STATE OF WISCONSIN
COURT OF APPEALS, DISTRICT I

BOSTCO LLC and PARISIAN, INC.,

Plaintiffs-Appellants-Cross-Respondents,

v. Appeals No. 2007AP221 & 2007AP1440

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

Defendant-Respondent-Cross-Appellant.

LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF

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

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INTRODUCTION

The League of Wisconsin Municipalities, which was created in 1898, is a non-profit association whose members include 576 Wisconsin municipalities (188 cities and 388 villages). The League is governed by a board of directors comprised of municipal officials from member municipalities. Through the League, municipalities cooperate to improve and aid the performance of local government. The League has long been recognized by the legislative and executive branches as a principal voice for municipal interests.

As part of its service to its members, the League monitors legislation and appellate case law that has the potential to significantly impact local government interests. We requested permission to file an *amicus* brief in this case because it involves a constitutional challenge to Wis. Stat. sec. 893.80(3), which limits municipal exposure for tort liability. The Wisconsin Supreme Court has upheld prior versions of this same statute against similar constitutional challenges and the League submits that Plaintiffs-Appellants have failed to provide this court with any basis for departing from this binding precedent. Plaintiffs-Appellants have failed to carry the heavy burden of proving the statute unconstitutional beyond a reasonable doubt, and a departure from existing precedent would jeopardize the already precarious financial state of Wisconsin municipalities and would have far-reaching and disastrous consequences for municipalities statewide.

For reasons stated below, as well as those advanced by the Milwaukee Metropolitan Sewerage District, the League urges this Court to conclude that the limitations in Wis. Stat. sec. 893.80 do not violate equal protection guarantees and that the Wisconsin Supreme Court's 2005 *Ferdon* decision does not undermine existing case law upholding the legislative cap on governmental tort damages.

ARGUMENT

The Wisconsin Supreme Court has recognized the legislature's power to limit the amount of damages recoverable in tort actions against municipalities and has held that the limitations are constitutional and do not violate the equal protection clauses of the Wisconsin and U.S. Constitutions. Plaintiffs-Appellants have failed to meet their heavy burden of demonstrating beyond a reasonable doubt that sec. 893.80(3) is unconstitutional, and existing law is not undermined by the Wisconsin Supreme Court's decision in *Ferdon ex rel Petrucelli v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis.2d 573, 701 N.W.2d 440.

THE WISCONSIN SUPREME COURT HAS HELD THAT THE LEGISLATIVE CAP ON GOVERNMENTAL TORT DAMAGES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

When the Wisconsin Supreme Court decided to abrogate the judicially-created doctrine of municipal immunity from tort liability in 1962, it acknowledged the legislature's power to reinstate immunity, or impose ceilings on the amount of damages recoverable against municipalities if the legislature

deemed it better public policy. *Holytz v. City of Milwaukee,* 17 Wis.2d 26, 40, 115 N.W.2d 618, 625 (1962).

Apparently, the legislature did deem it better public policy and wasted no time in responding to *Holytz.* One year later, a law limiting recovery against municipalities in tort actions was in place.[1] See 1963 Laws of Wisconsin, ch. 198. Although the legislature could have reinstated immunity, it chose instead to limit the amount of damages recoverable against municipalities. The initial limitation was $25,000.

The Wisconsin Supreme Court held that the $25,000[2] limitation did not violate the constitutional guarantees of equal protection in *Stanhope v. Brown County*, 90 Wis.2d 823, 280 N.W.2d 711 (1979). Stanhope challenged the $25,000 limitation on the grounds that it violated equal protection by creating two classes of plaintiffs (victims of governmental negligence and victims of non-governmental negligence) and two classes of defendants (governmental tortfeasors and non-governmental tortfeasors) and limiting the liability of governmental tortfeasors and the recovery of victims of governmental tortfeasors. The Wisconsin Supreme Court held that the different classifications expressed a legislative balancing of two purposes, compensating victims of government tortfeasors while at the same time protecting the public treasury. The court stated as follows:

> We are unwilling to say that the legislature has no rational basis to fear that full monetary responsibility entails the risk of

[1] "The general statute concerning the liability of local governmental units for torts was enacted shortly after [the *Holytz*] decision and in many respects draws from the decision for its content." Wis. Stat. Ann., sec. 893.80, Legislative Council Report – 1976.

[2] The limitations challenged in *Stanhope* were in sec. 895.43 (the predecessor to sec. 893.80(3)) and in sec. 81.15 (governing damages caused by highway defects).

> insolvency or intolerable tax burdens. Funds must be available in the public treasury to pay for essential governmental services; taxes must be kept at reasonable levels; it is for the legislature to choose how limited public funds will be spent. It is within the legitimate power of the legislature to take steps to preserve sufficient public funds to ensure that the government will be able to continue to provide those services which it believes benefits the citizenry. We conclude that the legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit.

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

One year later, the Wisconsin Supreme Court again held that the $25,000 limitations in sec. 81.15 and 895.43(2), Stats. 1965, did not violate the constitutional guarantees of equal protection. *Sambs v. City of Brookfield*, 97 Wis.2d 356, 378, 293 N.W.2d 504, 515) (Wis., 1980). In *Sambs*, Sambs contended that the legislature created improper classifications within the classification of "victims of public tort-feasors" by limiting the amount plaintiffs injured by reason of highway defects could recover while imposing no limit on the amounts recoverable where municipal motor vehicles were involved or where damage was caused by mobs or riots. Sambs also contended that it was unreasonable to cap municipal liability at $25,000 while state liability was capped at $100,000.

In concluding that the legislature had a rational basis for such distinctions, the court stated as follows:

> Government engages in activities of a scope and variety far beyond that of any private business, and governmental operations affect a large number of people. Municipal units of government have hundreds and thousands of employees. Municipal units of government maintain hundreds and thousands of miles of streets and highways and drains and sewers, subject to many hazards;

> they operate numerous traffic signals, parking lots, office buildings, institutions, parks, beaches and swimming pools used by thousands of citizens. Damage actions against a governmental entity may arise from a vast scope and variety of activities. A claim against a government unit may range from a few dollars to a few million dollars. A municipal unit of government, limited in fundraising capacity, may lack the resources to withstand substantial unanticipated liability. Unlimited recovery to all victims may impair the ability of government to govern efficiently.

Sambs v. City of Brookfield, 97 Wis.2d 356, 377, 293 N.W.2d 504, 514 (1980).

Although the *Sambs* court upheld the $25,000 limitation, it did note that the $25,000 limitation seemed low in relation to the damages awarded and, citing a New Hampshire case, urged the legislature to periodically review statutory recovery limitations to insure that "inflation and political considerations do not lead to inequitable disparities in treatment." *Sambs*, supra, (quoting *Estate of Cargill v. City of Rochester, N.H.*, 406 A.2d 704, 708, 709 (1979)). The legislature responded to *Sambs* by doubling the amount of recovery, and increasing it to $50,000.

Section 893.80(3) is the current version of the limitation.

Wis. Stat. sec. 893.80(3) provides in pertinent part:

> [T]he amount recoverable by any person for any damages, injuries or death in any action founded on tort against any ... governmental subdivision or agency thereof and against their officers, officials, agents or employees for acts done in their official capacity or in the course of their agency or employment ... shall not exceed $50,000....

Plaintiffs-Appellants challenge the $50,000 limitation on equal protection grounds asserting that the cap treats differently victims of

governmental torts who suffer less than $50,000 and victims who suffer more than $50,000. The effect of economic differentiation on victims was recognized by the Wisconsin Supreme Court in *Ferdon*, supra. The court invalidated a $350,000 cap on noneconomic medical malpractice damages after concluding that it violated the equal protection guarantees of the Wisconsin Constitution because the cap bore no rational relationship to the legislature's stated objectives. In contrast, the Wisconsin Supreme Court has twice held that the cap on governmental tort damages does have a rational relationship to the legislature's purposes. The fact that the cap treats victims of governmental torts who suffer less than $50,000 and victims who suffer more than $50,000 differently, does not undermine the rational relationship between the amount and purpose of the cap.

In both *Stanhope* and *Sambs*, the Wisconsin Supreme Court expressly recognized that "whatever the monetary limitation on recovery, the amount will seem arbitrary because it is based on imponderables" and that the monetary limitation was one for the legislature to determine. Although the courts may disagree as to the wisdom of the amount, and may urge the legislature to reconsider it, it is the legislature that should determine the amount. As the court recognized in *Stanhope*:

> Courts are not equipped or empowered to make investigations into the financial resources of various public bodies in Wisconsin; the coverage, policy limits and cost of available liability insurance; or the number of victims of governmental tortfeasors and a profile of the losses they have suffered.

> Information derived from such investigation must necessarily precede any reasoned evaluation of either a limitation on recovery or a requirement of purchase of insurance.

Stanhope at 844, 280 N.W.2d at 720.

The legitimate concerns that the Wisconsin Supreme Court recognized in *Stanhope* of ensuring funds are available to pay for essential municipal services and keeping property taxes at reasonable rates are concerns today and have in no way been diminished. In fact, these concerns are more acute today than perhaps ever before. Municipalities are facing great economic hardship and are finding it increasingly difficult to fund essential governmental services. The State has not increased amounts paid to municipalities over the years and municipalities are constantly being asked to do more with less. Municipalities must find the funds to comply with expensive unfunded state and federal mandates (e.g., a few examples include new and complex election requirements, public record storage requirements, stormwater regulations, smart growth comprehensive planning), and are constrained in their ability to raise funds by property tax, one of the few revenue sources available to municipalities, because the legislature has imposed levy limits. Governor Doyle recently announced that he anticipates Wisconsin will face a budget deficit of $3 billion dollars in the years ahead so it is unlikely that the monies local governments receive from the State, through Shared Revenues or other means, will be increasing anytime soon. In fact, municipalities are likely to face major cuts in revenue.

Plaintiff –Appellants have not provided this court with a reason for ignoring *Sambs* and *Stanhope*. These cases are valid and binding precedent that this court must follow.

PLAINTIFFS-APPELLANTS HAVE NOT MET THE HEAVY BURDEN OF ESTABLISHING BEYOND A REASONABLE DOUBT THAT SEC. 893.80 IS UNCONSTITUTIONAL.

Legislative enactments are presumed constitutional and a person challenging a statute on equal protection grounds bears a heavy burden in overcoming the presumption of constitutionality. Any doubt that exists must be resolved in favor of the constitutionality of a statute, and the challenger must demonstrate that a statute is unconstitutional beyond a reasonable doubt. *Sambs*, supra, 293 N.W.2d at 511, citing *Stanhope v. Brown County*, 90 Wis.2d at 837, 280 N.W.2d at 711; *Ferdon*, supra, at ¶¶ 67-68.

In *Ferdon*, the Wisconsin Supreme Court examined the cap on noneconomic damages in medical malpractice actions using what it termed "rational basis with bite." "Rational basis with bite" does not require the court to prove Plaintiffs-Appellants' case for them. In *Ferdon*, the court reviewed pages and pages of studies, reports by Wisconsin's Insurance Commissioner and others in concluding that the cap in question bore no rational relationship to the legislature's stated objectives. Plaintiffs-Appellants have presented absolutely no evidence that could justify this court in concluding that they have met their heavy burden and, despite two supreme court cases holding expressly to the contrary, proved sec. 893.80 unconstitutional beyond a reasonable doubt.

THE SUPREME COURT'S DECISION IN *FERDON*, DECLARING THE CAP ON NONECONOMIC MEDICAL MALPRACTICE DAMAGES UNCONSTITUTIONAL, PROVIDES NO BASIS FOR DEPARTING FROM PRIOR CASE LAW.

In *Ferdon*, supra, the Wisconsin Supreme Court emphasized that the case was "not about whether all caps ... are constitutionally permissible" and noted that the question before the court was a "narrow one." 2005 WI 125 ¶13.

The cap in *Ferdon* which was overturned is very different from the cap on governmental tort liability which has been twice upheld in the face of equal protection challenges. There is a big difference between medical providers and local governments. Medical providers are paid handsomely to do what they do and make tremendous profits. In contrast, local governments provide the services they provide not to make money, but to protect the public health, safety and general welfare. They provide those services in some cases by charging those to whom the service is provided or in most cases by levying property taxes to provide the amounts needed to perform those services. When municipalities do charge for services, the fees must bear a "rational relationship to the service for which the fee is imposed."[3] The municipality charges the fee to cover the cost of providing the service -- not to make a profit. When a municipality levies taxes to pay for services or other liabilities, that money comes from the public.

[3] Wis. Stat. sec. 66.0628.

As the Supreme Court expressly recognized in *Sambs*, government is different:

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

Sambs v. City of Brookfield, 97 Wis.2d 356, 377, 293 N.W.2d 504, 514 (1980) [emphasis added].

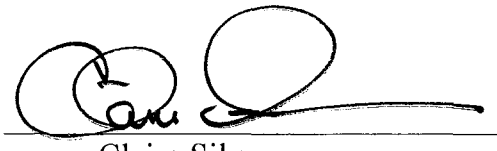
For the reasons stated above, this court should conclude that the Wisconsin Supreme Court's decision in *Ferdon* does not affect the outcome in this case

CONCLUSION

For the reasons stated above, this Court should adhere to precedent establishing that the cap on governmental tort liability does not violate the constitutional guarantees of equal protection.

Respectfully submitted this 31st day of October, 2008.

League of Wisconsin Municipalities

By: 

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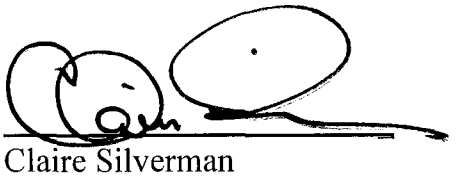
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,472 words.

Dated: October 31, 2008.



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