

1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF McHENRY)

4 IN THE TWENTY SECOND JUDICIAL CIRCUIT
5 MCHENRY COUNTY, ILLINOIS

6 Taxpayer, Wolf Realty,)
7 Inc., et. al,)
8 Plaintiffs;)
9 -vs-) 15 TX 5
10 Glenda Miller, in her)
11 official capacity,)
12 Defendant.)

13 REPORT OF ELECTRONICALLY RECORDED
14 Proceedings had at the hearing of the above-entitled
15 cause before the Honorable Thomas A. Meyer, Judge of
16 said Court, on the 12th day of December, 2017.

17 APPEARANCES AS GIVEN:

- 18 Mr. Timothy Dwyer,
19 representing the tax objectors;
- 20 Mr. James Kelly,
21 representing Algonquin Township
22 and Road District;
- 23 Mr. Jim Militello,
24 representing McHenry Township and
McHenry Township Road District;
- Mr. George Hoffman,
representing McHenry County.

25 Sandra K. Gardner, C.S.R., 084-001984
26 Official Court Reporter
27 2200 North Seminary Avenue
28 Woodstock, IL 60098

1 THE COURT: All right. If everybody could
2 approach.

3 MR. DWYER: Good afternoon, your Honor.

4 Timothy Dwyer on behalf of the tax
5 objectors.

6 MR. KELLY: James Kelly on behalf of Algonquin
7 Township and Road District.

8 MR. MILITELLO: Jim Militello on behalf of McHenry
9 Township and McHenry Township Road District.

10 MR. HOFFMAN: George Hoffman on behalf of McHenry
11 County.

12 THE COURT: Okay. Do you have a motion?

13 MR. DWYER: A motion?

14 THE COURT: Yeah, you asked to -- me to strike the
15 briefs filed by the other defendants.

16 MR. DWYER: Oh, well, your Honor, McHenry Township
17 has no -- has no issue in this particular case. This is
18 just a tax exemption against the intervenors, Algonquin
19 Township and Algonquin Road district.

20 There is a case pending against McHenry
21 Township and McHenry Township Road District. And I
22 think that Mr. Militello, last we were here, obtained an
23 order to amend his answer and affirmative defenses.

24 And I suspect that he will bring this up.

1 But right now I don't think it's (Unintelligible)
2 hearing.

3 THE COURT: Okay. I'll -- actually, I'll put that
4 over.

5 The first thing I want to address is the
6 issue of whether of 60 I.L.C.S. 1/85-65 applies
7 retroactively or prospectively.

8 And you made the argument that it applied
9 retroactively because it was procedural. But I -- I
10 guess I didn't appreciate the support -- how that
11 argument was supported.

12 And specifically what I was thinking, it
13 struck me that the impact of the statute was more
14 substantive because by its nature, it would allow a
15 change in the level of taxation.

16 And the change of rule would then, under your
17 argument, allow a district to retroactively justify an
18 increase in taxation, which struck me as more
19 substantive than procedural.

20 Obviously, you disagree; but that's where my
21 mind went so --

22 MR. KELLY: Judge --

23 THE COURT: -- if you want to address that.

24 MR. KELLY: -- I don't want to tell you I disagree.

1 I just never thought of it from that perspective. The
2 way I looked at this particular statute is that it
3 clarifies the presumption that there's an excessive
4 accumulation.

5 That's what the court -- that's what the
6 legislature really did. I mean, if you look at the
7 cases -- and we've cited some of them, and you've seen
8 them throughout the last year in this litigation. You
9 know, anything between two times and three times the
10 accumulation -- or three times the annual expenditures
11 is unnecessary accumulation, depending on what case you
12 happen to be looking at.

13 What happens --

14 THE COURT: Um-hum.

15 MR. KELLY: -- with this legislation -- and that's
16 why I'd say it's procedural. It basically establishes
17 -- it eliminates the presumption, okay. It states at
18 this point you can basically bring the suit. I see that
19 as purely a procedural matter.

20 You know, and the impact on tax objectors is
21 nothing. And the reason it's nothing is because they
22 can come in, and they have this range that they can
23 presumably -- it could be 2.01 --

24 THE COURT: Yeah.

1 MR. KELLY: -- or it could be something else. So
2 they're not guaranteed. They have no rights. It's just
3 that once that number is hit, there's a presumption.
4 (Unintelligible) that guaranteed anything. But as I say
5 --

6 THE COURT: But you mean a presumption of excessive
7 accumulation --

8 MR. KELLY: Yes, so that they can bring the case
9 before the court.

10 I've never -- and I'll -- I'll -- Judge, I
11 did not look at it from the perspective that it somehow
12 would encourage units of government to accumulate.

13 I think that the cases that we've cited -- I
14 think Toynton, as well as O'Connor, both talked about --
15 and a number of cases that have been cited throughout
16 this litigation cite to the proposition that the
17 governments are presumably acting in good faith. And I
18 think the court would have to be -- they do, Judge.
19 That's what the cases --

20 THE COURT: I'm -- I'm smirking because I'm
21 thinking this is Illinois but okay.

22 For the record, I'm kidding.

23 But --

24 MR. DWYER: Just half kidding.

1 MR. KELLY: Judge, we're -- we're not -- I'm not
2 debating Illinois.

3 But I mean, that's what the cases pretty much
4 hold. So I think that you need to take that into
5 consideration.

6 Once again, I -- I do think it's procedural.
7 I mean, it -- it doesn't deprive the tax objectors of
8 their rights. It basically sets the benchmark I think.

9 THE COURT: Well, and -- and I'm not being an
10 advocate. I'm -- I'm -- so much as I'm addressing your
11 argument with what my thoughts were as I read these.

12 And it -- how -- how is it purely procedural
13 when it clearly can affect -- again, this is my opinion
14 because there is no case law addressing this particular
15 statute. But how doesn't it affect substantive rights
16 of the taxpayer, meaning the amount he's got to pay in
17 taxes?

18 And -- and if that isn't a substantive right,
19 then I -- then I need case law that tells me that. But
20 it -- it was my assumption that it -- money out of their
21 pocket addresses substantive rights.

22 MR. KELLY: However, Judge, that right -- yes, they
23 have a -- a right as far as the amount of taxes that are
24 -- is being paid.

1 However, first of all, if it was truly
2 substantive, it would have been enacted a long time ago.
3 We know when Miller was -- we know when Miller was --

4 THE COURT: Yeah.

5 MR. KELLY: -- entered, Judge. I mean, it's been
6 fifty years, I mean, essentially.

7 And the -- the right in this case -- it
8 doesn't deal with a right to tax money. It's this
9 presumption. And that's a procedural issue. When you
10 get into court. Not how much taxes you pay. That's
11 really the issue is when you -- you know, can cross that
12 threshold and walk into the courthouse.

13 So I -- I can't argue against is there a
14 possibility that a taxpayer -- in this case taxpayers --
15 can't necessarily come into court and they'll -- they'll
16 lose some, you know --

17 THE COURT: With respect to the procedural
18 argument, it -- and -- and educate me. The -- the
19 procedural argument -- or it -- it is procedural with
20 respect to the right to file suit only implicitly
21 because it doesn't -- there's nothing in the statute
22 that explicitly addresses the -- the right to bring a
23 suit. Does it -- is there?

24 MR. KELLY: Not in the statute. Absolutely not,

1 Judge --

2 THE COURT: Okay.

3 MR. KELLY: -- it does not.

4 THE COURT: It just says they're allowed to --

5 MR. KELLY: Yes.

6 THE COURT: -- shall not exceed an amount

7 (Unintelligible) --

8 MR. KELLY: Right.

9 THE COURT: -- 2.5. So it -- it does clarify what
10 number -- it changes the number actually. It changes
11 the (Unintelligible) number for the presumption. But
12 it's -- see, and I -- and I -- and the problem I'm
13 having is it -- it changes their right to -- to even
14 file suit, which again strikes me as a substantive right
15 as opposed to (Unintelligible) procedural right. Unless
16 -- unless I'm misinterpreting this.

17 MR. KELLY: However, Judge, how does that -- you
18 know --

19 THE COURT: I'm thinking out loud.

20 MR. KELLY: -- the right is really to this: We
21 have an unnecessary accumulation; and therefore, you're
22 entitled to some type of refund. And that's what this
23 case is really about is, is there a refund entitled --
24 are the taxpayers entitled to some refund.

1 And I -- you know, my case -- I'll tell you
2 that some of the funds that, yes, that's the case. And
3 it's really a matter of doing the math and figuring out
4 how much that should be.

5 But the -- the issue is in this case, you
6 know, whether, you know, it's this number between
7 whether you determine there's a refund that can be
8 given, whether it's between this number, two times the
9 amount or three -- or over that amount is when they're
10 entitled to that refund.

11 And we've seen cases all over the place. And
12 I think this clarifies that procedure. When they get --
13 they don't lose anything because they could have --
14 there could be an accumulation --

15 THE COURT: Um-hum.

16 MR. KELLY: -- of 2.8. We'd come to court and this
17 court could make the determination, well, that's not an
18 unnecessary accumulation. You could make that decision
19 and say, no, it's not an unnecessary.

20 So that -- that right is illusive in a way.
21 I mean, to say you're -- they're entitled to some number
22 or amount of money. That they could come in and this
23 court could -- at the same time, you could have a 2.01
24 accumulation; and this court could find, yes, that .01

1 is unnecessary; and therefore, you know, we're going to
2 refund a part of that --

3 THE COURT: Um-hum.

4 MR. KELLY: -- .01.

5 This just literally sets the benchmark. They
6 don't get any money as a result -- or are deprived of
7 any money. I mean, this court is where the -- they're
8 deprived of entry into this -- walking in the door.

9 THE COURT: It -- it changes the -- it changes the
10 number at which -- I mean, previously -- and I --
11 forgive me, I'm still thinking out loud. Previously, as
12 you said, at 2.01, I could have found that's an
13 excessive --

14 MR. KELLY: Um-hum.

15 THE COURT: -- accumulation. Now I can't if -- if
16 we apply this retroactively. So in my mind, that's just
17 deprived them of a -- a right, meaning to claim an
18 excessive accumulation up to 2.5.

19 And -- and I'm just having a -- a hard time
20 seeing that as merely a procedural change because, I
21 mean, it -- it extinguishes effectively their cause of
22 action. And obviously, we all agree this occurred after
23 the tax years and --

24 MR. KELLY: Um-hum.

1 THE COURT: -- that are in question. And in fact,
2 it even occurred after the filing of this lawsuit. And
3 I -- I have -- I'm seeing it as a retroactive
4 justification of excessive taxation arguably. And I
5 don't think that that's intended by this type of
6 legislation.

7 And I -- I -- I have a problem with that
8 concept that the state can retroactively justify -- or
9 the government can retroactively justify something
10 they're not allowed to do and say but you can't bring
11 suit anymore. Going forward, certainly. But now
12 they're reaching back. And I have a hard time with that
13 concept.

14 MR. KELLY: Judge, and I -- I will tell the court I
15 did attempt -- I have attempted and I'm still in the
16 process of obtaining the legislative history of this
17 particular legislation, for whatever that's worth.

18 And the State of Illinois has not been acting
19 speedily to get me that. And we still don't have it.
20 But I -- and I don't know what it will or will not say.
21 My speculation was to -- was that this would be the
22 benchmark because the -- the legislature, in fact, I
23 think would have to recognize one of the arguments that
24 we made is that -- and I'm not telling you it's two

1 times -- but in every -- in McHenry County, a township
2 needs three months of accumulation to survive. That --
3 that's the way it is based upon this -- the cash flow
4 coming into the -- the (Unintelligible) government.

5 THE COURT: Um-hum.

6 MR. KELLY: I would think that the legislature at a
7 certain point made a determination that there are
8 certain things that need to be done to ensure
9 governments have unimpeded operations --

10 THE COURT: And I --

11 MR. KELLY: -- without (Unintelligible). But we
12 don't know that -- I was not able to get that
13 legislative history.

14 THE COURT: And I -- I think that's kind of the
15 idea behind Miller. You can accumulate some --

16 MR. KELLY: Yes.

17 THE COURT: -- but at some point it becomes
18 excessive.

19 MR. KELLY: Right.

20 THE COURT: Miller and Toynton give us some
21 guidelines that have now been changed.

22 And I -- I'm just having a hard time seeing
23 this as a substantive -- I'm sorry -- as a procedural
24 change.

1 I'll let you add to --

2 MR. DWYER: Well, your Honor, I think the issue of
3 substantive versus procedural is actually secondary in
4 this case --

5 THE COURT: Um-hum.

6 MR. DWYER: -- for these reasons: First of all,
7 the Illinois Supreme Court has said unambiguously that
8 the validity of a tax levy is determined at the time
9 that it's made; and facts concerning or arising out of
10 subsequent events cannot be used to defeat or invalidate
11 any tax levy. That's In Re Application of Rosewell,
12 Supreme Court in 1994. And that's based upon the
13 (Unintelligible) case that the Supreme Court did in
14 nineteen -- I want to say -- forty-six.

15 THE COURT: Um-hum.

16 MR. DWYER: And in between there, there's several
17 Supreme Court cases that say the same thing. So we know
18 that under the Supreme Court law, that the tax -- tax
19 levy is -- is to be adjudicated at the time it was made.
20 In this case it's 2014.

21 Secondly, the court said there is no case law
22 on this issue. And I would respectfully disagree, your
23 Honor. I think that if Commonwealth Edison Company
24 versus Will County Collector, which was a tax case, the

1 -- the court --

2 THE COURT: (Unintelligible) specifically this. Go
3 ahead.

4 MR. DWYER: Well, and -- oh, absolutely. This
5 statute was -- became effective on September 8 of this
6 year. There is -- there's been no litigation that I'm
7 aware of.

8 In any event, the -- in that case the court
9 said -- you know, the court went into a lengthy analysis
10 retroactive versus prospective and actually called out
11 an inconsistency in a previous (Unintelligible).

12 But in doing so, they looked to the Supreme
13 Court and said, listen, we're not going to -- we're not
14 going to say anything is retroactive unless the
15 legislature tells us it is.

16 In this case, obviously, there -- there's
17 nothing like that. They just went and they made this
18 thing. And they said that it's effective upon passage.

19 So I -- I think that the Commonwealth Edison
20 case is -- is very worthwhile in terms of making this
21 decision.

22 Finally, your Honor, in the event that you
23 did go into some analysis regardless of the -- the
24 complete lack of intent, the legislature has the

1 substantive versus procedural, clearly, this is
2 substantive. As the court pointed out, you know, three
3 and a half years later, after two -- two and a half
4 years of litigation, somehow a cause of action is going
5 be wiped out.

6 But also, your Honor, we talked about the
7 genesis; and Jim talked about the -- the statutory
8 history. This -- the genesis of this came from the --
9 the Township is Shelbyville, where there was a couple of
10 funds that had two hundred times in excess of the annual
11 two year expenditures. And five people resigned and one
12 person went to jail. And a -- a township alliance got
13 this through. And it's only -- it only pertains to the
14 townships. It doesn't pertain to anything else. It
15 wouldn't -- I mean, Mr. Kelly has for three years argued
16 with this court and I think successfully. The court has
17 told me that I can't -- I can't pool the road district
18 and the township together. This doesn't really apply to
19 the town -- to the road district.

20 THE COURT: Let's stick with today's argument.

21 MR. DWYER: Okay. Yeah. And -- well, that's what
22 I have, your Honor.

23 THE COURT: Okay. Anything else?

24 MR. KELLY: Judge, I don't know where the statute

1 arose from. However -- and I don't think we've been
2 litigating this for three years.

3 But the long and short of it, Judge, is this
4 affects the right to open the courthouse door and walk
5 through the door. That's what, you know, our analysis
6 is.

7 The court has looked at it from a different
8 perspective. And I'll leave it up to your discretion as
9 to how you rule on this. I -- I have no further
10 argument really.

11 THE COURT: One -- one of the things, in addition
12 to what I've already said about why I see it as a
13 substantive change and, therefore, wouldn't be applied
14 prospectively, is the fact that I -- I think I have to
15 presume that the legislature wrote this statute with
16 knowledge of Miller and its prodigy with respect to the
17 2.01 list -- or I'm sorry -- threshold.

18 I don't think this statute makes any sense if
19 Miller and Toynton, et cetera, didn't exist. I --
20 they're specifically addressing that formula I think.
21 And then that's the intent of this.

22 And the fact that they did that and did not
23 expressly state that this statute is to be applied
24 retroactively, knowing full well that the existence of

1 the Miller (Unintelligible) tells me it is a -- it is --
2 the application is to be prospective.

3 So in the absence of explicit language
4 telling me it is to be applied retroactively and my
5 belief that the impact is substantive rather than
6 procedural, I think this particular statute must be
7 applied prospectively, which then leads me to the rest
8 of the case.

9 And -- and I -- I -- is there anything
10 anybody needs to do before I -- I rule on the hearing
11 that took place on the 20th?

12 MR. KELLY: I have no -- unless you wanted brief
13 argument of some type.

14 THE COURT: Okay.

15 MR. DWYER: No, your Honor.

16 THE COURT: Well, if -- first, I've ruled with
17 respect to the -- how we're going to apply and interpret
18 60 I.L.C.S. 1/85-65. And that I -- this court's applied
19 it prospectively.

20 On November 20, the court heard testimony and
21 I accepted evidence on this matter. And I found the
22 witnesses to be credible. The information was
23 informative.

24 And their testimony and the documents that

1 were submitted support a finding in the favor of the
2 plaintiff. Specifically the court is finding that there
3 was an excess accumulation in the funds that are
4 recorded on Plaintiff's Exhibit K, excepting the road
5 and bridge fund. So specifically the town fund, public
6 assistance fund, Social Security fund, I.M.R.F. fund,
7 audit fund, insurance fund and Miller Equipment fund
8 were all excessive accumulations.

9 And as a result, I will find in favor of the
10 plaintiff on his complaint (Unintelligible) with respect
11 to those individual funds.

12 Any questions?

13 MR. DWYER: Yeah, we gave you a proposed order. Do
14 you want to adopt that or --

15 THE COURT: I'm -- I wanted to hear input on that
16 proposed order.

17 MR. KELLY: I did not bring a copy of it with me.

18 THE COURT: I'm --

19 MR. KELLY: Judge, the -- my --

20 MR. DWYER: Don't -- don't (Unintelligible).

21 MR. KELLY: No, no, no, no.

22 MR. DWYER: (Unintelligible).

23 MR. KELLY: No, no, no, no, no.

24 That's --

1 THE COURT: Do you have it?

2 MR. KELLY: Yes.

3 MR. DWYER: I didn't (Unintelligible) what you just
4 said, your Honor.

5 THE COURT: If -- if --

6 MR. KELLY: What I think, Judge, has to happen
7 (Unintelligible) --

8 THE COURT: I wanted you to look at it.

9 MR. KELLY: Because I mean, I see -- just by
10 looking at this, this -- this is real overreaching. I
11 mean, I don't object to -- the (Unintelligible) here --
12 object to an order finding that those funds are in
13 excess.

14 And I think what needs to happen is the --
15 you know, for example -- oh, he does have -- and I'm
16 sorry, Judge. Mr. Dwyer does have the amounts
17 specifically that he is asking to have rebated. Let me
18 see if there's -- I think that's where I would probably
19 -- that that I just have not calculated out. I see
20 (Unintelligible) is two of them are quite a bit. But I
21 -- I just have not calculated those out. But for that,
22 I don't object to an order. I mean, I -- we can read
23 this over.

24 THE COURT: What -- what do you mean that not --

1 not object to -- what kind of an order are you not
2 objecting to?

3 MR. KELLY: Oh, Judge -- Judge, I think we need an
4 order that simply states that you found accumulations in
5 these funds.

6 And I -- and Mr. Dwyer may very well be
7 absolutely 100 percent accurate with regard to the
8 rebates amount. I just have not looked at it. I don't
9 think that there's been any evidence presented as to the
10 amount for the refunds.

11 THE COURT: No, (Unintelligible) --

12 MR. KELLY: Now, I'm --

13 THE COURT: -- (Unintelligible) made that finding.

14 MR. KELLY: Yeah, but I -- once again, I -- I think
15 that this is something Mr. Dwyer and I should quickly be
16 able to give an answer to. So if you'll --

17 THE COURT: I will defer to you to check the
18 amounts of rebates. If you are in agreement -- if
19 you're in agreement that this order accurately
20 memorializes everything that's transpired, I have no
21 problem entering it in conjunction what I just said --
22 with what I just said. I --

23 MR. KELLY: Well, Judge, could we --

24 THE COURT: How long do you need?

1 MR. KELLY: Let's say two days, Judge. I mean,
2 that's -- that would be I think more than we need but --

3 THE COURT: Okay.

4 MR. KELLY: -- I think two days would be fine.

5 THE COURT: All right. (Unintelligible).

6 MR. KELLY: I would be happy to walk the order in
7 so Mr. Dwyer doesn't have to --

8 MR. DWYER: Well, just for the court's
9 edification -- Mr. Kelly's, as well, I guess -- there's
10 -- there's essentially three ways to do this, your
11 Honor.

12 THE COURT: Um-hum.

13 MR. DWYER: The traditional way is to take the --
14 the E.A.V. that's in the Exhibit B for Algonquin
15 Township, which in this case is eighty-two-million,
16 three-seventy-one, nine-forty-four, and times that by
17 the actual rate. And those are the numbers that are in
18 the order.

19 The second way, your Honor, is to take the
20 E.A.V. of eighty-two, three-seventy-one, nine-forty-four
21 and create a percentage of the E.A.V., which would be
22 .0389, in which case the -- the number would go up to
23 one-thirty-six, six-thirty-four.

24 The third way, your Honor, is to take the

1 actual taxes paid and then go through each tax code.
2 And what you'll find there is that under the -- the --
3 the rates in this order, you'll get anywhere from 1.21
4 to 1.67, with the average being 1.48. And that number
5 accumulates to one-forty-two, nine-seven-three-
6 eighty-four. So I took the lowest number.

7 What I would suggest is the court enter this
8 order. And that if Jim has a problem with any of the
9 numbers, that he come back within thirty days and file a
10 motion.

11 But if he doesn't want to do that, that's
12 fine.

13 THE COURT: I -- I don't have a problem --

14 MR. KELLY: Judge --

15 THE COURT: -- with giving him two days in which to
16 check the math on this, which is -- and I understood
17 your --

18 MR. DWYER: Sure.

19 MR. KELLY: Yeah, and that's -- and I'm not -- as I
20 said, I'm not debating Mr. -- or even disputing his
21 numbers at this point.

22 MR. DWYER: I have no problem with that, Judge.

23 MR. KELLY: I just want to make sure we're -- and
24 the methodology which I have used -- two methodologies

1 which --

2 MR. DWYER: Okay.

3 MR. KELLY: -- which I have used, he's discussed
4 one of them. And the other one was we just came up with
5 a number which resolved these but --

6 MR. DWYER: Pardon me?

7 MR. KELLY: In the past we've come up -- with other
8 attorneys, we've come up with a general amount that
9 seems to satisfy just for --

10 MR. DWYER: You mean with (Unintelligible).

11 MR. KELLY: -- these objectors as with regards to a
12 settlement based upon a certain rate.

13 But this -- this is fine, Judge, if I could
14 have two days --

15 THE COURT: Sure.

16 MR. KELLY: -- we'll draft up an order and ask for
17 that and get this thing back in. I'll offer to walk it
18 in once we have a --

19 THE COURT: Okay.

20 MR. KELLY: -- resolution.

21 THE COURT: I will put it over till Thursday.
22 Whatever the date is, the 14th --

23 MR. KELLY: Okay.

24 THE COURT: -- for entry of the order.

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And what about our other defendants?

MR. HOFFMAN: We have -- we're still --

(Whereupon, an unintelligible conversation was had.)

RESUMING:

MR. HOFFMAN: Mr. Dwyer and I are going to have a 201(k) conference on some discovery --

THE COURT: Okay.

MR. HOFFMAN: -- (Unintelligible). That's where we are. On that date produce some documents and answers to interrogatories. But I think (Unintelligible) on next week. That's where the county is.

THE COURT: Actually, I -- the one thing I didn't address is your request to strike their briefs on the statute.

MR. DWYER: It wasn't the county, your Honor. It was McHenry Township. It was Jim. And I think he was trying to get a word in edgewise before --

THE COURT: I --

MR. DWYER: -- you went into the substantive (Unintelligible).

1 THE COURT: I'm sorry. I -- I read your brief.
2 And I did consider it. Was there -- and I -- I didn't
3 see that you were trying to get -- to say something.
4 But what were you trying to say?

5 MR. MILITELLO: And I guess this would go back to
6 the argument, if the court would still offer a moment of
7 consideration as to that issue.

8 The whole issue of procedural versus
9 substantive --

10 THE COURT: Yeah.

11 MR. MILITELLO: -- we -- we -- we don't get to that
12 issue because this is a new statute. This is not an
13 amendatory statute.

14 THE COURT: Um-hum.

15 MR. MILITELLO: The original court which we cited
16 in our piece was the Commonwealth Edison case, which set
17 down the -- and when counsel was pointing out the
18 legislative intent. But then the second part of that
19 was looking at these three other tiers as far as
20 applying back retrospect.

21 The -- there's a second set of cases that
22 came back that said -- regarding the substantive and
23 procedural pieces, which Mr. Kelly talked about. But we
24 don't even get to that issue because this is not a

1 statute on statutes case.

2 Section 4 of -- of -- let me get the exact
3 cite. This is the (Unintelligible) law, 5 I.L.C.S. 70/4
4 is the reason why the whole issue of procedural versus
5 substantive came into place because the statute on
6 statutes.

7 And the court -- the Supreme Court in
8 Gleason, I believe, brought that forward. And that's
9 where the whole issue of procedural versus substantive
10 come forward. And then if it was procedural, then you
11 look at these three other issues.

12 Since this is a new statute, we don't even
13 get to the statute on statutes case so we go directly to
14 those three issues of basically -- make sure I got them
15 right -- whether it will impair a party's
16 right possessed when acting.

17 And at that time the taxpayer still had the
18 right to act. They could still file the suit. There
19 was nothing impairing it.

20 The second one was --

21 THE COURT: On the -- on the entry of the -- the --
22 when they -- the statute become effective in September?
23 Or am I -- are we talking about something else?

24 And let me clarify. You're saying when it

1 affects their right to bring suit essentially.

2 Yes, go ahead.

3 MR. MILITELLO: Yes, so -- so there is -- there's
4 three statutes.

5 THE COURT: Um-hum.

6 MR. MILITELLO: The court said let's look at three
7 issues as -- as to whether or not it's going to impact
8 the parties in this case.

9 And the first one was would it impair parties
10 that possessed the right that -- when they acted.

11 So if you look at these two pieces, you'd
12 have the township, when they acted, it may or may not
13 have had an effect. And the taxpayer, as long as they
14 followed the statutory process of filing their suit
15 within the timely process, it wouldn't have affected.

16 The second piece, which is interesting here
17 and I think --

18 THE COURT: Um-hum.

19 MR. MILITELLO: -- this is where your Honor was
20 going as far as the liability part of it, it is
21 addressed in the second part. And it says increases a
22 party's liability for past conduct.

23 That statute doesn't increase the liability
24 to either one of them. If anything, it reduces the

1 liability. So that's not an issue there.

2 THE COURT: How? I guess I'm not following you.

3 MR. MILITELLO: Well, it -- the court said when
4 looking at the retroactivity piece, the question is, is
5 there an increase in party's liability for past conduct.
6 So as to that (Unintelligible) -- so we're not going to
7 apply it retroactively if it increases liability.

8 So the question then becomes, Township, when
9 you took that act, did it increase your liability. I
10 would have to say no because it's not impacting as far
11 as --

12 THE COURT: But it arguably impacts their exposure,
13 the taxpayers'.

14 MR. DWYER: Taxpayers' liability.

15 MR. MILITELLO: The taxpayers' liability, their
16 liability is still their tax bill at the time that they
17 pay their tax bill.

18 THE COURT: Um-hum.

19 MR. MILITELLO: The question is when the -- not the
20 conduct of the township. There is no conduct on behalf
21 of the taxpayer. The conduct is of -- of in this
22 particular case, the township. And the conduct of the
23 township is they adopted a levy. And we're not
24 increasing -- had it been reversed around where it would

1 have increased the liability, then it would impact -- it
2 would impact the township.

3 THE COURT: When -- when you -- and the -- the
4 analogy -- I won't say analogy -- but as I looked at
5 this before, the township, by virtue of this statute,
6 could legalize what arguably was an illegal increase or
7 previous increase in the taxes the taxpayer has to pay
8 because previously the threshold that, as we discussed,
9 would have been 2.1. Now they've made it 2.5.

10 So what was previously inappropriate, the
11 2.01 rate, is now retroactively being made appropriate
12 to the detriment --

13 MR. MILITELLO: Yeah, but I -- I don't think that's
14 what -- the cases -- they talk about -- and that's why
15 in our brief we talked about the -- the range. And
16 we're -- this -- the statute is merely addressing the
17 method by which you're coming to the calculations. So
18 it creates --

19 THE COURT: I agree with that --

20 MR. MILITELLO: Yeah.

21 THE COURT: -- but the --

22 MR. MILITELLO: But the case still remains.

23 THE COURT: -- application --

24 MR. MILITELLO: They can still file the case and --

1 they can still file the case. And they can still
2 attempt to prove accumulation. And the township still
3 has the ability to show whether or not that accumulation
4 was proper --

5 THE COURT: Yeah.

6 MR. MILITELLO: -- that it was not proper. And 2.5
7 is just a method or a benchmark by which the township
8 can procedurally follow (Unintelligible).

9 Now, I'm not sure that, you know, substantive
10 or procedurally. But I think the issue is not so much
11 that as more of whether or not there's a direct impact
12 and whether or not this Commonwealth Edison applying
13 those three pieces when looking back at the
14 retroactivity --

15 THE COURT: Um-hum.

16 MR. MILITELLO: -- has been met.

17 I've heard no testimony from the plaintiff or
18 anything in the brief indicated that it would impact
19 them. There's been no argument that -- that this is an
20 amended statute. They talked about the structural act,
21 which is an amended statute, again applying the statute
22 on statutes.

23 And this is an increase in any liability on
24 behalf of the township. But anything -- it's

1 identifying a -- a ratio that can be applied in
2 determining how to move forward.

3 The case still goes forward.

4 THE COURT: Um-hum.

5 MR. MILITELLO: It's just a method by which it's
6 determined.

7 THE COURT: But the -- the case as I -- as I see
8 it, if we increased the ratio to 2.5, then that means a
9 previously valid cause of action for two and a quarter
10 is now largely -- is pretty much extinguished. So it --
11 that's the problem I'm running into --

12 MR. MILITELLO: But --

13 THE COURT: -- with this -- with this argument.

14 MR. MILITELLO: But that would also affect the --
15 the counter argument to that would be is that a
16 two point -- and they say that there's a range, a range
17 of bringing the case. So all this does is get the case
18 in front of the court. The 2.25, you -- you could still
19 decide that that's not excess accumulation based on --

20 THE COURT: True.

21 MR. MILITELLO: -- capital funds, whether or not
22 there's funds in excess. So it doesn't impact the
23 ability to move forward.

24 THE COURT: It -- it changes the -- the threshold

1 and --

2 MR. MILITELLO: For purposes of a directed finding

3 --

4 THE COURT: -- and I think it changes their -- it
5 changes their ability to bring the -- the client because
6 if there was a 1.9 --

7 MR. MILITELLO: Your Honor, the only thing I would
8 ask the court to do is to consider is --

9 THE COURT: What you got?

10 MR. MILITELLO: -- Schweickert versus. Let me give
11 a copy to counsel. Well, Schweickert versus --

12 THE COURT: 355 Ill. App. 3d 439.

13 MR. MILITELLO: In this particular --

14 MR. DWYER: Did you say 459, Judge?

15 THE COURT: 439.

16 MR. DWYER: Do you have a copy, Jim?

17 MR. MILITELLO: It's marked up. Go ahead take a
18 look.

19 MR. DWYER: Oh, thank you.

20 MR. MILITELLO: In this particular case it talks
21 about -- it originally cites to the three tier test
22 that's used. However, again, I would say that we don't
23 have to use the three tier. We can just -- we move it
24 to the two tier. But it -- but it talked about and then

1 went analysis into the one through three items that I'm
2 talking about now, which is also in the Commonwealth
3 Edison case.

4 And -- and in that particular case -- in this
5 particular case, it found -- it was a case where a
6 landlord had a notice of a lien; and a bank also had a
7 lien.

8 THE COURT: Um-hum.

9 MR. MILITELLO: And the question was whether or not
10 there was a modification of this amendment in the
11 statute, which then affected the statute on statutes.
12 And then the whole issue of substantive versus
13 procedural came into effect.

14 But the court went on to look at those three
15 issues of -- of whether or not it impacted, whether or
16 not the party could have still brought the lawsuit,
17 whether or not it, in fact, imposed any new duties.

18 And that was the third piece that I was
19 getting into is that this statute imposes no additional
20 duties on the part of the township and or the taxpayer.

21 The statute allows for a levy. The tax --
22 the statute allows for the adoption of budgets and
23 appropriations and the filing, all the rest of it.
24 Those are all vested rights and vested interest

1 (Unintelligible) as (Unintelligible) no additional
2 duties. It's just a mathematical formula as far as
3 providing the process.

4 THE COURT: And going -- relying on Schweickert --
5 Schweickert -- all right -- it says an amended statute
6 has a retroactive impact or effect if it, one, impairs
7 rights that a party possessed when it acted.

8 And I think that it does in this case.

9 Increases a party's liability for past
10 conduct.

11 Arguably, I think it does --

12 MR. MILITELLO: Okay.

13 THE COURT: -- because it exposes them to a higher
14 tax rate.

15 And three, imposes new duty.

16 But -- I -- that's or. I don't think that
17 really applies here.

18 So I -- I do think one and two here tell me I
19 can't apply it retroactively.

20 MR. DWYER: In addition to that, your Honor, on
21 Page 4 of 5 in the -- in the last paragraph on the
22 bottom right, it defines a substantive change in the law
23 as (Unintelligible) establishing and creating or
24 defining right.

1 Clearly, this law has done that because, you
2 know, prior to the actual law in 2014, we filed a claim.
3 And now that claim is -- is defining and establishing
4 and creating a different standard for the actual filing
5 of that claim.

6 So initially, when you were talking to
7 Mr. Kelly, you said, you know, how is it procedural when
8 the court looks at it as substantive. And I think this
9 case actually says that this particular law that we're
10 talking about is substantive.

11 THE COURT: And I -- and I think one of the things
12 you said is that the -- the ratio became relevant on the
13 motion for directed verdict.

14 And -- and certainly my application and use
15 of that ratio has had a substantive impact on the
16 taxpayers, at least perhaps in the other case if not
17 here, because that -- when they didn't (Unintelligible)
18 it, I denied them the right to proceed with -- with
19 respect to certain aspects of their case because they --
20 they couldn't establish a ratio in excess of two.

21 So I -- even with Schweickert, I think I come
22 to the same conclusion, right or wrong.

23 And anything else you want to say?

24 MR. MILITELLO: No, your Honor.

1 THE COURT: Okay. And yes, I freely admit I -- I
2 could be wrong. But this is -- this is my
3 interpretation of how to apply the statute. I suspect
4 there's going to be somebody else who will look at that
5 and (Unintelligible).

6 Where -- where does that leave us?

7 MR. DWYER: Well, with that order today, your
8 Honor, what we want that to say -- and I think -- and
9 tell me if I'm wrong, Mr. Kelly -- but I think
10 Mr. Kelly's position was my proposed order was too long.
11 It was overreaching. And I think -- I think -- what I
12 -- what I -- what I got -- what I infer from what he
13 said is that the potential order in two days time would
14 be a lot shorter.

15 I don't know if that's what the court wants
16 or -- I think that's what Mr. Kelly --

17 MR. KELLY: I think we should address it now. I --
18 I agree with Mr. Dwyer.

19 THE COURT: Okay.

20 MR. KELLY: I think the order should state that the
21 court in these specific funds found that there was --
22 that excess accumulation.

23 THE COURT: I do.

24 MR. KELLY: Now, as to the exact percentages or the

1 amount in each fund, I -- you know, that's different. I
2 mean -- and I'll be quite frank, Judge. I did some
3 calculations in the interim. And on some of the funds
4 the difference between some calculations -- especially
5 with the Social Security, I.M.R.F., audit fund and
6 insurance fund -- with the exception of the insurance
7 fund, I found that I had -- the differences between my
8 calculations and Mr. Dwyer's were probably de minimis.

9 The only fund that I would have argued we
10 have a real difference on is actually the town fund,
11 where I calculated it as under two. He calculates it as
12 .05 over.

13 THE COURT: Um-hum.

14 MR. KELLY: But other than that, I mean, my
15 calculations and his are relatively close. I think
16 within, you know, probably --

17 THE COURT: I'll let you check the math.

18 MR. KELLY: Yeah.

19 MR. DWYER: Well, your Honor --

20 MR. KELLY: But I think --

21 MR. DWYER: What -- what he's saying is our math is
22 different. And clearly, Ms. Bowman testified --

23 THE COURT: I -- I found in your favor on --

24 MR. DWYER: No, I know.

1 MR. KELLY: Right.

2 MR. DWYER: I know. In fact, that's why I -- I --

3 MR. KELLY: That's correct.

4 MR. DWYER: -- I want to -- I want to make this
5 clear.

6 THE COURT: What -- and what I -- what else I was
7 saying is I think the factual findings are objectively
8 accurate as contained in --

9 MR. KELLY: Um-hum.

10 THE COURT: -- plaintiff's order. But I -- I want
11 to give you an opportunity to take a look at it to see
12 if you dispute any of the assertions contained in these
13 and to double check his math.

14 MR. KELLY: I -- I -- I'm -- primarily, Judge, I'd
15 like to calculate or check the refund amounts.

16 THE COURT: Okay.

17 MR. KELLY: That's fine.

18 THE COURT: And if -- if that all works out, I will
19 -- I will enter this order.

20 MR. KELLY: Okay, Judge.

21 THE COURT: Anything else that we need to do today?

22 MR. DWYER: And if it doesn't work out?

23 THE COURT: If it doesn't -- well --

24 MR. DWYER: (Unintelligible) 1:30 on Thursday?

1 THE COURT: The -- I don't know if I'll be able to.

2 The only problem I anticipate out of the
3 defense is that they're going to dispute some of the
4 numbers and --

5 MR. DWYER: Which numbers, Judge?

6 THE COURT: Well, I -- I don't know. I -- I don't
7 know. I mean, I wanted to (Unintelligible) dispute the
8 numbers -- dispute the math as to how you get to the
9 refund.

10 MR. KELLY: Well, I think you've decided --

11 THE COURT: I -- I -- I thought I had.

12 MR. KELLY: I thought you made -- actually during
13 the case, I thought you made some -- probably they
14 weren't couched in terms of findings, but I took them
15 that way.

16 THE COURT: And it's --

17 MR. DWYER: (Unintelligible).

18 THE COURT: -- I'm giving you a chance to double
19 check his calculations.

20 MR. KELLY: Right. Yes, Judge.

21 THE COURT: And I -- if you have a -- if you have
22 an argument against his calculation, I'll hear it.

23 MR. KELLY: Um-hum.

24 THE COURT: Because I -- I don't want to cut that

1 off and there's been quite a lot of stuff here.

2 MR. KELLY: Well -- and I'll be clear, Judge. I
3 don't look at going backward in time with --

4 THE COURT: Okay.

5 MR. KELLY: -- regard to the formula. I -- we're
6 really talking about the -- and as I said, some of the
7 numbers that both Mr. Dwyer and I have were -- I'll
8 accept his. I mean, we're talking about the refund may
9 be changed by fifty or a hundred dollars.

10 THE COURT: Okay.

11 MR. KELLY: I mean, that's just not worth arguing
12 about.

13 THE COURT: I would agree with that.

14 MR. DWYER: We all agree on that.

15 MR. KELLY: Yeah, I think the issue will be, for
16 example, with the town fund and the building equipment
17 fund. And those are where the issues are going to be.

18 THE COURT: If --

19 MR. KELLY: And the calculation of the refund.

20 THE COURT: Here's -- here's the worst case
21 scenario: Let's --

22 MR. KELLY: Accepting -- accepting the proved up
23 numbers that I believe this court has accepted, which --

24 THE COURT: You -- let's -- let's say you dispute

1 significantly -- have a significant dispute --

2 MR. KELLY: Um-hum.

3 THE COURT: -- in those numbers. What I would
4 think might be the appropriate way to address it is to
5 enter an order Thursday. And then you could file your
6 motion to reconsider the specific number that you're
7 objecting to.

8 MR. KELLY: Okay, Judge.

9 THE COURT: But I -- I want to give you an
10 opportunity to double check the numbers he's presenting.
11 And if there's an issue, hopefully you'll come to some
12 sort of an agreement as to what number can be entered
13 and then (Unintelligible) --

14 MR. KELLY: Yes, Judge.

15 THE COURT: -- (Unintelligible).

16 MR. DWYER: Judge, what -- what do you want the
17 order today to say?

18 THE COURT: Continued to Thursday for entry of an
19 order of judgment.

20 MR. DWYER: Okay. Just -- just --

21 THE COURT: (Unintelligible).

22 MR. DWYER: -- blank like that?

23 THE COURT: Yeah, because --

24 MR. DWYER: Nothing -- nothing substantive today.

1 THE COURT: An order of judgment consistent with
2 the court's findings --

3 MR. DWYER: Okay.

4 THE COURT: -- on the record is fine.

5 MR. DWYER: Okay.

6 MR. KELLY: And do you want a separate order with
7 respect to the statute?

8 THE COURT: Probably would be appropriate. It --
9 yeah, I think -- I think that makes sense.

10 MR. KELLY: Okay, Judge.

11 THE COURT: Okay. And when did you want to come
12 back?

13 MR. DWYER: Well, Judge, we -- we have -- we have
14 another date on this case, your Honor.

15 THE COURT: We do?

16 MR. DWYER: We don't have to -- yeah.

17 THE COURT: Okay.

18 MR. DWYER: No? Yes, (Unintelligible) --
19 (Unintelligible) made a date.

20 VOICE: (Unintelligible).

21 MR. DWYER: Oh, excuse me. Excuse me. I'm sorry.

22 VOICE: (Unintelligible).

23 MR. HOFFMAN: I don't think we -- other than our
24 resolving our 201(k) issues. And if that's not

1 resolved, obviously, I'll be bringing a motion. But
2 otherwise, there's nothing else -- plaintiff hasn't
3 filed a motion for summary judgment against the county
4 yet. I presume that's going to come. But that's where
5 we are.

6 THE COURT: Okay.

7 MR. DWYER: Your Honor -- oh, you just --

8 MR. MILITELLO: Like, on the 2016 case, we just
9 need leave to amend our (Unintelligible).

10 MR. DWYER: This is 15.

11 MR. MILITELLO: I know. We asked for --

12 MR. DWYER: Oh.

13 MR. MILITELLO: -- we asked for -- you -- you were
14 thinking this case. But we asked for it on the 2016.

15 MR. DWYER: Right.

16 MR. MILITELLO: So we'd also ask for it on the 2015
17 case as well.

18 MR. DWYER: Oh, no objection, Judge.

19 THE COURT: Okay. You can do that.

20 MR. DWYER: Should we set a --

21 THE COURT: How long?

22 MR. MILITELLO: 28 days.

23 THE COURT: 28 days.

24 MR. DWYER: Set a status for, like, 30 days for

1 status on pleadings --

2 THE COURT: Let's go 60 since I'm giving him
3 28 days. 60 --

4 MR. DWYER: Well, he's just going to amend his
5 affirmative defenses.

6 THE COURT: Okay.

7 MR. DWYER: He's not -- I don't think there's going
8 to be any motions involved.

9 THE COURT: I'll --

10 MR. DWYER: Jim, you just -- you -- you just
11 (Unintelligible).

12 VOICE: (Unintelligible).

13 MR. DWYER: -- (Unintelligible) retroactive effect;
14 right?

15 MR. MILITELLO: That and -- and two other minor
16 issues.

17 MR. DWYER: Okay.

18 THE COURT: January -- how is Friday, January 26?
19 That's 45 days from today.

20 MR. DWYER: Sure.

21 THE COURT: Does -- does that work?

22 MR. DWYER: Yeah. Nine a.m.?

23 THE COURT: Nine a.m.

24 MR. MILITELLO: For status and which case or cases?

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MR. DWYER: 15 TX 5.

MR. MILITELLO: On this case. Okay.

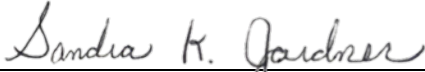
WHICH WAS AND IS ALL THE EVIDENCE OFFERED
AT THE HEARING OF SAID CAUSE

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STATE OF ILLINOIS)
) SS:
COUNTY OF MCHENRY)

IN THE TWENTY SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

I, Sandra K. Gardner, an Official Court Reporter for the Circuit Court of McHenry County, Twenty Second Judicial Circuit of Illinois, do hereby certify that, to the best of my ability, the foregoing is a true and accurate transcript prepared by me of the electronically recorded testimony and proceedings in the above-entitled cause, which recording contained a certification in accordance with rule or administrative order.



Sandra K. Gardner, C.S.R.
084-001984
Official Court Reporter

Dated this 19th day
of December, 2018