

immunizes the City from liability for plaintiff's injuries.
(181 Ill.2d at 343, 692 N.E.2d at 1182.)

See, also,

- (4) *In re Chicago Flood Litigation*, 176 Ill.2d 179, 680 N.E.2d 265 (1997) (City protected from liability by § 2-201 discretionary immunity for its decisions in deciding when and how to repair underground tunnel leak caused by contractor and whether and how to warn of tunnel breach).
- (5) *Johnson v. Decatur Park District*, 301 Ill.App.3d 798, 704 N.E.2d 416 (4th Dist. 1998) (Park District protected by § 2-201 discretionary immunity for coach's decisions on whether to use safety harness or use spotters for tumbling case where tumbler paralyzed using mini-trampoline).
- (6) *Wrobel v. City of Chicago*, 318 Ill.App.3d 390, 742 N.E.2d 401 (1st Dist. 2000) (City immune from liability per § 2-201 of Tort Immunity Act discretionary immunity where auto struck pothole and veered into oncoming traffic — nature creates potholes like it does snow, wind and rain and there is no possible way to prevent re-occurring potholes despite various policies and judgment calls on the best methods to try and repair them).

The Appellate Court in *Wrobel v. City of Chicago*, 318 Ill.App.3d 390, 742 N.E.2d 401 (1st Dist. 2000), concluded that, contrary to plaintiff Wrobel's contention that these were simple ministerial decisions, the decisions with respect to how to handle potholes involved policy decisions and the exercise of discretion. The *Wrobel* Court reasoned:

These workers are directed by Colianne to remove 'as

much' loose asphalt and existing moisture in a pothole 'as possible' before applying the cold mixture. While they are obligated to undertake such measure pursuant to the express directive of their foreman, the workers enjoy discretion in determining how much asphalt and moisture should be actually extracted and whether that amount is indeed adequate to ensure a durable patch.

The decisions of the workers in this regard can also fairly be characterized as policy determination. When confronted with a particular stretch of roadway, the workers must necessarily be concerned with the efficiency in which they prepare any potholes for repair. Specifically, the workers must allocate their time and resources among the various potholes that will be repaired, and they must ensure that not too much time is dedicated to pothole preparation. The more time and resources the workers devote to preparing potholes for a patch, the less time and resources they have available to repair the other potholes existing throughout their daily grid.

For the same reasons discussed above, the extent of the workers' removal efforts represent both a determination of policy and an exercise of discretion. The degree to which a pothole should be prepared, and specifically how much loose asphalt and moisture will be removed, is a matter of a worker's personal judgment, and encompassed within that judgment are the policy considerations of time and resource allocation during a given workday. (318 Ill.App.3d at 395, 742 N.E.2d at 406.)

**Rule No. 14 STATUTE OF LIMITATIONS: TORT IMMUNITY ACT
ONE-YEAR STATUTE OF LIMITATIONS FOR
ADULTS AND ONE-YEAR FOR A MINOR AFTER
HE/SHE TURNS AGE 18. TORT IMMUNITY ACT, 745
ILCS 10/8-101.**

Local government faces heavy burdens in maintaining its vast amounts of property, unlike private persons and private companies. Therefore, local government has been granted a shortened 1-year statute of limitations for injuries to persons arising from government property and activities. Section 8-101 of the Tort Immunity Act provides a 1-year statute of limitations (745 ILCS 10/8-101).

The 1-year Tort Immunity Act statute of limitations provides as follows:

8-101. Limitation of actions

§ 8-101. No civil action may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued. For purposes of this Article, the term "civil action" includes any action, whether based upon the common law or statutes or Constitution of this State. (745 ILCS 10/8-101.)

The following cases have applied the 1-year statute of limitations in the Tort Immunity Act in cases filed against local public entities:

- (1) *Paszkowski v. Metropolitan Water Reclamation District of Greater Chicago*, 213 Ill.2d 1, 820 N.E.2d 401 (2004) (1-year Tort Immunity Act statute of limitations, not the 4-year Construction Act limitation, controls construction injury suit by worker against Metropolitan Water District, a local public entity).

The Supreme Court in *Paszkowski* held the legislative intent of § 8-101 of the Tort Immunity Act is to provide a 1-year statute of limitations for local public entities which “necessarily controls over other statutes of limitation or repose.” (820 N.E.2d at 409.)

- (2) *Tosado v. Miller*, 188 Ill.2d 186, 720 N.E.2d 1075 (1999) (1-year Tort Immunity Act statute of limitations controls over 2-year Medical Malpractice Act statute in medical malpractice action against Cook County Hospital employees under the “more specific defendant test”).
- (3) *Ferguson v. McKenzie*, 202 Ill.2d 304, 780 N.E.2d 660 (2001) (1-year Tort Immunity Act statute of limitations controls over 2-year Medical Malpractice Act statute in medical malpractice action against Cook County Hospital & employees under *Tosado* and the “more specific defendant” test and the “legislature intended Tort Immunity Act to be controlling” test).
- (4) *Geb v. Forest Preserve District of Cook County*, 323 Ill.App.3d 461, 752 N.E.2d 519 (1st Dist. 2001) (1-year Tort Immunity Act statute of limitations controls over 4-year Construction — Design statute of limitations where plaintiff motorcyclist sued City of Chicago for injuries from loss of control of motorcycle on road in construction zone).

Rule No. 15 LIBEL OR SLANDER: A LOCAL PUBLIC ENTITY IS NOT LIABLE FOR WRITTEN OR ORAL DEFAMATION, LIBEL OR SLANDER. TORT IMMUNITY ACT, 745 ILCS 10/2-107.

Local government, a local public entity, receives immunity protection from claims for damages to persons who claim a local public entity

employee has defamed them and caused damage to their reputations. Section 2-107 of the Tort Immunity Act grants local government absolute immunity from libel and slander.

Section 2-107, libel & slander immunity, of the Tort Immunity Act reads as follows:

2-107. Libel – slander – provision of information

§ 2-107. A local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous or for the provision of information either orally, in writing, in a book or other form of library material. (745 ILCS 10/2-107.)

For example, see *Gavery v. County of Lake*, 160 Ill.App.3d 761, 513 N.E.2d 1127 (2nd Dist. 1987) (§ 2-107 libel immunity for letter written by county personnel directed to county employees stating they could not use the services of Dr. Gavery d/b/a Lakewood Medical Center because of problems regarding misdiagnosed medical problems, non-referral to specialist, and patients being released too soon from the hospital).

Rule No. 16

CONSTRUCTION ACCIDENTS: A PROPERTY OWNER OR GENERAL CONTRACTOR IS NOT LIABLE FOR INJURIES TO PERSONNEL ON THE CONSTRUCTION SITE UNLESS THE OWNER OR GENERAL CONTRACTOR CONTROLS “THE MEANS, METHODS OR OPERATIVE DETAILS” OF THE WORK BEING DONE BY THE CONTRACTOR WHOSE WORK CAUSES THE INJURY (*RANGEL V. BROOKHAVEN*).

The general rule is that one who hires an independent contractor to do work is not liable for the acts or omissions of that independent contractor:

As the Appellate Court stated in *Calderon v. Residential Homes of America, Inc.*, 381 Ill.App.3d 333, 885 N.E.2d 1138 (1st Dist. 2008):

As a general rule, one who entrusts work to an independent contractor will not be liable for the acts or omissions of that independent contractor. (381 Ill.App.3d at 340, 885 N.E.2d at 1145.)

- (1) *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 719 N.E.2d 174 (1st Dist. 1999) (General contractor not liable for injuries to employee of subcontractor who fell from subcontractor's scaffold because the general contractor did not control the "means, methods or operative details" of the subcontractor's work in erecting the scaffold).

The following cases follow the rule that one hiring an independent contractor is not liable for the acts or omissions of that independent contractor unless he controls "the means, methods or operative details" of the work so the independent contractor is not free to do it in its own way:

- (1) *Cochran v. George Sollitt Construction Co.*, 358 Ill.App.3d 865, 832 N.E.2d 355 (1st Dist. 2005) (General contractor on hospital construction site not liable to subcontractor's employee who fell off ladder placed on piece of plywood set on two milk crates set up by subcontractor as general did not control "the means, methods, operative details and incidental aspects of subcontractor's work" so it was not entirely free to do it in its own way).
- (2) *Calderon v. Residential Homes of America, Inc.*, 381 Ill.App.3d 333, 885 N.E.2d 1138 (1st Dist. 2008) (General contractor not liable as it did not control "the means, methods or operative details" of roofing

subcontractor's work where subcontractor's employee injured falling off ladder carrying bundle of shingles up to roof).

- (3) *Gregory v. Beazer East*, 384 Ill.App.3d 178, 892 N.E.2d 563 (1st Dist. 2008) (Mobil, as refinery owner, not liable to Estate of deceased welder who died of mesothelioma caused by asbestos in gloves and blankets provided to a subcontractor to deceased to use in welding as Mobil did not furnish such blankets and gloves and did not control the "means, methods or operative details" of welding sub's work).
- (4) *Ross v. Dae Julie, Inc.*, 341 Ill.App.3d 1065, 793 N.E.2d 68 (1st Dist. 2003) (Candy company owner & manager of construction on its premises not liable for injuries to employee of pipefitter subcontractor who fell from ladder because the owner/manager did not control the means, methods or operative details of the subcontractor's work and owed plaintiff no duty, despite its right to inspect, make change orders, and order safety precautions as to the subcontractor's work on the job site).

The *Cochran v. George Sollitt Construction Co.* case well illustrates the rule.

In *Cochran v. George Sollitt Construction Co.*, 358 Ill.App.3d 865, 832 N.E.2d 355 (1st Dist. 2005), George Sollitt Construction Co. ("Sollitt") contracted as general contractor with Loyola Hospital to do certain construction work at the hospital. James H. Anderson ("Anderson") was a subcontractor whose employee, George Cochran, was removing an old air duct in the basement and was standing on a ladder placed on a piece of plywood set on two milk crates set up by subcontractor Anderson, where he fell.

Cochran sued Sollitt as general contractor, contending Sollitt was in charge of the construction work. Sollitt moved for summary judgment, contending under the “retained control” provision of § 414 of the Restatement (Restatement (Second) of Torts, § 414), it did not control the “means, methods, operative details or incidental aspects” of Anderson’s work so it was not entirely free to do the work in its own way. The trial court granted summary judgment for Sollitt. The Appellate Court affirmed the trial court’s ruling, as follows:

The evidence tendered did not show that Sollitt controlled ‘the operative details, the incidental aspects or the means and methods of [Cochran’s] work’ and, consequently, did not owe Cochran a duty of care predicated on the retained control theory of section 414 of the Restatement. (358 Ill.App.3d at 872, 832 N.E.2d at 360.)

The Appellate Court in *Cochran v. George Sollitt Construction Co.*, 358 Ill.App.3d 865, 832 N.E.2d 355 (1st Dist. 2005), explained that Sollitt did not control the “means, methods, operative details or incidental aspects” of Anderson’s work in setting up the ladder on the plywood and two milk crates. Sollitt did not employ a full time safety manager, did not conduct safety meetings, did not do daily “walk-throughs” and did not get involved in the specifics of the subcontractor’s work. The Appellate Court relied upon *Kotecki v. Walsh Construction Co.*, 333 Ill.App.3d 583, 776 N.E.2d 774 (1st Dist. 2002) (The general contractor’s reservation of a general right over the work—the right to start, stop and inspect the progress — was not sufficient to impose vicarious liability where the control over the manner of the work of the subcontractor’s employees was exercised only by the subcontractor); and *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 719 N.E.2d 174 (1st Dist. 1999) (The general contractor’s retention of the right to inspect the work done, order changes to the specifications and plans, and ensure that safety precautions were observed and the work was done in a safe manner did not show that the general contractor retained control over the means of the independent contractor’s work), in concluding that:

. . . there is no basis for vicarious liability because no evidence was presented that Sollitt so controlled the operative details of Anderson's work that Anderson's employees were not entirely free to perform the work in their own way. (358 Ill.App.3d at 879, 832 N.E.2d at 365.)

Rule No. 17 CONTRIBUTORY NEGLIGENCE: A PLAINTIFF'S OWN FAULT OR CONTRIBUTORY NEGLIGENCE BARS THE PLAINTIFF FROM RECOVERY IF PLAINTIFF IS MORE THAN 50% AT FAULT UNDER § 2-1116 OF THE CODE OF CIVIL PROCEDURE. (745 ILCS 5/2-1116).

The Illinois Code of Civil Procedure, § 2-1116, provides that if a plaintiff's own contributory negligence or fault is more than 50% in causing an accident and injuries, plaintiff's cause of action is barred. (735 ILCS 5/2-1116.)

The following cases have held plaintiff's action was barred by § 2-1116 because plaintiff was more than 50% at fault:

- (1) *Reuter v. Korb*, 248 Ill.App.3d 142, 616 N.E.2d 1363 (2nd Dist. 1993) (Plaintiff pedestrian walking in middle of road on a curve at night and struck by defendant driver was over 50% at fault for accident and injuries and, therefore, recovery was barred — trial court directed a verdict which was affirmed on appeal).

- (2) *Coole v. Central Area Recycling*, 384 Ill.App.3d 390, 893 N.E.2d 303 (4th Dist. 2008) (Appellate Court affirmed summary judgment for defendant garbage truck company and driver where plaintiff's decedent pulled from stop sign in front of garbage truck with preferential, right-of-way, on grounds plaintiff's

decedent was 50% contributorily negligent, barring recovery under § 2-1116).

- (3) *Buerkett v. Illinois Power Co.*, 384 Ill.App.3d 418, 893 N.E.2d 702 (4th Dist. 2008) (Appellate Court affirmed summary judgment for defendant power company where plaintiff tree trimmer, aware of power company's "stub utility pole," fell out of tree and hit stub pole sustaining injuries, as plaintiff was over 50% contributorily negligent, barring recovery under § 2-1116).

This rule, barring plaintiff's action for contributory negligence of over 50%, was explained in *Coole v. Central Area Recycling*, 384 Ill.App.3d 390, 893 N.E.2d 303 (4th Dist. 2008), as follows:

In their response to William's complaint, defendants asserted Lisa was contributorily negligent. Section 2-1116 of the Code of Civil Procedure (735 ILCS 5/2-1116 (West 1994)) bars a plaintiff 'whose contributory negligence is more than 50% of the proximate cause of the injury or damage for which recovery is sought' from recovering any damages. . . . A plaintiff is contributorily negligent when he or she acts without the degree of care that a reasonably prudent person would have used for his or her own safety under like circumstances and that action is the proximate cause of his or her injuries. . . . Generally, the issue of contributory negligence is a question of fact for the jury, but it does become a question of law 'when all reasonable minds would agree that the evidence and the reasonable inferences therefrom, viewed in the light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.' (323 Ill.Dec. at 295, 893 N.E.2d at 309.)

In *Reuter v. Korb*, 248 Ill.App.3d 142, 616 N.E.2d 1363 (2nd Dist. 1993), plaintiff Reuter was on the roadway on a curve at night and was struck by an automobile driver. The trial court directed a verdict for defendant driver Korb at trial holding that:

- (1) Defendant driver Korb was not negligent in failing to avoid pedestrian Reuter standing in a lane of traffic on the road at night; and
- (2) Plaintiff Reuter was over 50% at fault or contributorily negligent for being on the roadway and not yielding to traffic on the roadway.

The Appellate Court held that plaintiff Reuter was over 50% at fault for being on the street in violation of State law and not yielding to vehicles on the street:

Here, it was readily apparent from the evidence that Reuter was more than 50% comparatively negligent in causing his injuries and, thus, not entitled to any recovery from defendant. Given the doctrine of comparative negligence, as well as the fact that all of the evidence overwhelmingly favored defendant, we find that it was within the trial court's discretion to take the case from the jury and direct a verdict in Defendants' favor. (248 Ill.App.3d at 153, 616 N.E.2d at 1371.)

In *Buerkett v. Illinois Power Co.*, 384 Ill.App.3d 418, 893 N.E.2d 702 (4th Dist. 2008), plaintiff Michael Buerkett sued defendant Illinois Power Co. for negligence, contending when Illinois Power removed a utility pole leaving only a "stub pole" equal in height to an adjacent privacy fence, it was negligent. Plaintiff Buerkett, a tree trimmer, slipped and fell after trimming a tree and descending to the ground and landed on the stub pole, sustaining injuries. Illinois Power Co. sought summary judgment on three grounds: (1) open and obvious danger/no duty; (2) plaintiff was

over 50% at fault, barring his recovery under § 2-1116; and (3) no breach of a voluntary undertaking. The trial court granted defendant Illinois Power Co. summary judgment and the Appellate Court affirmed.

The Appellate Court held that whether or not no duty was owed because of the open and obvious danger, plaintiff Buerkett was contributory negligent (over 50%, as a matter of law), barring any recovery.

The Appellate Court reasoned as follows:

Regardless of whether a duty and a breach of that duty existed, there was overwhelming evidence of Michael's contributory negligence. While ordinarily the question of contributory negligence is a question of fact for the jury, 'it becomes a question of law when all reasonable minds would agree that the evidence and reasonable inferences * * *, viewed in a light most favorable to the nonmoving party, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.'. . . The trial court correctly awarded summary judgment on the basis of Michael's overwhelming contributory negligence. (323 Ill.Dec. at 439, 893 N.E.2d at 711.)

Rule No. 18 DEFENDANT’S OWN INTERNAL POLICIES, PROCEDURES OR RULES: A DEFENDANT’S OWN POLICY MANUAL, INTERNAL RULES, PROCEDURES AND POLICIES DO NOT IMPOSE A DUTY WHICH, IF VIOLATED, CAN BE NEGLIGENCE, UNLESS SUCH POLICIES, PROCEDURES OR RULES ARE MANDATED BY THE LAW — A STATUTE, CODE OR ORDINANCE.

ANSI AND BOCA CODES IMPOSE NO DUTY, THE VIOLATION OF WHICH CAN BE NEGLIGENCE, UNLESS THEY HAVE THE “FORCE OF LAW” — ARE MANDATED TO BE FOLLOWED BY A STATUTE, CODE OR ORDINANCE.

It is often pleaded that a defendant was negligent because it violated its own internal policies, procedures, or rules. However, a violation of a defendant’s own rules, policies or procedures is not negligence and does not give a plaintiff a cause of action. (The only exception to this no liability rule is if the “law — common law, statute, code or ordinance — requires” such policy, procedure or rule.)

- (1) *Rhodes v. Illinois Central Gulf Railroad*, 172 Ill.2d 213, 665 N.E.2d 1260 (1996) (Defendant railroad’s alleged violation of its own internal procedures where a person was reported injured in a warming house and first aid was not immediately forthcoming did not establish a legal duty, the violation of which would give rise to a cause of action).
- (2) *Blankenship v. Peoria Park District*, 269 Ill.App.3d 416, 647 N.E.2d 287 (3rd Dist. 1994) (Even though Park District had internal rules requiring at least one lifeguard to remain on duty during adult swim, failure to comply with self-imposed regulations did not give rise to a legal duty in tort).

The *Rhodes v. Illinois Central Gulf Railroad*, 172 Ill.2d 213, 665 N.E.2d 1260 (1996), and *Blankenship v. Peoria Park District*, 269 Ill.App.3d 416, 647 N.E.2d 287 (3rd Dist. 1994), cases illustrates the no liability for violation of internal rules, policies and procedures rule.

In *Rhodes v. Illinois Central Gulf Railroad*, 172 Ill.2d 213, 665 N.E.2d 1260 (1996), Carl Rhodes was noticed to be asleep and intoxicated in the warming house of the Illinois Central Gulf Railroad by a train conductor who called this into his supervisor saying that it appeared that the man was in need of assistance to be able to get out of the warming house. After several calls, Chicago Police responded and took what appeared to be an intoxicated and injured man to the hospital where he died several hours later. It was contended that the railroad violated its own procedures by not calling a city policeman and calling a railroad patrolman to the scene to assist the apparently sleeping, injured or intoxicated man. The Supreme Court found that it was unclear as to whether such a policy or procedure existed. There was nothing in a written policy manual or handbook. But, the Supreme Court stated that, even if there was an internal policy or procedure or guideline and even if it was not followed, there could be no liability because there was no breach of a legal duty. The Court indicated that failure to follow one's own internal rules and procedures does not breach a legal duty:

Whether a legal duty exists is a question of law and is determined by reference to whether the parties stood in such a relationship to each other that *the law* imposes an obligation on one to act for the protection of the other . . . where the law does not impose a duty, one will not generally be created by a defendant's rules or internal guidelines. Rather, it is the law which, in the end, must say what is legally required. See, *Blankenship v. Peoria Park District* . . . (Park District's internal rules requiring one lifeguard on duty at all times did not create a legal duty to have a lifeguard on duty at all times). (172 Ill.2d at 238, 665 N.E.2d at 1272.)

In *Blankenship v. Peoria Park District*, 269 Ill.App.3d 416, 647 N.E.2d 287 (3rd Dist. 1994), the Appellate Court held that the failure to follow a voluntary internal rule or policy or the Peoria Park District to have one lifeguard on duty during adult swim periods (by state law, no lifeguard is required for adults over 17 years old) did not give rise to a cause of action:

Furthermore, we reject plaintiff's argument that a duty arises from the Park District's internal rules which required at least one lifeguard to remain on duty during the adult swim period. While the violation of a *statute* or *ordinance* designed to protect human life or property is *prima facie* evidence of negligence (*Davis v. Marathon Oil Co.* . . . and 'the failure to comply with self-imposed regulations does not necessarily impose upon municipal bodies and their employees a legal duty' (. . . *Davis*, 64 Ill.2d at 390, 356 N.E.2d at 97 (holding that in addition to statutes and ordinances, violations of administrative rules and regulations could be considered as evidence of negligence '*provided they are validly adopted and have the force of law.*') (Emphasis added in case.) (269 Ill.App.3d at 422-23, 647 N.E.2d at 291.)

See, also,

- (3) *Morton v. City of Chicago*, 286 Ill.App.3d 444, 676 N.E.2d 985 (1st Dist. 1997) (Violation of self-imposed rules or internal guidelines, such as a requirement that an operator of an unmarked police vehicle activate his siren when engaged in a pursuit, does not impose a legal duty, nor will it constitute admissible evidence of negligence).
- (4) *Fillpot v. Midway Airlines Inc.*, 261 Ill.App.3d 237, 633 N.E.2d 237 (1st Dist. 1994) (Where airline owed no legal duty to remove ice and snow, internal policy manual

requiring the clearing of walkways of ice and snow did not create such a duty).

- (5) *Roe v. Craddock*, 198 Ill.App.3d 454, 555 N.E.2d 1155 (4th Dist. 1990) (Daycare facilities internal personnel manual did not establish a duty of care, the violation of which would give rise to a cause of action, even though provisions of the internal manual were violated).
- (6) *Mattice v. Goodman*, 173 Ill.App.3d 236, 527 N.E.2d 469 (1988) (Where building owners owed no legal duty to assist elderly person through door, no such duty was created by building owner's employment of an employee who, in accordance with his job description, customarily assisted elderly persons through the door).

**Voluntary Standards Such As ANSI & BOCA Impose
No Duty Unless They "Have The Force Of Law"
— Are Mandated By Statute, Code Or Ordinance**

It is often pleaded that a defendant was negligent because of violating a voluntary standard such as ANSI (American National Standards Institute) or BOCA (Building Officials Code Administrators). However, these are purely voluntary standards which do not impose a duty on a defendant to follow — except or unless the law mandates they must be followed. That is, if some statute, code or ordinance requires compliance with ANSI or BOCA, then a duty is owed — then the ANSI or BOCA standards have "the force of law."

The following cases have ruled that ANSI and BOCA imposed no duty on the defendant because they did not have "the force of law" — were not mandated to be followed by law — a statute, code or ordinance:

- (1) *Miller v. Archer-Daniels-Midland Co.*, 261 Ill.App.3d 872, 634 N.E.2d 1108 (4th Dist. 1994) (BOCA Code's voluntary standards, not adopted by local city code or

ordinance, created no duty on defendant to comply re manlift standards where plaintiff subcontractor employee fell into manlift hole with no handrail).

- (2) *Murphy v. Messerschmidt*, 68 Ill.2d 79, 368 N.E.2d 1299 (1977) (BOCA Code erroneously admitted into evidence in slip & fall on stairs case where no handrail as required by BOCA mandated because stairs were built in 1952 and city adopted BOCA Code by ordinance in 1963).
- (3) *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 506 N.E.2d 581 (1987) (Reversible error to admit ANSI Standards for fixed ladder as irrelevant and non-probative of alleged defective ladder in portable, movable ladder on towboat case).

Illustrative of this no duty rule is *Miller v. Archer-Daniels-Midland Co.*, 261 Ill.App.3d 872, 634 N.E.2d 1108 (4th Dist. 1994).

In *Miller v. Archer-Daniels-Midland Co.*, 261 Ill.App.3d 872, 634 N.E.2d 1108 (4th Dist. 1994), David Miller worked for subcontractor R & R General Contractors installing handrails on a building under construction for defendant ADM. He was working on the fifth floor, walked down to the fourth floor to take the manlift to the ground (it did not extend to the fifth floor yet, there was just a hole opening to the manlift on the fifth floor), forgot something, returned to the fifth floor, and then somehow fell in the manlift open and obvious hole on the fifth floor. Miller sued under the Illinois Structural Work Act and sued also on a negligence theory. The defendants, ADM and flooring subcontractor Tri-R received summary judgment which was affirmed on appeal on two grounds:

- (1) No Structural Work Act violation as plaintiff was using the floor as a floor to walk on and not as a support to work on; and

- (2) Open and obvious condition and no distraction under the rule of *Dinkins*.

To support his negligence claim, Miller relied upon the BOCA Code (Building Officials & Code Administrators) and ANSI Standards (American National Standards Institute) violations regarding no hand rails on the manlift. The Appellate Court found that both BOCA and ANSI were voluntary standards recommended by voluntary organizations and imposed no duty on the defendants having the “force of law,” absent their adoption or incorporation into a statute, code or ordinance by a government body. The Appellate Court, holding that BOCA and ANSI Standards “do not create a statutory duty” stated:

While alleged violations of codes which do not contain language creating a statutory duty may be evidence of failure to exercise reasonable care, the violations do not create a duty where none otherwise exists (*Feldscher v. E & B, Inc.* . . .) violations of Occupational Safety & Health Administration standards may constitute evidence of negligence but they do not create a statutory duty. See (29 U.S.C. § 666 (1988)). Building Officials & Code Administrators and American National Standards Institute standards are promulgated by private institutions; they do not create a statutory duty. We have already held that ADM did not have a duty to protect Miller from the open and obvious hole. Accordingly, the alleged violations of these safety codes did not create a duty where, as here, no other duty existed. The trial court did not err in granting summary judgment in favor of ADM on the portions of the complaint alleging negligence. (261 Ill.App.3d at 879, 634 N.E. 2d at 1113).

Rule No. 19 DISCOVERY: NO DISCOVERY, DEPOSITIONS, WHICH INVOLVE “FACTUAL MATTERS” ARE PERMITTED WHILE A § 2-615 MOTION TO DISMISS THE COMPLAINT BASED UPON A QUESTION OF LAW IS PENDING (735 ILCS 5/2- 615) (*STORM V. CUCULICH*).

When a defendant files a Rule 2-615 motion to dismiss a complaint, plaintiff is not entitled to discovery to determine if a cause of action exists. A § 2-615 motion raises only a question of law — does the complaint plead facts showing each element of a cause of action. In a negligence action, plaintiff must plead: (1) duty facts; (2) breach of duty facts; (3) proximate cause facts; and (4) damages facts.

Supreme Court Rule 137 requires a complaint certifies a reasonable inquiry into the “facts” and “law” has been made and the complaint is well-grounded in “fact” and “in law.”

Holding that no discovery is needed before a ruling on a § 2-615 motion to dismiss (735 ILCS 5/2-615), is the *Storm & Associates, Ltd. v. Cuculich* case.

(*Storm & Associates, Ltd. v. Cuculich*, 298 Ill.App.3d 1040, 700 N.E.2d 202 (1st Dist. 1998) (A § 2-615 motion to dismiss presents only a question of law — does the complaint state a cause of action — so discovery is not needed before ruling on the motion to dismiss — Supreme Court Rule 137 requires a preliminary inquiry before filing a complaint which reveals a reasonable basis in “law” and in “fact” for the complaint).)

The Appellate Court in *Storm* held the plaintiff was not entitled to discovery before his complaint was dismissed under § 2-615, stating:

At the outset, we reject Storm’s argument that the defendants’ section 2-615 motion to dismiss count III was premature before discovery. The question of

whether a complaint states a cause of action is determined based on the facts alleged therein and the reasonable inferences favorable to the plaintiff which can be drawn from those facts. . . . The question is one of law, not fact. Either the complaint contains factual allegations in support of each element of the claim that the plaintiff must prove in order to sustain a judgment, or it does not. . . . The notion that plaintiffs are permitted to plead an action against a defendant before they are possessed of sufficient information to satisfy each element of the claim runs counter to Supreme Court Rule 137, which requires that all pleadings be well grounded in fact to the best of the pleader's knowledge, information and belief after reasonable inquiry. (298 Ill.App.3d at 1051, 700 N.E.2d at 209.)

A complaint which fails to plead a cause of action — duty facts, breach of duty facts, proximate cause facts and damages facts — must be dismissed:

- (1) *Kennell v. Clayton Township*, 239 Ill.App.3d 634, 606 N.E.2d 812 (4th Dist. 1992) (No duty exists absent the common law, a statute, code, rule or regulation existing which imposes a legal obligation on the defendant to perform in a certain manner).
- (2) *Koltes v. St. Charles Park District*, 293 Ill.App.3d 171, 687 N.E.2d 543 (2nd Dist. 1997) (No duty to design golf course by fencing off tee area because no common law case, statute or rule mandated such a duty).

The Appellate Court in *Kennell v. Clayton Township*, 239 Ill.App.3d 634, 606 N.E.2d 812 (4th Dist. 1992), found that the township had no duty to remove a rise in a road and stated the basis of the lack of duty as follows:

We have found no case law, statute, rule or regulation (nor have plaintiffs cited any) imposing a duty on a governmental entity or a public official to remove rises in roadways). (239 Ill.App.3d at 640, 606 N.E.2d at 816.)

The Appellate Court in *Koltes v. St. Charles Park District*, 293 Ill.App.3d 171, 687 N.E.2d 543 (2nd Dist. 1997), held that the Park District had no duty to design its golf course with a fence around the tee area to protect golfers from errant shots and stated its reasoning as follows:

However, the plaintiff has not cited any case law, statute, or regulation that imposes such a duty upon the defendant to provide fencing or warnings for the area in question. In addition, the plaintiff has not shown that there was a prescribed method that was to be followed during the design or construction of the golf course in question. (239 Ill.App.3d at 176, 687 N.E.2d at 547.)

Rule No. 20 AFFIDAVITS: AN AFFIDAVIT AS REQUIRED UNDER SUPREME COURT RULE 191 MUST COMPLY WITH A 5-PRONGED TEST: (1) BE BASED ON PERSONAL KNOWLEDGE; (2) STATE PARTICULAR FACTS; (3) PROVIDE COPIES OF DOCUMENTS REFERRED TO; (4) CONTAIN NO CONCLUSIONS WITHOUT FACTS; AND (5) CONSIST OF EVIDENCE WHICH THE WITNESS CAN TESTIFY TO AT TRIAL.

Affidavits are often used in support of a motion to dismiss or motion for summary judgment, and such affidavits must comply with the 5-pronged test for valid affidavits under Illinois Supreme Court Rule 191.

Illinois Supreme Court Rule 191(a) states that an affidavit must contain the following five bases to be valid. Supreme Court Rule 191(a) provides, in pertinent part, as follows:

. . . shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim . . . is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. . . . (S.Ct. Rule 191(a).)

The 5-pronged Supreme Court Rule 191(a) test for a valid affidavit is as follows:

- (1) it must be based upon personal knowledge;
- (2) it must state facts with particularity;
- (3) it must attach copies of all papers relied upon;
- (4) it shall not consist of conclusions; and
- (5) the affiant must be able to testify competently to the facts asserted.

The following cases have considered affidavits and found they failed to meet the 5-pronged test:

- (1) *Riley v. Jones Brothers Construction Co.*, 198 Ill.App.3d 822, 556 N.E.2d 602 (1st Dist. 1990) (Attorney's affidavit that amended complaint was filed timely within the statute of limitations on 2/17/88 insufficient to rebut court file filing stamped date of 2/19/88 — affidavit lacked personal knowledge, was conclusory and attorney could not competently so testify as he did not file the amended complaint).
- (2) *Longo v. AAA-Michigan*, 201 Ill.App.3d 543, 569 N.E.2d

927 (1st Dist. 1990) (Plaintiff's affidavit in Consumer Fraud Act and Odometer Act that defendants did business in Illinois in selling auto in Michigan with false odometer read, insufficient to rebut affidavits of defendant companies they did not "do business in Illinois" — Plaintiff's affidavit based on no personal knowledge to which he could testify and no facts and only conclusions was incompetent).

- (3) *Webber v. Armstrong World Industries, Inc.*, 235 Ill.App.3d 790, 601 N.E.2d 286 (4th Dist. 1992) (Affidavit of Plaintiff's co-worker in asbestosis case that Plaintiff was exposed to asbestos at various jobs over the years was incompetent to prevent summary judgment for defendants — Supreme Court Rule 191 requires specific facts and affidavit lacks specific work sites and specific products containing asbestos made by defendants).
- (4) *Wausau Insurance Co. v. All Chicagoland Moving & Storage Co.*, 333 Ill.App.3d 1116, 777 N.E.2d 1062 (2nd Dist. 2002) (In subrogation action involving a bailment of a microscope and return in damaged condition, affidavit of bailee that its care of the microscope was "in compliance with the custom and practice in the shipping industry" was incompetent under Supreme Court Rule 191 — a Rule 191 affidavit must consist of facts admissible in evidence and not mere conclusions or opinions).

The Appellate Court in *Wausau Insurance Co.*, finding the bailee's affidavit as conclusory and incompetent under Supreme Court Rule 191, stated:

We next address Chicagoland's contention that it exercised due care in handling the microscope.

Chicagoland relies exclusively upon a supplemental affidavit in which Kevin Illingworth described in detail the equipment and procedures he used when moving the microscope. Illingworth opined that he and his assistant were 'in compliance with the custom and practice in the shipping industry' when they dropped the main column of the microscope. We need not consider the conclusory portion of Illingworth's affidavit because Supreme Court Rule 191(a) states that an affidavit supporting a summary judgment motion 'shall not consist of conclusions but of facts admissible in evidence.' (333 Ill.App.3d at 1123, 777 N.E.2d at 1069.)

Rule No. 21 SPOLIATION OF EVIDENCE: FOR A CAUSE OF ACTION FOR SPOILIATION OF EVIDENCE TO EXIST AGAINST A PARTY, A 3-PRONGED TEST IS NECESSARY: (1) THE PARTY MUST POSSESS OR HAVE POSSESSED THE EVIDENCE; (2) A REASONABLE PERSON WOULD KNOW THE EVIDENCE WAS NECESSARY FOR A LAWSUIT; AND (3) THE MISSING EVIDENCE MUST BE THE PROXIMATE CAUSE OF A PARTY'S INABILITY TO PROVE A CAUSE OF ACTION.

Whether a cause of action can exist for negligent spoliation of evidence depends upon a 3-pronged test, as set out by the Illinois Supreme Court in the case of *Boyd v. Travelers Insurance Co.*, 166 Ill.2d 188, 652 N.E.2d 267 (1995), wherein the insurance company took possession of a heater, which exploded in an accident, to test it for defects, but lost the heater before testing it. The 3-pronged *Boyd* test is as follows:

- (1) possession of evidence and an agreement, contract, statute or voluntary undertaking to preserve it (relationship prong);

- (2) a reasonable person in defendant's position would foresee the evidence was material and necessary in a potential lawsuit (foreseeability prong); and
- (3) proof of proximate causation — but for the lost evidence, plaintiff had a reasonable probability of succeeding in the underlying suit (proximate cause prong).

The two Illinois Supreme Court negligent spoliation of evidence cases are:

- (1) *Boyd v. Travelers Insurance Co.*, 166 Ill.2d 188, 652 N.E.2d 267 (1995) (Illinois recognized an action for negligent spoliation of evidence where insurer took possession of propane heater in explosion case and lost heater and plaintiff could no longer prove a products defect).
- (2) *Dardeen v. Kuehling*, 213 Ill.2d 329, 821 N.E.2d 227 (2004) (Where plaintiff tripped on hole in homeowner's sidewalk, plaintiff had no relationship with homeowner's insurer and no negligent spoliation cause of action against insurer who never possessed sidewalk nor was requested to preserve sidewalk or evidence).

Defining the relationship prong and the foreseeability prong, the Supreme Court in *Boyd* explained:

The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute . . . or another special circumstance. Moreover, a defendant may voluntarily assume a duty by affirmative conduct. . . . In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable

person in the defendant's position should have foreseen that the evidence was material to a potential civil action. (166 Ill.2d at 195, 652 N.E.2d at 270-71.)

And, noting the proximate cause prong, the Supreme Court in *Boyd* stated:

Therefore, in a negligence action involving the loss or destruction of evidence, a plaintiff must allege sufficient facts to support a claim that the loss or destruction of the evidence *caused the plaintiff to be unable to prove* an underlying lawsuit. (166 Ill.2d at 196, 652 N.E.2d at 271.)

In *Dardeen v. Kuehling*, 213 Ill.2d 329, 821 N.E.2d 227 (2004), plaintiff fell on a defective sidewalk at the defendant's home and the defendant called his insurance agent and inquired whether the sidewalk should be repaired and the agent recommended repair. Plaintiff Dardeen sued the insurer, State Farm, alleging negligent spoliation of evidence. The Supreme Court held State Farm could not be liable on a negligent spoliation of evidence theory because it never possessed the sidewalk or agreed to preserve it for plaintiff. The Supreme Court stated:

Unlike the plaintiff in *Miller*, Dardeen never contacted the defendant to ask it to preserve evidence. Dardeen never requested evidence from State Farm, and he never requested that State Farm preserve the sidewalk or even document its condition. And though he visited the accident site hours after he was injured, he did not photograph the sidewalk. Additionally, unlike the doctor in *Miller*, State Farm never possessed the evidence at issue and, thus, never segregated it for the plaintiff's benefit. (213 Ill.2d at 337-38, 821 N.E.2d at 231-32.)

**Rule No. 22 PROXIMATE CAUSE: FOR A DEFENDANT TO BE
LIABLE, THE DEFENDANT’S CONDUCT MUST BE
THE PROXIMATE CAUSE OF THE ACCIDENT: (1) IT
MUST BE THE “CAUSE IN FACT” UNDER THE “BUT
FOR” TEST; AND (2) IT MUST BE THE “LEGAL
CAUSE” OR WHAT WOULD REASONABLY BE THE
EXPECTED LIKELY RESULT OF THE DEFENDANT’S
CONDUCT.”**

Proximate cause is always an issue in any negligence claim because negligence requires pleading and proof of: (1) a duty; (2) a breach of duty; (3) proximate cause; and (4) damages.

The Supreme Court set out the two-pronged proximate cause test: (1) “cause in fact”; and (2) “legal cause,” in *Abrams v. City of Chicago*, 211 Ill.2d 251, 811 N.E.2d 670 (2004), stating the test as follows:

In *Galman* and *Lee*, this court found that ‘the term “proximate cause” describes two distinct requirements: cause in fact and legal cause.’ . . . A defendant’s conduct is a ‘cause in fact’ of the plaintiff’s injury only if that conduct is a material element and a substantial factor in bringing about the injury. . . . A defendant’s conduct is a material element and substantial factor in bringing about the injury if, absent that conduct, the injury would not have occurred. . . . ‘Legal cause,’ by contrast, is largely a question of foreseeability. The relevant inquiry is whether ‘the injury is of a type that a reasonable person would see as a *likely result* of his or her conduct.’ (211 Ill.2d at 258, 811 N.E.2d at 674-75.)

The two proximate cause tests are applied as follows:

- (1) “cause in fact” test — The “cause in fact” test requires that the defendant’s conduct was a “material and substantial factor” in bringing about the accident. That

is, the accident would not have occurred “but for” defendant’s conduct.

- (2) “legal cause” test — The “legal cause” test requires foreseeability. That is, would a reasonable person see the accident as a “likely result of defendant’s conduct.”

Under the “cause in fact” test, it must be concluded that “but for” Plaintiff decedent’s conduct, there would have been no accident.

Under the “legal cause” test, it must be determined that a reasonable person would see the accident as the “likely result of plaintiff decedent’s conduct.”

Illustrative of a lack of proof of proximate cause and, therefore, no liability of the defendant is the *First Springfield v. Galman* case.

(*First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 720 N.E.2d 1068 (1999) (Illegally parked truck in “No Parking Zone” not the proximate cause of accident where plaintiff’s decedent crossing street mid-block, not in a crosswalk, and hit and killed by an auto as parked truck did not cause the accident).)

In *First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 720 N.E.2d 1068 (1999), May Phillippart was crossing a City of Springfield street mid-block and not at or in a pedestrian crosswalk and she was struck and killed by an automobile. Plaintiff’s decedent’s estate sued, contending, among others, that the proximate cause of the accident was a truck which was parked in a “No Parking Zone” and, but for the illegally parked truck, the accident would not have occurred.

The Illinois Supreme Court, finding that the illegally parked truck was not the proximate cause of the accident, but, rather, plaintiff decedent’s own conduct was the proximate cause, stated:

The question is whether it was reasonably foreseeable

that violating a 'no parking' sign at mid-block would likely result in a pedestrian's ignoring a marked crosswalk at the corner, walking to mid-block, and attempting to cross a designated truck route blindly and in clear violation of the law. Clearly, it would not. May Phillippart's (the deceased pedestrian) decision to jaywalk, was undeniably tragic and regrettable, was entirely of her own making. Dobson and ADM neither caused Phillippart to make that decision, nor reasonably could have anticipated that decision as a likely consequence of their conduct. One simply does not follow from the other. (188 Ill.2d at 261, 720 N.E.2d 1068 at 1073.)

. . . .

The question thus becomes whether the illegally parked tanker truck was the legal cause of Phillippart's injuries. We hold that it was not. The relevant inquiry here is whether the injury is of a type that a reasonable person would see as a *likely result* of his or her conduct. (188 Ill.2d at 260, 720 N.E.2d at 1073.)

The Illinois Supreme Court in *First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 720 N.E.2d 1068 (1999), determined, as a matter of law, that the illegally parked truck was not the proximate cause of the accident where the pedestrian crossed the street mid-block and was struck and killed by an auto.

See, also,

- (2) *Abrams v. City of Chicago*, 211 Ill.2d 251, 811 N.E.2d 670 (2004) (City's failure to send an ambulance on a "911" call was not the proximate cause of accident where plaintiff's girlfriend driving her to hospital ran a red light and collided with a car driving 75 to 80 m.p.h.

with a driver on liquor and crack cocaine).

- (3) *Thompson v. County of Cook*, 154 Ill.2d 374, 609 N.E.2d 290 (1993) (City's failure to maintain curve warning sign not proximate cause of accident, as a matter of law, where speeding and drunk driver was fleeing from police and left road on a curve).
- (4) *DiBenedetto v. Flora Township*, 153 Ill.2d 66, 605 N.E.2d 571 (1992) (Drainage ditch alongside township road not proximate cause of accident, as a matter of law, where auto lost control, crossed oncoming traffic lane in fog and landed in drainage ditch — proximate cause of accident was driver's loss of control).

In *Abrams v. City of Chicago*, 211 Ill.2d 251, 811 N.E.2d 670 (2004), the Supreme Court held that the City of Chicago was not the proximate cause of an accident where plaintiff called the City for an ambulance to take her to the hospital for childbirth and the City declined because her contractions were not close enough to warrant an ambulance. Subsequently, a friend drove her to the hospital, but an accident occurred on the way. Her friend drove through a red light and collided with an auto going 75-80 m.p.h. with a drunk driver on cocaine.

Finding the City was not the proximate cause of the accident, because the accident was not "reasonably foreseeable" as a result of the City not sending an ambulance, the Supreme Court in *Abrams v. City of Chicago* stated:

Applying *Galman*, *Thompson* and *DiBenedetto* to the present case, we conclude as a matter of law that the City could *not* have reasonably anticipated that a refusal to send an ambulance when labor pains are 10 minutes apart would likely result in plaintiff's driver running a red light at the same time that a substance-impaired driver was speeding through the intersection on a suspended

license. . . . While all traffic accidents are to some extent remotely foreseeable, this is not the kind of harm that was sufficiently foreseeable from the refusal to send an ambulance so as to satisfy the 'legal cause' portion of a proximate cause analysis. In other words, the injury was not of a type a reasonable person would see as the *likely or probable result* of the refusal to send an ambulance. (211 Ill.2d at 261-62, 811 N.E.2d at 676-77.)

Rule No. 23 TRAFFIC CONTROL DEVICES — SIGNS, LIGHTS, SIGNALS: A LOCAL PUBLIC ENTITY IS IMMUNE FROM LIABILITY FOR FAILURE TO “INITIALLY INSTALL” STOP SIGNS, TRAFFIC LIGHTS, WARNING DEVICES, LIGHTING AND BARRICADES UNDER § 3-104 OF THE TORT IMMUNITY ACT, 745 ILCS 10/3-104.

A local public entity has absolute and unconditional immunity for its failure to initially install or erect traffic control devices, including, among others, stop signs, traffic lights, warning signs, pavement markings, barricades or lighting, pursuant to § 3-104 of the Tort Immunity Act.

Section 3-104, failure to provide traffic signals and signs, provides as follows:

3-104. Failure to Provide Traffic Signals and Signs

§ 3-104. Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or

restraining devices or barriers. (745 ILCS 10/3-104.)

That § 3-104, failure to initially install warning devices immunity, is well-illustrated in the *Robinson* case. (*Robinson v. Atchison, Topeka & Santa Fe Railway Co.*, 257 Ill.App.3d 772, 629 N.E.2d 209 (3rd Dist. 1994) (§ 3-104 immunity barred action against township for failure to install a “Railroad Advance Warning” sign at railroad crossing as required by Uniform Manual on Traffic Control Devices).)

Explaining that § 3-104 immunity for failure to install warning signs was absolute, the Appellate Court in *Robinson* reasoned:

The court noted that section 3-104 ‘clearly and unequivocally states that the municipality is *immune* from all liability arising out of the failure to provide a particular traffic control device.’ . . . to immunize absolutely the failure to initially provide a traffic control device, even where that failure might endanger the safe movement of traffic. . . .

The plaintiffs argue that the township is not immune because the Manual on Uniform Traffic Control Devices provides that railroad advance warning signs are mandatory on roadways in advance of every grade crossing. Neither the express language of section 3-104 nor the supreme court’s interpretation of that section in *West* provide for an exception for mandatory warning signs. (257 Ill.App.3d at 775, 629 N.E.2d at 212.)

The following cases have applied § 3-104 traffic control devices immunity as an absolute defense to any liability:

- (1) *Ramirez v. Village of River Grove*, 266 Ill.App.3d 930, 641 N.E.2d 7 (1st Dist. 1994) (§ 3-104 warning sign immunity trumped any duty of Village to install a

“Railroad Advance Warning” sign per ICC Regulations and Uniform Manual thus barring plaintiff’s cause of action).

Finding § 3-104 warning signs and devices immunity trumps any statutorily-imposed duty, the Appellate Court in *Ramirez* explained:

While section 11-304 of the Illinois Vehicle Code and the rules and regulations of the Illinois Commerce Commission impose obligations upon municipalities to post various warning signs, section 3-104 of the Tort Immunity Act absolutely immunizes local public entities from any tort liability for failing to fulfil those duties. (266 Ill.App.3d at 932-33, 641 N.E.2d at 9.)

- (2) *Gresham v. Kirby*, 229 Ill.App.3d 952, 595 N.E.2d 201 (4th Dist. 1992) (City had § 3-104 signing devices immunity for accident at intersection of city street and State highway where city posted stop signs and there had been 8 other accidents and one death where cars pulled from stop sign into through traffic on State road).
- (3) *Thompson v. Cook County Forest Preserve District*, 231 Ill.App.3d 88, 595 N.E.2d 1254 (1st Dist. 1992) (Forest Preserve had no duty to install a sidewalk along forest preserve parking and restroom facilities and § 3-104 signing immunity for failure to post signs warning of pedestrians crossing roadway).
- (4) *Prostran v. City of Chicago*, 349 Ill.App.3d 81, 811 N.E.2d 364 (1st Dist. 2004) (City had no duty to warn pedestrian on sidewalk crossing alley of open and obvious danger of debris and rocks in construction work in alley and § 3-104 immunity for failure to install signs or barricades at alley warning pedestrians).

Rule No. 24 EMPLOYER LIABILITY FOR EMPLOYEES: AN EMPLOYER IS NOT LIABLE UNDER *RESPONDEAT SUPERIOR* FOR THE ACTS OR OMISSIONS OF ITS EMPLOYEES WHO ACT OUTSIDE THE SCOPE OF THEIR EMPLOYMENT — PERFORMING ACTS OUTSIDE OF WORK AND ACTS NOT SERVING THE INTERESTS OF THE EMPLOYER.

It is axiomatic that an employer cannot be liable for the actions of employees acting outside the scope of their employment — including acts not beneficial, but, rather, detrimental to their employer. The employer is not liable for sexual conduct, criminal conduct and non-authorized or prohibited conduct.

The following cases find no employer *respondeat superior* liability:

- (1) *Montgomery v. Petty Management Corp.*, 323 Ill.App.3d 514, 752 N.E.2d 596 (1st Dist. 2001) (Employee of McDonald's off-duty engaged in fight with customer for cutting into line, not in scope of employment as not doing employer's work or serving employer's interest when fighting with a customer).
- (2) *Randi F. v. High Ridge YMCA*, 170 Ill.App.3d 962, 524 N.E.2d 966 (1st Dist. 1988) (No *respondeat superior* of YMCA where teacher's aid at its day care center sexually molested a 3-year old as employee's conduct solely for her own benefit and sexual gratification and totally outside of the scope of her employment duties).
- (3) *Bates v. Doria*, 150 Ill.App.3d 1025, 502 N.E.2d 454 (2nd Dist. 1986) (Sexual assault outside scope of authority, no vicarious liability).
- (4) *Webb v. Jewel Cos.*, 137 Ill.App.3d 1004, 485 N.E.2d

409 (1st Dist. 1985) (Sexual molestation outside scope of employment; no vicarious liability).

In *Montgomery v. Petty Management Corp.*, 323 Ill.App.3d 514, 752 N.E.2d 596 (1st Dist. 2001), plaintiff Walter Montgomery was at a McDonald's owned by defendant Petty Management Corp. and was standing in line when McDonald's employee Demetrius Holmes requested a drink. Plaintiff Montgomery, feeling Holmes had cut into line, started an altercation with Holmes and sustained injuries therein.

The Appellate Court in *Montgomery* held that scope of employment means that the employee was doing the kind of work he was hired to do and doing it substantially within the hours and at the place of employment and that the employee was serving the employer's interests, at least in part. The Appellate Court set out the applicable test:

No precise definition has been accorded the term 'scope of employment,' but broad criteria have been enunciated:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) It is of the kind he is employed to perform;

(b) It occurs substantially within the authorized time and space limits;

(c) It is actuated, at least in part, by a purpose to serve the master. . . .

Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master. . . . (323 Ill.App.3d at 518, 752 N.E.2d at 598.)

The *Deloney* case illustrates the rule of no *respondeat superior* liability of the employer for the sexual misconduct of employees. (*Deloney v. Board of Education of Thornton Township*, 281 Ill.App.3d 775, 666 N.E.2d 792 (1st Dist. 1996) (School's truant officer having consensual sexual relations with 16-year-old student was outside of scope of employment — school board received no benefit, officer acted for personal pleasure and benefit so no vicarious liability).)

In *Deloney v. Board of Education of Thornton Township*, 281 Ill.App.3d 775, 666 N.E.2d 792 (1st Dist. 1996), William Deloney, a truant officer for School District 205, was sued by a 16-year-old student for having sex with her on numerous occasions. Deloney sought a defense from District 205 under the School Code requiring the Board to defend and indemnify employees for conduct within the scope of employment.

The Appellate Court in *Deloney* explained that *respondeat superior* liability of an employer for acts of its employees committed in the scope of their employment duties does not extend to acts committed solely for the employee's benefit and of no benefit to the employer. The Court ruled:

While an act may be within the scope of employment although consciously criminal . . . generally, acts of sexual assault are outside the scope of employment. (281 Ill.App.3d at 783, 666 N.E.2d at 797.)

Finding that sexual conduct by truant officer Deloney was outside the scope of his truant officer duties, as a matter of law, and that the Board of School District 205 owed him no defense, the Appellate Court in *Deloney* provided this rationale:

Applying those principles to the case at bar, it is clear that the allegations of sexual misconduct in the civil rights complaint, exacerbated by the further allegation that Deloney pled guilty to aggravated criminal sexual abuse, had no relation to Deloney's job as a truant

officer and were committed solely for his personal benefit. As a matter of law, his alleged actions were outside the scope of employment such that the Board owed no statutory duty to defend Deloney in the civil rights action. (281 Ill.App.3d at 786, 666 N.E.2d at 799.)

Rule No. 25 WEATHER IMMUNITY: § 3-105, WEATHER IMMUNITY, OF THE TORT IMMUNITY ACT GRANTS LOCAL PUBLIC ENTITIES IMMUNITY FROM LIABILITY FOR INJURIES CAUSED BY THE EFFECTS OF WEATHER — WIND, RAIN, ICE, SNOW, FLOOD AND HAIL — UPON STREETS, HIGHWAYS, ALLEYS, SIDEWALKS AND OTHER “PUBLIC WAYS OR PLACES OR WAYS ADJOINING.” TORT IMMUNITY ACT, 745 ILCS 10/3-105.

As the Illinois Appellate Court stated in the case of *Enriquez v. City of Chicago*, 187 Ill.App.3d 1110, 543 N.E.2d 905 (1st Dist. 1989), § 3-105, weather immunity, is merely the statutory codification of the “no liability for natural accumulations of ice, snow and water” rule:

When enacted, this section of the Act codified the preexisting common law rule of nonliability and also extended that rule to counties. . . . (187 Ill.App.3d at 1115, 543 N.E.2d at 908.)

Section 3-105, weather immunity, of the Tort Immunity Act provides, in pertinent part, as follows:

3-105. Use of streets, etc.

(a) Neither a local public entity nor a public employee is liable for an injury caused by the effect of

weather conditions as such on the use of streets, highways, alleys, sidewalks or other public ways, or places, or the ways adjoining any of the foregoing. . . . For purposes of this section, the effect of weather conditions as such includes but is not limited to the effect of wind, rain, flood, hail, ice or snow (745 ILCS 10/3-105.)

As the Appellate Court has ruled in *Enriquez v. City of Chicago*, 187 Ill.App.3d 1110, 543 N.E.2d 905 (1st Dist. 1989), in a case involving ice on a city bridge, § 3-105, weather immunity, applies to icy conditions, among other weather-related conditions, on public entity property:

Section 3-105 provides that a local public entity or public employee is not liable for injuries which result from the effect of weather conditions, including the natural accumulation of ice and snow. (187 Ill.App.3d at 113, 543 at 907.)

Illustrative of the application of § 3-105, weather immunity, are the cases of *Enriquez v. City of Chicago*, 187 Ill.App.3d 1110, 543 N.E.2d 905 (1st Dist. 1989), and *International Memory Products of Illinois, Inc. v. Metropolitan Pier & Exposition Authority*, 335 Ill.App.3d 602, 781 N.E.2d 505 (1st Dist. 2002).

In *Enriquez v. City of Chicago*, 187 Ill.App.3d 1110, 543 N.E.2d 905 (1st Dist. 1989), Antonio Enriquez was driving west on 106th Street across a city bridge and Javier Bermea was eastbound, and Bermea lost control on the ice on the bridge and slid into the Enriquez auto, resulting in Enriquez's death. The Enriquez Estate sued the City of Chicago for allowing an "unnatural accumulation of ice" on the bridge. The trial court granted summary judgment for the City based upon § 3-105, weather immunity. The Appellate Court affirmed.

Noting that because the City had no duty to remove the ice, it also had no duty to warn of it, the *Enriquez* Court explained:

If a municipality has no duty to remove accumulated snow and ice, it, therefore, also has no duty to warn that it has not done so. . . . Since we have found that the City was not liable for the accumulation of ice and snow on the bridge here, we must also find that the City had no duty to warn motorists of the accumulation. (187 Ill.App.3d at 1117, 543 N.E.2d at 910.)

The Appellate Court, finding § 3-105, weather immunity, barred plaintiff's claim against the City, concluded:

The accumulation on the bridge here was natural and the City had no duty to specifically remove it; hence, the City was not liable to the plaintiff under the provisions of section 3-105 of the Tort Immunity Act. (187 Ill.App.3d at 1119, 543 N.E.2d at 911.)

In the case of *International Memory Products of Illinois, Inc. v. Metropolitan Pier & Exposition Authority*, 335 Ill.App.3d 602, 781 N.E.2d 505 (1st Dist. 2002), International Memory Products was an exhibitor at the "Print 97" show at McCormick Place, owned and operated by the Metropolitan Pier and Exposition Authority, setting up a booth and was permitted by McCormick Place to use the massive emergency exit doors to bring its products and materials into the exhibition hall. Plaintiff International Memory sued the Metropolitan Pier Authority claiming property damage to its exhibits and booth when heavy winds blew through the massive emergency exit doors while they were open.

The Metropolitan Pier Authority argued that it owed no duty to Plaintiff under § 3-102 of the Tort Immunity Act and that it had immunity from the effects of weather under § 3-105, weather immunity, of the Tort Immunity Act. The trial court granted summary judgment for the Metropolitan Pier Authority, finding no duty and § 3-105 immunity. The Appellate Court affirmed.

The Appellate Court found § 3-102 and § 3-105 barred the cause of

action, absent a voluntary undertaking, and since there was no voluntary undertaking, the claim was barred. The Appellate Court explained:

Since MPEA had no duty to protect plaintiff from the effects of the wind coming into McCormick Place, the only way that MPEA can be held liable for the damage to plaintiff's property under sections 3-102(a) and 3-105 is if the facts of this case indicate that MPEA has somehow voluntarily undertaken a duty to protect plaintiff's property from the effects of the wind. (335 Ill.App.3d at 614, 781 N.E.2d at 515.)

The Appellate Court found § 3-105, weather immunity, barred the cause of action:

As such, section 3-105 is applicable to preclude recovery in favor of plaintiff and summary judgment in favor of MPEA was proper.

Since we find that section 3-105 provides immunity to MPEA, we need not address plaintiff's argument that section 3-108(a) also does not apply. (335 Ill.App.3d at 616, 781 N.E.2d at 516.)

Rule No. 26 GUESS CONJECTURE AND SPECULATION NOT EVIDENCE, NOT PROOF: A PLAINTIFF MUST PROVE ITS CASE BY PHYSICAL, OBJECTIVE EVIDENCE AND MERE GUESS, CONJECTURE AND SPECULATION IS NOT SUFFICIENT AND A JURY CANNOT BE ALLOWED TO SPECULATE.

The following cases have held that no negligence, no cause of action was proven and could not go to a jury because the jury could decide the case, not on objective evidence, but upon guess, conjecture and speculation:

- (1) *Shramek v. General Motors Corp.*, 69 Ill.App.2d 72, 216 N.E.2d 244 (1st Dist. 1966) (Summary judgment proper for defendant tire manufacturer where tire blew out and car lost control — without proof of tire defect, jury could not guess and speculate tire may have been defective).

The Court's pronouncement that guesswork and theoretical speculation require removal of a case from a jury's consideration in *Shramek v. General Motors Corp.*, 69 Ill.App.2d 72, 216 N.E. 2d 244 (1st Dist. 1966), is helpful:

Similarly, in the instant case, the determination of why the tire blew out could be left only to pure speculation. The law is well settled that an inference of negligence or liability itself cannot be based on mere speculation or imagination, and where the evidence presented indicates only a mere possibility that a defendant was negligent, the case must be removed from the jury's consideration. (69 Ill.App.2d at 79, 216 N.E.2d at 248.)

- (2) *Kimbrough v. Jewel Cos., Inc.*, 92 Ill.App.3d 813, 416 N.E.2d 328 (1st Dist. 1981) (Summary judgment affirmed on appeal where plaintiff fell on store ramp and offered no evidence except guess, conjecture and speculation fall caused by nearby grease spot).
- (3) *McInturff v. Chicago Title & Trust Co.*, 102 Ill.App.2d 39, 243 N.E.2d 657 (1st Dist. 1968) (Verdict for plaintiff reversed where plaintiff's decedent who had been ill found dead at bottom of steps which violated handrail ordinance — jury not permitted to guess and speculate whether illness or handrail defect caused accident).

McInturff v. Chicago Title & Trust Co., 102 Ill.App.2d 39, 243 N.E.2d 657 (1st Dist. 1968), involved the death of plaintiff's decedent from a fall down defendant's stairs. The stairs were old and worn and did not have

handrails required by municipal ordinance. There were no witnesses to the accident. A jury verdict of \$30,000 was set aside because there was no proof as to what caused plaintiff's decedent to fall. There was no evidence tying the fall to any defect in the stairs.

The Appellate Court explained its reasoning as follows:

Generally, no presumption of negligence arises from the mere happening of an accident. . . and negligence is not presumed but must be proved as a fact by the party alleging it.

* * *

There is no evidence in the record, direct or circumstantial, to indicate whether plaintiff's decedent slipped, tripped, stumbled, was pushed, blacked out or fell due to a sudden loss of consciousness which occurred as a residual effect of his recent operation for a malignant tumor of the kidney. There is no evidence with respect to whether the accident occurred immediately before or after the decedent stepped on the stairway and, consequently, no evidence with reference to where on the stairway the accident may have occurred. Likewise, other than the accident itself, there is no evidence that the alleged failure to comply with the handrail ordinance, the steepness of the stairs or the worn treads thereon, caused the accident; the cause thereof was left to the conjecture of the jury. In fact, there was no evidence of where, how or why the accident occurred. (102 Ill.App.2d at 51-52, 243 N.E.2d at 663-64.)

Proof of a mere possibility is not sufficient. A theory cannot be said to be established by circumstantial evidence, unless the facts are of such a nature and so

related, as to make it the only conclusion that could reasonably be drawn. It cannot be said one fact can be inferred, when the existence of another inconsistent fact can be drawn with equal certainty. (102 Ill.App.2d at 53, 243 N.E.2d at 664.)

- (4) *Williams v. Chicago Board of Education*, 267 Ill.App.3d 446, 642 N.E.2d 764 (1st Dist. 1994) (Plaintiff's theory that absence of a safety rope in pool proximately caused death was mere speculative theory; evidence was insufficient to allow jury to conclude that a missing rope had any connection to accident).
- (2) *Leavitt v. Farwell Tower, Ltd. Partnership*, 252 Ill.App.3d 260, 625 N.E.2d 48 (1st Dist. 1993) (Plaintiff's theory that absence of automatic door closure devices caused decedent to fall into elevator shaft constituted guess and speculation; absence of evidence of cause in fact of fall into shaft mandated summary judgment in favor of defendants).
- (3) *Englund v. Englund*, 246 Ill.App.3d 468, 615 N.E.2d 861 (2nd Dist. 1993) (Plaintiff's theory that loose deck plank next to pool somehow caused child to fall into pool was mere conjecture not supported by evidence; judgment in favor of defendant affirmed).

Rule No. 27 EXECUTION OR ENFORCEMENT OF THE LAW: A LOCAL PUBLIC ENTITY IS NOT LIABLE FOR NEGLIGENCE WHEN EXECUTING OR ENFORCING THE LAW, BUT CAN BE LIABLE FOR WILFUL AND WANTON CONDUCT UNDER § 2-202, EXECUTION OR ENFORCEMENT OF THE LAW IMMUNITY. TORT IMMUNITY ACT, 745 ILCS 10/2-202.

Section 2-202 of the Tort Immunity Act serves to absolve a police officer from liability for allegations of mere negligence where the allegedly wrongful act or omission occurs while the officer is in the execution or enforcement of any law. Section 2-202 of the Act provides as follows:

2-202. Execution or enforcement of law

§ 2-202. A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes wilful and wanton conduct. (745 ILCS 10/2-202.)

There are number of Illinois cases on § 2-202 immunity (no liability for ordinary negligence, just liability for wilful and wanton conduct). Some of the cases include the following:

- (1) *Thompson v. City of Chicago*, 108 Ill.2d 429, 484 N.E.2d 1086 (1985) (Police officer who struck plaintiff while driving his car in reverse to retreat from unruly crowd was engaged in the enforcement of the law; because § 2-202 applied, trial court should have directed verdict in favor of defendants on negligence allegations).
- (2) *Fitzpatrick v. City of Chicago*, 112 Ill.2d 211, 492 N.E.2d 1292 (1986) (Held: police officer's act of parking squad car partially in lanes of traffic for purpose of investigating vehicle accident constituted act in the

execution or enforcement of the law; cause remanded with directions to enter directed verdict in favor of police officer and his employer).

- (3) *Morris v. City of Chicago*, 130 Ill.App.3d 740, 474 N.E.2d 1274 (1st Dist. 1985) (Police officer and his employer were immune from allegations of mere negligence pursuant to § 2-202, where officer's car slid on a patch of ice and collided with plaintiff's vehicle while officer was responding to "in progress" call on police radio; although officer had turned off siren, he left flashing head lamps on immediately before collision).
- (4) *Bruecks v. County of Lake*, 276 Ill.App.3d 567, 658 N.E.2d 538 (2nd Dist. 1995) (§ 2-202 execution or enforcement of law immunity where deputy in accident responding to shots fired radio call — no wilful and wanton conduct).

The Appellate Court explained the various police activities which are immunized by § 2-202 and why Lake County and the Deputy Sheriff were also immunized:

In *Morris v. City of Chicago* (1985), 130 Ill.App.3d 740, 86 Ill.Dec. 77, 474 N.E.2d 1274, the court found immunity applicable to an officer who collided with plaintiff's parked car while responding to a report of a man with a gun. As in the present case, other officers had previously been dispatched to the scene and the officer was proceeding without his mars lights or siren. (Citation omitted). The appellate court held that the officer was responding to an actual call to enforce a law. (Citation omitted).

In the present case, Officer Lewallen was responding to a call of shots fired. He clearly was being called upon

to execute or enforce a law. The facts that he was not specifically dispatched to the scene, did not have his emergency lights and siren activated, and did not subjectively consider the situation to be an emergency do not alter that conclusion. The cases in which immunity has been found applicable do not require that the officer be engaged in an emergency response. (276 Ill.App.3d at 569, 658 N.E.2d at 539.)

- (5) *Sank v. Poole*, 231 Ill.App.3d 780, 596 N.E.2d 1198 (4th Dist. 1992) (Both village police chief and village were immune from liability for mere negligence allegations pursuant to sections 2-109 and 2-202, where decedent's vehicle overturned during high speed chase by police chief).

It is to be noted that the Emergency Vehicle Act (625 ILCS 5/11-205 & 5/11-907) imposes a duty on an emergency vehicle to exercise due care. But, the Tort Immunity Act trumps the Vehicle Code. Immunity always trumps duty. Therefore, § 2-202 trumps the Illinois Vehicle Code's duty to exercise due care:

- (1) *Carter v. DuPage County Sheriff*, 304 Ill.App.3d 443, 710 N.E.2d 1263 (2nd Dist. 1999) (§ 2-202 of Tort Immunity Act trumps § 11-205 of Vehicle Code — death case where sheriff's squad with lights and siren on wrong side of road and struck oncoming vehicle).
- (2) *Sanders v. City of Chicago*, 306 Ill.App.3d 356, 714 N.E.2d 547 (1st Dist. 1999) (Police officer responding to emergency call had § 2-202 immunity when he struck a pedestrian at the intersection — the officer was proceeding the wrong way in the lane of traffic, but the court held that § 2-202 trumps § 11-205 of the Vehicle Code).

Rule No. 28 POLICE PROTECTION, SERVICES, FAILURE TO ARREST IMMUNITY: § 4-102, FAILURE TO PREVENT CRIME, PROVIDE POLICE PROTECTION OR ADEQUATE POLICE PROTECTION IMMUNITY, GRANTS IMMUNITY FOR FAILURE TO PROVIDE ADEQUATE POLICE PROTECTION, PREVENT CRIME, SOLVE CRIMES OR APPREHEND CRIMINALS. TORT IMMUNITY ACT, 745 ILCS 10/4-102.

Neither a local public entity nor a local public employee can prevent criminal conduct of third persons and they are provided absolute immunity for failure to do so (one cannot be his brother's keeper) by virtue of § 4-102, police protection, failure to prevent criminal conduct immunity of the Tort Immunity Act (745 ILCS 10/4-102).

This immunity is sometimes overlooked in the school context because it is denominated "police protection" and while it does also apply to police officers, it applies to all public employees.

Section 4-102, police protection or failure to prevent criminal conduct immunity, of the Tort Immunity Act provides as follows:

4-102. Police protection

§ 4-102. Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. This immunity is not waived by contract for private security service, but cannot be transferred to any non-public entity or employee. (745 ILCS 10/4-102.)

The following cases hold that § 4-102 Police Protection Service Immunity bars any cause of action for negligence or wilful and wanton conduct in providing inadequate police protection:

- (1) *A.R. ex rel M.R. v. Chicago Board of Education*, 311 Ill.App.3d 29, 724 N.E.2d 6 (1st Dist. 1999) (§ 4-102 police protection immunity for failure to provide police protection services or, if provided, failure to provide adequate police protection barred action against Chicago Board of Education for failure to protect disabled student from sexual assault of other student on school bus).
- (2) *Barnes v. Chicago Housing Authority*, 326 Ill.App.3d 710, 761 N.E.2d 283 (1st Dist. 2001) (§ 4-102 police protection immunity barred action of father and daughter against CHA for gang attack on them where CHA failed to renew contract of security guard service providing security protection from gangs at housing project — § 4-102 bars actions both on a negligence theory and a wilful and wanton conduct theory).
- (3) *Lawson v. City of Chicago*, 278 Ill.App.3d 628, 662 N.E.2d 1377 (1st Dist. 1996) (both City and Board of Education immune from liability by § 4-102 police protection immunity for shooting of student at school by suspended student who came into school with gun not detected on metal detector which was not operating at the time — a voluntary undertaking did not create an exception to § 4-102 immunity, police protection immunity).

Rule No. 29 FALSE PLEADING AND PAYMENT OF COSTS AND ATTORNEYS' FEES FOR SUCH: SUPREME COURT RULE 137 PROVIDES A SIGNATURE ON A PLEADING CERTIFIES THE PLEADING HAS A REASONABLE BASIS "IN FACT" AND "IN LAW" BASED UPON A PRELIMINARY PRE-FILING INVESTIGATION AND THE FAILURE OF THE PLEADING TO HAVE A REASONABLE BASIS "IN LAW" OR "IN FACT" SUBJECTS THE PARTY TO PAYING THE OPPONENT'S ATTORNEYS' FEES AND COSTS (S.C.T. RULE 137).

Supreme Court Rule 137 requires the party or attorney to have read the pleading filed, and signing the pleading certifies that, after having made a reasonable inquiry or investigation into the contents of the pleading, the pleading is "well grounded in fact and in law."

Supreme Court Rule 137 provides, in pertinent part, as follows:

Every pleading, motion or other paper of a party represented by an attorney shall be signed by at least one attorney of record . . . The signature . . . constitutes a certificate by him that he has read the pleading, motion or other paper, that to the best of his knowledge . . . after reasonable inquiry, it is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. (Supreme Court Rule 137.)

The following cases have awarded attorneys' fees under Supreme Court Rule 137 for false pleading:

- (1) *Baker v. Daniel S. Berger, Ltd.*, 323 Ill.App.3d 956, 753 N.E.2d 463 (1st Dist. 2001) (Defendant corporation entitled to Rule 137 attorneys' fees for false pleading)

where plaintiff doctor sued the corporation to declare a non-compete clause unenforceable, but there was no contract executed between the doctor and the corporation and, even if there had been, the non-compete clause expired before doctor filed his complaint for declaratory judgment).

In *Baker v. Daniel S. Berger, Ltd.*, 323 Ill.App.3d 956, 753 N.E.2d 463 (1st Dist. 2001), the Appellate Court ruled that Rule 137 is intended to penalize the false pleader and that an attorney must immediately dismiss a case he finds baseless:

Supreme Court Rule 137 'authorizes the imposition of sanctions against a party or his attorney for filing a pleading, motion, or other paper that is not well grounded in fact and warranted by existing law or which has been interposed for any improper purpose.' . . . The policy underlying the rule is to penalize a litigant 'who pleads frivolous or false matters, or who brings a suit without any basis in the law.' . . . (purpose of Rule 137 is to penalize 'the party who initiates a vexatious or harassing action without a sufficient legal or factual underpinning').

. . . Thus the standard to be used in applying the rule is an objective one. 'It is not sufficient that an attorney "honestly believed" his or her case was well grounded in fact or law.' (323 Ill.App.3d at 962-63, 753 N.E.2d at 469.)

'[A]n attorney has an obligation to promptly dismiss a lawsuit once it becomes evident that it is baseless.' (323 Ill.App.3d at 964, 753 N.E.2d at 470.)

(2) *Penn v. Gerig*, 334 Ill.App.3d 345, 778 N.E.2d 325 (4th Dist. 2002) (Supreme Court Rule 137 attorneys' fees

plus Supreme Court Rule 375 reasonable attorneys' fees for a frivolous appeal awarded to defendant where plaintiff sued under the Residential Real Property Disclosure Act beyond its one-year statute of limitations frivolously arguing the "discovery rule" applied and also sued for punitive damages without having a pretrial hearing as required by § 2-604.1 of the Code of Civil Procedure).

- (3) *Ashley v. Scott*, 266 Ill.App.3d 302, 640 N.E.2d 677 (2nd Dist. 1994) (Supreme Court Rule 137 attorneys' fees of \$36,082 awarded to defendant where plaintiff's Complaint in an auto accident case sued the defendant driver and also the defendant owner on a negligent entrustment case and no evidence or proofs supported the negligent entrustment claim which was found to be false and frivolous).
- (4) *Amadeo v. Gaynor*, 299 Ill.App.3d 696, 701 N.E.2d 1139 (2nd Dist. 1998) (Supreme Court Rule 137 attorneys' fees and costs awarded to plaintiff against defendant in auto accident case where defendant rear-ended plaintiff's auto and plaintiff sued defendant for injuries and defendant filed a counterclaim for contribution against plaintiff charging plaintiff stopped too fast, suddenly and without warning and no evidence or proofs were offered to support defendant's "sudden stop" claim against plaintiff which was found to be "false and frivolous").
- (5) *Kellett v. Roberts*, 276 Ill.App.3d 164, 658 N.E.2d 496 (2nd Dist. 1995) (Supreme Court Rule 137 attorneys' fees and costs awarded to plaintiff against defendant in auto accident wherein defendant rear-ended plaintiff's stopped auto and when plaintiff sued for damages, defendant filed a counterclaim for contribution alleging

“falsely” that plaintiff stopped “suddenly and without warning” and court found no evidence was produced showing the alleged “sudden stop” which was a pleading not well-grounded in law or in fact).

- (6) *Swanson v. Cater*, 258 Ill.App.3d 157, 630 N.E.2d 193 (2nd Dist. 1994) (Supreme Court Rule 137 attorneys’ fees and costs awarded to defendant where plaintiff’s Complaint in an auto accident case sued the auto owner on a negligence entrustment theory with no well-grounded basis in law or in fact for such claim as no facts or evidence supported the conclusory charge of negligent entrustment).

Rule No. 30 DISCOVERY LIMITED TO MATERIAL AND RELEVANT FACTS AND EVIDENCE: SUPREME COURT RULE 201 LIMITS DISCOVERY TO WHAT IS MATERIAL (AN ISSUE RAISED IN THE COMPLAINT) AND RELEVANT (EVIDENCE THAT TENDS TO PROVE A MATERIAL FACT OR ISSUE IN THE CASE).

Under Supreme Court Rule 201 and *Monier v. Chamberlain*, 35 Ill.2d 351, 221 N.E.2d 410 (1966), discovery is limited to evidence which is material and relevant and that means evidence that is admissible at trial or will lead to evidence that is admissible at trial. Demands for discovery outside these parameters which is unnecessary, unreasonable, excessive or oppressive and cost prohibitive will not be honored.

The following cases illustrate instances wherein discovery was held to be immaterial, irrelevant and oppressive:

- (1) *Leeson v. State Fam Mutual Automobile Insurance Co.*, 190 Ill.App.3d 359, 546 N.E.2d 782 (1st Dist. 1989) (Where two plaintiffs with medical payments claims

sought production of 2,100 other medical claims from insurer State Farm and trial court ordered production and sanctioned State Farm with a default judgment for failure to produce, Appellate Court reversed finding 2,100 files immaterial and irrelevant and the order oppressive requiring reversal under *Bua* and *Mead*).

- (2) *In re All Asbestos Litigation v. La Conte*, 385 Ill.App.3d 386, 895 N.E.2d 1155 (1st Dist. 2008) (Where asbestos plaintiff sought discovery in form of 38 years of sales, records, invoices on defendant manufacturer of steam generator boilers and court ordered production of such on all 102 Illinois counties and plaintiff sued on jobsites in only 17 counties, Appellate Court reversed as overly broad and not material and relevant and an abuse of the trial court's discretion relying, in part, on *Leeson v. State Farm*).

In *Leeson vs. State Farm Mutual Automobile Insurance Co.*, 190 Ill.App.3d 359, 546 N.E.2d 782 (1st District 1989), Plaintiff James Leeson and Antoinette Heisman were in an auto accident and submitted medical payments claims for \$9,290.50 and \$12,954.50, respectively, to their auto insurer, defendant State Farm, who refused payment contending the medical expenses were unreasonable, excessive and unnecessary. Defendant State Farm based its denial on an opinion from an outside medical consultant, Dr. Daniel Samo of INSPE Associates.

Plaintiffs sought production of 2,100 claim files involving other claims for medical payments against State Farm; over objection, the trial court granted the request, but the Appellate Court reversed, finding the other files immaterial and irrelevant:

The central issue in this case is *whether the medical expenses claimed by plaintiffs were reasonable and necessary. Hence, whether the defendant unreasonably or vexatiously refused to pay these*

benefits, then hinges on whether these specific medical expenses themselves were reasonable. Accordingly, we cannot see how the information sought concerning the 2100 other unrelated medical claims submitted to defendant's Des Plaines office was at all material and relevant to the issue at hand [emphasis added]. (190 Ill.App.3d at 366, 546 N.E.2d at 787.)

