

COURT OF APPEALS OF WISCONSIN
DISTRICT I

Bostco LLC and Parisian, Inc.,

Plaintiffs-Appellants-
Cross-Respondents,

v. Appeal No. 2007AP00221

Milwaukee Metropolitan Sewerage District,

Defendant-Respondent-Cross-Appellant.

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

**SUPPLEMENTAL CROSS BRIEF OF APPELLANTS AND CROSS-
RESPONDENTS BOSTCO LLC AND PARISIAN, INC.
ADDRESSING *E-L ENTERPRISES* v. *MILWAUKEE METRO.
SEWERAGE DIST.*, 2009 WI APP 15**

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INTRODUCTION

Appellants and Cross-Respondents Bostco LLC And Parisian, Inc. ("Boston Store") file this brief in accordance with the Court's Order dated February 17, 2009 to address how this Court's opinion in *E-L Enterprises v. Milwaukee Metro. Sewerage Dist*, 2009 WI App 15, Case No. 2008AP921 (Dec. 23, 2008) impacts this case and specifically, the inverse condemnation and statute of limitations issues at issue. In short, *E-L Enterprises* confirms that the trial court erred in dismissing the Boston Store's inverse condemnation claim and does nothing to support MMSD's contention that it failed to bear its burden to submit evidence showing that Boston Store knew or should have known that it had suffered damage as a result of MMSD's conduct more than six years prior to the date on which Boston Store filed its lawsuit against MMSD.

DISCUSSION

I. *E-L ENTERPRISES* CONFIRMS THAT THE TRIAL COURT ERRED IN DISMISSING BOSTON STORE'S INVERSE CONDEMNATION CLAIM.

As noted in Boston Store's Brief in Chief in this appeal, courts examine two elements in determining whether a plaintiff has a viable inverse condemnation claim: (1) whether the plaintiff has a recognizable

property interest; and (2) whether that interest has been taken. *Bilda v. City of Milwaukee*, 2006 WI App 57, ¶ 14, 292 Wis. 2d 212, 713 N.W.2d 661. As noted in the *E-L Enterprises* opinion, a property interest has been "taken" for purposes of an inverse condemnation claim when the following three factors are present: (a) the taking was deliberate and not accidental; (b) the property interest was taken for some use that benefits the public; and (c) the property was taken permanently. *Id.*, ¶ 7 (citing with approval jury instructions given).

In the present case, the trial court dismissed Boston Store's inverse condemnation claim, reasoning that the evidence Boston Store had submitted showing that MMSD had drained the soils underlying the Boston Store building that had been providing soil support and preventing the Boston Store's timber pile foundation from rotting was not evidence of a "taking" but of simply building damage. On appeal, MMSD defended and adopted this reasoning, arguing, as it had in the *E-L Enterprises* case, that as a matter of law under *Wisconsin Power & Light Co. v. Columbia County*, 3 Wis. 2d 1, 6, 87 N.W.2d 279, 281 (1958), its diversion of the groundwater supporting the piles was not a compensable taking. *See E-L*

Enterprises., 2009 WI App 15, ¶¶ 9-10; MMSD Resp. Br. at 58-60 (citing *WP&L*, 3 Wis. 2d at 4-5).

This Court's holding in *E-L Enterprises* makes plain that the reasoning adopted by the trial court and advanced by MMSD on appeal is not a correct application of inverse condemnation law in Wisconsin. First, the *E-L Enterprises* holding confirms that the taking of property that provides foundational support for a building is actionable in an inverse condemnation claim; it is not mere property damage to the building.

The opinion relies heavily on the Wisconsin Supreme Court's holdings in *Dahlman v. City of Milwaukee*, 131 Wis. 427, 438-40, 110 N.W. 479, 111 N.W. 675 (1907) and *Damokoehler v. City of Milwaukee*, 124 Wis. 144, 151, 101 N.W. 706 (1904) that the removal of a building's lateral support by the grading of a street gives rise to an inverse condemnation claim. As this Court noted, there is "no logical basis to distinguish between the removal of soil providing lateral support and the diversion of groundwater performing essentially the same function—that is, supporting the structural integrity of a building." *E-L Enterprises*, 2009 WI App 15, ¶ 11. In this case, just as in *E-L Enterprises*, MMSD removed the groundwater under the Boston Store that had both provided soil support

and kept the Boston Store's timber pile foundation saturated and thereby prevented it from rotting.

This Court's holding in *E-L Enterprises* not only explains why Boston Store has a viable inverse condemnation claim but also why MMSD's reliance on *Wisconsin Power & Light* is misplaced. As this Court explained, the facts in *Wisconsin Power & Light* are materially distinguishable from the facts in the *E-L Enterprises* case, which are nearly identical to the facts in this case, in that the defendant in *Wisconsin Power & Light* "had no reason to anticipate that damage would result from its acts," while MMSD "was aware of a potential groundwater problem in connection with buildings near the project ... [and accordingly] had 'reason to anticipate that damage would result from its acts.'" *E-L Enterprises*, 2009 WI App 15, ¶ 10.¹

¹ As noted in Boston Store's primary appeal brief and combined response and reply brief, MMSD knew that heavy infiltration into the deep tunnel could lower groundwater levels, that a drawdown of the groundwater levels could adversely affect the structural integrity of nearby buildings, that buildings with timber piles were most likely at risk, that the Boston Store building was one of the buildings likely to be affected by the draw downs and that groundwater was flowing into the deep tunnel causing groundwater drops to levels MMSD had predicted would compromise the foundations of nearby buildings. *Boston Store App. Br.*, pp. 22-25; *Boston Store Resp.-Reply App. Br.*, pp. 12-15 (citing R. 351 (Trial Exs. 290, 359, 429), A-Ap. 1342, 1374-75; R. 381 pp. 144-45, 163-69, 171-73, 177, 179 A-Ap. 736-38, 740; R. 382 pp. 36-38; R. 390 pp. 11-12, 15-17, A-Ap. 1040-41).

II. THE *E-L ENTERPRISES* CASE ESTABLISHES MANY OF THE ELEMENTS OF AN INVERSE CONDEMNATION CLAIM AS A MATTER OF LAW.

Because the facts in the *E-L Enterprises* case and in the present case are nearly identical, the case not only indicates that Boston Store has a viable inverse condemnation claim but that many of the elements of that claim are established as a matter of law under the doctrine of issue preclusion. Both the Boston Store and E-L Enterprises filed inverse-condemnation claims against MMSD based on its draining of the groundwater beneath the buildings in downtown Milwaukee near the alignment of MMSD's deep tunnel, which had been keeping the timber pilings under both Boston Store and E-L Enterprises' buildings sufficiently saturated to support these buildings. *E-L Enterprises*, 2009 WI App 15, ¶¶ 1-3; *Boston Store Resp.-Reply App. Br.*, pp. 6-7 (citing R.134 pp.50-53, A-Ap.347-50; R.138 pp.1-3, A-Ap.382-84; R.137 pp.1-3, A-Ap.404-06; R.112, A-Ap.1250-57).

Issue preclusion bars the relitigation of issues that have already been decided in a prior case. *State v. Nommensen*, 2007 WI App 224, ¶ 20, 305 Wis. 2d 695, 741 N.W.2d 481 (citing *State v. Miller*, 2004 WI App 117, ¶ 19, 274 Wis. 2d 471, 683 N.W.2d 485). In determining whether the

doctrine of issue preclusion bars relitigation of an issue, courts apply a two-step analysis, asking first whether issue preclusion can be applied as a matter of law and second whether application of the doctrine is fair. *Estate of Rille v. Physicians Ins.*, 2007 WI 36, ¶ 36, 300 Wis. 2d 1, 728 N.W.2d 693. Whether issue preclusion can apply as a matter of law depends on "whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." *Id.*, ¶ 37.

Whether application of the doctrine is fair turns on (1) whether the party against whom preclusion is sought could have obtained review of the judgment; (2) whether there are relevant factual or legal distinctions between cases; (3) whether there are significant differences in the quality or extensiveness of proceedings between cases; (4) whether the burdens of persuasion shifted; and (5) whether the party against whom issue preclusion is sought had the opportunity and incentive to obtain a full and fair adjudication in the initial action. *See Michelle T. v. Crozier*, 173 Wis. 2d 681, 495 N.W.2d 327 (1993).

As noted above, the three considerations pertinent in determining whether a taking is compensable in an inverse condemnation claim are

whether the taking was deliberate and not accidental, whether the property interest was taken for some use that benefits the public and whether the property was taken permanently. *E-L Enterprises*, 2009 WI App 15, ¶ 7. All three elements are established as a matter of law under the principles of issue preclusion set forth above.

In *E-L Enterprises*, the jury found that MMSD took the groundwater permanently, not accidentally and for a public purpose. *Id.*, ¶ 3. Each of these issues was essential to the judgment that was entered in favor of E-L Enterprises. *Id.*, ¶ 7. Finally, MMSD had an opportunity and motive to obtain full and fair adjudication of these elements and obtain review of the jury's findings. *Id.*, ¶ 4. Moreover, the cases involve the same burdens of proof, have both been litigated thoroughly and are so factually analogous and there can be no reasonable argument that there are any legal or factual distinction that would render the application of issue preclusion inappropriate. Moreover, Boston Store submitted evidence showing that each of these three elements are met in this case.²

² While the jury in *E-L Enterprises* only found groundwater removal that had been providing support to the plaintiff's building, the jury in this case necessarily found that MMSD drained water that had been providing support to the Boston Store building. Furthermore, Boston Store submitted evidence that has not been contradicted showing that like the building owned by E-L Enterprises, MMSD had specifically identified the (footnote continued)

As the elements of permanency, public purpose and deliberacy are established under principles of issue preclusion and based on the evidence submitted at trial, the only remaining issue is whether Boston Store had a property interest in its timber piles and the groundwater beneath its building. Boston Store's ownership of the timber piles was established at trial and this Court's opinion in *E-L Enterprises* establishes that Boston Store has a property interest in the groundwater supporting the structural integrity of its building. *See id.*, ¶ 11. Because all of the elements of Boston Store's inverse condemnation claim should be established as a matter of law, this Court need not remand the case for a determination of liability.

III. THE *E-L ENTERPRISES* CASE DOES NOT SUPPORT MMSD'S STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE.

To the extent this Court reinstates Boston Store's inverse condemnation claim, as Boston Store believes it should, the claim should not be barred by the statute of limitations. *E-L Enterprises* establishes that the statute of limitations period for an inverse condemnation claim based

Boston Store building as one that would be affected by dewatering and that the deep tunnel has a public purpose. *See, e.g.*, R.134 pp.12-14, 16, 19-22,72; A-Ap.309-10, 316-19, 369.

on the draining of groundwater does not accrue when the first drop of water is taken but instead, when the property damage becomes significant enough to put the owner on notice. 2009 WI App 15, ¶¶ 22-23.

MMSD had full opportunity and motive to submit any evidence it had below that might show that Boston Store knew or should have discovered the building settlement and that such settlement was being caused by MMSD draining groundwater from beneath the building. However, as set forth more fully in Boston Store's Combined Response and Reply Brief, the trial court correctly observed MMSD failed to submit any evidence at trial that could support a finding that Boston Store knew or should have known that MMSD was draining the groundwater beneath its building and that this drainage was causing significant damage six years before filing the present lawsuit. R.394 pp. 26-29, MMSD-App-0835-38.

Although MMSD attempted to introduce such evidence for summary judgment purposes, it abandoned this evidence at trial. Rather, MMSD opted to rely on the defense that no MMSD-caused damage ever occurred at the Boston Store. Suggesting Boston Store was on notice earlier of MMSD-caused harm would have undermined MMSD's theory of defense. As the trial court correctly observed, "it's pretty difficult to

understand how the Boston Store could be responsible for figuring out or knowing that which, to this very day, [MMSD] maintains wasn't happening." *Id.* Because MMSD failed to submit any statute of limitations evidence, much less evidence sufficient to meet its burden of proof, when it had a chance to do so, this Court should not allow MMSD an opportunity to retry the issue.

CONCLUSION

For the reasons set forth above and those set forth in its prior appellate briefing, Boston Store respectfully requests that this Court enter an order reinstating its inverse condemnation claim, finding that Boston Store is entitled to a finding of liability on that claim and damages in the amount of the jury's damage award³ and directing the trial court to enter an order awarding Boston Store its litigation fees in an amount to be determined upon remand.

³ The proper measure of damages for an inverse condemnation claim turns on considerations of whether repairs actually performed were necessary, whether the cost of repairs was reasonable and the extent to which the fair market value of the property was reduced by the cost of repair a purchaser would be required to perform were the building sold. *E-L Enterprises*, 2009 WI App 15, ¶ 17. In this case, the jury found that the past damages meet this measure of damages. Moreover, the "future" damages assessed by the jury further meet this criteria as they are "costs of repair a purchaser would be required to perform were the building sold. Further, because inverse condemnation is not a tort claim, it is not limited by the damage cap set forth in Wis. Stat. § 893.80(3)

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