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)

# SUPPLEMENTAL BRIEF OF CROSS-APPELLANT MILWAUKEE METROPOLITAN SEWERAGE DISTRICT AND ADDENDUM


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In *E-L Industries, LLC v. Milwaukee Metropolitan Sewerage District*, this Court held that the District's removal of groundwater during excavation for an interceptor sewer constituted a compensable "taking" under art. I, §13 of the Wisconsin Constitution that gave rise to a cognizable claim under Wis. Stat. §32.10. 2009 WI App 15, *petition for review filed*. E-L claimed a taking of groundwater: "E-L persuaded the jury that the District took *E-L's groundwater* permanently, deliberately and for a public purpose and that E-L should be compensated for the lost groundwater and the accompanying loss in property value." *Id.* at ¶3 (internal quotation omitted)(emphasis added).

Although *E-L* might appear similar to this case, the claims and circumstances are materially distinct. First, Bostco LLC and Parisian, Inc. ("Owners") forfeited the groundwater takings claim *E-L* embraced by never advancing it in the circuit court.

Second, uncontestable facts make *E-L* inapplicable. The *E-L* claim was that the District took E-L's groundwater by continuously pumping groundwater out of a surface trench that was

immediately next to E-L's building.[1] Owners, in contrast, contend that water seeping into the Deep Tunnel—200–300 feet below the surface of Third Street and almost a block east of the Boston Store Building—harmed their foundational piles. Owners do not, and cannot, claim that the District directly removed groundwater from their property.

Third, any *E-L*-type takings claim is time barred.

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[1] Although *E-L* states that the "case has its beginnings in the Sewerage District's construction of a deep-tunnel storm-water system," 2009 WI App 15 at ¶2, the sewer involved there was not the Deep Tunnel. E-L alleged, as the circuit court's post-verdict decision (referred to *id.* at ¶3) correctly explained, that "the District had laid a 48″ sewer line within just a few feet of the south end of E-L's building. E-L claimed that, during the course of construction, the District pumped large amounts of water out of the ground in order to keep the construction trench dry and safe." Order, 04CV005505, 3 (Nov. 7, 2007). This 48-inch near-surface sewer carries flow for eventual collection in the Deep Tunnel, which is dramatically bigger, having a diameter of 17-32 *feet*, and which was dug out of bedrock about 300 feet below ground level.

## ARGUMENT

### I. Owners Forfeited an *E-L* Claim by Never Asserting a "Taking" of Groundwater.

This Court has announced as a "fundamental appellate precept . . . that [it] will not . . . blindside trial courts with reversals based on theories which did not originate in their forum." *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476 (internal quotation marks omitted). Even an argument that might result in the same relief sought in the trial court is forfeited "by failing to raise it with sufficient prominence and by failing to object when the circuit court did not address it." *Bilda v. Milwaukee County*, 2006 WI App 159, ¶42, 295 Wis. 2d 673, 722 N.W.2d 116 (takings argument forfeited). Forfeiture (or waiver) depends on whether the appellant advanced the principle adequately to allow the trial court below to consider it. *See id.* at ¶46.

The takings claim in *E-L* rests on the theory that the District dispossessed E-L of its "protectable right" "in the integrity of [ground]water." 2009 WI App 15, ¶11. In contrast, the only takings claim Owners have made theorizes that the District's operation and maintenance of the Tunnel damaged their "timber pilings."

Owners pleaded, for example, that "MMSD's operation and maintenance of the Deep Tunnel physically took portions of the timber pilings which rendered them unusable and damaged the Boston Store Building and Parking Garage." R.51:A-Ap.133. They repeated this contention in their opposition to the District's motion for summary judgment (R.134:A-Ap.367) and again here (Owners' Blue Br. 38, 42–43).

Judge Kremers correctly rejected Owners' argument that incidental property damage to the piles is a "takings." He reasoned that all Owners' evidence could show is that the Tunnel "damaged [Owners'] property to some extent. It hasn't resulted in a taking." R.374:MMSDApp-547–48. Allowing Owners now to claim that the property taken was "their" groundwater would impermissibly blindside the circuit court.

## II. *E-L*'s Takings Theory Could Not Apply to Owners' Contentions.

1. Judge Kremers ruled that Owners' allegations that groundwater infiltration during the District's operation and maintenance of the Tunnel caused their piles to decay is a claim for consequential damages potentially sounding in tort, but not in takings. *E-L* reaffirms the principle on

which Judge Kremers relied—consequential (or incidental) damage to private property resulting from governmental activities is not an actionable "taking" or "occupation." *E-L*, 2009 WI 15, ¶9 (citing *Wisconsin Power & Light Co. v. Columbia County*, 3 Wis. 2d 1, 87 N.W.2d 279 (1959)).

*E-L* reasoned that this principle did not apply to groundwater removal from a trench next to E-L's building. This Court equated the groundwater removal with land removed during street construction: "[L]and may be 'taken' by ... removing lateral support by reducing the grade of a street so that the adjoining owner's soil slides down into the street."[2] *E-L*, 2009 WI App 15, ¶10

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[2] Uncaptured groundwater is owned by the state. *See, e.g., United Cooperative v. Frontier FS Cooperative*, 2007 WI App 197, ¶23, 304 Wis. 2d 750, 738 N.W.2d 578. While *State v. Michels Pipeline Construction, Inc.*, recognizes a right to reasonable use of groundwater, *see* 63 Wis. 2d 278, 301-03, 217 N.W.2d 339 (1974), unreasonable use gives rise only to a nuisance action for interference with another landowner's use. *See* RESTATEMENT (SECOND) OF TORTS, §850A; *Village of Tequesta v. Jupiter Inlet Corp.*, 371 So.2d 663, 667 (Fla. 1979) (no takings claim for groundwater); *compare R.W. Docks & Slips v. State*, 2001 WI 73, ¶18, 244 Wis. 2d 497, 628 N.W.2d 78. Acknowledging *E-L*'s current precedential status, the District reserves these arguments.

(quoting *Wisconsin Power*, 3 Wis. 2d at 5). *See also Dahlman v. City of Milwaukee*, 131 Wis. 427, 438–40, 110 N.W. 675 (1907); *Damkoehler v. City of Milwaukee*, 124 Wis. 144, 150–51, 101 N.W. 706 (1904). Essential in *E-L* was the finding that the District's contractor purposefully removed a part of E-L's property—the groundwater.

Owners do not and cannot contend that the District physically removed their piles or purposefully pumped water out of the area near their building. They complain about groundwater seeping into the Tunnel, which is about 300 feet below Third Street—a block east of the Boston Store building. Unlike the groundwater the District's contractor pumped out of the trench in *E-L*, the District does not force groundwater from around the Boston Store building's foundation into the Tunnel. Hundreds of feet of different geological strata—soil, clay, and rock—separate the Boston Store foundation from the Tunnel. R.387:A-Ap.993; Trial Exs. 2988-122 & 2988-53 (copies included in Addendum). Groundwater resides at each of these different strata, slowly advancing at a rate depending in part on the density of the

compositional materials and replaced by groundwater entering the higher levels. *Id.*

Unlike E-L, Owners, whose land is not adjacent to the Deep Tunnel, cannot claim ownership of groundwater that infiltrates the Tunnel. And *E-L*'s analogy to soil sliding into an adjoining street because a lateral support is removed during road construction cannot be extended sensibly to groundwater infiltrating the Deep Tunnel from others' property hundreds of feet away from Owners' building.

Because the District cannot be found to have dispossessed Owners of *their* groundwater, *E-L* cannot convert their tort claims for consequential property damage into a cognizable takings or §32.10 claim. Absent a physical dispossession, a takings claim requires evidence of regulation that deprives Owners of "all economically beneficial or productive use of [their] land." *See R.W. Docks*, 2001 WI 73, ¶15; *Damkoehler*, 124 Wis. at 150. Given Owners' continuing use of the building, they cannot clear this hurdle.

2. Two additional factors on which *E-L* distinguished *Wisconsin Power* bear mention. First, Owners will presumably argue that the

District was "aware" that excessive removal of groundwater could cause harm. But "awareness" is irrelevant here. The District was not, and is not, aware that inflows during Tunnel operation and maintenance—the only conduct on which Owners base their takings claim—might cause harm. The "awareness of harm" evidence, including the often referenced "critical structures" memorandum, relates only to Tunnel construction. *See* MMSD's Reply Br. 11. The District had "no reason to anticipate that damage would result," *E-L*, 2009 WI App 15, ¶10, from operation and maintenance.

Second, *E-L* distinguished *Wisconsin Power* because the District's "diversion of groundwater [out of the neighboring trench] had utility," which *E-L* contrasts with the defendant's lack of benefit from harming the tower in *Wisconsin Power*. *Id.* Here the District cannot be found to have "diverted" groundwater into the Tunnel. Any infiltration during operation and maintenance results from gravity and the Tunnel's inward pressure gradient. Thus, the District neither purposefully damaged Owners' piles nor benefitted from any pile damage.

## III. The Statute of Limitations Bar.

The jury found that Owners should have discovered the cause of their harm more than six years before they commenced this action. *See* MMSD-Cross-Br.-61. If this finding is upheld (as the District has argued it should be, *see id.*; *see also* MMSD-Reply-Br.-15–17), then any groundwater "takings" claim based on the same alleged damage must have "sufficiently bloom[ed]" outside the limitation period, *see E-L*, 2009 WI App 15, ¶23. Unlike *E-L*, where the jury concluded that no harm accrued before E-L sued, the jury in this case found that Owners "should have known or discovered on or before June 4, 1997 that the tunnel as operated or maintained by the District had caused damage to the Boston Store building." R.403-2:A-App.586. Even if there were an *E-L*-type takings claim, this finding forecloses it.[3]

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[3] If this Court concludes (as it should not) that (i) Owners preserved a groundwater taking claim, (ii) the claim is not barred as a matter of law, and (iii) the claim is not precluded by the jury's finding that Owners sued more than six years after they should have discovered the cause of their injury, then whether Owners timely asserted an *E-L*-type claim should be addressed by the circuit court. *Cf. Gumz v. Northern States Power Co.*, 2007 WI 135, ¶49,

## CONCLUSION

The groundwater takings claim recognized in *E-L* was forfeited by Owners, has no application to the facts of this case, and is barred by the jury's statute of limitations finding. The circuit court's award of summary judgment on Owners' takings and inverse condemnation claim should be affirmed.

Respectfully submitted,

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By: _____
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305 Wis. 2d 263, 742 N.W.2d 271 (court should provide jury with statute of limitations question).

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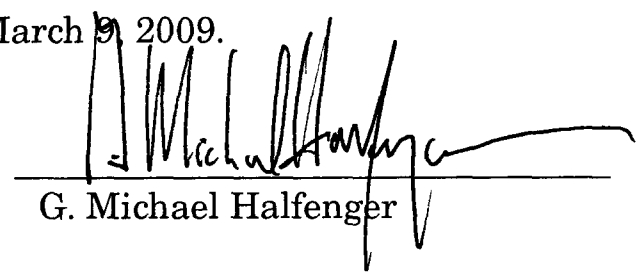
## FORM AND LENGTH CERTIFICATION

I certify that this supplemental brief conforms to the rules contained in § 809.19(8)(b) for a brief and appendix produced using proportional serif font and complies with this Court's February 17, 2009 order requesting supplemental briefing. The length of this supplemental brief is 10 pages.

Dated: March 9, 2009.



G. Michael Halfenger

## CERTIFICATE OF MAILING

I certify that this Supplemental Brief of Cross-Appellant Milwaukee Metropolitan Sewerage District and Addendum 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 March 9, 2009. I further certify that the brief was correctly addressed and postage was pre-paid.

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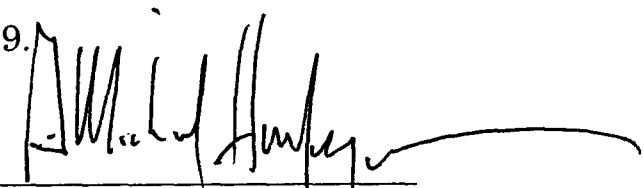

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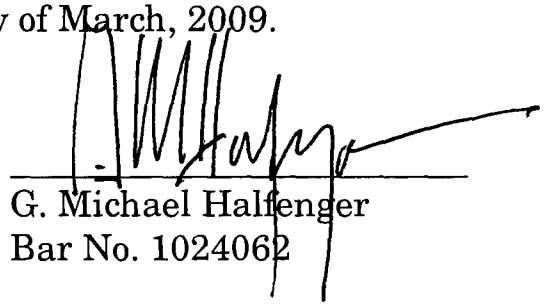
## SECTION 809.19(3)(B) CERTIFICATION OF COMPLIANCE

I hereby certify that filed with this brief is an addendum that has a table of contents and that the portions of the record included in the addendum are not required by law to be confidential.

Dated this 9th day of March, 2009.



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