No. 124999

In the Supreme Court of Illinois

GORDON BERRY, and ILYA PEYSIN,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO,

Defendant-Appellant.

On Petition for Leave to Appeal from the Illinois Appellate Court, First District, No. 1-18-0871

There on Appeal from the Circuit Court of Cook County, Illinois, No. 16-CH-02292

Trial Judge: Hon. Raymond W. Mitchell

PLAINTIFFS-APPELLEES' RESPONSE TO THE BRIEF OF DEFENDANT-APPELLANT CITY OF CHICAGO

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POINTS AND AUTHORITIES

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I. NATURE OF THE CASE

Plaintiffs allege that when the City of Chicago replaces water mains and water meters, the construction methods used cause lead to be immediately released into the water supply of residents with lead service lines, and cause increased amounts of lead to leach into the water over time. Plaintiffs also allege that, despite being aware of these risks and that its construction methods expose residents to them, the City of Chicago has done nothing to abate the dangers or adequately provide warning of the risks to its residents prior to construction.

The harm, according to Plaintiffs, has been twofold: (1) the City has created an environment where certain residents have been exposed to increased lead levels in their drinking water and must undergo diagnostic testing to determine the extent of their physical harm; and (2) the City has permanently damaged the lead service lines of homeowners, increasing their rate of corrosion and lead release. To remedy this, Plaintiffs filed a class action complaint, subsequently amended, pleading two counts. Count I, a negligence claim, seeks the establishment of a medical monitoring program to pay for the diagnostic testing of those residents exposed to increased lead levels due to the City's construction methods. Count II, an inverse condemnation claim, seeks to have the City fully replace any service lines damaged by partial lead service line replacements.

The City moved to dismiss Plaintiffs' First Amended Class Action Complaint, which the parties briefed and argued before Judge Raymond W. Mitchell of the Circuit Court of Cook County ("Circuit Court"). In the Circuit Court's May 29, 2018 Order, it dismissed both counts with prejudice. The Illinois Appellate Court reversed the decision on both counts. The City appeals. All questions are raised on the pleadings.

II. ISSUES PRESENTED

1. Whether the Illinois Supreme Court should formally recognize actions for medical monitoring relief, and affirm the Illinois Appellate Court's decision to reinstate Count I.

2. Whether the Appellate Court correctly held that Plaintiffs adequately pleaded a claim for inverse condemnation, where Plaintiffs allege the City's improvement project will cause Plaintiffs' service lines to release lead into their water supply over time.

3. Whether the Appellate Court correctly held the City had not met its burden in establishing the affirmative defense of Tort Immunity on its motion to dismiss.

* * *

III. STATEMENT OF FACTS

A. Plaintiffs' allegations.

Plaintiffs Gordon Berry and Ilya Peysin both reside in Chicago, Illinois, in homes with lead service lines. (A5–A6, ¶¶ 15–16.) Service lines provide water to one's home by connecting to a water main that is part of the municipal water system. (A3, ¶ 8.)

Since 1986, the federal government has banned the use of lead in public water systems due to the public health risks. (*Id.*) Lead is a highly poisonous metal that the body does not break down into another form, allowing it to remain and accumulate in the body for years once consumed. (A2, ¶ 7.) It can cause a myriad of medical conditions, including neuropathy, motor nerve dysfunction, weakened immunity to disease, renal failure, gout, hypertension, muscle and joint pain, memory and concentration problems, and infertility. (A2, ¶ 6.) It has also been identified as a possible cause of cancer. (*Id.*)

For children, the effects can be far worse. (A71, ¶ 13.) Lead stunts brain development, reduces IQ, causes attention deficit disorder, and increases hyperactivity, while causing a number of behavioral issues such as aggression, delinquency, and violence. (*Id.*) Some scholars and experts link increased lead exposure to the prevalence of violent crime and homicides. (A71, ¶ 16.)

As early as the mid-1800s, public health officials and medical journals openly questioned the use of lead by cities, warning that its use posed potential public health risks. (C 312.) By the late 1800s, some states advised against the use of lead pipes altogether, and by the 1920s, some cities began to ban its use outright. (C 312.) Chicago did the opposite, requiring residents to install lead service lines up until the federal government's ban in 1986. (C 312.) Because of this requirement, Chicago now contains

"a legacy of millions" of outdated lead pipes and service lines throughout the City. (C 312.)

Without protection, old, brittle lead service lines can corrode, depositing large amounts of "dissolved or particulate lead" into one's drinking water. (A3, ¶ 8.) Cities across the country, including Chicago, guard against this phenomenon by treating the water supply with a chemical that forms a protective coating on the inside of the water mains, service lines, and pipes. (*Id.*) But this protective coating is not always effective. (A3, ¶ 9.) And, unbeknownst to its residents, the City has knowingly been engaging in construction projects throughout Chicago that disrupt the protective coating. (A4, ¶ 12.)

When the City replaces a water main, the tremors, vibrations, and trauma associated with such construction disturb the pipes and compromise the protective coating. (A3, ¶ 9.) Consequently, unsafe levels of lead leach into the water supply for as long as "weeks or months" following construction projects. (*Id.*)

Further, while reconnecting the residence to the new water main, the City performs a partial lead service line replacement, removing a portion of the lead service line and replacing it with copper. (A3, ¶ 10.) This creates a reaction known as a "galvanic cell." (*Id.*) In addition to any contamination that might occur from the construction itself, the galvanic reaction speeds up the deterioration of the lead pipe over time. (*Id.*)

The City has known about these phenomena for some time. (A4, ¶ 11.) In fact, many cities do not perform partial lead service line replacements for these reasons. (A4, ¶ 10.) Boston, Massachusetts specifically acknowledges that partial lead service line replacements are "very bad for the occupants of the home." (A78, ¶ 42.) Madison, Wisconsin has worked to fully replace all lead service lines because of the dangers of

partial lead service line replacements. (A78, ¶ 43.) And in 2008, Washington, D.C. stopped its accelerated lead service line replacement program when faced with these same problems. (A76, ¶ 36.)

Many studies have revealed the extent of the problem as well. (A4, ¶ 11.) One study, conducted in Chicago by EPA employees and water experts, documented that virtually all homes where there had been some recent physical disturbance or construction produced water samples with lead levels exceeding federal standards for safety. (*Id.*) And even the City's own research showed that the greater the vibrations during water meter replacements, the more significant the increase in post-replacement lead levels. (A80, ¶ 50.) Yet publicly, the City dismissed these studies and continued to insist Chicago's water is "absolutely safe." (A80, ¶ 48.)

Test results from Plaintiffs' homes, however, contradict the City's claims regarding the safety of the water. Gordon Berry's home has shown lead levels as high as 30.8 parts per billion (ppb), which more than doubles the EPA's lead action level of 15 ppb. (A6, ¶ 15.) And Ilya Peysin's water supply has reached levels of 9.5 ppb, a significant amount that poses a health risk to his family. (A7, ¶ 17.)

Plaintiffs allege that, despite these risks, the City has taken insufficient action to alert residents. (A7, ¶ 19.) What little information the City did provide came buried in a handout and merely informed residents to run their faucets for a few minutes after the completion of the construction—significantly different and far less effective measures from what experts recommend. (A4–A5, ¶¶ 12–13.) As a result of the City's actions, Plaintiffs have filed a class action complaint bringing two counts.

Count I brings a claim for negligence against the City, alleging it failed to exercise reasonable care when "it did not take any measures to warn or protect Plaintiffs and Class members from lead exposures and, instead, covered up any contamination by misrepresenting the safety of the water." (A7, ¶ 19.) For relief, Count I seeks "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." *Id.*

Count II brings a claim for inverse condemnation. (A7, ¶ 20.) Plaintiffs allege that the City's water main and meter replacement projects "irreversibly damage[d] the service lines of Plaintiffs and the class by making them more dangerous." (*Id.*) Accordingly, Plaintiffs seek "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." (A7–A8, ¶ 20.)

B. Procedural history.

On January 9, 2017, Plaintiffs filed their First Amended Class Action Complaint against the City. (A67.) The City subsequently filed a motion to dismiss, which the Circuit Court granted. (A61.) The Circuit Court dismissed with prejudice Count I, reasoning that "there is no allegation that either Plaintiff suffered a present injury." (A58.) The Circuit Court also dismissed Count II with prejudice, on the grounds that the damage to Plaintiffs' lead service lines is a "damage borne by all Chicagoans," and therefore is a "loss without legal injury." (A60.)

Plaintiffs appealed, and on May 22, 2019, the Illinois Appellate Court reversed the Circuit Court's decision. Regarding Count I, the majority reasoned that "[a]ccepting 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," which one can reasonably infer they ingested. (A11, ¶ 27.) According to the majority, this sufficed as a present injury under Illinois tort law, which does not require a present *physical* injury. (A13, ¶¶ 34–35.) Relying on *Lewis v. Lead Indus. Ass'n*, 342 Ill. App. 3d 95, 101 (2003), and *Friends for All Children, Inc. v. Lockheed Aircraft Corporation*, 746 F.2d 816, 826 (D.C. Cir. 1984), the majority explained that Plaintiffs' injury—the need for diagnostic testing—is "a present injury compensable in a tort action." (A13, ¶ 35) (quoting *Lewis*, 342 Ill. App. 3d at 101).

The majority also rejected the City's arguments against the adoption of medical monitoring relief in Illinois. It reasoned that the economic loss doctrine did not bar Plaintiffs' medical monitoring claims because the injuries are not "purely economic damages" and their claims "are more in line with tort theory." (A16, ¶ 40.) The majority also noted that the single recovery principle would not bar Plaintiffs' existing claim because of what might happen in future cases; "[s]uch a determination would be improperly speculative and premature at this time." (A15, ¶ 39.)

Regarding Count II, the majority held that Plaintiffs had properly pleaded a cause of action for inverse condemnation. According to the majority, property is considered damaged under the takings clause, when there is a "direct physical disturbance of right *** which an owner enjoys in connection with his property *** ." (A21, ¶ 49.) And the dangerous contamination of water coming into plaintiffs' residences *** certainly interferes with [plaintiffs' right to] the use and enjoyment of their property." (*Id.* ¶ 51.)

The majority further declined to dismiss on the grounds of tort immunity, explaining that it would be inappropriate to do so on the record before the Court. (A17, ¶

43.) The majority emphasized that the City bore the burden of establishing the affirmative defense of immunity. (*Id.* ¶ 42.) But the City did not offer affirmative matter to support the defense. (A17–18, ¶ 43.) And because it was "not apparent from the facts of the plaintiffs' complaint that the City's advice was unique to a particular public office or discretionary"—which it must be for tort immunity to apply at this stage—the Appellate Court would not affirm the Circuit Court on this basis. *Id.*

IV. STANDARD OF REVIEW

While the City moved under both sections 2-615 and 2-619 of the Illinois Code of Civil Procedure, the Circuit Court dismissed Plaintiffs' complaint based solely on section 2-615. (See A57) ("In disposing of this motion to dismiss on the narrowest possible grounds, the Court *** does not reach any of the grounds for dismissal urged under section 2-619."). "A section 2-615 motion attacks the legal sufficiency of a complaint." *Bryson v. News Am. Publ'ns, Inc.*, 174 Ill. 2d 77, 86 (1996). On such a motion, a court "must accept as true all well-pleaded facts in the complaint and all reasonable inferences which can be drawn therefrom." *Id.* In other words, "the court is to interpret the allegations of the complaint in the light most favorable to the plaintiff." *Id.* Thus, the ultimate question "is whether sufficient facts are contained in the pleadings which, if established, could entitle the plaintiff to relief." *Id.* "A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover." *Id.* at 86–87. On appeal, the Court reviews dismissal under either 2-615 or 2-619 *de novo*. *Jane Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. Of Dirs.*, 2012 IL 112479, ¶ 15.

V. ARGUMENT

There is nothing unprecedented about the Illinois Appellate Court's decision to reverse the decision of the Circuit Court. Illinois courts have long granted the relief Plaintiffs seek in both counts of their First Amended Class Action Complaint. For over 20 years, plaintiffs in this state have been permitted to seek medical monitoring as part of a negligence claim—first in *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1119 (N.D. Ill. 1998), and then in *Lewis*, 342 Ill. App. 3d at 101. Likewise, since the 1800s, the Illinois Constitution has afforded Illinois citizens the ability to seek compensation from the government should the government damage property during an improvement project.

The legal premise that allows negligence actions for medical monitoring is elementary. The fundamental goal of tort law has always been to compensate for any loss or injury proximately caused by a defendant. So, when a defendant negligently exposes a group of people to toxic elements, medical monitoring answers the question "Who should pay for the diagnostic testing necessitated by the exposure?" with the obvious answer. The harm to those exposed is not speculative. It is also not resistant to proof. In 2019, science has demonstrated that certain toxins, chemicals, and elements can cause physical harm, the early detection of which is vital. It's no surprise then that a substantial number of states have recognized causes of action for medical monitoring. And this Court should follow the other Illinois courts before it and do the same.

None of the arguments posed by the City foreclose that result. The economic loss doctrine does not apply because losses in a medical monitoring action do not represent "purely economic losses"—or losses "incurred in the absence of harm to a plaintiff's person or property." Medical monitoring actions remedy a threat to the plaintiffs' health due to a defendant's negligence. Moreover, the many courts that recognize medical

monitoring actions do so despite the presence of the single-recovery principle. And even assuming its application, the single recovery principle wouldn't bar the medical monitoring action itself. In theory, it would *only* affect the future personal injury claims of the named plaintiffs because it cannot bar the claims of absent class members who did not participate in the litigation.

The legal premise that allows inverse condemnation claims is equally elementary. In fact, it's written into the Bill of Rights of the Illinois Constitution. That "self-executing" provision allows a property owner to sue for compensation when the government causes damage to the property by any public improvement. It does not matter if the government "lawfully" performed the improvement; if the government damaged the property or interfered with a right a property owner enjoys in connection to it, the property owner can recover. Plaintiffs' complaint details how the City—during water main repairs—removed a portion of their lead service line and replaced it with copper. This adjacent placement of copper and lead then results in galvanic corrosion, a process whereby the metals interact causing Plaintiffs' lead service lines to corrode. The Appellate Court recognized that this interfered with Plaintiffs' right to the use and enjoyment of their property, giving rise to an inverse condemnation claim. That ruling should not be disturbed.

Nor should the Appellate Court's ruling regarding tort immunity. The City did not meet its burden in establishing the affirmative defense, offering no evidence in support. The Circuit Court did not even address the argument. And the Appellate Court rightly ruled that it was not apparent discretionary immunity applied from the face of the complaint. Furthermore, tort immunity does not apply to claims, like Count I, that seek

injunctive relief in the form of a court-supervised medical monitoring program. And Count II derives from a self-executing provision of the Illinois Constitution that is not subject to the Tort Immunity Act.

Plaintiffs have valid claims. They should be permitted to pursue them. This Court should affirm the decision of the Illinois Appellate Court.

A. This Court should formally recognize medical monitoring in Illinois, join the other jurisdictions who have done the same, and agree with the many Illinois courts that have permitted such lawsuits to go forward.

1. Medical monitoring recognizes that injuries do not only occur from blunt trauma and mechanical forces alone, and aims to compensate for those injuries.

Count I of Plaintiffs' First Amended Class Action Complaint brings a claim for medical monitoring—or more precisely a common law negligence claim seeking equitable relief in the form of a medical monitoring program to pay for diagnostic testing of Plaintiffs and the Class to determine the extent of their injuries. (A7, ¶ 19.) A claim for medical monitoring aims to remedy the harm imposed when a defendant's negligence has created an environment where a person—or more often a group of persons—now requires diagnostic examinations to detect a possible injury or disease. For example, when a chemicals company negligently deposits waste containing a known carcinogen, continuously exposing nearby residents who must undergo medical testing to determine the presence of brain cancer, medical monitoring provides the remedy that pays for the MRIs. See *Gates v. Rohm & Haas Co., 24*8 F.R.D. 434, 437 (E.D. Pa. 2008) (under Illinois law, preliminarily approving the settlement of a lawsuit based on the foregoing facts).

Such claims are neither new nor groundbreaking. A significant number of states—including many of the largest in the country—have permitted them for decades.

California, Florida, New Jersey, Maryland, Massachusetts, Missouri, Pennsylvania, Washington, D.C., Nevada, Utah, and West Virginia have all recognized medical monitoring actions.[1] See *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 105 (Fla. Dist. Ct. App. 1999); *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 837–33 (D.C. Cir. 1984); *Potter v. Firestone Tire & Rubber Co., 86*3 P.2d 795, 824 (Cal. 1993); *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 898 (Mass. 2009); *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 80, *on reconsideration in part*, 71 A.3d 150 (Md. 2013); *Hansen v. Mtn. Fuel Supply Co.*, 858 P.2d 970, 978 (Utah 1993); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717 (Mo. 2007); *Ayers v. Township of Jackson.*, 525 A.2d 287, 312 (N.J. 1987); *Simmons v. Pacor, Inc.*, 674 A.2d 232, 240 (Pa. 1996); *In re W. Va. Rezulin Litig. v. Hutchison*, 585 S.E.2d 52, 71 (W. Va. 2003); *Sadler v. PacifiCare of Nevada, Inc.*, 340 P.3d 1264, 1270 (Nev. 2014). In doing so, courts often cite for support a hypothetical first used by the D.C. Circuit in *Friends for All Children*.

In the hypothetical, a driver runs a red light, knocking a motorcyclist off his bike. *Friends for All Children*, 746 F.2d at 825. The motorcyclist naturally goes to a hospital "to determine whether he has suffered any internal head injuries." *Id.* The tests prove negative. *Id.* Yet, while the motorcyclist is fortunate to escape any physical injuries, it's not as if he hasn't been harmed; he should still "be able to recover the cost for the various diagnostic examinations proximately caused" by the driver's negligence. *Id.*

[1] The City argues that the United States Supreme Court rejected a claim for medical monitoring. See *Metro-N. Commuter R.R. v. Buckley*, 521 U.S. 424, 117 S. Ct. 2113 (1997). But "[t]his is not entirely accurate. The Court merely held that medical monitoring was not provided for by the Federal Employers' Liability Act." *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 105 (Fla. Dist. Ct. App. 1999) (discussing *Metro–N. Commuter R.R.*, 521 U.S. 424 (1997).

The hypothetical uses a car accident intentionally to illustrate why the law should not always require proof of some existing physical injury as a prerequisite to having an actionable harm in a negligence action. See *id.* ("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."). But obviously the need for diagnostic testing can occur in the absence of some collision or accident like the above. Over-the-counter drugs may contain carcinogens, paint used on toy trucks may contain lead, and factories may expose residents to toxic pollution.

"[T]ort law developed in the late Nineteenth and early Twentieth centuries, when the vast majority of tortious injuries were caused by blunt trauma and mechanical forces." *Donovan*, 914 N.E.2d at 901. Times have changed; the law has adapted. See *Id.* And "[i]t is difficult 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." *Friends for All Children*, 746 F.2d at 826. So "[w]hen a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations." *Id.* Illinois law is not so illogical as to deny recovery to these Plaintiffs, and therefore this Court should formally recognize medical monitoring actions in this state. Indeed, trial judges and appellate courts across Illinois already have.

2. Illinois courts have allowed plaintiffs to bring medical monitoring cases under Illinois law for over 20 years.

Since at least 1998, Illinois courts relying on Illinois law have allowed claims for medical monitoring in virtually unanimous fashion. See, *e.g.*, *Berry v. City of Chicago,*

2019 IL App (1st) 180871; *Lewis*, 342 Ill. App. 3d at 101; *In re NCAA Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 591 (N.D. Ill. 2016); *Stella v. LVMH Perfumes & Cosmetics USA, Inc.*, 564 F. Supp. 2d 833, 836 (N.D. Ill. 2008); *Muniz v. Rexnord Corp.*, No. 04 C 2405, 2006 WL 1519571, at *3 (N.D. Ill. May 26, 2006); *Cary*, 999 F. Supp. at 1119; see also *Gates*, 618 F. Supp. 2d at 366 (applying Illinois law). And in 2003, relying on Illinois law and basic tort principles, the Illinois Appellate Court held that a plaintiff may seek "diagnostic testing to detect a possible injury, [for] which testing was made necessary by a defendant's breach of duty." *Lewis*, 342 Ill. App. 3d at 101.

In *Lewis*, a group of parents sued a corporation that "promoted the use of lead pigments in paint sold in the United States." *Id.* at 98. The six-count complaint alleged that "as a result of the health hazards associated with lead-based paints offered for sale prior to 1978, all minor children in Illinois 'are now, have been in the past, and will be indefinitely in the future, exposed to and at risk for lead poisoning[,]' and, as a consequence, all children six months through six years of age must be either screened for lead poisoning or assessed for the risk of developing it." *Id.* at 98–99. The trial court dismissed the case in its entirety, "characterizing the relief sought by the plaintiffs as damages for an increased risk of future harm." *Id.* at 100.

The *Lewis* court, however, noted the injury was not an "increased risk of future harm." *Id.* at 101. Rather, relying on the *Friends for All Children* decision, the *Lewis* court held defendant's negligence created a situation whereby the plaintiffs must incur "the cost[s] of medical testing," and "the trial court erred in concluding that the injury claimed by the plaintiffs was not compensable in a tort action." *Id.* at 101–02.

The City cites only one Illinois case that purportedly disagrees with *Lewis* and the other Illinois decisions: *Jensen v. Bayer AG*, 371 Ill. App. 3d 682 (2007). But the *Jensen* court did not disagree with *Lewis*. Instead, it evaluated whether the plaintiff had presented sufficient evidence to survive summary judgment on his medical monitoring claim. *Jensen*, 371 Ill. App. 3d at 692. And because the plaintiff had "offer[ed] nothing in support of his medical monitoring claim other than his own allegation that [the product] caused him leg cramps," and even his "own doctors testified that no future medical monitoring would be necessary," the court granted summary judgment in favor of the defendant. *Id.* To the extent the *Jensen* court even discussed *Lewis*—in dicta, no less—it only stated it "consider[ed] *Lewis* to be inapplicable." *Jensen*, 371 Ill. App. 3d at 693.

In this case, much like the other Illinois courts before it, the majority agreed with the reasoning of *Lewis*. It explained that the harm to plaintiffs is "not speculative" and the need for diagnostic medical testing is "capable of proof within a reasonable degree of medical certainty." (A13, ¶ 35) (citing *Lewis*, 342 Ill. App. 3d at 101). The City nevertheless argues this holding would run afoul of various Illinois tort principles. None of its arguments are persuasive.

a. Claims for medical monitoring do not violate the so-called "present injury requirement" of *Williams* or *Dillon*, because tort law has never limited compensable injuries to solely physical harms.

The City relies largely on two cases—*Williams v. Manchester*, 228 Ill. 2d 404 (2008), 888 N.E.2d 1, and *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483 (2002)—to challenge the majority opinion and *Lewis.* But these cases merely reaffirm a notion that is not in dispute: increased risk of future harm cannot alone serve as the basis of a claim for damages. Actions to establish a medical monitoring fund to pay for diagnostic testing,

however, differ from actions to recover compensatory damages for increased risk of harm.

As explained by the *Lewis* court, there is a "fundamental difference" between the two. *Lewis*, 342 Ill. App. 3d at 101. In a claim seeking compensatory damages for an increased risk of harm, the injury "is the anticipated harm itself." *Id.* By contrast, in a claim seeking to recover the costs of diagnostic medical examinations, the injury "is the cost of the examination." *Id.* Illinois law permits the latter because the "defendant's breach of duty [made] it necessary for [the] plaintiff to incur expenses" that he or she would otherwise have not; and this is "[no] 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.* (citing *Carey*, 999 F. Supp. at 1109).

Plaintiffs' case presents the latter scenario, not the former. Thus, *Williams* and *Dillon* do not preclude Plaintiffs' case because they are simply not at odds with it. In fact, the court in *Lewis* explicitly agreed with the conclusion ultimately reached by the court in *Williams*. See *Lewis*, 342 Ill. App. 3d at 101 ("The defendants are correct in their assertion 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."). The cases merely involve different theories of injury. *Id.* at 101–02; see *Muniz*, 2006 WL 1519571, at *5–6 ("[I]n Illinois, an increased risk of future harm, without more, is insufficient to support an award of damages under the theories of strict liability, negligence, or willful and wanton misconduct. However, that is not what is sought in this case.") (citation

omitted); see also *Petito*, 750 So. 2d at 105 ("[A] claim for medical monitoring is wholly distinguishable from a claim for enhanced risk of disease.").

To further illustrate the difference, examine the facts of *Williams*. The case involved a wrongful death claim against a driver for the death of an unborn fetus following a car accident. *Id.* at 407. The fetus suffered no injuries from the collision, but died after the mother opted to terminate the pregnancy so she could receive medical treatment. *Id.* at 408–12. To bring a claim under Illinois' Wrongful Death Act, however, the mother had to prove an injury *to the fetus* that, had the fetus not died, could have supported an independent action against the driver. *Id.* at 421.[2] That the fetus sustained no injury from the collision itself made that difficult. *Id.* at 425. Thus, the mother could only define the fetus's injury as the "increased risk of future harm" from radiation exposure following a post-accident x-ray. *Id.* The court then noted that because the increased risk of future harm cannot stand alone as the basis of an underlying claim brought by the fetus, a wrongful death claim by the mother must also fail. *Id.* at 426.

Crucially, the mother in *Williams* never argued her fetus would require diagnostic testing. *Id.* at 427 ("Plaintiff's *sole* contention is that Baby Doe suffered an increased risk of future harm from radiation exposure.") (emphasis added). Nor could she; her decision to terminate the pregnancy rendered any diagnostics impossible. And even if they were possible, the mother would still have to prove the need for the exams, which she also couldn't do given the "purely speculative" nature of any future injury. *Id.* at 415.

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[2] "[A]n action under the Wrongful Death Act may be said to be derivative of the decedent's rights, for the ability to bring the wrongful death action depends upon the condition that the deceased, at the time of his death, had he continued to live, would have had a right of action against the same person or persons for the injuries sustained." *Id.* (internal citations and quotations omitted).

Therefore, by necessity, the mother had to argue that the anticipated harm was the injury itself, and one for which she could receive compensatory damages. Plaintiffs do not assert the same here. And the distinction is more than mere semantics.

Moreover, the City distorts *Williams* and *Dillon*, equating the requirement that a plaintiff must plead a present injury as a requirement that such injury must also manifest as *physical* harm or disease. See Def.'s Br. at 17–18. But as the Appellate Court explained, neither *Williams* nor *Dillon* ever required that a present injury in tort must also be a "present *physical* harm." (A13, ¶ 34) (emphasis added).

The fundamental premise of tort law is to justly compensate for any loss or injury proximately caused by the tortfeasor." *Clark v. Children's Mem'l Hosp.*, 2011 IL 108656, ¶ 29; see also *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 406 (1997) ("There is universal agreement that the compensatory goal of tort law requires that an injured plaintiff be made whole."). And Illinois does not limit recovery in tort to purely physical injuries. *Gillman v. Chi. R. Co.*, 268 Ill. 305, 309 (1915) (defining a tort injury as an "invasion of a right and the damages resulting from such invasion. 'Injury' means detriment, hurt, harm, or damage *** ."); *White v. Touche Ross & Co.,* 163 Ill. App. 3d 94, 101 (1987) ("An injury has been defined as an invasion of a person's interest, even if there is no immediate harm or that harm is speculative *** . Accordingly, we hold that [plaintiff] was injured *** [because] he was faced with either having to contest the IRS' action, which requires the expenditure of both time and money, or he could have chosen not to contest the deficiency and proceed to pay the requested amount.") (*citing* RESTATEMENT (SECOND) OF TORTS § 7, Comment a (1965), *and* BLACK'S LAW DICTIONARY 706 (5th ed. 1979)). That is true even in negligence cases. *Cochran v.*

Securitas Sec. Servs. USA, Inc., 2016 IL App (4th) 150791, ¶ 45, *aff'd*, 2017 IL 121200 ("[A] plaintiff who is a direct victim of a defendant's negligence may bring a cause of action *** *without the added requirement of demonstrating a physical injury or impact.*") (emphasis added).

While courts previously may have limited negligence plaintiffs to recovery for injuries of "bodily harm," that was due to concerns about proof—or rather a lack thereof. Courts believed plaintiffs would be unable to evidence nonphysical injuries (like emotional distress) using objective proof, which would open the door to fraudulent claims. *Id.* ¶ 41. As advancements in medicine over time meant doctors could objectively identify and diagnose such nonphysical harms, the limitations on negligence claims without the presence of bodily harm eroded as well. *Id.* ¶¶ 42–44. Thus, the City's contention that a negligence action must be accompanied by some form of bodily harm is not only antiquated, but false.

The City's citation to *Sondag v. Pneumo Abex Corporation* changes nothing. 2016 IL App (4th) 140918. *Sondag* involved a products liability action—an entirely different theory of liability from this case. *Id.* ¶ 21. And the issue in *Sondag* was not whether Illinois law only permitted claims for negligence that caused some physical harm. *Id.* ¶ 32. The issue was that the plaintiff alleged he had suffered physical harm but presented no evidence at trial to support his allegations. *Id.* The case does not help this Court determine whether to recognize medical monitoring actions in Illinois, or whether plaintiffs have adequately pleaded one.

It also fails to rebut the notion that, reading Plaintiffs' complaint in a light most favorable to them, they have pleaded a present, compensable injury: Plaintiffs have

consumed water tainted with lead on account of the City's water construction projects and failure to warn thereof, and Plaintiffs now must undergo a diagnostic test to determine the extent of any physical harm. (A10, 13, ¶¶ 27, 35.) Plaintiffs have been clearly wronged by the City's negligence, and Illinois tort law does not—and should not—prohibit the ability to remedy that.

b. Because Plaintiffs' claims for medical monitoring do not even meet the definition for a purely economic loss, the *Moorman* Doctrine does not apply.

The City also claims that the economic loss doctrine—or *Moorman* doctrine—bars Plaintiffs' claims because medical monitoring actions seek the defendant to pay for diagnostic testing. Def.'s Br. at 26–30. According to the City, the cost of these exams represent purely economic losses unrecoverable in tort. The City, however, relies on an interpretation of the rule that courts characterize as "overly simplistic." *Trade Sols. v. Eurovictory Sports*, No. 97 CV 1153, 1998 WL 111639, at *5 (N.D. Ill. Mar. 6, 1998). And its analysis completely fails to comport the realities of Plaintiffs' injuries with the definition of an "economic loss" under *Moorman*.

To be certain, in *Moorman Mfg., Co. v. National Tank, Co.*, this Court held that the plaintiffs could not succeed in recovering purely economic losses under a tort theory because "*contract law*, which protects expectation interests, provide[d] the proper standard *** ." 91 Ill. 2d 69, 81 (1982) (citation omitted). The Court then proceeded to define "economic loss" as "'damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property' as well as 'the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.'" *Id.* at 82 (citations omitted). Plaintiffs' complaints

are not rooted in disappointed contractual or commercial expectations. They do not sue for the benefit of the bargain. The duty Plaintiffs allege the City to have breached lacks any basis in contract. This case does not implicate the policies served by *Moorman*.

The City's argument also misconstrues the nature of medical monitoring relief and misrepresents what constitutes an economic loss. "Purely economic losses" represent costs "incurred in the absence of harm to a plaintiff's person or property." *City of Chicago v. Beretta U.S.A., Corp.*, 213 Ill. 2d 351, 420 (2004). Medical monitoring actions, however, aim to establish a court supervised program to provide diagnostic medical testing because of a threat to the plaintiffs' health due to a defendant's negligence. They therefore seek to remedy an injury—in this case, the need for diagnostic medical testing following the consumption of lead-tainted water—that does not even meet the definition of a purely "economic loss" under Illinois law, rendering *Moorman* inapplicable. In this sense, the City's reliance on *In re Chicago Flood Litig.*, 176 Ill. 2d 179 (1997) is misguided. The harm in *Chicago Flood*— "lost revenues" and "lost wages, tips, and commissions"—do not resemble the harm pleaded by Plaintiffs. *Id.* at 185. Another case, *Bd. of Educ. of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428 (1989), illustrates the difference.

In *A, C & S*, the plaintiff school board sought damages to recover the cost of removing asbestos from the defendant who manufactured and distributed the toxic material. *Id.* at 436–37. Plaintiffs could not pursue a contract theory, and the injury could only be characterized as "financial." *Id.* Yet, the Illinois Supreme Court refused to apply the *Moorman* doctrine because asbestos "contamination is a form of property damage," and so the harm did not meet the definition of a purely economic loss. See *Beretta U.S.A.,*

Corp., 213 Ill. 2d at 420 (analyzing *Bd. of Educ. of City of Chicago v. A, C & S, Inc.*'s application of the *Moorman* doctrine). As in *A, C & S*, just because the plaintiffs may need to incur some financial expense to abate their harm (in this case, to cover the costs of medical testing as opposed to asbestos removal), that does not mean they incurred losses *in the absence of harm to their person or property*. The City completely overlooks that Plaintiffs' injuries have been caused by damage to their property—the contamination of their water supply with lead—and threat to their person—the consumption of that contaminated water. In other words, the so-called "financial costs" that the City focuses on do not differ from those that would be sought to make a plaintiff whole in any other personal injury claim. They do not qualify as "economic losses" under *Moorman*.

This is precisely what the Appellate Court below recognized when it stated that the injury of which Plaintiffs complain stems "from the harm they suffered because the City's alleged misconduct caused high levels of lead to leach into the water they consumed." (A15–A16, ¶ 40.) The Appellate Court's decision thus accords with existing Illinois Supreme Court precedent and should not be reversed.

c. The single recovery principle has not been implicated here or in other jurisdictions that, like Illinois, have adopted medical monitoring claims.

The City argues that allowing Plaintiffs to recover "other damages" in a later trial would violate Illinois's single recovery principle. See Def.'s Br. at 25. But even assuming that were true, it would not be an issue for this appeal for the obvious reason: no Plaintiff has filed a subsequent case actually seeking other damages.

To be sure, many states have permitted medical monitoring claims despite the presence of the single-recovery principle or similar legal concept. In New Jersey, for example, the Supreme Court explicitly stated "neither the single controversy doctrine nor

the statute of limitations *** will preclude a timely-filed cause of action for damages prompted by the future 'discovery' of a disease or injury related to the tortious conduct at issue in this litigation." *Ayers*, 525 A.2d at 300 (internal citations omitted). According to that Court, "the single controversy rule, intend[s] to avoid the delays and wasteful expense of the multiplicity of litigation which results from the splitting of a controversy." *Id.* (quotations omitted). Therefore, it "cannot sensibly be applied to a toxic-tort claim filed when disease is manifested years after the exposure, merely because the same plaintiff sued previously to recover for property damage or other injuries. In such a case, the rule is literally inapplicable since, as noted, the second cause of action does not accrue until the disease is manifested; hence, it could not have been joined with the earlier claims." *Id.* Other states agree. See *Donovan*, 914 N.E.2d at 902 ("the single controversy rule would not apply because the subsequent cause of action would not accrue until the disease is manifested."); *Fearson v. Johns–Manville Sales Corp.*, 525 F. Supp. 671, 674 (D.D.C. 1981) ("Under defendants' theory, plaintiffs would be forced to come into Court as soon as any minimal problem is diagnosed and seek speculative damages as to any other injuries that might develop in the future. Plain common sense teaches that the law was never meant to be so unreasonable."); see also *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 850 (3d Cir. 1990) ("[S]everal courts have modified the traditional rules discussed above to better serve in the toxic tort context"). Finally, even if the single recovery principle did apply, it still would not bar the claims of absent class members. See *Leib v. Rex Energy Operating Corp.*, No. 06-CV-802-JPG-CJP, 2008 WL 5377792, at *9 (S.D. Ill. Dec. 19, 2008) ("[T]he preclusive effect of a judgment in a class action seeking only declaratory or injunctive relief does not extend to class members'

individual damage claims brought in separate actions *** . A judgment on that claim would not prevent a class member from later bringing a personal injury lawsuit seeking damages, although the class member may be bound by issues actually determined in the class action and may be unable to recover for services received from the medical monitoring fund."). For all of these reasons, the single recovery principle does not preclude this Court from recognizing medical monitoring claims in Illinois.

3. Medical monitoring actions are supported by important policy considerations that the City ignores.

The policy arguments supporting the adoption of medical monitoring are not limited to just making innocent plaintiffs whole. Medical monitoring actions have additional benefits. First, they promote early detection, and in many instances provide notice to individuals who may not otherwise have considered it necessary to undergo diagnostic testing. *Donovan*, 914 N.E.2d, at 902 ("[E]arly detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury."); *Petito*, 750 So. 2d at 106 ("Public policy actually favors this result since the potential liability of a defendant is likely to be limited by the commencement of such a fund, as early detection will lessen the damages that a plaintiff will ultimately suffer."). For certain individuals, this can quite literally mean the difference between life and death.[3] And given the role that medical monitoring programs

[3] For example, "[t]he consequences of delayed or inaccessible cancer care are lower likelihood of survival, greater morbidity of treatment and higher costs of care, resulting in avoidable deaths and disability from cancer. Early diagnosis improves cancer outcomes by providing care at the earliest possible stage and is therefore an important public health strategy in all settings." See "Early Diagnosis," World Health Organization, available at https://www.who.int/cancer/prevention/diagnosis-screening/en/ (last visited November 25, 2019).

and class actions play in notifying otherwise unaware class members, this importance should not be discounted. Moreover, medical monitoring claims deter the toxic conduct that exposes typically large numbers of individuals to potential harm in the first place.

By contrast, the primary policy consideration offered by the City has proven untrue. Specifically, the City claims recognizing medical monitoring actions will lead to "flooding the courts with uninjured plaintiffs." Def.'s Br. at 11. Aside from being worn, the "floodgates" argument has proven wrong. Perhaps a litigant could make the argument in good faith 21 years ago. But Illinois courts have long allowed these claims. Other states have permitted them for longer. And the City provides no evidence of any "flooding" of the court system.

In short, so many states provide for medical monitoring because the obvious "positives" outweigh whatever "negatives" defendants can muster. The cause of action also appeals to the most basic sense of equity. When a tortfeasor causes such widespread harm, the tortfeasor should remedy it. That is as much a common sense principle as it is a longstanding tort principle. And Illinois would be wise to acknowledge it. This Court should affirm the Illinois Appellate Court's ruling regarding Count I.

B. Plaintiffs have sufficiently pleaded a claim for inverse condemnation where the City's improvement project—the replacement of public water mains—caused damage to their private property—Plaintiffs' lead service lines.

Claims for inverse condemnation aim to compensate residents for damage to their private property caused by an otherwise lawful government action. They remedy a type of governmental taking and thus derive from state constitutional protections. Specifically, the Illinois Constitution provides that "[p]rivate property shall not be taken *or damaged* for public use without just compensation." ILL. CONST. ART. I, § 15 (emphasis added). According to this Court, the inclusion of the phrase "or damaged" affords a property

owner in Illinois greater protection than its federal counterpart because the Illinois Takings Clause guards against *both* governmental taking of property *and* governmental damage to property. See, *e.g.,* H*ampton v. Metro. Water Reclamation Dist. of Greater Chicago,* 2016 IL 119861, ¶ 27; see also *International College of Surgeons v. City of Chicago*, 153 F.3d 356 (7th Cir. 1998). So when the government causes damage to one's property through public construction projects—or any "improvement that is public in its character"—the owner of that property may recover compensation in an inverse condemnation action. See *Cuneo v. City of Chicago*, 379 Ill. 488, 490 (1942).

Count II of Plaintiffs' complaint sets forth the nature of the damage to their property caused by the City. Plaintiffs allege that the City performed, without their consent, a partial lead service line replacement. (A76, ¶ 32.) This means that, while replacing water mains, the City removed portions of Plaintiffs' lead service lines and replaced them with copper (or another dissimilar metal). *Id.* This action causes "galvanic corrosion"—that is, when two dissimilar metals come in contact with each other in the presence of water, the water provides a "pathway" for metallic ions to move from one metal (the anode) to the other (the cathode). (A81, ¶¶ 53–54.) As a result, the anode—in this case, the lead service line—experiences an accelerated rate of corrosion. *Id.* In short, the partial lead service line replacement performed by the City physically damaged Plaintiffs' property by causing the corrosion of their service line, which consequently releases lead into Plaintiffs' drinking water.[4]

[4] Notably, many other cities do not perform partial lead service line replacements for this reason; instead, they work with residents to replace the entire service line to avoid endangering the residents. (See A78, ¶¶ 36, 42–44.)

The effects of galvanic corrosion are irreversible. (A68, ¶ 4.) To avoid future lead release into their drinking water, Plaintiffs need to replace the entire service line. That will cost thousands and amounts to precisely the kind of "wrongs *** our constitution was designed to prevent *** ." *Rigney v. Chicago*, 102 Ill. 64, 73 (1882) (quoting *Nevins v. The City of Peoria*, 41 Ill. 502 (1866)). Plaintiffs therefore seek compensation to have the line fully replaced.

The Appellate Court held that these allegations adequately stated a claim for inverse condemnation because "[p]roperty is considered damaged for the purposes of the takings clause if there is any direct physical disturbance of a right, *** which an owner enjoys in connection with his property" and "gives the property an additional value[.]" (A21, ¶¶ 49–50) (quoting *Hampton*, 2016 IL 119861, ¶ 27) (internal quotations omitted). "The dangerous contamination of water coming into plaintiffs' residences" caused by the City's partial lead service line replacement "certainly interferes" with Plaintiffs' "right to the use and enjoyment of their property without interference." (A21, ¶ 51.)

This much the City does not challenge. Nowhere does it contend that Plaintiffs have not adequately alleged damage to their property caused by the City's construction. Rather, the City suggests that Plaintiffs, despite sustaining this damage, cannot recover because they (1) have only incurred damage "necessarily incident to property ownership;" (2) have not suffered "special" damages in excess of that experienced by the public generally; and (3) only endured losses by means of a lawful government action. See Def.'s Br. at 36–44. Not one of these arguments justifies reversal of the Appellate Court's decision. Plaintiffs address each in turn.

1. Physical damage to a home's water service line shares nothing in common with the "inconveniences" or "loss of business" that courts have deemed "necessarily incident to property ownership" adjacent to a public improvement.

The City contends that the Appellate Court erred in reviving Plaintiffs' inverse condemnation count because the alleged damage to Plaintiffs' service lines is "necessarily incident to property ownership" and therefore "*damnum absque injuria*—[a] loss without legal injury." Def.'s Br. at 36. Yet the harm Plaintiffs' complain of—physical damage to their service lines that causes continuous lead contamination of their drinking water—does not correspond with the type of damage Illinois courts have deemed "incident to property ownership."

The City conspicuously does not provide a definition of "damage necessarily incident to property ownership," even though one exists. As Illinois courts have held, inverse condemnation damages do not include "inconvenience, expense, or loss of business necessarily occasioned to the owners of abutting property during the progress of the work by the construction of a public improvement," because they amount to "merely a burden incidentally imposed upon private property adjacent to a public work *** ." *Grassle v. State*, 8 Ill. Ct. Cl. 150, 153 (1934); see also *Osgood v. City of Chicago*, 154 Ill. 194, 198 (1894) (landlord could not recover "loss of rent" in inverse condemnation action due to a temporary obstruction of access during construction because such was "merely a burden incidentally imposed upon private property adjacent to a public work").

But no part of this definition would preclude Plaintiffs from recovery. Plaintiffs complain of ***direct physical damage*** to their services lines—property that must be entirely replaced by an invasive and costly construction project. This harm does not

amount to a mere "inconvenience" or incidental burden by virtue of being in the vicinity of a public work.

Examples from case law only underscore the difference. These include proximity to a police station, the building of a nearby hospital, or vibrations and tremors felt from construction. See, *e.g.*, B*elmar Drive-in Theatre Co. v. Ill. State Toll Highway Com.*, 34 Ill. 2d 544, 550 (1966). These oft-cited instances perhaps bar recovery where a property owner simply had the misfortune of living near a new public structure. But, notably, not one of these harms deemed "necessarily incident to property ownership" involves actual physical damage to property that must be repaired or replaced.

The City's attempts to compare the Plaintiffs' situation to that in *Belmar* consequently fail. In *Belmar*, a drive-in movie theater complained of light pollution from a nearby highway kiosk. See *Id.* Given the above, it's no mystery why this Court denied the movie theater recovery: the light pollution amounted to nothing more than an "inconvenience, expense, or loss of business" due to the drive-in movie theater's distance to the highway, however unfortunate its impact on the business.

Still, the City's reliance on *Belmar* fails for another reason. As this Court explained, the drive-in theater's losses stemmed entirely from its "sensitive use" of the property. See *Id.* And "damages arising from a sensitive or delicate use of land are not compensable" in inverse condemnation actions. *Id.* This "alone serve[d] to demonstrate the inadequacy" of the drive-in movie theater's complaint. *Id.* As plaintiffs' property lacks any such sensitivities, *Belmar* provides no guidance.

Moreover, the entire justification for the concept of "loss without legal injury" is the notion that "the property owner is compensated for the injury sustained by sharing the

general benefits which inure to all from the public improvement." *Id.* As the Appellate Court explained, the plaintiffs here "did *not* share in the general benefits of the replaced water mains where such replacement *** actually made their water *more dangerous* than that consumed by the general public." (A13, ¶ 35) (emphasis added). So even the rationale underpinning the legal concept on which the City relies is absent here.

Finally, the City's position that inverse condemnation claims cannot remedy damage that occurred as a result of improvements to "existing" infrastructure lacks any basis in law. See Def.'s Br. at 40. The City cites no case for the proposition; it invents a rule and then claims plaintiffs have failed to rebut it. See *Id.* To be certain, no such rule exists. See *Rigney*, 102 Ill. at 72 (noting that "the change of the grade of a public highway, or the erection of a public improvement of any kind, that causes any direct physical injury to the property of a private person is actionable"); *Chicago & W.I.R. Co. v. Ayres*, 106 Ill. 511, 518 (1883) ("[I]f the construction *and operation of the railroad or other improvement* is the cause of the damage, though consequential, the party damaged may recover.") (emphasis added); see also*, e.g., Stih v. State,* 17 Ill. Ct. Cl. 30, 31 (1947) (awarding $1,000 for damage to property from "a highway improvement" that included repaving the road, erecting a "retaining wall," and putting up a "pipe fence"); *Kidd v. State*, 24 Ill. Ct. Cl. 211, 214 (1962) (awarding $1,300 for damage to plaintiff's property resulting from improvements to an existing highway, U.S. Alternate Route No. 30). Nor would that rule make sense; any distinction between damage caused by improvements to existing infrastructure and damage caused by construction of new infrastructure would be arbitrary. For over a century, Illinois courts have allowed inverse condemnation lawsuits because of damage to property from "public improvements." See *Rigney*, 102 Ill. at 72.

And the City has yet to find a single case in that span denying recovery because the public improvement occurred on existing infrastructure.

All told, the concept of "loss without legal injury" does not apply here, and the Appellate Court appropriately reversed the Circuit Court below. This Court should affirm the Appellate Court's decision as to Count II.

2. The City cannot support the notion that "special damages" means damages incurred by only a limited number of residents.

The City argues that the majority erred in finding that Plaintiffs pleaded "special damages" sufficient to state a claim for inverse condemnation. But the majority addressed this argument, explaining that while inverse condemnation requires the damage be "special"—that is, "in excess of that sustained by the public generally"—the Plaintiffs incurred physical damage to their property, a harm the public-at-large did not incur. (A22, ¶ 52.) Put differently, the public does not "generally" sustain damage to their service lines when the City replaces a water main on a specific street. The City misconstrues what "special damages" means.

According to the City, "special" means damages suffered by only a few residents, or limited *in number*. Def.'s Br. at 41. But despite the City's depiction of this rule as "settled law," it provides not a single holding from this Court—or any for that matter—providing as such. This Court has never disallowed an inverse condemnation claim because the properties that endured the government-caused damage exceeded some numerical threshold—something even the dissent concedes. (See A48, ¶ 108) ("[T]here is no law that states that inverse condemnation claims brought by numerous plaintiffs are not allowable *** .").

Instead, as the majority explained below, courts should focus not on the number of people harmed, but on "*the type* of damage suffered by the property owner *** and whether or not it is the same damage suffered by the general public." (A22, ¶ 53) (emphasis added). This Court in *Parker v. Catholic Bishop of Chicago* stated the same, defining "special damages" as "differing *in kind* from those affecting the general public." 146 Ill. 158, 168 (1893) (emphasis added). No case cited by the City states any differently.

In *Chicago v. Union Bldg. Ass'n*, the plaintiff alleged that a temporary street closing several blocks away in downtown Chicago interfered with its ability to access the building. 102 Ill. 379, 391 (1882). But this Court did not hold that Plaintiffs' injury was not "special" because too many people suffered this harm. See *id.* at 392–93. It stated that "[t]he damages sustained [were] of the same kind as those sustained by the general public" because all of the public experienced a similar inconvenience to some degree; "every one, wherever located, having to pass that route *** [will] have to make an additional turn, and travel a little farther." *Id.* On similar facts, identical reasoning also controlled in *Parker*: "[the plaintiff] is not deprived of access to the rear of her lots, but is inconvenienced *** by having to go a few feet further to gain access *** [,] [which] 'is the 'same kind' of damage that will be sustained by all other persons in the city that might have occasion to go that way." *Parker*, 146 Ill. at 168. In other words, the *Union Building* and *Parker* decisions turned not on the number of people harmed, but on whether all of the public was harmed *in the same way*. See *id.* ("[I]t is apparent *** the damages resulting to complainant are of the same kind as those sustained by the general public, and differ only in degree *** ."). That is not the case here. The general public

does not have to replace their service lines. The general public does not consume tap water from Plaintiffs' homes. *Union Building* and *Parker* do not provide any guidance.

Nor for that matter does *Dep't of Pub. Works & Bldgs. v. Horejs, 78* Ill. App. 2d 284 (1966). In *Horejs*, following the construction of a nearby highway, property owners sought compensation for interference with "air, light and view" easements—which the Appellate Court ruled the property owners did not even have to begin with. *Id.* at 291–92. And the plaintiffs sought compensation for the depreciation of their property from being "in the vicinity" of the highway—which, as discussed above, does not amount to "compensable" damage in an inverse condemnation action. *Id.* at 292. The Appellate Court then stated that "[t]he claimant must show a direct physical disturbance of a right particular to his property," something the Plaintiffs indisputably show here. *Id.*

In addition to being unfounded, the City's proposed numerical limitation regarding inverse condemnation is inherently unworkable: how many are *too* many? No case states as much. The City does not provide an answer. In truth, the number of residents affected here is due not to the absence of any "special damages" but to the sheer size of Chicago and the number of construction projects in which the City engaged. The Appellate Court wisely held that a particular individual's constitutional right of recovery should not hinge on some arbitrary numerical limit. This Court should hold the same.

3. The "lawful" nature of the City's construction is irrelevant because all inverse condemnation actions presume a lawful action caused the damage.

A core assumption of any inverse condemnation claim is that the public action is lawful. In fact, it's part of the definition: "the owner of property is seeking to recover the just compensation guaranteed by the constitution for the ***lawful*** damaging of private property for public use." *Hampton*, 2016 IL 119861, ¶ 27 (emphasis added); see also

Chicago & W.I.R. Co., 106 Ill. at 518 ("[A claim for inverse condemnation] does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate *** ."). So the City's position that Plaintiffs cannot bring a claim for inverse condemnation because their damages "are a consequence of the City's lawful action" cannot possibly be the rule; it would render all inverse condemnation claims invalid. Neither the Appellate Court nor the Circuit Court addressed this argument. And that should tell this Court all it needs to know about the merits of it.

The City believes such a rule comes from *City of Chicago v. ProLogis*, 236 Ill. 2d 69 (2010). But the position relies on a parsing of one-line from the opinion out of context. A closer examination of the case reveals the flaws in the City's reasoning. In *ProLogis*, bondholders brought an inverse condemnation claim after the City acquired certain real property by eminent domain. *Id.* at 76. The bonds were secured by future taxes on that real estate, but because the City had acquired it for the airport, the underlying property became tax exempt and the bonds valueless. *Id.* at 75. While the *ProLogis* court dismissed the bondholders' claim, the case does not stand for such a general proposition as "lawful government action bars inverse condemnation." Rather, the case stands for the limited proposition that where "the destruction of the *** value [is] an ***indirect*** consequence of a lawful government action," there is no "taking separate from the property itself." *Id.* at 75–76, 80 (emphasis added).

The City's interpretation ignores that it was the indirect nature of the injury—not the lawfulness of the government action—that doomed the bondholders' claim. An examination of the case on which the *ProLogis* court relied proves as much. See *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923) ("[The takings clause] has

always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that *indirectly* work harm and loss to individuals.") (emphasis added).

Examples of inverse condemnation cases further reveal the obvious flaws in the City's position. In *Cuneo v. City of Chicago*, the property owner had a valid inverse condemnation action from damages that resulted from the City constructing a subway in front of a property. 379 Ill. at 493. In *Warner/Elektra/Atl. Corp. v. Cty. of DuPage, Ill.*, a warehouse owner sued after nearby county improvements to a storm water drainage system caused water to seep into the warehouse and damage the inventory. No. 83 C 8230, 1991 WL 32775, at *1. (N.D. Ill. Mar. 6, 1991). And in *City of Chicago v. Pulcyn*, a property owner properly brought a claim where the City constructed elevated railways that forced alternative access from another street. 129 Ill. App. 179, 180 (1906). In each of these examples, a lawful government action caused the damage to the property. And in each of these examples, that did not matter. It does not matter here either. This Court should affirm.

C. Tort immunity does not preclude Plaintiffs' claims.

1. Tort immunity does not bar Count I because Plaintiffs seek equitable relief.

Section 2-201 of the Tort Immunity Act immunizes public employees from liability while serving in a position "involving the determination of policy or the exercise of discretion." 745 ILCS 10/2-201. As the City admits, however, the Act does not "affect[] the right to obtain relief *other than damages* against a local public entity or public employee." See 745 ILCS 10/2-101 (emphasis added). Illinois courts have

interpreted this to mean that tort immunity does not preclude claims for injunctive or equitable relief. See, *e.g., Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 256 (2004) ("Plaintiffs' claim is an action which seeks 'relief other than damages,' as set forth in the first sentence of section 2-101, and is, therefore, excluded from the Act."); *Romano v. Village of Glenview*, 277 Ill. App. 3d 406, 410 (1995) (holding the Act does not apply to "suits for injunctive relief."); *Am. Islamic Ctr. v. City of Des Plaines*, 32 F. Supp. 3d 910, 915 (N.D. Ill. 2014) ("The Tort Immunity Act does not bar requests for relief other than damages."); *People ex rel. Birkett v. City of Chicago*, 325 Ill. App. 3d 196, 204 (2001) ("[T]he Tort Immunity Act applies only to tort actions *seeking damages* against municipalities *** ."") (emphasis added); *Anderson v. Sutter*, 119 Ill. App. 3d 1070, 1074 (1983) ("[T]he defendant village conceded that the [Tort Immunity] Act did not provide immunity from equitable relief.").

Plaintiffs do not seek traditional legal damages in Count I, but a medical monitoring program, which federal and state courts alike have repeatedly held is "injunctive" or "equitable." See, *e.g., Ayers*, 525 A.2d at 314 ("In our view, the use of a court-supervised fund to administer medical-surveillance payments in mass exposure cases *** is a highly appropriate exercise of the Court's equitable powers."); *In re W. Va. Rezulin Litig.*, 585 S.E.2d at 70 ("This equitable fund would not pay damages directly to any members of the class, but would rather provide a court-administered fund that could pay to medical providers the cost of any testing."); *Hansen*, 858 P.2d at 982 ("We agree with the rationale of the Ayers court [and] *** leav[e] it to the trial court to fashion a suitable equitable remedy *** [that] provide[s] for the defendant's payment of only the costs of the medical monitoring services *** ."); *Barth v. Firestone Tire & Rubber Co.,*

673 F. Supp. 1466, 1478 (N.D. Cal. 1987) (describing the medical monitoring program sought by Plaintiffs as "equitable relief" throughout); *German v. Fed. Home Loan Mortg. Corp.*, 885 F. Supp. 537, 560 (S.D.N.Y. 1995) (characterizing the medical monitoring program "to ensure that class members are not harmed by exposure to lead-based paint" as a form of "injunctive relief."). That is because plaintiffs "do not merely seek money *** [but] to implement a court-supervised program" to administer medical monitoring and diagnostic testing. *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705, 713 (D. Ariz. 1993). And that type of relief is undeniably injunctive. *Gibbs v. E.I. DuPont De Nemours & Co., 876* F. Supp. 475, 481 (W.D.N.Y. 1995) ("A court-administered fund which goes beyond payment of the costs of monitoring an individual plaintiff's health to establish pooled resources for the early detection and advances in treatment of the disease is injunctive in nature rather than 'predominantly money damages' and therefore is properly certified under Rule 23(b)(2).").

Illinois appeals courts are in accord, also describing medical monitoring as "equitable relief in the form of an injunction." *HPF, L.L.C. v. Gen. Star Indem. Co.*, 338 Ill. App. 3d 912, 914 (2003). In *HPF*, a company sought a declaratory judgment that its insurer had a duty to defend and indemnify the company for costs and attorney fees incurred in defending a lawsuit. *Id.* at 913–14. The relevant policy stated that the insurer had a duty to defend the insured "against any 'suit' seeking [damages because of 'bodily injury' or 'property damage']." *Id.* at 916. In finding no such duty to defend, the Illinois Appellate Court noted how the underlying complaint "[did] not seek damages for any sickness or injury *** [but sought] injunctive remedies"—that is, "equitable relief in the

form of an injunction *** establish[ing] a fund for medical monitoring of all persons who used HPF's Herbal Phen–Fen products." *Id.* at 914–15, 918.

Nonetheless, the City suggests that because medical monitoring relief would require it to pay money to create the medical monitoring fund, Plaintiffs truthfully seek compensatory damages. Def.'s Br. at 49. But the mere use of capital to accomplish some end does not transform the character of the relief. A constructive trust, for example, often involves the simple transfer of money from one individual to another. *Smithberg v. Ill. Mun. Ret. Fund*, 192 Ill. 2d 291, 299 (2000). And it is still equitable relief.

The City's argument is hardly novel, and mirrors that offered—and rejected—in *Elliott v. Chicago Hous. Auth.*, No. 98 C 6307, 2000 WL 263730 (N.D. Ill. Feb. 28, 2000). In *Elliot*, residents of Chicago Section 8 housing developments sought precisely the same remedy sought here: "the establishment of a court-supervised medical monitoring fund to pay for testing to detect the onset of lead poisoning." *Id.* at *3. In opposing class certification, defendants argued the requested relief was "simply a disguised request for money damages." *Id.* at *14. The court disagreed, certifying the class and "hold[ing] that a court-supervised medical monitoring program through which class members will receive periodic examinations may be properly characterized as seeking injunctive relief." *Id.* at *15.

Finally, to the extent the City argues that medical monitoring plaintiffs cannot seek equitable relief because they would otherwise have an adequate remedy at law, this is untrue. "While in most tort cases, plaintiffs seek compensation in the form of money, in some circumstances, money cannot adequately compensate, and an injunction is therefore required to remedy the harm. The remedy follows from the type of harm or

injury alleged." *Donovan v. Philip Morris USA, Inc.*, 268 F.R.D. 1, 25 (D. Mass. 2010). Where the harm "is continuing"—as it is here—"an injunction is appropriate because damages will not fully remedy the harm." *Id.;* see also *Barth*, 661 F. Supp. at 205 ("It is clear that no remedy at law exists that would permit a court to fashion an underlying remedy such as the medical monitoring fund sought here.").

Indeed, medical monitoring plaintiffs seek injunctive relief for a reason: when it comes to monitoring disease, a one-time test will most often not suffice. In the NCAA concussion litigation, for example, the parties devised a multi-phased program whereby class members would receive initial screenings every five years, followed by a series of medical examinations, if necessary. See *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 314 F.R.D., at 586.[5] As common sense dictates, different individuals may require multiple examinations, or those of a different kind. And given the prospective nature of medical monitoring relief, money damages make a poor fit—a problem only amplified in the class action context. See *Donovan*, 268 F.R.D. at 25 ("An elaborate medical monitoring program may not make sense if only a few individuals seek relief. But a class presents different issues *** ."). To be adequate, a remedy at law "must be clear, complete, and as practical and efficient *** as the

[5] "The Program itself contemplates two different assessment phases: screening and evaluation. In the screening phase, Class Members may seek an analysis of their symptoms by completing a Screening Questionnaire, in hard copy form or online, once every five years until age fifty and then not more than once every two years after the age of fifty. Their scores on the Screening Questionnaire will determine whether they qualify for a Medical Evaluation. *** Class Members may qualify for up to two Medical Evaluations during the Medical Monitoring Period and may seek a third by submitting an appropriate request to the Committee. The Medical Evaluations will be submitted to a physician, who will provide a diagnosis as well as the results of the testing to the Class Member or his or her personal physician, at the option of the Class Member, within sixty days of the Medical Evaluation." *Id.*

equitable remedy." *K.F.K. Corp. v. Am. Cont'l Homes, Inc.*, 31 Ill. App. 3d 1017, 1021 (1975). The City does not explain how money damages would be as practical and efficient as medical monitoring relief.

In any event, the City attempts to answer the wrong question. The question of whether plaintiffs are entitled to equitable relief differs entirely from the question of whether the relief they seek is equitable. The former question is not before this Court. And in answering the latter, courts in Illinois and throughout the country have responded in the affirmative. Therefore, as Plaintiffs seek equitable relief, the contours of tort immunity are irrelevant.

2. The Illinois Constitution guarantees residents the right to seek a claim for inverse condemnation, so the Tort Immunity Act cannot take away that cause of action.

A claim for inverse condemnation comes directly from the Illinois Constitution, which like its federal counterpart, includes a Bill of Rights. Section 15 of that Bill of Rights reads: "Private property shall not be taken *or damaged* for public use without just compensation as provided by law. Such compensation shall be determined by a jury as provided by law." ILL. CONST. art. 1, § 15 (emphasis added). The Illinois Supreme Court has interpreted the phrase "or damaged" as "expressive of a deliberate purpose" to compensate citizens of Illinois not only for "direct physical injur[ies] to the corpus or subject of the property" in question, but also for "injur[ies] to the right of use or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally." *Rigney*, 102 Ill. at 75, 78 (1881). Further, "the constitutional provision itself *** is self-executing and forms the basis for recovery at common law by an action on the case," because otherwise "the constitutional guaranty would be nugatory." *Roe v. Cook County*, 358 Ill. 568, 573 (1934).

Despite this "constitutional guaranty," the City argues the Tort Immunity Act wholly insulates it from Plaintiffs' inverse condemnation claims. This argument ignores the most basic of constitutional premises: "[i]f rights are secured by the constitution, they cannot be destroyed by the legislature." *People ex rel. Manier v. Couchman*, 15 Ill. 142, 144 (1853); *Hoekstra v. County of Kankakee*, 48 Ill. App. 3d 1059, 1061 (1977) ("Thus, where a right to damages [in an action for inverse condemnation] is guaranteed by the constitution, neither common law public official immunity nor the tort immunity statute can be a defense to an action against those responsible.").

The cases cited by the City in the courts below[6] do not contradict this basic protection. The first and primary case on which the City relied has been vacated by this Court. *Rozsavolgyi v. City of Aurora*, 2016 IL App (2d) 150493, *vacated by*, 2017 IL 121048. And the second case on which the City relied merely dismissed an inverse condemnation claim as untimely, applying the Act's statute of limitations; it did not hold that the Tort Immunity Act protected the City from liability under the Illinois Constitution. *Madison v. City of Chicago*, 2017 IL App (1st) 160195, ¶ 29. The Tort Immunity Act thus cannot eliminate a cause of action guaranteed by the Bill of Rights of the Illinois Constitution.

[6] While the City, in passing, maintains that Plaintiffs' inverse condemnation claims are barred by tort immunity, it fails to offer any rationale on appeal why discretionary immunity would even apply to the cause of action, or provide any example where tort immunity has barred the constitutional claim in the past. See Def.'s Br. at 44–51. Plaintiffs contend the City's argument that tort immunity should bar Count II should be forfeited under this Court's rules. ILL. SUP. CT. R. 341(h)(7) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

Regardless, the City has never explained why discretionary immunity would apply to an inverse condemnation action in the first place, seeing that the claim does not involve liability for the exercise of any discretion; "[t]here is no element of tort here." *Streeter v. County of Winnebago*, 44 Ill. App. 3d 392, 395 (1976). In Count II, "[t]he plaintiffs do not contend *** that any wrongful act was done," but rather "that they were injured in their property rights by the exercise of the [City's eminent domain power]." *Id.* And "since they were injured for a public purpose they are entitled to compensation." *Id.* Tort immunity does not bar Count II.

3. The City has nonetheless failed to establish the affirmative defense of tort immunity where it has offered no affirmative matter to support it.

A key aspect of tort immunity is that it is an affirmative defense which the public entity must plead *and prove*. See *Monson v. City of Danville*, 2018 IL 122486, ¶ 29. A court cannot presume statutory immunity. To the contrary, a court must strictly construe the Act against the City. *Aikens v. Morris*, 145 Ill. 2d 273, 278, (1991). Further, whether or not tort immunity applies is fact specific and turns on whether the acts in question were "discretionary." *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 56 (2003), *as modified on denial of reh'g* (Aug. 7, 2003).

The City contends that the Appellate Court erred in finding it did not engage in the exercise of discretion when it decided to update various water mains across Chicago. See Def.'s Br. at 47. But that is not what the Appellate Court held. The Appellate Court held that *at this stage*, reading Plaintiffs' complaint in a light most favorable to them, it would be inappropriate to dismiss the complaint on the record before the Court. (A17, ¶ 43.) As the Appellate Court explained, the City bore the burden of establishing the affirmative defense of immunity. (*Id.* ¶ 42.) Yet it did not offer affirmative matter to

support the defense. (A17–18, ¶ 43.) It also was "not apparent from the facts of the plaintiffs' complaint that the City's advice was unique to a particular public office or discretionary"—which it must be for tort immunity to apply at this stage of the proceedings. *Id.* That ruling is neither unprecedented nor erroneous. See, *e.g., Roark v. Macoupin Creek Drainage Dist.,* 316 Ill. App. 3d 835, 841 (2000) ("[T]he issue of whether the district's decision not to repair the system was discretionary or ministerial presents questions of fact that need to be resolved in the trial court.") (emphasis in original); *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 122 ("defendant has not met its evidentiary burden of showing that it exercised discretion"); *Ponto v. Levan*, 2012 IL App (2d) 110355, ¶ 73 (explaining that the relevant inquiry is decidedly "fact specific" and not necessarily appropriate for a motion to dismiss).

The City assumes that discretionary immunity applies because the City decided to "modernize its water system" and chose what precautions it would advise residents to take after water main replacements. Def.'s Br. at 49. This is not enough. See *Monson*, 2018 IL 122486, ¶ 35 (finding the City did not meet its burden where "[it] has not presented any evidence documenting" the particular repairs and decisions at issue in that case). While "[a] municipal corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, *** as soon as it begins to carry out that plan it acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner." *Ponto*, 2012 IL App (2d) 110355, ¶ 73 (emphasis in original). "[C]ourts are required to look at the *specific act or omission* and decide whether the defendant was 'engaged in both the determination of policy and the exercise of discretion *when performing the act or omission from which the plaintiff's injury*

resulted.'" *Andrews v. Metro. Water Reclamation Dist. of Greater Chicago*, 2018 IL App (1st) 170336, ¶ 28 (quoting *Cabrera*, 2015 IL App (1st) 140933, ¶ 122) (first emphasis added). The City fails to explain how—after the City determined the plan to replace various water mains—the individual water main replacements involved policy decisions in a way that would implicate discretionary immunity. *See Ponto*, 2012 IL App (2d) 110355, ¶ 74 ("Here, the trial court found that the City had commenced the implementation of its improvement plan and that, therefore, its actions were not discretionary.") (emphasis in original). Such was the City's burden. And having not done so, the City cannot establish the defense on a motion to dismiss.

VI. CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court affirm the judgment of the First District Illinois Appellate Court.

Dated: December 4, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Ill. Sup. Ct. R. 341(a) and (b). The length of this brief, excluding the pages contained in the Ill. Sup. Ct. R. 341(d) cover, the Ill. Sup. Ct. R. 341(h)(1) statement of points and authorities, the Ill. Sup. Ct. R. 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Ill. Sup. Ct. R. 342(a), is 44 pages.

Dated: December 4, 2019

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CERTIFICATE OF SERVICE

Under 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 and that on December 4, 2019, the undersigned caused one copy of the foregoing *Plaintiffs-Appellees' Response to the Brief of Defendant-Appellant City of Chicago* to be served on the individuals listed below by electronic mail.

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In the Supreme Court of Illinois

GORDON BERRY, and ILYA PEYSIN,

Plaintiffs-Appellants-Respondents,

v.

CITY OF CHICAGO,

Defendant-Appellee-Petitioner.

On Petition for Leave to Appeal from the Illinois Appellate Court, First District, No. 1-18-0871

There on Appeal from the Circuit Court of Cook County, Illinois, No. 16-CH-02292

Trial Judge: Hon. Raymond W. Mitchell

NOTICE OF FILING

TO: *See attached Certificate of Service*

PLEASE TAKE NOTICE that on December 4, 2019, we caused to be filed with the Clerk of the Supreme Court of Illinois, *Plaintiffs-Appellees' Response to the Brief of Defendant-Appellant City of Chicago*, a copy of which is attached hereto and served upon you herewith.

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