2019 IL App (2d) 180293-U
No. 2-18-0293
Order filed June 13, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BRUCE PORTER,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 2014-L-826
	)	
F. E. MORAN, INC.,	)	Honorable
	)	Dorothy French Mallen,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: In this breach-of-contract action, the appellate court reversed the judgment in favor of the plaintiff and held that the contract for a bonus was invalid for lack of consideration. The appellate court granted summary judgment in favor of the defendant pursuant to Illinois Supreme Court Rule 366(a)(5).

¶ 2 Plaintiff, Bruce Porter, sued his former employer, defendant F.E. Moran, Inc., for breach of contract for failing to pay him a bonus. The trial court denied defendant's motion for summary judgment, and the case was tried before a jury. The jury returned a verdict in favor of plaintiff, and defendant appeals both the order denying its motion for judgment notwithstanding the verdict (JNOV) and the order denying its motion for summary judgment. For the following

reasons, we reverse and hold that the trial court should have granted summary judgment in favor of defendant. We resolve this case on summary judgment grounds, rather than the propriety of the court's denial of the motion for a JNOV, because both parties submitted to the court, as a matter of law, the dispositive issue of whether plaintiff supplied consideration for the promised bonus.[1] The jury was not allowed to consider that question.

¶ 3 I. BACKGROUND

¶ 4 Defendant is a mechanical contractor doing heating, ventilating, and air conditioning work in the Chicago area. In 2006, plaintiff was orally hired by defendant as a sheet metal foreman. Plaintiff first worked on defendant's Parkview condominium job in Chicago. When that job finished, plaintiff was assigned to defendant's Blue Cross Blue Shield (BCBS) job, expanding a high rise building in Chicago. The BCBS job took more than a year to complete. Plaintiff's minimum salary and benefits were determined by a union collective bargaining agreement (CBA).

¶ 5 Before plaintiff was hired, Michael McCombie, defendant's president, had instituted a discretionary bonus incentive program to increase employees' effectiveness. The program was contingent on defendant's financial condition, whether a job made money, and the agreement of defendant's sole shareholder, Brian Moran, to pay a particular bonus. Plaintiff maintained that defendant's sheet metal superintendent, Robert Vogeler, offered him the opportunity to participate in that program while he was working on the Parkview job. According to plaintiff,

[1] Defendant initially submitted the issue to the court as a matter of law in its motion for summary judgment, although, after the denial of its motion, defendant requested that the jury be instructed on the element of consideration, which the court denied for reasons explained in ¶ ¶ 7-8 below.

Vogeler told him that he would be paid $100 for every man day that he saved defendant, to be calculated by subtracting the actual number of man days worked from the number of man days that defendant had bid to do the job. A man day is eight hours. According to plaintiff, the bonus was to be paid when defendant was paid by the client. Although defendant did not pay plaintiff a bonus on the Parkview job, plaintiff did not pursue any legal remedies, even though he believed that he had earned a bonus. However, when defendant did not pay plaintiff a bonus for the BCBS job, plaintiff sued for breach of an oral contract, claiming that defendant owed him $147,868.75 for that job based on the number of man hours saved.

¶ 6 Prior to trial, defendant interposed numerous affirmative defenses, including that plaintiff's claim was preempted by federal labor laws and, alternatively, that it was barred by the Illinois Frauds Act (hereinafter statute of frauds). See 740 ILCS 80/1 (West 2016) (any agreement that is not to be performed within the space of one year from the making thereof is not enforceable unless it is in writing). On January 15, 2016, defendant filed a motion for summary judgment based in part on those grounds and also on the basis that no contract for a bonus was formed as a matter of law. The court ruled that the claim was not preempted, because the CBA did not cover the subject of bonuses. The court also ruled that the statute-of-frauds issue was a question of fact.[2] With respect to contract formation, the court ruled that whether there were an offer, acceptance and consideration were issues of fact for the jury to decide.

[2] Ultimately, the court did not submit the question of whether the claim was barred by the statute of frauds to the jury but decided, as a matter of law in ruling on plaintiff's motion *in limine* No. 5, that defendant's full performance removed the claim from the operation of the statute of frauds.

¶ 7 At trial, but before the jury heard any evidence, plaintiff presented various motions *in limine*. Plaintiff's motion *in limine* No. 3 sought to bar defendant from arguing to the jury that the contract lacked consideration. Plaintiff's motions *in limine* are not in the common law record, but the context of No. 3 is discernible from defendant's written response to it, which is in the record, and the report of proceedings. Whether consideration existed, defendant argued, was a question of law. Initially, the court denied the motion *in limine*, but it reversed itself upon plaintiff's motion to reconsider and granted the motion.

¶ 8 The effect of that ruling was to remove the issue of consideration from the jury. The ruling occurred before the jury heard any evidence. Therefore, to put that ruling, and the ruling on defendant's motion for summary judgment, in their proper context, we set forth the state of the record as of the time of those rulings. The court had before it plaintiff's deposition, Vogeler's deposition, and McCombie's deposition, among others that are of no consequence to the issues on appeal. Those depositions were presented as attachments to the parties' memoranda in connection with defendant's motion for summary judgment.

¶ 9 In his deposition, McCombie testified that he instituted a discretionary bonus program in 2005 to see if there was a correlation between additional compensation and project effectiveness. The program was never reduced to writing. A bonus was to be paid at the end of a project if the company was making money, if the project was making money, and if Moran approved the bonus. The amount of the bonus was $100 for every man day saved in reduced labor. McCombie knew that Vogeler had talked to plaintiff about the discretionary bonus, but he did not know what Vogeler told plaintiff. According to McCombie, no one was paid a bonus on either the Parkview or the BCBS projects. Then, due to the Great Recession, Moran ended all discretionary bonuses.

¶ 10 In his deposition, plaintiff testified regarding the terms of the bonus as related to him by Vogeler: "They take how many man days you have saved, multiply that times [$100]. That was the deal." According to plaintiff, the bonus was to be paid "[a]s soon as the job closed out and [defendant] got their [*sic*] money." Plaintiff explained that a job "closed out" when there was nothing else to do on that particular job.

¶ 11 In his deposition, plaintiff described his first meeting with Vogeler in September 2006 as follows. Prior to the meeting, Vogeler called plaintiff and told him that defendant had a big project coming up (Parkview) and Vogeler heard that plaintiff might be available. At the meeting, plaintiff demanded certain "perks" in addition to his union rate, consisting of his fuel, parking, and a paid vacation. No other terms were discussed at that meeting. Vogeler hired plaintiff "right then and there."

¶ 12 Plaintiff explained in his deposition testimony that his former employer "handed me my last check because they were slow. So it rolled right over." After that, plaintiff's work with defendant was always "continuous." As a sheet metal foreman for defendant, plaintiff's job was to "take what was on the drawings, get it on the job, get it in the air, make sure it worked, make sure it looked good," and "make [defendant] money."

¶ 13 Plaintiff further testified at his deposition that, about a month into the Parkview project, Vogeler explained the incentive bonus program to him, as described above. According to plaintiff, Vogeler said that the program "gives you an incentive to push your men, be on your toes, do what you got to do to get the job done." Plaintiff replied: "I'm in." Vogeler then said: "Once you're in, you're in it. As long as you keep making money, you're in it." After the Parkview job finished, plaintiff did not pursue his bonus, even though his hours came in under

the budgeted hours, because he knew that a bonus was contingent on profitability and that defendant did not make a profit on that job.

¶ 14 According to plaintiff's deposition testimony, after the Parkview job was finished, Vogeler offered plaintiff his choice of either the BCBS job or something called the "Roosevelt Collection" job. Plaintiff testified that Vogeler made it clear that the incentive bonus program was still in effect. Plaintiff chose to do the BCBS job. Plaintiff also testified that, as foreman on these jobs, he was responsible to bring the jobs in under budget as far as man hours. Plaintiff stated: "[Defendant doesn't] want to go over." Plaintiff also testified that this had been his understanding of a foreman's job for the past 44 years.

¶ 15 Plaintiff testified at his deposition that Vogeler told him that he had earned a bonus after the BCBS job was closed. Plaintiff told Vogeler to "get the ball rolling," and plaintiff assumed that McCombie would have to sign the check. According to plaintiff, McCombie said that he would check the figures. After that, McCombie never returned his calls. Plaintiff testified that he did not know that a bonus was discretionary with Moran or that Moran had shuttered the bonus incentive program.

¶ 16 Vogeler testified at his deposition that he told plaintiff that for every man day that he saved, $120 would be split among plaintiff, Vogeler, and a shop sheet metal superintendent. Vogeler also testified that he knew that a bonus was not guaranteed and that it was up to McCombie to approve a bonus.

¶ 17 At trial, plaintiff and McCombie testified consistently with their deposition testimonies. Vogeler was too ill to appear at trial, and his discovery deposition was read to the jury. The jury returned a verdict in plaintiff's favor in the amount of $49,289.33. The jury also

answered special interrogatories, finding that there was an offer and an acceptance. Consistent with the court's earlier ruling, the jury did not receive an interrogatory regarding consideration.

¶ 18 As noted, defendant filed a motion for a JNOV. The court denied it, and defendant filed a timely notice of appeal in which it specified both the order denying summary judgment and the order denying the posttrial motion for review.

¶ 19 II. ANALYSIS

¶ 20 Defendant raises the following issues: (1) plaintiff's claim was preempted by federal labor laws, (2) plaintiff's claim was barred by the statute of frauds, and (3) no contract existed. We first address defendant's argument that there was no contract for a bonus. If there was no contract, we need not reach the issues of preemption and the statute of frauds. We conclude that plaintiff supplied no consideration for a bonus and that defendant's motion for summary judgment should have been granted on that basis.

¶ 21 Plaintiff contends that the denial of defendant's motion for summary judgment is not reviewable because it merged into the judgment after trial. Denial of a motion for summary judgment is not immediately appealable because it is an interlocutory order. *Regency Commercial Associates, LLC v. Lopax, Inc.*, 373 Ill. App. 3d 270, 280 (2007). Plaintiff is correct that, generally, the denial of a motion for summary judgment is not reviewable after a trial on the merits because any error is merged into the judgment entered after trial. *Regency*, 373 Ill. App. 3d at 280. The exception is where a summary-judgment motion presented a legal issue rather than a factual one, in which case, review of the denial of summary judgment is proper. *Regency*, 373 Ill. App. 3d at 280. Whether consideration existed is a question of law to be decided by the

court. *Chandra v. Chandra*, 2016 IL App (1st) 143858, ¶ 16.[3] Consequently, that aspect of the denial of the motion for summary judgment is before us.

¶ 22 Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Telenois, Inc. v. Village of Schaumburg*, 256 Ill. App. 3d 897, 901 (1993). Summary judgment is properly granted if the pleadings, depositions, and admissions on file, together with any affidavits, demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Johnson v. Mers*, 279 Ill. App. 3d 372, 375-76 (1996). We review *de novo* a ruling on a motion for summary judgment. *Telenois*, 256 Ill. App. 3d at 901.

¶ 23 In Illinois, the basic requirements for a contract are an offer, an acceptance, and consideration. *In re Marriage of Tabassum & Younis*, 377 Ill. App. 3d 761, 770 (2007). To prove a breach of contract, a plaintiff must show that (1) a contract exists, (2) plaintiff performed his or her obligations under the contract, (3) defendant failed to perform, and (4) damages resulted from the breach. *Walker v. Ridgeview Construction Co., Inc.*, 316 Ill. App. 3d 592, 595-96 (2000).

¶ 24 Plaintiff's acceptance had to be supported by consideration because a valid modification of a contract must meet all of the requirements essential for a valid original contract, including offer, acceptance, and consideration. See *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 35. Consideration is usually described as "any act or promise of benefit to one party or disadvantage to the other." *Steinberg v. Chicago Medical School*, 69 Ill.

[3] We note that, in his motion *in limine* No. 3, plaintiff asked the trial court to rule that consideration existed. Consequently, both parties submitted the issue to the court as a question of law. In effect, the parties submitted cross-motions for summary judgment.

2d 320, 330 (1977). More specifically, the *promisee* must suffer a detriment. *F.H. Prince & Co., Inc. v. Towers Financial Corp.*, 275 Ill. App. 3d 792, 798 (1995). That detriment can be "any act which occasions [the promisee] the slightest trouble or inconvenience, and which [the promisee] was not obligated to perform." *F.H. Prince*, 275 Ill. App. 3d at 798, quoting *Hamilton Bancshares, Inc. v. Leroy*, 131 Ill. App. 3d 907 (1985).

¶ 25 The undisputed facts as revealed in the depositions show that plaintiff, the promisee, suffered no detriment: (1) plaintiff was separated from his former employment due to lack of work; he did not give up that job to take the position of foreman with defendant, (2) plaintiff's job, prior to the offer of a bonus, was to finish a project in fewer man hours than the employer had bid and to make the employer money, (3) plaintiff did not increase his work efforts after Vogeler extended the bonus incentive, and (4) there was no evidence that plaintiff's work resulted in more savings to defendant after he was offered a bonus.

¶ 26 Where the promisee does not suffer any detriment, there is no valid contract. *Beyer v. Wolfe*, 228 Ill. App. 429, 435 (1923). In *Beyer*, the defendant rented a farm from the plaintiffs, and he gave the plaintiffs two notes for the rent. *Beyer*, 228 Ill. App. at 431. The defendant took possession of the farm, but then he defaulted on the notes. *Beyer*, 228 Ill. App. at 431. The defendant contended that the parties made a new agreement whereby the defendant was to remain on the farm during the year at a rental of $1000, and a prior payment of $1000 that he had previously given the plaintiffs for another purpose was to be applied to the rent. *Beyer*, 228 Ill. App. at 432. In addition, according to the defendant, the plaintiffs cancelled the notes. *Beyer*, 228 Ill. App. at 432. The plaintiffs sued the defendant, and the jury found in the defendant's favor. *Beyer*, 228 Ill. App. at 431. The appellate court reversed on two grounds, one being that the new agreement lacked consideration, where the defendant occupied the farm for a year without

paying "a cent" of rent. *Beyer*, 228 Ill. App. at 435-36. The court stated that "[t]here is an entire absence of any evidence showing, or even tending to show, any valid consideration" for the new agreement. *Beyer*, 228 Ill. App. at 436.

¶ 27 Plaintiff concedes in his brief that he continued to do the same work that he did before defendant offered him the bonus. Indeed, at oral argument, plaintiff confirmed that the offer "did not change [his] day-to-day job." Nonetheless, plaintiff insists that his mere continued work constituted consideration.[4] Plaintiff relies on *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104 (1999), and *Melena v. Anheuser-Busch Inc.*, 219 Ill. 2d 135 (2006). Both cases are inapposite as they concerned the enforceability of policy changes that *restricted* employees' conditions of employment.

¶ 28 In *Doyle*, the plaintiffs were nurses who were covered by an employee handbook that afforded them certain protections in the event of an "economic separation." *Doyle*, 186 Ill. 2d at 106-07. Then, the defendant-employer added disclaimers to the handbook that removed those protections. *Doyle*, 186 Ill. 2d at 108. After the defendant discharged the plaintiffs pursuant to the new policy, the plaintiffs sued on a breach-of-contract theory, arguing that the disclaimers were not supported by consideration. *Doyle*, 186 Ill. 2d at 109-10. The defendant argued that the consideration was the plaintiffs' continuing to work. *Doyle*, 186 Ill. 2d at 111. Our supreme court held that consideration was lacking. *Doyle*, 186 Ill. 2d at 114.

[4] At oral argument, plaintiff also insisted that consideration existed because it was defendant, the *promisor*, who suffered a detriment. As discussed in ¶ 24, this is the opposite of what case law has established to be the law of consideration. This argument is also inconsistent with defendant's position that he furnished consideration by continuing his employment.

¶ 29 In *Doyle*, the supreme court held that the defendant-*employer* had to furnish consideration because it sought to reduce the rights enjoyed by the plaintiffs-employees under the existing employee handbook. *Doyle*, 186 Ill. 2d at 112. Yet, as the court observed, the defendant provided nothing of value to the plaintiffs and did not itself incur any detriment. *Doyle*, 186 Ill. 2d at 112. The court held that consideration for a modification to an employee handbook that operates to an employee's disadvantage is not supplied by the employee's continued work for the employer. *Doyle*, 186 Ill. 2d at 113. The court pointedly refused to require the plaintiffs to supply consideration for a contractual change that operated to their disadvantage. *Doyle*, 186 Ill. 2d at 114. Public policy considerations dictated that result. The court opined that employers who choose to set forth policies in employee handbooks as an inducement to attracting skilled and loyal workers cannot disregard those obligations when they become inconvenient or burdensome. *Doyle*, 186 Ill. 2d at 116.

¶ 30 The court then contrasted those facts with the situation in which a change to an employee handbook aids the employee. *Doyle*, 186 Ill. 2d at 116. In that instance, the employee's continued performance is consideration, because the change is treated as a new offer of employment, and the employee's performance of the work constitutes both acceptance and consideration. *Doyle*, 186 Ill. 2d at 116.

¶ 31 In *Melena*, the defendant-employer changed its policy to require all employee claims against it to be submitted to binding arbitration. *Melena*, 219 Ill. 2d at 137-38. The defendant required its employees to agree to this change "as a condition of employment." *Melena*, 219 Ill. 2d at 139. When the plaintiff sued the defendant for retaliatory discharge, the trial court denied the defendant's motion to dismiss, and the appellate court affirmed on the ground that the plaintiff did not voluntarily enter into the modification agreement. *Melena*, 219 Ill. 2d at 137.

Our supreme court reversed the appellate court, holding that the plaintiff's continued employment was both an acceptance of the defendant's "offer" and consideration for it. *Melena*, 219 Ill. 2d at 151-52. The court came to this conclusion, holding that requiring arbitration did not result in any loss of rights to the employee. *Melena*, 219 Ill. 2d at 155. Again, the modification to the terms of employment was treated as an offer of new employment, which the plaintiff accepted and for which she gave consideration.

¶ 32 *Doyle* and *Melena* are qualitatively different from the case at bar. In both, the employer altered the nature of the contractual employment relationship, either by changing the terms upon which the employer could terminate an employee or by restricting the employees' remedies against the employer. *Doyle* is also distinguishable from our case in that it involved contractual rights that were established by an employee handbook. *Doyle*, 186 Ill. 2d at 106-07. Here, defendant did not alter the fundamental terms of plaintiff's employment, and it certainly did not restrict those terms.

¶ 33 Our case is also different from *Gustafson v. Lindquist*, 40 Ill. App. 3d 152 (1976), cited by plaintiff. In *Gustafson*, the plaintiff-employee loaned the defendant-employer money, for which the defendant gave the plaintiff three promissory notes. *Gustafson*, 40 Ill. App. 3d at 154. The plaintiff claimed that a portion of the increase in the amount of the third note over the second was a bonus payment promised to the plaintiff if he continued to work the night shift until the next July, while the defendant claimed that the overage was not supported by consideration and was an unenforceable gift. *Gustafson*, 40 Ill. App. 3d at 154. The appellate court held that the plaintiff's continuing to work the night shift was consideration because the plaintiff was not obligated either to remain in the defendant's employ or to work the night shift. *Gustafson*, 40 Ill. App. 3d at 157.

¶ 34 Plaintiff asserts that *Gustafson* stands for the general proposition that continued employment is consideration for a bonus, but he is mistaken. The offer of the bonus in *Gustafson* was to induce the plaintiff to remain employed on the night shift until the following July. The consideration was the plaintiff's forbearance to quit his job and to continue working a shift that he was not otherwise obligated to work. The lesson in *Gustafson* is that there must be a relationship between the inducement and the performance.

¶ 35 For a performance to constitute consideration, it must be bargained for. *Garber v. Harris Trust & Savings Bank*, 104 Ill. App. 3d 675, 681 (1982). More specifically, the act that constitutes the consideration generally must be done at the instance of the promisor, and it must be regarded by the parties as consideration. *Garber*, 104 Ill. App. 3d at 681. Here, McCombie instituted the bonus incentive program to induce employees to increase their effectiveness. Thus, plaintiff's performance had to increase his effectiveness to constitute consideration. It would make no sense for an employer to offer a bonus for the same work that the employee was already performing. Consequently, we determine that defendant's offer of a bonus required plaintiff to return something of value over and above continuing his employment.

¶ 36 Likewise, plaintiff's reliance on *Flynn v. Koppers Co., Inc.*, 567 F.2d 741 (7th Cir. 1977), and *Geary v. Telular Corp.*, 341 Ill. App. 3d 694 (2003), is misplaced. In *Flynn*, the plaintiff-employee enrolled in the defendant-employer's 1973 incentive plan, by which the plaintiff could earn additional money based on how much he exceeded his assigned sales quotas. *Flynn*, 567 F.2d at 742. The incentive plan was effective from January 1, 1973, to December 31, 1973, and the amount earned would become payable after the defendant closed its books for the year 1973. *Flynn*, 567 F.2d at 742. The plaintiff resigned in October 1973, and he claimed his bonus up to that time. *Flynn*, 567 F.2d at 742. The defendant refused to pay because the plaintiff had not

been employed for the entire year. *Flynn*, 567 F.2d at 742. The issue before the court was the interpretation of the incentive contract. *Flynn*, 567 F.2d at 743. Thus, *Flynn* is not relevant to our facts. However, we note that the plaintiff in *Flynn* showed that he exceeded his assigned sales quotas, unlike the present case, where plaintiff did nothing beyond his normal work. In *Geary*, the contractual element at issue was acceptance, not consideration. *Geary*, 341 Ill. App. 3d at 698. The court never discussed consideration in *Geary*, thus making *Geary* also irrelevant to the instant case.

¶ 37 In our case, the trial court also examined *DiLorenzo v. Valve & Primer Corp.*, 347 Ill. App. 3d 194 (2004), in granting plaintiff's motion to reconsider the ruling on his motion *in limine* No. 3. In its opening brief, defendant relies on *DiLorenzo*. In *DiLorenzo*, the plaintiff-employee claimed that the defendant-employer offered him a 10-year stock option as a bonus. *DiLorenzo*, 347 Ill. App. 3d at 196. Nine years later, the plaintiff attempted to exercise the option, but the defendant denied the existence of a stock purchase agreement. *DiLorenzo*, 347 Ill. App. 3d at 196-97. The plaintiff sued for specific performance. *DiLorenzo*, 347 Ill. App. 3d at 195. The trial court assumed the existence of the agreement, but it found that the option failed for lack of consideration. *DiLorenzo*, 347 Ill. App. 3d at 197. On appeal, the plaintiff argued that his continued employment constituted consideration. *DiLorenzo*, 347 Ill. App. 3d at 198. The appellate court held that there was no consideration, because the plaintiff could have immediately exercised the option and then quit work. *DiLorenzo*, 347 Ill. App. 3d at 201. The court put it thusly: "[T]he option itself carries with it no detriment to [the plaintiff]." *DiLorenzo*, 347 Ill. App. 3d at 201. The meaning of that phrase is that the offer did not require the plaintiff to do anything in exchange for accepting it. *DiLorenzo* supports that (1) plaintiff had to suffer a detriment other than continued employment to supply consideration for the offer of a bonus, and

(2) if the offer of a bonus did not itself require plaintiff to suffer a detriment, then the purported contract fails for lack of consideration. *DiLorenzo*'s specific focus was the lack of detriment to the employee. *DiLorenzo*, 347 Ill. App. 3d at 201. Thus, even if Vogeler communicated to plaintiff that the bonus was for bringing the job in under the man-hours that defendant had bid rather than for increased effectiveness, that offer did not itself require plaintiff to suffer a detriment, because plaintiff was already performing that work.

¶ 38 Plaintiff runs afoul of the preexisting-duty rule. The preexisting-duty rule provides that a promise to pay a bonus is unenforceable for lack of consideration where the employee is only giving the same service that he has already contracted with the employer to render. *In re Manchester Gas Storage, Inc.*, 309 B.R. 354, 372 (N.D. Okla., 2004).[5] Defendant raised the preexisting-duty rule at page 42 of its opening brief, but plaintiff failed to respond to that argument in his brief, thus conceding it. An appellee's failure to respond to an appellant's argument is a concession of the point. *Vukusich v. Comprehensive Accounting Corp.*, 150 Ill. App. 3d 634, 644 (1986). Accordingly, for all of the stated reasons, we hold that the court erred in denying defendant's motion for summary judgment. Accordingly, we reverse the judgment. Pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) (appellate court may, in its discretion, enter any judgment and make any order that ought to have been made), we grant summary judgment in favor of defendant and against plaintiff.

¶ 39 III. CONCLUSION

[5] We cite the *Manchester* opinion because it contains a scholarly discussion of the rule. Illinois also recognizes the rule. *Gustafson*, 40 Ill. App. 3d at 157; *DiLorenzo*, 347 Ill. App. 3d at 198. However, neither of these cases contains an analysis of the rule.

¶ 40 For the above reasons, we reverse the judgment of the circuit court of Du Page County and grant summary judgment in favor of defendant.

¶ 41 Reversed.