

Appellate Court of Illinois, Third District.
 Robert Charles KLOPP, Plaintiff-Appellant,
 v.
 COMMONWEALTH EDISON COMPANY, De-
 fendant-Appellee.
 Robert Charles KLOPP, Plaintiff-Appellant,
 v.
 The PEOPLES GAS, LIGHT & COKE COMPANY,
 Defendant-Appellee.
 Marvin ROZNER, Plaintiff-Appellant,
 v.
 NORTHERN ILLINOIS GAS COMPANY, Defen-
 dant-Appellee.
Nos. 76-510 to 76-512.

Nov. 9, 1977.

Customers of gas and electric utilities filed suits seeking injunctive and monetary relief on allegations that delayed payment charges included in each defendant's rate schedule were in essence a charge for interest which was in excess of the maximum allowed under Illinois law. The Circuit Court, Cook County, Sheldon Brown, Francis T. Delaney and Daniel A. Covelli, JJ., dismissed the actions on the ground that exclusive jurisdiction over the subject matter of the dispute was vested in the Illinois Commerce Commission, and plaintiffs appealed. The Appellate Court, McNamara, J., held that the trial court's conclusion was correct.

Orders affirmed.

West Headnotes

Public Utilities 317A 181

[317A](#) Public Utilities

[317AIII](#) Public Service Commissions or Boards

[317AIII\(C\)](#) Judicial Review or Intervention

[317Ak181](#) k. Jurisdiction of Courts in Advance of or Pending Proceedings Before Commission.

[Most Cited Cases](#)

(Formerly 317Ak191/2)

Utilities' customers' claims that delayed payment charges included in utilities' rate schedules constituted charges for interest in excess of maximum allowable

under Illinois law were, in essence, claims that customers were overcharged by utilities, and exclusive jurisdiction over such matter was vested in Illinois Commerce Commission; exhaustion of such administrative remedies would be required despite contentions that delayed payment charges had already been expressly approved by Commission and that Commission was unable to adjudicate class action. S.H.A. ch. 74, § 1 et seq.; ch. 111 2/3, §§ 1 et seq., 10.16, 64, 76; ch. 121 1/2, §§ 311-317; S.H.A.Const.1970, art. 6, § 9.

****823 ***912** Isham, Lincoln & Beale, Mayer, Brown & Platt, J. M. Wells and P. E. Goldstein, Chicago, for appellees.

***672** Philip H. Corboy & Asso., Sidney Z. Karasik, Chicago, for appellants.

McNAMARA, Justice:

The plaintiffs, Robert Charles Klopp and Marvin Rozner, purporting to represent themselves and all others similarly situated, filed separate suits seeking injunctive and monetary relief against the defendants, Commonwealth Edison Company, The Peoples Gas, Light & Coke Company and Northern Illinois Gas Company. The plaintiffs appeal from orders of judges of the circuit court of Cook County dismissing their respective amended complaints. The three class actions have been consolidated for this appeal.

The primary claim common to the three actions is that the delayed payment charge included in each defendant's rate schedule is in essence a charge for interest which is in excess of the maximum allowed under the Illinois Interest Statute. (Ill.Rev.Stat.1975, ch. 74, par. 1 et seq.) In each instance, the trial court dismissed the complaint on the grounds that exclusive jurisdiction over the subject matter of the dispute was vested in the Illinois Commerce Commission (hereinafter the "I.C.C."), and because the delayed payment charge was not "interest" within the meaning of the interest statute.

***673** Each complaint also alleged violations of the Public Utilities Act (Ill.Rev.Stat.1975, ch. 1112/3, par. 1 et seq.) and the Uniform Deceptive Trade Practices

Act (Ill.Rev.Stat.1975, ch. 1211/2, pars. 311-317). The trial judges dismissed these counts for their failure to state a cause of action. Plaintiffs, however, have not appealed the orders of dismissal as to these counts.

In his suit against Commonwealth, the plaintiff Klopp alleged that during 1973 and 1974 he had purchased and paid for electricity supplied by Commonwealth. During that period some of the bills tendered by Commonwealth were paid after the due dates indicated on the bills. As a result, plaintiff was assessed and subsequently paid an additional amount called a "delayed payment charge" in accordance with Commonwealth's schedule of rates for "General Service". The applicable portion of this schedule provides:

"Delayed payment charge.

A delayed payment charge determined in accordance with the formula set forth below shall be applied to the amount of any bill rendered. . . if such bill is not paid within the net payment period, the expiration date of which appears on the bill:

8% Of the first \$10.00 or less per month of any bill

824 *913 5% Of any additional amount."

Plaintiff Klopp alleged that these late charges were, in fact, interest and, as such, were in excess of the maximum allowable under the statute. Plaintiff prayed for an injunction against the continued collection of this delayed payment charge and also for double damages for the collection of usurious interest as permitted under the statute. Klopp specifically charged that the cause of action did not involve a claim for reparations pursuant to Section 72 of the Public Utilities Act (Ill.Rev.Stat.1975, ch. 1112/3, par. 76.) Under that provision, the I.C.C. has the exclusive jurisdiction to hear and determine claims that rates charged by a utility are excessive. Klopp also alleged that no adequate remedy at law existed which would prevent Commonwealth's continued collection of the late payment charge. He charged that the I.C.C. had no jurisdiction to hear claims and assess damages under the interest statute, and that the I.C.C. expressly had condoned the collection of this charge by Commonwealth.

Klopp pleaded substantially similar facts in his com-

plaint against Peoples Gas as he had in the Commonwealth complaint. The allegations of Rozner's complaint against Northern Illinois were virtually identical to the other two complaints.

As we have noted, the three judges dismissed the complaints. This appeal follows.

We first consider the contention of all three defendants that the subject matter of the complaints rests within the exclusive jurisdiction of the *674 I.C.C. If the trial judges were correct in so holding, we need not reach the issue of whether the delayed payment charges constituted interest.

Under Section 60 of the Public Utilities Act (hereinafter the "P.U.A."), Ill.Rev.Stat.1975, ch. 1112/3, par. 64, the I.C.C. is empowered to conduct hearings concerning any matters relating to public utilities. Section 72 of that act authorizes the remedy of reparation to any customer who establishes that a utility has charged an excessive or unjustly discriminatory amount for its commodity or service. Where the claim relates to a rate charged by a utility, as defined by Section 10.16 of P.U.A., this remedy consistently has been held to be exclusive. See [Gowdey v. Commonwealth Edison Co. \(1976\), 37 Ill.App.3d 140, 345 N.E.2d 785](#); [Dvorkin v. Illinois Bell Telephone Co. \(1975\), 34 Ill.App.3d 448, 340 N.E.2d 98](#); [Cummings v. Commonwealth Edison Co. \(1966\), 64 Ill.App.2d 320, 213 N.E.2d 18](#).

Plaintiffs correctly point out that courts of this state have distinguished between claims for reparation under the P.U.A. and common law actions for compensatory and punitive damages. ([Malloy v. Illinois Bell Telephone Company \(1973\), 12 Ill.App.3d 483, 299 N.E.2d 517](#); [Gowdey v. Commonwealth Edison Co.](#)) Plaintiffs further contend that the jurisdiction of the I.C.C. over the establishment of rates does not include authority to approve the assessment of a late charge by a public utility since such a charge is not within the definition of "rate" as provided in the P.U.A. Section 10.16 provides:

" 'Rate' includes every individual or joint rate, fare, toll, charge, rental or other compensation of any public utility . . . or any schedule or tariff thereof, and any rule, regulation, charge, practice or contract relating thereto."

However, the **essential nature** of the relief requested and not the label attached to it will determine whether the action must be commenced before the I.C.C. See *Cummings v. Commonwealth Edison Co.*

The P.U.A. represents a comprehensive scheme for the regulation of public utilities by the I.C.C. Our supreme court has held that the act supersedes the common law liability of the utilities as far as rates and unreasonable discrimination are concerned. ([Terminal R.R. Ass'n. v. Utilities Com. \(1922\), 304 Ill. 312, 136 N.E. 797.](#)) In view of the broad definition of the word "rate" found in the act and the clear legislative intent to vest exclusive jurisdiction over such matters in the I.C.C., we find that plaintiffs' claims are, in essence, that they were overcharged by the defendants. The proper form of relief, if any, is reparation under the act.

Support for this conclusion is found in ****825****[914Cummings v. Commonwealth Edison Co. \(1966\), 64 Ill.App.2d 320, 213 N.E.2d 18.](#) Plaintiff there filed a ***675** class action alleging that the utility had paid excessive prices for equipment purchased from companies which had conspired to set the prices of the equipment in violation of federal anti-trust laws. Plaintiff alleged that these overcharges had been included in the utility's property and plant accounts which constituted a principal factor in determining the rates and charges paid by plaintiff. Plaintiff claimed that the class was entitled to a refund out of the money paid to the utility by the companies as a result of civil litigation. Affirming the trial court's dismissal of the complaint, the court stated [at p. 324, 213 N.E.2d at p. 21](#):

"It is apparent that the sole basis for plaintiff's claim, irrespective of the label she chooses to employ, is that she and other customers were charged excessive rates for which she wants reparations."

So too, plaintiffs here essentially claim that the delayed payment charge is excessive. They do not take the position that any delayed payment charge is beyond the authority of a utility to assess, but urge that any such charge must bear a reasonable relation to the delinquent collection costs actually incurred by the utility. When so viewed, it is obvious that plaintiffs seek a refund and a reassessment of the reasonableness of the delayed payment charge. These functions are peculiarly within the jurisdiction of the I.C.C.

We do not accept plaintiffs' additional contention that initial resort to the I.C.C. would be futile. Generally exhaustion of administrative remedies is required before a plaintiff may resort to the courts ([Ill. Bell Telephone Co. v. Allphin \(1975\), 60 Ill.2d 350, 326 N.E.2d 737.](#)) Although there is an exception where any request for relief from the administrative agency would be futile, we find the exception inapplicable here. Plaintiffs argue that resort to the I.C.C. would be futile because the delayed payment charges had been expressly approved by the I.C.C. This contention overlooks the fact that any rate or charge challenged as excessive under the act has been expressly approved by the I.C.C. There is no reason to assume that the I.C.C. will not be receptive to plaintiffs' claim if, in fact, the delayed payment charge is unreasonable.

As further support for their argument that resort to the I.C.C. would be futile, plaintiffs point to the I.C.C.'s inability to adjudicate a class action. It should be noted that the commencement of a class action does not automatically invoke equitable jurisdiction. Where an individual plaintiff has no cause of action, it necessarily follows that any attempted class action also must fail. ([DePhillips v. Mortgage Associates, Inc. \(1972\), 8 Ill.App.3d 759, 291 N.E.2d 329.](#)) However this does not mean that plaintiffs, as a class, are left without a remedy. In fact, the record reveals that there is pending before the I.C.C. a complaint challenging Peoples Gas' delayed payment charges. (*Sabur et al. v. The Peoples Gas, Light & Coke Co., I.C.C. Docket No. 59141.*) In *Sabur*, the complainants have proposed ***676** changes in the delayed payment charge which would affect all the customers of Peoples Gas.

Plaintiffs also urge that the 1970 revision of the Illinois Constitution considerably broadened the original jurisdiction of the circuit courts. They point to the language of Article VI, Section 9: "Circuit Courts shall have original jurisdiction over all justiciable matters . . ." Plaintiffs maintain that this grant of jurisdiction is virtually unlimited as compared to the jurisdictional language contained in the 1870 Constitution. However, the language of the 1970 Constitution remains unchanged from the 1962 revision of the 1870 Constitution. It is clear from the cases decided after the effective date of the 1962 revision that neither the 1962 nor the 1970 amendments affected the statutory grant of exclusive jurisdiction to the I.C.C. See [Dvorkin v. Illinois Bell Telephone Co. \(1975\), 34](#)

370 N.E.2d 822
54 Ill.App.3d 671, 370 N.E.2d 822, 12 Ill.Dec. 911
(Cite as: 54 Ill.App.3d 671, 370 N.E.2d 822, 12 Ill.Dec. 911)

Page 4

[Ill.App.3d 448, 340 N.E.2d 98.](#)

For the reasons stated, the orders of the circuit court of Cook County dismissing plaintiffs' complaints are affirmed.

Orders affirmed.

JIGANTI and MCGILLICUDDY, JJ., concur.
Ill.App. 3 Dist., 1977.
Klopp v. Commonwealth Edison Co.
54 Ill.App.3d 671, 370 N.E.2d 822, 12 Ill.Dec. 911

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Appellate Court of Illinois,
 Third District.
 Johnnie FLOURNOY, Plaintiff-Appellant,
 v.
 AMERITECH, Defendants-Appellees.
 No. 3-03-0516.

July 9, 2004.
 Rehearing Denied Sept. 7, 2004.

Background: Former inmate filed a complaint against company that provided telephone service at prison that alleged fraud and negligence. The Circuit Court, Will County, [Richard J. Siegel](#), J., granted company's motion to dismiss. Former inmate appealed.

Holdings: The Appellate Court, [Barry](#), J., held that:
 (1) the Circuit Court had jurisdiction over former inmate's fraud and negligence claim against company that provided telephone service to prison;
 (2) former inmate adequately stated a cause of action for consumer fraud against company that provided telephone services to prison; and
 (3) the voluntary payment doctrine did not bar former inmate's consumer fraud claim against telephone company that provided telephone service to prison.

Reversed and remanded.

West Headnotes

[1] Public Utilities 317A 148

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(A\)](#) In General
[317Ak148](#) k. Exclusive and Concurrent Powers. [Most Cited Cases](#)
 Under the Public Utilities Act, the Illinois Commerce Commission has exclusive jurisdiction over complaints concerning excessive rates or overcharges by public utilities.

[2] Public Utilities 317A 148

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(A\)](#) In General
[317Ak148](#) k. Exclusive and Concurrent Powers. [Most Cited Cases](#)

Public Utilities 317A 181

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(C\)](#) Judicial Review or Intervention
[317Ak181](#) k. Jurisdiction of Courts in Advance of or Pending Proceedings Before Commission. [Most Cited Cases](#)

If the plaintiff's action is for reparations, the Illinois Commerce Commission has exclusive jurisdiction; however, if the action is for civil damages, then the circuit court may hear the case.

[3] Public Utilities 317A 181

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(C\)](#) Judicial Review or Intervention
[317Ak181](#) k. Jurisdiction of Courts in Advance of or Pending Proceedings Before Commission. [Most Cited Cases](#)

For the purpose of determining whether a claim fell under the Public Utilities Act, a claim is for reparations when the essence of the claim is that a utility has charged too much for a service.

[4] Public Utilities 317A 181

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(C\)](#) Judicial Review or Intervention
[317Ak181](#) k. Jurisdiction of Courts in Advance of or Pending Proceedings Before Commission. [Most Cited Cases](#)

For the purpose of determining whether a claim fell under the Public Utilities Act, a claim is for ordinary civil damages when the essence of the claim is not that the utility has excessively charged, but rather that the utility has done something else to wrong the plaintiff.

[5] Telecommunications 372 916(1)

[372](#) Telecommunications

[372III](#) Telephones

[372III\(F\)](#) Telephone Service

[372k912](#) Civil Liabilities and Actions

[372k916](#) Actions

[372k916\(1\)](#) k. In General. [Most Cited](#)

[Cases](#)

(Formerly [372k282.1](#))

The Circuit Court had jurisdiction over former inmate's fraud and negligence claim against company that provided telephone service to prison; former inmate sought civil damages, rather than reparations, based on the company's alleged practice of terminating inmates collect calls prematurely, which required an inmate to place an additional collect call to the same person and allowed the company to obtain multiple surcharges and initial calling fees.

[\[6\]](#) **Antitrust and Trade Regulation 29T**  [224](#)

[29T](#) Antitrust and Trade Regulation

[29TIII](#) Statutory Unfair Trade Practices and Consumer Protection

[29TIII\(C\)](#) Particular Subjects and Regulations

[29Tk224](#) k. Telecommunications; Tele-marketing. [Most Cited Cases](#)

(Formerly [92Hk6](#) Consumer Protection)

Former inmate adequately stated a cause of action for consumer fraud against company that provided telephone services to prison; inmate alleged that company fraudulently collected multiple initial calling fees and surcharges due to its practice of deliberately terminating collect telephone calls, that company intentionally terminated collect calls for the purpose of collecting multiple fees and surcharges, that the alleged practice by company occurred in the conduct of commerce, and that inmate suffered actual damages since he sent money to his mother to pay for his collect telephone calls to her. S.H.A. [735 ILCS 5/2-615](#); [815 ILCS 505/2](#).

[\[7\]](#) **Pretrial Procedure 307A**  [622](#)

[307A](#) Pretrial Procedure

[307AIII](#) Dismissal

[307AIII\(B\)](#) Involuntary Dismissal

[307AIII\(B\)4](#) Pleading, Defects In, in General

[307Ak622](#) k. Insufficiency in General.

[Most Cited Cases](#)

Pretrial Procedure 307A  [679](#)

[307A](#) Pretrial Procedure

[307AIII](#) Dismissal

[307AIII\(B\)](#) Involuntary Dismissal

[307AIII\(B\)6](#) Proceedings and Effect

[307Ak679](#) k. Construction of Pleadings.

[Most Cited Cases](#)

In ruling upon a motion to dismiss, the court must determine whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a claim upon which relief can be granted. S.H.A. [735 ILCS 5/2-615](#).

[\[8\]](#) **Appeal and Error 30**  [893\(1\)](#)

[30](#) Appeal and Error

[30XVI](#) Review

[30XVI\(F\)](#) Trial De Novo

[30k892](#) Trial De Novo

[30k893](#) Cases Triable in Appellate

Court

[30k893\(1\)](#) k. In General. [Most Cited](#)

[Cases](#)

The standard of review for granting a motion to dismiss is de novo. S.H.A. [735 ILCS 5/2-615](#).

[\[9\]](#) **Antitrust and Trade Regulation 29T**  [134](#)

[29T](#) Antitrust and Trade Regulation

[29TIII](#) Statutory Unfair Trade Practices and Consumer Protection

[29TIII\(A\)](#) In General

[29Tk133](#) Nature and Elements

[29Tk134](#) k. In General. [Most Cited](#)

[Cases](#)

(Formerly [92Hk34](#), [92Hk4](#) Consumer Protection)

To state a private cause of action under the Consumer Fraud Act, the plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) that the defendant intended for the plaintiff to rely on the deception; (3) that the deception occurred in the conduct of a trade or commerce; (4) that the plaintiff suffered actual damages; and (5) that the damages were proximately caused by the deceptive conduct. S.H.A. [815 ILCS 505/2](#).

[\[10\]](#) **Payment 294**  [86](#)

[294](#) Payment

[294V](#) Recovery of Payments

[294k86](#) k. Fraud. [Most Cited Cases](#)

The voluntary payment doctrine, which held that money voluntarily paid under a claim of right and with full knowledge of the facts could not be recovered unless the payment was made as a result of compulsion, did not bar former inmate's consumer fraud claim against telephone company that provided telephone service to prison; inmate's claim was based on fraud.

[\[11\]](#) Payment [294](#) ~~82~~(1)

[294](#) Payment

[294V](#) Recovery of Payments

[294k82](#) Voluntary Payments in General

[294k82\(1\)](#) k. In General. [Most Cited Cases](#)

The voluntary payment doctrine provides that, absent fraud, misrepresentation or mistake of fact, money that is voluntarily paid under a claim of right to the payment and with full knowledge of the facts by the payer cannot be recovered unless the payment was made as a result of compulsion.

****586 ***598 *584** Johnnie Flournoy, Menard, for Johnnie Flournoy.

[Mark Lewis](#), SBC Legal Department, Chicago, for Ameritech.

[Jeffrey S. Taylor](#), Spesia, Ayers & Ardaugh, Joliet, for Appellee.

****587 ***599** Justice [BARRY](#) delivered the opinion of the court:

The plaintiff, Johnnie Flournoy, filed a complaint against the defendant, Ameritech, alleging fraud and negligence. Ameritech filed a motion to dismiss the complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code). [735 ILCS 5/2-615, 2-619](#) (West 2002). The trial court granted Ameritech's motion and dismissed the complaint. Flournoy appeals, contending that the trial court erred in dismissing his complaint. We reverse and remand for further proceedings.

FACTS

In his complaint, Flournoy alleged that he was incarcerated at Joliet Correctional Center. From 1998 until

2001, Ameritech provided telephone service to the prison for use by inmates. Under the rate structure, any person who accepted a collect telephone call from an inmate was subject to an initial calling fee and a surcharge for accepting the call. Flournoy alleged that his collect telephone calls were often deliberately cut off only minutes after they were accepted. Therefore, he was forced to make another collect call to the same person. Flournoy alleged that he sent money to his mother every month to cover the cost of his collect calls.

***585** Based on these allegations, Flournoy asserted that Ameritech fraudulently collected multiple initial calling fees and surcharges from the people he called due to its practice of prematurely terminating his collect calls. Flournoy also asserted that Ameritech was negligent in operating a telephone system that prematurely terminated telephone calls and resulted in multiple initial calling fees and surcharges to its customers. Flournoy alleged personal and monetary damages, and demanded judgment against Ameritech in an amount in excess of \$50,000, along with costs and attorney fees.

Ameritech filed a motion to dismiss the complaint under sections 2-615 and 2-619 of the Code. The trial court granted the motion, and dismissed Flournoy's complaint.

DISCUSSION

On appeal, Flournoy contends that the trial court erred in granting Ameritech's motion to dismiss. Initially, Ameritech asserts that the circuit court lacked jurisdiction to hear Flournoy's claim.

[\[1\]](#) Under the Public Utilities Act (Act), the Illinois Commerce Commission (Commission) has exclusive jurisdiction over complaints concerning excessive rates or overcharges by public utilities. [Village of Evergreen Park v. Commonwealth Edison Company, 296 Ill.App.3d 810, 231 Ill.Dec. 220, 695 N.E.2d 1339 \(1998\)](#). The Act provides that the Commission may order a public utility to make due reparation to a complainant if the Commission finds that the public utility has charged an excessive or unjustly discriminatory rate for its service. [220 ILCS 5/9-252](#) (West 2002).

[\[2\]](#) In determining whether an action falls within the

exclusive jurisdiction of the Commission, courts have consistently focused on the nature of the relief sought rather than the basis for seeking relief. Village of Evergreen Park, 296 Ill.App.3d 810, 231 Ill.Dec. 220, 695 N.E.2d 1339; Chicago ex rel. Thrasher v. Commonwealth Edison Company, 159 Ill.App.3d 1076, 112 Ill.Dec. 46, 513 N.E.2d 460 (1987). If the plaintiff's action is for reparations, the Commission has exclusive jurisdiction. However, if the action is for civil damages, then the circuit court may hear the case. ****588***600**Village of Evergreen Park, 296 Ill.App.3d 810, 231 Ill.Dec. 220, 695 N.E.2d 1339; Thrasher, 159 Ill.App.3d 1076, 112 Ill.Dec. 46, 513 N.E.2d 460.

[3][4] A claim is for reparations when the essence of the claim is that a utility has charged too much for a service. Village of Evergreen Park, 296 Ill.App.3d 810, 231 Ill.Dec. 220, 695 N.E.2d 1339; Thrasher, 159 Ill.App.3d 1076, 112 Ill.Dec. 46, 513 N.E.2d 460. In contrast, a claim is for ordinary civil damages when the essence of the claim is not that the utility has excessively charged, but rather that the utility has done something else to wrong the plaintiff. Village of Evergreen Park, 296 Ill.App.3d 810, 231 Ill.Dec. 220, 695 N.E.2d 1339; Thrasher, 159 Ill.App.3d 1076, 112 Ill.Dec. 46, 513 N.E.2d 460.

[5] ***586** In this case, the essence of Flournoy's claim is that Ameritech deliberately terminated his collect telephone calls prematurely, forcing him to call the same person again. As a consequence, his family members were charged multiple surcharges and initial calling fees for accepting his collect calls. Flournoy does not contest the actual rates charged as surcharges and initial calling fees, or claim those rates are excessive. Instead, his claim is that Ameritech collected the charges multiple times due to its practice of prematurely terminating his collect calls. Flournoy is seeking damages due to the alleged fraud and negligence that resulted in multiple surcharges and initial calling fees. Based on these circumstances, we find that Flournoy's claim is for civil damages. Accordingly, his claim is within the jurisdiction of the circuit court.

[6][7][8] We also find that Flournoy has adequately stated a cause of action of consumer fraud in his complaint. A section 2-615 motion to dismiss attacks the legal sufficiency of a complaint, and presents the issue of whether the complaint states a cause of action upon which relief can be granted. 735 ILCS 5/2-615

(West 2002); Weiss v. Waterhouse Securities, Inc., 335 Ill.App.3d 875, 269 Ill.Dec. 915, 781 N.E.2d 1105 (2002). In ruling upon a section 2-615 motion to dismiss, the court must determine whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a claim upon which relief can be granted. Givot v. Orr, 321 Ill.App.3d 78, 254 Ill.Dec. 53, 746 N.E.2d 810 (2001). The standard of review for granting a section 2-615 motion to dismiss is *de novo*. Krilich v. American National Bank & Trust Co. of Chicago, 334 Ill.App.3d 563, 268 Ill.Dec. 531, 778 N.E.2d 1153 (2002).

[9] The Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) prohibits unfair or deceptive acts or practices in the conduct of any trade or commerce. 815 ILCS 505/2 (West 2000). To state a private cause of action under the Consumer Fraud Act, the plaintiff must allege: (1) a deceptive act or practice by the defendant; (2) that the defendant intended for the plaintiff to rely on the deception; (3) that the deception occurred in the conduct of a trade or commerce; (4) that the plaintiff suffered actual damages; and (5) that the damages were proximately caused by the deceptive conduct. Oliveira v. Amoco Oil Co., 201 Ill.2d 134, 267 Ill.Dec. 14, 776 N.E.2d 151 (2002).

In this case, Flournoy alleged that Ameritech fraudulently collected multiple initial calling fees and surcharges due to its practice of deliberately terminating his collect telephone calls. Flournoy's allegations indicate that Ameritech engaged in a deceptive practice of intentionally terminating calls for the purpose of collecting multiple fees and surcharges. The allegations that Ameritech billed for the ***587** multiple fees and surcharges indicate that it intended for customers to rely on the deception, and ****589 ***601** pay the multiple fees and surcharges. The deceptive practice alleged by Flournoy occurred in the conduct of commerce. Finally, Flournoy alleged that he sent money to his mother to cover the cost of the charges billed by Ameritech. These allegations were sufficient to show that Flournoy suffered actual damages that were proximately caused by the deceptive practice. Viewing the allegations in the light most favorable to the plaintiff, we conclude that the complaint sufficiently states a cause of action under the Consumer Fraud Act.

[10] Ameritech contends that Flournoy's claims are

barred by the voluntary payment doctrine because the initial calling fees and surcharges were voluntarily incurred and paid.

[11] The voluntary payment doctrine provides that, absent fraud, misrepresentation or mistake of fact, money that is voluntarily paid under a claim of right to the payment and with full knowledge of the facts by the payer cannot be recovered unless the payment was made as a result of compulsion. *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 203 Ill.Dec. 463, 639 N.E.2d 1282 (1994); *Jenkins v. Concorde Acceptance Corp.*, 345 Ill.App.3d 669, 280 Ill.Dec. 749, 802 N.E.2d 1270 (2003). In *Jenkins*, the First District Appellate Court found that the voluntary payment doctrine barred any recovery by the plaintiffs. *Jenkins*, 345 Ill.App.3d 669, 280 Ill.Dec. 749, 802 N.E.2d 1270. The court concluded that the plaintiffs did not allege fraud sufficient to defeat the voluntary payment doctrine because their claim under the Consumer Fraud Act was based on an unfair practice rather than deception or fraud. *Jenkins*, 345 Ill.App.3d 669, 280 Ill.Dec. 749, 802 N.E.2d 1270.

In this case, we have concluded that Flournoy alleged a deceptive practice under the Consumer Fraud Act. His cause of action is in the nature of fraud. Accordingly, we find that the voluntary payment doctrine does not bar Flournoy's claim.

Ameritech also asserts that the trial court lacked the authority to award Flournoy relief because he challenged the actual rates of the fees and surcharges. Additionally, Ameritech contends that Flournoy's claims are barred by the "filed rate doctrine" because he challenges the rates of the fees and surcharges that were established by tariff.

These contentions essentially repeat Ameritech's argument challenging the trial court's jurisdiction. As previously discussed, Flournoy does not contest the actual rates charged as fees and surcharges. Rather, he seeks relief based on Ameritech's alleged deceptive practice of intentionally terminating his collect telephone calls, thereby causing him to incur multiple initial calling fees and surcharges for a single collect call. We conclude that the trial court has jurisdiction and the authority to award relief based on these allegations.

*588 Finally, Flournoy contends that the judgment

should be reversed because the proceedings in the trial court were unfair in several respects. Because we have found that the trial court erred in granting Ameritech's motion to dismiss the complaint, we will not consider these procedural arguments.

CONCLUSION

For the foregoing reasons, the judgment of the Will County circuit court is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

SLATER, J. and McDADE, J. concurring.
Ill.App. 3 Dist., 2004.
Flournoy v. Ameritech
351 Ill.App.3d 583, 814 N.E.2d 585, 286 Ill.Dec. 597

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Appellate Court of Illinois,
 First District, Fourth Division.
 BLOOM TOWNSHIP HIGH SCHOOL, K & M
 Plastics, Inc., Marshall Field & Company, and St.
 Therese Medical Center, Petitioners,

v.

ILLINOIS COMMERCE COMMISSION, and
 Commonwealth Edison Co., an Illinois public utility
 company, Respondents.

No. 1-99-0625.

Nov. 24, 1999.

Customers of electric utility, who purchased electricity pursuant to tariff under which they agreed to reduce electricity usage to pre-established level during usage peaks, and had right to purchase additional electricity during such periods at a specified price, with availability of such electricity at discretion of utility, filed complaints after utility imposed penalty fees and charges for excessive use during peak period. The Illinois Commerce Commission (ICC) consolidated complaints, and granted summary judgment to ICC. Customers petitioned for review. The Appellate Court, [Hoffman, J.](#), held that: (1) tariff required utility to act reasonably under circumstances in exercising its discretion as to whether electricity would be made available to customers during peak periods; (2) fact issues as to whether utility acted reasonably, and whether emergency in fact existed, precluded summary judgment; and (3) lack of notice of emergency situation to one customer in manner contemplated by contract did not create material breach of tariff and contract, where customer received actual notice by other means.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Appeal and Error 30 **23**

30 Appeal and Error

[30II](#) Nature and Grounds of Appellate Jurisdiction
[30k23](#) k. Determination of Questions of Jurisdiction in General. [Most Cited Cases](#)

Before considering the merits of appeal, Appellate Court has affirmative duty to determine whether its jurisdiction has been properly invoked.

[2] Appeal and Error 30 **23**

30 Appeal and Error

[30II](#) Nature and Grounds of Appellate Jurisdiction
[30k23](#) k. Determination of Questions of Jurisdiction in General. [Most Cited Cases](#)

Appellate Court would address merits of motion to dismiss appeal, pursuant to its affirmative duty to determine whether its jurisdiction was properly invoked, even though motion had been withdrawn.

[3] Electricity 145 **11.3(7)**

145 Electricity

[145k11.3](#) Regulation of Charges
[145k11.3\(7\)](#) k. Judicial Review and Enforcement. [Most Cited Cases](#)

Failure of petitioners to name electric utility as a party in petition for review of determination by Illinois Commerce Commission (ICC) granting summary judgment for utility on petitioners' claims that utility had wrongfully assessed penalty fees and charges, as required by Supreme Court Rules, did not require dismissal of appeal, and instead, petitioners would be granted leave to amend petition to include utility as party, where failure to name utility was not intentional or strategic, but was due to conflicting provisions of Supreme Court Rules and Public Utilities Rules of Practice, and petitioners properly served utility with notice of petition and acted in good faith. [Sup.Ct.Rules, Rule 335](#); [Ill.Admin. Code title 83, § 200.890](#).

[4] Electricity 145 **11.3(7)**

145 Electricity

[145k11.3](#) Regulation of Charges
[145k11.3\(7\)](#) k. Judicial Review and Enforcement. [Most Cited Cases](#)

Any error resulting from unusual procedure employed by hearing examiner in connection with petition for review by Illinois Commerce Commission (ICC) of electric utility's assessment of penalty fees and

charges, in which officer interrupted hearing and directed parties to file cross-motions for summary judgment, was waived for purposes of appeal from final decision by ICC, where petitioners, who had questioned procedure in their brief on exceptions filed with ICC, did not raise issue in their appellate brief.

[5] Public Utilities 317A 194

[317A](#) Public Utilities

[317AIII](#) Public Service Commissions or Boards

[317AIII\(C\)](#) Judicial Review or Intervention

[317Ak188](#) Appeal from Orders of Commission

[317Ak194](#) k. Review and Determination in General. [Most Cited Cases](#)

Construction of a utility tariff is a question of law, and interpretation of tariff by Illinois Commerce Commission (ICC) is not binding upon court.

[6] Public Utilities 317A 194

[317A](#) Public Utilities

[317AIII](#) Public Service Commissions or Boards

[317AIII\(C\)](#) Judicial Review or Intervention

[317Ak188](#) Appeal from Orders of Commission

[317Ak194](#) k. Review and Determination in General. [Most Cited Cases](#)

Because interpretation of a utility tariff is a question of law, review by Appellate Court is de novo; however, Court will accord interpretation of tariff by Illinois Commerce Commission (ICC) deference in the event that tariff is found to be ambiguous.

[7] Public Utilities 317A 194

[317A](#) Public Utilities

[317AIII](#) Public Service Commissions or Boards

[317AIII\(C\)](#) Judicial Review or Intervention

[317Ak188](#) Appeal from Orders of Commission

[317Ak194](#) k. Review and Determination in General. [Most Cited Cases](#)

Whether a utility tariff is ambiguous is a question of law subject to de novo review.

[8] Public Utilities 317A 119.1

[317A](#) Public Utilities

[317AII](#) Regulation

[317Ak119](#) Regulation of Charges

[317Ak119.1](#) k. In General. [Most Cited Cases](#)

Although a utility tariff is not a legislative enactment, its interpretation is governed by the rules of statutory construction.

[9] Statutes 361 190

[361](#) Statutes

[361VI](#) Construction and Operation

[361VI\(A\)](#) General Rules of Construction

[361k187](#) Meaning of Language

[361k190](#) k. Existence of Ambiguity.

[Most Cited Cases](#)

Statutes are ambiguous when they admit of more than one reasonable interpretation.

[10] Public Utilities 317A 119.1

[317A](#) Public Utilities

[317AII](#) Regulation

[317Ak119](#) Regulation of Charges

[317Ak119.1](#) k. In General. [Most Cited Cases](#)

Public Utilities 317A 194

[317A](#) Public Utilities

[317AIII](#) Public Service Commissions or Boards

[317AIII\(C\)](#) Judicial Review or Intervention

[317Ak188](#) Appeal from Orders of Commission

[317Ak194](#) k. Review and Determination in General. [Most Cited Cases](#)

Utility tariff is ambiguous, and interpretation of tariff by Illinois Commerce Commission (ICC) is thus subject to deference, when it admits of more than one reasonable interpretation.

[11] Electricity 145 11(3)

[145](#) Electricity

[145k11](#) Supply of Electricity in General

[145k11\(3\)](#) k. Contracts for Supply in General.

[Most Cited Cases](#)

Electric utility's interruptible/curtailment service tariff, under which customers with discretionary electrical loads who agreed to reduce usage to

pre-established level during usage peaks had right to purchase electricity during such periods at a specified price, with availability of electricity at the discretion of company, and company obligated to make a reasonable effort to maintain availability during curtailment periods, required utility to act reasonably under circumstances in exercising its discretion as to whether electricity would be made available to customers at such times; whether a reasonable exercise of discretion would require utility to source electricity before deciding not to offer it was a question of fact, to be decided on a case by case basis.

[12] Public Utilities 317A 🔑101

317A Public Utilities

317AI In General

317Ak101 k. In General. [Most Cited Cases](#)

Purpose of Public Utilities Act is to maintain control over the operation of utilities so as to prevent them from exacting unjust, unreasonable, and discriminatory rates. S.H.A. [220 ILCS 5/1-101](#) et seq.

[13] Public Utilities 317A 🔑101

317A Public Utilities

317AI In General

317Ak101 k. In General. [Most Cited Cases](#)

Theory behind the regulation of public utilities is the protection of the public and the assurance of adequate service while, at the same time, securing for the utility a fair opportunity to generate a reasonable return. S.H.A. [220 ILCS 5/1-101](#) et seq.

[14] Public Utilities 317A 🔑119.1

317A Public Utilities

317AII Regulation

317Ak119 Regulation of Charges

317Ak119.1 k. In General. [Most Cited](#)

[Cases](#)

Illinois Commerce Commission (ICC) exists to maintain a balance between the rates charged by utilities and the services they perform.

[15] Public Utilities 317A 🔑119.1

317A Public Utilities

317AII Regulation

317Ak119 Regulation of Charges

317Ak119.1 k. In General. [Most Cited](#)

[Cases](#)

A utility tariff is a “rate” for purposes of Public Utilities Act, which mandates that all rates must be reasonable. S.H.A. [220 ILCS 5/3-116](#), 9-101.

[16] Contracts 95 🔑168

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k168 k. Terms Implied as Part of Contract. [Most Cited Cases](#)

[Cases](#)

Absent an express disavowal, every contract, as a matter of law, contains an implied covenant of good faith and fair dealing which requires a party vested with contractual discretion to act reasonably in its exercise.

[17] Public Utilities 317A 🔑119.1

317A Public Utilities

317AII Regulation

317Ak119 Regulation of Charges

317Ak119.1 k. In General. [Most Cited](#)

[Cases](#)

A utility tariff has the force of law and is not considered to be a contract.

[18] Judgment 228 🔑181(15.1)

228 Judgment

228V On Motion or Summary Proceeding

228k181 Grounds for Summary Judgment

228k181(15) Particular Cases

228k181(15.1) k. In General. [Most Cited](#)

[Cases](#)

Genuine issues of material fact as to whether electric utility made reasonable effort to provide electricity to customers who purchased electricity pursuant to interruptible/curtailment service tariff, under which customers agreed to reduce electricity usage to pre-established level during usage peaks, and had right to purchase electricity during such periods at a specified price, with availability of electricity at the discretion of company, and whether an emergency in fact existed, precluded summary judgment in action in which customers challenged penalty fees and charges assessed for their purchases during peak period. S.H.A. [735 ILCS 5/2-1005](#).

[19] Administrative Law and Procedure 15A
🔑489.1

[15A](#) Administrative Law and Procedure
[15AIV](#) Powers and Proceedings of Administrative Agencies, Officers and Agents
[15AIV\(D\)](#) Hearings and Adjudications
[15Ak489](#) Decision
[15Ak489.1](#) k. In General. [Most Cited Cases](#)

Granting summary disposition in an administrative proceeding is comparable to granting summary judgment under Code of Civil Procedure, and because of similarities, it is appropriate to apply the standards applicable to granting summary judgment when reviewing a summary determination entered by an administrative agency. S.H.A. [735 ILCS 5/2-1005](#).

[20] Judgment 228 🔑178

[228](#) Judgment
[228V](#) On Motion or Summary Proceeding
[228k178](#) k. Nature of Summary Judgment.
[Most Cited Cases](#)

Judgment 228 🔑181(2)

[228](#) Judgment
[228V](#) On Motion or Summary Proceeding
[228k181](#) Grounds for Summary Judgment
[228k181\(2\)](#) k. Absence of Issue of Fact.
[Most Cited Cases](#)
Summary judgment is a drastic means of disposing of litigation and should be employed only when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. S.H.A. [735 ILCS 5/2-1005](#).

[21] Judgment 228 🔑185(2)

[228](#) Judgment
[228V](#) On Motion or Summary Proceeding
[228k182](#) Motion or Other Application
[228k185](#) Evidence in General
[228k185\(2\)](#) k. Presumptions and Burden of Proof. [Most Cited Cases](#)
In determining the existence of a genuine issue of fact sufficient to preclude summary judgment, the evidentiary material of record must be construed strictly

against the movant and liberally in favor of the opponent. S.H.A. [735 ILCS 5/2-1005](#).

[22] Judgment 228 🔑185(2)

[228](#) Judgment
[228V](#) On Motion or Summary Proceeding
[228k182](#) Motion or Other Application
[228k185](#) Evidence in General
[228k185\(2\)](#) k. Presumptions and Burden of Proof. [Most Cited Cases](#)
If evidentiary material submitted in connection with motion for summary judgment could lead to more than one reasonable inference or conclusion, the one most favorable to the opponent of the motion must be adopted. S.H.A. [735 ILCS 5/2-1005](#).

[23] Judgment 228 🔑178

[228](#) Judgment
[228V](#) On Motion or Summary Proceeding
[228k178](#) k. Nature of Summary Judgment.
[Most Cited Cases](#)
Purpose of a summary judgment proceeding is to determine the existence of a genuine issue of material fact, not to resolve the issue. S.H.A. [735 ILCS 5/2-1005](#).

[24] Public Utilities 317A 🔑194

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(C\)](#) Judicial Review or Intervention
[317Ak188](#) Appeal from Orders of Commission
[317Ak194](#) k. Review and Determination in General. [Most Cited Cases](#)

Public Utilities 317A 🔑195

[317A](#) Public Utilities
[317AIII](#) Public Service Commissions or Boards
[317AIII\(C\)](#) Judicial Review or Intervention
[317Ak188](#) Appeal from Orders of Commission
[317Ak195](#) k. Presumptions in Favor of Order or Findings of Commission. [Most Cited Cases](#)
Findings and conclusions of Illinois Commerce Commission (ICC) on questions of fact are held to be prima facie true, and will not be disturbed on appeal

unless they are against the manifest weight of the evidence. S.H.A. [220 ILCS 5/10-201\(d\)](#).

[25] Appeal and Error 30 893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In General. [Most Cited](#)

[Cases](#)

Resolution of a motion for summary judgment is not based on findings or conclusions of fact, but rather, is a question of law subject to de novo review. S.H.A. [735 ILCS 5/2-1005](#).

[26] Appeal and Error 30 863

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on

Nature of Decision Appealed from

30k863 k. In General. [Most Cited Cases](#)

Order granting a summary judgment will be reversed on appeal if the reviewing court determines that a genuine issue of material fact exists. S.H.A. [735 ILCS 5/2-1005](#).

[27] Notice 277 1

277 Notice

277k1 k. Nature in General. [Most Cited Cases](#)

Purpose of a notice provision in either a contract or a statute is to ensure that a party is actually informed.

[28] Electricity 145 11.2(2)

145 Electricity

145k11.2 Rates and Charges in General

145k11.2(2) k. Contract Rates. [Most Cited](#)

[Cases](#)

Failure of electric utility to provide customer, who purchased electricity pursuant to tariff under which it agreed to reduce usage to pre-established level during emergency situations resulting from usage peaks, with notice of emergency situation through dedicated tel-

ephone line at customer's "Help Desk," as contemplated by parties contract, did not constitute material breach of tariff or contract, where customer received actual notice through other means, and claimed no prejudice.

****678 ***894 *165** Giordano & Associates, Chicago ([Patrick N. Giordano](#) and [Thomas A. Andreoli](#), of counsel), for Appellants.

Hopkins & Sutter, Chicago ([William J. McKenna](#), [David B. Goroff](#), [Ross E. Kimbarovsky](#), ****679***895** [Pamela B. Strobel](#) and [Simone Byvoets](#), of counsel), for Appellees.

Justice [HOFFMAN](#) delivered the opinion of the court:

The petitioners, Bloom Township High School, K & M Plastics, Inc., Marshall Field & Company (Marshall Field), and St. Therese Medical Center, filed separate complaints with the Illinois Commerce Commission (Commission) against the respondent, Commonwealth Edison Company (ComEd), alleging that ComEd wrongfully assessed penalty fees and other charges against them for excessive use of electrical power during the "heat wave" in July 1995. The Commission consolidated the complaints and subsequently entered summary judgment in favor of ComEd. The petitioners have filed a joint petition for review, contending that the Commission erred in granting summary judgment for the following reasons: (1) the "Rider 30 Interruptible/Curtailment Service" tariff (Rider 30), under which they were receiving electrical power, required ComEd to make reasonable efforts to provide them with "buy-through energy" ^{FNI} in lieu of curtailment; (2) the Commission violated section 2-1005 of the Code of Civil Procedure (Code) ([735 ILCS 5/2-1005](#) (West 1996)) by determining on ***166** summary judgment that ComEd made reasonable efforts to provide buy-through energy and that "emergency conditions" existed on July 14, 1995, such that the purchase of buy-through energy was impermissible; and (3) the Commission erred in denying Marshall Field's motion for summary judgment, asserting that it did not receive proper notice of the curtailment.

^{FNI}. The term "buy-through energy" refers to energy that is purchased by customers at a specified rate during a curtailment period in lieu of reducing their energy demand to their pre-established Firm Power Level.

ComEd filed a tariff with the Commission, known as Rider 30, the purpose of which is to assist ComEd in providing cost-effective and reliable electricity by reducing the amount of electricity that ComEd must provide during peak periods of demand. Service pursuant to Rider 30 is available to certain non-residential customers of ComEd who have discretionary electrical loads which can be interrupted or curtailed. Under Rider 30, customers such as the petitioners enter into contracts with ComEd and agree to reduce their electricity usage to a pre-established Firm Power Level ^{FN2} (FPL) upon request by ComEd. In exchange for their commitment to limit their electricity usage, ComEd agrees to compensate the customers by applying credits to their electricity bills.

^{FN2}. As defined in Rider 30, the term “Firm Power Level” means “[t]he amount of contracted demand, as determined initially by the customer at [the] time of application, that is not subject to interruption or curtailment.”

Pursuant to Rider 30, the customers must elect to receive service under one of three options (A, B, or C). The three types of service differ in the number of interruptions or curtailments ComEd is allowed to invoke per year, the maximum number of hours an interruption or curtailment may last, the extent of the notice period before a curtailment can be initiated, the credits to which the customer is entitled, and the ability of the customer to purchase buy-through energy in lieu of curtailment. In this case, all of the petitioners elected to receive service under option C, which specifically provides:

“Under this option, the customer may purchase energy during a curtailment period at a cost of \$.15/kWh for all kilowatthours consumed during the curtailment period associated with 30-minute demands which exceed the customer's Firm Power Level. Such purchases are referred to as purchases in lieu of curtailment. Demand levels associated with such purchases shall be considered when determining the customer's Maximum Demand as determined by the otherwise applicable rate. *The availability **680 ***896 of such energy shall be at the discretion of the Company, which shall notify the customer of its expected availability at the time the notice of curtailment is given. A reasonable effort to maintain that availability during a curtailment period will be made.* The cus-

tomers *167 shall not be allowed to make purchases during emergency conditions.” [Emphasis added].

Rider 30 further provides that all customers, other than those option C customers who purchase buy-through energy, shall be assessed a penalty ^{FN3} if their demand for power during a curtailment exceeds their pre-selected FPL. According to the parties, on July 13, 1995, the temperatures in the Chicago area reached record levels and ComEd experienced a system peak demand for power. ComEd gave its option C customers notice of a curtailment and provided them with the opportunity to purchase buy-through energy. On July 14, 1995, the temperatures again reached record levels, and ComEd issued another curtailment. This time, ComEd did not offer its option C customers buy-through energy, and all of the petitioners refused to limit their energy usage during the curtailment. As a result, ComEd imposed penalty fees and other charges against them for their energy demand that exceeded their FPL during the curtailment. Each of the petitioners subsequently filed a complaint with the Commission, alleging that ComEd misapplied Rider 30 and wrongfully assessed penalty fees and other charges against them because ComEd failed to make reasonable efforts to provide them with buy-through energy during the curtailment as required by option C. The petitioners did not challenge the amount of the fees and charges assessed against them. In fact, they admitted that, if ComEd was entitled to such fees, then the amount assessed against them was correct. The Commission consolidated the petitioners' complaints and scheduled an evidentiary hearing for April 20, 1998.

^{FN3}. Under Rider 30, customers who exceed their FPL during a curtailment period are subject to a penalty of \$30 per kW multiplied by the maximum amount of such excess kW over the FPL.

Prior to the hearing, both the petitioners and ComEd submitted extensive written testimony in support of their positions, as permitted by section 200.660 of the Public Utilities Rules of Practice (83 Ill. Adm. Code § 200.660 (1996)).^{FN4} At the hearing, Marshall Field presented the testimony of Andrew J. Sebescak, its senior maintenance *168 manager. Following Sebescak's testimony, the hearing examiner gave the parties the option of either limiting the cross-examination of all witnesses to 15 minutes or filing written briefs

regarding the issue of whether Rider 30 required ComEd to make reasonable efforts to provide its option C customers with buy-through energy during a curtailment period. The parties objected to limiting the time allowed for cross-examining witnesses. Although the parties agreed that a threshold question existed as to whether option C required ComEd to use reasonable efforts to provide buy-through energy in lieu of curtailment, they disagreed as to whether the decision on this issue was outcome determinative. Consequently, the petitioners objected to the suggestion of filing cross-motions on this issue and expressed their desire to proceed with the hearing. After a lengthy discussion, the hearing examiner stated:

FN4. The petitioners submitted written testimony from John C. Dolak of Bloom Township High School, Martin J. Egan of K & M Plastics, Inc., Andrew J. Sebescak of Marshall Field, Pamela J. Stoyanoff of St. Therese Medical Center, Philip M. Rosenberg of UTIL, Inc., and Keith E. Goerss of QST Energy, Inc. Other than Sebescak and Goerss, none of these witnesses submitted an affidavit in support of the petitioners' motion and their testimony is not contained in the record on appeal. ComEd submitted written testimony from two of its employees: Paul R. Crumrine and A. Daniel Gorski.

“[S]ince the parties are not in agreement, I just need to make a ruling or ****681 ***897** issue a direction which I feel is going to be of benefit to the Commission.

And so to that end, what I am going to direct the parties to do is to, basically, brief for me, and it can be done in the form of a motion for summary judgment with memo attached, again, with any type of testimony attached as exhibits, to indicate what the parties' positions are in regards to the interpretation of Rider 30C.”

On May 7, 1998, the petitioners filed a motion for summary judgment and a memorandum in support thereof, arguing that the Commission should grant summary judgment in their favor because: (1) ComEd had a duty to make reasonable efforts to provide buy-through energy during the July 14, 1995 **FN5**, curtailment period; and (2) ComEd failed to provide Marshall Field with proper notice of the curtailment. The following documents were attached to the peti-

tioners' memorandum: (1) an affidavit from Sebescak, stating that Marshall Field did not receive written notice of the curtailment; (2) the Rider 30 contract between Marshall Field and ComEd; (3) Rider 30; (4) a Rider 30 analysis report prepared for Marshall Field by ComEd's technical services department; and (5) ComEd's rate schedule sheets and supplemental materials regarding Advice No. H301 **FN6** that were filed with the chief clerk of the Commission on August 5, 1997.

FN5. In their motion, the petitioners inadvertently referred to the date upon which the curtailment in question occurred as July 13, 1995. They subsequently filed a motion to correct their mistake and change the date of the curtailment to July 14, 1995.

FN6. In this filing, ComEd proposed various revisions to Rider 30, including changes to the language contained in option C. ComEd proposed to change the language regarding purchases in lieu of curtailment to read in part: “The availability of such energy shall be at the discretion of the Company * * *. If the Company has given notice that it expects such energy will be available during a curtailment, the Company will make a reasonable effort to maintain that availability during that curtailment period.” ComEd subsequently withdrew its proposal.

***169** The following day, ComEd filed its motion for summary disposition, alleging that the penalty fees and charges assessed against the petitioners were proper based on the plain and unambiguous language of option C. ComEd argued that option C clearly provides that it has discretion to decide whether to offer buy-through energy during a curtailment and that it is only required to make reasonable efforts to maintain the availability of buy-through energy if it has first elected, in its sole discretion, to offer buy-through energy to its option C customers. ComEd also argued that the petitioners' interpretation of option C did not correspond with the purpose of Rider 30, which was to “maintain an appropriate level of interruptible load resources in a cost effective manner, thus deferring the need for additional capacity resources * * * by reducing peak period loads.” According to ComEd, the petitioners' interpretation was inconsistent with the requirement that it provide op-

tion C customers with notice of the availability of buy-through energy four hours prior to a curtailment. In the alternative, ComEd argued that, even if it was required to make reasonable efforts to provide buy-through energy to its option C customers, it did so in this case.

Attached to ComEd's motion was an affidavit from A. Daniel Gorski, its Bulk Power Operations Manager. In his affidavit, Gorski stated that, based on his 20 years of experience in bulk power operations, he believed that the information provided to ComEd on July 14, 1995, supported its conclusion that buy-through energy would not have been available on the open market during the curtailment period. He stated that ComEd took continuous surveys of the market to determine whether any utilities were willing to pre-schedule energy sales to ComEd before deciding not to offer buy-through energy. According to Gorski, ComEd could not be ****682 ***898** certain that purchases of hourly energy would be possible on the spot wholesale market. Gorski further stated that, based on the conditions at the time, ComEd had determined that if the demand for energy was not curtailed it would not have enough power to fully service the firm load of its customers.

ComEd also filed a memorandum in response to the petitioners' motion for summary judgment and in further support of its motion for summary disposition. Attached to ComEd's memorandum was an excerpt from the hearing on April 20, 1998, containing Sebescak's ***170** admission that he knew about the expected curtailment four hours in advance, that he was not in Marshall Field's State Street store on July 14, 1995, and that he did not know if written notice of the curtailment was provided to Marshall Field by ComEd. Also attached to the memorandum were affidavits from Jose G. Andrade and Sharon S. Kochanek, account managers in ComEd's energy services department. Andrade stated in his affidavit that four hours prior to the curtailment on July 14, 1995, he left detailed voice-mail messages for Sebescak and Thomas Mecham, who was also employed in the maintenance operations department at Marshall Field. He informed them that the curtailment would begin at 12:30 p.m. and end at 6:30 p.m., that buy-through energy would not be available, and that Marshall Field should curtail its energy usage to avoid being charged penalties under Rider 30. About one and one-half hours later, Andrade again left detailed voice-mail messages

concerning the curtailment for both Mecham and Sebescak. Kochanek stated in her affidavit that she also left detailed voice-mail messages for Sebescak and Mecham and even attempted to page Mecham. In addition, she spoke to Joe Tomaso, another Marshall Field employee, who stated that Marshall Field would not curtail its energy demand during the curtailment. Kochanek also called Chuck Clark at Marshall Field's corporate headquarters in Minnesota and left a message with his secretary regarding the curtailment and stating that buy-through energy would not be available.

The petitioners filed a reply to ComEd's motion for summary disposition, attaching the rebuttal and sur-rebuttal testimony of Keith E. Goerss, the director of economics and planning for QST Energy, Inc., a full-service energy company. Goerss's written testimony contained his opinion that option C did not provide ComEd with complete discretion in determining whether to provide buy-through energy and that ComEd did not take reasonable steps to insure the availability of buy-through energy on July 14, 1995. According to Goerss, reasonable efforts would include determining whether ComEd or another supplier (i.e., utilities, marketers, municipalities, or rural electric cooperatives) had energy available at a rate less than 15 cents per kWh that could be provided to ComEd's option C customers. Goerss did not dispute Gorski's testimony that ComEd surveyed other utility companies and the spot wholesale market to determine if such energy would likely be available during the curtailment. He believed, however, that ComEd's efforts were unreasonable because it failed to continue those efforts up to the time of the curtailment. On September 21, 1998, the hearing examiner submitted her proposed order to both parties and informed them of their right to file a "Brief on Exceptions". [83 Ill. Adm.Code § 200.820, 200.830 \(1996\)](#). The petitioners' filed such a brief, raising ***171** eight exceptions to the proposed order. In addition to the arguments that the petitioners previously raised before the hearing examiner, they argued that the order incorrectly stated that the parties agreed to submit cross-motions for summary judgment. The petitioners stated that the hearing examiner gave them two options, neither of which were acceptable. They could either agree to limit the cross-examination of witnesses to 15 minutes, which they argued violated their due process rights, or they could submit cross-motions for summary judgment. When they refused to choose either option, the hearing ****683 ***899** examiner ordered the parties to file

cross-motions for summary judgment. The petitioners, however, only requested that the proposed order be revised to reflect that they did not agree to such a procedure. ComEd filed a reply to the petitioners' brief in which it stated that the petitioners' agreed that the dispute between the parties was based on the interpretation of option C and, therefore, was a question of law to be decided by the Commission.

On December 16, 1998, the Commission issued an order in which it concluded that Rider 30 was not ambiguous. The Commission stated that, based on the plain language of the Rider, ComEd had "discretion" to decide whether to offer buy-through energy to its option C customers and that ComEd was not required to make reasonable efforts to maintain the availability of buy-through energy before initiating a curtailment period. In pertinent part, the order states:

"The Commission concludes that Rider 30C is not ambiguous. Under its plain meaning, ComEd has 'discretion' in deciding whether to offer buy-through energy during a curtailment. ComEd need not first make reasonable efforts to source buy-through power, before deciding not to offer buy-through. It has full discretion to decide whether to offer buy-through. If ComEd has given notice to its Rider 30C customers that it expects buy-through energy to be available during a curtailment, is it [*sic*] then required to make a reasonable effort to maintain the availability of such buy-through energy during the curtailment period. However, if ComEd has stated at the time it issues its notice of curtailment that buy-through energy will not be available, it has no obligation to provide buy-through energy."

In the alternative, the Commission held that, even if ComEd was required to use reasonable efforts to provide buy-through energy during a curtailment, it presented uncontroverted evidence that it made reasonable efforts to do so but was unable to locate buy-through energy within its own system or from third-party sources. The Commission also found that ComEd could not have provided its option C customers with buy-through energy because of the emergency conditions that existed on July 14, 1995.

*172 The Commission also rejected Marshall Field's claim that it did not receive proper notice of the curtailment. The Commission found that Sebescak's affidavit was improper under [Supreme Court Rule 191](#)

([145 Ill.2d R. 191](#)) because it was conclusory and not based on his personal knowledge. The Commission noted that Sebescak admitted in his testimony on April 20, 1998, that he was personally notified of the curtailment by ComEd more than four hours in advance. It further found the testimony of both Andrade and Kochanek to be persuasive. The Commission concluded that neither Rider 30, nor the contract between Marshall Field and ComEd, required ComEd to provide Marshall Field with written notice of an expected curtailment.

The petitioners subsequently filed an application for rehearing ([83 Ill. Adm.Code § 200.800 \(1996\)](#)), raising essentially the same issues previously argued before the hearing examiner. In addition, they again questioned the hearing examiner's order requiring the parties to file cross-motions for summary judgment. The Commission denied the petitioners' application, and they filed a timely petition for review with the clerk of this court.

The original petition for review filed in this case named the Commission as the only respondent, prompting ComEd to file a motion to dismiss this appeal on the basis that the petitioners failed to name all the necessary parties as required by [Supreme Court Rule 335 \(155 Ill.2d R. 335\)](#). Four days later, the petitioners filed a motion for leave to amend their "Joint Petition for Review", and ComEd subsequently filed a motion to withdraw its motion to dismiss. All of these motions were taken with the case.

684 [1112](#) *900 Section 10-201 of the Public Utilities Act ([220 ILCS 5/10-201](#) (West 1996)) provides that a party affected by a final order or decision of the Commission "may appeal to the appellate court of the judicial district in which the subject matter of [the] hearing is situated * * * for the purpose of having the reasonableness or lawfulness of the rule, regulation, or decision inquired into and determined." However, before considering the merits of this appeal, we have an affirmative duty to determine whether our jurisdiction has been properly invoked. [Board of Education of School District No. 122, Cook County v. Illinois State Board of Education, 209 Ill.App.3d 542, 545, 154 Ill.Dec. 289, 568 N.E.2d 289 \(1991\)](#). Consequently, we must address the merits of ComEd's motion to dismiss without regard to the fact that ComEd has moved to withdraw the motion.

[3] [Supreme Court Rule 335](#) provides in part:

“The procedure for a statutory direct review of orders of an administrative agency by the Appellate Court shall be as follows:

(A) The Petition for Review. The petition for review shall be filed *173 in the Appellate Court and shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. The agency and all other parties * * * of record shall be named as respondent.” 155 Ill.2d R, 335.

[Rule 335](#) also contains an example of the caption for such a petition, which includes a place to put the name of the administrative agency whose decision is being appealed, as well as the names of other parties of record. 155 Ill.2d R. 335. There is no doubt that the petitioners failed to satisfy these requirements. They, however, argue that their failure to name a necessary party was neither intentional nor strategic, but rather was due to the conflicting rules contained in [section 200.890](#) of the Public Utilities Rules of Practice ([83 Ill. Adm.Code § 200.890 \(1996\)](#)) and [Rule 335](#). [Section 200.890](#) provides that “[t]he notice of appeal filed with the Commission shall be captioned ‘(The name of appellant) v. Illinois Commerce Commission.’ ” Thus, the issue we must resolve is whether the petitioners failure to comply with [rule 335](#) and name ComEd as a party respondent on the face of their petition is a fatal defect which deprives this court of jurisdiction.

In [Lipsev v. Human Rights Comm'n](#), 267 Ill.App.3d 980, 984, 204 Ill.Dec. 845, 642 N.E.2d 746 (1994), this court considered the issue presently before us at great length and determined that the requirement to name all necessary parties was mandatory, but that the failure to do so would not require dismissal if the petitioners made a good-faith showing of compliance. See also [Worthen v. Village of Roxana](#), 253 Ill.App.3d 378, 380-82, 191 Ill.Dec. 468, 623 N.E.2d 1058 (1993). Given the confusion between [section 200.890](#) and [Rule 335](#), and the fact that ComEd was properly served with notice of the petition, we believe that the petitioners acted in good-faith. Furthermore, as in [Lipsev](#), 267 Ill.App.3d at 986, 204 Ill.Dec. 845, 642 N.E.2d 746, the petitioners sought leave to amend their petition four days after ComEd filed its motion to dismiss, and only three and one-half months after the Commission issued its order. We, therefore, conclude

that we have jurisdiction over this appeal and grant both the petitioner's motion for leave to amend their petition and ComEd's motion to withdraw its motion to dismiss.

[4] Before addressing the merits of this appeal, we wish to make it clear that we are not unmindful that the hearing examiner in this case initiated a rather unusual procedure by interrupting the hearing and directing the parties to file cross-motions for summary judgment. Although the Commission's order states that it was agreed between the parties and the hearing examiner that cross-motions for summary judgment would be filed, the record**685 ***901 indicates otherwise. Our reading of the record reveals that the petitioners objected to the procedure suggested by the hearing examiner, and, despite their objection, she directed the parties to file cross-motions for summary judgment. The *174 petitioners questioned the hearing examiner's direction in their brief on exceptions filed with the Commission, but they did not raised the issue in their appellate brief. Consequently, any error that might have been interjected into the proceedings by reason of the procedure employed by the hearing examiner is waived for purposes of this appeal. 155 Ill.2d R. 341(e)(7); see also [Abbott Laboratories, Inc. v. Illinois Commerce Comm'n](#), 289 Ill.App.3d 705, 710, 224 Ill.Dec. 779, 682 N.E.2d 340 (1997).

Turning to the merits of this appeal, we will first address the Commission's finding that ComEd is not required to make reasonable efforts to source buy-through power before deciding not to offer same to its Rider 30C customers during a curtailment. Both ComEd and the petitioners argue that the language of Rider 30C is clear and unambiguous, but they offer conflicting interpretations. The petitioners argue that, during a curtailment, ComEd is required to make reasonable efforts to procure buy-through power for its option C customers. ComEd argues that the decision as to whether buy-through power will be offered to option C customers during a curtailment is a matter committed to its discretion, and consequently, it need not make reasonable efforts to procure buy-through power before deciding not to offer it. After finding that Rider 30 is not ambiguous, the Commission adopted ComEd's interpretation.

[5][6][7] Rider 30 is a utility tariff. Consequently, its construction is a question of law and the Commission's interpretation is not binding upon this court.

[People ex rel. Hartigan v. Illinois Commerce Comm'n](#), 148 Ill.2d 348, 367, 170 Ill.Dec. 386, 592 N.E.2d 1066 (1992). Because the question is one of law, our review is *de novo*. [Branson v. Department of Revenue](#), 168 Ill.2d 247, 254, 213 Ill.Dec. 615, 659 N.E.2d 961 (1995). We will, however, accord the Commission's interpretation deference in the event that we find the tariff ambiguous. See [Abrahamson v. Illinois Department of Professional Regulation](#), 153 Ill.2d 76, 97-98, 180 Ill.Dec. 34, 606 N.E.2d 1111 (1992). Whether a utility tariff is ambiguous is also a question of law and subject to *de novo* review. [General Mills, Inc. v. Illinois Commerce Comm'n](#), 201 Ill.App.3d 715, 720, 147 Ill.Dec. 225, 559 N.E.2d 225 (1990).

[8][9][10] Although a utility tariff is not a legislative enactment, its interpretation is governed by the rules of statutory construction. See [General Mills](#), 201 Ill.App.3d at 720, 147 Ill.Dec. 225, 559 N.E.2d 225. Statutes are ambiguous when they admit of more than one reasonable interpretation. [Williams v. Illinois State Scholarship Comm'n](#), 139 Ill.2d 24, 51, 150 Ill.Dec. 578, 563 N.E.2d 465 (1990). We have applied the same rule to determine if Rider 30 is ambiguous. For the reasons which follow, we too find that Rider 30 is not ambiguous as it admits of only one reasonable interpretation, albeit not the one proffered by ComEd or the petitioners.

[11] *175 According to the Commission, ComEd need not exercise reasonable efforts to source buy-through energy before deciding not to offer it to its option C customers during a curtailment because Rider 30 gives ComEd discretion in determining whether to offer buy-through energy in the first instance. Taken to its logical extension, this interpretation permits ComEd to arbitrarily decline to offer buy-through energy to its option C customers for any reason or no reason. We find such an interpretation not only unreasonable, but wholly inconsistent with the Public Utilities Act ([220 ILCS 5/1-101](#) *et seq.* (West 1998)).

[12][13][14][15] The very purpose of the Public Utilities Act is to maintain control over the operation of utilities so as to prevent them **686 ***902 from exacting unjust, unreasonable, and discriminatory rates. The theory behind the regulation of public utilities is the protection of the public and the assurance of adequate service while, at the same time, securing for the utility a fair opportunity to generate a reasonable return. [Village of Monsanto v. Touchette](#), 63

Ill.App.2d 390, 400, 211 N.E.2d 471 (1965). The Commission exists to maintain a balance between the rates charged by utilities and the services they perform. [Village of Apple River v. Illinois Commerce Comm'n](#), 18 Ill.2d 518, 523, 165 N.E.2d 329 (1960). A utility tariff, such as Rider 30, falls within the definition of a "rate" as contained in the Public Utilities Act (see [220 ILCS 5/3-116](#) (West 1998)), and that act mandates that all rates must be reasonable. [220 ILCS 5/9-101](#) (West 1998). The notion that a public utility might be vested with unfettered discretion and the ability to act arbitrarily in the rendition of service to its customers is the antithesis of the purposes for regulating utilities. For this reason alone, we find that the Commission's interpretation of Rider 30 is unreasonable.

[16][17] If Rider 30 were a garden variety contract, it would never be interpreted as permitting ComEd to exercise its discretion arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. Absent an express disavowal, every contract, as a matter of law, contains an implied covenant of good faith and fair dealing which requires a party vested with contractual discretion to act reasonably in its exercise. [Perez v. Citicorp Mortgage, Inc.](#), 301 Ill.App.3d 413, 423-24, 234 Ill.Dec. 657, 703 N.E.2d 518 (1998). Although a utility tariff has the force of law and is not considered to be a contract ([Illinois Central Gulf R.R. Co. v. Sankey Brothers, Inc.](#), 67 Ill.App.3d 435, 439, 23 Ill.Dec. 749, 384 N.E.2d 543 (1978)), we fail to see any logic in a rule absolving a public utility from acting reasonably in the exercise of its discretion merely because it is vested with such power by a tariff as opposed to a contract.

Rider 30 governs the rights and obligations of ComEd and its *176 customers in the same manner as would a contract. Customers choosing option C obviously have some reasonable expectations regarding the availability of buy-through power during a curtailment. A simple comparison of the terms of options B and C reveals that the only advantages to electing option C is that option C customers are given 2 hours more notice of a curtailment, and, unlike option B customers, they may be able to purchase buy-through energy. Customers choosing option C are subject to 15 more curtailments annually and receive much lower credits against their charges than do customers electing option B. Absent a reasonable expectation that ComEd will offer buy-through power during a cur-

tailment, there would be no benefit to choosing option C over option B.

The Commission correctly found that Rider 30 vests ComEd with discretion in determining whether to offer buy-through power to its option C customers during a curtailment. It erred in concluding that this discretion means that ComEd need not make reasonable efforts to source buy-through power before deciding not to offer it to its option C customers. Our conclusion in this regard does not mean that we accept the petitioners interpretation of Rider 30. We do not.

Just as the plain language of Rider 30 cannot be interpreted as granting ComEd a license to arbitrarily refuse to offer buy-through power to its option C customers during a curtailment, neither should it be interpreted as mandating that ComEd source buy-through power before deciding not to offer it. Depending upon the circumstances of any given case, the failure to source buy-through power may, or may not, constitute a reasonable exercise of the discretion vested in ComEd under the terms of Rider 30. As the Commission correctly observed: “Particular actions which are reasonable will depend upon the **687** **903** situation at the time of the specific curtailment.”

Our analysis of Rider 30 leads us to conclude that it must be interpreted as requiring ComEd to act reasonably under the circumstances in exercising its discretion to determine if buy-through energy will be offered to option C customers during a curtailment. However, it cannot be said, as a matter of law, that a reasonable exercise of that discretion does, or does not, require that ComEd source buy-through energy before deciding not to offer it. That question is one of fact to be decided on a case by case basis.

[18] Next, we will address the petitioners' contention that the Commission erred in determining that ComEd used reasonable efforts to source buy-through energy during the curtailment on July 14, 1995, and that “emergency conditions” existed on that date which precluded ComEd from offering buy-through energy to its option C customers. On this issue, we need go no further than an application of the **177** traditional rules attendant to summary judgment proceedings to support our conclusion that the petitioners' assignment of error is well taken.

[19] Granting summary disposition in an administrative proceeding is comparable to granting summary judgment under section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 1998)). Cano v. Village of Dolton, 250 Ill.App.3d 130, 138, 189 Ill.Dec. 883, 620 N.E.2d 1200 (1993). Because of the similarities in the two procedures, it is appropriate to apply the standards applicable to granting summary judgment under section 2-1005 when reviewing a summary determination entered by an administrative agency. See Cano, 250 Ill.App.3d at 138, 189 Ill.Dec. 883, 620 N.E.2d 1200.

[20][21][22][23] Summary judgment is a drastic means of disposing of litigation and should be employed only when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Purtill v. Hess, 111 Ill.2d 229, 240, 95 Ill.Dec. 305, 489 N.E.2d 867 (1986). In determining the existence of a genuine issue of fact, the evidentiary material of record must be construed strictly against the movant and liberally in favor of the opponent. Purtill, 111 Ill.2d at 240, 95 Ill.Dec. 305, 489 N.E.2d 867. If that evidentiary material could lead to more than one reasonable inference or conclusion, the one most favorable to the opponent of the motion must be adopted. Lapidot v. Memorial Medical Center, 144 Ill.App. 3d 141, 147, 98 Ill.Dec. 716, 494 N.E.2d 838 (1986). The purpose of a summary judgment proceeding is to determine the existence of a genuine issue of material fact, not to resolve the issue. Addison v. Whittenberg, 124 Ill.2d 287, 294, 124 Ill.Dec. 571, 529 N.E.2d 552 (1988).

[24][25][26] The findings and conclusions of the Commission on questions of fact are held to be *prima facie* true (220 ILCS 5/10-201(d) (West 1998)), and will not be disturbed on appeal unless they are against the manifest weight of the evidence. Hartigan, 148 Ill.2d at 367, 170 Ill.Dec. 386, 592 N.E.2d 1066. However, the resolution of a motion for summary judgment is not based on findings or conclusions of fact; rather, it is a question of law subject to *de novo* review. In re Estate of Hoover, 155 Ill.2d 402, 411, 185 Ill.Dec. 866, 615 N.E.2d 736 (1993). An order granting a summary judgment will be reversed on appeal if the reviewing court determines that a genuine issue of material fact exists. Addison, 124 Ill.2d at 294, 124 Ill.Dec. 571, 529 N.E.2d 552.

As an alternative ground for granting summary

judgment in favor of ComEd, the Commission held that, “even if Rider 30C did require ComEd to use reasonable efforts to source or provide buy-through energy to its customers during a curtailment, ComEd presented undisputed facts that it did, in fact, use reasonable efforts, but still was unable to make buy-through energy available on July 14, 1995.” The record in ****688 ***904** this case clearly contains evidentiary material ***178** supporting the proposition that ComEd used reasonable efforts to source buy-through energy, but that material is by no means undisputed. As stated earlier, the petitioners submitted the affidavit of Goerss in opposition to ComEd’s motion for summary disposition. According to Goerss, ComEd’s efforts to source buy-through energy were not reasonable because ComEd did not continue those efforts up to the time of the curtailment. Standing alone, this opinion created a disputed issue of fact on the question of whether ComEd’s efforts were reasonable, precluding a resolution of the question by means of a summary judgment.

The Commission also found that emergency conditions existed on July 14, 1995. This finding is of significance in light of the fact that Rider 30C provides that option C customers are not permitted to purchase buy-through energy during emergency conditions. However, Rider 30 does not define “emergency conditions.” According to the Commission, emergency conditions are “unexpected conditions, internal or external to ComEd’s portion of the integrated electrical generation, transmission, and distribution system, which may, in ComEd’s determination, jeopardize the reliability or stability of the whole or any part of the system, or which may impair ComEd’s ability to operate its facilities economically and safely in accordance with the operating practices and requirements of FERC, the Illinois Commerce Commission, NERC, MAIN and ComEd.” Assuming for the sake of analysis that we accept the Commission’s definition of “emergency conditions,” we must still address the question of whether the Commission correctly determined, as a matter of law, that such conditions existed on July 14, 1995.

In support of its conclusion that emergency conditions existed, the Commission noted that: the ambient temperature was 100 degrees for the second straight day; the temperature on July 13, 1995, was 106 degrees; ComEd experienced an all time system peak demand on July 13; and, ComEd implemented nu-

merous demand-side options from its “Emergency Load Conservation Procedures” to reduce anticipated record peak loads. These facts could certainly support the conclusion that an emergency condition, as defined by the Commission, existed on July 14, 1995. However, we note that, with the exception of July 14, 1995, being the second straight day of temperatures in excess of 100 degrees, all of the same conditions existed on July 13, 1995, when ComEd offered buy-through energy to its option C customers during a curtailment. If these conditions did not constitute emergency conditions preventing the purchase of buy-through energy on July 13, 1995, one might reasonably conclude that no emergency conditions preventing the purchase of buy-through energy existed on July 14, 1995, either. ***179** The petitioners also point out that ComEd never notified its option C customers that buy-through energy would not be available on July 14, 1995, due to the existence of emergency conditions. Although ComEd is correct in its assertion that Rider 30 does not require it to notify its customers of the existence of emergency conditions, we believe that it is reasonable to infer that ComEd knows when such conditions exist, especially in view of the fact that the Commission’s own definition provides in part that the existence of an emergency condition is determined by ComEd. Nevertheless, ComEd’s own submissions in support of its motion for a summary determination reveal that it actually made some effort to procure buy-through energy on July 14, 1995, supporting the inference that no emergency conditions existed which would prevent it from providing buy-through energy to its option C customers. Simply put, the evidence in the record evinces a genuine issue of fact on the question of whether emergency conditions existed on July 14, 1995, which precluded the petitioners from purchasing buy-through energy during the curtailment.

****689 [27][28] ***905** The final issue to be determined is whether the Commission erred in denying Marshall Field’s motion for summary judgment premised upon the assertion that it did not receive proper notice of the July 14, 1995, curtailment. We begin our analysis of this issue by noting that the purpose of a notice provision in either a contract or a statute is to ensure that a party is actually informed. See *Rogers v. Balsley*, 240 Ill.App.3d 1005, 1011, 181 Ill.Dec. 814, 608 N.E.2d 1288 (1993); *Shipley v. Stephenson County Electoral Board*, 130 Ill.App.3d 900, 903-04, 85 Ill.Dec. 945, 474 N.E.2d 905 (1985). It is undisputed that Marshall Field received actual notice of the

curtailment within the time period provided under option C. Nevertheless, Marshall Field contends that, since it did not receive printed notice of the curtailment through a dedicated telephone line located at the “Held Desk” at its State Street store, it did not receive the notice provided for in Rider 30 and its contract with ComEd. It concludes, therefore, that the Commission erred in failing to grant its motion for summary judgment. We disagree.

Neither Rider 30 nor the contract between ComEd and Marshall Field requires that printed notice of a curtailment be given to Marshall Field via a dedicated telephone line located at its “Help Desk.” Rider 30 merely states that ComEd “shall notify” its option C customers of a curtailment and the availability of buy-through energy at least four hours before the curtailment becomes effective. It does not require that the notice be in writing, nor does it mention the manner in which the notice must be delivered. The contract between Marshall Field and ComEd provides:

“Customer Obligations

***180** (a) All notices of interruption or curtailment required to be provided by the Company under Rider 30 shall be provided by the Company to the Customer at its State Street Help Desk * * *.

(b) The Customer shall at its expense install, own, and maintain a dedicated telephone line for the Rider 30 notification system at the State Street store.”

Although this paragraph requires ComEd to provide Marshall Field with notice at its “Help Desk,” it does not require that the notice be in writing or that ComEd necessarily use the dedicated telephone line to provide such notice. See [Prairie Management Corp. v. Bell](#), 289 Ill.App.3d 746, 752, 224 Ill.Dec. 580, 682 N.E.2d 141 (1997). Although not argued by ComEd, we note that Sebescak testified before the hearing examiner that the designated printer was not operating on July 14, 1995.

Even if we were to assume for the sake of analysis that ComEd did not strictly comply with the notice provision of Rider 30 or its contract with Marshall Field, the fact remains that Marshall Field received actual notice of the curtailment within the time provided under option C. As stated in [Vole, Inc. v. Georgacopoulos](#), 181 Ill.App.3d 1012, 1019, 131 Ill.Dec. 17, 538

[N.E.2d 205 \(1989\)](#), the “object of notice is to inform the party [to be] notified, and if the information is obtained in any other way than formal notice, the object of notice is attained.”

For these reasons, we do not believe that ComEd's failure to give Marshall Field written notice of the curtailment at its “Help Desk” constituted a material breach of Rider 30 or the contract between the parties, especially where it is evident that Marshall Field received actual notice and claims no prejudice. See [In re Splett](#), 143 Ill.2d 225, 231-32, 157 Ill.Dec. 419, 572 N.E.2d 883 (1991); [Prairie Management Corp.](#), 289 Ill.App.3d at 752, 224 Ill.Dec. 580, 682 N.E.2d 141. We, therefore, affirm the Commission's denial of Marshall Field's motion for summary judgment.

In summary, we: (1) affirm the Commission's denial of Marshall Field's motion for summary judgment; (2) reverse the Commission's order granting summary judgment in favor of ComEd; and (3) remand ****690 ***906** this matter to the Commission for further proceedings.

Affirmed in part; reversed in part and remanded.

[SOUTH](#) and HOURIHANE, J.J., concur.
Ill.App. 1 Dist., 1999.

Bloom Tp. High School v. Illinois Commerce Com'n
309 Ill.App.3d 163, 722 N.E.2d 676, 242 Ill.Dec. 892

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H
Ill.C.C., 2000

Bloom Township High School
v.
Commonwealth Edison Company
95-0559

Complaint as to Respondent's wrongful assessment of penalty fees and other charges as a result of its misapplication of Rider 30C in Chicago Heights, Illinois.

Marshall Field & Company
v.
Commonwealth Edison Company
95-0561

Complaint as to Respondent's wrongful assessment of penalty fees and other charges as a result of its misapplication of Rider 30C in various locations

St. Therese Medical Center
v.
Commonwealth Edison Company
95-0563, (Consolidated)

Complaints as to Respondent's wrongful assessment of penalty fees and other charges as a result of its misapplication of 30C in Waukegan, Illinois.

Illinois Commerce Commission
November 21, 2000

ORDER

By the Commission:

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On November 14, 1995, Bloom Township High Schools, K&M Plastics, Inc., Marshall Field & Company ("Marshall Field"), St. Therese Medical Center, Arlington Mills, Inc. and Midwest Film Corporation (collectively "Complainants") filed separate complaints with the Illinois Commerce Commission ("Commission") against Commonwealth Edison Company ("Respondent" "ComEd" or "the Company") pursuant to Rider 30, Option C and §9-252 of the Public Utilities Act (the "Act"), [220 ILCS 5/9-252](#). The complaints alleged that ComEd misapplied Rider 30, Option C ("Rider 30C") and charged Complainants penalty fees and other charges which, according to Complainants, were improper.

I. Procedural Background

Pursuant to notice as required by law and the rules and regulations of the Commission, this matter originally came on for hearings before duly authorized Hearing Examiners of the Commission at its offices in Chicago, Illinois, on April 20, 1998. At the conclusion of cross-examination of Complainants' first witness, Andrew J. Sebescak of Marshall Field & Company, the Hearing Examiners stopped the hearings and directed Complainants and ComEd to file motions for summary judgment. After both parties filed such motions, the Hearing Examiners issued a Proposed Order on September 21, 1998 recommending that summary judgment be granted to ComEd and denied to Complainants on the grounds, inter alia, that ComEd was not legally required to make reasonable efforts to provide buy-through electricity. The Commission issued an Order granting summary judgment to ComEd and denying summary judgment to Complainants on December 16, 1998.

Complainants appealed the Commission's December 16, 1998 Order on February 18, 1999. On November 24, 1999 the Illinois Appellate Court rendered its decision, affirming in part and reversing in part the Commission's December 16, 1998 Order and remanding the case back to the Commission.

Pursuant to notice as required by law and the rules and regulations of the Commission, this matter came on for remand hearings before duly authorized Hearing Examiners of the Commission at its offices in Chicago, Illinois on August 23 and August 24, 2000. In addition to the testimony of Andrew J. Sebescak, Senior Maintenance Manager of Marshall Field & Company, who testified at the original hearing, Complainants presented the testimony of St. Therese's Pamela J. Stoyanoff, Bloom Township's John Romano, Director of Buildings and Ground, and the expert testimony of Keith E. Goerss, Director of Sales Central Illinois Light Company. Respondent presented the testimony of Mr. William J. Fredricksen, ComEd's, .?? Director, Generation Dispatch Transmission Operations, Timothy F. McInerney, Senior Rate Analyst of ComEd and Paul R. Crumrine, ComEd's Director Regulatory Strategies & Service, all of ComEd. At the conclusion of the hearing on August 24, 2000, the record was marked "Heard and Taken."

Complainant and Respondent filed Initial and Reply Briefs. A copy of the Hearing Examiners' Proposed Order was served on the parties on October 18, 2000.

II. Factual Background

Rider 30 was designed to provide Edison with a reliable capacity resource that can replace building or purchasing generating capacity to meet ComEd's system load requirements. Customers who take service under Rider 30 make a commitment to reduce their electricity usage on request by ComEd. In return for this commitment, ComEd pays the customers by applying credits to their electric bills.

Rider 30 contains three options from which customers may choose, Options A, B and C. Each option provides customers with billing credits in return for a commitment to curtail. Complainants all signed up on ComEd's Rider 30C and were customers thereunder during the relevant periods at issue in the Complaints.

Rider 30C provides, in pertinent part, that:

Under this option, the customer may purchase energy during a curtailment period at a cost of \$.15/kWh for all kilowatt hours consumed during the curtailment period associated with 30-minute demands which exceed the customer's Firm Power Level ... The availability of such energy shall be at the discretion of the Company, which shall notify the customer of its expected availability at the time the notice of curtailment is given. A reasonable effort to maintain that availability during a curtailment period will be made. The customer shall not be allowed to make such purchases during emergency conditions.

On July 14, 1995, ComEd decided to invoke a Rider 30C curtailment period without offering buy-through energy. ComEd sent the requisite notice to its Rider 30C customers. Complainants failed to comply with Rider 30C and failed to reduce their energy consumption to the appropriate Firm Power Levels during the curtailment period. Subsequently, ComEd assessed each of the Complainants penalties in accordance with the provisions of Rider 30C.

A. Issue Presented On Remand

The Illinois Appellate Court affirmed that part of the Commission's December 16, 1998 Order which denied Complainant's motion for summary judgment. The Appellate Court then went on to reverse that part of the Commission's Order which granted Respondent's motion for summary judgment. In the process of reaching this decision, the Appellate Court addressed two questions on review which are crucial to the remand proceedings.

First, the Appellate Court considered the question of the proper interpretation of Rider 30. The Appellate Court held that:

"Our analysis of Rider 30 leads us to conclude that it must be interpreted as requiring ComEd to act reasonably under the circumstances in exercising its discretion to determine if buy-through energy will be offered to option C customers during a curtailment. However, it cannot be said, as a matter of law, that a reasonable exercise of that discretion does, or does not, require that ComEd source buy-through energy before deciding not to offer it. That question is one of fact to be decided on a case by case basis." p. 14

Thus, while the Appellate Court did in fact rule on ComEd's contractual obligations under Rider 30, it left unanswered the question of whether ComEd was in breach of its

contractual duties as alleged by Complainants.

Secondly, the Appellate Court was confronted with the question of what constitutes "emergency conditions" as referred to in Rider 30. The Appellate Court noted that Rider 30 does not define emergency conditions. Moreover, the Appellate Court noted that since all of the same conditions existed on July 13, 1995 when buy-through was offered as existed on July 14, 1995, one might reasonably conclude that no emergency conditions preventing the purchase of buy-through energy existed on July 14, 1995, either. However, once again, the Appellate Court reached no specific conclusion, as to whether emergency conditions existed on July 14, 1995.

The Appellate Court, after reviewing the record on appeal, held that genuine issues of material fact existed as to these two questions in dispute. Thus, the Appellate Court remanded the case for the purpose of convening a hearing addressing the following issues:

(1) Whether, pursuant to the requirements of Rider 30C, Edison made reasonable efforts to source buy-through power to Complainants during the July 14, 1995 curtailment period before making its decision not to offer same; and

(2) Whether emergency conditions existed on that date which precluded ComEd's efforts to source buy-through energy.

There is no dispute here as to the fees ComEd charged any of the Complainants pursuant to the Rider. Complainants admit that if ComEd's proposed interpretation and application of Rider 30C are appropriate and correct, all the fees and charges for July 14, 1995 are all proper.

B. Complainants' Arguments

Complainants allege that they have been improperly assessed Rider 30 penalty fees by Respondent for their electric usage on July 14, 1995. Complainants acknowledge that they did not reduce their load during the curtailment period to their Firm Power Level as required by the provision Rider 30. However, Complainants assert that they should not be held to their load reduction contractual obligation because ComEd did not meet its obligation in making its determination not to provide buy-through power for its option C customers, including Complainants, during the July 14, 1995 curtailment.

Complainants contend that the plain language of Rider 30 Option C requires Respondent to make reasonable efforts to allow Option C customers to purchase buy-through electricity during a curtailment period. They allege that the record clearly indicates that ComEd did not make reasonable efforts to provide buy-through power during the July 14, 1995 curtailment.

Complainants witness Keith E. Goerss outlined what Complainants believe is the appropriate standard for judging whether Respondent acted reasonably under Rider 30. Mr. Goerss stated that before ComEd invokes a curtailment period without offering buy-through energy to Rider 30C customers, the company must:

Determine whether ComEd would have generation of their own available to serve the customers' load that has an incremental operating cost of less than 15 cents per kWh.

Continuously survey to determine whether other energy suppliers have energy available to supply ComEd at less than 15 cents per KWh. Other suppliers would include utilities, marketers, municipalities, and rural electric cooperatives which are located inside or outside of ComEd's service territory. (Complainant's Exhibit 5.0, p. 9)

Mr. Goerss went on to state that if ComEd has available generated energy or finds another supplier with available energy, then, either the curtailment should not be implemented, or buy-through energy must be offered.

Relying on this criteria, Complainants first argue that ComEd did not act reasonably in making its decision to implement a curtailment without offering buy-through electricity to Option C customers on July 14, 1995. In support of this argument, Complainant's point to William J. Fredericksen's testimony at the August 23-24, 2000 hearing that he did not know the amount of MWs carried by the Option C customers. Complainants believe that this testimony evidences ComEd's lack of reasonable effort to maintain service for Option C customers. Complainants state that without knowing the amount of load needed for these customers, Respondent could not have effectively evaluated whether ComEd had available energy or whether other suppliers had available energy to supply Option C customers.

Next they point to Mr. Goerss' testimony in support of their argument. Mr. Goerss stated that while circumstances may have reasonably led ComEd at 6:30 AM to make the decision to curtail without offering buy-through, ComEd's implementation of that decision at 12:30 P.M. was not reasonable. He alleged that ComEd's failure to continually monitor energy availability and to reevaluate its decision as conditions changed between 6:30 A.M. and 12:30 P.M. was a breach of ComEd's contractual duty under Rider 30. Further, to underscore this point, Complainants refer to August 16, 1995. On that date ComEd gave notice for curtailment, which ComEd later called off. Complainants argue that the Respondent's reversal of its curtailment decision on August 16, 1995 exemplifies the fact that prudent and continual monitoring of conditions will allow ComEd to determine that a curtailment should be called off.

Complainants then point to the fact that the actual peak load was approximately 299 MWs less than what had been forecasted at 6:30 AM. They propose that if ComEd had been aware of the amount of capacity used by Rider 30C customers, continual monitoring would have revealed that conditions had changed enough to allow for buy-through power to be offered to the Option C customers.

Complainants also point to ComEd's three power sales to other utilities on July 14, 1995. Complainants state that these sales are evidence that as conditions changed throughout the day, ComEd had sufficient power to sell to other utilities, and conceivably to its Option C customers. Thus, the failure to provide power to its Option C customers after 6:30 AM was unreasonable.

Secondly, Complainants address the argument of "emergency conditions". Complainants disagree with Respondent's contention that emergency conditions existed on July 14, 1995 which under Rider 30 precluded any buy-through offering to Rider 30C customers. Mr. Goerss indicated that the same conditions existed on July 13, 1995, as were present on July 14, 1995, and buy-through energy was offered on that date. Accordingly, since buy-through was offered no emergency existed on July 13, 1995, and following from that on July 14,

1995 as well.

Third, Complainants argue that Bloom did not receive proper notice of the July 14, 1995 curtailment. Complainants point to the testimony of John Romano who stated that he did not receive notice from ComEd officials of the July 14, 1995 curtailment, but that he received it from another source.

In summary, Complainants argue that the language of Rider 30, imposes a duty on Respondent to make reasonable efforts to maintain the availability of power to Option C customers during a curtailment. Complainants contend that Respondent's failure to provide such power on July 14, 1995 was unreasonable due to the circumstances. They therefore request that this Commission grant their complaint, declare that the Rider 30 penalties are null and void, and award them a refund of charges resulting from ComEd's increase in their Rider 30 Firm Power Level after July 14, 1995 along with interest.

C. ComEd's Position

ComEd submits that Complainants have not met their burden of proof in this matter. Rather than providing evidence to support their complaints, Complainants make various feeble allegations that have no basis in the record. ComEd asserts that Complainant's main contention is that on July 14, 1995 "conditions changed" and that the Company, should have therefore called off the curtailment. ComEd contends to the contrary, that the evidence showed that circumstances only grew worse on July 14, 1995.

ComEd states that it presented evidence that overwhelmingly supports its position that its actions were justified and reasonable in light of the conditions that existed on July 14, 1995.

1. Bulk Power Operations ("BPO") Overview

ComEd presented the testimony of Mr. Fredricksen. He testified that in 1995 he was ComEd's Interchange Operations Supervisor of Bulk Power Operations ("BPO"). In that capacity he had the tasks of supervising economic dispatch of available generating assets to meet forecasted load as well as participating in decisions about whether and when to invoke demand-side management tools, including Rider 30. He stated that he had over 20 years experience in determining how to meet high levels of load, particularly in the summer months, through dispatch of generating assets.

Mr. Fredricksen described how BPO implemented economic dispatch during 1995. He stated that the process utilized by ComEd during this time period began with BPO monitoring of customer demand throughout the ComEd System. Through a complex data network dispatch personnel were continually apprised of changing system demand. Numerous demand forecasts were generated throughout the day, with special attention being paid during the early morning hours when dispatch and demand-side management decisions had to be made. He opined that hourly load forecasting is a dynamic process. This means that dispatchers continually update hourly load forecasts based on the best weather conditions available. This information is continually updated as new weather information is received. In addition, he stated that BPO adjusted demand forecasts based on how the actual demand for energy, and the factors that influence it, evolve throughout the day.

Likewise, Mr. Fredricksen stated that generating unit capacity projections are

continually updated as well as interchange availability and price information are continually reviewed. He further explained that during 1995, ComEd's BPO communicated continually with utilities throughout the Midwest and beyond to order and identify the lowest bulk power available on an hour-to-hour basis.

He also testified regarding the options available to ComEd in 1995 in the event there was insufficient generation and purchases available to meet the forecasted demand. He stated when this event occurred the implementation of the Emergency Load Conservation Procedure ("ELCP") was considered. Among the options available to reduce the demand include the use of demand-side management resources (such as Rider 30), public appeals to reduce demand, voltage reductions, and ultimately, load shedding. He observed that the steps are not always followed sequentially due to the lead time required to implement each step.

2. July 13, 1995

ComEd maintains that an assessment of the reasonableness of its actions in curtailing power on July 14, 1995 without buy-through energy cannot be made in a vacuum. ComEd posits that its actions were directly related to its experiences on July 13, 1995, the hottest day in the history of Chicago and a day in which many heat-related deaths occurred in the Chicagoland area.

Mr. Fredricksen testified that on the morning of July 13, 1995, ComEd informed its Rider 30C customers that ComEd would be initiating Rider 30, and that buy-through energy would be available. At the time ComEd made the decision that the buy-through option would be available, emergency conditions did not exist and were not expected.

Mr. Fredricksen testified that following ComEd's decision to offer buy-through to its Rider 30C customers on July 13, weather conditions worsened. Temperatures soared, reaching a record-breaking 106 degrees at 3:25 p.m. In addition to the unprecedented temperatures, July 13, 1995 set an all-time record high demand on ComEd's system, requiring 19,151 MW at peak demand. He stated that ComEd had underestimated its anticipated system loads by as much as 900 MW, and had reached its transmission capacity limitations.

As a result of these conditions, ComEd states exigent circumstances existed throughout ComEd's transmission and distribution system. Therefore, ComEd was required to take a number of measures, including initiating a number of options from its ELCP. In fact, ComEd's BPO requested that the major substations be manned, in anticipation of invoking "rolling blackouts" as a means of maintaining voltage levels. In addition, ComEd was able and required to purchase emergency power on the wholesale market.

Mr. Fredricksen stated that all these facts and concerns were known to ComEd's decision makers on the morning of July 14, 1995, prior to their decision to invoke Rider 30C curtailment without buy-through. He submitted that it was with these experiences having occurred only hours before that ComEd personnel were required to evaluate system demands for July 14, 1995.

3. ComEd's Actions on July 14, 1995

Mr. Fredricksen testified in the early morning hours of July 14, 1995, ComEd's BPO

analyzed the expected conditions for the day. ComEd's situation appeared even more strained than the prior day, for a number of reasons. First, based upon the record-setting demand on July 13, ComEd's energy reserves were low. Second, the extremely hot, humid weather conditions and corresponding demand were expected to continue, if not worsen, throughout the day on July 14. Third, the availability of energy supply from the wholesale market appeared unlikely. Given ComEd's experiences from July 13 and the increasingly alarming conditions on the morning of July 14, he maintained that ComEd's action in initiating Rider 30C without buy-through at that time was reasonable and appropriate.

Mr. Fredricksen explained that ComEd is required to make decisions whether to implement riders based upon load forecasts developed much earlier in the day. ComEd must make dispatch strategy hours in advance in order to reliably operate its system, and to provide required notice to customers prior to curtailment. Rider 30C requires that customers be provided with four hours' notice prior to curtailment. Consequently, in order to have curtailment in effect at the time of peak demand, when most needed, ComEd had to make its decision to curtail early in the morning of July 14, 1995.

Based upon the extreme conditions of July 13, ComEd's reserves were already low on the morning of the July 14. Mr. Fredricksen stated that ComEd's system reserves registered in the "red," indicating an amount equal to or less than what is required. He testified that BPO determined that already in the red, any contingency would only further deplete ComEd's already insufficient energy reserves.

Already experiencing low energy reserves, Mr. Fredricksen stated that ComEd did not anticipate any break from the extreme heat. In fact, available data indicated that conditions would likely be worse on July 14 than they had been on July 13. The temperature on July 14, 1995 was expected to be over 100 degrees. This would make it the second day in a row with temperatures over 100 degrees, and the third day with temperatures in excess of 90 degrees. As Complainant witness Goerss acknowledged, sustained heat over several days increases demand. Available data supported this conclusion, with system demand at 4 a.m. (during minimum load) on July 14 already registering more than 1,400 MW greater than system demand for the same time in the morning of July 13.

In addition to unfavorable local conditions, the extreme heat and corresponding high demand in other parts of the country eliminated ComEd's ability to procure energy on the open market. The same heat wave hitting Chicago and the Midwest was making its way east, where a number of wholesale energy suppliers are located. He stated that based upon the eastward progression of the heat wave, the energy suppliers contacted by ComEd on the morning of July 14 indicated that unlike July 13, they would not preschedule energy sales due to the fact that they were unsure of what their own energy demands would be. Based upon these same factors, ComEd was not confident that the purchase of hourly energy would be available on the spot wholesale market. ComEd was, therefore, facing increased demands without the availability to purchase energy on the open market, as it had been able to do on July 13.

In the early morning hours of July 14, maximum possible demand curtailments on ComEd's system appeared to be essential to maintain sufficient power to serve firm load. At 6:30 a.m., BPO representatives met to discuss the impending situation and the best way to preserve the safety and reliability of the electric grid in ComEd's service territory. Mr. Fredricksen explained ComEd's operational strategy for July 14, 1995:

"Overall strategic decisions on how to meet demand must be made based on the information available at the time when the decision has to be made. Based upon this information, our best estimates for the peak demand, ComEd generating capacity and interchange availability for the day indicated that unless demand curtailments were implemented, the reliability of service to all ComEd customers would be in jeopardy. (Fredricksen Direct, ComEd Ex 1, pp.7-8; Tr. 372-73)."

ComEd asserts that in making this important judgment, BPO had to look at the system as a whole -- total projected demands compared to total available generating capacity and likely interchange. It could not and did not isolate the small group of Rider 30C customers to assess their unique likely demands or curtailments. The only reasonable and responsible course of conduct by BPO was the one it took -- make curtailment (and buy-through) decisions based upon the information available at the time.

Faced with extreme conditions and lack of alternate supplies, in an effort to reduce anticipated record peak loads on July 14, 1995, ComEd's BPO implemented numerous demand-side options from its ELCP. These options included ComEd building and lighting curtailment; direct load control; 5% voltage reduction in all areas except the Loop; implementation of Riders 26, 30A, and 30; ComEd Cooperative, and finally, implementation of Rider 30C. ComEd implemented curtailment under Rider 30C at 12:30 p.m., as its final load conservation measure, to last until 6:30 p.m. Through initiation of all of its various ELCP measures, viewed collectively, ComEd forecasted that an additional 700 MW would be available to help preserve system reliability. Mr. Fredricksen asserted that ComEd's ability to maintain system reliability and operational integrity relied on implementing curtailment without buy-through. In sum, ComEd's decision to implement Rider 30C without buy-through on the morning of July 14, 1995 was based upon many factors.

Further, even after the decision to curtail without buy-through had been made, Mr. Fredricksen stated that ComEd personnel continued to assess whether or not system load had changed significantly enough to alter the operational plan for the day. In particular, it looked for changing circumstances that would permit it to cancel the curtailment. He testified that BPO found that no changes in ComEd's system occurred that would support the cancellation of the curtailment request or the provision of buy-through energy.

ComEd asserts that even in hindsight, the reasonableness of the Company's decision not to offer buy-through energy is evident by the fact that on July 14, ComEd set a new all-time historic peak demand of 19,201 MW. As July 14 progressed, ComEd encountered the problems it had anticipated based upon its experience from July 13. The loads matured on an hourly basis as anticipated, leading BPO personnel to believe the estimates were accurate and system peaks were going to occur as anticipated which, in fact, they did. Therefore, ComEd states it continued to take ELCP actions to maintain the integrity of its transmission system.

4. Alternative Energy Supply Available on July 14, 1995

In response to Complainant's unsupported allegation that there was alternative energy supplies at ComEd's disposal on July 14, 1995 it states as follows. In addition to constant evaluation of its own system, ComEd continued its efforts to procure energy from alternative suppliers throughout July 14. As part of its normal business practice, ComEd dispatchers conduct market surveys on an hourly basis. Consistent with this established business practice Mr. Fredricksen testified on July 14, ComEd dispatchers continuously

surveyed the market throughout July 14 to determine whether other suppliers could sell energy to ComEd. Despite these efforts, he stated that the dispatchers were unable to find a source of any energy to serve ComEd customers or sale. ComEd submits the unavailability of energy on the market is unrefuted by Complainants. This, it contends, provides further support that the Company's decision to curtail its Rider 30C customers without buy-through on July 14, 1995 was reasonable based on the circumstances that existed on that day.

5. Emergency Conditions

Finally, ComEd asserts that it acted in full accordance with the provisions of Rider 30C by informing Complainants at the time of the notice of curtailment that no buy-through energy would be available during the period of curtailment on July 14, 1995. Moreover, ComEd posits that regardless of any other factors, Complainant's cannot prevail as a matter of law, because Complainants were not entitled to buy-through energy on July 14, 1995. ComEd contends that the unambiguous language in Rider 30C provides that customers taking service under Rider 30C cannot purchase buy-through energy during emergency conditions.

ComEd asserts that emergency conditions exist when a utility's ability to safely and reliably serve its load is in danger. Edison maintains that under any definition, on July 14, 1995, ComEd's system was operating under emergency conditions. As previously indicated and acknowledged by Complainants, the ambient temperature on July 14, 1995 was 100 degrees, a second straight day in the Chicagoland area in which temperatures reached that level. In fact, the high temperature recorded on July 13, 1995 of 106 degrees was an all time historic recorded high for the Chicago area, leading ComEd to experience an all time system peak demand. These conditions constituted an emergency, as explained by ComEd witness Fredricksen:

The information available to ComEd on the morning of July 14 supported a forecast for a high level of demand ... [which] was the result of, among other things, extremely high temperatures expected throughout the day ... If demand was not significantly curtailed, ComEd would not have sufficient power to fully service firm load. In order to prevent service interruptions to native load customers which were otherwise projected to have resulted, ComEd elected to invoke a variety of demand side resources, including using Rider 30, Option C without buy-through. Invoking these demand side resources was necessary both to ensure the stability of ComEd's electric system that otherwise [would] have been in jeopardy and to materially decrease the likelihood that firm load would go unserved. (Fredricksen Direct, ComEd Ex. 1, pp. 9 - 10).

On July 14, 1995, ComEd asserts it took all necessary steps short of shedding firm load and even requested that substations be manned, in anticipation of its need to initiate "rolling blackouts."

In addition to ComEd's implementation of its ELCP and the general state of its generation, transmission and distribution system, ComEd's requirement to file reports with governing bodies demonstrates that emergency conditions existed on July 14, 1995. ComEd was required to file an Electric Power System Report with the Federal Energy Regulatory Commission because of its voltage reductions. As indicated in the report, by implementing measures from its ELCP, ComEd stabilized its transmission voltages near minimum planned emergency levels. In addition, ComEd filed a heat storm report with the

ICC, based upon ComEd's need to initiate its ELCP measures.

Thus, Edison maintains that the record herein demonstrates that ComEd could not have offered buy-through energy to its customers on July 14, 1995. On that day, there were emergency conditions on ComEd's electrical generation, transmission, and distribution system, and by the unambiguous terms of Rider 30C, Complainants were not allowed to purchase buy-through energy.

With regard to the different circumstances that existed on July 13 versus July 14, Mr. Fredricksen explained that BPO did not anticipate emergency conditions developing early on July 13, when it made the decision to allow buy-through. As the day developed, emergency conditions emerged, yet ComEd was able to purchase enough power to permit it to continue to provide buy-through energy. ComEd maintains that it should not now be penalized for giving its customers an unwarranted benefit (in hindsight) on July 13. Moreover, as explained by Mr. Fredricksen, ComEd saw the emergency coming when it made its buy-through decision in the early morning of July 14. Conditions were materially worse at the time of critical decision making on July 14 than on July 13.

Additionally, Edison responds to Complainant's claim that the events of August 16, 1995, supports its contention that ComEd made its July 14, 1995 Rider 30C decisions arbitrarily. Complainant's witness Goerss seems to imply that circumstances on both days changed and that therefore, ComEd should have called off the curtailment on July 14, 1995. ComEd asserts that this argument is meritless?? because unlike August 16, 1995, when the temperature dropped 15 degrees due to a storm front, there was no changed circumstances on July 14, 1995 that would have justified either early termination of curtailment or an offer of buy-through energy. Edison submits to the contrary, as supported by the record evidence, conditions got worse as the day progressed resulting in Edison's record historic peak demand registering at 4p.m. on July 14, almost 4 hours into the Rider 30C curtailment.

6. Notice

Complainants argue that neither of Bloom's two high schools received required notice of the July 14, 1995 curtailment of Rider 30C customers from ComEd. Complainants assert that ComEd provided no evidence in this record which showed that they did provide notice to Bloom. Therefore, Complainants conclude that Bloom should not be required to pay any Rider 30 penalties and should be refunded the amounts it paid. ComEd avers that this argument is flawed for three reasons. First, Bloom never raised this issue in its complaint or its revised prefiled testimony and is consequently barred from raising the issue at this point in the proceeding. A party cannot present evidence and cannot obtain relief for issues outside the scope of that party's complaint. *Peifer v. MJM Electric Cooperative*, 1992 Ill. PUC LEXIS 326 (Aug. 26, 1992) (matters beyond the scope of the complaint are not before the Commission); *Citizens Utility Board v. GTE North Incorporated*, 1989 Ill. PUC LEXIS 279 (Sept. 7, 1989) (refusing to permit arguments or grant relief beyond scope of the complaint) Moreover, while Complainant Marshall Field (unsuccessfully) appealed the notice issue from the Commission's Summary Judgment ruling in favor of ComEd, Bloom did not raise that issue in its Complaint, its summary judgment pleadings, nor on appeal of the Commission's prior decision in this case. Accordingly, ComEd argues that the Commission should reject Bloom's untimely notice argument.

Second, Bloom had the burden of proof on this issue. Complainants' claim that ComEd

failed to produce evidence on this issue is therefore irrelevant, since ComEd did not have the burden to do so.

Third, the uncontroverted evidence demonstrates that Bloom Township High Schools did, in fact, receive actual notice of the curtailment. Bloom witness Romano testified that he did receive timely notice of the curtailment from his agent Phil Rosenberg of UTIL, Inc. Indeed, Bloom was able to largely, albeit not completely, curtail its usage to its FPL.

7. Power Sales on July 14, 1995

Complainants also state that ComEd's actions on July 14, 1995 were unreasonable because ComEd sold power on that day to support the systems of NIPSCO and AEP and made a terminable energy sale to WEPCo. ComEd asserts that this evidence is not credible. Edison maintains that on cross-examination, Mr. Goerss admitted that he did not know the time that the sales were made and the amount of power involved. In fact, the record shows that two of these sales were made on an emergency basis to support neighboring systems that interconnect with ComEd. In addition, all three sales were small and interruptible on only 10 minutes' notice.

8. Interest

Complainants request that in the event they prevail in this matter that the Commission declare null and void all penalties imposed on them by Edison. Additionally, Complainants request pursuant to Section 9-252 of the Act that the Commission should order ComEd to make such refund, with interest as a legal rate from the date the payments were made, all charges resulting from ComEd's increase of Complainants Firm Power Level due to their lack of curtailment on July 14, 1995.

In response to Complainants arguments, ComEd maintains that if Complainants prevail in this matter, their respective FPL should be recalculated and any differences owing to Complainant's should be refunded. With regard to statutory interest ComEd agrees that a recalculation of the FPL will result in credit and interest. Conversely, ComEd submits that if the Commission denies the complaints, ComEd is similarly entitled to statutory interest on the penalties owed to ComEd.

ComEd contends that Complainants conduct relating to this matter has been egregious. In the instant case, ComEd entered into contracts with the Complainants pursuant to Rider 30C. First, they failed to comply with their contractual obligation to curtail their electrical consumption in lieu of the credits they were receiving for being a curtailable customer. In particular, Marshall Field's blanket refusal to even attempt to curtail was a clear indication of its intent to game the system to its economic benefit. Secondly, Edison asserts that Complainant's then proceeded to file frivolous complaints and failed to produce one shred of credible evidence to support their claims. The result is that Complainants have had the use and benefit of significant amount of money to the detriment of ComEd and its ratepayers. Finally, ComEd states that Complainants' actions are particularly disturbing given the fact that the Rider 30C non-compliance penalties assessed upon Complainants are less than the credits they received for being Rider 30C customers.

D. Commission Analysis and Conclusion

Both Complainant and Respondent agree that the issue on remand in this matter is whether ComEd's decision to not offer buy-through to its Rider 30C option customers was reasonable in light of the circumstances that existed on July 14, 1995. Indeed, in its remandment, the Appellate Court stated:

The Commission correctly found that Rider 30 vests ComEd with discretion in determining whether to offer buy-through power to its option C customers during a curtailment. It erred in concluding that this discretion means that ComEd need not make reasonable efforts to source buy-through power before deciding not to offer it to its option C customers. Our conclusion in this regard does not mean that we accept the petitioners interpretation of Rider 30. We do not.

Just as the plain language of Rider 30 cannot be interpreted as granting ComEd a license to arbitrarily refuse to offer buy-through power to its option C customers during a curtailment, neither should it be interpreted as mandating that ComEd source buy-through power before deciding not to offer it. Depending upon the circumstances of any given case, the failure to source buy-through power may, or may not, constitute a reasonable exercise of the discretion vested in ComEd under the terms of Rider 30. As the Commission correctly observed: "Particular actions which are reasonable will depend upon the situation at the time of the specific curtailment." (emphasis added)

[Bloom Township High School, et al. v. Illinois Commerce Commission, 309 Ill. App. 3d 163, 175, 722 N.E. 2d 676, 686 \(1st Dist. 1999 at 176\)](#)(emphasis supplied)

Our examination of the reasonableness of ComEd's decision will be considered on the basis of the conditions that confronted the Company on July 13 and July 14, 1995. ComEd presented evidence which demonstrates that in the early morning hours of July 13, 1995 BPO ComEd determined to call a Rider 30C curtailment with buy-through. At that time, emergency conditions did not exist and were not expected. On the morning of July 13, ComEd was able to pre-schedule the purchase of energy. As the day progressed however, the temperature soared to 106° and ComEd's transmission and distribution was operating under extreme exigent circumstances. By the end of the day on July 13, a new record was set for the hottest day in the history of Chicago. ComEd's system reached and all time peak and the weather was declared a heat storm. Many deaths occurred which were directly related to the unprecedented heat storm.

As Mr. Fredricksen testified, in the early morning hours of July 14, 1995 ComEd's BPO was mindful of its experience on July 13th and that it had badly underestimated the amount of load that it was likely to see on that day. Although ComEd maintained system reliability on July 13th, BPO realized that the actual demand for the same time of day on the 14th was actually higher than the previous day. On July 14, BPO determined that ComEd's ability to maintain system reliability and operational integrity relied on implementing Rider 30C curtailment without buy-through. The evidence presented in this case establishes that ComEd's decision to specifically implement Rider 30C without buy-through on the morning of July 14, 1995 was based upon the following factors:

(1) Uncertainty with extreme weather forecasts for July 14 and associated load estimates;

(2) Risks involved in operation of the transmission system on July 13;

(3) Reduction in availability of electricity in the marketplace because the heat wave was moving further east;

(4) ComEd's reserves were equal to or less than what was required;

(5) System demands were already 14,326 MW at 4 a.m. on July 14, as compared to 12,903 MW at 4 a.m. on July 13;

(6) Market surveys looking for power indicated there were no utilities with pre-scheduled sales; and

(7) ComEd could not be certain that purchases of hourly energy could be made on the spot wholesale market.

The Commission finds even after the decision to curtail without buy-through had been made, the record shows that ComEd continued to assess whether or not system loads had changed significantly enough to alter the operational plan for the day. ComEd demonstrated that it continued to look for energy throughout the day, analyzing its own generation capability as well as searching out energy from alternative energy suppliers. Despite ComEd's efforts, the record conclusively demonstrates that there was insufficient energy to provide buy-through to Rider 30C customers. Accordingly, ComEd's decision to continue the curtailment without buy-through on July 14, 1995 was reasonable.

The Commission notes that even Complainants admit that, after ComEd made its decision to implement Rider 30C without buy-through energy, ComEd faced continuing higher temperatures and demand. Complainants' witness Mr. Goerss agreed that the net load at 9 a.m. on July 14 was 600 MW more than at the same time on July 13, and that temperatures were higher. At 10 a.m. on July 14, net load was over 300 MW higher than at the same time on the July 13, and temperatures were higher. ComEd's estimated peak on the July 14 was 800 MW higher than that experienced on the July 13, the highest previously recorded peak.

Moreover, the Commission concludes that the evidence establishes on July 14, the temperatures and demand increased and ComEd had less generation capacity than it had on July 13. We believe this further supports the reasonableness and prudence of its decision to curtail without buy-through on July 14, 1995. Most telling, however, is the fact that on July 14, Edison set a new all-time historic peak demand of 19,201 MW.

In reviewing the evidence presented by Complainants to support the allegations of their complaints, the Commission finds that they have failed to provide any credible evidence that would demonstrate that ComEd acted unreasonably in making its decision to not offer buy-through energy on July 14, 1995. Complainant relies solely on the testimony of Mr. Goerss, who made several unsubstantiated allegations which were based on speculation and not founded in fact. Amazingly, Mr. Goerss testified that ComEd erred in not reevaluating its decision in light of the changed circumstances that occurred between 6:30 a.m. and 12:30 p.m. on July 14, 1995. Yet Complainant failed to provide any evidence of what these "changed circumstances" were. Contrary to Complainant's allusions, the record shows that conditions actually continued to worsen throughout the day on July 14. Such conditions, as recognized by Mr. Goerss, placed ComEd's ability to meet even its firm load commitment in danger. As such, Complainants failure to present any evidence

leads the Commission to conclude that Complainant has failed to carry its burden of proof in the instant matter and its complaints should be denied.

The Commission also finds Complainants position that since the Rider 30C load was only 30 MW and the actual peak on July 14 was 300 MW less that ComEd projected, ComEd should have provided buy-through energy to its Rider 30C customers unconvincing and without merit. Unless ComEd was prescient, it had no way of predicting at 6:30 a.m. that there would be 300 MW difference between its projected versus actual peak load on July 14. As noted by Edison witness Fredricksen even if known, a 300 MW difference in load would be too insignificant to warrant a change in ComEd's decision to initiate Rider 30C without buy-through. Further, we agree that load forecasting is a dynamic process which involves making projections on data available to BPO, hours before the actual event. It is just a forecast - not an exact measurement. Moreover, it would be unreasonable for ComEd to make decisions fundamental to overall system reliability based upon singular focus on a small group of customers who had agreed to curtail in exchange for economic credits.

The Commission further finds particularly troubling the position of Complainant Marshall Field. We note the affidavit filed by Sharon S. Kochanek, National Accounts Segment Manager, in which she states that the morning of July 14, she contacted various personnel at Marshall Fields to advise them that a Rider 30C curtailment with no buy-through was going to be called. She was advised by Field's personnel that it had no intention of curtailing and it would pay the \$30 kW penalty as required under Rider 30C. The Commission is aware that the other Complainant's, Bloom and St. Therese, did in fact, attempt to curtail to comply with its Rider 30C obligations. Based on our review of the record evidence, we conclude that Fields did not make any attempt to meet its Rider 30C obligations to curtail nor mitigate the penalties it knew it would incur for such non-compliance. The record further shows that Marshall Field will still have benefited from Rider 30C. For the time period between June 1995 and May 1996, Fields received actual credits of \$305,539 under Rider 30, as compared to a non-compliance penalty of \$303,727, which to date remains unpaid.

Based on the evidence and in compliance with the Appellate Court's remandment the Commission concludes that record overwhelmingly shows that on July 14, 1995, ComEd took a reasonable, professional approach in determining to exercise its Rider 30C options and call a curtailment without buy-through. We find that ComEd looked at its system as a whole in making the curtailment decision. Moreover, in making its curtailment decision, ComEd properly considered the many factors confronting it on July 14, 1995, a day that proved to be the heaviest demand conditions that the Company had ever experienced.

Given that the Commission has already concluded that ComEd acted reasonably on July 14, 1995 in requesting Complainant's to curtail without buy-through pursuant to the terms of Rider 30C, it is secondary that we address the issue of whether emergency conditions existed on that day. We turn to the evidence presented in support of ComEd's contention that pursuant to Rider 30C emergency conditions existed on July 14 which precluded it from any obligation to provide buy-through on that day.

As the Appellate Court noted Rider 30C does not define "emergency conditions." We previously determined in this docket that emergency conditions are:

unexpected conditions, internal or external to ComEd's portion of the integrated electrical generation, transmission, and distribution system, which may, in ComEd's

determination jeopardize the reliability or stability of the whole or any part of the system, or which may impair ComEd's ability to operate its facilities economically and safely in accordance with the operating practices and requirements of FERC, the Illinois Commerce Commission, NERC, MAIN and ComEd.

(Order, ICC Docket Nos. 95-0559/95-0560/95-0561/95-0563 (Consol.), dated December 16, 1998, p. 12)

Based on our examination of the record in this matter, we conclude that Edison submitted un rebutted testimony which clearly demonstrates that conditions existed on July 14, 1995 which can be considered "emergency conditions." We note on the morning of July 13 when the Company had requested Rider 30C with buy-through, it had no way of knowing that circumstances on that day would result in such unprecedented demand and extreme conditions. On the morning of July 14, ComEd was aware of its experiences from the previous day and therefore armed with that information, as well as severe weather and supply constraints the Company had to make a different call for its Rider 30C customers than it did on July 13. Indeed, it would have been irresponsible for the Company to do otherwise with exigent circumstances confronting it that day. Even in hindsight, the Commission concludes the reasonableness of ComEd's decision not to offer buy-through energy is evident by the fact that on July 14, ComEd set a new all-time historic peak demand of 19,201 MW.

In evaluating the notice provided to Marshall Field, the Appellate Court ruled that actual notice, whether or not it strictly conformed with the Rider, satisfies the requirements of Rider 30. The Court stated as follows:

Even if we were to assume for the sake of analysis that ComEd did not strictly comply with the notice provision of Rider 30 or its contract with Marshall Field, the fact remains that Marshall Field received actual notice of the curtailment within the time provided under option C. As stated in [Vole, Inc. v. Georgacopoulos, 181 Ill. App. 3d 1012, 1019, 538 N.E.2d 205 \(1989\)](#), the "object of notice is to inform the party [to be] notified, and if the information is obtained in any other way than formal notice, the object of notice is attained."

For these reasons, we do not believe that ComEd's failure to give Marshall Field written notice of the curtailment at its "Help Desk" constituted a material breach of Rider 30 or the contract between the parties, especially where it is evident that Marshall Field received actual notice and claims no prejudice. See [In re Splett, 143 Ill. 2d 225, 231-32, 572 N.E.2d 883 \(1991\)](#); *Prairie Management Corp.*, 289 Ill. App. 3d at 752. We, therefore, affirm the Commission's denial of Marshall Field's motion for summary judgment.

[Bloom Township High School, et al. v. Illinois Commerce Commission, 309 Ill. App. 3d 163, 179 \(1st Dist. 1999\)](#).

In accordance with the Appellate Court conclusion on this issue, we find that the evidence establishes that Bloom received actual notice of the curtailment from their agent. We conclude that this notice satisfies the requirement of Rider 30C. The Commission, therefore, rejects Complainant's arguments on this point.

Both parties request that this Commission assess interest to the monetary awards that they each seek if the Commission rules in their favor. Complainants claim that they are

entitled to receive interest on the "refund" of the monies ComEd's increase in their Rider 30 Firm Power Level after July 14, 1995. Complainants argue that Section 9-252 of the Public Utilities Act ([220 ILCS 5/9-252](#)) mandates such an award.

Conversely, Respondent claims that it is entitled to receive interest on the unpaid Rider 30 penalties incurred by the Complainants. Respondent points to the Interest Act (815 ILCS 205) in support of its argument. Specifically, Section 205-2 of this Act provides for a statutory interest of 5% on unpaid bills where monies have been withheld by "unreasonable and vexatious delay in payment." Respondents point out that the Commission has previously relied on this statute in awarding interest in complaint cases.

We must reject Complainant's request for interest since there is nothing presented in the record which indicates that ComEd's increase in their Firm Power Levels was improper. The Commission further finds, that the record herein demonstrates on July 14, 1995, Complainants, in particular Marshall Fields, made a decision not to comply with its obligations under Rider 30C. The Commission notes that the evidence establishes that Fields had enjoyed the benefits of reduced rates by virtue of its Rider 30C customer status for the period of June 1995 through May 1996 in the amount of \$305,539. The record further demonstrates that when called upon to curtail on July 14, 1995 in accordance with its Rider 30C obligations, Fields management made the decision not to curtail one kWh. Considering the exigent circumstances that existed on July 14, 1995, we find that Fields actions (a) could have imperiled Edison's overall system and (b) has required ComEd and its ratepayers to bear the burden of Fields economically driven decision. We further note, that the circumstances which occurred on July 14, 1995 were precisely the situation that a tariff like Rider 30C was meant to deal with. Complainant cannot have it both ways-enjoy economic benefits without any of the concomitant obligations it agreed to when it became a Rider 30C customer.

Generally, prejudgment interest is recoverable only where contracted for or authorized by statute. [Department of Transportation v. New Century Engineering and Development Corp., 97 Ill.2d 343,352, 73 Ill. Dec. 538, 454 N.E. 2d 635 \(1983\)](#). The Interest Act ([815 ILCS 205/0.01 et seq.](#)), sets forth a limited number of circumstances in which, absent agreement between the parties, interest will be allowed on monies after they become due. The Interest Act provides, in pertinent part:

Creditors shall be allowed to receive at the rate of (5) per centum per annum for all monies after they become due on a bond, bill, promissory note, or other instrument of writing; ...on money due on the settlement of an account from the day of liquidating accounts between the parties and ascertaining the balance...and on money withheld by an unreasonable and vexatious delay of payment."

We also observe that Illinois courts have held that an element of bad conduct is necessary for either a statutory or equitable award of interest. Additionally, interest will only be awarded under the Interest Act where the amount due is fixed or easily computed (*Couch v. State Farm Insurance*, 279, App. 3d 1050. In this instance, the amounts due for Field's non-compliance with its Rider 30C obligations on July 14, 1995, are fixed and ascertainable. Given the paucity of evidence presented by Complainants, the Commission is of the opinion that the conduct of Marshall Fields comports with the "unreasonable" and "vexatious" standard as set forth in the Interest Act. Indeed, ComEd and its ratepayers have borne the burden of rightfully owed, and as yet unpaid, monies since

July 1995.

In [Hartigan v. Illinois Commerce Commission \(148 Ill. 2d 348, 592 N.E. 2d 1066, 170 Ill Dec. 386\)](#), the Supreme Court focused on the court's equitable powers to fashion a remedy when none is provided under the Public Utilities Act. The Court held that awards of interest are made to compensate the consumer for use of funds, and thus the consumer will be compensated for any economic loss associated with the inability to use his monies. Such an equitable award is a matter lying with the sound discretion of the circuit court and is governed by equity's goal of making utility customers whole. Thus, mindful that this Commission is an agency of specific and statutorily limited jurisdiction we conclude that Respondents' request for interest is more properly brought before a court of general jurisdiction. On this basis, the Commission defers ordering the payment of interest on the penalties owed to ComEd by Complainant -Marshall Fields for its non-compliance with its Rider 30C obligations on July 14, 1995.

III. Findings and Ordering Paragraphs

The Commission, having examined the entire record herein, and being fully advised in the premises, is of the opinion and finds that:

(1) Commonwealth Edison Company, an Illinois corporation engaged in the business of electric service in the State of Illinois, is a public utility within the meaning of Section 3-105 of the Illinois Public Utilities Act;

(2) the Commission has jurisdiction over the parties and the subject matter herein;

(3) the recitals of fact and law heretofore set forth are supported by the evidence of record and are hereby adopted as findings of fact and law herein;

(4) based on the evidence of record ComEd established that on July 14, 1995 ComEd acted reasonably and in accordance with the provisions of Rider 30C in invoking curtailment without buy-through;

(5) further the Commission finds that the record establishes that Emergency Conditions existed on July 14, 1995;

(6) Complainants' Complaints should be denied;

(7) Complainants are directed to pay to ComEd all charges due and owing for penalties assessed due to Complainants non-compliance with its Rider 30 C obligations on July 14, 1995;

(8) any petitions, objections or motions which remain unresolved should be considered resolved in a manner consistent with the ultimate conclusions contained in this Order.

IT IS THEREFORE ORDERED that the Complaints filed by Bloom Township High Schools, Marshall Field & Company, and St. Therese Medical Center, against Commonwealth Edison Company on November 14, 1995, be, and the same are hereby denied.

IT IS FURTHER ORDERED that Complainant's are directed to pay to Commonwealth Edison

Company all charges due and owing for penalties assessed due Complainants' non-compliance with its Rider 30C obligations on July 14, 1995.

IT IS FURTHER ORDERED that any petitions, objections or motions made in this proceeding that remain undisposed of should be considered disposed of in a manner consistent with the ultimate conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and [83 Ill. Admin. Code 200.880](#), this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission 21st day of November, 2000.

Commissioner Kretschmer dissented.

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Appellate Court of Illinois, First District, Second
Division.

FERNDALE HEIGHTS UTILITY COMPANY,
Appellant-Cross-Appellee,

v.

ILLINOIS COMMERCE COMMISSION, Appel-
lee-Cross-Appellant, and Metropolitan Housing De-
velopment Corporation, Appellee-Intervenor.

No. 81-2612

Dec. 28, 1982

Rehearing Denied Feb. 17, 1983.

Utility appealed from order of the Commerce Commission directing it to follow its tariffs in reimbursing developer for construction of water facilities used by utility to provide water to certain tract of land. The Circuit Court of Sangamon County transferred the case to the Circuit Court of Cook County, Arthur L. Dunne, J., which affirmed order of Commission. Utility appealed and Commission cross-appealed. The Appellate Court, Stamos, P.J., held that: (1) filing of appeal in Sangamon County was timely despite fact that court could not proceed to merits of case, and appeal was properly heard upon transfer to Circuit Court of Cook County, and (2) complaint was not based on section of Public Utilities Act which would have made complaint untimely.

Affirmed.

West Headnotes

[1] Waters and Water Courses 405 ↪ 203(12)

[405](#) Waters and Water Courses

[405IX](#) Public Water Supply

[405IX\(A\)](#) Domestic and Municipal Purposes

[405k203](#) Water Rents and Other Charges

[405k203\(12\)](#) k. Review by Courts and Injunction Against Enforcement. [Most Cited Cases](#)

Where utility was certified to serve only areas in Cook County and all equipment which was installed by parties was located in Cook County, filing of appeal of order of Commerce Commission in Sangamon County was improper; however appeal was properly trans-

ferred to circuit court of Cook County, and as appeal was to be regarded as action commencing at time case was begun in Sangamon County, appeal was timely, even though case was transferred more than 30 days after service of Commission's order. S.H.A. ch. 111 2/3 , ¶ 72; Ill.Rev.Stat.1979, ch. 110, ¶¶ 1 et seq., 48(a)(1).

[2] Public Utilities 317A ↪ 192

[317A](#) Public Utilities

[317AIII](#) Public Service Commissions or Boards

[317AIII\(C\)](#) Judicial Review or Intervention

[317Ak188](#) Appeal from Orders of Commission

[317Ak192](#) k. Requisites and Proceedings for Transfer of Cause. [Most Cited Cases](#)

Circuit court sitting in review of decision of Commerce Commission is in exercise of special jurisdiction, and such appeals must be prosecuted in accordance with requirements of Public Utilities Act to be legally effective. S.H.A. ch. 111 2/3 , ¶ 72.

[3] Courts 106 ↪ 483

[106](#) Courts

[106VII](#) Concurrent and Conflicting Jurisdiction

[106VII\(A\)](#) Courts of Same State

[106VII\(A\)2](#) Transfer of Causes

[106k483](#) k. In General. [Most Cited Cases](#)

Court in exercise of general jurisdiction is empowered to transfer case for lack of subject-matter jurisdiction if transfer will cure defect and avoid necessity of dismissing suit. Ill.Rev.Stat.1979, ch. 110, ¶ 48(1)(a); S.H.A. ch. 110, ¶ 2-619(a)(1).

[4] Courts 106 ↪ 483

[106](#) Courts

[106VII](#) Concurrent and Conflicting Jurisdiction

[106VII\(A\)](#) Courts of Same State

[106VII\(A\)2](#) Transfer of Causes

[106k483](#) k. In General. [Most Cited Cases](#)

Transfer of case from court where subject of jurisdiction is lacking does not have effect of "relating back"

time of filing of complaint to time that it was filed in improper court for purposes of avoiding applicable limitations period.

[5] Limitation of Actions 241 ↪120

241 Limitation of Actions

241II Computation of Period of Limitation

241II(H) Commencement of Proceeding; Relation Back

241k120 k. Want of Jurisdiction. Most Cited

Cases

Filing of suit in court without subject-matter jurisdiction commences action for limitations purposes.

[6] Public Utilities 317A ↪194

317A Public Utilities

317AIII Public Service Commissions or Boards

317AIII(C) Judicial Review or Intervention

317Ak188 Appeal from Orders of Commission

317Ak194 k. Review and Determination in General. Most Cited Cases
Commerce Commission has no general authority to fashion award of damages.

[7] Waters and Water Courses 405 ↪203(12)

405 Waters and Water Courses

405IX Public Water Supply

405IX(A) Domestic and Municipal Purposes

405k203 Water Rents and Other Charges

405k203(12) k. Review by Courts and Injunction Against Enforcement. Most Cited Cases
Complaint filed with Commerce Commission alleging that water utility's deviation from procedures for reimbursement set forth in its tariffs violated Public Utilities Act was not one for refund of excessive charges under section of Act requiring that complaints thereunder be brought within one year of time that commodity or services were provided, since fact that payment of money by utility was made necessary by effect of order that utility cease discriminating against a customer was incidental to action that Commission took; therefore, action was not time barred under that section. S.H.A. ch. 111 2/3 , ¶¶ 38, 68, 76.

****335 ***855** Chapman & Cutler, Chicago, for Ferndale Hts. Utility Co.; John Vander Vries, Daniel Kucera, Christine Hehmeyer Rosso, Chicago, of

counsel.

Edward G. Finnegan, Ltd., Chicago, for Illinois Commerce Com'n.

STAMOS, Presiding Justice:

Ferndale Heights Utility Company (Ferndale) appeals from an order of the Illinois Commerce Commission (Commission) directing it to *176 follow its tariffs in reimbursing Metropolitan Housing Development Corporation (MDHC) for the construction of water facilities used by Ferndale to provide water to a tract of land developed by MDHC. Ferndale contends that the order was issued under section 72 of the Public **336 ***856 Utilities Act (the Act) (Ill.Rev.Stat.1979, ch. 111 2/3 , par. 76) and that the complaint was untimely under that section. The Commission cross-appeals, contending that the circuit court lacked jurisdiction to hear the appeal from the Commission's order.

In 1969, Ferndale entered into a written agreement with Riverwoods Development Corporation under which Ferndale would provide water to a tract of land to be developed by Riverwoods. The agreement provided that Ferndale would construct the bulk of the facilities needed to bring service to the point where the water would be metered, and that the developer would bear the entire cost of constructing the necessary facilities on the site without reimbursement. Ferndale's tariffs which were then on file with the Illinois Commerce Commission provided that a developer which constructed facilities to be used by the utility would convey the facilities to the utility after construction and would be reimbursed for construction costs in the amount of 2 1/2 times the first year's revenue received by Ferndale from each customer attaching to the system, the reimbursement not to exceed the developer's cost of construction. Ferndale was not certified to serve the area of the proposed development, and therefore it sought a Certificate of Convenience and Necessity from the Illinois Commerce Commission which would allow it to expand its area of service. The certificate was issued on August 6, 1969. In the order granting the certificate, the Commission declared that it was neither approving nor disapproving the agreement between the parties, but that the provisions of the agreement that were contrary to the tariffs of the utility were "null and void." No new agreement was made by the parties,

and MDHC, as Riverwood's successor in interest, subsequently took an assignment of the original agreement.

By 1973, all the facilities that were needed to provide water to the development were completed. The MDHC's cost of construction was \$52,175. The facilities actually installed were substantially different from the facilities called for in the agreement.

In 1976, MDHC filed a complaint with the Commission alleging that the agreement violated several sections of the Public Utilities Act (Ill.Rev.Stat.1979, ch. 111 2/3 , par. 1 et seq.), specifically because the property owners covered by the agreement were reimbursed differently than those customers of the utility covered by the tariffs, and that therefore the agreement worked a discrimination against customers*177 covered by it. The complaint stated that it was not brought pursuant to section 72 of the Act. (Ill.Rev.Stat.1979, ch. 111 2/3 , par. 76.) That section authorizes the Commission to order a utility to refund any excessive or discriminatory charges for its services or commodity to its customers, and any complaint under that section must be brought within one year of the time that the commodity or services were provided.

On March 1, 1978, the Commission entered an order stating that the agreement between the parties did not "violate the law and the rules and regulations of the Commission which were in force when the agreement was entered into" and that the complaint was governed by section 72 of the Act and was untimely under that section.

MDHC was granted a rehearing, and on September 6, 1978, the Commission issued an order on rehearing which stated that the complaint was not governed by section 72, that Ferndale's tariffs should govern the issue of the reimbursement to be given MDHC, and specified how the reimbursement should be calculated. The order stated that the maximum reimbursement under the tariffs was \$52,175, which was the total amount of the construction costs to MDHC.

Ferndale filed a notice of appeal from the order on rehearing in the circuit court of Sangamon County. That court determined that venue should lie in Cook County, and the case was transferred. The circuit court of Cook County held that the transfer was properly

treated as a matter of venue and affirmed the order of the Commission. Ferndale appeals from that order, and the Commission cross-appeals, contending that the circuit court of Sangamon County was ****337***857** without jurisdiction to transfer the case, and that therefore the transfer to Cook County, where jurisdiction was proper, was without effect because an original filing of the appeal in Cook County would have been untimely by the time the transfer was granted.

Section 68 of the Act (Ill.Rev.Stat.1979, ch. 111 2/3 , par. 72) provides in pertinent part:

“ * * * within 30 days after the service of any final order or decision of the Commission upon and after a rehearing of any rule, regulation, order or decision of the Commission, any person or corporation affected by such rule, regulation, order or decision, may appeal to the circuit court of the county in which the subject-matter of the hearing is situated * * * [n]o circuit court shall permit a party affected by any rule, regulation, order or decision of the Commission to intervene or become a party plaintiff or appellant in such court who has not taken an appeal from such rule, regulation, order or decision in the manner as ***178** herein provided.”

[1] Ferndale is a utility certified to serve only areas in Cook County, and all the equipment which was installed by the parties is located in Cook County. The subject matter of the hearings before the Commission is clearly in Cook County, and therefore the filing of the appeal in Sangamon County was improper. The circuit court of Sangamon County denied the Commission's motion to dismiss the appeal, but held that the provision of section 68 relating to where the suit could be filed was a matter of venue, and transferred the case to Cook County more than thirty days after the service of the Commission's order.

[2] The circuit court of Cook County held that the filing of this appeal in the wrong county was properly treated as a matter of venue rather than of jurisdiction. We find that the requirement that the appeal be filed in the circuit court of the county where the subject matter of the Commission's hearings is located is jurisdictional. Our supreme court has stated that “[j]urisdiction and venue are distinct legal concepts. Jurisdiction relates to the power of a court to decide the merits of a case, while venue determines where the

case is to be heard.” ([Baltimore & Ohio R.R. Co. v. Mosele](#) (1977), 67 Ill.2d 321, 328, 10 Ill.Dec. 602, 368 N.E.2d 88.) A circuit court sitting in review of a decision of the Commission is in the exercise of a special jurisdiction, and such appeals must be prosecuted in accordance with the requirements of the Public Utilities Act to be legally effective. ([Village of Waynesville v. Pennsylvania R.R. Co.](#) (1933), 354 Ill. 318, 321, 188 N.E. 482; [Summers v. Illinois Commerce Com.](#) (1978), 58 Ill.App.3d 933, 935, 16 Ill.Dec. 336, 374 N.E.2d 1111.) Section 68 of the Act prohibits the circuit court from permitting a litigant to proceed with an appeal before it if the litigant has failed to comply with the procedures set forth in the statute. Therefore, the circuit court of Sangamon County had no power to decide the merits of the case because the appeal was not made to the circuit court of the county in which the subject matter of the hearings was located.

[3] A court in the exercise of general jurisdiction is empowered to transfer a case for lack of subject matter jurisdiction if transfer will cure the defect and avoid the necessity of dismissing the suit. (See Ill.Rev.Stat.1979, ch. 110, par. 48(1)(a) superseded without change of substance by Ill.Rev.Stat.1981, ch. 110, par. 2-619(a)(1).) Our supreme court has held that the same power attaches to a court sitting in the exercise of a special jurisdiction. In the case of [Central Illinois Public Service Co. v. Industrial Com.](#) (1920), 293 Ill. 62, 127 N.E. 80, the appellant filed an appeal from a workmen's compensation*179 award in the circuit court of Coles County. The appellee filed a motion to quash the writ of certiorari for lack of subject matter jurisdiction. After that motion was allowed, the appellant moved to reinstate the writ and for transfer of the case to Champaign County, where subject matter jurisdiction was proper. Our supreme court held that although subject matter jurisdiction was lacking in the circuit court of Coles County, that court had jurisdiction of the case for purposes of **338 ***858 transfer. The court based its holding on paragraph 36 of the Venue Act of 1891 (Hurd's Stat.1917, p. 2957) which provided that “wherever any suit or proceeding shall hereafter be commenced, in any court of record of this State, and it shall appear to the court where the same is pending that the same has been commenced in the wrong court or county, * * * the court shall change the venue of such suit or proceeding to the proper court or county * * *.”

The court noted that the legislature may grant special

jurisdiction over a prescribed class of cases to only specific circuit courts (293 Ill. 62, 65, 127 N.E. 80), but by the use of the words “commenced in the wrong court or county” in the Venue Act, “the legislature intended to reach those cases begun in courts not having jurisdiction of the subject matter as well as those where jurisdiction of the parties, alone, is lacking * * * [b]y this act it is evident that the legislature intended to and did confer on all courts of record in this State, without regard to any other jurisdiction either conferred upon or denied it by common law or statute, jurisdiction to ‘change the venue of such suit or proceeding to the proper court or county.’ ” 293 Ill. 62, 69, 127 N.E. 80.

Paragraph 10(2) of the Civil Practice Act replaced paragraph 36 of the Venue Act, which was repealed in 1955. (Laws 1955, p. 2290.) The intermingling of concepts of venue and jurisdiction which was noted by our supreme court in [Central Illinois Public Service Co.](#) was codified in the new provision, which provided that:

“Whenever it appears that an action has been commenced in a court which does not have jurisdiction to determine the action, the court shall, at any time, upon its own motion or upon the motion of any party, order the cause transferred to a court of competent jurisdiction in a proper venue.” Ill.Rev.Stat.1975, ch. 110, par. 10(2).

This provision was eliminated from the Civil Practice Act in 1976 by P.A. 79-1366, § 16. The supplement to the historical and practice notes for this section (Ill. Ann.Stat., ch. 110, par. 10 (Smith-Hurd 1982 Supp.)), suggests that the deletion was not intended to change the substantive law but was merely a recognition*180 of the fact that the courts of our State are now uniformly courts of general jurisdiction. This view is consistent with the continuing existence of section 48(1)(a) of the Civil Practice Act, which authorizes transfer rather than dismissal of a case if transfer will cure a lack of subject matter jurisdiction.

The Civil Practice Act applies to statutory actions such as appeals from the Illinois Commerce Commission “as to matters of procedure not * * * regulated by separate statutes.” (Ill.Rev.Stat.1979, ch. 110, par. 1.) Nothing in section 68 of the Public Utilities Act expressly prohibits the transfer of an appeal which was filed in the wrong county, and therefore we hold that

the appeal was properly transferred to the circuit court of Cook County.

[4][5] The Commission contends that if the transfer of the case was proper, the appeal still must be regarded as an action commencing at the time that the case was transferred, rather than at the time the case was begun in Sangamon County. If the appeal is regarded as beginning at the time the case was transferred to Cook County, the appeal is untimely because the case was transferred more than 30 days after service of the Commission's order. The Commission contends that the case of [Herb v. Pitcairn \(1943\), 384 Ill. 237, 51 N.E.2d 277](#), rev'd [325 U.S. 77, 65 S.Ct. 954, 89 L.Ed. 1483](#), rehearing denied, [325 U.S. 893, 65 S.Ct. 1188, 89 L.Ed. 2005](#), supplemented [\(1945\), 392 Ill. 151, 64 N.E.2d 318](#), establishes that as a matter of Illinois law the transfer of a case from a court where subject matter jurisdiction is lacking does not have the effect of "relating back" the time of the filing of the complaint to the time that it was filed in the improper court for purposes of avoiding the applicable limitations period. However, in the case of [Roth v. Northern Assurance Co. Ltd. \(1964\), 32 Ill.2d 40, 203 N.E.2d 415](#), our supreme court expressly overruled Herb. ([32 Ill.2d 40, 47, 203 N.E.2d 415](#).) After Roth, there can be no doubt that the filing of a suit in a ****339 ***859** court without subject matter jurisdiction commences the action for limitations purposes as a matter of Illinois law. Therefore, we hold that the filing of the appeal in Sangamon County was timely despite the fact that that court could not proceed to the merits of the case, and that the appeal was properly heard upon its transfer to the circuit court of Cook County.

Ferndale contends that this case is governed by section 72 of the Act. (Ill.Rev.Stat.1979, ch. 111 2/3 , par. 76.) At the time MDHC's original complaint was filed with the Commission, the Act provided that any claim under that section for reparations for excessive charges by a utility were to be filed within one year of the time that the product, commodity or services of the utility were provided to the ***181** complainant for the allegedly excessive charge. (See Ill.Rev.Stat.1975, ch. 111 2/3 , par. 76.) The water facilities in question here were completed in 1973 and MDHC's complaint was filed in 1976. Ferndale contends that the complaint to the Commission was therefore untimely and should have been dismissed.

Ferndale's entire argument on appeal is based on the

assumption that the complaint in question was a complaint for the refund of excessive charges under section 72. The complaint itself states that no claim is made under section 72 of the Act, but that the complaint is based on the fact that Ferndale entered into a contract with the developers which provided that the developers would be reimbursed for construction differently than the other customers of the utility, and that therefore the contract was discriminatory and unlawful. The complaint also makes an inappropriate prayer for damages under section 73 of the Act, which provides that an award of damages must be sought in the circuit court.

In its order on rehearing, the Commission found that the complaint was not a complaint for reparations under section 72, that the work performed and the equipment installed to serve the development was substantially different from what was called for by the contract and stated that because the parties had not entered into a revised agreement, Ferndale's tariffs control the method and amount of reimbursement to MDHC. The Commission then recited the conditions for reimbursement which were contained in the tariffs, and stated that the ceiling on payments to MDHC would be \$52,175, the total cost of construction to MDHC. Ferndale contends that because the order requires an exchange of money between the parties, it could only be made pursuant to section 72 because that section is the only provision of the Act which authorizes the Commission to order a utility to make a payment of money to a customer.

[6] Ferndale is correct in its contention that the Commission has no general authority to fashion an award of damages. (See [Barry v. Commonwealth Edison Co. \(1940\), 374 Ill. 473, 477, 29 N.E.2d 1014](#).) However, the Commission was not fashioning an award of damages or awarding reparations in the instant case. Rather, the Commission was ordering Ferndale to follow its tariffs in reimbursing MDHC instead of relying on a contract which the Commission had already declared to be null and void to the extent that the contract contradicted the tariffs.

[7] Section 64 of the Act (Ill.Rev.Stat.1979, ch. 111 2/3 , par. 68), authorizes the Commission to hear complaints concerning any violation of the Act committed by any utility. MDHC's complaint alleged ***182** that Ferndale's deviation from the procedures for reimbursement set forth in its tariffs violated the Act

in several regards, the most notable being that MDHC was treated in a discriminatory fashion because it was required to construct on-site facilities at its own expense, while reimbursement was available to Ferndale's other customers. Discrimination of this type is prohibited by section 38 of the Act. There can be no doubt that the Commission is authorized to order Ferndale to cease discriminating against a customer. This is essentially what the Commission did, and the fact that a payment of money by Ferndale to MDHC is made necessary by the effect of the order is incidental to the action that the Commission took. Ferndale makes no challenge to ****340 ***860** the sufficiency of the Commission's order as a matter of law except to contend that the complaint was based on section 72 and is therefore untimely. We hold that the complaint was not based on section 72 of the Act.

For the reasons stated herein, the judgment of the circuit court of Cook County affirming the order of the Illinois Commerce Commission is affirmed.

Affirmed.

DOWNING and PERLIN, JJ., concur.
Ill.App. 1 Dist., 1982.
Ferndale Heights Utility Co. v. Illinois Commerce
Com'n
112 Ill.App.3d 175, 445 N.E.2d 334, 67 Ill.Dec. 854

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Appellate Court of Illinois,
 First District, First Division.
 Mark KNAUERHAZE, Plaintiff-Appellee and Cross-
 Appellant,

v.

Oliver NELSON, Special Representative of George
 W. Allen, M.D., Deceased, and George W. Allen,
 M.D., S.C., an Illinois Corporation, Defendants-
 Appellants and Cross-Appellees.

No. 1-03-3370.

Sept. 19, 2005.

Background: Patient brought medical negligence action against ear surgeon and surgeon's corporation on theory of vicarious liability. A special representative was appointed to represent surgeon when surgeon died during trial. The Circuit Court, Cook County, [Thomas L. Hogan](#), J., entered judgment on jury's verdict in patient's favor and denied defendants' motions for judgment notwithstanding verdict and for new trial. Defendants appealed and patient cross-appealed.

Holdings: The Appellate Court, [Gordon](#), J., held that: (1) evidence was sufficient to show that surgeon's negligence during stapedotomy was proximate cause of patient's injuries;

(2) defendants' admission to allegation in original unverified complaint that surgeon was authorized agent of corporation did not constitute evidence of agency relationship for purposes of holding corporation vicariously liable;

(3) reply to notice for information to be produced at trial that surgeon was insured for \$1 million and that corporation was covered by surgeon's policy because surgeon was sole shareholder of corporation, by itself, did not constitute judicial admission that agency relationship existed;

(4) patient was not entitled to remand to reopen case to allow presentation of additional evidence of agency relationship;

(5) defendants preserved for appellate review challenge to jury's finding that agency relationship existed; and

(6) as matter of first impression, patient's recovery in action where special representative was appointed to defend suit when surgeon died during was limited to

\$1 million under surgeon's liability insurance.

Affirmed in part; reversed in part.

West Headnotes

[1] Judgment 228 199(3.5)

[228](#) Judgment

[228VI](#) On Trial of Issues

[228VI\(A\)](#) Rendition, Form, and Requisites in

General

[228k199](#) Notwithstanding Verdict

[228k199\(3.5\)](#) k. Propriety of Judgment

in General. [Most Cited Cases](#)

A trial court should enter judgment notwithstanding the verdict (JNOV) only when all the evidence, viewed in a light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict could stand based on the evidence.

[2] Judgment 228 199(3.5)

[228](#) Judgment

[228VI](#) On Trial of Issues

[228VI\(A\)](#) Rendition, Form, and Requisites in

General

[228k199](#) Notwithstanding Verdict

[228k199\(3.5\)](#) k. Propriety of Judgment

in General. [Most Cited Cases](#)

The standard for obtaining a judgment notwithstanding the verdict (JNOV) is a very difficult standard to meet and limited to extreme situations only.

[3] Negligence 272 202

[272](#) Negligence

[272I](#) In General

[272k202](#) k. Elements in General. [Most Cited](#)

[Cases](#)

The plaintiff in a negligence action must establish that the defendant owed a duty of care, that the defendant breached that duty, and that the plaintiff incurred injuries proximately caused by that breach.

[4] Negligence 272 1692

[272 Negligence](#)
[272XVIII Actions](#)
[272XVIII\(D\) Questions for Jury and Directed Verdicts](#)
[272k1692](#) k. Duty as Question of Fact or Law Generally. [Most Cited Cases](#)

Negligence 272 1693

[272 Negligence](#)
[272XVIII Actions](#)
[272XVIII\(D\) Questions for Jury and Directed Verdicts](#)
[272k1693](#) k. Negligence as Question of Fact or Law Generally. [Most Cited Cases](#)

Negligence 272 1713

[272 Negligence](#)
[272XVIII Actions](#)
[272XVIII\(D\) Questions for Jury and Directed Verdicts](#)
[272k1712](#) Proximate Cause
[272k1713](#) k. In General. [Most Cited Cases](#)
The existence of a duty in the context of negligence is a question of law for the court to decide, while the issues of breach and proximate cause are factual matters for the jury to decide, provided there is a genuine issue of material fact regarding those issues.

[5] Negligence 272 373

[272 Negligence](#)
[272XIII Proximate Cause](#)
[272k373](#) k. Necessity of and Relation Between Factual and Legal Causation. [Most Cited Cases](#)
The proximate cause element of negligence consists of both “cause in fact” and “legal cause.”

[6] Negligence 272 380

[272 Negligence](#)
[272XIII Proximate Cause](#)
[272k374](#) Requisites, Definitions and Distinctions
[272k380](#) k. Substantial Factor. [Most Cited Cases](#)

A defendant's conduct is a cause in fact of the plaintiff's injury for the purposes of negligence only if that conduct is a material element and a substantial factor in bringing about the injury.

[7] Negligence 272 379

[272 Negligence](#)
[272XIII Proximate Cause](#)
[272k374](#) Requisites, Definitions and Distinctions
[272k379](#) k. “But-For” Causation; Act Without Which Event Would Not Have Occurred. [Most Cited Cases](#)

Negligence 272 380

[272 Negligence](#)
[272XIII Proximate Cause](#)
[272k374](#) Requisites, Definitions and Distinctions
[272k380](#) k. Substantial Factor. [Most Cited Cases](#)
A defendant's conduct is a material element and substantial factor in bringing about the plaintiff's injury, and thus, is the cause in fact of the injury if, absent that conduct, the injury would not have occurred.

[8] Negligence 272 387

[272 Negligence](#)
[272XIII Proximate Cause](#)
[272k374](#) Requisites, Definitions and Distinctions
[272k387](#) k. Foreseeability. [Most Cited Cases](#)
Legal cause of the plaintiff's injury in the context of negligence examines the foreseeability of the injury or whether the injury is of a type which a reasonable man would see as a likely result of his conduct.

[9] Health 198H 821(1)

[198H Health](#)
[198HV](#) Malpractice, Negligence, or Breach of Duty
[198HV\(G\)](#) Actions and Proceedings
[198Hk815](#) Evidence
[198Hk821](#) Necessity of Expert Testimony

[198Hk821\(1\)](#) k. In General. [Most Cited Cases](#)

A plaintiff must generally prove the elements of a medical negligence cause of action through medical expert testimony.

[10] Evidence 157 547.5

[157](#) Evidence

[157XII](#) Opinion Evidence

[157XII\(D\)](#) Examination of Experts

[157k547.5](#) k. Certainty of Testimony; Probability, or Possibility. [Most Cited Cases](#)

Evidence 157 571(9)

[157](#) Evidence

[157XII](#) Opinion Evidence

[157XII\(F\)](#) Effect of Opinion Evidence

[157k569](#) Testimony of Experts

[157k571](#) Nature of Subject

[157k571\(9\)](#) k. Cause and Effect.

[Most Cited Cases](#)

In order to sustain the burden of proof in a medical negligence action, a plaintiff's expert must demonstrate within a reasonable degree of medical certainty that the defendant's breach in the standard of care is more probably than not the cause of the injury.

[11] Health 198H 822(3)

[198H](#) Health

[198HV](#) Malpractice, Negligence, or Breach of Duty

[198HV\(G\)](#) Actions and Proceedings

[198Hk815](#) Evidence

[198Hk822](#) Weight and Sufficiency in

General

[198Hk822\(3\)](#) k. Proximate Cause.

[Most Cited Cases](#)

A plaintiff in a medical negligence action does not need to present unequivocal or unqualified evidence of causation, but can meet his burden through the introduction of circumstantial evidence from which a jury may infer other connected facts which usually and reasonably follow according to common experience.

[12] Evidence 157 555.3

[157](#) Evidence

[157XII](#) Opinion Evidence

[157XII\(D\)](#) Examination of Experts

[157k555](#) Basis of Opinion

[157k555.3](#) k. Disclosure, Necessity and

Right. [Most Cited Cases](#)

In a medical negligence case, an expert may give an opinion without disclosing the facts underlying that opinion, and the burden is placed upon the adverse party during cross-examination to elicit the facts underlying the expert opinion.

[13] Evidence 157 571(9)

[157](#) Evidence

[157XII](#) Opinion Evidence

[157XII\(F\)](#) Effect of Opinion Evidence

[157k569](#) Testimony of Experts

[157k571](#) Nature of Subject

[157k571\(9\)](#) k. Cause and Effect.

[Most Cited Cases](#)

Health 198H 822(3)

[198H](#) Health

[198HV](#) Malpractice, Negligence, or Breach of Duty

[198HV\(G\)](#) Actions and Proceedings

[198Hk815](#) Evidence

[198Hk822](#) Weight and Sufficiency in

General

[198Hk822\(3\)](#) k. Proximate Cause.

[Most Cited Cases](#)

Proximate cause of a plaintiff's injury is not established in a medical negligence case where the medical expert testimony of the causal connection is contingent, speculative or merely possible.

[14] Evidence 157 571(3)

[157](#) Evidence

[157XII](#) Opinion Evidence

[157XII\(F\)](#) Effect of Opinion Evidence

[157k569](#) Testimony of Experts

[157k571](#) Nature of Subject

[157k571\(3\)](#) k. Due Care and Proper

Conduct. [Most Cited Cases](#)

Health 198H 825

[198H](#) Health
[198HV](#) Malpractice, Negligence, or Breach of Duty
[198HV\(G\)](#) Actions and Proceedings
[198Hk824](#) Questions of Law or Fact and Directed Verdicts
[198Hk825](#) k. In General. [Most Cited Cases](#)

Health 198H 826

[198H](#) Health
[198HV](#) Malpractice, Negligence, or Breach of Duty
[198HV\(G\)](#) Actions and Proceedings
[198Hk824](#) Questions of Law or Fact and Directed Verdicts
[198Hk826](#) k. Proximate Cause. [Most Cited Cases](#)

The relative weight, sufficiency and credibility assessed to medical expert testimony in a medical negligence action is peculiarly within the province of the jury, as is, ultimately, the resolution of evidentiary conflicts with respect to the factual question of proximate cause.

[15] Evidence 157 571(9)

[157](#) Evidence
[157XII](#) Opinion Evidence
[157XII\(F\)](#) Effect of Opinion Evidence
[157k569](#) Testimony of Experts
[157k571](#) Nature of Subject
[157k571\(9\)](#) k. Cause and Effect.
[Most Cited Cases](#)

Evidence 157 574

[157](#) Evidence
[157XII](#) Opinion Evidence
[157XII\(F\)](#) Effect of Opinion Evidence
[157k574](#) k. Conflict with Other Evidence.
[Most Cited Cases](#)

Health 198H 823(5)

[198H](#) Health
[198HV](#) Malpractice, Negligence, or Breach of Duty
[198HV\(G\)](#) Actions and Proceedings

[198Hk815](#) Evidence
[198Hk823](#) Weight and Sufficiency, Particular Cases

[198Hk823\(5\)](#) k. Surgical Operations in General. [Most Cited Cases](#)
Evidence was sufficient to show that ear surgeon's subluxing incus bone during stapedotomy due to failure to initially size prosthesis given large size of incus, his failure to properly size prosthesis after subluxing incus bone, and failure to terminate surgery after subluxing incus in order to allow it to heal before attempting stapedotomy was cause in fact of patient's total hearing loss in left ear, in medical malpractice action, even though patient's expert testified that initial subluxation of incus did not cause damage to inner ear, where expert testified that no damage would have occurred if surgeon had stopped procedure immediately after that point.

[16] Evidence 157 571(9)

[157](#) Evidence
[157XII](#) Opinion Evidence
[157XII\(F\)](#) Effect of Opinion Evidence
[157k569](#) Testimony of Experts
[157k571](#) Nature of Subject
[157k571\(9\)](#) k. Cause and Effect.
[Most Cited Cases](#)

Health 198H 823(5)

[198H](#) Health
[198HV](#) Malpractice, Negligence, or Breach of Duty
[198HV\(G\)](#) Actions and Proceedings
[198Hk815](#) Evidence
[198Hk823](#) Weight and Sufficiency, Particular Cases

[198Hk823\(5\)](#) k. Surgical Operations in General. [Most Cited Cases](#)
Evidence was sufficient to show that ear surgeon's subluxing incus bone during stapedotomy due to failure to initially size prosthesis given large size of incus, his failure to properly size prosthesis after subluxing incus bone, and failure to terminate surgery after subluxing incus in order to allow it to heal before making further attempts at stapedotomy, was legal cause of patient's total hearing loss in left ear, in medical negligence action against surgeon and surgeon's corporation, in view of expert testimony that well-qualified surgeon would not have attempted to

place a prosthesis on a subluxed incus because to do so would invite problems.

[17] Negligence 272 🔑387

[272 Negligence](#)
[272XIII Proximate Cause](#)
[272k374 Requisites, Definitions and Distinctions](#)

[272k387 k. Foreseeability. Most Cited Cases](#)

A defendant will be held liable for negligent conduct when the injury caused is foreseeable, or, in other words, it is of a type which a reasonable man would see as a likely result of his conduct.

[18] Evidence 157 🔑571(3)

[157 Evidence](#)
[157XII Opinion Evidence](#)
[157XII\(F\) Effect of Opinion Evidence](#)
[157k569 Testimony of Experts](#)
[157k571 Nature of Subject](#)
[157k571\(3\) k. Due Care and Proper Conduct. Most Cited Cases](#)

Health 198H 🔑823(5)

[198H Health](#)
[198HV Malpractice, Negligence, or Breach of Duty](#)
[198HV\(G\) Actions and Proceedings](#)
[198Hk815 Evidence](#)
[198Hk823 Weight and Sufficiency, Particular Cases](#)

[198Hk823\(5\) k. Surgical Operations in General. Most Cited Cases](#)

Even if no single act of ear surgeon in attempting to fit prosthesis over subluxed incus bone in course of stapedotomy constituted negligence, evidence was sufficient to show that ear surgeon's negligent continuation of surgery after first unsuccessful attempt was proximate cause of patient's total hearing loss in one ear and related injuries, in medical negligence action; expert testified that reasonably well-qualified surgeon would not attempt to place prosthesis on subluxed incus because to do so would invite problems, patient did demonstrate symptoms of inner ear injury during surgery, and blood entered inner ear after point in which continuation of surgery became negligent,

which both patient's expert and surgeon's expert agreed was constant risk throughout surgery.

[19] Health 198H 🔑671

[198H Health](#)
[198HV Malpractice, Negligence, or Breach of Duty](#)

[198HV\(C\) Particular Procedures](#)
[198Hk671 k. Ear, Nose, and Throat. Most Cited Cases](#)

Ear surgeon's negligent continuation of stapedotomy by making numerous attempts to size prosthesis to incus bone after incus became subluxed did not merely create condition in which patient's total ear loss and related injuries occurred when blood flowed into inner ear, as required to show that negligent continuation of surgery was not proximate cause of patient's injuries, in medical negligence action; there was no intervening cause of patient's injuries, and flow of blood into inner ear was known risk of surgery and consequence of negligent failure to terminate surgery.

[20] Negligence 272 🔑387

[272 Negligence](#)
[272XIII Proximate Cause](#)
[272k374 Requisites, Definitions and Distinctions](#)

[272k387 k. Foreseeability. Most Cited Cases](#)

Although legal cause of a plaintiff's injury is generally defined by foreseeability, the extent of the harm or the exact manner in which it occurs need not be foreseeable.

[21] New Trial 275 🔑72(5)

[275 New Trial](#)
[275II Grounds](#)
[275II\(F\) Verdict or Findings Contrary to Law or Evidence](#)

[275k67 Verdict Contrary to Evidence](#)
[275k72 Weight of Evidence](#)
[275k72\(5\) k. Clear, Great or Overwhelming, or Manifest Weight or Preponderance. Most Cited Cases](#)

A trial court should grant a new trial if, in the exercise of its discretion, it finds that the verdict is against the manifest weight of the evidence.

[\[22\]](#) [New Trial 275](#)  [72\(5\)](#)

[275](#) [New Trial](#)

[275II](#) [Grounds](#)

[275II\(F\)](#) [Verdict or Findings Contrary to Law or Evidence](#)

[275k67](#) [Verdict Contrary to Evidence](#)

[275k72](#) [Weight of Evidence](#)

[275k72\(5\)](#) k. Clear, Great or Overwhelming, or Manifest Weight or Preponderance.

[Most Cited Cases](#)

A verdict is against the manifest weight of the evidence, thus warranting a new trial, where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence.

[\[23\]](#) [Appeal and Error 30](#)  [977\(5\)](#)

[30](#) [Appeal and Error](#)

[30XVI](#) [Review](#)

[30XVI\(H\)](#) [Discretion of Lower Court](#)

[30k976](#) [New Trial or Rehearing](#)

[30k977](#) [In General](#)

[30k977\(5\)](#) k. Refusal of New Trial.

[Most Cited Cases](#)

In considering whether a trial court abused its discretion in the denial of a motion for a new trial, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial.

[\[24\]](#) [Evidence 157](#)  [208\(6\)](#)

[157](#) [Evidence](#)

[157VII](#) [Admissions](#)

[157VII\(A\)](#) [Nature, Form, and Incidents in General](#)

[157k206](#) [Judicial Admissions](#)

[157k208](#) [Pleadings](#)

[157k208\(6\)](#) k. Pleadings Superseded, Withdrawn, or Abandoned. [Most Cited Cases](#)

Admission by ear surgeon and surgeon's corporation to allegation in original unverified complaint that surgeon was authorized agent of corporation did not constitute evidence of agency at trial, for purposes of imposing vicarious liability on corporation in medical negligence action; answer was superseded by answer to amended complaint in which corporation denied

allegation that surgeon was "at all times relevant" acting as agent for corporation, and patient did not introduce original answer as evidence at trial.

[\[25\]](#) [Evidence 157](#)  [208\(.5\)](#)

[157](#) [Evidence](#)

[157VII](#) [Admissions](#)

[157VII\(A\)](#) [Nature, Form, and Incidents in General](#)

[157k206](#) [Judicial Admissions](#)

[157k208](#) [Pleadings](#)

[157k208\(.5\)](#) k. In General. [Most](#)

[Cited Cases](#)

[Evidence 157](#)  [265\(8\)](#)

[157](#) [Evidence](#)

[157VII](#) [Admissions](#)

[157VII\(E\)](#) [Proof and Effect](#)

[157k265](#) [Conclusiveness and Effect](#)

[157k265\(8\)](#) k. Pleadings. [Most Cited](#)

[Cases](#)

A statement of fact that has been admitted in a pleading is a judicial admission and is binding on the party making it.

[\[26\]](#) [Evidence 157](#)  [208\(4\)](#)

[157](#) [Evidence](#)

[157VII](#) [Admissions](#)

[157VII\(A\)](#) [Nature, Form, and Incidents in General](#)

[157k206](#) [Judicial Admissions](#)

[157k208](#) [Pleadings](#)

[157k208\(4\)](#) k. Pleadings Not Verified or Signed. [Most Cited Cases](#)

[Evidence 157](#)  [265\(8\)](#)

[157](#) [Evidence](#)

[157VII](#) [Admissions](#)

[157VII\(E\)](#) [Proof and Effect](#)

[157k265](#) [Conclusiveness and Effect](#)

[157k265\(8\)](#) k. Pleadings. [Most Cited](#)

[Cases](#)

An admission in an unverified pleading signed by an attorney is binding on the party as a judicial admission.

[27] Evidence 157 208(6)

157 Evidence

157VII Admissions

157VII(A) Nature, Form, and Incidents in General

157k206 Judicial Admissions

157k208 Pleadings

157k208(6) k. Pleadings Superseded, Withdrawn, or Abandoned. [Most Cited Cases](#)

Evidence 157 265(8)

157 Evidence

157VII Admissions

157VII(E) Proof and Effect

157k265 Conclusiveness and Effect

157k265(8) k. Pleadings. [Most Cited](#)

Cases

Once a pleading is amended, an admission made in an unverified original pleading can only be used as an evidentiary admission and not as a judicial admission; however, an admission in an original verified pleading will remain binding as a judicial admission even after the filing of an amended pleading which supersedes the original unless the amended pleading discloses that the original pleading was made through mistake or inadvertence.

[28] Appeal and Error 30 635(3)

30 Appeal and Error

30X Record

30X(J) Defects, Objections, Amendments, and Corrections

30k635 Effect of Omissions

30k635(3) k. Evidence. [Most Cited](#)

Cases

Failure to include in appellate record notice to produce information for trial to which ear surgeon and surgeon's corporation replied that surgeon was insured for \$1 million and corporation was covered by surgeon's policy because surgeon was sole shareholder of corporation precluded meaningful appellate review as to whether reply constituted judicial admission of agency relationship, for purposes of imposing vicarious liability on corporation for surgeon's medical negligence. [Sup.Ct.Rules, Rule 237](#).

[29] Principal and Agent 308 1

308 Principal and Agent

308I The Relation

308I(A) Creation and Existence

308k1 k. Nature of the Relation in General.

[Most Cited Cases](#)

Agency is a consensual, fiduciary relationship between two legal entities created by law, where the principal has the right to control the activities of the agent, and the agent has the power to conduct legal transactions in the name of the principal.

[30] Principal and Agent 308 159(1)

308 Principal and Agent

308III Rights and Liabilities as to Third Persons

308III(C) Unauthorized and Wrongful Acts

308k159 Negligence or Wrongful Acts of

Agent

308k159(1) k. Rights and Liabilities of

Principal. [Most Cited Cases](#)

A principal will only be held vicariously liable for the negligence of an agent if the agent was acting within the scope of his employment at the time of the negligent conduct.

[31] Principal and Agent 308 23(1)

308 Principal and Agent

308I The Relation

308I(A) Creation and Existence

308k18 Evidence of Agency

308k23 Weight and Sufficiency

308k23(1) k. In General. [Most Cited](#)

Cases

Principal and Agent 308 24

308 Principal and Agent

308I The Relation

308I(A) Creation and Existence

308k24 k. Questions for Jury. [Most Cited](#)

Cases

When the facts relied upon to establish the existence of an agency relationship are conflicting, or conflicting inferences can be drawn from them, the question is one of fact for the jury, and the existence of an agency relationship must be proved by a preponderance of the evidence.

[32] Evidence 157 🔑264

157 Evidence

157VII Admissions

157VII(E) Proof and Effect

157k264 k. Construction. Most Cited Cases

Reply by ear surgeon and surgeon's corporation to notice for information to be produced at trial that surgeon was insured for \$1 million and that corporation was covered by surgeon's policy because surgeon was sole shareholder of corporation, by itself, did not constitute judicial admission that agency relationship existed, as required to hold corporation vicariously liable for surgeon's negligence, in medical negligence action.

[33] Appeal and Error 30 🔑1106(4)

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(A) Decision in General

30k1106 Remand Without Decision

30k1106(4) k. To Determine Issues,

Introduce Evidence, or for New Trial. Most Cited Cases

Patient was not entitled to remand to reopen case to allow presentation of additional evidence of agency relationship between ear surgeon and surgeon's corporation, for purposes of imposing vicarious liability on corporation for surgeon's negligence in medical negligence action, after determination on appeal that defendants' reply to notice of information to be produced at trial, that surgeon was insured for \$1 million and that corporation was included in policy because surgeon was sole shareholder, did not constitute admission to agency relationship, where patient was put on notice of issue of agency relationship when defendants, in response to amended complaint, denied allegation that surgeon was, "at all times relevant," agent of corporation. Sup.Ct.Rules, Rule 366(a).

[34] Constitutional Law 92 🔑2311

92 Constitutional Law

92XIX Rights to Open Courts, Remedies, and Justice

92k2311 k. Right of Access to the Courts and a Remedy for Injuries in General. Most Cited Cases (Formerly 92k328)

The concept of "a day in court" is not to shut the parties off, but on the contrary to permit the parties to

offer all relevant evidence which the court requires to reach an accurate decision and to do justice.

[35] Appeal and Error 30 🔑216(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k214 Instructions

30k216 Requests and Failure to Give Instructions

30k216(1) k. In General. Most Cited Cases

Appeal and Error 30 🔑218.2(5.1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k218 Verdict and Findings by Jury

30k218.2 Special Interrogatories and Findings

30k218.2(5) Requests and Failure to Submit Interrogatories or Issues

30k218.2(5.1) k. In General. Most Cited Cases

Alleged failure of special representative for ear surgeon and surgeon's corporation to submit agency jury instruction did not result in waiver of claim on appeal that patient did not prove agency relationship, for purposes of imposing vicarious liability on corporation for surgeon's negligence, in medical negligence action, and, in any case, defendants submitted alternate verdict form which would have allowed for finding of negligence only against surgeon, which form was rejected by trial court.

[36] Appeal and Error 30 🔑238(2)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k234 Necessity of Motion Presenting Objection

[30k238](#) As to Judgment, or Modification or Vacation of Judgment
[30k238\(2\)](#) k. Motion for Judgment Notwithstanding Verdict. [Most Cited Cases](#)

Appeal and Error 30 294(1)

[30](#) Appeal and Error
[30V](#) Presentation and Reservation in Lower Court of Grounds of Review
[30V\(D\)](#) Motions for New Trial
[30k294](#) Review of Sufficiency of Evidence to Sustain Verdict, Findings, or Judgment
[30k294\(1\)](#) k. In General. [Most Cited Cases](#)

By filing motion for judgment notwithstanding verdict and for new trial, special representative for ear surgeon and surgeon's corporation preserved for appellate review challenge to jury's finding that agency relationship existed between surgeon and corporation, for purposes of imposing vicarious liability on corporation in medical negligence action.

[37] Appeal and Error 30 241

[30](#) Appeal and Error
[30V](#) Presentation and Reservation in Lower Court of Grounds of Review
[30V\(B\)](#) Objections and Motions, and Rulings Thereon
[30k234](#) Necessity of Motion Presenting Objection
[30k241](#) k. Sufficiency and Scope of Motion. [Most Cited Cases](#)

Appeal and Error 30 301

[30](#) Appeal and Error
[30V](#) Presentation and Reservation in Lower Court of Grounds of Review
[30V\(D\)](#) Motions for New Trial
[30k301](#) k. Necessity of Statement of Grounds. [Most Cited Cases](#)
A motion for judgment notwithstanding the verdict (JNOV) preserves for appeal the question as to whether, in consideration of all the evidence presented, there was any evidence which tends to support the verdict, and a motion for a new trial may preserve matters concerning the trial's outcome where specifically raised in the motion.

[38] Health 198H 834(1)

[198H](#) Health
[198HV](#) Malpractice, Negligence, or Breach of Duty
[198HV\(G\)](#) Actions and Proceedings
[198Hk828](#) Damages
[198Hk834](#) Statutory Limits on Damages Awards
[198Hk834\(1\)](#) k. In General. [Most Cited Cases](#)

Patient's recovery for medical negligence against ear surgeon who died prior to trial and for whom special representative was appointed to defend suit was limited to \$1 million under surgeon's liability insurance, under statute that limited recovery to liability insurance in cases where special representative is appointed in actions surviving party's death, and thus, patient was precluded from subsequently pursuing judgment against surgeon's estate. S.H.A. [735 ILCS 5/2-1008\(b\)](#).

[39] Statutes 361 176

[361](#) Statutes
[361VI](#) Construction and Operation
[361VI\(A\)](#) General Rules of Construction
[361k176](#) k. Judicial Authority and Duty.
[Most Cited Cases](#)
Statutory interpretation presents a question of law.

[40] Statutes 361 181(1)

[361](#) Statutes
[361VI](#) Construction and Operation
[361VI\(A\)](#) General Rules of Construction
[361k180](#) Intention of Legislature
[361k181](#) In General
[361k181\(1\)](#) k. In General. [Most Cited Cases](#)

The primary rule of statutory interpretation, to which all other rules are subordinate, is that a court should ascertain and give effect to the intent of the legislature.

[41] Statutes 361 205

[361](#) Statutes
[361VI](#) Construction and Operation

[361VI\(A\)](#) General Rules of Construction
[361k204](#) Statute as a Whole, and Intrinsic Aids to Construction
[361k205](#) k. In General. [Most Cited Cases](#)
A statute should be read as a whole and each provision should be construed in connection with every other section.

[42] Statutes 361 188

[361](#) Statutes
[361VI](#) Construction and Operation
[361VI\(A\)](#) General Rules of Construction
[361k187](#) Meaning of Language
[361k188](#) k. In General. [Most Cited Cases](#)
In ascertaining legislative intent, reviewing courts should look primarily to the language used in the statute.

[43] Statutes 361 188

[361](#) Statutes
[361VI](#) Construction and Operation
[361VI\(A\)](#) General Rules of Construction
[361k187](#) Meaning of Language
[361k188](#) k. In General. [Most Cited Cases](#)
If legislative intent can be ascertained from the statute's plain language, that intent must prevail without resort to other interpretive aids.

[44] Constitutional Law 92 994

[92](#) Constitutional Law
[92VI](#) Enforcement of Constitutional Provisions
[92VI\(C\)](#) Determination of Constitutional Questions
[92VI\(C\)3](#) Presumptions and Construction as to Constitutionality
[92k994](#) k. Avoidance of Constitutional Questions. [Most Cited Cases](#)
(Formerly 92k48(3))

Constitutional Law 92 1003

[92](#) Constitutional Law
[92VI](#) Enforcement of Constitutional Provisions
[92VI\(C\)](#) Determination of Constitutional

Questions
[92VI\(C\)3](#) Presumptions and Construction as to Constitutionality
[92k1001](#) Doubt
[92k1003](#) k. Avoidance of Doubt.
[Most Cited Cases](#)
(Formerly 92k48(3))

Statutes 361 206

[361](#) Statutes
[361VI](#) Construction and Operation
[361VI\(A\)](#) General Rules of Construction
[361k204](#) Statute as a Whole, and Intrinsic Aids to Construction
[361k206](#) k. Giving Effect to Entire Statute. [Most Cited Cases](#)
Courts will avoid a construction of a statute which renders any portion of it meaningless or void and will avoid any construction which would raise doubts as to the statute's constitutionality.

[45] Executors and Administrators 162 22(1)

[162](#) Executors and Administrators
[162II](#) Appointment, Qualification, and Tenure
[162k22](#) Temporary or Special Appointment
[162k22\(1\)](#) k. In General. [Most Cited Cases](#)
The appointment of a special administrator does not trigger the issuance of letters of office or empower anyone to distribute the assets of the decedent's estate in order to satisfy a judgment against the decedent; when a special administrator is appointed for the purpose of defending an action against the decedent, her statutory power is limited to defense of the action. S.H.A. [735 ILCS 5/2-1008\(b\)](#).

[46] Executors and Administrators 162 438(1)

[162](#) Executors and Administrators
[162X](#) Actions
[162k438](#) Parties
[162k438\(1\)](#) k. In General. [Most Cited Cases](#)

Parties 287 59(3)

[287](#) Parties
[287IV](#) New Parties and Change of Parties
[287k57](#) Substitution

[287k59](#) Persons Entitled to Be Substituted and Grounds Therefor
[287k59\(3\)](#) k. Executor or Administrator and Heirs or Legatees. [Most Cited Cases](#)
Opening of ear surgeon's estate after judgment was entered in patient's favor in medical negligence action in which special representative was appointed to defend action did not constitute event causing change or transmission of liability so as to warrant substitution of surgeon's estate for special representative, and thus, did not allow patient to seek recovery for judgment against surgeon's estate. S.H.A. [735 ILCS 5/2-1008\(a, b\)](#).

[47] Statutes 361 🔑194

[361](#) Statutes
[361VI](#) Construction and Operation
[361VI\(A\)](#) General Rules of Construction
[361k187](#) Meaning of Language
[361k194](#) k. General and Specific Words and Provisions. [Most Cited Cases](#)
Specific statutory language will take precedence over more general language relating to the same topic.

[48] Constitutional Law 92 🔑990

[92](#) Constitutional Law
[92VI](#) Enforcement of Constitutional Provisions
[92VI\(C\)](#) Determination of Constitutional Questions
[92VI\(C\)3](#) Presumptions and Construction as to Constitutionality
[92k990](#) k. In General. [Most Cited Cases](#)
(Formerly 92k48(1))

Constitutional Law 92 🔑996

[92](#) Constitutional Law
[92VI](#) Enforcement of Constitutional Provisions
[92VI\(C\)](#) Determination of Constitutional Questions
[92VI\(C\)3](#) Presumptions and Construction as to Constitutionality
[92k996](#) k. Clearly, Positively, or Unmistakably Unconstitutional. [Most Cited Cases](#)
(Formerly 92k48(1))

Constitutional Law 92 🔑1030

[92](#) Constitutional Law
[92VI](#) Enforcement of Constitutional Provisions
[92VI\(C\)](#) Determination of Constitutional Questions
[92VI\(C\)4](#) Burden of Proof
[92k1030](#) k. In General. [Most Cited Cases](#)
(Formerly 92k48(1))

There is a strong presumption that legislative enactments are constitutional, and one who asserts otherwise has the burden of clearly establishing the constitutional violation.

[49] Constitutional Law 92 🔑2364

[92](#) Constitutional Law
[92XX](#) Separation of Powers
[92XX\(B\)](#) Legislative Powers and Functions
[92XX\(B\)2](#) Encroachment on Judiciary
[92k2364](#) k. Damages. [Most Cited Cases](#)
(Formerly 92k55)

Health 198H 🔑604

[198H](#) Health
[198HV](#) Malpractice, Negligence, or Breach of Duty
[198HV\(A\)](#) In General
[198Hk601](#) Constitutional and Statutory Provisions
[198Hk604](#) k. Validity. [Most Cited Cases](#)

Statute limiting patient's recovery against ear surgeon to limits of surgeon's \$1 million insurance in medical negligence action where surgeon died prior to trial and patient elected to have special representative appointed to defend suit rather than opening probate estate did not amount to unconstitutional legislative remittitur; at common law, patient's medical negligence action would have abated at time of surgeon's death, and therefore, statute provided for mode of recovery which legislature was not precluded from limiting. S.H.A. [735 ILCS 5/2-1008\(b\)](#).

West Codenotes
Recognized as Unconstitutional [735 ILCS 5/2-1115.1](#)
**[646](#) John McGarry, [Pamela Davis Gorcowski](#), Dykema Gossett Rooks Pitts PLLC, Chicago, for Appellant.

[Edward J. Walsh](#), Walsh, Knippen, Knight & Diamond, Chartered, Chicago, for Appellee.

Justice [GORDON](#) delivered the opinion of the court:

***542 ***895** Plaintiff, Mark Knauerhaze, brought suit against defendants George W. Allen, M.D. (hereinafter Dr. Allen), and George W. Allen, M.D., S.C., an Illinois corporation (hereinafter Allen Corporation), alleging that Dr. Allen negligently performed surgery on his ear that resulted in permanent injuries. Dr. Allen died during trial, and on Knauerhaze's motion, the trial court appointed Oliver Nelson special representative pursuant to section 2-1008 of the Code of Civil Procedure ([735 ILCS 5/2-1008](#) (West 2004)). On May 22, 2003, a jury found for plaintiff and awarded damages of \$2,484,702. The trial court entered judgment on the verdict the same day. Defendants brought a motion for judgment notwithstanding the verdict or, alternatively, a motion for a new trial, arguing that Knauerhaze failed to provide evidence of causation. Defendants further argue that the judgment against Allen Corporation cannot stand because Knauerhaze never proved that Dr. Allen was acting as an agent of the corporation at the time of the surgery such that it could be held vicariously liable. Knauerhaze cross-appeals, alleging that the trial court improperly limited his award through a misinterpretation of section 2-1008. For the reasons that follow, we reverse.

I. BACKGROUND

In September of 1998, Knauerhaze, an otherwise healthy man in his forties, sought treatment from Dr. Allen for hearing problems with his left ear. Knauerhaze had [otosclerosis](#), a condition where the stapes bone of the middle ear becomes stiff and stops vibrating properly. The middle ear is comprised of three small bones, the malleus, the incus and the stapes. These bones work together to ****647 ***896** send vibrations to the inner ear where nerves then send signals to the brain. Knauerhaze had lost approximately 50 % of his hearing due to the stiffening of his stapes bone.

***543** Dr. Allen recommended a [stapedotomy](#), a surgery where part of the stapes bone is removed and replaced by a prosthesis which is hooked onto the incus bone with a wire hook. A successful [stapedotomy](#) reestablishes the correct interplay of the middle

ear bones and can lead to immediate improvement in hearing. A [stapedotomy](#) is performed with the surgeon looking into the ear through a microscope at various magnifications. A [stapedotomy](#) entails injecting an anesthetic and a blood constricting medication into the ear canal. An incision is then made and the eardrum is moved forward. The bones of the inner ear are then gently pushed to see if they are moving, or are, in fact, showing signs of [otosclerosis](#). If the surgeon verifies that the stapes bone is not moving as it should, a cut is then made between the incus and the stapes with a tiny knife, and the incus is lifted off the top of the stapes. The loop of the prosthesis is then put over the incus bone and the prosthesis is set in place.

Knauerhaze's surgery was scheduled for September 11, 1998, as a day surgery, meaning that Knauerhaze would arrive in the morning, have the procedure, remain in the hospital for a matter of hours for rest and observation, and then return home the same day.

Knauerhaze had diminished hearing before the surgery; however, he was still able to work, drive, walk, run and otherwise participate in normal activities. After the surgery, Knauerhaze lost all hearing in his left ear. The hearing loss resulted in ongoing balance problems and vertigo, which, in turn, led to fatigue from compensating for the loss of balance. He has not been able to return to work, or drive, and is no longer able to walk with ease due to disequilibrium.

On September 8, 2000, Knauerhaze brought suit against Dr. Allen and Allen Corporation alleging that he sustained injuries due to the medical negligence of Dr. Allen. Dr. Allen was the sole stockholder of Allen Corporation, and both Dr. Allen and Allen Corporation were insured by the Illinois State Medical Inter-insurance Exchange for the total sum of \$1 million.

Before the case proceeded to trial, Dr. Allen died on September 27, 2001. No letters of officer were issued and no probate estate was opened on his behalf. Rather, Knauerhaze opted to proceed with the litigation by bringing a motion pursuant to section 2-1008(b), which, as shall be set out later, allows a party to proceed with an action against an opponent who dies during litigation by having a special representative appointed to defend the action. [735 ILCS 5/2-1008\(b\)](#) (West 2004). Section 2-1008(b) allows the party who

invokes it to avoid the formalities of opening a probate estate, but it limits the amount recoverable to the liability insurance protecting the decedent's estate. [735 ILCS 5/2-1008\(b\)](#) (West 2004). On January 18, 2002, the court *544 granted Knauerhaze's section 2-1008(b) motion and appointed Oliver Nelson as special representative for Dr. Allen.

Dr. Allen's notes from the Knauerhaze surgery set forth certain facts of the surgery that are not in dispute. Dr. Allen noted that Knauerhaze's incus bone was much larger than normal. He then noted that in first attempting to put the [wire loop](#) of the prosthesis over the incus, the incus became subluxed, or dislocated, when the ligament supporting the incus was torn. Dr. Allen then made several more unsuccessful attempts to place the [wire loop](#) over the incus. After these attempts, **648 ***897 Dr. Allen noted that there was blood in the vestibule of Knauerhaze's ear. Also, after these several attempts, Dr. Allen noted that Knauerhaze began to retch, broke out into a cold dripping sweat, became nauseated and started to vomit on the operating table. At the same time, Knauerhaze's eyes began to rapidly flick from the left to right, a condition known as [nystagmus](#). At that point, Dr. Allen terminated the surgery and packed Knauerhaze's ear with gel foam. In addition, Dr. Allen saw Knauerhaze a week after the surgery on September 27, 1999, for a follow-up appointment. Dr. Allen's notes from this appointment indicated that he removed the packing from Knauerhaze's ear and that he was still very dizzy. Dr. Allen also indicated that Knauerhaze's hearing was still very bad, that he had mild spontaneous [nystagmus](#) to the right, and there was a purulent discharge from the ear.

At trial, Knauerhaze called Dr. Ralph Nelson as an expert witness. Dr. Nelson looked at the operative report and notes of Dr. Allen as well as other medical records and a surveillance tape taken of the plaintiff to make his opinion. Dr. Nelson testified that Dr. Allen was negligent in not properly sizing the [wire loop](#) of the prosthesis to fit over Knauerhaze's large incus bone. Dr. Nelson explained that a subluxed incus becomes totally flaccid and loose and it is significantly more difficult to place the prosthesis loop over a subluxed incus. In Dr. Nelson's opinion, a reasonably well-qualified ear surgeon would have terminated the surgery after subluxing the incus and would have allowed it to heal over a period of months before making any further attempts. Accord-

ing to Dr. Nelson, a prosthesis should not be attached to a subluxed incus because the prosthesis can then go too far into the inner ear and cause damage.

Dr. Nelson also testified that Dr. Allen was negligent in failing to initially open the prosthesis loop wider after noting the large size of Knauerhaze's incus. He further testified that if the prosthesis loop does not initially go over the incus with ease, it should be removed and resized to fit over the bone.

Dr. Nelson acknowledged that the act of subluxing the incus did *545 not, in itself, cause any damage to the nerves of the inner ear. However, Dr. Nelson testified that the retching, sweating, nausea, vomiting, and [nystagmus](#) that occurred after Dr. Allen had made several unsuccessful attempts to place the prosthesis loop over the incus were signs of inner ear damage. Furthermore, in Dr. Nelson's opinion, if Dr. Allen had stopped the surgery immediately after subluxing the incus, Knauerhaze would not have had any further [injury to his inner ear](#) and no permanent problems.

The Defendant's expert, Dr. Thomas Haberkamp, based his testimony on the same documents as Dr. Nelson and, in addition, he examined Knauerhaze on February 27, 2002. Dr. Haberkamp testified that Dr. Allen complied with applicable the standard of care and was not negligent in operating on the plaintiff. According to Dr. Haberkamp, subluxing the incus is a known and accepted complication of the surgery and does not amount to negligence. Dr. Haberkamp further testified that although it is more difficult to place a prosthesis loop over a subluxed incus, it is not negligent to do so, and it is actually the best way to stabilize a flaccid incus. Additionally, according to Dr. Haberkamp, Dr. Allen's attempts to place the prosthesis loop over the subluxed incus did not cause the complications that followed. Rather, Dr. Haberkamp opined that Knauerhaze's complications were caused by [labyrinthitis](#), which is an inflammation of the inner ear that can be caused by infection or ***898 through **649 the introduction of blood into the inner ear. Dr. Haberkamp further testified that [labyrinthitis](#) can occur in the absence of negligence and that because blood is always incident to ear surgery, it is always possible for it to travel from the middle ear to the inner ear and cause irritation. Knauerhaze's symptoms of retching, sweating, nausea, vomiting and [nystagmus](#) during the surgery were

consistent with [labyrinthitis](#), according to Dr. Haberkamp, as was the purulent discharge noted by Dr. Allen in the postoperative period.

Knauerhaze's original complaint dated September 8, 2000, contained the following allegation as count II, paragraph 1:

“At all times relevant to this cause of action, Defendant, George W. Allen, M.D., was and is a physician licensed in Illinois and practiced in the field of otolaryngology and he was an authorized agent, servant and/or employee of George W. Allen, M.D., S.C., and Illinois corporation located in Chicago, Cook County, Illinois.”

Defendants admitted this allegation in their answer. However, defendants denied count II, paragraph 2, which stated as follows:

“At all times relevant to this cause of action, Mark Knauerhaze, was under the care and treatment of George W. Allen, M.D., S.C., through its duly authorized agent, George W. Allen, M.D., for purposes of receiving medical care and treatment.”

***546** On May 22, 2003, Knauerhaze amended his complaint to properly recite the remaining defendants and to conform the allegations to [Supreme Court Rule 213 \(134 Ill.2d R. 213\)](#) opinions that were disclosed during pretrial discovery. The amended complaint contained an allegation identical to the allegation in count II, paragraph 1, from the first complaint. However, in its answer to the amended complaint, Allen Corporation did not simply admit this allegation as it previously had but answered as follows:

“George W. Allen, M.D., S.C. admits Dr. Allen was a physician licensed in Illinois and practiced in the field of otolaryngology and makes no answer to the allegations contained in [this allegation] of the Plaintiff's First Amended Complaint at Law because they call for a legal conclusion.”

In addition, Knauerhaze made a request pursuant to [Supreme Court Rule 237 \(134 Ill.2d R. 237\)](#) for certain information to be produced at trial. Defendants filed their response to this request on May 23, 2003, at the beginning of trial. In that response, defendants stated: “Dr. George Allen was insured for \$1 million and [Allen Corporation] was covered by Dr. Allen's policy because he was the sole shareholder of the

corporation.”

Defendants moved for a directed verdict at the close of plaintiff's case and again at the close of their case. The jury returned a verdict for the plaintiff in the amount \$2,484,702. On July 3, 2003, defendants then filed a posttrial motion for judgment notwithstanding the verdict and for remittitur. The trial court denied in part and granted in part defendants' posttrial motion. The court did not reduce the amount of judgment as sought but, rather, enforced section 2-1008 with respect to Oliver Nelson as special representative of Dr. Allen.

Subsequently, on July 23, 2003, Knauerhaze opened a probate estate for Dr. Allen and filed a petition for probate of will and for letters of administration. Letters of office were issued for Dr. Allen's estate on September 9, 2003, and the Northern Trust Company (hereinafter Northern Trust) was appointed as the independent ****650 ***899** executor. On October 20, 2003, Knauerhaze also successfully moved to have Northern Trust substituted as defendant in lieu of the special representative, Oliver Nelson.

On appeal, defendants argue that they are entitled to judgment notwithstanding the verdict because Knauerhaze failed to prove the cause element of the medical negligence cause of action. Defendants contend that Knauerhaze's expert, Dr. Nelson, did not establish how Knauerhaze's inner ear was damaged, but merely established a condition, rather than a cause of the injury. Alternatively, defendants argue that they are entitled to a new trial because the jury's conclusions ***547** were against the manifest weight of the evidence because there was no proof of cause. Defendants next contend that the trial court erred in denying their motion for judgment notwithstanding the verdict with respect to Allen Corporation because plaintiff failed to provide any evidence at trial of an agency relationship between Dr. Allen and Allen Corporation that would support a judgment against Allen Corporation for vicarious liability.

Knauerhaze contends that his expert, Dr. Nelson, did provide testimony establishing that Dr. Allen's negligence caused the injuries. In this regard, he appears to argue that the injury as evidenced by the various symptoms Knauerhaze presented during surgery was caused by Dr. Allen's repeated unsuccessful attempts to place the prosthesis loop. Knauerhaze further con-

tends that the defendants' answer to the first complaint constituted a judicial admission, and the fact of agency was, therefore, removed from issue. Knauerhaze further argues that defendants' [Rule 237](#) response admitted agency and should also be considered a judicial admission. Finally, Knauerhaze contends that defendants' failure to submit agency jury instructions constituted a waiver of the issue.

Additionally, Knauerhaze cross-appeals the trial court's determination to limit his recovery against Dr. Allen to the amount of his insurance coverage pursuant to section 2-1008(b). In this regard, Knauerhaze contends that section 2-1008 does not limit a plaintiff's ability to pursue an unsatisfied judgment against a defendant decedent's probate estate when there is a subsequent timely made claim against the estate. Knauerhaze additionally argues that limiting his ability to pursue a claim against Dr. Allen's probate estate after the invocation of section 2-1008 constitutes an unconstitutional legislative remittitur.

II. ANALYSIS OF APPEAL

[1][2] Defendants' first contention on appeal is that the trial court erred in not granting their motion for judgment notwithstanding the verdict because Knauerhaze failed to prove an essential element of negligence. A judgement notwithstanding the verdict presents a question of law that appellate courts review *de novo*. [McClure v. Owens Corning Fiberglas Corp.](#), 188 Ill.2d 102, 132, 241 Ill.Dec. 787, 720 N.E.2d 242, 257 (1999). A trial court should enter judgment notwithstanding the verdict only when all the evidence, viewed in a light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict could stand based on the evidence. [McClure](#), 188 Ill.2d at 132, 241 Ill.Dec. 787, 720 N.E.2d at 257; [Pedrick v. Peoria & Eastern R. Co.](#), 37 Ill.2d 494, 510, 229 N.E.2d 504, 513-14 (1967). Our supreme court further *548 described the standard in [Maple v. Gustafson](#), 151 Ill.2d 445, 452-53, 177 Ill.Dec. 438, 603 N.E.2d 508, 512 (1992):

“A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different**651 ***900 inferences or conclusions, or because the court feels that other results are more reasonable. [Citations.] Likewise, the appellate court should not usurp the function of the jury and substitute its judgment on questions of

fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way.” [Maple](#), 151 Ill.2d at 452-53, 177 Ill.Dec. 438, 603 N.E.2d at 512.

Thus, the standard for obtaining a judgment notwithstanding the verdict is a “very difficult standard to meet,” and limited to “extreme situations only.” [Jones v. Chicago Osteopathic Hospital](#), 316 Ill.App.3d 1121, 1125, 250 Ill.Dec. 326, 738 N.E.2d 542, 547 (2000), quoting [People ex rel. Department of Transportation v. Smith](#), 258 Ill.App.3d 710, 714, 197 Ill.Dec. 263, 631 N.E.2d 266 (1994).

[3][4] The plaintiff in a negligence action must establish that the defendant owed a duty of care, that the defendant breached that duty, and that the plaintiff incurred injuries proximately caused by that breach. [Espinoza v. Elgin, Joliet & Eastern Ry. Co.](#), 165 Ill.2d 107, 114, 208 Ill.Dec. 662, 649 N.E.2d 1323, 1326 (1995). The existence of a duty is a question of law for the court to decide, while the issues of breach and proximate cause are factual matters for the jury to decide, provided there is a genuine issue of material fact regarding those issues [Espinoza](#), 165 Ill.2d at 114, 208 Ill.Dec. 662, 649 N.E.2d at 1326; [Thompson v. County of Cook](#), 154 Ill.2d 374, 382, 181 Ill.Dec. 922, 609 N.E.2d 290, 293 (1993).

Defendants do not contest the existence of a duty owed by Dr. Allen to Knauerhaze. Nor do they not contest that Knauerhaze suffered some injury. Rather, they primarily contend that Knauerhaze failed to establish the element of proximate cause because his expert, Dr. Nelson, did not testify to any causal link between Dr. Allen's actions and Knauerhaze's subsequent injuries. Defendants additionally dispute the breach element of negligence by denying that Dr. Allen acted negligently in either subluxing the incus or continuing the surgery. However, their primary argument on appeal is on the element of cause. Defendants contend that continuing the surgery after subluxing the incus should not be viewed as the proximate cause of Knauerhaze's injury because it merely created the condition in which the injury could occur. They further argue that even if Dr. Allen's negligence was a cause in fact of the injury, it was not the legal cause. For these reasons, defendants argue, the jury did not have sufficient evidence to return a verdict for Knauerhaze.

[5][6][7][8] The proximate cause element of negligence consists of both *549 “cause in fact” and “legal cause.” *Thacker v. UNR Industries, Inc.*, 151 Ill.2d 343, 354, 177 Ill.Dec. 379, 603 N.E.2d 449, 455 (1992). “Cause in fact” involves the question of whether the defendant's negligence had any effect in producing the other's harm, or whether the harm was caused by some other factors. See *Restatement (Second) of Torts § 431*, comment b, at 429 (1965); *Thacker*, 151 Ill.2d at 354-55, 177 Ill.Dec. 379, 603 N.E.2d at 455.

“A defendant's conduct is a ‘cause in fact’ of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury. [Citations.] A defendant's conduct is a material element and substantial factor in bringing about the injury if, absent that conduct, the injury would not have occurred.” *Abrams v. City of Chicago*, 211 Ill.2d 251, 258, 285 Ill.Dec. 183, 811 N.E.2d 670, 675 (2004).

“Legal cause,” on the other hand, examines the foreseeability of the injury, or **652 ***901 whether the injury is “of a type which a reasonable man would see as a likely result of his conduct.” *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 456, 178 Ill.Dec. 699, 605 N.E.2d 493, 503 (1992).

[9][10][11][12][13][14] A plaintiff must generally prove the elements of a medical negligence cause of action through medical expert testimony. See *Seef v. Ingalls Memorial Hospital*, 311 Ill.App.3d 7, 15, 243 Ill.Dec. 806, 724 N.E.2d 115, 122 (1999); *Mengelson v. Ingalls Health Ventures*, 323 Ill.App.3d 69, 74, 256 Ill.Dec. 38, 751 N.E.2d 91, 95 (2001); *Northern Trust Co. v. University of Chicago Hospitals & Clinics*, 355 Ill.App.3d 230, 242, 290 Ill.Dec. 445, 821 N.E.2d 757, 768 (2004). In order to sustain the burden of proof, a plaintiff's expert must demonstrate within a reasonable degree of medical certainty that the defendant's breach in the standard of care is more probably than not the cause of the injury. *Mengelson*, 323 Ill.App.3d at 74, 256 Ill.Dec. 38, 751 N.E.2d at 95; *Northern Trust Co.*, 355 Ill.App.3d at 242, 290 Ill.Dec. 445, 821 N.E.2d at 768. A plaintiff does not need to present unequivocal or unqualified evidence of causation but can meet his burden through the introduction of circumstantial evidence from which a “‘jury may infer other connected facts which usually and reasonably follow according to * * * common

experience. [Citation.]’ ” *Thacker*, 151 Ill.2d at 357, 177 Ill.Dec. 379, 603 N.E.2d at 455. Moreover, “an expert may give an opinion without disclosing the facts underlying that opinion,” and “[t]he burden is placed upon the adverse party during cross-examination to elicit the facts underlying the expert opinion.” *Wilson v. Clark*, 84 Ill.2d 186, 194, 49 Ill.Dec. 308, 417 N.E.2d 1322, 1326 (1981) (adopting *Federal Rule of Evidence 705* (Fed.R.Evid.705)). Nevertheless, proximate cause is not established where the medical expert testimony of the causal connection is “ ‘contingent, speculative or merely possible.’ ” *Mengelson*, 323 Ill.App.3d at 75, 256 Ill.Dec. 38, 751 N.E.2d at 95, quoting *550 *Newell v. Corres*, 125 Ill.App.3d 1087, 1092, 81 Ill.Dec. 283, 466 N.E.2d 1085, 1088 (1984). However, “the relative weight, sufficiency and credibility assessed to medical expert testimony is ‘peculiarly within the province of the jury’ [citation], as is, ultimately, the resolution of evidentiary conflicts with respect to the factual question of proximate cause.” *Northern Trust Co.*, 355 Ill.App.3d at 242, 290 Ill.Dec. 445, 821 N.E.2d at 768.

[15] Although the question is a close one, the jury arguably had sufficient evidence to find that Dr. Allen's negligence was the cause in fact of Knauerhaze's injuries. The jury was presented with the testimony of two experts with generally conflicting opinions. However, as noted, our task is not to reweigh the evidence and make our own determinations. *Maple*, 151 Ill.2d at 453, 177 Ill.Dec. 438, 603 N.E.2d at 512. Rather, we need only determine if the evidence so overwhelmingly favors defendants that the judgment cannot stand. *McClure*, 188 Ill.2d at 132, 241 Ill.Dec. 787, 720 N.E.2d at 257. Thus, we view the evidence in a light most favorable to Knauerhaze. *McClure*, 188 Ill.2d at 132, 241 Ill.Dec. 787, 720 N.E.2d at 257. As noted, Dr. Nelson testified that Dr. Allen was negligent in several regards. He testified that Dr. Allen was negligent in sublucking the incus because he did not initially size the wire loop of the prosthesis given the large size of the incus. Next, Dr. Allen was negligent in not removing the prostheses and resizing the loop once it did not easily slip over the incus. Dr. Allen was further negligent in making several attempts to place the prosthesis on the negligently sublucked incus. Dr. Nelson testified that a reasonably well-qualified surgeon would not continue to attempt the procedure after sublucking the incus because**653 ***902 things were starting to go bad and proceeding was inviting a problem. Dr. Nelson

testified that a [stapedotomy](#) generally takes 20 to 45 minutes; however, Dr. Haberkamp admitted on cross-examination that Dr. Allen continued the surgery for approximately 35 minutes after the point he subluxed the incus. Finally, Dr. Nelson testified that although the initial subluxation of the incus, in and of itself, did not cause any damage to the inner ear, no damage would have occurred if Dr. Allen had stopped the procedure immediately after that point.

Although Dr. Haberkamp disputed Dr. Nelson's opinions in these regards, such disputes are the very type that juries are expected to resolve through their considered weighing of the relative merit of the experts and their positions. [Northern Trust Co.](#), 355 Ill.App.3d at 242, 290 Ill.Dec. 445, 821 N.E.2d at 768. Thus, it was clearly within the jury's purview to give greater weight to Dr. Nelson's opinion than to Dr. Haberkamp's contrary opinion. Dr. Nelson's testimony clearly established evidence through which the jury could conclude that Dr. Allen breached his duty of care. Moreover, Dr. Nelson testified that Dr. *551 Allen's breach of his duty resulted in Knauerhaze's injuries. Thus, the jury had evidence through which to infer that Dr. Allen caused the injury when he made several negligent and unsuccessful attempts to place a too-small wire prosthesis loop on a subluxed incus. Keeping in mind the standard applicable to expert testimony (see [Mengelson](#), 323 Ill.App.3d at 74, 256 Ill.Dec. 38, 751 N.E.2d at 95; [Northern Trust Co.](#), 355 Ill.App.3d at 242, 290 Ill.Dec. 445, 821 N.E.2d at 768; [Wilson](#), 84 Ill.2d at 194, 49 Ill.Dec. 308, 417 N.E.2d at 1326), and the standard of review applicable to an appeal of a denial of a judgment notwithstanding the verdict (see [Maple](#), 151 Ill.2d at 453, 177 Ill.Dec. 438, 603 N.E.2d at 512), we cannot conclude that the jury's determination on the issue of cause in fact was unfounded.

[16] Defendants next contend, relying on [Simmons v. Garces](#), 198 Ill.2d 541, 261 Ill.Dec. 471, 763 N.E.2d 720 (2002), that Knauerhaze failed to prove that Dr. Allen was the legal cause of Knauerhaze's injury. In *Simmons*, the plaintiff took her child to the defendant's clinic, but the defendant physician did not examine the child. [Simmons](#), 198 Ill.2d at 544-45, 261 Ill.Dec. 471, 763 N.E.2d at 724-25. Later that day, the child was taken to a hospital emergency room but was dead upon arrival. [Simmons](#), 198 Ill.2d at 546, 261 Ill.Dec. 471, 763 N.E.2d at 725. At trial, plaintiff's expert testified that the child suffered from se-

vere dehydration, which contributed to her death, and that defendant's failure to examine the child constituted negligence. [Simmons](#), 198 Ill.2d at 547, 261 Ill.Dec. 471, 763 N.E.2d at 726. The jury answered "No" to the special interrogatory: "Did dehydration contribute to cause the death of [the child]?" [Simmons](#), 198 Ill.2d at 553, 261 Ill.Dec. 471, 763 N.E.2d at 729. However, the jury found for the plaintiff. [Simmons](#), 198 Ill.2d at 553, 261 Ill.Dec. 471, 763 N.E.2d at 729. The trial court found that the special interrogatory was controlling and entered judgment in favor of the defendants. [Simmons](#), 198 Ill.2d at 553, 261 Ill.Dec. 471, 763 N.E.2d at 724. The supreme court affirmed the judgment for defendants based on the plaintiff's failure to prove proximate cause. [Simmons](#), 198 Ill.2d at 574-75, 261 Ill.Dec. 471, 763 N.E.2d at 741. The court noted that even if the defendant's failure to examine the child constituted a cause in fact of the child's death, the failure to examine could not be considered the legal cause because the only cause of death linked by expert testimony to the defendant's conduct was dehydration. **654***903[Simmons](#), 198 Ill.2d at 559, 261 Ill.Dec. 471, 763 N.E.2d at 732.

Defendants contend that the instant case is like *Simmons* in that even if Dr. Allen's failure to stop the surgery was a cause in fact of Knauerhaze's injury, it could not be the legal cause. They argue that because the *Simmons* court refused to hold the physician liable even though he may have been the cause in fact of the injuries, we should similarly refuse to hold them liable even though Dr. Allen's negligence may have been the cause in fact of Knauerhaze's injuries. However, *552 the applicability of *Simmons* to the instant case is limited. *Simmons* cites the rule that proximate cause consists of both cause in fact and legal cause, and there is no question that this rule applies here. But the holding in *Simmons* was based on the jury affirmatively refuting a basic premise of the plaintiff's theory of causation through their answer to a special interrogatory and thereby negating the possibility that the defendant's negligence was the legal cause of the death. The jury in the instant case made no such finding. Rather, the jury found defendants liable for negligence without specifically indicating the cause on which they based their determination. Thus, *Simmons*, applies only insofar as it generally reflects the rule of law with regard to proximate cause.

[17] As with cause in fact, the jury here had sufficient evidence on which to conclude that Dr. Allen's attempts to place the improperly sized loop of the prosthesis on a subluxed incus was the legal cause of the injuries. As noted, a defendant will be held liable for negligent conduct when the injury caused is foreseeable, or, in other words, it is "of a type which a reasonable man would see as a likely result of his conduct." [Lee, 152 Ill.2d at 456, 178 Ill.Dec. 699, 605 N.E.2d at 503](#). Dr. Nelson's testimony established that Dr. Allen breached the standard of care applicable to ear surgeons in several regards. He stated that a reasonably well-qualified surgeon would not attempt to place a prosthesis on a subluxed incus because to do so is to invite problems. Based on this opinion, the jury could infer that it was reasonably foreseeable that the act committed by Dr. Allen would cause [inner ear injury](#).

[18] Thus, we conclude that when viewed in a light most favorable to Knauerhaze, the jury had sufficient evidence to conclude that Dr. Allen proximately caused the injury when he made several negligent attempts to place the prosthesis loop on the subluxed incus. However, even if the jury did not infer that any specific act of Dr. Allen caused Knauerhaze's injuries, we still believe that their determination should stand based solely on the fact that the injury occurred during a portion of the surgery that was unwarranted.

Viewing the evidence in a light most favorable to Knauerhaze, we find that the jury had ample evidence on which to conclude that Dr. Allen's negligent continuation of the surgery was the cause in fact of the injury. First, Dr. Nelson testified that it was a breach of the standard of care for Dr. Allen to continue the surgery after subluxing the incus. Next, both experts agreed that Dr. Allen's notes indicated that blood entered the vestibule of Knauerhaze's ear only after the incus was subluxed. Additionally, both experts agreed that Dr. Allen reported the symptoms of [inner ear injury](#) (the retching, vomiting, nausea, sweating, and [nystagmus](#)) as occurring contemporaneously ***553** with the blood entering the vestibule and after the incus was subluxed. Both experts agreed that the risk of internal bleeding is always present throughout the duration of any [stapes surgery](#) and there is a constant risk that blood will enter the inner ear so ****655 ***904** as to cause irritation or damage like that suffered by Knauerhaze. Thus, the jury was presented with expert testimony which they were free to accept

that Dr. Allen was negligent in continuing the surgery, that the blood entered the inner ear after the point where continuation of the surgery was negligent, that the symptoms of [inner ear injury](#) occurred after the point continuation of the surgery was negligent, and that blood entering the inner ear can cause the type of injuries Knauerhaze sustained. Furthermore, Dr. Nelson testified that if Dr. Allen had terminated the procedure immediately after subluxing the incus, no injury would have resulted. Thus, Dr. Allen's negligent continuation of the surgery extended the period that Knauerhaze would be exposed to the risks of surgery. Based on these testimonial facts, the jury could conclude that Dr. Allen's negligent continuation of the surgery, without any additional specific act of negligence, was the cause in fact of Knauerhaze's injuries because absent that conduct, blood would not have infiltrated the inner ear and caused injury. See [Abrams, 211 Ill.2d at 258, 285 Ill.Dec. 183, 811 N.E.2d at 675](#).

[19] Defendants contend that Knauerhaze's expert merely established the condition in which the injury occurred rather than the cause of the injury. Defendants cite [Thompson v. County of Cook, 154 Ill.2d 374, 181 Ill.Dec. 922, 609 N.E.2d 290 \(1993\)](#), for the distinction between condition and cause. In that case, the court noted:

"Illinois courts have long distinguished * * * between condition and causation. * * * 'The cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for causal agencies to act.' If a defendant's negligence does nothing more than furnish a condition by which injury is made possible, that negligence is not the proximate cause of injury." [Thompson, 154 Ill.2d at 383, 181 Ill.Dec. 922, 609 N.E.2d at 294](#), citing [Briske v. Village of Burnham 379 Ill. 193, 199, 39 N.E.2d 976, 979 \(1942\)](#), and citing [Merlo v. Public Service Co., 381 Ill. 300, 306, 45 N.E.2d 665, 675 \(1942\)](#).

However, in [First Springfield Bank & Trust v. Galman, 188 Ill.2d 252, 242 Ill.Dec. 113, 720 N.E.2d 1068 \(1999\)](#), our supreme court elucidated that the condition/cause analysis is really nothing more than another way of asking whether the defendant's actions satisfy the cause-in-fact aspect of proximate cause. [Galman, 188 Ill.2d at 259, 242 Ill.Dec. 113, 720 N.E.2d at 1073](#); accord [Abrams, 211 Ill.2d at](#)

[258, 285 Ill.Dec. 183, 811 N.E.2d at 675](#). In *Galman*, the plaintiff urged the court to abandon the condition/cause distinction *554 and exclusively use the proximate cause standard as described in [Lee, 152 Ill.2d at 455, 178 Ill.Dec. 699, 605 N.E.2d at 503](#) (describing proximate cause as consisting of cause in fact and legal cause). [Galman, 188 Ill.2d at 257-58, 242 Ill.Dec. 113, 720 N.E.2d at 1072](#). However, the court rejected plaintiff's position that the two approaches were wholly incompatible. [Galman, 188 Ill.2d at 258, 242 Ill.Dec. 113, 720 N.E.2d at 1072](#). The court noted that while *Lee* addressed proximate cause in general terms, the cases that employed the condition/cause distinction, *Briske, Merlo, and Thompson*, for instance, involved a subset of negligence cases "in which the plaintiff's injury results not from the defendant's negligence directly but from the subsequent, independent act of a third person." [Galman, 188 Ill.2d at 259, 242 Ill.Dec. 113, 720 N.E.2d at 1072](#). The court then posited:

"[w]hen *Briske, Merlo, and Thompson* ask whether the defendant's conduct was a cause of the injury or simply **656 ***905 furnished a condition by which the injury was made possible, they are in effect asking whether the defendant's conduct was a material and substantial element in bringing about the injury. Similarly, when *Briske, Merlo, and Thompson* ask whether the defendant might have reasonably anticipated the intervening efficient cause as a natural and probable result of his or her own negligence, they are in effect asking whether the intervening efficient cause was of a type that a reasonable person would see as a likely result of his or her conduct." [Galman, 188 Ill.2d at 259, 242 Ill.Dec. 113, 720 N.E.2d at 1072](#).

There is no contention in the instant case that Knauerhaze's injuries were caused by an intervening third party as was the case in those cases that have employed the condition/cause distinction. See [Briske, 379 Ill. 193, 39 N.E.2d 976; Merlo, 381 Ill. 300, 45 N.E.2d 665; Thompson, 154 Ill.2d 374, 181 Ill.Dec. 922, 609 N.E.2d 290; Galman, 188 Ill.2d 252, 242 Ill.Dec. 113, 720 N.E.2d 1068](#). Nevertheless, *Galman* makes clear the condition/cause inquiry is merely another way of asking whether something was the cause in fact of an injury. See [Galman, 188 Ill.2d at 259, 242 Ill.Dec. 113, 720 N.E.2d at 1073; cf. Abrams, 211 Ill.2d at 258, 285 Ill.Dec. 183, 811 N.E.2d at 675](#) (describing cause in fact using "material element and a substantial factor" language). Thus, defendants' claim that Dr. Allen's failure to terminate

the surgery merely created a condition in which an injury could occur is tantamount to saying that Dr. Allen's negligence was not the cause in fact of Knauerhaze's injury, which, as noted was a contention that the jury reasonably declined to follow.

Furthermore, the jury could have found that Dr. Allen's negligent continuation of the surgery was also the legal cause of the injury. Both experts testified that [inner ear injury](#) is a risk of [stapes surgery](#). Dr. Nelson testified to the statistical failure rate of [stapes surgeries](#), stating that 10 % fail to restore hearing and approximately 2 % lead to *555 further hearing impairment due to the development of scar tissue, infection, [blood vessel spasm](#), irritation of the inner ear or a leak of inner ear fluid. Dr. Haberkamp testified that [labyrinthitis](#) is a known risk of [stapes surgery](#), that it can be caused by blood entering the vestibule, and that it can be caused in the absence of negligence. However, Dr. Haberkamp did not put a statistical limit on the frequency of this known complication. Thus, there was sufficient evidence from which to infer that any reasonably well-qualified ear surgeon would have been aware that [inner ear injury](#) was a risk of ill-advisedly extending the duration of a [stapedotomy](#) and, moreover, that in this specific case, that risk would not have materialized had Dr. Allen, in fact, terminated the surgery when he should have.

Although the statistical probability that stapes surgery will further impair hearing was generally established at 2 % by Dr. Nelson, that statistic does not address whether those surgeries surveyed were negligently extended in time and lends itself, we believe, to a reasonable possibility that the actual likelihood of further impairment under such circumstances would exceed the 2 % estimate. More overridingly, however, the extent to which a risk must be foreseeable to trigger liability should not be as significant where that particular risk is not essential to establish whether there is a breach of duty. The rationale that a harm must be reasonably foreseeable in order to satisfy the requirements of proximate cause so as to impose a duty and define its breach is to limit the extent to which a potential tortfeasor must regulate his conduct in order to avoid the possibility of injuring another. See generally**657 ***906 *W. Keeton, Prosser & Keeton on Torts* § 42, at 274 (5th ed.1984). As a matter of policy, if the risk of injury is too remote it does not justify the regulation of a potential defendant's conduct by imposing the burden of a duty

to avoid that particular risk. However, that rationale requiring that an injury be likely would not be fully applicable to consequential damages where the duty of care was already breached for other reasons that satisfied the elements of proximate cause. Thus, in this case, the possibility of blood infiltrating the inner ear and damaging it through the continuation of surgery need not be as foreseeable since the duty and its breach were already defined by the fact that the surgery clearly extended beyond the point where it should have been aborted and, as Dr. Nelson testified, extending the surgery was “inviting a problem.”

In this case, the duty to abort the surgery was imposed by the professional standard of care, which sought to avoid unnecessary and possibly risky continued attempts to attach a prosthesis to a subluxed incus. As noted, Dr. Nelson testified that a “reasonably well-qualified surgeon would stop because things are starting to go bad, and to *556 proceed is inviting a problem.” Thus, the jury was free to conclude that under the prevailing standard of care, the continuation of the surgery after the initial unsuccessful attempt was not only unnecessary, but was laden with risk. There can be no question under this test that the continuation of surgery under these circumstances constituted a breach of duty. Once the duty has been established and a breach has taken place, the consequential [injuries to the inner ear](#) resulting, not from the prosthesis pushing into the inner ear, but from a collateral consequence, namely, the flow of blood—a risk incidental to any ear surgery—became simply an element of damage rather than an increment in defining the duty. As such, the likelihood of its occurrence is of lesser import than it would be if that risk was incremental in defining the duty in the first instance.

[20] This conclusion is all the more appropriate in this instance where the injury the standard of care was designed to avoid, namely, [injury to the inner ear](#), is the same injury that actually occurred. Even though, according to the testimony of Dr. Nelson, the standard of care requiring the termination of [stapes surgery](#) when the incus is subluxed focused on the possible risk of the penetration of the prosthesis rather than blood leakage, which was more likely to account for the injury in this case since there is no evidence that the prosthesis was ever attached, it does not seem an undue burden to impose liability for damages that were consequential to Dr. Allen's breach of duty under these circumstances. We note,

too, that although legal cause is generally defined by foreseeability ([Lee](#), 152 Ill.2d at 456, 178 Ill.Dec. 699, 605 N.E.2d at 503), it is also said that the extent of the harm or the exact manner in which it occurs need not be foreseeable. [Colonial Inn Motor Lodge, Inc. v. Gay](#), 288 Ill.App.3d 32, 45, 223 Ill.Dec. 674, 680 N.E.2d 407, 416 (1997). This is not a case where the injuries or the manner of their occurrence are far-fetched or wholly unforeseeable. Rather, it was a known risk that blood could infiltrate the inner ear and cause damage. Furthermore, this is not an “unforeseeable plaintiff” case such as was dealt with in the famous Cardozo-Andrews debate in the case of [Palsgraf v. Long Island R.R. Co.](#), 248 N.Y. 339, 162 N.E. 99 (1928). See W. Keeton, Prosser & Keeton on Torts § 43, at 284 (5th ed.1984) (describing *Palsgraf* as dealing with the foreseeability of the plaintiff rather than of the consequences). Rather, here, there is no *658 ***907 question that Dr. Allen owed a duty directly to Knauerhaze. Thus, the jury could have inferred that Dr. Allen's negligent continuation of the surgery was the proximate cause of Knauerhaze's injuries because it unreasonably exposed him to known risks of surgery that did, in fact, come to pass. We therefore affirm the trial court's denial of defendants' motion for judgment notwithstanding the verdict on the negligence issue.

[21][22][23] *557 Defendants alternatively contend that trial court erred in failing to grant them a new trial because the verdict was against the manifest weight of the evidence. Defendants reiterate the substantive arguments made in their appeal of the denial of their motion for judgment notwithstanding the verdict. A motion for a new trial, however, is subject to different standards at both the trial and appellate levels. A trial court should grant a new trial if, in the exercise of its discretion, it finds that the verdict is against the manifest weight of the evidence. [Maple](#), 151 Ill.2d at 456, 177 Ill.Dec. 438, 603 N.E.2d at 513. “ ‘A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence.’ ” [Maple](#), 151 Ill.2d at 454, 177 Ill.Dec. 438, 603 N.E.2d at 512-13, quoting [Villa v. Crown Cork & Seal Co.](#), 202 Ill.App.3d 1082, 1087, 148 Ill.Dec. 372, 560 N.E.2d 969, 973 (1990). The appellate standard of review applicable to a trial court's determination on a motion for a new trial is abuse of discretion. [Maple](#), 151 Ill.2d at 455, 177 Ill.Dec. 438, 603 N.E.2d at 513. “In [considering] whether a trial court

abused its discretion, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." [Maple](#), 151 Ill.2d at 455, 177 Ill.Dec. 438, 603 N.E.2d at 513, citing [Reidelberger v. Highland Body Shop, Inc.](#), 83 Ill.2d 545, 549, 48 Ill.Dec. 237, 416 N.E.2d 268 (1981). For the reasons discussed above, we find that the trial court did not abuse its discretion in finding that the jury's verdict was not against the manifest weight of the evidence. We therefore affirm the trial court's denial of defendants' motion for a new trial on the negligence issue.

[24] Defendants next argue that the trial court erred in denying judgment notwithstanding the verdict or directing a verdict in favor of Allen Corporation because there was no evidence presented at trial to show that Dr. Allen was acting as an agent of Allen Corporation when he performed the surgery. Knauerhaze first contends that defendants' answer to count II, paragraph 1, constituted a judicial admission to the agency relationship that could not later be denied. Defendants contend that their original answer did not constitute evidence of agency because it was superseded by their answer to Knauerhaze's amended complaint and was never admitted into evidence at trial.

[25][26][27] As a general rule, a statement of fact that has been admitted in a pleading is a judicial admission and is binding on the party making it. [State Security Insurance Co. v. Linton](#), 67 Ill.App.3d 480, 484, 23 Ill.Dec. 811, 384 N.E.2d 718, 722 (1978). Judicial admissions are not evidence and need not be introduced as evidence at trial. [J. Strong, McCormick on Evidence § 254](#), at 142 (4th ed.1992). Rather, judicial admissions "are formal concessions in the pleadings in the case or stipulations by a *558 party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." [J. Strong, McCormick on Evidence § 254](#), at 142 (4th ed.1992); see also [J. Wigmore, Wigmore **659 ***908 on Evidence § 1064](#), at 536 (2d ed.1923); [Linton](#), 67 Ill.App.3d at 484, 23 Ill.Dec. 811, 384 N.E.2d at 722. In contrast to judicial admissions, evidentiary admissions must be offered into evidence and are always subject to contradiction or explanation. [J. Strong, McCormick on Evidence § 254](#), at 142 (4th ed.1992). An admission in an unverified pleading signed by an attorney is binding on the party as a judicial admission. [Linton](#), 67 Ill.App.3d at

484, 23 Ill.Dec. 811, 384 N.E.2d at 722. However, once a pleading is amended, an admission made in an unverified original pleading can only be used as an evidentiary admission and not as a judicial admission. [Yarc v. American Hospital Supply Corp.](#), 17 Ill.App.3d 667, 670, 307 N.E.2d 749, 752 (1974); [Galihier v. Spates](#), 129 Ill.App.2d 204, 207, 262 N.E.2d 626, 628 (1970) ("The prior answer was not verified and, being superseded by an amended answer, does not have the effect of an admission"); [Pettigrew v. Putterman](#), 331 Ill.App.3d 633, 641, 265 Ill.Dec. 49, 771 N.E.2d 1008, 1014 (2002). In contrast, original verified pleadings will remain binding as judicial admissions even after the filing of an amended pleading which supersedes the original unless the amended pleading discloses that the original pleading was made through mistake or inadvertence. [In re Marriage of Osborn](#), 206 Ill.App.3d 588, 594, 151 Ill.Dec. 663, 564 N.E.2d 1325, 1328 (1990); [American National Bank & Trust Co. of Chicago v. Erickson](#), 115 Ill.App.3d 1026, 1029, 72 Ill.Dec. 71, 452 N.E.2d 3, 6 (1983); [Montgomery Ward & Co. v. Wetzel](#), 98 Ill.App.3d 243, 251, 53 Ill.Dec. 366, 423 N.E.2d 1170, 1177 (1981).

In this case, all of the relevant pleadings were unverified. In their answer to Knauerhaze's amended complaint, defendants refused to answer the allegation that Dr. Allen was, "at all times relevant," an agent of Allen Corporation because it called for a legal conclusion. Thus, defendants' original answer to Knauerhaze's original complaint lost its status as a judicial admission once that pleading was amended. See [Yarc](#), 17 Ill.App.3d at 670, 307 N.E.2d at 752; [Galihier](#), 129 Ill.App.2d at 207, 262 N.E.2d at 628; [Pettigrew](#), 331 Ill.App.3d at 641, 265 Ill.Dec. 49, 771 N.E.2d at 1014. Moreover, although defendants' original answer retained potential evidentiary value, Knauerhaze did not introduce the original answer as evidence at trial. Thus, defendants' original answer did not provide proof of an agency relationship at trial. See [J. Strong, McCormick on Evidence § 254](#), at 142 (4th ed.1992); [Pettigrew](#), 331 Ill.App.3d at 641-42, 265 Ill.Dec. 49, 771 N.E.2d at 1014.

Knauerhaze next contends that defendants' response to their [Supreme Court Rule 237](#) notice to produce constituted a judicial admission of agency and that the trial court was correct in denying *559 defendants' posttrial motion on this basis. As noted, in that response, defendants stated: "Dr. George Allen was

insured for \$1 million and [Allen Corporation] was covered by Dr. Allen's policy because he was the sole shareholder of the corporation.”

[28] As noted, judicial admissions are formal concessions or stipulations that withdraw a fact from issue and dispense of the need of proof of the fact. J. Strong, McCormick on Evidence § 254, at 142 (4th ed.1992). As such, to constitute a judicial admission, the admission must clearly and unequivocally admit to the fact that is being removed from issue. See Young v. Pease, 114 Ill.App.3d 120, 122-23, 69 Ill.Dec. 868, 448 N.E.2d 586, 588 (1983). That determination cannot be made without viewing the proffered statement in the context in which it was made, which, in this case, would necessarily require an opportunity to review the Rule 237 elicitation **660 ***909 to which this statement purportedly responded. Since the parties have failed to include the Rule 237 notice to which the response was made as part of this record, it would be less than thorough for this court to determine, solely from the face of the response itself, that it rises to the level of a judicial admission. However, more overridingly, even if that statement were determined to be a judicial admission, it would not be sufficient to satisfy Knauerhaze's burden to prove agency.

[29][30][31][32] “Agency is a consensual, fiduciary relationship between two legal entities created by law, where the principal has the right to control the activities of the agent, and the agent has the power to conduct legal transactions in the name of the principal.” Caligiuri v. First Colony Life Insurance Co., 318 Ill.App.3d 793, 801, 252 Ill.Dec. 212, 742 N.E.2d 750, 756 (2000). A principal will only be held vicariously liable for the negligence of an agent if the agent was acting within the scope of his employment at the time of the negligent conduct. Pyne v. Witmer, 129 Ill.2d 351, 359, 135 Ill.Dec. 557, 543 N.E.2d 1304, 1308 (1989). When the facts relied upon to establish the existence of an agency relationship are conflicting, or conflicting inferences can be drawn from them, the question is one of fact for the jury (3 Am.Jur.2d Agency § 352 (2002)), and the existence of an agency relationship must be proved by a preponderance of the evidence. Granite Properties Ltd. Partnership v. Granite Investment Co., 220 Ill.App.3d 711, 714, 163 Ill.Dec. 139, 581 N.E.2d 90, 92 (1991). Knauerhaze cites no authority for his contention that being a sole shareholder of a corporation

or sharing liability insurance with a corporation automatically makes an individual an agent of that corporation. Nor could this court find any support for the contention that those facts, in and of themselves, establish agency such that Knauerhaze was relieved of his burden to prove the relationship. Moreover, no argument was made that an “S.C.” (“Service Corporation,” **560 as described in the Medical Corporation Act (805 ILCS 15/4 (West 2004))) as opposed to any other corporate form, is any more likely to support Knauerhaze's contention that sole stock ownership automatically equates to an agency relationship. Thus, even if an inference of agency could potentially be drawn from these facts, it was an inference that should have been left for the jury to make or reject. See 3 Am.Jur.2d Agency § 352 (2002); see also St. Ann's Home for the Aged v. Daniels, 95 Ill.App.3d 576, 579, 51 Ill.Dec. 64, 420 N.E.2d 478, 481 (1981) (“Unless the parties' relationship is so clear as to be undisputed, the existence and scope of an agency relationship are questions of fact, to be decided by the trier of fact”).

[33] Knauerhaze alternatively argues that if we find that no proof of agency was presented at trial, we should remand pursuant to our power under Supreme Court Rule 366 (155 Ill.2d R. 366) to the trial court for the purpose of taking more evidence. Knauerhaze points out that in response to defendants' motion for directed verdict he alternatively asked for leave to reopen the case and have the defendants' original answer read to the jury. The trial court, however, denied defendants' motion, finding that agency was established by the Rule 237 response and that it was unnecessary to reopen the case for more evidence.

Supreme Court Rule 366(a) enumerates the powers of the reviewing courts, which they may exercise in their discretion, including the powers to

“(1) exercise all or any of the powers of amendment of the trial court;

* * *

(3) order or permit the record to be amended by correcting errors or by adding**661 ***910 matters that should have been included;

(4) draw inferences of fact; and

(5) enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require.” 155 Ill.2d R. 366(a).

In support of his argument to remand, Knauerhaze cites to [Inter-Insurance Exchange of the Chicago Motor Club v. Employers Mutual Casualty Co.](#), 31 Ill.App.3d 906, 334 N.E.2d 913 (1975). In that case, the trial court entered declaratory judgment for the plaintiff insurer against the defendant insurer based solely on the pleadings and arguments of counsel. [Inter-Insurance Exchange of the Chicago Motor Club](#), 31 Ill.App.3d at 907, 334 N.E.2d at 916. The court determined *561 that the defendant's policy afforded coverage for the incident and was the primary policy. [Inter-Insurance Exchange of the Chicago Motor Club](#), 31 Ill.App.3d at 907, 334 N.E.2d at 914. The appellate court affirmed that conclusion but could not conclude from the record whether “escape” clauses in either of the policies rendered defendant's coverage secondary. [Inter-Insurance Exchange of the Chicago Motor Club](#), 31 Ill.App.3d at 909, 334 N.E.2d at 915. Therefore, the court remanded to the trial court for the “limited purpose of receiving evidence of the ‘excess’ coverage provision of plaintiff's policy and the ‘escape’ provision, if any, in defendant's policy, and determining which provision prevails.” [Inter-Insurance Exchange of the Chicago Motor Club](#), 31 Ill.App.3d at 909, 334 N.E.2d at 915.

[34] Knauerhaze contends that the instant case is like [Inter-Insurance Exchange of the Chicago Motor Club](#) in that remanding for further evidence does not amount to giving him a second day in court because, as the court in that case stated, “the concept of ‘a day in court’ is not to shut the parties off, but on the contrary to permit the parties to offer all relevant evidence which the court requires to reach an accurate decision and to do justice.” [Inter-Insurance Exchange of the Chicago Motor Club](#), 31 Ill.App.3d at 909-10, 334 N.E.2d at 915.

However, based on the circumstances of this case, we do not deem it appropriate to exercise our discretionary power under [Supreme Court Rule 366](#) to remand this case so that Knauerhaze can prove agency. In

[Geaslen v. Berkson, Gorov & Levin, Ltd.](#), 155 Ill.2d 223, 230, 184 Ill.Dec. 385, 613 N.E.2d 702, 705 (1993), the supreme court remanded a case pursuant to [Rule 366](#) so that the plaintiffs could amend their complaint to sufficiently allege a breach of duty. The court noted that the dismissal of plaintiffs' complaint by the trial court, and the affirmance of that dismissal by the appellate court, denied plaintiffs any meaningful opportunity to either defend or amend their complaint. The court then noted that plaintiffs were not on notice that the sufficiency of their complaint would be attacked because neither defendants' motion to dismiss nor the trial court proceedings addressed plaintiffs' allegations. [Geaslen](#), 155 Ill.2d at 230-31, 184 Ill.Dec. 385, 613 N.E.2d at 705.

In contrast, in the instant case, Knauerhaze was clearly put on notice that agency was being put back in issue by defendants' answer to his amended complaint. Although that answer did not deny the existence of an agency relationship, it refused to answer the allegation because it called for a legal conclusion. Thus, the answer clearly notified Knauerhaze that defendants were not going to concede the agency**662 ***911 issue and that Knauerhaze would have to prove it. Moreover, unlike in [Geaslen](#), Knauerhaze did have a “meaningful opportunity” to address *562 the deficiency of his case because he had notice of the issue and the opportunity to proffer the defendants' original answer, which admitted agency, as an evidentiary admission at trial. Thus, contrary to Knauerhaze's contentions and reliance on [Inter-Insurance Exchange of the Chicago Motor Club](#), a remand would, in fact, amount to a second day in court. Moreover, we note that in contrast to [Inter-Insurance Exchange of the Chicago Motor Club](#), a remand in the instant case would theoretically require the cumbersome process of reconvening a jury. For these reasons, we decline to remand pursuant to our [Rule 366](#) discretionary power so that Knauerhaze can offer proof of agency.

[35] Knauerhaze finally contends that defendants forfeited their right to appeal the agency issue by failing to submit agency jury instructions or failing to object to the lack of jury instructions. In support of this contention, Knauerhaze cites [Ozik v. Gramins](#), 345 Ill.App.3d 502, 279 Ill.Dec. 68, 799 N.E.2d 871 (2003). In [Ozik](#), the court stated:

“a litigant waives the right to object later, on appeal,

to instructions or verdict forms that were given to a jury, when the party fails to make a specific objection during the jury instruction conference or when the form is read to the jury. [Citations.] Additionally, even if the litigant properly objects to an instruction or verdict form, the litigant is still required to submit a remedial instruction or verdict form to the trial court.” *Ozik*, 345 Ill.App.3d at 520, 279 Ill.Dec. 68, 799 N.E.2d at 885.

However, *Ozik* does not apply to the present situation because defendants do not object on appeal to jury instructions or verdict forms; rather, they contend that Knauerhaze failed to prove an agency relationship through which Allen Corporation can be held vicariously liable for Dr. Allen's negligence. See *Ozik*, 345 Ill.App.3d 502, 279 Ill.Dec. 68, 799 N.E.2d 871. Moreover, *Ozik* does not address whether failing to object to the lack of instructions results in the issue being forfeited. See *Ozik*, 345 Ill.App.3d 502, 279 Ill.Dec. 68, 799 N.E.2d 871. However, to the extent that *Ozik* is applicable, defendants did, in fact, submit an alternate verdict form which was rejected by the trial court. Defendants' proposed verdict form allowed the jury to find only against Dr. Allen and did not mention Allen Corporation at all.

[36][37] Defendants contend that their motion for judgment notwithstanding the verdict or, alternatively, their motion for a new trial preserved the agency issue for appeal. A motion for judgment notwithstanding the verdict preserves for appeal the question “as to whether, in consideration of all the evidence presented, there [was] any evidence which tends to support the verdict,” and a motion for a new trial may preserve “matters concerning the trial's outcome where specifically raised in the motion.” *563 *Forrester v. Patrick*, 167 Ill.App.3d 105, 110, 117 Ill.Dec. 837, 520 N.E.2d 1188, 1191 (1988); *Zirp-Burnham, LLC v. E. Terrell Associates, Inc.*, 356 Ill.App.3d 590, 599, 292 Ill.Dec. 289, 826 N.E.2d 430, 438 (2005). Thus, because defendants made both motions on the basis that Knauerhaze failed to provide any proof of agency, the issue was preserved to the extent applicable to both motions. Thus, defendants adequately preserved their right to appeal the agency issue. For the foregoing reasons, we reverse the trial court's denial of defendants' motion for judgment notwithstanding the verdict, or alternatively, for new trial on the issue of agency.

****663 ***912 III. ANALYSIS OF CROSS-APPEAL**

[38] Knauerhaze cross-appeals the trial court's interpretation and subsequent enforcement of section 2-1008(b) with respect to Oliver Nelson, special representative of Dr. Allen, and Northern Trust, substitute special representative of Dr. Allen. In this regard, Knauerhaze argues that the language in section 2-1008(b) that limits the amount of recovery under the section to the proceeds of any liability insurance does not prohibit him from making a subsequent claim against the decedent's probate estate for the remainder of his judgment. See 735 ILCS 5/2-1008(b) (West 2004). He next contends that the Probate Act, and not section 2-1008, which is part of the Code of Civil Procedure, governs his claim against Dr. Allen's estate. Knauerhaze finally contends that an interpretation of section 2-1008 that prohibits his ability to pursue his claim against the probate estate amounts to an unconstitutional legislative remittitur.

Section 2-1008(b) provides:

“(b) Death. If a party to an action dies and the action is one which survives, the proper party or parties may be substituted by order of court upon motion as follows:

* * *

(2) If a person against whom an action has been brought dies, and the cause of action survives and is not otherwise barred, his or her personal representative shall be substituted as a party. If no petition has been filed for letters of office for the deceased's estate, the court, upon the motion of a person bringing an action and after the notice to the party's heirs or legatees as the court directs and without opening an estate, may appoint a special representative for the deceased party for the purposes of defending the action. If a party elects to have a special representative appointed under this paragraph (2), the recovery shall be limited to the proceeds of any liability insurance protecting the estate and shall not bar the estate from enforcing any claims that might have been available to it as counterclaims.” 735 ILCS 5/2-1008(b) (West 2004).

[39][40][41][42][43][44] Statutory interpretation presents a question of law that we review *564 *de*

novo. Quad Cities Open, Inc. v. City of Silvis, 208 Ill.2d 498, 508, 281 Ill.Dec. 534, 804 N.E.2d 499, 508 (2004). “The primary rule of statutory interpretation, to which all other rules are subordinate, is that a court should ascertain and give effect to the intent of the legislature.” *Bonaguro v. County Officers Electoral Board*, 158 Ill.2d 391, 397, 199 Ill.Dec. 659, 634 N.E.2d 712, 714 (1994). A statute should be read as a whole and each provision should be construed in connection with every other section. *Bonaguro*, 158 Ill.2d at 397, 199 Ill.Dec. 659, 634 N.E.2d at 714. In ascertaining legislative intent, reviewing courts should look primarily to the language used in the statute. *Bonaguro*, 158 Ill.2d at 397, 199 Ill.Dec. 659, 634 N.E.2d at 714. “If legislative intent can be ascertained from the statute’s plain language, that intent must prevail without resort to other interpretive aids.” *Balmoral Racing Club, Inc. v. Topinka*, 334 Ill.App.3d 454, 459, 268 Ill.Dec. 253, 778 N.E.2d 239, 243 (2002). Courts will avoid a construction of a statute which renders any portion of it meaningless or void (*People v. Tarlton*, 91 Ill.2d 1, 5, 61 Ill.Dec. 513, 434 N.E.2d 1110, 1111 (1982)) and will avoid any construction which would raise doubts as to the statute’s constitutionality (*Morton Grove Park District v. American National Bank & Trust Co.*, 78 Ill.2d 353, 363, 35 Ill.Dec. 767, 399 N.E.2d 1295, 1299 (1980)).

We note at the outset of our interpretation of section 2-1008(b) that the parties have not brought any case to our attention, **664 ***913 nor, for that matter, have we have found any case, that has specifically dealt with the effect of the limitation in section 2-1008(b) to liability insurance on subsequent claims against the decedent’s estate. Thus, the issue is one of first impression for this court. Looking solely to the plain language of this section (*Balmoral Racing Club*, 334 Ill.App.3d at 459, 268 Ill.Dec. 253, 778 N.E.2d at 243), the legislative intent seems clear. The section states that “[i]f a party elects to have a special representative appointed * * *, the recovery shall be limited to the proceeds of [the] liability insurance.” 735 ILCS 5/2-1008(b) (West 2004). The phrase “shall be limited,” given a plain reading, appears plain in its meaning that further recovery cannot be acquired after recovering the amount available from liability insurance. The section does not say that recovery shall be limited only to the extent that the section is relied upon and that a litigant can seek additional recovery on the same judgment elsewhere. See 735 ILCS 5/2-1008(b) (West 2004). We presume

that if the legislature had intended to qualify the limitation of this section in such respects it simply would have put in language making such qualifications. See *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill.2d 64, 77-78, 270 Ill.Dec. 724, 783 N.E.2d 1024, 1033 (2002).

Furthermore, this plain reading of section 2-1008(b) complies with the apparent purpose of limiting the amount recoverable under this section. Section 2-1008(b) allows a plaintiff to proceed with his *565 claim against a defendant who dies after the suit is filed without requiring that a probate estate be opened and consequently without invoking the protection and supervision of the probate court and Probate Act. 735 ILCS 5/2-1008(b) (West 2004). However, correspondingly, in allowing a plaintiff to proceed against a special representative, section 2-1008(b) limits the amount recoverable to the amount of liability insurance protecting the estate so as not to allow, under those circumstances, the financial depletion of the estate itself. 735 ILCS 5/2-1008(b) (West 2004). It is axiomatic that a plaintiff should not be able to collect a judgment without such protection and supervision under the special representative provision of section 2-1008(b) and then pursue that judgment against the entire estate by attempting to substitute the estate after the judgment was rendered. Cf. *Hannah v. Gilbert*, 207 Ill.App.3d 87, 90, 152 Ill.Dec. 53, 565 N.E.2d 295, 297-98 (1990); see generally 16C C.J.S. *Constitutional Law* § 946 (1985).

[45] The special representative provided for under section 2-1008 is not the same as the administrator of a probate estate. *Hannah*, 207 Ill.App.3d at 90, 152 Ill.Dec. 53, 565 N.E.2d at 297-98 (“a special administrator appointed pursuant to [section 2-1008(b) of] the Civil Practice Law for the purposes of defending an action is not the equivalent of an administrator appointed pursuant to the Probate Act”).

“The appointment of a special administrator does not trigger the issuance of letters of office or empower anyone to distribute the assets of the decedent’s estate in order to satisfy a judgment against the decedent. When a special administrator is appointed for the purpose of defending an action against the decedent, her statutory power is limited to defense of the action” *Hannah*, 207 Ill.App.3d at 90, 152 Ill.Dec. 53, 565 N.E.2d at 297-98.

[46] Knauerhaze further contends that reading subsections, 2-1008(b) and 2-1008(a) in conjunction supports his proposition.

Subsection 2-1008(a) states:

****665 ***914** “(a) Change of interest or liability. If by reason of marriage, bankruptcy, assignment, or any other event occurring after the commencement of a cause or proceeding, either before or after judgment, causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after commencement of the action, it becomes necessary or desirable that any person not already a party be before the court, or that any person already a party be made party in another capacity, the action does not abate, but on motion an order may be entered that the proper parties be substituted or added, and that the cause or proceeding be carried on with the remaining parties and new parties, with or without a change in the title of the cause.” [735 ILCS 5/2-1008\(a\)](#) (West 2004).

***566** Knauerhaze emphasizes that subsection 2-1008(a) allows persons to be substituted where “any other event” results in a change of interest and it becomes “necessary or desirable” that the substitution take place, and that substitutions can be made “either before or after judgment.” Knauerhaze contends that the opening of Dr. Allen's probate estate was an event that resulted in a change in interest or liability and permitted for the substitution of Dr. Allen's estate for the special representative Oliver Nelson.

[47] However, there is nothing in subsection 2-1008(a) that restores liability under subsection 2-1008(b) beyond the liability insurance simply because of a substitution, and the rationale for limiting recovery still applies. In that regard, we would further emphasize that a strict limitation to liability insurance as set forth in subsection 2-1008(b) has to prevail over the general substitution language of subsection 2-1008(a). Specific statutory language will take precedence over more general language relating to the same topic. [Flynn v. Industrial Comm'n, 211 Ill.2d 546, 555, 286 Ill.Dec. 62, 813 N.E.2d 119, 125 \(2004\)](#).

The fact that Knauerhaze had Northern Trust, the administrator of Dr. Allen's newly opened probate

estate, substituted for Oliver Nelson as special representative does not change the fact that Dr. Allen's estate had no opportunity to defend its interests during the trial. Thus, it follows that the mere fact of substituting Northern Trust did not, as Knauerhaze would contend, circumvent subsection 2-1008(b)'s limitation on recovery to liability insurance. As noted by the trial court, the substitution of Northern Trust for Oliver Nelson was a nonsubstantive housekeeping matter that did not change the effect of subsection 2-1008(b)'s limitation to liability insurance. Knauerhaze did not object to this characterization of the substitution. Knauerhaze chose to invoke subsection 2-1008(b) and avoid the additional time and effort involved with opening a probate estate before trial; in so doing, he accepted the limitations of subsection 2-1008(b) and waived his right to later proceed against the very estate he opted to not include in the trial.

[48] Knauerhaze finally contends that limiting his recovery against Dr. Allen to the liability insurance proceeds pursuant to section 2-1008(b) constitutes an unconstitutional legislative remittitur. With regard to this argument, we first note that there is a “strong presumption that legislative enactments are constitutional [citation] and one who asserts otherwise has the burden of clearly establishing the constitutional violation.” [Bernier v. Burris, 113 Ill.2d 219, 227, 100 Ill.Dec. 585, 497 N.E.2d 763, 767 \(1986\)](#).

[49] In support of his contention, Knauerhaze cites ****666***915** [Best v. Taylor Machine Works, 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057 \(1997\)](#), in which the ***567** supreme court held that the compensatory damages cap of section 2-1115.1 ([735 ILCS 5/2-1115.1](#) (West 2004)) violated the separation of powers clause of the Illinois Constitution by reducing damages by law without regard to the specific circumstances of individual jury awards. Knauerhaze argues that a reading of section 2-1008(b) that prohibits additional recovery from a decedent's probate estate is essentially the same thing as the cap on damages of section 2-1115.1 that the supreme court found unconstitutional.

However, there are distinct differences between sections 2-1008 and 2-1115.1. Section 2-1115.1 applied to all causes of action based on negligence or products liability for noneconomic damages and limited the amount of recovery to \$500,000. [735 ILCS 5/2-1115.1](#) (West 2004). Thus, section 2-1115.1 was au-

tomatically applicable to statutorily limit recovery for certain actions. [735 ILCS 5/2-1115.1](#) (West 2004). In contrast, section 2-1008(b) will only act to limit a litigant's recovery when invoked by that party. [735 ILCS 5/2-1008\(b\)\(2\)](#) (West 2004). Knauerhaze had the option to open a probate estate during the pendency of litigation. Instead, he chose to invoke section 2-1008(b) to avoid the formalities inherent with probate; however, in making this choice, Knauerhaze implicitly agreed to the limits of the statute he invoked.

Moreover, *Best* distinguished between causes of action based in common law and those legislatively created and noted that, with regard to the latter, the legislature could constitutionally limit damages because it had created both the right and the remedy. [Best](#), 179 Ill.2d. at 397 n. 3, 228 Ill.Dec. 636, 689 N.E.2d at 1072 n. 3, citing [Hall v. Gillins](#), 13 Ill.2d 26, 29 147 N.E.2d 352, 354 (1958); [Cunningham v. Brown](#), 22 Ill.2d 23, 174 N.E.2d 153 (1961). Although Knauerhaze's cause of action started out as a simple negligence action, which is clearly a common law cause of action, at common law that cause would have abated once Dr. Allen died. However, Knauerhaze's cause of action did not abate because the legislature provided for the survival of actions. [735 ILCS 5/2-1008](#) (West 2004). In providing for the survival of an action, there was nothing to prevent the legislature from imposing conditions to protect estates in the event the Probate Act is bypassed and replaced by section 2-1008(b). Thus, based on *Best*, even if the limitation of section 2-1008(b) were not applicable only at a party's invocation, the limitation on recovery would arguably still be constitutional. We therefore find that Knauerhaze has failed to meet his burden of "clearly establishing [a] constitutional violation." [Bernier](#), 113 Ill.2d at 227, 100 Ill.Dec. 585, 497 N.E.2d at 767.

IV. CONCLUSION

For the foregoing reasons, we affirm the trial court's denial of *568 defendants' motions for judgment notwithstanding the verdict and new trial on the issue of negligence; we reverse the trial court's denial of defendants' motions on the issue of agency; and we affirm the trial court on the application of section 2-1008.

Affirmed in part; reversed in part.

[McBRIDE](#), J., and O'Malley, J., concur.
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