From: **Julia WIlliams** juliawilliams@clintonlaw.net
Subject: Fwd: Exhibit 12 - Paul Dulberg v. Law Offices of Thomas Popovich, et al. - Deposition of Hans Mast, 6/25/2020
Date: July 14, 2020 at 11:17 AM
To: Paul Dulberg pdulberg@comcast.net
Cc: Mary Winch marywinch@clintonlaw.net, Ed Clinton ed@clintonlaw.net

JW

Dear Paul,

Attached is exhibit 12 that was missing in the original transcript copy because the copy that the court reporter received was blank.

Best Regards,

Julia Williams
Of Counsel
The Clinton Law Firm
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Chicago, IL 60602
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File Information

Case Name	Paul Dulberg v. Law Offices of Thomas Popovich, et al.		
Case No.	17LA377		
Job No.	923267	**Job Date**	6/25/2020
Witness	H. Mast Exhibits		

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debridement and skin grafting. In *Fomond*, a two-and-one-half-year-old girl sustained third-degree burns that required at least seven surgeries, including two skin grafts and continued physical therapy even several years after receiving the burns. In *Negrete*, a 17–month–old baby boy sustained burns from hot water, resulting in permanent scarring across 60% of his body and, due to the burning of his genital area, possible permanent damage to his reproductive capacity. In *Rogers*, the defendant poured grain alcohol on top of the female victim's head and then threw a lit match at her, causing her head, face, chest and pants to ignite.

In light of the above-cited case law, I would reverse defendant's conviction for heinous battery.

Defendant was properly convicted of aggravated battery against a child, however, no sentence was imposed for that crime. If a reviewing court reverses a conviction on which the sentence was imposed, it can remand for sentencing on a conviction on which no sentence was imposed. Such process has been approved in *People v. Dixon*, 91 Ill.2d 346, 63 Ill.Dec. 442, 438 N.E.2d 180 (1982) and *People v. Frantz*, 150 Ill.App.3d 296, 300, 103 Ill.Dec. 649, 501 N.E.2d 966 (1986) ("[i]f the reviewing court acts to affirm the incomplete judgment of conviction, the reviewing court then must remand the cause for imposition of sentence").

283 Ill.App.3d 126
669 N.E.2d 645

Fernando LAJATO, Plaintiff–Appellant,

v.

AT & T, INC., Defendant–Appellee, and Third Party Plaintiff (Quinn Delivery Service, Inc., Third Party Defendant).

No. 1–95–0447.

Appellate Court of Illinois,
First District, Fifth Division.

Aug. 9, 1996.

Independent contractor who was injured when loading telephone company's battery hoist for transport brought negligence action against telephone company. The Circuit Court, Cook County, Anthony J. Bosco, J., granted summary judgment for telephone company. Contractor appealed. The Appellate Court, Gordon, J., held that: (1) contractor's motion for reconsideration was timely; (2) telephone company had not voluntarily undertaken duty to properly maintain and secure battery hoist for transport; (3) telephone company was not liable as gratuitous bailor; and (4) trial court did not abuse its discretion by denying contractor's motion to amend his complaint.

Affirmed.

1. Judgment ⇐321, 386(1)

Posttrial motion must be filed within 30 days of final judgment or trial court will lose jurisdiction to modify or vacate final order which it entered after lapse of 30 days. S.H.A. 735 ILCS 5/2–1203.

2. Motions ⇐39

Motion to reconsider is posttrial motion, and therefore falls within purview of post-judgment motions which must be filed within 30 days after challenged judgment is entered. S.H.A. 735 ILCS 5/2–1203.

3. Appeal and Error ⇐344

Only if posttrial motion is timely filed will it extend time for filing notice of appeal. Sup.Ct.Rules, Rule 303(a)(1).

4. Judgment ⇐186

Motion to reconsider filed within 30 days of entry of summary judgment was timely, although no certificate of service was filed until well after 30 days of entry of summary judgment. S.H.A. 735 ILCS 5/2–1203; Sup. Ct.Rules, Rule 104.

5. Appeal and Error ⇐893(1), 1073(1)

Although trial court did not entertain motion for reconsideration of summary judgment in erroneous belief that it did not have jurisdiction to hear motion, appellate court

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6. Negligence ⇐

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did not need to remand to allow trial court to consider merit of motion, as grant of summary judgment required de novo review by appellate court to determine question of law.

6. Negligence ⇐36

Independent contractor could not base personal injury action against defendant on theory of premises liability, where he was injured in bed of his truck and not due to any condition of defendant's premises.

7. Appeal and Error ⇐893(1)

Appellate review of order granting summary judgment is de novo.

8. Judgment ⇐185(2)
Negligence ⇐1

To withstand motion for summary judgment in action based in negligence, plaintiff must allege facts sufficient to show that defendant owed him a duty, that defendant breached that duty, and that his injury proximately resulted from that breach.

9. Negligence ⇐20

Telephone company did not voluntarily undertake duty to properly maintain and secure its battery hoist for transport, where independent contractor, who was injured by hoist when loading it for transport as result of loosening of strap securing motor, had total discretion in preparing and moving hoist, and there was no evidence that telephone company had strapped motor, that strapping was undertaken as protection for contractor, or that contractor relied upon safety of strapping. Restatement (Second) of Torts § 323.

10. Negligence ⇐136(14)

Whether a duty has been voluntarily undertaken is question of law to be determined by court. Restatement (Second) of Torts § 323.

11. Bailment ⇐35

Telephone company was not liable as gratuitous bailor for injuries sustained by independent contractor when strap securing motor on battery hoist loosened when contractor was loading hoist for transport, where contractor presented no evidence other than inadmissible hearsay rumors to show either defect in hoist or that telephone company knew or should have known of any dangerous propensities in hoist.

12. Appeal and Error ⇐169

Contentions not raised in trial court are waived on appeal, even in summary judgment case.

13. Bailment ⇐9, 21

Gratuitous bailor may be liable for physical harm caused by use of chattel when he knows or has reason to know that chattel is or is likely to be dangerous when put to use for which it was supplied, has no reason to believe that those for whose use chattel is supplied will realize its dangerous condition, and fails to exercise reasonable care to inform user of its dangerous condition or of facts which make it likely to be dangerous.

14. Judgment ⇐185(1)

Unsubstantiated hearsay statements cannot be considered in ruling on motion for summary judgment.

15. Pleading ⇐236(6)

Trial court did not abuse its discretion by denying motion of independent contractor, who was injured when loading telephone company's battery hoist for transport, to amend his complaint to allege more specifically facts that there was voluntary undertaking by telephone company, after trial court granted summary judgment for telephone company, where issue was not that complaint was deficient in its framing of issues but that evidence presented in support of voluntary undertaking theory failed to establish genuine issue of material fact, and amendment would be prejudicial to telephone company in that amendment was sought on eve of trial and five years after inception of lawsuit, with no explanation as to why contractor never before attempted to develop facts necessary to withstand telephone company's summary judgment motion.

Beerman, Swerdlove, Woloshin, Barezky, Becker, Genin & London, Harvey L. Walner & Associates, Chicago (Alvin R. Becker, Harvey L. Walner, Christopher A. White, of counsel), for Appellant.

William F. DeYoung, Loretto M. Kennedy, Carole C. Tubbesing Burke, Weaver & Prell, Chicago, for American Telephone & Telegraph.

Justice GORDON delivered the opinion of the Court:

This is an action for damages brought by the plaintiff, Fernando Lajato, arising from injuries he incurred while working as an independent contractor for third-party defendant Quinn Delivery Service, Inc. (Quinn) to move a battery hoist owned by defendant AT & T. AT & T filed a contingent third-party complaint against Quinn, not at issue in this appeal, seeking indemnification pursuant to the delivery service contract between Quinn and AT & T, in the event plaintiff recovered a judgment in his tort action against AT & T. AT & T subsequently filed a motion for summary judgment against plaintiff which the trial court granted. In that order, the court also denied plaintiff's oral motion requesting leave to amend his complaint. Subsequently, plaintiff filed a motion to reconsider, which the court ultimately struck by reason of its alleged lack of jurisdiction to hear it. Plaintiff appeals from the orders granting summary judgment to AT & T, denying his motion to amend his complaint, and refusing to hear his motion to reconsider. AT & T has moved to dismiss this appeal for lack of appellate jurisdiction.

In November 1989, plaintiff filed a complaint against AT & T, wherein he alleged that on July 1, 1988, he was on the premises of AT & T on behalf of Quinn in order to move an AT & T battery hoist. The complaint further alleged that while performing that task, the hoist fell upon him, causing him injuries for which he sought damages. The complaint averred that AT & T was negligent in its failure to maintain, inspect, and repair the battery hoist, and for AT & T's failure to warn plaintiff of the propensity of the hoist to fall. In April 1990, AT & T filed its answer, specifically denying each basis for recovery alleged in plaintiff's complaint. The matter was scheduled for trial in June 1995.

On April 25, 1994, AT & T filed a motion for summary judgment, alleging that, based upon the undisputed facts, it was clear that it owed no duty of care to plaintiff with respect to his injuries. In support of its motion, AT & T submitted excerpts of the deposition testimony of plaintiff and a copy of the delivery services contract between AT & T and Quinn. In his deposition, plaintiff testified that on the date of the accident, July 1, 1988, he was making pick-ups and deliveries of telephone equipment at various AT & T locations as an independent contractor for Quinn. He stated that he had received instructions from Quinn via radio to go to an AT & T property in Rolling Meadows, Illinois, the scene of the accident, to pick up a battery hoist and to transport it to another AT & T location in Rockford, Illinois. Approximately 99% of plaintiff's delivery work for Quinn involved pick-ups and deliveries of AT & T equipment. The plaintiff stated that AT & T did not direct him in his moving work, but rather, allowed him to use his own expertise to determine how each move would be accomplished.

Plaintiff further testified that the battery hoist, which weighs approximately 500 pounds, was used to lift batteries weighing approximately 300 pounds up onto shelves. Plaintiff described the hoist as being rectangular in shape, on wheels, and consisting of a large, black metal frame with a motor and hoist accessories suspended from the top middle of the frame. The hanging motor and accessories could be pulled to one side of the hoist frame and secured thereto with a nylon strap and a chain, both of which were also attached to the hoist, in order to stabilize the hoist during transport and when not in use to perform its battery-lifting function. It was plaintiff's customary practice to inspect the hoist to ensure that the motor and accessories were firmly secured with the strap and the chain prior to moving the hoist. Plaintiff had moved this particular hoist on at least 10–15 different occasions.

Plaintiff's deposition further revealed that when he reached the AT & T Rolling Meadows location, an AT & T employee directed him to the hoist, and that after that brief conversation, plaintiff had no further discussions with anyone, AT & T employees or otherwise, until after the accident. Wh

laintiff approached the hoist, he observed at its motor and accessories were already rapped and secured to the hoist's frame. e also testified that he personally examined e strap to ensure that the hanging appara- s was firmly secured to the frame of the ist with the nylon strap and the motor ain before attempting to move the hoist. laintiff then wheeled the hoist to the back his truck and onto his truck's hydraulic lift latform, which he had lowered to ground- el in order to lift the hoist into his truck. ter raising the lift and the hoist from round-level up to the truck's bed, plaintiff mbed into the truck bed and began to pull e hoist into the bed.

Plaintiff further testified that while pulling e hoist into the truck, the strap around the tor and hoist accessories loosened for rea- ns beyond his knowledge, permitting the tor and the accessories to swing free and e weight of the hoist to shift towards him. mediately thereafter, the hoist fell onto intiff, causing him various injuries. Plain- stated that there were no known wit- ses to the accident. He also stated that ut two months after the accident, he rd from an AT & T installer that certain low laborers at AT & T had told him that er plaintiff's accident, they would not use t hoist because it was unsafe, and that AT T ultimately shipped the hoist back to the ufacturer.

In addition to plaintiff's deposition testimo- AT & T submitted the Quinn–AT & T very contract in support of its motion for mary judgment. That contract reveals t Quinn, through its own independent con- tors, performed moving services for de- lant AT & T. The contract required inn to

"receive, pick up, load, transport, unload, nd deliver telephone equipment and other aterial (the "Material"), and perform the ther services provided for in this agree- ent as ordered by [AT & T] from April 1, 1987 to March 31, 1989."

e contract further provided that Quinn or s agents

"shall have the sole and exclusive care, custody and control of the Material from the time it is tendered to [Quinn], [Quinn's] agents or servants, until it is delivered to and accepted by [AT & T] * * *."

In his response to AT & T's motion for summary judgment, plaintiff argued that AT & T had voluntarily assumed and breached a duty to him to keep its premises safe and to maintain the hoist such that it would not do harm to those moving it. In support of his position, plaintiff attached additional excerpts from his own deposition, pointing to his testimony that the AT & T hoist's motor and accessories were already secured to the frame of the hoist by the nylon strap and the motor chain when he arrived at the site to move the hoist. He also referred to his testimony that there was no motor lock securing the motor to the frame, and that the motor and accessories would not have swung free after the strap loosened if there had been such a motor lock.

In a hearing on July 27, 1994, the trial court granted AT & T's motion for summary judgment with prejudice. Later at that same hearing, the trial court heard plaintiff's oral request for leave to amend his complaint pursuant to section 2–1005(g) of the Illinois Code of Civil Procedure (735 ILCS 5/2–1005(g) (West 1994)), where plaintiff argued that he should be allowed to amend his complaint to show that AT & T voluntarily undertook to secure the hoist and did so negligently. The court denied plaintiff's motion to amend, stating as its reason that "[i]t's an '89 case."

On August 25, 1994, within 30 days of the July 27 order granting summary judgment and denying leave to amend, plaintiff filed a motion to reconsider. However, plaintiff did not serve AT & T with that motion until September 18, 1994, at which time he transmitted that motion to AT & T via facsimile at AT & T's request. No notice of motion was served upon AT & T until November 9, 1994, and plaintiff did not file a certificate of service for that motion until November 17, 1994.

AT & T subsequently filed a motion objecting to plaintiff's motion to reconsider, arguing that the trial court had no jurisdiction to hear it based on plaintiff's failure to file a proof of service within 30 days of the July 27 order. On January 13, 1995, the trial court

sustained AT & T's objection, finding that it had no jurisdiction to hear plaintiff's motion to reconsider, and therefore did not address the merits of that motion. On January 25, 1995, within 30 days of the trial court's January 13 order, plaintiff filed his notice of appeal, both from that order and from the July 27, 1994 order granting summary judgment and denying plaintiff leave to amend.

Plaintiff contends on appeal that the trial court erred in granting summary judgment because by improperly securing the battery hoist for transport, AT & T negligently performed a voluntary undertaking, and because as a gratuitous bailor, AT & T knew the hoist was dangerous yet failed to inform plaintiff of its dangerous condition. Plaintiff also contends that the trial court abused its discretion in denying him leave to amend his complaint after the grant of summary judgment.

I. JURISDICTION:

Before reaching plaintiff's contentions on appeal, we must first address defendant's motion to dismiss this appeal for want of appellate jurisdiction. *Bell Federal Savings & Loan Ass'n v. Bank of Ravenswood*, 203 Ill.App.3d 219, 148 Ill.Dec. 559, 560 N.E.2d 1156 (1990). In its motion to dismiss, AT & T contends that plaintiff's failure to file a proof of service with its August 25, 1994 motion to reconsider prevents this court from reviewing either of the trial court's July 27 or January 13 orders. Defendant argues, somewhat obliquely, that plaintiff's motion to reconsider should not be considered as being timely filed, because it was not accompanied by a proof of service, and as a result, the trial court was correct in stating that it had no jurisdiction to consider it. Consequently, defendant would urge that the motion to reconsider did not have the effect of extending the time for filing plaintiff's notice of appeal beyond the initial 30 day period following entry of the summary judgment order. See Illinois Supreme Court Rule 303(a)(1) (155 Ill.2d R. 303(a)(1)) (discussed more fully below). We disagree.

[1–3] Under Supreme Court Rule 303(a)(1), a notice of appeal must be filed within 30 days after the entry of the final judgment from which the appeal is taken, or, if a timely post-trial motion directed at the judgment is filed, within 30 days after entry of the order disposing of the last pending post-trial motion. (134 Ill.2d R. 303(a)(1)). Under section 2–1203 of the Illinois Code of Civil Procedure, a post-trial motion must be filed within 30 days of a final judgment. 735 ILCS 5/2–1203 (West 1994). Otherwise, the trial court will lose jurisdiction to modify or vacate the final order which it entered after the lapse of 30 days. *Archer Daniels Midland Co. v. Barth*, 103 Ill.2d 536, 83 Ill.Dec. 332, 470 N.E.2d 290 (1984); *In Matter of Application of County Treasurer*, 208 Ill.App.3d 561, 153 Ill.Dec. 528, 567 N.E.2d 486 (1990). A motion to reconsider is a post-trial motion (*Elmhurst Auto Parts v. Fencl–Tufo Chevrolet*, 235 Ill.App.3d 88, 175 Ill.Dec. 771, 600 N.E.2d 1229 (1992)), and therefore "falls within the purview of post-judgment motions which must be filed within 30 days after the challenged judgment is entered." *Sho–Deen, Inc. v. Michel*, 263 Ill.App.3d 288, 290, 200 Ill.Dec. 729, 732, 635 N.E.2d 1068, 1071 (1994). Only if a post-trial motion is timely filed pursuant to section 2–1203 will it extend the time for filing the notice of appeal under Rule 303(a). *In Matter of Application of County Treasurer.*

[4] Thus, the question as to whether the appellant's notice of appeal was filed beyond the 30 day period allowed under Rule 303(a), thereby depriving this court of its jurisdiction, depends upon whether the failure to file a certificate of service vitiated the filing of the plaintiff's motion to reconsider. If we determine that the filing of plaintiff's motion to reconsider on August 25 within 30 days after the July 27 summary judgment order was timely, notwithstanding the failure to file an accompanying certificate of service within that 30–day period, then plaintiff's notice of appeal from both the July 27 and the January 13 orders was timely. This would follow under Rule 303(a), since the notice of appeal was filed on January 25, within 30 days after the trial court's disposition on January 13 of plaintiff's motion to reconsider. On the other hand, if the trial court was correct in its determination that under section 2–1203, the timely filing of a certificate of service is

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jurisdictional, without which the motion to reconsider cannot be deemed to have been timely filed, then the notice of appeal in this case, filed more than three months after the entry of the summary judgment order, would be untimely pursuant to Rule 303(a) and leave this court without appellate jurisdiction.

The rule is clear that the absence of a certificate of service will not vitiate the filing of a motion to reconsider. This matter has been specifically preempted by Illinois Supreme Court Rule 104 (134 Ill.2d Rule 104), which provides at parts (b) and (d) as follows:

"(b) Filing of Papers and Proof of Service. Pleadings subsequent to the complaint, written motions, and other papers required to be filed shall be filed with the clerk with a certificate of counsel or other proof that copies have been served on all parties who have appeared * * *.

* * * * * *

(d) Failure to deliver or serve copies as required by this rule *does not in any way impair the jurisdiction of the court* over the person of any party, but the aggrieved party may obtain a copy from the clerk and the court shall order the offending party to reimburse the aggrieved party for the expense thereof." 134 Ill.2d R. 104(b), (d) (Emphasis added).

Thus, under Rule 104(d), the failure to deliver or serve copies does not impair the jurisdiction of the court. This rule has been applied to post-trial motions in *In re Marriage of Collins*, 154 Ill.App.3d 655, 107 Ill.Dec. 109, 506 N.E.2d 1000 (1987) and in *Kollath v. Chicago Title and Trust Co.*, 24 Ill.App.3d 353, 321 N.E.2d 344 (1974), which held that the failure to include proof of service with a post-trial motion will not invalidate the motion or render it untimely.

Defendant contends that Rule 104(d) only addresses the failure to actually serve copies of the motion but does not address the failure to file a certificate of service. This contention is devoid of any rationale since a failure to serve will preclude the filing of a certificate, unless the movant seeks to perjure himself. Thus, if the failure to actually serve notice does not impair jurisdiction, then *a fortiori*, the failure to serve a certificate of service will not impair the validity or timeliness of the motion. See *In re Marriage of Collins*.

Defendant's reliance on *Vlahakis v. Parker*, 3 Ill.App.3d 126, 278 N.E.2d 523 (1971) (abstract of op.) and *Ingrassia v. Ingrassia*, 156 Ill.App.3d 483, 109 Ill.Dec. 68, 509 N.E.2d 729 (1987) is misplaced. Although *Vlahakis* reached a contrary result, it is clear that that opinion did not purport to in any way consider or confront the impact of Rule 104(d) in its determination. That opinion has therefore been distinguished and rejected on that basis in *Kollath v. Chicago Title and Trust Co.*, 24 Ill.App.3d at 357–58, 321 N.E.2d at 348 ("Rule 104(d) renders a failure to comply with Rule 104(b) * * * non-jurisdictional * * * [and] the only cases decided since enactment of rule 104(d) which reached a contrary result [, including *Vlahakis v. Parker*,] did not consider that provision at all"). Likewise, the opinion in *Ingrassia* does not purport to consider rule 104(d) in its determination. Moreover, *Ingrassia* does not purport to deal with the validity or timeliness of the filing of a post-trial motion, but, rather, with the sufficiency of the notice of that motion when given to the opposing party only a few hours before the hearing on the motion. Hence, *Ingrassia* is not in point, since here there is no question that defendant had actual knowledge of the pendency of plaintiff's motion to reconsider well in advance of the scheduled hearing date on that motion.

Consequently, plaintiff's August 25 motion to reconsider, and therefore his January 25 notice of appeal, were seasonably filed, notwithstanding that no certificate of service was filed until long after 30 days had passed since summary judgment was entered on July 27. Since the August 25 motion was timely, the notice of appeal filed on January 25 complied with Rule 303(a) since it was filed within 30 days after the trial court disposed of the motion to reconsider, albeit on jurisdictional grounds, on January 13. Accordingly, our jurisdiction to review both the July 27 and January 13 orders of the trial court remains unimpaired.

[5] Defendant next would urge that if we determine that the January 13 order is reviewable, we should confine our review solely to the correctness of the trial court's denial of its jurisdiction over the motion to reconsider. Defendant contends that if we find that the trial court's jurisdictional determination was erroneous, we should remand the matter to the trial court to allow the trial court to first consider the merit of that motion. We disagree for the same reasons as articulated in *Myers v. Health Specialists, S.C.*, 225 Ill.App.3d 68, 167 Ill.Dec. 225, 587 N.E.2d 494 (1992). There, the court stated as follows:

> "Defendant initially urges us, without citation to authority, to remand this matter to the circuit court because that court did not address the merits of plaintiff's motion. This argument betrays a misperception of the nature both of the question presented and of our review. As noted above, we consider summary judgment orders *de novo:* we, like the circuit court, must decide only whether the parties' pleadings and other submissions present an issue of triable fact and if not, whether plaintiff is entitled to judgment as a matter of law. This is a question of law, not of fact." *Myers v. Health Specialists, S.C.*, 225 Ill.App.3d 68, 76, 167 Ill.Dec. 225, 231, 587 N.E.2d 494, 500 (1992).

Here, too, the grant of summary judgment is subject to *de novo* review, requiring our *de novo* determination whether the submissions of the parties presented triable issues of fact and if not whether defendant was entitled to a judgment as a matter of law. Thus, here, as in *Myers*, we may consider this appeal on its merits without the necessity of a remand.

II. MERITS:

[6] As noted earlier, plaintiff contends on appeal that the trial court erred in granting summary judgment because the facts are sufficient to create an inference that AT & T voluntarily assumed a duty to properly secure the battery hoist for transport, a duty which was breached as a result of AT & T's negligence. Additionally, plaintiff contends, for the first time on appeal, that there was error in granting summary judgment because the facts are sufficient to create an inference that as a gratuitous bailor, AT & T knew the hoist was dangerous yet failed to inform plaintiff of its dangerous condition. Plaintiff also contends that even if summary judgment was properly entered in favor of AT & T under the issues framed by the existing complaint, the trial court abused its discretion in denying him leave to amend his complaint pursuant to section 2–1005(g) of the Illinois Code of Civil Procedure (735 ILCS 5/2–1005(g) (West 1994)).[1]

[7, 8] We first address plaintiff's contention that the trial court erred in entering summary judgment pursuant to the issues framed by the existing complaint. Summary judgment is proper when the pleadings, depositions and affidavits on file, construed in the light most favorable to the nonmoving party, establish that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. See generally 735 ILCS 5/2–1005 (West 1994); *First State Insurance Co. v. Montgomery Ward & Co.*, 267 Ill.App.3d 851, 204 Ill.Dec. 814, 642 N.E.2d 715 (1994); *Torres v. City of Chicago*, 261 Ill.App.3d 499, 197 Ill.Dec. 985, 632 N.E.2d 54 (1994); *Giannoble v. P & M Heating & Air Conditioning, Inc.*, 233 Ill.App.3d 1051, 175 Ill.Dec. 169, 599 N.E.2d 1183 (1992). Appellate review of an order granting summary judgment is *de novo. E.g., Hesselink v. R.L. Perlow Corp.*, 265 Ill.App.3d 473, 202 Ill.Dec. 36, 637 N.E.2d 575 (1994); *La Salle National Bank v. Skidmore, Owings & Merrill*, 262 Ill.App.3d 899, 200 Ill.Dec. 225, 635 N.E.2d 564

1. As previously noted, at the trial level, plaintiff urged liability both on the basis of premises liability and the law governing voluntary undertakings. Plaintiff has conceded on appeal that he cannot base his action against AT & T upon a theory of premises liability as a matter of law, due to the holding in *Pagano v. Occidental Chemical Corp.*, 257 Ill.App.3d 905, 913, 196 Ill.Dec. 24, 30, 629 N.E.2d 569, 575 (1994), insofar as he incurred his injuries in the bed of his truck, and not due to any condition of AT & T's premises. See also *Jackson v. Hilton Hotels Corp.*, 277 Ill.App.3d 457, 214 Ill.Dec. 31, 660 N.E.2d 222 (1995) (in action based on premises liability, no duty to plaintiff existed where plaintiff failed to show that his injuries were caused by any condition of the premises).

(1994). To withstand a motion for summary judgment in an action based in negligence, a plaintiff must allege facts sufficient to show that the defendant owed him a duty, that defendant breached that duty, and that his injury proximately resulted from that breach. See *DiBenedetto v. Flora Township*, 153 Ill.2d 66, 178 Ill.Dec. 777, 605 N.E.2d 571 (1992); *Ziemba v. Mierzwa*, 142 Ill.2d 42, 153 Ill.Dec. 259, 566 N.E.2d 1365 (1991).

[9, 10] With respect to plaintiff's contention concerning AT & T's duty arising from its purported voluntary undertaking, section 323 of the Restatement (Second) of Torts provides as follows:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts § 323, at 135 (1965).

See generally, *Cross v. Wells Fargo Alarm Services*, 82 Ill.2d 313, 45 Ill.Dec. 121, 412 N.E.2d 472 (1980); *Jackson v. Hilton Hotels Corp.*, 277 Ill.App.3d 457, 214 Ill.Dec. 31, 660 N.E.2d 222 (1995). Whether a duty has been voluntarily undertaken is a question of law to be determined by the court. *Gouge v. Central Illinois Public Service Co.*, 144 Ill.2d 535, 163 Ill.Dec. 842, 582 N.E.2d 108 (1991); *Jackson v. Hilton Hotels Corp.*

In the instant case, plaintiff has failed to allege facts sufficient to establish in the first instance that defendant voluntarily assumed or undertook any duty to properly maintain and secure the battery hoist for transport. First, it is undisputed that AT & T had neither control nor influence over the manner in which plaintiff, an independent contractor retained by Quinn (who was also an independent contractor), readied or moved the hoist, and that plaintiff had total discretion in preparing and moving the hoist. Moreover, plaintiff did not submit any evidence that AT & T strapped the motor to the hoist, nor any evidence regarding whether the strapping was undertaken as protection for the plaintiff. Lastly, and more overridingly, even if we were to presume that the strapping was effected by AT & T, there is no evidence whatsoever submitted by plaintiff that he relied upon the safety of that strapping. In fact, the record is clear that plaintiff himself checked the strapping of the motor to ensure it was fastened securely prior to moving the hoist, as was his customary practice when moving that particular hoist.

[11–13] Plaintiff urges that even if there is no basis for liability under a theory of voluntary undertaking, there is a basis established for liability under a theory of gratuitous bailment. In that regard, he contends that there is a genuine issue of material fact that AT & T, as a gratuitous bailor of the hoist, breached a duty to plaintiff to provide a safe hoist or to warn plaintiff of its dangers. We first note that contentions not raised in the trial court are waived on appeal, even in a summary judgment case. *Witek v. Leisure Technology Midwest, Inc.*, 39 Ill.App.3d 637, 640, 350 N.E.2d 242, 245 (1976) ("This rule of waiver applies even in a summary judgment case"); *Wilson v. Gorski's Food Fair*, 196 Ill.App.3d 612, 143 Ill.Dec. 477, 554 N.E.2d 412 (1990). However, even if the argument were preserved, we note that there was no evidence presented that AT & T breached a duty to plaintiff as a gratuitous bailor of the hoist.

> "[A] gratuitous bailor may be liable for physical harm caused by the use of his chattel when he knows or has reason to know that the chattel is or is likely to be dangerous when put to the use for which it is supplied; has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and fails to exercise reasonable care to inform the user of its dangerous condition or of the facts which make it likely to be dangerous." *Pagano v. Occidental Chemical Corp.*, 257 Ill.App.3d 905, 913, 196 Ill.Dec. 24, 30, 629 N.E.2d 569, 575 (1994).

[14] Plaintiff has not produced evidence as to any specific defect either in the design or manufacture of the hoist itself which would indicate that AT & T had actual or constructive knowledge that the hoist was unsafe when it was handed over to plaintiff. Plaintiff himself did not testify as to the condition of the hoist except to say that the strap loosened. The only other evidence that plaintiff has presented consists of unsubstantiated hearsay statements. In that regard, plaintiff testified in his deposition to a conversation which took place after the accident with an AT & T installer who told plaintiff that certain other fellow employees had stated that after plaintiff's accident they refused to use the hoist because it was unsafe, and that AT & T ultimately returned the hoist to its manufacturer. However, plaintiff was unable to identify those other AT & T employees, and he did not provide any further detail regarding the specific contents of their statements. Such unsubstantiated hearsay statements cannot be considered in a ruling on a motion for summary judgment. See *Certified Mechanical Contractors, Inc. v. Wight & Co., Inc.*, 162 Ill.App.3d 391, 113 Ill.Dec. 888, 515 N.E.2d 1047 (1987) (in deciding a motion for summary judgment, court should ignore personal conclusions, opinions and self-serving statements and consider only facts admissible in evidence under the rules of evidence); *Seefeldt v. Millikin National Bank of Decatur*, 154 Ill.App.3d 715, 107 Ill.Dec. 161, 506 N.E.2d 1052 (1987) (although a complaint may purport to raise an issue of material fact, summary judgment is appropriate if such issue is not further supported by evidentiary facts, and in determining the genuineness of a fact, a court should ignore personal conclusions and opinions and consider only admissible facts).

Plaintiff's reliance on *Pagano* is not well taken. There, the court on appeal did find an issue of fact as to whether a defective dolly supplied by the defendant to help move certain barrel drums of ink rendered the defendant liable under a theory of gratuitous bailment. However, in that case, plaintiff gave direct testimony as to specific, observable defects in the dolly which, if believed, would establish that the dolly was defective. Here, aside from the inadmissible hearsay rumors which were reported, the plaintiff himself presented no evidence to show either a defect in the hoist or that AT & T knew or should have known of any dangerous propensities in the hoist. Consequently, the evidence presented here was not effective to support a counterinference for purposes of summary judgment.

[15] Plaintiff next contends that the trial court erred in its refusal in its July 27 order to allow him leave to amend his complaint to more specifically allege facts that there was a voluntary undertaking and that it was implemented negligently. We disagree.

Section 2–1005(g) of the Illinois Code of Civil Procedure (735 ILCS 5/2–1005(g) (West 1994)) provides as follows:

> "(g) Amendment of pleading. Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms."

The allowance of an amendment to the pleadings is in the trial court's discretion, and reversible error can only be found if there is a manifest abuse of discretion. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill.2d 263, 166 Ill.Dec. 882, 586 N.E.2d 1211 (1992). See also *Misselhorn v. Doyle*, 257 Ill.App.3d 983, 195 Ill.Dec. 881, 629 N.E.2d 189 (1994); *Eyman v. McDonough District Hospital*, 245 Ill.App.3d 394, 184 Ill.Dec. 502, 613 N.E.2d 819 (1993).

As noted, on July 27, immediately after the trial court entered summary judgment against him, plaintiff made an oral motion to amend his complaint, as follows:

> "**MR. JOHNSON** [Plaintiff's attorney]: I'll set it out to specifics that they undertook the duty to secure the hoist and they negligently performed that duty and as a result Plaintiff was injured based upon the *Nelson v. Pippen, Phillips* [*sic*] case, that one undertakes a duty to do something, they do so negligently, and someone is injured, they are absolutely liable.
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> If the fact that the Court feels that the premises liability count cannot stand does not mean then that a negligent voluntary [*sic*] undertaking is not proper here.

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The court denied plaintiff's motion to amend, stating that "It's an '89 case. I'll deny the motion [to amend]."

We first note that plaintiff never made the proposed amended complaint a part of the record on appeal, except for his oral proposal before the trial judge which, without any offers of new evidence, essentially duplicates the voluntary undertaking theory which has already been argued and rejected. Plaintiff's failure to include the proposed amendment and supporting facts therefor in the record could be found to constitute a waiver in this court of his right to have the denial of his request for leave to amend reviewed. See *Mendelson v. Ben A. Borenstein & Co.*, 240 Ill.App.3d 605, 181 Ill.Dec. 114, 608 N.E.2d 187 (1992) (plaintiff's failure to tender amended complaint or to include it in the appellate record diminished the appellate court's ability to determine whether the proposed amendment would provide a viable theory against defendant, and constituted waiver of right to a review of the denial of his request for leave to amend). See also *Ignarski v. Norbut*, 271 Ill.App.3d 522, 207 Ill.Dec. 929, 648 N.E.2d 285 (1995) (no abuse of discretion in denying motion for leave to amend complaint where movant orally moved to amend yet failed to submit proposed amendment to trial court).

Notwithstanding waiver, even if we were to review the amendment which plaintiff orally proposed, we would find no abuse of discretion by the trial court in denying plaintiff leave to amend. As already discussed, there was ample evidence before the trial court to support its conclusion that the facts in this case as revealed in the summary judgment submissions would not permit a pleading which could allege a valid cause of action. Moreover, by the same token, even if the complaint were amended to more specifically allege a voluntary undertaking as requested by the plaintiff, the allegations of the complaint would be superseded by the extrinsic facts already submitted which as noted would facilitate for summary judgment. See *Werckenthein v. Bucher Petrochemical Co.*, 248 Ill.App.3d 282, 188 Ill.Dec. 332, 618 N.E.2d 902 (1993) (where allegations in nonmovant's complaint are contravened by movant's extrinsic submissions in summary judgment proceedings, extrinsic submissions control); *East Side Fire Protection District v. City of Belleville*, 221 Ill.App.3d 654, 164 Ill.Dec. 192, 582 N.E.2d 755 (1991) (nonmovant must controvert proofs offered by movant in support of motion for summary judgment and cannot merely rest on pleadings); *Seefeldt v. Millikin National Bank of Decatur.* The issue here is not simply that plaintiff's complaint is deficient in its framing of the issues, but that, as discussed, the testimony and evidence presented in support of his negligent voluntary undertaking theory are deficient, and fall short of establishing a genuine issue of material fact such that judgment should not be entered as a matter of law on that theory of action.

Plaintiff's reliance on *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill.2d 263, 166 Ill.Dec. 882, 586 N.E.2d 1211 (1992) is not well taken. In *Loyola*, the court on appeal set forth four factors to determine whether the trial court had abused its discretion in denying a section 2–1005(g) amendment, including whether the proposed amendment would cure the defective pleading, whether it would cause prejudice or surprise to other parties, whether it was timely, and whether previous opportunities to amend the pleading could be identified.

Applying these factors in order, in the instant case the question of whether plaintiff's proposed amendment would cure the defective pleading is not relevant, because as already discussed, AT & T succeeded in its motion for summary judgment not because plaintiff's complaint was improperly pleaded, but because the evidence presented at summary judgment shows no genuine issue of material fact regarding the allegations in the complaint. *Werckenthein v. Bucher Petrochemical Co.; East Side Fire Protection District v. City of Belleville.* Taking the second and third *Loyola* factors together (whether there would be prejudice or surprise to AT & T and whether the proposed amendment was timely), the record is ample to support the trial court's determination that the allowance

of an amendment would in fact be prejudicial to AT & T, insofar as the amendment was being sought on the eve of trial, five years after the inception of this lawsuit, with no explanation from plaintiff as to why he never before attempted to develop the facts which would be necessary to withstand AT & T's motion for summary judgment. See *Mendelson v. Ben A. Borenstein & Co.* (no abuse of discretion in denying leave to amend following grant of summary judgment where proposed amendment was sought beyond the pleading stages). See also *Ignarski v. Norbut.*

The final *Loyola* factor is whether plaintiff had sufficient prior opportunities to amend. To that extent, we note that plaintiff indeed had substantial opportunities to amend. Although plaintiff complains that AT & T never gave him notice of any deficiency in his complaint which would require amendment because AT & T never filed a motion to dismiss prior to filing its motion for summary judgment, it is axiomatic that a party can amend its pleading on its own motion. See 3 R. Michael, Illinois Practice, ch. 26, at 446 (West 1989). The case of *Evans v. United Bank of Illinois, N.A.*, 226 Ill.App.3d 526, 168 Ill.Dec. 533, 589 N.E.2d 933 (1992), upon which plaintiff relies, does give credence to plaintiff's contention under the fourth *Loyola* factor that the failure of AT & T to challenge his pleadings prior to its motion for summary judgment deprived plaintiff of any prior opportunity to amend. However, we note that in *Evans* the court on appeal did not rely on that factor alone in finding that the trial court abused its discretion in denying the plaintiff in that case leave to amend, but found that *all* of the *Loyola* factors supported that plaintiff's motion for leave to amend.

In any event, even if plaintiff were correct in his reliance upon *Evans*, we need not consider its application here. As already discussed, the issue here is not whether the allegations of the complaint were sufficient to state a cause of action based upon a voluntary undertaking theory, but whether the facts adduced were sufficient to create an inference to support such allegations. See *Werckenthein v. Bucher Petrochemical Co.; East Side Fire Protection District v. City of Belleville.* As previously noted, the facts submitted here are insufficient to raise such an inference. Hence, we find that the trial court's denial of the motion to amend was not an abuse of discretion. See *Regas v. Associated Radiologists, Ltd.*, 230 Ill.App.3d 958, 172 Ill.Dec. 553, 595 N.E.2d 1223 (1992) (where a cause of action cannot be stated even after amendment, leave to amend should be denied).

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

McNULTY, P.J., and HOURIHANE, J., concur.

283 Ill.App.3d 112
669 N.E.2d 655

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

Vernetta CASSELL, Defendant–Appellant.

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

Curlee SIMMONS, Defendant–Appellant.

Nos. 1–94–2782, 1–95–1380.

Appellate Court of Illinois, First District, Fifth Division.

Aug. 9, 1996.

Rehearing Denied Sept. 11, 1996.

Defendants were convicted in the Circuit Court, Cook County, John J. Moran, J., of aggravated criminal sexual assault, and one defendant was convicted of additional crimes of home invasion and aggravated kidnapping. Defendants appealed. The Appellate Court, McNulty, P.J., held that: (1) circuit court had adequate basis for its determination that victim was not entitled to assert privilege

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Affirmed.

1. Witnesses ⇐297(13.1)

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debridement and skin grafting. In *Fomond*, a two-and-one-half-year-old girl sustained third-degree burns that required at least seven surgeries, including two skin grafts and continued physical therapy even several years after receiving the burns. In *Negrete*, a 17–month–old baby boy sustained burns from hot water, resulting in permanent scarring across 60% of his body and, due to the burning of his genital area, possible permanent damage to his reproductive capacity. In *Rogers*, the defendant poured grain alcohol on top of the female victim's head and then threw a lit match at her, causing her head, face, chest and pants to ignite.

In light of the above-cited case law, I would reverse defendant's conviction for heinous battery.

Defendant was properly convicted of aggravated battery against a child, however, no sentence was imposed for that crime. If a reviewing court reverses a conviction on which the sentence was imposed, it can remand for sentencing on a conviction on which no sentence was imposed. Such process has been approved in *People v. Dixon*, 91 Ill.2d 346, 63 Ill.Dec. 442, 438 N.E.2d 180 (1982) and *People v. Frantz*, 150 Ill.App.3d 296, 300, 103 Ill.Dec. 649, 501 N.E.2d 966 (1986) ("[i]f the reviewing court acts to affirm the incomplete judgment of conviction, the reviewing court then must remand the cause for imposition of sentence").

283 Ill.App.3d 126
669 N.E.2d 645

Fernando LAJATO, Plaintiff–Appellant,

v.

AT & T, INC., Defendant–Appellee, and Third Party Plaintiff (Quinn Delivery Service, Inc., Third Party Defendant).

No. 1–95–0447.

Appellate Court of Illinois,
First District, Fifth Division.

Aug. 9, 1996.

Independent contractor who was injured when loading telephone company's battery hoist for transport brought negligence action against telephone company. The Circuit Court, Cook County, Anthony J. Bosco, J., granted summary judgment for telephone company. Contractor appealed. The Appellate Court, Gordon, J., held that: (1) contractor's motion for reconsideration was timely; (2) telephone company had not voluntarily undertaken duty to properly maintain and secure battery hoist for transport; (3) telephone company was not liable as gratuitous bailor; and (4) trial court did not abuse its discretion by denying contractor's motion to amend his complaint.

Affirmed.

1. Judgment ⇐321, 386(1)

Posttrial motion must be filed within 30 days of final judgment or trial court will lose jurisdiction to modify or vacate final order which it entered after lapse of 30 days. S.H.A. 735 ILCS 5/2–1203.

2. Motions ⇐39

Motion to reconsider is posttrial motion, and therefore falls within purview of post-judgment motions which must be filed within 30 days after challenged judgment is entered. S.H.A. 735 ILCS 5/2–1203.

3. Appeal and Error ⇐344

Only if posttrial motion is timely filed will it extend time for filing notice of appeal. Sup.Ct.Rules, Rule 303(a)(1).

4. Judgment ⇐186

Motion to reconsider filed within 30 days of entry of summary judgment was timely, although no certificate of service was filed until well after 30 days of entry of summary judgment. S.H.A. 735 ILCS 5/2–1203; Sup. Ct.Rules, Rule 104.

5. Appeal and Error ⇐893(1), 1073(1)

Although trial court did not entertain motion for reconsideration of summary judgment in erroneous belief that it did not have jurisdiction to hear motion, appellate court

did not need to remand to allow trial court to consider merit of motion, as grant of summary judgment required de novo review by appellate court to determine question of law.

6. Negligence ⇐36

Independent contractor could not base personal injury action against defendant on theory of premises liability, where he was injured in bed of his truck and not due to any condition of defendant's premises.

7. Appeal and Error ⇐893(1)

Appellate review of order granting summary judgment is de novo.

8. Judgment ⇐185(2)
Negligence ⇐1

To withstand motion for summary judgment in action based in negligence, plaintiff must allege facts sufficient to show that defendant owed him a duty, that defendant breached that duty, and that his injury proximately resulted from that breach.

9. Negligence ⇐20

Telephone company did not voluntarily undertake duty to properly maintain and secure its battery hoist for transport, where independent contractor, who was injured by hoist when loading it for transport as result of loosening of strap securing motor, had total discretion in preparing and moving hoist, and there was no evidence that telephone company had strapped motor, that strapping was undertaken as protection for contractor, or that contractor relied upon safety of strapping. Restatement (Second) of Torts § 323.

10. Negligence ⇐136(14)

Whether a duty has been voluntarily undertaken is question of law to be determined by court. Restatement (Second) of Torts § 323.

11. Bailment ⇐35

Telephone company was not liable as gratuitous bailor for injuries sustained by independent contractor when strap securing motor on battery hoist loosened when contractor was loading hoist for transport, where contractor presented no evidence other than inadmissible hearsay rumors to show either defect in hoist or that telephone company knew or should have known of any dangerous propensities in hoist.

12. Appeal and Error ⇐169

Contentions not raised in trial court are waived on appeal, even in summary judgment case.

13. Bailment ⇐9, 21

Gratuitous bailor may be liable for physical harm caused by use of chattel when he knows or has reason to know that chattel is or is likely to be dangerous when put to use for which it was supplied, has no reason to believe that those for whose use chattel is supplied will realize its dangerous condition, and fails to exercise reasonable care to inform user of its dangerous condition or of facts which make it likely to be dangerous.

14. Judgment ⇐185(1)

Unsubstantiated hearsay statements cannot be considered in ruling on motion for summary judgment.

15. Pleading ⇐236(6)

Trial court did not abuse its discretion by denying motion of independent contractor, who was injured when loading telephone company's battery hoist for transport, to amend his complaint to allege more specifically facts that there was voluntary undertaking by telephone company, after trial court granted summary judgment for telephone company, where issue was not that complaint was deficient in its framing of issues but that evidence presented in support of voluntary undertaking theory failed to establish genuine issue of material fact, and amendment would be prejudicial to telephone company in that amendment was sought on eve of trial and five years after inception of lawsuit, with no explanation as to why contractor never before attempted to develop facts necessary to withstand telephone company's summary judgment motion.

Beerman, Swerdlove, Woloshin, Barezky, Becker, Genin & London, Harvey L. Walner & Associates, Chicago (Alvin R. Becker, Harvey L. Walner, Christopher A. White, of counsel), for Appellant.

William F. DeYoung, Loretto M. Kennedy, Carole C. Tubbesing Burke, Weaver & Prell, Chicago, for American Telephone & Telegraph.

Justice GORDON delivered the opinion of the Court:

This is an action for damages brought by the plaintiff, Fernando Lajato, arising from injuries he incurred while working as an independent contractor for third-party defendant Quinn Delivery Service, Inc. (Quinn) to move a battery hoist owned by defendant AT & T. AT & T filed a contingent third-party complaint against Quinn, not at issue in this appeal, seeking indemnification pursuant to the delivery service contract between Quinn and AT & T, in the event plaintiff recovered a judgment in his tort action against AT & T. AT & T subsequently filed a motion for summary judgment against plaintiff which the trial court granted. In that order, the court also denied plaintiff's oral motion requesting leave to amend his complaint. Subsequently, plaintiff filed a motion to reconsider, which the court ultimately struck by reason of its alleged lack of jurisdiction to hear it. Plaintiff appeals from the orders granting summary judgment to AT & T, denying his motion to amend his complaint, and refusing to hear his motion to reconsider. AT & T has moved to dismiss this appeal for lack of appellate jurisdiction.

In November 1989, plaintiff filed a complaint against AT & T, wherein he alleged that on July 1, 1988, he was on the premises of AT & T on behalf of Quinn in order to move an AT & T battery hoist. The complaint further alleged that while performing that task, the hoist fell upon him, causing him injuries for which he sought damages. The complaint averred that AT & T was negligent in its failure to maintain, inspect, and repair the battery hoist, and for AT & T's failure to warn plaintiff of the propensity of the hoist to fall. In April 1990, AT & T filed its answer, specifically denying each basis for recovery alleged in plaintiff's complaint. The matter was scheduled for trial in June 1995.

On April 25, 1994, AT & T filed a motion for summary judgment, alleging that, based upon the undisputed facts, it was clear that it owed no duty of care to plaintiff with respect to his injuries. In support of its motion, AT & T submitted excerpts of the deposition testimony of plaintiff and a copy of the delivery services contract between AT & T and Quinn. In his deposition, plaintiff testified that on the date of the accident, July 1, 1988, he was making pick-ups and deliveries of telephone equipment at various AT & T locations as an independent contractor for Quinn. He stated that he had received instructions from Quinn via radio to go to an AT & T property in Rolling Meadows, Illinois, the scene of the accident, to pick up a battery hoist and to transport it to another AT & T location in Rockford, Illinois. Approximately 99% of plaintiff's delivery work for Quinn involved pick-ups and deliveries of AT & T equipment. The plaintiff stated that AT & T did not direct him in his moving work, but rather, allowed him to use his own expertise to determine how each move would be accomplished.

Plaintiff further testified that the battery hoist, which weighs approximately 500 pounds, was used to lift batteries weighing approximately 300 pounds up onto shelves. Plaintiff described the hoist as being rectangular in shape, on wheels, and consisting of a large, black metal frame with a motor and hoist accessories suspended from the top middle of the frame. The hanging motor and accessories could be pulled to one side of the hoist frame and secured thereto with a nylon strap and a chain, both of which were also attached to the hoist, in order to stabilize the hoist during transport and when not in use to perform its battery-lifting function. It was plaintiff's customary practice to inspect the hoist to ensure that the motor and accessories were firmly secured with the strap and the chain prior to moving the hoist. Plaintiff had moved this particular hoist on at least 10–15 different occasions.

Plaintiff's deposition further revealed that when he reached the AT & T Rolling Meadows location, an AT & T employee directed him to the hoist, and that after that brief conversation, plaintiff had no further discussions with anyone, AT & T employees or otherwise, until after the accident. Wh

laintiff approached the hoist, he observed at its motor and accessories were already rapped and secured to the hoist's frame. e also testified that he personally examined e strap to ensure that the hanging appara- s was firmly secured to the frame of the ist with the nylon strap and the motor ain before attempting to move the hoist. laintiff then wheeled the hoist to the back his truck and onto his truck's hydraulic lift latform, which he had lowered to ground- vel in order to lift the hoist into his truck. fter raising the lift and the hoist from round-level up to the truck's bed, plaintiff mbed into the truck bed and began to pull e hoist into the bed.

Plaintiff further testified that while pulling e hoist into the truck, the strap around the otor and hoist accessories loosened for rea- ns beyond his knowledge, permitting the otor and the accessories to swing free and e weight of the hoist to shift towards him. mediately thereafter, the hoist fell onto intiff, causing him various injuries. Plain- stated that there were no known wit- ses to the accident. He also stated that ut two months after the accident, he rd from an AT & T installer that certain low laborers at AT & T had told him that r plaintiff's accident, they would not use t hoist because it was unsafe, and that AT T ultimately shipped the hoist back to the ufacturer.

In addition to plaintiff's deposition testimo- AT & T submitted the Quinn–AT & T very contract in support of its motion for mary judgment. That contract reveals t Quinn, through its own independent con- tors, performed moving services for de- lant AT & T. The contract required inn to

"receive, pick up, load, transport, unload, nd deliver telephone equipment and other aterial (the "Material"), and perform the ther services provided for in this agree- ment as ordered by [AT & T] from April 1, 1987 to March 31, 1989."

e contract further provided that Quinn or s agents

"shall have the sole and exclusive care, custody and control of the Material from the time it is tendered to [Quinn], [Quinn's] agents or servants, until it is delivered to and accepted by [AT & T] * * *."

In his response to AT & T's motion for summary judgment, plaintiff argued that AT & T had voluntarily assumed and breached a duty to him to keep its premises safe and to maintain the hoist such that it would not do harm to those moving it. In support of his position, plaintiff attached additional excerpts from his own deposition, pointing to his testimony that the AT & T hoist's motor and accessories were already secured to the frame of the hoist by the nylon strap and the motor chain when he arrived at the site to move the hoist. He also referred to his testimony that there was no motor lock securing the motor to the frame, and that the motor and accessories would not have swung free after the strap loosened if there had been such a motor lock.

In a hearing on July 27, 1994, the trial court granted AT & T's motion for summary judgment with prejudice. Later at that same hearing, the trial court heard plaintiff's oral request for leave to amend his complaint pursuant to section 2–1005(g) of the Illinois Code of Civil Procedure (735 ILCS 5/2–1005(g) (West 1994)), where plaintiff argued that he should be allowed to amend his complaint to show that AT & T voluntarily undertook to secure the hoist and did so negligently. The court denied plaintiff's motion to amend, stating as its reason that "[i]t's an '89 case."

On August 25, 1994, within 30 days of the July 27 order granting summary judgment and denying leave to amend, plaintiff filed a motion to reconsider. However, plaintiff did not serve AT & T with that motion until September 18, 1994, at which time he transmitted that motion to AT & T via facsimile at AT & T's request. No notice of motion was served upon AT & T until November 9, 1994, and plaintiff did not file a certificate of service for that motion until November 17, 1994.

AT & T subsequently filed a motion objecting to plaintiff's motion to reconsider, arguing that the trial court had no jurisdiction to hear it based on plaintiff's failure to file a proof of service within 30 days of the July 27 order. On January 13, 1995, the trial court

sustained AT & T's objection, finding that it had no jurisdiction to hear plaintiff's motion to reconsider, and therefore did not address the merits of that motion. On January 25, 1995, within 30 days of the trial court's January 13 order, plaintiff filed his notice of appeal, both from that order and from the July 27, 1994 order granting summary judgment and denying plaintiff leave to amend.

Plaintiff contends on appeal that the trial court erred in granting summary judgment because by improperly securing the battery hoist for transport, AT & T negligently performed a voluntary undertaking, and because as a gratuitous bailor, AT & T knew the hoist was dangerous yet failed to inform plaintiff of its dangerous condition. Plaintiff also contends that the trial court abused its discretion in denying him leave to amend his complaint after the grant of summary judgment.

I. JURISDICTION:

Before reaching plaintiff's contentions on appeal, we must first address defendant's motion to dismiss this appeal for want of appellate jurisdiction. *Bell Federal Savings & Loan Ass'n v. Bank of Ravenswood*, 203 Ill.App.3d 219, 148 Ill.Dec. 559, 560 N.E.2d 1156 (1990). In its motion to dismiss, AT & T contends that plaintiff's failure to file a proof of service with its August 25, 1994 motion to reconsider prevents this court from reviewing either of the trial court's July 27 or January 13 orders. Defendant argues, somewhat obliquely, that plaintiff's motion to reconsider should not be considered as being timely filed, because it was not accompanied by a proof of service, and as a result, the trial court was correct in stating that it had no jurisdiction to consider it. Consequently, defendant would urge that the motion to reconsider did not have the effect of extending the time for filing plaintiff's notice of appeal beyond the initial 30 day period following entry of the summary judgment order. See Illinois Supreme Court Rule 303(a)(1) (155 Ill.2d R. 303(a)(1)) (discussed more fully below). We disagree.

[1–3] Under Supreme Court Rule 303(a)(1), a notice of appeal must be filed within 30 days after the entry of the final judgment from which the appeal is taken, or, if a timely post-trial motion directed at the judgment is filed, within 30 days after entry of the order disposing of the last pending post-trial motion. (134 Ill.2d R. 303(a)(1)). Under section 2–1203 of the Illinois Code of Civil Procedure, a post-trial motion must be filed within 30 days of a final judgment. 735 ILCS 5/2–1203 (West 1994). Otherwise, the trial court will lose jurisdiction to modify or vacate the final order which it entered after the lapse of 30 days. *Archer Daniels Midland Co. v. Barth*, 103 Ill.2d 536, 83 Ill.Dec. 332, 470 N.E.2d 290 (1984); *In Matter of Application of County Treasurer*, 208 Ill.App.3d 561, 153 Ill.Dec. 528, 567 N.E.2d 486 (1990). A motion to reconsider is a post-trial motion (*Elmhurst Auto Parts v. Fencl–Tufo Chevrolet*, 235 Ill.App.3d 88, 175 Ill.Dec. 771, 600 N.E.2d 1229 (1992)), and therefore "falls within the purview of post-judgment motions which must be filed within 30 days after the challenged judgment is entered." *Sho–Deen, Inc. v. Michel*, 263 Ill.App.3d 288, 290, 200 Ill.Dec. 729, 732, 635 N.E.2d 1068, 1071 (1994). Only if a post-trial motion is timely filed pursuant to section 2–1203 will it extend the time for filing the notice of appeal under Rule 303(a). *In Matter of Application of County Treasurer.*

[4] Thus, the question as to whether the appellant's notice of appeal was filed beyond the 30 day period allowed under Rule 303(a), thereby depriving this court of its jurisdiction, depends upon whether the failure to file a certificate of service vitiated the filing of the plaintiff's motion to reconsider. If we determine that the filing of plaintiff's motion to reconsider on August 25 within 30 days after the July 27 summary judgment order was timely, notwithstanding the failure to file an accompanying certificate of service within that 30–day period, then plaintiff's notice of appeal from both the July 27 and the January 13 orders was timely. This would follow under Rule 303(a), since the notice of appeal was filed on January 25, within 30 days after the trial court's disposition on January 13 of plaintiff's motion to reconsider. On the other hand, if the trial court was correct in its determination that under section 2–1203, the timely filing of a certificate of service is

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The rule is clear that the absence of a certificate of service will not vitiate the filing of a motion to reconsider. This matter has been specifically preempted by Illinois Supreme Court Rule 104 (134 Ill.2d Rule 104), which provides at parts (b) and (d) as follows:

"(b) Filing of Papers and Proof of Service. Pleadings subsequent to the complaint, written motions, and other papers required to be filed shall be filed with the clerk with a certificate of counsel or other proof that copies have been served on all parties who have appeared * * *.

* * * * * *

(d) Failure to deliver or serve copies as required by this rule *does not in any way impair the jurisdiction of the court* over the person of any party, but the aggrieved party may obtain a copy from the clerk and the court shall order the offending party to reimburse the aggrieved party for the expense thereof." 134 Ill.2d R. 104(b), (d) (Emphasis added).

Thus, under Rule 104(d), the failure to deliver or serve copies does not impair the jurisdiction of the court. This rule has been applied to post-trial motions in *In re Marriage of Collins*, 154 Ill.App.3d 655, 107 Ill.Dec. 109, 506 N.E.2d 1000 (1987) and in *Kollath v. Chicago Title and Trust Co.*, 24 Ill.App.3d 353, 321 N.E.2d 344 (1974), which held that the failure to include proof of service with a post-trial motion will not invalidate the motion or render it untimely.

Defendant contends that Rule 104(d) only addresses the failure to actually serve copies of the motion but does not address the failure to file a certificate of service. This contention is devoid of any rationale since a failure to serve will preclude the filing of a certificate, unless the movant seeks to perjure himself. Thus, if the failure to actually serve notice does not impair jurisdiction, then *a fortiori*, the failure to serve a certificate of service will not impair the validity or timeliness of the motion. See *In re Marriage of Collins*.

Defendant's reliance on *Vlahakis v. Parker*, 3 Ill.App.3d 126, 278 N.E.2d 523 (1971) (abstract of op.) and *Ingrassia v. Ingrassia*, 156 Ill.App.3d 483, 109 Ill.Dec. 68, 509 N.E.2d 729 (1987) is misplaced. Although *Vlahakis* reached a contrary result, it is clear that that opinion did not purport to in any way consider or confront the impact of Rule 104(d) in its determination. That opinion has therefore been distinguished and rejected on that basis in *Kollath v. Chicago Title and Trust Co.*, 24 Ill.App.3d at 357–58, 321 N.E.2d at 348 ("Rule 104(d) renders a failure to comply with Rule 104(b) * * * non-jurisdictional * * * [and] the only cases decided since enactment of rule 104(d) which reached a contrary result [, including *Vlahakis v. Parker*,] did not consider that provision at all"). Likewise, the opinion in *Ingrassia* does not purport to consider rule 104(d) in its determination. Moreover, *Ingrassia* does not purport to deal with the validity or timeliness of the filing of a post-trial motion, but, rather, with the sufficiency of the notice of that motion when given to the opposing party only a few hours before the hearing on the motion. Hence, *Ingrassia* is not in point, since here there is no question that defendant had actual knowledge of the pendency of plaintiff's motion to reconsider well in advance of the scheduled hearing date on that motion.

Consequently, plaintiff's August 25 motion to reconsider, and therefore his January 25 notice of appeal, were seasonably filed, notwithstanding that no certificate of service was filed until long after 30 days had passed since summary judgment was entered on July 27. Since the August 25 motion was timely, the notice of appeal filed on January 25 complied with Rule 303(a) since it was filed within 30 days after the trial court disposed of the motion to reconsider, albeit on jurisdictional grounds, on January 13. Accordingly, our jurisdiction to review both the July 27 and January 13 orders of the trial court remains unimpaired.

[5] Defendant next would urge that if we determine that the January 13 order is reviewable, we should confine our review solely to the correctness of the trial court's denial of its jurisdiction over the motion to reconsider. Defendant contends that if we find that the trial court's jurisdictional determination was erroneous, we should remand the matter to the trial court to allow the trial court to first consider the merit of that motion. We disagree for the same reasons as articulated in *Myers v. Health Specialists, S.C.*, 225 Ill.App.3d 68, 167 Ill.Dec. 225, 587 N.E.2d 494 (1992). There, the court stated as follows:

> "Defendant initially urges us, without citation to authority, to remand this matter to the circuit court because that court did not address the merits of plaintiff's motion. This argument betrays a misperception of the nature both of the question presented and of our review. As noted above, we consider summary judgment orders *de novo:* we, like the circuit court, must decide only whether the parties' pleadings and other submissions present an issue of triable fact and if not, whether plaintiff is entitled to judgment as a matter of law. This is a question of law, not of fact." *Myers v. Health Specialists, S.C.*, 225 Ill.App.3d 68, 76, 167 Ill.Dec. 225, 231, 587 N.E.2d 494, 500 (1992).

Here, too, the grant of summary judgment is subject to *de novo* review, requiring our *de novo* determination whether the submissions of the parties presented triable issues of fact and if not whether defendant was entitled to a judgment as a matter of law. Thus, here, as in *Myers*, we may consider this appeal on its merits without the necessity of a remand.

II. MERITS:

[6] As noted earlier, plaintiff contends on appeal that the trial court erred in granting summary judgment because the facts are sufficient to create an inference that AT & T voluntarily assumed a duty to properly secure the battery hoist for transport, a duty which was breached as a result of AT & T's negligence. Additionally, plaintiff contends, for the first time on appeal, that there was error in granting summary judgment because the facts are sufficient to create an inference that as a gratuitous bailor, AT & T knew the hoist was dangerous yet failed to inform plaintiff of its dangerous condition. Plaintiff also contends that even if summary judgment was properly entered in favor of AT & T under the issues framed by the existing complaint, the trial court abused its discretion in denying him leave to amend his complaint pursuant to section 2–1005(g) of the Illinois Code of Civil Procedure (735 ILCS 5/2–1005(g) (West 1994)).[1]

[7, 8] We first address plaintiff's contention that the trial court erred in entering summary judgment pursuant to the issues framed by the existing complaint. Summary judgment is proper when the pleadings, depositions and affidavits on file, construed in the light most favorable to the nonmoving party, establish that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. See generally 735 ILCS 5/2–1005 (West 1994); *First State Insurance Co. v. Montgomery Ward & Co.*, 267 Ill.App.3d 851, 204 Ill.Dec. 814, 642 N.E.2d 715 (1994); *Torres v. City of Chicago*, 261 Ill.App.3d 499, 197 Ill.Dec. 985, 632 N.E.2d 54 (1994); *Giannoble v. P & M Heating & Air Conditioning, Inc.*, 233 Ill.App.3d 1051, 175 Ill.Dec. 169, 599 N.E.2d 1183 (1992). Appellate review of an order granting summary judgment is *de novo. E.g., Hesselink v. R.L. Perlow Corp.*, 265 Ill.App.3d 473, 202 Ill.Dec. 36, 637 N.E.2d 575 (1994); *La Salle National Bank v. Skidmore, Owings & Merrill*, 262 Ill.App.3d 899, 200 Ill.Dec. 225, 635 N.E.2d 564

1. As previously noted, at the trial level, plaintiff urged liability both on the basis of premises liability and the law governing voluntary undertakings. Plaintiff has conceded on appeal that he cannot base his action against AT & T upon a theory of premises liability as a matter of law, due to the holding in *Pagano v. Occidental Chemical Corp.*, 257 Ill.App.3d 905, 913, 196 Ill.Dec. 24, 30, 629 N.E.2d 569, 575 (1994), insofar as he incurred his injuries in the bed of his truck, and not due to any condition of AT & T's premises. See also *Jackson v. Hilton Hotels Corp.*, 277 Ill.App.3d 457, 214 Ill.Dec. 31, 660 N.E.2d 222 (1995) (in action based on premises liability, no duty to plaintiff existed where plaintiff failed to show that his injuries were caused by any condition of the premises).

(1994). To withstand a motion for summary judgment in an action based in negligence, a plaintiff must allege facts sufficient to show that the defendant owed him a duty, that defendant breached that duty, and that his injury proximately resulted from that breach. See *DiBenedetto v. Flora Township*, 153 Ill.2d 66, 178 Ill.Dec. 777, 605 N.E.2d 571 (1992); *Ziemba v. Mierzwa*, 142 Ill.2d 42, 153 Ill.Dec. 259, 566 N.E.2d 1365 (1991).

[9, 10] With respect to plaintiff's contention concerning AT & T's duty arising from its purported voluntary undertaking, section 323 of the Restatement (Second) of Torts provides as follows:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts § 323, at 135 (1965).

See generally, *Cross v. Wells Fargo Alarm Services*, 82 Ill.2d 313, 45 Ill.Dec. 121, 412 N.E.2d 472 (1980); *Jackson v. Hilton Hotels Corp.*, 277 Ill.App.3d 457, 214 Ill.Dec. 31, 660 N.E.2d 222 (1995). Whether a duty has been voluntarily undertaken is a question of law to be determined by the court. *Gouge v. Central Illinois Public Service Co.*, 144 Ill.2d 535, 163 Ill.Dec. 842, 582 N.E.2d 108 (1991); *Jackson v. Hilton Hotels Corp.*

In the instant case, plaintiff has failed to allege facts sufficient to establish in the first instance that defendant voluntarily assumed or undertook any duty to properly maintain and secure the battery hoist for transport. First, it is undisputed that AT & T had neither control nor influence over the manner in which plaintiff, an independent contractor retained by Quinn (who was also an independent contractor), readied or moved the hoist, and that plaintiff had total discretion in preparing and moving the hoist. Moreover, plaintiff did not submit any evidence that AT & T strapped the motor to the hoist, nor any evidence regarding whether the strapping was undertaken as protection for the plaintiff. Lastly, and more overridingly, even if we were to presume that the strapping was effected by AT & T, there is no evidence whatsoever submitted by plaintiff that he relied upon the safety of that strapping. In fact, the record is clear that plaintiff himself checked the strapping of the motor to ensure it was fastened securely prior to moving the hoist, as was his customary practice when moving that particular hoist.

[11–13] Plaintiff urges that even if there is no basis for liability under a theory of voluntary undertaking, there is a basis established for liability under a theory of gratuitous bailment. In that regard, he contends that there is a genuine issue of material fact that AT & T, as a gratuitous bailor of the hoist, breached a duty to plaintiff to provide a safe hoist or to warn plaintiff of its dangers. We first note that contentions not raised in the trial court are waived on appeal, even in a summary judgment case. *Witek v. Leisure Technology Midwest, Inc.*, 39 Ill.App.3d 637, 640, 350 N.E.2d 242, 245 (1976) ("This rule of waiver applies even in a summary judgment case"); *Wilson v. Gorski's Food Fair*, 196 Ill.App.3d 612, 143 Ill.Dec. 477, 554 N.E.2d 412 (1990). However, even if the argument were preserved, we note that there was no evidence presented that AT & T breached a duty to plaintiff as a gratuitous bailor of the hoist.

> "[A] gratuitous bailor may be liable for physical harm caused by the use of his chattel when he knows or has reason to know that the chattel is or is likely to be dangerous when put to the use for which it is supplied; has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and fails to exercise reasonable care to inform the user of its dangerous condition or of the facts which make it likely to be dangerous." *Pagano v. Occidental Chemical Corp.*, 257 Ill.App.3d 905, 913, 196 Ill.Dec. 24, 30, 629 N.E.2d 569, 575 (1994).

[14] Plaintiff has not produced evidence as to any specific defect either in the design or manufacture of the hoist itself which would indicate that AT & T had actual or constructive knowledge that the hoist was unsafe when it was handed over to plaintiff. Plaintiff himself did not testify as to the condition of the hoist except to say that the strap loosened. The only other evidence that plaintiff has presented consists of unsubstantiated hearsay statements. In that regard, plaintiff testified in his deposition to a conversation which took place after the accident with an AT & T installer who told plaintiff that certain other fellow employees had stated that after plaintiff's accident they refused to use the hoist because it was unsafe, and that AT & T ultimately returned the hoist to its manufacturer. However, plaintiff was unable to identify those other AT & T employees, and he did not provide any further detail regarding the specific contents of their statements. Such unsubstantiated hearsay statements cannot be considered in a ruling on a motion for summary judgment. See *Certified Mechanical Contractors, Inc. v. Wight & Co., Inc.*, 162 Ill.App.3d 391, 113 Ill.Dec. 888, 515 N.E.2d 1047 (1987) (in deciding a motion for summary judgment, court should ignore personal conclusions, opinions and self-serving statements and consider only facts admissible in evidence under the rules of evidence); *Seefeldt v. Millikin National Bank of Decatur*, 154 Ill.App.3d 715, 107 Ill.Dec. 161, 506 N.E.2d 1052 (1987) (although a complaint may purport to raise an issue of material fact, summary judgment is appropriate if such issue is not further supported by evidentiary facts, and in determining the genuineness of a fact, a court should ignore personal conclusions and opinions and consider only admissible facts).

Plaintiff's reliance on *Pagano* is not well taken. There, the court on appeal did find an issue of fact as to whether a defective dolly supplied by the defendant to help move certain barrel drums of ink rendered the defendant liable under a theory of gratuitous bailment. However, in that case, plaintiff gave direct testimony as to specific, observable defects in the dolly which, if believed, would establish that the dolly was defective. Here, aside from the inadmissible hearsay rumors which were reported, the plaintiff himself presented no evidence to show either a defect in the hoist or that AT & T knew or should have known of any dangerous propensities in the hoist. Consequently, the evidence presented here was not effective to support a counterinference for purposes of summary judgment.

[15] Plaintiff next contends that the trial court erred in its refusal in its July 27 order to allow him leave to amend his complaint to more specifically allege facts that there was a voluntary undertaking and that it was implemented negligently. We disagree.

Section 2–1005(g) of the Illinois Code of Civil Procedure (735 ILCS 5/2–1005(g) (West 1994)) provides as follows:

> "(g) Amendment of pleading. Before or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms."

The allowance of an amendment to the pleadings is in the trial court's discretion, and reversible error can only be found if there is a manifest abuse of discretion. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill.2d 263, 166 Ill.Dec. 882, 586 N.E.2d 1211 (1992). See also *Misselhorn v. Doyle*, 257 Ill.App.3d 983, 195 Ill.Dec. 881, 629 N.E.2d 189 (1994); *Eyman v. McDonough District Hospital*, 245 Ill.App.3d 394, 184 Ill.Dec. 502, 613 N.E.2d 819 (1993).

As noted, on July 27, immediately after the trial court entered summary judgment against him, plaintiff made an oral motion to amend his complaint, as follows:

> "**MR. JOHNSON** [Plaintiff's attorney]: I'll set it out to specifics that they undertook the duty to secure the hoist and they negligently performed that duty and as a result Plaintiff was injured based upon the *Nelson v. Pippen, Phillips* [*sic*] case, that one undertakes a duty to do something, they do so negligently, and someone is injured, they are absolutely liable.
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> If the fact that the Court feels that the premises liability count cannot stand does not mean then that a negligent voluntary [*sic*] undertaking is not proper here.

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The court denied plaintiff's motion to amend, stating that "It's an '89 case. I'll deny the motion [to amend]."

We first note that plaintiff never made the proposed amended complaint a part of the record on appeal, except for his oral proposal before the trial judge which, without any offers of new evidence, essentially duplicates the voluntary undertaking theory which has already been argued and rejected. Plaintiff's failure to include the proposed amendment and supporting facts therefor in the record could be found to constitute a waiver in this court of his right to have the denial of his request for leave to amend reviewed. See *Mendelson v. Ben A. Borenstein & Co.*, 240 Ill.App.3d 605, 181 Ill.Dec. 114, 608 N.E.2d 187 (1992) (plaintiff's failure to tender amended complaint or to include it in the appellate record diminished the appellate court's ability to determine whether the proposed amendment would provide a viable theory against defendant, and constituted waiver of right to a review of the denial of his request for leave to amend). See also *Ignarski v. Norbut*, 271 Ill.App.3d 522, 207 Ill.Dec. 929, 648 N.E.2d 285 (1995) (no abuse of discretion in denying motion for leave to amend complaint where movant orally moved to amend yet failed to submit proposed amendment to trial court).

Notwithstanding waiver, even if we were to review the amendment which plaintiff orally proposed, we would find no abuse of discretion by the trial court in denying plaintiff leave to amend. As already discussed, there was ample evidence before the trial court to support its conclusion that the facts in this case as revealed in the summary judgment submissions would not permit a pleading which could allege a valid cause of action. Moreover, by the same token, even if the complaint were amended to more specifically allege a voluntary undertaking as requested by the plaintiff, the allegations of the complaint would be superseded by the extrinsic facts already submitted which as noted would facilitate for summary judgment. See *Werckenthein v. Bucher Petrochemical Co.*, 248 Ill.App.3d 282, 188 Ill.Dec. 332, 618 N.E.2d 902 (1993) (where allegations in nonmovant's complaint are contravened by movant's extrinsic submissions in summary judgment proceedings, extrinsic submissions control); *East Side Fire Protection District v. City of Belleville*, 221 Ill.App.3d 654, 164 Ill.Dec. 192, 582 N.E.2d 755 (1991) (nonmovant must controvert proofs offered by movant in support of motion for summary judgment and cannot merely rest on pleadings); *Seefeldt v. Millikin National Bank of Decatur.* The issue here is not simply that plaintiff's complaint is deficient in its framing of the issues, but that, as discussed, the testimony and evidence presented in support of his negligent voluntary undertaking theory are deficient, and fall short of establishing a genuine issue of material fact such that judgment should not be entered as a matter of law on that theory of action.

Plaintiff's reliance on *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill.2d 263, 166 Ill.Dec. 882, 586 N.E.2d 1211 (1992) is not well taken. In *Loyola*, the court on appeal set forth four factors to determine whether the trial court had abused its discretion in denying a section 2–1005(g) amendment, including whether the proposed amendment would cure the defective pleading, whether it would cause prejudice or surprise to other parties, whether it was timely, and whether previous opportunities to amend the pleading could be identified.

Applying these factors in order, in the instant case the question of whether plaintiff's proposed amendment would cure the defective pleading is not relevant, because as already discussed, AT & T succeeded in its motion for summary judgment not because plaintiff's complaint was improperly pleaded, but because the evidence presented at summary judgment shows no genuine issue of material fact regarding the allegations in the complaint. *Werckenthein v. Bucher Petrochemical Co.; East Side Fire Protection District v. City of Belleville.* Taking the second and third *Loyola* factors together (whether there would be prejudice or surprise to AT & T and whether the proposed amendment was timely), the record is ample to support the trial court's determination that the allowance

of an amendment would in fact be prejudicial to AT & T, insofar as the amendment was being sought on the eve of trial, five years after the inception of this lawsuit, with no explanation from plaintiff as to why he never before attempted to develop the facts which would be necessary to withstand AT & T's motion for summary judgment. See *Mendelson v. Ben A. Borenstein & Co.* (no abuse of discretion in denying leave to amend following grant of summary judgment where proposed amendment was sought beyond the pleading stages). See also *Ignarski v. Norbut.*

The final *Loyola* factor is whether plaintiff had sufficient prior opportunities to amend. To that extent, we note that plaintiff indeed had substantial opportunities to amend. Although plaintiff complains that AT & T never gave him notice of any deficiency in his complaint which would require amendment because AT & T never filed a motion to dismiss prior to filing its motion for summary judgment, it is axiomatic that a party can amend its pleading on its own motion. See 3 R. Michael, Illinois Practice, ch. 26, at 446 (West 1989). The case of *Evans v. United Bank of Illinois, N.A.*, 226 Ill.App.3d 526, 168 Ill.Dec. 533, 589 N.E.2d 933 (1992), upon which plaintiff relies, does give credence to plaintiff's contention under the fourth *Loyola* factor that the failure of AT & T to challenge his pleadings prior to its motion for summary judgment deprived plaintiff of any prior opportunity to amend. However, we note that in *Evans* the court on appeal did not rely on that factor alone in finding that the trial court abused its discretion in denying the plaintiff in that case leave to amend, but found that *all* of the *Loyola* factors supported that plaintiff's motion for leave to amend.

In any event, even if plaintiff were correct in his reliance upon *Evans*, we need not consider its application here. As already discussed, the issue here is not whether the allegations of the complaint were sufficient to state a cause of action based upon a voluntary undertaking theory, but whether the facts adduced were sufficient to create an inference to support such allegations. See *Werckenthein v. Bucher Petrochemical Co.; East Side Fire Protection District v. City of Belleville.* As previously noted, the facts submitted here are insufficient to raise such an inference. Hence, we find that the trial court's denial of the motion to amend was not an abuse of discretion. See *Regas v. Associated Radiologists, Ltd.*, 230 Ill.App.3d 958, 172 Ill.Dec. 553, 595 N.E.2d 1223 (1992) (where a cause of action cannot be stated even after amendment, leave to amend should be denied).

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

McNULTY, P.J., and HOURIHANE, J., concur.

283 Ill.App.3d 112
669 N.E.2d 655

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

Vernetta CASSELL, Defendant–Appellant.

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

Curlee SIMMONS, Defendant–Appellant.

Nos. 1–94–2782, 1–95–1380.

Appellate Court of Illinois, First District, Fifth Division.

Aug. 9, 1996.

Rehearing Denied Sept. 11, 1996.

Defendants were convicted in the Circuit Court, Cook County, John J. Moran, J., of aggravated criminal sexual assault, and one defendant was convicted of additional crimes of home invasion and aggravated kidnapping. Defendants appealed. The Appellate Court, McNulty, P.J., held that: (1) circuit court had adequate basis for its determination that victim was not entitled to assert privilege

Cite a

against self-incrimination; sufficient evidence that defer threat of force in order to course with victim to sup aggravated criminal sexua was sufficient evidence tha by confined victim to supp napping conviction; (4) denied effective assistan defendant who drove vehi assault occurred was crir for the assault; and (6) e of emergency room nurse ny that victim identified d and who dragged her fr harmless error.

Affirmed.

1. Witnesses ⇐297(13.1)

Trial court had adequ cation for aggravated crir for its determination th entitled to assert Fifth A against self-incrimination court did not conduct he whether victim's testimon her, where, in response t tions as to why she wan lege, victim never expres fear of being charged wit that she could not remem clearly. U.S.C.A. Const.A

2. Witnesses ⇐297(1)

Privilege against guards against compulsor tending to establish U.S.C.A. Const.Amend. 5

3. Witnesses ⇐297(1)

Although witness ir privilege to refuse to an tend to incriminate him secured by Fifth Amend those instances where wit cause to believe he or himself or herself to pro answers. U.S.C.A. Const

4. Witnesses ⇐297(1)

Once witness asser Amendment privilege not self or herself, trial cou

appointed to you and we will not ask questions until he has been appointed—"I told him, without his attorney I wouldn't talk to him and that would be it. That he didn't have to say anything." (He said he didn't want a lawyer.) (5) If you decide to answer now with or without a lawyer, you have the right to stop questioning at any time or stop questioning and consult a lawyer—"I told him, if I start talking to you and it becomes apparent to you that you suddenly think you want an attorney to tell me and we will stop right there and we won't ask any further questions at that point. In other words, he could stop me from asking anything, at any time and I will just stop and leave the room." (He said he still wanted to talk to me.)

Dickett testified that she gave defendant the *Miranda* warnings one at a time, speaking slowly. After each one she asked defendant if he understood and he said he did. She testified that she told him the word attorney meant lawyer and instead of the phrase, "appoint a lawyer", she told him the court would give him a lawyer.

In contrast to this questioning by Kill and Dickett, Smith testified that she interviewed defendant on December 15, 1989, six months after the fire. In questions she posed which were intended to determine whether or not he could intelligently waive what are commonly known as "Miranda rights or Miranda warnings" she would ask him "what does this mean, and then I would say what the particular right was" and his reaction would be to "look around, scratch his head and draw a blank. He didn't say anything." From these reactions she concluded that "he didn't understand what these rights meant."

The contrast in the manner in which the police officer and assistant State's Attorney advised the defendant and the form of the questions posed to the defendant by the psychologist lead us to the conclusion that the record does not support the trial court's conclusion that defendant did not understand his rights and therefore did not knowingly and intelligently waive them. The court's grant of defendant's motion to suppress is not supported by the record.

Here we find the defendant was advised of his right to remain silent and his right to have an attorney present in language he could understand. He was advised that anything he told the officer could be used against him in court. Defendant then stated that he wanted to tell the police about the fire. He repeated the story to the officer and to the assistant State's Attorney in a coherent manner. Although he was asked to do so, he chose not have his statement taken down verbatim in writing. Since he was unable to read, he could not verify what a written statement contained.

While the State has a heavy burden to show that a defendant has waived his constitutional rights in a knowing, intelligent and voluntary manner, (*Brownell*, 79 Ill.2d at 516, 38 Ill.Dec. 757, 404 N.E.2d 181) we find the State has met that burden. We find the weight of the evidence establishes that defendant waived his *Miranda* rights in a knowing and intelligent manner. For all of the foregoing reasons the order of the trial court granting defendant's motion to suppress his statements is reversed.

REVERSED.

RAKOWSKI, P.J., and EGAN, J., concur.

217 Ill.App.3d 952
578 N.E.2d 33

Byong K. CHOI, Plaintiff–Appellant,

v.

COMMONWEALTH EDISON COMPANY, Defendant–Appellee.

No. 1–89–2177.

Appellate Court of Illinois,
First District, Third Division.

July 10, 1991.

Rehearing Denied Aug. 26, 1991.

Independent contractor's employee brought action against owner of nuclear

power plant to recover for injuries sustained when he slipped and fell on wet concrete floor. The Circuit Court, Cook County, Dean Sodaro, J., granted summary judgment for owner, and employee appealed. The Appellate Court, Cerda, P.J., held that owner's duty to maintain safe workplace did not include mopping up water that accumulated on floor when snow and ice from pipes used in construction project melted onto floor, causing puddles of water.

Affirmed.

1. Judgment ⇐185(2)

Although plaintiff does not have to try his case on defendant's motion for summary judgment, he must provide factual basis which would arguably entitle him to judgment.

2. Appeal and Error ⇐949

Determination that summary judgment is appropriate will not be reversed absent abuse of trial court's discretion such that plaintiff's right to fundamental justice is violated.

3. Negligence ⇐32(2.10)

Landowner owed duty to independent contractor's employee to maintain reasonably safe workplace.

4. Negligence ⇐50

Landowner's duty to independent contractor's employee to maintain reasonably safe workplace did not extend to taking precautions against water tracked inside from natural accumulation outside.

5. Negligence ⇐2, 10

Duty is determined by considering number of factors, including foreseeability of harm, likelihood of injury, magnitude of burden of guarding against it, consequences of placing that burden on defendant, public policy, and social considerations.

6. Negligence ⇐29, 44

Landowner owes no duty where natural accumulation of snow, ice or water exists on outside or is tracked into building by pedestrian traffic.

7. Negligence ⇐28

Property owner has duty and may be liable in negligence when injuries are result of unnatural or artificial accumulation of snow, ice or water, or natural condition aggravated by owner's use of area and creation of condition.

8. Negligence ⇐50

Duty owed by owner of nuclear power plant to independent contractor's employee to provide reasonably safe workplace did not include duty to mop up water that accumulated on concrete floor when snow and ice from pipes being brought in from outside for use in construction project melted onto floor, causing puddles of water, where there was no evidence that owner did anything to aggravate that condition, but instead condition was continuation of natural accumulation.

Lane and Munday, Thomas J. Nathan, Chicago, for plaintiff-appellant.

Johnson, Cusack and Bell, Ltd., John W. Bell, Michael B. Gunzburg and Thomas H. Fegan, Chicago, for defendant-appellee.

Presiding Justice CERDA delivered the opinion of the court:

Plaintiff, Byong K. Choi, brought this action against defendant Commonwealth Edison Company seeking recovery for injuries sustained when plaintiff fell on a concrete floor while working at a construction site. The trial court granted defendant's motion for summary judgment. On appeal, plaintiff argues that the trial court erred in granting defendant's motion for summary judgment because a genuine issue of material fact exists. In addition, he argues that the trial court erred by failing to recognize defendant's duty to provide a safe workplace for workmen engaged in construction work on its premises and by failing to extend that duty to include taking precautions against the accumulation of water inside the building.

On January 10, 1979, plaintiff Choi was employed by Universal Power Piping, Inc. (UPP) as a welder at the Dresden Nuclear Power Plant, which is owned by defendant

Commonwealth Edison Company. UPP was a subcontractor hired by Commonwealth Edison to complete installation of a decontamination flushing system in the Reactor 1 building. Plaintiff was working on the third-floor turbine deck receiving pipes brought in from the outside by UPP employees. While stored outside, the pipes became encrusted with snow and ice. Once inside, the pipes were raised from the ground floor to the third-floor turbine deck area by an overhead crane, which was operated by a Commonwealth Edison employee. Then, the pipe was taken from the crane, placed on a cart, and moved through the interlock hatch to the reactor building by UPP employees, including plaintiff. Snow and ice melted from the frozen pipes, forming puddles of water on the deck wherever the pipes were transported. Plaintiff was working in this manner all day prior to the accident.

As plaintiff and a co-worker were carrying a pipe, approximately 20 feet long and 10 inches in diameter, plaintiff slipped on water that was on the concrete floor. He fell backward, hitting his back on a pipe, and a floor spacer fell across his mid-section, causing injuries.

Previously, the appellate court upheld the trial court's summary judgment order for defendant regarding a Structural Work Act (Ill.Rev.Stat.1983, ch. 48, pars. 60 through 69). (*Choi v. Commonwealth Edison Co.* (1984), 129 Ill.App.3d 878, 85 Ill. Dec. 17, 473 N.E.2d 385.) In plaintiff's second amended complaint, he alleged that defendant was guilty of several negligent acts in its supervision of the construction work. Defendant filed a motion for summary judgment, arguing that under Illinois law, it had no duty to take precautions against natural accumulations of snow, ice or water that were tracked into a building. Defendant noted that the UPP foreman's deposition stated that he did not inform Edison of the condition because it was the duty of the contractor's own employees to clean up after themselves. Defendant pointed out that the snow came from pipes that plaintiff and his co-workers had brought in and carried to the area.

In response to defendant's motion for summary judgment, plaintiff argued that defendant owed him a duty to maintain a reasonably safe work place because it retained control over the construction work performed by UPP employees and could stop the work in progress for safety or other reasons. Plaintiff also argued that defendant breached that duty by failing to provide a reasonably safe workplace and by failing to stop work that was being performed in an unsafe manner. In addition, plaintiff contended that the melted snow and ice that caused the unsafe condition did not accumulate naturally, was not transported into the building by pedestrian traffic, and was caused by defendant's refusal to allow the pipes to be brought into the building and cleaned off before being transported to the work area. Plaintiff notes that the deposition of Commonwealth Edison's superintendent stated that Commonwealth Edison employees had the responsibility to clean snow and ice which came into the building, had the authority to stop work being performed in an unsafe manner, and regularly inspected the area.

Concluding that the facts were essentially undisputed, the trial court ordered summary judgment for defendant. The trial court stated that there was a common law duty of an occupier of land to exercise reasonable care for the safety of people lawfully on the premises, but that duty did not extend to a building owner being required to mop up water from an accumulation of snow, ice or water brought inside a building construction site. The trial court indicated that it would be an impossible burden placed on an owner of a building construction site to require following the independent contractor's employees around, mopping up every drip of water brought in from the outside. The trial court further ruled that Commonwealth Edison did not create the dangerous condition, but merely failed to clean up a mess which is common whenever building materials from the outside of a building are moved into a building.

The trial court analogized this case to *Lohan v. Walgreens Co.* (1986), 140 Ill. App.3d 171, 173, 94 Ill.Dec. 680, 488 N.E.2d 679, which ruled that a landowner has no duty to clean up snow, ice or water that is

tracked into a building from a natural accumulation on the outside. The trial court made no finding whether the accumulation inside the building was natural or unnatural, but did state that the water began as a natural accumulation of snow and ice on the pipes outside, and was brought into the building the same way as people tracking it on their feet. The trial court did not consider the expert's affidavit and deposition because it was not factually based. The expert did not actually examine the premises, the court noted, but merely looked at photographs.

After the trial court denied plaintiff's motion to reconsider, plaintiff appealed the summary judgment order. Plaintiff's argument emphasizes that Commonwealth Edison owed him a duty to maintain a safe workplace even though he was employed by an independent contractor hired by Commonwealth Edison. He asserts that the duty included mopping up water that accumulated on the building's floor when snow and ice from the pipes melted onto the floor, causing puddles of water. Plaintiff relies on cases holding that the landowner owes a duty to the employee of an independent contractor if the owner retains sufficient control over the contractor's work. *Claudy v. City of Sycamore* (1988), 170 Ill.App.3d 990, 120 Ill.Dec. 812, 524 N.E.2d 994; See *Haberer v. Village of Sauget* (1987), 158 Ill.App.3d 313, 110 Ill.Dec. 628, 511 N.E.2d 805; *Tsourmas v. Dineff* (1987), 161 Ill.App.3d 897, 113 Ill.Dec. 758, 515 N.E.2d 743; *Weber v. Northern Illinois Gas Co.* (1973), 10 Ill.App.3d 625, 295 N.E.2d 41; *Pasko v. Commonwealth Edison Co.* (1973), 14 Ill.App.3d 481, 302 N.E.2d 642. These cases state that the duty owed is to maintain a reasonably safe workplace.

Even if the water began as a natural accumulation on the outside, plaintiff asserts, Commonwealth Edison's intervening acts caused the water to be unnaturally accumulated on the inside of the building. In the alternative, plaintiff states, the condition was aggravated by Commonwealth Edison because it would not allow the pipes to be stored inside where the snow and ice could be safely removed after it melted. Furthermore, plaintiff argues, the pipes were brought in from the outside and loaded onto an overhead crane operated by a Commonwealth Edison employee. The overhead crane then took the pipes to the third floor of the building, where UPP employees transported the pipes through a tunnel into the reactor building. By the time the pipes reached the third floor, the snow and ice was melting, and water from the pipes was dripping on the floor. It is on that water that plaintiff fell and injured himself.

Defendant responds that the water was a natural accumulation tracked in from the outside by UPP employees, including plaintiff. It asserts that this situation should be treated the same as a natural accumulation tracked in from the outside by pedestrian traffic, thus creating no duty by the landowner.

Defendant relies on two types of cases: those concerning natural accumulations of snow, ice or water outdoors and those concerning snow, ice or water tracked into a building from the outside, whether tracked in by pedestrians' shoes, coats or umbrellas. In *Lohan*, 140 Ill.App.3d at 172, 94 Ill.Dec. 680, 488 N.E.2d 679, the plaintiff slipped and fell on water that had been tracked from the outside into the common hallway of the defendants' stores. The appellate court ruled that the owners did not have a duty to continuously remove the tracks left by customers who had walked through the natural accumulations of snow or water outside, tracking them inside. Even if the owner has knowledge that the accumulation caused a dangerous condition, the court stated, there is no duty if the accumulation is natural. (*Lohan*, 140 Ill.App.3d at 173, 94 Ill.Dec. 680, 488 N.E.2d 679.) See also *Handy v. Sears, Roebuck & Co.* (1989), 182 Ill.App.3d 969, 131 Ill.Dec. 471, 538 N.E.2d 846 (summary judgment in favor of defendant store affirmed where plaintiff slipped and fell on water located within store); *Shoemaker v. Rush–Presbyterian–St. Luke's Medical Center* (1989), 187 Ill.App.3d 1040, 135 Ill.Dec. 446, 543 N.E.2d 1014 (hospital had no duty to clean up natural accumulation of water tracked into hospital on pedestrians' coats and umbrellas); *Serritos v. Chicago Transit Authority* (1987), 153 Ill.App.3d 265, 106 Ill.Dec. 243, 505 N.E.2d 1034 (city transit authority had no duty where plain-

tiff fell on snow and slush covered steps of bus owned and operated by defendant).

[1, 2] The purpose of summary judgment is to determine whether a triable issue of fact exists. (*Haberer*, 158 Ill.App.3d at 316, 110 Ill.Dec. 628, 511 N.E.2d 805.) It may be granted if the pleadings, exhibits, affidavits, and depositions on file establish that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. (Ill.Rev. Stat.1985, ch. 110, par. 2–1005(c); *Branson v. R & L Investment, Inc.* (1990), 196 Ill. App.3d 1088, 1090, 143 Ill.Dec. 689, 554 N.E.2d 624.) Although the plaintiff does not have to try his case, he must provide a factual basis which would arguably entitle him to judgment. (*Handy*, 182 Ill.App.3d at 972, 131 Ill.Dec. 471, 538 N.E.2d 846.) The determination that summary judgment is appropriate will not be reversed absent an abuse of the trial court's discretion such that the plaintiff's right to fundamental justice is violated. *Breeze v. Payne* (1989), 181 Ill.App.3d 720, 727, 130 Ill.Dec. 386, 537 N.E.2d 453.

[3–5] Commonwealth Edison owed plaintiff the duty to maintain a reasonably safe workplace, but it did not extend to taking precautions against water tracked inside from a natural accumulation outside. Duty is determined by considering a number of factors: the foreseeability of harm (*Breeze*, 181 Ill.App.3d at 727, 130 Ill.Dec. 386, 537 N.E.2d 453), the likelihood of the injury, the magnitude of the burden of guarding against it, the consequences of placing that burden on the defendant, public policy, and social considerations. *Dealers Service & Supply Co. v. St. Louis National Stock.* (1987), 155 Ill.App.3d 1075, 1080, 108 Ill.Dec. 664, 508 N.E.2d 1241.

[6, 7] In Illinois, a landowner owes no duty where a natural accumulation of snow, ice or water exists on the outside or is tracked into a building by pedestrian traffic. (*Lohan*, 140 Ill.App.3d at 172, 94 Ill.Dec. 680, 488 N.E.2d 679.) However, a property owner does have a duty and may be liable where the injuries are a result of an unnatural or artificial accumulation, or a natural condition aggravated by the owner's use of the area and creation of the condition. (*Handy v. Sears, Roebuck & Co.* (1989), 182 Ill.App.3d 969, 971, 131 Ill. Dec. 471, 538 N.E.2d 846.) To establish a duty, the plaintiff must make an affirmative showing of an unnatural accumulation or an aggravation of a natural condition before recovery will be allowed. (*McCann v. Bethesda Hospital* (1979), 80 Ill.App.3d 544, 549, 35 Ill.Dec. 879, 400 N.E.2d 16.) Plaintiff made no such showing in this case.

[8] Therefore, summary judgment for defendant was proper. The water in the nuclear power plant was a continuation of a natural accumulation. There was no evidence presented that Commonwealth Edison did anything to aggravate the condition. To require an owner of a construction site to follow workmen around and immediately clean up any melting snow, ice or water that had been brought in from the outside would be too high a burden.

Affirmed.

WHITE and GREIMAN, JJ., concur.

217 Ill.App.3d 958
578 N.E.2d 37

FISTER/WARREN, successor in interest to Charles L. Fister and Associates, Inc., a corporation; Charles L. Fister and Robert J. Warren, Plaintiffs–Appellants/Counter–Defendants–Appellees,

v.

BASINS, INC., a Wyoming corporation, and Georgia Marble Company, a Georgia corporation, Defendants–Appellees/Counter–Plaintiffs–Appellants.

Nos. 1–90–2260, 1–90–2882.

Appellate Court of Illinois,
First District, Sixth Division.

July 12, 1991.

Rehearing Denied Aug. 30, 1991.

Stock sellers brought action against buyer of corporation and corporation, seek-