COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal No. 2007AP00221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-Cross-
Appellant.

APPEAL FROM THE ORDER OF THE CIRCUIT COURT OF MILWAUKEE COUNTY CASE NO. 2003cv005040 THE HONORABLE JEFFREY A. KREMERS AND JEAN W. DIMOTTO PRESIDING

COMBINED BRIEF OF APPELLANTS AND CROSS-RESPONDENTS BOSTCO LLC AND PARISIAN, INC.

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STATEMENT ON THE FACTS

Throughout MMSD's combined brief, MMSD makes numerous factual assertions without providing adequate citation to the record. WISCONSIN STAT. RULE 809.19(1)(e) requires that briefs contain "citations to the ... parts of the record relied on." "An appellate court is improperly burdened where briefs fail to consistently and accurately cite to the record." *Insurance Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI App 15, ¶ 2 n. 2, 269 Wis. 2d 286, 674 N.W.2d 886.

It is the responsibility of the party advancing an argument or fact to provide this court with proper references to the record. *Anic v. Board of Review*, 2008 WI App 71, ¶ 2 n.1, __ Wis. 2d __, 751 N.W.2d 870. "[W]here a party fails to comply with the rule, 'th[e] court will refuse to consider such an argument ...'" *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶ 6, 239 Wis. 2d 406, 620 N.W.2d 463 (additional citation omitted).

Due to word limitations, an exhaustive recitation of every inaccurate or insufficient factual characterization and record citation is not possible. However, the following are examples of these concerns:

- MMSD asserts that it authorized payment of repairs to other building owners "in order to avoid having to reimburse its Tunnel construction [sic] under the terms of their contract for the contractor resolving the claims itself" and cites R.122 in support. MMSD Resp. Br. at 14. Record document 122 is a four page affidavit that says nothing of the sort and provides no other explanation why MMSD authorized these payments.

- Two of MMSD's statements are supported only by citations to opening statements at trial. MMSD Resp. Br. at 15 (citing R.381 p.61-62, 198).

- Many statements on pages 16-18 are not adequately supported by the citations provided. For example, the record pages cited offer no support for many of MMSD's statements regarding the history of the Boston Store building foundation, that other building owners were underpinning their buildings or constructing rewetting systems or that it was Boston Store's policy "to allow the piles to rot."

- With respect to a fact relevant only to trial issues, MMSD cited generally to an entire deposition transcript of a witness who did not testify at trial and whose testimony was not read at trial. MMSD Resp. Br. at 17.

- Many of the statements made on page 20 are not facts but argument.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING BOSTON STORE'S INVERSE CONDEMNATION CLAIM.

MMSD's response to Boston Store's appeal of the trial court's summary judgment order dismissing the inverse condemnation claim leaves only two items for this Court to resolve: (1) whether an inverse condemnation claim must always be based on the taking of the entire

property, and (2) whether the trial court properly dismissed the inverse condemnation claim despite evidence that Boston Store lost all beneficial use of the timber pile foundations which support its building.

Because Boston Store presented evidence on summary judgment that it had lost all beneficial use of the timber pile foundations that support its building (a point on which MMSD submitted no competing evidence) and because the taking of an entire property is not necessary, the trial court's decision to enter summary judgment on the Boston Store's inverse condemnation claim should be reversed.

MMSD makes two arguments related to Boston Store's inverse condemnation claim.[1] First, MMSD argues that an inverse condemnation claim cannot be based on anything less than a taking of the whole property. MMSD Resp. Br. at 58-59. On this point, MMSD is wrong as a matter of law. Second, MMSD argues that "mere damage" to property is not a "taking" absent actual occupancy or seizure under *Wisconsin Power & Light Co. v. Columbia Co.*, 3

[1] On appeal, MMSD does not argue that the "public purpose" element of the Boston Store's taking claim is lacking.

Wis. 2d 1, 87 N.W.2d 279 (1958) [herinafter *WP&L*]. MMSD Resp. Br. at 58-60. On this point, MMSD is wrong as a matter of both fact and law.

A. Inverse Condemnation Does Not Require A Complete Taking.

MMSD's first argument, that an inverse condemnation claim cannot be based on anything less than a taking of the claimant's entire property, is premised on an incorrect statement of law. For purposes of inverse condemnation, a taking of "property" includes a taking of real property, the fixtures thereto and even personal property having a direct connection with the land. *See* WIS. STAT. § 32.01(2).

Thus, an inverse condemnation claim may be predicated on "a direct and physical interference with *some part* of the particular piece of property in question." *Heiss v. Milwaukee & L.W.R. Co.*, 69 Wis. 555, 34 N.W. 916, 917 (1887) (emphasis added). Because citizens are entitled to just compensation for a government taking of a *part* of a larger piece of property, destruction of the whole is unnecessary. *Id.*; *accord United States v. Cress*, 243 U.S. 316, 328-29 (1917) (condemnation of less than the whole is "familiar in the law of eminent domain"). In opposition to summary judgment, Boston Store

presented evidence to show a taking of the building's timber pile foundations.[2]

B. Boston Store's Claim Is Not For "Mere Damage" to Property.

MMSD's second argument is that "mere damage" to property is not a "taking" absent actual occupancy or seizure. MMSD Resp. Br. at 58-60 (citing *WP&L*, 3 Wis. 2d at 4-5). On this point, MMSD is wrong as a matter of both law and fact.

The law has long recognized that property may be "taken" without "actual occupancy or seizure by the taker." *Wikel v. Department of Transp.*, 2001 WI App 214, ¶ 12, 247 Wis. 2d 626, 635 N.W.2d 213.[3] A taking occurs when government action "practically or substantially renders the property useless for all reasonable purposes," *Andersen v. Village of Little Chute*, 201 Wis. 2d 467, 476, 549 N.W.2d 737 (Ct. App. 1996), regardless of whether there is an "actual occupancy or seizure." *WP&L*, 3 Wis. 2d at 4.

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[2] *See* R.134 pp.50-53, A-Ap.347-50; R.138 pp.1-3, A-Ap. 382-84; R.137 pp.1-3, A-Ap.404-06; R.112, A-Ap.1250-57.

[3] *See also Pumpelly v. Green Bay Co.*, 80 U.S. 166, 178 (1871); *Olen v. Waupaca County,* 238 Wis. 442, 449, 300 N.W. 178 (1941)); *Price v. Marionette & Menominee Paper Co.,* 197 Wis. 25, 27, 221 N.W. 381 (1928); *Dahlman v. City of Milwaukee*, 131 Wis. 427, 438-40, 111 N.W. 675 (1907); *Arimond v. Green Bay and Mississippi Canal Co.,* 31 Wis. 316, 335 (1872).

MMSD's reliance on *WP&L* likewise misses the mark. First, in *WP&L*, the government caused damage to the claimant's radio tower, but no public benefit resulted. *Id.* at 7. Here, the Deep Tunnel was (intended at least) to benefit the public. Second, in *WP&L*, the government had no reason to anticipate the damage that would result from its acts. *Id.* at 4. Here, MMSD was aware of the risk to properties, including the Boston Store, affected by the Deep Tunnel. *See, e.g.,* R.134 pp.12-14, 16, 19-22,72; A-Ap.309-10, 316-19, 369. Finally, in *WP&L*, the injury to the tower was purely accidental. *WP&L*, 3 Wis. 2d at 7. Here, MMSD was aware that dewatering could significantly and negatively impact properties with timber pile foundations. *See, e.g.,* R.134 pp.12-14, 16, 19-22,72; A-Ap.309-10, 316-19, 369. MMSD's actions were not accidental—and if MMSD had argued that they were, that question should have been put to the jury.

Finally, MMSD is mistaken that the evidence submitted showed "mere damage" to property. Boston Store's evidence showed that it had lost all beneficial use of its timber pilings. *See* R.134 pp.50-53, A-Ap.347-50; R.138 pp.1-3, A-Ap.382-84; R.137 pp.1-3, A-Ap.404-06; R.112, A-Ap.1250-57. Specifically, Boston Store

submitted evidence showing that groundwater infiltration into the Deep Tunnel lead to soil subsidence and pile rot such that many of its timber piles could no longer bear any meaningful weight and were thereby rendered useless. *Id.*

In spite of the evidence that Boston Store's timber pilings had lost all beneficial use, the trial court granted MMSD summary judgment, apparently accepting MMSD's argument that Boston Store could show "only property damage" and that "damage to property is insufficient to constitute a takings claim." *See* R.119 pp.60-64, A-Ap.279-283; R.374 pp.39-40, A-Ap.723-24.

On *de novo* review, this Court should reverse the trial court's grant of summary judgment on Boston Store's inverse condemnation claim; the evidence submitted would readily and reasonably support a jury finding that MMSD's conduct caused Boston Store the loss of all beneficial use of portions of its property.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BOSTON STORE'S WIS. STAT.§ 101.111 CLAIM.

This Court should also reverse the trial court's order granting MMSD summary judgment on Boston Store's statutory claim under WIS. STAT. § 101.111. The Boston Store property adjoins the

property through which MMSD's easement and Deep Tunnel run and MMSD's excavation has caused the soil underneath the Boston Store to settle, necessitating underpinning and foundation work.

There is only one aspect of Boston Store's § 101.111 claim that remains at issue: the trial court's decision that the statute is inapplicable because "the property interest of the MMSD for this tunnel was separated from the Boston Store property by 160 feet of someone else's property." R.374 pp.38-39; A-Ap.722-23. Boston Store's property does adjoin property on which MMSD excavated—there is no dispute that Boston Store's property adjoins the "Grand Avenue" property, on which MMSD had an easement, and though which MMSD excavated. *See* MMSD Resp. Br. at 67. The trial court's ruling is erroneous, should be reversed, and also should be remanded for entry of judgment in favor of Boston Store. *See* WIS. STAT. § 802.08(6).

Section 101.111 imposes a ministerial duty upon any excavator to protect its excavation site "in such a manner so as to prevent the soil of adjoining property from caving in or settling." § 101.111(2). MMSD was and is an "excavator" under § 101.111 because an "excavator" is defined as "owner of an interest in land making or

causing to be made an excavation[.]" *Id.*[4] MMSD obtained an easement from Boston Store's neighboring property, the Grand Avenue. *See* MMSD Resp. Br. at 67. The "interest in land" is MMSD's easement through the Grand Avenue property,[5] within which the tunnel is located.

Contrary to the trial court's ruling, the Grand Avenue property is not a property that "separates" the Boston Store from the MMSD's "interest in land"—MMSD's "interest in land" is the easement on the Grand Avenue property that adjoins the Boston Store.

The trial court erred in holding that § 101.111 requires the excavation itself to "touch" the Boston Store property, but does not apply to an excavation on adjoining property. MMSD Resp. Br. at 66. The trial court ruled that 160 feet was just too far away, but the trial

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[4] MMSD argues that WIS. STAT. § 101.111 does not apply to it because it did not engage in traditional from-surface excavation. But the statute applies to excavators and is not limited to traditional excavation or from-surface excavation. Moreover, this litigation position is directly at odds with MMSD's pre-litigation documents explicitly recognizing the application of the statute to the Deep Tunnel. *See, e..g.*, R.350 (Ex. 112), A-Ap.1262 (correspondence to contractors advising"[b]e further advised that § 101.111 ... specifically governs this situation ...").

[5] "An easement is, among other attributes, an 'interest in another's land, with a right to enjoy it fully and without obstruction.'" *Turner v. Taylor*, 2003 WI App 256, ¶ 10, 268 Wis. 2d 628, 673 N.W.2d 716 (additional citation omitted).

court did not indicate, and MMSD has never revealed, just how many feet would be close enough under the statute.

In any event, an excavation would only "touch" an adjoining property if it were made to the limits of a lot line, and not an inch or a yard removed. The Legislature would not have intended the statute to protect only those neighboring properties which were actually "touched" by an excavation, but not to protect those adjoining properties *affected* by an excavation three feet away. Nor would the Legislature have intended to hold "farmers or other large property owners conducting a small-scale excavation thousands of feet from the property line" liable under section 101.111, as MMSD worries. MMSD Resp. Br. at 68. In those situations, there would be no liability because the excavation would not affect the adjoining property and thus, no prevention would be necessary.

The text of the statute confirms, as it should, that the Legislature did not intend to limit its protection to those excavation sites that "touch" a neighboring property, because the statute does not use the words "adjoining excavation" as MMSD implies. It uses the words "adjoining property" four times, "adjoining owners" once, and "adjoining building" twice. *See* WIS. STAT. §§ 101.111(1), (2), (3)(a),

(3)(b), (4). It is captioned as "protection of adjoining property and buildings." *Id.*

The trial court's decision has no basis in the language or the purpose of the statute. Because Boston Store's property adjoins the property through which the excavation runs, Boston Store's property is protected by § 101.111. The trial court erred in granting summary judgment to MMSD on this claim, and should be reversed.

III. BOSTON STORE SUFFERED SIGNIGICANT HARM AS A MATTER OF LAW.

Contrary to MMSD's suggestion, Boston Store is not arguing that any time a party suffers property damage it has established a nuisance claim. That suggestion ignores that the jury found not only that MMSD was negligent but that the manner in which MMSD maintains and operates the Deep Tunnel has interfered with Boston Store's use and enjoyment of its property and that the interference is abatable. *See* R.403 p.3, A-Ap.587. Moreover, the jury found that this caused Boston Store to suffer millions of dollars in damage—*per se* "significant harm." R.403 p.2, A-Ap.586.

Because MMSD cannot find a successful way to distinguish the Wisconsin Supreme Court's holding in *Jost v. Dairyland Power*

Cooperative, 45 Wis. 2d 164, 172 N.W.2d 647, from the irrational result reached in this case, MMSD has attempted to recategorize the issue on appeal as one it would rather argue.[6] But, the jury did *not* find that Boston Store "never proved (or even pleaded) the 'particular type of injurious consequence,' that is the essence of a nuisance claim." *See* MMSD Resp. Br. at 69. In fact, the jury found that the particular type of harm a nuisance is predicated upon exists here—the jury found that the manner in which MMSD has operated or maintained interfered with Boston Store's use and enjoyment of its property. *See* R.403 p.3, A-Ap.587.

The sole question before this Court is whether, in light of the jury's conclusion that MMSD's operation or maintenance of the Deep Tunnel has interfered with Boston Store's use and enjoyment of its property and that Boston Store ultimately suffered $3 million in damage (30% assigned to Boston Store for the challenged

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[6] MMSD inexplicably implies that since *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis.2d 635, 691 N.W.2d 658 was decided after both *Jost* and *Krueger v. Mitchell*, 112 Wis. 2d 88, 332 N.W.2d 733 (1983), *Jost* and *Krueger* are limited or nullified by the holding in *City of Milwaukee*. *See* MMSD Resp. Br. at 74. The latter opinion involved a case in which MMSD was seeking to recover for damage to one of its sewers, and the opinion did not discuss the significant harm element. *See* 277 Wis. 2d 635. The fact that it was decided after *Jost* and *Krueger* is irrelevant.

contributory negligence), Boston Store suffered significant harm as a matter of law. MMSD has presented no compelling argument to the contrary.

A. Wisconsin Law Has Long Recognized That Damage To Property Is Recoverable Under Nuisance.

It has long been held that damage to property is recoverable under a nuisance claim and as such, it is irrelevant that there was both a negligence and a nuisance claim and only one set of damage questions on the special verdict. Property damages are a type of nuisance damage separate and distinct from damages for personal discomfort, annoyance, and inconvenience, but both types of damages are independently recoverable under a nuisance cause of action. *See Krueger v. Mitchell*, 112 Wis. 2d 88, 105-06, 332 N.W. 2d 733 (1983). "[T]raditional nuisance harms" have been described as, among other things, "physical injury to land and fixtures [and] depreciation of property value[.]" *Krueger v. Mitchell*, 106 Wis. 2d 450, 456, 317 N.W.2d 155 (Ct. App. 1982), *aff'd*, 112 Wis. 2d 88, 332 N.W. 2d 733 (1983). In fact, the Wisconsin Supreme Court never had occasion to adopt the rule that a plaintiff *may* recover damages for personal inconvenience, annoyance and discomfort caused by a

nuisance *even if* there was no showing of any monetary loss or bodily injury before the court of appeals addressed the issue in its *Krueger* opinion. *See id.* at 458-59.

Contrary to MMSD's uncited proposition that Boston Store had to prove "business interruption losses," *see* MMSD Resp. Br. at 77, the Wisconsin Supreme Court has held that:

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

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

Finally, MMSD's suggestion that Boston Store cannot recover for property damage under a nuisance claim should be rejected. MMSD specifically stipulated to consolidating the nuisance and negligence damages into a single verdict question:

> THE COURT: . . . [M]y understanding is the parties agree that I would not ask the jury to answer a separate set of damage questions with respect to the nuisance claim, that the answers on the damage questions to the negligence claim would stand as the answers to the nuisance claim, and that the only thing that I think the defense is giving up is the right to argue on appeal should they lose that the Court -- the circuit court was wrong -- trial court was wrong in not giving a separate damage question to the nuisance claim.
>
> MR. LYONS: That's right.

See R. 392 pp. 16-17, 210, A-Ap.1049, 1098. Pursuant to the law cited above and the consolidated damages stipulation, MMSD cannot now argue that Boston Store did not allege or prove nuisance damages, or that none of the damages can be tied to the nuisance because they requested,[7] and the trial court agreed, that no separate question would be submitted to the jury. If MMSD really believed what it is now arguing, it never would have entered into such a stipulation.

B. The Harm Suffered By Boston Store Is Significant As A Matter Of Law.

The notion that ongoing damage to a building's foundation is not significant harm and has nothing to do with Boston Store's use and enjoyment of its property is not rational. The nuisance harm here has ultimately manifested itself as property damage, much like the harm at issue in *Jost.* 45 Wis. 2d 164. The Josts were not required to plead or prove that their house was uninhabitable at some point before succeeding. *Id.* But, according to MMSD's theory, Boston Store would have had to essentially "shut its doors" to prove significant

[7] Boston Store submitted a proposed special verdict with separate damage questions for nuisance and negligence. *See* R.247 pp.2, 4, A-Ap. 552, 554.

harm. There is no support in Wisconsin's case law for such a proposition.

MMSD argues that "[h]ere, a finding of 'property damage' can be (and was) based on evidence distinct from harm resulting from interference with Owners' 'use and enjoyment of their building,'" but provides no citation to any authority or evidence to support such a statement. *See* MMSD Resp. Br. at 77. Instead, the record establishes that the jury heard considerable testimony explaining how MMSD's negligent actions have caused the dewatering of the ground, which triggers destructive pile rot and downdrag, ultimately eliminating the foundation's ability to support the building, and resulting in millions of dollars of property damage. *See* Boston Store Br. at 12-19.

Attempting to confuse the issue by evasion does not respond to the question presented. In Wisconsin, tangible injury to property is recoverable under nuisance law and as particularly relevant here, the Wisconsin Supreme Court has explained:

> *Substantial injury is defined as 'tangible' injury, or as a 'discomfort perceptible to the senses of ordinary people.'* ... Here the damage was to tangible property. The damage was apparent and undisputed. ...
> *We conclude that the injury was substantial as a matter of law, since ... the injury was obvious injury to tangible property. Moreover, it was, in fact, of such a nature that the jury placed more than a nominal value upon the injury done.*

Jost, 45 Wis. 2d at 172 (emphasis added and citations omitted). Boston Store suffered significant harm as a matter of law; this Court must reverse the trial court and change the jury's answer to Question No. 10 of the Special Verdict.

IV. THE SPECIAL VERDICT ERRONEOUSLY CONTAINED A QUESTION REGARDING BOSTON STORE'S "CONTRIBUTORY NEGLIGENCE" AND THE TRIAL COURT SHOULD HAVE CHANGED THE ANSWER TO "NO."

Judge DiMotto was correct when she questioned the basis for the jury's finding of contributory negligence. *See* R.399 p.7, A-Ap.114. Whether Boston Store knew that it had some foundation trouble due to fluctuating water levels and repaired some piles in the past, before MMSD's negligent conduct, is not the question at issue here. Boston Store is not seeking to recover damages for having to replace piles over two decades ago.[8] Instead, the question is whether

[8] In its Statement of Facts, MMSD includes a section entitled "The Boston Store building and its long history of foundation problems[,]" which is riddled with inaccurate statements and/or citations to the record. *See* MMSD Resp. Br. at 15-19. By way of example, in support of several "facts" included in this section of its brief, MMSD cites portions of Boston Store's opening statement at trial and deposition transcripts that were never admitted at trial (and that pertained to witnesses who never testified at trial). *See, e.g.*, MMSD Resp. Br. at 15, 17 (R.381-198-99, MMSDApp-0655 is a citation to Boston Store's opening statement; R.128-2, MMSDApp-0143 is a citation to the cover page of Phillip Smith's *deposition* testimony). Other citations are simply inaccurate, leaving the propositions they "support" either unsupported by accurate citations to the record

Boston Store was contributorily negligent and, if so, whether that negligence caused any of the *claimed* damage. Because MMSD erroneously conflated alternative cause theories with unsupported accusations that Boston Store was itself negligent, the jury mistakenly concluded that the answer to that question is "yes." But there is no basis to uphold that conclusion for at least two reasons.

MMSD has not pointed to any evidence in the record indicating that Boston Store was aware of the effect, if any, its well was allegedly having on the water levels beneath the building. There is none. Without such notice or knowledge of this subterranean chain of events, and without any evidence suggesting that an ordinary building owner would have understood or foreseen this complex hygrogeological cause and effect relationship and the potential for harm, MMSD has provided nothing to this Court to support its

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or unsupported by the evidence in the record. Notwithstanding the fact that any repairs made to the building's foundation prior to 1997 were never part of the damage claim in this case, and while each party is entitled to persuasively present its case in the manner it chooses (with the inevitable, occasional citation mistakes), MMSD should not be rewarded for failing to provide proper citations to the record in support of its arguments. Indeed, parties are required by the Rules of Appellate Procedure to include "appropriate references to the record." WIS. STAT. § 809.19(1)(d). "'[I]t is not the duty of this [C]ourt to sift and glean the record in *extenso* to find facts which will support an [argument].'" *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶ 6, 239 Wis. 2d 406, 620 N.W.2d 463.

suggestion that Boston Store was negligent in the "operation and maintenance" of its well.

Even if this Court was to accept MMSD's flawed theory that failing to rewet the ground beneath its building is the relevant inquiry here, it was undisputed at trial (and MMSD has not now attempted to dispute) that adding water to the upper levels of soil under the Boston Store would have *exacerbated* the destructive downdrag forces that were pulling the timber piles from and destroying the foundation of the Boston Store. *See* R.385 pp.72-73, A-Ap.900; R.385 pp.174-75, A-Ap.926. Boston Store cannot be negligent for failing to do something that would have harmed the foundation of its building.

A. Knowledge Of Fluctuating Groundwater Levels Is Not Equivalent To Knowledge Of The Well's Alleged Effect On Those Fluctuations.

It is not enough for MMSD to show that Boston Store was aware that groundwater levels had fluctuated, at different times in the past, and that Boston Store's well might have contributed to those fluctuations, to establish that Boston Store was contributorily negligent unless there is evidence of Boston Store's knowledge or reason to know of the alleged effect its well was having on the

groundwater levels beneath the building. Without such a connection, MMSD's evidence shows only an alternate cause, but not negligence.

There was no evidence presented at trial that Boston Store was, or should have been, aware that the well might have been contributing to the fluctuating water levels and MMSD cites to none here. Without that connection, the jury's contributory negligence finding cannot be justified on any of the facts MMSD asserts related to Boston Store's well, even had such assertions been supported by adequate record citations.

B. A Wetting System Would Have Exacerbated Downdrag.

MMSD's contention that the jury's contributory negligence finding can be upheld because Boston Store did not install a pile rewetting system fares no better. One word that never appears in MMSD's argument is "downdrag." Why? Because MMSD refuses to acknowledge the central fact that the damages Boston Store suffered were primarily due to downdrag, not pile rot. *See, e.g.*, R.385 pp.49-53,63-77, A-Ap.894-95, 898-901; R.351 (Trial Exs. 1552-018 to 025), A-Ap.1289-96. Boston Store's expert testified, and MMSD does not dispute, that while keeping the piles wet will help prevent rot, there is

nothing a building owner can do to prevent drowndrag—a wetting system presents a "Catch 22" situation in that it exacerbtaes the effect of downdrag even though it might keep the tops of the pile wet. *See* R.385 pp.72-73, A-Ap.900; R.385 pp.174-75, A-Ap.926. MMSD's only real defense to the downdrag theory was its theory that none of this reported settlement ever really happened. The jury rejected that argument, as is evidenced by the millions of dollars in damages the jury awarded to Boston Store.

There is no credible evidence in the trial record to support MMSD's affirmative defense, and the jury's conclusion, that Boston Store was contributorily negligent. As MMSD failed to meet its burden of introducing evidence at trial that would permit a jury to find that Boston Store acted negligently, this Court should reverse the trial court and change the jury's answer to Questions Nos. 4 and 5 of the Special Verdict.

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

MMSD argues that the trial court was correct in reducing Boston Store's recoverable damages under WIS. STAT. § 893.80(3) to

less than one percent[9] of the damages the jury found Boston Store sustained as a result of MMSD's negligent conduct. There are four independent reasons why § 893.80(3) should not be held to limit recoverable damages in this case: (1) the $50,000 cap is unconstitutional on its face; (2) were it not unconstitutional on its face, it would be unconstitutional were it applied to Boston Store in this case—the cap was not applied to other similarly situated property owners suffering damages exceeding $50,000; (3) MMSD waived the cap and should be estopped from invoking the damage limitation; and (4) the damage cap does not apply to continuing nuisances and the jury's findings makes clear that it found a continuing nuisance.

A. WISCONSIN STAT. § 893.80(3) Violates Equal Protection on its Face.

MMSD does not dispute that this Court reviews a constitutional challenge to a statute *de novo*. *See Bethke v. Lauderdale of La Crosse, Inc.*, 2000 WI App 107, ¶ 15, 235 Wis. 2d 103, 612 N.W.2d 332. Nor does it dispute that under WIS. STAT. § 893.80(3), governmental tort victims who suffer over $50,000 in

[9] This 1% figure is based on a $6 million award. By using this more conservative figure, Boston Store in no way means to suggest that it believes that the question of contributory negligence was proper.

damages are treated differently than those who suffer less. Finally, MMSD does not dispute that § 893.80(3) is thus subject to "rational basis with teeth" standard of review.

1. Rational Relationship with Governmental Interest.

Under rational review with teeth, a court "need not, and should not, blindly accept the claims of the legislature ... [but must] conduct an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose." *Ferdon v. Wisconsin Patients Comp. Fund*, 2005 WI 125, ¶ 77-78, 284 Wis. 2d 573, 701 N.W.2d 440. Rational basis with teeth "does not require that all individuals be treated identically, but any distinctions must be relevant to the purpose motivating the classification." *Id.*, ¶ 72.

Municipal damage caps serve the legitimate governmental interest of preventing disruptions in local government functions that unlimited liability may threaten. *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 377, 293 N.W.2d 504 (1980). Thus, the first question is whether the *specific* cap set forth in WIS. STAT. § 893.80(3) has more than a speculative tendency to further the government's interest in

preventing disruptions in local government functions. *Ferdon*, 284 Wis. 2d 573, ¶¶ 77-78.

The second question is whether the cap "is harsh and unreasonable, that is, if the limitation is too low when considered in relation to the damages sustained." *See Ferdon*, 284 Wis. 2d 573, ¶ 111. This second inquiry is required because the legislature is required to balance the need for fiscal security against the ideal of equal justice. *See Stanhope v. Brown County,* 90 Wis. 2d 823, 843, 280 N.W.2d 711 (1979).

The damage cap does not meet either standard. The legislative history of WIS. STAT. § 893.80(3) gives no indication what the justification for the $50,000 figure was when it was adopted in 1981. *See* 1981 Assembly Bill No. 85 (February 1981); Assembly Amendment No. 1 to Assembly Bill No. 85 and 1981 Wis. Laws c. 63. Even had the $50,000 figure been related to the purpose of preventing disruptions in governmental functions, such rationale cannot continue to justify this figure twenty-seven years later. Moreover, its application is harsh and unreasonable as it limits Boston Store's recovery to less than 1% of the damages the jury found

MMSD negligently caused and to which Boston Store otherwise would have been entitled.

2. MMSD's Arguments Related to the Constitutionality of WIS. STAT. § 893.80(3) are Unavailing.

In response to Boston Store's constitutional challenge to WIS. STAT. § 893.80(3), MMSD advances three arguments: (1) that *a* municipal damage cap can be constitutional; (2) that § 893.80(3) is constitutional because there is a legitimate governmental interest in municipal damage caps; and (3) that tort victims, such as Boston Store, that have the assets to pay for the damages they have suffered as a result of the negligence of another have lesser rights than other tort victims. MMSD's first argument can and should be rejected summarily: Boston Store is not and has never argued that the legislature cannot enact a municipal damage cap.[10] However, the fact that the legislature may enact a cap of some sort does not inoculate the

[10] For example, on page 25 of its brief, MMSD asserts that "[c]ontrary to Owner's unsupportable assertion that *Holytz* 'makes clear that the government has no legitimate interest' in limiting municipal liability in tort, Owners' Br. 65 ..." MMSD quotes Boston Store's prefatory language and then materially alters its substance. Boston Store's actual statement was as follows: "*Holytz* makes clear that the government has no legitimate interest in shifting the costs of governmental negligence from the public at large to a handful of victims." In the very next sentence, Boston Store noted that instead, "the government's interest in municipal damage caps is to prevent disruptions in local government functions that unlimited liability may threaten."

cap amount from constitutional review. *See generally Ferdon*, 284 Wis. 2d 573; *Sambs*, 97 Wis. 2d 356.

MMSD's second argument also can and should be rejected summarily: MMSD's argument that the constitutional review begins and ends with the identification of a legitimate governmental interest is not legally accurate. "[F]or judicial review under rational basis to have any meaning, there must be ... a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose." *Ferdon*, 284 Wis. 2d 573, ¶ 77.[11]

MMSD attempts to distinguish *Ferdon*, arguing that:

> 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.

MMSD Resp. Br. at 31. MMSD surely knows that the Wisconsin Supreme Court abrogated municipal sovereign immunity in 1967 and that without § 893.80(3), it would be subject to full liability to its tort

[11] MMSD argues that statements by the Wisconsin Supreme Court acknowledging that any cap amount will inevitably involve some degree of arbitrariness strips the judiciary of its ability to review the constitutionality of a specific cap amount. While the supreme court has acknowledged that any cap amount must involve an element of arbitrariness, it has made clear that this does *not* strip the judiciary of the right or the obligation to insure that the limitation is "harsh or unreasonable, that is, if the limitation is too low when considered in relation to the damages sustained." *Ferdon*, 284 Wis. 2d 573, ¶ 111.

victims; were this not the case, MMSD would have no motive in defending its constitutionality.

MMSD's apparent "confusion" that without § 893.80(3), Boston Store would be entitled to collect nothing spills over into MMSD's argument that in determining whether $50,000 is unconstitutionally low, the comparison figure should be $0 instead of damages suffered. MMSD Resp. Br. at 32. Again, there is no longer common law municipal sovereign immunity and "a statutory limit on tort recoveries may violate equal protection guarantees if the limitation is harsh and unreasonable, that is, if the limitation is too low *when considered in relation to the damages sustained.*" *Ferdon*, 284 Wis. 2d 573, ¶ 111 (emphasis added). MMSD's belief that because it is a governmental entity, it should be immune from all and beholden to no one, simply does not reflect the law in this state and has not for over fifty years.

MMSD's final argument, that there is no hardship or injustice in requiring Boston Store to pay for the damages caused by MMSD's negligence rather than MMSD's taxpayers is inconsistent with Wisconsin Supreme Court precedent. The Wisconsin Supreme Court has already rejected the notion that shifting the costs of government

negligence to a few victims rather than to the public at large is a legitimate governmental interest. *Holytz v. City of Milwaukee,* 17 Wis. 2d 26, 115 N.W.2d 618 (1962). Caps do not alleviate the burden of governmental negligence on the public but rather shift those costs unevenly and arbitrarily.

Moreover, the notion that MMSD should not be held accountable to Boston Store because Boston Store can hold MMSD accountable is not rational. Through no lack of effort, Boston Store has not yet been able to hold MMSD meaningfully accountable for the millions of dollars in property damage MMSD caused to Boston Store's property. MMSD's argument that Boston Store is a worthy victim has no place in a facial constitutional analysis.

B. WISCONSIN STAT. § 893.80(3) Would Violate Equal Protection if Applied in this Case.

Even if the damage cap were facially constitutional, its application in this case would violate equal protection. Equal protection is denied when a public body selectively enforces a law in a manner that is intentional, systemic and arbitrary. *State ex rel. Murphy v. Voss*, 34 Wis. 2d 501, 510, 149 N.W.2d 595 (1967). As noted in greater detail in Boston Store's brief-in-chief, MMSD waived

the cap with respect to building owners who discovered and reported their damage prior to June 30, 2004 but invoked the cap against owners who discovered their damage thereafter.

On appeal, MMSD argues that it waived the cap with respect to the earlier payments because Traylor Brothers, the construction company, not a property owner, had a contractual right to seek compensation from MMSD if *it* incurred unforeseen costs resulting from differing site conditions. MMSD Resp. Br. at 38. This argument might be more convincing if the dates actually matched up. Under the contract, Traylor Brothers was required to submit the full amount it was claiming within thirty days after MMSD's determination of a differing site condition. R.124 p.108. June 30, 1994 was years after Traylor Brothers' contractual rights would have expired.

MMSD also argues that time is not arbitrary because timing of a claim is frequently a basis for denying relief under statutes of limitation. *See* MMSD Resp. Br. at 40. First, the statutes of limitations applicable to Boston Store's claims are legislatively set and MMSD does not have the authority to move those limitation periods forward or abrogate the discovery rule with respect to claims against

it. Moreover, MMSD's policy is not analogous to a statute of limitations, which limits actions if brought a set number of years after damage has accrued or is discovered. Such limitations punish only those who have knowingly sit on their rights. Finally, suggesting that earlier claims based on unexpected inflows of water and drops in water levels made a more convenient case for liability, MMSD omits the overwhelming evidence submitted at trial that those conditions existed long after construction and the severity of the harm that the jury found MMSD's negligent operation and maintenance of the Deep Tunnel caused.

MMSD next argues that Boston Store's as applied equal protection challenge threatens its ability to deal with settlement on a case-by-case basis. Had MMSD actually been approaching the issue on a case-by-case basis, Boston Store would not have an as applied equal protection challenge. *See State ex rel. Murphy*, 34 Wis. 2d at 510 (equal protection denied when public body selectively enforces a law in a manner that is intentional, *systemic* and arbitrary). However, MMSD's own witness charged with administering the payments, testified that the decision was not made on a case-by-case basis and that is part of the problem. *See, e.g.,* R.272 p.7-11, A-Ap.695-99.

Finally, MMSD argues that the fact that Boston Store had a deep pile foundation while the other property owners with respect to whom MMSD waived the municipal damage cap had shallow foundations justifies the unequal treatment. However, MMSD does not explain why that distinction, if true and supported by the record, is material, nor does it dispute that this is not actually the reason why Boston Store was treated differently. *See* R.189 pp.95-96, A-Ap.1370-71 (if Boston Store had submitted its damage claim on or before June of 1994, MMSD would have accepted full responsibility for repair costs if the investigation lead to the conclusion that the damage at issue was caused by the Deep Tunnel).

C. Waiver and Estoppel.

Third, even if application of WIS. STAT. § 893.80(3) in this case would not violate the constitutional guarantee of equal protection, it is barred under both the doctrines of waiver and judicial estoppel. At a May 2, 2005 hearing, MMSD's counsel explicitly stated that "if the plaintiffs win, they will be made whole based on their damage claim alone . . . [i]f their damages allow them to recover and get a new foundation that is built and addresses the underlying soil conditions, which is what their damage claim is in this case . . .

[t]hey can have complete and whole relief based on what they have already alleged in this case." R.371 pp.4, 9, A-Ap.182, 187 (emphasis added).

MMSD relies on the fact that after the court granted its request at that hearing, R.371 p.19, 24, A-Ap.197, 202, MMSD's counsel recognized that its previous comments amounted to waiver and announced that he "[did not] *want* to waive" "legal defenses that we *will* raise." *See* R.371 p.31, A-Ap.209 (emphasis added). Even assuming a waiver can be retracted if made immediately without prejudice to another party, MMSD's statement does not constitute a retraction. Instead of conceding that Boston Store would not be able to recover all of its damages—such that MMSD had no basis for opposing the expert testimony related to lining—MMSD simply announced in the vaguest terms possible that it did not want to be bound by its own statements.

MMSD argues that even if its statement were an unretracted waiver, it would not be an enforceable waiver under the holding of *Anderson v. City of Milwaukee,* 208 Wis. 2d 18, 33-34, 559 N.W.2d 563 (1997). This argument is unavailing for the reasons set forth on page 74, footnote 41, of Boston Store's brief-in-chief.

Finally, even if MMSD's statements did not constitute waiver, MMSD should be estopped from taking a contrary position now.[12] Under the doctrine of judicial estoppel, a party who succeeds in convincing a court to adopt a particular position is not permitted to argue the contrary unless there has been a material change in facts. *State v. Johnson*, 2001 WI App 105, ¶ 10, 244 Wis. 2d 164, 628 N.W.2d 431.

MMSD argues that the doctrine does not apply because it has not made inconsistent statements. It is unclear how MMSD's statement that "[i]f the plaintiffs win, they will be made whole based on their damage claim alone" and its position here that Boston Store should be "made whole" for less than 1% of the more than $6 million in damages the jury found attributable to MMSD could be any more inconsistent.[13] As MMSD convinced the court that Boston Store

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[12] MMSD argues that Boston Store waived the estoppel argument by not raising it with the trial court. MMSD is mistaken. *See* R.280 p.4, MMSDApp-2056 ("Because [MMSD] prevailed in this argument ... it should have been estopped from later arguing the opposite—that the Plaintiffs should not be made whole if they win.").

[13] MMSD also advances the untenable position that what it actually meant by its statement "if the plaintiffs win" was not win its claims but win on its argument that the damage cap does not apply. This position cannot be reconciled with MMSD's later statement at the May 2, 2005 hearing that Boston Store "can have complete and whole relief based on what they have already alleged in this case." R.371 p.9, A-Ap.187.

would be made whole in damages and, therefore, that discovery related to tunnel lining should be limited, MMSD should be barred from arguing that Boston Store should not be able to recover its full damages.[14]

D. Continuing Nuisances Are Not lLimited by WIS. STAT. § 893.80(3).

Finally, even if this Court rejects all of the foregoing arguments, the full damage award should be reinstated if this Court concludes that Boston Store prevailed on its continuing nuisance claim. Although WIS. STAT. § 893.80(3) caps damage at $50,000 for "any *action* founded on tort," a continuing nuisance is not a single "action." *Stockstad v. Town of Rutland*, 8 Wis. 2d 528, 534, 99 N.W.2d 813, 817 (1959) ("It is well settled that every continuance of a nuisance is in law a new nuisance and gives rise to a new cause of action."), *superseded with respect to claims for flooding caused by road construction by* WIS. STAT. § 88.87.

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[14] MMSD notes that estoppel does not apply to blunders, inadvertence or mistakes. Whether the statement was a mistake when it was made, it is clear that MMSD recognized at the May 2, 2005 hearing that it had made a statement inconsistent with its actual position but failed to correct that misstatement. MMSD also notes that estoppel applies only to the statements of persons qualified to bind a party. This was not a statement by a low level MMSD employee but by MMSD's attorneys who are authorized to make binding legal representations on MMSD's behalf.

MMSD attempts to get around this conclusion arguing that continuing nuisances may be recurring *causes of action* (i.e. claims) while § 893.80(3) limits the damages recoverable to $50,000 per action (i.e. lawsuit). In making this argument, MMSD relies on *Wilmot v. Racine County*, 136 Wis. 2d 57, 400 N.W.2d 917 (1987). However, *Wilmot* actually uses the phrases action and causes of action synonymously in analyzing § 893.80(3). *Wilmot* makes plain that MMSD's contention that a single lawsuit can result in no more than $50,000 liability to a municipal entity is not true.

Finally, MMSD does nothing to soften the effect its position will have on necessitating serial causes of action. Rather, it seems to suggest that litigation would be resolved one multi-year lawsuit at a time. In reality, its interpretation of the effect of continuing nuisance actions on the cap would require a plaintiff to bring an action on successive dates. This surely cannot be a correct or intended interpretation of the relationship between the caps and continuing nuisance claims.

For any one of the foregoing independent reasons, this Court should find that the trial court erred in reducing Boston Store's damage from $9,000,000 to $100,000.

CONCLUSION

For the foregoing reasons, Boston Store respectfully requests that this Court reverse the trial court's dismissal of Boston Store's inverse condemnation and WIS. STAT. §101.111 claims,[15] reverse the trial court and hold that Boston Store established it suffered significant harm as a matter of law, reverse the trial court's decision to submit MMSD's contributory negligence defense to the jury and ultimately uphold the jury's conclusion and finally, reinstate the full damage award found by the jury.

[15] Based on the trial court record and the jury's verdict, this Court should direct that judgment be entered in favor of Boston Store on its WIS. STAT. § 101.111 claim consistent with the damages assessed in the verdict, plus fees and costs as provided for in the statute.

COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal No. 2007AP00221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-Cross-
Appellant.

FORM AND LENGTH CERTIFICATION

I hereby certify this brief conforms to the rules contained in section 809.19(8)(b) of the Wisconsin Statutes for a brief and appendix produced with a proportional serif font, and pursuant to the motion accompanying this brief, Bostco LLC and Parisian, Inc. are requesting leave to exceed the length limitation imposed by WIS. STAT. Rule 809(8)(c). The length of this brief is 7,777 words.

Dated this 24th day of November, 2008.

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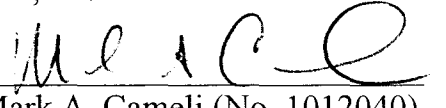
BY 

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RESPONSE TO MMSD'S STATEMENT ON THE FACTS

It is the responsibility of the party advancing an argument or fact to provide this court with proper references to the record. *Anic v. Board of Review*, 2008 WI App 71, ¶ 2 n.1, __ Wis. 2d __, 751 N.W.2d 870. "[W]here a party fails to comply with the rule, 'th[e] court will refuse to consider such an argument ...'" *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶ 6, 239 Wis. 2d 406, 620 N.W.2d 463 (additional citation omitted).

Many of MMSD's factual assertions do not meet the requisite standard but due to limited space, a detailed listing of every inadequacy is not possible. Boston Store has incorporated some specific examples that have particular bearing on the issues presented within the context of its argument below. Other facts germane to these appeals also have been set forth in Boston Store's other appellate briefs.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT BOSTON STORE'S CLAIMS ARE NOT BARRED BY THE IMMUNITY FOR LEGISLATIVE AND JUDICIAL ACTS SET FORTH IN WIS. STAT. § 893.80(4).

MMSD's principal argument on appeal is that it is immune from liability to Boston Store under WIS. STAT. § 893.80(4). MMSD's argument fails for several independent reasons:

First, it is well-established, and MMSD does not dispute, that under Wisconsin's municipal immunity law, a municipality is not immune from tort liability for negligent operation and maintenance of a sewerage system. MMSD advanced the municipal immunity defense with the trial court and the trial court agreed with MMSD, ordering that Boston Store would be limited to presenting only evidence related to MMSD's operation and maintenance of the Deep Tunnel and that the jury would be asked only about negligent operation and maintenance. In fact, MMSD chose the specific date its liability would attach—August 7, 1992—over Boston Store's objection that the date should be earlier. The jury found that as of August 7, 1992, MMSD was negligent in its operation and maintenance of the Deep Tunnel. MMSD's argument that the record

evidence is insufficient to support the jury's conclusion ignores a substantial amount of evidence submitted at trial.

Second, if this Court reinstates Boston Store's inverse condemnation claim or its claim under WIS. STAT. § 101.111, MMSD's immunity argument necessarily fails with respect to those claims as § 893.80(4) applies to neither inverse condemnation nor statutory causes of action.

Finally, even if MMSD were correct that Boston Store's evidence of harm was and is "all ultimately based on the design, construction, and implementation of the Deep Tunnel," MMSD Cross-Appeal Br. at 36, this does not establish that it is entitled to immunity. What differentiates this case from a more traditional "construction" immunity case is that MMSD was on notice that the Deep Tunnel was causing and continues to cause damage to the Boston Store.[16]

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[16] In addition to these three bases for finding liability, both the known danger and professional discretion doctrines should apply in this case. The known danger doctrine applies where dangerous circumstances give rise to a ministerial duty to act. *Cords v. Anderson*, 80 Wis. 2d 525, 538-42, 259 N.W.2d 672 (1977) (park manager who was aware of unguarded gorge that presented danger to hikers but who failed to place a warning sign or advise his supervisors of the condition was not immune); *Domino v. Walworth County*, 118 Wis. 2d 488, 490-93, 347 N.W.2d 917 (Ct. App. 1984) (sheriff's department dispatcher liable for failing to have the department investigate a nighttime report of a downed tree or notifying the town so it could investigate); *Voss v. Elkhorn Area Sch. Dist.*, 2006 WI App 234, ¶ 22, 297

A. Wisconsin Does Not Provide Municipal Immunity for Negligent Operation and Maintenance of a Sewerage Utility.

WISCONSIN STAT. § 893.80(4) provides that "[n]o suit may be brought against any [municipal entity] for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." Under this statute, "liability is the rule and immunity is the

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Wis. 2d 389, 724 N.W.2d 420 (teacher using vision distorting goggles liable for failing to take any precautions to prevent injury).

The professional discretion doctrine applies when negligence relates to a discretionary act but discretion of a professional, rather than governmental nature. *See Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 686-87, 292 N.W.2d 816 (1980). To date, Wisconsin courts have only applied the professional discretion doctrine in the context of medical discretion and this Court has indicated that arguments that the doctrine should be expanded further should not be directed to this Court. *DeFever v. City of Milwaukee*, 2007 WI App 266, ¶ 16, 306 Wis. 2d 766, 743 N.W.2d 848 ("Because the supreme court has refused to recognize a 'professional' exception beyond the medical context, we will not do so.") (additional citation omitted). Accordingly, the issue need not be belabored, but in order to preserve the issue for appeal, the rationale for the professional discretion doctrine is not limited to the medical field and therefore, the doctrine should not be either.

Similarly, the known danger doctrine was limited in *Lodl v. Progressive Northern Ins. Co.*, 2002 WI 71, ¶ 39, 253 Wis. 2d 323, 646 N.W.2d 314, to only those circumstances that are "sufficiently dangerous to require an explicit, non-discretionary municipal response." Although this Court is bound by the conclusions of the Wisconsin Supreme Court and therefore, not in a position to alter this standard, for the purpose of preserving the argument, Boston Store, like the dissent in *Lodl*, contends that this limiting standard in effect eviscerates the known danger doctrine by rendering it superfluous with liability for ministerial acts. *See id.*, ¶¶ 49-73 (Bradley, J., dissenting).

exception." *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 22, 253 Wis. 2d 323, 257 Wis. 2d 348, 651 N.W.2d 292.

It is both well-established in Wisconsin law and MMSD does not dispute that a municipal entity is not immune under WIS. STAT. §893.80(4) for any negligence in operating or maintaining a sewerage system. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 56, 277 Wis. 2d 635, 691 N.W.2d 658 [hereinafter *MMSD v. Milwaukee*] (municipal immunity "[does] not extend to claims arising from negligence in operating or maintaining" a public works project); *Caraher v. City of Menomonie*, 2002 WI App 184, ¶ 17, 256 Wis. 2d 605, 649 N.W.2d 344 (same); *Menick v. City of Menasha*, 200 Wis. 2d 737, 745, 547 N.W.2d 778, 781 (Ct. App. 1996) ("[w]hile the decision to install and provide a sewer system in a community is a discretionary decision, there is no discretion as to maintaining the system so as not to cause injury to residents").[17]

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[17] MMSD contends that Boston Store "concede[s] that [its] theory of injury is based on how the Tunnel was designed and constructed," MMSD Cross-Appeal Br. at 41, and in support, quotes the second half (designated with italics) of the following sentence from Boston Store's brief-in-chief: "Throughout the course of the trial, Boston Store introduced evidence showing that MMSD had maintained and operated the Deep Tunnel negligently, that MMSD's negligent operation or maintenance of the Deep 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*

In response to MMSD's argument in the trial court that all of Boston Store's allegations of negligence related to the design and construction of the Deep Tunnel rather than operation and maintenance, the trial court asked both parties if they would agree to delineate operation and maintenance from design and construction by setting a date when the design and construction phase ended and the operation and maintenance phase began:

> The Court: Let me ask this question. Do both sides agree that the date at which, upon which the District began operating, maintaining and inspecting the tunnel is a critical start date for the fact finder to use in determining what, if any acts of negligence the MMSD committed in furtherance of those duties? Seems like posing the questions (sic) raises the answer.
>
> Mr. Lyons [counsel for MMSD]: Yes.
>
> The Court: So, you agree with that, Mr. Cameli?
>
> Mr. Cameli [counsel for Boston Store]: I do.

R.376 p.4, MMSD-App-0597.

MMSD later proposed to use August 7, 1992, the date on which the construction contractors provided MMSD with a certificate of substantial completion, as the date that would distinguish what acts were part of design and construction and what acts were part of

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downdrag and pile rot." at 11. In place of Boston Store's repeated references to MMSD's negligent operation and maintenance, MMSD has inserted the phrase "the Tunnel." MMSD Cross-Appeal Br. at 41.

operation and maintenance. R.377 pp.8-9.[18] Over Boston Store's objection that immunity should have ended at the point MMSD was on notice that the Deep Tunnel was causing significant property damage to Boston Store or at a minimum, October 1990, the date on which MMSD had previously indicated construction ended, R.377 pp.3-7; R.376 p.41, MMSDApp-0594, the court accepted MMSD's proposal and ordered that the Boston Store would be barred from presenting evidence of events that occurred before August 7, 1992, except for the limited purpose of proving notice. R.377 pp.10-13.

At trial, the court repeatedly ruled against Boston Store's efforts to properly admit evidence of pre-August 1992 events for the purpose of showing that MMSD was on notice that heavy groundwater infiltrations into the Deep Tunnel would cause and was causing significant damage to the foundation of the Boston Store building and that the damage could be abated and instead, with a few limited exceptions, barred Boston Store from introducing evidence of events occurring before August 1992, the date on which MMSD had

[18] MMSD's director of legal services and the individual MMSD designated to speak on its behalf, Michael McCabe, testified at trial that MMSD took responsibility for operation and maintenance of the Deep Tunnel in August 1992. R.381 p.123, MMSDApp-0660; R.381 176, A-Ap.739.

agreed and even proposed as the date immunity would no longer attach. *See, e.g.*, R.381 p.153-62; R. 382 pp.132-39, MMSDApp-0670-75.[19]

At the conclusion of trial, the court instructed the jury that "[t]he claims in this case involve claims for negligence based on the operation, maintenance and inspection of the tunnel on or after August 7, 1992[; e]vidence of events prior to August 7, 1992, was admitted and may be considered by you insofar as it bears on the knowledge of the parties and actions of the parties after August 7, 1992." R.392 p.44, A-Ap.1056. The verdict submitted to the jury asked only about MMSD's negligence in the operation or maintenance of the Deep Tunnel and again, specified MMSD's date of August 7, 1992:

QUESTION No. 1:	On or after August 7, 1992 was the District negligent in the manner in which it operated or maintained the tunnel near the Boston Store?
QUESTION No. 2:	Answer the following question ONLY if you answered Question No. 1 "YES": Was such negligence a cause of the claimed damage to the Boston Store foundation?

[19] On page 15 of its brief-in-chief, MMSD asserts that Judge Kremers told the parties that Boston Store would be permitted to put on whatever evidence Boston Store believed related to a ministerial duty of MMSD and he would decide at the end of trial whether such conduct was immune or not. Although Judge Kremers made such a statement prior to trial with respect to certain ministerial duties, he clearly abandoned it at trial.

R. 403 p.1, A-Ap.585.

The jury answered "yes" to both questions, finding that MMSD negligently operated or maintained the Deep Tunnel and that MMSD's negligent operation or maintenance of the Deep Tunnel was a cause of the damage to the Boston Store building. R.403 p.1, A-Ap.505; R.393 p.20, A-Ap.1109. The jury did not find that MMSD designed, constructed, or "implemented" the Deep Tunnel in a negligent way.

MMSD's argument on appeal is in essence that even though the jury said that it found that MMSD was negligent for operation or maintenance after August 1992, what it actually found was that MMSD was negligent for design and construction prior to August 1992. More specifically, MMSD argues that the evidence submitted at trial was insufficient to support the jury's unanimous conclusion that MMSD had been negligent in its operation or maintenance of the Deep Tunnel. MMSD Cross-Appeal Br. at 16.

In reviewing the sufficiency of evidence on appeal, the relevant inquiry is whether there is any credible evidence "under any reasonable view, that leads to an inference supporting the jury's

finding." *Morden v. Continental AG*, 2000 WI 51, ¶ 38, 235 Wis. 2d 325, 611 N.W.2d 659; *see also* WIS. STAT. § 805.14(1) ("No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that ... there is no credible evidence to sustain a finding in favor of such party.").[20]

The evidence at trial easily meets this standard. For example:

- Richard Stehly, a civil engineer with wide experience in soil and materials engineering, testified that "[t]he Boston Store has experienced large structural column movements as a result of the *operation* of the North Shore Tunnel."[21] Mr. Stehly also testified that "[i]f the *operation* of the North Shore Tunnel continues under the current conditions, the Boston Store will experience large structural column movements requiring future repair." R.385 p.43, A-Ap.893; R.385 pp.33-38, A-Ap.891-92; R.351 (Trial Exs. 1552-003 to 005), A-Ap.1285-87.

- Another expert witness, Dr. Thomas Quirk, observed the deterioration of the piles in 2001 and opined that the rot could have occurred in a time period of approximately ten years, also coinciding with the Deep Tunnel's operation. *See* R.384, pp.55-57, 88-89, A-Ap.846, 854; *but see* R.384 pp.83-85, A-Ap.853 (discussion of 10-12 year time period during cross-examination).

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[20] While it is an issue of law that a municipality is not immune for negligent operation and maintenance of a public works project, the substance of MMSD's challenge is to the sufficiency of the evidence to support the jury's conclusions.

[21] For purposes of this appeal, "Deep Tunnel" and "North Shore Tunnel" may be used interchangeably.

- Further evidence of MMSD's negligent operation of the Tunnel came from Mr. Stehly, who opined that during the period of 1990-2001, with regard to columns at equal elevation, three times as many columns were repaired and there was nearly twice as much movement in the columns than in the previous twenty-six year time period. R.385, pp.93-94, A-Ap.905-06; R.351 (Trial Ex. 1552-041), A-Ap.1298.[22]

- Mr. Stehly also explained how the settlement data relating to the two sets of columns repaired in 1997 and 2001 reflect that the columns were relatively stable until the early 1992, when they suffered large settlements and were eventually jet-grouted and stabilized, R.385 pp.98-105, 138-43, A-Ap.907-08, 917-18; R.351 (Trial Exs. 1552-043-051 and 054 to 068), A-Ap.1300-08; R.385 pp.138-43, A-Ap.917-18, and how a topographical survey of the second floor of the building, drawn in 2000, corroborates the settlement of the columns repaired in 1997 and 2001, *see* R.385 pp.144-48, A-Ap.918-19; R.351 (Trial Exs. 1552-071 to 074), A-Ap.1325-28. This movement was contemporaneous with the operation of the Deep Tunnel and Mr. Stehly opined that the large movement was due to the operation of the tunnel. *See* R.385 pp.42-43, A-App893; R.385 pp.42-43, A-Ap.893; R.351 (Trial Ex. 1552-006), A-Ap.1345.

- Expert testimony also demonstrated that due to MMSD's continued negligent operation of the Tunnel, the Boston Store would likely continue to suffer damage in the future, because the conditions that caused the past damages continue—"[t]he drawdown from the tunnel continues to draw the water down and make this building vulnerable"—and sooner or later, the remainder of the columns are going to need to be repaired.

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[22] Mr. Stehly also discussed how the foundation had been altered or repaired on several occasions prior to 1990—between the late 1940's or early 1950's and 1990. *See* R. 385 pp. 94-95, A-Ap. 906; R. 351 (Trial Ex. 1552-042), A-Ap. 1299. However, several of the column repairs or alterations were attributed to changes in the use of the building including, for example, lowering the basement for use as retail space. R. 385 pp. 87-88, A-Ap. 904-05. Several column changes were also done for unknown reasons. R. 385 pp. 94-95, A-Ap. 906.

R.385, pp.160-61, A-Ap.922; *see also* R.383, pp.50-51 (hydrogeology expert opining same general conditions exist today); R.382 p.97, A-Ap.742; R.351 (Trial ex. 1550-009),A-Ap.1277.[23]

In addition to affirmative negligence, Boston Store submitted evidence showing that MMSD was also negligent in failing to properly maintain the Deep Tunnel. When a municipality is "on notice that its [public utility] [is] leaking and could potentially interfere with the use and enjoyment of another's property," it has a non-immune affirmative duty to take affirmative steps to repair the leak. *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 48. The record evidence is more than sufficient to show that MMSD was on notice that the Deep Tunnel was leaking, that the leaking could potentially cause substantial damage to Boston Store's property, and that the leaking had been occurring long enough that MMSD knew or should have known of the condition and could have remedied it in a reasonable period of time.

For example, MMSD admitted that the resident engineer advised MMSD's legal services division "that groundwater intake into the tunnel construction zone might cause groundwater drawdowns to

[23] This evidence is also discussed in great detail in Boston Store's brief-in-chief. *See, e.g.*, Boston Store Br. at 12-20.

occur in the future." R.381 pp.167-68, A-Ap.737. Boston Store also introduced evidence indicating that MMSD was on notice of the potential for harm to buildings and structures. Michael McCabe, the Director of Legal Services for MMSD, confirmed that a portion of a 1982 planning document referenced potential effects that the Deep Tunnel could have on various utilities and structures "under certain conditions." R.381 pp.144-45, A-Ap.736. MMSD also admitted that it was "understood that too great a drawdown of groundwater from a zone wherein wooden piles are located might have a deleterious effect on such wooden piles if the wooden piles were otherwise in sound condition." R.390 pp.15-16, A-Ap.1041. MMSD was also aware that the "drainage of water from the alluvial layer causes drainage from the overlaying marsh deposits which, in turn, leads to settlement" and that "[i]f the drainage remained uncontrolled, then subsequent settlement could lead to building damage[.]" R.381 pp.171-73, A-Ap.738; R. 351 (Trial Ex. 429). MMSD was aware that "[o]ther potential effects are downdrag on piles, which means that the downward movement of the settling soil creates a downward force on the pile,and this is of most concern for older buildings founded on timber piles, the condition of which is not known." *Id.* MMSD once

even "indicate[d] that liability for downtown settlement due to water drawdown form a great distance away will be accepted by MMSD." R.351 (Trial Ex. 359), A-Ap.1342 (minutes from a May 26, 1988 meeting statement); R.382 pp.36-38. MMSD has also identified structures at risk as a result of dewatering from the Deep Tunnel, designating them as "critical structures," and included Boston Store by name:

> This category includes those structures that are underlain by soft compressible soils such as the estuarine deposits. The structures identified are located within ...the effective dewatering through of 1,000 feet of the tunnel alignment.

R.351 (Trial Ex. 290), A-Ap.1374; R.381 P.163.

MMSD cites to the testimony of two of Boston Store's four expert witnesses and characterizes their testimony as being related to construction and the tunnel's existence. *See* MMSD Cross-Appeal Br. at 16-20, 38-41. First, MMSD's contention that the fact that Boston Store' expert witnesses' conclusions depend on the existence of the tunnel advances nothing. Operation and maintenance are necessarily predicated on existence. Second, with respect to construction, MMSD focuses on statements that the damage to Boston Store would have been far less likely had the tunnel been lined. In doing so, MMSD

assumes that tunnel lining is exclusively a matter of design. However, this litigation position is directly at odds with MMSD's planning documents related to the Deep Tunnel. According to MMSD's technical documents, "[m]aintenance may include removal of solid deposits, removal of fallen rock, repair of deteriorated linings and placement of concrete lining in deteriorated, unlined areas." R.381 pp.145-48; R.351 (Trial Ex. 206). Finally and most important, MMSD's argument is misplaced: when an appellant challenges the sufficiency of the evidence to support a jury's finding, "appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. *Morden*, 235 Wis. 2d 325, ¶ 39. Accordingly, whether the testimony of Doctors Turk and Nelson can be said to encompass design and construction is beside the point; the relevant inquiry is whether there is evidence to support the jury's finding that MMSD was negligent in operation or maintenance. *See id.*

B. WISCONSIN STAT. § 893.80(4) Does Not Apply to Either Inverse Condemnation or Statutory Causes of Action.

In the event that this Court reinstates Boston Store's claim for inverse condemnation and/or its cause of action under WIS. STAT.

§ 101.111, Boston Store respectfully requests that this Court make clear in its order for remand that the municipal immunity provided for in WIS. STAT. § 893.80(4) does not apply. *See Busse v. Dane County Reg'l Planning Comm'n*, 181 Wis. 2d 527, 540, 511 N.W.2d 356 (Ct. App. 1993) ("Claims based on the taking of private property for public use without just compensation are not barred by sovereign immunity . . .") (citing *Zinn v. State*, 112 Wis. 2d 417, 435, 334 N.W.2d 67 (1983)); *Crawford v. Whittow*, 123 Wis. 2d 174, 183-84, 366 N.W.2d 155 (Ct. App. 1985) (specific statutory prohibition trumps municipal immunity conferred in WIS. STAT. § 893.80(4)).

C. MMSD Had Knowledge That It Was Causing Harm, and Should Enjoy No Immunity For The Harm It Knew It Would Cause Under WIS. STAT. § 893.80(4).[24]

Even if MMSD was correct that Boston Store's evidence of harm was and is "all ultimately based on the design, construction, and implementation of the Deep Tunnel," MMSD Cross-Appeal Br. at p. 36, this still does not establish that it is entitled to immunity. In this state, it is an undecided question of law "whether municipal immunity

[24] If the Court concludes that there was evidence in the record to support the jury's finding that MMSD was negligent in its operation or maintenance of the Deep Tunnel from August 1992 forward, the Court need not address this issue.

attached to the planning function should persist in view of subsequent experience or changed conditions which demonstrate an actual and substantial danger." *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 60 n.19; *Allstate Ins. Co. v. Metropolitan Sewerage Comm'n*, 80 Wis. 2d 10, 17n.5, 258 N.W.2d 148 (1977) (noting that court would express no opinion as to "whether municipal immunity attached to the planning function should persist in view of subsequent experience or changed conditions which demonstrate an actual and substantial danger").[25]

Although the Wisconsin Supreme Court has twice deferred on this issue, *see id.*, it has cited to the holding of the Supreme Court of California in *Baldwin v. California*, 491 P.2d 1121 (Cal. 1971). In *Baldwin*, the court concluded that a public entity does not retain its statutory immunity from liability for injury caused by the plan or design of a public works project where the plan or design "although approved in advance as being safe, nevertheless in its actual operation becomes dangerous under changed physical conditions." *Id.* at 1122.

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[25] To the extent that this Court feels that it lacks the authority to resolve this issue—and as the Wisconsin Supreme Court has expressly noted that it has never ruled on the issue, Boston Store believes that it is well within this Court's authority to rule on this issue—the default is no immunity. First, immunity is an affirmative defense and as such, does not apply unless MMSD proves its application. Second, it is well settled that under WIS. STAT. § 893.80(4), liability is the rule and immunity the exception. *Lodl*, 253 Wis. 2d 323, ¶22.

Or, in other words, "that the Legislature did not intend that public entities should be permitted to shut their eyes to the operation of a plan or design once it has been transferred from blueprint to blacktop." *Id.* at 1122.

In reaching this conclusion, the court adopted the following reasoning from the Court of Appeals of New York in *Weiss v. Fote*, 167 N.E.2d 63, 66-7 (N.Y. 1960):

> design immunity persists only so long as conditions have not changed. Having approved the plan or design, the governmental entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard.

Baldwin, 491 P.2d at 1127.

In addition, the court reasoned that its conclusion was consistent with its prior decision abrogating common law immunity and default presumption that where there is negligence, the rule is liability and immunity is the exception. *Id.* at 1128.

Finally, the court reasoned that this conclusion was consistent with other case law recognizing that immunity for design and liability for maintenance:

> The purpose of ... immunity is to keep the judicial branch from reexamining the basic planning decisions made by executive

> officials or approved by legislative bodies. However, supervision of the design after it has been executed is essentially operational or ministerial. Consequently, it is consistent to find liability for negligence at that level when, as in the instant case, the actual operation of the planning decision is examined in the light of changed physical conditions.

Id. at 1129 n. 9.

The holding in *Baldwin* is instructive here. Similar to the Supreme Court of California, the Wisconsin Supreme Court abrogated the common law doctrine of municipal immunity, under which municipalities were held immune from tort damages "unless it was deemed to be engaged in a 'proprietary function' or the relation between the governmental entity and the plaintiff was not that of 'governor to governed,'" *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶52, save for acts by a municipality in the "exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions." *Holytz v. City of Milwaukee,* 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962).

WISCONSIN STAT. § 893.80(4) is a legislative codification of the *Holytz* opinion, s*ee MMSD v.Milwaukee*, 277 Wis. 2d 635, ¶53,[26]

[26] Given that MMSD would not have enjoyed immunity for negligent maintenance even under the broad common law doctrine of immunity, *see Christian v. City of New London* , 234 Wis. 123, 129, 290 N.W. 621 (1940) (noting that "[t]he doctrine of the cases dealing with municipally owned waterworks is that the municipality must use proper care in maintaining the means of storage and distribution, or respond in damages to anyone injured"), it would be anomalous to find it immune for such conduct under the narrowed scope of WIS. STAT. §893.80(4).

and as such, it is clear that the legislature intended § 893.80(4) to confer only a narrow scope of immunity, leaving in place a presumption of liability.[27] Also similar to *Baldwin*, Wisconsin recognizes immunity for design but liability for maintenance. As noted in *Baldwin* "supervision of the design after it has been executed is essentially operational or ministerial." 491 P.2d at 1129 n. 9. There is simply nothing in the history of § 893.80(4) to suggest that the legislature intended to grant municipalities free license to "ostrich-like, hide [their] head[s] in the blueprints, blithely ignoring the actual operation of [their] plan[s]." *See id.*, 491 P.2d at 1127. Accordingly, municipal immunity for designing a public works project should not be found to persist when subsequent experience or changed conditions demonstrate an actual and substantial danger to the property interests of another.

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[27] Because municipal immunity is conferred by statute rather than common law, *MMSD v. Milwaukee*, 277 Wis. 2d 635, ¶ 53, the answer to this question is one of statutory construction. "The goal of statutory interpretation is to determine and give effect to the legislature's intent." *State v. Greene*, 2008 WI 100, ¶ 6, __ Wis. 2d __, 756 N.W.2d 411. A construction that "fulfill[s] the intent of a statute or a regulation [is favored] over a construction that defeats its manifest object." *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶ 11, 308 Wis. 2d 103, 746 N.W.2d 762.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT MMSD FAILED TO SUBMIT ANY EVIDENCE AT TRIAL TO SUPPORT ITS STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE.

Having decided for strategic reasons to abandon all of the evidence it had relied on before trial to support its statute of limitations argument, MMSD now appears to regret that decision. But it knew then, as it does now, that it could not defend the case factually by arguing that none of this settlement ever really occurred, and even if it did, it was not caused by MMSD, while simultaneously arguing that Boston Store was on notice that MMSD caused its damages a long time ago. At the post-verdict hearing, the trial court emphasized the stark change from what MMSD argued before trial with respect to the statute of limitations, and the utter lack of evidence in the trial record to support the defense:

> I heard a lot about that [the statute of limitations] at the summary judgment motion and a lot of references to some other folks. Most notably Bud [Zomboracz]. Then we didn't hear about him at trial and I'm not going to get into speculating as to why that it. But it comes back to the question I asked the District at the beginning of this hearing.
>
> I think it's pretty difficult to understand how the Boston Store could be responsible for figuring out or knowing that which, to this very day, the District maintains wasn't happening. Which was that the tunnel in any of its applications; either design, construction, operation, maintenance, whatever you want to call it, was causing damage to the Boston Store's foundation.

> ...
>
> So, by analogy, here, with the evidence that the jury had to rely on, the only relevant evidence I think was from Joe Zdenek, ... who testified that no one ever suggested to him that the tunnel was the cause of Boston Store's settlement problems. Instead, the only testimony I recall regarding other possible causes were pile driving at the Marriott, the building immediately to the east of the Boston Store, and there was a great deal of focus on that by MMSD during Mr. Zdenek's cross-examination.
>
> ....
>
> So that in 1997, I think it is fair to say the the most anyone could claim with respect to Mr. Zdenek is that he didn't even have a hunch that MMSD was the cause of this damage. ...
>
> So, I really am at a loss to find anything in the record to support the jury's verdict.

R.394 pp.26-29, MMSD-App-0835-38.

The burden was on MMSD to prove its own affirmative defense, which it failed to do. As the trial court properly concluded, there was no evidence in the record upon which the jury could base a finding that Boston Store discovered, or in its exercise of reasonable diligence should have discovered, both the fact of the injury *and that the injury was probably caused by MMSD's conduct.* MMSD has not pointed to any evidence of any objective indication of such a casual relation prior to June 1997. In reality, MMSD spent all of its time arguing that none of this settlement really happened, but even if it did, it had nothing to do with MMSD. The date, June 4, 1997, was not

even mentioned by MMSD. The statute of limitations special verdict question should not have been submitted to the jury. *See* R.252 pp. 4-5 (Boston Store objecting to statute of limitations question); R.392 pp. 202-204 (Boston Store moving for directed verdict on statute of limitations defense).

A. MMSD Had The Burden Of Proving Its Own Affirmative Defense; It Was Not Boston Store's Burden To Disprove MMSD's Theory.

MMSD seems to suggest that the onus was on Boston Store to *disprove* MMSD's theory that Boston Store should have discovered its injury and the cause of that injury before June of 1997, instead of on MMSD to *prove* it. *See* MMSD Cross-Appeal Br. at 59-60. But as an affirmative defense, the burden of proving that the statute of limitations expired was MMSD's and MMSD failed to supply the jury with the necessary evidence to meet that burden. *See* WIS. STAT. § 802.03(3).

MMSD needed to prove that Boston Store's claim accrued on or prior to June 4, 1997, and in tort actions, a statute of limitations period "will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of injury *but also that the injury was probably caused by the defendant's*

conduct or product." *Borello v. U.S. Oil Company*, 130 Wis. 2d 397, 411, 388 N.W. 2d 140 (1986) (emphasis added). "Discovery occurs when the plaintiff has information that would constitute the basis for an objective belief as to [the] injury *and* its cause." *Schmidt v. Northern States Power Co.*, 2007 WI 136, ¶ 27, 305 Wis. 2d 538, 742 N.W.2d 294 (emphasis added). A subjective suspicion is not enough. *Jacobs v. Nor-Lake, Inc.*, 217 Wis. 2d 625, 636-37, 579 N.W.2d 254 (Ct. App. 1998). Moreover, an "ordinary person" cannot be expected "to take extraordinary steps" in investigating the cause of his or her injury. *Id.* at 636.

MMSD failed to introduce and has failed to point this Court to any evidence of "objective information" suggesting that Boston Store should have discovered the complex, hydrogeological cause of its damages, and MMSD's responsibility for it, on or before June 4, 1997. What the trial record *does* show is that Boston Store's employee, Joseph Zdenek, was diligently seeking guidance from an engineering firm as to the root cause of the settlement problem in 1997, shortly after Boston Store received a report indicating that there had been settlement in several columns that had been relatively stable before 1990. *See* R.384 pp.103-106, 108-110, A-Ap.858-60. But there is no

evidence indicating that either the engineering firm or anyone else suggested to Mr. Zdenek that MMSD could be a cause of the harm before he left in 1998. *See* R.384 p.139, A-Ap.867. In fact, Mr. Zdenek specifically testified that no one ever told him that the Deep Tunnel could have been a cause of the Boston Store settlement problems while he was employed by Boston Store. *Id.* Instead, the record reflects that, as late as September 2008, the engineering firm believed that pile driving at the nearby Marriott could be a cause of column settlement. R.351 (Trial Ex. 2156); R.384 pp.140-42, A-Ap.867-88.

MMSD attempts to gloss over the absence of any evidence of objective information suggesting that Boston Store should have discovered the cause of its damages before June 1997 by arguing that "[d]uring deliberations, the jury specifically asked to review the 'utmost importance' correspondence requesting the report on foundation causes[,]" and that evidence "credibly supports an inference that [Boston Store] '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.'" MMSD Cross-Appeal Br. at 22, 60. But the jury never specifically asked to

see the "utmost importance" correspondence; instead, the jury sent the following request: "'Please send us the Jaques exhibit, purchase agreement . . . any Zdenek exhibits and the critical structures agreement.'" R.393 p.10. The jury could have asked for these exhibits for any number of reasons, and MMSD's speculation as to the jury's motivation for requesting these exhibits is all that it is—speculation. It does nothing but attempt to sidestep the reality that there is no evidence in the record to support the jury's answer to the statute of limitations question on the special verdict.

B. Evidence Of Boston Store's Awareness Of The Damage Prior To June 1997 Does Not Prove That Boston Store Should Have Been Aware That MMSD Was The Cause.

Evidence that Boston Store was aware of the damage prior to June 1997 does not prove that Boston Store knew or should have known that it was caused by MMSD by June 1997.[28] And while MMSD attempts to tell the story as if Boston Store knew of the

[28] MMSD includes a considerable discussion of repairs made to other buildings in the 1990's in the factual background portion of its response brief. *See* MMSD Resp. Br. at 14-15. While MMSD does not reference this evidence in its argument, it must be made clear that *none* of this evidence was admitted at trial or known to the jury. Indeed, it was MMSD who objected to Boston Store's request to admit evidence of other building damage at trial and, as a result, by party stipulation before trial, all evidence of damage to other buildings was *excluded* at trial. *See* R.211pp.4-5, A-Ap.793-04 (order excluding evidence of damage to other buildings).

settlement for years and did nothing to figure out what was causing it, the record (and portions of MMSD's own brief) belie such a suggestion. Contrary to MMSD's statement that "[t]he evidence showed that [Boston Store was] 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[,]"[29] the evidence introduced at trial actually showed that Boston Store learned of the settlement at issue in 1996, not the early 1990's. *See* R.384 pp.103-106, A-Ap.858-59; R.351 (Trial Ex. 691) (letter from engineering firm reporting settlement, dated June 20, 1996). Moreover, as noted above, the evidence shows that in 1997, Boston Store sought guidance from the engineering firm that was monitoring the columns as to what could be causing the settlement. And, as noted above, MMSD's suggestion that no other causes of settlement at Boston Store were discussed is refuted by evidence MMSD itself admitted at trial. *See* R.384 pp.140-42, A-Ap.867-68 (discussion of pile driving as potential cause); R.351 (Trial Ex. 2156).

[29] MMSD cites Boston Store's expert's testimony concerning his pre-trial analysis of the column monitoring records for the proposition that Boston Store was aware of accelerating column settlement in the early 1990's. There is nothing in the cited testimony to support such a proposition.

Moreover, MMSD's attempt to distinguish *Kolpin v. Pioneer Power & Light Co.* 162 Wis. 2d 1, 469 N.W.2d 595 (1991), does not help its cause. In both *Kolpin* and *Gumz v. Northern States Power Co.*, 2007 WI 135, ¶¶ 7, 41, 305 Wis. 2d 263, 742 N.W.2d 271, there was evidence that the plaintiffs either had "hunches" or were told that stray voltage might be the cause of their problems well outside the statute of limitations period, yet the court in each case still concluded that the plaintiffs were exercising reasonable diligence and could not have objectively known or discovered the actual cause and identity of the defendant more than six years before suit was filed. *See Kolpin*, 162 Wis. 2d at 26-27; *Gumz*, 305 Wis. 2d 263, ¶¶ 51-55. While here, as in *Kolpin* and *Gumz*, there was evidence of Boston Store seeking a probable cause of its foundation trouble, unlike in *Kolpin* and *Gumz*, there was no evidence of any "hunch" or suggestion made to Boston Store that dewatering caused by the Deep Tunnel or MMSD might be the cause prior to June 1997. *See Kolpin*, 162 Wis. 2d at 12, 26; *Gumz*, 305 Wis. 2d 263, ¶¶ 7, 41. And contrary to MMSD's suggestions in its attempt to distinguish *Kolpin*, the only evidence in

the record suggests that Boston Store *was* seeking to discover the cause of its foundation trouble.[30]

C. The Trial Court Was Not Clearly Wrong In Changing The Jury's Answer.

When including the statute of limitations question on the special verdict, the trial court thought the jury "would do . . . the right thing, which was to say, there just isn't any evidence here that Boston Store knew or should have known with reasonable diligence prior to June 4, 1997 that the tunnel was what was causing them problems." R.394 p.26, MMSD-App-0838. The trial court keenly noted that "it's pretty difficult to understand how the Boston Store could be responsible for figuring out or knowing that which, to this very day, [MMSD] maintains wasn't happening[,]" *id.*, before concluding, "I really am at a loss to find anything in the record to support the jury's

[30] While MMSD appears to base much of its argument on the idea of whether Boston Store exercised reasonable diligence, the issue of Boston Store's exercise of reasonable diligence was never presented to the jury, and as such, the jury answered a question that was not based on the proper legal standard. *See* R.403 p.2, A-Ap.586. Boston Store moved for a directed verdict with respect to the statute of limitations question and objected to the inclusion of the question on the special verdict. *See* R.392 pp.202-04, A-Ap.1096; R.252 pp.4-5, A-Ap.579-80. But Boston Store also objected to a statute of limitations question on the ground that the inquiry must address the exercise of "reasonable diligence." R.252 p.5, A-Ap.580. Should this Court reverse the trial court on this issue, notwithstanding the fact that there is no credible evidence in the record to support the jury's answer, this Court must also grant Boston Store a new trial on the negligence claim, because the question asked of the jury did not accurately present the proper legal standard.

verdict[,]" and changing the answer to the statute of limitations question from "yes" to "no." R.394, p.29. The trial court was not clearly wrong in doing so.

MMSD's emphasis on Boston Store's alleged failure to present evidence "that they explored any potential cause between the Zdenek-GAS correspondence and the time they filed suit alleging the Tunnel caused the damage" is misplaced. *See* MMSD Cross-Appeal Br. at 60. Failure to bring a claim within the applicable statute of limitations is an affirmative defense; it was MMSD's burden to put sufficient evidence in the record for the jury to conclude that Boston Store discovered or should have discovered not only its injury, but also that the injury was probably caused by MMSD's conduct by June 1997. And as delineated above, the evidence in the record shows that Boston Store was exercising reasonable diligence in trying to ascertain the cause of its damages and the correct responsible party. Indeed, evidence elicited by MMSD shows that other causes were suggested well into the statutory period. Given the scientific complexity of connecting tunnel infiltration to the foundation damage, this was not a simple matter of common sense for Boston Store. Unlike MMSD, which knew of the danger its tunnel posed to downtown buildings

from its commissioned studies, Boston Store did not have such information concerning MMSD's conduct, nor did MMSD even disclose the risk of harm to Boston Store. There was no evidence in the record to enable the jury to determine that Boston Store discovered or should have discovered by June 4, 1997 that MMSD caused the damage to the foundation. MMSD failed to meet its burden. The trial court properly recognized the failure and was not "clearly wrong" when it changed the jury's answer.

III. THE TRIAL COURT CORRECTLY CONCLUDED THAT BOSTON STORE'S NOTICE OF CLAIM SATISFIES THE NOTICE OF CLAIM REQUIREMENTS OF WIS. STAT. § 893.80(1).

A. MMSD Waived The Notice Of Claim Defense.

The case law is clear that a party may not raise a notice of claim defense under WIS. STAT. § 893.80 after the parties have undertaken substantial pretrial preparation:

> The timeliness of [raising a notice of claim defense after submitting to jurisdiction] . . . has previously been criticized by this court and the Wisconsin Supreme Court as "unseemly" . . . [It is] not only violative of "fundamental fairness," but waste[s] the resources of the parties and of the court by requiring all to continue preparing the matter for a trial when the party eventually moving for dismissal knows that the matter may warrant disposition short of a full-blown trial, and yet fails to alert the court until the proverbial eleventh hour. We continue to condemn such practices.

Strong v. Brushafer, 185 Wis. 2d 812, 824 n.8, 519 N.W.2d 668 (Ct. App. 1994) (citations and quotation marks omitted).

MMSD litigated this case for almost a year and a half before filing a motion to dismiss based on the alleged defect in the Notice of Claim.[31] *See* R.1; R.34; R.35. During that time, MMSD filed an Answer, filed an Amended Answer, made several court appearances, filed for and obtained a substitution of the presiding judge, and overall caused the parties and the court system to expend substantial resources to the substantive facts and law of the case. *See* R.8, R.10, R.20, R.26, R.28, R.43 p.3. MMSD not only appeared before the trial court on several occasions, it even moved the court to permit it additional time to prepare its substantive expert reports. R.43 p.3. It was only then that MMSD claimed the case should not be before the court. R.34.

By its conduct, MMSD waived the notice of claim defense. *See, e.g., Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 56, 357 N.W.2d 548 (1984) (stating that a motion to dismiss based upon section

[31] The Complaint was filed in June of 2003, and it was not until litigating the case through October 2004 that MMSD filed its motion to dismiss raising the Notice of Claim issue. *See* R.1; R.34; R.35.

893.80 is "unseemly" after the parties have expended large sums of money in litigation). Regarding MMSD's litigation of the case and late claim to a defect in the notice of claim, the trial court stated:

> I think that the defendants in a situation like this should notify the court at the scheduling conference [that] we have an issue here that we think potentially knocks this case out right now . . . . so we can verify that either we have a serious challenge to the competency of the court or jurisdiction of the court . . . . but let's get that out of the way before we go down the road of having a regular scheduling order and all of that.

R.369 p.15, MMSDApp-0464; *cf.* WIS. STAT. § 802.06(2) ("a motion making [the defense of lack of capacity to sue or be sued] *shall be made before pleading*." (emphasis added)).[32]

As this Court has admonished, litigating a case and expending private and public resources in such a situation "not only violates the concept of fundamental fairness, it wastes the resources of the parties and the trial court. Requiring all participants to prepare the stage for trial while waiting in the wings with a potentially dispositive motion need not gain judicial acquiescence." *Strong*, 185 Wis. 2d at 825 (internal citations omitted). The pursuit of the notice of claim issue at

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[32] When MMSD first filed a petition for leave to appeal in this case, it characterized the alleged defect in the Notice of Claim as creating a lack of capacity to sue. *See Bostco LLC v. Milwaukee Metropolitan Sewerage District*, Appeal No. 2005AP000134-LV.

such a late date is both "abusive and wasteful." *Id.* By its decision to litigate the case for nearly a year and a half, MMSD waived any objection based on any alleged defect in the notice of claim.

B. The Trial Court Correctly Concluded That Boston Store Substantially Complied With The Notice Of Claim Requirements.

The overall purpose of the notice of claim statute is to provide the municipality with "the information necessary to decide whether to settle the claim" without litigation. *DNR v. City of Waukesha*, 184 Wis. 2d 178, 198, 515 N.W.2d 888 (1994) (citations omitted), *abrogated on other grounds in State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 594, 547 N.W.2d 587 (1996). Two principles are used to measure fulfillment of this purpose. *Thorp v. Town of Lebanon,* 2000 WI 60, ¶ 28, 235 Wis. 2d 610, 612 N.W.2d 59. First, the notice must provide enough information to apprise a governmental entity of the budget it will need to set aside in case of litigation or settlement. *Id.* Second, the court should "construe [the notice] so as to preserve bona fide claims." *Id.*

To that end, "only substantial, and not strict, compliance with notice statutes is required." *City of Waukesha*, 184 Wis. 2d at 198. The notice of claim must substantially comply with the following four

requirements: "1) state a claimant's address, 2) include an itemized statement of the relief sought, 3) be presented to the appropriate clerk, and 4) be disallowed by the governmental entity." *Thorp*, 235 Wis. 2d 610, ¶ 28.

On July 19, 2001, MMSD was served with the notice of claim, stating that the downtown Boston Store building located at 331 West Wisconsin Avenue in Milwaukee had been damaged by MMSD's nearby Deep Tunnel System. R.46 pp.5-7. MMSD was then served with the itemized statement of relief on June 22, 2002. R.46 pp.9-11.

To begin, MMSD had actual notice of the circumstances giving rise to the claim. The record is replete with evidence that MMSD had actual knowledge that it was damaging the foundations of buildings, including the Boston Store, along West Wisconsin Avenue. *See, e.g.* R.46 pp.16-55. Regardless, there is no dispute that the notice and the itemized statement of relief together put MMSD on notice of the claim asserted by the owners of the downtown Boston Store. MMSD was provided with the address (331 West Wisconsin Avenue, Milwaukee), was provided with an itemized statement of relief, and was provided with the address of the counsel of record. The trial court found:

> The subject of the claim, that is the property damage that they were seeking recompense for is the same property that the plaintiffs in this lawsuit are seeking compensation for. That is, damage to the same piece of property, alleging that your clients damaged that property. I don't know if I said it clearer that time.

R.369 p.4

MMSD was not only apprised of the address of the claimants (the current and former owners of the Boston Store at 331 West Wisconsin Avenue in Milwaukee), but more importantly the notice provided MMSD with the address of the claimants' attorneys, through whom any settlement could be negotiated and made. Because the underlying purpose of the notice of claim is to provide the municipality the opportunity to negotiate a settlement, "[t]he attorney's address is considered the equivalent of the claimant's address for the purpose of the notice of claim statute." *City of Waukesha*, 184 Wis. 2d at 198. Given the opportunity to explain how the name and address of the attorney in the notice of claim was insufficient, coupled with the fact that both the notice and the lawsuit alleged continuing damage to the foundation of the downtown Boston Store Building, MMSD's attorney argued that he did not know who to call because the Plaintiffs' firm "is a large firm and they have lots of clients." R.369 p.2.

There is no question that the notice "provide[d] enough information to apprise [MMSD] of the budget it [would] need to set aside in case of litigation or settlement." *Thorp,* 235 Wis. 2d 610, ¶ 28. MMSD has always been aware of the claim for damages by the owners of the Boston Store, and has always been aware of the identity and address of their attorneys. There is no question that the trial court properly construed the notice "'so as to preserve [Boston Store's] bona fide claims.'" *Id.* (citation omitted). This is clearly a case of substantial compliance, justifying the trial court's construction of the notice in a way that preserved the Boston Store's bona fide claims.

C. The Notice of Claim Statute Does Not Apply to Boston Store's Claim under WIS. STAT. 101.111.

Boston Store's claim under WIS. STAT. § 101.111 is not subject to any notice of claim requirement, because the specific procedure set forth in § 101.111 displaces the generalized procedure set forth in section 893.80. *See, e.g., Gillen v. City of Neenah*, 219 Wis. 2d 806, 822-23, 580 N.W.2d 628 (1998); *Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶ 28, 265 Wis. 2d 422, 665 N.W.2d 379. Because MMSD itself had a statutorily imposed duty under § 101.111 to provide written notice to adjoining property owners that its

excavation could harm the foundations of their respective buildings, *see* WIS. STAT. § 101.111(4), the notice of claim statute is in conflict and is inapplicable. *Gillen*, 219 Wis. 2d at 822. Additionally, because § 101.111 provides for immediate injunctive relief for MMSD's failure to comply, *see* WIS. STAT. § 101.111(6), the waiting period that would be imported by the notice of claim statute is in conflict and is inapplicable. *Nesbitt Farms,* 265 Wis. 2d 422, ¶ 28 (refusing to "layer" the requirements of § 893.80(1) onto specific statutory relief). Regardless of the court's analysis regarding the notice of claim defense generally, Boston Store's claim under § 101.111 is not subject to any notice of claim requirement.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN GRANTING BOSTON STORE'S REQUEST FOR EQUITABLE RELIEF.

The decision whether to grant injunctive is vested to the discretion of the trial court. *Allen v. Wisconsin Pub. Serv. Corp.*, 2005 WI App 40, ¶ 29, 279 Wis. 2d 488, 694 N.W.2d 420. A trial court's decision to grant injunctive relief will be affirmed so long as "the court applied the correct law to the facts of record and used a rational process to reach a reasonable result." *D.L. Anderson's*

Lakeside Leisure Co., Inc. v. Anderson, 2007 WI App 269, ¶ 51, 306 Wis. 2d 470, 744 N.W.2d 300.

A. The Trial Court Did Not Abuse its Discretion in Finding that Boston Store Had No Adequate Remedy at Law and a Sufficient Likelihood of Irreparable Harm.

There are two elements a court must find in order to grant injunctive relief: "(1) the movant has no adequate remedy at law; and (2) the movant will suffer irreparable harm if the injunction is not granted." *Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 471, 588 N.W.2d 278 (Ct. App. 1998). In this case, the trial court found both of these elements to be satisfied.

Because the jury concluded that Boston Store would likely suffer $6,000,000 in future damage and because Boston Store would, at most, be compensated for less than $1/40^{th}$ of that amount, the trial court found Boston Store's remedy at law to be inadequate. R.399 p.10, MMSD-App-0889; *see also Allen*, 279 Wis. 2d 488, ¶¶ 30-32 (an award of some amount of money is not enough; the award must be adequate).

The trial court also concluded that there was a sufficient likelihood that MMSD's future conduct would cause Boston Store

irreparable harm. R.399 pp.10-12, MMSDApp-0889-91 (citing *Allen*, 279 Wis. 2d 488, ¶ 30). MMSD tacitly conceded that it had no intention of doing anything to prevent or limit the groundwater infiltration into the Deep Tunnel that had caused and was expected to continue to cause significant damage to the Boston Store building. "Irreparable harm" does not mean harm that cannot be fixed, but instead means harm that is not adequately compensable in damages. *Allen*, 279 Wis. 2d 488, ¶ 30. The approximated cost of future repairs is $9,000,000 while compensable damages were limited to $100,000. R.383 pp.238-42, A-Ap.825-26; R.351 (Trial Ex. 1553-018), A-Ap.1336.

On appeal, MMSD does not challenge that the court abused its discretion in making the two findings prerequisite to an order for injunctive relief. Instead, MMSD relies on immunity and procedural based challenges. None of MMSD's arguments merit reversal of the trial court's conclusions.

B. The Trial Court's Injunction Ruling is Not Barred by WIS. STAT. § 893.80.

First, MMSD argues that the trial court's order granting Boston Store's motion for injunctive relief is barred by various subsections of

WIS. STAT. § 893.80. But these arguments do not even make it out of the gate as they themselves are barred. WISCONSIN STAT. § 802.06(7) provides in relevant part as follows:

> CONSOLIDATION OF DEFENSES IN MOTIONS . . . . If a party makes a motion under this section but omits therefrom any defense or objection then available to the party which this section permits to be raised by motion, the party *shall not thereafter make a motion based on the defense or objection so omitted.*

(Emphasis added).

There are limited exceptions to this rule, but immunity is not among them. *See* WIS. STAT. §§ 802.06(8)(b)-(d); *cf.* WIS. STAT. § 802.02(3) (setting forth "immunity" as an affirmative defense). A party does not "retain[] the option of asserting the defense at his leisure, to the detriment of both the plaintiff and the courts." *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 734 (7th Cir. 1991) (finding waiver under Fed. R. Civ. P. 12 based upon a party's continuing participation in the litigation); *see also Albany Ins. Co. v. Almancenadora Somex S.A.*, 5 F.3d 907, 909-910 (5th Cir. 1993) (holding that a party who files a motion to dismiss waives specified defenses not included in the first motion); *American Ass'n. of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106-1107 (9th Cir. 2000); *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994,

996-97 (1st Cir. 1983) (defendant had caused "the very delay which Rule 12 was designed to prevent" where defendant filed an appearance, attended numerous depositions and four years later, presented defense).

MMSD's claim that it is immune or exempt from injunction is belied by the actions MMSD has taken in this action. MMSD filed a motion to dismiss in this case in October 2004 but did not include any defense based on discretionary immunity in that motion, and did not include any argument that § 893.80(5) barred Boston Store's claim for equitable relief. *See* R.35. Irrespective of the merits of MMSD's argument that § 893.80 exempts it from injunction, the law required MMSD to include those defenses in its motion to dismiss years ago. MMSD failed to do so and offers no explanation why.

Even were the Court to consider MMSD's arguments related to § 893.80, each one fails on the merits for the reasons explained below.

1. WISCONSIN STAT. § 893.80(4).

First, MMSD argues that injunctive relief is barred under WIS. STAT. § 893.80. Specifically, MMSD contends that the trial court's equitable power to order a portion of the tunnel to be lined is barred by § 893.80(4), which provides that "no suit may be brought against

any [municipal entity] for acts done in the exercise of legislative, quasi–legislative, judicial or quasi–judicial functions." For the reasons set forth more fully herein, this suit does not challenge actions MMSD took in the exercise of "exercise of legislative, quasi–legislative, judicial or quasi–judicial functions."

Moreover, according to MMSD's own documents, installing concrete lining as needed and not called for in the original construction plans *is* part of tunnel maintenance. R.381 pp.145-48; ("[m]aintenance may include removal of solid deposits, removal of fallen rock, repair of deteriorated linings and placement of concrete lining in deteriorated, unlined areas."): R.351 (Trial Ex. 206). MMSD does not and cannot dispute that there is no immunity under § 893.80(4) for tunnel maintenance. *Menick*, 200 Wis. 2d at 745 ("there is no discretion as to maintaining the [sewerage] system so as not to cause injury to residents").

Finally and most fundamentally, nothing in the plain language of § 893.80(4) can be read as a limit on a court's equitable power to fashion equitable relief so as to prevent future damage to a movant's property. By its clear terms, § 893.80(4) is a limitation on the conduct for which a municipality may be held liable, not on the form

of remedy. As MMSD itself stresses, this section limits "suits" not remedies.

2. WISCONSIN STAT. §§ 893.80(3) and (5).

Next, MMSD argues that the trial court's order, which requires MMSD to line a portion of its Deep Tunnel, violates WIS. STAT. § 893.80(3) because it may cost MMSD $10,000,000 to comply with that order. Section 893.80(3) provides in relevant part as follows:

> Except as provided in this subsection, the amount recoverable by any person for any damages, injuries or death in any action founded on tort against any [municipal entity] shall not exceed $50,000. ... No punitive damages may be allowed or recoverable in any such action under this subsection.

Again, the unambiguous language of § 893.80(3) makes plain that it limits only "the amount recoverable by any person." The amount it may cost MMSD to comply with the trial court's order is not an "amount recoverable by any person." *Id.*

Even were the language of § 893.80(3) less clear, MMSD's proposed construction that the $50,000 should be read to refer to the cost a municipality may spend is not reasonable. If the legislature truly meant that no lawsuit should burden a municipality with more than $50,000 in costs to it, plaintiffs would rarely collect anything; a municipality can easily incur $50,000 in administrative costs and

attorney fees alone. To the extent that MMSD believes that the policy for the cap cannot be satisfied unless it limits total costs of a lawsuit to a municipal entity to $50,000, it must address that issue with the state legislature. As written, § 893.80(3) does not provide such a limitation.

Finally, as noted above, the last sentence of § 893.80(3) specifies that punitive damages are not recoverable against a municipal entity. Clearly, the legislature knew how to bar specific types of remedies; it did not do so with respect to injunctive remedies.

MMSD's reliance on the exclusivity provision of WIS. STAT. § 893.80(5) does not improve its argument. Section 893.80(5) provides in relevant part as follows:

> Except as provided in this subsection, the provisions and limitations of this section shall be exclusive and shall apply to all claims against a [municipal entity].

Id. The parties disagree vigorously as to whether § 893.80(3) ought to apply in this case at all and the reasons for each side's positions need not be set forth again here. What is not in dispute is that there is no other damage cap other than § 893.80(5) that would potentially apply. Accordingly, § 893.80(5) is not at issue.

3. WISCONSIN STAT. § 893.80(1).

MMSD contends that the notice of claim is defective because it does not specify an intention to seek injunctive relief. Boston Store is not now and never has sought an injunction in addition to adequate monetary relief but always as an alternative. The notice of claim itemized damages totaling $10.8 million dollars and specified that the itemization "does not constitute an election of remedy and shall not preclude or prohibit Claimants from taking any other legal action or bringing any other legal claims it ... deems necessary to seek redress from matters related to the program construction activities of MMSD." R.46 pp.6-7, 10, MMSD-App-0089-90,0093.

Although conceding that strict compliance is not required and instead, that the standard is "substantial compliance," *Thorp*, 235 Wis. 2d 610, ¶ 28, MMSD nonetheless argues that substantial compliance is not satisfied because the notice of claim did not state that Boston Store would seek an order for a "new public works project." *See* MMSD Cross-appeal Br. at 75. As an initial matter, performing repair and maintenance work on the Deep Tunnel hardly qualifies as a "new public works project"; the Deep Tunnel has been in existence since the early 1990s.

More to the point, MMSD's argument relies on a construction of the phrase "substantial compliance" that is inconsistent with the past holdings of the Wisconsin Supreme Court. In determining whether a notice of claim meets the "substantial compliance" standard, the court applies a two-part test: First, "[t]he notice must provide enough information to apprise a governmental entity of the budget it will need to set aside in case of litigation or settlement." *Thorp*, 235 Wis. 2d 610, ¶ 28. The damage in the notice totals $10.8 million, which approximates the estimated cost of the injunctive relief sought and the $100,000 actually awarded. *See* R.46 p.10, MMSD-App-0093; R.382 pp.163-64, A-Ap.757-58; R.3005 p.3, A-Ap.710. Second, "[t]he notice should also be construed so as to preserve bona fide claims." *Throp*, 235 Wis. 2d 610, ¶ 28. Holding the notice invalid because it fails to use an inaccurate description, such as "new public works project" is not a construction that preserves bona fide claims.

C. The Trial Court's Injunction Ruling was Procedurally Proper.

MMSD next attempts to avoid the trial court's injunction order by arguing that Boston Store's motion and the trial court's order were

procedurally improper. For the reasons set forth below, none of MMSD's three argument is availing.

1. WISCONSIN STAT. § 805.16.

MMSD first contends that Boston Store's motion for injunctive relief is barred under WIS. STAT. § 805.16, which sets the deadline for parties to file post-verdict motions. This argument necessarily fails because Boston Store's motion for injunctive relief is not a post-verdict motion subject to the filing requirements set forth in § 805.16 and in fact, did not ripen until such motions had been decided. "[Section] 805.16 contemplates trial-related motions – new trial, evidentiary considerations, etc." *Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 230, 533 N.W.2d 746, 757 (1995). It does not apply to verdict-related motions. *Id.* (petition for attorney fees not subject to § 805.16 because it "is not trial-related; rather, it is verdict-related as it is predicated on a party's prevailing party status").

The motion for injunctive relief was not predicated on any ruling made during trial but on the trial court's ruling with regard to the damage cap. *See generally* R.280. At the time post-verdict motions were due, there was no basis for asserting that Boston Store had no adequate remedy at law because the damage cap had not yet

been applied. Had Boston Store filed its motion for injunctive relief with its post-verdict motions, MMSD would no doubt be arguing that the trial court's injunction order must be reversed because Boston Store's motion was premature. Noteably, in addition to praying for injunctive relief in its complaint and seeking and producing information related to injunctive relief throughout discovery, Boston Store specifically noted in its post-verdict submissions and at the post-verdict hearing that it would seek injunctive relief if the damage cap were applied. R.257 p.4 n.1, A-Ap.620; R.394 p.44, MMSDApp-0853.

Particularly troubling about MMSD's argument that Boston Store erred in waiting until after all trial issues were resolved is that MMSD explicitly agreed to this arrangement. At a hearing on July 15, 2005, the trial court asked MMSD if it had "any problem with us sort of putting off the issue of the scope of an equitable relief until after we have a trial on the underlying claims?" and counsel for MMSD responded, "I don't, your Honor." R.372 pp.27-28. Having agreed to leave the issue injunctive relief until after resolution of the underlying claims, MMSD cannot now complain that Boston Store delayed improperly in doing so.

When a motion, such as this, does not seek to change a verdict answer or obtain a new trial, it is not a post-trial motion subject to § 805.16. *See Gorton*, 194 Wis. 2d at 203. Boston Store's motion did not become ripe until the trial court decided the parties' post-verdict motions and remitted Boston Store's $ 6,000,000 damage award to $100,000. Accordingly, the time limits set forth in § 805.16 are inapplicable and Boston Store's motion was not late.

2. Judge Kremers' October 25, 2006 Order was Not Final.

Next, MMSD argues that Judge DiMotto's injunction order was foreclosed because of Judge Kremers' October 25, 2006 order. MMSD contends that the October 25, 2006 order was final and therefore, determined all of the rights of the parties in the case.

A judgment or order is final only if it "disposes of the entire matter in litigation." WIS. STAT. § 808.03(1). As used in this section, the phrase, "disposes of the entire matter in litigation" turns on: "(1) whether the document is final in the sense of substantive law in that it disposes of all of the claims brought in the litigation as to one or more of the parties; and (2) whether the document is final in the sense that it is the last document that the trial court intended to issue in the

litigation." *Harder v. Pfitzinger*, 2004 WI 102, ¶ 12, 274 Wis. 2d 324, 682 N.W.2d 398 (citation omitted). True finality cannot be manufactured, *Cascade Mountain. Inc. v. Capitol Indemnity Corp.*, 212 Wis. 2d 265, 270, 569 N.W.2d 45 (Ct. App. 1997), and how an order is titled is not dispositive of the issue of finality. *Harder*, 274 Wis. 2d 324, ¶ 13; *Wamboldt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶ 29, 299 Wis. 2d 723, 728 N.W.2d 670.

The October 25, 2006 order satisfies neither of the two factors used to determine whether an order is final. First, it did not dispose of all of the claims brought in the litigation. Boston Store's motion for injunctive relief had been pending for over a month at the time the October 25, 2006 was signed. *See* R.280, MMSDApp-0253-59; R.305, A-Ap.708-10. The order also was clearly not the last document that the trial court intended to issue in the litigation. Neither the parties nor the court anticipated that the order would be dispositive of the Boston Store's motion for injunctive relief; to the contrary, it was understood at that point that the motion for injunctive relief would be handled by Judge DiMotto and not Judge Kremers pursuant to regular judicial rotations. *See* R.397 pp.3-4, 26 (Judge DiMotto notifying parties that she was not yet ready to rule on Boston

Store's injunctive relief and that Judge Kremers had signed the order for judgment in order to preserve his post trial motion rulings); *see also* R.315 (Order Modifying Post-Verdict Order for Judgment, A-Ap. 711-12. MMSD has not pointed to any statement by Judge Kremers indicating that he intended that his October 25, 2006 order would operate to dismiss or deny Boston Store's motion as no such statement exists.

As it is clear that the October 25, 2006 was not final in the legal sense, it does not invalidate the trial court's ruling granting Boston Store's motion for injunctive relief.

3. Boston Store's January 19, 2007 Appeal does not Require Reversal.

MMSD makes a last ditch challenge to the trial court's injunction order, arguing that the order was barred by Boston Store's precautionary January 19, 2007 notice of appeal. As Boston Store made abundantly clear in the motion accompanying that notice of appeal, Boston Store did not believe that the October 25, 2006 order was final such that an appeal could be taken from it but nonetheless, filed its notice to preserve its right to an appeal in the event that any court might find that the October order was in fact final. *See*

Appellant-Cross-Respondent's Motion for Determination of Finality, or in the Alternative for Remand of the Trial Court for the Limited Purpose of Deciding the Pending Motion for Injunctive Relief (Jan. 19, 2007).

In advancing this argument, MMSD contends that the trial court lost jurisdiction when the record was transferred to this Court. Adopting the deductively unsound reasoning that because the Wisconsin Statutes require that a record include a docket sheet, *see* WIS. STAT. § 59.40(2)(b), that the record is the docket sheet, MMSD identifies the date the "record" (i.e. the docket sheet) was transferred as January 25, 2007. MMSD is mistaken. The record is not the docket sheet alone and the record was not transferred until, according to this Court's own records, September 10, 2007.

D. MMSD Has Had Ample Opportunity to be Heard.

Citing *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, 262 Wis. 2d 264, 664 N.W.2d 55, MMSD argues that the trial court abused its discretion by failing to consider evidence relevant to the injunction. The primary problem with MMSD's argument is that MMSD failed to present the trial court with the evidence that MMSD argues the trial court failed to "hear."

MMSD had numerous opportunities to present evidence related to any alleged difficulty with tunnel lining both at trial and during the injunction proceedings before Judge DiMotto. First, MMSD had both opportunity and motive at trial to rebut Boston Store's evidence that the harm at issue reasonably could be abated with one mile of tunnel lining. MMSD complains that injunctive relief was not at issue at trial and while that is true, the issue of abatement was relevant to both nuisance and injunctive relief alike. *See* R.403 p.3, A-Ap.587 (jury asked whether MMSD could abate interference by reasonable means at a reasonable cost).

But MMSD's ability to present evidence related to the propriety of injunctive relief was not limited to the trial, as MMSD would have this Court believe. MMSD had an opportunity to present evidence on this issue in responding to Boston Store's motion for injunctive relief, but MMSD did not take that opportunity to do so, instead favoring arguments that the motion was improper legally. *See generally* R.288; MMSDApp-0260-67. After a telephonic hearing held after briefing should have been completed, MMSD filed a letter with the trial court, arguing that an injunction would be improper and enclosing two affidavits in support, which were accepted by the trial

court. *See generally* R.293; R.294, MMSDApp-0447-49; R.295. The trial court also was prepared to consider a submission that MMSD filed without permission and outside the normal course of briefing, but MMSD voluntarily withdrew its submission for risk of sanction. *See* R.397 pp.27-37; R.303; R.304.

Neither *Hoffman*, nor any of the other cases MMSD cites, stands for the proposition that the trial court errs by not "hearing evidence" that is not presented to it. Nor do any of the cases cited suggest that a trial court is obligated to give a party a fifth opportunity to present evidence simply because it has refrained from doing so in response to the first four. To the extent that there was evidence bearing on the propriety of the trial judge's order that she did not adopt, fault lies not with the judge but with MMSD.

CONCLUSION

For the foregoing reasons, Boston Store respectfully requests that this Court affirm the trial court's conclusions that MMSD is not immune from liability to Boston Store under WIS. STAT. § 893.80(4), that MMSD failed to present any evidence to prove its statute of limitations affirmative defense and that Boston Store's notice of claim is legally sufficient to meet the statutory requirement set forth in WIS.

STAT. § 893.80(1) and find that the trial court did not abuse its discretion in ordering equitable relief.

Dated this 24th day of November, 2008.

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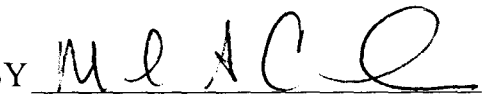
BY 
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COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal No. 2007AP002210221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-Cross-
Appellant.

FORM AND LENGTH CERTIFICATION

I hereby certify this brief conforms to the rules contained in section 809.19(8)(b) of the Wisconsin Statutes for a brief and appendix produced with a proportional serif font, and pursuant to order of this Court dated July 8, 2008, this brief exceeds the length limitations set forth in WIS. STAT. Rule 809(8)(c) by 50%. The length of this brief is 12, 501 words.

Dated this 24th day of November, 2008.

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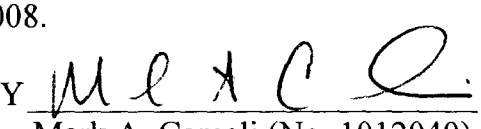
BY 

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