2012 IL App (2d) 110866-U
No. 2-11-0866
Order filed August 23, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JAMES ZECHMAN and BARBARA ZECHMAN,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellants,	)	
v.	)	No. 09-L-573
THE CITY OF HIGHLAND PARK,	)	
Defendant-Appellee	)	
(Eric Bolander Construction Company, Inc., Defendant.)	)	Honorable Wallace B. Dunn, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: In jury trial where homeowners sued their city for damages resulting from a failure to reconnect their home to a storm sewer following an upgrade project, the trial court did not commit reversible error in (1) finding that the construction statute of repose (735 ILCS 5/13-214(b) (West 2010)) barred homeowners from introducing evidence regarding the city's role in the design, construction, inspection, and observation of the sewer project; (2) allowing the city to present the affirmative defense that it lacked notice of the lack of connection and thus met the common law duty of due care codified by section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102(a) (West 2010)); (3) allowing the city's expert to testify to hearsay statements made by the

homeowners' roofing expert regarding the condition of the gutters; (4) admitting photographs that the city had not disclosed before trial; (5) allowing the jury to hear evidence relating to insurance claims; (6) barring the homeowners from presenting an e-mail and power point presentation to impeach a city employee; and (7) instructing the jury on premises liability and tort immunity and allowing the city's special interrogatory relating to notice.

¶ 1 Plaintiffs, James and Barbara Zechman, allege that their 143-year-old residence and its contents were damaged by episodes of water infiltration from 1994 to 2008. Plaintiffs filed a complaint against the City of Highland Park (the City) and its contractor, Eric Bolander Construction Company (Bolander), claiming that the damage was caused when defendants disconnected the home from the City's storm sewer system as part of a system upgrade in 1994.[1] Plaintiffs' theory is that (1) before the 1994 project, the house experienced no water damage because its system of gutters and downspouts was connected to the storm sewer; (2) the 1994 project caused a disconnection that resulted in rain and melted snow backing into the downspouts and gutters and infiltrating the home; and (3) the house stopped experiencing water infiltration in 2008 because the City reconnected it to the sewer at that time. The City's theory is that the lack of a sewer connection is unrelated to the water infiltration, plaintiffs showed a long history of poor maintenance, and they finally solved the problem by replacing the roof in 2008, which happened to coincide with correcting the disconnection.

¶ 2 Plaintiffs' claims against the City for negligence, trespass, breach of implied contract, and promissory estoppel were tried by a jury. At the close of plaintiffs' case, the trial court granted the

[1] Bolander went out of business before this action commenced. Plaintiffs obtained a default judgment of $301,805 against Bolander, which is not a party to this appeal.

City a directed verdict on the claims of breach of implied contract and promissory estoppel.[2] The jury returned a verdict for the City on the negligence and trespass claims.

¶ 3 Plaintiffs appeal from the judgment for the City, alleging that the following errors entitle them to a new trial on the negligence and trespass claims: (1) the trial court improperly found that the construction statute of repose (735 ILCS 5/13-214(b) (West 2010)) barred plaintiffs from introducing evidence regarding the City's role in the design, construction, inspection, and observation of the sewer project; (2) the court improperly allowed the City to present the affirmative defense that it lacked notice of the disconnection and thus met the common law duty of due care codified by section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102(a) (West 2010)); (3) the court improperly allowed the City's expert to testify to hearsay statements made by plaintiffs' roofing expert regarding the condition of the gutters; (4) the court admitted photographs that the City had not disclosed before trial; (5) the court prejudiced plaintiffs by allowing the jury to hear evidence relating to insurance claims; (6) the court barred plaintiffs from presenting an e-mail and power point presentation to impeach a City employee; and (7) the court incorrectly instructed the jury on premises liability and tort immunity and allowed the City's improper special interrogatory relating to notice. We affirm.

¶ 4 I. FACTS

¶ 5 A. Background

¶ 6 Plaintiffs purchased their home in 1983. They allegedly experienced no water infiltration problems until 1994, around the time the City began construction on its curb, street, sanitary, and

[2] Plaintiffs do not appeal the directed verdict entered on the claims of breach of implied contract and promissory estoppel, and therefore, we need not address them.

storm sewage system in the street adjacent to plaintiffs' home. The City hired Bolander to perform construction and maintenance on the project. Plaintiffs allege that their home was connected to the storm sewer until Bolander damaged or otherwise interfered with the connection, at which point the entire home allegedly suffered severe water damage following rain or snow.

¶ 7 As a result of their increasing frustration over the water infiltration, in June 2008, plaintiffs hired a roofing company, A Roofing Cedar Works, to replace their entire roof and tighten the gutters and downspouts. Plaintiffs allege that, soon after the roof replacement, a heavy rainstorm caused water to back up the downspouts into the gutters, spray into the air above the roof line, and uproot large chunks of asphalt in the driveway. After this alleged episode of water spraying like a "geyser," plaintiffs hired Pasquesi Plumbing Company, which helped them discover that their home was not connected to the City's storm sewer. The City confirmed the lack of a connection and installed 100 feet of sewer main on August 13, 2008, to connect the home to the storm sewer. Plaintiffs allege that they experienced no water infiltration following the City's repair.

¶ 8 B. The Pleadings

¶ 9 On June 18, 2009, plaintiffs filed their complaint asserting claims of negligence, trespass, breach of implied contract, and promissory estoppel. For purposes of this appeal, the salient allegations of the negligence claim are as follows:

> "24. Defendants, [the City] and Bolander, acted carelessly and negligently in one or more of the following respects:
>
> a. Failed to reconnect [plaintiffs'] property's storm sewer connection to [the City's] storm sewer system;

b. Caused, or permitted to be caused, the crushing and continued disconnection of [plaintiffs'] property's storm sewer connection to [the City's] storm sewer system;

c. Failed to take proper care and precaution in the planning, design, performance, supervision, and inspection of the maintenance and construction activities related to the sewer project, which failures have caused or contributed to the damages sustained by plaintiffs; and/or

d. Were otherwise careless and negligent in the performance of construction activities on the sewer project."

¶ 10 The trespass claim alleged that the City knowingly, intentionally, or with reckless disregard, disconnected or failed to reconnect plaintiffs' storm sewer connection. Plaintiffs alleged that it was foreseeable that the disconnection would cause excess water to back up and infiltrate the home and that the continued entry of excess water interfered with the exclusive use and possession of their land.

¶ 11 The City moved to dismiss the complaint under section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2010)), arguing that the claims were barred either by the 10-year construction statute of repose (735 ILCS 5/13-214(b) (West 2010)) or by the five-year statute of limitations (735 ILCS 5/13-205 (West 2010)). The City alternatively argued for dismissal under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) on the ground that the complaint failed to state a claim because section 2-201 of the Tort Immunity Act confers immunity to public employees serving in positions involving the determination of policy or the exercise of discretion (745 ILCS 10/2-201 (West 2010)).

¶ 12 On December 9, 2009, the trial court dismissed without prejudice the promissory estoppel claim, but otherwise denied the City's motion to dismiss. On December 22, 2009, plaintiffs filed an amended complaint, realleging the four claims.

¶ 13 On January 13, 2010, the City moved for summary judgment (735 ILCS 5/2-1005 (West 2010)) on the ground that the claims were time-barred by the construction statute of repose (735 ILCS 5/13-214(b) (West 2010)) as a matter of law because plaintiffs alleged that a disconnection occurred in 1994, but they discovered the condition in 2008 and filed a complaint in 2009. The statute of repose requires that claims for faulty construction be brought within a certain period:

> "No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission. However, any person who discovers such act or omission prior to expiration of 10 years from the time of such act or omission shall in no event have less than 4 years to bring an action as provided in subsection (a) of this Section. Notwithstanding any other provision of law, contract actions against a surety on a payment or performance bond shall be commenced, if at all, within the same time limitation applicable to the bond principal." 735 ILCS 5/13-214(b) (West 2010).

¶ 14 On March 3, 2010, the trial court granted the City summary judgment as to any claims premised on paragraphs 24(c) and 24(d) of the amended complaint, but the court otherwise denied the City summary judgment.

¶ 15 On March 19, 2010, the City filed an answer to the amended complaint. The City denied the allegations of wrongdoing and pointed out that summary judgment had been entered against

plaintiffs on their allegations in paragraphs 24(c) and 24(d). As affirmative defenses, the City alleged that plaintiffs failed to mitigate their damages and that the construction statute of repose barred the claims.

¶ 16 On the eve of trial, the court began ruling on the parties' various motions *in limine*. Among its rulings, the court granted plaintiffs' motion *in limine* No. 6, barring the City from introducing evidence that plaintiffs had made insurance claims for water damage. The court also granted the City's motion *in limine* No. 18, barring plaintiffs from introducing evidence regarding the City's role in the design, construction, inspection, and observation of the sewer project. The court concluded that the order granting the City partial summary judgment rendered such evidence immaterial and irrelevant.

¶ 17 C. The Trial

¶ 18 Plaintiffs' claims were tried to a jury from March 7, 2011, to March 15, 2011. Plaintiffs' house was constructed in 1869 and has been updated over the years by its various owners, including plaintiffs. The house is equipped with an internal gutter system which is constructed within the roof instead of along the edges of the roof. Instead of allowing precipitation to drain off the home and splash into the yard, the downspouts on the front of the house run directly into the ground where they can be connected to the storm sewer. On the rear of the house, the downspouts are not so connected, but rather are exposed and allow water to splash into the back yard and drain away naturally.

¶ 19 In 1994, the City implemented a maintenance and construction project on its curbs, streets, and sanitary and storm sewer systems. The City hired Bolander to perform the work, and it is undisputed that some of the work was performed on the street adjacent to plaintiffs' home.

¶ 20 Plaintiffs testified that they experienced water infiltration only after the sewer project was completed in 1994. James described the water problems as follows:

> "They all seem to occur in the spring, summer, and fall *** starting in the fall of 1994 after the City project. During heavy rains, we would see up on the ceilings on the second floor of our home and first floor of our home, we would see water spots developing in the plaster, and they would grow larger over time. Also, in the basement during a significant rain, I would go downstairs and take a look in the wall that [*sic*] we had the French drain installed that used to be dry, now it was weeping. It was very wet.
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> * * *
>
> It didn't happen after every rain. We tended to notice it after significant rains. And in the early days after the project, it seemed to take longer maybe to show up. And all of a sudden there would be one spot in the living room, and later there would be a spot — and when I say spot, it could be anywhere from six inches to three feet up in the ceilings. It could be after a heavy rain and then followed by a lighter rain that we would start seeing problems. Over the period of time, my recollection is we had to have buckets in two or three of the rooms to catch water on six to eight occasions, and those were the worst because on one of the occasions buckets were downstairs in our family room catching water coming in and the entire plaster ceiling fell in. To say it was frightening, it was an understatement."

¶ 21 James testified that the water damage was confined to the front of the house, where the downspouts ostensibly would carry the water to the storm sewer. The damage encompassed the following areas: (1) the first floor sun room, living room, family room, office, and foyer, including windows, window sills, and casements; (2) the stairway landing between the first and second floors;

(3) two second floor bedrooms and a sitting room, including the windows; and (4) the basement. In addition to the damage to the house itself, plaintiffs suffered damage to numerous items of personal property. James admitted that, from 1994 to 2008, he neither complained to the City about the water infiltration nor asked the City to investigate it.

¶ 22 James testified that, in June 2008, he hired Juan Gutierrez, the proprietor of A Roofing Cedar Works, to replace the house's roof and the internal gutters within the roof. Approximately one week after the roofing work was complete, Barbara was backing her car out of the driveway during a rain storm. Barbara testified that she observed water "shooting up" out of the internal gutters on the roof. Barbara described what she saw as "Old Faithful" on top of the house, with "water gushing out of the downspouts." James testified that he exited the house and saw "water bubbling over the scuppers throughout the whole front of the home." The water was "shooting up the downspouts in the lower area and a couple feet in the air like a geyser."

¶ 23 James called Pasquesi Plumbing, which had been doing plumbing work on the house since plaintiffs purchased it. Fred Alaimo came to the house, observed the "geyser" phenomenon, and opined that the gutters had a blockage that needed to be rodded. While performing the rodding, the workers reached an area underground near the driveway where they could no longer pass the rod. Pursuant to Alaimo's recommendation, the driveway was excavated, which disclosed that plaintiffs' house was not connected to the storm sewer. The City reconnected plaintiffs' house to the sewer in August 2008.

¶ 24 Plaintiffs introduced evidence on the issue of what caused the water infiltration. Gutierrez testified that, when plaintiffs hired him to replace the old roof, it was "a little old, but it was still in pretty good shape." According to Gutierrez, James told him that plaintiffs wanted to replace the roof

because it had leaking problems. Gutierrez recommended that plaintiffs replace the internal gutters at the same time because they are incorporated into the roof so that replacing them later would be more expensive. Gutierrez testified that he also installed an ice shield because the house did not have one. An ice shield is placed between the roof deck and the shingles to prevent rain and ice melt from leaking through the roof. Gutierrez opined that the lack of a connection between plaintiffs' house and the sewer "could have" caused the water infiltration, but he believed the lack of an ice shield might have made matters worse.

¶ 25 Alaimo testified that he watched the excavation of plaintiffs' driveway and saw the lack of a connection between plaintiffs' house and the storm sewer. Alaimo testified that he believed that the lack of a sewer connection caused the water infiltration. However, he described the phenomenon of water backing up to a roof as something he had seen "not a lot."

¶ 26 Mike Brenner testified that he was serving as the City's mayor *pro tem* in June 2008. Brenner was summoned to the scene of the driveway excavation and saw the lack of a connection to the storm sewer. Brenner, who also worked for Merkel Builders, a general contractor, concluded that the disconnection of plaintiffs' line to the sewer caused the water problems. Brenner opined that "this type of damage [plaintiffs] incurred is, I think, typical to where you have all this hydrostatic pressure, especially water coming from a higher level and nowhere to go. It is just looking for relief, and it is going to try to get out and anywhere it can."

¶ 27 Larry Schwartz, a licensed home building inspector, testified that he inspected plaintiffs' home in September 2008. Based on the location of the damage, the characteristics of hydrostatic water pressure, and other unspecified "scientific principles," Schwartz agreed that the water infiltration was caused by the lack of a storm sewer connection. Schwartz testified that he had "no

doubt" that, if a downspout is blocked, it is possible for water to back up the downspout to a second-floor gutter where the water would bubble over or even spray two feet into the air. Schwartz compared plaintiffs' rainwater "geyser" phenomenon to oil spraying from the ground when drilling relieves the soil pressure around it. Schwartz testified that, although he believed hydrostatic pressure can cause water to back up onto a roof, he was unaware of any instance where that actually happened.

¶ 28 Plaintiffs also introduced evidence that the City should have known that plaintiffs' house was not connected to the storm sewer. Bill Stewart, Leif Dickinson, and Mary Anderson, employees of the City, testified that in May 1999, another home was found to be disconnected from the storm sewer. The home is two lots east of plaintiffs' home. The City connected the home to the storm sewer at that time, but it did not investigate whether other homes lacked connections. The City discussed performing dye testing in the area, but the City did not follow through on the plan. Plaintiffs argued that the 1999 discovery of the nearby home's disconnection put the City on notice that plaintiffs' home was not connected to the storm sewer.

¶ 29 Following the close of plaintiffs' case, on March 14, 2011, the trial court entered a directed verdict for the City on the claims of breach of implied contract promissory estoppel. On March 15, 2011, the trial court granted the City leave to present an additional affirmative defense under section 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a) (West 2010)). Section 3-102(a) codifies the standard of due care in negligence actions against local governmental entities:

> "Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the

property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102(a) (West 2010).

¶ 30 Dr. Tarek Refai, an licensed professional engineer, testified for the City on the issue of causation. After twice inspecting plaintiffs' house and property, Dr. Refai opined that the lack of a connection to the storm sewer did not cause water to infiltrate plaintiffs' house. Describing plaintiffs' theory as physically and scientifically impossible, Dr. Refai testified that "water cannot go up in the air and past the exterior edge [of the roof] two or three inches and then get higher five more [inches] to get to the top of the apron [of the roof] and then travel sideways and get [inside the house]."

¶ 31 Dr. Refai offered his own theory of the cause of the water infiltration. First, deteriorated roof and gutter systems caused damage on the ceilings and walls of the first and second floors. The shingles had been damaged by hail in July 2003 and were never repaired, the gutters were rusted, and the old roof lacked an ice-shield. The roof and gutters were 24 years old and deteriorated when they were replaced in 2008. Plaintiffs had neglected the roof, which allowed water intrusion and the resulting interior damage. Second, water damage around the windows was caused by deteriorated window seals and broken glass in certain sections. The windows were 26 years old. Third, water damage to the basement was caused by the deteriorated and poorly maintained exterior foundation, which was made of stone and mortar and lacked a waterproof membrane. Dr. Refai conceded that the lack of a connection to the storm sewer hindered water drainage from the house, but he explained

that excessive tree roots on the parkway in the area of the storm sewer slowed drainage too and that the house was built on clay, which does not drain well.

¶ 32 The jury returned a verdict for the City on plaintiffs' claims of negligence and trespass, and they responded to a special interrogatory by stating that the City had neither constructive nor actual notice of the lack of a storm sewer connection at plaintiffs' home such that the City could have prevented the water damage. The trial court entered judgment on the verdict, and following the denial of plaintiffs' motion for a new trial, this timely appeal followed.

¶ 33 II. ANALYSIS

¶ 34 Plaintiffs assert that they are entitled to a new trial against the City because the trial court committed seven errors: (1) the trial court improperly found that the construction statute of repose (735 ILCS 5/13-214(b) (West 2010)) barred plaintiffs from introducing evidence regarding the City's role in the design, construction, inspection, and observation of the sewer project; (2) the court improperly allowed the City to present the affirmative defense that it lacked notice of the disconnection and thus met the common law duty of due care codified by section 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a) (West 2010)); (3) the court improperly allowed the City's expert to testify to hearsay statements made by plaintiffs' roofing expert regarding the condition of the gutters; (4) the court admitted photographs that the City did not disclose before trial; (5) the court prejudiced plaintiffs by allowing the City to present evidence relating to insurance claims; (6) the court barred plaintiffs from presenting an e-mail and power point presentation to impeach a City employee; and (7) the court incorrectly instructed the jury on premises liability and tort immunity and allowed the City's improper special interrogatory relating to notice.

¶ 35 A. The City's Motion *In Limine* No. 18

¶ 36 Plaintiffs argue that the trial court erroneously granted the City's motion *in limine* No. 18, which sought to exclude evidence regarding the City's role in the design, construction, inspection, and observation of the sewer project. The court agreed with the City that claims relating to such evidence were time-barred by the construction statute of repose, and thus, such evidence was immaterial and irrelevant. The statute of repose provides in relevant part that "[n]o action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission." 735 ILCS 5/13-214(b) (West 2010).

¶ 37 The City argues that plaintiffs have forfeited the issue by failing to raise it in their posttrial motion. "A party who fails to file a posttrial motion following entry of judgment on a jury verdict forfeits appellate review of all waivable issues." *Johnson v. Transport Intern. Pool, Inc.*, 345 Ill. App. 3d 471, 472 (2003). By failing to respond, plaintiffs concede the point, and we consider the issue forfeited. Forfeiture notwithstanding, we conclude that plaintiffs' argument regarding the statute of repose lacks merit.

¶ 38 Generally speaking, evidentiary motions, such as motions *in limine*, are directed to the trial court's discretion. *In re Leona W.*, 228 Ill. 2d 439, 460 (2008). A trial court's ruling on such motions will not be disturbed on review absent an abuse of that discretion. *Leona W.*, 228 Ill. 2d at 460. The threshold for finding an abuse of discretion is high. A trial court will not be found to have abused its discretion with respect to an evidentiary ruling unless it can be said that no reasonable person would take the view adopted by the court. *Leona W.*, 228 Ill. 2d at 460. Moreover, even where an abuse of discretion has occurred, it will not warrant reversal of the judgment unless the

record indicates the existence of substantial prejudice affecting the outcome of the trial. *Leona W.*, 228 Ill. 2d at 460. Plaintiffs argue that the court's decision is subject to *de novo* review because it is a "uniquely legal ruling" regarding the operation of the statute of repose. Even reviewing the decision *de novo*, we conclude that the court did not err in granting the City's motion *in limine* No. 18.

¶ 39 Plaintiffs assert that the effect of the order was that "[p]laintiffs were only allowed to present evidence that the City was negligent in failing to reconnect [plaintiffs'] storm sewer line *after completion* of the 1994 upgrade project. Plaintiffs could not present any evidence or testimony that the City caused [plaintiffs'] storm sewer line to be disconnected in the first place." (Emphasis added.) Plaintiffs' contention that the order "materially altered [their] entire case" is based on the mistaken premise that their negligence claim required proof that (1) the house was connected to the sewer before the project; (2) the City caused the house to be disconnected from the sewer; and (3) the City failed to reconnect the house to the sewer. "To state a cause of action for negligence, a complaint must allege facts that establish the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). Regardless of whether the house was connected before the project or whether the project caused the disconnection, plaintiffs had the opportunity to argue that the City knew or should have known that the house was not connected after the project and therefore was negligent for failing to reconnect the storm sewer.

¶ 40 Plaintiffs assert that "[i]n essence, the court restricted plaintiffs' negligence claim to the activities encompassed by and following paragraph 24(a) of the amended complaint and precluded plaintiffs' from presenting evidence with respect to paragraph 24(b)." However, plaintiffs

misinterpret their own allegation in paragraph 24(b) and the effect of the court's order. Paragraph 24(b) alleged that the City "[c]aused, or permitted to be caused, the crushing and *continued disconnection* of [plaintiffs'] property's storm sewer connection to [the City's] storm sewer system." (Emphasis added.) The order barring evidence regarding the City's role in the design, construction, inspection, and observation of the sewer project did not preclude evidence that the City was negligent for the continued disconnection of the storm sewer after Bolander's work was ostensibly complete.

¶ 41 We further reject plaintiffs' assertion that the order barred them from proving that the home was connected to the storm sewer in the first place, as plaintiffs could have presented circumstantial evidence that the water infiltration problems began soon after the project started. Moreover, plaintiffs introduced evidence that the water infiltration ended after the disconnection was discovered and corrected in 2008, from which they could argue the inference that the continuous disconnection from 1994 to 2008 caused the water damage.

¶ 42 The trial court's ruling on the City's motion for summary judgment in which it struck paragraphs 24(c) and 24(d) are consistent with granting the City's motion *in limine* No. 18. The court consistently applied the statute of repose to the allegations relating to the City's activities in the 1994 project. The court allowed the negligence claim against the City to go forward as it related to the City's failure to reconnect the sewer after the project, and there was no restriction on plaintiffs' right to introduce evidence that the house was connected to the storm sewer before the project.

¶ 43 Plaintiffs alternatively contend that the City was *not* involved in the project, and therefore the statute of repose does not apply. However, that argument completely contradicts the allegations in paragraphs 24(c) and 24(d), which alleged that the City "[f]ailed to take proper care and

precaution in the planning, design, performance, supervision, and inspection of the maintenance and construction activities related to the sewer project" and was "otherwise careless and negligent in the performance of construction activities on the sewer project." Allegations in a pleading are formal, conclusive judicial admissions withdrawing a fact from issue, provided the pleading has not been amended, abandoned, or withdrawn. *Farmers Auto. Ins. Association v. Danner*, 394 Ill. App. 3d 403, 412 (2009). In this action, plaintiffs have persistently alleged that the City was responsible for the storm sewer disconnection. Plaintiffs attempt to distance themselves from this position for the first time on appeal, after recognizing that their allegations trigger the statute of repose. The trial court struck paragraphs 24(c) and 24(d) from the complaint, but such action is very different from a party's amendment, abandonment, or withdrawal of a factual allegation. We conclude that plaintiffs are bound by their judicial admission.

¶ 44 B. The Affirmative Defense of Tort Immunity

¶ 45 Plaintiffs next contend that the court should not have allowed the City to present an affirmative defense under section 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a) (West 2010)) because the statute does not apply and the amendment was untimely. The City responds that the trial court did not abuse its discretion in granting leave to add the affirmative defense because plaintiffs were not prejudiced by the amendment and the City met its burden of disproving actual or constructive notice of the lack of a sewer connection. We agree with the City.

¶ 46 Pursuant to section 3-102(a), a local public entity has a duty to exercise ordinary care to maintain its property in a reasonably safe condition, but the public entity "shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to

remedy or protect against such condition." 745 ILCS 10/3-102(a) (West 2010)). A public entity does not have constructive notice of a condition of its property that is not "reasonably safe" if the public entity establishes "[t]he existence of the condition and its character of not being reasonably safe would not have been discovered by an inspection system that was reasonably adequate considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property." 745 ILCS 10/3-102(b)(1) (West 2010)).

¶ 47 Plaintiffs' theory throughout the case has been that (1) the City, as a passive landowner, owed a duty to keep its property free from defective conditions, (2) the lack of a sewer connection to plaintiffs' home was a defective condition on the City's property, (3) the City had notice of the condition, (4) the City failed to remedy the condition, and (5) plaintiffs suffered damages to their property from the City's omission.

¶ 48 The parties do not dispute that the City lacked actual notice of plaintiffs' lack of a sewer connection until the driveway was excavated in June 2008. By that time, plaintiffs already had suffered the damages for which they were seeking compensation. Thus, the remaining issue pertaining to notice was whether, at some point after the 1994 project, the City had constructive notice that plaintiffs' home lacked a sewer connection such that the City could have prevented plaintiffs' alleged damages. Through the affirmative defense of section 3-102, the City sought to prove that the impracticability and significant cost of investigating every home affected by the 1994

upgrade project outweighed the likelihood of finding any problems, and therefore, the City lacked constructive notice of the lack of a sewer connection at plaintiffs' home.

¶ 49 The jury heard evidence that, in 1999, a neighbor two doors down from plaintiffs' home was not connected to the storm sewer. At that time, a contractor working on the home called the City about a missing connection to the storm sewer at the front of the property, and the City corrected the problem. By establishing that the City was placed on notice of this lack of connection, plaintiffs raised the issue of whether the City was negligent for failing to check other homes for similar disconnections. In response, the City presented Anderson's testimony to prove that the City was not negligent.

¶ 50 Anderson testified that, before plaintiffs commenced this action, the City believed that the 1994 sewer project was a complete success. Aside from the 1999 report, the City did not receive any complaints from property owners, including plaintiffs, involved in the project. After the 1999 report of a disconnection, the City weighed three factors in concluding that further investigation in the area was not warranted. First, the 1994 project involved 53 properties and more than 150 connections, but the disconnection reported by plaintiffs' neighbor was the only problem encountered in 5 years. Second, the City had no indication that the neighbors' home suffered water damage from the lack of a connection or that other properties were experiencing water infiltration. Third, an investigation of all of the connections would have been cost prohibitive, especially considering there was no indication of a public health risk.

¶ 51 Based on this evidence, the City argued to the jury that it acted reasonably under the circumstances. An investigation that would have led to the discovery of a lack of a sewer connection at plaintiffs' home would have required substantial resources, including money, manpower, and time,

to test more than 150 connections. Anderson described such an expenditure as financially irresponsible based on the report of a single disconnection in the five years since the project's completion. The jury was free to weigh the evidence and concluded that the City did not breach a duty to investigate other homes, including plaintiffs' home, for the absence of sewer connections.

¶ 52 Plaintiffs assert that section 3-102 does not apply because "the injury" did not occur on the City's property. Plaintiffs suffered damage to their home and personal property, which was not on the City's property. However, the allegedly negligent acts and omissions of the City occurred at the place at which plaintiffs' home connects to the storm sewer, which was on the City's property.

¶ 53 Plaintiffs cite *Belton v. Forest Preserve District of Cook County*, 407 Ill. App. 3d 409, (2011), in which a tree branch from a rotting tree on forest preserve land fell onto an adjacent road and hit the plaintiff's car. The appellate court reversed summary judgment for the forest preserve district on the ground that there were insufficient facts in the record to determine whether the forest preserve district owed a duty to the plaintiff. However, in rejecting the forest preserve's contention that "its property maintenance duties to the world are limited to certain users of its property and do not encompass persons on adjacent or abutting property," the appellate court specifically recognized that "there is considerable, well-settled authority indicating public entities are liable for injuries occurring on adjacent or abutting land." *Belton*, 407 Ill. App. 3d at 417. Plaintiffs' reliance on *Belton* is misplaced, as the City never has asserted that the water infiltration occurring on adjacent land meant that it owed plaintiffs no duty. *Belton* stands for, *inter alia*, the proposition that public entities are liable for injuries suffered on public land as well as on adjacent property, a principle with which the City does not disagree.

¶ 54 We further conclude that the trial court did not commit reversible error in allowing the City to introduce its affirmative defense. Section 2-616(a) of the Code of Civil Procedure permits parties to amend their pleadings at any time before a final judgment is rendered "on just and reasonable terms." 735 ILCS 5/2-616(a) (West 2010); *Jones v. O'Brien Tire and Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 936 (2007). Section 2-616 is to be interpreted liberally so that cases may be decided on their merits rather than on the basis of flaws in the pleadings. The decision to permit or deny leave to amend pleadings is within the discretion of the trial court, and we will not reverse its decision absent an abuse of that discretion. *Jones*, 374 Ill. App. 3d at 936. A court considers the following factors when deciding whether to grant leave to amend pleadings: (1) whether the proposed amendment would cure a defect in the pleadings, (2) whether other parties would sustain prejudice if the amendment is allowed, (3) whether the amendment is timely, and (4) whether the party had previous opportunities to amend the pleadings. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992); *Jones*, 374 Ill. App. 3d at 936-37.

¶ 55 Contrary to plaintiffs' claims of surprise and prejudice, the City's alleged notice of the lack of a sewer connection at plaintiffs' home was the central issue from the start of this case, long before the City moved to amend its affirmative defenses. Accordingly, plaintiffs cross-examined Anderson on the practicability and cost of investigating possible sewer disconnections after the City received actual notice in 1999 of plaintiffs' neighbor's disconnection. If plaintiffs had wished to present additional evidence on the cost-benefit issue after the City obtained leave to add its affirmative defense, plaintiffs had various options that they did not pursue. First, plaintiffs could have presented additional evidence in their rebuttal case. Second, if plaintiffs believed that they lacked sufficient evidence on the issue, they could have asked for a continuance for additional discovery. Plaintiffs

could have presented the new evidence in their rebuttal case or could have sought leave to reopen their case-in-chief. Third, if plaintiffs believed that these remedial measures were inadequate, they could have moved for a mistrial, but they did not.

¶ 56 The City had prior opportunities to propose the amendment and waited until the close of plaintiffs' case-in-chief to do so, which arguably makes the decision to grant leave to add the affirmative defense a close one. We do not condone the City's dilatory conduct, especially in light of its argument that notice was a central issue in the case from the outset, but our deferential standard of review compels us to affirm the trial court's decision to allow the affirmative defense, as we cannot say that the decision was an abuse of discretion.

¶ 57 C. The City's Expert Witness

¶ 58 Plaintiffs also argue that the court should not have allowed Dr. Refai, the City's expert, to testify to inadmissible, unsworn hearsay statements made by Gutierrez, plaintiffs' expert, regarding the condition of plaintiffs' gutters. Dr. Refai testified that he had a phone conversation with Gutierrez, the roofer who had replaced plaintiffs' roof and gutters in 2008. Dr. Refai cited his conversation with Gutierrez as part of the basis for his opinion that improper maintenance caused the water infiltration. Dr. Refai did not take notes of the conversation, but he recalled that Gutierrez said that the old gutters "were shot, [were] severely deteriorated, [were] severely rusted." In contrast, at his deposition and at trial, Gutierrez testified that the gutters had no holes but only rust spots or stains. Gutierrez opined that the gutters had four to five years' use remaining when they were replaced.

¶ 59 Plaintiffs argue that Gutierrez's statement to Dr. Refai was inadmissible hearsay, an out-of-court statement offered to prove the truth of the matter asserted. See *People v. Cloutier*, 178

Ill. 2d 141, 154-55 (1997). Illinois courts have "long held that prohibitions against the admission of hearsay do not apply when an expert testifies to underlying facts and data, not admitted into evidence, for the purpose of explaining the basis of his opinion." *People v. Lovejoy*, 235 Ill. 2d 97, 142 (2009). "[A]n expert may give opinion testimony which relies upon facts and data not in evidence, as long as the underlying information is of the type reasonably relied upon by experts in the particular field." *Lovejoy*, 235 Ill. 2d at 142. The underlying information "must be sufficiently trustworthy to make the reliance reasonable." *Bass v. Cincinnati Inc.*, 281 Ill. App. 3d 1019,1024 (1996). Provided the foundational requisites are met, an expert is permitted "not only to consider the reports commonly relied upon by experts in their particular field, but also to testify to the contents of the underlying records." *Lovejoy*, 235 Ill. 2d at 143.

¶ 60 Before Dr. Refai testified, the trial court specifically instructed the jury that the expert's testimony necessarily would involve descriptions of information he learned from other sources during his investigation, including conversations with Gutierrez. The court instructed the jury as follows:

> "This testimony is allowed for a limited purpose. It's allowed so that the witness can tell you what he relied on in forming his opinions. The material that he refers to — that the witness refers to and relied on or used in reaching his opinion may not be evidence. The evidence is what I've admitted into evidence, and those are a few documents and pictures and so on. But there may be other pictures and documents and so on that he's relied on. And anyhow — it still doesn't make it evidence, and it's not to be considered by you as evidence. But you can consider that material — for instance, City records — he may mention depositions. You're not going to see these things. Those aren't evidence. But you may

consider that for the purpose of deciding what weight, if any, should be given to his opinions."

¶ 61 Evidentiary motions generally are directed to the trial court's discretion. *Leona W.*, 228 Ill. 2d at 460. A trial court's ruling on such motions will not be disturbed on review absent an abuse of that discretion. *Leona W.*, 228 Ill. 2d at 460. The threshold for finding an abuse of discretion is high. A trial court will not be found to have abused its discretion with respect to an evidentiary ruling unless it can be said that no reasonable man would take the view adopted by the court. *Leona W.*, 228 Ill. 2d at 460. Moreover, even where an abuse of discretion has occurred, it will not warrant reversal of the judgment unless the record indicates the existence of substantial prejudice affecting the outcome of the trial. *Leona W.*, 228 Ill. 2d at 460.

¶ 62 Contrary to plaintiffs' assertion, a roofer's assessment of the condition of the gutters would be information on which an engineering expert would base his opinion on the cause of water infiltration in a home. Plaintiffs imply that the statement is unreliable because Dr. Refai did not make notes of his conversation with Gutierrez. However, a roofer's description of gutters being "shot" and "severely deteriorated" is an important fact that an expert like Dr. Refai likely could recall without recording it.

¶ 63 Moreover, Dr. Refai's opinion was not based "almost entirely" on Gutierrez's statement, as plaintiffs assert. Dr. Refai is a professional engineer who specializes in materials and failure analysis, and he reached his opinions on the cause of the water infiltration based on deposition transcripts and telephone conversations. Besides inspecting the residence, Dr. Refai consulted with Alaimo, plaintiffs' expert witness plumber, and with Gutierrez. In light of our deferential standard of review, we conclude that the trial court did not abuse its discretion in allowing Dr. Refai's

testimony regarding Gutierrez's description of the gutters, especially considering that the court mitigated any potential prejudice to plaintiffs by instructing the jury to consider Gutierrez's statement for the limited purpose of weighing Dr. Refai's opinion. See *People v. Taylor*, 166 Ill. 2d 414, 438, (1995) ("The jury is presumed to follow the instructions that the court gives it"); see also *Kim v. Evanston Hospital*, 240 Ill. App. 3d 881, 891 (1992) ("A circuit court's instruction to disregard certain evidence can cure prejudice resulting from the jury's exposure to that evidence").

¶ 64 D. The Photographs

¶ 65 Plaintiffs contend that they were prejudiced when the court admitted photographs that the City had not disclosed before trial. As discussed, evidentiary motions generally are directed to the trial court's discretion, and the court's ruling on such motions will not be disturbed on review absent an abuse of that discretion. *Leona W.*, 228 Ill. 2d at 460.

¶ 66 Plaintiffs allege that the City ambushed James on cross-examination with four color photos taken by Dr. Refai in February 2009. The photos depict the home's new gutters with paint splatters on ice. The City's counsel asked James whether he painted the area around the gutters to hide rust and deterioration before Dr. Refai examined the house. James denied doing so and testified that he did not know how the paint got there. The City's counsel also examined Dr. Refai on the photographs on the theory that James had attempted to conceal wear and tear on the house.

¶ 67 After the cross-examination of James on this point, plaintiffs' counsel requested a sidebar at which he objected to the photographs on the ground that they had not been produced in discovery. The trial court denied plaintiffs' objection to the photographs as untimely, commenting that "[w]ell, they're already before the jury, and you didn't object before, so there's not much I can do at this point."

¶ 68 During a break, counsel for both sides attempted to sort out the photographs, but they continued to dispute whether the City had tendered them during discovery. The City told the court that it had submitted black and white versions of the photographs and that plaintiffs' counsel had not objected to that production. Plaintiffs' counsel responded that color versions should have been tendered and that the black and white versions were unrecognizable. Plaintiffs' counsel also alleged that he did not receive 32 other photographs before trial. The court stated "If you didn't receive 1 through 32 or whatever number it is, it was not brought to my attention until six days into trial — okay — rather than before we started jury selection — we did motions. At that point you still knew you were to receive 1 through 32 or whatever number it is. That's the time it should have been brought to the court's attention and I could have done something."

¶ 69 On appeal, plaintiffs continue to deny receiving the photographs before trial and assert in their reply brief that the photographs were "completely irrelevant, prejudicial, and inflammatory — even had this alleged activity [a concealment of deterioration] occurred, it would have occurred years after the roof was replaced, during a time when plaintiffs were not complaining of water damage." Plaintiffs arguments are unresponsive to the City's argument and the trial court's finding that their trial objection was made six days into the trial, after the witness testified in front of the jury regarding the photos, and therefore was untimely.

¶ 70 We agree with the City that the court acted within its discretion when it overruled plaintiffs' objection. Plaintiffs have not claimed that the photographs actually produced were late or that production did not comply with the court's discovery orders. As to photographs that were not disclosed at all, plaintiffs admitted to the court that they had the City's exhibit list, knew of the

alleged discovery deficiency before trial, and said nothing. Moreover, plaintiffs' objection was untimely because it was made after James testified to the photographs.

¶ 71 E. Evidence of Insurance Claims

¶ 72 On March 7, 2011, plaintiffs filed their motion *in limine* No. 6 to bar the City from making any statement, offering or eliciting testimony, using any exhibits, or in any other way attempting to inform the jury that plaintiffs made insurance claims for water damage. The court granted the motion. Plaintiffs assert that they were prejudiced when the court allowed the City to present evidence relating to those insurance claims. The City does not dispute that a jury should not hear such evidence. See *Wills v. Foster*, 229 Ill. 2d 393, 399 (2008) (the collateral source rule provides that payments or benefits an injured party receives from a source independent of, and collateral to, the tortfeasor will not be credited against the tortfeasor's liability).

¶ 73 On cross-examination, the City asked James about numerous repairs made to the house over the years, the reasons for those repairs, and the form of payment for those repairs. The City intended the evidence to show that the water infiltration was caused by poor home maintenance rather than by the lack of a sewer connection. The word "insurance" was used once, for which plaintiffs' objection was sustained, but the jury heard James testify repeatedly about "reimbursement" of home repair invoices. Moreover, the City's counsel argued to the jury that plaintiffs poorly maintained their roof by rejecting reimbursement for $20,000 worth of roof work performed by a professional roofer in favor of $10,000 worth of work performed by a local handyman. The record shows that the City violated the spirit of the court's order barring evidence of plaintiffs' insurance claims.

¶ 74 However, improper comments that also violate a motion *in limine* do not necessarily constitute reversible error. *Willaby v. Bendersky*, 383 Ill. App. 3d 853, 862 (2008) (citing *Magna*

Trust Co. v. Illinois Central R.R. Co., 313 Ill. App. 3d 375, 395 (2000) ("Violation of a motion *in limine* is not *per se* reversible error"). To constitute reversible error, the violation must cause substantial prejudice, not cured by the trial court's actions. Where the trial court sustains a timely objection and instructs the jury to disregard the improper comment, the court sufficiently cures any prejudice. *Willaby*, 383 Ill. App. 3d at 862.

¶ 75 Here, at the conclusion of James's testimony, the trial court recognized the violation and gave the jury a limiting instruction directing them not to consider insurance in their deliberations:

> "Ladies and gentlemen, we have gotten a little far afield from something. Let me give [an] *in limine* instruction right now because you will be inferring this from basically what you heard. Whether a party [is] insured or not insured has no bearing on any issue you must decide. You must refrain from any inference, speculation, or discussion about insurance. If you find for [plaintiffs], you shall not speculate about or consider any possible sources of benefits [plaintiffs] may have received or might receive. After you have returned your verdict, the court will make whatever adjustments are necessary in this regard."

¶ 76 We conclude that the trial court cured the violation with the limiting instruction that reflects the collateral source rule. Plaintiffs were not prejudiced because the court instructed the jury to disregard any testimony regarding reimbursement or insurance. See *Taylor*, 166 Ill. 2d at 438 ("The jury is presumed to follow the instructions that the court gives it"); see also *Kim*, 240 Ill. App. 3d at 891 ("A circuit court's instruction to disregard certain evidence can cure prejudice resulting from the jury's exposure to that evidence").

¶ 77 F. Impeachment

¶ 78 Plaintiffs next contend that they were erroneously barred from offering an email and power point presentation prepared by Mary Anderson, a City employee, for impeachment purposes. The credibility of a witness may be tested by showing that, at a prior time, he made a statement which is inconsistent with his trial testimony on a material matter. The trial court has discretion to allow the admission of evidence for impeachment purposes, and a reviewing court will not disturb that decision absent an abuse of discretion. *Krklus v. Stanley*, 359 Ill. App. 3d 471, 488 (2005). The credibility of a witness may be tested by demonstrating that on an occasion prior to trial, the witness made statements that are inconsistent with those made at trial. To be used for impeachment purposes, the prior statement must be materially inconsistent with the witness' testimony at trial. To be considered inconsistent, the prior statement need not be directly contradictory but must have a reasonable tendency to discredit the witness' testimony. For example, inconsistency is not limited to direct contradictions but may be found in evasive answers, silence, or changes in position. *Krklus*, 359 Ill. App. 3d at 488.

¶ 79 Anderson testified that she served as the City's director of public works since September 2002. Bill Stewart, the City's superintendent of infrastructure, notified Anderson of the lack of a connection in June 2008, when he visited plaintiffs' excavated driveway. At trial, Anderson testified that she did not know whether plaintiffs' house was connected to the storm sewer before the 1994 project. Anderson testified that there was no storm sewer main in front of plaintiffs' property but that there was a sewer main running under the street adjacent to the house. After reviewing the City's records and plans and speaking with mayor *pro tem* Brenner, Anderson concluded that the house had "perhaps" been connected to the storm sewer before the project.

¶ 80 Plaintiffs attempted to impeach Anderson with her prior statements. First, plaintiffs introduced a September 11, 2008, email to Elizabeth Holleb, the City's director of finance, in which Anderson stated that her preliminary investigation caused her to believe that plaintiffs' home was connected to the City sewer before 1994 and that Bolander "likely didn't know that the downspouts were connected [to the sanitary sewer] and could have demolished that connection because it wasn't supposed to be connected" because such downspouts were to be switched from the sanitary sewer to the storm sewer. Second, plaintiffs introduced a January 2009 power point presentation to the City council in which Anderson stated that "it appears [plaintiffs'] storm service line may have originally been connected to the City sanitary sewer main that was replaced in this location as part of the 1994 project."

¶ 81 The trial court disallowed the proposed impeachment on the ground that Anderson's testimony at trial was not conclusive on whether the house was connected to the sewer before the project. Anderson testified that plaintiffs' house *might* have been connected but she did not know for sure. Thus, the court found that the email and power point presentation were not inconsistent with the testimony.

¶ 82 Anderson made prior statements pertaining to a possible sewer connection before 1994, but those statements were equivocal, as was Anderson's trial testimony on the topic. The proposed impeachment documents do not reasonably tend to discredit Anderson's trial testimony on a material matter. Therefore, we conclude that the trial court did not abuse its discretion in barring the proposed impeachment documents on the ground that they were not inconsistent with Anderson's testimony.

¶ 83 G. Jury Instructions

¶ 84 Plaintiffs argue that the trial court incorrectly used jury instructions on premises liability and tort immunity relating to negligence. Plaintiffs assert that the court should have used a negligence instruction based on IPI 20.01. Plaintiffs claim to have given the trial court their proposed instruction during an "informal" jury instruction conference off the record. However, plaintiffs never made the instruction a part of the record in the trial court. On appeal, plaintiffs moved to supplement the record with their proposed instruction, but this court denied the motion to supplement. Plaintiffs' proposed instruction is not part of the record, and its absence is a deficiency that we construe against plaintiffs. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984) (Any doubts that may arise from incompleteness of record will be resolved against appellant).

¶ 85 Deficiencies in the record notwithstanding, we conclude that the trial court did not err in instructing the jury. Illinois Supreme Court Rule 239(a) requires that "[w]henever Illinois Pattern Jury Instructions (IPI) contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 239(a) (eff. Jan.1, 1999)*; Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002). The court may use a non-IPI instruction if the court determines that the pattern instruction does not accurately state the law. Ill. S. Ct. R. 239(b); *Schultz*, 201 Ill. 2d at 273. Whether a jury instruction is an accurate statement of the law is reviewed *de novo*. *Auten v. Franklin*, 404 Ill. App. 3d 1130, 1137 (2010). Otherwise, the trial court has discretion to determine which instructions to give the jury and that determination will not be disturbed absent an abuse of that discretion. *Schultz*, 201 Ill. 2d at 273. The standard for deciding whether a trial court abused its discretion is whether, taken as a whole, the instructions fairly, fully, and comprehensively

apprised the jury of the relevant legal principles. *Schultz*, 201 Ill. 2d at 273-74. A reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant. *Schultz*, 201 Ill. 2d at 274.

¶ 86 The trial court instructed the jury on the elements of negligence and the City's affirmative defense of tort immunity as follows:

"Plaintiffs claim they were injured and sustained damage, and that [the City] was negligent in one or more of the following respects:

Failing to connect plaintiffs' property to the City of Highland Park's sewer system following the 1994 sewer project.

Plaintiffs have the burden of proving each of the following propositions:

First, that [the City] acted or failed to act in one of the ways claimed by plaintiffs as stated to you in this instruction and that in so acting, or failing to act, [the City] was negligent;

Second, that plaintiffs' property was damaged;

Third, that the negligence of [the City] was a proximate cause of the damage to plaintiffs' property;

Fourth, that [the City] had actual or constructive notice in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

[The City] denies that it was negligent in doing any of the things claimed by plaintiffs and denies that any claimed act or omission on the part of [the City] was a proximate cause of plaintiffs' claimed damages.

> [The City] also sets up the following affirmative defenses of which it has the burden of proof:
>
> A municipality does not have constructive notice if it proves either of the following propositions in true:
>
> (1) The existence of the condition and its character would not have been discovered by an inspection system that was reasonably adequate considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential injury; or
>
> (2) The City maintained and operated such an inspection system with due care and did not discover the condition.
>
> [The City] claims, and has the burden to prove, that plaintiffs failed to mitigate their damages by neglecting to call professionals to determine the extent of their alleged water infiltration and failed to otherwise mitigate their damages.
>
> [The City] further denies that plaintiffs were injured or sustained damage to the extent claimed."

¶ 87 Thus, the trial court instructed the jury that plaintiffs had the burden of proving, *inter alia*, that the City had actual or constructive notice of the lack of a sewer connection. The instructions further set forth the City's affirmative defense under section 3-102 of the Tort Immunity Act and stated that the City had the burden of proof on its defense. For the reasons expressed in Section II(B) relating to the trial court's rulings on the City's affirmative defense under section 3-102, we conclude that the challenged jury instructions accurately stated the law and that the trial court did not abuse its discretion in giving the instructions.

¶ 88 Plaintiffs further argue that the court allowed the City to offer an improper and prejudicial special interrogatory relating to notice. The special interrogatory asked "[a]t any time after the 1994 sewer project was completed in November 1994 but before plaintiffs contacted [the City] in June 2008, did [the City] have actual or constructive notice of plaintiffs not being connected to [the City's] storm sewer system such that [the City] could have prevented plaintiffs' alleged damages?" The jury answered that the City had neither actual nor constructive notice.

¶ 89 The purpose of special interrogatories is to test a general verdict against the jury's determination as to one or more specific issues of ultimate fact. *Balough v. Northeast Illinois Regional Commuter R.R. Corp.*, 409 Ill. App. 3d 750, 768 (2011). Upon the request of a party, the trial court has no discretion but to submit a special interrogatory to the jury, as long as it is in proper form. *Balough*, 409 Ill. App. 3d at 768. A special interrogatory is in proper form if (1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsive thereto is inconsistent with some general verdict that might be returned. *Balough*, 409 Ill. App. 3d at 768. A proper special interrogatory consists of a single, direct question that, standing on its own, disposes of an issue in the case such that it would, independently, control the verdict with respect thereto. *Balough*, 409 Ill. App. 3d at 768. Section 2-1108 of the Code governs special interrogatories and provides that "[w]hen the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly." *Balough*, 409 Ill. App. 3d at 768-69 (quoting 735 ILCS 5/2-1108 (West 2008)).

¶ 90 The special interrogatory in this case was in proper form because (1) the interrogatory related to the City's alleged notice of the disconnection, which was an ultimate issue of fact upon which the rights of the parties depend, and (2) if the jury had found the City liable and yet answered that the

City lacked notice, the jury thus would have provided a responsive answer to the interrogatory that was inconsistent with the general verdict. The special interrogatory consisted of a single, direct question that, standing on its own, disposed of the notice issue such that it could, independently, control the verdict with respect thereto. See *Balough*, 409 Ill. App. 3d at 768. We conclude that the trial court did not abuse its discretion in administering the special interrogatory.

¶ 91 H. Sufficiency of the Evidence

¶ 92 Finally, in their 49-page brief, plaintiffs devote a few sentences to the proposition that, even if the alleged trial errors are not reversible, the judgment for the City must be reversed outright and the cause remanded to the trial court with instructions to enter a $300,432 judgment for plaintiffs. Without citation to authority or the record, plaintiffs' whole argument is that the judgment is against the manifest weight of the evidence because the City failed to meet its burden of proof on the issue of constructive notice under section 3-102(a) of the Tort Immunity Act. A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented; this court is not a repository into which an appellant may foist the burden of argument and research; it is neither the function nor the obligation of this court to act as an advocate or search the record for error. See, *e.g.*, *People v. Jacobs*, 405 Ill. App. 3d 210, 218 (2010). Plaintiffs' bald contention that the judgment is against the manifest weight of the evidence does not meet the standard of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (argument shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on). We agree with the City that plaintiffs have forfeited the issue for review.

¶ 93 III. CONCLUSION

¶ 94 For the preceding reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 95 Affirmed.