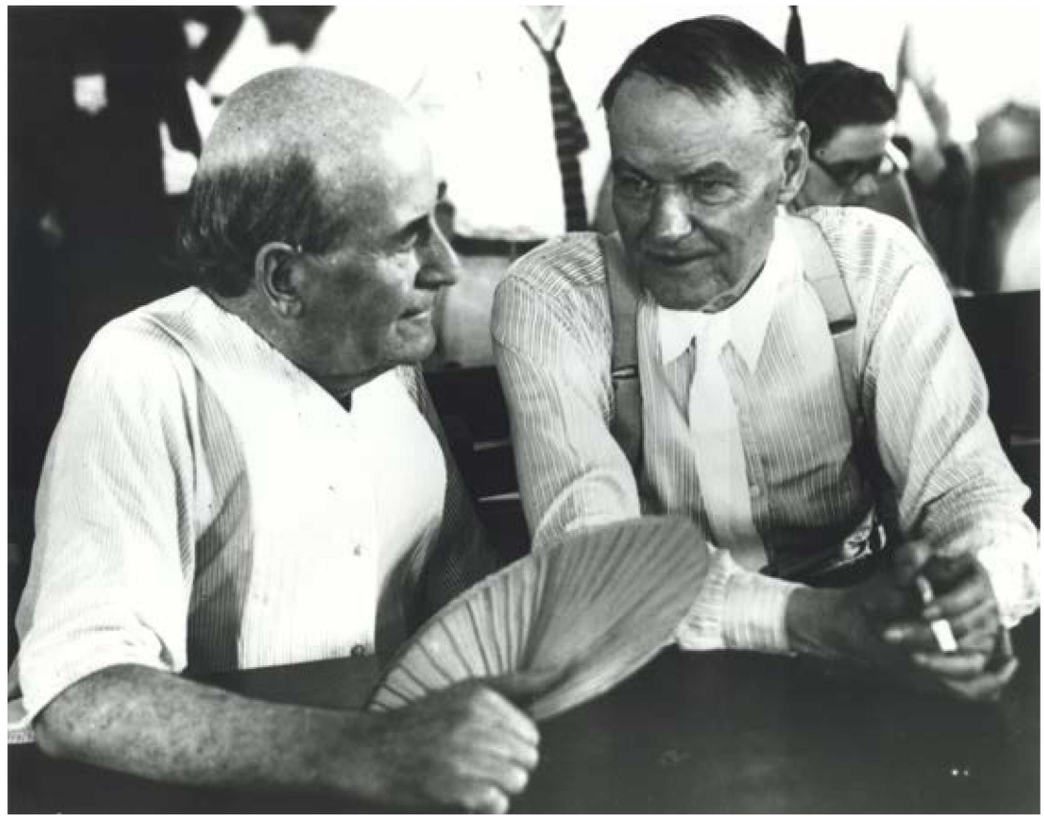
# READY FOR THE DEFENSE

## *30 COMMON LAW & TORT IMMUNITY ACT DEFENSE RULES AVAILABLE TO DEFENDANTS IN ILLINOIS*

## Clarence Darrow Brochure

**The Scopes "Monkey Trial" — July 10-21, 1925**
*State of Tennessee v. John Thomas Scopes*
154 Tenn. 105, 289 S.W. 363 (1927)



William Jennings Bryan Clarence Darrow

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***Lincoln on General Grant:***
***"I can't spare this man, he fights."***

## About The Scopes "Monkey Trial"

In 1925, John Thomas Scopes, teacher and football coach at Clark County High School in Dayton, Tennessee (population: 1,756), was charged with teaching the theory of evolution in violation of Tennessee's Anti-Evolution Act which prohibited teachers from teaching "any theory that denies the story of divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals."

Among the lawyers for the prosecution was William Jennings Bryan (three-time presidential candidate, Congressman and former Secretary of State) and among the ACLU's team on the defense was Clarence Darrow (of *Leopold-Loeb* fame).

After an 8-day very public trial, the jury took 9 minutes to find Scopes guilty on July 21, 1925, and the Judge imposed a $100 fine.

The Tennessee Supreme Court reversed holding only a jury could impose a fine over $50 under Tennessee law. The Supreme Court dismissed the case stating: "We see nothing to be gained by prolonging the life of this bizarre case . . . we think the peace and dignity of the state . . . will be better conserved by the entry of a *nolle prosequi* herein.

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### Foreword — Purpose Of This Brochure

The purpose of this 30 Defenses brochure is to protect the rights of defendants and to improve defense arguments. The goal is to save 25% on indemnity payments and 25% on defense fees and costs.

By providing cites to statutes and Supreme Court and Appellate Court cases and an explanation of the rules and rationale for each, we hope to "level the playing field" between claim personnel and defense lawyers dealing with plaintiffs' attorneys. Without use of the brochure, the defense is "taking a knife to a gunfight." With the brochure, the defense "takes a machine gun to a six-shooter gunfight."

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**Rule No. 1** **THE COMPLAINT: ILLINOIS REQUIRES THE COMPLAINT TO PLEAD "FACTS" — *TETER V. CLEMENS*; BUT, FEDERAL COURT ALLOWS "NOTICE PLEADING" IF SOME FACTS PLEADED SHOW A PLAUSIBLE CLAIM AGAINST THE DEFENDANT — *ASHCROFT V. IQBAL.***

## State Court

The Code of Civil Procedure and the case law requires that a Complaint plead "facts" in support of each element of a cause of action: (a) duty facts; (b) breach of duty facts; (c) proximate cause facts; and (d) damages facts. Failure to do so requires that the Complaint be dismissed. Conclusions and opinions without facts don't count.

Section 2-601, Substance of Pleadings, of the Code of Civil Procedure provides, in pertinent part, as follows:

> § 2-601. . . . This section does not affect in any way the substantial allegations of fact necessary to state any cause of action. (735 ILCS 5/2-601.)

(*Teter v. Clemens*, 112 Ill.2d 252, 492 N.E.2d 1340 (1986) (Illinois is a "fact" pleading state, not a "notice" pleading state and "facts" supporting each element of a cause of action must be pleaded and "conclusions" unsupported by "facts" must be ignored); and *Weidner v. Midcon Corp.*, 328 Ill.App.3d 1056, 767 N.E.2d 815 (5th Dist. 2002) ("A complaint fails to state a cause of action where it omits facts the existence of which are necessary for a plaintiff to recover" — 328 Ill.App.3d at 1060, 767 N.E.2d at 319).)

A complaint must plead "facts." Conclusions don't count and will be ignored on a motion to dismiss.

The Supreme Court in *Teter v. Clemens*, 112 Ill.2d 252, 492 N.E.2d 1340 (1986), explained:

> This Court has said, 'A complaint for negligence, to be legally sufficient, must set out facts that establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from the breach. . . .' Fact pleading, as opposed to notice pleading, is required in Illinois; accordingly, a plaintiff must allege facts that are sufficient to bring his claim within the scope of a legally recognized cause of action. . . . Only well-pleaded facts are admitted by a motion to dismiss, and the requirement that a complaint set forth facts necessary for recovery under the theory asserted is not satisfied, in the absence of the necessary allegations, by the general policy favoring the liberal construction of pleadings. (112 Ill.2d at 256-57, 492 N.E.2d at 1342.)

**Federal Court**

However, the federal courts require only "notice pleading," not "fact pleading." Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim" giving the defendant "fair notice of what the claim is and the grounds upon which it rests."

The U.S. Supreme Court decisions in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1956, 167 L.Ed.2d 929 (2007), require a complaint under Rule 8(a)(2) to be sufficient to withstand a Rule 12(b)(6) motion to dismiss to plead the following:

(1) "factual plausibility" — enough facts to show a claim is plausible or probable;

(2) conclusions absent "factual support" will be ignored; and

(3) labels pleading the elements of a claim without any

"facts" will be insufficient.

The U.S. Supreme Court stated the rule in *Iqbal* as follows:

> . . . the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. . . . A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' (129 S.Ct. at 1949.)

**Rule No. 2** **PREMISES LIABILITY: NO LIABILITY FOR DEFECTS ON THE PREMISES UNLESS THE OWNER HAS NOTICE OF THE DEFECT IN TIME TO REPAIR PRIOR TO THE ACCIDENT. COMMON LAW/CASE LAW RULE AND TORT IMMUNITY ACT RULE (745 ILCS 10/3-102(a)).**

**Notice To Governmental Entities**

Notice of a defect on governmental property is mandatory under § 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a)). Section 3-102(a) provides that a local public entity "shall not be liable for injury unless it is proven that is has actual or construction notice" in a "reasonably adequate time prior to an injury to have taken measures to remedy it."

Section 3-102(a), notice of a defect on property, provides as follows:

**3-102. Care in maintenance of property — Constructive notice**

> § 3-102. Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition . . . and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition. (745 ILCS 10/3-102(a).)

Cases finding no liability because of lack of pleading and proving "notice" include the following:

(1) *Lewis v. Rutland Township*, 359 Ill.App.3d 1076, 824 N.E.2d 1213 (3rd Dist. 2005) (Township not liable because of no "notice" of depression or rut in road struck by school bus driver who was injured because no depression existed on Friday when school bus drove road, but depression existed on Monday due to rains and flooding over the weekend).

In granting summary judgment for Rutland Township, in the case of *Lewis v. Rutland Township*, 359 Ill.App.3d 1076, 824 N.E.2d 1213 (3rd Dist. 2005), involving the depression in the road for three days after a heavy rainfall and no "notice" to the Township in time to repair, the Court stated:

> Here, plaintiff proffered no evidence that actual notice of the depression was given to the township prior to February 28, 2000. Further, the pleadings, depositions and competent affidavits establish that there is no genuine issue of fact regarding constructive notice. The only competent evidence indicating the amount of time

during which the township's road was in an unsafe condition appeared in plaintiff's deposition testimony, wherein she said that the depression was not unsafe on Friday, February 25 at 4 p.m. and it was unsafe at 4 p.m. the following Monday. Plaintiff also testified that it rained throughout that weekend. It would be unreasonable to require the township to inspect all of its roads within hours of heavy rainfall absent actual notice of a problem. (359 Ill.App.3d at 1080, 824 N.E.2d at 1217.)

(2) *Seigel v. Village of Wilmette*, 324 Ill.App.3d 903, 756 N.E.2d 316 (1st Dist. 2001) (Village had no notice and received no complaints of 1" sunken sidewalk section which accumulated ice and caused plaintiff pedestrian's fall and, therefore, could not be liable for accident).

(3) *Wilsey v. Schlawin*, 35 Ill.App.3d 892, 342 N.E.2d 417 (1st Dist. 1976) (No § 3-102(a) notice of missing stop sign by Village where only proofs were Village saw stop sign up one day before accident — no actual or constructive "notice" of missing sign down for 24 hours).

(4) *Coultas v. City of Winchester*, 208 Ill.App.3d 238, 566 N.E.2d 992 (4th Dist. 1991) (City could not be charged with notice of dangerous condition of newly constructed wheelchair ramp where work done by independent contractor and barricade removed less than 24 hours before accident).

(5) *Palermo v. City of Chicago Heights*, 2 Ill.App.3d 1004, 276 N.E.2d 470 (1st Dist. 1971) (No duty imposed on city for slip and fall on water meter box lid in parkway where plaintiff failed to prove that city had notice that lid was not properly bolted).

## Requirements For Constructive Notice

Constructive notice exists only when a defective condition has existed for a lengthy period of time and was obvious, conspicuous and plainly visible so that a local public entity could not have been unaware of its presence. Cases considering "constructive notice" include the following:

(1) *DiMarco v. City of Chicago*, 278 Ill.App.3d 318, 662 N.E.2d 525 (1st Dist. 1996) (No "constructive notice" of defective curb raised 2" higher than rest of curb where plaintiff fell even though defect existed for 8 years because defect was not conspicuous and plainly visible as even plaintiff and her husband who frequented the area did not notice it in 8 years).

(2) *Ramirez v. City of Chicago*, 318 Ill.App.3d 18, 740 N.E.2d 1190 (1st Dist. 2000) ("Constructive notice" where plaintiff tripped on a 2" rise in a sidewalk which was present and conspicuous for 16 years near plaintiff's doctor's office).

## Pleading Defendant "Knew Or Should Have Known" Of Defect Is Insufficient To Plead "Notice"

The Appellate Court in *Lawson v. City of Chicago*, 278 Ill.App.3d 628, 662 N.E.2d 1377 (1st Dist. 1996), specifically held pleading a defendant "knew or should have known" is an impermissible, insufficient conclusory allegation. The *Lawson* Court stated:

> Plaintiff's other allegation pertaining to knowledge, that the Board 'knew or should have known of the likelihood of harm being done to persons lawfully on said premises' also is insufficient. That allegation is overly broad, nonspecific and conclusory. (278 Ill.App.3d at 641-42, 662 N.E.2d at 1387.)

## Notice To Non-Governmental Entity

At the common law, a landowner or possessor cannot be liable for a defect on the premises unless it has "notice" in time before the accident to correct the accident. The following cases so hold:

(1) *Smolek v. K.W. Landscaping*, 266 Ill.App.3d 226, 639 N.E.2d 974 (2nd Dist. 1994) (No liability because of no "notice" to condo owner of depression in ground where tree had been removed and over which plaintiff was caused to trip and fall).

(2) *Barker v. Eagle Food Centers, Inc.*, 261 Ill.App.3d 1068, 634 N.E.2d 1276 (2nd Dist. 1994) (Grocery store not liable because no proof of "actual or constructive notice" of water on floor on which plaintiff slipped and fell where plaintiff claimed water was caused by sprinkling vegetables, but offered no proof or evidence of such).

(3) *Thompson v. Economy Super Marts, Inc.*, 221 Ill.App.3d 263, 581 N.E.2d 885 (3rd Dist. 1991) (Grocery store not liable for customer's slip and fall on lettuce leaf on floor in produce section where no proof provided as to length of time leaf on floor so as to give store actual or constructive notice).

(4) *Wroblewski v. Hillman's, Inc.*, 43 Ill.App.2d 246, 193 N.E.2d 470 (1st Dist. 1963) (Grocery store not liable to customer for slip and fall on vegetable leaf on floor near check-out counter as no evidence as to length of time the vegetable leaf was on floor so as to give store constructive notice of condition).

## No Notice Of A Latent Or Hidden Defect

A latent defect is one which is not open and obvious, but is hidden and

not readily noticeable or apparent. (*E.g.*, dry rot on premises.) Generally, a landowner cannot be liable for a "latent defect" on the premises because the landowner does not know of and has "no notice" of a latent defect. Cases so holding are as follows:

(1) *Guenther v. Hawthorn Mellody, Inc.*, 27 Ill.App.3d 214, 326 N.E.2d 533 (5th Dist. 1975) (Judgment for defendant barn owner affirmed where plaintiff delivering hay to barn fell through hayloft floor due to "dry rot," a latent defect unknown by the barn owner and not apparent by inspection).

(2) *Hamilton v. Baugh*, 335 Ill.App. 346, 82 N.E.2d 196 (4th Dist. 1948) (Landowner owed no duty to tenant to warn tenant of latent/hidden defect in outhouse which partially collapsed causing injuries because landlord had no knowledge of such hidden defect).

(3) *Hendricks v. Socony Mobil Oil Co.*, 45 Ill.App.2d44, 195 N.E.2d 1 (2nd Dist. 1963) (Gas station property owner not liable for latent defect, a light pole rusted out at the bottom, but painted over, where plaintiff hired to repair light leaned his ladder against pole which collapsed causing injury to plaintiff – property owner not liable for latent/hidden defect on which he has no notice or knowledge).

**Rule No. 3** **PREMISES LIABILITY: A LOCAL PUBLIC ENTITY HAS A DUTY TO MAINTAIN ITS PREMISES IN REASONABLY SAFE CONDITION ONLY FOR "INTENDED AND PERMITTED USERS" (NOT TRESPASSERS). TORT IMMUNITY ACT, 745 ILCS 10/3-102(a).**

Government owns and is responsible for maintenance of vast amounts

of public property open for the use of the public and, therefore, has immunity protection available to protect it against liability for injuries on public property under § 3-102. Liability for negligence in maintenance of property will exist, under § 3-102, only if:

(1) Plaintiff was an "intended and permitted user" of such property; and

(2) The public entity has notice of the defective condition in sufficient time to allow repairs to be made.

Section 3-102(a) of the Tort Immunity Act grants immunity to local government by providing a local public entity's duty to maintain its property in "reasonably safe condition" extends only to persons intended by local government to be both "intended and permitted users" of the property. An "intended user" is one for whose use the property was planned, designed, constructed and maintained. A "permitted user" is one who is on the property with permission — a non-trespasser.

Section 3-102(a) of the Tort Immunity Act reads as follows:

> § 3-102. (a) Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition. (745 ILCS 10/3-102(a).)

The following cases give a sense of who is considered an "intended

user" of public property — for what purposes or use or uses was the public property planned, designed, constructed and maintained?

The following cases illustrate that pedestrians are not "intended users" of streets, parkways and alleys, although they may be "permitted users" and that bicyclists are not "intended users" of streets, though they may be "permitted users," and, therefore, no duty is owed to them.

(1) *Boub v. Township of Wayne*, 183 Ill. 2d 520, 702 N.E.2d 535 (1998) (Bicyclist on township road and bridge not an "intended user," as required in § 3-102(a) of Tort Immunity Act, and, therefore, township immune from liability pursuant to § 3-102(a) of Tort Immunity Act when bike wheel caught in gap between wooden slats on township bridge causing bike to flip over and cyclist to sustain serious injuries).

(2) *Sisk v. Williamson County*, 167 Ill.2d 343, 657 N.E.2d 903 (1995) (Pedestrians are not intended users of county gravel roads though permitted users thereof, and, therefore, county owed no duty to provide or maintain pedestrian walkway or sidewalk alongside the county road).

(3) *Wojdyla v. City of Park Ridge*, 148 Ill.2d 417, 592 N.E.2d 1098 (1992) (Pedestrian crossing city street at night at non-crosswalk area struck and killed by auto was not an "intended user" of the street and, therefore, city not liable to pedestrian for failing to maintain its property in reasonably safe condition for plaintiff under § 3-102(a)).

(4) *Roberson v. City of Chicago*, 260 Ill.App.3d 994, 636 N.E.2d 776 (1st Dist. 1994) (No duty owed by city to pedestrian who fell into hole crossing parkway median separating four lanes of traffic as parkway median

intended to separate lanes of traffic and not intended or designed for pedestrian usage).

(5) *Khalil v. City of Chicago*, 283 Ill.App.3d 161, 669 N.E.2d 1189 (1st Dist. 1996) (No duty to maintain alley for pedestrian as pedestrian not "intended user," though pedestrians "permitted users," because their usage was not prohibited — frequent usage of alley by pedestrians did not render it as "intended" for pedestrians).

(6) *Vaughn v. City of West Frankfort*, 166 Ill.2d 155, 651 N.E.2d 1115 (1995) (Pedestrian who stepped in hole in street crossing mid-block not "intended user" — no duty to maintain street for pedestrian).

**Rule No. 4** **PREMISES LIABILITY: A LOCAL PUBLIC ENTITY IS IMMUNE FROM LIABILITY FOR "FAILURE TO SUPERVISE" AN "ACTIVITY ON OR USE OF PUBLIC PROPERTY" UNLESS THE LAW REQUIRES SUPERVISION — A STATUTE, CODE OR ORDINANCE REQUIRES SUPERVISION. TORT IMMUNITY ACT, 745 ILCS 10/3-108(b).**

A local public entity is granted immunity for its supervision or failure to supervise activities on or the use of public property by § 3-108(a) and (b), supervision immunity, of the Tort Immunity Act. (745 ILCS 10/3-108(a)(b).)

If no supervision is provided and if the common law/case law or some statute, code, ordinance or regulation does not require supervision, the immunity is absolute and unconditional. (§ 3-108(b).)

If supervision is provided or if the law requires supervision, then there is immunity from negligence, but no immunity from wilful and wanton conduct. (§ 3-108(a).)

Supervision Immunity of the Tort Immunity Act provides as follows:

> § 3-108. (a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.
>
> (b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury. (745 ILCS 10/3-108(a) & (b).)

The following cases hold that § 3-108, failure to supervise immunity, of the Tort Immunity Act trumps any duty of a local public entity:

(1) *Moorhead v. Metropolitan Water Reclamation District of Greater Chicago*, 322 Ill.App.3d 635, 749 N.E.2d 443 (1st Dist. 2001) (Metropolitan Water District who hired general contractor Perini to do "deep tunnel" work and Perini hired subcontractor Tunnel Electric to provide lighting in "deep tunnel" not liable to plaintiff construction worker injured when he fell in "deep tunnel" on slippery condition with no lighting as Metropolitan Water District was immune from liability under § 3-108(b), failure to supervise immunity, for failure to supervise contractor's work).

(2) *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 687 N.E.2d 1042 (1997) (Board of Education immune per § 3-108(a) supervise immunity for fall of construction worker who fell from building and sued Board of Education under Illinois Structural Work Act for failure to supervise work of contractor hired by Board to do construction work on school).

(3) *In re Chicago Flood Litigation*, 176 Ill.2d 179, 680 N.E.2d 265 (1997) (City immune from liability under § 3-108(a) failure to supervise immunity for failure to supervise contractor Great Lakes' pile driving activity which breached underground freight tunnel causing flooding in Chicago Loop).

(4) *Valentino v. Hilquist*, 337 Ill.App.3d 461, 785 N.E.2d 891 (1st Dist. 2003) (Community college board of trustees entitled to full blanket supervision immunity (§ 3-108) immunity for former employee's intentional battery and intentional infliction of emotional distress claims stemming from negligent supervision of department vice president, pursuant to provision of Tort Immunity Act in effect at time of injury).

(5) *Repede v. Community Unit School District No. 300*, 335 Ill.App.3d 140, 779 N.E.2d 372 (2nd Dist. 2002) (School District and teacher immune from liability pursuant to § 3-108, supervision immunity, where freshman cheerleader practicing a pyramid routine fell and broke her arm — § 3-108, supervision immunity, is absolute and there are no exceptions).

(6) *Gusich v. Metropolitan Pier & Exposition Authority*, 326 Ill.App.3d 1030, 762 N.E.2d 34 (1st Dist. 2001) (Metropolitan Pier Authority immune from liability to plaintiff who fell off of loading dock due to debris for

failure to supervise contractor hired to clean loading dock by virtue of § 3-108, failure to supervise immunity).

The Appellate Court also applied § 3-108 supervision immunity in *Gusich v. Metropolitan Pier & Exposition Authority*, 326 Ill.App.3d 1030, 762 N.E.2d 34 (1st Dist. 2001). Gusich was the plaintiff who fell off the loading dock at McCormick Place and plaintiff sued alleging that the Metropolitan Authority should have made sure the clean-up contractor removed debris from the loading dock. The Appellate Court held as follows:

> Similarly, here the amount of control retained by Metropolitan is the essence of a supervisory relationship — Metropolitan retained the right to oversee and direct the cleanup of McCormick Place. Accordingly, section 3-108 bars plaintiffs' cause of action. We affirm the circuit court's grant of summary judgment for Metropolitan. (326 Ill.App.3d at 1033-34, 762 N.E.2d at 38.)

## Rule No. 5 ABUSED AND NEGLECTED CHILD REPORTING ACT (325 ILCS 5/4) DOES NOT GRANT A CAUSE OF ACTION FOR DAMAGES FOR ITS VIOLATION IN FAILING TO REPORT CHILD ABUSE.

It is often pleaded that a defendant failed to report child abuse to the Department of Children and Family Services ("DCFS") as required by the Abused and Neglected Child Reporting Act ("ANCRA") (325 ILCS 5/4), and the defendant is negligent and liable for damages for violation of the Act. But, no cause of action exists for failure to report child abuse under the Act and, therefore, no damages can be obtained for such violation.

The following cases hold that there is no private cause of action for damages under the Abused and Neglected Child Reporting Act:

(1) *Cuyler v. United States*, 362 F.3d 949 (7th Cir. 2004) (7th Circuit reversed $4 million verdict where babysitter abused child who died and had previously abused another child which U.S. Naval personnel at Naval Hospital failed to report to DCFS under the Abuse and Neglected Child Reporting Act (ANCRA) because statute granted no private cause of action for violation failing to report under it).

The Seventh Circuit Court of Appeals in *Cuyler v. United States*, 362 F.3d 949 (7th Cir. 2004), explained why no private cause of action is granted by the Abuse and Neglected Child Reporting Act (325 ILCS 5/4), as follows.

The Seventh Circuit explained that under Illinois common law, there is no duty to "rescue a person in peril" or become a "good Samaritan" — (362 F.3d at 953) — *Stockberger v. United States*, 332 F.3d 479 (7th Cir. 2003); *Parra v. Tarasco, Inc.*, 230 Ill.App.3d 819, 595 N.E.2d 1186 (1992); *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill.2d 213, 665 N.E.2d 1260 (1996); *Handzel v. Kane-Miller Corp.*, 244 Ill.App.3d 244, 614 N.E.2d 206 (1993); Restatement (Seconds) of Torts, § 314 (1965).

Finding the Abused and Neglected Child Reporting Act (ANCRA) did not meet the 4-pronged test used to determine when a statute grants a private cause of action, the Court stated:

> Thus Illinois common law did not impose on the hospital"s employees a tort duty running to the Cuylers" child, but we must consider whether the Illinois notification statute may have created such a duty. It did not do so expressly. The statute contains no reference to damages or other tort-type remedies. The only sanctions provided are criminal and disciplinary sanctions for willful violations. Nothing in the statute's text indicates that the legislature meant to expand the scope of tort liability to encompass people who fail to

> report child abuse and are thus analogous to bystanders who fail to intervene to prevent injuries by third parties. No Illinois case has addressed the question whether, nevertheless, the statute implicitly creates a private right to obtain damages. . . . But an imposing line of cases from other jurisdictions dealing with the private-right question under very similar, indeed materially identical, child-abuse notification statutes, and using a standard similar to that used by the Illinois courts to determine whether to read a damages remedy into a statute . . . have held that a private right should *not* be implied. (362 F.3d at 954.)

*See, also,*

(2) *Varella v. St. Elizabeth's Hospital of Chicago, Inc.*, 372 Ill.App.3d 714, 867 N.E.2d 1 (1st Dist. 2006) (Emergency room doctor and hospital not liable for failure to report suspected abused child to Illinois Department of Children and Family Services under the Abused and Neglected Child Reporting Act as Act grants no private cause of action for damages).

(3) *Doe v. White*, 627 F.Supp.2d 905 (C.D.Ill. 2009) (Teacher, school administrators and school district not liable for failure to report child sexual abuse to DCFS under the Abused and Neglected Child Reporting Act (325 ILCS 5/4) because violation of reporting duty under the Act does not give rise to a cause of action for damages).

**Rule No. 6** **PREMISES LIABILITY: A LOCAL PUBLIC ENTITY IS NOT LIABLE FOR A CONDITION OF RECREATIONAL PROPERTY UNLESS IT IS GUILTY OF WILFUL AND WANTON CONDUCT. TORT IMMUNITY ACT, 745 ILCS 10/3-106.**

Local government maintains vast amounts of property, some of it recreational property, and it receives immunity from negligence in maintaining "recreational property," but no immunity for wilful and wanton conduct in maintaining such property by virtue of § 3-106, recreational property immunity (745 ILCS 10/3-106).

Section 3-106, recreational property immunity, provides as follows:

**3-106. Property used for recreational purposes**

> § 3-106. Neither a local public entity nor a public employee is liable for an injury where the liability is based upon the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of wilful and wanton conduct proximately causing such injury. (745 ILCS 10/3-106.)

The Tort Immunity Act also defines the term "wilful & wanton conduct" as follows:

**1-210. Wilful And Wanton Conduct**

> § 1-210. "Wilful and wanton conduct" as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their

property. (745 ILCS 10/1-210.)

The Appellate Court, in *A.D. v. Forest Preserve District of Kane County*, 313 Ill.App.3d 919, 731 N.E.2d 955 (2nd Dist. 2000), set out the three-pronged test required to prove wilful and wanton conduct: (1) knowledge of dangerous condition; (2) knowledge of prior accidents and injuries from the condition; or, (3) removal of safety device from the recreational property. The Court explained:

> In order to establish willful and wanton conduct, a plaintiff must prove that a defendant engaged in a 'course of action' that proximately caused the injury . . . A public entity may be found to have engaged in willful and wanton conduct only if it has been informed of a dangerous condition, knew others had been injured because of the condition, or if it intentionally removed a safety device or feature from property used for recreational purposes. (313 Ill.App.3d at 924, 731 N.E.2d at 959.)

Section 1-210's definition of "wilful and wanton conduct" requires the Defendant's "course of action" reveal Defendant's mental state dismissive of Plaintiff's safety — that Defendant's actions show "utter indifference to" or "conscious disregard for" Plaintiff's safety:

(1) "Utter indifference to" plaintiff's safety means, "entire, complete, absolute and total disregard" for plaintiff's safety. (Black's Law Dictionary).

(2) "Conscious disregard for" plaintiff's safety means, "intentional, knowing, purposefully ignoring" plaintiff's safety. (Black's Law Dictionary).

The following cases found no wilful and wanton conduct because the conduct involved did not show "utter indifference to" or "conscious disregard for" plaintiff's safety. "Utter indifference to" or "conscious

disregard for" plaintiff's safety means defendant knew of a defective condition, knew injury was almost bound to happen and chose to do nothing.

(1) *Oravek v. Community Dist. No. 146*, 264 Ill.App.3d 895, 637 N.E.2d 554 (1st Dist. 1992) (No wilful & wanton conduct for school district not to remove skateboard ramp on school property in violation of school policy where plaintiff injured riding bike onto ramp inadvertently).

(2) *Bialek v. Moraine Valley Community College School Dist. No. 524*, 267 Ill.App.3d 857, 642 N.E.2d 825 (1st Dist 1994) (No wilful & wanton conduct where plaintiff collided with goal post used as boundary marker playing pick-up football — not wilful and wanton for college not to remove or pad goal post).

(3) *Koltes v. St. Charles Park District*, 293 Ill.App.3d 171, 687 N.E.2d 543 (2nd Dist. 1997) (No wilful and wanton conduct on Park District's part where golfer standing by woman's tee hit by golfer on men's tee even though Park District knew of a similar prior accident because knowledge of one prior accident and non-action thereafter is not a "course of conduct" which shows "utter indifference to" plaintiff's safety).

## A. WHAT IS RECREATIONAL PROPERTY — *REXROAD V. CITY OF SPRINGFIELD*, 207 ILL.2d 33, 796 N.E.2d 1040 (2003)?

Section 3-106, recreational property immunity, grants immunity to a local public entity, except for wilful and wanton conduct, for injuries caused by a condition (not activities) of public property intended or permitted to be used for recreational purposes.

What is "recreational" property? Whether property is "recreational property" is determined by its nature, intended use and past use. But, analysis is on a case-by-case basis. An example will help explain.

Is a parking lot "recreational property"? It can or cannot be, as two Supreme Court cases illustrate:

(1) *Sylvester v. Chicago Park District*, 179 Ill.2d 500, 689 N.E.2d 1119 (1997) (Parking lot across street from Soldier Field, where plaintiff tripped over concrete parking bumper, was "recreational property" under § 3-106 because it increased the usefulness of Soldier Field used for recreational purposes).

Thus, non-recreational property (parking lot) can be "recreational property" if its use increases/aids/allows use of recreational property.

(2) *Rexroad v. City of Springfield*, 207 Ill.2d 33, 796 N.E.2d 1040 (2003) (Parking lot located to serve the school, football practice field and locker room, where plaintiff fell in a hole under construction, was not recreational property under § 3-106 because it served the whole school and was not primarily serving and increasing the usefulness of recreational property — it did so only incidentally).

The Supreme Court in *Rexroad* characterized the parking lot as only "incidental" to recreational property.

> . . . we hold that any recreational use of the parking lot in question was so incidental that § 3-106 does not apply. (207 Ill.2d at 43, 796 N.E.2d at 1045.)

**Rule No. 7** **PREMISES LIABILITY: A PROPERTY OWNER IS NOT LIABLE FOR INJURIES TO PERSONS ON PROPERTY THAT ARISE FROM THE CONSTRUCTION OF IMPROVEMENTS TO THE PROPERTY MORE THAN 10 YEARS OLD. (745 ILCS 5/13-214).**

When accidents occur on public property as a result of some condition thereon, the second question to be asked (the first question is, it will be recalled, whether the public entity breached a duty) is: Is the accident condition a condition of public property that has existed for more than 10 years?

There is no liability for some condition resulting from planning, designing or constructing a condition on public property if that condition has existed for over 10 years. The 10-year Statute of Repose bars such claims.

The 10-year Construction Statute of Repose reads as follows:

> **§ 2.13. Construction — Design Statute Of Repose**
>
> The Construction — Design, Management and Supervision Act reads as follows:
>
> **Construction — Design management and supervision**
>
> *As used in this Section "person" means* any individual, any business or legal entity, or *any body politic.*
>
> * * *
>
> (b) *No action based upon tort*, contract or otherwise *may be brought against any person* for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real

> property *after 10 years have elapsed from the time of such act or omission.* . . . (735 ILCS 5/13-214.) (Emphasis added.)

The Statute of Repose contained in § 13-214(b) bars any action based upon alleged design and construction defects where a period of more than ten years has elapsed between the date that the complained-of improvement was designed, erected and constructed and the date of the alleged occurrence. Representative cases include:

(1) *Wright v. Board of Education of City of Chicago*, 335 Ill.App.3d 948, 781 N.E.2d 386 (1st Dist. 2002) (10-year Construction Statute of Repose barred plaintiff's claim for trip & fall on school step allegedly defectively designed 35 years earlier when school built).

(2) *Gavin v. City of Chicago*, 238 Ill.App.3d 518, 606 N.E.2d 506 (1st Dist. 1992) (Design and construction Statute of Repose barred suit for alleged negligent design and construction of traffic light fixture with which vehicle collided where suit was filed 24 years after the traffic light had been erected and installed).

(3) *Ocasek v. City of Chicago*, 275 Ill.App.3d 628, 656 N.E.2d 44 (1st Dist. 1995) (Design and construction Statute of Repose barred action against city for design and construction of median barriers on Lake Shore Drive where suit was filed 19 years after the median had been installed).

## Rule No. 8 PREMISES LIABILITY: THE DUTY A LOCAL PUBLIC ENTITY OWES TO MAINTAIN ITS PROPERTY SAFE FOR PEDESTRIANS: STREETS, SIDEWALKS, PARKING SPACES, PARKWAYS AND CURBS — DIFFERENT AND DISTINCT DUTIES.

Pedestrians slip or trip and fall and sustain injuries on public property and bring suit and those lawsuits raise a number of questions involving the duty a local public entity owes to pedestrians, including the question of what duty does a local public entity owe to pedestrians to maintain its streets, sidewalks, parkways and curbs. Determination of what duty is owed begins with § 3-102(a) of the Tort Immunity Act (745 ILCS 10/3-102(a)), which states a local public entity owes a duty to exercise ordinary care to maintain its property in a "reasonably safe condition" for people whom the local public entity "intended and permitted" to use the property.

"Intended users" are those persons using the property for the purpose which the local public entity plans, designs, engineers, constructs, maintains and holds out property for specific usage by people. For example, generally speaking, sidewalks are for people and streets and roads are for motor vehicles.

"Permitted users" are those persons using the property where the local public entity has not forbidden or prohibited use by people — that is, non-trespassers. For example, the grassy lawn in front of the Village Hall is not "intended" for persons to walk on, but walking across the lawn is not prohibited, so a person walking on the lawn is a "permitted user," but not an "intended user."

For a local public entity to have a duty for a person using the property, the person must be both an "intended and permitted user."

### Streets Are Not Sidewalks

Streets are intended for motor vehicles, not pedestrians. So, generally,

there is no duty to maintain streets for pedestrians. That is, "a street is not a sidewalk."

(1) *Wojdyla v. City of Park Ridge*, 148 Ill.2d 417, 592 N.E.2d 1098 (1992) (City not liable for death of pedestrian struck by auto while crossing street mid-block and not in a crosswalks as pedestrian not an "intended user").

The Supreme Court in *Wojdyla* stated that streets are "intended" for motor vehicles. The Supreme Court said:

> Here, the purpose of the highway is clearly for the use of automobiles. The lines in the street and the signs by the road are intended for use by vehicular traffic, and the overhead streetlights are spaced according to design to light the way for fast-moving vehicles. (148 Ill.2d at 421, 592 N.E.2d at 1102.)
>
> . . . .
>
> This historical perspective still holds true, for the developer of modern highways now creates the design for the benefit of automobiles and other vehicles, and rarely for pedestrians. (148 Ill.2d at 423, 592 N.E.2d at 1101.)

(2) *Vaughn v. City of West Frankfort*, 166 Ill.2d 155, 651 N.E.2d 1115 (1995) (City not liable to pedestrian who crossed street mid-block (the sidewalk ended) and stepped in a hole as pedestrian not an "intended user" of street).

(3) *Sisk v. Williamson County*, 167 Ill.2d 343, 657 N.E.2d 903 (1995) (County not liable to pedestrian who exited auto on county road with no sidewalk and fell off of

culvert into water below as pedestrian not an "intended user" of a county road — pedestrians walk along county road at their own peril).

(4) *Boub v. Township of Wayne*, 183 Ill.2d 520, 702 N.E.2d 535 (1998) (Township not liable to bicyclist whose wheel caught in wooden slat on township bridge as township road and bridge "intended" for motor vehicles and bicyclist not an "intended user" of road and bridge).

**Exceptions: Streets At Crosswalks & Around Marked Legal Parking Spaces**

There are two exceptions to the general rule that pedestrians are not "intended users" of streets. Pedestrians are "intended users" at two places on streets:

(1) Pedestrians are "intended users" of crosswalks at intersections whether "marked" or unmarked" crosswalks; and

(2) Pedestrians are "intended users" of the space immediately around a motor vehicle legally parked in a parking space held out by the local public entity for parking for purposes of "entering and exiting" the motor vehicle.

(a) *Curatola v. Village of Niles*, 154 Ill.2d 201, 608 N.E.2d 882 (1993) (Village owed duty to truck driver who parked his truck in a marked parking space and stepped in a pothole at the rear of the truck because the area immediately surrounding a legally marked parking space is "intended" for pedestrians entering and exiting their vehicle).

The Supreme Court in *Curatola* explained that

the area immediately around a parked vehicle in a marked parking space is "intended" to be maintained in reasonably safe condition for persons parking their vehicles and entering and exiting the vehicle:

> Curatola's use of the immediately surrounding street to exit his vehicle was permitted and intended. Curatola's use of this area of the street was mandated by virtue of the fact that he had parked his vehicle and had to exit or reenter it. (154 Ill.2d at 215-16, 608 N.E.2d at 889.)

**Sidewalks Are For Pedestrians, But Need Not Be Smooth, Flat & Level**

The law does not require sidewalks be maintained in "smooth, flat and level" condition. Indeed, it is physically and practically impossible to do so. The law recognizes that sidewalks will contain minor or trivial or *de minimis* conditions, of which all persons are aware and appreciate. This is because of multiple factors which affect and play havoc with sidewalks, including the following:

(1) weather conditions — freeze and thaw cycles causing expansion and contraction;

(2) the growth of trees and shrubbery nearby sidewalks causing rising and lowering of sidewalk sections;

(3) the presence of driveways crossing over sidewalks causing them to be depressed and tilted and slanted; and

(4) the presence of utility and public service providers doing

work along the roadway right-of-way moving the earth and affecting the levelness of sidewalks.

The Supreme Court has held that local public entities are not liable for "slight inequalities" or "minor defects." In the case of *Warner v. City of Chicago*, 72 Ill.2d 100, 378 N.E.2d 502 (1978), the Supreme Court recognized that an elevated sidewalk section raised 1⅛" was not actionable:

> . . . the law does not exact of a municipality the duty of keeping all sidewalks in perfect condition at all times, and that slight inequalities in level, or other minor defects frequently found in traversed areas, are not actionable.' (72 Ill.2d at 103, 378 N.E.2d at 503.)

The following cases show that to plead a cause of action against a local public entity for negligent maintenance of sidewalks, some dimensions — height, width, depth, diameter, length — must be pleaded:

(1) *Warner v. City of Chicago*, 72 Ill.2d 100, 378 N.E.2d 502 (1978) (A height variation of 1⅛" between sidewalks is a *de minimis*, nominal, non-actionable condition, but a 1¾" variation could be actionable).

(2) *Harting v. Maple Investment & Development Corp.*, 243 Ill.App.3d 811, 612 N.E.2d 885 (2nd Dist. 1993) (A condition of a difference in elevations between sidewalk sections of ½" to ¾" was a nominal, *de minimis*, non-actionable condition).

(3) *Gresser v. Union Pacific Railroad Co.*, 130 F.Supp.2d 1009 (C.D.Ill. 2001) (The elevation or unlevel condition of ⅝ths" between the concrete sidewalk and the asphalt at a pedestrian crossing over railroad tracks was insubstantial, nominal and *de minimis* giving rise to no cause of action).

## What Is Needed To Show A Sidewalk That Is Defective

Because local public entities do not have a duty to maintain sidewalks in "smooth, flat and level" condition and because local public entities cannot be liable for sidewalk conditions which are "*de minimis*, nominal, trivial, minor or insubstantial, when a plaintiff sues a local public entity, the complaint must plead "facts" showing the dimensions of the claimed defect — height, width, depth, diameter, length — to show a condition that is more than *de minimis* or minor or trivial. (*Gillock v. City of Springfield*, 268 Ill.App.3d 455, 644 N.E.2d 831 (4th Dist. 1994) (In fall on city sidewalk claim, plaintiff must plead and prove the size or dimensions of the claimed defect because city has no duty to keep all sidewalks in perfect condition and is not liable for slight or *de minimis* defects on a sidewalk).)

The Appellate Court in *Gillock*, a trip and fall on a city sidewalk case, explained the city was not liable for minor or *de minimis* conditions and a plaintiff must plead and prove the defect claimed to have been tripped over was more than *de minimis* or minor or nominal. The Court explained:

> Municipalities do not have a duty to keep all sidewalks in perfect condition at all times. . . . A municipality has no duty to repair sidewalk defects unless a reasonably prudent person should anticipate danger to persons walking on the sidewalk. . . . Thus, *de minimis* or slight defects frequently found in traversed areas are not actionable, as a matter of law. (268 Ill.App.3d at 457, 644 N.E.2d at 833-34.)
>
> . . . .
>
> There is no duty on the part of a landowner to repair *de minimis* or slight sidewalk defects. Therefore, as part of her case, plaintiff must prove the defect here was not *de minimis,* by presenting evidence of the size of the defect

> and any aggravating circumstances. In this case, plaintiff failed to offer any evidence as to the size of the sidewalk defect in question. . . . People sometimes trip over defects which would be characterized as *de minimis,* just as they sometimes fall on sidewalks where there is no defect. (268 Ill.App.3d at 458, 644 N.E.2d at 834.)

## Parkways — Free Of Traps, Snares & Pitfalls

Parkways are the grassy areas usually found between the street and the sidewalk. A parkway is not a sidewalk. But, pedestrians do use parkways on some occasions. Pedestrians walk on parkways for several reasons: (a) to mow the grass or rake leaves or set garbage cans out on the parkway or curb; and (b) as a short-cut to parked cars or when the sidewalk is blocked.

The Supreme Court has determined that parkways are not sidewalks and must be maintained safely for pedestrians, but the duty to maintain parkways is not the same as the duty to maintain sidewalks. The Supreme Court held that the duty to maintain parkways is only a duty to maintain them "free of traps, snares and pitfalls" and not to maintain them "smooth, flat and level."

*Marshall v. City of Centralia*, 143 Ill.2d 1, 570 N.E.2d 315 (1991) (City owed duty to maintain grassy parkway free of "traps, snares and pitfalls" for pedestrian who walked on parkway because city sidewalk was muddy and stepped into an open sewer manhole).

## Curbs — Likely No Duty — Curbs Are Not Intended To Be Walked On

A curb is not a street and a curb is not a sidewalk and a curb is not "intended" for pedestrians to walk on. A curb is not planned, designed, engineered, constructed and maintained and held out for pedestrians to walk on. Pedestrians generally are not "intended users" of curbs.

But, pedestrians do encounter curbs at crosswalks and at legal, marked parking spaces, usually stepping over and upon, onto or down from the curb.

The Supreme Court has not yet ruled upon the question of what duty is owed to pedestrians for cubs. But, curbs may be likened to parkways and may even be considered to be part of a parkway. It would appear that the duty to maintain curbs would likely be to maintain curbs "free of traps, snares and pitfalls."

The Appellate Court has provided some guidance on curbs. The Appellate Court held that a pedestrian jaywalking to her parked car, crossing mid-block and not at a crosswalk, who fell on a broken curb, was not an "intended user" of the curb in the *Williams v. City of Chicago* case:

(a) *Williams v. City of Chicago*, 371 Ill.App.3d 105, 861 N.E.2d 1115 (1st Dist. 2007) (City owed no duty to pedestrian who was not an "intended user" of curb under § 3-102(a) where she parked across from friend's house, visited friend and jaywalked across street and walked around back of parked car and stepped on curb which was broken and was injured — no duty to maintain curb for plaintiff who jaywalked to reach curb where car parked).

## Rule No. 9 PREMISES LIABILITY: ICE AND SNOW AND NO DUTY TO REMOVE A NATURAL ACCUMULATION OF ICE OR SNOW OR SPREAD SALT, SAND OR ASHES AND NO LIABILITY IF ICE AND SNOW REMOVED, BUT A THIN GLAZE OF ICE REMAINS THEREAFTER.

A landowner is not an insurer of the safety of persons coming onto the property with respect to ice and snow which is a common condition in

winter known and experienced by all. Persons using property must take care for their own safety and be aware of the open and obvious conditions present when snow is present — mounds or piles of snow, ridges or ruts from cars, pedestrians and plowing operations, a glaze or sheet of ice in areas from where snow has been removed and the nature of freezing and thawing cycles when snow is present.

There is no duty to remove natural accumulations of ice and snow. There is no duty to spread rock salt or ashes or cinders on ice and snow. And, there is no liability for the thin glaze of ice that may remain when snow-shoveling or snow-plowing of ice and snow takes place. The following cases illustrate the rule:

(1) *Sheffer v. Springfield Airport Authority*, 261 Ill.App.3d 151, 632 N.E.2d 1069 (4th Dist. 1994) (Airport Authority, a common carrier with highest degree of care to passengers, owed no duty to airline passenger who fell on patch of ice left on ground after snow removal — ice left after snow removal is a natural accumulation of ice or snow).

(2) *American States Insurance Co., v. A.J. Maggio Co., Inc.*, 229 Ill.App.3d 422, 593 N.E.2d 1083 (2nd Dist. 1992) (General contractor on construction site had no duty to remove ruts of ice and snow on construction site driveway where plaintiff fell — ruts created by traffic in ice and snow constitute a natural, not an unnatural accumulation of ice and snow).

(3) *Madeo v. Tri-Land Properties, Inc.*, 239 Ill.App.3d 288, 606 N.E.2d 701 (2nd Dist. 1992) (Neither owner of property nor snow plow company liable for pedestrian's slip and fall in parking lot as proof insufficient to show ice in lot created as artificial or unnatural accumulation by defendant's plowing of lot).

(4) *Bakeman v. Sears, Roebuck & Co.*, 16 Ill.App.3d 1065, 307 N.E.2d 449 (2nd Dist. 1974)(Landowner department store not liable to plaintiff who fell on thin glaze of ice after snow had been removed from parking lot).

(5) *Anderson v. Davis Development Corp.*, 99 Ill.App.2d 55, 241 N.E.2d 222 (3rd Dist. 1968)(Mere removal of snow, which may leave a natural ice formation remaining on the premises, does not of itself constitute negligence).

The general rule on no duty to remove ice and snow or spread cinders, sand or rock salt on it or provide floor mats or handrails has been well-summarized by the Appellate Court in *Greenwood v. Leu*, 14 Ill.App.3d 11, 302 N.E.2d 359 (5th Dist. 1973), in these words:

> If liability of a business owner may not be predicated on falls resulting from natural accumulations of ice or snow it follows the business owner is not required to warn of the presence of such natural accumulations of ice or snow. The duty of warning against a particular condition or hazard coexists with the corresponding liability for the consequences or hazards of the condition if no appropriate warning is given.
>
> Absent any evidence that the ice or snow was the result of an unnatural, or artificial accumulation thereof, the only inference is that it was a natural accumulation and if so, defendant was under no duty of warning (by way of illumination) against the hazards thereof.
>
> . . . This same reasoning can be applied to plaintiff's other allegations of negligence, the failure to provide adequate safeguards, such as a handrailing, salt or foot mat. As we have already seen in *Kelly,* there is no duty to scatter cinders, sand or some substance to prevent a slippery condition of ice.

* * * *

> Numerous cases have dealt with this specific situation (a slope or slant on the property), where pedestrians have slipped and fallen on snow and ice covered inclines. All have found no liability on the part of the owner of the incline. (14 Ill.App.3d at 15-17, 302 N.E.2d at 362-63.)

**Rule No. 10** **PREMISES LIABILITY: NO LIABILITY ON PROPERTY OWNER FOR RAINWATER TRACKED INTO PREMISES FROM OUTSIDE BY PATRONS OR VISITORS AS RAINWATER IS A NATURAL ACCUMULATION.**

Just as ice and snow are natural accumulations created by nature and not the owner of the premises, rainwater tracked inside from outside by visitors or patrons is a natural accumulation of which the premises owner has no duty to remove or warn of.

Tracked in rainwater is a natural accumulation of which there is no duty to remove or warn about. (*Reed v. Galaxy Holdings, Inc.*, 394 Ill.App.3d 39, 914 N.E.2d 632 (1st Dist. 2009) (Laundromat owner not liable to customer who slipped and fell on rain water inside laundromat tracked inside from outside by customers as such rain water is a natural accumulation of which there is no duty to remove or warn of).)

In *Reed v. Galaxy Holdings, Inc.*, 394 Ill.App.3d 39, 914 N.E.2d 632 (1st Dist. 2009), plaintiff Aletha Reed, at defendant Laundry World to do her laundry, entered the laundromat from outside where it was raining and stepped off a mat in the vestibule onto the bare floor and slipped and fell on a natural accumulation of rain water tracked in by patrons.

The trial court granted summary judgment for defendant Laundry World based upon the no liability for natural accumulations of water, even water

brought onto the premises by customers, rule. The Appellate Court affirmed.

The Appellate Court in *Reed* explained the rationale of the no duty rule as follows:

> Illinois law, however, is well settled that property owners as well as business operators are not liable for injuries resulting from the natural accumulation of ice, snow, or water that is tracked inside the premises from the outside. *Branson v. R & L Investment, Inc.* . . . Under the natural accumulation rule, property owners and business operators do not have a duty to remove the tracks or residue left inside the building by customers who have walked through natural accumulations outside the building. (394 Ill.App.3d at 42, 914 N.E.2d at 636.)

The Appellate Court in *Reed v. Galaxy Holdings, Inc.*, 394 Ill.App.3d 39, 914 N.E.2d 632 (1st Dist. 2009), found a property owner is not liable for a fall down on water on a floor tracked in from outside as such is a natural accumulation of water for which there is no liability. The Court reasoned:

> *Lohan* and *Wilson* are dispositive of the issue presented here. Plaintiff slipped and fell on a puddle of water after she stepped off a mat in the entranceway of defendant's store. Plaintiff testified both that it rained on the day of the incident and that she had noticed that the concrete leading up to the entranceway was wet. Even though it was defendant's practice to mop and towel dry the floor and place cones and two additional mats by the entranceway on rainy days, defendant did not do so on the day of plaintiff's injury. Similar to *Lohan* and *Wilson,* however, the record in this case clearly establishes that the water was tracked in from the outside. Therefore, adopting the holding in *Lohan* and *Wilson,* defendant

> did not have a duty to remove the naturally accumulated water tracked into the Laundromat regardless of the prior existence of any rainy-day protocol. (394 Ill.App.3d at 46, 914 N.E.2d at 639.)

Another case which is helpful to understanding the "no liability for tracked in rainwater" rule is the *Roberson* case. (*Roberson v. J.C. Penney Co.*, 251 Ill.App.3d 523, 623 N.E.2d 364 (3rd Dist. 1993) (Store operator not liable to customer who slipped and fell as she entered store entrance and stepped off 4 ft. x 8 ft. mat onto floor on water which was tracked into store from outside by customers as water tracked in by customers is a natural accumulation of water).)

In *Roberson v. J.C. Penney Co.*, 251 Ill.App.3d 523, 623 N.E.2d 364 (3rd Dist. 1993), plaintiff Barbara Roberson slipped and fell inside defendant J.C. Penney Co. store near the entrance where customers tracked in snow and water. J.C. Penney had two mats, 4 ft. x 8 ft., at the entrance and as she stepped off a mat, she slipped and fell on water tracked in by customers.

The trial court granted summary judgment based upon the natural accumulation of water/no duty rule. The Appellate Court affirmed.

The Appellate Court held a landowner owed no duty to remove or warn of natural accumulations of water:

> Finally, we find the 'natural accumulation rule' exonerates J.C. Penney from any duty to remove the water from its entrance, notwithstanding the presence of the mats. Generally, a landowner is not liable for injuries resulting from natural accumulations of ice, snow or water. . . . A landowner also has no duty to remove water that patrons track into its building by walking through natural accumulations outside the building. (251 Ill.App.3d at 527-28, 623 N.E.2d at 367.)

Explaining water tracked in and onto mats is a "natural accumulation" and a water-soaked mat is not an aggravation of a natural accumulation, the Appellate Court reasoned:

> A mat which becomes saturated in a store's entryway due to tracked-in water does not transform the water into an unnatural accumulation, nor does it aggravate the water's natural accumulation. (251 Ill.App.3d at 528, 623 N.E.2d at 367.)

**Rule No. 11** **PREMISES LIABILITY: A PROPERTY OWNER IS NOT LIABLE FOR AN "OPEN AND OBVIOUS DANGER" ON THE PROPERTY BECAUSE IT IS NOT REASONABLY FORESEEABLE THAT AN ENTRANT OR VISITOR WILL VOLUNTARILY ENCOUNTER AN "OPEN AND OBVIOUS DANGER."**

It is a well-established rule that a property owner or possessor owes no duty to warn a person coming onto the property of an "open and obvious danger" on the property or of a "danger already known" to a person coming onto the property.

The following cases apply the "open and obvious danger/no duty" rule:

(1) *Bucheleres v. Chicago Park District*, 171 Ill.2d 435, 665 N.E.2d 826 (1996) (Chicago Park District owed no duty to warn or protect swimmer from "open and obvious danger" of diving into Lake Michigan and hitting head on bottom of lake, sustaining paralyzing injuries).

(2) *Blue v. Environmental Engineering, Inc.*, 345 Ill.App.3d 455, 803 N.E.2d 187 (1st Dist. 2003) (Defendant has no duty to warn of an open and obvious danger on property as the open and obvious danger is itself a warning and defendant has no duty to warn of a danger already

known of).

(3) *Ford v. Nairn*, 307 Ill.App.3d 296, 717 N.E.2d 525 (4th Dist. 1999) (Trampoline owner owed no duty to warn 14-year old of open and obvious danger of jumping on a recreational trampoline).

In *Bucheleres v. Chicago Park District*, 171 Ill.2d 435, 665 N.E.2d 826 (1996), the plaintiff dove into Lake Michigan near Oak Street Beach in a non-diving area and struck his head on the bottom of Lake Michigan and became paralyzed. The Supreme Court held the Chicago Park District could not be liable because the danger of diving into Lake Michigan was open and obvious. Explaining the well-recognized, long-established rule that no duty is owed to warn of open and obvious dangers which all people know and appreciate, the Supreme Court in *Bucheleres* stated:

> This court has recognized,
>
> > certainly a condition may be so blatantly obvious and in such position on the defendant's premises that he could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by that condition. Even in the case of children on the premises, this court has held that the owner or possessor has no duty to remedy conditions presenting obvious risks which children would generally be expected to appreciate and avoid. *Ward v. K mart*, 136 Ill.2d 132, 148, 554 N.E.2d 223.
>
> In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition. The open and obvious nature of the

condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks. (171 Ill.2d at 448, 665 N.E.2d at 832.)

Examples of application of the Supreme Court's "open and obvious danger/no duty" rule can be found in the following cases:

(1) *Sollami v. Eaton*, 201 Ill.2d 1, 772 N.E.2d 215 (2002) (The danger of "rocket-jumping" on a trampoline and landing wrong and sustaining injuries was "open and obvious" and homeowner owed no duty to warn of).

(2) *Prostran v. City of Chicago*, 349 Ill.App.3d 81, 811 N.E.2d 364 (1st Dist. 2004) (City owed no duty to warn plaintiff pedestrian on sidewalk of "open and obvious danger" of walking on debris and rocks from construction work in alley).

(3) *Whittleman v. Olin Corp.*, 358 Ill.App.3d 813, 832 N.E.2d 932 (5th Dist. 2005) (No duty of plant owner where electrical work was being done to warn electrician of the "open and obvious danger" of touching high-voltage lines with aluminum conduit).

(4) *Sandoval v. City of Chicago*, 357 Ill.App.3d 1023, 830 N.E.2d 722 (1st Dist. 2005) (City had no duty to warn pedestrian of a missing 5 ft. by 6 ft. section of city sidewalk because condition was an "open and obvious danger" — especially to plaintiff whose home was located at address of missing section).

(5) *Belluomini v. Stratford Green Condominium Association*, 346 Ill.App.3d 687, 805 N.E.2d 701 (2nd Dist. 2004) (Bicycle in condo hallway of which plaintiff was aware was an open and obvious peril of which

there was no duty to warn or protect plaintiff from).

(6) *Bonavia v. Rockford Flotilla, 6-1, Inc.*, 348 Ill.App.3d 286, 808 N.E.2d 1131 (2nd Dist. 2004) (Algae growth on dock pier on which boater who rented dock space slipped was an "open and obvious peril" imposing no duty on dock operator to warn of or guard against).

(7) *Wreglesworth v. Arctco*, 317 Ill.App.3d 628, 740 N.E.2d 444 (1st Dist. 2000) (Pier on lake into which jet-ski watercraft on which plaintiff was a passenger was an open and obvious peril for which pier owner could not be liable — pier owner created no momentary distraction and there was no economic compulsion to deliberately encounter pier).

**Rule No. 12** **PREMISES LIABILITY: THE TWO EXCEPTIONS TO THE "OPEN AND OBVIOUS DANGER"/"NO LIABILITY" RULE: (1) THE "MOMENTARY DISTRACTION/FORGETFULNESS" RULE; AND (2) THE DELIBERATE ENCOUNTER/ECONOMIC COMPULSION RULE.**

There are two exceptions to the rule that a premises owner is not liable for and has no duty to warn about or guard patrons or invitees from an "open and obvious danger." Those two exception to the general rule of no duty are:

(1) The "momentary distraction/forgetfulness" rule where the premises owner causes the patron to be momentarily distracted or forgetful.

*Ward v. Kmart Corp.*, 136 Ill.2d 132, 554 N.E.2d 223 (1990) (Kmart customer carrying a large mirror out door of store crashed into a concrete pole meant to stop cars

from entering the store and court held Kmart created a momentary distraction by having pole near door so customer carrying a large object out of the store could not see it).

(2) The "deliberate encounter/economic compulsion" rule where a patron or invitee knowingly encounters an "open and obvious danger" because he has no choice — economic compulsion.

*LaFever v. Kemlite Co.*, 185 Ill.2d 380, 706 N.E.2d 441 (1998) (Garbage scrap hauler walked on slippery plastic debris to reach dumpster to empty it and did so out of "economic compulsion" because his job required it.

The following cases found the "momentary distraction/forgetfulness" and "deliberate encounter/economic compulsion" exceptions did not apply and there was no liability for the premises owner because of the "open and obvious danger/no duty" rule:

(1) *Prostran v. City of Chicago*, 349 Ill.App.3d 81, 811 N.E.2d 364 (1st Dist. 2004) (City not liable for open and obvious danger of mud and rocks in alley under construction where plaintiff, walking on sidewalk, saw construction and could have walked around it or crossed to the other side of the street, but walked into alley and fell on a rock).

(2) *Bieruta v. Klein Creek Corp.*, 331 Ill.App.3d 269, 770 N.E.2d 1175 (1st Dist. 2002) (Property owner and general contractor not liable to plaintiff backhoe operator who climbed into trench to remove debris and fell when trench collapsed as danger of collapse was "open and obvious danger" and his claim a co-worker yelled at him was not a "momentary distraction" caused by the owner and general contractor).

(3) *Wreglesworth v. Arctco*, 317 Ill.App.3d 628, 740 N.E.2d 444 (1st Dist. 2000) (No liability of property owner of dock pier on lake where plaintiff on a jet-ski collided with dock pier which was an "open and obvious danger" and dock pier owner did not create a "momentary distraction" nor was plaintiff under an "economic compulsion" to jet-ski on lake).

**Rule No. 13** **PUBLIC EMPLOYEES: DISCRETIONARY OR JUDGMENT-CALL IMMUNITY FOR PUBLIC EMPLOYEES MAKING A POLICY DECISION BALANCING CONFLICTING INTERESTS OF SAFETY, EFFICIENCY, TIME, RESOURCES AND MANPOWER AND EXERCISING DISCRETION BY MAKING A JUDGMENT-CALL AND SELECTING THE BEST METHOD. TORT IMMUNITY ACT, 745 ILCS 10/2-201, DISCRETIONARY IMMUNITY.**

A public employee of a local public entity has discretionary immunity when making a policy decision and exercising judgment as to how to act, pursuant to § 2-201, discretionary immunity of the Tort Immunity Act (745 ILCS 10/2-201). If a public employee is not liable by virtue of § 2-201 discretionary immunity, the local public entity, as his or her employer, cannot be liable and is immune from liability (745 ILCS 10/2-109).

Section 2-201, discretionary immunity, provides as follows:

> **2-201. Determination of Policy or Exercise of Discretion**
>
> § 2-201. Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of

such discretion. (745 ILCS 10/2-201.)

The Illinois Supreme Court has applied a two-pronged test to determine when § 2-201 discretionary immunity applies in the case of *Harinek v. 161 No. Clark St. Ltd. Partnership*. (*Harinek v. 161 No. Clark St. Ltd. Partnership*, 181 Ill.2d 335, 692 N.E.2d 1177 (1998) (Chicago city fire marshal not liable for injuries during a fire drill by virtue of § 2-201, discretionary immunity, where he made a policy decision balancing competing interests of efficiency, safety, resources and time and exercised his discretion or best judgment in determining how, when and where to conduct the fire drill).)

The Supreme Court in *Harinek* used a two-pronged test to determine when § 2-201 discretionary immunity bars any cause of action:

(1) a policy decision — balancing of competing interests — the fire marshal balanced the interests of efficiency, safety, resources and time and personnel.

(2) the exercise of discretion or judgment — choosing the best solution — the fire marshal exercised discretion in deciding how, when and where to conduct the fire drill.

The law looks at the actions of local public employees in one of two fashions: (1) the actions are "ministerial"; or (2) the actions are "discretionary."

Ministerial actions are those imposed by and compelled by law. Ministerial actions are actions an employee must perform because they are required by the law — a statute, code, ordinance or common law/case law rule.

All non-ministerial actions are discretionary, involving a judgment call left up the employee to make.

Illustrative of discretionary judgment-calls for which § 2-201,

discretionary immunity, provides immunity are the following:

(1) *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill.2d 475, 763 N.E.2d 756 (2002) (§ 2-201 discretionary immunity for School District for failure to provide kneepads as safety equipment for rollerblades in gym class where student fell and fractured leg — § 2-201 of Tort Immunity Act trumps duty of School District to furnish safety equipment under School Code/ "*in loco parentis*" statute).

(2) *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill.2d 466, 758 N.E.2d 848 (2001) (§ 2-201 discretionary immunity barred suit against School District for decision not to grant student early dismissal where snow storm approaching — when student released with all students later, student in auto accident in snow & motorist sued student & School District).

(3) *In re Estate of Elfayer v. City of Chicago*, 325 Ill.App.3d 1076, 757 N.E.2d 581 (1st Dist. 2001) (§ 2-201 discretionary immunity for City's decision to install 8" concrete median barriers on city streets as no statutes or codes required certain height measurements on median barriers — where drunk driver crossed 8 inch center median barrier and hit oncoming auto head-on).

The *Harinek* case provides an excellent illustration of the application of § 2-201 discretionary immunity.

In *Harinek v. 161 No. Clark Street Ltd. Partnership*, 181 Ill.2d 335, 692 N.E.2d 1177 (1998), the Supreme Court held that the City of Chicago was protected by § 2-201 discretionary immunity from a suit brought by plaintiff Harinek who was injured during a fire drill when she was knocked down by a fire door a person opened into her. The Supreme Court held that § 2-201 discretionary immunity applied because the defendant City

met the two-pronged test for its applicability:

(1) The fire marshal made policy decisions balancing competing interests of efficiency, safety, resources and time in conducting the fire drill;

(2) The fire marshal exercised his discretion in determining how, when and where to conduct the fire drill.

Finding the fire marshal made a policy decision, the Supreme Court in *Harinek* stated:

> We hold that these allegations describe acts and omissions of the fire marshal in determining fire department policy. This court has previously defined 'policy decisions made by a municipality as "those decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests." ' *West v. Kirkham*, 147 Ill.2d 1, 11, 167 Ill.Dec. 974, 588 N.E.2d 1104 (1992). The conduct described in the instant complaint falls squarely within this definition. The fire marshal is responsible for planning and conducting fire drills in the City of Chicago. In planning these drills, the marshal must balance various interests which may compete for the time and resources of the department, including the interests of efficiency and safety. The alleged acts and omissions outlined in the complaint, such as the marshal's decisions regarding where to assemble the participants and whether to provide warning signs and alternate routing, were all part of his attempts to balance these interests. Accordingly, these acts and omissions were undertaken in determining policy within the meaning of the statute. (181 Ill.2d at 342-43, 692 N.E. 2d at 1182.)

Holding the fire marshal exercised discretion, the Supreme Court in *Harinek* reasoned:

> Plaintiff contends in the alternative that the appellate court erred in holding that the fire marshal's conduct was discretionary. In construing section 2-201 of the Act, this court has held that 'discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act.' Snyder v. Curran Township, 167 Ill.2d 466, 474, 212 Ill.Dec. 643, 657 N.E.2d 988 (1995).
>
> Under these standards, the fire marshal's conduct described in the complaint clearly constituted an exercise of discretion. The marshal bears sole and final responsibility for planning and executing fire drills in buildings throughout Chicago. He is under no legal mandate to perform these duties in a prescribed manner; rather, he exercises his discretion in determining how, when, and where to hold drills such as the one in which plaintiff was injured. The appellate court was therefore correct in concluding that the fire marshal's conduct was discretionary. (181 Ill.2d at 343, 692 N.E. 2d at 1182.)

Thus, the *Harinek* Court held the fire marshal and City were shielded from liability to plaintiff by § 2-201 immunity:

> Because the fire marshal occupied a position involving the determination of policy or the exercise of discretion, and because his conduct as described in the complaint constituted acts or omissions in determining policy and exercising discretion, section 2-201 of the Act