RISING WATERS: ISSUES FOR MUNICIPALITIES WHEN DEALING WITH FLOODING AND WATER DAMAGE EVENTS

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I. NEGLIGENCE CLAIMS INVOLVING OVERFLOWING STORM SEWERS, SEWER BACKUPS AND BROKEN WATER MAINS

A. OVERVIEW

Claims typically involve events where property owners have been damaged due to broken or ruptured water mains, or where overflowing storm sewers caused property damage. Claims typically allege faulty construction or failing to properly monitor, inspect or repair or replace.

B. MUNICIPAL IMMUNITY UNDER WIS. STAT. § 893.80(4)

"No suit may be brought against any … governmental subdivision or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." When determining if governmental immunity applies, "legislative, quasi-legislative, judicial, or quasi-judicial functions" are synonymous with discretionary acts. ***Willow Creek Ranch, L.L.C. v. Town of Shelby*, 2000 WI 56, ¶ 25, 235 Wis.2d 409, 424-25, 611 N.W.2d 693**. A discretionary act is one that involves an exercise of judgment when applying rules to the facts. ***Id***.

1. **Adoption, Design and Implementation of Public Works Systems:** "Decisions concerning the adoption, design, and implementation of a public works system are discretionary, legislative decisions for which a municipality enjoys immunity." ***Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis.2d 635, 652, 691 N.W.2d 658 (MMSD)**. Discretionary decisions include:

   a. Designing system to handle 10 year storm events, as opposed to a something more. ***Welch v. City of Appleton*, 2003 WI App 133, n. 4, 265 Wis.2d 688, 666 N.W.2d 511**

   b. The adoption of a waterworks system. ***MMSD*, 277 Wis.2d 635, ¶ 9**.

   c. Selection of the specific type of pipe. ***Id***.

   d. The placement of the pipe in the ground. ***Id***.

   e. The continued existence of the pipe. ***Id***.

2. **Poor Design Choices:** "Approval of the design and construction of a [public works system] are generally discretionary acts . . . . Even if the system is poorly designed, a municipal government is immune for this discretionary act." ***Welch*, 2003 WI App 133, ¶13**.

3. **Cases**

   a. In ***MMSD*, 277 Wis.2d 635**, the Milwaukee Metropolitan Sewerage District sued the City of Milwaukee to recover costs resulting from the rupture of a city water main. The complaint alleged that the city failed to properly monitor, inspect, and repair or replace the water main. The court held that "[d]ecisions concerning the adoption, design, and implementation of a public works system are discretionary, legislative decisions for which a municipality enjoys immunity." Because MMSD could not point to laws directing the City how to inspect, monitor, and repair or replace the water main, the City's duty was discretionary rather than ministerial.

   b. ***Anhalt v. Cities and Vills. Mut. Ins. Co*., 2001 WI App 271, 249 Wis.2d 62, 637 N.W.2d 422** involved an unusual and abnormally heavy rain in the City of Sheboygan. The destruction to personal and real property was "well documented." In some instances, the foundations of homes collapsed inward, with basement walls giving way causing the earth to slide into the basements. In one case, the home collapsed entirely. Court rejected negligence claims that the City should have followed the City engineer's recommendations to implement a storm sewer system to handle a 100 year storm event, but City instead decided to implement and maintain a sewer system with a capacity to handle only a 1-year storm event. The city was immune from suit because the decision to implement and maintain the system was a discretionary act.

   c. In ***Welch v. City of Appleton*, 2003 WI App 133, 265 Wis.2d 688, 666 N.W.2d 511**, an overflowing storm sewer caused the Welches' home to collapse to a point requiring total demolition. At the peak of the storm's intensity, two inches of rain fell in ten minutes. There was so much water in the system that the resulting pressure created a twenty-foot geyser from the City's pipe in the Welches' yard. The geyser lasted about thirty minutes. Because the ground sloped downward from the pipe toward the house, the water naturally pooled against the foundation causing it to collapse, and bringing down most of the house as well. The court found the city sewer was working properly at the time. The Court rejected the homeowner's expert's opinions about the City's negligence,

finding that all of the following amounted to discretionary decisions about the design of the system: (1) the ponding in the Welches' backyard was foreseeable; (2) flooding was foreseeable because the system was designed for a ten-year event at best; (3) the pipe in the Welches' yard could have been capped or relocated; (4) the lack of a safety valve may have contributed to the flood; and (5) the City should have done an evaluation of the water's escape plan.

C. EXCEPTIONS TO IMMUNITY

1. **Ministerial Acts.** A ministerial act is one 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." The performance of a ministerial act does not require the use of judgment or discretion. ***Willow Creek*, 235 Wis.2d 409, ¶27**.

   a. **Statutes, Administrative Rules, Policies or Orders May Create A Ministerial Duty. See *DeFever v. City of Waukesha*, 2007 WI App 266, 306 Wis.2d 766, 743 N.W.2d 848** (a water main ruptured under an entrance ramp to the underground parking garage of the Kendal Glen Apartments in Waukesha. The escaping water caused flooding of approximately four feet in the underground parking garage. The flooding caused significant damage to the residents' property. Court held that Wisconsin Administrative Code provisions requiring placement of water main at specified depth as to prevent freezing created a ministerial act because the Code prescribed the depth, or an acceptable range, at which installation was to be performed. However, City escaped liability because it complied in this regard and court held that remaining issues of post-installation inspections and modifications did not impose a ministerial act).

   b. **Notice of a Defect May Impose a Ministerial Duty. See *MMSD*, 277 Wis.2d 635, ¶61-62** (Failure to repair a leaking water main may be an act for which a municipality may potentially be liable. However, court did not resolve issue: "Since we cannot determine whether the City was on notice that its water main was leaking and could potentially interfere with the use and enjoyment of another's property, we cannot conclude whether its duty to repair the leaking main with reasonable care before it broke was 'absolute,

certain and imperative,' or whether the City's decision not to repair the main before the break was discretionary.").

c. **Operation May be Ministerial.** "The actions of the City in operating and maintaining the sewer system do not fall within the immunity provisions of § 893.80." ***Menick v. City of Menasha*, 200 Wis.2d 737, 547 N.W.2d 778 (Ct. App. 1996)**.

2. Maintenance

a. **Maintenance may be ministerial. *Welch*, 265 Wis.2d 688, ¶ 34** ("Maintenance of sewers so as not to cause injury is generally considered ministerial compared to the discretionary decision relating to design or implementation of a system.").

b. **Key to defense is to show regular and systematic procedures to inspect and clean. See, e.g., *Freitag v. Montello*, 36 Wis.2d 409, 419, 153 N.W.2d 505 (1967)** (Action against city for damage resulting from back up of sewage into basement. Court held that a municipality must maintain sewers and drains in good repair, including keeping them free of obstruction. Evidence raised fact question as to whether municipality should have inspected sewer main between dates of annual cleaning operation); ***Sambs v. City of Brookfield*, 66 Wis.2d 296, 306, 224 N.W.2d 582 (1975)** ("In this case there is evidence that the city had notice that its failure to provide an adequate drainage system created a hazardous situation, and, therefore, it had a duty to remedy the defect. Also, because of such notice the city had a duty to inspect the system it provided for its continued adequacy and to prevent blockages and obstructions having the same result.").

c. **Tree roots causing blockages in sewer lines may lead to liability. *Jenzake v. City of Brookfield*, 108 Wis.2d 537, 543, 322 N.W.2d 516 (Ct. App. 1982)** (Plaintiff brought suit against city claiming that, although aware of root blockage problems, city negligently failed to maintain and repair sewer line, resulting in flood damage to her home. Here, credible evidence existed to support the finding that the city failed, within a reasonable time, to remedy a defect that was actually or constructively known to exist. The city's wastewater treatment manager acknowledged that the plaintiff's home was in an older subdivision and prone to

backups. He admitted to knowledge of a root growth problem in the subdivision and even had suggested to the city that the sewer system be replaced. The record further showed that blockages had to be removed a number of times in a problem area which included the plaintiff's address. Inspections were conducted quarterly in the problem areas, and cleaning was done annually. Moreover, the inspections consisted of workers simply opening manhole covers and looking in. The city wastewater manager admitted that workers could not determine from the quarterly inspections whether the sewer line could handle the full eight-inch capacity of flow. The plaintiff's expert testified that remote control televisions could and should have been rented to investigate the problem areas and that the rental was not expensive. Further, he opined that the cleaning should be done bi-monthly and that a sewer rooter was the best tool to use in maintaining control of any substantial tree root problems.).

3. Discharge

a. **Negligent maintenance or construction that allows water to discharge onto adjacent land.** Collecting water and allowing it to escape with regularity, intentionally or negligently, onto adjacent land permits the trial court to find liability for the system design. In ***Bratonja v. City of Milwaukee*, 3 Wis.2d 120, 123-24, 87 N.W.2d 775 (1958)**, the supreme court held that a "city is not obligated to build a sewer at all, or to build one large enough to carry away all the water in the street as a result of even ordinary rainfall." However, if the City first collects the water in the sewer and thereafter, by negligent construction or maintenance allows it to escape onto adjacent land, the City may be liable. **See also *Anhalt*, 2001 WI App 271, ¶ 24** ("the City is under no obligation to collect the rainwater that may accumulate in the street, but if it takes possession of the water and assumes responsibility for it, the City *may* be liable in nuisance for subsequently discharging the water onto adjoining property."); ***Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis.2d 431, 441, 400 N.W.2d 493 (Ct. App. 1986)** (the city system collected rainwater, discharging it through a culvert onto the club's property causing erosion. Case fits into the ***Bratonja*** exception - collecting water and allowing it to escape with regularity, intentionally or negligently, onto adjacent land permits the trial court to find liability for the system design.); ***Winchell v. City of***

Waukesha*, 110 Wis. 101, 85 N.W. 668 (1901)** (the City's sewer system emptied into a river that passed Winchell's property. As the volume of sewage increased, the stench caused illness. Case involved the *intentional* and unreasonable discharge of sewage into the river, not the capacity of the system). **Compare *Welch*, 265 Wis.2d 688, ¶ 22** ("In both ***Winchell and ***Hillcrest***, the design of each city's system perpetually moved the water from the system and past or through the plaintiff's land, not just during a heavy rain or flood event. In ***Menick***, as here, the sewer water would not, *under normal circumstances,* invade the private property. The Welches do not contend otherwise. The cities took care in designing their sewers to avoid creating such a nuisance and invasion. Indeed, as the trial court noted, "this was the only time that the [Welches] had ever experienced drainage problems." The fact that during an unforeseen and irregular rainstorm, the otherwise fully operational sewer could not process the falling water fast enough resulting in a back-up within the system does not make this a collected water case.").

b. **Claimants burden to prove. See *Bratonja*, 3 Wis.2d 120** (Plaintiffs failed to prove what part, if any, of their damage resulted from backing up of water in sewer as contrasted with that from flooding by surface water, failed to make a case for recovery against city even assuming that city could have been liable for result of bursting sewer pipe.); ***Reserve Supply Co. v. Viner*, 9 Wis.2d 530, 532-533, 101 N.W.2d 663 (1960)** (Warehouse owner sued plumbing contractor who had installed water line from city water main into warehouse to recover for damage to warehouse caused when mechanical joint in line under concrete floor of warehouse separated and water flooded into warehouse. Court held that trial court erred in asking jury to determine if contractor's negligence caused rupture in view of evidence from which it could be found that several causes combined to produce rupture.).

4. **Professional Skills**. Wisconsin Supreme Court has recognized an exception to governmental immunity for the acts of officers in the medical context. Exception has been rejected in other contexts, including city engineers who are employing their professional skills when designing a water main system. **See *DeFever*, 306 Wis.2d 766, ¶ 17** ("we will not undertake to extend the exception, first set forth in ***Scarpaci*** for medical discretion exercised by medical professionals, to city engineers.").

5. **Res Ipsa Loquitor.** The doctrine of *res ipsa loquitur* is an evidentiary rule that ordinarily arises at trial when determining the instructions the trial court should give

to the jury. *Res ipsa loquitur* is a rule of circumstantial evidence that permits a fact finder to infer a defendant's negligence from the mere occurrence of the event. Two conditions must be present before the doctrine of *res ipsa loquitur* is applicable. "The event in question must be of a kind which does not ordinarily occur in the absence of negligence … and the agency of instrumentality causing the harm must have been within [the] exclusive control of the defendant." **Wis JI-Civil 1145, cmt.** The jury is free to accept or reject this permissible inference. In the ***MMSD*** case, both the Court of Appeals and the Supreme Court agreed that, depending on the proffered evidence, at the conclusion of the case, the trial court could decide whether this doctrine would be appropriate to submit to the jury. Other jurisdictions have done so. **See, e.g., *Quigley v. Village of Hibbing*, 268 Minn. 541, 129 N.W.2d 765 (Minn. 1964)** (applying doctrine to water mains). The court may also address *res ipsa* arguments on summary judgment especially where a proper record supports no negligence. **See *Lambrecht v. Estate of Kacmarczyk*, 2001 WI 25, ¶ 27, 241 Wis.2d 804, 623 N.W.2d 751**.

II. DAMAGE CLAIMS FROM NATURAL AND ARTIFICIAL ACCUMULATION OF WATER

A. **Artificial accumulations of ice or snow on public sidewalks**. Generally, when ice or snow has accumulated on a public sidewalk abutting private property, the property owner owes no duty to passers-by either to clear the sidewalk or to scatter abrasive material thereon. **See *Corpron v. Safer Foods, Inc.*, 22 Wis. 2d 478, 484, 126 N.W.2d 14 (1964)**; **see also Wis. Stat. § 893.83** (prohibits an action against a municipality to recover damages for injuries sustained by a natural accumulation of snow or ice upon a highway unless the condition existed for three weeks). However, liability may exist for artificial accumulations. ***Gruber v. Village of N. Fond du Lac*, 2003 WI App 217, ¶ 4, 267 Wis. 2d 368, 671 N.W.2d 692.**

1. Where land is graded or structures are built in the usual and ordinary way, and not for the purpose of accumulating and discharging water on a public sidewalk, drainage that results only incidentally and is not caused by negligent maintenance is deemed natural and ordinary. ***Corpron*, 22 Wis. 2d 478, 484**.

2. Where the presence of a normal amount of water would be anticipated, but where it is allowed to accumulate because of the negligent omission of the party sought to be liable, such as a failure to keep a drainage system in repair, then it is an artificial condition and the governmental entity may be held responsible. ***Sambs v. City of Brookfield*, 66 Wis. 2d 296, 306, 224 N.W.2d 582 (1975)**.

B. **Focus is the presence or absence of a design system that is defective.** There must be evidence that something man-made – such as a drainage system design or a downspout – was defective and that the defect caused the accumulation. ***Gruber*, 2003 WI App 217, ¶ 18**.

1. Whenever land grading and structures on the property are built in a usual and ordinary way and not for the purpose of accumulating and discharging runoff on a public sidewalk, drainage that results only incidentally and is not caused by negligent maintenance is deemed natural and ordinary. ***Gruber*, 2003 WI App 217, ¶ 2**. In ***Gruber***, although water normally ran down an alleyway and across a sidewalk to the street during heavy flows, some of the runoff would flow down the sidewalk, resulting in ice accumulations when the pooled water froze. ***Id.*, ¶¶ 7, 9**. The plaintiff in ***Gruber*** sustained her injuries when she fell on such an accumulation. ***Id.*, ¶¶ 5-7**. The court held that even if the flow resulted from the varying pitches and elevations of the village's streets, it could not deem that flow artificial without the essential allegation that the village paved the streets in this arrangement "*as part of a drainage system design plan*." ***Id.*, ¶ 23** (emphasis added). **See also *Kobelinski v. Milwaukee & Suburban Transp. Corp.*, 56 Wis. 2d 504, 515, 202 N.W.2d 415 (1972)** (snow piled high on a curb, while man-made, is not "defective" such that it creates an artificial condition); ***Stippich v. City of Milwaukee*, 34 Wis. 2d 260, 269-70, 149 N.W.2d 618 (1967)** (leaving snow on the sidewalk is not considered to be a man-made "defective" condition rendering it artificial); ***Plasa v. Logan*, 261 Wis. 640, 644-47, 53 N.W.2d 720 (1952)** (where a man-made downspout is properly working and water finds its way from the rear of the building to a sidewalk, the accumulation is not considered artificial because while it was man-made, it was not defective).

2. When a property owner by negligent omission allows water to accumulate where one would only expect to find a normal amount thereof — for example by failing to properly repair a drainage system — then an artificial condition exists. ***Gruber*, 2003 WI App 217, ¶ 2; *see also Sambs v. City of Brookfield*, 66 Wis. 2d 296, 301, 306-07, 224 N.W.2d 582 (1975)** (where it is alleged that the driveway culverts are inadequate and the drainage ditches therefore overflow onto the road every time there is a substantial thaw, it is considered to be a negligently maintained man-made drainage system which causes the condition and is thus artificial.). **See also *Adlington v. City of Viroqua*, 155 Wis. 472, 473-474, 477-478, 480, 144 N.W. 1130 (1914)** (affirmed property owners' liability where defendants discharged water onto a private alleyway on their property via a conveyer pipe. The runoff reached the nearby sidewalk because a culvert designed to catch the excess drainage had become clogged.); ***Smith v. Congregation of St. Rose*, 265 Wis. 393, 400-01, 61 N.W.2d 896 (1953)** (overruled in part on other grounds) (If allegedly clogged and defective gutters on a roof causes an accumulation of water from melted snow in one spot which overflows into a gutter and forms ice on the sidewalk below, it is a man-made, defective condition which causes the problem and is considered artificial).

III. WATER DAMAGE CLAIMS ARISING OUT OF CONSTRUCTION AND MAINTENANCE OF ROADS AND HIGHWAYS

A. OVERVIEW

1. **Wisconsin Statute § 88.87**, part of Chapter 88 entitled "Drainage of Lands," was enacted to regulate the construction and drainage of all highways in order to protect property owners from damage to lands caused by unreasonable diversion or retention of surface waters due to the construction of highways or railroad beds.

2. **General Duty Imposed Upon Municipalities Under Wis. Stat. § 88.87(2)(a):**

   Whenever any county, town, city, village, railroad company or the department of transportation has heretofore constructed and now maintains or hereafter *constructs* and *maintains* any highway or railroad grade in or across any marsh, lowland, natural depression, natural watercourse, natural or man-made channel or drainage course, *it shall not impede the general flow of surface water or stream water in any unreasonable manner so as to cause either an unnecessary accumulation of waters flooding or water-soaking uplands or an unreasonable accumulation and discharge of surface waters flooding or water-soaking lowlands*. All such highways and railroad grades *shall be constructed with adequate ditches, culverts, and other facilities as may be feasible, consonant with sound engineering practices, to the end of maintaining as far as practicable the original flow lines of drainage*. This paragraph does not apply to highways or railroad grades used to hold and retain water for cranberry or conservation management purposes.

B. PURPOSE CODIFIED IN § 88.87(1)

It is recognized that the construction of highways and railroad grades must inevitably result in some interruption of and changes in the preexisting natural flow of surface waters and that changes in the direction or volume of flow of surface waters are frequently caused by the erection of buildings, dikes and other facilities on privately owned lands adjacent to highways and railroad grades. The legislature finds that it is necessary to control and regulate the construction and drainage of all highways and railroad grades so as to protect property owners from damage to lands caused by unreasonable diversion or retention of surface waters due to a highway or railroad grade construction and to impose correlative duties upon owners and users of land for the purpose of protecting highways and railroad grades from flooding or water damage.

C. PROCEDURAL REQUIREMENTS

1. **Prerequisites.** The procedures in **§ 88.87(2)(c)** are "a mandatory condition precedent to filing a claim under the statute." ***Van v. Town of Manitowoc Rapids*, 150 Wis.2d 929, 930-931, 442 N.W.2d 557 (Ct. App. 1989)** (**§ 88.87(2)(c)** "creates a remedy for property owners who claim damages [from a violation of] this statute and establishes certain procedures to be followed in making a claim.").

2. **Filing of Claim:** "The claim shall consist of a sworn statement of the alleged faulty construction and a description, sufficient to determine the location of the lands, of the lands alleged to have been damaged by flooding or water-soaking." **Sec. 88.87(2)(c)**.

   a. Courts examine all aspects of the flooding for reasonableness, including its inception, duration, and degree. ***See Klein v. Town of Trempealeau,* 228 Wis.2d 510, 597 N.W.2d 774 (Ct. App. 1999)** (unpublished).

   b. **Causation:** some level of specificity should be pled in order to satisfy the requirement of a "statement of the alleged faulty construction." Merely alleging a *condition* as opposed to *faulty construction* may be insufficient. **See *Herr v. DOT*, 2006 WI App 130; 294 Wis.2d 698;717 N.W.2d 853** (unpublished).

3. **Time Limit:** 3 years from event to file a notice of claim, per § 88.87(2)(c). See ***Lins v. Blau*, 220 Wis.2d 855, 584 N.W.2d 183 (Ct. App. 1998)** (time limit applies retroactively). In 1993, the legislature amended paragraph 2(c). **See 1993 Wis. Act 456, §§ 109 and 110** (effective on May 13, 1994). The only significant change made to paragraph 2(c) was that the time period for an aggrieved property owner to file a claim increased from ninety days to three years. **1993 Wis. Act 456, § 109**. The legislature made this change with the intent to provide the landowner with "sufficient time to discover the damage." **Legislative Council Special Committee Note, 1993 Wis. Act 456 § 109**.

   a. **Ends Repetitive Common Law Nuisance Lawsuits.** The legislature sought to protect municipal governments from repetitive lawsuits making the same basic allegations each and every time flooding took place. **See *Pruim v. Town of Ashford*, 168 Wis.2d 114, 121-22, 483 N.W.2d 242, 245 (Ct. App. 1992)**

   b. **Dismissal With Prejudice.** Prevailing against a § 88.87 claim would therefore entitle municipality to have case dismissed with prejudice, which has the effect of barring the landowner from suing the municipality again on each future flooding.

   c. **Exception:** However, landowners could still bring an inverse condemnation proceeding. ***Pruim*, 168 Wis.2d at 121-22.**

4. **Actual Notice:** Failure to give the *requisite notice by filing a claim* does not bar an action if the governmental entity "*had actual notice of the claim* within 3 years

after the alleged damage occurred and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant city, village town, county, railroad company or department of transportation." **See § 88.87(2)(d)** (emphasis added). Legislature enacted this provision in 1993, partly in response to ***Van v. Town of Manitowoc***.

D. RELIEF AVAILABLE

1. **Inverse Condemnation and Equitable Remedies.** A plaintiff alleging that the government has injured him or her by unreasonably impeding the flow of water in constructing or maintaining a highway "may bring an action in inverse condemnation under ch. 32 or sue for such other relief, other than damages, as may be just and equitable." **Wis. Stat. § 88.87(2)(c)**.

   a. **Equitable relief includes issuance of an injunction**. Injunction available only if either the water's diversion or retention was unreasonable since the statute gives landowners legal recourse against "unreasonable diversion or retention of surface waters due to highway" construction. **See Wis. Stat. § 88.87(1)**. To obtain an injunction it must be shown that the injunction is necessary to prevent future harm to the property and there is no adequate legal remedy. ***Kohlbeck v. Reliance Construction Company, Inc.,* 2002 WI App 142, 256 Wis.2d 235, 647 N.W.2d 277.**

   b. **Examples of equitable relief:**

      - ***Pruim v. Town of Ashford*, 168 Wis.2d 114, 483 N.W.2d (Ct. App. 1992)** (upholding as a proper claim for relief plaintiff's request for a court order for an independent engineering evaluation and if necessary "all necessary repairs to the culvert to ensure against future washouts of the culvert")

      - ***CNW v. Comm'r of Railroads*, 204 Wis.2d 1, 553 N.W.2d 845 (Ct. App. 1996)** (railroad ordered to modify grade and replace existing culvert with larger culvert to protect against future damage; dissenting opinion agreed that orders may be made to require the railroad to take action to cease impeding the flow of water)

      - ***Line R.R. Co. v. Comm. of Transp.*, 170 Wis.2d 543, 489 N.W.2d 672 (Ct. App. 1992)** (railroad ordered to install a 60-inch culvert even though other parties responsible for upstream development;

court's order allowed railroad to exercise its discretion in determining how to meet requirements of installing additional pipes).

c. **"Takings" Claims:** Wis. Stat. § 88.87 does not preempt a takings claim under the Wisconsin Constitution. ***Kohlbeck v. Reliance Construction Co*****., 2002 WI App 142, 256 Wis.2d 235, 647 N.W.2d 277**.

E. CASES

1. ***Lins v. Blau*****, 220 Wis.2d 855, 584 N.W.2d 183 (Ct. App. 1998)**. The Town and the County built two dikes on the highway to prevent the water from coming back into the Prairie View Subdivision. The plaintiffs alleged that the construction of these dikes, combined with the continuous pumping by the County, resulted in excessive water build-up on certain parcels of their property, causing severe damage to their crop land. The issue was whether amendments to § 88.87 should be applied prospectively or retroactively. The court held they should apply retroactively and remanded to decide remaining issues.

2. ***Klein v. Town of Trempealeau*** **228 Wis.2d 510, 597 N.W.2d 774 (Ct. App. 1999)** (unpublished). The Kleins sought an injunction to make the Town change a culvert contributing to flooding on their farm land. The Town had enlarged the culvert during road construction, and the Kleins claimed that the flooding caused a drop in their crop production. The following evidence tended to show that the Kleins' property did not experience extraordinary surface water retention as a result of the roadwork, but the surface water retention tended to fall within a legislatively acceptable range: The Kleins' expert witness stated that fields often have standing surface water in the spring before thawing. One witness viewed the land on two occasions; he saw water running through the culvert and saw no standing water. Another witness viewed the land on several occasions after heavy rains; he saw no ponding, no standing water, and a working culvert. A third witness viewed the land four or five times after heavy rains and saw no ponding. One family member complained only of flooding during spring thaw and one heavy rain in June. Another family member conceded that the Kleins always had some water in the fields during spring thaw.

3. ***Kohlbeck v. Reliance Construction Company, Inc.,*** **2002 WI App 142, 256 Wis.2d 235, 647 N.W.2d 277**. The State of Wisconsin began a road construction project on Highway 8 in Dunbar. The State repaved the highway, widening the lanes and creating a curb. DOT was responsible for designing and constructing the highway. The Kohlbecks owned a gas station and resided along a portion of Highway 8 that underwent construction. The Kohlbecks alleged that the construction project diverted surface and ground water to their property, causing environmental contamination. In addition, they claimed they were required to move a pump to another part of the property, costing $ 35,000 and forcing them to

temporarily close their business. Finally, the Kohlbecks claimed that they installed a higher curb line in an attempt to prevent more water from invading their land from the highway. The court concluded that the Kohlbecks stated a claim under **Wis. Stat. §§ 88.87** and **32.10**, as well as **art. I, § 13**. Based on these allegations, the court found the following request for relief under § 88.87 to be sufficient: "Injunctive relief requiring [the DOT] to repair the damage caused by its past conduct."

4. ***Herr v. DOT*, 2006 WI App 130; 294 Wis.2d 698; 717 N.W.2d 853** (unpublished). Herr alleged that portions of his elk pens experienced chronic flooding since the DOT implemented a highway improvement project, but never had before. He also alleged that flooding in a barn occurred because the DOT constructed an outflow pipe that was too small to accommodate the volume of water present, resulting in backflow into the barn's storage area and in the vicinity of the barn. Herr contended this allegation satisfied the "alleged faulty construction requirement" of **§ 88.87(2)(c)**. The DOT responded that Herr's claim draws a "spurious correlation" between the highway project and the water problems without identifying with sufficient specificity what aspect of the extensive project caused the alleged flooding. The circuit court found that the level of specificity urged by the DOT was appropriate and that Herr's claim gave deficient notice of claim. Court of Appeals affirmed. "Herr's 'before and after' allegation woefully fails to satisfy the requirement of a 'statement of the alleged faulty construction' as required by **§ 88.87(2)(c)**. This allegation merely alleges a condition, but fails to speak to any 'faulty construction.' As to the outflow pipe allegation, the DOT points to the unrefuted summary judgment evidence that the pipe belongs to Herr, is located entirely on Herr's land, and was not constructed by the DOT."

5. ***Niesen v. State*, 30 Wis.2d 490, 492, 141 N.W.2d 194 (1966) (Niesen I); *Niesen v. State*, 36 Wis.2d 671, 154 N.W.2d 316 (1967) (Niesen II)**. In the first suit, plaintiff brought an action for damages alleging that "the state highway commission, during the construction of Highway I-94 in the fall of 1963, blocked the highway ditch and failed to provide the proper drainage, causing the flooding of the plaintiff's land in the spring of 1964 and thereby rendering it useless for planting." Although claim for relief arose prior to the effective date of the new statute because the government's negligent conduct preceded the effective date of the statutory change, court held that Niesen could maintain his suit. In second suit, the court again held Niesen could recover under § 88.87 where the highway commission's subsequent act of closing off the highway drainage ditch caused the Niessen's land to become marshy.

IV. <u>CLAIMS UNDER THE INVERSE CONDEMNATION STATUTE OR THE "TAKINGS" CLAUSES UNDER THE STATE OR FEDERAL CONSTITUTION</u>

A. OVERVIEW

1. Plaintiffs may seek compensation from the government alleging that flooding and other water events constitute a "taking" of their property in violation of **Article I, section 13 of the Wisconsin Constitution** or the **Fifth Amendment to the United States Constitution**.

2. **Wisconsin Statute § 32.10, the inverse condemnation statute,** also permits a landowner to recover when government restricts or prohibits an owner's use of his or her property but has not exercised its condemnation power, or where there has been a "taking" but the entity with condemnation power does not pay "just compensation." The purpose of the statute is to "protect property owners against the slothful actions of a condemnor which, having constructively taken an owner's property, is in no hurry to compensate the owner." ***Wikel v. DOT*, 2001 WI App 214, ¶ 2, 247 Wis.2d 626, 635 N.W.2d 213**.

B. CAUSE OF ACTION

1. **Constitutional and Statutory Language**. The Fifth Amendment states in part: "nor shall private property be taken for public use, without just compensation." The Wisconsin counterpart states: "The property of no person shall be taken for public use without just compensation therefore." Section 32.10 provides:

   > If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceedings be commenced. The petition shall describe the land, state the person against which the condemnation proceedings are instituted and the use to which it has been put or is designed to have been put by the person against which the proceedings are instituted…. The court shall make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this subchapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same and assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied.

2. **Arises Prior to Actual Condemnation.** A cause of action under § 32.10 arises prior to the actual possession or occupation of the property if the complaint alleges facts that indicate the property owner has been deprived of all, or substantially all, of the beneficial use of the property. ***Howell Plaza, Inc. v. State Highway Comm*., 66 Wis.2d 720, 226 N.W.2d 185 (1975)**.

3. **Similarity in Legal Standards**. The standard for determining a violation under **Wis. Stat. § 32.10** is generally the same as that for a taking under **art. I, § 13**. ***Kohlbeck v. Reliance Construction Co*., 2002 WI App 142, 256 Wis.2d 235, 251, 647 N.W.2d 277**. With regard to the state and federal constitutional provisions, although terminology may sometimes differ, the standards by which courts determine whether government action constitutes a taking of property are similar.

    a. **Exception:** § 32.10 does not govern inverse condemnation proceedings seeking just compensation for a temporary taking of land for public use. Such takings claims are based directly on Article I, section 13, of the constitution. ***Anderson v. Village of Little Chute*, 201 Wis.2d 467, 549 N.W.2d 561 (Ct. App. 1996)**.

    b. **Exception:** Wisconsin Constitution only compensates taking, not damage. ***Menick v. City of Menasha*, 200 Wis.2d 737, 744, 547 N.W.2d 778 (Ct. App. 1996)**.

    c. **Exception:** No statutory remedy is necessary to enforce the provisions of art. I, § 13. ***Zinn v. State*, 112 Wis.2d 417, 438, 334 N.W.2d 67 (1983)**.

4. **Types of Takings**.

    a. **A permanent physical occupation:** Determine whether the claimant retains the rights of ownership, use and possession, and the right to dispose of the property. If so, probably no taking. "[T]o be a taking, flooding must appropriation of, and not merely an injury to, the property.'" ***Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 428 (1982)**. In flooding cases, there is no taking unless the flooding is permanent. ***Menick*, 200 Wis.2d 737, 743** (after resident's basement was twice flooded by the City's sewer system, she brought suit alleging private nuisance and inverse condemnation. Court affirmed summary judgment on the private nuisance claim because she failed to meet the burden of proving that the flooding resulted from the negligence of the City. In particular, she provided no expert testimony to advance her theory that the City's negligent acts caused the backup rather than unprecedented rainfall. On the § 32.10 inverse condemnation claim, court held that where flooding subsides and waters recede, there was no permanent physical occupation of the plaintiff's land and no governmental taking.); ***Anhalt v. Cities* and *Vills. Mut. Ins.***

Co*., 2001 WI App 271, 249 Wis.2d 62, 637 N.W.2d 422** ("We find ***Menick controlling in this case. The residents counter that those plaintiffs whose homes were destroyed or who had a wall of their home collapse have suffered a taking distinguishable from the typical temporary flooding case. They assert that the permanent loss in value of real property is a taking. However, it is the character of the invasion, not the amount of damage resulting from it, that determines whether a taking has occurred."); ***Strzelec v. City of Franklin,*** **2001 WI App 166, 246 Wis.2d 987, 632 N.W.2d 123** (unpublished) ("[T]he Strzelecs have not pointed to anything but failed attempts by the municipal defendants to rectify the [ponding on their land] - they have not alleged that the municipal defendants caused the ponding. Thus, they argue .. that the City was 'the only entity empowered to see that the illegal swale obstruction was removed on the neighbor's property and that the ponding on the Strzelec' property was eliminated.' …That may be, but the City did not cause the ponding problem. The Strzelecs have cited to us no case - from any jurisdiction - and we have found none, where negligent failure to fix a problem caused by a private party has supplied the basis for an inverse-condemnation claim.").

b. **A physical invasion short of an occupation:** Claimant must allege and demonstrate that the property has lost all value or utility. Mere consequential damage to property resulting from governmental action is not a taking. ***Wisconsin Power & Light Co. v. Columbia County*, 3 Wis.2d 1, 6, 87 N.W.2d 279 (1958)**. Damage to private property without appropriation to public use may be a compensable taking under some states' constitutions, but not Wisconsin's. ***Id***.

c. **A regulation that restricts the use of property:** Takings that do not involve physical invasions of land are called "regulatory takings". Is there a regulation at issue, what property is at issue and what is the impact on the practical uses of the land? In order to be considered a taking for which compensation is required, a regulation or government action "must deny the landowner all or substantially all practical uses of a property." ***Zealy v. City of Waukesha*, 201 Wis.2d 365, 374, 548 N.W.2d 528 (1996)** (citing ***Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)**). Taking jurisprudence does not allow dividing the property into segments and determining

whether rights in a particular segment have been abrogated. ***Id***.

- In ***Zealy***, the City of Waukesha rezoned 8.2 acres of a 10.4 acre parcel into a "conservancy" classification, which prohibited most types of development, including residential. Residential and business uses were still permitted on the remaining two-plus acres of the parcel. In denying the property-owner's taking claim, the supreme court noted that the 8.2 acres "may still be used for its historical use, farming. Viewed as a whole, the parcel retains a combination of residential, commercial, and agricultural uses."

- ***Eternalist Found., Inc. v. City of Platteville*, 225 Wis.2d 759, 593 N.W.2d 84 (Ct. App. 1999)** ("The [local government's] zoning decisions undoubtedly reduced the potential economic value of the [owner's] land. But such a reduction in economic value - even if dramatic - does not constitute a taking when the owner is left with some beneficial use of the land and the reduction is the result of the [local government's] legitimate exercise of its power over the pace and quality of development of the land within its jurisdiction. As the Supreme Court has made clear, the mere diminution in the value of the property does not constitute a taking.").

C. AVAILABLE REMEDIES

1. **Damages Available.** In addition to the fair market value of the property "taken," just compensation may include incidental and consequential damages such as rent, recording fees, mortgage pre-payment penalties and loss of value. **See Wis. Stat. §§ 32.09 & 32.19; *Luber v. Milwaukee County*, 47 Wis.2d 271, 280, 177 N.W.2d 380 (1970)** (determining that a statute limiting recovery for rent loss was an unconstitutional limit on the just compensation recoverable under art. I, §13).

2. **Litigation Expenses.** A successful plaintiff in an inverse condemnation action was entitled to litigation expenses, which included expenses related to a direct condemnation action. Expenses related to an allocation proceeding under s. 32.11 were not recoverable. ***Maxey v. Racine Redevelopment Authority*, 120 Wis.2d 13, 353 N.W.2d 812 (Ct. App. 1984)**.

3. **Exhaustion of State Judicial Remedies.** A claim based on violation of federal constitutional rights is unavailable where state remedies exist. In ***Williamson County Reg. Planning Comm'n. v. Hamilton Bank,*** **473 U.S. 172, 186-187 & 193-94 (1985)**, the Supreme Court articulated a ripeness doctrine for constitutional property rights claims that precludes courts from adjudicating land use disputes until two requirements are satisfied: (1) the "final decision" requirement: the relevant governmental entity has had an opportunity to make a considered definitive decision; and (2) the exhaustion requirement: the property owner exhausts available state remedies for compensation (i.e., the plaintiff must have sought "compensation through the procedures the State has provided for doing so"). **See, e.g.,** ***Rockstead v. City of Crystal Lake***, **486 F.3d 963 (7th Cir. 2007)** (where plaintiffs alleged Fifth Amendment "taking" in the form of impairment of value after town installed a pipeline in ditch that cut off the plaintiffs' drainage, resulting in intermittent but recurring flooding of their land from the ponds that transformed it from productive farmland into worthless wetlands, court held that suit was properly dismissed where state court remedies available even though state law common law foreclosed suits for intermittent flooding).

D. CASES

1. ***Hillcrest Golf & Country Club v. City of Altoona***, **135 Wis.2d 431, 441, 400 N.W.2d 493 (Ct. App. 1986)**. Owner of golf and country club brought action against city alleging that sewer system in street subdivision, which had been approved by city, collected rain water which discharged through culvert and then onto property owner's land leaving some of that land unfit for any use and rendering the remainder unfit for use as a golf course. Court held that allegations that city's sewer system caused erosion rendering certain land "unfit for any use," and rendering remainder of land "unfit for use as a golf course," stated cause of action for inverse condemnation. In addition, owner's pleadings alleging unique injury caused by discharge of water collected by sewer system depriving property owner of its reasonable use of property, stated claim against city under theory of private nuisance, as to which city was not immune. (This aspect of decision may be suspect in light of ***MMSD***.)

2. ***Kohlbeck v. Reliance Construction Co***., **2002 WI App 142, 256 Wis.2d 235, 251, 647 N.W.2d 277.** In addition to the § 88.87 claim above, where complaint alleges that the flooding has not subsided and diverted water continues to invade their property, this is sufficient to state a claim under **art. I, § 13** and **§ 32.10**.

3. ***Herr v. DOT***, **2006 WI App 130; 294 Wis.2d 698;717 N.W.2d 853** (unpublished). In addition to the § 88.87 claim above, Herr brought an inverse condemnation claim under **§ 32.10**; or, alternative, a determination that the water damage constituted a taking warranting just compensation. Herr asserted an entitlement to compensation from the DOT for its taking of a "flooding easement" over Herr's property, pursuant to the takings clauses of the federal and state

constitutions. With regard to **§ 32.10**, the court found that Herr's complaint did not allege that the flooding is "permanent." Rather, it alleged "persistent, chronic flooding" of portions of the elk pens and "periodic, chronic flooding" in the vicinity of a barn. The court found that "periodic" flooding is not "permanent," and it further construed "persistent" and "chronic" to connote flooding of a recurring, but not permanent, nature *such as after a dam gives way*. With regard to the "taking" claims, the court repeated this explanation and also found that Herr had not alleged or demonstrated that property has lost all value or utility.

E. INSURANCE: Claims for inverse condemnation may not be covered by municipal insurance.

1. ***Wolff v. Grant County Bd. of Adjustment*, 231 Wis.2d 238, 604 N.W.2d 304 (Ct. App. 1999)** (unpublished) (where the terms of a public official's liability policy excluded coverage for wrongful acts associated with land use actions, defendant insurance company had no duty to defend against a takings lawsuit).

2. ***Trumeter Dvpt. v. Pierce County*, 2004 WI App 107, 272 Wis.2d 829, 681 N.W.2d 269** (no duty to indemnify where the insurance policy contained an exclusion for inverse condemnation and there was a temporary taking and a diminished value of the developer's land through land use restrictions).

V. WATER DAMAGE AND FLOODING ALLEGED TO CONSTITUTE A PUBLIC OR PRIVATE NUISANCE

A. OVERVIEW

1. A nuisance is a material and unreasonable impairment of the right of enjoyment or the individual's right to the reasonable use of his or her property or the impairment of its value. ***Anhalt v. Cities & Villages Mut. Ins. Co*., 2001 WI App 271, ¶ 18, 249 Wis.2d 62, 637 N.W.2d 422**. In order to establish liability for a nuisance, there must be proof of the nuisance, proof of the underlying tortious conduct giving rise to the nuisance, and proof that the tortious conduct was the legal cause of the nuisance. ***Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, ¶ 6, 277 Wis.2d 635, 652, 691 N.W.2d 658 (MMSD)**

2. Immunity under § 893.80 may be available, per ***MMSD*, 277 Wis.2d 635, ¶ 59 n. 16** ("[T]he court of appeals in the instant case misstated the law when it concluded that **§ 893.80(4)** immunizes a municipality from a cause of action alleging negligence but not a nuisance claim that is based in negligence."). A municipality is immune from suit for nuisance if the nuisance is predicated on negligent acts that are discretionary in nature (i.e., legislative, quasi-legislative, judicial, or quasi-judicial). A municipality does not enjoy immunity from suit for nuisance when the underlying tortious conduct is negligence and the negligence is comprised of acts performed pursuant to a ministerial duty. ***Id*., ¶ 8**. **See also**

***Lange v. Town of Norway*, 77 Wis.2d 313, 314, 253 N.W.2d 240 (1977)** (plaintiff alleged that a town negligently maintained a dam and that the operation of the dam constituted a nuisance because it caused the waters of a nearby lake to back up and flood his lands. Court found the town was immune from any liability predicated upon its acquisition of the existing dam or construction of a new dam because "these are clearly legislative functions under the statute." While the town enjoyed immunity in regard to "the size of the dam acquired and the capacity of its floodgate," immunity did not extend to claims arising from negligence in operating or maintaining the existing dam. Immunity "would not include a failure to maintain as to a condition of disrepair or defect or a failure to operate said floodgate.")

B. CAUSE OF ACTION

1. **Existence of a Nuisance:** A nuisance exists if there is a condition or activity that unduly interferes with the private use and enjoyment of land or with a public right. ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co*., 2002 WI 80, ¶ 21, 254 Wis.2d 77, 646 N.W.2d 777**. A cause of action in nuisance is predicated upon a particular type of injurious consequence, not the wrongful behavior causing the harm. ***MMSD*, 277 Wis.2d 77, ¶ 26**.

2. **Public and Private Nuisances:** If the interest invaded is the private use and enjoyment of land, then the nuisance is considered a private nuisance. If the condition or activity interferes with a public right or the use and enjoyment of public space, the nuisance is termed a public nuisance. ***MMSD*, 277 Wis.2d 77, ¶ 30**.

    a. **Private Nuisance:** The essence of a private nuisance is an interference with the use and enjoyment of land. Since a private nuisance is "broadly defined to include any disturbance of the enjoyment of property[,]" an action to recover damages for a private nuisance may be brought by those who "have property rights and privileges in respect to the use and enjoyment of the land affected," including possessors of the land and owners of easements. ***MMSD*, 277 Wis.2d 635, ¶ 27**.

    b. **Public Nuisance:** A public nuisance is a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community. In other words, it is an unreasonable interference with a right common to the general public. The interest involved in a public nuisance is broader than that in a private nuisance because "a public nuisance does not necessarily involve interference with use and enjoyment of land." ***MMSD*, 277 Wis.2d 635, ¶ 28**.

c. The distinction between a private and public nuisance is "not the number of persons injured *but the character of the injury and of the right impinged upon*." ***MMSD*, 277 Wis.2d 635, ¶ 29**.

d. Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. Since the term public nuisance refers to a broader set of invasions than private nuisance, "[a] nuisance may be both public and private in character. . . . A public nuisance which causes a particular injury to an individual different in kind and degree from that suffered by the public constitutes a private nuisance." ***MMSD*, 277 Wis.2d 635, ¶ 29**.

3. **Intentional or Negligent:** Liability for a nuisance may be based upon either intentional or negligent conduct. ***MMSD*, 277 Wis.2d 635, ¶ 33**.

a. **Intentional:** An interference with another's interest in the use and enjoyment of land is deemed to be "intentional" if the actor "(a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct." Thus, a nuisance is based on intentional conduct when the defendant, through ill will or malice, intends to cause the interference or if the defendant, without any desire to cause harm, nonetheless has knowledge that his otherwise legal enterprise is causing harm or is substantially certain to cause the invasion at issue. The "knowledge" requirement refers to knowledge that the condition or activity is causing harm to another's interest in the use and enjoyment of land. ***MMSD*, 277 Wis.2d 635, ¶ 37**.

b. **Negligent:** When liability for a nuisance is predicated upon negligent conduct, it is necessary to establish both the existence of a private nuisance – an interference with the private use and enjoyment of land – and that the conduct causing the harm is actionable under the rules governing liability for negligent conduct, including notice. ***MMSD*, 277 Wis.2d 635, ¶ 49**. Concepts of negligence and nuisance overlap when a nuisance is predicated on negligent conduct, but "nuisance is a result and negligence is a cause." ***Physicians Plus*, 2002 WI 80, ¶ 27**. As such, "a person may not recover damages from a private

unintentional nuisance in the absence of underlying negligent . . . conduct . . . or activities." ***MMSD*, 277 Wis.2d 635, ¶ 43**. An essential element of a private nuisance claim grounded in negligence is proof that the underlying conduct is "otherwise actionable under the rules controlling liability for negligent . . . conduct." ***Id.*, ¶ 44**. When the plaintiff's complaint does not allege intentional conduct and negligence is not properly proved, the "'plaintiff adds nothing to the sufficiency of the complaint by his allegations of nuisance.'" ***Id***.

1. **Four elements must exist to maintain a cause of action for negligence:** (1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. ***Rockweit v. Senecal*, 197 Wis.2d 409, 418, 541 N.W.2d 742 (1995)**. **See *Matthies v. Positive Safety Mfg. Co*., 2001 WI 82, ¶11, 244 Wis.2d 720, 628 N.W.2d 842** (where a private party's construction of a roadway or parking lot contributes to storm water run-off problems onto another's land, must show that negligence was a contributing factor to the runoff).

2. **All Negligence Defenses Available.** Since proof of negligence is essential to a negligence-based nuisance claim, the usual defenses in a negligence action are applicable, including notice, causation and public policy factors that may preclude liability. ***Physicians Plus*, 2002 WI 80, ¶ 20**. Six public policy factors: (1) [t]he injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; (4) allowance of recovery would place too unreasonable a burden on the negligent tortfeasor; (5) to allow recovery would open the way for fraudulent claims; or (6) to allow recovery would enter a field that has no sensible or just stopping point. ***Butler v. Advanced Drainage Sys*., 2006 WI 102, ¶ 19, 294 Wis.2d 397;717 N.W.2d 760**

4. Elements of a Private Nuisance (Restatement)

The following elements must be proven for liability for a private nuisance:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent conduct
>
> ***MMSD*, 277 Wis.2d 635, ¶ 32**.

5. Elements of a Public Nuisance (Restatement)

a. Maintenance of Public Nuisance: To prove defendants **maintained** a public nuisance, the plaintiff must show:

1. The existence of the public nuisance itself;
2. Actual or constructive notice of the public nuisance; and
3. The failure to abate the public nuisance is a cause of the plaintiff's injuries.
4. Courts also look to public policy considerations; liability for maintaining a public nuisance can be limited on public policy grounds.

***Physicians Plus*, 254 Wis.2d 77, ¶¶ 2, 19-32**.

b. Creation of Public Nuisance: Same elements except do not need to prove that the defendant had actual or constructive notice of the hazardous condition that later developed. ***Physicians Plus*, 254 Wis.2d 77, ¶ 24 n. 19**.

C. CASES

1. *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis.2d 635, 691 N.W.2d 658 (MMSD). MMSD filed a complaint against the City of Milwaukee to recover sums related to the repair and replacement of its metropolitan interceptor sewer (MIS), which allegedly collapsed due to the rupture and collapse of the City's nearby water main. The complaint set forth a negligence claim, alleging that the City "did not properly monitor the volume of water through the pipeline, did not properly inspect the pipeline, did not notice the unusual water flows in the vicinity, and did not properly repair/replace the City's water main in the vicinity of [the MIS]." The complaint also set forth a nuisance claim, alleging that "The City has, upon information and belief, permitted a nuisance condition to exist, to wit: the existence of broken water main, which

nuisance caused the collapse of the District's MIS." The court held that disputed issues of fact existed regarding whether the City had notice of the leaking water main prior to the break, and as to what caused MMSD's sewer to collapse. The court found there was no evidence that the City intentionally created a nuisance. "This is not a case where the nuisance condition is created by the very nature of the defendant's activities and operations, such as the case with a slaughterhouse or tannery. Rather, the allegations in the present case are more analogous to [cases] regarding a failure to act. Water mains are generally beneficial to property owners. It is only when, over time, through the natural process of corrosion and the City's negligence in repairing and maintaining its mains that the pipes leak, break, or otherwise create a condition that interferes with the private use and enjoyment of property." "The initial act in laying the water main did not give rise to a cause of action; rather it is the City's alleged negligence in failing to act and repair a leak in the water main that ultimately damaged MMSD's sewer and gave rise to the cause of action." Having determined that the nuisance in this case was premised on the City's alleged negligence in failing to repair its leaky water main - that is, failure to abate a nuisance – the Supreme Court found that notice is a necessary part of the plaintiff's proof that must be established. Moving to immunity issues, the Court observed that "[t]he only act for which the City may be potentially liable is its failure to repair the leaking water main. As MMSD has not alleged that the City was negligent in failing to repair the main *after* it broke, the question then becomes whether the City was under a ministerial duty to repair the leaking main *before* it broke." "Having reviewed the record, we determine that the facts of the present case are not sufficiently developed for us to determine whether the City was under a ministerial duty to repair the leaking main prior to its break on December 9, 1999. [T]here is a material issue of fact as to whether the City had notice of the leaking water main prior to its break. Since we cannot determine whether the City was on notice that its water main was leaking and could potentially interfere with the use and enjoyment of another's property, we cannot conclude whether its duty to repair the leaking main with reasonable care before it broke was "absolute, certain and imperative," …, or whether the City's decision not to repair the main before the break was discretionary."

2. ***Butler v. Advanced Drainage Sys*., 2006 WI 102, 294 Wis.2d 397, 717 N.W.2d 760**. Dismissal of negligence and nuisance claims was affirmed because the claims were precluded by public policy, when plaintiffs were aware of the flooding hazard surrounding the lake, and it was probable that absent any act by defendants, plaintiffs nevertheless would have suffered damages. This action arose out of a project by the City and several engineers and contractors to design and install a system to lower the water level, including by use of a pipeline. The Lake is located entirely within the boundaries of the City of Shell Lake. There were more than 400 properties abutting the Lake. The plaintiffs own properties on the Lake. After installation of the pipeline, leaks immediately developed and it was shut down for repairs for almost a year. While the attempted repair was underway, the City hired an engineering firm to investigate the Project and to propose solutions. The resulting report concluded that the pipeline's failure

stemmed from design and material defects, failure to test the materials and problems with installation. The report suggested several alternative solutions to appropriately accommodate the water pressure, including reconstruction of the pipeline, the use of new types of piping made of different materials, and the insertion of a "slip-line" within the existing pipe. The complaint alleged the following claims: (1) the City and private parties were negligent in performing their contractual obligations for the Project, causing property damage, loss of property value and loss of enjoyment; and (2) the defendants' negligent actions and inactions created and maintained a nuisance, which nuisance unreasonably impaired the plaintiffs' right of enjoyment and right of reasonable use of their property. Court held, "[a]lthough several of the six public policy factors could apply in this case, the sixth public policy factor, that imposing liability would enter a field that has no sensible or just stopping point, is the factor that compels us to preclude liability." "[P]ermitting this claim to go forward could encourage lawsuits for any number of potentially negligent participants who have tried unsuccessfully to prevent flooding, over the long history of the Lake's rising water levels. This is a natural hazard that was amplified by development on the Lake. Should every failed effort at controlling the flooding bring a lawsuit? For example, if a retaining wall had been constructed in the hope of holding off rising water and the property flooded nevertheless, should that contractor also be held responsible for the damage to the plaintiff's or to neighboring residents' properties because the efforts were unsuccessful?"

3. In ***Strzelec v. City of Franklin,* 2001 WI App 166, 246 Wis.2d 987, 632 N.W.2d 123** (unpublished), the plaintiffs' claimed that their neighbors unlawfully interfered with the free drainage of water on their property by filling in a swale. Despite their repeated requests that the City and the neighbors do something about it, water still ponded on part of the plaintiffs' property. After the neighbors did not successfully alleviate the water problems on the plaintiffs' property, the City undertook to do so. The plaintiffs' claimed that this was done negligently. The plaintiffs sued the City, its engineer and their neighbors alleging negligence, inverse condemnation and nuisance (among other claims). On the negligence claim, the court ruled: "The crux of the Strzelecs' negligence claim against the municipal defendants is that the City and [its engineer] did not effectively monitor the landscaping and filling work done by the [neighbors], and that this led to the ponding on the Strzelecs' land. But the Strzelecs point to nothing in the ordinances they claim were violated by the City and [its engineer], Franklin Ordinances §§ 12.15 and 13.14, that so circumscribed the duties and obligations of city personnel as to the 'time, mode and occasion for its performance with such certainty that nothing remain[ed] for judgment or discretion.'" "At the most, the Strzelecs' negligence claim against the City and [its engineer] is based on a retrospective, result-colored analysis of how they contend the governmental discretion should have been exercised. Section 893.80(4) bars that claim." With regard to their claim that the City negligently failed to alleviate the problem, the court held that the plaintiffs "do not point to anything - either in the city ordinances or anywhere else - that so circumscribed the duties and obligations of

city personnel…." Court rejected arguments that the elimination of ponding was clear and positive and that it was "an objective specification readily obtainable from an engineering and construction standpoint."

VI. OTHER CAUSES OF ACTION

A. **Wis. Stat. § 32.18:** Provides property owners with a remedy against governmental entity when an owner's property was damaged by a change of grade in the street or highway, but the damage does not rise to the level of a taking. Statute broadly allows "a claim for any damages to said lands occasioned by such change of grade." Special benefits may be offset against any claims for damages under this section. Claims must be filed within 90 days following completion of the project and the claim is deemed disallowed 90 days thereafter. A claimant has 180 days from the filing of the claim to commence legal action. **See *Johnson v. City of Onalaska*, 153 Wis.2d 611, 451 N.W.2d 466 (Ct. App. 1989)**. Although **§ 32.18** generally requires claims to be brought within ninety days of completion of the highway project, that requirement does not apply when a party is proceeding under **Wis. Stat. § 88.87**. The final sentence of **Wis. Stat. § 32.18** provides: "This section shall in no way contravene, limit or restrict s. 88.87." This suggests that parties are not time-barred from pursuing a claim under **§ 32.18** so long as they have proceeded timely under **§ 88.87**.

B. **The Reasonable Use Doctrine:** The reasonable use doctrine states that "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." ***State v. Deetz*, 66 Wis.2d 1, 14, 224 N.W.2d 407 (1974)**. Whether a possessor makes reasonable use of his or her land depends upon multiple factors. **See *Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen*, 129 Wis.2d 129, 138-41, 384 N.W.2d 692 (1986)** (discussing factors). Further, even if a possessor's conduct has social utility, a finder of fact must still determine whether his or her conduct was reasonable. ***Id*. at 144**. Application of the reasonable use standard generally requires a full exposition of all underlying facts and circumstances. **See *Prah v. Maretti*, 108 Wis.2d 223, 242, 321 N.W.2d 182 (1982)**.

C. **Metering: *Zehner v. Village of Marshall*, 2006 WI App 6, 288 Wis.2d 660, 709 N.W.2d 64**. In ***Zehner***, renters of mobile home park lots sued Village, alleging that water/sewer fees Village charged were unjust, unreasonable, and non-uniform. The Village began using the different billing method for American Mobile Home because the Village determined that American's mobile home park was responsible for significant groundwater infiltration into the sewer system. The Village had the authority to require American Mobile Home to repair its sewer equipment to stop groundwater infiltration, but the Village chose to address the issue by charging American Mobile Home water/sewer fees based on sewer outflow. The result was that American Mobile Home was charged more than if it were charged based on

water inflow like other Village residents, and more than if American Mobile Home repaired its sewer line. Court held that renters lacked standing. The plaintiffs failed to show that they had suffered, or were threatened with, an injury to a legally protectable interest, and renters did not allege that, if they prevailed, landlord would be required to reduce their rent. With regard to the owner of the mobile home park, court held owner had no duty to renters of park lots to repair its defective sewer line to reduce sewer outflow and the water/sewer fees charged by Village.