

IN THE CIRCUIT COURT OF THE 22ND 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.)

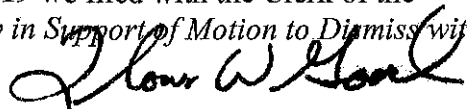
CHARLES A. LUTZOW JR.,)
)
Cross-Defendant,)

ANDREW GASSER,)
)
Counter-Defendant)

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

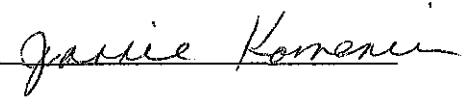
PLEASE TAKE NOTICE that on **January 25, 2019** we filed with the Clerk of the Circuit Court of Cook County, Illinois, the attached *Reply in Support of Motion to Dismiss with Prejudice*.



Thomas W. Gooch, III

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedures, the undersigned certifies that she served a copy of the foregoing to whom it is addressed via email from Wauconda, Illinois on January 25, 2019 by 5:00 p.m.

Handwritten signature of Jamie Komani in cursive script, underlined.

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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 IN SUPPORT OF MOTION TO DISMISS WITH PREJUDICE

NOW COMES your Defendant, ROBERT MILLER, former Highway Commissioner of Algonquin Township by and through his attorney, THOMAS W. GOOCH, III of THE GOOCH FIRM and for his Reply in support of his Motion to Dismiss the Fourth Amended Complaint and states the following:

ARGUMENT

At the outset, this Court should recognize that the documents attached to the Reply Brief filed by ROBERT MILLER are documents that this Court can and should take judicial notice of as they relate directly to this matter.

This Court should take judicial notice of a subpoena issued in this case by plaintiff directed against an entity known as “mc.net”. That entity was the email provider for ROBERT MILLER. The return of that subpoena, which plaintiff seeks not to discuss in any pleadings, resulted in production of literally thousands of emails which plaintiff was finally required to distribute to all parties in this case pursuant to court order when they otherwise found it unnecessary. Seemingly, it is difficult to understand how, in view of the production of all of those emails long before the Fourth Amended Complaint was filed, that plaintiff can still argue there are emails that defendant has and plaintiff does not have.

Next, plaintiff has made quite an argument in his Response Brief relating to the Public Records Act and things of that nature. However, the Court should also take judicial notice of a docketing statement filed by the same plaintiff and the same attorney in appellate case number 2-19-0026 where seemingly plaintiff alleges an issue he intends to raise in the appellate process following dismissal of his complaint in the circuit court where plaintiff maintains the road district is not subject to the Illinois Freedom of Information Act. The plaintiff maintains that the road district is not an entity under the Illinois Freedom of Information Act. It stands to reason that plaintiff cannot here maintain that the local records act applies to plaintiff as the highway commissioner and to the road district. The aforesaid docketing statement which defendant seeks the Court to take judicial notice of is attached hereto as Exhibit “A”.

What plaintiff is advocating both in the Fourth Amended Complaint and in his Response Brief is that this court supervise, amend or change the legislative procedures of Algonquin Township. As cited in the Motion to Dismiss, such a request clearly violates the holdings in *People, ex.rel. v. McDavid Barrett*, 370 Ill.478 (1939). *Barrett* remains good law even though issued in 1939 and stands for the proposition that the Courts should not become involved in issues which require a determination of what is for the public good and what are public purposes. The *Barrett* Court held, among other things that, "In determining whether or not the sovereign power is used in the public interests, the judgment of the legislature is to be accepted, in the absence of a clear showing that the purported public purpose is but an invasion and that the purpose is in fact, private. 370 Ill.478 at 482.

The plaintiff refuses to acknowledge that none of these purchases were paid for by MILLER using township funds. Plaintiff makes a somewhat dubious argument that nothing in the minutes which plaintiff attaches to his Response reflect the audit of a specific bill, yet the minutes reflect the audit of the total amounts paid from each month. Plaintiff is well aware that those amounts are based on the individual bills submitted to the town board. To find otherwise would be erroneous.

With the legislative body approving not only the individual purchases but the sick pay which was received by ROBERT MILLER then clearly the allegations of the Fourth Amended Complaint contradicting that are erroneous or the Complaint misses necessary allegations.

While plaintiff maintains the road district is not subject to the Township Act, such a position is incorrect. In fact, the Township Act, as cited below in this Reply Brief controls such things as who is the custodian of the records of both the township and the road district (the township clerk not the highway commissioner), who has custody of the road district funds (the

supervisor serving as the treasurer of the road district) and who approves, after audit, the bills of the road district (township board of trustees at its regularly scheduled meeting). All of the provisions set forth here have been cited previously and at least one is cited below in actual language in the Reply Brief. Therefore, the suggestion that the Township Act has nothing to do with the road district is simply not correct.

It would be impossible to allege necessary elements of conversion without some affirmative allegation as to how defendant himself took control of the road district's money without any authorization when, in fact, the bill is for items purchased which were submitted to the town board who approved payment, not ROBERT MILLER. In order to sustain the conversion counts, if such sustaining of the conversion counts were at all possible would require numerous allegations relating to how defendant ROBERT MILLER intentionally and completely took control of the property of another with the improper intent of retaining it under these circumstances. Likewise, the breaches of fiduciary duties fail for the same reasons. The Highway Commissioner does not pay for anything. The Highway Commissioner, in a road district setting may order the purchase of various things, however, it is the Town Board that reviews and approves it. Without numerous missing allegations, this would be impossible to allege as a "Robert Miller breach of fiduciary duties to the road district" when he correctly submitted all expenses for approval to independent board of trustees sitting as a Board of Auditors in monthly meetings.

This case has receded to a point to where now the Plaintiff is alleging constructive fraud against Robert Miller. The difficulty with that cause of action as put here, is there was no breach by illegal or equitable act. Miller in all cases, followed the statute by submitting all expenses to the town board. The plaintiff is unable to point to any common law involving a township with the facts similar to the instant case. The case cited by Plaintiff do, in a general way, state in more than

once instance that the facts constituting the alleged fraud must be set forth in the Complaint “*Pfendler v. Anshe Elementary Day School*, 81 ILL.APP.3d 818, 822 (1980)” the citation failing to set forth what district it was filed in leading Defendant as argued further below, to suggest that many of the cases are simply “copy and paste” from another document. Seemingly, there must be some certainty in the pleading of constructive fraud, which is clearly lacking in this case.

Plaintiff cites to no authority, that a Highway Commissioner is an Agent of a road district and without such principle agency relationship there, can be no fiduciary relationship in the Counts maintained by Plaintiff in the Fourth Amended Complaint. The Plaintiff in conclusionary fashion, alleges a principle agent relationship to claim a fiduciary relationship without any authority whatsoever and does show in a clearly conclusionary manner.

GASSER argues that this Court can take judicial notice of the Minutes of the township board, it should do so. Judicial notice is an evidentiary concept which operates to admit matters into evidence without formal proof but it should not be used as a means of evading its responsibility to prove the matters alleged in its pleadings. *National Aircraft Leasing, Ltd. v. American Airlines, Inc.* 74 Ill.App.3d 1014, 1017-1018 (1st Dist., 1979). GASSER wants to avoid actually proving his cause of action by asking the Court to take judicial notice of the Minutes of the township board. However, all the minutes show an audit of road district bills every month.

GASSER states without any authority that whether or not an expenditure is a public purpose is a question of fact. GASSER fails to state how a trier of fact would be able to step into the shoes of the township board to determine which expenses were for a public purpose. See *Barrett, supra*.

The *Friends of Parks* Supreme Court described a public purpose as a non-static concept that is flexible.

“What is a ‘public purpose’ is not a static concept, but is flexible and capable of expansion to meet the changing conditions of a complex society. Moreover, ‘ “[t]he power of the State to expend public moneys for public purposes is not to be limited, alone, to the narrow lines of necessity, but the principles of wise statesmanship demand that those things which subserve the general wellbeing [*sic*] of society and the happiness and prosperity of the people shall meet the consideration of the legislative body of the State, though they oftentimes call for the expenditure of public money.” The consensus of modern legislative and judicial thinking is to broaden the scope of activities which may be classified as involving a public purpose.” *Friends of Parks v. Chicago Park Dist.*, 203 Ill.2d 312, 320-21 (Ill., 2003), citing to *Lappe*, 176 Ill.2d at 429–31, 223 Ill.Dec. 647, 680 N.E.2d 380.

Due to the expanding definition of a public purpose, the expenditures that were made by MILLER were in fact for a public purpose as supported by the board’s approval of them.

GASSER, again, ignores the statute, 60 ILCS 1/80-10 (a) which states

“The township board shall meet at the township clerk's office for the purpose of examining and auditing the township and road district accounts before any bills (other than general assistance, obligations for Social Security taxes as required by the Social Security Enabling Act, and wages that are subject to the Illinois Wage Payment and Collection Act, or other expenses determined by the township board by resolution) are paid, provided that payments made pursuant to a board resolution shall be reviewed and verified at the next meeting. The board may meet at other times as they determine. The township board may consider and approve bills individually or in a summary statement of any number of bills.” 60 ILCS 1/80-10(a).

The statute is clear who approves the bills. Thus, as previously argued, if GASSER has any issues with the bills that were approved, he should join the necessary parties or preferably stop this witch hunt against the MILLERS.

Also, because the board makes the final determination as to whether the bills are approved, the fact that MILLER’s expenditures were approved must mean that they were considered for a public purpose.

Therefore, because of GASSER’s continuous and deliberate ignoring of the statute and failure to allege any cause of action against ROBERT MILLER, the Fourth Amended Complaint must be dismissed. More importantly, due to GASSER’s lack of standing to even bring any

cause of action against MILLER, the Complaint must be dismissed with prejudice as further argued below.

GASSER FAILS TO PROVE HE HAS STANDING.

Next, GASSER again attempts to convince this Court that he in fact has standing to sue as a Road Commissioner. This is inaccurate.

GASSER tries, but fails, to distinguish *Lyons v. Ryan*, 324 Ill.App.3d 1094 (1st Dist., 2001). The case, *Lyons v. Ryan*, 324 Ill.App.3d 1094 (1st Dist., 2001) is similar to the instant case despite what GASSER argues. The *Lyons* Supreme Court stated that the public interest is not served by allowing certain government agencies or private persons to assume the inherent powers of the Attorney General. The Appellate Court affirmed the trial court's granting Defendants' motion to dismiss based on lack of standing and the Supreme Court affirmed. *Id.*

The Township Clerk possesses the standing to sue as the Clerk of the Road District, in this case, under this Court's Order it is KAREN LUKASIK that is the Clerk who is the custodian of the records. The Township Clerk, not GASSER, has standing to sue if there are any records or documents missing. GASSER cannot stand in the shoes of the Township Clerk.

In addition to this Court's Order, the statute, 60 ILCS 1/75-5, gives the Township and Road District Clerk standing to sue, not the Highway Commissioner. Thus, again, GASSER is without standing as the Highway Commissioner. Instead GASSER continues on his "political witch hunt" against ROBERT MILLER, which must not be allowed.

More importantly, GASSER fails to cite any cases that support his position that he has standing to sue on behalf of the Road District.

Instead, GASSER cites to a United States Supreme Court case, *Lujan v. Defs. Of Wildlife*, 112 S.Ct. 2130 (1992) for the "irreducible constitutional minimum of standing" requirements, as:

“First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical’.

Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.

Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.” (internal citations omitted) *Lujan v. Defs. Of Wildlife*, 112 S.Ct. 2130, 2136 (U.S., 1992)

However, GASSER completely fails to demonstrate how he believes his cause of action satisfies each of these three elements of standing, because they do not. First, GASSER as the Highway Commissioner has failed to show that he suffered an injury in fact. GASSER cannot show that the injury he claims is a legally protected interest which is concrete, particularized and actual. Next, GASSER does not satisfy the second element, by failing to show that there was a causal connection between the injury and the conduct. Lastly GASSER does not show that it is likely that the purported injury will be redressed by a favorable decision. The failure of GASSER to apply any of these elements of the case he cited to his cause of action and Complaint must result in further support that GASSER cannot prove that he has standing and the Complaint must be dismissed.

Similarly, under the Illinois rules of standing, GASSER fails to allege that he has standing. The Illinois Supreme Court discussed standing in Illinois. “We thus adhere to the principle that standing in Illinois requires only some injury in fact to a legally cognizable interest. More precisely, the claimed injury, whether “actual or threatened” must be: (1) “distinct and palpable” (2) “fairly traceable” to the defendant's actions and (3) substantially likely to be prevented or redressed by the grant of the requested relief.” (internal citations omitted) *Greer v. Illinois Housing Development Authority*, 122 Ill.2d 462, 492-493 (Ill., 1999).

Additionally, GASSER failed to distinguish *Wood River Township. v. Wood River Township. Hospital*, 331 Ill.App.3d 599 (5th Dist., 2002), where the municipality and individual taxpayers brought an action for declaratory judgment and injunctive relief against the Defendants. The Defendants filed a motion to dismiss based on lack of standing. The Trial Court held that township lacked the standing to sue because the township is not a taxpayer and is not injured in its corporate capacity. The Court held that the township did not have an injury of fact to establish standing to sue and that any allegation of injury in the Complaint was vague, speculative, and conclusory. The Appellate Court affirmed the Trial Court's dismissal of the township. *Id.*, at 607 generally.

Here, because GASSER fails to specifically allege how or why he has standing to sue, in his Complaint as well as in his Response, standing is not sufficiently alleged and this Motion to Dismiss must be granted.

Lastly, GASSER gives a "bank analogy" that fails to prove his point. GASSER attempts to say that a head cashier of a bank that has custody of money (here, the Township Clerk) is not required to be a Plaintiff in a lawsuit. This analogy is illogical and inapplicable because the statute gives the Township Clerk the standing to sue on those records, unlike a bank cashier. Also GASSER does not connect his analogy to giving himself standing to sue. His analogy is not helpful to showing any proof of standing.

Defendant wishes this Court to know that in the response filed by GASSER, this counsel cited 47 different common law cases, none of which have anything to do directly with the fact patterns contained in the Fourth Amended Complaint or Plaintiff's allegations in general. Counsel for Defendant ROBERT MILLER, has read each and every case defined some basis for their inclusion in the Response Brief and is unable to find anything except general principle to

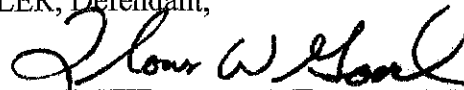
law which probably could have been handled in 4 (four) or 5 (five) basic cases. This use of gay citations having little or nothing to do with the subject matter is what brings Defendant to believe that these broad principles and all of the cases cited, were simply copied and pasted from some other treatises or case, mainly due to the absence of the district identifiers which are generally omitted from many Appellate decisions and other types of legal treatises. Defendant raises this issue to point out to the Court the desperation Plaintiff is faced with trying to maintain the Fourth Amended Complaint filled with its conclusions, exaggerations, and its lacking of any true merit.

Therefore for the reasons set forth above, GASSER's Fourth Amended Complaint fails to even state a cause of action against MILLER and further does not sufficiently allege standing to sue and should be dismissed with prejudice. Every piece of litigation has a beginning and every piece of litigation has an end. After 4 (four) attempts and thousands of dollars of the taxpayer's money wasted in a defense by 4 (four) different attorneys of this lawsuit, the time to end this litigation has arrived.

WHEREFORE, your Defendant, ROBERT MILLER, prays this Honorable Court dismiss the Fourth Amended Complaint with prejudice and for any other relief deemed just and equitable.

Respectfully submitted by,

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



Thomas W. Gooch, III

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No. 2-19-0026
IN THE APPELLATE COURT OF THE STATE OF ILLINOIS
SECOND DISTRICT

ANDREW GASSER, ALGONQUIN)	
TOWNSHIP ROAD COMMISSIONER,)	Appeal from the Circuit Court
ALGONQUIN TOWNSHIP ROAD)	22nd Judicial Circuit, McHenry
DISTRICT,)	
)	Circuit Court Case #17 CH 482
Defendants./Counter-Plaintiffs – Appellants,))	
v.)	
)	Trial Judge Jassica Presiding
JAMES SWEENEY and INTERNATIONAL)	
UNION OF OPERATING ENGINEERS,)	
LOCAL 150,)	
)	
Plaintiffs./Counter-Defendants,-Appellee.))	

DOCKETING STATEMENT
(Civil)

1. Is this a cross-appeal, separate appeal, joining in prior appeal, or related to another appeal which is currently pending or which has been disposed of by this Court?

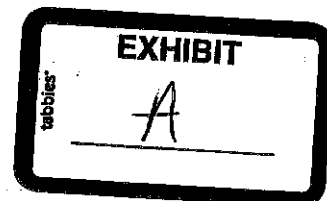
Yes. Defendant/Counter-Plaintiff – Appellant filed its notice of Appeal in November 2018 within 30 days of what was believed to be the final order. However, Plaintiff moved for Sanctions, Attorney fees under the Open Meetings Act, Attorney Fees under FOIA and to hold in contempt Defendant Road District’s Highway Commissioner, Andrew Gasser. On January 10, 2019 the Circuit Court ruled on pending motions, and after the court ruled on all pending motions, sua sponte changed its September 20, 2018 order to command additional procedural steps be taken in connection with Local 150’s Motion to Compel Arbitration that was subject of the Notice of Appeal. Defendant/Counter-plaintiff filed a new notice of appeal on January 14, 2019.

2. If any party is a corporation or association, identify any affiliate, subsidiary, or parent group:
Defendant Algonquin Township Road District is a unit of local government.

Plaintiff, Local 150 International Union of Operating Engineers is a local union affiliated with the International Union of Operating Engineers, AFL-CIO.

3. Full name of appellant filing this statement: **Algonquin Township Road District and Andrew Gasser, Algonquin Township Highway Commissioner.**

Counsel on Appeal for Appellant:
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4. Counsel on Appeal for Appellees:

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5. Court reporting personnel:

Q&A Court Reporting, Crystal Lake Illinois.

Approximate duration of trial court proceedings to be transcribed: **Approximately 6 hours worth of hearing argument.**

Can this appeal be accelerated? No

6. Briefly state the Supreme Court Rule, or other law, which confers jurisdiction upon the reviewing court; the facts of the case which bring it within this rule or other law; and the date that the order being appealed was entered and any other facts which are necessary to demonstrate that the appeal is timely:

This court has jurisdiction pursuant to Supreme Court Rule 303(a).

7. Nature of Case:

Administrative review _____ Domestic Relations _____
Contract _____ Child Custody/Support _____
Estates _____ Product Liability _____
Personal Injury _____ Forcible Detainer _____
Tort _____ Other _____
Juvenile _____

This appeal arises out of Local 150's Freedom of Information Act claims seeking certain documents of the Algonquin Township Road District including the personal e-mails of the Highway Commissioner and a counter-claim filed by the Road District to invalidate a purported Collective Bargaining Agreement, purportedly executed without public disclosure, or hearing to bind the successor highway commissioner to policy decisions of the prior Highway Commissioner.

8. Briefly describe the nature of the case and the result of the trial court, and set forth any reasons for an expedited schedule:

In this case of first impression, Local 150 and its Business Manager, James Sweeney brought suit against the Algonquin Township Road District (hereinafter "Road District") seeking production of documents pursuant to the Illinois Freedom of Information Act ("FOIA") and attorney fees for its in-house counsel. Defendant, Road District, raised the defense that the act does not include a Road District in the definition of Public Body thereby nullifying the FOIA claim. Defendant also defended against the granting of attorney fees on the basis that the in-house counsel of Local 150 are not entitled to fees because it did not incur actual attorney fees. The Court ordered production and attorney fees for one of Local 150's attorneys.

In another area of first impression, Defendant Road District filed a counter-claim against Local 150 asking the court below to declare a purported labor agreement void ab initio. The purported CBA was executed by the previous Highway Commissioner as he was leaving office to control the Road District's new Highway Commissioner's policy decisions during his term. Local 150 moved to dismiss and the court below granted dismissal of the counter-claim seeking to invalidate the CBA.

9. State the general issues proposed to be raised (failure to include an issue in this statement will not result in the waiver of the issue on appeal):

- 1) **Whether a Highway Commissioner has the power to enter into a Collective Bargaining Agreement (hereinafter "CBA"); (a case of First Impression)**
- 2) **Whether a Highway Commissioner has the power to enter into a CBA that extends beyond his term of his office; (a case of First Impression)**
- 3) **Whether a Road District is subject to the Illinois Freedom of Information Act; (a case of First Impression.)**
- 4) **Whether or not the Open Meetings Act applies to a Road District. (A case of First Impression)**
- 5) **Whether in-house counsel for a labor union can collect attorney fees in connection with a Freedom of Information Act claim;**
- 6) **Whether the Circuit Court can order specific items of an arbitration procedure when the CBA in question leaves all questions of procedure to the ultimate arbitrator. (A case of First Impression.)**
- 7) **Whether an arbitrator can change a provision of a CBA that allows a public official's decision to stand as made to overrule a public official in the exercise of his statutory power; (a case of First Impression.)**
- 8) **Whether a Circuit Court has the Power to Order specific steps of an arbitration not called for in a CBA. (A case of First Impression.)**

I, as attorney for the appellant, hereby certify that on January 15, 2019, my office made written request to the Clerk of the Circuit Court to prepare the record. A copy of that request is attached.

On January 15, 2018, my office made a written request to the court reporter to prepare the transcripts of the 3/9/2018, 8/21/2018, 9/20/2018, 10/23/2018, and 1/10/2019 hearings.

Dated: January 22, 2018

/s/ Robert T. Hanlon

In lieu of court reporting personnel's signature, I have attached the written request to the court reporting personnel to prepare the transcript(s).

Dated: January 22, 2018

/s/ Robert T. Hanlon

CERTIFICATE OF SERVICE

I, Robert T. Hanlon, an attorney, hereby certify that I caused a copy of the Docketing Statement to be served on Appellees' counsel, via electronic mail and regular mail on January 22, 2019 at the following Addresses:

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/s/ Robert T. Hanlon