Court] held that municipalities in Wisconsin were exempt from tort liability under the doctrine of municipal tort immunity." *Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 26, 559 N.W.2d 563 (1997). In 1962, the Court abrogated this judicially-created immunity. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962). Contrary to Owners' unsupportable assertion that *Holytz* "makes clear that the government has no legitimate interest" in limiting municipal liability in tort, Owners' Br. 65, *Holytz* expressly invited the Legislature to assume its proper role and impose limits on municipal liability if it deemed limitations to be in the public interest:

> If the legislature deems it better public policy, it is, of course, free to reinstate immunity. ***The legislature may also impose ceilings on the amount of damages*** or set up administrative requirements which may be preliminary to the commencement of judicial proceedings for an alleged tort.

Holytz, 17 Wis. 2d at 40 (emphasis added). A year later, the Legislature did precisely that, limiting the amount a plaintiff can recover from a municipality in a tort action to $25,000, *see* Laws of 1963, ch. 198, an amount that was increased to $50,000 in 1979, *see* Laws of 1981, ch. 198.

In 1980, the Wisconsin Supreme Court upheld the Legislature's limitation on municipal tort damages in *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 358–59, 293 N.W.2d 504 (1980), when the cap was still $25,000. *Sambs* controls this case and precludes a ruling that § 893.80(3) is unconstitutional on equal protection grounds.

In *Sambs*, the Court rejected the arguments Owners press here—that the then-$25,000 cap on municipal damages violated the equal protection rights of a plaintiff who Brookfield had negligently caused almost $1 million of personal injury damages. The Court reasoned that the Legislature's cap satisfied rational basis scrutiny because it serves "a legitimate public purpose to prevent the disastrous depletion of municipal treasuries, thereby safeguarding public funds and the government's ability to discharge public responsibility." *Id.* at 371. Surveying a selection of

different governmental damages provisions then in force, the Court concluded that the Legislature could reasonably determine that given the broad number of persons touched by governmental operations, allowing even modest damage recoveries could put governmental services at risk. As then-Justice Abrahamson wrote for the Court:

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

Id. at 376-77. The Court explained that it is for the Legislature to balance the public policies of protecting the public fisc and reimbursing those harmed by government conduct. *Id.* at 377; *see also Anderson*, 208 Wis. 2d at 31-32.

"[T]he legislature," the Court explained, "could reason that a maximum should be imposed on the amount recoverable in those situations where the burden of unlimited liability may be substantial and the danger of disrupting the functioning of local government by requiring payment of substantial damage awards may be great." 97 Wis. 2d at 377-78.

The same reasoning applies here. Claims like those of the Owners, if not subject to the limitation of § 893.80(3), could easily disrupt governmental entities' ability to provide services. The Legislature was, therefore, well within its constitutional authority to enact the legislation. *See also Stanhope v. Brown County*, 90 Wis. 2d 823, 280 N.W.2d 711 (1979) ($25,000 limit on recovery against governmental tortfeasors did not deny equal protection or violate the "certain remedy" clause of the State Constitution) (Abrahamson, J.).

Owners' only answer to *Sambs* is to suggest that the mere passage of time justifies disregarding it. They hang tightly to the fact that in 1980, *Sambs* quoted a decision of the New Hampshire Supreme Court in which a $50,000 statutory limitation on tort damages was described as "close to the boundary of acceptability," *see Estate of Cargill v. City of Rochester*, 406 A.2d 704, 708, 709 (N.H. 1979). Although, since *Sambs*, the Wisconsin Legislature raised the limitation in § 893.80(3) to $50,000, Owners contend that the mere fact of inflation justifies raising the cap and ignoring *Sambs*. Believing that the Legislature should have authorized another cost-of-living increase in the cap by now, Owners turn to the judicial branch to provide the nullification they seek, a course of action that they believe is sanctioned by *Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 440, 701 N.W.2d 440.

Ferdon, which approvingly cited *Sambs* and expressly reaffirmed that caps on municipal liability are justifiable because of concern for public finances, *see id.* at ¶180, does not aid Owners. *Ferdon* held that a cap on noneconomic damages

recoverable by a plaintiff in a medical malpractice action from the Patients Compensation Fund was not rationally related to any legitimate state interest. *Id.*

Distinguishing *Sambs*, *Ferdon* explained why its holding does not provide license for this Court to strike down § 893.80(3)'s wholly unrelated limitation on tort damages against municipalities. Because of the long common-law history of government immunity, claims against municipalities are not analogous to medical malpractice claims: "[m]unicipalities were immune from suit at the adoption of the Wisconsin constitution, and concern about public finances as a result of numerous actions against municipalities . . . has justified the cap involved in that statute."[4] *Id.* at ¶180.

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[4] In discussing her earlier opinion for the Court in *Sambs*, Chief Justice Abrahamson mentioned only Wis. Stat. § 81.15's limitation on tort damage awards against municipalities for highway defects, but *Sambs*' holding applied equally to § 895.43—now § 893.80(3)—which also was contested by Sambs as unconstitutional because it similarly limited the City of Brookfield's liability. *See Sambs*, 97 Wis. 2d at 365-66, 371, 376-77 (upholding both

Ferdon involved the Legislature's effort to limit damages that would have otherwise been available in a common law tort suit. By contrast, this case, like *Sambs*, involves the Legislature's authorization of a limited monetary claim against a governmental entity when, at common law, as *Ferdon* explains, Owners would have been entitled to no recovery at all. Equal protection principles do not authorize the judiciary to re-balance the public policy considerations involved in determining the extent to which taxpayer-supported government entities should be open to damages claims. *See Anderson*, 208 Wis. 2d at 27 ("The court thus placed the doctrine of municipal immunity in the hands of the legislature."); *see also Sambs v. City of Brookfield*, 66 Wis. 2d 246, 317, 224 N.W.2d 592 (1975).

Owners further argue that the § 893.80(3) limitation "is unreasonably low . . . in relation to the damages sustained." Owners' Br. 68. But as the legal trajectory described in *Holytz* and elsewhere

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statutory caps on municipal damages from equal protection challenge).

shows, that analysis is upside-down. The proper baseline for considering whether the limitation is "too low" is not, as Owners suggest, the full recovery of damages as if they were suing a private party. Instead, as *Ferdon* recognizes, *see* 284 Wis. 2d at ¶180, the proper baseline for considering whether $50,000 is unreasonably low is the zero recovery available at common law—the recovery that *Holytz* acknowledges the Legislature is free to impose, 17 Wis. 2d at 40. Whether greater recoveries should be allowed based on the size of typical claims against governmental entities and the need to protect those entities' ability to provide services is precisely the kind of public policy question that *Holytz* and the cases since have left to the Legislature's discretion, unless no set of facts can justify it. As *Ferdon* itself explained:

> A statute will be upheld against an equal protection challenge if a plausible policy reason exists for the classification and the classification is not arbitrary in relation to the legislative goal. A statute will be held unconstitutional if the statute is shown to be "patently arbitrary" with "no rational relationship to a legitimate government interest." The party challenging the classification has the burden of demonstrating that the

> classification is arbitrary and irrationally discriminatory.

Ferdon, 2005 WI 125, ¶73 (footnote omitted). The Legislature is not even required to use the "wisest" way to accomplish its goal—here, to protect the public fisc to ensure ongoing governmental functions—"[d]eference to the means chosen is due even if the court believes that the same goal could be achieved in a more effective manner." *Id.* at ¶76.

In apparent response to the "patently arbitrary" language of *Ferdon*, Owners contend that the $50,000 limit was "selected arbitrarily," Owners' Br. 68, and that inflation alone has rendered it too low to be constitutional, *id.* at 67. Neither point justifies holding § 893.80(3) unconstitutional. First, our Supreme Court long ago rejected this very argument in *Stanhope*. As the Court explained, any amount the Legislature selects as the limit will seem arbitrary, but this provides no grounds on which a court can hold the limitation constitutionally infirm:

> As to the specific monetary limitation on recovery we recognize that whatever figure is selected will be arbitrary in the sense that it is based on imponderables. This monetary

> limitation is one which the legislature determines balancing the ideal of equal justice and the need for fiscal security. . . .
>
> We cannot conclude in this case that the $25,000 cut-off point adopted by the Wisconsin legislature in secs. 81.15 and 895.43 [now § 893.80(3)] is arbitrary or unreasonable or violates state and federal constitutional guarantees.

Stanhope, 90 Wis. 2d at 843–44. This point was reiterated in *Sambs*: "[W]hatever the monetary limitation on recovery, the amount will seem arbitrary . . . the legislature, not the court, must select the figure." 97 Wis. 2d at 367.

Even if the judiciary had the authority to declare the $50,000 limit "too low," Owners do not begin to make a case for its exercise. Ignoring the essential role played by the economic data considered by the Court in *Ferdon*, *see, e.g.*, 284 Wis. 2d at ¶¶133-147, Owners do not present any evidence of the type a legislator would consider in deciding whether to increase the governmental tort damages limitation. For example, the Court has no information on the effect of a higher limitation on the various types of governmental entities covered by § 893.80(3), it has no information on the

frequency of tort claims against those governmental entities, no information on the extent to which the frequency of tort claims would increase if the § 893.80(3) limitation were removed, no information on the types or frequency of claims that exceed the limitation amount, no information on the cost to insure against the greater exposure, and no information on the estimated amount of tax increases that would be necessary if some higher limitation were enacted, or the likely economic and political costs of those higher taxes. Absent this information, it is impossible to determine whether increasing the limitation would be sound public policy, much less what the extent of that increase should be. No court under these circumstances is equipped with anything close to the information needed to hold the limitation unconstitutional without directly contravening the holdings of *Sambs* and *Stanhope*.

Nor does consideration of the damages sustained, as Owners urge, Owners' Br. 68, provide grounds for diverging from *Sambs* and *Stanhope*. Unlike *Sambs*, *Stanhope*, and even *Ferdon*, all of which dealt with personal injury claims by individuals, Owners are sophisticated commercial

businesses that allege only economic injuries—repairable decay of their pile foundation for which the jury found them 30% responsible. That Owners should pay for needed repairs, rather than the District's taxpayers, works no obvious hardship or injustice. Owners' argument that the damages limitation shifts the cost of government negligence "to a small handful of victims, who cannot, standing alone, hold the negligent government official(s) accountable through ordinary political means, and away from the public at large, who can," Owners' Br. 68, is at best an inapposite distraction. Owners do not lack a political voice. Bostco is a wholly-owned subsidiary of a utility holding company that presumably does not lack political influence. Indeed, as a result of its ability to secure a public development grant, Bostco acquired the Boston Store building without using its own funds. R.383-846-47:MMSDApp-0707-08; R.385-1127-28:MMSDApp-0752-53. No claim of inequity or disenfranchisement can support Owners' request that this Court ignore controlling precedent or Owners' suggestion that the constitution requires the judiciary to set aside the Legislature's limitation on tort recoveries from

governmental entities in order to force the District's taxpayers to fund reconstruction of the Boston Store's foundation.

B. Wis. Stat. § 893.80(3) is constitutional "as applied."

Owners argue that the District's reliance on § 893.80(3)'s damages limitation is unconstitutional "as applied" because the District settled earlier claims made by other property owners for amounts greater than $50,000. This argument fails because (1) governmental conduct having any reasonable purpose survives the applicable rational basis review, *see Nankin v. Village of Shorewood*, 2001 WI 92, ¶11, 245 Wis. 2d 86, 98, 630 N.W.2d 141 (2001), and (2) equal protection does not apply because Owners are not "similarly situated" to the claimants from the mid-1990s and before. *See id.*

1. The District's decision to pay claims made close in time to the construction and for which the District would have been required to reimburse its contractor was reasonable.

The resolved claims to which Owners refer were claims that buildings were damaged as a result of the Tunnel's construction in the downtown area in the late 1980s. During that construction,

the contractor, Traylor Brothers, experienced unexpected and substantial inflows from the shallower groundwater aquifers in the soils above the rock layers 200-300 feet below ground surface. R.123-3,5-6:MMSDApp-0106, 8-9. This differing site condition encountered by the contractor during the construction was believed responsible for causing differential settlement and structural duress to buildings "without deep foundations and certain older buildings supported by relatively short timber piles." R.51-25:A-Ap.1364. The District installed recharge wells, and, by 1994, had concluded that "[g]roundwater aquifers have stabilized," "[s]tructural settlements have stopped," and that "[i]t is not expected that damages will occur beyond those currently being evaluated." R.51-26:A-Ap.1365.

Under Traylor Brothers' contract with the District to construct the Tunnel, Traylor Brothers was entitled to modify the contract and obtain additional compensation from the District if it incurred unforeseen costs as a result of differing site conditions. R.388-2027:MMSDApp-0788. Such an arrangement is standard in the construction industry. *See, e.g.*, *Metro. Sewerage*

Comm'n v. R.W. Constr., Inc., 72 Wis. 2d 365, 241 N.W.2d 371 (1976). Rather than have Traylor Brothers resolve those claims and pass on to the District the cost of repairing the damage, plus the expense of administering the claims, and a reasonable markup, the District undertook to investigate and pay these claims itself—in effect standing in the shoes of its contractor.

These payments thus did not resolve tort claims against the District; the District compensated building owners for settlement damages in the 1990s in order to avoid having to pay a greater amount under its contract with Traylor Brothers. This reasonable course of action also allowed the District to maintain favorable relations with the building owners whose claims, after investigation, appeared to have been plausibly caused by the construction problems. These claims were substantially resolved by 1994, and the District's contractual obligation to pay Traylor Brothers ended around the same time.

By contrast, in 2001 when Saks and Wispark first raised the claim at issue in this litigation, the District's contract with Traylor Brothers had concluded and the District was not responsible for

additional payments under that contract. By that time, any claim relating to the Boston Store building was necessarily a claim directly against the District, which it handled in the ordinary course, including defending the claim in part based on the damages limitation in § 893.80(3). Far from violating equal protection, the statutory limitation would be similarly applied to all other direct claims.

Owners' argument that it is arbitrary and therefore unconstitutional to deny their claim based on when it was asserted is a non-starter. Certainly, the District had far greater reason to believe credible claims of settlement damage asserted soon after the water inflows during construction, than it had to believe claims raised a decade after construction had been completed. To accept Owners' time-is-arbitrary argument would strip all government actors of a statute of limitation defense: indeed, *no* court could constitutionally apply a statute of limitations without depriving the plaintiff "arbitrarily" of a claim. The absurdity of this conclusion requires the argument's rejection.

Even putting the actual events showing the reasonableness of the District's method aside, Owners' "as applied" constitutional challenge is an invitation for the Court to judge a government entity's settlement strategies on a case-by-case basis. No case Owners cite, and no case of which the District is aware, suggests that this is properly the role of the judiciary. *Cf. Anderson*, 208 Wis. 2d at 30-32 (refusing to allow court-found implied waivers of governmental tort damages limitation).

2. Equal protection cannot be violated by application of § 893.80(3) because Owners and earlier claimants are not "similarly situated."

Even if an "as applied" equal protection challenge authorized a court to compare the similarity of claims and settlement amounts, such an undertaking would not aid Owners. "A party challenging a statute on equal protection grounds must 'demonstrate that the state unconstitutionally treats members of similarly situated classes differently,'" *In re Nelson*, 2007 WI App. 2, ¶19, 298 Wis. 2d 453 464–65, 727 N.W.2d 364 (Ct. App. (2006) (quoting *State v. Post*, 197 Wis. 2d 279, 318, 541 N.W.2d 115 (1995)), and Owners have not

demonstrated that they were "similarly situated" to the claimants who settled for more than $50,000.

Nor could Owners so prove. Owners made their claim several years after the Tunnel was constructed and claimed damage to century-old foundation piles resulting from migrating groundwater. The paid claims to which Owners compare their deep pile foundation claim involved shallow piles and façade and surface damages. R.122:MMSDApp-0100. These distinctions are more than adequate to provide a rational basis for treating the claims differently, thus satisfying any "as applied" equal protection challenge.

C. The District did not waive the § 893.80(3) damages limitation nor does judicial estoppel preclude its application.

Owners next contend that the District waived the caps or—using the same argument relabeled—is judicially estopped from relying on them. They base this argument solely on an exchange made in the context of a May 2, 2005 hearing, which took place after the District filed its answer to the amended complaint again pleading the § 893.80(3) damages limitation. R.75-29:A-App-159. This exchange, however, cannot be a waiver. First, any

waiver of the damages limitation must be made expressly. Second, even if an implied waiver was possible, the exchange on which Owners rely could not constitute an implied waiver.

1. The damages limitation was not waived.

Our Supreme Court "has repeatedly held that the [governmental] damage limitation can be waived only if the legislative purposes of § 893.80(3) are met, and a public entity expressly waives the damage limitation." *Anderson*, 208 Wis. 2d at 32. Waiver in this context is "a 'voluntary and intentional relinquishment of a known right.' Intent to waive is regarded as an essential element of waiver.'" *Gonzalez v. City of Franklin*, 137 Wis. 2d 109, 128 403 N.W.2d 747 (1987) (citations omitted) (finding city could not implicitly waive damages caps by purchase of insurance coverage in excess of cap amount because *Sambs requires* "express policy language indicating that a waiver was intended." The statements on which Owners rely do not meet this standard.

Owners cite no authority, and the District is aware of none, that has deemed municipal immunity waivable by implication. On the contrary, the Court has repeatedly emphasized the

opposite. In *Anderson*, for example, the Court reiterated that § 893.80(3)'s damage limitation in ruling that Milwaukee's failure to plead § 893.80(3) or raise the issue at any time before the jury verdict or raise it even in post-verdict motions did not constitute a waiver. 208 Wis. 2d at 33-34 (emphasis added). Since the District pleaded the § 893.80(3) limitation and never expressly waived it, Owners' waiver argument fails.

a. The exchange at the May 2, 2005 hearing was no waiver of the cap.

At issue on May 2 was whether Owners should be entitled to name a tunnel construction expert, whose opinions appeared to be either irrelevant or redundant. R.371-1-40:MMSDApp-0469-09. The District argued that the expert was unnecessary because Owners had already named a damages expert and, if they recovered the damages they sought, reconstruction of the tunnel was unnecessary. R.371-3-4:MMSDApp-0471-72.

Owners' characterization of this argument as a waiver of the damages limitation is untenable. Counsel's argument—that "*if* plaintiffs win, they will be made whole based on their damages claim," R.371-4:MMSDApp-0472, and "[t]hey can have

complete and whole relief *based on what they have already* alleged," R.371-9:MMSDApp-0477 (emphasis added)—plainly did not constitute an express waiver of the § 893.80(3) limitation. The statutory limitation was not mentioned. Because only an express waiver of § 893.80(3) can be effective, *see Anderson, supra,* Owners' implied waiver argument is without merit.

In fact, the District's counsel expressly said it was *not* waiving its legal defenses. R.371-31-32:MMSDApp-0499-00. Because the Court's inquiries at the hearing were premised on the fact that Owners were seeking damages rather than injunctive relief, the District's counsel made clear that counsel was not waiving the District's legal defenses in addressing the Court's hypothetical scenarios:

> in addition to the other caus[ation] defenses I mentioned to you a moment ago, we have legal defenses that we will raise, which we don't want to waive here in discussing what would happen if [plaintiffs] were able to prove the facts you suggested. . . . I don't want to suggest to you by participating in the colloquy as I am, as any of us are, that we are waiving certain legal aspects.

R.371-32:MMSDApp-0500. The Court expressly allowed the reservation, stating: "I understand. I'm not suggesting that you are [waiving defenses]." R.371-32:MMSDApp-0500. And, when Owners' counsel later suggested that the District had "stipulated" to an issue in the course of the argument, the Court made clear that nothing said in the colloquy would be treated as preclusive, stating in response to the District's counsel's clarification that he had not stipulated: "I know you didn't. I didn't see the word stipulation. Unless it is signed by you or agreed by you, there are no stipulations." R.371-39:MMSDApp-0507.

b. No waiver can here be enforceable because it would not satisfy the statutory purpose.

Even if counsel had made an express statement that the District was not relying on the statutory limitation, it would not be an enforceable waiver because, under the circumstances here, it would not "satisfy the purposes of this statute—protecting the public treasury and allowing for fiscal planning." *Anderson*, 208 Wis. 2d at 34. The Supreme Court has only upheld § 893.80(3) waivers when the municipality purchased insurance

coverage that expressly provides that the insurance company will not invoke the damages limitation and has sufficiently high limits to protect the municipal treasury. *See id.* at 30; *compare Sambs*, 66 Wis. 2d at 315; and *Gonzalez*, 137 Wis. 2d at 128-29, with *Stanhope*, 90 Wis. 2d at 846-47.

c. The circuit court expressly found no waiver.

In any event, in ruling on motions after verdict, the circuit court expressly rejected Owners' waiver argument by finding that the District had not waived reliance on the § 893.80(3) limitation, stating: "I find no waiver of the caps." R.394-45:MMSDApp-0854. In the absence of a compelling reason to disregard this finding, which Owners do not, and cannot, present, this Court should adhere to the circuit court's conclusion.

2. Equitable estoppel is inapplicable.

Owners also contend that the same conduct on which they base their waiver argument constitutes judicial estoppel. The argument is no better in different clothing. *Cf. In re C.L.F.*, 2007 WI App 6, ¶17, 298 Wis. 2d 333, 727 N.W.2d 334 (2006) (treating judicial estoppel rule like waiver rule because both are rules of judicial

administration). First, Owners did not raise estoppel below; thus, it is waived. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶23, 303 Wis. 2d 258, 735 N.W.2d 93.

Second, judicial estoppel is an "equitable doctrine . . . [that] is intended to protect against a litigant playing fast and loose with the courts by asserting inconsistent positions." *Mrozek v. Intra Fin. Corp.*, 2005 WI 73, ¶22, 281 Wis. 2d 448, 699 N.W.2d 54 (internal quotation marks omitted). "The doctrine is not directed to the relationship between the parties, but is intended to protect the judiciary as an institution from the perversion of judicial machinery." *Feerick v. Matrix Moving Sys., Inc.*, 2007 WI App 143, ¶16, 302 Wis. 2d 464, 736 N.W.2d 172 (internal quotation marks omitted). Here, given the District's express reservation of its legal defenses, which was acknowledged by the circuit court, the District cannot be characterized correctly as "playing fast and loose" with the court in arguing that if Owners won on their claims, which sought damages, they would be compensated at law. This alone defeats estoppel.

Additionally, a party asserting judicial estoppel must show: "(1) the later position is clearly

inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." *Id.* at ¶34. The District's argument that damages are limited by § 893.80(3) is not "clearly inconsistent" with its argument for why a tunnel construction expert was irrelevant—that, *if* plaintiffs prevailed, they would recover compensatory damages. Plaintiffs claimed $13 million of damages. If they prevailed, i.e., if they recovered damages based on their apparent belief that a nuisance claim would allow them to avoid the damages cap, they would have been fully compensated. There is no inconsistency. For the same policy reasons as discussed in connection with Owners' waiver argument, it would be improper to hold that the District is estopped from asserting the statutory limitation based on a lawyers' colloquy on a different topic in which the § 893.80(3) limitation was never mentioned and the District's counsel emphasized, and the circuit court acknowledged, that counsel was not waiving any legal defenses. *See Kennedy v. Wis. Dep't of Health & Soc. Servs.*, 199 Wis. 2d 442, 544 N.W.2d 917 (Ct. App. 1996) (judicial estoppel inapplicable

to blunder, inadvertence, or mistake). Finally, only official acts by the government entity, and not statements like those here, can give rise to estoppel. *Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶51, 235 Wis. 2d 409, 436, 611 N.W.2d 693 (Ct. App. 2000) (statement of Town chairman insufficient basis for estoppel of immunity defense).

D. Even if Owners could recover in nuisance, Wis. Stat. § 893.80(3) limits each plaintiff to $50,000 damages.

Owners argue that if the Court disregards the jury's finding that defeats their nuisance claims, then they "ought not be limited by Wis. Stat. § 893.80(3)" "[b]ecause continuing nuisances give rise to continually recurring causes of action." Owners' Br. 77. This argument ignores the statute's text, its purpose, and the case law construing it.

Section 893.80(3) limits the amount any person can recover in any action founded on tort, stating, "the amount recoverable by any person for any damages, injuries or death in any action founded on tort against any . . . political corporation, governmental subdivision or agency

. . . shall not exceed $50,000." Owners commenced an "action founded on tort"; the amount recoverable by them shall not exceed $50,000. *See Schwartz v. City of Milwaukee*, 54 Wis. 2d 286, 295, 195 N.W.2d 480 (1972) (the limitation applies to "each person asserting a cause of action for damages"); *Wood v. Milin*, 134 Wis. 2d 279, 285, 397 N.W.2d 479 (1986) (when two plaintiffs "each qualify as a 'person' who has suffered 'damages . . . in any action founded on tort . . .' as required by sec. 893.80(3)" both can recover up to the statutory limit).

Owners argue that because courts have recognized that a continuing nuisance is construed as a series of causes of action for statute of limitations purposes, "a continuing nuisance is not a single 'action'" for purposes of § 893.80(3). Owners' Br. 75. This reasoning is faulty. Section 893.80(3) imposes a $50,000 damages limit per "action," not per "cause of action." An "action" is a "civil or criminal judicial proceeding." Black's Law Dictionary 31 (8th ed. 2004); *see also* Wis. Stat. § 801.01(1) ("Proceedings in the courts are divided into actions and special proceedings."). A "cause of action," on the other hand, is a claim. Black's, *supra*, at 235. A single action, of course, can

encompass multiple causes of action. *See, e.g.*, Wis. Stat. § 802.06(1) (increasing the allowed time to answer when "any cause of action raised in the original pleading . . . is founded in tort"). Section 893.80(3)'s text could not be clearer: in this "action," Owners are entitled to no more than $50,000.

The Supreme Court has used the "cause of action" concept in construing § 893.80(3) only as a limiting principle—that is, it has asked of two separate plaintiffs whether they are only entitled to one $50,000 limit because they share a single cause of action. *See Wilmot v. Racine County*, 136 Wis. 2d 57, 400 N.W.2d 917 (1987) (subrogated plan not entitled to separate $50,000 recovery). As Chief Justice Abrahamson, who would not use "cause of action" even to limit recovery by multiple plaintiffs, explained: "The statute uses the word 'action,' not the phrase 'cause of action,' and not the phrase 'a person who has a cause of action.'" *Id.* at 920 (Abrahamson, C.J., concurring). To accept Owners' multiple cause of action theory and allow plaintiffs unbridled recovery for nuisance claims would ignore the legislative purpose of imposing a maximum per plaintiff recovery "where the burden

of unlimited liability may be substantial and the danger of disrupting the functioning of local government by requiring payment of substantial damage awards may be great." *Sambs*, 97 Wis. 2d at 377-78.

Nor does Owners' suggestion that they will become serial litigants—burdening the courts and the District with multiple lawsuits over the same alleged infiltration into the Tunnel—justify abandoning the Legislature's damage limitation. Whether Owners can bring another action after they chose here to litigate all past and future damages is at best uncertain. *Compare City of Chicago v. Harris Trust & Sav. Bank*, 371 N.E.2d 1182, 1186 (Ill. App. Ct. 1977) ("we reject plaintiff's argument that the classification of defendants' use of the subject property as a continuing nuisance would prevent the application of res judicata"); with *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 469-70, 588 N.W.2d 278, 282 (Ct. App. 1998) (suggesting that possibility that plaintiff could "repetitively sue" for ongoing damage from defendant's reconstruction of canal bank supported

award of injunctive relief).[5] No case Owners cite (and none of which the District is aware) allows a plaintiff to commence a second nuisance action after it litigates all of its future damages and obtains a jury verdict, like the one here, that answers the question "[w]hat sum of money, if any, will fairly and reasonably compensate [plaintiffs] for damages they will suffer in the future?" To allow Owners to relitigate a claim for the same damages would violate the Wisconsin Supreme Court's recent pronouncement that, "[u]nder the

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[5] Section 893.80(3) was not at issue in *Sunnyside Feed*. There, a City and its insurer were sued for damage to a mill caused by repairs to a canal bank alleged to constitute a nuisance. After a jury found damages of $10,000, the circuit court ruled this amount inadequate and granted injunctive relief to accomplish effectively the same result an additur. In upholding that relief, the court suggested in dicta that injunctive relief in the same proceedings would avoid re-litigation by the plaintiff. *Stockstad v. Town of Rutland*, 8 Wis.2d 528, 99 N.W.2d 813 (1959), on which Owners also rely, is even more inapplicable. *Stockstad*, which was decided before *Holytz*, is silent on statutory damages limitations. The Supreme Court has explained that pre-*Holytz* authorities, like *Stockstad,* have been "rendered obsolete" and have no bearing on the scope of the Legislature's post-*Holytz* immunities. *See MMSD*, 277 Wis. 2d at ¶52, n.12.

doctrine of claim preclusion, a valid and final judgment in an action extinguishes all rights to remedies against a defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Kruckenberg v. Harvey,* 2005 WI 43, ¶25, 279 Wis. 2d 520, 694 N.W.2d 879. Allowing the Owners' claimed do-over would also offend the District's constitutional right to have a single jury decide all of the issues between the parties. *See Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 226, 556 N.W.2d 326, 333 (Ct. App. 1996).

All of this, however, while showing the intractable difficulties that follow from Owners' argument that § 893.80(3) would not apply to nuisance claims, need not detain the Court long. Under the plain statutory terms, damages in "this action" shall not exceed $50,000 per plaintiff. No authority suggests a reading of "in this action" that would yield a larger recovery where liability is for nuisance, and it would subvert the Legislature's purpose to allow plaintiffs to saddle municipalities with millions in damages through serial nuisance actions.

II. Owners Have No Inverse Condemnation Claim: They Can Show Neither a Physical Invasion of Their Property nor the Existence of a Regulatory Scheme Depriving Them of Its Use.

Owners' amended complaint included a claim for inverse condemnation based on Wis. Stats. § 32.10. An action for inverse condemnation may be initiated where a property owner has demonstrated a taking for which compensation is due under Article I, Section 13 of the State Constitution. *Vivid, Inc. v. Fiedler*, 174 Wis. 2d 142, 149, 497 N.W.2d 153 (Ct. App. 1993). Because mere property damage of the kind alleged here is not a taking under Wisconsin law, *see Wis. Power & Light Co. v. Columbia County* ("*WP&L*"), 3 Wis. 2d 1, 5–8, 87 N.W.2d 279 (1958), the circuit court properly dismissed the claim upon the District's motion for summary judgment. R.374-9-40:MMSDApp-0477-08. Owners now appeal this decision, which this Court reviews de novo. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 316–17, 401 N.W.2d 816 (1987).

Takings in Wisconsin come in two forms: (1) the classic physical taking in which there has been a direct appropriation or physical invasion of private property by the government for which

compensation is due; and (2) a "constructive" or "regulatory" taking where a regulatory action of the government "deprives a property owner of all economically beneficial use of his property." *R.W. Docks & Slips v. State*, 2001 WI 73, ¶14, 244 Wis. 2d 497, 628 N.W.2d 781 (2001) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)). Regulatory takings themselves exist in two categories: "The first includes regulatory actions that bring about some form of physical 'invasion' of private property. . . . The second includes regulatory actions that . . . deny the landowner all or substantially all practical uses of a property.'" *Id.* ¶15.[6]

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[6] The pervasive regulatory scheme exception arises when a condemnor creates a pervasive regulatory scheme that deprives landowners of "all, or substantially all of the beneficial use of their property." *Howell Plaza, Inc. v. State Highway Comm'n*, 66 Wis. 2d 720, 728, 226 N.W.2d 185 (1975). In such cases, the court treats the pervasive regulatory regime as having "constructively" taken the property. Section 32.10 was intended to prevent the slothful condemnor from constructively taking private property without timely commencing proceedings to compensate the owner. *Maxey v. Redevelopment Auth. of Racine*, 94 Wis. 2d 375, 393-94, 288 N.W.2d 794 (1980). *Maxey* provides a fact pattern illustrative of the types of conditions required to constitute a constructive taking. In *Maxey*, the city's denial of a license, at the behest of the

But consequential damage to property caused by the government, even where the damage approaches destruction, is not a taking. *WP&L*, 3 Wis. 2d at 7; *see also Menick v. City of Menasha*, 200 Wis. 2d 737, 744, 547 N.W.2d 778 (Ct. App. 1996) ("Mere damage is not compensable as a taking."). Nor does a taking exist where the deprivation of an owner's beneficial use of his property is "only an indirect result of government action." *Howell Plaza, Inc. v. State Highway Comm'n*, 92 Wis. 2d 74, 87, 284 N.W.2d 887 (1979).

Owners argue that the District's "operation and maintenance" of the Deep Tunnel rendered the Boston Store building's foundation unusable, thereby "physically taking" the piles and physically invading Owners' property to deprive them of the beneficial use of these piles without just compensation. Owners' Br. 39-42.

First, Owners' premise that a taking claim can be made based on the Tunnel's effect on

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redevelopment authority, to operate a movie theater in a space that could only be used as a movie theater amounted to a constructive taking.

"certain timber piles and not Boston Store's entire building," Owners' Br. 38, is wrong. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *R.W. Docks*, 2001 WI 73, ¶25 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978)).

Second, Owners' taking claim—really a restyled claim for consequential property damage caused by governmental conduct—is precluded by *WP&L*. In *WP&L*, plaintiffs sued a county for an unconstitutional taking under Art. I, § 13 after its transmission tower was destroyed as a result of land pushed into a wetland as a result of the county's construction of a roadway. *WP&L*, 3 Wis. 2d at 4. The plaintiffs did not assert "that defendant removed, seized, or touched the tower," but only that "inanimate forces set in motion by defendant some distance from the tower eventually damaged it to an extent which destroyed its utility." *Id.* The Court rejected WP&L's takings claim as one for damages:

> [C]onsequential damage to property resulting from governmental action is

> not a taking thereof. Art. I, sec. 13 . . . "does not undertake . . . to socialize all losses, but those only which result from a taking of property."

Id. at 6; *see also Zinn v. State*, 112 Wis. 2d 417, 424, 334 N.W.2d 67 (1983) ("Governmental action which merely causes damage to private property is not the basis for compensation under [the state constitution's Takings Clause].").

Like the plaintiffs in WP&L, Owners fail to assert that District employees or District-retained contractors physically entered upon Owners' property to seize, use, or prevent Owners from using the timber piles; or that any consolidated soils or rotted piles left the perimeter of the property. Owners' allegation of a "physical invasion" is just an artful way of saying that Owners believe the "operation and maintenance" of the Deep Tunnel damaged the wood pile foundation. This is not enough to establish a constitutional taking.

A physical invasion constitutes a taking only where there is direct government action leading to a permanent presence on private property, *see Olen v. Waupaca County*, 238 Wis. 442, 449, 300 N.W. 178 (1941) (taking occurred by covering land with

permanent embankment of earth); *Arimond v. Green Bay & Miss. Canal Co.*, 31 Wis. 316, 335 (1872) (taking by permanent flooding with water impounded by dam); or an actual physical removal of a substantial part of the property itself, *see Dahlman v. City of Milwaukee*, 131 Wis. 427, 438–40, 110 N.W. 479 (1907) (taking where removal of lateral support as part of street grading caused substantial part of owner's land to fall into the street).[7]

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[7] Owners cite the 1907 *Dahlman* case as an example of an inverse condemnation claim because the City removed the property owner's lateral support. *Dahlman* was a takings case, not an inverse condemnation case. To the extent *Dahlman* remains good law, it does not apply to this case for two reasons. First, *Dahlman* involved removal of lateral support, i.e., by lowering the road grade, the lateral support for a neighboring property, perhaps a protected property interest in and of itself for the neighboring landowner, was taken. Second, the legislature amended state statutes so that claims similar to *Dahlman's* are treated as actions for damages against the authority altering the road grade. *See, e.g.*, Wis. Stat. § 62.16(1) (providing "any person . . . sustaining damages to that person's property on the affected street . . . may maintain an action to recover such damages."); Wis. Stat. § 32.18 (providing that abutting landowners whose property is not taken for a grade change, but is damaged by the change of grade, can maintain action for such damages). Thus, *Dahlman*'s particular holding has been

Owners cannot successfully assert a non-physical taking: "A taking can occur absent physical invasion only where there is a *legally imposed* restriction upon the property's use." *Howell Plaza*, 92 Wis.2d at 88 (emphasis added). Mere deprivation of the benefit of property is not enough to establish a taking. *Id.* Having identified no permanent physical presence, governmental appropriation, or legal restriction, Owners' inverse condemnation claim fails.

III. Summary Judgment Was Correctly Granted on Owners' § 101.111 Claim.

Owners allege that the District's construction of the Deep Tunnel violated Wis. Stat. § 101.111. That statute provides in relevant part:

> (2) **Cave-in Prevention**. Any excavator shall ***protect the excavation site*** in such a manner so as to prevent the soil of adjoining property from caving in or settling.
>
> (3) **Liability for Underpinning and Foundation Extensions**. . . . (b) If the excavation ***is made to a depth in***

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superseded by statute, and it has no broader application here.

> ***excess of 12 feet below grade***, the excavator shall be liable for the expense of any necessary underpinning or extension of the foundations of any adjoining buildings ***below the depth of 12 feet below grade***. . . .
>
> (4) **Notice**. Unless waived by adjoining owners, at least 30 days prior to commencing the excavation the excavator shall notify, in writing, all owners of adjoining buildings of his or her intention to excavate . . . .

Wis. Stat. § 101.111 (emphasis added). Owners presume this statute applies to the Tunnel mined 300 feet below the surface and argue that the District failed to provide the notice required by § 101.111(4) and failed to comply with § 101.111(2) by excavating in a manner that caused the Boston Store property's soil to settle.

A. Section 101.11 governs excavations that affect lateral support of adjoining property.

Owners have not demonstrated that the statute even applies. By its terms, the statute applies to protecting "excavation sites" in a manner that buildings adjoining the site are protected. The natural application of this statute is to excavations for building constructions with respect to the lateral support of neighboring buildings. *See* 1977

Senate Bill 58. The statute supersedes in part common law principles that required building owners to "protect the buildings that have been constructed on his own land by taking reasonable measures to protect his own land and buildings as against the intended excavation and as against the collapse of his land and improvements due to the excavating on the adjoining property." *Schmidt v. Chapman*, 26 Wis. 2d 11, 22, 131 N.W.2d 689 (1964). The "excavation" at issue here—the mining of a Tunnel 300 feet below the ground surface—is not of the type to which those principles or the statute properly pertains.

B. The Deep Tunnel is not adjoining the Boston Store.

As the circuit court correctly concluded, the uncontested facts show that § 101.111 could not apply to this dispute because the Boston Store building and the property on which it sits are not "adjoining" to the Deep Tunnel excavation, R.374-38-39:MMSDApp-0568-69, a conclusion supported

by the statutory text, the common law meaning of "adjoining," and common sense.[8]

The plain language of § 101.111 provides for the protection of "adjoining property" or "adjoining buildings" in locations where an excavation at a certain depth "below grade" is taking place. The focus is not on ownership of the land being excavated—the statute clearly applies, for example, to "any owner *of an interest* in land," *see* Wis. Stats. § 101.111(1) (emphasis added)—but on the "excavation" or "excavation site" itself.

Although the statute does not define "adjoining," Wisconsin has long held in similar contexts that two bodies are not adjoining one another unless they are "touching or contiguous, as distinguished from lying near or adjacent." *State ex rel. Badtke v. Sch. Bd. of Joint Common Sch. Dist. No. 1*, 1 Wis. 2d 208, 211, 83 N.W.2d 724 (1957) (quoting *Hennessy v. Douglas County*, 99 Wis. 129, 136-37, 74 N.W. 983 (1898)). The Supreme Court

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[8] This Court reviews de novo the circuit court's ruling. *Cueller v. Ford Motor Co.*, 2006 WI App 210, ¶8, 296 Wis. 2d 545, 723 N.W.2d 747.

has described "'adjoining [to] indicate[] that [two bodies] are so joined or united that no third body intervenes." *Id.* This understanding is consistent with the consensus legal definition of the term. *See* Black's, *supra*, at 44 (defining "adjoining" as "[t]ouching, sharing a common boundary"). The word "adjoining" is therefore not an ambiguous, loosely-defined term; it has a clear and distinct legal meaning—i.e., touching or closely joined.

Applying this definition of "adjoining," the circuit court properly concluded that neither the Boston Store building nor its property adjoins the "excavation site," i.e., the District's Tunnel, for the simple reason that the Tunnel and the Boston Store property are separated by 160 feet of earth that constitutes part of the Grand Avenue Mall. A-Ap. 722-723. In other words, the Tunnel and Boston Store do not "touch" and are not "continguous." The Boston Store building, therefore, is not an "adjoining building" and Owners are not "adjoining owners" protected by § 101.111.

Disregarding the clear language of the statute and the Supreme Court's undisputed precedent on the meaning of "adjoining," Owners

insist that the circuit court got it wrong. In their view, the Boston Store building adjoins the District's Tunnel because the District's Tunnel is located within a written easement that is surrounded by Grand Avenue Mall property—property that includes the 160 feet between the Tunnel and Boston Store. Because the Grand Avenue Mall property is "adjoining" to the Boston Store property, Owners argue that the Tunnel is "adjoining" to Boston Store such that the District violated §101.111.

Owners' theory has no support. They cite no legal authority for their ownership-focused, rather than excavator-focused, view of the meaning of the statute. Yet § 101.111 imposes obligations upon an excavator with respect to property that adjoins the excavation site; the statute refers to "excavation site" in combination with "adjoining property," not "property on which the excavation is taking place" and "adjoining property." For the statute to apply, therefore, Boston Store would have to be adjoining to the Deep Tunnel itself, and not merely adjoining to a large piece of property owned by someone else within which the District has an easement interest.

Common sense reveals the absurdity of Owners' reading of the statute. If it is the boundaries of the property on which the excavation is being conducted rather than the boundaries of the excavation site itself that matter, it would follow that the statutory requirements would apply to farmers or other large property owners conducting a small-scale excavation thousands of feet from their property line.

The Legislature's choice of the word "adjoining" (rather than "adjacent," *see Badtke*, 1 Wis. 2d at 211 (distinguishing "adjacent" and "adjoining")) precludes precisely the kind of broad application that Owners champion. Owners have never disputed that 160 feet separate the District's Tunnel from the Boston Store building. On a correct reading of the statute, therefore, the Tunnel does not adjoin their building or their property.

In any event, the District, for the reasons described in section I and III of the argument in its Cross-Appeal brief, *infra*, the District is immune from liability for design and construction of the Deep Tunnel under § 893.80(4) and any relief under § 101.111 is barred because Owners failed to serve a notice of the claim and claim as required by

§ 893.80(1). As a result, Owners cannot bring an excavation-related claim against the District.

IV. The Jury's Nuisance-Defeating Finding—That the Tunnel Did Not Significantly Interfere With Owners' Use and Enjoyment of Their Building—Is Supported by Credible Evidence.

Owners ask this Court to save their nuisance claim from the jury's fatal finding that an interference with their use or enjoyment of the building did not cause significant harm. As in the circuit court, they pursue this claim in a misguided effort to avoid limitations on their negligence claim, such as the damages cap of § 893.80(3) and the accrual of their negligence claim outside the limitations period. But, as the jury found, they never proved (or even pleaded) the "particular type of injurious consequence," *MMSD v. City of Milwaukee*, 2005 WI 8, ¶26, 277 Wis. 2d 635, 691 N.W.2d 658, that is the essence of a nuisance claim.

A nuisance is an "unreasonable interference with the interests of an individual in *the use and enjoyment of land*." *Krueger v. Mitchell*, 112 Wis. 2d 88, 103, 332 N.W.2d 733 (1983) (emphasis added); *see also MMSD*, 277 Wis. 2d at ¶27 ("The essence of a private nuisance is an interference with the use and enjoyment of land."). "Nuisance

arises when [this] particular type of harm is suffered," *Butler v. Advanced Drainage Sys., Inc.*, 2006 WI 102, ¶29, 294 Wis. 2d 397, 419, 717 N.W.2d 760, that is, "a nuisance exists if there is a condition or activity that unduly interferes with the private use and enjoyment of land." *Id.* at ¶28 (quoting *MMSD*, 277 Wis. 2d at ¶30). To be an actionable nuisance, the unreasonable interference in the "usability of land" must constitute "significant harm"—i.e., harm that ordinary persons in similar circumstances would regard as "substantially offensive, seriously annoying, or intolerable," *Hoffmann v. Wis. Elec. Power Co.*, 2003 WI 64, ¶15 n.12, 262 Wis. 2d 264, 664 N.W.2d 55 (quoting jury instruction) (emphasis added).

A. Owners' failure to present any evidence of significant harm resulting from the Tunnel's interference with their use or enjoyment of the building justifies the jury's finding.

Using WI-JI Civil 1920, the circuit court instructed the jurors that "significant harm" looks to whether the defendant's interference with the use or enjoyment of land was "substantially offensive, seriously annoying or intolerable." R.392-2548-49:MMSDApp.-0800-01. Owners do not

contest that instruction. Moreover, after the jurors requested a definition of "use and enjoyment," the circuit court instructed them *at Owners' request* that "[t]he phrase 'use and enjoyment of property' encompasses not only the interests that an owner may have in *the actual present use of the property*, but also *an interest in having the present use value* of the land unimpaired by changes in its physical condition," R.253:A-Ap.582; R.392-2736-37:MMSDApp-0802-03 (emphasis added). *See also* RESTATEMENT (SECOND) OF TORTS, § 821D, cmt. b (1979) (similarly defining "use and enjoyment").

Owners, however, presented no evidence of significant harm to "the actual present use of the property" or to any interest in its "present use value." Owners' proof of harm was limited to their past and expected future costs of replacing all wood piles with concrete piles. They presented no evidence that the claimed interference resulted in business interruptions, annoyance, discomfort, or any other type of "use and enjoyment" harm. Instead, they showed that the building had been continuously used for retail space, commercial offices, apartments, and parking, and is sound enough for Wisconsin Electric Power Company to

invest tens of millions of dollars in it. R.383-836-37:MMSDApp-0705-06.

Based on this evidence and the unchallenged instructions, the jury answered "yes" to verdict question 9, "[h]as the manner in which the District has operated or maintained the tunnel interfered with [Owners'] use and enjoyment of their building," but "no" to question 10, "[d]id the interference result in significant harm to the [Owners]." R.403:A-Ap.585.

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

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

Owners' request that this Court upset the verdict is based on a refusal to acknowledge the

fundamental difference between negligent damage to property (their actual claim) and nuisance. Rather than contend that there was evidence of significant harm resulting from the interference with their use and enjoyment of the property, they argue that the jury's finding that Owners had suffered "property damage" necessarily constitutes significant harm. Owners mix negligence-damage apples with nuisance-harm oranges.

Damage to the property itself, no matter how great, is not the kind of harm against which nuisance protects. *See MMSD*, 277 Wis. 2d at ¶49. Otherwise, as Judge Kremers noted, R.394-18-19:MMSDApp-0827-28, every negligent injury to property would be a nuisance: a nuisance is simply an interference with the use and enjoyment of property that is either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent . . . conduct." *Id.* at ¶32. But not every negligent act damaging property is a nuisance. The nuisance touchstone, which separates nuisances from ordinary negligence, is the significant interference with the property's "use and enjoyment" or the "usability" of the property. *See*

RESTATEMENT (FIRST) OF TORTS, § 822, cmt. e (1939), *quoted in part in Krueger v. Mitchell*, 106 Wis. 2d 450, 459-60, 317 N.W.2d 155 (Ct. App. 1982), *aff'd*, 112 Wis. 2d 88, 332 N.W.2d 733 (1983).

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

Neither *Krueger* nor *Jost v. Dairyland Power Cooperative*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969), the only two cases on which Owners rely, suggests otherwise. In addition to the fact that these cases long pre-date the Supreme Court's later

clarification of nuisance law in *MMSD*, *Krueger* and *Jost* both involve alleged interferences with the use and enjoyment of property.

Mr. Krueger claimed that an expansion of an airport near his property "caused an increase in the noise level over [his] business thus interfering [significantly] with the operation of his business, and that this noise level was personally offensive to [him]." 112 Wis. 2d at 105. Based upon evidence of these interferences with his business and the offensive nature of the plane noise, the Court had no difficulty concluding that Mr. Krueger had pleaded significant harm to the use and enjoyment of the property. Thus, *Krueger*'s statement that, "[w]hen an invasion involves a detrimental change in the physical condition of land, there is seldom any doubt as to the significant character of the invasion," *id.* at 107, must be understood in context as referring to an invasion that detrimentally changes the land's condition in a way that impairs its use and renders it less enjoyable. *See id.* ("The focus in determining whether a particular nuisance is actionable depends on whether the interference with the use and enjoyment of land is unreasonable and substantial.").

Similarly, the *Jost* plaintiffs alleged that the defendant's sulfur fumes made enjoyment and use and enjoyment of their property impossible by damaging their crops and farm homes. The jury found hundreds of dollars of crop damage but concluded that the farmers' harm had not been "substantial," even though the circuit court had defined "substantial damage" as "a sum, assessed by way of damages, which is worth having . . . [and] are considerable in amount and intended as a real compensation for a real injury." 45 Wis. 2d at 171. The Supreme Court concluded that, under these circumstances, including importantly the trial court's definition of "substantial" to include any "sum assessed by way of damages," *id.*, the jury's finding that the crop damage was not "substantial" could not stand because it was inconsistent with their finding of tangible damage to the crops. *Id.* at 171-74.

Because of the trial court's instruction that "substantial harm" meant any "sum . . . intended as real compensation," *Jost* has no direct application here. More important, the damage at issue in *Jost* was plainly to the farm property's *use*—to the land's use to produce alfalfa crops—and also to

plaintiffs' *enjoyment* of that property—damage resulting in "flowers [that] could not be raised" and "screens [that] became rusty . . . and totally unusable within two years . . . [allowing] barn insects in[to] [plaintiffs'] home." *Id.* at 172.

Here, a finding of "property damage" can be (and was) based on evidence distinct from harm resulting from interference with Owners' "use and enjoyment of their building." As a result, the property damage finding does not amount to a finding of significant harm.[9] *Cf. Gumz v. Northern States Power Co.*, 2007 WI 135, ¶48, 305 Wis. 2d 263, 742 N.W.2d 271 (noting mistake to infer a finding from jury's answer on legally distinct issue).

The jury's damages finding was only supported by evidence of the cost to repair the building's foundation piles. Owners submitted no evidence of business interruption losses,

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[9] Contrary to Owners' suggestion, Owners' Br. 53, n.32, the District did not stipulate that negligence damages would be treated as nuisance damage, a point Judge Kremers confirmed on the record. R.392-2522:MMSDApp-__. The District simply agreed not to appeal the Court's decision to give only one damage question.

inconvenience, or annoyance. To equate the damages finding with a finding of significant harm would therefore be factually, as well as logically, erroneous.

The factual error is revealed by Owners' failure to point to any evidence of harm from the Tunnel that is similar to the significant use and enjoyment harm caused by the planes in *Krueger* or the sulfur fumes in *Jost*. All the evidence is to the contrary: Owners continued to use and enjoy the building for business purposes—it has continuously housed the Boston Store retail operation and served other commercial and residential lessees. R.385-1126:MMSDApp-0751.

Moreover, Owners and the predecessor-owners, whose conduct Owners agreed at trial could be attributed to them, R.376-63-64:MMSDApp-0616-17, had for decades before the Tunnel was constructed embraced a replace-on-failure approach to the building's piles. Even if one were to accept Owners' claims that the District's conduct resulted in a greater need of pile replacement, nothing about that evidence suggests a significant harm to their use or enjoyment of the building. Owners and their predecessors-in-

interest long ago accepted the need to replace piles, and they continued to use the building after the Tunnel's alleged interference in the same way as before.

Consequently, the jury's finding that the Tunnel's interference with Owners' use and enjoyment of the building did not result in significant harm is supported by credible evidence. The circuit court's refusal to change the verdict answer should be affirmed.

V. The Record Is Replete With Evidence Supporting the Jury's Finding That Owners Were Negligent.

Owners also appeal the circuit court's refusal to change the jury's finding that Owners were 30% causally negligent for the damage to the Boston Store building's foundation. R. 403-2:A-Ap.586; R.256-MMSDApp-0189; R.394-1-42:MMSDApp-0810-51. While this Court need not reach this argument if it agrees with the District on application of any of the § 893.80 issues addressed here and on cross-appeal, Owners' contention that there is no credible evidence to support the jury's

finding of contributory negligence bears no scrutiny.[10]

Owners argue against a strawman—contending that the "thrust of [the District's] contributory negligence defense is that Boston Store had a well that contributed to depressed water levels . . . [b]ut *without more*, a possible alternate cause for damage does not impute contributory negligence to [Owners]." Owners' Br. 57 (emphasis added). There is "more": Owners had a long history of neglecting maintenance, including knowing neglect of the piles and improper use of the building's well. This conduct provides the basis for the jury's negligence finding.

At the final pre-trial conference, Judge Kremers ruled *on Owners' own motion*, R.167-27-28:MMSDApp-0186-87, that "Boston Store" would refer to the "collective representation of the plaintiffs in this case and *all predecessors in*

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[10] As noted above, this Court will only reverse the circuit court's decision not to change a jury answer if the court was "clearly wrong" and no credible evidence supports the verdict. *See Weiss v. United Fire & Cas. Co.,* 197 Wis. 2d 365, 390, 541 N.W.2d 753, 762 (1995).

interest on the title of this property." R.376-63:MMSDApp-0616 (emphasis added). Judge Kremers went on to instruct that "plaintiffs are responsible for their actions and their predecessors in interest on the title of that property at all times relevant to the lawsuit, whatever relevant to the lawsuit turns out to mean." R.376-64:MMSDApp-0617. The trial court then specifically stated, "the fact that there was a different owner in place at the time who paid for those damages or acknowledged that some other condition was causing the damages, that is chargeable against the plaintiffs." R.376-66:MMSDApp-0619. Owners do not, and could not, challenge this stipulated case management ruling.

Owners' own witnesses testified to Owners' (and their predecessors-in-interests') long history of problems with the building's wood piles. Their testimony established the Boston Store's foundational pile problems were known for more than two decades before the Tunnel was constructed.

James Feit, who worked at the Boston Store from the late 1960s until 1982, R.385-1134-35:MMSDApp-0754-55, testified that when he first

arrived he was told that there were problems with the columns that made up the Boston Store's foundation. R.385-1140. Ray Bolton, a Boston Store employee from 1976 until 1995, R.384-1055:MMSDApp-0743, similarly testified that he was aware from his first day that the building was experiencing settlement problems due to fluctuations of the water table beneath the building. R.384-1069:MMSDApp-0745. Rudy Visser, an independent inspector who inspected the building in 1978, R.388-2065:MMSDApp-0792, reported that during his inspection, that Mr. Bolton told him the Boston Store was having a problem with the wood pile foundation underneath the building. R.388-2070:MMSDApp-0793. The foundation problem was so extensive that Mr. Visser reported the foundation as a "major deficiency." R.388-2072-73, ex.2992:MMSDApp-0443. Despite this knowledge, the Boston Store did nothing to protect its foundation.

The evidence also revealed that the building's owners at a minimum contributed to lowering the water table and drying out the piles long before the Tunnel's construction. A well was drilled at the Boston Store building in 1936 and began pumping

at 800 gallons per minute R.387-1820-21:MMSDApp-0780-81.[11] After the Boston Store ceased pumping its well in 1962, it took no steps to ensure that the well was properly abandoned. Instead, the well was left in place and continued to draw water out from below the building.[12] R.387-1825, 1830:MMSDApp-0784-85.

Although the water pumped out of the Boston Store's well was used primarily for air conditioning, the well was also connected to a pile hydration system. R.384-990-91:MMSDApp-0718-19. The presence of this system makes clear that building owners appreciated the need to keep the piles saturated, but they rarely turned the system on. R.383-810-14:MMSDApp-0698-02; R.384-1040-42:MMSDApp-0739-41.

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[11] The District's expert, Dr. Douglas Cherkauer, opined during these twenty-six years of pumping, the well drew groundwater out of the ground beneath Boston Store. R.387-1822-23:MMSDApp-0782-83.

[12] Judge Kremers instructed the jury with regard to the contributory negligence of a building owner. R.392-2540-41:MMSDApp-0798-99. Owners do not contest that instruction.

Despite the knowledge that the piles needed to remain saturated, R.384-1069-70:MMSDApp-0745-46, and the fact the settlement problems were due to fluctuations in the water table, R.384-1069:MMSDApp-0749, the Owners did nothing between 1936 and 1962 to protect the piles from rot by keeping them saturated. R.384-1070:MMSDApp-0746. Nor did the Boston Store owners do anything to monitor the groundwater level beneath the building. R.384-1070:MMSDApp-0746. This negligent operation and maintenance continued after 1962 through at least 2002 when the well was finally sealed. R.387-1816-17:MMSDApp-0778-79. And, even later, when specifically told by their hired third-party engineers, GAS, to use a wetting system on their wood piles, Owners failed to do so. R.384-1040-41:MMSDApp-0740-41. Owners refused the advice because they were concerned that someone would forget to open the spigot to turn the water on. *Id.*

Without saturation, the Boston Store's foundation timber piles were exposed to conditions conducive to rot, and they rotted, while owners did nothing. R.384-982-83:MMSDApp-0716-17; R.390-2418-19. Thus, Owners' negligence is evidenced by

the combination of the well's effect on the groundwater—the lowering of which Owners were aware—*and* the Owners' failure to ensure that the piles remained saturated.

Owners suggest in a footnote that their failure to use a pile wetting system "is, if anything, a question of failure to mitigate damages and not contributory negligence." Owners' Br. 59, n.35. But Owners' awareness of the pile rot problem long preceded the Tunnel's construction. R.384-1069:MMSDApp-0749; R.385-1134-35:MMSDApp-0754-55. Their failure to keep the piles saturated before the Tunnel was built is evidence of contributory negligence in the building's maintenance. [13] Even after the Tunnel's construction, the existence of the well and Owners' continuing failure to ensure that the piles were saturated are all facts from which the jury could have found Owners' negligence was a cause of the pile damage. *See Jankee v. Clark County*, 2000 WI

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[13] Owners' own expert witness testified that it would be incumbent on the owner of a building with a wood pile foundation to keep the piles wet. R.384-981-82:MMSDApp-0715-16.

64 ¶53, 235 Wis. 2d 700, 612 N.W.2d 297 (acting or failing to act when a reasonable person would have foreseen that their actions or failure to act subjected their property to an unreasonable risk of damage establishes negligence); *Connar v. W. Shore Equip.*, 68 Wis. 2d 42, 45, 227 N.W.2d 660 (1975) (proper to submit contributory negligence jury question when reason to believe there is "evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person or other legal entity [being] inquired about.").

Having heard all of the evidence, Judge Kremers remarked that given the building's long history of pile problems that pre-dated the Tunnel's construction, he would have understood a verdict not finding the District at all responsible for the claimed damage:

> I thought the District put on some pretty strong evidence to suggest that Boston Store had been experiencing foundation problems from the beginning of the construction of the building or at least going back a hundred years, 80 years or something, that there was this on-going necessity to replace some of the, some of the piles and some of the foundation of the Boston Store, that they had continuing problems that pre-

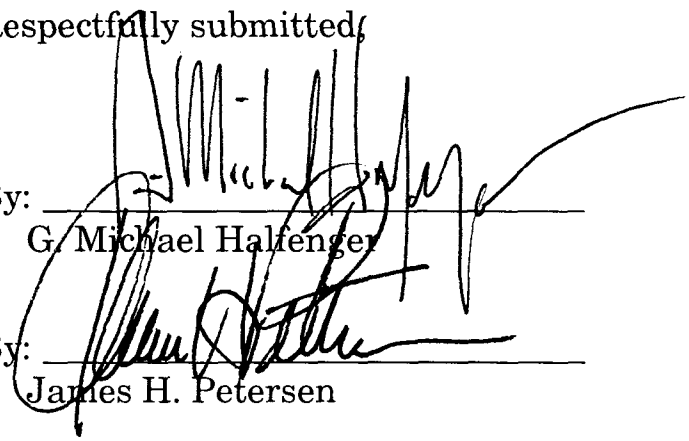
> existed the tunnel. I thought that was pretty persuasive.

R.394-27:MMSDApp-0836. The evidence shows that these problems were caused by Owners' negligent building maintenance. Therefore, this Court, if it reaches the issue, should affirm the circuit court's order refusing to change the jury's finding that Owners were 30% negligent.

CONCLUSION

None of the issues Owners raise justify vacating the judgment below. This Court should direct entry of judgment as described in the District's cross-appeal brief, or, in the alternative, should affirm Judge Kremers' judgment awarding only the limited damages on Owners' negligence claim and dismissing all of their remaining claims and requests for relief.

Respectfully submitted,



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FORM AND LENGTH CERTIFICATION

I certify that this response brief conforms to the rules contained in § 809.19(8)(b) for a brief and appendix produced using proportional serif font and pursuant to this Court's July 8, 2008, order expanding the brief volume limitation in § 809(8)(c) by 50%. The length of this response brief is 14569 words.

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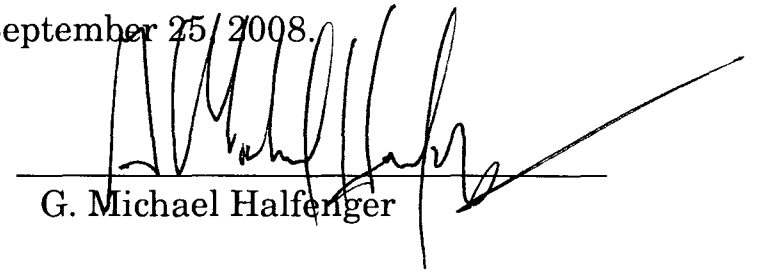

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INTRODUCTION

As the Milwaukee Metropolitan Sewerage District's ("District's) response brief explains, plaintiffs-appellants-cross-respondents ("Owners") are a current and a past owner of the Boston Store building in downtown Milwaukee. Owners sued the District claiming that infiltration of groundwater into the Deep Tunnel harmed the building's wooden foundation piles. Owners tried two claims—negligence and nuisance. The jury found the District liable in negligence but not in nuisance. Judge Kremers entered a judgment that applied Wis. Stat. § 893.80(3)'s cap on governmental tort damages and dismissed the nuisance claim. Owners' challenge to that judgment is addressed in the response brief.

This brief addresses: (1) The circuit court's failure to grant judgment to the District based on the discretionary act immunity provided by Wis. Stat. § 893.80(4), which the Supreme Court has held immunizes all decisions about the adoption, design, and implementation of public works projects, such as sewer systems; (2) the circuit court's decision to change the jury's finding that Owners should have discovered their claim outside the

statute of limitations period; (3) the circuit court's failure to dismiss the action based on Owners' failure to comply with § 893.80(1)'s requirement that before suing a governmental entity, a claimant serve notice of claim and an itemized statement of relief; and, (4) the circuit court's post-judgment entry of an injunction requiring the District to line a one-mile long section of the Tunnel with concrete.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Owners' case consisted of presenting expert testimony and other evidence to show that, because the Deep Tunnel lacks a concrete liner, groundwater infiltrates resulting in harm to Owners' building's wood pile foundation. Plaintiffs characterized this evidence as showing that Tunnel "operation, inspection, or maintenance" harmed their building. But the Tunnel was designed and constructed without a complete concrete liner. It was also designed so that groundwater would infiltrate in order to prevent wastewater from exfiltrating, and the Wisconsin Department of Natural Resources' permit, under which the Tunnel operates, requires infiltration. Owners presented no evidence of a ministerial duty to line the Tunnel, nor did they present evidence from which a jury could

reasonably find that the District failed to perform any other ministerial act that caused them harm.

Question: Whether the District is entitled to judgment as a matter of law because the evidence that Owners submitted at trial pertained only to the District's discretionary decisions to adopt, design, and implement the Deep Tunnel public works project for which the District is immune from suit under Wis. Stat. § 893.80(4), as the Supreme Court held in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*?

The circuit court, in denying the District's post-verdict motion for judgment, answered, "no." In doing so, however, Judge Kremers indicated that he "remained troubled" by whether his ruling on the discretionary act immunity issue was correct.

2. The evidence showed that Owners had requested an engineering firm's report on the cause of their building damage outside the limitations period. The evidence further showed that the Deep Tunnel's existence, to which Owners attribute their injury, was generally well known, and Owners never presented any evidence of a later date by which they claimed to have determined the cause of

their injuries or that they ever considered any potential cause other than the Tunnel.

Question: Whether, under these circumstances, the jury's finding that Owners should have known or discovered their claim outside the statute of limitations period was supported by credible evidence?

The circuit court in ruling on Owners' post-verdict motion to change the jury's finding on the statute of limitations question answered, "no," and changed the jury's finding.

3. Neither Owner served the notice of claim or claim accompanied by an itemized statement of relief required by Wis. Stat. § 893.80(1). Owners rely on a notice of claim and an itemized statement of relief served by distinct entities that never owned the property at issue. In that notice and itemization of relief, the non-owners identified themselves as the "claimants" and falsely stated that they owned the property.

Question: Whether, under these circumstances, Owners' failure to serve a notice of claim or itemized statement of relief before commencing any action entitles the District to judgment as a matter of law?

The circuit court, in denying the District's motion to dismiss, answered "no."

4. Judge Kremers presided through trial and decided the parties' timely post-verdict motions. After Judge Kremers ruled that Owners' damages were limited by the $50,000-per-plaintiff cap provided in Wis. Stat. § 893.80(3) for tort claims against governmental entities, and after the time to file post-verdict motions had expired, Owners filed a motion for an injunction requiring the District to line the Tunnel with concrete. Owners' injunction motion was taken under consideration by Judge Jean DiMotto, who took over Judge Kremers' civil calendar as a result of judicial rotation. Judge Kremers, while aware of the injunction motion, entered a judgment on the jury verdict, which dismissed Owners' nuisance claim and entered damages in the capped amount on their negligence claim. Owners appealed the judgment. After Owners' appealed, Judge DiMotto, without holding a hearing to consider equitable factors, ordered the District to line with concrete the one-mile section of the Deep Tunnel in the Boston Store vicinity.

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

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

(b) Did the circuit court err in ordering the District to line a mile-long portion of the Deep Tunnel with concrete when that order circumvents the governmental tort damages limitation in Wis. Stat. § 893.80(3), which § 893.80(5) makes the "exclusive" relief available?

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

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

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

(d) Did the circuit court lack authority to enter the injunction because it acted long after Wis.

Stat. § 805.16(3)'s 90-day limit on granting post-verdict relief had passed?

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

(e) Did the circuit court lack authority to enter the injunction because it had entered a final judgment that adjudicated all remaining claims and Owners had perfected an appeal of that judgment before the circuit court issued the injunction?

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

(f) Did the circuit court erroneously exercise its equitable authority by ordering the District to line the Deep Tunnel without considering relevant equitable factors or affording the District and the Wisconsin Department of Natural Resources an opportunity to present evidence relating to those factors, as the Supreme Court required in *Hoffmann v. Wisconsin Electric Power Co.*?

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

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The District's appeal in this case involves important issues of governmental immunity from suit

based on the design, construction, and implementation of public works projects. It also implicates important issues dealing with the fair administration of justice, because a second circuit court judge ordered injunctive relief mandating the reconstruction of a portion of the District's "Deep Tunnel"—the Inline Storage System that stores sewerage flows during wet weather until those flows can be treated and promptly discharged—when a first circuit court judge had already issued a final order fully adjudicating Owners' claims, when the circuit court lacked the authority to enter the requested relief, and when the circuit court ordered that relief without considering the many countervailing equitable factors.

Given the complexity of the substantive and procedural issues involved, oral argument is warranted and is requested. The importance of the legal issues justifies publication.

STATEMENT OF THE CASE

NATURE OF THE CASE AND PROCEDURAL HISTORY

As described more fully in the response portion of this brief, Owners alleged that groundwater infiltrating the Deep Tunnel damaged their building's wood pile foundation. R.51-26-29:A-Ap.126-

29. The District pleaded two complete defenses under § 893.80: (a) Owners' suit was brought against the District for discretionary acts for which the District has immunity under § 893.80(4), and (b) Owners failed to serve the notice of claim and itemization of relief required by § 893.80(1). R.75-29:A-Ap.169. The District also defended on the ground, among others not relevant to this cross-appeal, that the Owners, who sued in June 2003, commenced their claim outside the statute of limitations period because they should have discovered their claim on or before June 4, 1997, a date long after the Tunnel went into service in 1994. R.75-30-31:MMSDApp-170-71.

This case has two distinct procedural components: First, the case proceeded through a jury trial in which Owners sought to recover damages. Judge Kremers, who presided over this component, ruled on post-verdict motions and entered a final order adjudicating the only remaining claims by awarding damages on Owners' negligence claim and dismissing their nuisance claim. R.305:A-Ap.708. Second, Judge DiMotto, who acquired the case from Judge Kremers after he had ruled on the parties' post-verdict motions, decided to consider a

motion for injunctive relief that Owners filed in response to Judge Kremers' ruling that the statutory damages limitation capped recoverable damages at $50,000 per plaintiff. R.395-13:MMSDApp-0869. After Owners appealed Judge Kremers' judgment, Judge DiMotto, without any further hearing to consider equitable factors, ordered the District to line the Tunnel near the Boston Store building. R.399-26:MMSDApp-0945.

PROCEDURAL HISTORY AND STATEMENT OF FACTS ABOUT TRIAL-RELATED CROSS-APPEAL ISSUES

While recognizing that the District had immunity from Owners' allegations that the Tunnel was improperly designed or constructed, Judge Kremers declined to grant the District summary judgment under § 893.80(4). R.374-42:MMSDApp-0550. He allowed Owners to try to a jury whether the District was liable in negligence or nuisance for acts relating to the Tunnel's "operation, inspection or maintenance." R.374-39:MMSDApp-0547.

Judge Kremers also had denied summary judgment on statute of limitations grounds because he agreed with Owners' position that there were material facts in dispute and submitted to the jury the question of when Owners should have discov-

ered their claim. R.403-2:A-Ap.586. The jury found that the claim should have been discovered more than six years before Owners commenced suit, but the circuit court changed the answer after verdict. R.403-2:A-Ap.586; R.394-29:MMSDApp-0838.

Finally, Judge Kremers denied the District's motion to dismiss based on Owners' failure to serve a notice of claim and claim with itemization of relief sought. R.374-40:MMSDApp-0548. He excused the statutory non-compliance because separate entities that never owned the building had served a notice claiming that they owned the building and were injured by the acts Owners allege in this case. *Id.*

I. Owners' Claims Attack Tunnel Design and Construction.

Owners' amended complaint, filed more than 18 months into the litigation, reveals the true nature of their case: it repeatedly emphasizes the Tunnel's design—specifically, the lack of a concrete lining—and construction as the cause of reduced groundwater levels that damaged the building's pile foundation. For example, they alleged:

- "[i]nadequate [p]re-construction and [d]esign of the Deep Tunnel System" R.51-6:A-Ap.106;

- massive amounts of water [ ] were encountered on a sustained basis and prolonged basis during construction" R.51-8:A-Ap.108;

- the District's "refusal to line its deep tunnel has created a drain under downtown Milwaukee that continuously depresses the water table, damaging buildings in the process" R.51-10:A-Ap.110 (allcaps removed).

Owners' amended complaint only conclusorily contended that the District's "inspection, operation or maintenance" of the Tunnel caused harm. R.51-28:A-Ap.128. They did not plead a distinct harm from "operation and maintenance," rather than from Tunnel construction. *See, e.g.*, R.51-28:A-Ap.128. Nor did Owners allege facts showing a ministerial duty. They based the alleged breach of "inspection, operation, or maintenance" on a failure "to exercise ordinary care in inspecting, repairing, maintaining and operating the Deep Tunnel." R.51-31:A-Ap.131.

The District sought summary judgment based on the immunity provided by Wis. Stat. § 893.80(4) for intentional and discretionary conduct, arguing

specifically that the Wisconsin Supreme Court held in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee* that § 893.80(4) immunizes governmental entities from liability for all "decisions regarding the adoption, design and implementation of public works." 2005 WI 8, ¶60, 277 Wis. 2d 635, 691 N.W.2d 658 ("*MMSD*"). R.119-56-60:A-Ap.275-79. Judge Kremers declined to award summary judgment on the negligence and nuisance claims. R.374-41:MMSDApp-0549. He concluded that the immunity issue went "to the scope of what is going to be allowed at trial" R.374-42:MMSDApp-0550, but recognized that the District's "points are well taken with respect to governmental immunity versus the acts that they may not have immunity for and, again, we are going to have to be . . . very vigilant in making sure people follow what is allowed and what isn't." *Id.* He cautioned that the District's discretionary act immunity would require the verdict to be phrased in a way that confined the jury to considering only actionable breaches of ministerial duties:

> It will be, I think, a tricky business for all of us at the trial to sort of sort out how we go about presenting the evidence to the jury and how the verdict is going to get phrased with respect to some of these

> ministerial duties and what is a ministerial duty and what is not and what amounts to knowledge on the part of the people acting on behalf of the District versus intentional accusations of intentional torts.

R.374-41:MMSDApp-0549.

Before trial, Judge Kremers ruled that the District's conduct relating to the design and construction of the Deep Tunnel was not relevant. R.376-75:MMSDApp-0628;R.381-245:MMSDApp-0656. But Owners contended that they could prove a ministerial duty of "operation and maintenance" by evidence that the tunnel as designed or constructed allowed water to infiltrate and the District did not take corrective measures; as their counsel argued at the pre-trial conference, their case was about the Tunnel's unaltered existence:

> [This case] has to do with the mere existence of [the Tunnel] and the fact that it is being maintained with these porous holes and it has dewatered the area and has started this cascade of building damage to the Boston Store.

R.376-38:MMSDApp-0591.

Ultimately, Judge Kremers ruled that the District could not be liable for conduct involving the Tunnel's design or construction, but could only be liable for conduct occurring after it took over re-

sponsibility for the Tunnel's operation. R.376-11-12:MMSDApp-0564-65. But he allowed Owners to submit evidence from the Tunnel's design and construction because Owners argued that whether the District was earlier on notice of potential harm from groundwater infiltration was relevant to whether the District had an actionable ministerial duty in the later operation, maintenance, or inspection of the Tunnel. R.377-12-13. He also told the parties that he would "allow the plaintiffs to put on their evidence that they believe supports those particular ministerial standards and at the end of the plaintiff's case [he would] decide whether in fact [he thought] they appl[ied] and whether [he thought] the plaintiff[s] ha[d] met their burden with respect to that." R.379-34.

Even in making these allowances, however, Judge Kremers identified the Owners' problem in presenting evidence of design and construction conduct, saying, "I suspect that the Plaintiffs[']] position in this case will ultimately come back or may come back to defeat [their] claim because . . . [it] lays the problem at the feet of the construction people for which the district has immunity. And the fact that they are constructing something . . .

seems to me to go to the design and construction, not to maintenance." R.377-13-14.

At trial, the court cautioned Owners that "[w]hat you're claiming in this lawsuit is about whether or not as [the District] operated, maintained, and inspected this tunnel post '92 it caused harm to Boston Store. . . . If it didn't, you lose." R.381-245:MMSDApp-0656; *see also* R.382-494-99:MMSDApp-0670-75. But the Owners' evidence did not provide a basis for finding harm caused by any ministerial duty in the operation, maintenance, or inspection of the Tunnel after 1992. Their evidence was that the operation of the Tunnel as designed and constructed resulted in the movement of groundwater away from the Boston Store building's foundation.

Dr. Turk, the expert on whom Owners relied to establish a link between the District's conduct and the building's foundation problems, repeatedly attributed decreases in groundwater levels to the Tunnel's presence and construction. *See, e.g.*, R.383-650-652:MMSDApp-0689-91; R.351-ex.1551:MMSDApp-0321. Dr. Turk's summary of his opinions highlighted that they were based on the Tunnel's existence. Although he remarked that

the "processes . . . will continue as long as the MMSD tunnel system is operated and maintained in the same manner as it its today," R.383-652:MMSDApp-0691, all of his opinions are founded on the Tunnel's construction and existence, rather than on the effect of any specific operation or maintenance activities. His testimony stating his first three opinions is representative:

> In the first place, it's my opinion that the MMSD tunnel system drains water from the shallow dolomite aquifer beneath downtown Milwaukee. The second opinion is that the same MMSD tunnel system is now the primary discharge zone, or a sink, in other words a drain, for shallow groundwater beneath Milwaukee. Third, the drainage of groundwater into the tunnel system has caused the dewatering of the upper part of the shallow dolomite aquifer in the vicinity of the Boston Store.

R.383-651-52:MMSDApp-0691-92.

The rest of his testimony amplified his opinion that the Tunnel's existence, as designed and constructed, caused a reduction in groundwater levels. Dr. Turk testified, for example, that it was his opinion that "a major impact on the water levels in the dolomite [w]as a result of the *tunnel going through*," R.383-713-14:MMSDApp-0692-93; R.383-741:MMSDApp-0695 (emphasis added), and that it

caused a greater drawdown effect than earlier drawdowns from wells. R.383-740:MMSDApp-0694. "We had some impact before from the leaky wells," he testified, but "[w]e had a much greater impact from the tunnel." R.383-741:MMSDApp-0695. He readily conceded on cross-examination that the activities he referred to occurred "during and after" construction and that, with the exception of noting some groundwater level recovery after Tunnel construction, he had not separated the effects of construction of the Tunnel from activities after its construction. R.383-751:MMSDApp-0696. The fall in dolomite water levels below the Boston Store building, according to Dr. Turk, "was initiated during the construction of the . . . tunnel, but it's still true today." R.383-754:MMSDApp-0697. Neither Dr. Turk nor any other witness testified that the District's post-construction activities had an identifiable effect on the Boston Store building's piles other than the general reduction in groundwater that Dr. Turk attributed to the Tunnel's construction and continuing existence.

Owners' Tunnel expert, Dr. Nelson, also opined that the design and construction of the Tunnel with only a partial lining resulted in excess

water infiltration. R.382-457:MMSDApp-0668; *see also* R.382-508:MMSDApp-0676. He testified that it is "[b]ecause the tunnel was not fully lined with a watertight lining, [that] the excessive loss of groundwater under the Boston Store continues more than 14 years after construction. . . . [And] more rock grouting in the unlined tunnel sections is unlikely to reduce inflows." *Id.* Instead of replacing the grouting, he opined, the "tunnel must have a complete lining installed with all joints and cracks sealed to stop groundwater inflow and drawdown," R.382-457:MMSDApp-0668, and that "[a]ction is required now . . . because of the time . . . [t]hat has elapsed from tunnel excavation to the present [and the] time required to engineer and construct the tunnel liner." R.382-458:MMSDApp-0669.

On cross-examination, Dr. Nelson conceded that "the question of lining the tunnel or not was one considered during the design phase and the construction phase." R.382-587. He admitted that, as long as the pressure outside the Tunnel is greater than the pressure inside (as the District's WDNR permit requires), "the only way to stop water from flowing toward the deep tunnel[] is to ***not***

have the deep tunnel or fill it up with concrete completely." R.382-586:MMSDApp-0686 (emphasis added). He acknowledged that he had no opinion about the Tunnel's operation. *Id.*

Based on this evidence, the jury answered in the affirmative verdict question number 1: "On or after August 7, 1992,[1] was the District negligent in the manner in which it operated or maintained the tunnel near the Boston Store?" and question number 2: "Was such negligence a cause of the claimed damage to the Boston Store foundation?" R.403-1:A-App.585.

The District timely moved for judgment notwithstanding the verdict on the basis of its statutory immunity for discretionary conduct, including conduct involving the design and construction of public works projects, as well as other discretionary acts, including the timing of inspections and the fact that no duty of "maintenance" required adding a concrete lining. R.262-1-10:MMSDApp-0220-29. Judge Kremers denied the motion, but he never identified any ministerial duty the violation of

[1] The circuit court adopted August 7, 1992 as the date the Tunnel went into service.

which injured Owners. R.394-1-47:MMSDApp-0810-56. Instead he left the issue for the Court of Appeals:

> One comment on the ministerial duty thing. I remain troubled by that issue more than anything, any other decision I have made in this case. . . . [I]n terms of my decision at the summary judgment, on the ministerial duties, I have concerns about that. We'll see what the appellate court does with that.

R.394-29-30:MMSDApp-0838-39.

II. Statute of Limitations: The Jury Found That Owners' Claim Accrued Outside the Limitations Period.

The evidence showed that Owners were aware of accelerating column settlement beginning in the early 1990s, R.385-1211-16:MMSDApp-0761-0766, around the same time that the Tunnel was completed. In 1996, Owners' building engineer consulted with an outside engineering firm about the foundation issues. R.384-1009. In January 1997, six months outside the limitations period, he wrote the firm to make a request of the "utmost importance" for the engineering firm immediately to report the causes of the problem and make recommendations about corrective measures. R.384-1012-23:MMSDApp-0724-35.

Owners presented evidence that the underpinning called for in the requested engineering report was performed in 1997. R.384-1012-23:MMSDApp-0724-35. But Owners presented no evidence that they pursued or evaluated any potential cause other than the Tunnel between the expected engineering report and the time they sued the District alleging that the Tunnel caused the injury.

During deliberations, the jury specifically asked to review the "utmost importance" correspondence requesting the report on foundation causes. R.393-11, 15-18:MMSDApp-0814, 18-21. The jury then found that Owners "should have known or discovered on or before June 4, 1997 that the tunnel as operated or maintained by the District had caused damage to the Boston Store building." R.403-2:A-App.586. Judge Kremers changed the finding in ruling on motions after verdict. R.394-29:A-Ap.-732.

III. Notice of Claim: Neither Plaintiff Served a Notice of Claim.

Neither Bostco nor Parisian served a notice of claim or the claim and itemized statement of relief, as required in suits against political corporations by Wis. Stat. § 893.80(1). In 2001, two other enti-

ties, WISPARK Holdings LLC and Saks Incorporated, served a notice of claim and claim. R.46-1-ex.A:MMSDApp-0088. These entities are both legally distinct from Bostco and Parisian, the only entities who ever owned the building: Saks is a Tennessee corporation that owned the stock of Carson Pirie Scott & Co. (Carson), a former owner of the Boston Store building, and, after 1996, the stock of Parisian, which acquired the Boston Store building through a 1999 merger with Carson. R.37-1-76:MMSDApp-0001-76.

Bostco is a single-member ch. 183 limited liability company created in September 2000 by Wisconsin Electric Power Company. R.37-1-76:MMSDApp-0001-76. Bostco bought the Boston Store building from Parisian in January 2001. R.383-834:MMSDApp-0703. WISPARK is a separate limited liability company formed by Wisconsin Energy Corporation in July 2000. R.383-845:MMSDApp-0706. WISPARK contracted with Bostco to redevelop the Boston Store building, but it never owned the property. R.383-834:MMSDApp-0703.

In their 2001 notice of claim, non-owners WISPARK and Saks asserted that they, as the sole "Claimants," owned the Boston Store building:

> At all material times, Claimants have owned the Boston Store Retail/Office property located at 331 W. Wisconsin Avenue, Milwaukee, Wisconsin.

R.46-5:MMSDApp-0088. According to the WISPARK-Saks notice, *their* property was damaged by the District's "construction activities, and installation of and/or maintenance of (or lack thereof) the deep tunnel project." R.46-5:MMSDApp-0088. The non-owner claimants' notice stated that they "have repaired and must make additional repairs to the wooden timber piles, reinforce the foundation and repair the structural damage." R.46-6:MMSDApp-0089. They stated further that they "are seeking monetary relief from [the District] to offset the damages caused by [the District]." *Id.*

Almost a year later, non-owners WISPARK and Saks served a "Notice of Claim (Itemization of Relief Sought)." It too identifies WISPARK and Saks as the only "Claimants," and states that it "itemizes the damages that the *Claimants incurred* as a result of the injury described in the Notice of Claim previously served on the [District] on July

19, 2001." R.46-9-11:MMSDApp-0092-94 (emphasis added). This claim describes various claimed "damages sustained" totaling $10,877,912.01. It neither requests reconstruction of the Tunnel nor makes any mention of injunctive relief. *Id.*

Although Owners later alleged an agency relationship between themselves and the non-owners, R.51-3:A-App.103; R.44-1-2:MMSDApp-0081-82; R.45-1-2:MMSDApp-0084-85, they conceded that the non-owners had unknowingly "filed the notice of claim [and] itemization of damages on behalf of the wrong part[ies]." R.369-8-9:MMSDApp-0457-58. Owners argued that the non-owners' notices substantially complied with § 893.80(1) because Owners employed the same attorneys, had the same business addresses, and "are so inter-related that even the people who are the directors of the company, the president of the company didn't realize . . . that when they captioned the notice of claim WisPark and Saks, rather than Bostco and Parisian, . . . they were bringing it in the name of someone who was not the current title owner of the property," *id.*

Judge Kremers was "not very impressed by the argument that, well there is a lot of interre-

lated companies and even the directors don't know which company they are working for or who is what anymore." R.369-14:MMSDApp-0463. But, after noting that the issue would eventually reach the Court of Appeals, he ruled that Owners substantially complied with the notice of claim statute because the non-owners' notices made the District aware that someone asserted a claim related to the Boston Store building. R.369-17:MMSDApp-0466.

PROCEDURAL HISTORY AND STATEMENT OF FACTS ABOUT JUDGE DIMOTTO'S POST-JUDGMENT ORDER TO LINE THE DEEP TUNNEL

Judge Kremers granted the District's post-verdict motions to apply the $50,000 damages limitation in actions against governmental entities in Wis. Stat. § 893.80(3). R.394-45-46:MMSDApp-0854-55. In response, Owners filed a motion for injunctive relief requesting an order forcing the District to line a mile-long section of the Tunnel with concrete—an undertaking that Owners' Tunnel expert speculated at trial would cost around $10 million. R.280-1-8:MMSDApp-0253-60; R.382-523-24:MMSDApp-0678-79. Because Judge Kremers had rotated to a criminal calendar, the injunction motion was heard by Judge Jean DiMotto, who succeeded to his civil calendar.

Judge DiMotto, although aware of Judge Kremers' intent to enter a written order incorporating his rulings on the post-verdict motions, R.395-5:MMSDApp-0861, failed to rule on Owners' injunction motion before the end of the 90-day cut-off for Judge Kremers' order. On October 25, 2006, Judge Kremers signed Owners' proposed "Order for Judgment." That order provides that "judgment is entered in favor of Plaintiffs . . . and against Defendant . . . in the amount of $100,000, together with interest, plus the taxable costs, fees, and disbursements of this action" and that it is further ordered "that Plaintiffs' nuisance claim is hereby dismissed."[2] R.305-1-3:A-Ap.0708-10. On January 19, 2007, a few days before the expiration of the time to appeal that judgment, Owners filed a notice of appeal from Judge Kremers' judgment.

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[2] A day earlier, Judge Kremers mistakenly signed and entered the District's proposed order providing that "IT IS FURTHER ORDERED that Judgment be entered as follows: 1) Plaintiffs' nuisance claim be and the same is hereby DISMISSED; and 2) Damages awarded in the sum of $50,000 for Plaintiff BOSTCO LLC and $50,000 for Plaintiff Parisian, Inc., together with statutory costs, fees, and disbursements." R.302-1-3:A-Ap.705-07. The parties had previously agreed that Judge Kremers should enter Owners' proposed order, which he signed on October 25, 2006.

On January 30, 2007, Judge DiMotto, without holding a hearing to consider equitable factors, granted Owners' request for affirmative injunctive relief based solely on her review of the damages trial transcript. She held that the injunction motion was not a post-verdict motion for purposes of Wis. Stat. § 805.16's 20-day post-verdict filing deadline because it did not "ripen" until Judge Kremers reduced the jury's damage award. R.399-7-8:MMSDApp-0886-87. She concluded that the relief should be awarded because "the remitted $100,000 is an inadequate remedy at law, given the past and expected harm the Plaintiffs have suffered in this matter." R.399-10:MMSDApp-0889. Her only other justification was that "there was unrebutted expert testimony at trial, . . . that the tunnel must . . . get a complete lining installed with all joints and cracks sealed to stop groundwater inflow and drawdown. . . . And . . . if the tunnel were lined, groundwater levels would rise to a level similar to the tunnel not being there." R.399-26-27:MMSDApp-0905-06.

Judge DiMotto rejected the District's argument that Owners' failure to serve notice of a claim for injunctive relief—even the non-owners' claim

and itemized statement of relief did not request that remedy—and the fact that they had never pleaded injunctive relief as a remedy for negligence barred an order to line the Tunnel. She concluded that Owners had substantially complied with § 893.80(1) because they had itemized damages in an amount similar to the estimated lining cost. R.399-12-14:MMSDApp-0891-93. She did not address the basis for awarding injunctive relief when the only claims for which Owners had pleaded such relief had been dismissed. Nor did she address § 893.80(4)'s prohibition on suits based on discretionary conduct in running public works. Instead, Judge DiMotto remarked that, having ordered the $10 million tunnel reconstruction, she expected the parties to "talk turkey." R.399-33-34:MMSDApp-0912-13.

In the injunction order, Judge DiMotto also directed the District to identify issues that remained to be litigated and directed Owners to "respond to [the District's] submission, arguing matters such as issue preclusion." [3] R.336-1-2:A-

[3] Judge DiMotto entered two written orders, one on February 9, 2007 and an amended order on February 16, 2007, incorporating the January 30, 2007 directive to line

Ap.713-15. After the District informed the court that none of the issues central to injunctive relief had been litigated—indeed, the court had never held a hearing on the propriety of injunctive relief and the trial had been limited to damages claims—Owners filed a brief arguing that the issues identified by the District were either "(1) already litigated and decided; (2) should have been raised earlier and [are] now waived; (3) irrelevant or unnecessary; or (4) stipulated." R.343-3:MMSDApp-0291. Judge DiMotto did not afford the District a response. R.400-1-83:MMSDApp-0920-1002.

At a May 30, 2007, "status conference," Judge DiMotto ruled, without providing the District an opportunity to respond to the preclusion and waiver arguments Owners raised in their brief, that the District already litigated or abandoned the issues it identified by its failure to raise them during the jury trial. In the circuit court's view, the District should have interjected into the jury trial issues relating to whether lining the Tunnel would exacerbate future harm, the cost of lining the Tunnel, and

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the Tunnel. R.336-1-3:A-Ap.713-15; R.339-1-3:A-Ap.716-18.

the harm lining the Tunnel would cause the public. R.400-32-33:MMSDApp-0951-52. Judge DiMotto held that the District waived issues relating to whether equitable relief should issue, stating, for example, "I'm not understanding as well why harm to the public, regulatory and water law restrictions on this [injunctive] relief were not front and central [sic] at trial." R.400-43:MMSDApp-0962. Similarly, although the effect of Tunnel lining on the public was not at issue in the damages trial and the court did not hold a hearing before issuing the injunction, Judge DiMotto remarked, "Nothing was proffered by the District about the tunnel being lined as harmful to the public or being precluded by the restrictions. . . . The District had ample opportunity to raise those issues during the trial and/or to raise them in the injunctive relief litigation." R.400-44:MMSDApp-0963. In response to the District's suggestion that the court should consider whether primary jurisdiction to line the tunnel lies with the Wisconsin Department of Natural Resources before requiring the District to line the tunnel, the court commented, "I don't know why they [the EPA and the WDNR] weren't named in the matter. I don't know why that wasn't litigated.

It should have been litigated. . . . It's way too late." R.400-47-48:MMSDApp-0966-67.

Judge DiMotto incorporated her rulings into a "Final Order" entered on June 10, 2007. R.346-1-2:MMSDApp-0719-20. Also on June 10, Judge DiMotto appointed a special master to oversee implementation of the injunctive relief that directs the special master to oversee or resolve (1) an environmental impact appraisal; (2) whether the lining thickness should be 1 foot or 1.2 feet; (3) when the work will be commenced and completed; and (4) other technical issues involved in lining the tunnel, such as quality assurance, obtaining necessary permits, and "means and methods" of construction. R.347-1-3:MMSDApp-0286-88. Judge DiMotto stayed the special master order pending resolution of all appeals. R.347-3:MMSDApp-0288.

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

ARGUMENT

I. All Relief Is Barred By Wis. Stat. § 893.80(4)'s Governmental Immunity for Discretionary Acts, Including the Design and Construction of Sewer Systems.

Following the Supreme Court's abandonment of common law governmental immunity in 1962, the Legislature in 1963 enacted the predecessor of Wis. Stat. § 893.80(4). Section 893.80(4) provides, "[n]o suit may be brought against any . . . political corporation . . . for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

In 2005, our Supreme Court clarified the law of § 893.80(4) governmental immunity in the context of a water main break. In *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658, the Court considered whether the City of Milwaukee enjoyed immunity from negligence and nuisance claims after one of the City's water mains ruptured causing the collapse of an interceptor sewer. Surveying the law since § 893.80(4)'s enactment, the Court explained that § 893.80(4) "immunizes against liability for legislative, quasi-legislative, judicial, and quasi-judicial acts, which have been

collectively interpreted to include *any act that involves the exercise of discretion and judgment.*" *MMSD*, 277 Wis. 2d at ¶54 (internal quotation marks omitted). Discretionary act immunity applies to all governmental conduct except that based on conduct that is non-discretionary or "ministerial"; that is, conduct involving the performance of tasks so specifically required by law that *no* judgment or discretion plays a role:

> A ministerial act, in contrast to an immune discretionary act, ***involves 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.***

Id. (internal quotation marks omitted; emphasis added).

On the claims that the City was negligent or created a nuisance by not earlier repairing its water main, *MMSD* held that § 893.80(4) bars all liability for the planning, design, *and implementation* of public works, such as sewer systems:

> decisions regarding the adoption, design, and implementation of public works are discretionary, legislative or quasi-legislative acts subject to immunity. . . . "Even if the system is poorly designed, a

> municipal government is immune for this discretionary act."

Id. at ¶60 (internal citations omitted). The design, placement, and continued existence of the City's waterworks project, *MMSD* held, cannot be a basis for liability: "the City is immune from suit relating to its decisions concerning the adoption of a waterworks system, the selection of the specific type of pipe, the placement of the pipe in the ground, and the continued existence of such pipe. These are discretionary legislative decisions." *Id.*

Because *MMSD* reached the Supreme Court after the circuit court had awarded the City summary judgment, the Court considered whether any set of facts, if proven, would support holding the City liable for a ruptured water main. Because many of the circumstances surrounding the water main break were in dispute or unresolved, the Court left for resolution by the circuit court on remand whether the law imposed a clear duty—unrelated to the adoption, selection, placement or continued existence of the pipe—to fix the main at a certain time before the main broke and damaged District's interceptor tunnel. In remanding to the circuit court, the Court pointed to a necessary but then unadjudicated condition for liability: for a

ministerial duty of repair to even possibly exist, it would have to be shown that (1) the City knew the water main was leaking before it broke; and (2) that knowledge gave rise to an "absolute, certain, and imperative" duty to repair it, and the "law impose[d], prescribe[d] and define[d] the time, mode and occasion for [the City's] performance with such certainty that nothing remain[ed] for judgment or discretion," *id.* at ¶54 (internal quotation marks omitted).

As described below, Owners' evidence provides no basis on which to hold the District liable for non-immune conduct. First, Owners' evidence of harm was all ultimately based on the design, construction, and implementation of the Deep Tunnel. Second, even if some of the District's conduct at issue could be construed as involving operation, maintenance, or inspection of the Deep Tunnel, that conduct would be legally inadequate to support a finding that the District violated a ministerial duty and that the violation caused the claimed damages. Third, each of the specific attempts Owners made to identify a breach of a ministerial duty fails to provide a basis for liability. And, fourth, Owners made no attempt to prove what por-

tion of the claimed harm to their foundation piles was caused by non-immunized conduct, rather than by other causes, including immunized conduct. The District is accordingly entitled to judgment as a matter of law.

A. The District's decision not to line the Tunnel completely is a design and construction decision for which the District is immune.

As Owners conceded below, whether the District has immunity is a question of law. R.271-4-5:A-Ap. 657-58 (whether "decisions regarding [tunnel] lining were negligently made or of ministerial nature . . . are both legal conclusions"). Review of the circuit court's decision not to direct a verdict on this ground is therefore de novo. *See Miesen v. State DOT*, 226 Wis. 2d 298, 304, 594 N.W.2d 821, 825 (Ct. App. 1999).

Based on *MMSD*, the circuit court correctly ruled that the District could not be held liable for any damages caused by the design or construction of the Deep Tunnel. R.376-11-12:MMSDApp-0564-65. But it accepted Owners' theory that the District could be held liable for "operation and maintenance" of the Tunnel if there was evidence suggesting that the District knew that its "operating or

maintaining" the Tunnel was harming Owners' property. R.376-18-19:MMSDApp-571-72.

Based on this notice theory, the circuit court allowed Owners' witnesses to testify repeatedly about the effect the Tunnel's "design and construction" had on groundwater levels. *See, e.g.*, R.382-457:MMSDApp-0668 (Owners' expert, Dr. Nelson, opining that design of Tunnel has led to "excess loss of groundwater under the Boston Store [which] continues more than 14 years after construction"); R.382-458:MMSDApp-0669 (Dr. Nelson testifying that water levels have not returned to their "pre-construction levels"); *id.* (Dr. Nelson testifying that "[t]he design and construction of a watertight tunnel is within the capability of the underground construction industry."). Indeed, rather than testifying that the District breached some ministerial duty of "operation," "maintenance," or "inspection" that resulted in harmful amounts of groundwater entering the Tunnel, the Owners' experts testified that the harm resulted from the fact of the Tunnel's unlined existence. *See, e.g.*, R.383-652:A-Ap.768; R.385-1275-76:A-Ap.-923-24. As Dr. Turk, Owners' principal causation expert summarized his opinions, the "tunnel system's" existence in its unlined state

caused the reduction in groundwater to which Owners' attribute their injuries; he testified:

> [I]t's my opinion that ***the MMSD tunnel system drains water*** from the shallow dolomite aquifer beneath downtown Milwaukee.
>
> The second opinion is that ***the same MMSD tunnel system*** is now the primary discharge zone, or a sink, in other words a drain, for shallow groundwater beneath Milwaukee.
>
> Third, the drainage of groundwater ***into the tunnel system has caused the dewatering*** of the upper part of the shallow dolomite aquifer in the vicinity of Boston Store. . . .
>
> number four, the ***drainage of groundwater into the tunnel system*** has caused the lowering of water levels. . . .
>
> And also, number five, the lowering of the water levels . . . has, in turn, caused water to drain from the shallow marsh deposits in the vicinity of the Boston Store . . .
>
> The sixth opinion . . . is that ***the tunnel system*** and not the well at the Boston Store ***has caused the fall in water*** . . .
>
> And, finally, my opinion is that the processes that I describe . . . continue today and will continue as long as the MMSD tunnel system is operated and maintained in the same manner as it is today.

R.383-652:A-App.768 (emphasis added). By "operated and maintained in the same manner" Dr. Turk meant only "unlined"—that is, the way the Tunnel was designed and constructed.

Owners' post-verdict arguments highlighted that their evidence depended on matters of Tunnel design and construction. Owners contended that their expert's testimony supported liability for negligence in the "inspection, operation or maintenance of the tunnel," R.271-2:A-App.655, because he opined that:

> (1) The North Shore Interceptor ***continues to drain groundwater*** from the soil and rock below Boston Store[;]
>
> (2) That "***because the tunnel was not fully lined*** with water tight lining, the excessive loss of groundwater under the Boston Store continues more than 14 years after construction[]"[;]
>
> (3) . . . ***a design and construction of a water tight tunnel*** is well within the capability of the underground and construction industry"[; and]
>
> (4) . . . ***installing the concrete liner*** for half a mile on each side of Boston Store would stop excessive inflows of water in to [sic] the tunnel.

R.271-3:A-App.656 (transcript citations omitted, emphasis added).

Even now, before this Court, Owners concede that their theory of injury is based on how the Tunnel was designed and constructed. As they state in their appellate brief, Owners sought to prove that the Tunnel "has caused and continues to cause significant groundwater drawdowns, which in turn have damaged and will continue to damage the Boston Store's timber pile foundation through the mechanisms of downdrag and pile rot." Owners' Br. 11. Owners' expert evidence involved only criticisms of the Tunnel's design, construction, and continuing existence. Owners give the purported cause of their injury the fictional label "negligent operation or maintenance of the Deep Tunnel." *See id.* at 12-13 (relying on Nelson and Turk.)

Because the conduct Owners contest does not involve operation and maintenance, but rather "decisions regarding the adoption, design, and implementation of public works," *see MMSD*, 277 Wis. 2d at ¶60, liability is barred by § 893.80(4)'s immunity for "discretionary, legislative or quasi-legislative acts." *Id.* The Deep Tunnel—properly, the "Inline Storage System"—is a massive storage tunnel for sewerage flows. R.381-257-60. Its design, construction, and operation were all approved and

permitted by the Wisconsin Department of Natural Resources. R.382-556-57:MMSDApp-0658-60. Water flows into the Tunnel *by design*—surrounding water sources have a greater pressure (hydraulic head), R.382-591, and by the laws of physics, R.382-584. Under the terms of the District's operating permit from the WDNR, the Tunnel must be operated and maintained to allow water to infiltrate in order to avoid wastewater exfiltrating the Tunnel and contaminating surrounding groundwater. R.351-ex.2563:MMSDApp-0356.

Owners' expert admitted that he had no opinion on the proper operation of the Tunnel itself; his only view was that it should have been lined with concrete. R.382-586-87:MMSDApp-0685-86. Notwithstanding Owners' efforts to characterize the absence of a concrete lining as "maintenance," this was a quintessential design and construction choice—one that was considered and rejected, as Owners' expert conceded:

> Q: You have no professional opinion about the operation of the tunnels.
>
> A: No, I have none.
>
> Q: Your opinion, as I understand it, as we've seen and you delivered it earlier today, is that as a matter of maintenance, the tunnel should be

lined to some extent with concrete; is that right?

A: That's right.

Q: And lining a tunnel with concrete or not is something that the designers considered in this case, didn't they?

A: I'm sure they did.

Q: And it was also a question raised during construction by the construction contractor; isn't that correct?

A: That's correct.

Q: So that the question in this—for this tunnel, in this case, the question of lining the tunnel or not was one considered during the design phase and the construction phase; isn't that correct?

A: It was.

R.382-586-87:MMSDApp-0685-86.

None of Owners' witnesses identified any basis for finding a duty to add a concrete liner as a matter of maintenance or otherwise. Indeed, lining the tunnel is *not* a matter of "maintenance." "Maintenance" is something that "maintains" or keeps a thing in its original state. *See Merriam Webster's Collegiate* Dictionary, 702 (10th ed. 1993)("1: to keep in an existing state (as of repair,

efficiency, or validity); *Random House Dictionary of the English Language,* 1160 (2d ed. 1987) ("1: to keep in existence or continuance; preserve; retain"). In this context, maintenance might include ensuring that gates and other mechanicals remain in proper working order. *See, e.g.*, *Lange v. Town of Norway*, 77 Wis. 2d 313, 319-20, 253 N.W.2d 240 (1977) (failure to repair or properly operate floodgate might be ministerial, but decisions about size and capacity of the floodgate would be immune). But it certainly does not include adding (or failing to add) a concrete liner—unquestionably a discretionary act of design or construction for which the District is immune under § 893.80(4). *MMSD*, 277 Wis. 2d at ¶60.

B. Even if immunized conduct was known to create a risk of harm, *MMSD* holds that § 893.80(4) bars liability based on that conduct.

In the circuit court, Owners defended the verdict based on evidence of immune conduct by contending that the Supreme Court in *MMSD* allowed liability if a municipality knew that a public works system was broken and failed to fix it. But *MMSD* did not, as Owners would have it, suggest that notice of harm is alone sufficient to strip a

government entity of its immunity. Instead, the Court was clear in its explanation that to determine whether there is immunity, one must consider the nature of the act on which the plaintiff seeks to base liability: "Wis. Stat. § 893.80(4) does not immunize municipalities for certain *results*; rather, immunity is provided for certain *acts*." *MMSD*, 277 Wis. 2d at ¶59 n.17 (emphasis in original). Unlike *MMSD*, where the City might have been found to have had a ministerial duty to fix a broken water main, there is no comparable ministerial duty here to "fix"—i.e., redesign and reconstruct—the Deep Tunnel in an effort to prevent water inflow that is contemplated by the Tunnel's design and operation permit. The Tunnel, an enormous storage unit dug out of bedrock and designed and built to allow the inflow of groundwater, cannot be equated with a broken water main designed and built to prevent both inflow and outflow.

Nor is it any answer to contend, as Owners did below, that there is no evidence that the Tunnel was designed to infiltrate at a particular level. This is an argument from *results*; "immunity is provided for certain acts," *id.*, and among those acts

is the design and construction of an infiltrating Tunnel.

In addition, Owners' presented no evidence that would support a finding that a breach of a ministerial duty by the District caused them harm. Owners identified no law, regulation, or applicable standard that would require lining the Tunnel. Indeed, the decision not to line the Tunnel completely was approved by the WDNR before its construction. R.124-6:MMSDApp-0117. Taking all the evidence in Owners' favor, there is none that supports a jury verdict based on anything other than construction and design decisions for which the District is immune.

C. Owners' other ministerial duty theories do not support the verdict.

Owners did not ask the jury to find that the District violated any ministerial duty. Instead, the jury was asked only whether the District was "negligent in the manner in which it operated or maintained the tunnel"; a question that obviously finds no breach of 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*, 277 Wis. 2d at ¶54. This failure is fatal: Under § 893.80(4), the District may only be sued for ministerial acts.

In response to the District's motion for judgment notwithstanding the verdict, Owners argued that the jury's general negligence verdict could be sustained as long as the evidence could possibly support the violation of some ministerial duty. This approach, however, misunderstands the nature of discretionary act immunity: the immunity is intended to protect government actors performing discretionary conduct from later second-guessing based on vague, ill-defined standards of conduct like "negligence," which requires the fact-finder to balance the conduct's perceived costs and benefits. Government actors are instead only subject to suit for harms caused by their breach of ministerial duties—i.e., duties so clear cut that no factor-finder has to decide for itself whether the conduct should have been performed at all or in some other way or at some other time.

Thus, this Court should go no further than holding that the failure of the jury to find a ministerial duty breach requires judgment in the District's favor. But, even if the Court were to consider

the ministerial duty theories Owners argued below to justify liability under the general negligence finding, none of those theories supports the verdict.

1. No ministerial duty is created by § NR 110.13(2)(k)(1).

Owners argued below that, NR § 110.13(2)(k)1, a "construction quality" standard in the administrative code relating to the placement of sewer "*pipe*" should be held to create a ministerial maintenance duty for the Deep Tunnel. This provision, which states, "[t]he leakage outward or inward (exfiltration or infiltration) may not exceed 0.19 cubic meters *per centimeter pipe diameter* per kilometer per day (*200 gallons per inch of pipe diameter per mile per day*) for any section of the system." *Id.* (emphasis added). This 200-gallons-per-inch-of-pipe-diameter-per-mile-per-day standard is wholly inapplicable: the Tunnel does not consist of pipe. This code provision, therefore, cannot properly be read to create a duty for construction of the enormous storage cavern that is the Tunnel. *See MMSD*, 277 Wis. 2d at ¶61 (a ministerial act involves a duty that "is absolute, certain and imperative").

Because design of the Tunnel has not properly at issue, the actual design criteria for the Deep

Tunnel were not presented at trial. But even the Owners' Tunnel expert explained that the standard on which this code provision for construction of pipe sewers is based requires adjusting the amount of allowable inflow for depth. R.382-574:MMSDApp-0684. Thus, while the 200 gallons-per-inch-of-pipe-diameter-per-mile-per-day standard applies accurately to traditional pipe sewer construction, the standard would require adjustment to account for the Deep Tunnel's 300 foot depth. *Id.* So adjusted, as Owners' expert testified, the Tunnel meets this inapplicable standard:

> Q: Have you done the calculation to see whether or not the Milwaukee Metropolitan Sewerage District's deep tunnels meet the standard once you apply the conversion factor for depth?
>
> A: I have.
>
> Q: And it meets it, doesn't it?
>
> A: Yes, it does.
>
> Q: Meets the 200 limit when you convert it to depth, doesn't it?
>
> A: It does.

R.382-574:MMSDApp-0684.

More important, § 110.13(2)k deals with traditional sewer pipe *construction* for which our Su-

preme Court has held there is immunity. The Court has twice explained that "decisions in 'planning and designing the system in question, including the placement of the manhole, were legislative acts.'" *MMSD*, 277 Wis. 2d at ¶58 (quoting *Allstate Ins. Co. v. Metropolitan Sewerage Comm.*, 80 Wis. 2d 10, 258 N.W.2d 148 (Wis. 1977)). Thus, NR § 110.13(2)k cannot impose a duty to act that is not immune. The provision by its terms does not purport to impose any duty of operation or maintenance and certainly no such duty that is "absolute, certain, and imperative." NR § 110.13(2)(k)1 ("Tests for infiltration shall be specified in the construction specifications."). In all events, the WDNR discharge permit, which allows and requires the Deep Tunnel's operation makes no reference to this provision. R.382-557-59:MMSDApp-0680-82; R.388-2126:MMSDApp-0795.

2. No ministerial duty to inspect is required by law.

Owners contended that liability could rest on negligent inspection of the Deep Tunnel. But Owners did not, and cannot, establish that the District has a ministerial duty to inspect the Tunnel: Owners identified no law, regulation, or applicable standard that would require inspections. At trial,

Owners presented only a former consultant's testimony that he had suggested that the District inspect the Tunnel annually. R.386-1438-41:MMSDApp-0770-73. But such testimony does not establish a ministerial duty, a fact Owners conceded in post-verdict briefing when they characterized the testimony as "simply evidence of negligence, not existence of a duty; the duty is imposed by law." R.270-9:MMSDApp-0238. But there is no such law. The only authority Owners identified, *Freitag v. City of Montello*, 36 Wis. 2d 409, 153 N.W.2d 505 (1967), does not establish it. *Freitag* upheld, without any discussion of statutory immunity, a finding that the municipality was *not* liable for negligently causing a sewer backup. The Court referenced an *American Jurisprudence* entry that identified a "municipality's duty to keep servers in good repair as including the duty to use "reasonable diligence to keep its sewers and drains from becoming clogged . . . —duty to exercise a reasonable degree of watchfulness to ascertain the condition of sewers and drains from time to time so as to prevent them from becoming obstructed." *Id.* at 413 (quoting 38 Am. Jur., *Municipal Corporations* § 636, 341-42 (internal quotation marks omitted)).

This duty, which the Court recognized as an expansion of liability under the pre-*Holytz* common law immunity, *id.* at 414, is not ministerial. A "reasonable diligence" and "reasonable degree of watchfulness" plainly do not satisfy the definition of ministerial duty—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*, 277 Wis. 2d at ¶54.

And nothing suggests that, even at common law, this inspection duty for ordinary transport sewers would apply to a tunnel 300 feet below the ground. The burdens of inspections and the expected benefits are obviously very different. No law, regulation or standard suggests that the District should have inspected the Deep Tunnel more frequently.[4]

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[4] The District has twice inspected the Tunnel. Once in 1992 before it was put into operation and once in 2002. Neither inspection revealed substantial infiltration of groundwater. R.388-1971 (neither grouting nor lining required; inspections every ten years adequate to guard against excessive inflows).

Separately dispositive of Owners' "inspection" theory is that they presented no evidence linking a failure to inspect with their claimed injury and there is no jury finding that even mentions inspections. Nothing suggested that an inspection would have revealed a blockage or some other maintenance issue resulting in harm—and that does not fit Owners' theory. Their theory is that the harm results from a failure to line the Tunnel near the Boston Store building. Inspections would have revealed nothing material. Even if an inspection had showed unexpected infiltration (which no post-construction inspection in fact showed),[5] the act of harm would not have been the failure to inspect. The act of harm would still have been the failure to design or construct the Tunnel with a lining—acts for which § 893.80(4) affords immunity. *MMSD*, 277 Wis. 2d at ¶60.

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[5] In fact, groundwater infiltration reduced about 40% from the time construction was completed to the time of the 2002 inspection. R.388-1965. This reduction is due to "self-healing" as groundwater leaves behind mineral deposits, filling gaps in the rock. R.388-1966.

3. The District's discharge permit does not create a ministerial duty to line the Tunnel.

Owners also argued that exfiltration caused by the occasional overfilling of the Tunnel in the last decade in violation of the District's permit avoids the immunity bar. But this infrequent occurrence—there was only evidence of three instances in which storm flows resulted in the Tunnel exceeding the permit's fill requirement—does not create some ministerial duty of the District to Owners. Owners' harm allegedly resulted from foundation damage, not contamination, and from the infiltration of water *into* the Tunnel, not the exfiltration of *water out of* the Tunnel. Thus, exfiltration cannot create a duty to Owners.

This is true even accepting Owners' expert's suggestion that the exfiltration and infiltration of sewerage might make infiltration and drawdown more likely. The permit requirements were intended to protect against contamination through exfiltration, not greater future infiltration that Owners' expert speculates follows exfiltration. Owners' evidence, at best, showed that this phenomenon was a result of the Tunnel's design and construction. In other words, on Owners' own the-

ory, only redesign and reconstruction of the Deep Tunnel with a new concrete liner would effectively avoid this potential exfiltration/infiltration effect. As noted above, these issues are at the very core of immune conduct under *MMSD*. 277 Wis. 2d at ¶60.

More important, exfiltration is an effect, not an act—an effect resulting from discretionary decisions about how long sewer flows can be allowed to enter the Tunnel before it overflows. These operational decisions unquestionably require judgments about, among other things, the rate of the flows, the expected precipitation rate, the amount of rainfall that will be absorbed into the ground, and the rate at which the Tunnel can be emptied to the treatment plants. These decisions are judgmental not ministerial, and thus exfiltration—that occasionally can be an effect of misjudgments about these factors—cannot give rise to liability consistent with § 893.80(4).

D. Owners' failure to link their damages to any ministerial duty breach requires a verdict in the District's favor.

Even if Owners had presented evidence that the District breached a ministerial duty, recovery is

bound by their failure to link that breach to the Deep Tunnel's effect on Owners' foundation. Owners were repeatedly allowed to try to the jury exactly that harm. *See supra*. Owners' witnesses argued that "the Tunnel" damaged the Boston Store's foundation without ever linking the harm caused by non-immune conduct rather than from the immune conduct of designing and constructing the Tunnel. *Id.* Because the District cannot be held liable for immune acts, Owners' failure to disaggregate damage caused by non-immune conduct bars any damages recovery. *See, e.g., Blue Cross & Blue Shield v. Marshfield Clinic,* 152 F.3d 588 (7th Cir. 1998) (plaintiff must show harm caused by actionable conduct).

A plaintiff cannot recover unless there is "a causal connection between the conduct and the injury; and ... an actual loss or damage as a result of the injury." *Martindale v. Ripp*, 2001 WI 113, ¶33, 246 Wis. 2d 67, 89, 629 N.W.2d 698, 707. The "mere possibility" that some non-immune conduct caused harm is inadequate to support an award when, as here, neither the court nor Owners identified a ministerial duty and thus damages attributable to non-immune conduct "remains one of pure

speculation or conjecture." *Merco Distributing Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 460, 267 N.W. 652 (1978). Since Owners' evidence emphasized the harm allegedly caused by the design and construction of the Tunnel—neither of which can be the proper source of liability—"it becomes the duty of the court to direct a verdict for the defendant." *Id.*

II. The Jury's Finding That the Claim Arose Outside the Limitations Period Is Supported by Credible Evidence.

Credible evidence supported the jury's finding that the Owners should have discovered the facts on which they based their claim before June, 1997. The circuit court's decision to overturn the jury's verdict on Question 6 was therefore erroneous. *See* Wis. Stat. § 805.14(1).[6]

A cause of action accrues when a plaintiff discovers or, in the exercise of reasonable diligence, should have discovered both the injury and that the defendant's conduct probably caused the injury.

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[6] This Court will reverse the circuit court's decision to change a jury answer as "clearly wrong" if its review of the record reveals any credible evidence supporting the verdict. *See Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 390, 541 N.W.2d 753 (1995).

Schmidt v. Northern States Power Co., 2007 WI 136, 305 Wis. 2d 538, ¶27, 742 N.W.2d 294, *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 411, 388 N.W.2d 140 (1986). When a plaintiff objectively should have discovered facts sufficient to plead the claimed cause of his injury presents a jury question. *See Schmidt,* 305 Wis. 2d at ¶ 45. The jury answered that question by finding that Owners should have discovered the cause of their harm before June 4, 1997—a date more than six years before they commenced this action, R.403-2:A-App.586, and thus beyond the limitations period of Wis. Stat. § 893.52.

The evidence showed that Owners became aware of accelerating column settlement beginning in the early 1990s, R.385-1211-16:MMSDApp-0761-66, around the same time that the Tunnel was completed. Joseph Zdnenek, director of construction from August 1995 through November, 1998, testified that he became aware of column settlement in the winter of 1995. R. 384-997. In June 1996, he corresponded with Graef Anhalt Schloemer ("GAS"), Owners' engineering consultant on pile and foundation issues. In that correspondence, GAS attributed column settlement problems to rot-

ting or sinking piles, and noted that several columns that had been stable before 1990 were now sinking. R.351-ex.691:MMSDApp-0317.

On January 9, 1997, Zdenek wrote GAS and stated that "there continues to be movement along [the building's] column line." R.351-ex.697:MMSDApp-0317. Emphasizing that "time is of the utmost importance" and that the project "must be undertaken immediately," *id.*, he asked GAS for "an immediate response" to his request that they "survey . . . this structure locating ALL major cracks in the interior partitions and columns ***and a probable cause for each***." *Id.* (emphasis added). The requested report would "also need to indicate which cracks can be repaired & which must remain unaddressed for further monitoring" and must provide a "written time table . . . indicating priority areas of attention and the order in which repairs should succeed." *Id.* He wrote that his "level of confidence in this structure [was] slipping" and he required that GAS "in their best professional opinion state the current status of this structure in a report due by early Feb., 1997." *Id.*

Owners presented evidence that the underpinning called for in Zdenek's "utmost importance"

letter was performed in 1997. R.384-1012-1023:MMSDApp-0724-35. They did not present GAS's opinion on the "probable cause" for the building damage, but they also presented no evidence that they explored any potential cause between the Zdenek-GAS correspondence and the time they filed suit alleging the Tunnel caused the damage.[7] Zdenek testified that, during his tenure, the only thing that owners did was to monitor the columns and underpin on an as-needed, as recommended basis. R 384-1039.

The Zdenek evidence, which the jury specifically requested and were given to review during deliberations, R.391-1, 15-18, credibly supports an inference that Owners "should have known or discovered on or before June 4, 1997 that the tunnel as operated or maintained by the District had caused damage to the Boston Store building." R.403-2:A-

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[7] Owners' failure to suggest that they pursued any other cause makes cases such as *Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 25, 469 N.W.2d 595 (1991), inapplicable. In *Kolpin*, the plaintiffs' diligent efforts to evaluate causes other than the defendant's stray voltage made unreasonable the jury's finding that they should have discovered their claim outside the statute of limitations period. *See Gumz v. Northern States Power Co.*, 2007 WI 135, ¶34-41, 305 Wis. 2d 263, 742 N.W.2d 271 (discussing *Kolpin* and its progeny).

App.586. The circuit court therefore erred in changing the jury's answer on claim accrual.

III. Owners' Failure to Serve a Notice of Claim and Claim Requires Judgment for the District.

Owners did not serve either a notice of claim or a claim and itemization of relief sought as required by Wis. Stat. § 893.80(1), which provides:

> (1) ***[N]o action may be brought*** **or maintained** ***against any . . . political corporation,. . . unless***:
>
> (a) ***Within 120 days*** after the happening of the event giving rise to the claim, ***written notice of the circumstances of the claim signed by the party, agent or attorney is served*** on the . . . political corporation . . .; ***and***
>
> (b) A ***claim containing the address of the claimant and an itemized statement of the relief sought is presented*** to . . the defendant . . . and the claim is disallowed.

The Owners' failure to meet these requirements bars this litigation. *See Colby v. Columbia County*, 202 Wis. 2d 342, 362, 550 N.W.2d 124, 132 (1996).[8]

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[8] This Court reviews de novo the circuit court's application of the § 893.80(1) to the uncontested facts. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 189, 515 N.W.2d 888, 892 (1984), *overruled on other grounds by State ex rel.*

A. A notice of claim served by different entities that never owned the building that falsely asserts that they are the claimants, does not satisfy § 893.80(1).

Saks, a distinct corporation that owned Parisian, and WISPARK, a distinct limited liability company that is owned ultimately by the same holding company as Bostco, are the only entities that served a notice of claim relating to the Boston Store building. R.46-5-7:MMSDApp-0088-90. Neither Saks nor WISPARK ever owned the building. R.383-834:MMSDApp-0703. But they served a notice of claim on July 19, 2001, in which they identified themselves as "Claimants," stated that they owned the Boston Store building, and claimed that the District was liable to them:

> PLEASE TAKE NOTICE that WISPARK Holdings LLC . . . and Saks Incorporated . . . (together 'Claimants') by their attorneys . . . present . . . this Notice of Claim . . . .
>
> At all material times, Claimants have owned the Boston Store . . .

Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 547 N.W.2d 587 (1996).

> Because of the damage MMSD caused, Claimants have repaired and must make additional repair to the wooden timber piles . . . at substantial cost. Consequently, Claimants are seeking monetary relief from MMSD to offset the damages caused by MMSD.

R.46-5-6;MMSDApp-0088-89. These non-owners also served a separate Notice of Itemized Relief Sought in which they again identify themselves as "Claimants" and purported to "itemize[ ] the damages that Claimants incurred as a result of the injury described in the Notice of Claim previously served on the MMSD on July 19, 2001." R.46-5-7:MMSDApp-0088-90.

Owners argued that Saks and WISPARK were (undisclosed) agents and that the notice was "intended to be on behalf of" Parisian and Bostco. R.44-2:MMSDApp-0081; R.45-2:MMSDApp-0083. Owners' counsel, however, confessed that confusion resulted in the notices and claims erroneously being sent on behalf of the wrong entities: "The reason [the notice and claim] wasn't brought in the correct name is that these companies are so interrelated . . . that even the people who are the directors of the company, the president of the company didn't realize they had filed the notice of claim

[and] itemization of damages on behalf of the wrong party." R.369-8-9:MMSDApp-0457-58.

Owners also argued, and the circuit court accepted, that the notice of a claim and the claim containing an itemized statement of relief by non-owners was "substantial compliance" because Owners and non-owners had the same street address and used the same law firm. R.369-9,17:MMSDApp-0458-66. Owners and the circuit court relied on *Thorp v. Town of Lebanon*, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59. But *Thorp* requires substantial compliance with § 893.80(1)(b)'s four requirements—(i) claimant's address, (ii) itemized statement of relief, (iii) presented to the appropriate clerk, and (iv) disallowed by the governmental entity. The Thorps' letter identified themselves as the claimants, provided the address of their attorneys, and substantially complied with § 893.80(1)(b)'s service-on-the-clerk requirement because it was sent to several government officials involved in the challenged rezoning. *Id.* at ¶32.

Neither *Thorp* nor any other case holds that a notice of claim or claim complies with § 893.80(1) when those items are filed by entities that falsely assert they are claimants and falsely assert they

are owners of allegedly damaged property. To "substantially comply" with § 893.80(1), the Supreme Court has held, a "written claim must be definite enough to fulfill the purpose of the claim statute—to provide the municipality with the information necessary to decide whether to settle the claim. The municipality must be furnished with sufficient information so that it can budget accordingly for either a settlement or litigation." *DNR*, 184 Wis. 2d at 198 (citation omitted). A written claim that falsely states the claimant's identity fails this test: the identity of the claimant is always material to the decision whether to settle or budget for litigation.

The circuit court's decision, however, requires the District to divine that when Saks and WISPARK untruthfully defined themselves as "Claimants," they really meant they were only agents. When Saks and WISPARK untruthfully asserted they owned the Boston Store building, the District should have known that what they really meant to say was that they were agents of the owners.

The law in fact does not require government entities to guess at their peril about who is the actual claimant. This Court has held that in addition

to providing notice of the claim, the notice must identify the actual claimant so that it can identify the claim's merits: "unless the government entity has 'actual knowledge' of both the claimant and his or her claim, the investigation and evaluation envisioned by the statute is impossible." *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 220-21, 556 N.W.2d 326 (Ct. App. 1996) (emphasis added).

While *Markweise* was a case in which the barred undisclosed claimants were class members, its principle applies equally here. Just as the individual class members in *Markweise* were separate persons, WISPARK, Saks, Parisian and Bostco are each separate legal entities that must individually comply with notice of injury and notice of claim requirements. That the actual claimant's identity matters is evidenced here by the fact that the non-owners' notice of itemized damages claims injuries that occurred in 1997 and 2000, before Bostco owned the property. The settlement calculus is obviously different if it is known that the claimant did not own the property during a significant portion of the time for which damages are sought.

Consequently, the circuit court erred in not dismissing Owners' claims as barred by § 893.80(1).

B. Owners also did not establish actual notice.

Owners' failure to provide written notice is not excused by actual notice. If a claimant does not provide timely written notice, the claim may be preserved if the government entity is shown to have "had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to [the government entity]." Wis. Stat. § 893.80(1)(a).

But the section unambiguously requires that the government have actual notice of the claimant's claim within 120 days of the occurrence. Owners produced no evidence the District had actual notice "of both the claimant and his or her claim." *Markweise*, 205 Wis. 2d at 221. Nor could Owners show that the District had actual notice of a damaged foundation at the Boston Store. Actual notice, therefore, does not remedy their failure properly to serve a notice of claim.

IV. The Post-Judgment Order to Line the Tunnel Is Barred by § 893.80, by Procedural Fault, and by the Court's Failure to Consider Equitable Factors.

A. Injunctive relief is barred by Wis. Stat. § 893.80.

1. Section 893.80(4) bars any "suit" for injunctive relief relating to the discretionary design and construction of the Tunnel.

Section 893.80(4) bars any "suit"—at law or in equity—to challenge discretionary governmental acts. Our Supreme Court recently made clear that § 893.80(4) immunizes from judicial oversight government decisions on how to design and construct sewerage systems. *MMSD*, 277 Wis. 2d at ¶60. No suit to redesign and reconstruct the Tunnel—that is, no suit of the type into which Owners and Judge DiMotto converted this one after Judge Kremers applied the § 893.80(3) damages limitation—can lie.

Even Judge Kremers' (incorrect) decision to permit the jury to find liability for negligent "maintenance or operation" of the Tunnel cannot support Judge DiMotto's order that the District reconstruct a one-mile section of the Tunnel by lining it with concrete. Section 893.80(4) allows no suit—

including this one—to remedy discretionary acts of tunnel design. And, given the nature of the relief, there can be no question that the injunction is premised acts the Tunnel's design and construction.

Judge DiMotto erred in her suggestion that the § 893.80(4) bar "to injunctive relief . . . was an issue that should have been brought up earlier." R.400-58:MMSDApp-0977. The District had consistently opposed Owners' entire action on § 893.80(4) grounds. *See, e.g.*, R.14-1-33. And Judge Kremers had ruled early on that the case was *not* about "actually seeking injunctive relief for lining a portion of the tunnel" (R.371-18:MMSDApp-0486):

> The Court: ... We are not going to have a trial about whether, how a lined tunnel performs as opposed to an unlined tunnel. That is not relevant in my view. What is relevant is whether or not this tunnel as constructed, damaged Boston Store. I don't care that another tunnel wouldn't have done it. That is not the issue in this case. It is not a trial about who can build a better tunnel.

R.371-23-24:MMSDApp-0491-92.

In response to Owners' belated injunction request, the District raised the defense again, argu-

ing, "Granting Plaintiffs injunctive relief strips the District of immunity and usurps the authority of the agencies involved in the decision-making process. *See also* § 893.80(4)." R.288-8:MMSDApp-0267. There was no waiver.

As explained above, § 893.80(4) provides immunity from "suits" based on exactly the type of discretionary conduct that Judge DiMotto's order addresses—construction of a specific type of tunnel. *MMSD*, 277 Wis. 2d at ¶60. The Legislature specifically authorized the District to "project, plan, design, adopt, construct, operate, and maintain . . . [s]torm sewers and other facilities and structures for the collection and transmission of storm water and groundwater," Wis. Stat. § 200.35(1)(e). After *MMSD*, there should be no debate that the District is immune from court-ordered sewer redesign and reconstruction. *MMSD*, Wis. 2d at ¶60.

Owners argued post-verdict that Wis. Stat. § 893.80(4) did not bar its claims because "[t]here is no immunity for negligent operation and maintenance of a public works project and the *only* question regarding [the District's] negligence put to the jury was whether it operated or maintained the deep tunnel negligently." R.291-2 (emphasis in

original). While this analysis is wrong for the reasons explained above, Owners' concession that whether the Tunnel was improperly *constructed* was not tried to the jury underscores an error with the injunction award. Judge DiMotto did not enjoin the District from a particular manner of operating the Tunnel or conducting a particular method of maintenance: She ordered the Tunnel's redesign and reconstruction, even though § 893.80(4) plainly bars any suit to obtain that relief. *See MMSD*.

2. Section 893.80(3) & (5) limit relief to $50,000, and do not allow an affirmative injunction costing taxpayers millions of dollars.

Owners' motivation to seek an injunction forcing the District to line the Tunnel with concrete was Judge Kremers' post-verdict ruling that § 893.80(3) limited each plaintiff's recovery to $50,000. To provide evidence that the claimed nuisance could be abated, Owners' expert testified at trial that lining a portion of the Tunnel was "within the capability of the underground construction industry," R.383-458-59:MMSDApp-0669-70, but estimated would cost $10 million, R.383-523:MMSDApp-0678. Judge DiMotto's later award of that injunctive relief thus impermissibly exceeds

the Legislature's limit on the relief available from government entities.

As explained in the District's Response Brief, *infra*, § 893.80 sets the metes and bounds of governmental liability for common law claims. Section 893.80(5) makes exclusive the relief allowed under § 893.80's provisions, including §893.80(3)'s damages limitation, unless the Legislature specifically provides by statute for greater relief:

> Except as provided in this subsection, the provisions and limitations of this section ***shall be exclusive*** and shall apply to all claims against a . . . governmental subdivision or agency. . . . When rights or remedies are provided by any other statute against [a governmental entity] . . . for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable.

Wis. Stat. § 893.80(5) (emphasis added). The clear text of the statute does not allow for injunctive relief when damages are at issue unless such relief is specifically authorized by another statute.

Though § 893.80 is clear on this point the Legislative policy it embodies requires an interpretation that precludes Owners' attempt to end-run the governmental damages cap by seeking injunctive relief that would impose costs far in excess of

the limited damages award. To accept Judge DiMotto's reasoning that the damages cap justifies affirmative injunctive relief whenever its operation precludes an award of damages in excess of $50,000 would, as a practical matter, nullify the damages limitation in many nuisance or negligence cases where the damages exceed that amount. The Legislature's intent to protect the public fisc would be defeated whenever a plaintiff could plausibly suggest that the government should be ordered to provide a costly "fix." *Cf. Andrews v. Chevy Chase Bank*, No. 07-1326, 2008 WL 4330761, at *5 (7th Cir. Sept. 24, 2006) ("[t]he notion that Congress would limit liability to $500,000 with respect to one remedy while allowing the sky to be the limit with respect to another for the same violation strains credulity" (internal quotation marks omitted)).

Section 893.80(5) precludes this result. Unless another statute affords a right to injunctive or greater monetary relief (not the case here) the right to damages not in excess of $50,000 is the exclusive relief provided by the Legislature. Judge DiMotto's injunction order must therefore be vacated as inconsistent with the limited relief the

Legislature has authorized against government entities.[9]

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[9] Owners argued below that the District had waived § 893.80(5)'s application. The circuit court, without affording the District any opportunity to respond, agreed. R.401-1-7. This was legal error. In opposition to Owners' motion for injunctive relief, the District argued that the motion improperly sought relief not allowed in light of § 893.80(3)'s damages limitation, stating, that Owners' request "attacks the application of Wis. Stat. § 893.80(3)." R.288-1:MMSDApp-0260. The § 893.80(5) issue is the same: can the circuit court award injunctive relief in addition to the capped damages award? As a result, the District was not required to cite § 893.80(5) earlier to preserve the issue. *See Gansch v. Nekoosa Papers, Inc.*, 158 Wis. 2d 743, 463 N.W.2d 682 (1990). The "shall be exclusive" language in § 893.80(5) merely augments the issue raised below—that a court cannot properly order a remedy that violates the limitations sanctioned by the legislature. Subsection (5) is simply a further argument making clear that the statutory cap is the limit of all relief under circumstances like those here.

Additionally, even if the issue were "new," this Court should address it. Whether the Legislature has prohibited the end-run around the damages limitation that the Owners seek to accomplish here involves a pure question of law and an important public policy matter. Consequently, it would be properly considered even had it been waived below (which it was not). *See, e.g., Preston v. Meriter Hosp., Inc.*, 2005 WI 122, ¶¶16-17, 284 Wis. 2d 264, 700 N.W.2d 158.

3. Section 893.80(1) bars injunctive relief when, no itemized statement of relief gave notice of it.

As discussed above, § 893.80(1) bars recovery against governmental entities unless the claimant timely gives notice of claim and the relief sought. Wis. Stat. § 893.80(1)(b). The non-owner notice of claim on which Owners rely made no mention of injunctive relief. Thus injunctive relief is barred.

Judge DiMotto, however, ruled that Owners had "substantially complied" with the notice provision. R.399-12-14:MMSDApp-0891-93. In doing so, she simply adopted Judge Kremers' erroneous decision that ignored the fact that Owners had never served a notice of a claim. She further concluded that the non-owners' statement of itemized relief substantially provided notice of injunctive relief—of which it made no mention—by itemizing $10.8 million of *damages* for the cost of repairing the building's foundation. R.399-13:MMSDApp-0892.

But notice of damages cannot be substantial compliance with seeking injunctive relief ordering a new public works project. Just as identification of an amount of claimed damages affords the government entity the ability to plan for a possible monetary loss, proper notice of an intent to seek injunc-

tive relief allows the government entity to plan for the issues that litigating and complying with an injunction order would entail. In a case like this one, these are not transferable concepts: the issue of lining the Tunnel implicates design, construction, and regulatory issues that a claim for damages does not.

B. Injunctive relief was procedurally improper.

1. Owners did not seek, and the court did not award, injunctive relief until after the expiration of § 805.16's post-verdict deadlines.

Section 805.16 sets rigid deadlines for seeking relief different from that awarded in a jury verdict. Subsection (1) requires that "[m]otions after verdict shall be filed and served within 20 days after the verdict is rendered, unless the court, within 20 days after the verdict is rendered, sets a longer time by an order specifying the dates for filing motions, briefs or other documents." Subsection (3) provides that all such motions are denied unless the Court signs an order resolving them "within 90 days after the verdict is rendered." These deadlines are strictly construed and cannot be extended. *See Fakler v. Nathan*, 214 Wis. 2d 458, 464, 571

N.W.2d 465 (Ct. App. 1997); *Ahrens-Cadillac Oldsmobile, Inc. v. Belongia*, 151 Wis.2d 763, 766-67, 445 N.W.2d 744 (Ct. App. 1989).

Owners' motion for injunctive relief—a motion that sought additional relief based on the jury's liability findings—is unquestionably a post-verdict motion: It seeks relief different from that provided in the verdict based on the jury's findings. *Compare Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 230, 533 N.W.2d 746 (1995) (§ 805.16 governs "trial-related motions," rather than motions "separate from the underlying action," such as for attorneys' fees); *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 588 N.W.2d 278 (Ct. App. 1998) (request for injunctive relief based on perceived inadequacy of the nuisance award made in post-verdict motion). It is uncontested that Owners' request for post-verdict injunctive relief was neither filed "within 20 days after the verdict [was] rendered," as required by § 805.16(1), nor decided "within 90 days after the verdict [was] rendered," as required by § 805.16(3). Thus, that relief was barred.

Owners have argued that they should be excused from these deadlines because (1) their motion

did not "seek to change a verdict answer or obtain a new trial" R.291-3:MMSDApp-0271, and (2) their request did not "ripen" until Judge Kremers' ruled post-verdict that § 893.80(3) limited damages to $50,000 per plaintiff. *Id.* The first point is wrong: Section 805.16 does not cabin post-verdict motions to those that seek to alter the verdict or set it aside. It applies to all "trial-related motions," a category into which Owners' request for injunctive relief unquestionably falls. *See Gorton*, 194 Wis. 2d at 230. Indeed, the rule's purpose is to ensure that a judgment finally resolving all claims will be entered within 90 days of a jury verdict. Owners' interpretation of the rule, which would allow, as here, proceedings to stretch on for many months after the jury verdict was rendered, is directly contrary to that purpose and should be rejected.

Owners' second point is irrelevant: The District had long maintained its § 893.80(3) defense, and Owners had consistently argued (incorrectly, see *supra* Resp. Br.) that their nuisance claim avoided the $50,000 damages limit. Moreover, Owners told Judge Kremers before trial that the nuisance claim—their only remaining claim for which they pleaded injunctive relief—was neces-

sary if the jury award did not fully compensate them for their claimed injuries. R.376-9-10:MMSDApp-0562-63. Judge Kremers rejected this suggestion as a "back door" means of getting more money than a jury might find justified and stated that he would not grant injunctive relief. R.376-21-24:MMSDApp-0574-77.

At all events, even on Owners' own incorrect construction of § 893.80(3) as avoided by a nuisance claim, they should have realized that the jury verdict's nullification of their nuisance claim entailed that § 893.80(3) capped damages at $100,000.[10] No rule or court order precluded Owners from filing a timely post-verdict motion requesting injunctive relief in the alternative should the court apply § 893.80(3)'s damages limitation. Perhaps Owners did not want to highlight the applicability of the cap, but, regardless of the reason for not seeking timely injunctive relief, having made the decision not to do so, § 805.16 bars the award.

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[10] Owners' counsel acknowledged to Judge DiMotto that the District had raised the caps before trial but Judge Kremers had deferred ruling on § 893.80(3) until after trial. R.396-9-10.

2. The circuit court's entry of a final judgment merged Owners' claims into a judgment and precluded additional equitable relief.

Judge Kremers' October 25, 2006 "Order for Judgment" was a final order. An order is final if it "explicitly dismiss[es] or adjudg[es] . . . the entire matter in litigation as to one or more parties." *Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶34, 299 Wis. 2d 723, 728 N.W.2d 670; *Tyler v. Riverbank*, 2007 WI 33, ¶17, 299 Wis. 2d 751, 728 N.W.2d 686. The October 25 order adjudicated both of Owners' remaining claims, awarding $100,000, interests, costs, and fees on their negligence claim and dismissing their nuisance claim; it provided:

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

R.305-1-3:A-Ap.708-10 (emphasis added).[11]

Judge Kremers' final order awarding Owners damages on their negligence claim and dismissing the nuisance claim foreclosed Judge DiMotto's later attempt to provide additional relief. Under the common-law doctrine of merger, when a valid, final judgment in favor of the plaintiff is entered, "[t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof." *Prod. Credit Ass'n. of Madison v. Laufenberg*, 143 Wis. 2d 200, 205, 420 N.W.2d 778, 779 (Ct. App. 1988) (internal quotation omitted). Once judgment is entered, the claims merge into the judgment, and any

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[11] Whether an order is final is a question of law that appellate courts must decide by examining whether the order "contains explicit language dismissing or adjudging the entire matter in litigation as to one or more parties." *Wambolt*, 299 Wis. 2d at ¶34 n.11. "A court disposes of the entire matter in litigation," the Court explained in *Tyler*, "in one of two ways: (1) by explicitly ***dismissing*** the entire matter in litigation as to one or more parties or (2) by explicitly ***adjudging*** the entire matter in litigation as to one or more parties." *Tyler,* 299 Wis. 2d at ¶17 (emphasis added). Whether an order so disposes of the entire matter, *Tyler* instructs, depends on whether it includes "language related to the disposal of [the plaintiff's] ***claims***." *Id.* at ¶19 (emphasis added). Thus, where, as here, an order contains language that "dismisses or adjudges" all claims, it is final and subject to appeal under § 808.03. *Id.* at ¶3.

action must be maintained on the judgment. *Id.*; *see also Waukesha Concrete Prods. Co. v. Capitol Indem. Corp.*, 127 Wis. 2d 332, 343-44, 379 N.W.2d 333, 338 (Ct. App. 1985).

Judge DiMotto thus erred in granting injunctive relief after the circuit court previously had entered judgment on Owners' claims. The judgment had dismissed the nuisance claim, which was the only remaining claim for which Owners pleaded injunctive relief. The judgment, which superseded the merged claims, did not provide for injunctive relief. Owners did not (and could not) seek relief from the judgment under § 806.07, which is the only proper procedural mechanism, other than appeal, for modification of a judgment. *See also Restatement (Second) of Judgments* § 18 (1982).[12]

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[12] On November 7, 2006, Judge DiMotto entered an order purporting to "modif[y]" the October 25 order "insofar as it may be interpreted to be a final order" and directed the clerk not to enter a separate "judgment" in addition to the October 25 order. As *Wambolt* and *Tyler* make clear, this order does not, and could not, deprive the October 25 order of finality. *See also Harder v. Pfitzinger*, 2004 WI 102, 274 Wis. 2d 324, ¶3, 682 N.W.2d 398 ("The test of finality is not what later happened in the case."). Indeed, the November 7 order does not even purport to vacate the October 25 order, and, at all events, it could not have done so, since Judge DiMotto had no basis for vacating the October 25 final order and thereby extending the time to appeal.

3. Owners' appeal of the final judgment barred a later injunction.

The Owners' January 19, 2007 appeal from the October 25 final order also deprived the circuit court of jurisdiction to award injunctive relief. Owners' appeal was perfected on January 24, the day the § 59.20(2)(b) "record"—i.e., the docket sheet—was transmitted to the Court of Appeals.

Under the well-established common-law rule incorporated into § 808.075, the circuit court is authorized to act after the filing of a notice of appeal "until the record has been transmitted to the court of appeals." Wis. Stat. § 808.075(3). The "record" to which that section refers is "a copy of the trial court record maintained pursuant to § 59.40(2)(b) or (c)." Wis. Stat. § 809.11(2). Section 59.40(2)(b) (sub. (c) applies only to criminal cases) describes the docket sheet, which was filed with this Court no later than January 25, 2007—five days before Judge DiMotto announced her order of affirmative

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See Eau Claire County v. Employers Ins., 146 Wis. 2d 101, 111, 430 N.W.2d 579, 583 (Ct. App. 1988); *cf. Edland v. Wis. Physicians Serv. Ins. Corp.*, 210 Wis. 2d 638, 647-48, 566 N.W.2d 519, 522-23 (1997) ("circuit court has no authority to vacate and reenter" a final order absent a proper § 806.07 motion).

injunctive relief and fourteen days before the order was first reduced to writing.[13] Consequently, the circuit court's later injunction orders are ineffective. *See Hengel v. Hengel*, 120 Wis. 2d 522, 355 N.W.2d 846 (Ct. App. 1984).

C. The circuit court's failure to hold a hearing and consider all relevant factors before awarding injunctive relief was improper.

At an October 11, 2006, status conference, Judge DiMotto informed the parties that in considering Owners' motion for injunctive relief, she was first going to decide whether injunctive relief was authorized under the circumstances, and would then allow the parties to be heard on the issue of whether such relief was appropriate. R.395-5-6:MMSDApp-0861-62. Rather than follow this course, she announced on January 30, 2007 that she was awarding the requested injunction to line the Tunnel because § 893.80(3) rendered damages inadequate and, based on her review of the trial

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[13] As Owners have candidly conceded in this Court, § 808.07(2), which allows circuit courts to stay judgment pending appeal, "when read in context . . . does not appear to contemplate the type of injunctive relief" that Owners sought from Judge DiMotto. Appellants' Mot. for Determination of Finality, No. 2007AP000221, p. 10.

transcript, Owners were entitled to the form of abatement—lining the tunnel—for which they argued at trial in connection with their (at this point dismissed) nuisance claim. R.399-14,29:MMSDApp-0893, 0908. She further ordered that she would not entertain any additional argument on why injunctive relief was inappropriate or on the specific form of relief, and held that the District had "waived" all offsetting equitable considerations by not submitting evidence of them during the jury trial for damages. R.399-29-30:MMSDApp-0908-09. While circuit courts generally have broad discretion to grant an injunction, this exercise of discretion, even if it were not otherwise barred by the request having been untimely and the circuit court having been divested of jurisdiction, was erroneous.

Judge DiMotto's order requiring the District to line the Deep Tunnel is irreconcilable with *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, 262 Wis. 2d 264, 664 N.W.2d 55. In *Hoffmann*, a jury concluded that the defendant power company was liable in negligence and nuisance for a deteriorating electric distribution cable that resulted in stray voltage that harmed plaintiffs' dairy herd.

The circuit court awarded injunctive relief to abate the nuisance—ordering the power company to install a specific type of electrical distribution system at the plaintiffs' farm. It did so because it "believed that the plaintiffs are entitled to [the] relief . . . that they request[ed because] . . . they were the victors." *Id.* at ¶26. Like Judge DiMotto, the *Hoffmann* circuit court "fail[ed] to take into account relevant factors in ordering a method of abatement." *Id.* at ¶28.

The Supreme Court reversed. It held that ordering a specific form of electric distribution system without taking evidence and making findings about the merits of that system constituted an erroneous exercise of discretion. *Id.* at ¶27. "The ordering of an electrical system," the Court explained, "must be based on the merits of the system ***with a record to support that*** order." *Id.* (emphasis added).

Similarly, any order affecting the Deep Tunnel's construction cannot be entered without considering the merits of the proposal. As in *Hoffmann*, there are questions of whether this section of the Deep Tunnel can safely be lined without risking sewer overflows and whether undertaking this work complies with WDNR's requirements govern-

ing the Deep Tunnel's operation. Judge DiMotto refused to consider these factors concluding that they either were or should have been argued to the jury—a conclusion that is wrong. But a litigant cannot correctly be said to have intelligently and knowingly waived a right to submit evidence on equitable factors by not addressing those factors in a trial where the only relief at issue was damages. Judge Kremers had stated before trial that he would not consider awarding injunctive relief, which seemed to him merely a tactic for seeking more in settlement than the jury might award. R.376-21:MMSDApp-0574. The District consequently could not have anticipated a need to dispute the cost or feasibility of lining the tunnel in order to demonstrate that injunctive relief was improper. Judge DiMotto's subsequent ruling that the District "waived" its right to submit evidence of equitable factors was an abuse of discretion that deprived the District of its fundamental opportunity to be heard on those issues.

Judge DiMotto's ruling also replicated another error made by the circuit court in *Hoffmann*. As in *Hoffmann*, Judge DiMotto awarded a plaintiffs' preferred form of injunctive relief without re-

questing and considering evidence about whether such relief can be afforded in compliance with state (and, in this case, federal) regulations. As in *Hoffmann*, the court below used its equitable power to order construction in an area in which it lacks expertise without considering the views of the state regulatory agency, here the WDNR, that has that expertise.[14]

One relevant consideration the circuit court refused to entertain is the federal Clean Water Act's prohibitions on the discharge of pollutants not authorized by a permit. 33 U.S.C. §§ 1311, 1342(a), (b). The District's WDNR permit controls when discharges are allowed, and controls operation of the Tunnel. Only the WDNR can modify the permit or authorize changes to the District's sewer facilities, *see* Wis. Stat. § 281.41(1)(c), and it can only do so in accord with the Clean Water Act. WDNR affidavits submitted to the circuit court in-

[14] While *Hoffmann* states that "[o]nly a court has the authority to grant an injunction," 262 Wis. 2d at ¶29, it provides no warrant for exercising that authority in contravention of federal and state regulatory requirements or in a manner that usurps the planning and construction of public works projects that the Legislature has vested in other units of government.

formed it of this fact: "WDNR must approve or disapprove any new plan, design, or construction proposed for the ISS [deep tunnel]." R.294-2. As the WDNR affidavits also explained, in order to accomplish the circuit court's injunctive relief, "WDNR would have to issue a new plan approval for the lining," *id.*, and WDNR "has no present intention of approving the lining." R.294-1-3.

Remarkably, the circuit court concluded that any issues requiring WDNR's involvement should have been litigated earlier, even though Owners did not move for injunctive relief until *after* trial. Judge DiMotto was of the view that the environmental regulatory agencies should have been joined as parties:

> I don't know why [WDNR and EPA] weren't named in the matter. I don't know why that wasn't litigated. It should have been litigated. That had everything to do with whether this – whether the proper parties were joined in this lawsuit in the first instance.

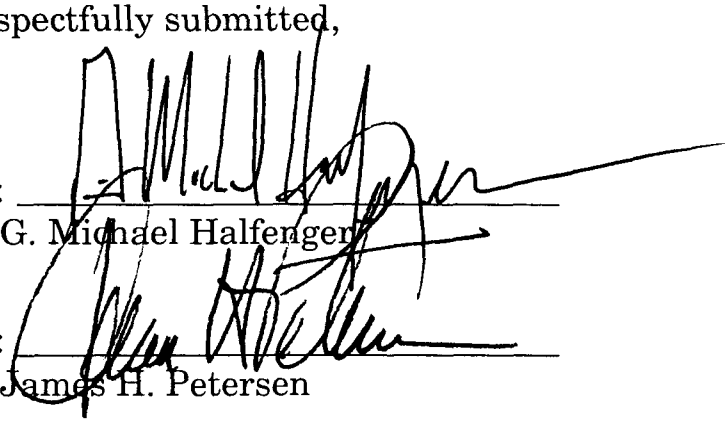
R.400-47-48:MMSDApp-0966-67. Until Owners' belated post-verdict motion for injunctive relief, however, there was no basis for these agencies to be involved with this private damages action.

The circuit court's failure to consider the many equitable factors implicated by an order to line the Tunnel provides an independently sufficient ground for vacating the injunction.

CONCLUSION

The circuit court's judgment and its order of injunctive relief should be vacated and the case remanded with instructions to enter judgment in the District's favor dismissing all of Owners' claims with prejudice. Should the Court conclude that the circuit court had authority to award equitable relief, the injunction order should be vacated and the case remanded for further proceedings affording the District a full and fair opportunity to present evidence of equitable factors relating to the propriety of ordering the Deep Tunnel to be lined.

Respectfully submitted,



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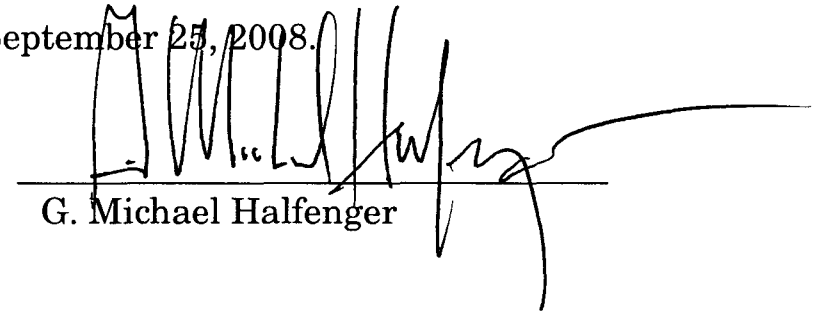
FORM AND LENGTH CERTIFICATION

I certify that this cross-appeal brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) for a brief and appendix produced using proportional serif font and pursuant to this Court's July 8, 2008, order expanding the brief volume limitation in § 809(8)(c) by 50%. The length of this brief is 15,409 words.

Dated: September 25, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that I will today cause a copy of the foregoing cross-appeal brief of the Milwaukee Metropolitan Sewerage District, to be delivered to:

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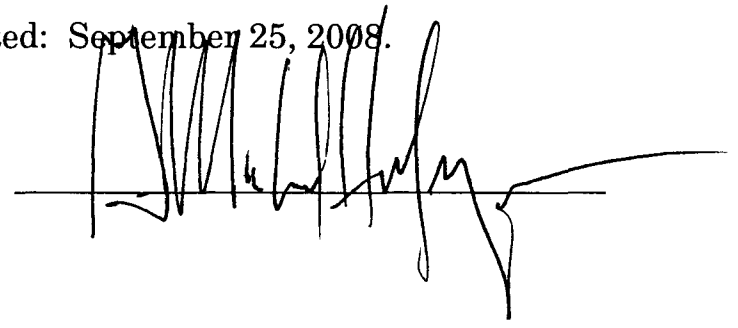
Dated: September 25, 2008.



CERTIFICATE OF MAILING

I certify that this Combined Brief of Respondent-Cross-Appellant and the separate appendix of Respondent-Cross-Appellant Milwaukee Metropolitan Sewerage District were deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class or priority mail, or other class of mail that is at least as expeditious, on September 25, 2008. I further certify that the brief was correctly addressed and postage was pre-paid.

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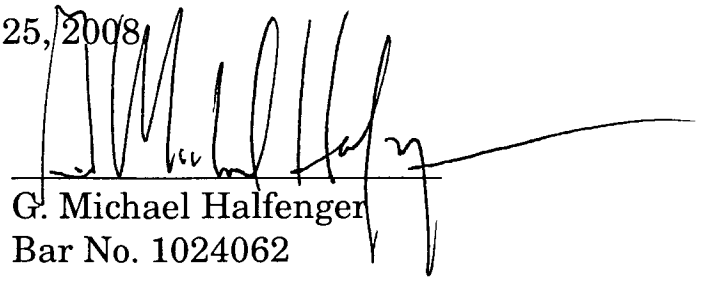

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