

paying for its annual audits in violation of the School Code. The result of these benefits being conferred upon LT is that the other public school districts in Lyons Township are being forced to subsidize LT – the largest and wealthiest school district.

In an effort to keep this unlawful subsidy, LT asserts as its Third Consolidated Affirmative Defense the “voluntary payment doctrine,” which provides that certain payments made under a claim of right cannot be recaptured in subsequent litigation. No Illinois court has ever applied this doctrine against a public body, however, and other jurisdictions have declined to do so. Moreover, the undisputed facts establish that the doctrine is inapplicable to this case, as it is undisputed the Trustees have never made a payment to LT to which the doctrine might apply. This affirmative defense should be dismissed.

LT asserts as its Fourth Affirmative Defense the “American rule” regarding attorneys’ fees, which states that each party must pay its own attorneys’ fees, absent fee-shifting language found in a statute or contract. The Trustees have incurred legal fees prosecuting this lawsuit and defending against LT’s counterclaims; those fees are part of the Treasurer’s expenses of office; and Section 5/8-4 of the School Code mandates that those expenses be allocated among all of the school districts. LT asserts that the common-law “American rule” overrides the School Code and exempts LT from paying its share of the Treasurer’s expenses that include attorneys’ fees. In short, LT wants this Court to rewrite the School Code to excuse it from paying statutorily-mandated expenses that all of the other districts pay. LT’s theory fails as a matter of law and this affirmative defense should also be dismissed.

II. AS A MATTER OF LAW THE VOLUNTARY PAYMENT DOCTRINE DOES NOT APPLY TO THE TRUSTEES' CLAIMS

The voluntary payment doctrine provides that, absent fraud, duress or mistake of fact, money paid on a “claim of right” to the payment cannot be recovered on the ground that the claim was illegal. *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 801 (3rd Dist. 2007). This doctrine is inapplicable to the Trustees claims in this case, as a matter of law, for two reasons.

First, no Illinois court has applied this doctrine to bar a public body from asserting a claim to recover public funds. Other jurisdictions, moreover, have held that the doctrine does not apply where the recovery of public funds are at issue. *See, e.g., Kansas City v. Halvorson*, 177 S.W.2d 495, 498 (Mo. 1943); *Township of Normania v. Yellow Medicine County*, 286 N.W. 881, 883 (Minn. 1939); *State ex rel. Hunt v. Fronizer*, 1906 WL 1164 (Ohio C.C. May 19, 1906); *Wiles v. McIntosh County*, 88 N.W. 710, 712-13 (N.D. 1901); *Village of Ft. Edwards v. Fish*, 50 N.E. 973 (N.Y. 1898).

The logic behind this point of law is that special rules govern a public body’s attempt to recover public funds. For example, the Illinois Supreme Court had directed that where a public body is seeking to recover public funds in furtherance of a “public right,” the statute of limitations is not applicable against the public body. *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 472 (1989); *City of Shelbyville v. Shelbyville Restorium, Inc.* 96 Ill. 2d 457, 459-61 (1983). Likewise, principles of estoppel may not be applied against a public body absent extraordinary and compelling circumstances. *Matthews v. CTA*, 2016 IL 117638 at ¶94. Likewise, *laches* is generally considered inapplicable to public bodies. *Van Milligan v. Board of Fire & Police Comm’rs of Village of Glenview*, 158 Ill. 2d 85, 90-91 (1994). Nor may the concept of apparent authority be invoked against a public body. *Patrick Eng’g, Inc. v. City of*

Naperville, 2012 IL 113148 at ¶39. This Court should decline LT’s invitation to be the first court in Illinois to apply this doctrine to bar a public body from its attempt to address the wrongful disposition of public funds.

The second reason this doctrine fails as a matter of law is that the undisputed facts establish that the Trustees have never made a payment to LT. The Trustees current claims against LT involve two different unlawful benefits that LT received.¹

First, the former Treasurer wrongfully paid for LT’s annual audits and treated those payments as an expense of his office. This means that every school district was billed for (and paid for) a share of LT’s audits; LT did not have to absorb that cost itself. Conversely, all of those same districts also paid for their own audit – only LT got special treatment. It is undisputed that while the Treasurer paid LT’s audit bills, those payments were made directly to the auditing firm, Baker Tilly. Baker Tilly, however, is not being sued for the payments and Baker Tilly is not asserting this doctrine as a defense. As the payments in question were never made to LT, the doctrine is inapplicable as a defense for LT.

Next, it is undisputed that LT failed to pay its pro rata share of the Treasurer’s expenses of office during the years in question. The Trustees are seeking to recover the funds billed to LT but which LT refuses to pay. Again, because this claim does not involve any payments being made to LT, the doctrine is not available as a defense to LT. For these additional reasons, the

¹ The Trustees have a third claim to reallocate wrongful allocations of investment income to LT. In gist, the former Treasurer over-allocated investment generated by pooled investments to LT (thereby under-allocating that same income to the other districts). Although this Court’s ruling applying the statute of limitations bars this claim for now, the voluntary payment doctrine would also be inapplicable to this third claim. The allocations of interest were not made under a “claim of right” by LT; that is to say LT never claimed any right to the specific amounts allocated.

voluntary payment doctrine does not apply to this case as a matter of law, and this Court should dismiss LT's Third Consolidated Affirmative Defense.

III. THE "AMERICAN RULE" REGARDING ATTORNEYS' FEES HAS NOTHING TO DO WITH THIS CASE AND DOES NOT BAR THE TRUSTEES' CLAIMS

The Trustees appoint a Treasurer who provides financial services for the public school districts in Lyons Township. 105 ILCS 5/5-2; 105 ILCS 5/8-1. The Treasurer is compensated and the Treasurer has expenses of office, although the Trustees do not have a tax base to pay for the Treasurer's office. Accordingly, the School Code requires that each district "shall pay a proportionate share of the compensation of the township treasurer serving such district...and a proportionate share of the expenses of the treasurer's office." 105 ILCS 5/8-4. The School Code also provides the formula for determining the proportionate shares of each district. 105 ILCS 5/8-4. Each year, the Treasurer sends a bill to each district (including LT) for its share based on this statutory formula, and each year those districts pay that bill (except LT). LT has refused to pay that portion of its annual bill that includes the Trustees' legal fees incurred in this lawsuit.

The Trustees are entitled to retain counsel, at their discretion, to pursue relief for violations of Illinois law:

it appears manifest that the trustees are given control of the school business of their township; are charged with its transaction, and are empowered to sue for money due the township or the school districts; that...they are vested with a discretion in the matter of its collection, and...have the right to direct the course of the proceedings, and select the persons and agencies through whom they will act.

Trustees of Schools, 271 Ill. App. 539, 547 (4th Dist. 1933).

The fact that this lawsuit was brought in the name of the Trustees, rather than the Treasurer, does not mean that the expenses are not the Treasurer's expenses; the Treasurer would not be the property party to bring suit because only the Trustees are authorized to do so. *See id.*

at 543 (holding that any such lawsuit must be brought in the name of township trustees rather than the township treasurer).

Accordingly, the expenses incurred by the Trustees in this case are expenses of the Treasurer's office and under Section 5/8-4 each district "shall pay" a proportionate share of those expenses. This conclusion is reinforced by the undisputed fact that the Trustees (and Treasurer) do not have a tax base or any source of income other than the payment of expenses as mandated by Section 8-4. If, as here, the Trustees bring suit to enable the Treasurer to collect funds due from LT, the legal fees are properly considered an expense of the Treasurer's office, and this Court should not apply a common-law doctrine to change statutory language and require the Treasurer to allocate his expenses other than that provided by Section 5/8-4.

LT's Fourth Consolidated Affirmative Defense, if applied, would contradict the mandate of Section 8-4; and, respectfully, rewriting the statutory formula is something best left to the legislature, not this Court. *See Prazen v. Shoop*, 2013 IL 115035, ¶ 38 ("It is the dominion of the legislature to enact laws and the courts to construe them, and we can neither restrict nor enlarge the meaning of an unambiguous statute."). Section 5/8-4 does not permit the Treasurer to allocate only some of his expenses to some districts, and some of his expenses to other districts, yet LT's theory would require the Treasurer to do exactly that, in violation of Illinois law.

In past briefing before Judge Reilly, LT attempted to find support for its position in *Village of Glenview v. Zwick*, 356 Ill. App. 3d 630 (1st Dist. 2005), but that case involves such a fundamentally different fact pattern that the difference is patent. In *Village of Glenview*, the Village enacted an ordinance providing that if the Village was the prevailing party in litigation the Village could recover its attorneys' fees from the other side. *Id.* at 632. The Appellate Court held that the ordinance was an unlawful exercise of the Village's home rule powers because a

municipality cannot enact a fee-shifting ordinance that changes the “American rule” and thereby place a chilling effect on persons who might wish to challenge a citation issued by the Village *Id.* at 640.

Here, conversely, the Trustees have not enacted any ordinance, but rather apply the School Code as it was written by allocating the Treasurer’s expenses among all the districts. The General Assembly, which is not limited by home-rule powers, saw fit to direct the Treasurer to allocate his expenses in this manner and only the General Assembly may change that direction.

LT’s argument also teeters on a slippery slope. Under LT’s theory, any governmental body engaged in litigation with a taxpayer would need to customize a tax bill to avoid running afoul of the “American rule.” Imagine a concerned taxpayer residing in LT’s district filing suit against LT. That taxpayer’s property taxes support LT, and so some portion of those taxes necessarily goes to pay LT’s attorneys’ fees. Under LT’s theory, the “American rule” means that the taxpayer is entitled to withhold some of his property taxes from LT, else he would be funding the litigation against him. This is, of course, an illogical position and LT cannot point to any case in which a court found that a neutral revenue measure (which is what Section 5/8-4 is) violated the “American rule” and thereby was unenforceable.

The Trustees are vested with discretion whether to pursue litigation on behalf of the Treasurer. Section 5/8-4 requires each district to pay its proportionate share of the Treasurer’s expenses. If some of those expenses happen to be legal fees that the Trustees, in their discretion, decided to incur, then LT is responsible for paying their share of those fees – as they are with any other expense the Treasurer incurs.

IV. CONCLUSION

Because both the Third and Fourth Consolidated Defense fail as a matter of law, this Court should dismiss each, and provide any such other relief as it finds appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2019, I electronically filed **MOTION TO DISMISS DEFENDANT'S THIRD AND FOURTH CONSOLIDATED AFFIRMATIVE DEFENSES** with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/Barry P. Kaltenbach_____