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

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

vs.

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

Appeal from the Circuit Court for
Milwaukee County
No. 03-CV-005040
Hon. Jeffrey A. Kremers
(presiding through judgment on jury verdict) and
Hon. Jean W. DiMotto
(presiding after judgment on jury verdict)

REPLY BRIEF OF CROSS-APPELLANT MILWAUKEE METROPOLITAN SEWERAGE DISTRICT

G. Michael Halfenger
(WBN 1024062)
William J. Katt
(WBN 1066365)
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400
(414) 297-4900 (facsimile)

Kevin J. Lyons
(WBN 1013826)
Matthew R. McClean
(WBN 1041470)
DAVIS & KUELTHAU, s.c.
111 E. Kilbourn Avenue
Suite 1400
Milwaukee, WI 53202
(414) 276-0200
(414) 278-3602 (facsimile)

Michael J. McCabe
(WBN 1011060)
James H. Petersen
(WBN 1014389)
MILWAUKEE
METROPOLITAN
SEWERAGE DISTRICT
260 West Seeboth Street
Milwaukee, WI 53204
(414) 225-2102
(414) 225-0167 (facsimile)

Attorneys for Defendant-
Respondent-Cross-Appellant
Milwaukee Metropolitan
Sewerage District

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INTRODUCTION

Section 893.80 bars Owners' claims. First, Owners' injury evidence depends solely on water infiltration into the Tunnel. Even if this infiltration resulted from acts of "operation or maintenance"—rather than from immune acts of design, implementation, and continued existence of a public works project—Owners cannot avoid §893.80(4)'s immunity bar: Owners have not shown, and cannot show, that their harm results from a negligently performed ministerial act of operation or maintenance.

Second, Owners do not dispute that they failed to serve the notice of claim and itemization of relief required by §893.80(1). Owners' substantial compliance argument, which relies on notices given by others who falsely claimed building ownership, is meritless. Controlling precedent and §893.80(1)'s purpose of allowing municipalities to investigate, settle, or deny claims before litigation demands notice by the actual claimant.

Owners' claims are also barred by the statute of limitations. The jury found that Owners "should have known" their claims arose outside the limitations period—a finding well supported by

Owners' earlier knowledge of column movement and failure to pursue other potential causes before filing suit.

Finally, the award of post-judgment injunctive relief must be vacated. The relief is barred by §893.80, and the court lacked competency, failed to afford the District a hearing, and did not consider all relevant equitable factors.

ARGUMENT

I. Section 893.80(4) Immunity Bars Owners' Claims.

Section 893.80(4) immunizes the District from liability based on discretionary acts, including all "decisions regarding the adoption, design, and implementation of public works." *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶60, 277 Wis. 2d 635, 691 N.W.2d 658 ("*MMSD*"). All of Owners' evidence is of this immune type: their experts testified that the construction, placement, and continued existence of an unlined Tunnel damaged the Boston Store's foundational piles. *See* MMSD-Cross-Br.-16-20.

Owners make three arguments: (1) the District is not immune for acts of operation and maintenance; (2) the Court should read into

§893.80(4) an exception for acts that knowingly cause harm; and (3) Owners' §101.111 claim is not subject to §893.80(4). Each argument fails.

A. Owners established no ministerial duty of operation or maintenance.

Owners, like the circuit court, identify no ministerial duty. That failure establishes immunity: "a municipality is liable for its negligent acts *only if* those acts are performed pursuant to a ministerial duty." *MMSD*, 2005 WI 8, ¶59 n.17 (emphasis added); *see also Allstate Ins. Co. v. Metro. Sewerage Comm'n*, 80 Wis. 2d 10, 17-18, 258 N.W.2d 148, 151 (1977). While Owners insist on labeling the Tunnel's unlined existence "operation or maintenance," that label does not aid them. They presented no evidence that the District negligently performed (or failed to perform) a ministerial act of operation or maintenance.

"'[M]inisterial' acts," our Supreme Court has emphasized, "involve[] a duty that is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." *MMSD*, 2005 WI 8, ¶54. *See also Lodl v.*

Progressive N. Ins. Co., 2002 WI 71, ¶21, 253 Wis. 2d 323, 646 N.W.2d 314. Unable to demonstrate any act of this type, Owners contend that "[i]t 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." Owners-Resp.-Br.-5. They are wrong.

In considering whether the City had immunity for its negligent failure to repair a broken water main, *MMSD* emphasized that immunity depended on whether "the City was under a ministerial duty to repair." *MMSD*, 2005 WI 8, ¶61 (internal quotation marks omitted). Only ministerial acts of "operation and maintenance" escape immunity. *Id.*

Owners' contrary suggestion misreads paragraph 56 of *MMSD*. That paragraph describes *Lange v. Town of Norway*, 77 Wis. 2d 313, 253 N.W.2d 240 (1977), a case in which a farmer alleged negligent operation and maintenance of a dam after his field flooded. The Court ruled that, although the town was immune from allegations based on the dam's capacity and structure, a claim might be stated for "failure to maintain as to a

condition of disrepair or defect or a failure to properly operate said floodgate." *Id.* at 320. *MMSD*'s discussion of *Lange* emphasizes the distinction between types of acts deemed always discretionary and those that can be discretionary or ministerial depending on the act's character. For some acts, including acts of operation and maintenance, immunity applies unless there is a ministerial duty to perform the act. *Compare MMSD*, 2005 WI 8, ¶60 (immunity afforded to all acts of design, construction and continued existence of "waterworks system"); *with id.* at ¶61 (where liability claimed for failure to repair "the question then becomes whether the City was under a ministerial duty to repair").

The District has never conceded that municipalities lack immunity for acts of operation or maintenance. As the District stated in its cross-appeal brief, "Under § 893.80(4), the District may only be sued for ministerial acts." MMSD-Cross-App.-Br.-47.

Neither *Caraher v. City of Menomonie*, 2002 WI App 184, 256 Wis. 2d 605, 649 N.W.2d 344, nor *Menick v. City of Menasha*, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996), provides differently.

To the extent that those cases can be read to allow municipal liability for public works operation in the absence of a ministerial duty, they are overruled by *MMSD*, which recognizes that lower court decisions had "created confusion in the area of municipal liability," *MMSD*, 2005 WI 8, ¶59 n.17, and clarifies the law by holding that municipal entities can only be liable for negligent acts "performed pursuant to a ministerial duty," *id.*

Because Owners' claim is unrelated to any ministerial duty, they are not aided by the parties' agreement that the District began operating the Tunnel in August 1992.[1] Nor does the jury's conclusion that the District was "negligent in the manner in which it operated or maintained the tunnel" (Owners-Resp.-Br.-8-9) provide a basis for ignoring the immunity bar. Owners presented no evidence of a ministerial act of operation or maintenance.

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[1] The circuit court correctly ruled that all acts before August 1992, the date on which the District was deemed to have taken over operational control from the construction contractor, were immune acts of design or construction. R.377:11-14.

Owners' experts repeatedly contended that the Tunnel's design, construction, and continued existence without a concrete liner caused their harm. Owners emphasize that their experts called the Tunnel's existence without a concrete liner "operation" and "maintenance." But labels do not create specific ministerial acts of operation and maintenance when nothing suggests that the District had a ministerial duty—a specific task imposed by law, *MMSD*, 2005 WI 8, ¶54—to "operate" or "maintain" the Tunnel differently.

The record shows only that the District operated and maintained the Tunnel as it was designed and as its Wisconsin Department of Natural Resources permit requires—i.e., with a positive inward head allowing clear water to enter and preventing wastewater from exiting. R.382-581; R.351-ex.2563:MMSDApp-0384. Owners do not contest this.

Owners instead put misplaced reliance on a pre-construction draft plan document, which states, among other things, "[m]aintenance *may* include removal of solids deposits, removal of fallen rock, repair of deteriorated linings and placement of concrete lining *in deteriorated*, unlined areas."

R.381-284-85 (emphasis added). This statement, which Owners read into the trial record without further comment, does not establish a ministerial duty of maintenance: even if it were not a draft, it refers only to what maintenance "may" include, not what it *must* include. Rather than creating "a duty to act *in a particular way* . . . [that] is explicit as to time, mode, and occasion for performance," *Lodl*, 2002 WI 71, ¶44, the draft's language leaves to the District's discretion the choice of whether to remedy deterioration by adding a lining. *See id.* at ¶46-47.

Moreover, there is no evidence that the Tunnel near the Boston Store building was "deteriorated." Nor do Owners so argue.

The draft document on which Owners rely also limits its lining suggestion to places where structural support is threatened or erosion protection is needed: "Lining will be included only as necessary to maintain structural support or to protect the tunnels from erosion . . . [otherwise] grouting will be sufficient to protect the groundwater from impacts resulting from infiltration or exfiltration." R.351-ex.206 at 8-34.

No evidence suggests that the Tunnel portion at issue needs structural support or is eroded.

B. Owners' notice of harm argument is legally unsupported.

Owners argue that the District lacks immunity because it was on notice that the Tunnel was "leaking." Mis-citing *MMSD*, they contend that this notice creates "a non-immune affirmative duty to take affirmative steps to repair the leak." Owners-Resp.-Br.-12 (citing *MMSD*, 2005 WI 8, ¶48). This is wrong for two reasons.

First, the portion of *MMSD* on which Owners rely is not addressing immunity but is discussing the basis for an assertion of *negligence*. Municipal liability, however, exists only if "the negligence involves an act performed pursuant to a ministerial duty." *MMSD*, 2005 WI 8, ¶59.

Paragraph 62 of *MMSD* contains the "leaking" language Owners take out of context at page 12 of their response. The Court there makes clear that notice of disrepair does not equate to a ministerial duty to fix. Even if the City had known the water main was broken, the Court explained, the facts were "not sufficiently developed for [the Court] to determine whether the City was under a ministerial duty to repair the leaking water main

prior to its break," *id.* at ¶62, because the record did not reveal "whether the City's decision not to repair the main before the break was discretionary." *Id.* If the repair decision was discretionary, "the City [was] entitled to governmental immunity under §893.80(4)," *id.*, even if it had knowledge of the break. Nothing shows that the District has a duty—especially a non-discretionary duty—to prevent water from infiltrating the Tunnel. Instead, it has a duty under its WDNR permit to maintain infiltration. R.351-ex.2563:MMSDApp-0384.

Second, unlike the water main in *MMSD*, which was designed and constructed to contain the water that was "leaking," there is no evidence that the Tunnel was not working as designed. The Tunnel was designed and constructed to allow infiltration of water (R.382-591), and the operating permit so requires (R.351-ex.2563:MMSDApp-0384). Infiltration of water into the Tunnel, therefore, is not a "leak" as *MMSD* used that word to describe the broken water main.

Nothing suggests that the Tunnel was broken or in need of repair. At trial, the only test of Tunnel operation Owners suggested was the 200

gallons-per-inch-of-diameter-per-mile-per-day standard—a standard that does not apply to the Tunnel, as the District has shown (MMSD-Cross-Appeal-Br.-48-50) and Owners have implicitly conceded. Owners' expert did acknowledge, however, that the Tunnel complies with this inapplicable standard when properly adjusted for Tunnel depth. R.382-574:MMSDApp-0684.

The "notice of harm" evidence on which Owners rely is evidence that the District was aware that ground water infiltration *during Tunnel construction* might damage buildings in the construction zone. Owners-Resp.-Br.-12-14. This risk of water entry during construction was of a substantially greater quantity than the minimal infiltration occurring during Tunnel operation. *See* R.350,ex.53-2:A-Ap.-1163 (describing 1400-1500 gallons per minute construction inflow). Regardless, the District's awareness of that risk involves, at most, immune construction conduct and does not support a ministerial duty of post-construction operation or maintenance.

C. Owners' argument for changing immunity law underscores the law's application.

Owners next resort to arguing inapplicable California law. Relying on *Baldwin v. California*, 491 P.2d 1121 (Cal. 1972), they contend that the District "should enjoy no immunity for the harm it knew it would cause." Owners-Resp.-Br.-16 (title case omitted).

Baldwin involved a car accident allegedly caused by an inadequately controlled intersection. Relying on state surveys showing an increase in traffic and accidents in the four decades since the intersection had been designed, the plaintiff sued under a California statute making the state liable for dangerous conditions of which it had notice. The state defended based on a California statute affording immunity for "injury caused by the plan or design of" an improvement to public property. The court interpreted the California immunity statute to incorporate a New York traffic signal decision, *Weiss v. Fote*, 167 N.E.2d 63 (N.Y. 1960), which, in *dicta*, suggested that "design immunity persists only so long as conditions have not changed." *Baldwin*, 491 P.2d at 1127.

There is no reason to believe that §893.80(4) incorporates this principle. To the contrary: Our Supreme Court instructed in *Lodl* that even when there are known dangerous circumstances, the immunity inquiry turns "on whether the act negligently performed or omitted can be characterized as ministerial." 2002 WI 71, ¶24. Owners' request that this Court narrow the scope of immunity by legislating a "changed conditions" exception to §893.80(4) ignores the controlling authority of *MMSD*, *Allstate*, and *Lodl*.

Owners also ignore the facts of this case. They cannot show "changed conditions," "substantial danger," or any notice of the specific-post-construction injury risk that would bring this case within *Baldwin*'s inapplicable principle.

And nothing commends *Baldwin*'s principle. Other courts have rejected it, *see, e.g.*, *Thompson v. Newark Hous. Auth.*, 531 A.2d 734 (N.J. 1987), and California modified it by statute, *see Cornette v. Dep't of Transp.*, 26 P.3d 332 (Cal. 2001).

D. Section 893.80(4) applies to Owners' §101.111 claim.

Contrary to Owners' argument, §893.80(4) bars their §101.111 claim. Section 893.80(4) allows "No suit . . . for acts done in the exercise of

legislative, quasi-legislative, judicial or quasi-judicial functions." Wis. Stat. §893.80(4). Owners' claim that Tunnel construction was an excavation in violation of §101.111 (which it was not, *see* MMSD-Resp.-Br.-62-69) necessarily comes within this immunity because construction involves categorically immune acts. *See MMSD*, 2005 WI 8, ¶60.

None of the authorities on which Owners rely supports their argument that a §101.111 claim is exempt from §893.80(4)'s directive that "[n]o suit" can be maintained based on immune conduct. *Busse v. Dane County Regional Planning Commission*, 181 Wis. 2d 527, 511 N.W.2d 356 (Ct. App. 1993), holds only that sovereign immunity does not bar a constitutional takings claim. *Id.* at 540. And *Crawford v. Whittow*, 123 Wis. 2d 174, 366 N.W.2d 155 (Ct. App. 1985), involved a claim that government personnel had violated §11.33 by using state funds to circulate nomination papers. *Id.* at 179. This Court reasoned that the legislature could not have intended §11.33's *specific* prohibition on *official* conduct to be completely negated by application of §893.80(4). *Id.* at 183.

Neither case's rationale applies here. Section 101.111 applies generally to owners of land. It is not constitutional trump. Unlike §11.33, it is not directed at official conduct. Consequently, §101.111 and §893.80 do not conflict, and there is no basis to imply an exception to §893.80(4) for §101.111 claims. *See Dep't of Natural Res. v. City of Waukesha*, 184 Wis. 2d 178, 191, 515 N.W.2d 888 (1994) ("sec. 893.80 applies to all causes of action"), *overruled in part by State ex rel. Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 597, 547 N.W.2d 587 (1996) (all actions language of *DNR v. City of Waukesha* does not apply when legislation specifically affords a remedy for governmental conduct).

II. Credible Evidence Supports the Jury's Statute of Limitations Finding.

The jury's finding that Owners' claim accrued outside the limitations period gets lost in Owners' effort to justify the circuit court's refusal to accept that answer. Confessing that unsubmitted evidence supported the jury's finding, Owners emphasize that the District had the burden to prove a limitations defense. The jury's finding, however, requires only some credible evidence to render the answer change "clearly wrong." *Weiss v.*

United Fire & Cas. Co., 197 Wis. 2d 365, 390, 541 N.W.2d 753 (1995).

The jury was entitled to conclude from Zdenek's "utmost importance" letter (*see* R.384-1012-23:MMSDApp-0724-35) that by the limitations date, June 4, 1997, Owners should have possessed enough information to allege the same claim against the District they filed years later. Indeed, the Zomboracz evidence to which Owners' brief makes reference relates damage to the Boston Store building's façade in 1995 to the Tunnel's construction. R.119-35-37:A-Ap.-254-56 (referencing record).

Owners rely on the circuit court's mistaken reasoning that the District's denial of liability precluded a finding that the claim accrued years earlier: "[I]t's pretty difficult to understand," the court stated, "how [Owners] could be responsible for figuring out or knowing that which, to this very day, the District maintains wasn't happening." R.394-26:MMSDApp-835. The question, however, is not whether Owners before June 4, 1997 knew that the construction or existence of the Tunnel caused pile damage; the question is whether Owners were aware of information sufficient to

plead their claim before June 4, 1997. While Owners argue that they then lacked that information, the jury found otherwise; and the Zdenek-GAS correspondence, the general awareness of the Tunnel's existence, and Owners' failure to explain any other probable time of accrual adequately support the finding.[2]

III. Owners' Failure to Serve a Notice of Claim Bars Their Action.

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

Owners offer three arguments to avoid judgment against them on this ground. None has merit.

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[2] Owners suggest (Owners-Resp.-Br.-27, n.29) that their experts' analysis of column movement in the 1990s does not show their knowledge of those movements. This is incorrect, as is the remainder of Owners' arguments that the District has materially misstated the record. Owners' expert testified about how Boston Store's records demonstrated accelerating column settlement in the early 1990s. *See* R.385-1211-16:MMSDApp-0761-66.

A. The District did not forfeit the notice of claim bar by pursuing related discovery.

Owners argue that the District waived §893.80(1) by pursuing discovery before seeking dismissal. A §893.80(1) defense is preserved by raising it in the circuit court, *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶27, 273 Wis. 2d 76, 681 N.W.2d 190, and the District preserved the defense by pleading it, *see Thorp v. Town of Lebanon,* 2000 WI 60, ¶24, 235 Wis. 2d 610, 612 N.W.2d 59; *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶18, 302 Wis. 2d 358, 735 N.W.2d 30. Compliance with §893.80(1), moreover, is a precondition to recovery. *See Sambs v. Nowak*, 47 Wis. 2d 158, 167, 177 N.W.2d 144 (1970); *Ibrahim v. Samore*, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984).

No case holds that §893.80(1) is waived by failing immediately to seek dismissal on that ground. Neither *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 357 N.W.2d 548 (1984), nor *Strong v. Brushafer*, 185 Wis. 2d 812, 519 N.W.2d 668 (Ct. App. 1994), support Owners' waiver argument. In *Figgs*, the Court did not reach waiver, even though the City of Milwaukee dallied until after the second

day of a jury trial to move for dismissal based on its notice of claim defense. 121 Wis. 2d at 48. In *Strong*, the same assistant city attorney who had moved belatedly in *Figgs* orally moved for dismissal for failure to comply with §893.80(1) as the circuit court was seating the jury some 15 months after the dispositive motion deadline. 185 Wis. 2d at 817. *Strong* also did not address waiver—the circuit court dismissed the complaint without prejudice and plaintiff had filed anew while the original case was on appeal. *Strong* upheld the circuit court's sanction for violating an order requiring dispositive motions to be made in writing and for counsel's repeated "ambush" tactics. *Id.* at 824-25.

In contrast, the District reasonably sought discovery on whether Saks and WISPARK, the entities that served the only notices, had assigned their rights to Owners. Within a few months of receiving Owners' response that there was no assignment, the District sought dismissal under §893.80(1). The District filed its motion within 17 months of the action's commencement, before Owners amended their complaint, before Owners voluntarily dismissed the Tunnel construction

contractors, and more than a year before the dispositive motion deadline. Judge DiMotto's suggestion that the District should have raised the notice issue sooner was incorrect, and Owners' attribution of it to "the trial court" (Owners-Resp.-Br.-33) is misleading, since Judge Kremers, who presided through trial, made no such suggestion.

B. Owners did not "substantially comply" with §893.80(1).

Owners argue "substantial compliance" with §893.80(1) based on notices served by entities that never owned the Boston Store building. Owners'-Resp.-Br.-35-37. As the District's principal brief explains, §893.80(1) requires notices that identify the actual claimant. MMSD-Cross-Br.-66 (citing *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 556 N.W.2d 326 (Ct. App. 1996)). *See also Hicks v. Milwaukee County*, 71 Wis. 2d 401, 407, 238 N.W.2d 509, 514 (1976) (notice must "identify the claimants and show that the claims are being made by their authority"); *Carpenter v. Comm'r of Public Works*, 115 Wis. 2d 211, 216-217, 339 N.W.2d 608 (Ct. App. 1983). These authorities defeat Owners' contention that the non-owners' notices amount to Owners' "substantial compliance" with §893.80(1).

"Substantial compliance" is a doctrine that applies only when the actual claimant gives notice but fails to comply exactly with the statutory requirements. To comply "substantially" one must at least provide (1) "actual notice of the claim," *Thorp*, 2000 WI 60, ¶27, and (2) enough information to "afford[] a municipality the opportunity to compromise and settle [the] claim," *id.* at ¶28. The non-owners' notices did not give actual notice of *Owners'* claims or provide the District a meaningful opportunity to settle Owners' claims before litigation. Paying non-owners or denying non-owners' (non-)claims would have had no effect on Owners' claims.

What is more, non-owners' identification of the Reinhart firm as their counsel did not reveal anything relating to Owners' claims. Even though that firm's lawyers now represent Owners, those lawyers told the circuit court that the reason non-owners served notices was that corporate management did not know which entities actually had the claim. R.369-8-9:MMSDApp-0457-58. There can be no question that non-owners' notices did not contain information sufficient to identify, settle, or deny Owners' claims when even Owners'

own managers and lawyers did not know that the entities asserting claims in the notices had no claims. It is no answer to contend that the notices identified related corporations and their counsel: The District could not have properly denied Owners' claim and availed itself of §893.80(1g)'s six-month statute of limitations by sending a denial notice to anyone other than Owners. Wis. Stat. §893.80(1g); *see also Pool v. City of Sheboygan*, 2007 WI 38, ¶11, 300 Wis. 2d 74, 729 N.W.2d 415 (notice received by claimant's relative insufficient to deny claim); *Cary v. City of Madison*, 203 Wis. 2d 261, 267, 551 N.W.2d 596 (Ct. App. 1996) (notice sent to claimant's attorney inadequate to deny claim).

The notices' failure to identify the actual claimants is a dispositive omission. Owners' failure to cite *Markweise*—holding that persons not identified by name in a notice are barred by §893.80(1)—underscores this point. Courts "must respect a governmental entity's . . . legislatively mandated right to have a claim presented to it before it is forced into costly and expensive litigation." *C. Coakley Relocation Sys., Inc. v. City of Milwaukee*, 2008 WI 68, ¶22 (internal quotation

marks omitted). That respect required dismissal of Owners' claims under §893.80(1).

C. Owners' §101.111 claim is barred by §893.80(1).

Section 101.111 has its genesis in common law rules governing disputes that arise when new buildings are constructed next to existing structures. It requires persons making excavations "below grade," i.e., into the ground, to provide adjoining building owners 30 days' prior notice and allows injunctive relief against non-complying excavators "directing such excavator to comply with this section and restraining the excavator from further violation thereof," §101.111(6). The statute divides responsibility for any "underpinning or extensions of foundations" when the excavation is dug 12 or more feet "below grade," §101.111(3)(b).

Even the non-owners' notices failed to identify a §101.111 claim or a claim for injunctive relief, perhaps because the Tunnel was not constructed by excavating from the surface and an injunction directing notice more than a decade later makes no sense. The circuit court held §101.111 inapplicable and awarded summary judgment to the District. R.374-38-39:MMSDApp-0546-47.

Owners, who appeal that dismissal, argue that their §101.111 claim does not require compliance with §893.80(1)'s notice provision because "the specific procedure set forth in §101.111 displaces the generalized procedure set forth in section 893.80." Owners-Resp.-Br.-37. That is incorrect.

Addressing §893.80(1), our Supreme Court has directed that "Wisconsin Stat. §893.80 provides a set of rules specifically for claims against governmental bodies . . . which broadly applies to all causes of action unless a further, more specific rule says otherwise." *Rouse*, 2007 WI 87, ¶37. Statutes, like §101.111, that provide for remedies to be enforced through generally available procedural mechanisms are not excepted from §893.80 if there is no procedural conflict. *Id.* at ¶¶37-38. Owners' §101.111 claim creates no conflict with §893.80(1).

Given that the Tunnel was constructed long ago, this is not a case in which a party seeks to use §101.111 to enjoin an excavation. Owners do not seek an injunction authorized by statute to be awarded prior to, and in anticipation of, future

harm, as in *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998).

Nor does Owners' §101.111 claim meet this Court's three-part test for creating an implied exemption from §893.80(1). *See Nesbitt Farms v. City of Madison*, 2003 WI App 122, ¶9, 265 Wis. 2d 422, 665 N.W.2d 379. First, Owners' claim for damages does not involve a "specific statutory scheme" and Owners' affirmative injunctive relief to line the Tunnel is not authorized by §101.111. Second, the legislature has not provided for expedient resolution of Owners' claims for damages caused by alleged post-construction ground water infiltration. Thus, requiring compliance with §893.80 does not hinder a legislative preference for prompt resolution. Third, there is no doubt that §893.80(1)'s policies of affording municipal entities an opportunity to investigate, settle, or disallow claims and to budget for their allowance or litigation apply fully to Owners' §101.111 claim.

IV. The Post-Judgment Injunction Must Be Vacated.

A. Section 893.80 deprived the circuit court of competency to award injunctive relief.

1. The District did not "waive" application of §893.80.

Owners' response to the §893.80 bar on injunctive relief begins with an incredible argument that the procedural rule in §802.06(7) nullifies §893.80's application to their requested injunctive relief. Section 802.06(7)—the Wisconsin analog of Federal Rule of Civil Procedure 12(g)—is designed to prevent delay caused by multiple motions to dismiss. *See* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, §1385 (3d ed. 2004). It provides that if a party moves to dismiss under §802.06 "but omits therefrom any defense . . . *then available to the party*, which [that] section permits to be raised by motion, the party shall not thereafter make a motion based on the defense . . . so omitted" (emphasis added). Wis. Stat. §802.06(7). Owners contend that this provision bars application of §893.80 to its request for injunctive relief because the District filed a post-answer motion on

§893.80(1) grounds but did not argue other §893.80 defenses in the motion.

Owners' argument has glaring flaws. Most obvious is that §893.80 did not arise in the context of a second motion to dismiss. The District made its argument that §893.80 precludes Owners' request for injunctive relief in response to *Owners'* motion for an injunction. Section 802.06(7) has no application in this context.

What is more, §802.06(7) provides for waiver of procedural rights—the right to bring certain types of motions provided for in §802.06—not *substantive rights*—such as the assertion of a legal bar to relief. *See* 3 Jay E. Grenig, *Wisconsin Practice Series, Civil Procedure* §206.05 at 294 (3d ed. 2003); *see also* 3B Jay E. Grenig & Daniel D. Blinka, *Wisconsin Practice Series, Civil Rules Handbook* § 802.06:5 at 118 (2008 ed.). The District preserved its §893.80 defenses by pleading them. And the District's motion invoking §893.80(1) asserted matters outside the pleading (R.35); thus, it was a §802.08 motion to which §802.06(7) does not apply. *See* Wis. Stat. §802.06(2)(b).

All this aside, §802.06(7) would not have precluded the District from moving to bar an award of injunctive relief. Owners did not seek that relief until they amended their complaint *after* the District sought judgment on the original complaint. R.34; R.51. And §802.06 reserves a party's right to file a motion to dismiss for failure to state a claim upon which relief can be granted. Wis. Stat. §802.06(8). *See Canadian Overseas Ores Ltd. v. Compania de Acero Del Pacifico S.A.*, 528 F. Supp. 1337, 1344-45 (S.D.N.Y. 1982); *see also* 5C Wright & Miller, *supra*, §1385.

Additionally, the District's position that injunctive relief could not be justified by application of §893.80(3)'s damages limitation was not "available" earlier. The District's §893.80(5) arguments—for example, that where a party obtains an award of damages under §893.80(3), §893.80(5) makes that remedy exclusive—was not at issue before the court applied §893.80(3)'s cap to the jury's damages award.

Regardless, courts even retain the authority to allow subsequent motions to dismiss based on grounds that could have been earlier asserted. *See Thorn v. New York City Dep't of Social Servs.*, 523

F. Supp. 1193, 1196 (S.D.N.Y. 1981). Thus, even if §802.06 applied (which it does not), there is no legitimate ground for refusing to apply §893.80 to preclude injunctive relief.[3]

2. Section 893.80(4) bars an injunction to reconstruct the Tunnel.

Owners contend that "§893.80(4) is a limitation on the conduct for which a municipality may be held liable, not on the form of remedy." Owners-Resp.-Br.-43-44. This misses the point. Section 893.80(4) allows "No suit" based on a municipal entity's discretionary conduct. In explaining the basis for her injunction to line the Tunnel, Judge DiMotto explained, "[t]he tunnel's *presence* . . . created a drawdown on dewatering the

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[3] None of the federal cases on which Owners rely support their waiver argument. *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 734 (7th Cir. 1991), and *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994 (1st Cir. 1983), hold that motions for insufficient process and personal jurisdiction can be waived by extensive participation in the litigation before raising those defenses by motion. *Albany Ins. Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907 (5th Cir. 1993), makes the District's point that the waiver principle applies only to subsequent motions to dismiss, rather than other types of motions.

soil, in which the pilings of the foundation of Boston Store sit, causing them to rot." R.399-27:MMSDApp-0906 (emphasis added). The Tunnel's "presence" cannot be the proper basis for a suit at law or in equity. A municipality "is immune from suit relating to its decisions concerning the adoption of a waterworks system, the selection of the specific type of pipe, the placement of the pipe in the ground, and *the continued existence of such pipe*." *MMSD*, 2005 WI 8, ¶60 (emphasis added). Judge DiMotto failed to base her award on a ministerial act—she could not, of course, since Owners proved none; thus, her injunction is barred by §893.80(4).

3. No notice identified injunctive relief.

Even non-owners' itemization of relief did not mention injunctive relief. R.46-ex.A:MMSDApp-0088-0090. Non-owners' identification of $10.8 million of damages—even if that itemization could be attributed to Owners (which, for reasons explained above, it cannot)—does not amount to substantial compliance with §893.80(1)(b)'s requirement that the claimant provide a "statement of the relief sought." If injunctive relief is sought, §893.80(1)(b) requires the claimant's

statement to "clearly define[] the equitable relief sought." *DNR*, 184 Wis. 2d at 199. Notices, like non-owners', that make no reference to equitable relief cannot, as a matter of law, amount to compliance with §893.80(1)(b) for a claim seeking injunctive relief. *Id.* And a claim seeking damages is materially different, from the perspective of pre-litigation settlement considerations, from one seeking an injunction requiring the District to reconstruct a mile of the Tunnel. *See id.*

4. The $100,000 damage award provides the exclusive remedy.

Owners misunderstand the District's argument that §893.80 limits their relief to the damages available under §893.80(3). Contrary to Owners' response, the District does not argue that the cost of complying with the injunction or other litigation costs are "damages" capped by §893.80(3).

Section 893.80 bars injunctive relief because §893.80(5) states that "the provisions and limitations of this section shall be exclusive and shall apply to all claims," unless additional "rights and remedies" are provided by another statute. Where, as here, a damage remedy is sought and §893.80(3)'s damages limitation applies, a court cannot, consistent with §893.80(5), end-run that

limitation by awarding costly injunctive relief based on a judicial conclusion that the legislative limit renders the damages award inadequate. Yet this is exactly what Owners contend, stating, that their request for injunctive relief was "predicated . . . on the trial court's ruling with regard to the damage cap." Owners-Resp.-Br.-48. Judge DiMotto accepted that contention, stating, "In my view, it is in fact a no-brainer to conclude that the remitted $100,000 is an inadequate remedy at law." R.399-10:MMSDApp-0889.

No reasonable interpretation of §893.80 allows a court to use the section's damages limitation as the basis for awarding injunctive relief costing millions of dollars. Affirmative orders to rebuild are an "economic (but perhaps cumbersome) equivalent of damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 478 (2003). "The notion that [a legislature] would limit liability . . . with respect to one remedy while allowing the sky to be the limit with respect to another for the same violation strains credulity." *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 575 (7th Cir. 2008). Properly applied, §893.80(3) & (5)

preclude an affirmative injunction to line the Tunnel.

B. Affirmative injunctive relief is procedurally barred.

1. Owners requested injunctive relief too late.

Arguing that their motion for injunctive relief was not a motion after verdict governed by §805.16's time limitations, Owners rely on *Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 533 N.W.2d 746 (1995). But *Gorton* holds that a petition for attorney's fees is not governed by §805.16 for two reasons: (1) the fee award was solely "predicated on a party's prevailing party status," *id.* at 230, and (2) a "fee determination is separate from the underlying action," *id.* Neither rationale applies to Owners' motion for injunctive relief.

First, the Supreme Court held in *Hoffmann v. Wisconsin Electric Power* that injunctions requiring changes in public utility service *do not* follow from prevailing party status. 2003 WI 64, ¶27, 262 Wis. 2d 264, 664 N.W.2d 55. Before ordering an injunction, a court must hear evidence and make findings about the merits of the proposed changes. *Id.*

Second, injunctive relief, unlike a fee award, is not separate from the resolution of the underlying claims. *Id.*; *see also ACLU v. Thompson*, 155 Wis. 2d 442, 447, 455 N.W.2d 268 (Ct. App. 1990) (comparing fee award with executing on judgment), *overruled on other grounds by Edland v. Wisconsin Physicians Service Ins. Corp.*, 210 Wis. 2d 638, 563 N.W.2d 519 (1997). Fee petitions are not trial-related motions because fee awards "are not compensation for the injury giving rise to an action." *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 297, 528 N.W.2d 502 (Ct. App. 1995). Owners, in contrast, requested injunctive relief to remedy the claimed injury giving rise to the action.

Owners' additional contention that their request is not governed by §805.16 because it was not "ripe" until Judge Kremers ruled that damages were limited by §893.80(3) is empty rhetoric. That the availability of injunctive relief might depend on other rulings is not dispositive of whether that relief is separate from the underlying action. An award of adequate damages will always preclude injunctive relief, but Owners cite no authority suggesting that a party, having tried only claims

for damages, can wait until after the circuit court decides post-trial motions to seek equitable relief. Owners' "ripeness" test would allow serial post-trial motions whenever disposition of one issue precludes consideration of others: The application of §893.80(3)'s limitation, for example, could similarly be viewed as unripe until Judge Kremers changed the jury's statute of limitations answer.

Owners' suggestion that the District "explicitly agreed" to allow an untimely motion for injunctive relief (Owners-Resp.-Br.-49) is legally irrelevant and wrong. Section 805.16's deadlines cannot be extended by agreement. *See Ahrens-Cadillac Olds v. Belongia*, 151 Wis. 2d 763, 767 445 N.W.2d 744 (Ct. App. 1989) (trial court not competent to consider motions after verdict outside §805.16's 20-day period unless movant obtains an extension within the 20-day period).

Moreover, after the July 2005 hearing on which Owners base their claimed agreement to postpone consideration of injunctive relief, Judge Kremers again took up the injunction issue at the March 31, 2006 pretrial. The District then argued that Owners were not entitled to injunctive relief and Judge Kremers expressed skepticism at

Owners' suggestion that if the jury verdict did not make them whole, he could award injunctive relief. R.376:MMSDApp-0573-78. On the same occasion, Judge Kremers reserved ruling on the District's motion for application of the §893.80(3) limitation "until after the verdict." R.376:MMSDApp-0629. Given this notice, Owners' decision not to request injunctive relief conditionally in a timely post-verdict motion reflects Owners' strategic decision to pursue only the jury's damages award. Having so chosen, there is nothing "troubling" about properly applying §805.16 to bar their untimely motion for injunctive relief.

Finally, *Gorton* provides that §805.16 governs "trial-related motions," including those that implicate the nature of the judgment. 194 Wis. 2d at 230. Owners contend that their motion for injunctive relief was "verdict related" rather than "trial related," even though they justify Judge DiMotto's award of that relief based on evidence submitted at trial—evidence relating to their nuisance claim, which the jury's verdict rejected. Owners-Resp.-Br.-48, 54. But the fact that the injunctive relief necessarily altered the nature of the relief awarded in the judgment leaves no

question that the motion was "trial related" under *Gorton*'s test and, therefore, barred by §805.16's deadlines.

2. Judge Kremers' entry of judgment precluded a subsequent award of injunctive relief.

Owners do not dispute that if Judge Kremers' October 25 order for judgment is final, then the merger doctrine prevents an award of injunctive relief (*see* MMSD-Cross-Br.-80-82). They instead contend that the October 25 order is not final. Relying on *Harder v. Pfitzinger*, they argue that to be final, an order must (1) dispose of a party's claims, and (2) be the last order the court intended to issue. 2004 WI 102, ¶12, 274 Wis. 2d 324, 682 N.W.2d 398.

The October 25 order disposed of Owners' claims. R.305:A-Ap.-708-10. It expressly entered judgment on Owners' negligence claim and dismissed their nuisance claim—the only two remaining claims. *See Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶34 & n.11, 299 Wis. 2d 723, 728 N.W.2d 670.

Given the clear adjudicative language of the order, Owners' argument that their pending motion for injunctive relief defeats finality is unavailing.

The entry of the order disposing of the claims effectively denied that motion. *See id.*; *see also Strong*, 185 Wis. 2d at 817-18 ("Although the written judgment fails to address Strong's motion, the trial court's judgment in favor of the City in effect was a denial of Strong's motion."). Indeed, had Judge Kremers not signed the October 25 order entering judgment in accordance with his post-verdict rulings, §805.16(3) would have required entry of judgment based on the jury's verdict. *See* Wis. Stat. §805.16(3).

Owners' reliance on *Harder*'s "intended last document" language is misplaced. As *Wambolt* clarified, "the effect of *Harder*'s holding is to dispense with the 'intent' part of the finality test. Under *Harder* disposing of all substantive issues with respect to a party indicates that the circuit court intended the document to be final as a matter of law." 2007 WI 35, ¶30, n.9. The October 25 order disposed of all substantive issues: it adjudicated the negligence claim and dismissed the nuisance claim. *See Tyler v. Riverbank*, 2007 WI 33, ¶17, 299 Wis. 2d 751, 728 N.W.2d 686 (an order disposes of claims by dismissing or adjudicating

them). *Tyler*, which Owners ignore, makes clear that the October 25 order was final.

Because the order finally disposed of the claims, Owners could not obtain further relief on those claims. MMSD-Cross-Br.-81-82. Their only recourse was to appeal.

3. Owners' appeal deprived the circuit court of jurisdiction to enter injunctive relief.

Transfer of jurisdiction upon appeal divests the circuit court of authority: "[I]n the context of a direct appeal pursuant to Wis. Stat. §808.03, service of a notice of appeal strips the circuit court of all jurisdiction regarding the case, except where there is a specific grant of authority permitting the trial court to act." *In re John Doe Proceeding*, 2003 WI 30, ¶58 n.16, 260 Wis. 2d 653, 660 N.W.2d 260; *see also Hengel v. Hengel*, 120 Wis. 2d 522, 355 N.W.2d 846 (Ct. App. 1986). Section 808.075, which provides that "the circuit court retains the power to act on all issues until the record has been transmitted to the court of appeals," codifies this rule and provides for several inapplicable exceptions.

In allowing the circuit court to act until the clerk "transfers the record," §808.075 incorporates

the traditional rule of "perfecting the appeal," under which jurisdiction transferred when the court of appeals received the notice of appeal, the filing fee, and the circuit court's docket entries:

> An appeal was "perfected" by filing the fee for docketing the appeal with the notice of appeal, and having the clerk of the trial court forward the notice of appeal, the docketing fee *and a copy of the trial court docket entries to the court of appeals*. While the term "perfected" is no longer a part of the general statute, this activity must still be performed.

6 Edwin E. Bryant, *Wisconsin Pleading and Practice*, § 52:2 (4th ed. 2006) (emphasis added); *see also Douglas v. Dewey*, 147 Wis. 2d 328, 337, 433 N.W.2d 243 (1989). Perfection is carried out in the same way by the requirements of §809.11(2), which provides:

> The clerk of the trial court shall forward to the court of appeals, within 3 days of the filing of the notice of appeal, a copy of the notice of appeal, the filing fee, and *a copy of the trial court record of the case maintained pursuant to s. 59.40(2)(b) or (c).*

Wis. Stat. §809.11 (emphasis added). The "record" to which §808.075 refers, therefore, is that maintained pursuant to §59.40—the circuit court

docket entries. When this Court received that "record" on January 25, 2007, the circuit court lost jurisdiction to enter any relief not specifically authorized by statute or rule. No statute or rule authorized Judge DiMotto's post-appeal order of injunctive relief, which she issued orally on January 30, 2007 and first reduced to writing on February 9, 2007.

C. The circuit court erred in ordering injunctive relief without a hearing and as a substitute for damages limited by statute.

Judge DiMotto first informed the parties that, if she ruled the court competent to award equitable relief, she would hold a hearing on whether that relief was appropriate. R.395-5-6:MMSDApp-0861-62. Months later, she ruled without notice or a hearing that Owners were entitled to an order requiring the District to line the Tunnel. R.399-14,29:MMSDApp-0893,0908. She concluded that application of the legislature's municipal damages limitation rendered damages "inadequate" and that Owners' trial evidence that the claimed nuisance could be abated by lining the Tunnel provided sufficient support for an affirmative injunction to line a mile-long portion of

the Tunnel with concrete. R.399-26-29:MMSDApp-0905-0908.

In so doing, she repeated the course the Supreme Court rejected in *Hoffmann*: she awarded Owners' requested injunctive relief without "taking into account relevant factors." 262 Wis. 2d at ¶28. The Supreme Court required that any order to change the manner in which public utility service is provided "must be based on the merits of the system with a record to support that order." *Id.*

Owners do not argue that Judge DiMotto made this record, considered "the relevant factors," or based the injunction on "the merits" of lining the Tunnel. They first suggest that a court can award injunctive relief based only on a finding that the movant has an inadequate legal remedy and will suffer irreparable harm (Owners-Resp.-Br.-39)—repeating Judge DiMotto's legal error (R.395-9:MMSD-App-0888). Injunctive relief demands more: "[I]njunctive relief is addressed to the sound discretion of the trial court; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance equity favors issuing the injunction." *Pure Milk Prods. Co-op v. Nat'l*

Farmers Organization, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

Owners next argue that the District should have put in proof of these competing interests and addressed the merits of lining the Tunnel at trial. This contention is defeated by Owners' own emphasis on the fact that they did not seek injunctive relief until Judge Kremers applied the §893.80(3) damages limitation *after* trial. Owners-Resp.-Br.-48-50.

Moreover, the District's "opportunity" to disprove one element of Owners' nuisance damages claim—the reasonableness of abatement—is not the equivalent of an opportunity to demonstrate in an equity hearing that other factors make injunctive relief inappropriate. By not conducting the required hearing, Judge DiMotto deprived the District of its opportunity to show, among other factors, that an order to line the Tunnel is not authorized by the WDNR, could potentially result in unpermitted wastewater discharges, and is not likely to address the problem of which Owners complain.

Owners' suggestion that there were "numerous opportunities to present evidence

related to any alleged difficulty with tunnel lining . . . during the injunction proceeding before Judge DiMotto" (Owners'-Resp.-Br.-54) is incorrect. Judge DiMotto did not hold the evidentiary "injunction proceeding" mandated by *Hoffmann* and basic notions of due process. R.399-14,29:MMSDApp-0893,0908. Thus, even if the circuit court had the authority to award injunctive relief, its order must be vacated and the case remanded with instructions to conduct an evidentiary hearing and to consider all relevant equitable factors.

CONCLUSION

The case should be remanded for entry of judgment dismissing Owners' claims on the merits and with prejudice.

Respectfully submitted,

By: _____
G. Michael Halfenger

By: _____
James H. Petersen

Attorneys for Respondent-Cross-Appellant
Milwaukee Metropolitan Sewerage District

G. Michael Halfenger (WBN 1024062)
William J. Katt (WBN 1066365)
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 271-2400
(414) 297-4900 (facsimile)

Kevin J. Lyons (WBN 1013826)
Matthew R. McClean (WBN 1041470)
DAVIS & KUELTHAU, s.c.
111 E. Kilbourn Ave., Suite 1400
Milwaukee, WI 53202
(414) 276-0200
(414) 278-3602 (facsimile)

Michael J. McCabe (WBN 1011060)
James H. Petersen (WBN 1014389)
MILWAUKEE METROPOLITAN
SEWERAGE DISTRICT
260 West Seeboth Street
Milwaukee, WI 53204
(414) 225-2102
(414) 225-0167 (facsimile)

FORM AND LENGTH CERTIFICATION

I certify that this reply brief conforms to the rules contained in § 809.19(8)(b) for a brief and appendix produced using proportional serif font and pursuant to this Court's December 11, 2008, order expanding the brief volume limitation in § 809(8)(c) to 7,777 words. The length of this response brief is 7,684 words.

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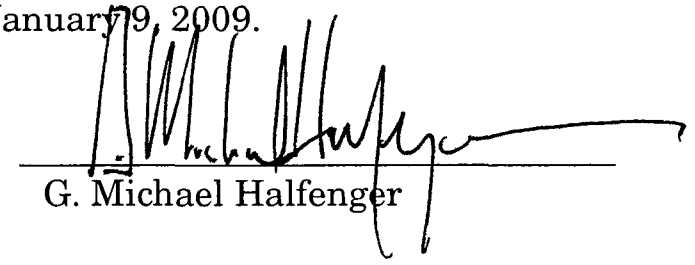

G. Michael Halfenger

CERTIFICATE OF MAILING

I certify that this Reply Brief of Cross-Appellant Milwaukee Metropolitan Sewerage District was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class or priority mail, or other class of mail that is at least as expeditious, on January 9, 2009. I further certify that the brief was correctly addressed and postage was pre-paid.

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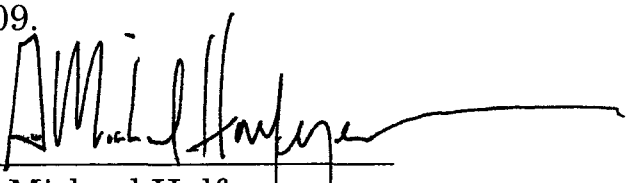

G. Michael Halfenger
Bar No. 1024062

Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202-5306
414-271-2400
414-297-4900 Facsimile