No. 124999

In the Supreme Court of Illinois

GORDON BERRY and ILYA PEYSIN,	) On Petition for Leave to Appeal from) The Illinois Appellate Court, First) District, No. 1-18-0871
Plaintiffs-Appellees,	)
v.	) There on Appeal From the Circuit) Court of Cook County, Illinois,) No. 2016-CH-02292
CITY OF CHICAGO,	)
Defendant-Appellant.	) Trial Judge: The Hon. Raymond W.) Mitchell

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BRIEF OF DEFENDANT-APPELLANT CITY OF CHICAGO

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NATURE OF THE CASE

Plaintiffs brought this lawsuit asserting class action negligence and inverse condemnation claims against the City of Chicago, alleging that the City's actions to maintain and improve its water delivery systems have resulted in increased lead levels in the water delivered to plaintiffs' homes. Plaintiffs admit that neither of them has any present physical injury caused by the alleged lead exposure. The circuit court dismissed both claims with prejudice; plaintiffs appealed; and the appellate court reversed over a dissent. All questions are raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court majority errs in holding that plaintiffs sufficiently alleged the injury element of their negligence claims by asserting exposure to elevated levels of lead in the water delivered to their homes where plaintiffs admit that they have no physical injury from the alleged exposure.

2. Whether the appellate court majority errs in holding that plaintiffs could bring an inverse condemnation claim based on the repair and replacement of existing water infrastructure across hundreds of blocks in Chicago.

3. Whether the appellate court majority errs in holding that the City's discretion under the Tort Immunity Act could be prescribed by an outside, private organization's recommendations that do not have the force of law.

STATUTES INVOLVED

The third issue involves the discretionary immunity provision of the Local Governmental and Governmental Employees Tort Immunity Act, which states:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

745 ILCS 10/2-201.

STATEMENT OF FACTS

A. Plaintiffs' Allegations.

This case concerns the connections between the City's water mains and residents' water service lines. C305, 314.[1] The City's water mains are underground and typically run along streets in residential areas, and the residents' water service lines connect the water mains to residences. C314, 320. Homes constructed before 1986 may have water service lines made of lead. C312.

Plaintiffs allege that in 2008, the City decided to modernize its water system, replacing water mains that date to the 1800s. C320. In recent years, the City announced plans to replace 900 miles of water mains over a ten-year period. *Id.* In conducting this modernization project, the City's contractor disconnects the residents' water service lines from the old water main,

[1] We cite the Common-Law Record as "C_"; the Reports of Proceedings as "R_"; and the Separate Appendix as "A_."

replaces the water main, and then reconnects the residents' water service lines to the new water main. C314.

As the City has carried out these improvements, it has considered what precautions to recommend residents take after water main replacements. Plaintiffs allege that from 2009 through 2012, the City did not advise residents to take certain precautions after water main replacements. C320-21. In the next three years, 2013-2015, the City sent letters to residents whose water mains were replaced, advising them to remove screens from their faucets, open their faucets, and flush the water for 3 to 5 minutes. C321.

The two named plaintiffs allege that they reside on streets where water mains (and in Berry's case, his water meter) were replaced, and that they now have elevated levels of lead in their water. C307-08. Berry alleges that the water main on his block was replaced in 1998, almost twenty years before the 2016 testing that showed elevated lead levels. C323-25 ¶¶ 68, 70-76. As explained in the Section 2-619 motion filed in the circuit court, based on City records, the water main connected to Berry's home when the complaint was filed dated from July 1897. C540 (City MTD Memo, Ex. 3, Putz Aff. ¶ 4). Berry also claims that his water meter was replaced in 2009—seven years before the testing. C323-24 ¶¶ 68-69. According to a City employee's affidavit, Berry's water meter was replaced in 2005 (not 2009) and

a register was installed in 2009, using procedures that would not have shaken or otherwise disturbed Berry's service lines. C540-41 ¶¶ 7, 9.

The most likely reason for Berry's lead levels is that his lead service pipe extends near his basement ceiling, instead of stopping at the basement floor as is common. C541-42 ¶ 12. This piping is not supported or insulated and is located near a heater, which increases the potential for lead from the pipe leaching into the water. *Id*. Although Berry alleges that the City's work on the water lines servicing his home placed his family at higher risk of lead contamination, C323-25 ¶¶ 68-79, he does not allege what his lead levels were before the alleged water main or water meter replacements. Nor does Berry mention the freestanding service pipe in his basement, or that the City recommended that he support and insulate, or replace, that pipe. C542 ¶¶ 13-14.

Plaintiff Peysin alleges that in April 2015 he received a letter informing him that the water main on his block would be replaced. C325-26 ¶ 80. Peysin had his water tested more than a year later, at the end of October 2016. C326 ¶ 82. The highest lead level found in Peysin's water was 9.5 parts per billion ("ppb"). C327 ¶ 83. Although Peysin's private testing service describes this amount as "significant," C327 ¶¶ 83-84, it is well below the 15 ppb that the EPA uses as the action level for lead, C317 ¶ 46. Peysin does not allege what his lead levels were before the water main replacement in 2015.

Plaintiffs brought counts for negligence and inverse condemnation. C331-32. Plaintiffs also purported to bring the case as a class action, on behalf of all City residents who reside in an area where water mains or meters have been replaced since January 1, 2008, although no motion for class certification has been filed and that issue is thus not before this court. C328-31. To further describe the proposed class, plaintiffs attached a 58-page exhibit purporting to list the blocks where the City had undertaken the modernization of its water and sewer mains. C328-29 ¶ 92, C38-96 [Ex. A].

Because plaintiffs have not alleged that they were physically injured, they sought as a remedy establishment of a trust fund to pay for medical monitoring of class members and written notification to all class members that they may require such monitoring. C328-29, 333. Plaintiffs also sought compensatory damages that were undefined, other than requesting that the City pay to replace the residents' lead water service lines with copper lines. C333.

Neither plaintiff alleges that he has experienced any physical injuries. Indeed, plaintiffs admitted in their response to the City's motion to dismiss that they do not "suffer from an existing physical injury or illness," C566, and plaintiff's counsel agreed, in response to a question from the circuit court, that he would "readily concede there's no present injury alleged in [plaintiffs'] complaint." R105-06. Plaintiffs also conclusorily assert that the City's work "irreversibly damages the service lines of Plaintiffs and the class by making

them more dangerous," C332 ¶¶ 107-08, but do not plead any facts in this regard, such as inspection or testing, showing damages to their water service lines, much less damage caused by the City.

B. The Circuit Court's Dismissals of Plaintiffs' Complaint.

The City moved to dismiss plaintiffs' original complaint, which was brought by Peysin and two other plaintiffs who are no longer part of the case. After oral argument, the circuit court (Judge Rodolfo Garcia) dismissed the negligence claim without prejudice, granting leave to re-plead that claim. R34-35 (Tr. at 33:12-34:21). Noting that plaintiffs sought medical monitoring as a remedy, the court explained that this is proper only for present injuries:

> [A]s I understand it … medical monitoring is, of course, a proper relief that can be given, but it's only in a certain context. And the context is when the plaintiff has demonstrated present harm that exists at the moment and medical monitoring is necessary to continually assess that present harm … .

R22 (Tr. at 21:9-21). Accordingly, the court stated:

> So I'm granting the motion to dismiss based on … the lack of exposure, factual allegation in plaintiffs' complaint, as well as the problem that might arise if medical monitoring were imposed and which might trigger the single recovery rule.

R34-35 (Tr. at 33:24-34:6).

Regarding the inverse condemnation claim, the City had argued for dismissal on the ground that "there are public improvements that are necessarily incident to the ownership of property, things like when the government repairs roads, … resurfaces roads, repairs sidewalks, when it builds lights, … and here when it repairs the water infrastructure." R39 (Tr.

at 38:13-20). The circuit court agreed that this was a "very apt … comparison," and dismissed the inverse condemnation claim on the ground that the damage the plaintiffs alleged was necessarily incident to property ownership. R40 (Tr. at 39:1-2).

Plaintiffs moved for leave to file a First Amended Complaint on behalf of Berry and Peysin, which the court granted. R69 (Tr. at 18:6-8). The City filed a motion to dismiss this First Amended Complaint. C427-64. After Judge Garcia retired in late 2017, the case was re-assigned to Judge Raymond Mitchell. C874, 983.

On March 29, 2018, the circuit court again dismissed plaintiffs' complaint, but with prejudice. C1061-67. The circuit court dismissed plaintiffs' "negligence claim seeking medical monitoring" because "[n]o Illinois authority has permitted such a claim absent an allegation of a present injury." C1063. The circuit court explained that the appellate court "in *Jensen v. Bayer AG* … squarely held that a claim for medical monitoring in the absence of a present injury was not compensable in tort." C1064. The circuit court concluded that, as plaintiffs "readily concede that they lack a present injury," they "fail to allege a viable claim for medical monitoring." *Id.*

The circuit court also dismissed plaintiffs' inverse condemnation claim, holding that the damages provision of the Illinois Takings Clause "was intended to provide a remedy to property owners who suffered a significant, *special* damage to their property." C1065 (emphasis in original). Noting that

plaintiffs alleged that nearly 80% of Chicago properties are serviced by lead pipes and their complaint attached "a 58-page listing of various streets throughout Chicago where work on water mains has occurred since 2009," the circuit court concluded that "this alleged damage is not unique or special to Plaintiffs' properties." C1065 n.1.

C. The Appellate Court Reverses, Over A Dissent.

Plaintiffs appealed, and the appellate court reversed, over a dissent by Justice Connors. The majority opinion recognized that plaintiffs concede "a lack of 'present physical injury,'" A9 ¶ 26, but concluded "that plaintiffs have sufficiently alleged a present injury in consuming lead-contaminated water, even if they have yet to develop physical ailments linked to such consumption," A10 ¶ 27; *see also* A13 ¶ 34 (Plaintiffs "sufficiently allege a present injury due to their consumption of water containing high levels of lead."). The majority thus held that mere exposure to a hazardous substance constitutes a legally cognizable injury under negligence law. The dissent responded that the "majority's holding … is the first of its kind in Illinois and is contrary to our supreme court's decision" in *Williams v. Manchester*, 228 Ill. 2d 404 (2008), and also noted that plaintiffs themselves had "never made the argument that mere exposure or consumption suffices as a present injury in order to bring a negligence claim." A25 ¶ 63.

For plaintiffs' inverse condemnation claim, the majority recognized that plaintiffs needed to plead "special damages" to recover, but held that requirement was satisfied by plaintiffs' allegation that their "lead service

lines have become 'more dangerous' than lines that have not been partially replaced or are not made of lead." A21 ¶ 51, A23 ¶ 53. The majority also rejected the City's argument that plaintiffs had no claim because its water infrastructure work was necessarily incident to property ownership, because, in the majority's view, "[p]laintiffs here did not share in the general benefits of the replaced water mains where such replacement, they alleged, actually made their water more dangerous than that consumed by the general public." A23 ¶ 55.

The dissent countered that plaintiffs did not properly allege the required special damages because "plaintiffs Berry and Peysin have allegedly suffered the same kind of damage … as any other resident with lead service lines, *i.e.*, 80% of the city's population would suffer if the city replaced a nearby water main." A51 ¶ 114. Moreover, given the large number of residents with lead service lines, "any alleged damage that resulted from defendant's infrastructure repair or maintenance to its water system would necessarily be incident to property ownership in this city, in the same way that any general benefit received from such repairs, such as the reduction of service interruptions, preventing holes and cracks that could allow bacteria, and preventing wastewater leaks, is also common to all owners." A54 ¶ 118.

Finally, the majority concluded that discretionary tort immunity did not apply because plaintiffs identified a "prescribed method of advising residents to flush, and how to flush, the water in their homes after lead pipe

work." A17-18 ¶¶ 43-44. This purported "prescribed method" consisted of recommendations promulgated by the American Water Works Association, a private organization. *Id.*; C321-22 ¶¶ 61-64. The majority opinion cited no authority for the notion that an outside organization's recommendations can dictate a municipality's actions and limit its discretion.

ARGUMENT

As this appeal concerns dismissal of a complaint under 735 ILCS 5/2-615, all issues are reviewed *de novo*. *Jarvis v. South Oak Dodge, Inc.*, 201 Ill. 2d 81, 86 (2002).

First, a plaintiff asserting a negligence claim must plead and prove a present physical injury; exposure to an allegedly harmful substance does not suffice to make out a negligence claim as a matter of law. This physical injury requirement is the foundation of the economic loss doctrine set forth in *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69 (1982), and this court again made clear the necessity of showing a physical injury in *Williams v. Manchester*, 228 Ill. 2d 404 (2008), which held that exposure to radiation, even if it carried a risk of future harm, could not satisfy the injury element of a negligence claim. Here, while plaintiffs allege that they consumed water with increased lead levels, they do not allege that they have suffered any physical ailment as a result—indeed they conceded before the circuit court that they have no present physical injury.

Plaintiffs' argument that their medical monitoring costs constitute an "injury" is likewise meritless, for multiple reasons. Those costs are not a

physical injury, as required by cases such as *Moorman* and *Williams*. *Williams* distinguishes between "injury" and "damages," and medical monitoring costs are an element of damages, not the injury necessary for a negligence claim. In addition, plaintiffs' attempt to recover the financial costs of medical monitoring where they have no physical injury is barred by the economic loss doctrine. Plaintiffs' position also is inconsistent with Illinois' single recovery rule, as plaintiffs cannot sue for medical monitoring at one point and then sue again if they develop physical injuries. Instead, plaintiffs must sue for all damages in a single proceeding, which should be if and when they ever develop physical injuries.

Finally, numerous state supreme courts, federal courts of appeals, and other courts have considered whether a plaintiff can recover medical monitoring costs without a physical injury. The modern trend has been to follow the United States Supreme Court decision in *Metro-North Commuter R.R. Co. v. Buckley,* 521 U.S. 424 (1997), which rejected such claims. This is especially true in states, like Illinois, that require physical injuries or distinguish between the elements of injury and damages. Such courts also recognize the strong policies in favor of requiring a physical injury, such as avoiding flooding the courts with uninjured plaintiffs seeking medical monitoring.

Second, by allowing plaintiffs' inverse condemnation claim to proceed, the appellate court's majority opinion conflicts with this court's precedents

that limit inverse condemnation claims alleging that property was damaged but not physically taken. A plaintiff cannot state an inverse condemnation claim where the damages alleged were necessarily incident to property ownership, or where the damages were shared by the general public. Both these circumstances are present here, because plaintiffs' claim is based on the City's repair of existing, century-old water infrastructure, affecting thousands of blocks throughout Chicago. The appellate court's ruling should be rejected because it exposes municipalities across Illinois to inverse condemnation claims whenever plaintiffs allege that dust, pollution, or other effects from infrastructure projects has "damaged" their property.

Third, the appellate court's rejection of the City's defense of discretionary immunity under section 2-201 of the Tort Immunity Act, 745 ILCS 10/2-201—based on the view that the City lacked discretion in how to make improvements and repairs to its water delivery system and to advise residents of lead risks—is unprecedented and erroneous. The majority concluded that recommendations from an outside organization about flushing pipes and warning residents constituted a "prescribed method" for those tasks, A18 ¶ 44, such that "'nothing remain[ed] for judgment or discretion,'" A17-18 ¶ 43. The majority opinion cited no authority for its view that some private outside organization's recommendations for best practices strip a municipality of discretion in carrying out public works projects. And indeed, that notion contradicts this court's precedents explaining that acts are

ministerial, rather than discretionary, only where they are performed "'in obedience to the mandate of legal authority.'" *Harinek v. 161 N. Clark St. Ltd. P'ship*, 181 Ill. 2d 335, 343 (1998) (quoting *Snyder v. Curran Twp.*, 167 Ill. 2d 466, 474 (1995)). Where the requirements of discretionary tort immunity are otherwise present, it should not be denied based on the recommendations of some private organization.

I. UNDER THIS COURT'S PRECEDENT, EXPOSURE ALONE IS NOT AN INJURY FOR A NEGLIGENCE CLAIM.

A. Exposure To A Harmful Substance, Without A Present Physical Injury, Cannot State A Negligence Claim As A Matter Of Law.

Under Illinois law, a "present injury" is necessary for a negligence claim. *Williams,* 228 Ill. 2d at 425. Even where a plaintiff establishes that a defendant's conduct or product is hazardous or dangerous, there is no liability without physical injury. This court's "holdings [have] reinforced the necessity of physical damage to other property or personal injury, not merely a risk of injury or damage." *Bd of Educ. of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 442-43 (1989). "The dangerousness which creates a risk of harm is insufficient standing alone to award damages in either strict products liability or negligence." *Id.* at 443.

Williams exemplifies the rule that exposure to dangerous actions or substances alone cannot constitute an injury. Williams was injured in a car crash while pregnant, and filed a wrongful death claim on behalf of the fetus she elected to terminate as a result of her injuries and treatment after the

crash. 228 Ill. 2d at 412. Williams's fetus was not injured in the crash, but Williams suffered a broken hip and pelvis, and the recommended surgery would put her fetus at risk, while delaying surgery would risk permanent disability for Williams. *Id.* at 408-12. Based on these factors, along with information from her physicians that radiation from x-rays that had been taken could pose future risks to her fetus, Williams terminated the pregnancy. *Id.*

This court observed that, because a wrongful death claim is barred "if the decedent, at the time of death, would not have been able to pursue an action for personal injuries," 228 Ill. 2d at 421, Williams had to show that her fetus suffered some injury before termination of the pregnancy, *id.* at 423-24. Williams asserted that "radiation exposure is an increased risk of future harm," which constituted an injury to the fetus. *Id.* at 425. This court rejected that argument, concluding that mere exposure to radiation, even if it increased the risk of future harm, was not a "present injury." *Id.* at 427. The court noted that although it had held in *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483 (2002), that "an increased risk of future harm is an *element of damages* that can be recovered for a present injury," such future risk "is *not* the injury itself." *Williams*, 228 Ill. 2d at 425 (emphasis in original).

Consistent with *Williams*, the appellate court has also held that exposure alone cannot satisfy the present injury element. For instance, in *Sondag v. Pneumo Abex Corp.*, the plaintiff was exposed to asbestos-

containing products for approximately thirty years and had developed pleural plaques and scarring in his lungs. 2016 IL App (4th) 140918 ¶¶ 5, 14. He sued, alleging the defendant "'was negligent' by failing to warn of the adverse health effects of asbestosis …." *Id.* ¶ 5. Yet he could not recover under a negligence claim without proof of "'physical harm,'" meaning a "physically impairing loss or detriment." *Id.* ¶¶ 23, 28, 32, 36. Because plaintiff was healthy and had no clinical symptoms (despite the plaques and scarring), he failed to state a negligence claim. *Id.* ¶¶15-16, 36.

Similarly, in *Jensen v. Bayer AG*, the plaintiff had taken the drug Baycol, which he alleged increased his risk of rhabdomyolysis, a potentially fatal disease, and that "such health risks required medical monitoring." 371 Ill. App. 3d 682, 684 (1st Dist. 2007). Despite exposure to a drug with potentially deadly effect, *Jensen* rejected the plaintiff's claims because he had not shown a present physical injury. *Id.* at 692-93; *see also Cooney v. Chicago Pub. Schs.*, 407 Ill. App. 3d 358, 360, 365-66 (1st Dist. 2010) (exposure of employees' social security and insurance information was not actual injury or damages, despite allegations that disclosure put plaintiffs at increased risk of identity theft).

B. The Majority Erred In Holding That Mere Exposure Could Constitute An Injury.

The majority opinion contradicts this court's precedent holding that a present physical injury is a necessary element of a negligence claim. Even though the majority recognized that plaintiffs concede "a lack of 'present

physical injury,'" A9 ¶ 26, it concluded "that plaintiffs have sufficiently alleged a present injury in consuming lead-contaminated water, even if they have yet to develop physical ailments linked to such consumption," A10 ¶ 27; *see also* A13 ¶ 34 (Plaintiffs "sufficiently allege a present injury due to their consumption of water containing high levels of lead."). In other words, the majority held that mere exposure or consumption was a "present injury." As the dissent correctly recognized, the majority's opinion is contrary to this court's decision in *Williams* and other Illinois cases. A25 ¶ 63.

The majority did not cite any Illinois case holding that exposure alone could constitute an injury, which is unsurprising given *Williams* and its progeny.[2] Instead, the majority opinion cited only the Restatement (Second) of Torts' definition of "injury" "'as an invasion of a person's interest, even if there is no immediate harm or that harm is speculative.'" A10 ¶ 27. But Illinois law establishes that this broad definition of "injury" does not apply to plaintiffs' allegations of exposure to an allegedly harmful substance, such as water with elevated lead levels. Construing any "invasion of a person's interest" as sufficient to meet the injury requirement for a negligence claim

[2] Although the majority opinion cites *Lewis v. Lead Indus. Ass'n, Inc.*, 342 Ill. App. 3d 95 (1st Dist. 2003), a few times in passing, A9 ¶ 26; A13-14 ¶ 35, it did not rely on *Lewis* for the view that lead exposure is itself an injury, nor does *Lewis* support that position. As the dissent notes, plaintiffs never argued that exposure alone could constitute an injury. Their position, both before the circuit court and on appeal, was that, based on *Lewis*, the cost of medical testing sufficed as a present injury, A25-26 ¶ 64, an argument we address in subsections I.C-E. But the majority did not adopt plaintiffs' argument, and discusses medical monitoring costs only briefly, and primarily in terms of damages rather than injury. A13-14 ¶ 35.

cannot be reconciled with *Williams*, where the fetus's exposure to radiation was an invasion of its interest. Yet the court squarely held that this potentially harmful future effect was not a sufficient claim of injury.

The majority below attempted to distinguish *Williams*, stating that *Williams* "did not find that Baby Doe's exposure to X-rays or medication could not be a present, actionable injury." A12-13 ¶ 33. But that is precisely what *Williams* concluded—the court held as a matter of law that radiation exposure alone, without a showing of actual harm suffered as a result, was not an injury that could support a negligence claim. 228 Ill. 2d at 427. As the dissent from the decision below explained, if "mere exposure to a harmful or toxic substance, such as radiation or lead, was sufficient to establish an actionable injury, then the court would have found the unborn fetus had suffered an injury, since it was undisputed that the plaintiff underwent an X-ray while pregnant with the fetus." A29 ¶ 71.

Similarly, in *Sondag*, the plaintiff's interest was invaded when he inhaled asbestos dust, causing plaques and scarring in his lungs, 2016 IL App (4th) 140918, ¶¶ 5, 14, and in *Jensen*, the plaintiff's interest was invaded when he took a drug with potentially fatal side effects without being warned, 371 Ill. App. 3d at 684. These decisions likewise reflect that mere exposure to a harmful substance is not an injury as a matter of law, meaning that plaintiffs here do not have a negligence claim.

The majority's approach also conflicts with *Moorman*, where the plaintiff argued that it had been injured by the defendant's defective tank, which posed an "extreme threat to life and limb, and to property of plaintiff and others." 91 Ill. 2d at 82. Yet this court held that the plaintiff had no claim in the absence of actual personal injury or property damages. *Id.* at 85-86. Similarly, the plaintiffs in *A, C & S* argued that risk of contracting asbestosis (a type of invasion of plaintiffs' interests) should suffice for a negligence claim, which this court rejected because of the "necessity of physical damage to other property or personal injury." 131 Ill. 2d at 442-43.

The appellate court's opinion in *Sondag* illustrates how the majority below misinterpreted the Restatement. *Sondag* expressly rejected the argument that "injury" as defined by the Restatement could support a negligence claim for exposure to asbestos, and instead expressly required "physical harm." 2016 IL App (4th) 140918, ¶¶ 27, 32. As the court explained, the Restatement defines terms such as "injury" and "harm" in specific, distinct ways. *Id.* ¶¶ 27-28. The reason is that "in some circumstances, the common law recognizes a cause of action for conduct that invades or 'injures' a legally protected interest, even though the conduct causes no harm"; for example, an inconsequential trespass or an assault in the form of a threatened punch with no contact. *Id.* ¶ 28. By contrast, in cases based on a product such as asbestos (or water), "physical harm" in the form of a "physically impairing loss or detriment" must be proven. *Id.* ¶ 32;

see also Wood v. Wyeth-Ayerst Labs. Div. of Am. Home Prods. Corp., 82 S.W.3d 849, 854-55 (Ky. 2002) (rejecting plaintiff's argument that under the Restatement she needed only to show "harm" to recover for negligence and other theories, and instead requiring plaintiff to prove "physical harm," the "physical impairment of the human body, or of tangible property") (internal citation and quotation marks omitted). Here, the majority opinion erroneously relies on this notion of "injury" in the context of a negligence claim, where actual, physical harm is required.

Gillman v. Chicago Rys. Co., 268 Ill. 305 (1915), and *White v. Touche Ross & Co.*, 163 Ill. App. 3d 94 (1st Dist. 1987), which plaintiffs cited in their answer to the City's petition for leave to appeal, Pls. Answer to PLA at 7, are easily distinguishable. In *Gillman*, the plaintiff suffered a physical injury (broken glass cutting his hand), 268 Ill. at 306, and thus the court there had no reason to consider whether the plaintiff could recover without a physical injury. And *White* primarily concerned when an injury accrued for purposes of the joint tortfeasors act, rather than what constitutes an injury; it also involved tax and legal advice rather than alleged exposure to or injury from a hazardous substance. 163 Ill. App. 3d at 98-99. Neither of these decisions overcome this court's clear holdings in *Williams*, *Moorman*, and their progeny.

In short, the majority's holding that exposure alone can constitute an injury is a radical change in Illinois negligence law. It would allow anyone

exposed to a harmful substance to sue for damages for increased risk or medical monitoring—exactly what *Williams* holds that plaintiffs cannot do. That change would undermine judicial efficiency by requiring the courts to handle untold numbers of cases from exposed but uninjured plaintiffs, and would divert public funds to monitoring costs in circumstances where there is no proven need or benefit. The court should reverse the appellate court, and affirm the circuit court's dismissal to maintain the fundamental principles of negligence law and its injury element.

C. The Present Injury Requirement Cannot Be Satisfied By Alleged Medical Monitoring Costs.

1. Medical Monitoring Costs Are Not A Present Injury.

Plaintiffs argued in the circuit court and the appellate court that their medical monitoring costs constitute an injury, *see, e.g.,* A25-26 ¶ 64, but this argument also founders on *Williams*. *Williams* holds that the "present injury" element is separate from the requirement that a plaintiff seeking recovery in a negligence case establish "damages," and both must be alleged and proven before a plaintiff can recover. 228 Ill. 2d at 425. Significantly, *Williams* makes clear that although an increased risk of future harm might constitute an element of damages "that can be recovered for a present injury," *id.*; *see also Dillon*, 199 Ill. 2d at 504, a risk of future harm is not itself a "present injury," *Williams*, 228 Ill. 2d at 425.

The plaintiff in *Williams* asserted that the "radiation exposure is an increased risk of future harm and that 'an increased risk of future harm is a

present injury' for which the fetus could have brought an action for damages against defendant." 228 Ill.2d at 425; *see also id.* at 427. For this argument, the plaintiff relied on this court's earlier decision in *Dillon*, *id.* at 425, which held that in appropriate circumstances a plaintiff could recover for "an increased risk of future injury," recognizing this category as a cognizable element of damages, 199 Ill. 2d at 501-03.

Williams rejected the plaintiff's argument, holding that, "as a matter of law, an increased risk of future harm is an *element of damages* that can be recovered for a present injury—it is *not* the injury itself." 228 Ill. 2d at 425 (emphasis in original). This court thus held that a negligence claim requires both (1) injury and (2) damages, as separate elements, and the absence of either is fatal to the claim.

In so holding, *Williams* distinguished *Dillon*, where a physician left a catheter fragment in a patient, and the fragment then migrated to the plaintiff's heart. *Dillon*, 199 Ill. 2d at 487-88. In *Dillon*, the "present injury was the catheter embedded in the plaintiff's heart," *Williams*, 228 Ill. 2d at 425, a present physical injury. By contrast, in *Williams,* the exposure to radiation, and the alleged resulting increased risk of future harm, did not constitute "a present injury." *Id.* at 427. Even though the increased risk of future harm could be an element of damages, it could not establish the present physical injury necessary for recovery.

Here as in *Williams*, plaintiffs' allegations do not show that they have an "injury." Indeed, plaintiffs admit that they do not "suffer from an existing physical injury or illness." C566. Instead, plaintiffs allege that their negligence claim is based on "their increased risk of harm." C331 ¶ 103; *see also* C305-06 ¶ 2 (alleging that plaintiffs have an "increased risk of lead exposure over time"); C307-08 ¶ 9 (alleging that Peysin is now "at an increased risk for problems associated with ingesting lead").

Plaintiffs also have asserted that the cost of medical monitoring is a present injury, but *Williams* distinguishes between injury and damages as separate elements of a negligence action. 228 Ill. 2d at 425-26. A present injury requires an actual physical injury, such as medical malpractice resulting in a catheter embedded in the plaintiff's heart. *Id.* at 425 (describing the facts of *Dillon*). By contrast, the cost of medical examinations is an "element of damages," the same as recovering damages for an increased risk of future harm. *Id.* Put simply, whether a plaintiff has such a present injury is a separate question from what damages the plaintiff seeks. As the Michigan Supreme Court explained in holding that plaintiffs could not recover medical monitoring without a present injury, it "is no answer to argue … that the need to pay for medical monitoring is *itself* a present injury." *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 691 (Mich. 2005) (emphasis in original). "[T]he fact remains that these economic losses are wholly

derivative of a *possible, future* injury rather than an *actual, present* injury." *Id*. (emphasis in original).

In accord with these principles, the appellate court has held that medical monitoring costs do not constitute a present injury under Illinois law. In *Jensen*, the court held that exposure to a drug that increased the plaintiff's risk of a potentially fatal disease was not a present injury, where the plaintiff failed to allege that he actually suffered any physical harm from taking the drug. 371 Ill. App. 3d at 692-93. Additionally, and significant with respect to plaintiffs' claims here, the court in *Jensen* deemed the plaintiff's assertions that his "health risks required medical monitoring*," id*. at 684, insufficient to establish the present injury requirement, *id.* at 692-93.

In so holding, the *Jensen* court rejected the plaintiffs' reliance on *Lewis v. Lead Indus. Ass'n, Inc.*, 342 Ill. App. 3d 95 (1st Dist. 2003), which the plaintiff had argued stood "for the proposition that a claim for medical monitoring exists in Illinois without proof of present physical injury." *Jensen*, 371 Ill. App. 3d at 692. The court held *Lewis* was inapplicable "because there, unlike here, the plaintiff sought compensation for medical testing to detect a *present* physical injury," *id.* at 693 (emphasis in original), and thus it "did not address the question posed by plaintiff [in *Jensen*]; namely, whether a plaintiff may bring a claim for medical monitoring for potential *future* harm, where no present injury is shown," *id*. (emphasis in original). *Jensen's* holding that medical monitoring damages are not recoverable under such

circumstances is faithful to *Williams*. And here, as in *Jensen*, plaintiffs allege the need for ongoing medical testing to monitor possible future health risks, but they concede the absence of any present physical injury.

Accordingly, plaintiffs' argument that medical monitoring costs are a type or theory of "injury" different from an increased risk of future harm, Pls. Answer to PLA at 9, confuses the two distinct elements of injury and damages. *Williams* and *Dillon* make clear that exposure to a hazardous substance or an increased risk of future injury is not an "injury"; instead an "injury" is a physical harm like a catheter embedded in a plaintiff's heart. Regardless of what elements of damages a plaintiff alleges—whether increased risk of future harm, medical monitoring, or something else—the plaintiff cannot recover without a present injury. Here, plaintiffs admit that they have no present physical injury, and thus have no claim regardless of whether they can allege a valid theory of damages. Plaintiffs' argument contradicts *Williams*' holding that present injury and damages are separate elements, and that an element of damages is not the injury itself.

Finally, plaintiffs' proposed exception would swallow the rule requiring a present injury. *Williams* held that radiation exposure was not a present injury and thus could not support a negligence claim. 228 Ill. 2d at 424-25. Under plaintiffs' theory, if the plaintiff in *Williams* had sought to recover the costs of monitoring the fetus for adverse effects from the radiation exposure, then the plaintiff would have been able to state a cause of action. In fact, in

almost any circumstance where *Williams'* rule holds that there is no present injury, any plaintiff would be able to circumvent that rule by seeking some form of monitoring. Nothing in *Williams* or any other decision of this court suggests that the foundational negligence requirement of a present injury can be avoided so easily. Plaintiffs' argument would render *Williams'* present injury holding a nullity, and this court should reject it.

2. Recovering Monitoring Costs In One Trial And Other Damages In A Later Trial Is Inconsistent With Illinois' Single Recovery Principle.

Illinois' "single recovery" principle "requires that *all* damages, future as well as past, must be presented and considered at the time of trial." *Dillon*, 199 Ill. 2d at 502 (emphasis added). *Dillon* explains:

> An entire claim arising from a single tort cannot be divided and be the subject of several actions, regardless of whether or not the plaintiff has recovered all that he or she might have recovered. This is true even as to prospective damages. There cannot be successive actions brought for a single tort as damages in the future are suffered, but the one action must embrace prospective as well as accrued damages.

Id. at 502; *see also Saichek v. Lupa*, 204 Ill. 2d 127, 140-41 (2003) ("Because a plaintiff cannot sue for part of his claim in one action and then seek recovery for the remainder of his claim in another, all of a plaintiff's damages must be presented and considered at once, when the matter is first litigated at trial. … That includes prospective damages as well as damages that had already accrued.") (citations omitted).

The majority concluded that the single recovery principle did not preclude plaintiffs' claims because the "court should not find plaintiffs'

allegations barred based on what might happen in the future." A15 ¶ 39. But the lesson from *Dillon*, especially in light of *Williams*, is clear: only when a plaintiff has a present injury—and not before—is a plaintiff allowed to bring an action, which must encompass all of the plaintiff's alleged damages. As the dissent explained, recognizing a claim for "medical monitoring damages absent a present physical injury is unworkable in light of the single-recovery principle." A39 ¶ 91. Specifically, if "plaintiffs were allowed to recover damages for medical monitoring without any physical symptoms, then under the single-recovery principle, they would also have to seek compensation for personal injuries that did not yet (or may never) exist." *Id.* "Until plaintiffs manifested a physical injury, it would be impossible to determine what treatment and corresponding compensation was merited." *Id.*; *see also Wood*, 82 S.W.3d at 858-59 (explaining that "another obvious impasse for medical monitoring remedies granted in the absence of present injury is the issue of claim preclusion").

D. The Majority Opinion Is Inconsistent With This Court's Economic Loss Doctrine.

Illinois' economic loss doctrine is a specific application of the general requirement of physical harm for negligence claims. This rule, alternatively referred to as the "*Moorman* doctrine," bars recovery in negligence of purely economic losses—*i.e.*, "costs incurred in the absence of harm to a plaintiff's person or property." *See City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 423 (2004); *see also In re Chicago Flood Litig.*, 176 Ill. 2d 179, 201

(1997); *Moorman*, 91 Ill. 2d at 88; *Donovan v. Cnty. of Lake*, 2011 IL App (2d) 100390 ¶ 43 (holding that economic loss doctrine barred alleged damages based on a county failing to properly operate the water system and rendering the water unfit for drinking). Plaintiffs' negligence claim seeks medical monitoring costs, but plaintiffs admit that they do not have any physical injury or ailment. Because plaintiffs are seeking financial costs for medical monitoring but have no bodily injury, their claim is barred by the economic loss doctrine.

The majority refused to apply the economic loss doctrine, on the ground that plaintiffs' "alleged injuries and claimed damages ... do not relate to disappointed expectations based on contract law." A16 ¶ 40. As the dissent observed, that squarely contradicts *Beretta*, A41-43 ¶¶ 96-97, which the majority opinion ignores. In *Beretta*, the City and Cook County sued a number of gun manufacturers, distributors, and dealers on a public nuisance theory. 213 Ill. 2d at 355-56. The City sought as damages more than $433 million in out-of-pockets costs caused by gun violence—health care costs, police investigations, court proceedings, and emergency response costs, among others. *Id.* at 356, 415. The defendants raised the economic loss doctrine, to which the plaintiffs responded that "their claim is not based on … commercial interests" and their damages were not "economic losses associated with 'disappointed commercial expectations'"—the same argument the majority opinion adopted here. *Id.* at 417 (internal citation omitted). But

Berretta rejected the argument that the economic loss doctrine is limited to commercial expectations:

> Although the economic loss doctrine is rooted in the theory of freedom of contract, it has grown beyond its original contract-based policy justifications [and includes cases in which] … [t]he parties are typically strangers and, with no foreknowledge of each other's activities, had no opportunity to assess and allocate risks *ex ante*.

Id. at 422-23 (internal citation and quotation marks omitted). The court went on to hold that although the claimed losses in that case were not rooted in disappointed commercial expectations, they were "'solely economic damages' in the sense that they represent *costs incurred in the absence of harm to a plaintiff's person or property*," and not recoverable in a negligence claim. *Id.* at 423 (emphasis added); *see also Chicago Flood*, 176 Ill. 2d at 185-86 (economic loss doctrine barred plaintiffs from recovering damages such as lost revenues, lost wages, and expenses, even in the absence of a contractual relationship between plaintiffs and defendant); *Gondeck v. A Clear Title & Escrow Exch.*, 47 F. Supp. 3d 729, 746-47 (N.D. Ill. 2014) (collecting Illinois cases and explaining that "settled law holds that the absence of a contractual relationship does not place a negligence claim outside the [economic loss] doctrine's scope"). Under *Beretta*, plaintiffs' alleged medical monitoring costs are economic damages barred by the *Moorman* doctrine because plaintiffs admit that they have no present physical injury or harm, regardless of whether their losses are based on contract law or disappointed expectations.

Plaintiffs have argued that lead has contaminated their water supply, and that such contamination is damage to property that is compensable under *A, C & S*, 131 Ill. 2d at 436-37, but this argument ignores the limits of that decision and the more apposite case of *Chicago Flood*. *A, C & S* allowed the plaintiffs to proceed on a claim alleging damage to a building from asbestos contamination, based on how "the nature of the 'defect' and the 'damage' caused by asbestos is unique" and is a "harmful element exist[ing] throughout a building or an area of a building which by law must be corrected." *Id.* at 445-46. *A, C & S* specifically noted that "the holding in this case should not be construed as an invitation to bring economic loss contract actions within the sphere of tort law through the use of some fictional property damage." *Id.* at 445. Yet that is exactly what plaintiffs try to do. Plaintiffs complain about alleged elevated levels of lead in their water, which, unlike the contamination of the school buildings in *A, C & S,* is not a complaint about damage to the *plaintiffs' property*, but about the quality of the water delivered to buildings in which plaintiffs reside. *Cf. Donovan*, 2011 IL App (2d) 100390, ¶ 56 ("The costs of bottled water and filtration, as well as impacted property values, are not 'property' that plaintiffs possessed and that was ruined as a result of the County's negligence.").

Moreover, this court addressed water contamination of properties in *Chicago Flood*. In *Chicago Flood*, water from the Chicago River flooded downtown buildings, contaminating them and requiring emergency repairs

and cleaning, while also causing numerous types of alleged economic losses. 176 Ill. 2d at 185. This court held that the economic loss doctrine barred most of these alleged losses, despite the flooding and contamination of the plaintiffs' premises. *Id.* at 198-201. The facts of *Chicago Flood* are far more similar to this case than those of *A, C & S* are, and *Chicago Flood* should apply here.

E. Other Jurisdictions Reject Medical Monitoring Claims Without Present Physical Injury.

Courts in other jurisdictions have rejected plaintiffs' argument that claims seeking medical monitoring can be brought without a present physical injury, and these results additionally preclude the majority's holding that exposure alone is sufficient for recovery. These courts also rely on the strong public policy considerations that weigh against recognizing claims for medical monitoring.

For instance, in *Metro-North Commuter R.R. Co. v. Buckley*, the United States Supreme Court rejected medical monitoring under the Federal Employers Liability Act ("FELA") as "beyond the bounds of currently 'evolving common law.'" 521 U.S. at 439-40. The Court identified multiple policy rationales supporting this decision, including "uncertainty among medical professionals about just which tests are most usefully administered and when," and the lack of scientific consensus with respect to "whether an exposure calls for *extra* monitoring." *Id.* at 441 (emphasis in original). Recognizing a medical monitoring claim without a present injury would also

"ignore the presence of existing alternative sources of payment," such as insurance. *Id.* at 442-43.

Perhaps most significant, "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Buckley*, 521 U.S. at 442. In light of this, recognizing medical monitoring claims without a present injury "could threaten both a 'flood' of less important cases (potentially absorbing resources better left available to those more seriously harmed) and the systemic harms that can accompany 'unlimited and unpredictable liability' (for example, vast testing liability adversely affecting the allocation of scarce medical resources)." *Id.* Other courts have echoed these concerns. As the Supreme Court of Kentucky observed, "[g]iven that negligently distributed or discharged toxins can be perceived to lie around every corner in the modern industrialized world, and their effects on risk levels are at best speculative, the potential tort claims involved are inherently limitless and endless." *Wood,* 82 S.W.3d at 857-58 (internal quotation marks omitted). "Furthermore, defendants do not have an endless supply of financial resources" and "[s]pending large amounts of money to satisfy medical monitoring judgments" would "impair their ability to fully compensate victims who emerge years later with actual injuries that require immediate attention." *Id.* at 857. *See also Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11, 18 (N.Y. 2013) ("Moreover, it is speculative, at best, whether

asymptomatic plaintiffs will ever contract a disease; allowing them to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure."). *See generally Wood*, 82 S.W.3d at 856-59 (discussing various policy arguments against allowing medical monitoring claims without a present injury). In this case, directing the payment of public funds for ongoing medical monitoring of great numbers of individuals who have lived in homes with lead service lines but suffer no present injury from lead exposure would also needlessly waste funds that the City uses to provide vital public safety and other government services to its residents.

After *Buckley*, numerous states have rejected exposure-only and medical monitoring claims absent actual injury. *E.g.*, *Caronia*, 5 N.E.3d at 14 (explaining that, under New York law, the "requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system" and rejecting the plaintiffs' request to create a new medical monitoring cause of action that would not require physical harm); *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 186-87 (Or. 2008) (holding that "the present economic harm that defendants' actions allegedly have caused—the cost of medical monitoring—is not sufficient to give rise to a negligence claim" and "that negligent conduct that results only in a significantly increased risk of future injury that requires medical

monitoring does not give rise to a claim for negligence"); *Paz v. Brush Eng'red Materials, Inc.*, 949 So. 2d 1, 5-6 (Miss. 2007) (declining to recognize under Mississippi law a claim "allowing a plaintiff to recover medical monitoring costs for mere exposure to a harmful substance without proof of current physical or emotional injury from that exposure"); *Wood*, 82 S.W.3d at 856-59 (rejecting under Kentucky law "medical monitoring causes of action [which] make available medical monitoring remedies that do not require a showing of present physical injury," as contrary to "well-settled principles of tort law"); *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 828 (Ala. 2001) (holding that Alabama law does not recognize "a distinct cause of action for medical monitoring in the absence of a manifest physical injury or illness").[3]

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[3] *See also*, *e.g.*, *Genereux v. Raytheon Co.*, 754 F.3d 51, 56-57 (1st Cir. 2014) (explaining that prior Massachusetts Supreme Court decision "made pellucid that it was holding only that a cause of action for medical monitoring would lie if a plaintiff could make a showing of subcellular or other physiological change"); *Parker v. Wellman*, 230 F. App'x 878, 883 (11th Cir. 2007) (stating that under Georgia law, plaintiffs who failed to show "a current physical injury" could not "recover the 'quantifiable costs of periodic medical examinations' as future medical expenses"); *Trimble v. Asarco, Inc.*, 232 F.3d 946, 963 (8th Cir. 2000) (rejecting under Nebraska law "proposition that damages may be awarded for future medical monitoring costs in the absence of a present physical injury"), *abrogated in part on other grounds by Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005); *Pickrell v. Sorin Group USA, Inc.*, 293 F. Supp. 3d 865, 868 (S.D. Iowa 2018) (determining that Iowa Supreme Court "would be unlikely to adopt a medical monitoring cause of action rooted in a negligence theory, especially absent an actual injury"); *Atkins v. Ferro Corp.*, 534 F. Supp. 2d 662, 668 (M.D. La. 2008) (plaintiffs could not pursue a claim for medical monitoring under Louisiana law without "medical evidence of manifest physical or mental injury or disease"); *see also Sinclair v. Merck & Co., Inc.*, 948 A.2d 587, 588-89 (N.J. 2008) (holding that Products Liability Act governed allegations of harm from

The Michigan Supreme Court's decision in *Henry v. Dow Chem. Co.* is particularly instructive. 701 N.W.2d 684 (Mich. 2005). There, the plaintiffs did not allege "the manifestation of disease or physical injury," but instead alleged that defendant's negligence "created the *risk* of disease—that they *may* at some indefinite time in the future develop disease or physical injury because of defendant's allegedly negligent release of dioxin." 701 N.W.2d at 686 (emphasis in original). The plaintiffs theorized that they were injured because they "must incur the costs of intensive medical monitoring for the possible health effects of elevated exposure to dioxin." *Id.* at 688. But the court held that "plaintiffs' medical monitoring claim is not cognizable under our current law and that recognition of this claim would require both a departure from fundamental tort principles and a cavalier disregard of the inherent limitations of judicial decision-making." *Id.* at 701. Analogous to this court's decision in *Williams*, *Henry* explained that Michigan negligence law requires both "an 'injury' and the 'damages' flowing therefrom." *Id.* at 690. *Henry* also made plain that the cost of medical monitoring could not substitute for the injury required by negligence law:

> It is no answer to argue, as plaintiffs have, that *the need to pay for medical monitoring is itself a present injury* sufficient to sustain a cause of action for negligence. In so doing, plaintiffs attempt to blur the distinction between "injury" and "damages." ... [T]he fact remains that these economic losses are wholly derivative of a possible, future injury rather than an actual, present injury. *A financial "injury" is simply not a present*

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taking dangerous drug, and holding that Act "does not include the remedy of medical monitoring when no manifest injury is alleged").

> *physical injury, and thus not cognizable under our tort system*. Because plaintiffs have not alleged a present physical injury, but rather, "bare" damages, the medical expenses plaintiffs claim to have suffered (and will suffer in the future) are not compensable.

Id. at 691 (emphasis added).

Although some decisions have recognized medical monitoring without a present physical injury, those conflict with the current trend of the case law as well as Illinois jurisprudence. The decisions recognizing such a claim mostly pre-date the United States Supreme Court's 1997 *Buckley* decision. *Buckley* has proven influential in articulating basic tort principles as well as the policy reasons for requiring a present physical injury, and the substantial majority of courts to consider medical monitoring since 1997 have rejected medical monitoring claims or remedies in the absence of a present injury.

Moreover, whether a state allows or prohibits claims for medical monitoring without a present injury often turns on whether state law requires proof of injury and damages as distinct elements of a negligence claim. As cases including *Henry*, *Paz*, *Wood*, and *Hinton* illustrate, states that require not just damages but also injury to state a claim apply that fundamental tort rule to hold that neither exposure nor medical monitoring costs are an injury, and thus cannot support a tort claim without a present physical injury. *Williams'* distinction between injury and damages, and its emphasis on the present injury requirement, reflects that Illinois falls squarely into this category. Thus, in accord with other states requiring both injury and damages as well as the case law trend, this court should reiterate

that Illinois does not recognize a negligence claim without a present physical injury, which both plaintiffs here admit they do not have.

II. PLAINTIFFS' INVERSE CONDEMNATION CLAIM DOES NOT ALLEGE A COGNIZABLE INJURY.

The Illinois constitution provides that "property shall not be taken or damaged for public use without just compensation … ." Ill. Const. art. I, § 15. Plaintiffs do not allege that any portion of their property has been "taken." Instead, they claim that the City's replacing of water mains and then connecting the new mains to plaintiffs' service lines (all of which is done under the public way) resulted in damaging plaintiffs' property by allegedly increasing lead levels in their water. But this court has held that the takings clause "was not intended to reach every possible injury that might be occasioned by a public improvement." *Belmar Drive-In Theatre Co. v. Ill. State Toll Hwy. Comm'n*, 34 Ill. 2d 544, 550 (1966). Multiple doctrines bar plaintiffs' inverse condemnation claims.

A. Plaintiffs' Alleged Damages Are Necessarily Incident To Property Ownership.

In the inverse condemnation context, "it has long been established that there are certain injuries, necessarily incident to the ownership of property, which directly impair the value of private property," that "the law does not, and never has, afforded any relief, examples being the depreciation caused by the building of fire houses, police stations, hospitals, cemeteries and the like in close proximity to private property." *Belmar*, 34 Ill. 2d at 550. "Such injury is deemed to be [d]amnum absque injuria—loss without injury in the

legal sense," on the theory that the property owner is compensated for the loss "by sharing the general benefits which inure to all from the public improvement." *Id.*

This rule defeats inverse condemnation claims regardless of whether a plaintiff alleges "special damages" or whether the work could have been performed in a different manner. *Belmar* dismissed a drive-in theater's inverse condemnation claim that adding lights to a highway service center constituted a taking because the lights illuminated the theater's property at night. 34 Ill. 2d at 546. There was no dispute that the plaintiff had suffered damages unique to it—the lights made "it impossible to properly exhibit outdoor movies" and "caused a substantial decline in plaintiff's business." *Id.* Nor did *Belmar* consider whether the defendant was negligent, or whether the lights could have been placed to illuminate the highway without damaging plaintiff's business. Instead, this court held that the drive-in theater had no inverse condemnation claim because "the damage claimed in this particular instance due to the location of the toll highway, and the oasis which is an integral part of such highway, is not an injury embraced within the constitutional provision relied upon." *Id.* at 550-51 (internal citations omitted).

This case falls comfortably within this doctrine. The government regularly performs work on existing infrastructure such as resurfacing roads, fixing sidewalks, replacing lights, and—as here—repairing or replacing water

mains and meters. Property owners understand that water infrastructure repairs must be undertaken on a regular basis—indeed, residents expect that the City keep roads, sewers, and other public goods in proper repair, which necessarily requires construction work. There is no dispute that many of these mains are more than a century old, that the mains deteriorate over time, and that they need periodic repair or replacement. As the dissent recognized, among other benefits, replacing water mains reduces service interruptions, prevents holes or cracks in the mains that can allow bacteria into the water supply, and prevents leaks that waste water. A54 ¶ 118. Plaintiffs, and all other residents, are compensated for any supposed injury by sharing in the general public benefits of such repair work.[4] Allowing claims in cases such as these could make such important public works projects financially unfeasible.

The majority did not successfully distinguish *Belmar*. The majority concluded that plaintiffs did not share in the general benefit of the replaced water mains because that replacement made their water more dangerous, A23-24 ¶ 55, but nothing in *Belmar* requires showing that plaintiffs shared in such benefits. Rather, *Belmar* explains that the necessarily-incident-to-

[4] Moreover, whether to repair or replace infrastructure—and how—is left to the government's judgment. *See Schuringa v. City of Chicago*, 30 Ill. 2d 504, 515-16 (1964). For every public improvement, residents can argue that it is not necessary or could be done somewhere else. Any assertion that the City could have decided not to improve the water infrastructure at all and left residents with century-plus old water mains, or that the City could have repaired the mains and meters in some different (and unidentified) way, cannot state a claim for inverse condemnation.

property-ownership doctrine is based "*on the theory* that the property owner is compensated for the injury sustained by sharing the general benefits." 34 Ill. 2d at 550 (emphasis added). And, indeed, *Belmar* makes clear that the plaintiff's drive-in theater did not benefit from the highway lights, which made it impossible for the business to operate. *Id.* at 546. Thus, *Belmar* holds that the government need not show that the challenged action benefits for each individual resident; rather, a general benefit from infrastructure improvements is sufficient to preclude the claim. *Id.* at 550-51.[5]

The majority also attempted to distinguish *Belmar* on the ground that here, plaintiffs' alleged injuries do not arise from "a sensitive use of their property," as the drive-in theatre in *Belmar* did. A23-24 ¶ 55. But *Belmar* made clear that, although the "sensitive" use of the property was one ground for rejecting plaintiff's claim, there was, "in addition," the separate reason that the damage was incident to property ownership. 34 Ill. 2d at 550. Indeed, the majority's conclusion would render *Belmar's* discussion of the necessarily-incident-to-property-ownership doctrine a nullity, even though it was the bulk of *Belmar*'s reasoning for rejecting the drive-in theater's inverse condemnation claim. *Id.* at 550-51.

Tellingly, neither the majority opinion nor plaintiffs have cited a single case recognizing inverse condemnation where the government repairs or

[5] In any event, the dissent explains that plaintiffs do benefit from the water infrastructure repairs including "avoid[ing] the consequences from corrosion over time," "reduction of service interruptions, preventing holes and cracks that could allow bacteria, and preventing wastewater leaks." A54 ¶ 118.

replaces *existing* utilities. Instead, they cite cases such as *Rigney v. City of Chicago*, which involved a new viaduct that cut off the plaintiff's access to the street, 102 Ill. 64, 68-69 (1881), or *Cuneo v. City of Chicago*, which concerned a single plaintiff's building that physically sunk as a result of excavations to build a new subway, 379 Ill. 488, 489 (1942). Having one's street access obstructed or property sink because of a new rail line, subway, or viaduct may not be an injury incident to property ownership. But allegedly being affected by the repair or replacement of existing utilities or other improvements is, and plaintiffs cite no authority to the contrary.[6]

Finally, plaintiffs' theory would exponentially expand the scope of inverse condemnation claims to cover virtually all public works projects, and obstruct or defeat needed public improvements. The majority conclusorily asserts that the "special damages … limitation should reduce the number of claims from property owners only incidentally affected by public improvements," A24 ¶ 55, but the majority's holding removes much of those limitations. Under the majority opinion, residents who live near new roads

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[6] Plaintiffs assert that *Hampton v. Metropolitan Water Reclamation Dist.*, 2016 IL 119861, shows that inverse condemnation claims can apply to work on existing infrastructure, Pls. Answer to PLA at 15, but that case is inapposite for various reasons. *Hampton* involved temporary flooding that completely prevented plaintiffs from using their properties, unlike here. 2016 IL 119861 ¶ 5. *Hampton* did not involve water infrastructure repairs to maintain historical benefits to residents, but instead government entities that chose to divert water and flooded the plaintiffs' properties. *Id.* ¶ 4. *Hampton* involved a "taking" of property, not "damages" to property. *Id.* ¶ 28. And finally, based on plaintiffs' allegations, *Hampton* rejected their claim that the temporary flooding constituted a taking. *Id.* ¶ 26.

or highways could allege that they are exposed to pollution that could harm their health, and thus that they are entitled to compensation. Where the government builds new buildings or public works, residents also could argue that they have been exposed to dust and pollution, entitling them to damages. Yet "the wisdom, necessity and expediency" of public improvements "are matters primarily for the legislative body of a municipality" rather than for the courts. *Schuringa v. City of Chicago*, 30 Ill. 2d 504, 515-16 (1964). Therefore, under established case law, practice, and policy, the circuit court properly dismissed plaintiffs' inverse condemnation claims.

B. The Majority Opinion Conflicts With Settled Law Defining "Special Damages."

An inverse condemnation claim requires that a plaintiff have "sustained a special damage with respect to his property in excess of that sustained by the public generally." *Rigney*, 102 Ill. at 80-81. These special damages also are absent in this case. As the dissent recognized, plaintiffs had "the same kind of damage as any other resident with lead service lines, *i.e.*, 80% of the city's population, would suffer if the city replaced a nearby water main." A51 ¶ 114. Indeed, this is highlighted by plaintiffs' class certification allegations, where they claim that "the number of people residing in the more than 1,600 areas where the City has undertaken water infrastructure projects greatly exceeds the number considered in this judicial district to make joinder impossible." C329 ¶ 94.

Yet the majority deemed it sufficient that plaintiffs contend their service lines are "'more dangerous' than lines that have not been partially replaced or are not made of lead." A22-23 ¶ 53. This conflicts with case law establishing that where a large number of residents share the same kind of alleged damage, that damage cannot be "special." For example, in *City of Chicago v. Union Bldg. Ass'n*, this court held that residents within a few blocks in Chicago's Loop could not bring an inverse condemnation claim based on the City's permanent closure of part of a street, even though many other Chicago residents would suffer no damages from the closure. 102 Ill. 379, 393-94 (1882); *see also Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 161-62, 168 (1893) (holding that owner of properties adjacent to alley did not have special damages different from those of the general public, even though other members of public may never set foot in alley); *Dep't of Pub. Works & Bldgs. v. Horejs*, 78 Ill. App. 2d 284 (1st Dist. 1966) (holding that residents living near a new highway could not recover, even though residents who did not live near the expressway would be unaffected). These cases make clear that "special damages" do not depend on identifying some residents who might have different damages (or no damages at all), which is all that is present here.

By contrast, the cases cited by the majority and plaintiffs typically involve a single plaintiff whose damage was either unique or shared by only a handful of other property owners. *E.g.*, *Rigney*, 102 Ill. at 69-70 (single

plaintiff whose access to the street was cut off by a viaduct); *Cuneo*, 379 Ill. at 489 (single plaintiff's whose building physically sank as a result of subway excavations). The majority does not cite a single case holding that thousands of residents throughout a city can all have "special damages."

C. Plaintiffs' Alleged Damages Are Consequences Of Lawful Acts, Which Cannot Give Rise To Inverse Condemnation.

Plaintiffs' claim fails for the independent reason that their alleged damages are the consequences of the City's lawful conduct. In *City of Chicago v. ProLogis*, 236 Ill. 2d 69 (2010), the City acquired property by eminent domain, causing it to become exempt from taxes, which rendered valueless TIF bonds secured by taxes on the property. The bond owners brought an inverse condemnation claim against the City for the value of the bonds, arguing that even though their property was not physically taken, it had been damaged by the City's action—the same argument plaintiffs make here. This court, noting that the United States Supreme Court has "held that where loss or injury are the consequences of a lawful government action, the government does not owe just compensation," *id.* at 78, concluded that the "destruction of the value of the TIF bonds was a consequence of [the City's] lawful action," and thus, the City did "not have to pay just compensation for the TIF bonds' loss in value," *id.* at 80.[7]

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[7] *ProLogis* stated that it would not consider the bondholders' arguments that the Illinois Takings Clause provided greater protection than the federal takings clause because the bondholders did not raise that issue in their petition for leave to appeal. 236 Ill. 2d at 80-81. Nevertheless, the *ProLogis* opinion quoted the Illinois Constitution provision on which plaintiffs rely

There was no dispute that the *ProLogis* bondholders were injured—they lost the entire value of their bonds. Nor did the court in *ProLogis* consider whether the City was negligent, could have taken a course that did not destroy the value of the bonds, or could have decided not to condemn the land. Instead, the court relied solely on the loss of the bonds' value being the consequences of a lawful action. 236 Ill. 2d at 80-81.

Replacing and repairing the City's water infrastructure is a lawful action. Under Chicago Municipal Code § 2-106-040, the "commissioner of water management shall ... operate and maintain the waterworks of the city" and "construct, extend, install, repair or relocate water pipes ... ." Because plaintiffs here do not allege a physical taking but instead claim their property was damaged, and the damages plaintiffs allege are a consequence of the City's lawful action, plaintiffs cannot maintain an inverse condemnation claim.

III. THE CITY'S WATER INFRASTRUCTURE REPAIRS ARE DISCRETIONARY ACTS PROTECTED BY THE TORT IMMUNITY ACT.

A. The City's Discretionary Decisions Regarding Water Infrastructure Repairs Are Analogous To Those In *Chicago Flood*.

Section 2-201 of the Tort Immunity Act immunizes the City from damages caused by the determination of policy and the exercise of discretion:

("[p]rivate property shall not be taken or damaged") and quoted this court's case law in determining the definition of private property. *Id.* at 77-78. Thus, *ProLogis* would have reached the same result even if it had explicitly considered the arguments regarding the Illinois Takings Clause.

"Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201; *see also Harinek,* 181 Ill. 2d at 341-42; *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, ¶¶ 27, 29, 37.

The City's exercise of discretion in deciding whether and how to repair its water infrastructure is analogous to the actions at issue in *Chicago Flood*. In *Chicago Flood*, a contractor performing work in the Chicago River caused a crack in an underwater tunnel wall, which eventually opened into a breach allowing water to flood Chicago's downtown. 176 Ill. 2d at 184-85. This court held that immunity applies because "plaintiffs do not allege that there was any prescribed method for how to repair the tunnel and how quickly, or how to warn class plaintiffs of the tunnel breach." *Id.* at 196-97. Instead, the City had to make various decisions after learning of the tunnel breach, including how to repair the tunnel and whether and how to warn the public. *Id.* at 197.

Likewise, here the City had to decide whether and how to repair the City's aging water infrastructure and what warnings and precautions to provide residents after water main or meter replacement. Plaintiffs allege that in 2008, the City decided to modernize its water system, replacing water mains that date to the 1800s, C320 ¶ 56, and also decided what precautions it would advise residents to take after water main replacements, C320-21 ¶¶

58-60. Therefore, the City's discretionary tort immunity bars plaintiffs' claims for both negligence and inverse condemnation.

B. The City's Water Infrastructure Repairs Are Not Ministerial.

Despite *Chicago Flood*, the majority concluded that discretionary immunity did not apply to any of plaintiffs' claims because plaintiffs identified a "prescribed method of advising residents to flush, and how to flush, the water in their homes after lead pipe work." A17-18 ¶¶ 43-44. This purported "prescribed method" consisted of recommendations promulgated by the American Water Works Association, a private organization. *Id.*; C321-22 ¶¶ 61-64.[8] That conclusion is contrary to this court's precedent concerning what constitutes ministerial, as opposed to discretionary, actions.

"[M]inisterial acts are those which a person performs on a given state of facts in a prescribed manner, *in obedience to the mandate of legal authority*, and without reference to the official's discretion as to the propriety of the act." *Harinek*, 181 Ill. 2d at 343 (emphasis added); *Snyder,* 167 Ill. 2d at 474. Where "tailored statutory and regulatory guidelines place certain constraints on the decisions of officials," discretionary immunity may not be

[8] Plaintiffs also cited advice from the Environmental Protection Agency that "any household with a lead service line should flush pipes for three to five minutes any time water hasn't been used for several hours." C322 ¶ 63. That advice refers generally to all homes with lead service lines, not to the post-work remediation about which plaintiffs assert the City should have advised them. Regardless, this sort of guidance, even from a federal agency, does not mandate particular action by a municipality, as our further discussion about what constitutes "ministerial action" illustrates.

appropriate. *Snyder,* 167 Ill. 2d at 474. But where municipal officials are "under no legal mandate to perform these duties in a prescribed manner," discretionary immunity applies. *Harinek*, 181 Ill. 2d at 343.[9]

At the outset, the majority opinion cites no authority for its notion that an outside organization's recommendations constitute prescribed methods that negate discretionary immunity. That notion is unfounded under Illinois law. Neither section 2-201 itself nor this court's precedent provides a basis to allow the suggestions of outside organizations to limit the discretion inherent in municipal decisions about how to carry out public works projects. Nor should legislatively enacted discretionary immunity be controlled by outside organizations. That is particularly true for public works projects as vast in scope (City-wide) and time (over a decade) as Chicago's water main replacement. Besides everything else, the more difficult and significant a project is, the more likely it is that there will be multiple conflicting recommendations from groups with different interests and views.

Moreover, plaintiffs' allegations concern not only what warnings they claim the City should have given after servicing water lines, but also with

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[9] *See also Koltes v. St. Charles Park Dist.*, 293 Ill. App. 3d 171, 177 (2d Dist. 1997) ("Unlike *Snyder*, however, the defendant's decision herein to provide fencing or warnings or to alter the design of the first tee was not subject to any statutory or regulatory guidelines. As the defendant's actions could not be performed in a prescribed manner, they cannot be classified as a ministerial function."); *Gavery v. Lake Cnty.*, 160 Ill. App. 3d 761, 764 (2d Dist. 1987) (affording discretionary immunity to defendant who wrote letter that allegedly damaged plaintiff's reputation, where the complaint did not allege that the defendant "sent the letter pursuant to any statute, ordinance, court decision, or administrative directive").

how the City went about repairing and replacing those lines in the first place. *E.g.*, C313-20. On that issue, neither plaintiffs nor the majority below identified any prescribed method, not even a private recommendation, constraining the City's discretion. The majority ignores that aspect of plaintiffs' complaint altogether.

Plaintiffs have argued that repairs are generally ministerial acts, but this misdescribes the law. "Repairs" are not some exception to the Tort Immunity Act; instead, they follow the rules this court set forth in *Harinek*, *Snyder*, and similar cases regarding when an act is discretionary or ministerial. When the law dictates repair in a specific manner, that repair is ministerial; when the law leaves the government with discretion whether or how to perform the repair, then discretionary immunity applies. So holds *Chicago Flood*, where this court applied discretionary immunity to the City's decisions regarding whether and how to repair the underwater breach. 176 Ill. 2d at 184-85, 195-97. In short, neither the majority opinion nor the plaintiffs have identified any statutes, regulations, or other legal mandate prescribing how water infrastructure repairs must be performed or what post-repair warnings regarding lead must be provided. Discretionary tort immunity bars plaintiffs' claims.

C. Plaintiffs' Negligence Claim Seeks Damages, Not Equitable Relief.

The Tort Immunity Act does not affect "the right to obtain relief other than damages against a local public entity or public employee." 745 ILCS

10/2-101. There is no dispute that plaintiffs seek damages for their inverse condemnation claim. C332 ¶ 109 (stating that plaintiffs seek "compensation for the damage to their lead service lines"); C333 (stating that plaintiffs seek "[c]ompensatory damages, including an amount sufficient to fully replace existing lead service pipes …"). But for their negligence claim, plaintiffs have argued—although the majority did not adopt this—that the medical monitoring remedy they seek does not constitute "damages" but instead is equitable relief. Pls. Answer to PLA at 17-19. Plaintiffs' characterization is incorrect under Illinois law.

This court, relying on the "plain and ordinary meaning of the word," defines "damages" under the Act as "'[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury.'" *Yang v. City of Chicago*, 195 Ill. 2d 96, 104 (2001) (quoting *In re Consol. Objections to Tax Levies of Sch. Dist. No. 205*, 193 Ill. 2d 490, 497 (2000)). Here, plaintiffs' own complaint describes their negligence claim as based on the plaintiffs' "*damages* and their increased risk of harm." C331 ¶ 103 (emphasis added). Moreover, plaintiffs state that they "seek to recover the costs of diagnostic testing," C306 ¶ 3, which once again falls within the definition of money to be paid as compensation for an alleged loss or injury.

Moreover, in arguing that they can recover medical monitoring costs, plaintiffs relied heavily on *Lewis*. Yet *Lewis* clearly states that for medical monitoring claims, the "injury which is alleged, and for which compensation

is sought, in a claim seeking *damages* for a medical examination to detect a possible physical injury *is the cost* of the examination." 342 Ill. App. 3d at 101 (emphasis added); *see also id*. at 103 ("[T]he plaintiffs failed to satisfy the causation element of a claim *seeking damages for the cost of screening* their children for lead poisoning.") (emphasis added). *Lewis* also describes medical monitoring as seeking "compensation" and "costs," which is the essence of damages. *See Yang*, 195 Ill. 2d at 104; s*ee also Muniz v. Rexnord Corp*., No. 04 C 2405, 2006 WL 1519571, at *6 (N.D. Ill. May 26, 2006) ("in their prayer for medical monitoring, the Plaintiffs are seeking damages, which are costs of the examination, for a medical examination to detect a possible physical injury").

Plaintiffs' argument also is inconsistent with standard Illinois litigation practice describing medical monitoring costs as damages. Section 30.00 of the Illinois Pattern Jury Instructions, titled "DAMAGES INSTRUCTIONS," sets forth instructions that "relate to damages for injury." One of these "damages instructions" is Section 30.06, titled "Measure of Damages—Medical Expense," and covers the "reasonable expense of necessary medical care, treatment, and services received," which includes medical testing costs.

Furthermore, plaintiffs' argument contradicts bedrock principles of equity. Plaintiffs do not allege that a legal remedy for damages is unavailable. Nor could they, as the jury instructions demonstrate that, if

plaintiffs could prove all the elements of their claims, they could recover medical monitoring costs as damages. "Equitable relief is not available if there is an adequate remedy at law." *La Salle Nat'l Bank v. Refrigerated Transp. Co., Inc.*, 165 Ill. App. 3d 899, 900 (1st Dist. 1987); *Sjogren v. Maybrooks, Inc.,* 214 Ill. App. 3d 888, 892 (1st Dist. 1991). Thus, treating plaintiffs' medical monitoring remedy as equitable, it would be barred by the availability of money damages. *See also Zahl v. Krupa*, 365 Ill. App. 3d 653, 658 (2d Dist. 2006) ("Plaintiffs seek not equitable relief but the legal remedy of money damages.").

To support their position, plaintiffs rely on various federal decisions discussing whether medical monitoring is considered equitable relief for purposes of determining whether a class can be certified under Federal Rule of Civil Procedure 23(b)(2).[10] Those cases do not involve the Illinois Tort Immunity Act, and cannot overcome this court's clear holdings regarding what constitutes "damages" for purposes of that Act. In short, plaintiffs' argument that the Tort Immunity Act does not apply because their medical monitoring claim is purportedly equitable is contrary to plaintiffs' own allegations, Illinois case law, jury instructions, and basic principles of equitable relief.

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[10] Plaintiffs also have relied on *HPF, L.L.C. v. Gen. Star Indem. Co.*, but that court simply repeated the *allegations* of the complaint, which would determine whether a duty to defend existed in that insurance coverage case, 338 Ill. App. 3d 912, 914-15 (1st Dist. 2003); it did not decide whether the relief sought by a medical monitoring claim is damages or injunctive relief.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the court reverse the appellate court's judgment and affirm the circuit court's dismissal of plaintiffs' complaint.

Dated: October 30, 2019

Respectfully submitted,

/s/ R. Chris Heck

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 315(d) and 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 315(c)(6), is 13,264 words.

/s/ R. Chris Heck
R. Chris Heck

CERTIFICATE OF SERVICE

I, R. Chris Heck, an attorney, certify that on October 30, 2019, I electronically filed the foregoing *Brief and Separate Appendix of Defendant-Appellant City of Chicago* with the Illinois Supreme Court and served the brief via the *Odyssey E-Filing System* on all parties to this case that are listed with that system. I also served each party by emailing the brief directly to its attorneys at the email addresses specified below:

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Upon penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ R. Chris Heck
R. Chris Heck

No. 124999

In the Supreme Court of Illinois

GORDON BERRY and ILYA PEYSIN,	) On Petition for Leave to Appeal from) The Illinois Appellate Court, First) District, No. 1-18-0871
Plaintiffs-Appellees,	)
v.	) There on Appeal From the Circuit) Court of Cook County, Illinois,) No. 2016-CH-02292
CITY OF CHICAGO,	)
Defendant-Appellant.	) Trial Judge: The Hon. Raymond W.) Mitchell

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SEPARATE APPENDIX TO BRIEF OF DEFENDANT-APPELLANT CITY OF CHICAGO

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APPENDIX

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Lawyers

2019 IL App (1st) 180871

FIRST DISTRICT
SIXTH DIVISION
May 22, 2019

No. 1-18-0871

GORDON BERRY and ILYA PEYSIN,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 16 CH 02292
	)	
THE CITY OF CHICAGO,	)	Honorable
	)	Raymond W. Mitchell,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Justice Cunningham concurred in the judgment and opinion.
Justice Connors dissented, with opinion.

OPINION

¶ 1 Plaintiffs, Gordon Berry and Ilya Peysin, appeal the order of the circuit court dismissing their class action complaint alleging negligence and inverse condemnation, which they filed after the defendant City of Chicago (City) replaced the water main and/or water meter servicing their homes. On appeal, plaintiffs contend the court erred in dismissing their complaint where (1) the complaint sufficiently alleged a claim of negligence and plaintiffs properly sought medical monitoring as relief, based on the City's actions in replacing/repairing its lead pipe water service and water meters, and (2) plaintiffs sufficiently alleged a claim of inverse condemnation where the City's actions caused the release of high levels of lead in their water supply over time, resulting in damage to plaintiffs' property. For the following reasons, we reverse and remand for further proceedings.

¶ 2 JURISDICTION

¶ 3 The trial court dismissed plaintiffs' complaint with prejudice on March 29, 2018. Plaintiffs filed their notice of appeal on April 20, 2018. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. July 1, 2017), governing appeals from final judgments entered below.

¶ 4 BACKGROUND

¶ 5 The following facts are alleged in plaintiffs' complaint.

¶ 6 Lead is a well-documented environmental contaminant "that is highly poisonous to humans" and "bioaccumulates in the body over time." Exposure to lead harms the nervous system and can lead to various ailments, "including neuropathy, motor nerve dysfunction, weakened immunity to disease, renal failure, gout, hypertension, muscle and joint pain, memory and concentration problems, and infertility." The effect of lead in the body is far more problematic in children and is connected to stunted brain development, reduction in intelligence quotient (IQ), intense aggression, and other behavior issues. Even low levels of lead exposure in children "have been linked to damage to the central and peripheral nervous system, learning disabilities, shorter stature, impaired hearing, and impaired formation and function of blood cells."

¶ 7 Since the human body does not remove lead from the system, it accumulates over time and can remain for years in soft tissue, organs, bones, and teeth. Thus, the effect of lead on children can be " 'long lasting' " if not " 'permanent.' " Moreover, the effects of lead may not appear for years. Blood lead testing is a universally recognized and reliable method of testing lead levels because results can be compared "to the published standard of 10 μg/dL, established by the Center[s] for Disease Control" and Prevention (CDC).

¶ 8 In 1986, an amendment to the Safe Drinking Water Act (42 U.S.C. § 300f *et seq.*), imposed a ban on the use of lead pipes in public water systems. Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339, 100 Stat. 642. Up until this point, the City required residents to install lead service lines "even in the face of all the public health warnings over the past century." As a result, "nearly 80 percent of the properties in Chicago receive their drinking water via lead pipes." Over time, lead pipes can corrode resulting in the " 'transfer of dissolved or particulate lead into the drinking water.' " To minimize this risk, defendant treats its water supply with "Blended Polyphosphate," which causes a chemical reaction that coats "the interior of water mains, house services, and plumbing in an attempt to prevent the pipes from corroding" and leaching lead into the drinking water.

¶ 9 This treatment is not foolproof, however, and the protection can fail when "construction or street work, water and sewer main replacement, meter installation or replacement, or plumbing repairs" are performed. When the City replaces the water main or meter, the "[d]rilling, digging, as well as moving or bending [of] the pipes can all cause the interior coating to flake off and the polyphosphate protection to fail." When the water is turned back on, "the violent rush of water into the pipes disrupts the protective coating," putting residents at further risk of lead exposure. Unsafe lead levels can persist "for weeks or months after the disturbance."

¶ 10 Also, in reconnecting the residential lead service lines to the water mains after replacement or repair, the City performs a "partial" replacement in which it replaces a portion of the lead service line with copper. When sections of a lead pipe are replaced with copper, a galvanic cell (a battery) is created that can cause the release of lead into water as the pipes corrode. Organizations such as the American Academy of Pediatrics and the CDC Advisory Committee on Childhood Lead Poisoning Prevention have expressed concern about elevated

water lead levels from partial lead service line replacements. This particular repair is discouraged by the United States Environmental Protection Agency's (EPA) science advisory board and the American Water Works Association. But it is standard procedure in Chicago when crews damage lead pipes during water main work. Cities such as Washington D.C. and Boston have ceased their accelerated lead service line replacement programs due to these dangers.

¶ 11 Between 2005 and 2011, the EPA tested the water of homes connected to lead service lines in Chicago to determine whether the Lead and Copper Rule (Rule), the existing federal regulation for sampling water, sufficiently identified high lead levels in the water supply. The Rule "seeks to manage lead levels in drinking water by setting a 'lead action level.' " Currently, " 'the lead action level is exceeded if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period … is greater than 0.015 mg/L.' " Using the Rule, the EPA found that "[o]f the 13 sites where there had been a recently documented physical disturbance *** virtually all of them produced samples that exceeded the lead action level under the Lead and Copper Rule," which was "in stark contrast" to samples taken from undisturbed sites. In October 2013, the commissioner of the Chicago Department of Water Management wrote a letter to alderman about the concerns raised in the study. The City, however, found that the water is "absolutely safe to drink."

¶ 12 The City began modernizing its water system in 2008 and since 2009 has conducted more than 1600 water main and sewer replacement projects. The American Water Works Association recommends that "immediately following a lead service line replacement, cold water should be run for at least 30 minutes at full flow after removing the faucet aerator" to flush out any lead debris that may have resulted from the replacement. It instructs that residents should begin at the lowest level of their homes and open the cold water taps fully, letting the water run for at least 30

minutes. After the 30 minutes, "they should turn off each tap starting with the taps in the highest level of the home." The EPA also recommends that a household with lead service lines should flush pipes for three to five minutes whenever the water has not been used for several hours. Residents "should be warned that they should not consume tap water, open hot water faucets, or use an icemaker or filtered water dispenser until after flushing is complete."

¶ 13 Prior to 2013, the City informed residents after replacing water mains only that the water may be shut off a couple of times. In September 2013, the City began to advise residents to, after replacement of their old water main,

> "please open all your water faucets and hose taps and flush your water for 3 to 5 minutes. Sediment and metals can collect in the aerator screen located at the tip of your faucets. These screens should be removed prior to flushing. This flushing will help maintain optimum water quality by removing sediment, rust, or any lead particulates that may have come loose from your property's water service line as a result of the water main replacement."

¶ 14 Plaintiff Berry resides at 5411 S. Harper Avenue in Chicago. The City replaced the water main on his block in 1998, and replaced the water meter at his home in 2009. In replacing the water meter, the City disturbed the lead service lines running to his home, causing the interior protective coating to be compromised. Violent flushing of the water when it was turned back on caused more damage to the interior coating. The water meter was reconnected using galvanized pipes that placed Berry and his family at further risk of lead contamination. In January 2016, a routine check-up revealed that Berry's two-year-old granddaughter, who resided with him, had high lead levels in her blood.

¶ 15 On February 11, 2016, the City tested the water at Berry's residence, and results showed that it contained 17.2 parts per billion (ppb) of lead. The EPA's recommended lead action level is 15 ppb. On March 4, 2016, the City collected another 10 samples of drinking water from the residence, and the tests revealed results reaching as high as 22.8 ppb. Berry was not informed of these results until early May 2016, when an investigative reporter informed him that his residence appeared on a list showing addresses where the water supply tested for significant lead content. Berry's water was tested again, and the 10 samples taken showed lead levels ranging from 7.6 ppb to 30.8 ppb. Berry's granddaughter and her parents have since moved out of his home. Plumbers have confirmed that Berry's service line is lead, and Berry received quotes to replace the remaining portion of the lead service line that range from $14,000 to $19,000.

¶ 16 Plaintiff Peysin resides at 6529 N. Albany Avenue in Chicago, with his wife and children. In April 2015, the City replaced 2536 feet of water main on North Albany Avenue, which included the water main in front of Peysin's home. The letter did not warn Peysin of the potential for lead exposure as a result of the replacement but only advised that he "open all [his] water faucets and hose taps and flush [his] water for 3 to 5 minutes" in order to remove "sediment, rust, or any lead particulates that may have come loose from your property's water service line."

¶ 17 Peysin's water was tested on October 28, 2016, and the results showed that after five minutes of flushing, the lead level registered at 5.8 ppb, which was deemed "Significant." The report indicated that lead may be leaching into the tap water from the service line, and a plumber confirmed that Peysin's service line is lead. The report further advised Peysin that, although running water for a minute or more before using can help reduce lead exposure, it "will not

work" in his case because the lead level in his water was "Significant" or "Serious" after prolonged flushing.

¶ 18 The initial class action complaint against the City was filed on February 18, 2016, alleging one count of negligence and one count of inverse condemnation. The City filed a motion to dismiss, which the trial court granted without prejudice because plaintiffs had not adequately pled exposure absent documentary evidence. Plaintiffs thereafter tested their water and filed an amended complaint on January 9, 2017.

¶ 19 Count I of plaintiffs' amended complaint alleged that the City owed them "a duty to exercise reasonable care in providing safe drinking water, free from dangerous contaminants such as lead that would expose them to the unnecessary health risks documented herein." Defendants failed to exercise such care when "it did not take any measures to warn or protect Plaintiffs and Class members from lead exposure and, instead, *** misrepresent[ed] the safety of the water." As a result, "[d]efendant's negligence proximately caused Plaintiffs' and the Class members' damages and their increased risk of harm as documented herein." As relief, plaintiffs sought the establishment of a trust fund to pay for medical monitoring and the notification of all class members in writing that medical monitoring may be necessary to diagnose lead poisoning.

¶ 20 Count II alleged that, in conducting water main and water meter replacements, the City "irreversibly damage[d] the service lines of Plaintiffs and the class by making them more dangerous." The City's use of copper to reconnect the lead service lines owned by the plaintiffs further caused the release of lead into the drinking water because it causes the lead pipe to corrode "more aggressively than it would under normal circumstances." As a result, "Plaintiffs' property is damaged insofar as it is more dangerous than before." Plaintiffs sought

"compensation for the damage to their lead service lines caused by the City's work" in the amount "necessary to fully replace their lead service lines with copper piping."

¶ 21 The City filed a motion to dismiss the amended complaint, arguing that plaintiffs have not alleged physical injuries or shown damage to their water service lines. The City also argued that the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-201 (West 2016)) barred plaintiffs' claims against the City. Attached to its motion was the affidavit of Andrea R.H. Putz, the water quality manager of the City's department of water management. In the affidavit, Putz stated that the City replaced the 54th Street water main in 1998, which connects to the Harper main servicing Berry's home. The Harper water main has not been replaced. Berry's water meter was replaced in 2005. The affidavit disputed plaintiffs' allegations that the elevated levels of lead found in Berry's water resulted from the City's disturbance of the water main or lead service lines servicing his home but stated instead that it came from the lead pipes located in his basement.

¶ 22 After a hearing, the trial court dismissed both counts of plaintiffs' amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)). As to count I, the court determined that "[n]o Illinois authority has permitted [a claim for medical monitoring] absent an allegation of a present injury." Since plaintiffs "readily concede that they lack a present injury," the court found their claim for medical monitoring to be "based solely on a potential risk for *future* harm," which is not recoverable under *Jensen v. Bayer AG*, 371 Ill. App. 3d 682 (2007). The trial court dismissed count II, plaintiffs' inverse condemnation claim, based on its finding that such a claim requires an allegation of special damage to property in excess of that sustained by the public generally. The court found that the damages alleged by plaintiffs resulting from the City's work on the water pipes and meters was "borne equally by all

residents of the City of Chicago attendant to *** the replacement of lead water mains." Plaintiffs filed their timely appeal.

¶ 23 ANALYSIS

¶ 24 The trial court dismissed plaintiffs' complaint pursuant to section 2-615 of the Code. A section 2-615 motion to dismiss challenges only the legal sufficiency of the complaint based on defects apparent on the face of the complaint. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. "The critical inquiry in deciding a section 2-615 motion to dismiss is whether the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Gonzalzles v. American Express Credit Corp.*, 315 Ill. App. 3d 199, 206 (2000). In making this determination, courts must accept as true all well-pleaded facts and reasonable inferences that can be drawn from those facts. *DeHart*, 2013 IL 114137, ¶ 18. A plaintiff need not prove his case at this pleading stage but must only allege sufficient facts to state the elements necessary to his cause of action. *Visvardis v. Eric P. Ferleger P.C.*, 375 Ill. App. 3d 719, 724 (2007). We review an order granting a section 2-615 motion to dismiss *de novo*. *DeHart*, 2013 IL 114137, ¶ 18.

¶ 25 I. Count I—Negligence

¶ 26 "In a negligence action, the plaintiff must plead and prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and injury proximately resulting from the breach." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. The City argues that we should affirm the dismissal of plaintiffs' negligence count because they conceded that they suffered no present injury. However, according to the record plaintiffs conceded only a lack of "present physical injury," not that no injury occurred at all. After the supposed confession, plaintiffs' counsel responded that in *Lewis v. Lead Industries Ass'n*, 342 Ill. App. 3d 95 (2003), they "made it very

clear that there wasn't a present physical injury as well." Counsel further states, "What is the injury? The truth is that the city has created an environment in which all of these residents now must get tested to determine the extent of their potential physical injury."

¶ 27 As courts have recognized, the Restatement (Second) of Torts broadly defines an injury "as an invasion of a person's interest, even if there is no immediate harm or that harm is speculative." *White v. Touche Ross & Co.*, 163 Ill. App. 3d 94, 101 (1987) (citing Restatement (Second) of Torts § 7, Comment a (1965)). Accepting plaintiffs' allegations as true, the City's negligent conduct in replacing water mains and water meters servicing plaintiffs' homes caused a high level of a dangerous contaminant, lead, to leach into their water. We can reasonably infer from these allegations that plaintiffs and their families drank the contaminated water serviced to their homes, thus exposing their bodies, and the organs, tissues, and bones therein, to lead. Plaintiffs set forth in their complaint that the human body does not transform lead in the system and therefore lead bioaccumulates and can remain in the tissues and bones for many years before a person develops an illness. Exposure to lead harms the nervous system and can lead to various ailments and behavior issues in children. Even low levels of lead exposure in children "have been linked to damage to the central and peripheral nervous system, learning disabilities, shorter stature, impaired hearing, and impaired formation and function of blood cells." We find that plaintiffs have sufficiently alleged a present injury in consuming lead-contaminated water, even if they have yet to develop physical ailments linked to such consumption.

¶ 28 The City, however, points out that plaintiffs seek medical monitoring costs as damages and argues that this relief is only available to plaintiffs who have demonstrated a present physical injury. Otherwise, the City argues, plaintiffs are actually seeking damages only for an increased

risk of future harm, which our supreme court disallowed in *Dillon v. Evanston Hospital*, 199 Ill. 2d 483 (2002), and *Williams v. Manchester*, 228 Ill. 2d 404 (2008).

¶ 29 In *Dillon*, the plaintiff brought a medical malpractice action alleging that the doctor treating her for breast cancer inadvertently left in her chest a nine-centimeter fragment of the catheter used to administer chemotherapy. *Dillon*, 199 Ill. 2d at 487. The plaintiff did not know that the catheter was not removed in its entirety. *Id.* A routine X-ray taken more than two years later revealed that the fragment had migrated to her heart with the tip embedded in the wall of the right atrium or right ventricle. *Id.* at 487-88. Plaintiff decided, based on the opinions of doctors, to leave the catheter fragment in her heart because it would be more dangerous to remove the fragment than to leave it in place. *Id.* at 488. The case proceeded to trial, and the jury awarded plaintiff $1.5 million for past pain and suffering, $1.5 million for future pain and suffering, and $500,000 for the increased risk of future injuries. *Id.* at 488-89. The appellate court affirmed the judgment. *Id.* at 489.

¶ 30 On appeal to the supreme court, the defendants argued that the trial court erred in instructing the jury it could award damages based on the increased risk of future injuries where it was not reasonably certain plaintiff would suffer those injuries in the future. *Id.* at 496-97. The evidence at trial showed that plaintiff's risk of future infection ranged between close to 0% up to 20%, her risk of arrhythmia was less than 5%, the risks of perforation and migration were small, and the risk of embolization was low to nonexistent. *Id.* at 497.

¶ 31 The supreme court acknowledged that it "has historically rejected assessing damages for future injuries." *Id.* However, the court felt compelled to revisit the issue and noted "a trend toward allowing compensation for increased risk of future injury as long as it can be shown to a reasonable degree of certainty that the defendant's wrongdoing created the increased risk." *Id.* at

500. The court found there is no element of speculation in awarding damages where the plaintiff has competent evidence that the defendant negligently caused her to bear the burden of an increased risk of future injury. *Id.* at 501. In this situation, "the treatment of an increased risk of future injury as a present injury does not run afoul of the general rule." *Id.* The court determined that the trial court did not err in allowing the jury to award damages for an increased risk of future injuries because "a plaintiff must be permitted to recover for *all* demonstrated injuries." (Emphasis in the original.) *Id.* at 504. In other words, where the plaintiff has shown a present injury, she may obtain relief for an increased risk of future harm as an element of damages. See *id.* at 503-04.

¶ 32 In *Williams*, the plaintiff was 10½ weeks pregnant with Baby Doe when she was involved in a serious accident while riding as a passenger in an automobile. *Williams*, 228 Ill. 2d at 407. She was taken to the hospital where an X-ray revealed she suffered a broken hip and broken pelvis from the accident. *Id.* at 408. After discussing with doctors about the various treatments for her and possible effects on the fetus, plaintiff decided to terminate her pregnancy approximately one week after the accident. *Id.* at 412. Plaintiff subsequently filed a complaint against the defendant in which one count sought damages for injuries to Baby Doe, " 'including radiation and medication exposure' " due to plaintiff receiving a computerized axial tomography (CAT) scan and pelvic X-rays while she was pregnant. *Id.* at 414. She attached an affidavit by a doctor who opined that Baby Doe's radiation exposure produced an increased risk of future injury. *Id.* at 415.

¶ 33 The supreme court noted, however, that plaintiff's experts "did not opine that Baby Doe's radiation exposure resulted in an actual, present injury, but rather that the fetus incurred an increased risk of future harm." *Id.* at 424-25. The court declined to expand *Dillon* so as to equate

an increased risk of future harm with a present injury, especially where the plaintiff did not present any evidence of damages because "there can be no legal injury without damages." *Id.* at 425-26. The court did not find that Baby Doe's exposure to X-rays or medication could not be a present, actionable injury. Rather, the court determined that plaintiff's proof of injury was insufficient because the testimony showed only that Baby Doe incurred an increased risk of future harm with no present damages. *Id.* at 427.

¶ 34 *Dillon* and *Williams* require only that plaintiffs establish a present injury in which they suffer damages and express no requirement that plaintiffs' injury be a present physical harm or ailment in order to recover in tort. Viewing the complaint in the light most favorable to plaintiffs, they sufficiently allege a present injury due to their consumption of water containing high levels of lead. Furthermore, plaintiffs' complaint alleges the need for medical testing due to plaintiffs' consumption of lead-contaminated water. Their complaint states that blood lead testing is a universally recognized and reliable method of testing lead levels because results can be compared "to the published standard of 10μg/dL, established by" the CDC. As damages they seek the costs of such testing and monitoring.

¶ 35 These damages clearly flow from plaintiffs' injury and are not speculative, as they are capable of proof within a reasonable degree of medical certainty. See *Lewis*, 342 Ill. App. 3d at 101. Where such testing is made necessary by defendant's breach of duty, courts have found that the testing itself is "a present injury compensable in a tort action." *Id.* at 101-02; *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 826 (D.C. Cir. 1984). We find that plaintiffs have sufficiently alleged facts to support their claims of injury and damages due to the City's negligence. We reiterate that our focus here is simply whether plaintiffs alleged sufficient facts to state a cause of action, not whether they presented sufficient evidence to prevail on every

element of their claims. Plaintiffs need not prove their case at this pleading stage. *Visvardis*, 375 Ill. App. 3d at 724.

¶ 36 *Jensen*, a case relied on by the City and the trial court below, does not require a different result. In *Jensen*, the plaintiff was prescribed and took Baycol to lower his cholesterol after he suffered a heart attack. *Jensen*, 371 Ill. App. 3d at 685. In August 2001, defendant, the manufacturer of Baycol, issued a statement that it was removing Baycol from the market because some users of Baycol and other statin drugs reported development of rhabdomyolysis as a serious and potentially fatal side effect. *Id.* at 684. Plaintiff filed an action in which he claimed that defendant's product subjected him to unnecessary future health risks that require medical monitoring. *Id.*

¶ 37 Plaintiff testified that he took Baycol from May 2000 to August 2001. He suffered from pain in his calves and legs, and he concluded that the pain resulted from his taking Baycol. *Id.* at 685. The pain, however, did not cause plaintiff to miss work, nor did he know of any increased risk to his future health from his prior use of Baycol. *Id.* Plaintiff testified that he has no reason to believe that his future health is at risk from his consumption of Baycol. *Id.* The record contained deposition testimonies of two medical professionals. *Id.* Each physician acknowledged that all statin drugs carry the risk of rhabdomyolysis; however, the benefits of lowering cholesterol " 'way outweigh the risks of a very, very rare event taking place.' " *Id.* at 685-86. Plaintiff's current physician stated that, although plaintiff had used Baycol in the past, he did not find it necessary that plaintiff undergo any special testing or monitoring. *Id.* at 686. The trial court granted defendant's motion for summary judgment on the medical monitoring count, finding no evidence that plaintiff needed future medical monitoring due to his past use of Baycol. *Id.* at 687.

¶ 38 This court affirmed the trial court's determination, finding that plaintiff offered "nothing in support of his medical monitoring claim other than his own allegation that Baycol caused him leg cramps" while he was taking it. *Id.* at 692. Plaintiff alleged no present injury. The court distinguished *Lewis*, finding that it did not address whether a plaintiff may bring a claim for medical monitoring for potential future harm where he has shown no present injury. *Id.* at 693. *Jensen* is distinguishable. Here, taking plaintiffs' factual allegations as true, they have sufficiently alleged a present injury necessitating medical monitoring.[1]

¶ 39 The City also argues that the single recovery principle precludes plaintiffs' claim for the costs of medical monitoring because if "future injuries actually appeared, then there would be a trial each time an injury occurred to determine causation and damages for that injury." "The single recovery principle requires that all damages, future as well as past, must be presented and considered at the time of trial." *Dillon*, 199 Ill. 2d at 502. Thus, "[a]n entire claim arising from a single tort cannot be divided and be the subject of several actions, regardless of whether or not the plaintiff has recovered all that he or she might have recovered." *Id.* However, as plaintiffs point out, the present complaint is the only one they have filed, and no other actions have been filed. This court should not find plaintiffs' allegations barred based on what might happen in the future. Such a determination would be improperly speculative and premature at this time. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 469 (2003).

¶ 40 Nor do we find persuasive the City's argument that the *Moorman* doctrine applies to bar plaintiffs' claim. The doctrine, derived from *Moorman Manufacturing Co. v. National Tank Co.*,

[1]The City also cites a Michigan case, *Henry v. Dow Chemical Co.*, 701 N.W.2d 684 (Mich. 2005), in support of its argument that medical monitoring is not a cognizable claim for plaintiffs' injuries. We need not look to the law of other jurisdictions, however, when Illinois law is more than sufficient on the issue. *K&K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 47.

91 Ill. 2d 69, 86 (1982), provides that the remedy for economic loss, or "loss relating to a purchaser's disappointed expectations due to deterioration, internal breakdown or nonaccidental cause," lies in contract rather than theories of tort. The City's argument that the doctrine applies presumes that plaintiffs' claim for medical monitoring costs represents purely economic damages. Plaintiffs' alleged injuries and claimed damages, however, do not relate to disappointed expectations based on contract law. Instead, their medical monitoring claims stem from the harm they suffered because the City's alleged misconduct caused high levels of lead to leach into the water they consumed. Such claims are more in line with tort theory, and thus, we find the *Moorman* doctrine inapplicable. See *id.*

¶ 41 The City next argues that we should affirm the dismissal of plaintiffs' negligence claims because they are barred by the Tort Immunity Act.[2] Such immunity is an "affirmative matter" properly raised under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)). *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377 (2003). A section 2-619 motion to dismiss admits the legal sufficiency of plaintiffs' complaint, but raises defects, defenses, or other affirmative matters that defeat plaintiffs' claims. *Mack Industries, Ltd. v. Village of Dolton*, 2015 IL App (1st) 133620, ¶ 19. The affirmative matter "must be apparent on the face of the complaint" or "be supported by affidavits or certain other evidentiary materials." *Van Meter*, 207 Ill. 2d at 377. The defendant bears the initial burden of establishing the affirmative defense. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). In determining a section 2-619 motion to dismiss, courts "must interpret all pleadings and supporting documents in the

[2]While the trial court did not dismiss plaintiffs' complaint based on section 2-619 or consider the tort immunity issue in its order, the parties raised the issue before the trial court and in their briefs, and it is an issue of law. Therefore, this court may consider the issue on appeal. See *Brugger v. Joseph Academy, Inc.*, 326 Ill. App. 3d 328, 330 (2001).

light most favorable to the nonmoving party." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). Our standard of review is *de novo*. *Van Meter*, 207 Ill. 2d at 368.

¶ 42 The City argues that section 2-201 of the Tort Immunity Act applies here. Section 2-201 provides:

> "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2016).

Policy decisions made by a municipality "require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests." *West v. Kirkham*, 147 Ill. 2d 1, 11 (1992). On the other hand, discretionary acts are "those which are unique to a particular public office." *Snyder v. Curran Township*, 167 Ill. 2d 466, 474 (1995). "Municipal defendants are required to establish both of these elements in order to invoke immunity under section 2-201." *Van Meter*, 207 Ill. 2d at 379. Municipal actions that involve " 'merely the execution of a set task *** [such] that nothing remains for judgment or discretion' " are considered ministerial and are not subject to immunity. *In re Chicago Flood*, 176 Ill. 2d at 193-94.

¶ 43 The City argues that it was determining policy when it decided to modernize the water system and that deciding what precautions to advise residents to take was an exercise of discretion. While the decision to replace lead water pipes may be viewed as a policy determination, plaintiffs here do not challenge the City's decision to modernize their water system. Instead, plaintiffs take issue with *how* the City conducted the replacement project after the decision was made to modernize and with *how* residents were advised to treat their water

afterwards. It is not apparent from the face of plaintiffs' complaint that the City's advice was unique to a particular public office or discretionary. In fact, plaintiffs' complaint alleged otherwise. Plaintiffs alleged that, according to the American Water Works Association, "immediately following a lead service line replacement, cold water should be run for at least 30 minutes at full flow after removing the faucet aerator" to flush any lead debris that may have resulted from the replacement. Their complaint also set forth the manner in which the flushing should occur: residents should begin at the lowest level of their homes and open the cold water taps fully, letting the water run for at least 30 minutes. After the 30 minutes, "they should turn off each tap starting with the taps in the highest level of the home." The EPA cautions that residents "should be warned that they should not consume tap water, open hot water faucets, or use an icemaker or filtered water dispenser until after flushing is complete." Plaintiffs' complaint, liberally construed, alleged that advising and warning residents in this situation is akin to an "execution of a set task" where "nothing remains for judgment or discretion."

¶ 44 This is in contrast to the complaint in *In re Chicago Flood*, a case cited by the City. In that case, the City hired a dredging company to replace bridge piling clusters, and a tunnel wall under the Chicago River was breached during pile driving. A number of downtown businesses were flooded as a result of the breach, and in their complaint the plaintiffs alleged, among other things, that the City failed to warn them about the danger of flood after learning of the breach. *Id.* at 184-86. The supreme court found the City's actions discretionary in nature, rather than ministerial, because the plaintiffs "do not allege that there was any prescribed method for how to repair the tunnel and how quickly, or how to warn class plaintiffs of the tunnel breach." *Id.* at 196-97. Plaintiffs here, however, have set forth a prescribed method of advising residents to flush, and how to flush, the water in their homes after lead pipe work.

¶ 45 Furthermore, although the City submitted Putz's affidavit in support of its motion to dismiss, the affidavit does not state facts to support the City's argument that its actions were discretionary. Instead, her affidavit disputes plaintiffs' factual allegations concerning the source of the lead in plaintiff Berry's water. Where the affirmative matter is merely evidence upon which a defendant expects to challenge an ultimate fact stated in the complaint, it is insufficient to support a section 2-619 motion to dismiss. *In re Marriage of Vaughn*, 403 Ill. App. 3d 830, 835-36 (2010). Since the City has not established both elements of section 2-201 immunity under the Tort Immunity Act, dismissal of plaintiffs' negligence claim pursuant to section 2-619 of the Code would be error.

¶ 46 The City briefly argues that section 2-107 of the Tort Immunity Act and common-law immunity also bar plaintiffs' negligence claims. Section 2-107 provides that a "local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous or for the provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material." 745 ILCS 10/2-107 (West 2016). The City merely argues, without further analysis, that plaintiffs' complaint seeks to impose liability based on the City's provision of information, which is barred by section 2-107. The City also argues that absolute immunity applies to protect government officials from liability for statements made within the scope of official duties. The City again merely concludes that count I claims that City officials should have made statements about the water in plaintiffs' homes and "[s]uch officials are immune from liability for making or omitting such statements. Therefore, the City is immune as well, under settled Illinois law."

¶ 47 We find that the City has not met its burden to establish this affirmative defense. "Because the Tort Immunity Act is in derogation of the common law, it must be strictly

construed against the public entities involved." *Van Meter*, 207 Ill. 2d at 380. At the very least, questions of fact exist as to whether the City's provision of information falls within the protections of this section precluding dismissal under section 2-619. See *id.* Furthermore, the cases cited in the City's brief involve claims for defamation. See *Dolatowski v. Life Printing & Publishing Co.*, 197 Ill. App. 3d 23 (1990); *Harris v. News-Sun*, 269 Ill. App. 3d 648 (1995); *Morton v. Hartigan*, 145 Ill. App. 3d 417 (1986). Plaintiffs' complaint, however, makes no claim for defamation.[3]

¶ 48 II. Count II—Inverse Condemnation

¶ 49 Plaintiffs argue that the trial court improperly dismissed count II of their complaint, pursuant to section 2-615 of the Code, where they sufficiently alleged a claim for inverse condemnation. An inverse condemnation claim is a claim for the governmental taking of a property interest without compensation, where no condemnation proceeding has been initiated. *City of Chicago v. ProLogis*, 236 Ill. 2d 69, 76-77 (2010). As our supreme court found, "the Illinois takings clause reaches beyond the scope of the federal takings clause" to provide a remedy when government action damages private property. *Hampton v. Metropolitan Water Reclamation District*, 2016 IL 119861, ¶ 27. This constitutional provision, however, "was not intended to reach every possible injury that might be occasioned by a public improvement." *Belmar Drive-In Theater Co. v. Illinois State Toll Highway Comm'n*, 34 Ill. 2d 544, 550 (1966). Rather,

[3]The parties disagree whether the Tort Immunity Act applies to plaintiffs' inverse condemnation claim. We need not decide that particular issue at this time because, even if it did apply, we find that the City has not established this affirmative defense as to plaintiffs' inverse condemnation claim for the same reasons.

"[p]roperty is considered damaged for purposes of the takings clause if there is 'any direct physical disturbance of a right, either public or private, which an owner enjoys in connection with his property; a right which gives the property an additional value; a right which is disturbed in a way that inflicts a special damage with respect to the property in excess of that sustained by the public generally.' " *Hampton*, 2016 IL 119861, ¶ 27 (quoting *Citizens Utilities Co. of Illinois v. Metropolitan Sanitary District of Greater Chicago*, 25 Ill. App. 3d 252, 256 (1974)).

¶ 50 In their complaint, plaintiffs allege that the City embarked on a project to replace water mains and water meters throughout Chicago. In replacing the water mains and meters, however, plaintiffs allege that the City disturbed the polyphosphate interior coating of nearby lead pipes, causing its protection to be compromised. Furthermore, after replacing the water mains and meters, the City reconnected the service lines to certain property owners by performing a partial lead service line replacement, which can cause more lead to release into the water over time. Plaintiffs allege that, as a result, property owners with lead service lines in areas where a water main or meter was replaced have been, and continue to be, exposed to dangerous levels of lead in their water.

¶ 51 Plaintiffs, as property owners, have the right to the use and enjoyment of their property without interference. *Cuneo v. City of Chicago*, 379 Ill. 488, 493 (1942). They have the rightful expectation that they will be able to use their properties to maintain a home. *Hampton*, 2016 IL 119861, ¶ 26. The dangerous contamination of water coming into plaintiffs' residences, water that is consumed and used by the residents, certainly interferes with the use and enjoyment of their property. However, plaintiffs must also allege special damages in order to recover for " 'the lawful damaging of private property for public use.' " *Id.* ¶ 27.

¶ 52 The City argues that the number of potential plaintiffs could be large and thus plaintiffs' damages cannot be characterized as special damages. The cases cited, however, do not support this argument. In *City of Chicago v. Union Building Ass'n*, 102 Ill. 379, 391-92 (1882), the court found that no "special or peculiar injury" to property resulted from the partial closure of La Salle Street because "[p]recisely the same injury will result to every one, wherever located, having to pass that route." In *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 168 (1893), the court defined special injury or damage as "differing in kind from those affecting the general public." It found that the plaintiff, "having to go a few feet further to gain access" from an adjacent street, suffered the "same kind" of damage as that sustained by " 'all other persons in the city that might have occasion to go that way' " and affirmed the dismissal of the action. *Id.* 168-69. In *Department of Public Works & Buildings v. Horejs*, 78 Ill. App. 2d 284, 291 (1966), property owners claimed that a newly constructed expressway embankment obstructed their light, air, and view. The complaining property owners, however, were "not abutting owners to the highway embankment construction, nor was the embankment built on the road which fronts [their] property; nor was the expressway constructed on or across any part of the property taken from [them]." *Id.* at 292. The court determined that the alleged damages were suffered in "common to all property owners in the area and the law provides them no basis for compensation." *Id.*

¶ 53 These cases do not establish that damages suffered by numerous plaintiffs cannot be "special damages." Rather, they illustrate that the proper focus in determining special damages is ascertaining the type of damage suffered by the property owner due to the City's actions and whether or not it is the same damage suffered by the general public. In their complaint, plaintiffs here allege that the City's replacement of water mains and meters disrupted the protective coating of their lead service lines, causing harmful levels of lead to leach into their water. They

allege that the City further damaged their property when it partially replaced lead service lines when reconnecting water service to the newly replaced water mains. As a result, these lead service lines have become "more dangerous" than lines that have not been partially replaced or are not made of lead. We find that plaintiffs' complaint sufficiently alleges they have incurred excess damages beyond that experienced by the public generally.

¶ 54 The City also argues that plaintiffs' inverse condemnation claim should be dismissed because the public improvement work the City performed was "necessarily incident to property ownership" and damages flowing from such actions are not afforded relief under the law. Instead, "[s]uch injury is deemed to be *damnum absque injuria*" or "loss without injury in the legal sense." *Belmar*, 34 Ill. 2d at 550. In *Belmar*, the plaintiff owned an outdoor movie theater adjacent to a toll-road service center, or oasis, built by the Illinois State Toll Highway Commission. *Id.* at 546. Plaintiff filed a complaint alleging that the bright artificial lights emanating from the oasis dispel the darkness on neighboring property, making the exhibition of outdoor movies impossible. *Id.* The court found that plaintiff's use of the property was a sensitive one and the damages claimed, the bright lights, resulted only from the property's location next to the oasis. *Id.* at 550-51. While plaintiff did suffer damages, the court deemed such injury "*damnum absque injuria*" because "the property owner is compensated for the injury sustained by sharing the general benefits which inure to all from the public improvement." *Id.*

¶ 55 *Belmar* is distinguishable. Plaintiffs here did not share in the general benefits of the replaced water mains where such replacement, they alleged, actually made their water more dangerous than that consumed by the general public. Nor do plaintiffs' damages stem from a sensitive use of their property, as was the case in *Belmar*. The City argues that accepting plaintiffs' theory here "would greatly expand the scope of inverse condemnation claims and

obstruct needed public improvements." We disagree. Our supreme court has limited recovery to plaintiffs who plead and prove special damages "in excess of that sustained by the public generally." *Rigney v. City of Chicago*, 102 Ill. 64, 81 (1881). Such a limitation should reduce the number of claims from property owners only incidentally affected by public improvements.

¶ 56 Since we find that plaintiffs have sufficiently pled their claims, dismissal pursuant to section 2-615 of the Code was error.

¶ 57 For the foregoing reasons, the judgment of the circuit court is reversed and the cause remanded for further proceedings.

¶ 58 Reversed and remanded.

¶ 59 JUSTICE CONNORS, dissenting:

¶ 60 Water is essential for life and should be safe to drink. Lead is a toxic chemical that accumulates in one's body over time and is highly poisonous to humans. There may be a complaint that would state a claim to appropriately consider the levels of lead in Chicago's water and the cause thereof, but this is not that complaint. Although plaintiffs' allegations paint a concerning picture, they are insufficient to state a claim for either negligence or inverse condemnation under current Illinois law, and contrary to the majority, I decline to misconstrue our supreme court's precedent in order to make the complaint viable. Therefore, I respectfully dissent and would affirm the trial court's decision to dismiss counts I and II.

¶ 61 A. Count I: Negligence

¶ 62 It is axiomatic that, "[t]o state a cause of action for negligence, a plaintiff must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and damages." *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194-95 (1995). The primary issue in this case is whether plaintiffs have stated a cause of action for

common-law negligence without alleging that they suffer from a present physical (or actual) injury. In my opinion, they have not. I believe that based on our supreme court's decision in *Williams v. Manchester*, 228 Ill. 2d 404 (2008), the single recovery principle, the *Moorman* doctrine, and general public policy considerations, the majority recognizes a claim that runs contrary to Illinois law.

¶ 63 It is undisputed that plaintiffs do not suffer from any present physical injury and are completely asymptomatic. Nonetheless, the majority finds they have stated a claim for negligence because "plaintiffs have sufficiently alleged a present injury in consuming lead-contaminated water, even if they have yet to develop physical ailments linked to such consumption." *Supra* ¶ 27. The majority's holding is significant, not only because it is the first of its kind in Illinois and is contrary to our supreme court's decision in *Williams*, but also because plaintiffs have never made the argument that mere exposure or consumption suffices as a present injury in order to bring a negligence claim.

¶ 64 The majority reaches its holding by accepting as true plaintiffs' allegations that defendant's negligent conduct caused a high level of lead to leach into their water. The majority then makes the inference that "plaintiffs and their families drank the contaminated water serviced to their homes, thus exposing their bodies, and the organs, tissues, and bones therein, to lead." That the majority finds it necessary to infer that plaintiffs' bodies, organs, tissues, and bones were exposed to lead is extremely telling. To me, it indicates that plaintiffs have not, in fact, alleged that their injury is exposure to, or consumption of, lead in their water. If plaintiffs had alleged that, the majority would not need to make such an inference. In the lower court and on appeal, plaintiffs have instead consistently asserted that the cost of medical testing sufficed as a present injury and relied on *Lewis v. Lead Industries Ass'n*, 342 Ill. App. 3d 95 (2003), as support. It is apparent from

the briefing in the trial court and the parties' appellate briefs that the crux of plaintiffs' contentions hinged on *Lewis*. Interestingly, however, the majority barely addresses *Lewis* and fails to provide any insight as to the facts of that case or its holding. Similarly lacking is the majority's analysis of the single-recovery principle and the *Moorman* doctrine. I write separately to take a deeper look into *Williams*, *Lewis*, the single-recovery principle, the *Moorman* doctrine, and other policy considerations that I believe are necessary to the resolution of this appeal.

¶ 65 1. *Dillon* and *Williams*

¶ 66 The majority concludes that the mere consumption of, or exposure to, lead-contaminated water suffices as a present injury, such that plaintiffs have stated a claim for negligence. I find this conclusion problematic for various reasons, not least of which is that it is directly contrary to our supreme court's decision in *Williams* and that no court in Illinois has ever rendered such a holding.

¶ 67 In order to explain *Williams*, it is necessary to first mention our supreme court's decision in *Dillon v. Evanston Hospital*, 199 Ill. 2d 483 (2002). In *Dillon*, the court acknowledged that it had "historically rejected assessing damages for future injuries" but was compelled to revisit that rule based on "a trend toward allowing compensation for increased risk of future injury as long as it can be shown to a reasonable degree of certainty that the defendant's wrongdoing created the increased risk." *Id.* at 497-500. The court, quoting a Connecticut case, recognized that part of the basis for this trend was that " '[o]ur legal system provides no opportunity for a second look at a damage award so that it may be revised with the benefit of hindsight.' " *Id.* at 501 (quoting *Petriello v. Kalman*, 576 A.2d 474, 483 (Conn. 1990)). As a result, our supreme court adopted a new rule that "better comports with this state's principle of single recovery" (*id.* at 502), which provided "simply that a plaintiff must be permitted to recover for *all* demonstrated injuries" and that "[t]he burden is on the plaintiff to prove that the defendant's negligence increased the plaintiff's risk of

future injuries" (emphasis in original) (*id.* at 504). Although not mentioned by the majority in this case, the supreme court in *Dillon* explained its reasoning as follows:

> "An entire claim arising from a single tort cannot be divided and be the subject of several actions, regardless of whether or not the plaintiff has recovered all that he or she might have recovered. This is true even to prospective damages. There cannot be successive actions brought for a single tort as damages in the future are suffered, but the one action must embrace prospective as well as accrued damages." *Id.* at 502.

Our supreme court also explained that its previous decisions that did not recognize the increased risk of future injury as a compensable injury were decided over 80 years ago, and that scientific advances had made it easier for the medical community to more accurately determine the probability of future injuries. *Id.* at 503. Therefore, the risk of undue speculation was lessened. *Id.*

¶ 68 Subsequently, our supreme court addressed a related issue in *Williams*. In *Williams*, the plaintiff sought damages for the death of her unborn fetus, Baby Doe. *Williams*, 228 Ill. 2d at 407. The plaintiff opted to terminate her pregnancy after an X-ray revealed she suffered a broken pelvis in a car accident caused by the defendant's negligence and was told that she would have to remain bedridden and may not ever walk normally again if she stayed pregnant. *Id.* at 408. The trial court granted summary judgment, a split panel of the appellate court reversed, and our supreme court affirmed the trial court's decision. *Id.* at 415, 427. Although our supreme court recognized that the appellate court's observation that, " '[a]side from the additional element of the occurrence of death, the elements of a wrongful death claim are identical to those of a common law negligence claim' " (*id.* at 421-22) was correct, it reversed the appellate court's decision, noting that the appellate court had incorrectly identified the actionable injury in the plaintiff's wrongful death claim as Baby Doe's death. *Id.* at 423. The court explained that, "a wrongful-death action is

premised on the deceased's potential, at the time of death, to bring an action for injury" and that "it was 'not until the death occurred could the court examine whether there was a viable wrongful injury which would permit the case to proceed.' " *Id.* at 423-24. The court determined that Baby Doe could not have maintained a claim for personal injury against the defendant because a doctor testified that Baby Doe was not injured during the accident and the plaintiff admitted that she never claimed Baby Doe was injured in the crash but rather was injured in the hospital following the crash. *Id.* at 424. The court also found significant that, at oral argument, "[the] plaintiff expressly conceded that, for purposes of summary judgment, the record did not contain sufficient evidence that Baby Doe suffered a present, actionable injury as a result of the radiation exposure" and that the doctors who testified "did not opine that Baby Doe's radiation exposure resulted in an actual, present injury, but rather that the fetus incurred an increased risk of future harm." *Id.* at 424-25.

¶ 69 Next, the court addressed whether Baby Doe's increased risk of future harm from radiation exposure was a present injury for which the fetus could have brought an action for damages against defendant. *Id.* at 425. The court rejected this premise for two reasons. First, the court stated, "as a matter of law, an increased risk of future harm is an *element of damages* that can be recovered for a present injury—it is *not* the injury itself." (Emphases in original.) *Id.* The court compared the case before it with *Dillon* and explained that in that case, the present injury was the catheter embedded in the plaintiff's heart. *Id.* Unlike the plaintiff in *Dillon*, Baby Doe had no such present injury. Second, the court stated that, "even if we were to convert or expand *Dillon* so as to describe an increased risk of future harm as a present injury, plaintiff, as a matter of fact, has not presented any evidence that Baby Doe was injured as a result of the increased risk." *Id.* at 426.

¶ 70 Here, the majority concludes, "*Dillon* and *Williams* require only that plaintiffs establish a present injury in which they suffer damages and express no requirement that plaintiffs' injury be a

present physical harm or ailment in order to recover in tort." *Supra* ¶ 34. I disagree with this conclusion and believe the majority's decision fails to follow the holding of *Williams*. "It is well settled that this court is bound to follow the supreme court's precedent, and 'when our supreme court has declared law on any point, only [the supreme court] can modify or overrule its previous decisions, and all lower courts are bound to follow supreme court precedent until such precedent is changed by the supreme court.' " *Certain Underwriters at Lloyd's, London v. Reproductive Genetics Institute*, 2018 IL App (1st) 170923, ¶ 19 (quoting *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 366 Ill. App. 3d 730, 734 (2006)).

¶ 71 Although perhaps not explicit, the supreme court's analysis in *Williams* indicated that mere exposure to a potentially harmful substance, *i.e.*, radiation, is not an actionable present injury in a wrongful death case. This can be said with certainty because the plaintiff in *Williams* was unable to pursue a wrongful death claim on behalf of Baby Doe because the fetus had not suffered any injury, even though Baby Doe had been exposed to radiation when the plaintiff was X-rayed.[4] If mere exposure to a harmful or toxic substance, such as radiation or lead, was sufficient to establish an actionable injury, then the court would have found the unborn fetus had suffered an injury, since it was undisputed that the plaintiff underwent an X-ray while pregnant with the fetus. However, the

[4]Further support for my reading of *Williams* is found in an unpublished federal case. Although unpublished federal decisions are not binding or precedential in Illinois courts, nothing prevents this court from using the same reasoning and logic as used in an unpublished federal decision. *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 37. In *Rowe v. Unicare Life & Health Insurance Co.*, No. 09 C 2286, 2010 WL 86391, at *6 (N.D. Ill. Jan. 5, 2010), the court held that, "[b]eyond simply establishing that the increased risk of future harm is not a present injury, the *Williams* decision also rules out the possibility that in this case the exposure of personal information might be the present injury providing the basis for recovery of damages for increased risk of future harm." *Rowe* further explained, "[the plaintiff] may collect damages based on the increased risk of future harm he incurred, but only if he can show that he suffered from some present injury beyond the mere exposure of his information to the public." *Id. Rowe* also mentioned *Dillon* and explained that, "[w]hile it may seem odd to allow [the plaintiff] to collect damages based on his vulnerability to identity theft only if he can prove a substantively different type of present injury such as emotional distress, this result is in concert with the principles that led the *Dillon* Court to its decision in the first place." *Id.*

court did not find that exposure equates to an injury and instead found that exposure amounted to an "increased risk of future harm," which "is *not* the injury itself." (Emphasis in original.) *Williams*, 228 Ill. 2d at 425.

¶ 72 Ultimately, it is perplexing how the majority can rectify its holding with *Williams*. Despite acknowledging *Williams*'s holding that the unborn fetus's radiation exposure was merely an increased risk of harm and that an increased risk of harm is not a present injury, the majority expressly finds "that plaintiffs have sufficiently alleged a present injury in consuming lead-contaminated water, even if they have yet to develop physical ailments linked to such consumption." *Supra* ¶ 27. Although *Williams* involved a wrongful death claim, the same principles apply here because both a wrongful death claim and a common-law negligence claim require an actionable injury. *Williams* made clear that a plaintiff cannot recover for an increased risk of future injury without showing a present physical (or actual) injury, and thus I would affirm the trial court's decision to grant summary judgment on count I.

¶ 73 2. *Lewis*

¶ 74 Next, I find it necessary to address *Lewis*, 342 Ill. App. 3d 95, the primary case upon which plaintiffs relied but that the majority barely addresses. In *Lewis*, the plaintiffs brought a six-count putative class action on behalf of themselves and all other similarly situated parents and guardians of minor children who had undergone or would undergo medical screening, assessment, or monitoring for lead poisoning or latent diseases associated with lead poisoning. *Id.* at 98. The numerous defendants consisted of promoters, manufacturers, marketers, and distributors of lead pigment for use in paint. *Id.* "Common to each count was a prayer seeking an order compelling the defendant to reimburse and pay the plaintiffs and the members of the putative class for the costs of all medical screenings, assessments, and monitoring of their minor children." *Id.* at 99. The circuit

court granted the defendants' section 2-615 motion to dismiss, which asserted that the plaintiffs' complaint failed to allege a present injury or facts in support of proximate cause. *Id.* The circuit court determined that the relief sought by the plaintiffs could be characterized as damages for an increased risk of future harm. *Id.* at 100. On appeal, the plaintiffs argued that the court below misconstrued their relief sought because they did not seek relief for an increased risk of future harm and sought compensation only for the cost of medical testing made necessary by the defendants' manufacturing, marketing, and sale of a dangerous product. *Id.* at 100-01.

¶ 75 This court began its analysis by recognizing that, "in order for a plaintiff to recover damages for an increased risk of future harm in a tort action, he or she must establish, among other things, that the defendant's breach of duty caused a present injury which resulted in that increased risk." *Id.* at 101 (citing *Dillon*, 199 Ill. 2d at 496-507). The court pointed out that the plaintiffs primarily relied on *Friends for All Children Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984), to support their contention that an action seeking recovery for the cost of medical examinations is distinct from a claim seeking damages for an increased risk of harm of developing a future injury or disease. *Lewis*, 342 Ill. App. 3d at 101. The *Lewis* court stated that, "In *Friends for All Children*, the court reasoned that 'an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury.' " *Id.* (quoting *Friends for All Children, Inc.*, 746 F.2d at 826.) The court then expressed its agreement with *Friends for All Children* and recognized the following:

> "There is a fundamental difference between a claim seeking damages for an increased risk of future harm and one that seeks compensation for the cost of medical examinations. The injury which is alleged, and for which compensation is sought, in a claim seeking damages for an increased risk of harm is the anticipated harm itself. The

> injury that is alleged, and for which compensation is sought, in a claim seeking damages for a medical examination to detect a possible physical injury is the cost of the examination. Unlike a claim seeking damages for an increased risk of future harm, a claim seeking damages for the cost of a medical examination is not speculative and the necessity for such an examination is capable of proof within a 'reasonable degree of medical certainty.' If a defendant's breach of duty makes it necessary for a plaintiff to incur expenses to determine if he or she has been physically injured, we find no reason why the expense of such an examination is any less a present injury compensable in a tort action than the medical expenses that might be incurred to treat an actual physical injury caused by such a breach of duty." *Id.* at 101-02.

¶ 76 *Lewis* concluded by stating that, although it had "determined that the trial court erred in concluding that the injury claimed by the plaintiffs was not compensable in a tort action," it was further tasked with determining whether the plaintiffs had pled sufficient facts to satisfy the causation elements of their claims. *Id.* at 102. The court ultimately affirmed the dismissal of counts I and II on the causation issue because the plaintiffs failed to identify which of the defendants manufactured or supplied the lead pigment used in the paint to which their children were exposed. *Id.* at 103-04.

¶ 77 In this case, plaintiffs assert that, because *Lewis* recognized that the expense of a medical examination caused by a defendant's negligence is a present injury compensable in a tort action, the trial court improperly dismissed count I of their first amended complaint for lack of a present injury. Interestingly, the majority ignores the plaintiffs' argument and finds that plaintiffs sufficiently alleged an injury "due to their consumption of water containing high levels of lead."

Supra ¶ 34. Although the majority only briefly addresses *Lewis*, I find it necessary to fully address that case based on plaintiffs' heavy reliance thereon. *Lewis* is problematic for numerous reasons.

¶ 78 First and most significantly, I respectfully disagree with *Lewis*'s conclusion that, "[t]here is a fundamental difference between a claim seeking damages for an increased risk of future harm and one that seeks compensation for the cost of medical examinations." *Lewis*, 342 Ill. App. 3d at 101. Such a distinction is not apparent, and I disagree with the following reasoning from *Lewis*:

> "Unlike a claim seeking damages for an increased risk of future harm, a claim seeking damages for the cost of a medical examination is not speculative and the necessity for such an examination is capable of proof within a 'reasonable degree of medical certainty.' " *Id.*

The majority explicitly cites *Lewis* for this proposition but fails to explain how the damages in this case are not speculative. Although I agree that the cost of a single medical examination, as was at issue in *Lewis*, would be easy to ascertain, in this case, plaintiffs' prayer for relief requests "the establishment of a medical monitoring program that includes *** a trust fund, in an amount to be determined, to pay for the medical monitoring of all Class members; and [n]otifying all Class members in writing that they may require frequent medical monitoring necessary to diagnose lead poisoning." That frequent testing may be required, coupled with the plaintiffs' allegation that lead bioaccumulates in the body over time, indicates that plaintiffs are not seeking a one-time-only test. Plaintiffs allege no facts regarding how often, or for what duration, a person would need testing. Thus, the cost of plaintiffs' damages is, in fact, much more speculative than *Lewis* indicated it would be in such a case.

¶ 79 Additionally, the majority ignores that plaintiffs' first amended complaint includes the following five explicit references to an increased risk of harm:

> "2. ***The City has also failed to advise Plaintiffs and the Class of its intention to

only partially, rather than fully, replace their lead service pipes at the time of construction and the resulting increased risk of lead exposure over time as a result of the City's work.

3. As a result of Defendant's negligent and reckless conduct, Plaintiffs, their children, grandchildren, and the Class are at a significantly increased risk of exposure to a known hazardous substance and lead poisoning. ***

* * *

9. ***As a result of the City's project, Peysin and his family are now at an increased risk for problems associated with ingesting lead.

* * *

90. As a result of Defendant's negligent and reckless conduct, Plaintiffs, their families, and the Class have been significantly exposed to a known hazardous substance and, consequently, are at an increased risk of lead poisoning. ***

* * *

103. Defendant's negligence proximately caused Plaintiffs' and the Class members' damages and their increased risk of harm as documented herein."

¶ 80 Based on these allegations, I simply do not see a contrast between a claim seeking medical monitoring damages and a claim for damages for an increased risk of future harm. Additionally, courts at the state and federal level have recognized that "a claim for medical monitoring is essentially 'a claim for future damages.' " See *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424, 429-30 (W. Va. 1999) (quoting *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir. 1991)). I find this view more consistent with principles of Illinois tort law, such as the single-recovery principle and the *Moorman* doctrine, which will be analyzed later in this dissent.

¶ 81 *Lewis*'s reliance on *Friends for All Children, Inc.*, a federal decision from the District of Columbia, is also problematic. The complaint in *Friends for All Children, Inc.* was brought on behalf of numerous Vietnamese orphans who survived an aviation disaster in South Vietnam in 1975 and alleged that, due to both the "decompression of the troop compartment and the crash itself, these survivors suffered, *inter alia*, from a neurological development disorder generically classified as Minimal Brain Dysfunction ('MBD')." 746 F.2d at 818-19. The district court granted partial summary judgment in favor of the plaintiffs, who were children adopted by non-U.S. parents, finding that "approximately forty adopted Vietnamese children living in France faced irreparable injury unless they promptly obtained diagnostic examinations" and granted the plaintiffs' motion for a mandatory preliminary injunction ordering the defendant to create a fund from which the examination costs could be drawn. *Id.* On appeal, the defendant argued that the District of Columbia's tort law had never recognized a cause of action for compensation for diagnostic examinations designed to discover whether a plaintiff has been injured, unless that plaintiff first proved actual physical injury. *Id.* at 824. The court recognized the lack of clarity in tort law in that jurisdiction but predicted that the District of Columbia would allow a plaintiff to maintain an action for diagnostic examinations in the absence of proof that he or she suffered a physical injury. *Id.* at 824-25. The court reasoned that in light of the Restatement (Second) of Torts's definition of " 'injury' "—" 'the invasion of any legally protected interest of another' "—it would be tough to dispute that "an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury." *Id.* at 826 (quoting Restatement (Second) of Torts § 7 (1965)).

¶ 82 In reaching its conclusion, the court in *Friends for All Children, Inc.* stated as follows:

"To aid our analysis of whether tort law should encompass a cause of action for

diagnostic examinations without proof of actual injury, it is useful to step back from the complex, multi-party setting of the present case and hypothesize a simple, everyday accident involving two individuals, whom we shall identify simply as Smith and Jones:

> Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.
>
> From our example, it is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action." *Id.* at 825.

¶ 83 I find it worthwhile to set forth this hypothetical because it served as the basis of the court's holding in *Friends for All Children, Inc.*, which then served as a basis for *Lewis*. If the above hypothetical was converted to allegations of a complaint, I believe that such a complaint would undoubtedly state a claim for negligence in Illinois. I believe the physical impact of being knocked down by a motorbike and the resulting pain, bruising, bleeding, or other physical symptom, however minor, that would have inevitably occurred are sufficient to constitute a present physical injury, which would allow a plaintiff to recover for medical monitoring damages. Perhaps the question would then become what if the plaintiff did not have any pain, bruising, bleeding, or other physical symptom? It is perplexing why someone who was not in pain, who was not experiencing any physical symptoms, and who did not have any visual physical injury would undergo substantially costly medical examinations. However, even if no outward physical manifestations

of injury were apparent, a physical impact has been found to be sufficient to constitute a physical injury in certain circumstances.[5] For example, in claims seeking recovery for negligent infliction of emotional distress, our supreme court has confirmed that "a direct victim's claims for negligent infliction of emotional distress must include an allegation of contemporaneous physical injury *or* impact." (Emphasis added.) *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 38. Thus, I disagree with the logic from *Friends For All Children, Inc.* because Illinois law would allow recovery for medical monitoring damages in the hypothetical the court relied upon to recognize medical monitoring damages as compensable without present physical injury.

¶ 84 Second, *Lewis* is not convincing because its recognition that the cost of medical testing was compensable absent a present, physical injury was premised on the fact that the court there "*[found] no reason why* the expense of such an examination is any less a present injury compensable in a tort action than the medical expenses that might be incurred to treat an actual physical injury caused by such a breach of duty." (Emphasis added.) *Lewis*, 342 Ill. App. 3d at 101-02. It is not clear whether the defendant in *Lewis* raised the same arguments as defendant here, *i.e.*, the applicability of the single-recovery principle, the applicability of the *Moorman* doctrine, and the public policy considerations weighing against allowing recovery without present physical injury.

¶ 85 Third, some confusion exists in *Lewis* as a result of the court's apparent use of the terms "injury" and "damage" interchangeably. In *Lewis*, the court stated that it found "no reason why the expense of such an examination is any less a present *injury* compensable in a tort action than the

[5]As a brief aside, I, again, note that plaintiffs have not argued that the exposure to lead in their drinking water was a present physical injury sufficient to state a claim. If they had, such an argument would be meritless because our supreme court has already recognized that mere exposure to a harmful substance is not sufficient to constitute a present physical injury. See *Williams*, 228 Ill. 2d at 424-26 (finding that radiation exposure is not a present physical injury).

medical expenses that might be incurred to treat an actual physical injury caused by such a breach of such duty" (emphasis added) (*id.*), but in *Lewis v. NL Industries, Inc.*, 2013 IL App (1st) 122080, a subsequent appeal of the same case, the court referred to its prior decision in *Lewis* as accepting "plaintiffs' theory that the cost of lead testing or assessment could constitute a compensable *damage*" (emphasis added) (*id.* ¶ 2). This is not a distinction without a difference. In setting forth the elements of a cause of action for negligence, injury and damages are often denoted separately. See *Boyd*, 166 Ill. 2d at 194-95. Additionally, it has long been recognized that "[a] legal injury is a wrongful act resulting in damages. As a general rule, to constitute a valid cause of action, there must be both injury and damages. An action cannot be maintained for an injury without damage." *Franks v. North Shore Farms, Inc.*, 115 Ill. App. 2d 57, 65 (1969). Thus, I further decline to rely on *Lewis* because confusion exists as a result of the court's initial use of the term "injury" and later use of the term "damage" when referring to the same item.

¶ 86 Fourth, *Lewis*'s holding hinged on a causation issue, not an injury issue as we are faced with here. Based on the foregoing, I reject plaintiffs' reliance on *Lewis*.

¶ 87 3. Single-Recovery Principle

¶ 88 Further support for my position that plaintiffs were required to plead a present physical (or actual) injury in order to state a claim for medical monitoring damages is apparent when one attempts to rectify plaintiffs' lack of present physical injury with the single-recovery principle. The majority fails to fully address this issue and merely makes the unexplained conclusion that "[t]his court should not find plaintiffs' allegations barred based on what might happen in the future." *Supra* ¶ 39.

¶ 89 In Illinois, we follow the single-recovery principle, which holds that "there may not be more than one recovery of damages for a single, indivisible injury." *Saichek v. Lupa*, 204 Ill. 2d

127, 140 (2003). This means that, when a plaintiff sustains an injury, he cannot divide up his claim and bring successive actions to obtain additional damages. *Id.* This is true " 'regardless of whether or not the plaintiff has recovered all that he or she might have recovered' in the initial proceeding." *Id.* (quoting *Dillon*, 199 Ill. 2d at 502). "This rule is founded on the premise that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 340 (1996).

¶ 90 Plaintiffs assert that their claims do not implicate the single-recovery principle because the purpose of claim preclusion is to prevent future actions on grounds that could have been raised, not to hinder future actions on grounds that did not yet exist in an earlier action. Plaintiffs do not cite any Illinois case law to support their point and primarily rely on a federal case from Pennsylvania, *Gates v. Rohm & Haas Co.*, 265 F.R.D. 208 (E.D. Pa. 2010), *aff'd*, 655 F.3d 255 (3rd Cir. 2011). I decline to rely on *Gates* because in addition to being a federal decision from another state, in that case, the court was tasked with deciding whether to grant class certification and did not decide whether Illinois law applied or what effect the "Illinois so-called single recovery rule" would have if Illinois law did apply. *Id.* at 219.

¶ 91 Instead, I opt to rely on our supreme court's decision in *Dillon*, which, as previously stated, placed express importance on the single-recovery principle. I find that plaintiffs' claim for medical monitoring damages absent a present physical injury is unworkable in light of the single-recovery principle. If plaintiffs were allowed to recover damages for medical monitoring without any physical symptoms, then under the single-recovery principle, they would also have to seek compensation for personal injuries that did not yet (or may never) exist. Until plaintiffs manifested a physical injury, it would be impossible to determine what treatment and corresponding compensation was merited. Additionally, plaintiffs have not cited any binding precedent that

supports their contention that the single recovery rule does not prevent future actions on grounds that did not yet exist. As such, I find that the single-recovery principle weighs against recognition of medical monitoring damages absent a present physical injury.

¶ 92 4. *Moorman* Doctrine

¶ 93 The majority also fails to fully address this issue and merely finds that, because the plaintiffs' claims are "more in line with tort theory," the *Moorman* doctrine does not apply. *Supra* ¶ 40. Likely, this is because the majority ignores plaintiffs' argument that the cost of medical testing is a present compensable injury. Plaintiffs contend that the *Moorman* doctrine, or economic loss doctrine, has no application here, where their injury does not meet the definition of solely economic damages. "At common law, solely economic losses are generally not recoverable in tort actions." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 198 (1997). In *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 85-86 (1982), our supreme court held that the plaintiff purchaser of a grain storage tank was unable to recover in tort from the manufacturer for solely economic loss based on defects in the tank. The plaintiff had pled theories of liability sounding in strict liability, negligence, and innocent misrepresentation. *Id.* at 72. The court recognized that claims involving "qualitative defects" in products are "best handled by contract, rather than tort." *Id.* at 85-86.

¶ 94 The *Moorman* doctrine was further examined in *In re Chicago Flood Litigation*, a case wherein the plaintiffs (individuals and businesses) brought suit against the City of Chicago and another defendant for negligence, willful and wanton misconduct, and strict liability as a result of massive flooding that occurred in the Chicago Loop, and sought "damages for various alleged losses proximately caused by the flood, including: injury to their property; lost revenues, sales, profits, and good will; lost wages, tips, and commissions; lost inventory; and expenses incurred in

obtaining alternate lodging." 176 Ill. 2d at 185-86. The trial court granted the city's motion to dismiss because the *Moorman* doctrine barred recovery for those plaintiffs who only alleged economic loss rather than physical property damage, and the appellate court affirmed for plaintiffs who only alleged an economic loss but did not bar the claims of the plaintiffs who alleged damage in the form of lost inventory due to disruption of utility service. *Id.* at 186-88.

¶ 95 Our supreme court agreed with the trial and appellate courts that "those plaintiffs who did not incur personal injury or property damage may not recover solely economic losses." *Id.* at 201. The court explained that "the tort recovery requirement of injury to person or property is not a 'fortuity,' " (*id.* at 199) because as recognized in *Moorman*, " '[t]ort law [is] "appropriately suited for personal injury or property damage resulting from a sudden or dangerous occurrence" whereas the remedy for a "loss relating to a purchaser's disappointed expectations due to deterioration, internal breakdown or nonaccidental cause *** lies in contract." ' " *Id.* at 200 (quoting *In re Illinois Bell Switching Station Litigation*, 161 Ill. 2d 233, 240-41 (1994), quoting *Moorman*, 91 Ill. 2d at 86). The court also rejected the plaintiffs' argument that the flood was a sudden or calamitous event, reasoning that the exception to the *Moorman* doctrine that the plaintiffs sought to invoke was made up of "a sudden, dangerous, or calamitous event coupled with personal injury or property damage" and that the exception would not apply to losses incurred without any personal injury or property damage. *Id.* at 200-01. The court concluded that, "[a]bsent injury to a plaintiff's person or property, a claim presents an economic loss not recoverable in tort." *Id.* at 201.

¶ 96 Here, plaintiffs first argue that the *Moorman* doctrine does not apply because their complaint is not rooted in contractual or commercial expectations. Defendant asserts that plaintiffs' view of the rule is outdated and was rejected by our supreme court in *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351 (2004). In *Beretta*, the court recognized, "Although the

economic loss doctrine is rooted in the theory of freedom of contract, it has grown beyond its original contract-based policy justifications of maintaining the fundamental distinction between contract and tort and protecting the freedom of parties to allocate risk by contract." *Id.* at 422. The court further explained that the plaintiffs had alleged solely economic damages because the damages were based on "costs incurred in the absence of harm to a plaintiff's person or property." *Id.* at 423. I agree with defendant's contentions on this point, and contrary to the majority, I find that merely because plaintiffs' allegations do not arise from a contractual relationship does not preclude the application of the *Moorman* doctrine. In this case, the only loss alleged by plaintiffs in their negligence count is an economic one, *i.e.*, the cost of medical testing and monitoring, and thus *Moorman* applies.

¶ 97 In *Moorman*, the court set forth three exceptions to the economic loss rule that our supreme court has subsequently summarized as follows:

> "(1) where the plaintiff sustained damage, *i.e.*, *personal injury or property damage*, resulting from a sudden or dangerous occurrence [citation]; (2) where the plaintiff's damages are proximately caused by a defendant's intentional, false representation, *i.e.*, fraud [citation]; and (3) where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions [citation]." (Emphasis in original.) *In re Chicago Flood Litigation*, 176 Ill. 2d at 199.

Plaintiffs argue that even if the economic loss rule was implicated, then the first exception listed in *Moorman* applies because contamination is a form of property damage that does not constitute a solely economic loss. Defendant responds that no exception applies because any alleged damage was not caused by a sudden, dangerous, or calamitous occurrence. I agree. Although plaintiffs'

count II for inverse condemnation seeks compensation for alleged property damage to their service lines, plaintiffs have not alleged they sustained any personal injury. Plaintiffs have not cited, and I have not found, any case where an allegation of property damage in one count was sufficient to recover for personal injury damages in another count where no present physical injury to the plaintiff's person existed. I decline to make such a finding here.

¶ 98 Even assuming *arguendo* that plaintiffs adequately alleged compensable property damage in count I, which they have not, the *Moorman* doctrine would still prevent plaintiffs from stating a claim here because their alleged property damage did not result from a sudden, dangerous, or calamitous event, as is required for the relevant exception to preclude application of the doctrine. Compare *Donovan v. County of Lake*, 2011 IL App (2d) 100390, ¶ 54 (holding that no sudden or calamitous event occurred where the alleged water contamination "manifested itself over a five-year period"), with *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 450 (1989) (recognizing that preventing "recovery in tort merely because the physical harm did not occur suddenly would defeat the underlying purposes of strict products liability"). Neither plaintiffs' opening brief nor their reply provides an explanation or argument as to how the alleged lead contamination resulted from a sudden, dangerous, or calamitous event. Further, plaintiffs' complaint made clear that their allegations stemmed from corrosion that would occur "over time," albeit at a more rapid pace. As such, count I of plaintiffs' complaint seeking purely economic damages for the cost of medical testing violates the *Moorman* doctrine and does not fall under one of its exceptions.

¶ 99 5. Other Policy Considerations

¶ 100 In addition to running afoul of our supreme court's decision in *Williams*, the single-recovery principle, and the *Moorman* doctrine, recognition of medical monitoring damages

for plaintiffs' negligence claim absent present physical injury would have various negative policy implications. The United States Supreme Court recognized that allowing such a claim could lead to an essentially limitless pool of plaintiffs because it is widely accepted that "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring." *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997). The high number of potential plaintiffs, coupled with the uncertainty as to the amount of liability, could result in a flood of less important cases that would absorb resources that are better left available to those who are more seriously harmed. Defendants do not have access to an unlimited supply of financial resources, and requiring a present physical injury sufficiently quells an influx of litigation that might deplete a defendant's financial resources that are more productively utilized by actually injured plaintiffs. In the same vein, the Supreme Court of Michigan aptly recognized the following:

> "To recognize a medical monitoring cause of action would essentially be to accord carte blanche to any moderately creative lawyer to identify an emission from any business enterprise anywhere, speculate about the adverse health consequences of such an emission, and thereby seek to impose on such business the obligation to pay the medical costs of a segment of the population that has suffered no actual medical harm." *Henry v. Dow Chemical Co.*, 701 N.W.2d 684, 703 (Mich. 2005).

The following reasoning from that case is also sound:

> "The present physical injury requirement establishes a clear standard by which judges can determine which plaintiffs have stated a valid claim, and which plaintiffs have not. In the absence of such a requirement, it will be inevitable that judges *** will be required to answer questions that are more appropriate for a legislative than a judicial body ***." *Id.* at

691.

¶ 101 The foregoing logic from *Henry* comports with our state's view of tort law. Although not recognized by the majority as such, the majority's decision is the first of its kind in this state, and it is pertinent to note that a broad range of holdings from the highest state courts across the country exists.[6] The divergence among the states illustrates that this is an area of law where there is neither a majority rule nor discernible trend. Based on my analysis of Illinois jurisprudence, I find that the trial court properly dismissed plaintiffs' count I for negligence based on plaintiffs' failure to allege

[6]Many states have rejected medical monitoring damages without present physical injury. See *Caronia v. Philip Morris USA, Inc.*, 5 N.E. 3d 11, 18 (N.Y. 2013) (refusing to recognize a judicially created independent cause of action for medical monitoring because allowing such a claim, absent evidence of present physical injury or property damage, would have been "a significant deviation from [New York's] tort jurisprudence"); *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 187 (Or. 2008) (holding that negligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring did not give rise to a claim for negligence); *Paz v. Brush Engineered Materials, Inc.*, 2006-FC-00771-SCT (¶ 5) (Miss. 2007) ("Creating a medical monitoring action would be contrary to Mississippi common law, which does not allow recovery for negligence without showing an identifiable injury ***."); *Henry*, 701 N.W.2d at 692 (rejecting medical monitoring as a separate cause of action and also as a form of damages in a tort action because the only noneconomic injury alleged by the plaintiffs was their fear of future physical injury); *Wood v. Wyeth-Ayerst Laboratories, Division of American Home Products*, 82 S.W.3d 849, 857 (Ky. 2002) (rejected prospective medical monitoring claim without present injury); *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 829 (Ala. 2001) ("Although we acknowledge that other jurisdictions have recognized medical monitoring as a distinct cause of action or as a remedy under other tort causes of action, even in the absence of a present physical injury, we do not and need not know how such jurisdictions coordinated that recognition with the traditional tort-law requirement of a present injury.").

Conversely, some states allow recovery for medical monitoring damages without the plaintiff showing a present, physical injury. See *Sadler v. PacifiCare of Nevada, Inc.*, 340 P.3d 1264, 1270 (Nev. 2014) (holding that "a plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present *physical* injury" (emphasis in original)); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 719 (Mo. 2007) (*en banc*) (finding that there is no need for proof of a present physical injury in a medical monitoring case); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 239-40 (Pa. 1996) (finding that despite the absence of physical manifestation of any asbestos-related disease, the plaintiffs were able to recover for such regular medical testing and evaluation as is reasonably necessary and consistent with contemporary scientific principles); and *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 (Cal. 1993) (*en banc*) (holding that "the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable").

present physical (or actual) injury to person or property, in addition to damages that result from said injury.

¶ 102 6. Defendant's Section 2-619 Motion to Dismiss

¶ 103 As a final matter on count I, I take issue with the majority's decision to make advisory[7] rulings on defendant's section 2-619 motion to dismiss. Defendants filed a motion to dismiss pursuant to section 2-619.1 of the Code, which allows combined motions pursuant to section 2-615, section 2-619, and section 2-1005. 735 ILCS 5/2-619.1 (West 2016). Section 2-619.1 does not authorize distinctive claims pursuant to section 2-615, 2-619, or 2-1005 to be commingled. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 20. "Combined motions pursuant to section 2-619.1 retain procedural distinctions between section 2-615, section 2-619, and section 2-1005 based motions, and parties are not free to ignore these distinctions." *Id.* Additionally, a motion to dismiss for failure to state a claim (section 2-615) tests the legal sufficiency of the complaint based on defects apparent on its face (735 ILCS 5/2-615 (West 2016)), whereas a motion to dismiss based on an affirmative matter (section 2-619) admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts that an affirmative matter outside the complaint bars or defeats the causes of action (*id.* § 2-619(a)(9)), such as tort immunity.

¶ 104 Here, the trial court's March 29, 2018, order, granting defendant's motion to dismiss explicitly stated, "In disposing of this motion to dismiss on the narrowest possible grounds, the Court finds it unnecessary to address many of Defendant's arguments and does not reach any of the grounds for dismissal urged under section 2-619." The order also specifically stated that

[7]I refer to the majority's conclusion on the section 2-619 motion as "advisory" because it states that "dismissal of plaintiffs' negligence claim pursuant to section 2-619 of the Code *would be* error," implicitly acknowledging that the trial court never ruled on this motion. (Emphasis added.) *Supra* ¶ 45.

defendant's motion to dismiss "pursuant to section 2-615" is granted. Thus, the trial court did not enter a judgment on defendant's section 2-619 motion to dismiss. Despite it being abundantly clear that the trial court did not consider or rule on defendant's section 2-619 motion to dismiss, the majority takes it upon itself to conduct analysis and make a conclusion on the issue.

¶ 105 The majority cites to *Brugger v. Joseph Academy, Inc.*, 326 Ill. App. 3d 328 (2001), as support for its consideration of defendant's section 2-619 motion, even though it was not ruled upon by the trial court. In *Brugger*, the trial court granted the defendant's motion for summary judgment "on the grounds that [the defendant] was a 'local public entity' entitled to supervisory immunity for negligence and willful and wanton misconduct under sections 1-206 and 3-108(a) of the Tort Immunity Act." *Id.* at 330. On appeal, the plaintiff asserted that the trial court incorrectly found that the defendant, a private school, was protected under the Tort Immunity Act. *Id.* The defendant argued that the plaintiff waived review of the issue by failing to raise it in the trial court. *Id.* The court stated, "Review of the record indicates that [the plaintiff] raised the argument in the trial court that the Tort Immunity Act did not immunize [the defendant] from liability. Further, a reviewing court may consider an issue where, as here, the issue is one of law and is fully briefed and argued by the parties. [Citations.]" *Id.* at 330-31.

¶ 106 The scenario before this court is not similar to *Brugger*. While it is true that a reviewing court may affirm on any basis in the record, there must first be a judgment entered by the circuit court for us to affirm. *Estate of Powell v. John C. Wunsch, P.C.*, 2013 IL App (1st) 121854, ¶ 32. In *Brugger*, the trial court granted the defendant's summary judgment motion specifically based on the issue of tort immunity. Here, unlike *Brugger*, the circuit court did not enter a judgment on defendant's section 2-619 motion to dismiss based on tort immunity, and thus even though it was briefed by the parties, the majority should not have addressed that issue for the first time on appeal.

See, *e.g.*, *City of Chicago v. Latronica Asphalt & Grading, Inc.*, 346 Ill. App. 3d 264, 276-77 (2004) (refusing to address the merits of the defendant's section 2-615 motion to dismiss because "it was never addressed or even ruled on by the trial court in reaching its decision"). Even more troubling is the fact that the majority seemingly decides the contested issue of whether tort immunity applies in the context of an inverse condemnation claim by cursorily stating in a footnote that "even if it did apply, we find that [defendant] has not established this affirmative defense as to plaintiffs' inverse condemnation claim for the same reasons." *Supra* ¶ 47 n.3. Such a conclusion is concerning.

¶ 107 B. Count II: Inverse Condemnation

¶ 108 I also dissent from the majority's decision that the trial court improperly dismissed count II for inverse condemnation. The majority's decision analyzes a number of cases cited by the parties and concludes that "[t]hese cases do not establish that damages suffered by numerous plaintiffs cannot be 'special damages.' " *Supra* ¶ 53. Although I agree that there is no law that states that inverse condemnation claims brought by numerous plaintiffs are not allowable, I believe the majority has ignored the fact that plaintiffs have failed to allege that they suffered any damages beyond that which would be experienced by a member of the general public whose water main or meter was replaced.

¶ 109 "Property is considered damaged for purposes of the takings clause if there is 'any direct physical disturbance of a right, either public or private, which an owner enjoys in connection with his property; a right which gives the property an additional value; a right which is disturbed in a way that inflicts a special damage with respect to the property in excess of that sustained by the public generally.' " *Hampton v. Metropolitan Water Reclamation District*, 2016 IL 119861, ¶ 27

(quoting *Citizens Utilities Co. of Illinois v. Metropolitan Sanitary District of Greater Chicago*, 25 Ill. App. 3d 252, 256 (1974)). Our supreme court has also recognized:

> "[I]t has long been established that there are certain injuries, necessarily incident to the ownership of property, which directly impair the value of private property and for which the law does not, and never has, afforded any relief, examples being the depreciation caused by the building of fire houses, police stations, hospitals, cemeteries and the like in close proximity to private property. [Citations.] Such injury is deemed to be *damnum absque injuria*—loss without injury in the legal sense—on the theory that the property owner is compensated for the injury sustained by sharing the general benefits which inure to all from the public improvement." *Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n*, 34 Ill. 2d 544, 550 (1966).

¶ 110 The trial court dismissed plaintiffs' count II, finding that "the damage to [p]laintiffs is not *special*: it is a damage borne equally by all residents of the City of Chicago attendant to a public improvement, namely the replacement of lead water mains." (Emphasis in original.) I agree with this assessment. In *Rigney v. City of Chicago*, 102 Ill. 64, 81 (1881), our supreme court first recognized that, in order to recover damages in an inverse condemnation action, a plaintiff must show, *inter alia*, that "he has sustained a special damage with respect to his property in excess of that sustained by the public generally." Various cases decided since then illustrate the manner and context in which this language has been applied, though none have addressed a factual scenario identical to the one before us.

¶ 111 In *City of Chicago v. Union Building Ass'n*, 102 Ill. 379, 381, 391 (1882), a building association filed suit against the City, alleging that as a result of City action, a portion of La Salle Street would become impassable as a thoroughfare and thus would cause great damage to the

plaintiffs' property, which was located 3½ away. The building association argued that it had an individual interest that was distinct from others because its lot had contributed to the costs of extending and opening La Salle Street, in special assessments made for benefits received. *Id.* at 391. Our supreme court determined that the business association did not suffer special damages, and only sustained damages "of the same *kind* as those sustained by the general public, differing, if at all, only in degree." (Emphasis in original.) *Id.* at 393.

¶ 112 Similarly, in *Parker v. Catholic Bishop of Chicago*, 146 Ill. 158, 168 (1893), our supreme court held that the owner of property adjacent to an alley that was to be permanently closed off did not suffer damages special from that of the general public. The court explained that "special injury, or damages differing in kind from those affecting the general public are the gist of the right of private action." *Id.* The property owner did not suffer special damages because, although she had to go a few feet further to access her property, that was the "same kind of damage that will be sustained by all other persons in the city that might have occasion to go that way." (Internal quotation marks omitted.) *Id.*

¶ 113 Conversely, in *Department of Transportation v. Rasmussen*, 108 Ill. App. 3d 615, 621-22 (1982), the owners of a gas station brought an inverse condemnation claim for damages to their land after access to their property was materially impaired as a result of highway overpass construction, leading to a decrease in the property's value. On appeal, the court rejected the Department of Transportation's argument that the gas station owners merely experienced the same circuitousness as the general public. *Id.* at 621. The court reasoned that a claimant must show "a direct physical disturbance peculiar to his property; depreciation suffered in common by all lands in the vicinity of an improvement is not compensable." *Id.* Because the construction specifically

limited ingress and egress to their property, the gas station owners were entitled to recover. *Id.* at 623-24.

¶ 114 Here, plaintiffs contend that the circuit court's decision to dismiss their inverse condemnation claim was erroneously based on the large number of potential claimants in this action. It is not the number of plaintiffs that is fatal to plaintiffs' claim but rather that plaintiffs Berry and Peysin have allegedly suffered the same kind of damage as one another and the same kind of damage as any other resident with lead service lines, *i.e.*, 80% of the city's population, would suffer if the city replaced a nearby water main. Plaintiffs' count II alleged that, as a result of defendant's water main and meter replacement projects, their services lines are more dangerous because their lead pipes now corrode more aggressively than under normal circumstances. Plaintiffs' complaint sought certification of the following class: "All residents of the City of Chicago who have resided in an area where the City has replaced the water mains or meters (including, but not limited to, those areas defined in attached Exhibit A) between January 1, 2008, and the present." Exhibit A to the complaint does not appear in the record. However, we are aware of the contents of Exhibit A because the trial court's order included a footnote that stated, "Exhibit A to Plaintiffs' First Amended Complaint consists of a 58-page listing of various streets throughout Chicago where work on water mains has occurred since 2009." Plaintiffs' complaint also alleged the following:

> "25. As early as the mid-1800's, public health official and medical journals warned of the dangers of lead to humans and openly questioned the use of lead. By the late-1800's, some states had begun advising 'cities and towns to avoid the use of lead pipes' altogether, as 'there was little doubt in the public health community that lead water pipes were to be avoided.' Consequently many cities had already begun banning their use as of the 1920's,

'conclud[ing] that the engineering advantages of lead were outweighed by the public health risks ***.'

26. Chicago did not ban the use of lead in plumbing and public water systems. In fact, Chicago did the opposite; up until the federal ban in 1986, the City actually *required* residents to install lead service lines, even in the face of all the public health warnings over the past century.

27. Due to its own building code, the City thus contains 'a legacy of millions' of lead service lines throughout the city and not surprisingly has more than any other U.S. municipality, such that nearly 80 percent of the properties in Chicago receive their drinking water via lead pipes. Unfortunately, these older pipes can corrode, 'result[ing] in the transfer of dissolved or particulate lead into the drinking water.' " (Emphasis in original.)

¶ 115 Plaintiffs' allegations make clear that their alleged damages are not "special." Plaintiffs' damages are of the same kind as their neighbors and 80% of the properties in Chicago, who have lead service lines and are connected to water mains that have been or will need to be replaced. Plaintiffs' complaint also stated that defendant performed water infrastructure projects in more than 1600 areas and that damages allegedly sustained, except as to amount, were common to all members of the putative class. To allege only a difference in degree or amount of damages is not sufficient; a plaintiff must also allege a difference in kind of damages. See *Metropolitan West Side Elevated R.R. Co. v. Goll*, 100 Ill. App. 323, 332 (1902) ("It is not enough that the damage exceeds merely in amount that sustained by the public generally. It must be greater in kind—that is, greater by reason of its peculiar nature; for if only greater in degree no recovery can be had."). Plaintiffs' count II fails to state a claim because it essentially alleges that plaintiffs and all potential class members have the same kind of damages that vary only in amount. It is perplexing how plaintiffs

can argue that their damages were both common and special. Perhaps the inability to rectify these concepts is the reason the parties did not cite, and we did not find, any compensable class action claims for inverse condemnation damages.

¶ 116 If this was not a putative class action alleging commonality, our analysis would still be the same because there is nothing that makes Berry's or Peysin's damages different from the public generally, *i.e.*, their neighbors who are connected to the same water main that defendant replaced, or from all persons who lived in a residence where defendant partially replaced a lead service line or water main. Plaintiffs argue that the public cannot "generally" sustain damage when water main or meter replacement takes place on a specific street, in a specific part of the city, and thus only affects only a few homes. However, this argument ignores that a plaintiff must allege a direct disturbance that was "peculiar" to his property because "depreciation suffered in common by all lands in the vicinity of an improvement is not compensable." See *Rasmussen*, 108 Ill. App. 3d at 621. According to plaintiffs' complaint, anyone who resided in one of the more than 1600 locations where defendant performed a partial lead service line replacement would have experienced the same damages, *i.e.*, pipes that corrode more aggressively and are more dangerous. Thus, plaintiffs' alleged damages are of the same kind as the general public.

¶ 117 Even if I found plaintiffs' damages to be sufficiently "special," which I have not, count II for inverse condemnation was still properly dismissed because the water infrastructure repairs that allegedly caused the damage to plaintiffs' service lines were necessarily incident to property ownership. In *Belmar Drive-In Theatre Co.*, the operator of a drive-in movie theatre brought an action against the highway commission seeking damages based on allegations that bright lights emanating from a toll-road service center made it impossible to show outdoor movies and caused the theatre's business to decline. 34 Ill. 2d at 546. On appeal, our supreme court found that the

theatre's claimed injury was based solely on "the exceptionally sensitive and delicate use to which plaintiff devotes its own property" and that such injuries are not compensable. *Id.* at 548-50. The court held that, although the sensitive and delicate nature of the theatre's use of the land was enough to demonstrate the claim's inadequacy, the claim was also deficient because "there are certain injuries, necessarily incident to the ownership of property, which directly impair the value of private property and for which the law does not, and never has, afforded any relief." *Id.* at 550. For example, the depreciation caused by the building of fire houses, police stations, hospitals, and cemeteries in close proximity to private property has never been compensable. *Id.* The court explained, "Such injury is deemed to be *damnum absque injuria*—loss without injury in the legal sense—on the theory that the property owner is compensated for the injury sustained by sharing the general benefits which inure to all from the public improvement." *Id.*

¶ 118 I find that plaintiffs' alleged damages are of a nature that renders them necessarily incident to the ownership of property and thus plaintiffs have failed to state a claim. Plaintiffs' allegations indicate that their alleged property damage is incident to their ownership of property in Chicago, where the use of lead service lines was mandated until 1986, and defendant has opted to partially replace those lines in thousands of locations throughout the city in order to avoid the consequences from corrosion over time. As previously mentioned, plaintiffs alleged that "nearly 80 percent of the properties in Chicago receive their drinking water via lead pipes." Thus, any alleged damage that resulted from defendant's infrastructure repair or maintenance to its water system would necessarily be incident to property ownership in this city, in the same way that any general benefit received from such repairs, such as the reduction of service interruptions, preventing holes and cracks that could allow bacteria, and preventing wastewater leaks, is also common to all owners. Therefore, I respectfully dissent and would affirm the trial court's dismissal of count II.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Gordon Berry and Ilya Peysin, individually and on behalf of all others similarly situated, Plaintiffs, v. City of Chicago, Defendant.	Case No. 2016 CH 02292 Calendar 2 Courtroom 2601 Judge Raymond W. Mitchell

ORDER

This case is before the Court on Defendant City of Chicago's motion to dismiss Plaintiffs Gordon Berry and Ilya Peysin's first amended class action complaint pursuant to 735 ILCS 5/2-619.1.

I.

The allegations in the first amended complaint are taken as true for the purpose of analyzing this motion to dismiss, and those facts are summarized as follows. The City's residential water system consists of city-owned water mains, which connect to city-owned service lines, which connect to privately-owned service lines. (Compl. ¶¶ 1, 31 *et seq.*). Most of these pipes are made of lead. (¶¶ 26-27). As the pipes corrode, lead can dislodge from them and dissolve into the water that residents consume. (¶ 28).

Recent actions by the City have affected the water's lead levels. The City has added a chemical called blended polyphosphate to the water supply, which creates a white coating on the pipes' interior and prevents lead from entering the water. (¶ 29). But other City actions have increased the levels of lead in the water. (¶¶ 30-44). When the City performs maintenance work on the water system, the resulting vibrations can cause the blended polyphosphate to fail and can allow lead to enter the water at a higher rate. (¶ 31). Further, the rush of water that accompanies a service restoration also disrupts the blended polyphosphate. (*Id.*). Finally, the City's practice of replacing its lead service lines with copper service lines causes higher lead levels in two ways. (¶¶ 33-35). First, like other work, it disrupts the blended polyphosphate. (¶ 34). Second, placing copper in close proximity to lead in the presence of water creates a galvanic cell and leaches lead into the water at a higher rate. (¶ 35).

City officials are alleged to have actual knowledge of both the high lead levels in the City's water and its causes. (¶¶ 45-51, 55). EPA testing has routinely revealed that at sites with a documented physical disturbance, such as pipe maintenance, the water lead levels exceed the EPA's lead action level. (¶ 47). Testing after water main or service line replacements yields the same result. (¶¶ 50-51). The City nevertheless pursues its projects and insists that the water is safe to drink. (¶¶ 48-49).

Lead, which accumulates in the body over time, generally harms an individual's nervous system. (¶¶ 11-12). It can cause hypertension and can weaken one's immunity to disease, along with other adverse effects. (¶ 12). Lead's potential effects are even more dramatic in children: it reduces IQ, intensifies aggression, and impairs blood cell formation. (¶¶ 13-14). Even a small amount of lead in a child's blood is dangerous; there is no safe level. (¶¶ 15-19). Medical professionals use a blood test to detect lead in the blood. (¶¶ 21-22).

Berry sets forth facts alleging unsafe lead levels in his water. (¶¶ 68-79). The City replaced the water main on Berry's block in 1998, and replaced his water meter in 2009. (¶ 68). The City moved his service line during the latter project, which compromised its coating and caused lead to enter his water. (¶ 69). Berry's two-year-old granddaughter lived with him, and in January 2016 had high lead levels in her blood. (¶ 70). Multiple tests by the City revealed elevated lead levels in his water, but the City never told him this. (¶¶ 71-72). Instead, Berry learned of the results from an investigative reporter. (¶ 73). Berry's granddaughter and her parents have moved out of his house, and estimates to replace his lead lines range from $14,000 to $19,000. (¶¶ 77-78).

Peysin alleges that he received a notice that the City would be installing a water main in front of his house. (¶ 80). The notice did not mention the lead service line replacement the City would perform, nor his water's possibly elevated lead levels. (¶¶ 80-81). Eighteen months later, a report from a private company informed Peysin that testing revealed elevated lead levels in his water. (¶¶ 82-84). The report faulted the service line, not Peysin's home plumbing. (¶¶ 84-88).

The first amended complaint consists of two counts. Count I alleges a negligence claim seeking medical monitoring for the putative plaintiff class consisting of all residents of the City of Chicago who have resided in an area where the City has replaced the water mains or meters. (¶¶ 99-104 (Count I); ¶ 92 (class definition)). Count II seeks money damages on an inverse condemnation theory. (¶¶ 105-109).

II.

Defendant argues pursuant to section 2-615 that both counts of the first amended complaint fail to state a claim for a variety of reasons. 735 ILCS 5/2-615. Defendant also argues that pursuant to section 2-619 there are affirmative matters that defeat Plaintiffs' right to relief. In disposing of this motion to dismiss on the narrowest possible grounds, the Court finds it unnecessary to address many of Defendant's arguments and does not reach any of the grounds for dismissal urged under section 2-619.

A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Beachem v. Walker*, 231 Ill. 2d 51, 57 (2008). All well-pleaded facts in the complaint are taken as true and the question is whether the allegations of the complaint, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12 (2005). The court may also consider judicial admissions in the record and matters of which it is entitled to take judicial notice. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 18. A cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). However, Illinois is a fact-pleading jurisdiction; while the plaintiff is not required to set forth evidence in the complaint, she must allege facts, not mere conclusions, sufficient to bring a claim within a legally recognized cause of action. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368-69 (2004).

A.

Count I alleges a negligence claim seeking medical monitoring. No Illinois authority has permitted such a claim absent an allegation of a present injury. The principal case on which Plaintiffs rely in defending their claim is *Lewis v. Lead Industries Association*, 342 Ill. App. 3d 95, 101-02 (1st Dist. 2003). The appellate court in *Lewis* held that the plaintiffs did not state a tort claim based on exposure to lead paint because the plaintiffs had not adequately pled causation. *Id.* at 103-04. In its discussion of the claim, the appellate court noted its agreement with the plaintiffs' theory that the cost of statutorily-mandated lead testing could constitute a compensable damage in a tort action (though this discussion might be characterized as *dictum* since the appellate court affirmed the dismissal of the tort claim): "we find no reason why the expense of such an examination is any less a present injury compensable in a tort action than the medical expenses that might be incurred to treat an actual physical injury caused by such a breach of duty." *Id.* at 101-02.

Any question about the meaning and limits of *Lewis* was answered by the appellate court four years later in *Jensen v. Bayer AG*, where the appellate court squarely held that a claim for medical monitoring in the absence of a present injury was not compensable in tort. Ill. App. 3d 682, 693 (1st Dist. 2007). Indeed, the appellate court read *Lewis* as circumscribed by the narrow facts of that case: where a statute imposed a medical monitoring requirement on the plaintiffs, the cost associated with that testing could constitute a present injury. *Id.* That scenario is in stark contrast to the facts alleged by Plaintiffs here, who readily concede that they lack a present injury. Their claim is one for medical monitoring based solely on a potential for *future* harm. Under *Jensen*, such a claim is not compensable in tort.

The rule espoused in *Jensen* finds support in elementary tort principles articulated in various Illinois authorities. In *Williams v. Manchester*, the Illinois Supreme Court held that an increased risk of future harm does not give rise to a cause of action—instead, it is an element of damages that can be recovered when (but only when) there is a present injury. 228 Ill. 2d 404, 425 (2008). In *Dillon v. Evanston Hospital*, the plaintiff's recovery included an award for an increased risk of future harm because she had sustained a clear *present* injury and recovered on that basis. 199 Ill. 2d 483, 487-88 (2002). Similarly, the First District Appellate Court affirmed this general principle by denying credit monitoring relief without present injury. *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358 (1st Dist. 2010). The only cases to the contrary are a few federal district court cases predicting that the Illinois Supreme Court would uphold a claim for medical monitoring absent a present injury. *See, e.g., Carey v. Kerr-McGee Chemical Corp.*, 999 F. Supp. 1099, 1119 (N.D. Ill. 1998). Twenty years and intervening Illinois decisions have proven that prediction to be in error.

There is no allegation that either Plaintiff suffered a present injury. Accordingly, Plaintiffs fail to allege a viable claim for medical monitoring.

B.

Count II alleges a claim for inverse condemnation based on the Illinois Constitution, which provides in relevant part:

> Private property shall not be taken or damaged for public use without just compensation as provided by law.

Ill. Const. (1970) art. I, § 15. This provision is identical in substance to the 1870 Constitution. The language "or damaged" dates to the 1870 Constitution and was added to "overcome decisions under the 1818 and 1848 Constitutions" limiting compensation to situations where the state physically took property. *See* G. Braden and R. Cohn, *The Illinois Constitution: An Annotated and Comparative Analysis* 56

(Univ. of Ill. 1969). The Illinois Supreme Court recognized the same in *Rigney v. City of Chicago* and held that the additional language was intended to provide a remedy to property owners who suffered a significant, *special* damage to their property:

> [T]o warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which give to it an additional value, and that by reason of such disturbance he has sustained *a special damage with respect to his property in excess of that sustained by the public generally.*

102 Ill. 64, 80-81 (1882) (emphasis added). The Illinois Supreme Court, however, has consistently recognized that this constitutional provision is not intended to reach every instance where government action impacts private property. *See Rigney*, 102 Ill. 64 (1882); *Cuneo v. Chicago*, 379 Ill. 488 (1942); *Belmar Drive-in Theatre Co. v. Illinois State Toll Highway Commission*, 34 Ill. 2d 544 (1966).

Here, Plaintiffs allege that the City's work on water pipes or near the owners' properties, including the attachment of copper lines to the lines servicing Plaintiffs' homes, disturbed the protective coating on the lines, shook lead loose, or created a galvanic cell. (Compl. ¶¶ 1, 30 *et seq.*). All of these things, it is alleged, caused lead to leach into Plaintiffs' water. (¶¶ 1, 31-35). But this alleged damage is not unique or special to Plaintiffs' properties. According to Plaintiffs, the City has "known for years" that the work to replace existing water mains causes "the release of additional unsafe levels of lead into residents' water over time." (¶ 1). The City has a "vast network of lead services lines" that run throughout Chicago and "nearly 80 percent of the properties in Chicago" receive their drinking water via lead pipes. (¶¶ 23-24, 27). Indeed, Plaintiffs' proposed class consists of "[a]ll residents of the City of Chicago who have resided in an area where the City has replaced the water mains or meters ... between January 1, 2008, and the present." (¶92).[1] In short, as Plaintiffs' first amended complaint alleges, the damage to Plaintiffs is not *special*: it is a damage borne equally by all residents of the City of Chicago attendant to a public improvement, namely the replacement of lead water mains.

Throughout the Illinois Supreme Court's jurisprudence is the recognition that an allegation of general damage will not support a claim for inverse condemnation:

> [i]t has long been established that there are certain injuries, necessarily incident to the ownership of property, which directly impair the value of private property and

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[1] Exhibit A to Plaintiffs' First Amended Complaint consists of a 58-page listing of various streets throughout Chicago where work on water mains has occurred since 2009.

> for which the law does not, and never has, afforded any relief, examples being the depreciation caused by the building of fire houses, police stations, hospitals, cemeteries and the like in close proximity to private property.

Belmar Drive-in Theatre, 34 Ill. 2d at 550. This category of damage is characterized as *damnum absque injuria*—loss without legal injury—and it is not compensable based on the rationale that the property owner is compensated for the injury or damage by sharing in the general benefits which inure to all from the public improvement. *Id.*

The Illinois Supreme Court's decision in *Cuneo* highlights the failing in Plaintiffs' inverse condemnation claim. 379 Ill. 488 (1942). In *Cuneo*, the Court affirmed a money judgment for the plaintiff where an adjacent construction of a subway airshaft damaged the plaintiff's property through a loss of support. *Id.* at 493. That injury was unique to the plaintiff's property. *Id.* Here the injury or damage of which Plaintiffs complain is one borne by all Chicagoans. A damage sustained by all property owners due to a public improvement is *not* compensable: "Depreciation suffered in common by all lands in the vicinity of an improvement is not compensable." *Department of Public Works & Bldgs. v. Horejs*, 78 Ill. App. 2d 284, 292 (1st Dist. 1966). Accordingly, Plaintiffs cannot allege a claim for inverse condemnation.

III.

For the foregoing reasons, it is hereby ORDERED:

(1) Defendant City of Chicago's motion to dismiss Plaintiffs' First Amended Class Action Complaint pursuant to section 2-615 is GRANTED. Having already been afforded an opportunity to amend, it is now abundantly clear that Plaintiffs can plead no set of facts which would entitle them to relief. Accordingly, the First Amended Class Action Complaint is dismissed with prejudice.

(2) All other pending motions are denied as moot.

(3) The case management conference set for May 14, 2018 is STRICKEN.

(4) This is a final order that disposes of the case in its entirety.

ENTERED,

Judge Raymond W. Mitchell, No. 1992

Judge Raymond W. Mitchell

MAR 29 2018

Circuit Court – 1992

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GORDON BERRY and ILYA PEYSIN, individually and on behalf of all others similarly situated,

Plaintiffs/Appellants,

v

CITY OF CHICAGO,

Defendant/Appellee.

Reviewing Court No. _____

Circuit Court No. 2016-CH-02292

Hon. Raymond W. Mitchell, Calendar 2

NOTICE OF APPEAL

A. Appellant Information

1. Plaintiff-Appellants:

Gordon Berry, Ilya Peysin

2. Appellants' Counsel:

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C. Final Order Information

1. Date of the judgment/order being appealed:

March 29, 2018 (final order disposing of case) (attached as Exhibit A)

2. Name of judge who entered the judgment/order being appealed:

Hon. Raymond W. Mitchell, Chancery Calendar No. 2

D. Relief Sought

Plaintiff-Appellants seek reversal of Judge Raymond W. Mitchell's final order ruling on Defendant-Appellee's Motion to Dismiss Plaintiffs' First Amended Class Action Complaint Pursuant to 735 ILCS 5/2-619.1, and disposing of the case in its entirety. Plaintiff-Appellants request that the Illinois Appellate Court reinstate both Count I and Count II of their First Amended Class Action Complaint.

Dated: April 20, 2018

Respectfully submitted,

By: */s/ Elizabeth A. Fegan*
Elizabeth A. Fegan

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CERTIFICATE OF SERVICE

I, Elizabeth A. Fegan, an attorney, certify that I caused a copy of the foregoing **NOTICE OF APPEAL** to be served on April 20, 2018, upon the following counsel by the methods indicated:

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GORDON BERRY and ILYA PEYSIN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF CHICAGO,

Defendant.

No. 2016-CH-02292

Hon. Rodolfo Garcia

JURY TRIAL DEMANDED

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs, GORDON BERRY and ILYA PEYSIN, individually and on behalf of all others similarly situated through their undersigned attorneys, complain as follows:

I. INTRODUCTION

1. The City of Chicago (the "City" or "Defendant") has known for years that the work it is undertaking to replace water mains and meters, including the partial replacement of the lead service line that runs between the water main and a resident's home, is causing elevated and unsafe lead levels in the water to travel through lead service pipes that pour directly into residents' homes. The City has also known that when the City replaces sections of the lead service pipe with copper, but not the whole lead service pipe, it causes the remaining portion of the lead service pipe to corrode more quickly than if the City had left it alone, causing the release of additional unsafe levels of lead into residents' water over time.

2. Despite its knowledge, the City has failed to warn Plaintiffs and the Class of the dangers of drinking or cooking with City water after the City has completed its work and, further, failed to provide accurate directions to Plaintiffs and the Class of how to reduce the risk

of lead contamination in the water from their taps. The City has also failed to advise Plaintiffs and the Class of its intention to only partially, rather than fully, replace their lead service pipes at the time of construction and the resulting increased risk of lead exposure over time as a result of the City's work.

3. As a result of Defendant's negligent and reckless conduct, Plaintiffs, their children, grandchildren, and the Class are at a significantly increased risk of exposure to a known hazardous substance and lead poisoning. Tests of water in Plaintiffs' homes have revealed significant levels of lead that are not the result of plumbing in the homes, but the result of lead from the lead service lines that were the subject of the City's work and/or the City's water supply following work. Moreover, at least one child who lived in a Plaintiff's home has already tested for high levels of lead in her blood following work performed by the City and will require ongoing monitoring. Accordingly, Plaintiffs seek to recover the costs of diagnostic testing necessary to detect lead poisoning to them, their children, and the Class resulting from Defendant's actions over time.

4. Plaintiffs also seek to require the City to replace their service lines in full, given that the City has interfered with their private property, partially replaced their lead service lines in a manner that has caused ongoing and will cause future lead exposure, and caused damage that cannot be reversed.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 735 ILCS 5/2-209, because the City regularly transacts business within the State and has committed tortious acts within the State.

6. Venue is appropriate in the Circuit Court of Cook County under 735 ILCS 5/2-101, *et seq*., and 735 ILCS 5/2-103, because the City of Chicago is located within Cook County

and because the transactions or some part thereof occurred in Cook County, out of which the causes of action arose.

III. PARTIES

7. Plaintiff, Gordon Berry, is a citizen of Illinois and resident of Chicago. Berry, along with his family, resides at 5411 S. Harper Ave., Chicago, Illinois 60615, in a home that receives its water from a lead service line. Berry and his family lived at this address during the periods when the City replaced the water main and meter. The City did not warn Berry of the risks of lead contamination at the time the work was performed. On three occasions, subsequent testing revealed dangerous levels of lead contamination in the home's water supply, including as high as 30.8 ppb,[1] which is considered an extremely "serious" level according to experts.

8. Berry's granddaughter, together with her parents, lived with Berry after the City completed its work. When Berry's granddaughter was two years old and living with him, blood lead testing revealed lead levels in her blood to be elevated at 3.0 ppb. "EPA and the Centers for Disease Control and Prevention (CDC) agree that there is no known safe level of lead in a child's blood."[2]

9. Plaintiff, Ilya Peysin, is a citizen of Illinois and resident of Chicago. Peysin, along with his family, resides at 6529 N. Albany Avenue, Chicago, Illinois 60645, in a home that receives its water from a lead service line. Peysin and his family lived at this address during the period when the City replaced the water main along his street. Peysin received a handout from the City at the time the work was performed, but the handout failed to warn Peysin and his

[1] Lead content can be expressed either in parts per billion (ppb) or micrograms per liter (μg/L), which are equivalent units of measurement.

[2] "Basic Information About Lead in Drinking Water," EPA.gov, https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#regs (last visited Jan. 3, 2017).

family of the potential for lead poisoning as a result of the work and failed to provide accurate information to minimize the risks of ingesting lead. Testing performed on Peysin's drinking water since the construction has revealed "significant" lead levels of 9.5 ppb. As a result of the City's project, Peysin and his family are now at an increased risk for problems associated with ingesting lead.

10. Defendant, City of Chicago, is a municipal corporation and political subdivision of the State of Illinois.

IV. FACTUAL ALLEGATIONS

A. Overview of Lead Exposure

11. Lead is considered a "brain drain" chemical.[3] Lead is a dangerous environmental contaminant that is highly poisonous to humans and whose adverse health effects have been well documented.[4] Lead is persistent and bioaccumulates in the body over time.[5]

12. Generally, lead exposure harms an individual's nervous system. This can result in a number of medical afflictions, including neuropathy, motor nerve dysfunction, weakened immunity to disease, renal failure, gout, hypertension, muscle and joint pain, memory and concentration problems, and infertility. Lead exposure has also been identified as a probable cause of cancer.[6]

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[3] "The Problem," Healthy Babies Bright Futures, https://hbbf.org/problem (last visited Jan. 3, 2017).

[4] Mary Jean Brown & Stephen Margolis, *Lead in Drinking Water and Human Blood Lead Levels in the United States*, 61 MORBIDITY & MORTALITY WKLY. REP. (SUPP.) 1, 1 (August 10, 2012), *available at* http://www.cdc.gov/mmwr/pdf/other/su6104.pdf.

[5] "Basic Information About Lead in Drinking Water," EPA.gov, https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#regs (last visited Jan. 3, 2017).

[6] Brown & Margolis, *supra* note 4, at 2; World Health Organization, *Lead in Drinking-water: Background document for development of WHO Guidelines for Drinking-water Quality*, 5–8 (2011), *available at* http://www.who.int/water_sanitation_health/dwq/chemicals/lead.pdf; *see also* "What expert agencies say," LEAD - CANCER.ORG, http://www.cancer.org/cancer/cancercauses/othercarcinogens/athome/lead (last visited Jan. 9, 2017).

13. For a child, however, the effects of lead poisoning can be far more dramatic. Lead stunts brain development, reduces IQ, and intensifies aggression and other behavior problems later in life.[7] According to the EPA, low levels of lead exposure to children have been linked to damage to the central and peripheral nervous system, learning disabilities, shorter stature, impaired hearing, and impaired formation and function of blood cells.[8]

14. Pediatric lead poisoning can also result in attention deficit disorder, hyperactivity, behavioral problems, and delinquency.[9]

15. Even the slightest amount of lead in a child's blood stream is dangerous; "no safe blood lead threshold for the adverse effects of lead on infant or child neurodevelopment has been identified."[10]

16. These symptoms in children can result in more serious consequences, not just to the individuals themselves, but to the communities in which they live. Scholars and experts consistently link lead exposure with violent crime, finding "the weight of the evidence suggests that cities' use of lead water pipes considerably increased their homicide rates."[11]

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[7] "The Problem," Healthy Babies Bright Futures, https://hbbf.org/problem (last visited Jan. 3, 2017).

[8] "Basic Information About Lead in Drinking Water," EPA.gov, https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water#regs (last visited Jan. 3, 2017).

[9] Committee on Environmental Health, *Lead Exposure in Children: Prevention, Detection, and Management*, 116 PEDIATRICS 1036, 1037–38, 1041 (2005) ("Pediatrics"), *available at* http://pediatrics.aappublications.org/content/pediatrics/116/4/1036.full.pdf.

[10] Brown & Margolis, *supra* note 4, at 2.

[11] James J. Feigenbaum and Christopher Muller, Lead Exposure and Violent Crime in the Early Twentieth Century (March 22, 2016), *available at* http://scholar.harvard.edu/files/jfeigenbaum/files/feigenbaum_muller_lead_crime.pdf; *see also* Rick Nevin, *Understanding International Crime Trends: The Legacy of Preschool Lead Exposure*, 104 ENVTL. RESEARCH 315, 333 (2007) ("This analysis adds to mounting evidence that preschool lead exposure affects the risk of criminal behavior later in life . . . . The hypothesis that murder rates are especially affected by severe lead poisoning is consistent with international and racial contrasts and a cross-sectional analysis of average 1985–1994 USA city murder rates."); Janet L. Lauritsen, et al., *When Choice of Data Matters: Analyses of U.S. Crime Trends, 1973–2012*, 32 J. QUANTITATIVE CRIMINOLOGY 335, 336 (Dec. 2015) ("As we will show below, only [lead exposure] is significantly related to [the Uniform Crime Reports] violence trends . . . .").

17. Moreover, lead is a cumulative poison; that is, your body does not change lead into any other form, allowing it to accrue in the body. Shortly after lead is introduced to the body, it travels via the blood stream to soft tissue and organs, where it may remain for years. Much of the lead, however, ultimately settles in one's bones and teeth, where it can potentially remain for decades.[12]

18. Consequently, the effects of lead poisoning on children can be "long lasting," if not "permanent."[13]

19. Indeed, children exposed to lead may not experience any issues until they are adults and certain events occur. For example, when a woman gets pregnant, the lead may begin to leach from her bones where it previously lay dormant and pass through the placenta and umbilical cord to the baby, causing the baby to be born with increased lead blood levels.[14] Similarly, in the case of a woman going through menopause, the lead may leach from her bones and then begin to cause a number of health issues, including increased blood pressure, nerve disorders, muscle and joint pain, and problems with memory or concentration.[15]

20. With such health problems come massive financial costs. The annual costs of environmentally attributable diseases in American children total $54.9 billion, of which the vast

[12] U.S. Department of Health & Human Services, *Toxicological profile for lead-update*, 7–8 (Aug. 2007), *available at* http://www.atsdr.cdc.gov/toxprofiles/tp13.pdf.

[13] Pediatrics, *supra* note 9, at 1038.

[14] Centers for Disease Control and Prevention, Guidelines for the Identification and Management of Lead Exposure in Pregnant and Lactating Women, 30–31 (Nov. 2010), *available at* http://www.cdc.gov/nceh/lead/publications/leadandpregnancy2010.pdf.

[15] Dana Lintea, "Lead Poisoning and Menopause: How Similar Are They? Does Lead Make Menopause Worse?," Global Lead Advice & Support Service, 1 (July 2010), *available at* https://www.lead.org.au/fs/Lintea_Lead_poisoning_and_menopause_20100728.pdf.

majority arises from lead poisoning; it is estimated that the total cost of lead poisoning in the U.S. each year is $43.4 billion.[16]

21. One such cost is associated with a blood test, a universally recognized method for testing lead levels. The reliability of blood lead testing comes from, in part, the capability of comparing blood lead test results, especially for children, to the published standard of 10 µg/dL, established by the Center for Disease Control.

22. Blood lead testing is also useful in signaling a need for further medical examinations, which can lead to a more definite diagnosis.

23. Lead poisoning is, of course, entirely preventable, but hundreds of thousands of children in the U.S. become poisoned regardless. And Chicago remains one the most affected cities nationwide; the incidence of lead poisoning in Chicago children residing in homes built before 1950 (where lead paint is most likely to exist) is 400 to 500 percent higher than those of children living in similar homes in other cities.[17]

B. The City of Chicago's Vast Network of Lead Service Lines

24. In 1986, President Ronald Reagan signed into law an amendment to the "Safe Drinking Water Act." The amendment, which sought to increase protections on the nation's drinking water, imposed a ban on the use of lead piping in public water systems.[18] This

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[16] *See* Philip J. Landrigan et al., *Environmental Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs for Lead Poisoning, Asthma, Cancer, and Developmental Disabilities*, 110 ENVTL. HEALTH PERSPECTIVES 721, 726 (July 2002), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1240919/pdf/ehp0110-000721.pdf.

[17] Marc Edwards, "Elevated Lead in Water as a Public Health Concern," Invited Presentation to the Center for Disease Control and Prevention Advisory Committee on Childhood Lead Poisoning Prevention (Nov. 18, 2010).

[18] Press Release, Environmental Protection Agency, President Signs Safe Drinking Water Act Amendments (June 20, 1986), *available at* https://archive.epa.gov/epa/aboutepa/president-signs-safe-drinking-water-act-amendments.html; 42 U.S.C. § 300g-6.

amendment did not, however, mark the moment at which the public and municipalities became aware of the dangers of lead service lines.

25. As early as the mid-1800's, public health officials and medical journals warned of the dangers of lead to humans and openly questioned the use of lead. By the late-1800's, some states had begun advising "cities and towns to avoid the use of lead pipes" altogether, as "there was little doubt in the public health community that lead water pipes were to be avoided." Consequently, many cities had already begun banning their use as of the1920's, "conclud[ing] that the engineering advantages of lead were outweighed by the public health risks . . . ."[19]

26. Chicago did not ban the use of lead in plumbing and public water systems. In fact, Chicago did the opposite: up until the federal ban in 1986, the City actually *required* residents to install lead service lines,[20] even in the face of all the public health warnings over the past century.

27. Due to its own building code, the City thus contains "a legacy of millions" of lead service lines throughout the city and not surprisingly has more than any other U.S. municipality, such that nearly 80 percent of the properties in Chicago receive their drinking water via lead pipes. Unfortunately, these older pipes can corrode, "result[ing] in the transfer of dissolved or particulate lead into the drinking water."[21]

[19] Richard Rabin, *The Lead Industry and Lead Water Pipes, "A Modest Campaign,"* 98 AM. J. PUB. HEALTH 1584, 1585 (Sep. 2008).

[20] *See id.*; *see also* Chapters of the Municipal Code of Chicago Relating to Plumbing, with Amendments to October 19, 1978.

[21] Miguel Del Toral et al., *Detection and Evaluation of Elevated Lead Release from Service Lines: A Field Study*, 47 ENVTL. SCI. & TECH. 9300, 9300 (2013); Michael Hawthorne, *City Fails to Warn Chicagoans About Lead Risks in Tap Water*, CHI. TRIB., Feb. 8, 2016, *available at* http://www.chicagotribune.com/news/watchdog/ct-chicago-lead-water-risk-met-20160207-story.html.

28. According to EPA estimates, "10 to 20 percent of lead exposure in young children may come from drinking water, and infants raised on mixed formula can receive 40 to 60 percent of their exposure from drinking water."[22]

29. To minimize this risk, Chicago treats the water supply with a chemical—specifically, "Blended Polyphosphate." This treatment causes a chemical reaction that causes a white coating to form on the interior of the water mains, house services, and plumbing in an attempt to prevent the pipes from corroding and lead leaching into the drinking water.[23]

C. The Dangers of City Construction Projects and Partial Lead Service Line Replacements

30. The polyphosphate chemical treatment is not, however, 100 percent effective. The anti-corrosion treatment can fail for a number of reasons, especially from construction or street work, water and sewer main replacement, meter installation or replacement, or plumbing repairs.[24]

31. During water main and meter replacement projects, the City disturbs the interior polyphosphate coating in a number of ways. Drilling, digging, as well as moving or bending the pipes can all cause the interior coating to flake off and the polyphosphate protection to fail. Additionally, when the City turns back on a resident's water after any construction or repair, the violent rush of water into the pipes disrupts the protective coating and put the residents at risk.

[22] American Water Works Association, Communicating About Lead Service Lines: A Guide for Water Systems Addressing Service Line Repair and Replacement, 2 (2014), *available at* http://www.awwa.org/Portals/0/files/resources/publicaffairs/pdfs/FINALeadServiceLineCommGuide.pdf.

[23] Water Treatment, CITY OF CHICAGO.ORG, http://www.cityofchicago.org/city/en/depts/water/supp_info/education/water_treatment.html; Lead and Copper Rule, DPWC.ORG, http://www.dpwc.org/lead-and-copper-rule/ (last visited Feb. 10, 2016); Del Toral, *supra* note 21, at 9300.

[24] *See generally* Del Toral, *supra* note 21.

32. Further, during water main projects, the City has to reconnect the lead service lines (*i.e.*, the pipes connecting to the residence) to the water mains after they are replaced. During this process, the City performs what is known as a partial lead service line replacement. This practice involves the City replacing a portion of the lead service line with copper when reconnecting the lead service line to the main.

33. While it may seem logical that removing part of the lead service line would result in less lead contamination, municipalities and water experts know that the opposite is true. The problem with partial lead service line replacements is twofold.

34. First, these projects severely disrupt the polyphosphate coating that protects the service lines and allow "alarming levels of lead to leach from service lines" into the nearby residents' water supply.[25] Studies have shown that when lead service lines are disturbed, they can release unsafe levels of lead for weeks or months after the disturbance.[26]

35. Second, when the City replaces sections of the lead pipe with copper, "[it] creates a galvanic cell (i.e., a battery) . . . [that] can cause release of lead into the water as the lead pipe corrodes" over time.[27]

36. In 2008, Washington, D.C. stopped its accelerated lead service line replacement program due to the dangers associated with partial lead service line replacements.[28] Both before and since that time, these risks have been continuously documented and cities have taken action to address those risks unlike the City of Chicago.

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[25] Hawthorne, *supra* note 21; Del Toral, *supra* note 21, at 9304.

[26] American Water Works Association, *supra* note 22, at 2; *see* Del Toral, *supra* note 21, at 9304.

[27] Letter from American Academy of Pediatrics to Aaron Yeow of EPA (March 22, 2011).

[28] Michael E. Ruane, *WASA Backs Off Lead Pipe Program*, WASHINGTON POST, Sep. 5, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/04/AR2008090403613_2.html.

37. For example, in September of 2011, the EPA's Science Advisory Board found that the available data indicate that partial lead service line replacement "may pose a risk to the population, due to the short-term elevations in drinking water lead concentrations."[29]

38. Likewise, the American Academy of Pediatrics recommended a moratorium on the partial lead service line replacements because "[t]here is considerable evidence that, under certain conditions, partial lead service line replacements cause persistent, often intermittent, elevated water lead levels."[30]

39. Both the CDC's Advisory Committee on Childhood Lead Poisoning Prevention and the EPA's Children's Health Protection Advisory Committee have also expressed concerns about elevated lead concentrations in drinking water from partial lead service line replacements.

40. The EPA's National Drinking Water Advisory Council indicated that elevated lead levels were a concern from both full and partial lead service line replacement.[31]

41. Research has shown that, at least in the short-term, partial lead service line replacements are not effective in reducing lead from entering the water system.[32] Moreover, according to the American Water Works Association, "[e]ven after a full service line replacement, flushing of the service line is required, and may create lead deposits that could persist for weeks or months."[33]

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[29] Letter from EPA and SAB to Hon. Lisa P. Jackson re: SAB Evaluation of the Effectiveness of Partial Lead Service Line Replacements (Sep. 28, 2011), *available at* http://www.epa.gov/sites/production/files/2015-09/documents/sab_evaluation_partial_lead_service_lines_epa-sab-11-015.pdf.

[30] Letter from American Academy of Pediatrics to Aaron Yeow of EPA (March 22, 2011).

[31] *See* Important update: Lead-based Water Lines, CDC.GOV, http://www.cdc.gov/nceh/lead/waterlines.htm; American Water Works Association, supra note 22, at 5.

[32] Letter from EPA and SAB to Hon. Lisa P. Jackson re: SAB Evaluation of the Effectiveness of Partial Lead Service Line Replacements (Sep. 28, 2011).

[33] American Water Works Association, *supra* note 22, at 7.

42. In Boston, the Water Department has ceased performing partial lead service line replacements because, "as [it] know[s] now, [partial lead service line replacements are] very bad for the occupants of the home." In fact, Boston gives interest-free loans to its residents who wish to remove their lead service lines and, as a condition to receiving those loans, the resident must agree to *fully* replace the service line; partial lead service line replacements will not be allowed.[34]

43. Madison, Wisconsin became the first major city in the country to launch a full Lead Service Replacement Program in 2001. Since then, the Madison Water Utility has worked to replace all known lead water service lines in the city—more than 8,000 in all—with much safer copper. Madison also continues to offer a rebate to residents who discover they have a lead service line covering half the cost of replacement up to $1,000.

44. Lansing, Michigan began a 12-year campaign in 2004 to replace all 12,000 lead service lines in the City, completing the project on December 13, 2016.

D. Defendant Knew Its Work Would Cause the City's Water Supply to Be at Risk for Being Contaminated with Lead

1. The City's Construction Projects Place Significant Trauma on the Lead Service Lines and Their Polyphosphate Coating, Causing Lead to Contaminate Plaintiffs' Drinking Water

45. Between 2005 and 2011, water experts for the Environmental Protection Agency conducted a study, testing water sampled from homes connected to lead service lines in Chicago. The goal of the study was to determine whether the "Lead and Copper Rule," the existing federal

[34] John Sullivan, during Q&A Session to "Lead Service Line Replacement: Vital Tips from Leading Utility Managers," American Water Works Ass'n (May 3, 2016), *available at* https://www.youtube.com/watch?v=4viqO_RWM0Q (last accessed Jan. 4, 2017).

regulation for the sampling of water,[35] was sufficient, or if it "systematically missed" high lead levels in the water supply, risking "human exposure."[36]

46. The Lead and Copper Rule seeks to manage lead levels in drinking water by setting a "lead action level." Currently, under the rule, the "lead action level is exceeded if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period . . . is greater than 0.015 mg/L." In such a scenario, a municipality will be required to take certain steps to resolve the issue, such as informing the public and/or replacing lead service lines.[37]

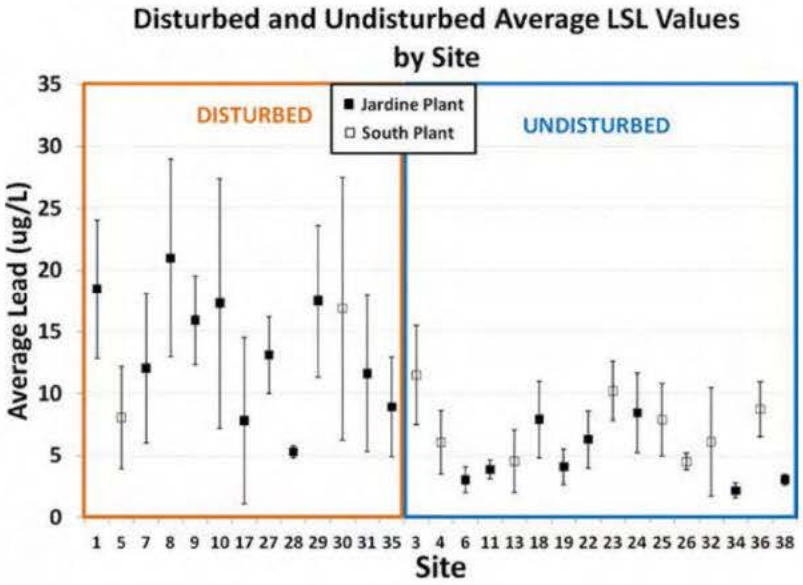
47. To determine the efficacy of the Lead and Copper Rule, the study, among other things, compared samples from homes in various parts of the City. Of the 13 sites where there had been a recently documented physical disturbance (*i.e.*, construction, plumbing repairs, etc.), virtually all of them produced samples that exceeded the lead action level under the Lead and Copper Rule—results in stark contrast to those produced by samples collected from undisturbed sites. In other words, City projects have been contaminating residents' drinking water with lead and the City has been doing nothing to address the problem.[38]

[35] *See* 40 C.F.R. § 141.80.

[36] Del Toral, *supra* note 21, at 9300.

[37] *See* 40 C.F.R. §§ 141.81–.85.

[38] Del Toral, *supra* note 21, at 9304.



48. In October 2013, Thomas Powers, then-Commissioner of the Chicago Department of Water Management, wrote a letter to aldermen addressing the concerns raised in the study. Instead of taking steps to remedy the release of lead into the water supply, follow up on the EPA study, or at least warn the residents of Chicago about safety measures they can take, the City simply insisted that the water is "absolutely safe to drink."[39]

49. In fact, Powers made that statement despite the City's own records contradicting it.

50. In 2012, the City studied the effect of water meter replacement projects on lead levels and noted that meter replacements that required a sawzall resulted in more vibrations during the cutting process, more disturbances to the lead, and thus a greater increase in post-construction lead levels in the water.[40]

[39] Hawthorne, *supra* note 21.

[40] Andrea Putz, Alan E. Stark, et al., City of Chicago Dept. of Water Management, Watercon 2014, "The Impact of Drinking Water Lead Levels on Chicago Children" (Mar. 19, 2014).

51. Further, in September 2013, the City replaced water mains on the 1300 block of W. Rosedale Ave. and the 1400 block of W. Thorndale Ave. The City tested homes on both blocks following their construction and both homes had significant lead contamination in their drinking water. The home tested on the 1300 block of W. Rosedale showed lead levels of 18.9 ppb, in excess of the EPA's lead action level. The home tested on the 1400 block of W. Thorndale Ave. revealed lead levels of 50.8 ppb in the water supply, *more than triple* the EPA's lead action level.

2. Partial Lead Service Line Replacements Result in Galvanic Corrosion That Damages the Service Line and Results in Significant Lead Release over Time

52. City construction projects also contaminate residents' drinking water via a reaction called galvanic corrosion.

53. Galvanic corrosion occurs when two dissimilar metals come in contact with each other in the presence of electrolyte (in this case, water). The water provides a "pathway" for metallic ions to move from one metal (the anode) to the other (the cathode), resulting in the anode experiencing an accelerated rate of corrosion.[41]

54. The City typically uses copper to reconnect any lead service lines to the water mains or meters, even though "galvanic connections between lead pipe (either new or old) and copper pipe increase[s] lead release into the water, compared to a full length of lead pipe alone."[42] This same reaction occurs between lead and galvanized iron, which the City may also use to reconnect lead service lines to water meters.

[41] Water Research Foundation, "Galvanic Corrosion Following Partial Lead Service Line Replacement," 49 (2013), *available at* http://www.waterrf.org/PublicReportLibrary/4349.pdf (last visited Jan. 4, 2017).

[42] Jonathan Cuppett, Water Research Foundation, Lead and Copper Corrosion: An Overview of WRF Research, 17 (Oct. 2016).

55. The City has known for years of this effect. In 1989, the Illinois Environmental Protection Agency provided the City's Water Department with materials describing galvanic corrosion as "vigorous in new piping" and causing "lead levels [to] be extremely high."[43]

E. Despite Its Knowledge, the City Pursued Construction Projects That Disturbed the Lead Pipes and Caused Galvanic Corrosion Supplying Contaminated Water to Chicago Residents without Taking Proper Precautions

56. Since 2008, the City of Chicago has been modernizing its water system, replacing water meters and water mains that date to the 1800s. The Emanuel Administration has stepped up that effort, vowing to replace 900 miles of water mains over 10 years.[44] The City has also been aggressively replacing water meters that connect to the residences under its Meter Save Program implemented in 2009.[45] This process regularly disturbs and partially destroys the lead service pipes supplying water to Chicago residents.

1. The City's Gives Inadequate Warnings to Residents Regarding the Lead Contamination Following Water Main Replacement

57. According to the City, it has conducted more than 1,600 water main and sewer replacement projects since January 1, 2009 that directly affect the water supply to Chicago residents, including but may not be limited to 13 in 2009, 12 in 2010, 100 in 2011, 418 in 2012, 436 in 2013, 425 in 2014, and at least 251 in 2015.[46]

58. When replacing water mains, the City advises residents that their water may be shut off "a couple of times," but the City does not advise residents of the effects of the water

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[43] Office of Drinking Water (U.S. EPA), Lead in School Drinking Water: A Manual for School Officials to Detect, Reduce, or Eliminate Lead in School Drinking Water (1989).

[44] Megan Cottrell, "Why experts say Chicago parents should worry about the drinking water," CHI. PARENT, *available at* http://www.chicagoparent.com/magazines/chicago-parent/2014-april/lead.

[45] METERSAVE.ORG, https://www.metersave.org/MeterSave.aspx (last visited Jan. 4, 2017).

[46] DWM Construction Projects, CITY OF CHICAGO.ORG, http://www.cityofchicago.org/city/en/depts/water/supp_info/dwm_constructionprojects.html (last visited Feb. 12, 2016).

main replacements, the partial lead service pipe replacements or precautions the residents should take as a result when water service resumed in 2009, 2010, 2011, or 2012.[47]

59. It was not until September 2013 that the City started advising residents:

> **After your old water main has been replaced** and you have been connected to your new water main, please open all your water faucets and hose taps and flush your water for 3 to 5 minutes. Sediment and metals can collect in the aerator screen located at the tip of your faucets. These screens should be removed prior to flushing. This flushing will help maintain optimum water quality by removing sediment, rust, or any lead particulates that may have come loose from your property's water service line as a result of the water main replacement. If you have any questions or concerns about your water quality, please call us at 312-744-8190.[48]

60. In fact, this was the *only* warning the City gave to its residents and was buried in the handouts sent to homeowners when their water mains were replaced. Furthermore, that warning no longer even contains any reference to lead as of October 2015, according to the Chicago Tribune;[49] similar letters regarding construction projects to residents sent after September 2015 are no longer available on the City's website.[50]

61. Moreover, the buried warning the City did give residents fell far short of providing advice that would actually protect residents, according to leading experts in the field. The warning fails to acknowledge the long-term potential of lead leaching resulting from

[47] S. Hoyne Avenue, from W. 69th Street to W. 69th Place, and in W. 69th Place, from S. Hamilton Avenue to S. Damen Avenue New Water Main Project Frequently Asked Questions (October 27, 2009), *available at* http://www.cityofchicago.org/content/dam/city/depts/water/supp_info/arcConRpt/2009/wd17dp.PDF (last visited February 11, 2016).

[48] Customer Notice Infrastructure Renewal Program for residents living on N. Seeley Avenue, from W. Irving Park Road to W. Grace Street (September 5, 2013), *available at* http://www.cityofchicago.org/content/dam/city/depts/water/supp_info/arcConRpt/2013construction/09Sep/20130905_Seeley_47w.pdf (last visited Feb. 11, 2013).

[49] Hawthorne, *supra* note 21.

[50] *See* 2015 Water and Sewer Main Projects, CITY OF CHICAGO.ORG, *available at* http://www.cityofchicago.org/city/en/depts/water/supp_info/archived_constructionreports/2015_water_and_sewer_projects.html (last visited Feb. 12, 2016).

physical disturbance or galvanic corrosion, which can last from weeks to years. One leading expert has even called the City's actions "criminal." Removing the aerator and running the water for 3 to 5 minutes will not eliminate all of the lead in the system, according to the EPA.[51]

62. According to the American Water Works Association, immediately following a lead service line replacement, cold water should be run for at least 30 minutes at full flow after removing the faucet aerator. The purpose of this flush is to remove any debris resulting from the replacement process that might contain lead. Residents should also flush the interior plumbing after a lead service line replacement. Beginning in the lowest level of the home, they should remove faucet aerators and fully open the cold water taps throughout the home, letting the water run for at least 30 minutes. Then they should turn off each tap starting with the taps in the highest level of the home.[52]

63. According to the EPA, any household with a lead service line should flush pipes for three to five minutes any time water hasn't been used for several hours—not just one time after street work or plumbing repairs as the City advises in handouts to homeowners.[53]

64. Additionally, residents should be warned that they should not consume tap water, open hot water faucets, or use an icemaker or filtered water dispenser until after flushing is complete.[54]

65. According to expert Marc Edwards,[55] drinking the tap water in Chicago, particularly where the City has conducted a water main replacement project, is "like a game of Russian roulette."[56]

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[51] Cottrell, *supra* note 44.

[52] American Water Works Association, *supra* note 22, at 15.

[53] Hawthorne, *supra* note 21.

[54] American Water Works Association, *supra* note 22, at 15.

2. The City Gives No Warning to Residents Regarding Risks Following Water Meter Replacements

66. On its Meter Save website, the City asks residents to volunteer to sign up to have their water meter replaced.

67. However, despite its own studies that indicate these replacement projects can result in elevated lead levels in the water,[57] the City does not issue any warning on that website whatsoever.[58]

F. The City's Water Main and Meter Replacement Projects Have In Fact Elevated Lead in the Water Supply of Plaintiffs and the Class

1. Plaintiff Gordon Berry's Experience

68. During two separate projects, the City replaced the water main on Gordon Berry's block in 1998 and the water meter at his home in 2009 at 5411 S. Harper Ave., Chicago, Illinois 60615.

69. Berry's water meter is located outside the front of his property, in a well (known as a "buffalo box") between the sidewalk and street. In replacing the meter, the City's work wrestled, moved, and disturbed the lead service lines running to his home, causing the interior coating of the service line to be compromised. Further, the violent flushing of water back into the service line after the water had been shut off, caused more damage to the interior coating of the lead service line. The City reconnected Berry's water meter to his lead service line using galvanized iron pipes, placing his family at further risk of lead contamination through their

[55] Edwards is a professor of environmental and civil engineering at Virginia Tech and a 2008 MacArthur genius grant winner. Edwards spent 10 years uncovering a massive spike in lead levels in Washington, D.C.'s tap water, which was linked to hundreds, if not, thousands of children being poisoned and a substantial rise in the local miscarriage rate. *See* Cottrell, *supra* note 44.

[56] Cottrell, *supra* note 44.

[57] *See* Putz, et al., *supra* note 40.

[58] *See generally* METERSAVE.ORG, https://www.metersave.org/MeterSave.aspx (last visited Jan. 4, 2017).

drinking water. The City did not warn Berry of the potential risks associated with the water meter replacement, galvanic corrosion, or his lead service line.

70. In January 2016, a routine checkup showed high levels of lead present in the blood of Berry's two-year-old granddaughter who lived with him, his wife, and his son and his wife. Berry immediately requested that the City test his home's water supply for lead content.

71. The City first collected three samples for testing on February 11, 2016. The testing showed Berry's drinking water to contain lead in the amount of 17.2 ppb, but the City did not inform Berry of the specific lead levels in his water. Instead, the City contacted him and indicated the results were such that it would need to test the water again.

72. On March 4, 2016, the City collected another 10 samples of Berry's drinking water for lead testing. Test results revealed dangerous lead levels reaching as high as 22.8 ppb. However, approximately two months passed and the City did not inform Berry of these results.

73. In early-May 2016, an investigative reporter showed up at Berry's front door and informed Berry that his address appeared on a list she obtained from the City through a Freedom of Information Act request. That list revealed Berry's water supply had tested for significant lead content. She showed him the test results, which was the first time Berry was informed of the significant lead levels in his water.

74. Around that same time, the reporter interviewed Water Department Commissioner Barrett Murphy. Only after this interview did the City contact Berry regarding his test results and agree to test the water again.

75. On May 13, 2016, Gary Litherland, the Freedom of Information Act Officer for the Chicago Water Department, accompanied water department employees to Berry's house for additional water testing. Litherland apologized to Berry for not disclosing the lead testing results

for his home, explaining that the letter had been delayed by executives at the Water Department. Litherland assured Berry that the City had nothing to do with the lead contamination.

76. During this visit, the City tested Berry's water for the third time. The testing yet again revealed a dangerous amount of lead contamination far in excess of the EPA's lead action level. The first 10 samples indicated the following lead levels: 9.8, 29.3, 30.8, 27.3, 16.2, 13.1, 7.6, 12.1, 11.2, and 9.43 ppb. Samples collected after three and five minutes still revealed significant lead levels of 5.91 and 5.33 ppb, respectively.

77. Since that time, Berry's granddaughter (together with her parents) have moved out of Berry's home. Berry has installed water filters in an attempt to decrease his family's exposure to the lead in his water.

78. Several plumbers have inspected Berry's service line and confirmed that it is lead. He has also obtained at least three quotes to replace the remaining portion of the lead service line left behind by the City in amounts ranging from $14,000 to $19,000. At least one of the quotes includes the permit fee to the City of $3,500.00.

79. Berry and his family have thus been injured in their person and property, and will continue to be exposed to lead in their water as a result of the City's water main and meter replacement and partial lead service line replacement to his home.

2. Plaintiff Ilya Peysin

80. In April 2015, Peysin, along with his wife and children, resided at 6529 N. Albany Avenue, Chicago, Illinois, 60645. On April 27, 2015, the City sent Plaintiff Peysin a letter informing him that crews would "soon be installing 2,536 feet of 8-inch water main in N.

Albany Avenue, from W. Albion Avenue to W. Granville Avenue,"[59] which included the water main in front of Peysin's home. The letter was silent as to the partial lead service line replacement that would occur at the same time.

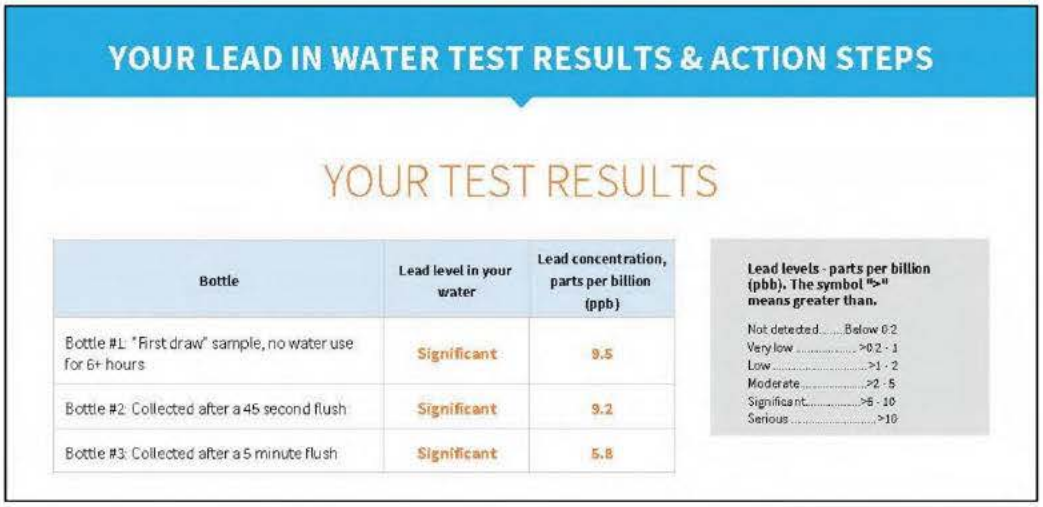
81. The City's letter did not warn Plaintiff Peysin of the long-term potential for lead exposure as a result of the physical disturbances, partial lead service line replacement and galvanic corrosion caused by the construction.[60] The April 27th letter only advised Plaintiff Peysin to "open all [his] water faucets and hose taps and flush [his] water for 3 to 5 minutes" in order to remove "sediment, rust, or any lead particulates that may have come loose from your property's water service line as a result of the water main replacement."

82. On October 28, 2016, water was collected at Peysin's home to be tested for lead. The first draw was collected at 5:30 a.m., when no water had been used since the evening before. The second draw was collected after a 45-second flush. The third draw was collected after a five-minute flush.

[59] Customer Notice Infrastructure Renewal Program for residents living on N. Albany Avenue, from W. Albion Avenue to W. Granville Avenue (Apr. 27, 2015), http://www.cityofchicago.org/content/dam/city/depts/water/supp_info/arcConRpt/2015construction/April%202015/20150427_Albany_50w.pdf.

[60] *Id.*

83. Peysin received the results of the water tests on or about November 29, 2016. The results of the water tests at Peysin's home are as follows:



YOUR LEAD IN WATER TEST RESULTS & ACTION STEPS

YOUR TEST RESULTS

Bottle	Lead level in your water	Lead concentration, parts per billion (ppb)
Bottle #1: "First draw" sample, no water use for 6+ hours	Significant	9.5
Bottle #2: Collected after a 45 second flush	Significant	9.2
Bottle #3: Collected after a 5 minute flush	Significant	5.8

Lead levels - parts per billion (ppb). The symbol ">" means greater than.

Not detected.....Below 0.2
Very low.....>0.2 - 1
Low.....>1 - 2
Moderate.....>2 - 5
Significant.....>5 - 10
Serious.....>10

84. Because the results reflected "significant" levels of lead in Peysin's water even after flushing, the report he received advised him that his "home plumbing does not appear to be a significant source of lead in your tap water," but that "[l]ead may be leaching into your tap water from your service line (the pipe that leads from the road into your home)."

85. The report explained:

> In many single family homes, Bottle #2 reflects lead levels in water from your service line – the pipe that runs through your yard from the utility's main pipe at the street. It detects lead that leached from the pipe over the 6+ hours before you sampled. Based on the lead level in your Bottle #2 sample, we recommend that you check if you have a lead service line.

86. A plumber inspected Peysin's service line and confirmed that it is lead.

87. The report further stated: "Levels indicate that there may also be lead in the water supply, before it reaches your home. Contact your utility to learn about any plans to reduce the

lead levels, especially if your Bottle #3 result is above 5 ppb." Here, Peysin's test result from Bottle #3 was 5.8 ppb.

88. Moreover, despite the fact that the City's notice had advised Peysin that he only needed to flush his pipes for three to five minutes on one occasion after the City's work was completed, the report he received with his water test results explained that this type of flushing would not resolve the lead levels in his water:

> In some homes, running the water ("flushing") for a minute or more before using it for drinking and cooking can help reduce exposures to lead. Unfortunately, this will not work in your case. Your lead level was "Significant" or "Serious" after prolonged flushing.

89. Peysin and his family have thus been injured in their person and property, and will continue to be exposed to lead in their water as a result of the City's water main replacement and partial lead service line replacement to his home.

90. As a result of Defendant's negligent and reckless conduct, Plaintiffs, their families, and the Class have been significantly exposed to a known hazardous substance and, consequently, are at an increased risk of lead poisoning. Accordingly, Plaintiffs seek to recover the costs of diagnostic testing necessary to detect lead poisoning to them, their families, and the Class resulting from Defendant's actions.

91. Plaintiffs also seek to require the City to replace their service lines in full, given that the City has interfered with their private property and caused damage that cannot be reversed.

V. CLASS ALLEGATIONS

92. Plaintiffs seek certification of the following Class pursuant to 735 ILCS 5/2-801:

All residents of the City of Chicago who have resided in an area where the City has replaced the water mains or meters (including, but not limited to, those areas defined in attached Exhibit A) between January 1, 2008, and the present.

93. Illinois law provides that an action may be maintained as a class action if:

> (1) The class is so numerous that joinder of all members is impracticable.
> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
> (3) The representative parties will fairly and adequately protect the interest of the class.
> (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.[61]

A. Numerosity

94. Pursuant to Section 2-801(1), Class members are so numerous that their individual joinder is impracticable. The precise number of Class members is unknown to Plaintiff, but the number of people residing in the more than 1,600 areas where the City has undertaken water infrastructure projects greatly exceeds the number considered in this judicial district to make joinder impossible.

B. Common Questions of Fact or Law

95. Pursuant to Section 2-801(2), questions of fact and law, except as to the amount of damages each member of the Class sustained, are common to the Class. Common questions of law and fact predominate over the questions affecting only individual Class members. Some of the common legal and factual questions, without limitation, include:

a. Whether Defendant's construction, street work, meter installation or replacement, and plumbing repairs have caused and will cause lead to

[61] 735 ILCS 5/2-801.

leach into Plaintiffs' and Class members' water supply, putting them at risk of lead poisoning now and into the future;

b. Whether Defendant owed a duty to Plaintiffs and Class members to disclose the dangers of their drinking water;

c. Whether Defendant intentionally misrepresented, and continues to misrepresent, the safety of the Plaintiffs' and Class members' drinking water to them and the public; and

d. The nature and extent of damages and other remedies to which Defendant's conduct entitles Plaintiffs and the Class members.

C. Typicality

96. Plaintiffs' claims are typical of the claims of the other members of the Class. Plaintiffs, like other members of the Class, have been exposed to same dangers of lead poisoning after the City failed to take adequate measures to protect and warn those affected by City projects that leaked lead into the water supply. Plaintiffs were subject to, and were financially harmed by, a common policy and practice applied by Defendant to all Class members.

D. Adequacy

97. Pursuant to Section 2-801(3), Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs are familiar with the basic facts that form the bases of the Class members' claims. Plaintiffs' interests do not conflict with the interests of the other Class members that they seek to represent. Plaintiffs have retained counsel competent and experienced in class action litigation and intend to prosecute this action vigorously.

E. Superiority

98. Pursuant to Section 2-801(4), a class action is an appropriate method for the fair and efficient adjudication of this controversy because joinder of all Class members are impracticable. The prosecution of separate actions by individual members of the Class would impose heavy burdens upon the courts and Defendant, and would create a risk of inconsistent or varying adjudications of the questions of law and fact common to the Class. A class action would achieve substantial economies of time, effort, and expense, and would assure uniformity of decision as to persons similarly situated without sacrificing procedural fairness.

VI. CLAIMS ALLEGED

A. Count I – Negligence

99. Plaintiffs incorporate by reference all other paragraphs of this Complaint as if fully set forth here.

100. Defendant owed Plaintiffs a duty to exercise reasonable care in providing safe drinking water, free from dangerous contaminants such as lead that would expose them to the unnecessary health risks documented herein.

101. Defendant failed to exercise reasonable care when, despite knowingly contaminating the water supply of Plaintiffs and Class members with lead, it did not take any measures to warn or protect Plaintiffs and Class members from lead exposure and, instead, covered up any contamination by misrepresenting the safety of the water.

102. Defendant knew or should have known that Plaintiffs and the Class members would foreseeably suffer injury from lead exposure as a result of Defendant's failure to exercise ordinary care.

103. Defendant's negligence proximately caused Plaintiffs' and the Class members' damages and their increased risk of harm as documented herein.

104. Plaintiffs and Class members are therefore entitled to the establishment of a medical monitoring program that includes, among other things:

(1) Establishing a trust fund, in an amount to be determined, to pay for the medical monitoring of all Class members; and

(2) Notifying all Class members in writing that they may require frequent medical monitoring necessary to diagnose lead poisoning.

B. Count II – Inverse Condemnation

105. Plaintiffs incorporate by reference all other paragraphs of this Complaint as if fully set forth here.

106. Plaintiffs and Class members own or reside at properties that adjacent to construction or street work, meter installation or replacement, or plumbing repairs conducted by Defendant.

107. During these water main and meter replacement projects, the City irreversibly damages the service lines of Plaintiffs and the class by making them more dangerous. The City uses copper to reconnect the lead service lines owned by Plaintiffs and the Class to the water mains or meters after they are replaced.

108. This practice creates a reaction that causes the release of lead into Plaintiffs' drinking water over time as the lead pipe corrodes more aggressively than it would under normal circumstances. Plaintiffs' property is thus damaged insofar as it is more dangerous than before.

109. Plaintiffs and Class members are entitled to compensation for the damage to their lead service lines caused by the City's work and seek amounts necessary to fully replace their lead service lines with copper piping.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court enter an order or judgment against Defendant including the following:

a. Certification of the proposed Class pursuant to 735 ILCS 5/2-801;

b. Designation of Plaintiffs as representative of the proposed Class and designation of Plaintiffs' counsel as Class counsel;

c. The establishment of a medical monitoring program that includes, among other things:

(1) Establishing a trust fund, in an amount to be determined, to pay for the medical monitoring of all Class members; and

(2) Notifying all Class members in writing that they may require frequent medical monitoring necessary to diagnose lead poisoning;

d. Compensatory damages, including an amount sufficient to fully replace existing lead service pipes with copper pipes or other appropriate lines and repair accompanying damage;

e. The costs of bringing this suit, including reasonable attorneys' fees; and

f. All other relief to which Plaintiffs may be entitled at law or in equity.

VIII. JURY DEMAND

Plaintiffs demand a jury trial on all issues and claims that can be so tried.

Dated: January 9, 2017

Respectfully Submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP
[Firm No. 41580]

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12/06/2017	Plaintiffs' Opposition to Defendant City of Chicago's Motion for Protective Order Against Discovery	C 984 - C 994; C 995 - C 1044
12/15/2017	Defendant City of Chicago's Reply in Support of its Motion for Protective Order Against Discovery	C 1045 - C 1055
01/18/2018	Order rescheduling hearing	C 1056
02/08/2018	Order rescheduling hearing	C 1057
02/23/2018	Order rescheduling hearing	C 1058
03/06/2018	Order rescheduling hearing	C 1059
03/28/2018	Order continuing Case Management Conference	C 1060

REPORT OF PROCEEDINGS