STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case Nos. 2007AP221 and 2007AP1440

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

v.

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

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

THE EARL AND JOANN CHARLTON REVOCABLE TRUST'S *AMICUS CURIAE* BRIEF

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INTRODUCTION

The Earl and Joann Charlton Revocable Trust ("Trust") owns the Charlton Building located at 840 North Old World Third Street, Milwaukee, Wisconsin 53203 ("Charlton Building"). Built in 1910, The Charlton Building has now been in the Charlton family for nearly 50 years. The Trust has requested permission to file an *amicus curiae* brief in this case because issues under consideration by this court could materially affect both the short term and long term fate of the Charlton Building. As a past and current claimant of damage caused by MMSD, the Charleton Trust comes to this court as a neighborhood representative in opposition to the positions MMSD takes in this litigation. These positions are legally incorrect and, if adopted, could be devastating to the Old World Third Street community. Over the objection of Milwaukee Metropolitan Sewerage District ("MMSD"), the Court granted the Trust's request.

Like many buildings in the area (including the Boston Store), the Charlton Building's basement sits below both the footprint of the building and the sidewalk in front of it. The sidewalk is immediately adjacent to Third Street, the site of the Deep Tunnel. While at present the building itself appears relatively stable, the basement portion outside the footprint of the building and the sidewalk above are rapidly sinking. The sidewalk now sharply slants toward Third Street and, according to an expert, has experienced crumbling as a result of the rapid movement. The City of Milwaukee has taken notice of the crumbling and cited

the Trust as responsible for repairs. In turn, the Trust consulted with experts who recommended the Trust file a Notice of Claim with the Milwaukee Metropolitan Sewerage District ("MMSD"). Shortly thereafter, experts estimated repairs to cost $620,000.

While the $620,000 repair bill should address the damage that is present and known today, according to experts (and consistent with the findings of the jury in the present case) additional future damages are a possibility as long as MMSD refuses to address the underlying groundwater drawdown and line the Deep Tunnel with concrete. The Hon. Jean DiMotto's Order in the present case called for lining the Deep Tunnel in the area that includes the Charlton Building.

ARGUMENT

A. Wisconsin Statute Section 893.80, in Limiting MMSD's Responsibility for Damages to $50,000, is Both Facially Unconstitutional and Unconstitutional as Applied[1]

1. The Statute is Facially Unconstitutional

In an Equal Protection analysis, because there is no allegation that the discriminatory treatment at issue deprives the plaintiff of a fundamental right or discriminates on the basis of a suspect classification, courts apply a "rational basis with teeth standard." *Ferdon ex.rel. Petrucell v. Wisconsin Patients Compensation Fund*, 2005 WI 125, ¶¶ 59, 65, 78, 284 Wis.2d 573, 701 N.W.2d

[1] The Trust obviously concedes that at this point it has not proven in court that MMSD is responsible for its $620,000 repair bill. But practically speaking, should this Court rule in favor of MMSD on the issue of damage caps, MMSD would undoubtedly cite to this case as part of an Affirmative Defense in the ensuing litigation.

440. In exercising judicial review, courts must conduct all inquiry to determine "whether the classification scheme rationally advances the legislative objective." *Ferdon,* 284 Wis.2d 573, ¶ 81.

Here, a certain class of tort victims is denied Equal Protection under the law. There are two very distinct groups of tort victims under the current statutory scheme. Tort victims with minor losses have reasonable access to the courts to redress their grievances while tort victims with major losses (such as Bostco and the Trust) do not.[2] For example, a plaintiff with a $40,000 claim, if it has merit, is not statutorily barred from receiving full recovery. Both plaintiff and defendant should devote appropriate resources to pursuing or defending that claim and the system is designed to produce a result that is commensurate with the relative merit of each case.

By contrast, practically speaking, there is no difference between limiting a $5.8 million award to $50,000 per plaintiff and granting a defendant complete immunity. In reality, simply investigating and negotiating a quick resolution to a multi-million dollar claim is likely to cost a plaintiff $50,000 in expert and legal fees. Therefore, a plaintiff with such a claim, knowing that at most it could recover its cost of presenting the claim, is effectively barred from even pursuing it in the first place under the current statutory scheme.

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[2] This is not true nationwide. A study conducted several years ago shows that several states limit their liability to seven, rather than five, figures. *See* Shane W. Falk, *Municipal Liability Caps: A Legislative Duty to Review and Increase the Limits,* 23 THE VERDICT 33-35 (2000). (Copy attached).

In 1962 the Wisconsin Supreme Court recognized the absurdity of granting complete immunity to municipal and state corporations for actions founded in tort. *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962). The court presented an exhaustive list of criticisms of the governmental immunity doctrine and was quick to abrogate this judicially-created doctrine. *Id.* at 33. Additionally, the court recognized that while it had the power to abrogate judicially created governmental immunity, it is the province of the legislature to reinstate this immunity or place limits on governmental tort liability if public policy deems it appropriate. *Id.* at 36.

The previous municipal damage cap challenges cited within the party briefs are of questionable precedential value in light of *Ferdon.* First, the cap was challenged on constitutional grounds in *Stanhope v. Brown County*, 90 Wis.2d 823, 280 N.W.2d 711 (1979). In *Stanhope,* the Court was faced with an action arising out of an automobile accident where Stanhope was injured as a result of a negligently designed, constructed, and maintained public highway. *Id.* at 829. At the conclusion of trial, Stanhope was awarded $250,000 in damages and upon Brown County's motion, the damages cap was applied and the award reduced to $25,000. *Id.* at 832. The damage cap was challenged on similar constitutional grounds in *Sambs v. City of Brookfield*, 97 Wis.2d 356, 293 N.W.2d 504 (1980). Sambs was originally awarded $949,645.66 in damages due to the City of Brookfield's causal negligence. *Id.* at 358-359. The City of Brookfield asserted

the $25,000 damages cap and the Supreme Court ultimately held that the damages cap applied and Sambs was only entitled to $25,000 in damages. *Sambs,* 97 Wis.2d at 361. The Court stated that "[t]he limit enacted by the legislature must be accepted unless we can say it is very wide of any reasonable mark.'" *Id.* at 367 (*citing Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928). Then the Court concluded that the $25,000 limit, while appearing low relative to the seriousness of the injury sustained, did not violate equal protection. *Id.* at 368.

These holdings stand in stark contrast to the more recent holdings of the Supreme Court: that the legislature must set a figure that is rationally related to preventing governmental disruptions or is not unreasonably low when considered in relation to the damages sustained. *See Ferdon*, 284 Wis.2d 573, ¶111. The *Ferdon* court held that the $350,000 medical malpractice cap for noneconomic damages to be a constitutional violation of equal protection. *Ferdon,* 284 Wis.2d 573, ¶10. The court considered the disparity between the class of victims who suffered greater than $350,000 with the class who suffered less than $350,000 and stated "when the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care providers to a small group of vulnerable, injured patients, the legislative action does not appear rational." *Ferdon,* 284 Wis.2d 573, ¶101.

This is precisely what is happening in the case at bar. To put it another way, the legislature is shifting the economic burden from political corporations

who act in a negligent manner to small group of local businesses, the Old World Third Street community; therefore, this shift does not rationally advance any legitimate government interest. In this case, according to the jury's verdict, the government acted in a negligent manner when constructing, operating, and maintaining a singular, albeit complex, public works project. They reached this conclusion after hearing testimony that MMSD knew where damage could occur, why it would occur and what could be done to stop it.

This is precisely why, even in the absence of *Ferdon*, the prior municipal damage cap cases are readily distinguishable. *Stanhope* and *Sambs* both concerned personal injury claims against political corporations for the negligent maintenance and operation of public roadways. As the court stated in *Sambs* "[m]unicipal units of government maintain hundreds of thousands of miles of streets and highways and drains and sewers, subject to many hazards." *Sambs*, 97 Wis.2d at 376-77. The court was concerned with the unpredictability of personal injury lawsuits against municipal governments. As the court stated, municipal governments are responsible for thousands of miles of streets and sewers and holding municipal governments liable for every cause of action resulting from street and sewer maintenance would be nearly impossible. Unlike *Stanhope* and *Sambs*, car accident cases where the accidents themselves came without specific warning, in this Deep Tunnel case, the victim (the Boston Store) was specifically

identified as a "critical structure" that could suffer harm if MMSD failed to take an appropriate course of action. (R. 381 at 163-164; R. 351 (Tr. Ex. 290)).

More specifically, the current statutory scheme fails to hold a political corporation accountable for its negligent actions in a specific project. Upholding the damages cap in this case implicitly sanctions the negligent conduct of MMSD and their operation of the Deep Tunnel. This will allow MMSD to pass on the cost of their negligent operation of the Deep Tunnel to a class of citizens that are in no position to bear the substantial financial weight of this complex repair project when given damage awards that pale in comparison to repair costs. Practically applied to the situation caused by the Deep Tunnel, the damages cap is so unreasonably low that it bars tort victims such as Bostco from meaningful access to the courts.

The League of Wisconsin Municipalities' ("LWM") *amicus curiae* brief argues that "there is a big difference between medical providers and local governments" because medical providers "make tremendous profits." (LWM Br. 9). The League essentially argues that high dollar medical malpractice awards have no effect on the public, which is simply not true; the costs are disbursed through increased premiums rather than through taxes, but *Ferdon* and *Holytz* still represent a preference for broadly disbursing costs rather than inflicting them on non-negligent victims. Moreover, the argument misses the point: political fallout is not at issue, Equal Protection is.

Using the language of *Ferdon*, the classification scheme does not rationally advance the legislative objective. In this case, under the court's ruling in *Ferdon,* the current statutory scheme violates Equal Protection because the cap is so unreasonable low compared to the actual damages the jury found MMSD caused. As a result, plaintiffs with minor damages can get every dollar of damage they prove, while plaintiffs with major damages are effectively denied any justice whatsoever. While it is clearly the province of the legislature to study the issue and create caps that do not violate Equal Protection, it is equally clear that it is this Court's province to invalidate the current statute because it violates Equal Protection. Limiting damages to a fixed dollar amount per plaintiff leads to a two-tiered justice system. The damage cap is a violation of Equal Protection on its face because the cap is not rationally related to preventing governmental disruptions and it is so unreasonably low that it does not offer a reasonable opportunity for repair.

2. As Applied, Wisconsin Statutes section 893.80 is Unconstitutional

"The aim of the 'equal protection of the laws' clause is to assure that every person within the state's jurisdiction will be protected against intentional and arbitrary discrimination, whether arising out of the terms of a statute or the manner in which the statute is executed by officers of the state." *State ex rel. Murphy v. Voss*, 34 Wis.2d 501, 510, 149 N.W.2d 595 (1967). *(citation omitted).* Equal protection is denied when a public body selectively enforces a law in a

manner that is intentional, systematic, and arbitrary. *Id. See also Village of Menononee Falls v. Michelson*, 104 Wis.2d 137, 145, 311 N.W.2d 658 (Ct. App. 1981).

As Bostco details in its brief, MMSD's decisions as to whether or not to waive damage caps in its many Deep Tunnel cases was based *not* on available funds, or any other rational consideration, but instead on a completely arbitrary consideration: the *timing of the complaint.* (Bostco's App. Br. dated 7/25/08, 69-72). MMSD set an arbitrary time limit for paying claims in excess of the damages cap, halting all payments that went above the cap on June 30, 1994. *Id.* As parties who filed Notices of Claim after that date, both Bostco and the Trust are victims of this arbitrary policy.

B. The Trial Court did not Abuse its Discretion in Ordering Tunnel Lining

MMSD's objections to the injunction fall into three general categories. First, it complains about the timing of Bostco's request and the trial court's order. Second, it complains about the factual basis for granting the injunction. Third, as part of a recurring theme in its briefing, it attempts to evade responsibility through Wisconsin Statutes section 893.80. In reviewing the injunction, this Court should hold that the trial court's decision was legal.

Although space limits do not provide the Trust an adequate ability to brief this issue in full, it need not be because the parties fully briefed the Court already. To summarize:

- MMSD's complaints about the timing of the injunction are the result of its own stipulations. Counsel for MMSD agreed a year before trial that it had no problem with the court "sort of putting off the issue of the scope of an equitable relief until" a trial was held on the underlying claims. (R.372 at 27-28). As a result of this agreement, the October 25, 2006 Order could not have been final and therefore could not have barred Bostco from requesting the injunction or the trial court from granting it. Furthermore, Bostco's, January 19, 2007 notice of appeal does not somehow "convert" that previous order into a final order. Courts, not parties, decide the effect of court orders.
- MMSD's claim that it was blocked from being substantively heard on relevant issues is untrue. After MMSD got an adverse result, it complained about a lack of opportunity to present evidence. But after a 13 day trial, the appropriate factual issues had already been fully litigated and decided by a jury. After hearing specific evidence on (1) how MMSD could protect against future damages to the Boston Store by lining the tunnel and (2) the manner in which the tunnel needed to be lined and (3) a

cost estimate for lining it, the jury determined that MMSD could abate the interference by reasonable means at a reasonable cost. *See* R.403 at 3.

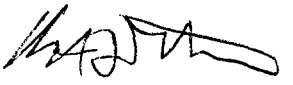
- MMSD's arguments to void the trial court's order under Wisconsin Statutes section 893 are without merit. First, its argument that the cost of the injunction exceeds the $50,000 damage cap ignores the plain language of the statute. Sections 893.80(3) and (5) limit recovery of money to a plaintiff, not cost to a defendant. Second, section 893.80(1) does not preclude a court from granting this injunction based on Bostco's Notice of Claim. Bostco correctly notes that MMSD was on notice that plaintiffs sought a remedy that would cost on the order of ten million dollars –that it must pay that amount to contractors rather than the plaintiff does not prejudice MMSD in any way. Finally, section 893.80(4) is simply inapplicable given the record in this case. Per a pre-trial ruling, the jury could only consider evidence of MMSD's breach of its ministerial duties. (R. 211 at 2). The trial court in turn based its injunction on the findings of that jury.

Based on this summary, and more importantly, based on the detailed arguments advanced by Bostco, this Court should uphold the order for injunctive relief.

CONCLUSION

For the foregoing reasons, the Trust respectfully requests that this Court (1) hold that the damage caps are unconstitutional and (2) uphold the trial court's Order for Injunctive Relief.

Respectfully Submitted,



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I certify that this brief or appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail, or other class of mail that is at least expeditious, on February 5, 2009. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes sections 809.19(8)(b) and (c) for brief produced in proportional serif font. The length of the brief is 2,715 words.

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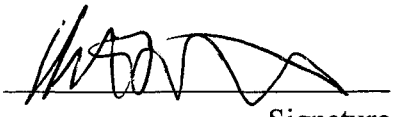

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