

THE UNITED STATES OF AMERICA
IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL COURT
MCHENRY COUNTY ILLINOIS

ANDREW GASSER, ALGONQUIN)
TOWNSHIP ROAD COMMISSIONER)

Plaintiff,)

V.)

CASE NO. 17 CH 435

KAREN LUKASIK,)
INDIVIDUALLY AND IN HER)
CAPACITY AS ALGONQUIN)
TOWNSHIP CLERK, ANNA MAY)
MILLER AND ROBERT MILLER,)

Defendants,)

KAREN LUKASIK,)

Cross-Plaintiff,)

V.)

CHARLES A. LUTZOW JR.,)

Cross-Defendant,)

ANDREW GASSER,)

Counter-Defendant)

REPLY TO PLAINTIFF'S RESPONSE TO
MOTION TO DISMISS BASED ON STANDING

COMES NOW your Defendant, ROBERT MILLER by and through his attorney
THOMAS W. GOOCH, III of THE GOOCH FIRM, and as and for his Reply Brief states the
following:

INTRODUCTION

In typical fashion the Plaintiff, not having a defense to the Motion to Dismiss, launches a diatribe relating to Defense counsel's alleged lack of ability to reason and sophomoric analysis of the issues, none of which is particularly relevant to anything.

Following, rather than addressing the thrust of the Motion to Dismiss, which is simply that the cause of action, if one exists, belongs to the Clerk of the Algonquin Township, or the Clerk of the Algonquin Township Road District or appropriate law enforcement authorities and not the Highway Commissioner, Plaintiff begins another tired old argument about alleged missing documents, an iPad cover, gift cards, their opinions about the way a street sweeper was acquired or sold, and numerous other things unsupported by the pleadings or their vague allegations.

As argued below, they still are unable to point to anything actually missing, but continue their personal attack in hopes of biasing the Court to overlook the greater issue – that they simply do not have standing to maintain this cause of action, even under the abstract theories advanced by the Plaintiff in the Response Brief.

The “clutching at straws” is best illustrated by suggesting an iPad cover should be contained in an inventory and citing only a partial portion of the Statute, eliminating the portion that states the inventory includes only things having a value of over \$200.00. This Court can take judicial notice that the average iPad cover, new, is sold for less than \$50.00.

ARGUMENT

Standing as an Affirmative Defense

There is no question that standing is an affirmative defense however there is no requirement that it be immediately pled as an affirmative defense, obviously a 735 IL CS 5/2-619 (9) raises the affirmative matter of a lack of standing. It could have been the very initial pleading filed which, like this pleading, would predate the filing of an affirmative defense and when the motion is granted avoid the need entirely. The point is, regardless of how filed it places the Plaintiff on notice that the Defendant is raising this affirmative matter. Obviously, if this Court was to deny the motion to dismiss then Defendant would seek leave to raise it as an affirmative defense only for the purposes of preserving the record. In fact, the courts of review have indicated that standing must be raised as an affirmative defense not only to give notice to the opponent but to preserve the issue on appeal. Defendant cite to with Lebron v. Gottlieb, 237 Ill.2d 217 at 252 (2010) for their position that a Defendant must initially raise an affirmative defense *Lebron* says no such thing. However the reading of *Lebron* indicates the dicta-like statement was based on another Supreme Court case; *Lebron* cites to; Skolnick v. Alherheimer and Grey, 191 Ill.2d 214 (Ill.2000) which holds that while standing is an affirmative defense it was not raised in the trial court in *Skolnick* therefore was waived on appeal. Nothing in *Skolnick*, or for that matter in *Lebron*, maintains that an affirmative defense must be filed immediately before even a motion to dismiss. Further, *Lebron* makes it clear that they are discussing subject matter jurisdiction when they raise the issue of justiciability. Plaintiff also raises the issue of justiciability citing to a criminal case, The People v. Greco, however Plaintiff's own *Lebron* case makes clear that justiciability does not mitigate standing but does involve the Court's subject matter jurisdiction. It is clear that the issue of justiciability relates only to subject matter jurisdiction. Plaintiff's raise a case, The People v. Greco 204 Ill.2d 400 for the proposition that standing is "an element of justiciability" and then go on to say that even though Plaintiff may not

have standing, the issue is justiciable so that the Plaintiff can still proceed, that it simply is not what the law says. *People v. Greco* has absolutely no applicability to the issue presented by this motion. To put the matter to rest, a better case is found and known as *Nationstar Mortgage v. Canale 2014 Ill. App. (2d) 13676* where the Second Appellate District makes clear when they are speaking of justiciability they are speaking of the Court's subject matter jurisdiction, it has nothing to do with standing and it is again another argument raised by Plaintiff to avoid the heart of the matter: that he has no right to maintain this action.

Matters Raised as to Accounting and Reports

Once again, Plaintiff attempts to raise a smokescreen relating to accountings and reports claiming that they are required reports to be made evidently to a highway commissioner. However, where they cite "the law" as contained in *605 IL CS 5/6-204* they do so incompletely leaving out the parts that do not favor them in fact, a reading the statute indicates that the annual report, which is not an accounting but a report the statute requires, also includes an inventory and is to be made to the township board of trustees and not left for some other highway commissioner. The total statute *605 IL CS 5/6-201.15* as attached as **EXHIBIT B**. Attached hereto, as **EXHIBIT A**, is the affidavit of Robert Miller authenticating the annual report and inventory which he timely filed while still the highway commissioner which should put this matter to rest. Again, Plaintiff ignores the allegations of the motion to dismiss and ignores the heart of the matter; that he does not have standing to bring this lawsuit. Even if the reports had never been prepared standing would vest with the Board of Trustees of Algonquin Township and perhaps the Clerk of Algonquin Township (who is also the road district clerk) as the custodian of records as previously ruled by Judge Caldwell in this matter. It should be noted of course that

none of these issues were raised in the initial complaint and now are raised in a smokescreen fashion to bias this Court.

As part of his assault on the annual accounting and report, none of which was pled in the complaint, but is contained in his response he maintains there was a liability not listed which he maintains does not include the owing of money. Only because of unfamiliarity with the township code and the records of Algonquin Township the highway commissioner presently fails to understand that the liability he speaks of was a liability of the township for sick pay as the road district had never paid the highway commissioner's salary or sick days, there is no reason such a liability would be listed in the annual report. Again, none of this was pled in the complaint properly, it is being raised in Plaintiff's response only to create a smokescreen and really an argument which makes and draws few lines toward the heart of this matter: the lack of standing to maintain this case.

We turn now to Dillon's Rule. Plaintiff seems to misquote Dillon's Rule and the impact that it might have. In summary, it provides that the government can only take such actions as specifically authorized by statute and logical extensions. Somehow, again, although not pled in the complaint, Dillon's Rule has found its way into the response based on the theory that the supervisor as the treasurer only can do what the highway commissioner orders, however the statute speaks of the orders for payment for bills that are contained in the warrants submitted to the Township Board of Trustees for approval at monthly meetings and then the supervisor as treasurer is required to pay the bills. In fact, the supervisor does not have the power to command and control the road district funds but holds them as the treasurer, nor does the highway commissioner have the power to command and control the funds. Under township law and as contained in the township code and of common knowledge to this Court and most the town board

approves on a monthly basis the bills of the road district who has submitted them, theoretically, in a monthly warrant for payment they are then paid. Again, as part of the "Dillon's Rule argument" Plaintiff launches on to another vague accusation regarding the street sweeper which is not contained in the complaint in any allegation but again is nothing more than an attempt to illustrate to the Court that the Defendant was not a good person and was not the great highway commissioner that most believe him to have been. Finally, Plaintiff has taken another opportunity to point out that there is a criminal investigation ongoing which is probably doubtful at best, but nevertheless makes good reading in order to avoid the heart of the matter: the lack of the highway commissioner to maintain this lawsuit.

Plaintiff does allege in the complaint that electronic records were deleted but they were not able to point out what electronic records were deleted and, again, it has nothing to do with the motion to dismiss. The Clerk of Algonquin Township and of the road district has already been determined by Court order in this case to be the is custodian of all records, if something is missing then it is the clerk who has the cause of action to recover them or perhaps the board of trustees. Utilizing "Dillon's Rule" as raised by the Plaintiff it would seem obvious that there is no statute that allows Plaintiff, Andrew Gasser, riding in on his white horse, to be filing lawsuits for this, that, or the other thing all contained in the scurrilous allegations in the response to the motion to dismiss. Finally, Plaintiff again raises a collective bargaining agreement, an I-Pass account (which was never owned by the road district but was always the personal account of Robert Miller and paid for by Robert Miller) and a truly unusual argument relating to the Plaintiff's concern that he could be charged with official misconduct for not creating a cause of action as contained in the complaint he filed. Unfortunately, there is no requirement that requires him to demand an accounting from a previous highway commissioner when that highway

commissioner has filed the required yearly reports. The whole argument regarding *Dillon's Rule* and the so called "statutory penalties faced by Plaintiff" has no bearing in fact or in law and is designed as the proverbial smokescreen the Defendant has spoken of throughout this reply. Page 10 in the final sentence at the top of the page indicates his desire to defeat the motion by maintaining the incredible position that "his personal stake in the outcome of this litigation satisfies any standing requirement this Court could impose" this statement bears no reasonable relationship to fact and is founded only on fantasy and a desperate attempt to continue maintaining a lawsuit filed only as a political witch hunt and to feed the local gossip blogs circulating in McHenry County.

CONCLUSION

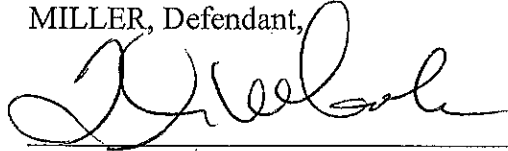
For all of the reasons stated above, and without regard to the scurrilous allegations that Plaintiff has maintained relating to this entire matter, they have not, and cannot allege, one particular document or piece of equipment missing. Even if they could, then the cause of action would belong to the Clerk of the Algonquin Township Road District, and of the Township, who is not the Plaintiff. Even if all the scurrilous allegations directed against Defendant were true, and if Defendant had done the horrible things that Plaintiff continues to rave about, then that particular remedy belongs to the appropriate law enforcement agencies, and/or the Board of Trustees of Algonquin Township that were sitting at the time of the alleged misconduct and not the Highway Commissioner.

Finally, Judge Caldwell has already ruled by written order in this case, as set forth in the Motion to Dismiss, that the Clerk of Algonquin Township is the Custodian of all records of Algonquin Township. Delivery of documents or records to the Clerk of Algonquin Township, who also serves as the Road District Clerk, is *defacto* delivery to the Highway commissioner.

This matter has been used only for political purposes and should be dismissed with prejudice.

Respectfully submitted by,

THE GOOCH FIRM, on behalf of ROBERT
MILLER, Defendant,

A handwritten signature in black ink, appearing to read 'T. Gooch, III', written over a horizontal line.

Thomas W. Gooch, III

THE GOOCH FIRM
209 S. Main Street
Wauconda, IL 60084
847-526-0110
gooch@goochfirm.com
office@goochfirm.com
ARDC No.: 3123355