SIXTH DIVISION
June 15, 2012

No. 1-09-3342

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

RONALD COSTELLO, individually and on behalf of all others similarly situated, Plaintiffs-Appellants, v. CITY OF CHICAGO, a municipal corporation, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. No. 01 CH 15037 The Honorable Nancy J. Arnold, Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. Gordon and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held:* Where, upon the successful completion of four pilot studies, the City implemented a modification to the city sewage system citywide without performing additional analyses suggested by the designer of the implemented Rainblocker System, the trial court's finding in favor of the City in the negligence class action was not against the manifest weight of the evidence.

¶ 2 In this class action filed in 2001, the plaintiffs, individually and on behalf of those similarly situated, sued the City of Chicago (the City) for damages they alleged were sustained as a result of the City's citywide implementation of a modification to the sewage system, known as the Rainblocker System, to address historic flooding problems, which the plaintiffs contend was negligently implemented. In June 2009, the court denied the plaintiffs' request to reopen discovery after ordering the substitution of plaintiffs' trial counsel. Following the September 2009 trial, the trial court found in favor of the City. The court ruled that even if the City had acted negligently, the plaintiffs' claims nevertheless would be barred by section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-201 (West 2008)).

¶ 3 The plaintiffs take issue with all of the trial court's rulings and, specifically, argue the trial court erred in finding the plaintiffs failed to prove breach of duty by the City or that the purported breach of duty proximately caused the damages suffered by the class representatives. The plaintiffs contend the trial evidence established the City negligently implemented the Rainblocker System citywide by failing to take into consideration the variances among the city streets, which conflicted with the specific assumptions of the Rainblocker System's design. According to the plaintiffs, the City failed to follow the recommendations of the Rainblocker System's designers to conduct additional pilot studies to address the variances in the dimensions of the City streets. We affirm. The record evidence did not establish that the City breached its duty of ordinary care by the manner in which it implemented the Rainblocker System or that its

implementation proximately caused the plaintiffs to incur severe flooding, which damaged their property.

¶ 4 BACKGROUND

¶ 5 The City operates a combined sewer system, which collects storm water run-off and sewage in a single pipe. Historically, heavy rainfall in the City results in sewer backups and significant damage to basements of a significant number of City residents in flood-prone areas. Between 1999 and 2001, the City implemented the Rainblocker System, a sewer system inlet control system intended to alleviate sewer backup during heavy rains.

¶ 6 Harza Environmental Services proposed the Rainblocker System to the City, noting that a similar system had worked successfully in Evanston, Illinois. The Rainblocker System was designed to include the installation of inlet restrictors in catch basins to divert rain water to the streets where it would accumulate, which would reduce the amount of rainwater that would enter the sewer system. The Rainblocker System, as designed, also called for disconnection of gutter downspouts to prevent the rainwater striking the roofs of buildings from being directed to the sewers.

¶ 7 Harza conducted a pilot study in the Jeffery Manor neighborhood of Chicago. After that study was deemed a success, the City commissioned Harza to perform three additional studies in the neighborhoods of Sauganash, Austin, and Belmont-Cragin, before the City would consider implementing the Rainblocker System citywide. The neighborhoods varied in their degree of historic flooding, with Austin and Belmont-Cragin being in the middle, Jeffery Manor suffering a high degree of flooding, and Sauganash suffering a low degree of flooding. Following these

successful studies, the Rainblocker System was implemented citywide without additional testing or design modifications.

¶ 8 On September 12, 2001, Ronald Costello, individually and as representative of the proposed class of similarly situated individuals, filed a complaint alleging that in August 2001, the Rainblocker System "caused streets in the City to flood above the curb level *** and flow into the basements and first floor units of hundreds of residents and businesses ***, with attendant physical damage to property ***." Eight years of litigation ensued. Costello amended his complaint three times and the City filed four motions to dismiss. On September 7, 2004, Costello filed a third and final amended class action complaint, setting forth five causes of action: count I alleged willful and wanton conduct; count II alleged negligence; count III alleged creation of a nuisance; count IV alleged intentional trespass; and count V alleged a taking of property. The plaintiffs sought an injunction to compel the City to "disengage" the Rainblocker System.[1]

¶ 9 The plaintiffs alleged that Harza provided the City with a detailed installation plan, including notice that the Rainblocker System would "improve drainage and prevent discharge in basements only where curbs were at least six inches high, where the crown of the street was at least six inches high, and the grade of the adjacent buildings was at least one foot above the curbs." The plaintiffs alleged that Harza informed the City that the Rainblocker System would not properly function if downspouts were not disconnected and the catch basins were not cleaned on a regular basis.

[1] The trial court's findings following the trial were limited to the plaintiffs' negligence claims.

¶ 10 In the reports Harza prepared regarding the pilot studies, Harza advised the City that the Rainblocker System could only be expected to work with "typical" street dimensions, which Harza defined as streets 34-feet wide, with a street crown of 6 inches higher than the sewer-downspout connection, and with the grade of adjacent buildings of approximately 12 inches above the curb.

¶ 11 The plaintiffs alleged the City's implementation of the Rainblocker System citywide was negligent for a variety of reasons. The plaintiffs alleged the City failed to clean the catch basins on a regular basis; it failed to disconnect the downspouts uniformly or enact an ordinance requiring disconnection of downspouts; and the City failed to restrict installation to only areas with "typical" street dimensions. The plaintiffs further alleged the City negligently installed the Rainblocker System in areas where the buildings abutted the sidewalk. Generally, the plaintiffs alleged that from 2001 to the time of the trial, the City's negligent installation of the Rainblocker System caused flooding in city streets, which in turn caused rainwater to enter private property, resulting in hazardous conditions and significant property damage.

¶ 12 On December 10, 2005, the trial court certified the class, which it defined on March 29, 2006, as

> "All persons or entities that have sustained damage to real or personal property as a result of the diversion of storm water from public streets to private property resulting from the City of Chicago's installation, operation, and maintenance of a modification of the City's sewer system with an inlet control design, known as the Rainblocker System, beginning in August, 2001."

At that time, William R. Quinlan of Quinlan & Carroll, Ltd., was designated trial counsel, joined later by Much Shelist Denenberg Ament & Rubenstein, P.C. (Much Shelist). On November 20, 2008, the trial court granted plaintiff Costello leave to add as an additional class representative, Trish Galvez-Tuel, due to Costello's declining health. On January 12, 2009, the trial court set a trial date of April 27, 2009. The court denied the plaintiffs' request for a later trial date; on March 27, 2009, the court denied the plaintiffs' request for an extra month to prepare and denied the parties' cross-motions for summary judgment.

¶ 13 On April 23, 2009, the plaintiffs filed their third request for a continuance. The parties appeared in court on April 27, 2009, the date for trial as had been set in January. Plaintiffs' counsel informed the court they were not prepared to proceed: "Over 25 depositions. There were thousands of pages of documents. This isn't a case that somebody can come in and in a week prepare to try." The court responded, "No. But somebody could have prepared it in four months, and that's the point, because you told me that that was going to be a problem in January *** [when] your oral motion for continuance was denied." The court denied the plaintiffs' request for a continuance, but continued the matter to the following day to "take up the question of substitute lead class counsel." The next day, the trial court ordered the case continued for "substitution of trial counsel." The trial court removed William R. Quinlan of Quinlan & Carroll, and the firm of Much Shelist as trial counsel and continued the case to June 2, 2009, for substitution of counsel.

¶ 14 On June 2, 2009, substitute counsel for plaintiffs, Kenneth M. Sullivan and Associates, LLC, and the Quinlan Law Firm filed appearances as trial counsel and a motion to reopen discovery. The trial court took counsel's motion to substitute trial counsel under advisement, but

denied counsel's request to reopen discovery, tender requests to admit, and request to supplement Rule 213 responses. On June 10, 2009, the trial court granted counsel leave to substitute as trial counsel and set a trial date of September 21, 2009.

¶ 15 The bench trial began as scheduled, spanning over several days and concluding on September 25, 2009. At the start of the trial, Galvez-Tuel testified she owned several properties: 3457 North Kedzie, her residence at the time of trial, 3459, 3461, and 3463 North Kedzie, and 3758 North Sacramento. She testified that in August 2001, she experienced two floods on her Kedzie properties, but none on her Sacramento property. During the first storm, an inch or two of water came through the door on the ground floor into her property at 3463 North Kedzie, where she was living at the time. She testified the rainwater overflowed the streets and sidewalks and flooded her backyard. Galvez-Tuel testified that her house was 10 to 15 feet from the curb and the curb ranged from 2.5 to 2.75 inches high and was 2 to 5 inches below the plane of the sidewalk. She did not know the width of the street in front of her house or the height of the street's crown, later explained by the plaintiffs' expert as the middle portion of the street with a peak for the purpose of directing water into the sewers along the curbs. Galvez-Tuel testified that during this first storm, four to five inches of water flooded the basement of her property at 3457 North Kedzie. She explained that, as the case for her home at 3463, the downspouts of the building were connected to the sewer system during this first storm. Galvez-Tuel claimed that following this first flood, she learned from her alderman about the installation of the Rainblocker System on North Kedzie.

¶ 16 Galvez-Tuel explained that during the second storm in August 2001, the water came in over two rear entryway steps at 3463 North Kedzie and over two front steps at 3457 Kedzie. The rainwater flooded each basement with two and a half feet of water. Galvez-Tuel testified that the flooding eroded the foundation at 3463 North Kedzie and the ensuing repairs caused her to lose her tenant. She testified the hot water tanks, the washer and dryer, and the furniture located in the basement had to be replaced at her 3457 North Kedzie property. Galvez-Tuel testified that following the second storm in 2001, and at her request, the City removed the inlet control devices from the sewer catch basin in front of her properties. The City also increased the height of the curb to four inches.

¶ 17 Galvez-Tuel's properties flooded again in August 2004 and June 2007. During the 2004 storm, three to four feet of water entered the 3457 property, and two feet of water entered the 3463 property. She testified the water entered each property through the backdoor, not the drains. Because of the 2004 flooding, Galvez-Tuel remodeled the basement for a second time at the 3457 property at an additional cost of $50,000. The ensuing repair work at the 3463 property caused her to lose her tenant. She testified that in 2004 she tried to encourage her neighbors to have their inlet control devices removed as she had done after the 2001 flooding.

¶ 18 During the 2007 storm, the 3457 and 3463 North Kedzie properties flooded. Following this flood, Galvez-Tuel and others successfully lobbied the City to triple the size of the sewer pipe under North Kedzie between Addison and Roscoe, double the size of the sewer drains, and remove other inlet control devices in the area. Since 2007, Ms. Galvez-Tuel's Kedzie properties have not flooded.

¶ 19 Denis Connolly, a civil engineer, who also served as First Deputy Commissioner of the Department of Sewers, testified that "historically, there's always been basement flooding in the City." The City's main concern was the risk of residents being electrocuted in flooded basements, which resulted in the death of three residents in 1997. Connolly testified that the initial step in deciding whether to implement the Rainblocker System was commissioning Harza to perform neighborhood pilot studies. Connolly noted that following the installation of the Rainblocker System in the pilot studies, the number of complaints of basement flooding decreased. Connolly acknowledged that he did not read the reports of the four neighborhood pilot studies, relying instead on being briefed on their content by Bilal Al-Masri, the Chief Engineer for the Department of Sewers. More than a year after the installation of the Rainblocker System in the neighborhood pilot studies, Connolly recommended citywide implementation to John Kosiba, the Commissioner of the Department of Sewers.

¶ 20 Connolly acknowledged that Harza had advised the City that the effectiveness of the Rainblocker System would differ based on the "differences between the city blocks." Connolly testified he disagreed with that assessment. He believed Harza "was trying to build a case to do studies in every area of the City of Chicago, which would have taken a tremendous amount of money that [the City] did not have."

¶ 21 Bilal Al-Masri, Chief Engineer for the City's Department of Sewers at the time, testified that he supervised the construction and installation of the Rainblocker System in the pilot study neighborhoods. Al-Masri was not involved in the decision to implement the Rainblocker System citywide, but did assist in its citywide implementation. He testified that the City had to balance

two opposing risks: if the downspouts remained connected, the likelihood of sewage backup would increase; if the downspouts were disconnected, the likelihood of flooding by surface water would increase. Al-Masri testified that as part of the citywide implementation, and as a cost saving measure, the City made the decision to switch to less expensive plastic restrictors, which could be installed without any street excavation or construction. He testified that for purposes of dealing with sewage backups, the "only alternative" to implementing the Rainblocker System would have been "to replace the whole sewer system in the City of Chicago, 4300 miles of sewers."

¶ 22 Commissioner Kosiba testified he conferred with Connolly and Al-Masri multiple times regarding the Rainblocker System. He testified that the pilot studies were "very successful [in that] *** the amount of water in the basement complaints dropped from the thousands after a rain event to somewhere in the hundreds." Based on that success, he made the decision to implement the Rainblocker System everywhere "within the City limits except for the central business district." He concluded that the success of the pilot studies showed the Rainblocker System did not require "a lot of fine tuning" before citywide implementation. He explained his rationale for the timing of the citywide implementation of the Rainblocker System:

> "With the rain blockers, the idea was to expand the program so that the people throughout the City of Chicago would have the same relief as the two original pilot areas, and then the third one that we added, which was on the west side.

> So that they wouldn't have to go through the heartache of basement backup.
>
> I mean, because when your basement backs up, it's–it is not only rain water, but it's affluent from your own private drain that's coming back at you."

Kosiba also commented on the other flood-related issues, including property damage and mold, which he considered in deciding against delaying the citywide implementation to do additional studies. "[F]rom my perspective, to go city-wide would prevent further flooding for people, which would mean we would eliminate problems in peoples' day-to-day lives." Kosiba had to "balance considerations of risks and costs[.]"

¶ 23 Kosiba testified the goal of the Rainblocker System was to hold water on the streets longer. He concluded the economic impact to residents was much less when rainwater remained on the streets than having the rainwater flood basements. Kosiba acknowledged that disconnecting the downspouts was part of the Rainblocker System and that homeowners were "asked that they try to disconnect their downspouts whenever possible." Kosiba recalled sending letters to the homeowners or community groups in which he characterized the downspout disconnection as "essential" to encourage the homeowners to take the recommendations "seriously." Kosiba testified, however, that disconnection was not mandatory; he explained that printed material was made available to homeowners regarding the disconnection of their downspouts, which also included coupons for supplies. "So that's–that's the kind of approach we took to try and convince people to move forward with their disconnections whenever possible."

¶ 24 Kosiba explained why the additional feasibility studies Harza recommended prior to citywide implementation of the Rainblocker System were not conducted. "[T]here were studies done in three areas before and after the restrictors went in. And all three times it worked. The flooding complaints were down, water to the basements was down." Kosiba noted that the City Council never passed an ordinance directing that additional feasibility studies be conducted before the Rainblocker System was implemented citywide.

¶ 25 Paul Shadrake, an engineer for Harza, testified he was the project manager assigned to develop the preliminary designs of the City's Rainblocker System and the individual responsible for the pilot studies. He testified Harza's design included certain assumptions of a "typical" street, specifically a 6-inch curb height, a 34-foot street width, and a street crown 6 inches higher than the downspouts. Shadrake testified that downspout disconnection was a critical part of the Rainblocker System, but the design allowed for some downspout connection; he explained the aim during each study was for 80% downspout disconnection. Shadrake did not recall whether Harza recommended citywide implementation of the Rainblocker System, but the company did report that the pilot studies "seemed to indicate [citywide implementation] would be feasible."

¶ 26 The plaintiffs called Wayne Chang, a civil engineer specializing in hydrology, as their expert witness. To form his opinion concerning whether the Rainblocker System caused the flooding that damaged the plaintiffs' properties, Chang reviewed Harza's pilot study reports, the correspondence between the City and Harza, and the depositions of Connolly, Al-Masri, Kosiba, and Shadrake. Chang also "prepared analyses of the street systems in Chicago," "reviewed aerial photographs," and conducted on-site inspections of the four pilot study neighborhoods. Chang

opined the City did not adhere to civil engineering standards because it did not perform an analysis regarding the citywide implementation of the Rainblocker System.

¶ 27 Chang testified that Harza's assumptions concerning a typical street were appropriate for the pilot studies, but not reliable for the citywide implementation phase. He opined, "It's essential [to] prepare detailed engineering analyses prior to implementation or as part of implementation." He explained, "Every area of the City is going to be different. *** So all of those unique conditions really need to be analyzed to ensure that you're not causing adverse surface flooding impacts." Chang testified it was "totally inappropriate" for the City to install a smaller size valve restrictor when they implemented the Rainblocker System citywide without first performing an analysis that would account for the variances between streets. Chang acknowledged that some streets in the pilot study neighborhoods differed from Harza's assumptions of a "typical" street for the implementation of the Rainblocker System.

¶ 28 Chang concluded that the citywide implementation of the Rainblocker System by the City, "without performing detailed engineering analysis in the city-wide areas, *** violated the engineering standard of care" and "either caused or increased the amount of overland flooding on private property" in August 2001.

¶ 29 As its expert witness, the City called John Nicklow, a civil engineering university professor specializing in hydraulics and hydrology. In concluding the City acted reasonably in implementing the Rainblocker System citywide, Nicklow reviewed Chang's expert report, the depositions of the parties and witnesses, and Harza's pilot study neighborhood reports. Nicklow testified the City properly weighed the benefits of citywide implementation against the risks. He

concluded the "public health hazard" of sewage backups in basements lent "an immediacy aspect" to the decision. Nicklow concluded that based on the success of the system in Evanston, it was reasonable to move forward with the city-wide implementation.

¶ 30 Nicklow testified it was impossible to look at a property in the City that flooded during a heavy rainfall and determine that the inlet control devices of the Rainblocker System were the cause of the flooding, without also considering whether the same flooding would have occurred had the devices not been present during the storm. Nicklow explained, "In other words, everything in that system must remain the same, except the variable that I'm trying to isolate, and that would be the installation of the rain blocker." He testified that a computer model would be necessary to conduct the analyses as such an experiment could not be done in the real world.

¶ 31 Nicklow testified the city experienced record rainfall in 2001. In his report, Nicklow concluded, "Without a comprehensive hydraulic and hydrological modeling effort, including both computational modeling and field-scale modeling *** it cannot be determined whether flooding at any particular location was attributable to the [Rainblocker System]." Nicklow opined that "given the size of the [August 2001] events, there is a high probability that equivalent or increased flooding would have occurred under the same storm conditions had the [Rainblocker System] not been in place."

¶ 32 Upon considering all of the evidence, the trial court found in favor of the City. The court expressly rejected the plaintiffs' contention that the City violated an "engineering standard of care" in implementing the Rainblocker System citywide, as the plaintiffs' expert testified, because it presented a "legal theory that had neither been pled nor advanced by the plaintiffs."

Instead, the court ruled the City's conduct was subject to an "ordinary care" duty, as the owner of the sewage system. The court concluded the plaintiffs failed to prove the City breached that duty by implementing the Rainblocker System citywide. The court also conlcuded "it was not unreasonable or wanting in reasonable care for the Commissioner and Deputy Commissioner to conclude that no further studies were necessary." The court also found neither the Commissioner nor the Deputy Commissioner were negligent in relying on the reading and analysis of the pilot study reports by the Sewer Department's design staff to approve the citywide implementation of the Rainblocker System. "[T]he balancing of the risks and costs/benefit that the Commissioner and Deputy Commissioner performed in reaching the decision to go city-wide was reasonably careful and [] well within their discretionary immunity under the [Tort Immunity Act]."

¶ 33 The court also found the plaintiffs failed to prove the element of proximate cause by linking the alleged deficiencies in the City's implementation of the Rainblocker System with the surface flooding on the representative plaintiffs' properties. The court noted the absence of any "evidence whatsoever regarding plaintiff Costello's property." Regarding the Galvez-Tuels properties, the court determined the evidence was "lacking in several ways." The court reviewed the evidence against the plaintiffs' theory that the City deviated from Harza's design by implementing the Rainblocker System in areas of the City that did not meet the "typical" street assumptions made by Harza, without additional design work. As trier of fact, the court concluded the plaintiffs offered "no evidence to indicate that, because of a lack of design, an inappropriate restrictor was in operation." It followed that the plaintiffs failed to marshal any "evidence demonstrating that failure to design for this individual block was a cause of the surface

flooding plaintiff Galvez-Tuel's property experienced" to meet their burden of proof. The court concluded that the "Galvez-Tuel's properties, whatever their peculiarities, would have flooded in heavy storms whether control devices were in place in the catch basins or not, even though her downspouts remained directly connected to the sewer." As support, the court pointed to Galvez-Tuel's testimony that even after the inlet control devices from the sewer catch basin were removed following the 2001 flooding, she experienced flooding again in 2004 and 2007.

¶ 34 Addressing the application of the Tort Immunity Act, the court concluded that the City would be immune from liability under the Act regarding the citywide implementation of the Rainblocker System given the exercise of discretion involved in the decision. The court stated no further discussion of the tort immunity issue was necessary because the plaintiffs' negligence claim failed for want of proof.

¶ 35 The plaintiffs timely appeal.

¶ 36 ANALYSIS

¶ 37 Motion to Reopen Discovery

¶ 38 The plaintiffs contend the court below abused its discretion in denying their request to reopen discovery after the circuit court permitted the substitution of trial counsel. The plaintiffs contend the court abused its discretion given that no firm trial date was set when the court granted substitution of counsel. While it is true that no firm trial date was set when new counsel appeared on behalf of the plaintiffs, we look to the totality of the litigation to examine the court's decision not to reopen discovery.

¶ 39 When the court granted a continuance on April 27, 2009, for substitution of counsel, the court made clear its frustration with plaintiffs' counsel for not being prepared for trial on prior dates. The court allowed the plaintiffs from April 27, 2009, until June 2, 2009, to arrange for substitute trial counsel. On June 10, 2009, the court set September 21, 2009, as the trial date. From the record before us, it is clear the trial court declined to reopen discovery to foreclose any further delays in proceeding to trial. We also note the plaintiffs requested a delay on April 23, 2009, of the April 27 trial date, to review the large amount of discovery already available: "Over 25 depositions. There were thousands of pages of documents." The court granted the plaintiffs a 3 and a half month delay in the trial to permit substitute counsel to review the available discovery.

¶ 40 "In the area of pretrial discovery, the court's discretionary powers are extremely broad." *Wynne v. Loyola Univ. of Chicago*, 318 Ill. App. 3d 443, 455 (2000) (citing *Popeil v. Popeil*, 21 Ill. App. 3d 571, 573-74 (1974)). We will not disturb the trial court's ruling absent a clear abuse of that discretion. *Ruane v. Amore*, 287 Ill. App. 3d 465, 471 (1997).

¶ 41 In the present case, the trial court's decision to adhere to the schedule it had set earlier drove its decision not to reopen discovery. By 2009, the case had been pending for nearly eight years. We are unconvinced that the trial court's decision somehow impeded justice in this case. In fact, under the circumstances presented, it was imminently reasonable for the court to avoid opening the door to further trial delays by permitting discovery to be reopened.

¶ 42 Nor is there anything in the record to suggest that the trial court's decision not to reopen discovery was arbitrary. See *People v. M.D.*, 101 Ill. 2d 73, 90 (1984) (Simon, J., dissenting)

(quoting *Peek v. United States*, 321 F.2d 934, 942 (9th Cir. 1963) (no abuse of discretion if the ruling is not " 'arbitrary, fanciful, or unreasonable' " or " 'where no reasonable man would take the view adopted by the trial court.' ")). Absent such a showing, there is no basis to conclude the court abused its discretion in declining to reopen discovery, following nearly eight years of litigation.

¶ 43 We next address the plaintiffs' remaining issues: whether the plaintiffs proved negligence by the City in its implementation of the Rainblocker System; more specifically, whether the City breached a duty of care owed to the plaintiffs and, if so, whether that breach proximately damaged the plaintiffs. Only if we find that negligence on the part of the City was proved, do we need to address whether it is nonetheless protected from liability under the Tort Immunity Act (745 ILCS 10/1–101 *et seq.* (West 2008)).

¶ 44 Whether a duty exists is a question of law, subject to *de novo* review. *Vancura v. Katris*, 238 Ill. 2d 352, 373–74 (2010). Breach of duty and causation are generally findings of fact, which, as a reviewing court, we will reject only if they are against the manifest weight of the evidence. *Id.* at 374 (citing *Jones v. Chicago & Northwestern Transportation Co.*, 206 Ill. App. 3d 136, 139 (1990)). A finding of fact is against the manifest weight of the evidence when it is unreasonable, arbitrary, or not based on the evidence. *Id.* at 374 (citing *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002)). The interpretation of the Tort Immunity Act is a matter of law we review *de novo*. *Wilson v. City of Decatur*, 389 Ill. App. 3d 555, 558 (2009).

¶ 45 Negligence

¶ 46 To prevail in a common law tort action, a plaintiff must prove the defendant owed the plaintiff a duty of care, the defendant breached that duty, and the breach proximately caused the plaintiff an injury. *Hess v. Flores*, 408 Ill. App. 3d 631 (2011). A property owner, including a local government, is required to "exercise ordinary care to maintain its property in a reasonably safe condition ***." 745 ILCS 10/3-102 (West 2008). The trial court ruled "ordinary care" is the standard of care applicable in this case, consistent with the plaintiffs' original complaint and each subsequently amended complaint.

¶ 47 We first address the plaintiffs' contention that the trial court erred, as a matter of law, by refusing to hold the City to the engineering standard of care rather than a standard of ordinary care. According to the plaintiffs, their claim that the City breached the engineering standard of care was properly before the trial court as expressly asserted in Chang's expert report. We disagree that the engineering standard was properly raised.

¶ 48 The legal issue before us is whether the plaintiffs provided timely notice of their claim that the City was required to meet the engineering standard of care, presumably a higher standard. Nowhere in the plaintiff's original complaint or in their amended complaints do the plaintiffs mention this "engineering standard of care." In fact, in the plaintiffs' brief filed with the circuit court a week before the start of the trial, their declared position was that the City "failed to exercise reasonable care." Nor did the plaintiffs ever provide the City with notice of their intent to assert a standard of care other than reasonable care. We agree with the circuit court that the plaintiffs neither pled nor properly advanced the engineering standard of care.

¶ 49 The plaintiffs attempt to demonstrate support for their claim that an engineering standard of care applied to the City's conduct by pointing to their request to reopen discovery. The plaintiffs submit they would have "further disclosed the expert witness opinion that the City breached the basic engineer's standard of care" had the trial court granted their motion to reopen discovery. At best for the plaintiffs, we view the trial court's refusal to hold the City to the engineering standard of care as essentially a denial of the plaintiffs' implicit request for leave to amend their complaint to offer a legal theory not otherwise included. Similar to our review of a trial court's decision on a motion to reopen discovery, a ruling on a motion to amend brought pursuant to section 2-616(c) of the Code of Civil Procedure (735 ILCS 5/2-616 (c) (West 2008)), is reviewed for an abuse of discretion. *Prignano v. Prignano*, 405 Ill. App. 3d 801, 822 (2010). "In considering whether to permit such an amendment, the trial court should consider whether the amendment will further the ends of justice, whether the amendment alters the nature of the proof required to defend against the claim, and whether the opposing party will be surprised or prejudiced." *Id.*

¶ 50 As we ruled above, the trial court did not abuse its discretion when it denied the plaintiffs' motion to reopen discovery. Nor do we find an abuse of discretion in the trial court's rejection of the plaintiffs' implicit request to amend their pleadings and proceed under a new standard of care. Allowing the plaintiffs to reopen discovery to plead negligence based on the engineering standard of care would have altered the nature of the proof adduced at trial. By necessity, the invocation of a new standard of proof would have impacted the City's defense. The plaintiffs fail to provide us with authority holding that a new standard of care, first raised in the plaintiffs' expert's report,

is sufficient notice to properly assert the application of an engineering standard of care to assess the City's conduct in this case. We note the City's expert did not address this contention, which alone raises the issue of prejudice to the City should a new standard of care be found to apply.

¶ 51 It is also doubtful that the engineering standard of care is the correct standard to apply under the facts of this case. Commissioner Kosiba made the decision to implement the Rainblocker System. Commissioner Kosiba is not an engineer and, although he consulted his technical staff in making his decision to implement the Rainblocker System, some of whom had engineering backgrounds, he expressly considered other factors. The circuit court did not abuse its discretion in determining that allowing the plaintiffs to amend their pleadings to include a claim that the City breached the engineering standard of care would not "further the ends of justice." See *Prignano*, 405 Ill. App. 3d at 822. In any event, we agree with the circuit court that "ordinary care" applied to the City's decision to implement the Rainblocker System citywide.

¶ 52 We also conclude that no breach of the duty of ordinary care can be shown by the City's reliance on the successful pilot studies of four city neighborhoods with varying degrees of historical problems with flooding of basements following heavy rainfall based on the plaintiffs' contention that streets citywide varied in dimensions. The plaintiffs asserted in their opening and closing arguments before the trial court, as finder of fact, that the City engaged in "impetuous decision making" in implementing the Rainblocker System citywide. The court expressly rejected this contention based on Commissioner Kosiba's decision to avoid substantial risks to residents in flood-prone areas of the City if the implementation of the Rainblocker System were delayed to conduct additional pilot studies. The City's expert, Nicklow, supported Commissioner

Kosiba's decision in his testimony that the "public health hazard" of sewage backup in basements lent "an immediacy aspect" to the decision of citywide implementation. On the record before us, the manifest weight of the evidence is not contrary to the trial court's findings that the decision to implement the Rainblocker System citywide was reasonable. See *Prignano*, 405 Ill. App. 3d at 822.

¶ 53 The plaintiffs' negligence claim also falls short on the evidence to prove proximate cause. The court found the plaintiffs failed to prove that the flood damage suffered by their properties would not have occurred had the City performed additional feasibility studies and modified the design of the Rainblocker System based on the results of those studies prior to citywide implementation of the system. The term "proximate cause" encompasses two distinct requirements: cause in fact and legal cause. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992). Cause in fact is present "when there is a reasonable certainty that a defendant's acts caused the injury or damage." *Id.* Legal cause is a question of foreseeability. "[A] negligent act is a proximate cause of an injury if the injury is of a type which a reasonable man would see as a likely result of his conduct." *Id.* at 456.

¶ 54 In holding the plaintiffs failed to prove proximate cause, the trial court focused on the sufficiency of the evidence pertaining to the class representatives' properties. The court found "there was no evidence whatsoever regarding plaintiff Costello's property" and that the proof "was lacking in several ways" regarding the Rainblocker System causing or contributing to the flooding of Galvez-Tuel's property.

¶ 55 To challenge this finding, the plaintiffs argue in their main brief, "Chang's testimony clearly established that damage would occur as a result of surface flooding when the [Rainblocker] System was installed citywide without conducting the additional analyses recommended by Harza[.]" As further support, the plaintiffs point to the testimony of Galvez-Tuel that the curb height of her street was 2.5 to 2.75 inches high, which was below the 6 inches Harza assumed in the design of the Rainblocker System. The plaintiffs argue that taken together, Galvez-Tuel's testimony that her property was outside the scope of Harza's assumptions and Chang's expert opinion that the City's implementation of the Rainblocker System citywide was negligent, established that the surface flooding Galvez-Tuel experienced was the proximate result of the City's negligence. The crux of the plaintiffs' argument is that because the dimensions of the citywide streets could be at odds with the design assumptions of the Rainblocker System, and the intent of the City was to permit the rainwater to accumulate in the streets following heavy rainfall, it was reasonable to conclude that street curbs lower than design assumptions would result in rainwater flowing onto adjacent property and flooding basements, as in Galvez-Tuel's situation, all of which was sufficient to establish the proximate cause element. In their reply brief, the plaintiffs complain that "by requiring Plaintiffs' expert to physically inspect the property of Ms. Galvez-Tuel, the trial court erroneously imposed a requirement that Plaintiffs' expert satisfy a standard of absolute certainty that Illinois law does not require."

¶ 56 The record does not support the plaintiffs' contention that a greater burden under Illinois law was imposed on their expert. Nor does the record support the plaintiffs' claim that the trial court rejected Chang's opinion based solely on his failure to physically inspect the plaintiffs'

properties. Rather, the record shows the court weighed Chang's testimony against the contrary opinion of the City's expert, and, in the proper exercise of its discretion, decided to give little weight to Chang's opinion where he failed to perform site specific analyses of the plaintiffs' properties to support the conclusions he reached, analyses the City's expert Nicklow opined was necessary before blame for the flooding could be placed on the Rainblocker System. The trial court, as finder of fact, considered this a weakness in the plaintiffs' evidence because no link was shown between the City's failure to modify the design of the Rainblocker System before implementing it citywide to address the flooding that the plaintiffs claim damaged their properties. That Chang's opinion, which supported the plaintiffs' claims, was not afforded more weight than Nicklow's by the trial court, does not mean its findings of fact on this issue are against the manifest weight of the evidence. Where contrary evidence is presented, it falls to the trier of fact to resolve the conflicts in the evidence. See *York v. Rush-Presbyterian-St. Lukes Medical Center*, 222 Ill. 2d 147, 179 (2006) (credibility determinations and the resolution of inconsistencies and conflicts in the testimony are for the trier of fact). It was well within the purview of the trial court to conclude that evidence of the specifications of the representatives' properties was necessary in order to entitle Chang's opinion to more weight than Nicklow's. See *Kalabogias v. Georgou*, 254 Ill. App. 3d 740, 749 (1993) (in a bench trial, the judge determines the weight to be given an expert witness's testimony and absent an abuse of discretion, that assessment will not be disturbed on appeal).

¶ 57 The circuit court's finding that proximate cause was not proved is supported as well by Nicklow's testimony that in a severe storm, such as the August 2001 storm, there was a "high

probability that equivalent or increased flooding would have occurred under the same storm conditions" even without the Rainblocker System. The testimony of Galvez-Tuel also supported the conclusion that an exceptionally heavy rainfall would overwhelm the sewer system with or without the Rainblocker System. She testified that although the inlet restrictors had been removed from the street in front of her house after the August 2001 storm, she experienced flooding again in 2004 and 2007.

¶ 58 In a class action, the class representative must prove all of the elements of the claim to prevail on behalf of the class. See *Mulligan v. QVC, Inc.*, 382 Ill. App. 3d 620, 631 (2008) (citing *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 203 (2005) ("When a class representative has not proven his claim for consumer fraud, the consumer fraud claim asserted on behalf of the class cannot stand.").

¶ 59 Here, the trial court's determination that the City's implementation of the Rainblocker System did not cause the plaintiffs' properties to sustain greater flood damage than the properties would have experienced had the Rainblocker System not been in place was not against the manifest weight of the evidence. Accordingly, we uphold the trial court's finding in favor of the City on the plaintiffs' negligence claims.

¶ 60 Tort Immunity Act

¶ 61 The circuit court concluded that even if the City were negligent in the citywide implementation of the Rainblocker System under the plaintiffs' version of the facts, the clear exercise of discretion by the administrators of the City's sewers department in making that decision would trigger immunity under the Tort Immunity Act (745 ILCS 10/1–101 *et seq.* (West

2008)). Because we agree with the court that the plaintiffs failed to establish negligence on the record before us, there is no need to discuss this alternative ground for the trial court's judgment.

¶ 62 CONCLUSION

¶ 63 The trial court's finding of no liability on behalf of the City is consistent with the manifest weight of the evidence. Based upon that evidence, the trial court properly found that the City breached no duty of care to residents in flood-prone neighborhoods based on the City's decision to implement the Rainblocker System citywide. Even if a breach of duty has been shown, we affirm the trial court's finding that the evidence fell short to prove the Rainblocker System proximately caused the damage to the properties suffered by the class representatives.

¶ 64 Affirmed.