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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REPLY OF DEFENDANT-APPELLANT CITY OF CHICAGO

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ARGUMENT

Plaintiffs concede that they do not "suffer from an existing physical injury or illness" resulting from allegedly increased lead levels caused by the City's maintenance and improvement of its water delivery systems. C566; *see also*, *e.g.*, R105-06. As we explain in our opening brief, under settled Illinois law, a negligence claim requires a present physical injury, and mere risk of injury as a result of exposure to a harmful substance is insufficient. *See*, *e.g.*, Brief of Defendant-Appellant City of Chicago 13-20 ("City Br."). The appellate court majority below erred in departing from this settled principle to hold that exposure could constitute the necessary injury. *Id.*

Plaintiffs' argument that the cost of medical monitoring can constitute an injury for negligence likewise fails under this court's precedents. Plaintiffs fail to cite a single case from this court allowing a negligence claim without physical injury, or allowing such a claim based on financial costs. While plaintiffs point to decisions from other jurisdictions, *see* Plaintiffs-Appellees' Response to the Brief of Defendant-Appellant City of Chicago 11-12, 24 ("Pls. Resp."), they cannot dispute that other states with negligence principles similar to Illinois—such as requiring both "injury" and "damages," or holding that increased risk of harm is not an injury—have rejected medical monitoring remedies without a present physical injury.

As for plaintiffs' inverse condemnation claim, their response fails to distinguish the case law precluding such claims where the alleged injury is necessarily incident to property ownership. Moreover, plaintiffs must plead

"special damages" to state such a claim, but their own complaint and response demonstrate that their supposed damages are shared with thousands of residents throughout the City; plaintiffs present no authority recognizing "special damages" under such circumstances.

We also explained in our opening brief that the majority below wrongly rejected the City's Tort Immunity Act defense. Plaintiffs do not defend the appellate court majority's holding that the City lacked discretion based on an outside organization's recommendations. Instead, plaintiffs argue that medical monitoring is an equitable remedy rather than "damages," and thus the Act does not apply, Pls. Resp. 35-40, but plaintiffs cite the cost of such monitoring as their alleged harm, and such costs constitute "damages" for purposes of the Act. Plaintiffs further argue that the Act cannot preclude a constitutional claim for inverse condemnation, but the Illinois Constitution expressly authorizes the legislature to establish governmental immunity by statute, and the Act expressly applies to constitutional claims. Finally, plaintiffs assert the City has not offered affirmative matter in support of tort immunity, but plaintiffs' own complaint establishes the discretionary nature of the City's actions.

I. PLAINTIFFS LACK THE INJURY REQUIRED FOR A NEGLIGENCE CLAIM.

A. Settled Illinois Law Holds That A Negligence Claim Requires A Present Physical Injury.

As we explain in our opening brief, this court has held that the present injury required for a negligence claim must be a physical injury. Plaintiffs

cannot distinguish the plain language in *A, C & S* explaining that 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); *Cloverhill Pastry-Vend Corp. v. Cont'l Carbonics Prods., Inc.*, 214 Ill. App. 3d 526, 528-29 (1st Dist. 1991); *see also Williams v. Manchester*, 228 Ill. 2d 404, 427 (2008). Allegations "of the unreasonably dangerous nature of the product are insufficient in tort when neither personal injury nor property damage is involved." *A, C & S, Inc.,* 131 Ill. 2d at 444.

Plaintiffs cannot overcome this rule. In arguing that no physical injury is required, plaintiffs assert that the premise of tort law is to compensate "for any loss or injury," Pls. Resp. 9, 18, ignoring that this general statement is limited by the elements, requirements, and doctrines of tort law.

For instance, *Sondag v. Pneuomo Abex Corp.*, 2016 IL App (4th) 140918, illustrates that there is a distinction between the general concept of an "injury" to a "legally protected interest" and "physical harm," which is required for a negligence claim, *id.* ¶¶ 27, 32. Plaintiffs seek to avoid *Sondag*, claiming that because it was a product liability case, it involved "an entirely different theory of liability from this case," Pls. Resp. 19, but this is incorrect. In *Sonda*g, as in this case, the plaintiff alleged that he was injured by exposure to a harmful substance—there, asbestos—and thus *Sondag's*

holding regarding what constitutes an injury fully applies to this case. As this court observed in *A, C & S*, "physical harm caused by" a product is required, whether the theory of recovery is negligence or strict products liability. 131 Ill. 2d at 442-43. Indeed, plaintiffs rely extensively on *Lewis v. Lead Indus. Ass'n, Inc.*, 342 Ill. App. 3d 95 (1st Dist. 2003), another products liability case, for their argument that no present physical injury is required, *see* Pls. Resp. 9, 14-16, undermining their effort to distinguish *Sondag*.

As for plaintiffs' contention that *Sondag* did not address whether a negligence claim under Illinois law requires physical harm, Pls. Resp. 19, this is simply wrong. The court in *Sondag* specifically held that the plaintiff's exposure to asbestos (which had caused observable physical alterations to his body) was insufficient, 2016 IL App (4th) 140918 ¶¶ 29-30, in the absence of "physical harm," *id.* ¶¶ 31-32. As the court explained, "physical harm" was "an essential element" of plaintiff's negligence claim, and because that element was lacking the defendant was entitled to judgment as a matter of law. *Id.* ¶ 36.

Plaintiffs misplace reliance on *Gillman v. Chicago Rys. Co.*, 268 Ill. 305 (1915), and *White v. Touche Ross & Co.*, 163 Ill. App. 3d 94 (1st Dist. 1987), to argue that tort recovery is not limited to physical injuries. Pls. Resp. 18. As we explain in our opening brief, *Gillman* involved an actual physical injury, and *White* primarily concerned accrual, rather than the injury element. City Br. 19.

Plaintiffs also cite the appellate court decision in *Cochran v. Securitas Sec. Servs. USA, Inc.*, 2016 IL App (4th) 150791, as purportedly holding that negligence claims do not require a physical injury, Pls. Resp. 18-19, but that case is wholly off point. As this court explained in reviewing the decision, *Cochran* did not involve a claim based on the risk of future bodily injury; instead, plaintiff alleged that defendant wrongly cremated her son's corpse, and the sole damages claimed were for emotional distress, *Cochran*, 2017 IL 121200 ¶¶ 4-5, 12, 24, which is not alleged here. And, although plaintiffs quote the appellate court's decision in *Cochran* stating that a direct plaintiff alleging emotional distress need not demonstrate a physical impact or injury, 2016 IL App (4th) 150791 ¶ 45, Pls. Resp. 19, this court has rejected that position and held that "a direct victim's recovery for negligently inflicted emotional distress [must] include an allegation of a contemporaneous physical injury or impact," *Schweihs v. Chase Home Fin., LLC*, 2016 IL 120041 ¶ 44; *see also Cochran*, 2017 IL 121200 ¶ 15.

Indeed, plaintiffs admit that "courts previously may have limited negligence plaintiffs to recovery for injuries of 'bodily harm.'" Pls. Resp. 19. They claim that this was due to concerns about proof, but all they cite in support are passages from the appellate court's *Cochran* decision holding that emotional distress claims for direct victims do not require physical impact, *id.*, a position this court has rejected. Moreover, nothing in this court's decisions in *A, C & S*, *Moorman*, or *Williams*, which require physical injury,

suggests that these cases turned on proof concerns. This court continues to apply the economic loss rule, which is a particular application of the physical injury requirement, despite "advancements in medicine" that aid in proving harm. Pls. Resp. 19. The "previous" decisions from this court requiring physical injury are still good law today.

B. Medical Monitoring Costs Are Not An Exception To The Physical Harm Necessary For A Present Injury.

1. Medical Monitoring Costs Are Not A Present Injury.

Nothing in this court's jurisprudence suggests that economic damages such as medical monitoring costs are an exception to the present physical injury requirement established in cases such as *A, C & S*. Indeed, *Williams* further confirms that such economic damages are not an injury for a negligence claim. City Br. at 20-22.

While plaintiffs argue otherwise, Pls. Resp. 18, *Williams* makes clear that an injury must be physical. The example *Williams* provided of an injury was *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483 (2002), where the "present injury was the catheter embedded in the plaintiff's heart," *Williams*, 228 Ill. at 425. Nothing in *Williams* suggests that an injury could be non-physical, and such a suggestion would be irreconcilable with *A, C & S* and *Moorman*. Nor do plaintiffs cite a single case from this court holding that economic damage such as medical monitoring costs could be an injury for a negligence claim.

Plaintiffs also assert that the increased risk and medical monitoring cases "involve different theories of injury," Pls. Resp. 16, but such arguments are meritless. Plaintiffs' complaint states that their negligence claims are based on an "increased risk of harm" from lead exposure. *E.g.*, C331 ¶ 103. And, in arguing that the costs of medical monitoring that they seek to recover do not constitute a "purely economic loss," Pls. Resp. 20, plaintiffs claim that the alleged need for testing is "because of a *threat* to the plaintiffs' health," *id.* at 21 (emphasis added). Nor could plaintiffs have alleged otherwise, as the only reason for medical monitoring is increased risk from exposure to some hazard. Thus, the basis of plaintiffs' negligence claims is an increased risk from exposure, which *Williams* holds is not an injury.

Moreover, plaintiffs fail to explain how medical monitoring costs constitute an "injury" instead of "damages" under Illinois law. Indeed, *Williams'* reasoning establishes that the cost of medical monitoring are only "damages." City Br. at 22-23. Under *Dillon*, 199 Ill. 2d at 506, as confirmed by *Williams*, 228 Ill. 2d at 425-26, an increased risk of future harm is a recognized form of economic loss under Illinois law that can be damages. *Williams*' reasoning is that such economic losses are only damages, not the injury that is necessary to establish a negligence claim. The same is true for any economic loss from paying medical monitoring costs.

We explain in our opening brief that plaintiffs' proposed exception would swallow the rule of *Williams*, City Br. 24-25, yet plaintiffs offer no

response. Under plaintiffs' theory, anyone exposed to an allegedly hazardous substance could sue for medical monitoring regardless of whether he has, or will ever experience, a physical injury. This would abrogate Illinois' settled legal principles and create a new body of liability based on compensating plaintiffs who do not, and likely will never, experience physical harm.

Unable to find support in this court's decisions, plaintiffs instead rely heavily on the appellate court's decision in *Lewis* for the proposition that medical monitoring can be recovered without a present physical injury. Pls. Resp. 9, 14-16. Their interpretation of *Lewis* is flawed for multiple reasons. The appellate court, in *Jensen v. Bayer AG*, 371 Ill. App. 3d 682 (1st Dist. 2007), expressly rejected the argument that Illinois law permits "a claim for medical monitoring ... without proof of present physical injury," refuting plaintiffs' interpretation of *Lewis*, *id.* at 692; *see also* City Br. 23-24. Plaintiffs assert that *Jensen* turned on evidentiary issues, Pls. Resp. 15, but the plain language of *Jensen* distinguishes *Lewis* as a matter of law.

Lewis also pre-dates *Williams* and its explanation that injury and damages are separate elements. 228 Ill. 2d at 425-26. Nor, apparently, did the *Lewis* court have the benefit of briefing on this court's physical injury requirement for negligence, the economic loss doctrine, the single recovery rule, decisions from other states rejecting medical monitoring as an injury, and other arguments presented by the City. *See* A37 ¶ 84 (dissent); Defendants-Appellees' Brief in *Lewis v. Lead Indus. Assoc., Inc.*, 2000 WL

35729174, at *16-21 (Ill. App. Ct. Apr. 7, 2000) (discussing only how increased risk of harm is not an injury). Finally, *Lewis* relied primarily on a non-Illinois case that is incompatible with Illinois negligence jurisprudence. 342 Ill. App. 3d at 101-02; *see infra* 14. Plaintiffs' interpretation of *Lewis* should not be followed here.

2. Recovering Medical Monitoring Costs Without A Physical Injury Would Contradict *Dillon*.

Plaintiffs argue that the single recovery principle is not an issue on this appeal because they have not (yet) filed a subsequent case. Pls. Resp. at 22. The question is not what these individual plaintiffs might do, but whether recognizing a medical monitoring remedy without physical injury is consistent with *Dillon*; it is not.

Plaintiffs rely on non-Illinois cases to argue that the single recovery principle does not apply until a disease actually manifests, Pls. Resp. at 22-24, but this argument contradicts *Dillon*. *Dillon* holds that plaintiffs' single recovery "may embrace *prospective as well as accrued* damages." 199 Ill.2d at 502 (emphasis added). The single recovery rule thus applies to unaccrued—that is, prospective—claims. Moreover, in *Dillon*, the plaintiff sought recovery for the risk of developing ailments that had not yet manifested and likely would never manifest, such as a 0-20% chance of infection. 199 Ill. 2d at 496-97. Under plaintiffs' argument, the *Dillon* plaintiff should have been able to bring subsequent actions if these harms manifested in the future. Yet *Dillon* held the opposite, concluding that all damages—including for

prospective harms that had not yet manifested—must be recovered in a single action. 199 Ill. 2d at 503-04.

C. Medical Monitoring Costs Without A Physical Injury Are Barred By The Economic Loss Rule.

As we explain in our opening brief, the economic loss doctrine precludes plaintiffs from recovering medical monitoring costs in the admitted absence of any present physical injury. City Br. 26-30. Plaintiffs suggest that the economic loss doctrine does not apply because their claims are not rooted in contract law, Pls. Resp. 20-21, but the doctrine is not limited to such claims, as this court explained in *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 422-23 (2004), and *In re Chicago Flood Litig.*, 176 Ill. 2d 179, 185-86 (1997).

Plaintiffs also attempt to avoid the economic loss doctrine by asserting that they have suffered property damage, likening their claim to the asbestos installed in a building in *A, C & S*. Pls. Resp. 22. But the notion that plaintiffs' "injuries have been caused by damage to their property," *id.*, does not square with the requested relief of medical monitoring, which addresses the alleged increased risk of bodily harm, not property damages. Plaintiffs cite no case indicating that a plaintiff can recover costs to monitor his person because of supposed property damage. *Chicago Flood* rejected the proposition that having one form of property harm (lost perishable inventory) could allow recovery for different economic losses (such as lost revenues), 176

Ill. 2d at 201-03; here, plaintiffs' claim for bodily monitoring is even further afield.

Moreover, *A, C & S* recognized a claim for property damage based on the existence of asbestos throughout the plaintiff's buildings, where state law compelled the plaintiff to undertake extensive and costly repairs to abate. 131 Ill. 2d at 437, 439, 446. Noting that the damage to property caused by asbestos is "unique," *id.* at 445, the court warned that its recognition of the claim there "should not be construed as an invitation" to bring claims involving economic loss "within the sphere of tort law through the use of some fictional property damage," *id.* *Beretta* noted "that *A, C & S* predates this court's decision in *In re Chicago Flood*, in which the recognized exceptions to the *Moorman* doctrine were listed." 213 Ill. 2d at 420. Medical monitoring costs in the absence of personal injury do not fit into any of those exceptions. *Chicago Flood*, 176 Ill. 2d at 199. Finally, recovery of economic losses is barred by *Moorman* unless the damage was caused by a "sudden, dangerous, or calamitous occurrence," *Chicago Flood,* 176 Ill. 2d at 201, which plaintiffs do not allege here. A43 ¶ 98 (dissent).

This case is more like *Chicago Flood*, 176 Ill. 2d at 185, 198-201, and *Donovan v. Cty. of Lake*, 2011 IL App (2d) 100390 ¶¶ 43, 56, which applied the *Moorman* doctrine to economic losses caused by water contamination. Plaintiffs make no effort to distinguish *Donovan*, and simply say *Chicago Flood* involved different financial harms, such as lost revenues. Pls. Resp.

21. But any "costs incurred in the absence of harm to a plaintiff's person or property" are barred by the economic loss doctrine, *Beretta*, 213 Ill. 2d at 423, whether lost revenues or medical monitoring costs.

Plaintiffs also claim that because the alleged contaminated water presents a "threat to their person" the economic loss doctrine does not apply, Pls. Resp. 22, but this is the exact argument rejected by *A, C & S* which holds that a "risk of harm" cannot avoid the economic loss doctrine, 131 Ill. 2d at 443. This court regularly applies the economic loss doctrine to actions involving the threat of physical harm, including in *Moorman* itself. *Moorman Mfg. Co. v. Nat'l Tank Co.*, 91 Ill. 2d 69, 82 (1982) (barring claim under the economic loss doctrine despite allegations that defective storage tank "posed an 'extreme threat to life and limb'"); *Chicago Flood*, 176 Ill. 2d at 185, 198-199 (applying economic loss doctrine to losses caused by flooding that required evacuations and risked damage to property).

D. Jurisdictions With Negligence Principles Similar To Illinois' Require Physical Injury For Medical Monitoring.

The City cited numerous supreme court and other decisions from jurisdictions including New York, Oregon, and Michigan rejecting medical monitoring without physical injury. City Br. 30-36 & n.3. Plaintiffs and their amicus do not attempt to distinguish any of these cases.[1]

[1] Plaintiffs' amicus asserts that New York allows negligence claims based on exposure, Amicus Br. 6-7, but does not address *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11, 14-18 (N.Y. 2013), which is directly on point and holds that smokers could not recover for medical monitoring without proof of physical harm. Plaintiffs claim that Massachusetts allows medical monitoring, Pls.

While plaintiffs cite cases from certain jurisdictions allowing recovery of medical monitoring costs without physical injury, those are not persuasive for two reasons. City Br. 35-36. First, those decisions are largely older cases pre-dating *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 439-43 (1997), whose holding and reasoning have persuaded courts more recently to reject medical monitoring without a present physical injury.

Second, those decisions are from jurisdictions following negligence principles that are fundamentally different from Illinois. As we explain, City Br. 13-21 and this Reply 2-9, Illinois negligence law (1) requires a physical injury, (2) requires injury and damages as separate elements, and (3) does not recognize an increased risk of future harm as injury. State supreme courts that follow these principles have rejected medical monitoring without a present physical injury. For example, New York's highest court rejected medical monitoring without physical injury because 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" such that a "threat of future harm is insufficient to impose liability against a defendant in a tort context." *Caronia*, 5 N.E.3d at 14. The Oregon Supreme Court's "precedents establish that the threat of future harm that plaintiff has alleged is not sufficient to give rise to a negligence claim," leading it to reject medical monitoring

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Resp. 11-12, but the First Circuit analyzed Massachusetts law and held that an action for medical monitoring lies only "if a plaintiff could make a showing of subcellular or other physiological change," that is, a physical injury, *Genereux v. Raytheon Co.*, 754 F.3d 51, 56-57 (1st Cir. 2014).

without physical injury. *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 186 (Or. 2008). As Illinois negligence jurisprudence follows these same principles, this court should reach the same result.

Plaintiffs rely on *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984), which is not persuasive for multiple reasons. Not only was this case decided before *Buckley*, it does not discuss or attempt to reconcile its result with the foundational negligence principles recognized by Illinois and other states. Moreover, the opinion was based on District of Columbia negligence law, which had a "lack of clarity." *Id.* at 824-825. By contrast, the legal principles of Illinois negligence law have been well-settled by this court. Finally, *Buckley* and other courts have distinguished *Lockheed* as involving "the presence of a traumatic physical impact," specifically a plane crash, 521 U.S. at 440, which is absent here.

Plaintiffs raise various policy arguments, Pls. Resp. 24-25, but the U.S. Supreme Court and numerous state supreme courts have found these outweighed by the concerns over allowing recovery of medical monitoring costs without a physical injury. City Br. 30-32. Such recoveries would open courts to a flood of unharmed plaintiffs and consume defendants' limited financial resources, impairing their ability to pay plaintiffs with actual injuries. *E.g.*, *Buckley*, 521 U.S. at 441-43. These concerns also reflect the large number of hazardous substances all individuals are regularly exposed to. *Id.* Both these policies and the legal foundations of negligence that these

jurisdictions—and Illinois—follow preclude medical monitoring without a present physical injury.

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

A. Plaintiffs Cannot Distinguish This Case From *Belmar*.

In our opening brief, we explain that plaintiffs' inverse condemnation claim is barred under the necessarily-incident-to-property-ownership doctrine, and specifically this court's decision in *Belmar Drive-In Theatre Co. v. Ill. State Highway Comm'n*, 34 Ill. 2d 544 (1966). City Br. 40-41. Plaintiffs assert that the doctrine is limited to "inconvenience, expense, or loss of business," Pls. Resp. 28, but the 80-year old court-of-claims decision they cite, *Grassle v. State*, 8 Ill. Ct. Cl. 150, 153 (1934), nowhere purports to limit the doctrine. *Belmar* does not cite *Grassle*'s language concerning the necessarily-incident-to-property-ownership doctrine. Instead, *Belmar* applied the doctrine where the defendant's drive-in theater was polluted by light and its business destroyed, far beyond mere inconvenience, expense, or loss. 34 Ill. 2d at 546, 550-51.[2]

Plaintiffs argue that the allegedly increased lead level in their water "interferes" with their right to use their property, Pls. Resp. 27, 29, but the

[2] This court also has applied the necessarily-incident-to-property-ownership doctrine to bar inverse condemnations alleging that the government's actions put plaintiffs at the risk of physical harm. *E.g.*, *Frazer v. City of Chicago*, 186 Ill. 480, 484-85 (1900) (applying doctrine where the "real injury alleged, and for which plaintiffs seek a recovery, is the menace to the health of the inhabitants in the vicinity of the [smallpox] hospital …").

destruction of the business in *Belmar* was a greater interference, yet this court barred the inverse condemnation claim. Plaintiffs also assert they have "direct physical damage" necessitating the repair or replacement of their property, Pls. Resp. 29, but the same could be said of *Belmar*, where illumination from highway lights rendered the plaintiff's movie screens useless. 34 Ill. 2d at 546.

Plaintiffs, like the majority below, assert that *Belmar* is distinguishable because it involved a "sensitive use" of property, Pls. Resp. 28-29, but we explain in our opening brief that this is incorrect, City Br. 39; *Belmar* made clear that the necessarily-incident-to-property-ownership doctrine was an independent ground for rejecting the claims, 34 Ill. 2d at 550. Likewise, plaintiffs' assertion that they received no benefit from the water infrastructure work, Pls. Resp. 29-30, is immaterial. This is not a requirement to apply the doctrine, and plaintiffs in fact have received various benefits from the work. City Br. 38-39 & n.5. Plaintiffs argue they can recover for repairs to existing infrastructure, but the decisions they cite involved new infrastructure. Pls. Resp. 30. Plaintiffs cite no decision allowing inverse condemnation for repairs of existing infrastructure, which is not surprising as residents expect existing infrastructure to be maintained and replaced as found to be appropriate. City Br. 37-38.[3]

[3] Plaintiffs assert that the City "removed portions of Plaintiffs' lead service lines," Pls. Resp. 26, but the City's work took place under the public way and did not remove any portion of the lead service lines on plaintiffs' properties.

B. Plaintiffs Do Not Cite Any Authority Finding "Special Damages" Based On The Allegations Here.

Plaintiffs require "special damage" to prevail on their inverse condemnation claims, City Br. at 41, yet they allege that nearly 80% of Chicago properties—thousands of residents across 1,600 areas in the City—have lead service lines, *id.* at 7-8, 41. Damages shared by thousands of others cannot be "special."

Despite years and several briefs litigating this issue, plaintiffs still cannot cite a single case finding "special damages" for more than a few plaintiffs with the same damages, much less one finding such damages for thousands. Plaintiffs' failure to cite any relevant case law should be conclusive.

Moreover, as the dissent recognized, plaintiffs' inverse condemnation claim is internally inconsistent. A52 ¶ 115 (dissent). Plaintiffs must prove "special" damages for an inverse condemnation claim, but the whole import of plaintiffs' class allegations is that their damages are common to the class. Plaintiffs have not cited any cases holding that an entire class can have "special damages." *Id.*

In contrast, numerous cases from this court and the appellate court hold that where a large number of residents share the same injury, that

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Plaintiffs also assert that the City does not challenge that plaintiffs have adequately alleged damage to their property, *id.* at 27, but the City has pointed out that plaintiffs do not plead any facts to support their conclusory allegations of damage, City Br. 5-6.

injury cannot be special. City Br. 42. Plaintiffs' attempts to distinguish this case law, Pls. Resp. 32-33, only confirm that it bars their claims. Plaintiffs' attempted distinctions show that when some significant percentage of the public experiences the same type of damage, those damages are not special. *Id.* at 32. For example, when people would have to use a different route in downtown Chicago, that injury was not considered "special," even though many people would not travel downtown or be affected by having to use a different route. *Id.* (discussing *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379, 392-94 (1882)).

Finally, plaintiffs ask how many people must be damaged before damages are no longer special. Pls. Resp. 33. This is like asking how many precautions a reasonable person must take not to be negligent. The answer is developed through case law. This court's decisions have never allowed "special damages" allegedly shared by thousands.

C. Plaintiffs Cannot Distinguish *ProLogis*.

"[W]here loss or injury are the consequences of a lawful government action, the government does not owe just compensation." *City of Chicago v. ProLogis*, 236 Ill. 2d 69, 78 (2010). The allegations here fall squarely within that rule. Plaintiffs allege that the City engaged in the lawful action of replacing water mains and meters, and that as a consequence, the lead levels in their water increased.

Plaintiffs claim that the injury in *ProLogis* was "indirect," but provide no explanation of how their alleged injuries here are any less indirect. Pls.

Resp. 34-35. In *ProLogis*, the defendant's bonds were secured by taxes from real estate near O'Hare airport. 236 Ill. 2d at 73. When the City took the underlying real estate through eminent domain, the properties became exempt from taxes. *Id.* at 75. A clear and inevitable result of the properties becoming tax exempt was to render defendant's bonds worthless. *Id.* Nevertheless, the bondholder had no inverse condemnation claim.

Plaintiffs' alleged damages here are at least as "indirect" as those in *ProLogis*. The City did not directly damage plaintiffs' property. Instead, plaintiffs allege that the City's replacement of water mains and meters could have the consequence of elevating lead levels in plaintiffs' water. As with the destruction of the bonds' value in *ProLogis*, such alleged damages are at most an indirect consequence of the City's water infrastructure work, and thus are not compensable.[4]

III. DISCRETIONARY TORT IMMUNITY BARS PLAINTIFFS' CLAIMS.

A. The Costs Of Medical Monitoring That Plaintiffs Seek Constitute Damages, Not Equitable Relief.

The Tort Immunity Act applies to claims for "damages," defined 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); City Br. 49. Medical monitoring costs fit squarely into this definition, as they are compensation for the alleged loss incurred by paying for monitoring. Indeed,

[4] Plaintiffs also cite pre-*ProLogis* cases, Pls. Resp. 35, but to the extent there is any conflict, *ProLogis* controls as the most recently decided case.

plaintiffs' own complaint describes medical monitoring as "damages" and "costs," City Br. 49, and plaintiffs do not claim otherwise in their response.

Plaintiffs assert that paying money is not always damages, Pls. Resp. 38, but *Smithberg v. Ill. Mun. Ret. Fund*, 192 Ill. 2d 291 (2000), which they cite, Pls. Resp. 38, confirms that the monitoring they seek here is damages. *Smithberg* involved a dispute over a man's death benefit, which he had promised to his ex-wife in a settlement. 192 Ill. 2d at 293. This death benefit was wrongfully acquired property in which the ex-wife had a "distinct property interest," such that a constructive trust was appropriate. *Id.* at 299, 302. By contrast, this case does not involve some distinct pot of money in which plaintiffs have a property interest; plaintiffs seek compensation for monitoring costs they allegedly will incur—classic damages.

Plaintiffs rely heavily on *Lewis* to argue that Illinois recognizes medical monitoring, Pls Resp. 14-16, but *Lewis* itself describes medical monitoring as "damages." City Br. 49-50. Nor do plaintiffs have any response to Illinois jury instructions for "damages" that include expenses such as medical testing costs. *Id.* at 50.

Plaintiffs' argument that medical monitoring can be equitable despite the existence of legal remedies, Pls. Resp. 39-40, is irrelevant and confirms their argument contradicts Illinois law. Plaintiffs claim multiple examinations may be required, but regardless of how many examinations are involved, monetary compensation for them is damages. Moreover, because

Dillon establishes that plaintiffs must recover all their remedies, including medical monitoring costs, in a single action, this argument otherwise dooms plaintiffs' claims. Plaintiffs have an adequate legal remedy—the one required by *Dillon*—should they ever become injured.

Finally, plaintiffs rely heavily on federal case law involving whether a class can be certified under Federal Rule of Civil Procedure 23(b)(2). Pls. Resp. 36-38. As previously explained, those cases do not involve the Illinois Tort Immunity Act and cannot overcome clear Illinois holdings and authority. City Br. at 51. Plaintiffs also cite *HPF, L.L.C. v. Gen. Star Indem. Co.*, but that insurance coverage case merely recited the allegations of the complaint without deciding whether medical monitoring actually was injunctive relief. 338 Ill. App. 3d 912, 914-15 (1st Dist. 2003); City Br. 51 n.10.

B. The Tort Immunity Act Can Bar Constitutional Claims.

Plaintiffs' argument that the Tort Immunity Act cannot bar an inverse condemnation claim, Pls. Resp. 40-42, ignores the plain language of the Illinois Constitution as well as the Act. The constitution expressly allows the General Assembly to provide sovereign immunity by statute. Ill. Const., Art XIII, § 4. "This constitutional provision 'now makes the General Assembly the ultimate authority in determining whether local units of government are immune from liability.'" *Harris v. Thompson*, 2012 IL 112525 ¶¶ 16-17. Under the Act, discretionary immunity applies to "an injury." 745 ILCS 10/2-201. "'Injury' includes any injury alleged in a civil action, whether based upon the Constitution of the United States *or the Constitution of the State of*

Illinois …" 745 ILCS 10/1-204 (emphasis added). Thus, in enacting the Act, the General Assembly exercised its constitutional powers to provide immunity from constitutional claims such as inverse condemnation.

Rozsavolgyi v. City of Aurora held that the Act applies to constitutional claims. 2016 IL App (2d) 150493 ¶¶ 97-113. While this court vacated the decision as involving an improper interlocutory question, 2017 IL 121048 ¶ 34, nonetheless the reasoning is persuasive, and should be followed here.

Madison v. City of Chicago, thus, correctly applied the Act to expressly bar inverse condemnation claims. 2017 IL App (1st) 160195 ¶ 29. Plaintiffs state that *Madison* dismissed the inverse condemnation claim based on the Tort Immunity Act's statute of limitations, Pls. Resp. 41, but that confirms that the appellate court held that the Act applied to inverse condemnation claims. 2017 IL App (1st) 160195 ¶ 29 ("[Plaintiff] provided no basis ... for treating [inverse condemnation claims] as outside the Tort Immunity Act.").[5]

C. Plaintiffs' Own Allegations Establish Discretionary Immunity.

The City explained that the allegations of plaintiffs' complaint recognize that the City has discretion in whether and how to replace water

[5] Plaintiffs assert that the City has not sufficiently argued that the Act applies to inverse condemnation claims, Pls. Resp. 41 n.6, but this is frivolous as the City's brief explained why the Act applied to both claims and rebutted the majority opinion's reasoning, City Br. 44-48. Plaintiffs also claim that discretionary immunity should not apply because they allege no "wrongful act," Pls. Resp. 42, but the Act's plain language applies to any "injury" resulting from discretion, regardless of whether there was a wrongful act. 745 ILCS 10/2-201.

infrastructure and what warnings to give, and that the City has given different warnings over time. City Br. 45-46. These allegations demonstrate that discretionary immunity applies to the City's actions. The City cited *Chicago Flood*, a case decided on a section 2-615 motion to dismiss, where this court relied on plaintiffs' allegations to apply discretionary immunity to the City's decisions regarding repairing a tunnel, as supporting dismissal here. City Br. 45, 48. Plaintiffs argue that the City has not established tort immunity, Pls. Resp. 42-44, but in making this argument plaintiffs simply ignore *Chicago Flood*, and indeed the language of their own complaint.

Plaintiffs argue that discretionary immunity is a fact issue, Pls. Resp. 43, but *Chicago Flood* establishes that such immunity can be based purely on the complaint's allegations without any other affirmative matter, 176 Ill.2d at 197. Plaintiffs claim that it is not enough to show that the City decided to modernize its water system, Pls. Resp. 43, but *Chicago Flood* held that the decision about whether to repair a tunnel breach was sufficient to show discretion. 176 Ill. 2d at 197. Moreover, plaintiffs' cases are easily distinguishable as they involve circumstances where municipalities had failed to make repairs and did not present evidence that they made a conscious decision not to make repairs. *E.g.*, *Andrews v. Metro. Water Reclamation Dist. of Greater Chicago*, 2019 IL 12483 ¶ 35 (government did not know of ladder setup that injured plaintiff and thus did not make any decisions regarding it); *Ponto v. Levan*, 2012 IL App (2d) 110355 ¶¶ 71, 76

(municipality did not know about, and thus could not make any decisions concerning, a leak in a water main that allegedly caused an accident). By contrast, plaintiffs' own complaint alleges that the City was aware of the aging water mains and made the conscious decision to replace them. C320 ¶ 56. None of plaintiffs' arguments can avoid that the City has established that discretionary immunity applies here, the same as in *Chicago Flood*.

CONCLUSION

The City respectfully requests that the court reverse the appellate court's judgment and affirm the circuit court's dismissal of plaintiffs' complaint.

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Respectfully submitted,

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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 5,936 words.

/s/ R. Chris Heck
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CERTIFICATE OF SERVICE

I, R. Chris Heck, an attorney, certify that on January 8, 2020, I electronically filed the foregoing *Reply 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.

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