

**NOTICE**

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2016 IL App (4th) 150336-U

NO. 4-15-0336

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

May 13, 2016  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

MARY YARBOROUGH, Individually and as a	)	Appeal from
Special Administratrix of the Estate of ERIC M.	)	Circuit Court of
JONES,	)	Sangamon County
Plaintiff-Appellee,	)	No. 08L176
v.	)	
THE CITY OF SPRINGFIELD,	)	Honorable
Defendant-Appellant.	)	John P. Schmidt,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.  
Presiding Justice Knecht and Justice Pope concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court reversed and remanded, finding the trial court abused its discretion in admitting an internal policy which did not show a breach of duty.

¶ 2 In July 2008, plaintiff, Mary Yarborough, filed a wrongful death suit on behalf of decedent, Eric M. Jones, her son. Plaintiff's second amended complaint named the City of Springfield as the sole defendant. The suit arose from Jones's July 14, 2007, death by drowning at a public beach at Lake Springfield (the beach). In February 2015, a jury found defendant liable and returned a verdict in favor of plaintiff.

¶ 3 On appeal, defendant argues (1) the trial court erred in (a) admitting evidence of defendant's internal rules regarding lifeguard placement at the lake; (b) refusing defendant's proffered limiting instruction, which informed jurors the internal rules regarding lifeguard placement did not define the scope of defendant's duty of care; (c) admitting irrelevant evidence

of an inapplicable emergency-action plan; and (d) refusing defendant's jury instruction regarding plaintiff's failure to call decedent's eyewitness relatives; and (2) the jury's determination of proximate cause and the verdict were against the manifest weight of the evidence.

¶ 4

## I. BACKGROUND

¶ 5 In July 2008, plaintiff filed a wrongful death action against City Water Light and Power (CWLP) and the City of Springfield. Prior to trial, plaintiff filed a second amended complaint, naming the City of Springfield as the sole defendant. Count I alleged defendant acted willfully and wantonly in failing to supervise a portion of the swimming area, "in violation of this [d]efendant's own mandatory supervision policy," and in failing to train the lifeguards in proper supervision. Count II alleged the lifeguards acted negligently in the manner in which they responded to the emergency. During the trial, count II was amended by interlineation to allege willful and wanton conduct.

¶ 6

### A. Trial Testimony

¶ 7

#### 1. *Michael Jones*

¶ 8 Michael Jones, decedent's brother, testified the two siblings went to the beach on July 14, 2007, with their cousins and friends. Their cousin, Marciano (Marty), was going to teach Michael and decedent to swim. When the group got to the beach, they went through the locker rooms and straight into the water. Marty "wasn't a real good swimmer, but he knew how to swim." Michael testified he spent "about a minute or two" with Marty trying to learn how to swim. According to Michael, decedent spent "a minute" with Marty trying to learn how to swim.

¶ 9

Michael testified the group was standing in a circle in the water past the buoy line. Michael, who was six feet tall, was standing on his "tippy toes" when he lost his balance and slipped into "a hole or something." Decedent, who was a few inches taller than Michael, tried to

grab Michael and slipped into the deeper water as well. Michael stated, "[a]fter we was [sic] in the water, we was [sic] trying to get some air off of each other's shoulders." Michael then felt someone—who turned out to be Marty—push him toward shallower water. According to Michael, he was choking and spitting water when he regained his footing and surfaced.

¶ 10 Michael called to the lifeguard, who asked if decedent was really in the water and whether decedent knew how to swim. In response, Michael told the guard decedent could not swim and pointed to bubbles he saw in the water a few feet away. According to Michael, the lifeguard told Michael and his companions to get out of the water. The lifeguard then entered the water but went past where Michael pointed. Michael returned to the shore, where he continued "hollering and yelling at them [sic] to try to show him where my brother was at."

¶ 11 *2. Douglas England*

¶ 12 Plaintiff played a video of Douglas England's evidence deposition. England testified he was the utility property manager for CWLP in 2007. According to England, he did not hire any employees to work at the beach. His job was to ensure the beach employees had everything they needed on a daily basis, such as sunscreen and cleaning supplies. England was not involved in the hiring, training, or certification of the lifeguards. He kept copies of the lifeguards' certifications in his office.

¶ 13 According to England, the lifeguards rotated in 20- to 30-minute rotations. This allowed someone to always be on guard duty. The other guards could get out of the sun, cool off inside, eat lunch, swim, or play volleyball.

¶ 14 England testified regarding the missing-person emergency procedures followed by the lifeguards. According to England, the first priority was to clear the water. While the water was cleared, someone would also search the indoor facilities. A line search would also be

conducted. England further testified about a written emergency-procedure policy which was posted at the beach. According to the policy, three whistle blasts indicated "a true emergency[,] such as a lost child or a drowning patron. If this code is sounded all off-duty guards will report to the area of the whistle. Guards on duty will remain at their stations and point to the area." In the event of a missing child, the procedures provided for a search of the beach and indoor facilities before clearing the water and initiating a line search.

¶ 15 In June 2007, England received an e-mail documenting a phone call to the mayor's office, reporting the beach had 1 lifeguard watching 52 children in the water, and 1 guard in the deep end with his back to the children. England printed this e-mail out and wrote the following handwritten note to the beach managers:

"I would hope that this is not accurate. Any time there are patrons on the diving board, there must be a guard in that area. If patrons are on the slide, there must be a guard in that area. If patrons are in the mid area, there must be a guard in that area. Whether there is one person or more, guards must be on duty in any area patrons are using. I have pointed this out to managers in the past. Please make certain that this type of complaint does not occur again."

According to England, he made copies of this memorandum and distributed them to the beach managers. The memorandum reflected a policy that had been in place as long as England had been the utility property manager. This "long[-]standing policy of supervision" was repeated numerous times by plaintiff's counsel.

¶ 16 England testified the Illinois Department of Public Health (IDPH) regulations required 1 lifeguard per 100 swimmers. However, England testified, "[w]e don't rely on the one

per hundred ratio, we feel that it's too lax." According to England, the IDPH rules allow one lifeguard to supervise both the diving area and the mid area. He stated the IDPH rules were minimum standards in order for the beach to be certified to be open to the public.

¶ 17 *3. Denis Caveny*

¶ 18 Denis Caveny testified in his video evidence deposition he was a certified lifeguard at the beach in July 2007. Caveny's testimony is largely consistent with that of the other lifeguards regarding the fitness test and lack of onsite training. According to Caveny, the lifeguard in the mid area chair was responsible for watching the diving area and the swimmers in the mid area. Caveny testified the guard in the mid area chair would watch the swimmers go up to the diving board, go off the diving board, and swim away. According to Caveny, his lifeguard training taught him to use the "10/10" rule of supervision, which requires a guard to look at every area every 10 seconds. The 10/10 test was a standard and accepted form of supervision and Caveny always tried to abide by it.

¶ 19 Caveny testified he had never seen England's handwritten memorandum before. Caveny had no memory of any manager relaying the subject of the memorandum to him.

¶ 20 Caveny testified the emergency action plan (EAP) required blowing a whistle to alert the other guards, clearing the water, and searching the last place a missing person was seen. The other guards would then form a line search. A missing person search where the person's whereabouts are unknown would require the guards to perform a line search, but not a specific search of a location in the water.

¶ 21 Caveny testified decedent was an average-looking black male in his middle to late teens. According to Caveny, decedent was standing in a circle with a group of three to six boys, splashing around. The group was forward and to the right of the mid area lifeguard chair.

Caveny was watching a child on the diving board at the time decedent went missing. According to Caveny, one of the males from the group got his attention and said, "Our friend is missing," or, "He went under water and he can't swim." The patron indicated to Caveny that decedent had gone under in the same area where the boys had been standing in a circle.

¶ 22 According to Caveny, he got in the water and went to the area where the boys indicated decedent was last seen. Caveny performed a grid search, which was a pattern instead of swimming around randomly. Caveny asked the boys if they were sure he was searching the right area and performed a second grid search when the boys confirmed he had the correct search area. When he surfaced from the second search, Caveny told the other lifeguard, Chase Gobble, to clear the water. After Caveny surfaced the second time, the boys said they saw bubbles out by the seawall and pointed farther out into the lake. Caveny went farther out, where the boys pointed, and continued searching.

¶ 23 *4. Chase Gobble*

¶ 24 Chase Gobble testified in his video evidence deposition he was a certified lifeguard at the beach in 2007. According to Gobble, the lifeguards did in-service trainings at the beach throughout the summer. Gobble testified the chair just past the buoy line was used to supervise the diving area and the mid area. According to Gobble, the lifeguard chair on the diving board platform was never used. Gobble's testimony regarding the EAP for a person missing in the water was consistent with the other lifeguards' testimony.

¶ 25 On the day of the drowning, Caveny alerted Gobble there was a problem and the water needed to be cleared. Gobble could not recall if he or Caveny blew the whistle, but he knew someone did blow a whistle. Gobble used a megaphone to clear the patrons out of the water. After the water was cleared, Gobble testified, "I remember whoever the kids were that

were talking to [Caveny] told us that he was out by the wall. And we went out there, trying to, you know, submerge to see what we could find, because that's where we were told where he was at." According to Gobble, all the lifeguards searched in the water out by the seawall before forming the line search.

¶ 26 On cross-examination, Gobble testified he had never seen England's handwritten memorandum before. Additionally, Gobble indicated he was never informed of the policy outlined in the memorandum.

¶ 27 *5. Brittany Young*

¶ 28 Brittany Young testified she was a certified lifeguard and worked at the beach in 2007. According to Young, she had to complete a fitness test prior to beginning the lifeguard position at the beach. To complete the test, Young jumped from the balcony of the beach house onto a sand pile, ran down the beach, swam out to the seawall, and returned to the beach. The test had to be completed within three minutes to ensure the lifeguards were capable of responding to an emergency in the water. Young did not recall any other test or site-specific training prior to beginning work at the beach.

¶ 29 Young testified her certifications through StarGuard and the American Red Cross taught her about EAPs. According to Young, EAPs are typically written documents, which outline the steps to be taken in an emergency. Young never saw a written EAP when she was employed at the beach. Young also never saw England's handwritten memorandum and was never informed of the contents of the memorandum.

¶ 30 Young testified, as a head lifeguard, she took water samples, did in-service training, and organized the guard rotations. On a typical day, there would be 12 to 14 lifeguards working. According to Young, the lifeguards at the beach never used the chair on the diving

platform because the diving board obstructed the guards' view of patrons jumping in the water. The lifeguards usually monitored the diving area and the deep end from a stand near the buoy line in the "mid area." Young testified the lifeguards had to watch patrons climb the ladder, jump off the diving board, and return to the surface. According to Young, it was not difficult to scan and monitor the deep end and the diving area.

¶ 31 Young further testified as to her personal memory of what steps to take in an emergency at the beach. If a person approached and reported another person missing in the water, Young would first ask questions to determine when and where the missing person was last seen. According to Young, once a lifeguard determined a person was missing in the water, the guard would blow a whistle to start the EAP. The water would be cleared of swimmers. Once the other guards responded to the whistle, they would form a line and begin a line search starting with the last point the missing person was seen.

¶ 32 At the time of decedent's drowning, Young was on the beach using a shovel to remove snakes. Young heard Chase Gobble, another lifeguard, on a megaphone, ordering everyone out of the water. His tone alarmed her, and Young dropped the shovel and ran to the water. After helping clear the water, Young was waist deep in the water when she saw a woman on shore frantically waving her arms. It was Young's impression the woman on shore had information about where the missing person was last seen. According to Young, the woman told her the missing person was out by the seawall. Once there, she and Gobble began diving and searching the bottom.

¶ 33 At some point, Young realized she had not heard a whistle and began blowing her whistle in three short blasts to indicate an emergency. The other lifeguards responded and Young attempted to have them form a line. The beach was crowded, chaotic, and noisy. The



other guards entered the water and began searching randomly for the missing person.

Eventually, a patron managed to form a line to comb the water and decedent's body was found within a minute to a minute-and-a-half.

¶ 34

#### 6. *Cassie Kovalski*

¶ 35 Cassie Kovalski testified she worked as a certified lifeguard at the beach during the summers of 2006 and 2007. According to Kovalski, the City of Springfield gave her a test after she was hired as a lifeguard. Kovalski testified, "[t]he test was what we would do if there was an emergency or what would happen if there was any incident. So we had to jump off of the balcony of the beach house into the sand pile, which is a safe place to jump, run out into the water, and swim all the way to the seawall and back in a certain amount of time." Kovalski further testified the lifeguards had another exercise where they had to tread water and pass a brick around above their heads.

¶ 36

Kovalski testified the EAP for a missing person required the lifeguard to blow a whistle. According to Kovalski, the guards responding to the whistle would then clear the water and form a line to search for the missing person. Kovalski testified she had never been trained in actually performing a line search, but she had been taught how to do one and felt the procedure was self-explanatory. Additionally, Kovalski did not recall ever seeing the handwritten memorandum from England outlining the supervision policy for the various swimming areas.

¶ 37

Kovalski testified, on the day of the drowning, she was in the lifeguard room on the first floor of the beach house. She and another lifeguard noticed people getting out of the water and went to the water line. On cross-examination, Kovalski said, "when I was coming down the beach, I saw people pointing[,] saying [']he's out there,['] and then I saw where the guards were, so I went to them."

¶ 38 According to Kovalski, she went into the water to talk to the guards she saw. Kovalski testified she realized there were only four or five guards in the water and she could not recall hearing a whistle, so she blew her whistle. This occurred approximately two or three feet from the seawall.

¶ 39 Kovalski testified she performed a few rescue dives. At that time, all she knew was the missing boy could not swim. She did not know the boy's last known location, his age, his size, or his race. According to Kovalski, she did not know how long it took for the line search to form, but she estimated 10 minutes had passed.

¶ 40 *7. Alexandra Nutt*

¶ 41 Alexandra Nutt testified she was a certified lifeguard working for the beach in 2007. Nutt's testimony was largely consistent with that of the other lifeguards. According to Nutt, the lifeguard chair in the mid area was utilized to supervise the entire deep end, including the diving area. If the lake were extraordinarily busy, another lifeguard would be present, floating in the water. According to Nutt, the lifeguards were told the missing person was in the deep end, so the guards went into the water. The guards were each in charge of a specific area and were doing systematic searches, consistent with Nutt's lifeguard training.

¶ 42 *8. Cassandra Gurnsey-Hopkins*

¶ 43 Cassandra Gurnsey-Hopkins testified she was a certified head lifeguard during 2007, when she worked at the beach. Gurnsey-Hopkins' testimony was consistent with the other lifeguards with respect to the fitness test and EAP procedures. She also never received a copy of England's handwritten memorandum.

¶ 44 According to Gurnsey-Hopkins, she heard whistle blasts the day of the drowning, despite being in the air-conditioned breakroom. When she arrived at the beach, she saw Gobble

talking to a group of people. The group told Gurnsey-Hopkins they were associated with the decedent, the decedent could not swim, and the last known sighting was bubbles out by the seawall. Gurnsey-Hopkins testified she organized a bottom search out in the deep water by the seawall. She explained, in deep water, lifeguards "have to stay in a line in a 2-foot vicinity and do either what they call a pencil search or you can dive down and search with your hands." A pencil search involved diving down feet first.

¶ 45 At some point, Gurnsey-Hopkins called off this bottom search and initiated the line search from the shoreline. Gurnsey-Hopkins testified the line search moved into deeper water and her foot made contact with decedent's body on her third pencil dive. Gurnsey-Hopkins was 5'9" and she estimated the water was two feet over her head.

¶ 46 *9. Travis Woodrum*

¶ 47 Travis Woodrum testified he was at the beach for a birthday party on the day of the drowning. Travis estimated approximately 50 people were at the beach when he arrived around 12:30 p.m. The beach got busier as the afternoon wore on and Travis had to wait in line to use the diving board. Travis and his wife, Darcy Woodrum, were in the mid area near the buoy line when they noticed a large group arrive at the beach. The group "ran down to the beach, jumped in the water[,] and started splashing and carrying on." The group stood out because their splashing disturbed Travis and Darcy. Travis observed the boys dunking each other under the water.

¶ 48 Travis and his companions went to the parking lot to have a snack. Through a chain-link fence, Travis noticed people suddenly exiting the water. Travis had an unsettling feeling and sprinted down the road, through the beach house, and back down to the beach. According to Travis, everyone on the beach was staring out at the water. Someone confirmed a

person was missing in the water. Travis noticed the group of boys who splashed him earlier talking to a lifeguard. He overheard the boys telling the lifeguard the missing person was last seen just to the right of the lifeguard chair at the buoy line.

¶ 49 Travis testified, "I started talking amongst me and a couple other gentlemen that were there on the side of the beach and just wondering what was going to be done, what everybody was doing, because nothing was being done." According to Travis, the men ran into the water where two lifeguards were standing. One of the lifeguards suggested they lock hands and sweep the bottom of the lake. Travis estimated 20 people did this, starting before the buoy line and heading into deeper water. Travis and some others made it almost all the way to the seawall. According to Travis, decedent's body was found to the right of the guard chair of the buoy line, as the group of boys had indicated to the lifeguard on the beach.

¶ 50 *10. Darcy Woodrum*

¶ 51 Darcy Woodrum testified she was at the beach with her husband on July 14, 2007. Her testimony was largely consistent with Travis's testimony. Darcy testified she followed Travis from the parking lot back to the beach when they noticed the commotion. According to Darcy, there was a female lifeguard still climbing down from the guard chair in the shallow end when Darcy reached the beach. By her estimation, Darcy and Travis stood on the beach for about five minutes and Darcy kept yelling at Travis to get into the water and help look for the missing person.

¶ 52 Darcy further testified she observed the lifeguards' activities when they were not at their stations. Some of the guards were playing beach volleyball. Others were swimming and doing flips in the water. Darcy remembered observing this behavior because she "got[] smart

with a group of the lifeguards about that [*sic*] they needed to start paying more attention to the kids."

¶ 53

11. *Thomas Ebro*

¶ 54

Thomas Ebro testified for plaintiff as an aquatic-safety expert. According to Ebro, lifeguard supervision requires the lifeguard to constantly scan the area where people are swimming "so no head goes unnoticed, unanalyzed for more than 10 seconds." Unlike a pool, a lifeguard at a lake must rely on the last point a swimmer was seen to monitor them due to the opacity of lakes. Ebro testified a lifeguard assigned to watch a diving board on a platform in a lake must exclusively monitor the diving board and not scan other swimming areas.

¶ 55

According to Ebro, there is a precise EAP for lifeguards to follow when a swimmer goes missing in a lake setting. The EAP is triggered when a lifeguard "diagnoses" a swimmer as missing for 10 seconds or someone brings a missing swimmer to the guard's attention. The lifeguard should signal the emergency situation by blowing a whistle and then search the area the swimmer was last seen, as determined either by the guard or by the person reporting the missing swimmer. Upon hearing the emergency whistle, the other guards should report to the scene, clear the other swimmers out of the water, and conduct a line search. The other guards form a line, linking arms, and shuffle forward through the water toward the lifeguard searching the last point seen. The EAP must be completed within three minutes following the 10-second diagnosis. The EAP has been taught in the lifeguard industry since at least the 1980s.

¶ 56

The beach at Lake Springfield has lifeguard stands in various locations. There are three principal swimming areas: the "shallow end," which extends from the shore line to a buoy line that divides the swimming area at the 3-foot mark; the "mid area," from the 3-foot buoys to

the diving area; and the "diving area," where the water was 11 feet deep. On the day of decedent's death, a lifeguard, Denis Caveny, was stationed in a chair located in the mid area, responsible for monitoring the mid area and the diving area. A second guard, Chase Gobble, was stationed in a chair in the shallow end.

¶ 57 Ebro testified he recalled a handwritten memorandum written by England. The memorandum emphasized each of the three swimming areas was to be supervised by a lifeguard when swimmers were present. In Ebro's opinion, the beach was "operated recklessly" by having only two lifeguards on duty. Ebro testified:

"[Decedent's] death was because of the egregious recklessness of the \*\*\* city \*\*\* because of the standard that was violated. \*\*\* That area that was unguarded where the boys were needed to be guarded. It was internal policy. It was certainly the consensus of every training organization, lifeguards[,] and anyone operating a facility you must guard. \*\*\* And then to have—have that detection—have that supervision not take place, that in my mind raises way high above simply a mistake. That to me is willful. That to me is reckless."

Ebro further testified the lifeguard delayed in signaling the EAP and deviated from the place decedent's brother indicated decedent was last seen.

¶ 58 **B. Jury Instructions**

¶ 59 During the jury instruction conference, the trial court refused defendant's offered jury instruction which read: "The evidence of concerning [sic] [p]laintiff's [e]xhibit 1, the e-mail from Doug England, is to be considered by solely [sic] as it relates to whether the lifeguards

were guilty of willful and wanton conduct, but is not a evidence [sic] as to a standard of care or duty the life guards were required to follow. It should not be considered for any other purpose." The court noted standard of care was already included in the jury instructions. The court found defendant's instruction confusing and refused it.

¶ 60 C. Verdict

¶ 61 Following trial, the jury returned a verdict in favor of plaintiff on both counts. The jury returned damages in the total amount of \$750,000. The jury found decedent's contributory negligence accounted for 30% of the damages and reduced the damages award to \$525,000.

¶ 62 This appeal followed.

¶ 63 II. ANALYSIS

¶ 64 On appeal, defendant argues (1) the trial court erred in (a) admitting evidence of defendant's internal rules regarding lifeguard placement at the lake; (b) refusing defendant's proffered limiting instruction, which informed jurors the internal rules regarding lifeguard placement did not define the scope of defendant's duty of care; (c) admitting irrelevant evidence of an inapplicable EAP; and (d) refusing defendant's jury instruction regarding plaintiff's failure to call decedent's eyewitness relatives; and (2) the jury's determination of proximate cause and the verdict were against the manifest weight of the evidence.

¶ 65 Defendant contends the trial court abused its discretion in admitting evidence of England's handwritten memorandum outlining the policy regarding the number of lifeguards on duty at the beach. Specifically, defendant asserts the court erred in admitting the memorandum as evidence of "whether or not the defendant violated the ordinary standard of care imposed by law." Defendant argues the policy outlined in the memorandum does not establish the duty

defendant owed plaintiff. Rather, defendant argues the duty owed to the decedent derived from IDPH regulations requiring one certified lifeguard per 100 bathers. 77 Ill. Adm. Code 820.300(b)(4)(A) (2007).

¶ 66 Plaintiff agrees the internal rules outlined in the memorandum do not impose a duty on defendant. However, plaintiff contends the internal rules were admissible as evidence of a breach of duty—*i.e.*, as evidence of willful and wanton conduct in failing to supervise the "mid area." Plaintiff further asserts defendant's duty is not in question. Nowhere in its three-page response to this claim does plaintiff attempt to clarify what duty defendant owed plaintiff.

¶ 67 A reviewing court will not disturb a trial court's ruling on a motion *in limine* addressing the admission of evidence absent a clear abuse of discretion. *Estate of Nicholls v. Nicholls*, 2011 IL App (4th) 100871, ¶ 33, 960 N.E.2d 78.

¶ 68 The pertinent IDPH regulation requires public swimming facilities to provide lifeguards if unsupervised persons under the age of 16 are allowed. 77 Ill. Adm. Code 820.300(b) (2007). Facilities that do not provide lifeguards must post signage warning patrons no lifeguards are on duty and prohibiting unsupervised swimmers under the age of 16. The regulation further provides the following relevant minimum number of lifeguards (when required):

"One lifeguard per 100 bathers or 2,000 square feet of water surface area, whichever will result in the smaller number of lifeguards. All areas of the pool must be visible to a lifeguard.  
\*\*\* A lifeguard shall not simultaneously guard more than one pool unless the areas under surveillance can be continuously monitored with a clear[,] unobstructed view and immediate



assistance can be rendered if needed." 77 Ill. Adm. Code  
820.300(b)(4)(A) (2007).

Thus, the legislature and IDPH have exercised their judgment in creating a duty for a public swim facility operator, if it chooses to provide lifeguards, to adhere to this ratio.

¶ 69 As a general rule, "[v]iolation of self-imposed rules or internal guidelines \*\*\* 'does not normally impose a legal duty, let alone constitute evidence of negligence, or beyond that, willful and wanton conduct.'" *Wade v. City of Chicago*, 364 Ill. App. 3d 773, 781, 847 N.E.2d 631, 639 (2006) (quoting *Morton v. City of Chicago*, 286 Ill. App. 3d 444, 454, 676 N.E.2d 985, 992 (1997)); see also *Floyd v. Rockford Park District*, 355 Ill. App. 3d 695, 702, 823 N.E.2d 1004, 1011 (2005) ("[A] public entity's violation of its own internal rules does not constitute proof of negligence, much less willful and wanton conduct."); *Young v. Forgas*, 308 Ill. App. 3d 553, 566, 720 N.E.2d 360, 369 (1999) ("Internal rules and procedures \*\*\* do not impose a legal duty upon municipal entities and their employees.").

¶ 70 Plaintiff directs this court's attention to numerous cases to support the argument a defendant's rules and regulations can "always" be used as evidence of misconduct. The majority of the cases cited by plaintiff involves claims against medical providers and, thus, are distinguishable. See *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 331-32, 211 N.E.2d 253, 257 (1965) (determining licensing regulations for hospitals, accreditation standards, and its own bylaws were admissible, in addition to evidence of custom, in determining the duty owed by a hospital); *Advincula v. United Blood Services*, 176 Ill. 2d 1, 32-33, 678 N.E.2d 1009, 1024-25 (1996) (noting *Darling* expanded hospitals' negligence liability and noting: "Whether a hospital is reasonably careful may be shown by a wide variety of evidence, including \*\*\* hospital bylaws \*\*\*."); *Ohligschlager v. Proctor Community Hospital*, 55 Ill. 2d

411, 417, 303 N.E.2d 392, 396 (1973) (finding the instruction furnished by a drug manufacturer provided proof of the proper professional standard of care ordinarily shown by expert testimony); *Johnson v. St. Bernard Hospital*, 79 Ill. App. 3d 709, 717-18, 399 N.E.2d 198, 205 (1979) (finding hospital's bylaws imposed a duty on the hospital to ensure an orthopedic consultation is done when requested and did not require the hospital administration to engage in the practice of medicine).

¶ 71           Also in support, plaintiff cites *Hudson v. City of Chicago*, 378 Ill. App. 3d 373, 881 N.E.2d 430 (2007). The court acknowledged that "countermanding a police department general order does not constitute negligence or willful and wanton conduct *per se*." *Id.* at 405, 881 N.E.2d at 456. However, the court in *Hudson* found that the violation of a police department order could be considered by the jury in reaching a determination of willful and wanton conduct. *Id.* at 405, 881 N.E.2d at 456-57. The *Hudson* court based its reasoning on a cleverly edited quote from *Morton* in finding a " 'violation of self-imposed rules or internal guidelines \*\*\* does not \*\*\* alone constitute evidence of negligence, or beyond that, wilful [*sic*] and wanton conduct.' " *Id.* In fact, the *Morton* court held, "Indeed, the violation of self-imposed rules or internal guidelines, such as [the rule at issue], does not *normally impose a legal duty*, let alone constitute evidence of negligence, or beyond that, wilful [*sic*] and wanton conduct." (Emphasis added.) *Morton*, 286 Ill. App. 3d 444, 454, 676 N.E.2d 985, 992. As the case does not cite authority supporting its position, we find *Hudson* unpersuasive.

¶ 72           Defendant relies on *Blankenship v. Peoria Park District*, 269 Ill. App. 3d 416, 422-23, 647 N.E.2d 287, 291 (1994). *Blankenship* involved a decedent's estate bringing suit against the Peoria Park District, alleging the defendant's failure to supervise a swimming pool caused the decedent's death. *Id.* at 418, 647 N.E.2d at 288. On appeal, the court found the

defendant "owed a duty 'to take precautions for the safety of [the] patrons' of the swimming pool." *Id.* at 421, 647 N.E.2d at 290 (quoting *Cope v. Doe*, 102 Ill. 2d 278, 464 N.E.2d 1023 (1984)). In defining the scope of that duty, the court relied, in part, on the administrative regulations requiring lifeguards only at swimming facilities with unsupervised swimmers under the age of 16. *Id.* at 422, 647 N.E.2d at 291. Thus, the court held the defendant's "common law duty to supervise the patrons of its swimming pool [did] not extend to adult swimmers such as the decedent." The court also rejected the claim the defendant's internal policy requiring one lifeguard on duty at all times created a duty. "While the violation of a *statute* or *ordinance* designed to protect human life or property is *prima facie* evidence of negligence [citations], 'a legal duty is normally not established through rules \*\*\* or internal guidelines,' [citation], and '[t]he failure to comply with self-imposed regulations does not necessarily impose upon municipal bodies and their employees a legal duty' [citation.]" (Emphases in original.) *Id.*

¶ 73 In the instant case, it is uncontroverted defendant was in compliance with the IDPH regulation requiring one lifeguard per 100 swimmers. Defendant contends admission of the handwritten memorandum reflecting the internal policy, which directly contradicts the statutory requirements, effectively imposed a heightened duty on defendant. According to defendant, its internal policy requiring (at the time of the accident) three lifeguards did not create a legal duty to have three guards on duty. See *Young v. Forgas*, 308 Ill. App. 3d 553, 566, 720 N.E.2d 360, 369 (1999).

¶ 74 The rationale behind plaintiff's position appears to be that one should characterize the duty as requiring defendant to provide adequate supervision by designating one lifeguard to focus solely on the diving board and another to focus solely on those in the water in the deep end. That distribution of lifeguards would allow for the supervision of the diving board

in accordance with Ebro's expert testimony on the standard of care for diving board supervision in a lake. We note plaintiff did not so characterize the duty in the three pages devoted to this issue in her brief. Plaintiff asserts the memorandum demonstrates a breach. When viewed in this light, the memorandum could arguably show breach if it spoke to willful and wanton actions by the lifeguards in ignoring the directive. However, none of the lifeguards testified they had seen the handwritten memorandum or had ever been informed of its contents. Moreover, the memorandum did not address the adequacy of supervision or the techniques for supervising the diving board or swimmers. Nor did it address line searches or EAP protocol.

¶ 75 We conclude the memorandum consisted of evidence of an inadmissible internal policy. We agree with defendant that plaintiff relied heavily on the internal memorandum, raising the issue with almost every single witness as well as in opening and closing argument. Moreover, plaintiff's expert witness characterized the violation of this policy as "willful" and "reckless." This reliance denied defendant a fair trial and necessitates a new trial. Accordingly, we reverse and remand for further proceedings.

¶ 76 III. CONCLUSION

¶ 77 For the reasons stated, we reverse and remand.

¶ 78 Reversed and remanded.