No. 2—10—0390
Order Filed May 10, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHRISTOPHER DONOVAN, AMANDA DONOVAN, ROBERT COOPER, AND MARY COOPER, individually and on behalf of all persons similarly situated,	)	Appeal from the circuit court of Lake County
Plaintiffs-Appellants,	)	
v.	)	
COUNTY OF LAKE, a Body Politic and Corporate of the State of Illinois,	)	Christopher Starck and Mitchell Hoffman, Judges Presiding
Defendants-Appellees.	)	

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment

ORDER

Held: Trial court properly dismissed counts I and II of plaintiffs' amended class-action complaint, which alleged that defendant was negligent and in breach of contract for, *inter alia*, failing to maintain plaintiffs' water system, because: (1) the *Moorman* doctrine barred recovery of plaintiffs' alleged damages; (2) the Local Government and Governmental Employees Tort Immunity Act barred recovery of the negligence claim; and (3) plaintiffs waived their breach of contract claim. The trial court also properly granted summary judgment in favor of defendants on counts III and IV of the second amended complaint, which alleged that defendant did not have the authority to only charge plaintiffs for the cost to replace the water system, on the ground that the Counties Code authorizes the County to

> issue revenue bonds payable solely by the water system's customers pursuant to section 5—15017 of the Counties Code. 55 ILCS 5/5—15017 (West 2008).

Plaintiffs, residents of the Glennshire subdivision in the Village of Hawthorne Woods (Village), brought this class-action complaint against defendants, the County of Lake (County), to prevent the County from issuing revenue bonds repayable solely by Hawthorne Woods-Glennshire water system (water system) customers for the costs of constructing a new water system. Judge Christopher Starck granted the County's motion to dismiss counts I and II of the amended complaint, and transferred the remaining counts to the chancery division. In the chancery division, Judge Mitchell Hoffman granted summary judgment in favor of the County on counts III and IV of the second amended complaint. For the following reasons, we affirm the orders of the trial court.

I. FACTS

A. Background

The water system was originally constructed in the Village between 1954 and 1962 and served 224 residences by delivering water to the residences from 20 shallow wells. Each well served no more than 15 residences, which classified the wells and residences being served as "non-community water supply" and therefore not subject to compliance with public water system standards. See 415 ILCS 5/3.145.

The wells in the water system have water distribution mains, or piping, measuring 1 ½ to 2 inches in diameter and are located mainly in the back and front yards of private residences. Half of the water system was never under the Village's control and was acquired by the County in 1973 under an agreement to which the Village was not a party. In 1975, the Village contracted with the County for the County to take over the operation and ownership of the portion of the water system it controlled (hereinafter referred to as the 1975 contract).

In the 1975 contract, the County agreed to make any necessary improvements to the water system as may be required by the IEPA. It also provided that, for operating, maintaining or payment of debts for improvements to the water system, the County was authorized to bill and charge individual customers rates and charges as may be necessary for the cost of operating or construction of the water system. Further, the contract provided that "[t]he County will from time to time issue revenue bonds to expand and improve the water supply facilities. Said revenue bonds shall be retired by funds derived from the local system."

When operating the water system, the County sampled and tested the water in the system monthly at each of the 20 wells, among other water system locations, and the results of those tests were sent by the County to the Illinois Environmental Protection Agency (IEPA). Between September 2000 and August 2005, three test results showed a coliform exceedance in the maximum contaminant level.

In 2006, the County obtained a permit from the IEPA to install interim chlorination facilities on the water system site. Those facilities were constructed and made operational before August 2006. On September 19, 2007, the County submitted engineering and design plans for an IEPA compliant water system to the Village for approval, along with an application for a Village permit to site the new water system's distribution piping in the Village's right-of-ways and public easements.

Since the Village had permitted a competing water supply system, Aqua Illinois, to be installed in the Village subsequent to the 1975 contract, in order for a new water system to be constructed, the Village required that: (1) the County connect to the Aqua Illinois, water system in the Village; and (2) obtain the new water supply by buying water in bulk from Aqua, Illinois.

To fulfill the Village's requirement, the County negotiated a "Water Supply and Sales

Agreement" with the Village and with Aqua Illinois. This contract was effective May 12, 2009 (2009 contract).

In the 2009 contract, the parties acknowledged that there existed a 1975 contract between the County and the Village, and that the 2009 contract was a supplement to the 1975 contract. The parties also acknowledged that the water system was not originally constructed to public water system standards, and that the water system was at that time more than 50 years old. The parties noted that the water supply system has been cited for various violations of state drinking water standards by the IEPA and that the Illinois Attorney General had filed an enforcement action against the County which sought the replacement of the water system with a state code compliant public water system ("PWS").

Among other things, the 2009 contract provided for Village authorization for a surcharge to water system customers' water bills to retire subordinate revenue bonds issued by the County to fund the construction of a new water system.

Regarding the local funding for the construction of the new water system, the 2009 contact specifically provides:

> "***Funding Mechanism for new HWG PWS.*** The Village acknowledges and agrees that the proposed County-issued subordinate revenue bonds, secured by a surcharge on the water bills to HWG area Customers, is an appropriate funding mechanism by which the County is authorized, under the terms of the 1975 Contract between the Village and County, to charge and collect from HWG area Customers, for the proposed new Code-compliant HWG PWS construction and related costs. The Village agrees that the County is authorized, upon issuance of said County subordinate revenue bonds, to charge and collect from HWG area Customers, a surcharge on the

water bills of HWG area Customers to retire said County-issued subordinate revenue bonds." (2009 contract, par. 3(g)(2)(I)).

The construction permit for the new water system was issued on May 8, 2009, and identified the approved water supply distribution piping as "17, 207 feet of 4-inch water main, 2,490 feet of 6-inch water main, 12,373 feet of 8-inch water main, and 1,885 feet of 10-inch water main." The replacement water system is an entirely new, code-compliant public water system, with distribution piping located in public right-of-ways and easements.

The initial estimates for the construction costs of building the new water system ranged from between $23,000 to $25,000 per water system resident/parcel. However, following approval of the 2009 contract, and subsequent bidding out of the new replacement project by the County, the actual cost for constructing the new water system total is a pro rata amount of $11,600 per residence/parcel.

Before fixing the amount of the revenue bonds to be issued to fund the construction of the new water system, the County provided notice to the water system customers of the $11,600 per residence/parcel pro rata cost, and offered the water system customers an opportunity to pre-pay that amount in a lump sum. Of the 227 parcels served by the water system, 144 customers pre-paid the $11,600 pro rata lump sum amount.

For the 83 customers that had not pre-paid, the County adopted and approved a subordinate revenue bond ordinance, secured by a surcharge on those customers' water bills, in the amount of $1,220,000, to fund the remaining portion of the construction costs, and related projects, for the new water system project. Sale of those subordinate revenue bonds closed on November 2, 2009, and the water system contractor was given a Notice to Proceed on November 3, 2009.

Plaintiffs' initial complaint was filed on February 25, 2009. Plaintiffs filed an amended complaint on June 2, 2009, and a second amended complaint on August 27, 2009.

B. Plaintiffs' Complaint

In count I of the amended complaint, plaintiffs alleged a cause of action for negligence. Generally, plaintiffs alleged that the County was obligated to chlorinate the groundwater in the water system that it distributed to plaintiffs and their neighbors, and because the County failed to do so, excessive amounts of coliform were detected on at least three occasions reported to the IEPA between 2000 and 2005. Plaintiffs alleged that the County had a duty to plaintiffs to responsibly operate and maintain the water system, and the County breached its duties to plaintiffs in failing to do the following: (1) chlorinate the water system; (2) provide safe, potable water; (3) repair or replace water mains with monies from an adequate capital improvements fund; (4) set aside reserves sufficient to fund necessary capital improvements; (5) responsibly operate the water system; (6) responsibly maintain the water system; (7) make improvements to the water system as required by the IEPA; and (8) to otherwise operate the water system in a reasonable fashion so as not to cause damage to plaintiffs.

In its brief, as support for its claim that the County was obligated to make improvements to the water system, plaintiffs cited to section two of the 1975 contract, entitled, "Obligations of the County." That section provides, in pertinent part:

> "[T]he County agrees to take over operation and maintenance of the existing water system and make the necessary improvements to the water system as may be required by the Illinois E.P.A."

Plaintiffs claimed that the County's failures to meet those alleged duties proximately

caused damages to plaintiffs. The plaintiffs alleged the following as damages:

> ". . .costs incurred for bottled water and filtration. In addition, Plaintiffs and the Class has suffered and will continue to suffer property damages. Property values in the proposed class areas have been impacted by Defendant's negligence, and such negligence threatens to cause Plaintiffs and the Class at least $25,000 per home for the cost of replacing the Water System." (Plaintiffs' amended complaint, par. 50).

In count II of the amended complaint, plaintiffs allege a cause of action for breach of contract against the County, as third-party beneficiaries of the 1975 contract between the County and the Village. Specifically, plaintiffs assert that they have a right to have the County properly operate and maintain the water system, that the County is required to make improvements to the water system as required by the IEPA, and that the County has failed to do both. Plaintiffs claim unspecified damages resulting from these alleged breaches of contract.

With respect to the County's authority under the 1975 contract to issue revenue bonds to pay for the cost of construction of a new water system, in the statement of facts section of their brief, plaintiffs cite to section six of the 1975 contract, entitled "Expansion and Improvement of the County Water System." That section provides, in pertinent part:

> "The County shall expand and improve these facilities when the need arises for expansion of the Lake County Water System within the Village of Hawthorne Woods. The County will from time to time issue revenue bonds to expand and improve the water supply facilities. Said revenue bonds shall be retired by funds derived from the System."

Plaintiffs allege that the water system does not require expansion within the Village. Instead, the water system requires replacement because the County did not operate and maintain the water system properly over time. Since section six does not apply, plaintiffs allege, the

County does not have contractual authority to issue such revenue bonds.

In count III of the amended complaint, plaintiff sought a declaratory judgment that the County is not authorized, by statute or under the terms of the 1975 contract, to charge plaintiffs exclusively for the cost of replacing the water system.

Plaintiffs' count IV, added in a second amended complaint on August 27, 2009, sought an injunction against the County, premised on its claims that the County possessed no constitutional or statutory authority, and no contractual authority under the 1975 contract, to charge the water system users exclusively for the costs of replacing the water system. Plaintiffs alleged that the County had advised the water system customers that a 30 day time period was open within which to pay a lump sum, alleged to be $23,000 per residence, which represented each user's *pro rata* share of the costs to replace the water system. Plaintiffs contended that injunctive relief was appropriate and required to preserve the status quo.

Neither the plaintiffs' amended complaint, nor its second amended complaint, acknowledged the 2009 contract between the Village, the County, and Aqua Illinois.

Before plaintiffs filed their second amended complaint, defendants moved to dismiss counts I, II, and III of the amended complaint. On September 9, 2009, the trial court entered an order dismissing counts I and II of the amended complaint. With regard to count I, the court found that the negligence claims were barred by the *Moorman* doctrine as well as section 2—201 of the Local Government and Governmental Employees Tort Immunity Act. See *Moorman Manufacturing Company v. National Tank Company*, 91 Ill. 2d 69 (1982); 745 ILCS 10/2—201 (West 2008). The trial court dismissed count II without prejudice, and found that if the breach of contract count was to be repled, it would have to be repled under the 2009 contract. Judge Starck then transferred the remaining counts to the chancery court.

On November 9, 2009, the County filed a motion to dismiss counts III and IV of the second amended complaint. See 735 ILCS 5/2—619(a)(9) (West 2008). By agreement of the parties, the motion to dismiss was treated by the trial court as a motion for summary judgment. See 735 ILCS 5/2—1005 (West 2008).

With regard to whether the County had its own statutory authority to issue the revenue bonds and to have them payable from the funds generated solely from the water system, the court found that the sentence "any waterworks properties" in section 5—15017 of the Counties Code was critical. 55 ILCS 5/5—15017 (West 2008). The court said that it looked up the definition of "waterworks system" in the Counties Code and noted that the term "waterworks system" was defined as a waterworks system in its entirety *or any integral part thereof.* See 55 ILCS 5/5—15002 (West 2008) (emphasis added). Therefore, the court held that the Counties Code authorized the County to issue revenue bonds payable solely from a portion of the waterworks properties. See 55 ILCS 5/5—15017 (West 2008).

The trial court also found that the 2009 contract, together with the applicable terms of the 1975 contract, impliedly authorized the Village to share with the County the municipal code authorities found in section 11—139—9 of the Illinois Municipal Code, which then authorized the County to issue bonds payable solely from the water system customers' properties. See 65 ILCS 5/11–139—8 (West 2008). Plaintiffs' filed a motion to reconsider, which was denied. Accordingly, the trial court entered an order granting summary judgment to the County on both counts.

II. ANALYSIS

We initially note that plaintiffs do not frame their issues on appeal with respect to the four counts raised in their complaint. However, for purposes of clarity we will address the

arguments that plaintiffs raise in the context of each count alleged in the complaint.

A. Count I - Negligence

First, we will address whether the trial court erred in dismissing count I of plaintiffs' amended complaint when it held that the negligence claims were barred by both the *Moorman* doctrine as well as section 2—201 of the Local Government and Governmental Employees Tort Immunity Act. 735 ILCS 5/2—615 (West 2008); *Moorman Manufacturing Company v. National Tank Company*, 91 Ill. 2d 69 (1982); 745 ILCS 10/2—201 (West 2008).

When presented with a motion to dismiss pursuant to section 2—615 of the Illinois Code of Civil Procedure, a trial court must determine whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. 735 ILCS 5/2—615 (West 2008); *Hough v. Kalousek*, 279 Ill. App. 3d 855, 862 (1996). Illinois is a fact-pleading jurisdiction that requires a plaintiff to present a legally and factually sufficient complaint. *Hough*, 279 Ill. App. 3d at 863. When ruling on such a motion to dismiss, a trial court should admit all well-pleaded facts as true and disregard legal and factual conclusions that are unsupported by allegations of fact. *Lake County Grading Company of Libertyville, Incorporated v. Advance Mechanical Contractors, Incorporated*, 275 Ill. App. 3d 452, 456-57 (1995). If, after disregarding any legal and factual conclusions, the complaint does not allege sufficient facts to state a cause of action, the trial court must grant the motion to dismiss. *Lake County Grading Company*, 275 Ill. App. 3d at 457. A motion made pursuant to section 2—615 of the Illinois Code of Civil Procedure is reviewed on a *de novo* basis. *735 ILCS 5/2—615 (West 2008); T & S Signs, Incorporated v. Village of Wadsworth*, 261 Ill. App. 3d 1080, 1084 (1994).

1. The *Moorman* Doctrine

In count I of the amended complaint, plaintiffs alleged that the County had a duty to plaintiffs to responsibly operate and maintain the water system, and the County breached its duties to plaintiffs in failing to do the following: (1) chlorinate the water system; (2) provide safe, potable water; (3) repair or replace water mains with monies from an adequate capital improvements fund; (4) set aside reserves sufficient to fund necessary capital improvements; (5) responsibly operate the water system; (6) responsibly maintain the water system; (7) make improvements to the water system as required by the IEPA; and (8) to otherwise operate the water system in a reasonable fashion so as not to cause damage to plaintiffs. Plaintiffs contended that the County's failures to meet those alleged duties proximately caused damages to plaintiffs. The plaintiffs alleged the following as damages:

> ". . . costs incurred for bottled water and filtration. In addition, Plaintiffs and the Class has suffered and will continue to suffer property damages. Property values in the proposed class areas have been impacted by Defendant's negligence, and such negligence threatens to cause Plaintiffs and the Class at least $25,000 per home for the cost of replacing the Water System."

In dismissing count I, the trial court held that the plaintiffs' damages involved allegations of out-of-pocket expenses and market value loss to real property, which were considered economic losses not recoverable under the *Moorman* doctrine. See *Moorman Manufacturing Company v. National Tank Company*, 91 Ill. 2d 69 (1982).

On appeal, plaintiffs argue that the damages alleged in count I are not barred under the *Moorman* doctrine for the following reasons: (1) the plaintiffs did not allege that the damages were caused by a defect in the water system itself, but instead they have alleged that the County's conduct caused their damages; (2) the cost to repair or replace property that is damaged

by a defendant's negligence is not solely economic loss; (3) the County's negligence caused the water in the system to be unfit for drinking, and that dangerous situation was sufficiently sudden and calamitous to be considered an exception to the *Moorman* doctrine; and (5) this case is analogous to this court's decision in *Village of Deerfield v. Commonwealth Edison Company*, 399 Ill. App. 3d 84 (2009), where we found that the *Moorman* doctrine did not apply.

In *Moorman Manufacturing Company v. National Tank Company*, the Illinois Supreme Court held that a plaintiff cannot recover solely economic loss under a tort theory of negligence. *Moorman Manufacturing Company v. National Tank Company*, 91 Ill. 2d 69, 91 (1982). In *Moorman*, "economic loss" was described as damages for inadequate value, costs of repair and replacement, or consequential loss of profits, without any other claim of personal injury or damage to other property." *Moorman*, 91 Ill. 2d at 82. Although the *Moorman* case involved products liability, our supreme court later applied the economic loss rule to claims that services were performed negligently. See *Anderson Electric, Incorporated v. Leadbetter Erection Corporation*, 115 Ill. 2d 146, 153 (1986). In *Anderson*, the court held that a plaintiff seeking to recover purely economic losses due to the defeated expectations of a commercial bargain cannot recover in tort, regardless of the plaintiff's inability to recover in contract. *Anderson*, 115 Ill. 2d at 153.

The economic loss rule applies even to plaintiffs who have incurred physical damage to their property if the damage is caused by disappointed commercial expectations, gradual deterioration, internal breakage, or other nonaccidental causes, rather than an dangerous event. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 200 (1997). For damages to be recoverable in tort, the sudden, dangerous, or calamitous occurrence must still result in personal injury or property damage. Without injury to a plaintiff's person or property, a claim presents an

economic loss not recoverable in tort. *In re Chicago Flood Litigation*, 176 Ill. 2d at 201.

Plaintiffs first argue that the *Moorman* doctrine should not apply here because they are claiming that the County's negligent conduct in failing to properly maintain the water system caused their damages, instead of alleging that the water system itself was defective. Specifically, they point to the County's failure to chlorinate the potable water, which caused excessive levels of coliform to be present in the water supply. As support for this contention, plaintiffs note that the plaintiff in *Moorman* alleged a defect in the storage tank itself, and therefore the court correctly held that the damages alleged were solely economic losses. See *Moorman Manufacturing Company v. National Tank Company*, 91 Ill. 2d 69 (1982). Plaintiffs contrast *Moorman* to the instant case, where they have alleged that the damages were proximately caused by the County's operation and maintenance of the water system.

We are not persuaded by plaintiffs' reasoning. Four years after the supreme court rendered its decision in *Moorman*, it applied the economic loss rule to claims that services that were performed negligently. See *Anderson Electric, Incorporated v. Ledbetter Erection Corporation*, 115 Ill. 2d 146 (1986). The *Anderson* court also held that "[a] plaintiff seeking to recover purely economic losses due to defeated expectations of a commercial bargain cannot recover in tort, regardless of the plaintiff's inability to recover under an action in contract." *Anderson*, 115 Ill. 2d at 153.

Here, according to plaintiffs' allegations, the County was providing water service to plaintiffs pursuant to a contract with the Village. If plaintiffs' expectations regarding how the County performed that water supply service were not met, then the bar of *Moorman* doctrine clearly applies. *Moorman*, 91 Ill. 2d 69 (1982).

Next, plaintiffs contend that the cost to repair or replace property that is damaged by a

defendant's negligence is not solely economic loss. As support for this contention, plaintiffs cite to *City of Oakbrook Terrace v. Hinsdale Sanitary District*, 172 Ill. App. 3d 653 (1988). In *City of Oakbrook Terrace*, this court held that damages to the city's streets resulting from defendant's negligent installation of storm sewers were not solely economic losses. *Oakbrook Terrace*, 172 Ill. App. 3d at 661. Here, plaintiffs contend that the potable water at homes in the proposed class area were made unsafe by, *inter alia*, the County's refusal to chlorinate the water. Therefore, the compelled replacement of the water system is a direct result of the County's negligence, and the cost of replacing the water system is a recoverable damage, just as the costs to replace the streets were recoverable in *City of Oakbrook Terrace,* 172 Ill. App. 3d 653 (1988).

We disagree with plaintiffs that *City of Oakbrook Terrace* can be likened to the instant case. Here, the cost to replace the water system cannot be compared to the cost to repair the city's streets in *Oakbrook Terrace*. In *Oakbrook Terrace*, the damages to the city's streets were a direct result of the defendant's negligent installation of storm sewers. See *City of Oakbrook Terrace v. Hinsdale Sanitary District*, 172 Ill. App. 3d 653 (1988). Here, however, even viewing the allegations in the complaint in the light most favorable to the plaintiff, there are factual allegations in plaintiffs' complaint that indicate the water system did not have to be completely replaced simply because the County did not chlorinate the water. Specifically, the well-pleaded factual allegations are that the water system did have chlorination facilities installed in 2006, almost three years before plaintiffs filed their first state court case. Since even the plaintiffs' factual allegations do not show a direct relationship between the County's failure to chlorinate prior to 2006 and the need for the more than 50 year-old water system to be replaced, the plaintiffs' argument is without merit.

Plaintiffs also claim that the County's negligence caused the water in the system to be

unfit for drinking, and that dangerous situation was sufficiently sudden and calamitous to be considered an exception to the *Moorman* doctrine. As support for this contention, plaintiffs cite to *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (1997) and *Murifield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Company*, 349 Ill. App. 3d 178 (2009).

In *In re Chicago Flood Litigation*, our supreme court held that the plaintiffs were permitted to seek recovery for lost perishable inventory due to an interruption in electrical service as a result of a flood. See *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (2009). Based upon this holding, plaintiffs argue that "[b]y analogy, it is only logical that plaintiffs here be allowed to pursue their damages caused by unfit drinking water. Both electrical service and potable water are utilities of everyday life. When a defendant's negligence interrupts a utility, as in the *Chicago Flood Litigation*, or permits pollutants in one, as here, the suddenness or dangerousness of those occurrences distinguishes those plaintiffs' tort damages from other situations when merely economic loss result."

Plaintiffs' analysis is flawed. The court in *In re Chicago Flood Litigation* did not allow the plaintiffs to seek recovery for their lost perishable inventory because the loss of electricity was a "utility of everyday life," nor did the court hold that the loss of electricity was a sudden or dangerous event which constituted an exception to the *Moorman* doctrine. Instead, the Illinois Supreme Court held that to recover in negligence, there must be a showing of harm above and beyond disappointed expectations. *In re Chicago Flood Litigation*, 176 Ill. 2d at 201. The court specifically noted that the class plaintiffs were not seeking damages for the loss of continuous electrical service, which was a disappointed commercial expectation. Instead, the plaintiffs were seeking damages for property loss, in the form of lost perishable inventory, as a result of a tortious event. The court held that such damages were above and beyond the plaintiffs'

commercial expectation in continual electrical service, and therefore those losses fell outside the definition of economic loss and were recoverable in tort. *In re Chicago Flood Litigation*, 176 Ill. 2d. at 202. Here, plaintiffs have not alleged any actual property loss which was above and beyond their disappointed commercial expectations, and, therefore, *In re Chicago Flood Litigation* is not analogous to the instant case. *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (2009).

Plaintiff also cites to *Murifield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Company* as support for their proposition that the County caused a dangerous situation by not chlorinating the water in the water system prior to 2006, and that situation was sufficiently sudden and calamitous to be considered an exception to the *Moorman* doctrine. See *Murifield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Company*, 349 Ill. App. 3d 178 (2004).

In *Muirfield*, an infestation of mold and bacteria in a new home was held to be a sudden and calamitous event so as to fall within the exception to the *Moorman* doctrine. *Muirfield*, 349 Ill. App. 3d 178 (2009). The *Muirfield* court noted that when characterizing an event as sudden and calamitous, the focus is upon "the suddenness of the *occurrence of an event*—the point when the injury occurs * * * where such occurrence causes personal injury or damage to property external to the defective product which exposes a party to an unreasonable risk of injury to himself or his property, rather than the suddenness or length of time within which the *defect or cause of the occurrence* develops * * * and manifests itself in the sudden and calamitous occurrence." *Muirfield*, 349 Ill. App. 3d at 194 (emphasis in original) (citing *American Xyrofin, Incorporated v. Allis-Chalmers Corporation*, 230 Ill. App. 3d 662, 671 (1992)).

The court then held that although the mold and bacterial infestation grew gradually, the manifestation was sudden and calamitous, damaging the plaintiff's personal property and

causing them to flee their house or experience the likelihood of personal injury. *Muirfield*, 349 Ill. App. 3d at 194. In the instant case, there is no sudden or calamitous manifestation of an event. The alleged dangerous event, the unfit drinking water, manifested itself over a five year period when the water tested high for coliform levels on three different occasions. This in no way can be considered a sudden or calamitous event, and therefore the exception to the *Moorman* doctrine does not apply.

Plaintiffs also argue that the instant case is similar to and should be controlled by *Village of Deerfield v. Commonwealth Edison Company*, 399 Ill. App. 3d 84 (2009). In *Village of Deerfield*, damage claims were allowed to proceed for perishable inventory lost during electric outages because the plaintiffs were making a claim for "other property." Plaintiffs argue that the spoiled food in *Village of Deerfield* is analogous to the unfit water in this case.

We are not persuaded. The cost of bottled water and filtration costs, as well as impacted property values, are not "property" which the plaintiffs possessed and which was ruined as a result of the County's negligence. Accordingly, *Village of Deerfield* in inapplicable to the instant case. See *Village of Deerfield v. Commonwealth Edison Company*, 399 Ill. App. 3d 84 (2009).

For all these reasons, we hold that the trial court properly dismissed count I of the amended complaint because plaintiffs' alleged damages were barred by the *Moorman* doctrine. See *Moorman Manufacturing Company v. National Tank Company*, 91 Ill. 2d 69 (1982).

2. Tort Immunity

Plaintiffs also argue that the trial court erred in ruling that section 2—201 of the Local and Governmental Employees Tort Immunity Act (Tort Immunity Act) barred count I of the amended complaint. See 745 ILCS 10/2–201 (West 2008). Plaintiffs argue that the County did

not establish its defense under the Tort Immunity Act because some of the duties that plaintiffs alleged were breached in its amended complaint were not discretionary in nature. Specifically, plaintiffs claim that the County was mandated by law to provide water that was safe in quality, and it was obligated to chlorinate the groundwater that it distributed to plaintiffs and their neighbors. See 35 Ill. Adm. Code § 601.101; 653.601—608.

Section 2—201 of the Tort Immunity Act extends the most significant protection afforded to public employees under the Act. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 370 (2003) ; 745 ILCS 10/2—201 (West 2008). That section provides:

> "Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2—201 (West 2008).

Our supreme court has defined the terms "discretionary" and "ministerial" as follows:

> "[D]iscretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 371-72 (2003) (quoting *Synder v. Curran Township*, 167 Ill. 2d 466, 474 (1995)).

Since the immunities afforded to governmental entities operate as an affirmative defense, those entities bear the burden of properly raising and proving their immunity under the Tort Immunity Act. *745 ILCS 10/2—201 (West 2008); Zimmerman for Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 44 (1998).

Here, although the County may have been legally mandated to chlorinate the water and to provide safe drinking water, it is the *manner* in which the County carried out, or failed to carry out, its duties which is our focus. For example, as to plaintiffs' factual allegations relating to three IEPA reports of coliform violations between 2000 and 2005, each required the County to decide the appropriate means and method to repair the violation, *i.e.,* whether to initially install chlorination facilities on the existing site, or to completely rebuild the water system, as well as how to fund the repair. Further, the majority of the allegations in the amended complaint relate to the alleged required replacement of the water system, and whether plaintiffs should be bearing the entire cost of replacing that water system. Those allegations relate to how to replace a more than 50 year-old water system and invoke discretionary decisions on the part of the County. See *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 194 (1997) (a municipal corporation acts judicially, or exercises its discretion, when it selects and adopts a plan in the making of public improvements). Accordingly, we find that the County met its burden of establishing that Count I should be barred because the County was shielded from liability under section 2—201 of the Tort Immunity Act. 745 ILCS 10/2—201 (West 2008).

B. Count II - Breach of Contract

Count II of the second amended complaint is a cause of action for breach of contract. Specifically, the plaintiffs alleged that as third party beneficiaries of the 1975 contract, they have a right to have the County properly operate and maintain the water system, and make required improvements in the water system as mandated by the IPEA. The trial court dismissed count II without prejudice and ruled that if the plaintiffs were to replead this count it should be repled under the 2009 contract. The record reflects that the plaintiffs did not replead this count.

In their notice of appeal, plaintiffs sought reversal of: (1) the September 9, 2009, order dismissing counts I and II of the plaintiffs' amended complaint; (2) the January 5, 2010, order granting the County summary judgment on counts III and IV of the second amended complaint; and (3) the March 23, 2010, order denying plaintiffs' motion to reconsider the January 5, 2010, order. However, although plaintiffs discuss the allegations contained in Count II, and make various claims regarding certain sections of the 1975 contract in their statement of facts on appeal, they do not raise this issue or cite to any authority to support an argument that the trial court erred in dismissing this count in the argument section of their appellate briefs. Accordingly, we find that plaintiffs have waived this argument on appeal. See *Kinkaid v. Ames Department Stores, Incorporated*, 283 Ill. App. 3d 555, 570 (1996) (issues raised in a notice of appeal but not raised before the appellate court are waived).

Even if we were to ignore plaintiffs' waiver, it is clear that any lawsuit brought on a contract which has been modified, as the 1975 contract was modified by the 2009 contract, must be brought on the modified contract. *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 469 (2004) (when a contract is modified or amended by a subsequent agreement, any lawsuit to enforce the agreement must be brought on the modified agreement and not on the original agreement). Therefore, the trial court did not err in dismissing this court without prejudice for plaintiffs to replead it under the 2009 contract.

C. Counts III and IV

Count III of the second amended complaint sought a declaration that the County was not authorized, by statute or under the terms of the 1975 contract, to charge plaintiffs and the purported class exclusively for the cost of replacing the water system. Count IV of the second amended complaint sought an injunction against the County premised upon plaintiffs' claims in count III.

In granting the County summary judgments on both counts, the court held: (1) the Counties Code authorized the County to issue revenue bonds payable solely from a portion of the waterworks properties (55 ILCS 5/5—15017 (West 2008); and (2) the 2009 contract, together with the applicable terms of the 1975 contract, impliedly authorized the Village to share with the County the authority found in section 11—139—8 of the Municipal Code, which authorized the County to issue revenue bonds payable solely from the water system properties (65 ILCS 5/11—139—8 (West 2008)).

On appeal, plaintiffs argue that the trial court erred in granting summary judgment for the County on counts III and IV because the Counties Code makes no provision for repayment of the issuance of revenue bonds by anything but the County's entire waterworks properties.

The cardinal rule of statutory construction requires courts to ascertain and give effect to the legislature's intent. The statutory language, given its plain and ordinary meaning, best indicates the legislature's intent. *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 332 (2008). When the statutory language is clear and unambiguous, a court must give effect to the statute's plain meaning. *People v. Benton*, 322 Ill. App. 3d 958, 960 (2001).

> The term "waterworks system" is defined in the Counties Code as follows: "Definitions. When used in this Division the term "waterworks system" means and includes a waterworks system in its entirety, or any integral part thereof, including mains, hydrants, meters, valves, standpipes, storage tanks, pumps, tanks, intakes, wells, impounding reservoirs, machinery, purification plants, softening apparatus, and all other elements useful in connection with a water supply or water distribution system." 55 ILCS 5/5—15002 (West 2008).

The County derives the authority to issue subordinate revenue bonds for water supply projects from section 5—15017 of the Counties Code. 55 ILCS 5/5—15017 (West 2008). That

statute provides, in pertinent part:

> "Revenue bonds. In order to pay the cost of the construction, acquisition by condemnation, purchase or otherwise of *any waterworks properties*, or sewage facilities, or a combination thereof, or waste management facilities, as the case may be, and the improvement or extension from time to time thereof, * * * the county board may issue and sell revenue bonds *payable solely from* the income and revenue derived from the operation of *the waterworks properties*, or sewage facilities, or a combination thereof, or waste management facilities, as the case may be, * * *. 55 ILCS 5/5—15017 (West 2008) (emphasis added).

The plaintiffs initially note that the County, as a non-home rule unit of government, is bound by Dillon's rule. See *Village of Sugar Grove v. Rich*, 347 Ill. App. 3d 689, 694 (2004). We agree that the County is bound by Dillon's rule and therefore only possesses those powers that are specifically conveyed by the constitution or by statute. *Village of Sugar Grove*, 347 Ill. App. 3d at 964.

We have reviewed the pertinent sections of the Counties Code and agree with the trial court that the Counties Code authorizes the County to issue revenue bonds payable solely by the water system's customers pursuant to section 5—15017 of the Counties Code. 55 ILCS 5/5—15017 (West 2008). In that section, the County is given the statutory authority to issue revenue bonds payable solely from the income and revenue derived from the operation of "any waterworks properties" in order to pay the cost of the construction of any waterworks properties. 55 ILCS 5/5—15017 (West 2008). When determining the meaning of "waterworks properties", the definition section of the Counties Code defines "waterworks system" as including a waterworks system in its entirety, *or any integral part thereof*." 55 ILCS 5/5—15002 (West 2008) (emphasis added). We need not look outside the terms of section 5—15017 and the

definition section in the Counties Code to determine the legislature's intent to authorize the County to issue revenue bonds to only the people being served by that particular water system. See *Beecher Medical Center, Incorporated v. Turnock*, 207 Ill. App. 3d 751, 760 (1990) (a fundamental rule of statutory construction requires that, when an act defines its own terms, those terms must be construed according to the act's definitions).

For these reasons, we find that the trial court properly granted summary judgment to the County on counts III and IV of the second amended complaint. Since we have ruled that the County had direct statutory authority to issue revenue bonds payable solely by the plaintiffs, we need not address the plaintiffs' argument that the trial court erred in also ruling that the 2009 contract, together with the applicable terms of the 1975 contract, impliedly authorized the Village to share with the County the authority found in section 11—139—8 of the Municipal Code, which then authorized Lake County to issue revenue bonds payable solely from the water system properties (65 ILCS 5/11—139—8 (West 2008)).

III. CONCLUSION

Accordingly, we affirm the judgment of the trial court dismissing counts I and II of plaintiffs' amended complaint. We also affirm the judgment of the trial court granting the County summary judgment on counts III and IV of the second amended complaint.

The judgments of the circuit court of Lake County are affirmed.

Affirmed.