IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

ENBRIDGE ENERGY, LIMITED PARTNERSHIP, a Delaware limited partnership,	)	
Plaintiff,	)	Case No. 11 L 0727
vs.	)	
OLDCASTLE APG, INC., d/b/a Northfield Block Company, a Delaware corporation, and VILLAGE OF ROMEOVILLE, an Illinois municipal corporation,	)	
Defendants.	)	

DEFENDANT VILLAGE OF ROMEOVILLE'S
RENEWED MOTION FOR SUMMARY JUDGMENT

NOW COMES the Defendant, VILLAGE OF ROMEOVILLE, by and through their attorneys, MICHAEL D. BERSANI and YORDANA SAWYER of HERVAS, CONDON & BERSANI, P.C., and renews its motion for summary judgment pursuant to 735 ILCS 5/2-1005(b).

INTRODUCTION

In this suit, Plaintiff Enbridge Energy, Ltd. (hereinafter "Enbridge") alleges that the Defendant Village of Romeoville (hereinafter "Village") negligently failed to prevent the leak of a lateral water service Line ("Water Service Line") that supplied water to property owned by co-Defendant Old Castle APG, Inc. d/b/a Northfield Block Company (hereinafter "Northfield Block"). The Water Service Line was located approximately seven feet below the surface of Parkwood Avenue and crossed perpendicularly under a crude oil pipeline ("Oil Pipeline") owned and operated by Enbridge. In what Enbridge's experts have described as a "rare" and "unusual" occurrence, a water jet from the leaking Water Service Line, combined with sand, formed an

erosive slurry ("Water Jet Slurry") that allegedly impinged or eroded a hole into the Oil Pipeline resulting in the release of crude oil into the environment. Enbridge is claiming that it incurred clean-up costs and other damages as a result of the leak incident.

Last year, the Village moved for summary judgment. Enbridge opposed the motion, in part, based on an affidavit from civil engineer, Paul Fleming. This Court denied summary judgment on December 23, 2014. Since then, Enbridge has formally disclosed Fleming as a controlled expert witness pursuant to Illinois Supreme Court Rule 213(f)(3), and the Village has taken Fleming's deposition. Suffice it to say, Fleming's deposition is a game changer. He admitted that the Village had no knowledge of the water leak and that Village employees "had no way of knowing" that a Water Jet Slurry was impinging a hole into Oil Pipeline. Fleming also admitted that any preventive maintenance activities by the Village of its water system, including the Water Service Line, were acts of discretion and involved policymaking. Finally, Fleming conceded that the Village had to make certain judgment calls in response to the leak incident.

Based in large part on Fleming's deposition testimony, the Village hereby renews its motion for summary judgment pursuant to Section 3-102 (lack of notice) and Section 2-201 (discretionary immunity) of the Illinois Tort Immunity Act. *See* 745 ILCS 10/2-201, 10/3-102 (West 2010). Additionally, in April 2015, the Appellate Court issued an opinion in *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994, in which it held that a municipality's failure to conduct preventive maintenance on a municipal sewer system was subject to discretionary immunity under Section 2-201. *Nichols* dictates that the same result here. Accordingly, the Village is entitled to summary judgment as a matter of law.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. On September 9, 2010, Enbridge operated a 34" crude Oil Pipeline (hereinafter "Oil Pipeline") under the 700 block of Parkwood Avenue in Romeoville, Illinois (Ex. A, Village Answer, ¶ 4).

2. On September 9, 2010, Northfield Block operated a masonry manufacturing plant at 717 Parkwood Avenue (Ex. A, Village Answer ¶ 2).

3. Running perpendicular to and underneath the Oil Pipeline was a 6-inch lateral Water Service Line that supplied water to Northfield Block's property (hereinafter "Water Service Line") (Ex. A, Village's Ans., ¶ 5).

4. The Water Service Line ran laterally from the Northfield Block building and connected to an 8-inch public water main located west of the Oil Pipeline under Parkwood Avenue (Ex. A, Village's Ans., ¶ 6).

5. The Water Service Line was located seven feet below the surface of Parkwood Avenue and crossed five inches below the Oil Pipeline (Ex. B, Fleming Dep., pp. 70-71).

6. An accurate aerial depiction of the Oil Pipeline and Water Service Line and their respective orientation to each other and the surrounding area is attached hereto as a demonstrative exhibit (Ex. C, Aerial Depiction).

7. On September 9, 2010, at 9:36 a.m., a Village Public Works Department employee, Dale Wills, responded to a report of a water leak on Parkwood Avenue and observed water coming up through the pavement of Northfield Block's driveway off Parkwood Avenue and notified Northfield Block (Ex. D, Wills Dep., pp. 5-9, 12-14).

8. This was the Village's first notice of the water leak (Ex. B, Fleming Dep., p. 74; Ex. E, Bromberek Dep., pp. 126-127).

9. A water valve, otherwise known as a "stopcock," existed in the street and controlled the water flow to the Water Service Line (Ex. A, Village's Ans., ¶ 6).

10. Wills turned and closed the stopcock and observed the water recede from the pavement and concluded that the leak was on the Water Service Line (Ex. D, Wills Dep., pp. 12-17).

11. Wills subsequently turned and opened the stopcock, thereby restarting the water flow to the Water Service Line, and he then observed water reappearing through the pavement (Ex. D, Wills Dep., pp. 18-19, 37-38).

12. In deciding whether to turn the water back on, or leave it off, Wills considered whether the leak was endangering anyone or creating a traffic concern; whether Northfield Block would continue to have water for its operations; whether a leak detection company could locate the leak without the water flowing; and whether leaving the water off would cause back-contamination into the Village's water system (Ex. D, Wills Dep., pp. 18-21, 37-39; Ex. F, Drey Dep. I, pp. 89-90).

13. Enbridge's retained civil engineering expert, Peter Fleming, admitted that Wills acted reasonably in shutting down the water and notifying Northfield Block that the Water Service Line was leaking (Ex. B, Fleming Dep., pp. 77-79).

14. While Fleming disagreed with Wills' decision to turn the water back on, he admitted that Wills made a judgment call in this situation (Ex. B, Fleming Dep., pp. 88-90).

15. Fleming agreed that there was no rule or guideline that mandated Wills to keep the water service off while waiting for a leak detection service to arrive (Ex. B, Fleming Dep. pp. 175-178).

16. Northfield Block retained a leak detection company, Water Services, Inc., who responded to the leak site and needed the water flowing to determine the location of the leak (Ex. G, Northfield Block Ans. To Village Interrog. #5; Ex. H, Shelton Dep. I, 8/14/13, pp. 44).

17. Fleming agreed that, in determining the location of the leak, it was reasonable to have the water flowing (Ex. B, Fleming Dep., pp. 80-82, 87).

18. Upon arriving at the scene, Derek Shelton, an employee of Water Services, observed oil on the pavement (Ex. I, Shelton Dep., II, 12/9/13, p. 6).

19. This was the first notice of an oil leak (Ex. B, Fleming Dep., p. 74-75).

20. Fleming had no opinion as to whether Wills' actions in turning the water off and then back on caused the Oil Pipeline to leak (Ex. B, Fleming Dep., p. 101).

21. At 12:05 p.m., a call was placed to the Village's 911 call center about a gas odor on Parkwood Avenue (Ex. J, Panzer Dep., p. 13).

22. Romeoville Assistant Fire Chief Ed Panzer responded to the scene and called Enbridge's call center and reported the oil leak (Ex. J, Panzer Dep., pp. 17-23).

23. Enbridge's computerized leak detection system had not detected the oil leak prior to, or even immediately after, receiving the call from Panzer (Ex. K, Philipenko Dep., pp. 8-9).

24. At 1:45 p.m. on September 9th, the Public Works Department turned the stopcock to the off position, but the water continued to flow (Ex. D, Wills Dep., pp. 24-25; Ex. F, Drey Dep. I, pp. 40, 43-44, 79; Ex. E, Bromberek Dep., pp. 24-25).

25. This was the Village's first notice of any problem with the stopcock (Ex. E, Bromberek Dep., pp. 132-133).

26. Public Works Director Dan Bromberek was authorized and empowered by the Village to make the necessary decisions on behalf of the Village in response to the leak incident (Ex. E, Bromberek Dep., pp. 37, 136, 146-148; Ex. L, Gulden Dep., pp. 8-10, 12, 23-25).

27. In response to the incident, Bromberek made the decision *not* to shut off the valves to the Village's water main, which ran parallel to the Oil Pipeline in the street, because he was concerned that it would cause back-contamination of crude oil into the Village water distribution system, and he believed that he had the legal responsibility, as one of the certified operators of the water system, not to pump contaminated water through the system (Ex. E, Bromberek Dep., pp. 26-28, 109-110, 146-148, 151; Ex. L, Gulden Dep., pp. 24-25).

28. If crude oil contaminated the Village-wide system, the cost to remedy that contamination would have been significant, and the Village would have had to allocate resources in order to deal with that contamination (Ex. E, Bromberek Dep., p. 147).

29. Bromberek was also concerned that shutting off the water main valves on Parkwood Avenue would interrupt water service to the commercial and industrial users in the industrial park (Ex. E, Bromberek Dep., pp. 27-28, 147-148).

30. In making the decision not to shut off the water main valves, Bromberek balanced all of these competing concerns and chose a solution that best served the situation in his discretion (Ex. E, Bromberek Dep., pp. 147-148).

31. Fleming admitted that there was no legal mandate, rule or even a guideline that required the Village to shut off the water main valves in response to the oil leak or cleanup efforts (Ex. B, Fleming Dep., pp. 178-179; *see, also,* Ex. E, Bromberek Dep., p. 148).

32. While Fleming did not agree with Bromberek's decision, he conceded that there were factors that needed to be weighed in making that decision (Ex. B, Fleming Dep., p. 183).

33. Bromberek subsequently hired a contractor to install two new valves on the water main immediately on either side of the leak site in order to isolate and shut off the water flow to the leak site (Ex. E, Bromberek's Dep., pp. 26-28; Ex. E, Drey Dep. I, p. 46).

34. Enbridge's retained metallurgical expert, Dr. John Beavers, has opined that the metallurgical cause of the Oil Pipeline failure was a water jet from the leaking Water Service Line, combined with sand, which together formed an erosive slurry ("Water Jet Slurry") that impinged or eroded a hole in the Oil Pipeline, an occurrence which he described as "unusual" and something he had never previously encountered in 40-plus years in the industry and having conducted thousands of pipeline failure investigations; this was "new for [him]." (Ex. N, Beavers Dep., pp. 58-61).

35. Fleming agreed that the probable cause of the Oil Pipeline failure was the Water Jet Slurry, which he too described as "unusual" and "rare," and that he had never seen it happen in his career (Ex. B, Fleming Dep., pp. 30-31, 77).

36. Fleming also agreed that, prior to the leak incident, the Village did not know that there was only a 5-inch separation between the Water Service Line and the Oil Pipeline (Ex. B, Fleming Dep., pp. 75, 160-161; *see* also, Ex. E, Bromberek Dep., p. 126).

37. Fleming conceded that there was "[n]o way [Village employees] would have known" about the Water Jet Slurry or that it was impinging a hole into the Oil Pipeline (Ex. B, Fleming Dep., p. 75; *see, also,* Ex. E, Bromberek Dep., p. 126).

38. Dr. John Beavers also opined that the corrosion to the Water Service Line was caused by stray electrical currents emanating from some cathodic protection system in the area; he based this opinion on the fact that the corrosion was isolated to the top portion of the Water Service Line directly below where it crossed the Oil Pipeline; and, that the stray currents

discharged off the Water Service Line onto the Oil Pipeline at that specific location (Ex. N, Beavers Dep., pp. 18-20, 99-100).

39. Fleming agreed that the Water Service Line corroded due to stray electrical currents from a cathodic protection system of a pipeline system in the area (Ex. B, Fleming Dep., pp. 28, 40, 53, 61).

40. Prior to the leak incident, the Village did not know that stray currents were corroding or degrading the Water Service Line, or that the service line otherwise posed an unsafe condition to the Oil Pipeline (Ex. E, Bromberek Dep., pp. 126-127, 135).

41. Approximately 18 months before the leak incident, on January 22, 2009, a portion of the Water Service Line within 6-7 feet of the Oil Pipeline was uncovered and exposed during an unrelated repair of a sanitary sewer main, and there was no leak, corrosion or other defective condition observed by Village employees (Ex. O, Trobiani Dep., pp. 24-27; Ex. P, Rossio Dep., pp. 26-27, 110).

42. Public Works Director Dan Bromberek and Water Superintendent Chris Drey were responsible and empowered by the Village Board and Village Ordinances to exercise discretion over maintenance and repair of the Village's water system (Ex. M, Bromberek Aff. I, ¶¶ 4-5; Ex. E, Bromberek Dep., pp. 11-13, 135-139, 143-146; Ex. F, Drey Dep. I, pp. 6-7; Ex. Q, Drey Dep. II, pp. 95-96).

43. Bromberek and Drey exercised discretion in performing preventive maintenance activities, including leak detection and informal water audits and exercising water valves (Ex. E, Bromberek Dep., pp. 11-13, 48-49, 62-64, 88-91, 114-115, 135-139, 143-146; Ex. F, Drey Dep. I, pp. 85-87; Ex. Q, Drey Dep. II, pp. 19-20, 47-54, 76-79, 88-101).

44. In order to conduct a system-wide water audit, the Village Board of Trustees would have to approve the funding to retain (after competitive bidding) outside vendors (Ex. E, Bromberek Dep., pp. 143-144).

45. Fleming opined that the Village should have conducted water audits and then performed leak detection by sections throughout the entire Village, as recommended by the American Water Works Association ("AWWA"), to prevent the leak incident (Ex. B, Fleming Dep., pp. 102-108, 116).

46. Fleming conceded, however, that the AWWA is not a regulatory agency, and that the AWWA Manuals of Practice, which he relied upon in rendering his opinions, are *voluntary and not mandatory,* and that the Village was not bound by them (Ex. B, Fleming Dep., pp. 23-24, 37, 111, 114).

47. Fleming admitted that the Village was not legally mandated under state or federal laws to perform leak detection or water audits, or to inspect water valves (Ex. B, Fleming Dep., pp. 113-114, 127-128, 152; *see, also,* Ex. E, Bromberek Dep., pp. 138, 143-145).

48. Fleming admitted that leak detection is conducted primarily on water mains, that the AWWA Manuals do not address maintenance of lateral water service lines, and that he was not aware of any industry standard that addressed maintenance of lateral water service lines (Ex. B, Fleming Dep., pp. 111-112).

49. Fleming was not aware of any municipality that employed an ongoing leak detection system on lateral water service lines (Ex. B , Fleming Dep., pp. 111-112, 126-128, 139).

50. Fleming agreed that the Village Public Works Department and Village administration had to make budgeting and resource decisions in making improvements to and

maintaining of its waterworks system (Ex. B, Fleming Dep., pp. 120-125; *see, also,* Ex. E, Bromberek Dep., pp. 136-137).

51. At the time of the subject incident, there were over 16,000 lateral water service lines and associated stopcocks supplying potable water to residential, commercial and industrial users both within and outside of the Village's municipal boundaries (Ex. M, Bromberek Aff. I, ¶ 16; Ex. E, Bromberek Dep., pp. 134-135; Ex. Q, Drey Dep. II, p. 95).

52. It would have taken a significant amount of public resources and manpower to assume the task of performing routine leak detection services on the 16,000+ lateral water service lines or to exercise or inspect water valves (Ex. E, Bromberek Dep. pp. 135-136).

53. Decisions were made on how to allocate the Village's limited resources, and the Village did not have the financial resources or manpower to monitor or inspect every single water service line and stopcock in order to detect and/or prevent leaks (Ex. E, Bromberek Dep., pp. 137-139, 145-146; Ex. Q, Drey Dep. II, pp. 95-96).

54. Fleming agreed that the Village could not force Northfield Block to replace the Water Service Line, and that replacing a lateral water service line is very rare (Ex. B, Fleming Dep., pp. 139-141).

55. In the 15 years prior to the subject incident, the Northfield Block Water Service Line was repaired six times and, according to Fleming, three repairs occurred "in the street" under Parkwood Avenue, and the rest occurred on Northfield Block's private property (Ex. B, Fleming Dep., pp. 128-129, 132; Group Ex. R, Prior Water Service Line Repair Records).

56. According to Fleming, the repairs that occurred on Northfield Block's property were approximately 500 feet away from the street (Ex. B, Fleming Dep., p. 138).

57. The last repair on the Water Service Line "in the street" occurred in 2000, which was 10 years before the subject incident (Group Ex. R, Prior Water Service Line Repair Records).

MEMORANDUM OF LAW

ARGUMENT

I. THE VILLAGE DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE WATER OR OIL LEAK IN REASONABLY ADEQUATE TIME TO PREVENT THE LEAK INCIDENT AND, THEREFORE, IS NOT LIABLE FOR ENBRIDGE'S DAMAGES PURSUANT TO 745 ILCS 10/3-102 OF THE TORT IMMUNITY ACT

Section 3-102(a) of the Illinois Tort Immunity Act provides that a municipality is not liable for the negligent maintenance of its property[1] unless it had "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 2013). Notice, therefore, is a necessary predicate for establishing liability against a municipality. *See Lansing v. McLean Cnty.,* 69 Ill. 2d 562, 572-73 (1978); *also Mark Twain Illinois Bank v. Clinton County*, 302 Ill. App. 3d 763 (5th Dist. 1999). "The burden of proving notice is on the party charging it." *Perfetti v. Marion Cnty.*, 2013 IL App (5th) 110489, ¶ 19 (*quoting Burke v. Grillo*, 227 Ill. App. 3d 9, 18 (1992)). "Although the issue of notice is normally one of fact, it becomes a question of law which may be determined by the court if all of the evidence, when viewed in the light most favorable to the plaintiff, so overwhelmingly favors the defendant public entity that no contrary verdict could stand." *Perfetti, id.*

[1] It is the Village's position in this litigation that it did not own the land beneath Parkwood Avenue or Water Service Line, and it had no duty to maintain the Water Service Line. However, those issues are not the subject of this motion and need not be resolved in this motion because the Village is otherwise immune from liability, as argued herein. *DeSmet ex rel. Estate of Hays v. Cnty. of Rock Island*, 219 Ill. 2d 497, 509 (2006) ("so may we assume a defendant owes a duty, for the sake of analysis, in order to expedite the resolution of an immunity issue"); *also Prough v. Madison Cnty.*, 2013 IL App (5th) 110146, ¶ 18.

Here, there is no evidence of actual notice. Enbridge's retained civil engineering expert, Peter Fleming, conceded that the Village did not have notice of the water leak until 9:36 a.m. on September 9, 2010, and that oil was not observed until a few hours later (Village Stmt. of Facts, ¶¶ 7-8, 18-19). In fact, the Village's first actual notice of the oil leak was when Romeoville police and fire officials responded to a 911 call about a gas odor at 12:05 p.m. (*id.* ¶¶ 21-22). Not even Enbridge's sophisticated computer leak detection system detected the oil leak; rather Enbridge had to be notified of the leak by Romeoville Assistant Fire Chief Ed Panzer (*id.* ¶ 23).

Furthermore, according to both Fleming and Enbridge's metallurgical expert, John Beavers, the cause of the oil leak was the Water Jet Slurry impinging or eroding a hole into the Oil Pipeline, which both described as "unusual" and "rare" and an occurrence that neither had ever encountered in their respective careers. (*id.* ¶¶ 34-35). Indeed, Fleming conceded that the Village did not know prior to the leak incident that there was only a 5" separation between the pipelines, and he conceded that there was "[n]o way [village employees] would have known" about the Water Jet Slurry or its impingement on the Oil Pipeline. (*id.* ¶¶ 36-37).

Both Fleming and Beavers also opined that the Water Service Line had corroded due to stray current corrosion from some cathodic protection source in the area. (*id.* ¶¶ 38-39). The Village's Public Works Director, Dan Bromberek, testified that the Village had no knowledge that the Water Service Line was corroding, let alone that stray currents were causing the corrosion. (*id.* ¶ 40). In fact, approximately 18 months before the September 9, 2010 leak incident, a portion of the Water Service Line only 6-7 feet west of the Oil Pipeline had been exposed in connection with an unrelated repair of a sanitary sewer line, and there was no corrosion, leak or other defective or unsafe condition observed by Village Public Works employees (*id.* ¶ 41). Based on these facts, the only possible conclusion that a jury could reach

is that the Village did not have actual notice of any unsafe condition in reasonably adequate time to take action to prevent the leak incident.

That leaves Enbridge with proving constructive notice. To do so, Enbridge must prove that an unsafe condition existed for such a length of time or was so conspicuous that the Village should have known about it. *See Pinto v. DeMunnick*, 168 Ill. App.3d 771, 774 (1st Dist. 1988); *Siegel v. Vill. Of Wilmette*, 324 Ill. App.3d 903, 908 (1st Dist. 2001); *Burke*, 227 Ill. App.3d at 18. Obviously, the alleged unsafe condition was inconspicuous as it occurred 7 feet below the surface of the street (Village Stmt. of Facts, ¶ 5). There is no evidence that the Village knew or should have known that this event was occurring over any period of time. Even Enbridge's experts, Beavers and Fleming, admitted how "rare" and "unusual" this occurrence was. As stated above, the last time that the Water Service Line was exposed, approximately 18 months before the leak incident, the Water Service Line was in good condition and was not corroding or leaking water. (*id.* ¶ 41). Under these undisputed facts, no reasonable jury could ever conclude that the Village had constructive knowledge of any unsafe condition. *See Siegel*, *id.* (holding that there was no constructive notice of sidewalk defect because a village inspection just over year before incident found no defect or need for repair).

In its Second Amended Complaint, Enbridge alleges that the Water Service Line had a history of leakage based on prior repairs over a 15 year period (Ex. A, Sec. Am. Compl., ¶ 7). However, this allegation is irrelevant as a matter of law. "Section 3-102(a) requires proof that the defendant had timely notice of the *specific defect* that caused the plaintiff's injuries, not merely the condition of the area." *Zameer v. City of Chicago*, 2013 IL App (1st) 120198, ¶16. In *Zameer*, the plaintiff contended that the municipality had actual or constructive notice of the defect that caused her injuries – a two-inch height difference in the sidewalk – based on the

multiple prior complaints about the general condition of the sidewalk along the same block. 2013 IL App (1st) 120198, ¶ 17. In affirming summary judgment for the city, the Appellate Court rejected this argument, noting that there was no evidence of prior complaints about the *specific defect* that caused the plaintiff's injuries and, therefore "the [condition of the] surrounding area [was] irrelevant." *Id.* at ¶ 17, 23.

Other courts have reached similar conclusions. *See*, *e.g.*, *Perfetti* (holding that knowledge that a dangerous condition *could* occur on a stretch of highway is not sufficient notice of a dangerous condition at the location where the plaintiff was injured); *Brzinski v. Northeast Ill. Reg'l. Commuter R.R. Corp.*, 384 Ill. App. 3d 202, 206 (2008) (the presence of sinkholes in the general area is insufficient to establish constructive notice); *Pinto*, 168 Ill. App. 3d 771 (knowledge that sinkholes were a "common problem" within the municipal drainage system did not establish notice about the sinkhole that caused plaintiff's accident); *Harms v. Vill. of Romeoville*, 2011 IL App (3d) 100858-U, ¶ 10 (granting summary judgment for village based on lack of notice of the particular sidewalk defect that caused plaintiff's injuries); *Gleason v. City of Chicago*, 190 Ill. App.3d 1068, 1070 (1st Dist. 1989) (the presence of broken or cracked sidewalk slabs in the area was irrelevant to the cause of the plaintiff's fall because she testified that she stubbed her toe on a ¼ inch crack and therefore the general condition of the surrounding are did not cause her fall).

In the instant case, according to Enbridge's experts, the cause of the water leak was stray current corrosion which led to the Water Jet Slurry which led to the impingement or erosion of a hole in the Oil Pipeline (Village Stmt. of Facts, ¶¶ 38-39). According to Beavers, these mechanisms were possible ***only*** because the Water Service Line and the Oil Pipeline crossed in close proximity to each other (*id.*). In other words, the corrosion occurred ***only*** because the Oil

Pipeline provided the return path for the stray currents, and the impingement or erosion occurred ***only*** because of the close proximity of the pipes to each other (*id.*). Under *Zameer* and the other cases cited above, therefore, the general conditions elsewhere on the Water Service Line did not cause the leak incident and are irrelevant. Thus, as a matter of law, the prior repair history of the Water Service Line could not, and did not, put the Village on notice of the specific condition that caused Enbridge's injuries.

Furthermore, in forming his opinions, Fleming relied on three repairs that he claimed occurred "in the street." (Village Stmt. of Facts, ¶¶ 55-56). The last of these repairs, however, occurred in November of 2000 - *10 years* before the September 9, 2010 leak incident. (*id.* ¶ 57). In other words, in the 10 years before the leak incident, there were no repairs of the Water Service Line "in the street." Thus, no reasonable jury could ever conclude that the Village should have known of any unsafe condition in a reasonably adequate period of time to remedy it – particularly when the condition was caused by invisible, inconspicuous electrical currents and a Water Jet Slurry occurring seven feet below the surface of Parkwood Avenue.

Finally, Enbridge faults the Village for failing to maintain the stopcock, which allegedly malfunctioned within hours after the oil leak was discovered. The undisputed fact is that Village Public Works employee, Dale Wills, successfully turned the stopcock without any problems just a few hours before the oil leak was reported. (Village Stmt. of Facts, ¶¶ 9-11). It was only later, in the throes of an undisputed emergency after the Village and Enbridge learned about the oil leak, that the stopcock allegedly malfunctioned – which was the first notice of any problem. (id. ¶¶ 24-25). The Village simply had no notice, actual or constructive, that the stopcock was unsafe in a reasonably adequate period of time to remedy or prevent the oil leak.

II. THE VILLAGE IS ENTITLED TO DISCRETIONARY IMMUNITY PURSUANT TO SECTION 2-201 OF THE TORT IMMUNITY ACT

Under § 2-201 of the Illinois Tort Immunity Act, "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 discretion, even though abused." 745 ILCS 10/2-201 (West 2014). Section 2-201 has two parts: (1) the position held by the municipal employee must involve a determination of policy *or* the exercise of discretion; and, (2) the employee's decision must be both a determination of policy *and* an exercise of discretion. *See Harinek v. 161 North Clark St. Ltd. Partnership*, 181 Ill. 2d 335, 341 (1998). Section 2-201 "extends the most significant protection afforded public employees under the Act." *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 370 (2003).[2]

"Discretionary acts involve the exercise of personal deliberation and judgment in deciding whether to perform a particular act or how and in what manner that act should be performed." *Richter v. Coll. of DuPage*, 2013 IL App (2d) 130095, ¶43 (*quoting Trtanj v. City of Granite City*, 379 Ill. App. 3d 795, 803 (5th Dist. 2008)). "Discretionary acts are 'those which are unique to the particular public office,' whereas ministerial acts that 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.'" *Id. (quoting Kevin's Towing, Inc. v. Thomas*, 351 Ill. App. 3d 540, 547 (2d Dist. 2004)).

Policy determinations require a public employee to balance competing interests and to make a judgment call as to what solution will best serve each of those interests. *West v.*

[2] Under § 2-109 of the Tort Immunity Act, "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where its employee is not liable." 745 ILCS 10/2-109 (West 2014). Together, §§ 2-109 and 2-201 provide broad discretionary immunity to public entities and their officials. *See Arteman v. Clinton Cmty. Unit Sch. Dist. No. 15*, 198 Ill. 2d 475, 484 (2002).

Kirkham, 147 Ill. 2d 1, 11 (1992). Several factors must be considered in determining policy, including "the public benefit, the practicability of the plan or procedure, and the best methods to be employed considering resources, costs, and safety." *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390, 394 (1st Dist. 2000). While a municipality is not immune for the actual performance of ministerial tasks, immunity is available for the determination of policy and exercise of discretion in deciding how and when those tasks are to be performed. *See Robinson v. Washington Twp.*, 2012 IL App (3d) 110177, ¶ 11 (2012); *see, also, Kennell v. Clayton Twp.*, 239 Ill. App. 3d 634, 640 (4th Dist. 1992).

Recently, in *Nichols v. City of Chicago Heights*, 2015 IL App (1st) 122994 (2015), the Appellate Court addressed the application of § 2-201 discretionary immunity to the maintenance of municipal utility systems. In *Nichols*, the plaintiff homeowners whose homes had been damaged by flooding caused by sewer overflow, sued the City of Chicago Heights and several of its officials and employees. The Court reaffirmed that "[w]hether a municipality engages in a program of public improvement is a discretionary matter, but the manner in which the municipality implements the program is ministerial." *Id.* at ¶ 31. The plaintiffs had asked the Court "to determine that the City's conduct as a whole in regard to the maintenance and upkeep of its sewer systems prior to the occurrence period was ministerial." *Id.* at 33. The Appellate Court rejected the plaintiffs' argument and found that the "the trial court properly ruled that the city is immune from plaintiffs' claims of negligence where the decisions the City made regarding the maintenance and improvement of its sewer system were discretionary in nature." *Id.*

In rendering its decision, the Appellate Court in *Nichols* relied on *Donovan v. Cnty. of Lake*, 2011 IL App (2d) 100390 (2011). In *Donovan*, the plaintiffs sued Lake County for failing to chlorinate the public water system as required by the Illinois Environmental Protection

Agency and thereby allowing excessive amounts of bacteria into the water supply. The Appellate Court affirmed dismissal of the suit, finding that, even though the County was legally mandated to chlorinate the water and provide safe drinking water, the manner in which it carried out, or failed to carry out, that duty, including whether to repair and/or rebuild the system at the public's cost, invoked discretionary and involved policy decisions. *Id.* at ¶ 62.

The Appellate Court's decision in *Herrington, Inc. v. City of Geneva*, 2012 IL App (2d) 120131-U, is also on point. In that case, a hotel owner sued a city for flood damage. During a recent storm, water had apparently pooled in a city-owned storm water basin on the west side of the hotel, and the storm drain in the basin was covered by soils. The owner alleged that the city had negligently operated and maintained the storm sewers that serviced the hotel and failed to inspect the system for blockage and to clean it out. The Appellate Court affirmed summary judgment in favor of the city based on discretionary immunity. *Id.* at ¶ 50. The city's public works director had testified that he determined when and how to inspect and maintain the city's sewers, and that he did not have the manpower or resources to inspect all sewers. *Id.* at ¶ 57. Thus, he had to make policy decisions on how to best allocate his resources and, as a result, had to prioritize those inspections and maintenance activities. *Id.* The Court held that the city's acts or omissions in maintaining the sewer system, specifically how it went about inspecting the system, involved both a policy determination and the exercise of discretion. *Id.*

In the instant case, the Village's Public Works Director, Dan Bromberek, and Water Superintendent, Chris Drey, were empowered to exercise discretion over the maintenance of the Village's water system. (Village Stmt. of Facts, ¶ 42). Both enjoyed the discretion to decide if, how and when to perform preventive maintenance activities, including leak detection, inspecting water valves, and conducting informal focused water audits. *(id.*, ¶ 43). With regard to formal,

system-wide water audits, the Village Board had the authority and discretion to approve funding to retain (after competitive bidding) outside vendors to perform that work. (*id.*, ¶ 44). Thus, it is undisputed that Bromberek and Drey, as well as members of the Village Board, served in positions that involved both the determination of policy and/or the exercise of discretion relative to the maintenance of the Village's water system.

Enbridge's retained civil engineering expert, Peter Fleming, opined that the Village should have conducted water audits and leak detection based on the AWWA recommended practices and that, had it done so, it would have prevented the leak. (Village Stmt. of Facts, ¶ 45). However, he conceded that performing such preventive maintenance was not legally mandated, and that the AWWA practices are merely voluntary and that *the Village was not bound by them.* (*id.* ¶¶ 46-47). Fleming was also unaware of any law, standard or practice that addressed the maintenance of lateral water service lines (*id.* ¶¶ 48-49). Thus, similar to *Nichols, Donovan* and *Herrington*, when and how the Village carried out its alleged duty to maintain its water distribution system (of which the Northfield Block Water Service Line was a part, according to Enbridge), was discretionary and not mandated by any law, regulation, or even recommended industry practices. Fleming also conceded that the Village had to make budgetary decisions and allocate resources in maintaining its water distribution system (Village Stmt. of Facts, ¶ 50). Indeed, there were over 16,000 later water service lines within the Village system, and it would have taken a significant amount of public resources to assume the task of performing leak detection on all of those lines (*id.* ¶¶ 51-52). Bromberek and Dry testified that they made decisions in maintaining the water works system based on the resources made available to them by the Village Board of Trustees (*id.* ¶¶ 53-54). Thus, under the above-cited case law, Section 2-201 squarely applies to this case and immunizes the Village completely from liability for

Enbridge's damages. *See, also, In re Chicago Flood Litigation*, 176 Ill. 2d 179 (1997) (§2-201 immunity for decision as to where to make repairs to flood control improvements); *Richter*, 2013 IL App (2d) 130095 (decision as to how and when to repair sidewalk was discretionary and a matter of policy); *Wrobel v. City of Chicago*, 318 Ill. App. 3d 390 (1st Dist. 2000) (laborer's decision *how* to fill potholes involved policy and discretion).

Enbridge also alleges that the Village was negligent in turning the water back on after discovering the water leak.[3] However, this decision was part of a plan to address the water leak put in place by Wills and his supervisor Chris Drey. Once the water leak was discovered, Wills turned off the water and saw the water recede and suspected that the leak was on the water line. He contacted Northfield Block who hired a leak detection company. (Village Stmt. of Facts, ¶ 7). Wills turned the water back on, in part, so that the leak detection company could find the leak. (*id.*, ¶¶ 10-12). While Fleming did not agree with this decision, he admitted that the water needed to be flowing for the company to locate the leak, that there was no rule or guideline that mandated that Wills keep the water off, and that Wills had to make a judgment call in this situation. (*id.*, ¶¶ 12-16). Section 2-201 discretionary immunity controls this decision and immunizes the Village from liability. *See Richter*, 2013 IL App (2d) 130095 (school building manager's plan as to when and how to repair a sidewalk was discretionary and a matter of policy for purposes of § 2-201 immunity).

Finally, the decision *not* to shut down the water main in response to the oil leak also fell squarely within the scope of § 2-201 immunity. Public Works Director Dan Bromberek was not only empowered to exercise discretion over the water system, he was authorized specifically to make decisions in response to the oil leak. (Village Stmt. of Facts, ¶ 26). Bromberek's main

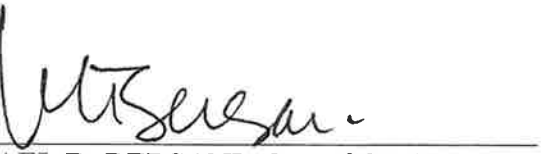
[3] Enbridge offers no evidence that this decision caused or contributed to the oil leak. Indeed, Fleming admitted that he had no such opinion. (Village Stmt. of Facts, ¶ 20).

concern was contaminating the Village-wide water system. (*id.* ¶¶ 27-29). He testified that the cost to remedy such contamination would have been significant. (*id.* ¶ 28). Bromberek balanced all of these competing concerns and chose, in his discretion, a solution that best served the situation (*id.* ¶ 30). While Enbridge's expert, Peter Fleming, disagreed with Bromberek's decision, he conceded that there was no legal mandate governing this decision, and that Bromberek made a judgment call after weighing the factors present at the time (*id.* ¶ 32). This decision considered "the public benefit, the practicability of the plan or procedure, and the best methods to be employed considering resources, costs, and safety." *See Wrobel*, 318 Ill. App. 3d at 394. Bromberek's decision was quintessentially one of policy and discretion warranting immunity under § 2-201 of the Tort Immunity Act.

CONCLUSION

For the foregoing reasons, the Defendant, Village of Romeoville, is immune from liability and is entitled to summary judgment in its favor on the entirety of Plaintiff Enbridge Energy Ltd.'s second amended complaint.

Respectfully submitted,



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