IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff and Counter-Defendant,	)	No. 13 CH 23386
v.	)	Hon. Thomas M. Mulroy
LYONS TOWNSHIP H.S. DISTRICT 204,	)	Calendar I
Defendant and Counter-Plaintiff.	)	(Transferred to Law)

LT'S RESPONSE TO THE TTO'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

Defendant and Counter-Plaintiff Lyons Township High School District 204 ("LT") provides this response to the Motion for Reconsideration ("the Motion") of Plaintiff and Counter-Defendant Township Trustees of Schools ("the TTO").

Since receiving this case by transfer in July 2018, this Court has made three substantive legal rulings. In the Motion, the TTO asks this Court to revisit and reverse all three rulings. The Motion fails to cite to, let alone meet, the Illinois standard for reconsideration motions. There are no newly decided legal authorities or newly discovered facts cited in the Motion, and the TTO is asking for a third consideration of its arguments in most instances. The TTO is continuing its inexhaustible pursuit of the TTO's 'great white whale' in this case, which is governmental immunity.

LT believes that the TTO did not file this motion in good faith. While sanctions under S. Ct. Rule 137 seem warranted, LT does not want to put this Court into an awkward situation right before the parties are to conduct a bench trial. Accordingly, LT is not requesting sanctions.

Also, in order to minimize the burden on LT in responding to the Motion, LT provides this short response that attaches and incorporates by reference its original briefs on the contested rulings.

II. THE STANDARD FOR RECONSIDERATION MOTIONS

"The purpose of a motion for reconsideration is to apprise the trial court of newly discovered evidence, a change in the law, or errors in the court's earlier application of the law." *Farley Metals v. Barber Colman Co*., 269 Ill.App.3d 104, 116 (1st Dist. 1994).

The Motion nowhere cites this standard, and the Motion makes no effort to meet the requirements of this standard. The Motion should be denied on this basis alone.

III. THE STATUTE OF LIMITATIONS DEFENSE

On July 31, 2018, this Court ruled that the 5-year statute of limitations in 735 ILCS 5/13-205 applied to the TTO's claims in this case. This has been a difficult ruling for the TTO to accept. Through August 2019, the TTO has incurred about $2.7 million in legal fees and expenses on this case. Its legal bills will exceed $3 million by the time this case is tried. But the TTO's best case scenario at the trial of this case, depending on which way the statute of limitations is applied, is (in rough numbers) involves a $1.4 or $2.0 million recovery. Knowing that it cannot truly win at trial, the TTO has decided to take one more shot at being allowed to sue LT for claims that date back as far as 1993 (*i.e.*, 20 years before the filing of this suit).

On the statute of limitations issue, the TTO presents an incomplete and inaccurate account of the events that led to this Court's ruling on July 31, 2018. The Motion (p. 6) states that LT filed a motion for partial summary judgment on the limitations issue in May 2017; suggests that Judge Hall "almost" ruled in favor of the TTO; and states that LT then moved for reconsideration of Judge Hall's decision in July 2018.

The actual procedural history is different, and it shows that the TTO has had ample opportunity to present its governmental immunity position to both Judge Hall and to this Court. In May 2017, LT filed a partial summary judgment motion on the limitations issue. In July 2017, the TTO filed a response. At the same time, the TTO filed a cross-motion for summary judgment on its claims and LT's affirmative defenses. In the TTO's 2017 motion, the TTO presented no argument on the limitations defense and simply cross-referenced its response to LT's motion. Thus, both LT and the TTO moved for summary judgment on the limitations issue before Judge Hall.

In February 2018, Judge Hall ruled that that she could not resolve the limitations issue on summary judgment. The Order states, "Defendant LT's Motion for Partial Summary Judgment, for the reasons stated in its oral ruling issued today in open Court, is denied without prejudice to proofs to be presented at trial." (Ex. 3 to Ex. A hereto.) In her oral ruling, she explained, "I'm going to deny the motion for Statute of Limitations without prejudice because I think there is some factual matters that may have a bearing on whether or not a Statute of Limitations will apply." (Ex. 4 p. 3 to Ex. A hereto.)

After receiving Judge Hall's ruling, the TTO filed a revised summary judgment motion in 2018. While the TTO's 2017 motion acknowledged that a ruling on LT's 2017 motion would resolve the limitations issue, the TTO's 2018 motion again raised the limitations issue. Judge Hall did not rule on the TTO's 2018 motion before transferring the case.

After the case was transferred to this Court, both LT and the TTO sought and received permission from this Court to file motions for reconsideration of Judge Hall's ruling. The Order of July 22, 2019 states, "The parties are granted leave to file motions for reconsideration of the Court's ruling on the limitations issue …." Thus, the parties agreed that the limitations issue was a purely legal question.

On May 29, 2018, both LT and the TTO filed 15-page briefs seeking reconsideration. The TTO decided to call its brief a motion for judgment on the pleadings and, in the alternative, for reconsideration for reasons that are not necessary to address here. After conducting a lengthy oral argument on July 31, 2018, this Court granted LT's motion, denied the TTO's motion, and ruled that the 5-year limitations period applies to the TTO's claims. The Court declined to find any valid basis for exempting the TTO from the statute of limitations.

On August 7, 2018, the TTO filed a motion for leave to file an interlocutory appeal on the limitations ruling. The Court denied that motion on August 8, 2019.

The Motion now asks this Court to revisit and reverse its July 31, 2018 ruling based on the *Shelbyville* and *AC&S* cases. The TTO cited to and discussed the *Shelbyville* and *AC&S* cases in thorough detail in the TTO's July 2018 reconsideration motion. The TTO also presented extensive argument concerning the *Shelbyville* and *AC&S* cases at the July 2018 oral argument.

The Motion presently before the Court simply contains a rehashing of its prior arguments seeking immunity from the statute of limitations. There are no new authorities or arguments for the TTO to present in the Motion, as this topic has been so thoroughly covered in the past. Also, as it has done before, the TTO presents a distorted and wishful account of Judge Hall's prior ruling – which, in any event, is irrelevant and unnecessary to argue about now.

Should this Court be inclined to re-visit its prior ruling, LT attaches and incorporates by reference (as Exhibit A hereto) LT's motion for reconsideration on the limitations issue filed in July 2018. LT's motion explains why controlling Illinois authorities, including the *Shelbyville* and *AC&S* cases and other pertinent decisions, do not exempt the claims of the TTO in this case from the statute of limitations.

IV. THE LACHES DEFENSE

The Motion also presents a re-hashing of the TTO's prior objection to LT's laches defense. The TTO made a thorough written argument on this issue in its 2018 summary judgment motion, which this Court denied in its entirety after argument on July 31, 2018.

The TTO asserts (p. 10) that this defense should be inapplicable to the TTO's claims as a matter of law, while simultaneously admitting that laches is a valid affirmative defense against the claims of a public entity where there are "unusual or extraordinary circumstances."

In July 2018 – and again in November 2019, in the context of the TTO's motion to strike the voluntary payment doctrine defense – the Court recognized that the Illinois law requirement of "unusual or extraordinary circumstances" cannot be transformed into a blanket immunity. The Motion presents no newly issued authorities or newly discovered facts in support of its argument on the laches defense.

Indeed, a careful reading of the Motion (p. 11) suggests that the TTO's real motivation behind raising the laches defense again is to somehow equate that defense with the limitations defense, and to persuade the Court that both defenses need to be resolved based on the evidence presented at trial. The Motion (p. 11) cites no authority for this proposition apart from the TTO's own "logic." Of course, the laches defense in this case is entirely fact-based, while the application of the statute of limitations – *as <u>both</u> parties argued to the Court in July 2018* – is a purely legal question with no disputed fact issues that can and should be resolved by the Court prior to trial. The TTO's attempt in the Motion to change its position, and to now argue that the limitations question involves disputed issues of fact (p. 11-13), is not a position taken in good faith.

Should this Court be inclined to re-visit its prior ruling, LT attaches and incorporates by reference (as Exhibit B hereto) that portion of LT's response to the TTO's 2018 summary judgment

motion addressing the laches defense. LT's response explains why controlling Illinois authorities, including the *Van Mulligan* case that the TTO has cited to in multiple briefs, do not entitle the TTO to judgment as a matter of law on the laches defense. LT's response also relies on *Trustees of Schools v. American Surety*, 307 Ill.App. 398 (1940), a case in which a Court sustained a laches defense raised against the township trustees of schools, the same type of governmental entity involved in this case: "[T]rustees [of schools] failed to exercise the diligence imposed on them by express statutory command," the Court ruled, and thereby failed to uncover their treasurer's misdeeds until it was too late to file suit. *Id.* at 408.

V. THE VOLUNTARY PAYMENT DOCTRINE DEFENSE

On March 8, 2017, LT filed its first amended affirmative defenses in this case, which included an affirmative defense based on the voluntary payment doctrine. On April 28, 2017, the TTO filed a reply that answered that affirmative defense instead of seeking to dismiss it. On September 24, 2018, the TTO filed a motion for summary judgment that asked for judgment on LT's voluntary payment doctrine affirmative defense. On July 31, 2018, this Court denied the TTO's summary judgment motion in its entirety.

In October 2019, the Court requested that the parties consolidate the two pending cases between the parties, which they did. In September 2019, the TTO filed a consolidated second amended complaint. On October 21, 2019, LT filed its answer, affirmative defenses, and consolidated counterclaim to the second amended complaint. LT's October 2019 affirmative defenses presented the same voluntary payment doctrine defense that the TTO had answered in 2017, and that the TTO had attacked unsuccessfully in summary judgment proceedings in 2018-19.

Nevertheless, in November 2019, filed a motion to dismiss that same affirmative defense. The TTO's motion to dismiss the voluntary payment doctrine made the same arguments and raised the

same authorities set forth in the TTO's 2018 motion. In November 2019, the parties fully briefed the TTO's motion to dismiss. On November 21, 2019, the Court conducted a lengthy oral argument and denied the TTO's motion to dismiss the voluntary payment doctrine. As the Court did in its 2018 rulings, the Court rejected the TTO's efforts to create a blanket immunity from LT's legal defenses where no such immunity exists under Illinois law.

Now, two months later, the TTO asks this Court to re-visit its November 2019 decision. The Motion presents no newly decided authorities or newly discovered facts in support of its argument. Again, the Motion (p. 12-13) tries to equate the voluntary payment doctrine defense with the statute of limitations defense, arguing that if the first needs to be resolved at trial then the second should as well. Again, the TTO cites no authority for this strained proposition that contradicts the TTO's prior position on the limitations issue.

Should this Court be inclined to re-visit its prior ruling, LT attaches and incorporates by reference (as Exhibit C hereto) that portion of its response to the TTO's November 2019 motion to dismiss addressing the voluntary payment doctrine defense.

VI. CONCLUSION

For all the reasons stated in this response, and in the prior briefs attached hereto and incorporated by reference, LT respectfully asks this Court to deny the TTO's motion for reconsideration in its entirety.

Respectfully submitted,

LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204

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CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on January 27, 2020, he caused the foregoing pleading to be served by email and eService on the following attorneys:

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DEFENDANT LT'S MOTION FOR RECONSIDERATION OF LT'S PARTIAL SUMMARY JUDGMENT MOTION ON THE STATUTE OF LIMITATIONS ISSUE

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EX. A

Defendant Lyons Township High School District 204 ("LT"), pursuant to 735 ILCS 5/2-1005(d), respectfully asks this Court to reconsider Judge Sophia Hall's ruling on LT's motion for partial summary judgment on its statute of limitations affirmative defense. LT asked Judge Hall to rule that the 5-year catch-all statute of limitations (735 ILCS 5/13-205) applies to all three of the financial and accounting claims of Plaintiff Township Trustees Of Schools ("the TTO"). The application of this limitations period would reduce the TTO's total claims, which stretch back to 1993, from $4.6 to $1.3 million, and eliminate one TTO claim and the need for experts.

The TTO cross-moved for summary judgment, and asked the Court to rule that the TTO's claims were exempt from the statute of limitations under two separate legal theories. Judge Hall decided that she could not resolve the limitations issue on summary judgment due to the existence of disputed factual issues. LT respectfully asks this Court to reconsider Judge Hall's ruling because she committed error in finding the existence of disputed issues of material fact, especially where both parties agreed the issue was ripe for resolution.

I. SUMMARY OF ARGUMENT

The TTO's Amended Complaint contains three claims, all of which concern financial dealings between the parties from 1993-2012. LT has the burden of identifying the applicable statute of limitations, and proving which portions of the TTO's claims are time barred. The burden of proof switches to the TTO to prove that its claims are exempt from the statute of limitations. There is no dispute that the TTO's claims are founded on provisions of the Illinois School Code; that neither the School Code nor the Code of Civil Procedure have a specific limitations period for these types of claims; and that the 5-year catch-all provision is the applicable statute.

The TTO contends that its claims are exempt from limitations under the "public rights" exception. This exception depends on the nature of the claim involved. The exception does not

exempt the claims of all government units, nor does it exempt all attempts to recover public funds. Rather, this exception allies to claims that involve critical rights of the general public, such as public safety and public health issues, and that involve remedial actions mandated by statute and further expenditures of public funds. It does not apply to claims of government units that address purely financial or accounting issues, which are more like private business claims.

Second, the TTO contends that its claims are exempt from limitations because its claims involve disputes over public money that the TTO holds in trust. The public trust exception depends on the nature of the funds and accounts at issue. The held in trust exception applies only to expressly established trust accounts, and it does not apply to agency accounts like the account that LT maintains at the TTO, from which only LT can authorize spending.

II. JUDGE HALL'S RULING ON THE LIMITATIONS ISSUE

In May 2017, LT filed its partial summary judgment motion on the limitations issue ("LT's Motion"). In July 2017, the TTO filed a response. At the same time, the TTO filed a cross-motion for summary judgment ("the TTO's 2017 Motion") on its claims and LT's affirmative defenses. In the TTO's 2017 Motion, the TTO presented no argument on the limitations defense and simply cross-referenced its response. Ex. 1. The Court stayed the TTO 2017 Motion pending consideration of LT's Motion. Ex. 2.

In February 2018, Judge Hall ruled that that she could not resolve the limitations issue on summary judgment. Her Order states, "Defendant LT's Motion for Partial Summary Judgment, for the reasons stated in its oral ruling issued today in open Court, is denied without prejudice to proofs to be presented at trial." Ex. 3. In her oral ruling, she explained, "I'm going to deny the motion for Statute of Limitations without prejudice because I think there is some factual matters that may have a bearing on whether or not a Statute of Limitations will apply." Ex. 4 p.3.

While not ruling on the TTO's argument on the public trust exemption, Judge Hall suggested she did not regard this position as viable. *Id.* p.6-7. On the public interest exception, she made favorable comments, *id.* at p.8-9, but stated that she did not have sufficient information about the accounts, the movement of funds, and the relationship of the claims to the applicable legal precedent to resolve the issue without the presentation of evidence at trial. *Id.* p.7-8.

After receiving Judge Hall's ruling, the TTO filed a revised summary judgment motion ("the TTO's 2018 Motion"). While the TTO's 2017 Motion acknowledged that a ruling on LT's Motion would resolve the limitations issue, the TTO's 2018 Motion asked for a second bite at the apple. Judge Hall did not rule on the TTO's 2018 Motion before transferring the case. Now, this case is before a newly assigned Circuit Judge. LT appreciates the Court granting the parties leave to seek reconsideration of the Court's ruling on the statute of limitations.

III. THE STANDARDS FOR SUMMARY JUDGMENT AND RECONSIDERATION

Pursuant to 735 ILCS 5/2-1005(d), a Court may determine that "there is no genuine issue of material fact as to one or more of the major issues in the case." Under Illinois law, "The applicability of a statute of limitations to a cause of action presents a legal question …." *Travelers Cas. & Sur. Co. v. Bowman*, 229 Ill.2d 461, 466 (2008). "The purpose of a motion for reconsideration is to apprise the trial court of newly discovered evidence, a change in the law, or errors in the court's earlier application of the law." *Farley Metals v. Barber Colman Co*., 269 Ill.App.3d 104, 116 (1st Dist. 1994).

IV. THE APPLICABLE 5-YEAR STATUTE OF LIMITATIONS

Which statute of limitations applies in this case depends on the nature of the parties and the legal grounds for the TTO's three claims. Over a century ago, money management and accounting were difficult tasks beyond the capability of most school districts. Illinois set up a

political subdivision in each township called the township trustees of schools. The trustees were elected officials who appointed a treasurer. They collect property tax revenues earmarked for school districts within the township, manage the investment of the schools' funds, and perform accounting functions for the schools. Ex. 5. LT is the largest school district in the TTO's jurisdiction. LT owns about 25 percent of the commingled investment pool that the TTO manages for LT and the other school districts. Ex. 6 p.26.

In this case, the TTO bases all three of its claims on various provisions in the School Code, 105 ILCS 5/1 *et seq.* Ex. 7. First, the TTO contends that it paid for LT's annual audit for 19 years, but that the TTO did so improperly under Article 3, Section 7 of the School Code, and the TTO should be allowed to recoup those payments from LT ("the Audit Payments Claim"). *Id.* ¶ 48, 54. Second, the TTO contends that it overallocated investment income to LT relative to the other districts for 17 years under Section 8-7 of the School Code, and that the TTO should be able to recoup those funds from LT ("the Income Allocation Claim"). *Id.* ¶ 40, 44. Third, the TTO contends that LT failed to pay its pro rata expense bills in full for 12 years under Section 8-4 of the School Code, and tries to disavow an agreement between the parties to offset LT's business function costs against those expense charges ("the Pro Rata Claim"). *Id.* ¶ 25-26, 33-36.

The School Code does not include a statute of limitations, and the Code of Civil Procedure does not contain a limitations period for claims under the School Code. Where the Code does not list a limitations period for a particular claim, the five-year catch-all limitations period applies. 734 ILCS 5/13-205 (governing "all civil actions not otherwise provided for").

The Supreme Court of Illinois has emphasized that statutes of limitations are favored because they are necessary to prevent injustices to litigants. "A statute of limitations is by definition an arbitrary period after which all claims will be cut off. However, the need to encourage

claimants to investigate and pursue causes of action in order to discourage delay, in time, outweighs the right to litigate a claim." *Langendorf v. City of Urbana*, 197 Ill.2d 100, 110 (2001). "Delayed claims will almost certainly prejudice defendants, who must defend against claims arising out of traumatic events long after witnesses' memories have faded and evidence has become unavailable for testing and inspection." *Golla v. Gen. Motors Corp*., 167 Ill.2d 353, 370 (1995). These fairness considerations are critical in our case, where the TTO waited up to 19 years to assert a legal claim against LT, and only did so due to a change in leadership at the TTO.

Furthermore, there is no dispute in this case about the impact of the 5-year limitations period in this case: barring claims based on events and transactions prior to October 17, 2008 (5 years before filing). This bar would reduce the Audit Payments Claim from $511,068.60 to $164,435.35. Ex. 8. This bar would reduce the Income Allocation Claim from $1,427,442.04 to zero, and thus eliminate the need for expert accountants. Ex. 9. This bar would reduce the TTO's pro rata expense claim from $2,628,807 to $1,080,160. Ex. 10.

V. THE PUBLIC RIGHTS EXCEPTION TO LIMITATIONS

Once LT has established the applicability of a statute of limitations to the TTO's claims, the burden shifts to the TTO to prove that an exception to that limitations period applies. *Ocasek v. City of Chicago*, 275 Ill.App.3d 628, 632 (1st Dist. 1995). Based on the uncontroverted facts of this case, the TTO cannot meet its burden of proving that the public rights exception to the statute of limitations applies to any of its three claims. Judge Hall erred when she found there were disputed factual issues concerning this exception that needed to be resolved at trial.

When considering claims of governmental bodies, Illinois courts have distinguished cases involving "public rights" from those involving "private rights." The involvement of public money or public government units is not determinative. Rather, the public versus private distinction

depends on whether the government unit's claims are based on general public interests involving health or safety, and the remedial expenditure of public funds pursuant to legal requirements, or whether the dispute involves financial transactions that are more like private corporate claims.

A. The Applicable Case Law

The standards for applying the public rights exception were established in the Supreme Court's decisions in *Board of Education v. A, C & S, Inc.*, 131 Ill.2d 428 (1989), and *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill.2d 457 (1983). In *Shelbyville*, the city sued a home builder for failing to construct streets in a subdivision in accordance with the requirements of a city ordinance. *Id.* at 459. Many years later, the city "eventually constructed or repaired the streets at great expense to itself." *Id.* at 459-60. The Court held that the city's claim was exempt from the statute of limitations because "the safety of all persons who have occasion to use the streets at issue here will depend on the workmanlike construction and maintenance of the streets." *Id.* at 464. The Court further reasoned that the action was public in nature because the city had to spend public money for road work that the builder should have done under the ordinance, and the city had a responsibility under state statutes to maintain the roads. *Id.* at 464-65.

In the *A,C&S* case, 34 school districts sued 78 defendants involved in the manufacturing and distribution of asbestos-containing material. 131 Ill.2d at 436. The school districts were required by a state statute to remove or contain asbestos materials in public schools, and they expected to spend large amounts of money on the remedial work. *Id.* at 437. The Court held that the application of the statute of limitations depended on whether "the right that the government unit seeks to assert is in fact a right belonging to the general public, or whether it belongs only to the government or some small distinct subsection of the public at large." *Id.* at 472. More specifically, the Court had to consider a three-part test: "the effects of the interest on the public,

the governmental entities obligation to act on behalf of the public and the extent to which public funds must be expended." *Id.* at 476.

The Court concluded that the districts' claims were in the general public's interest because of the "interest in the safety of these public buildings and in the safety of a large segment of this State's population which attends the public schools." *Id.* at 473-74. The Court referenced the "property damage that will be costly to repair" and the "health concern involved." *Id.* at 474-75. The Court also relied on the state statute that required the schools to correct the asbestos problems and the state administrative oversight authority and grants set up for this effort. *Id.* at 474. The Court found that the asbestos projects "will run into the millions." *Id.* at 476. Accordingly, the Court held that the districts were not barred by the statute of limitations. *Id.*

The most recent Illinois decision on this exception is *Champaign County Forest Preserve Dist. v. King*, 291 Ill.App.3d 197 (4th Dist. 1997). In *Champaign County*, a forest preserve district claimed it was overcharged for liability insurance purchased over 6 years earlier. *Id.* at 199. Defendant raised the 5-year catch-all limitations period. *Id.* The Court applied the Supreme Court's three-factor test. On the effect of Champaign County's interests on the general public, the Court distinguished the liability insurance involved from the health and safety interests in the prior cases: "Unlike the governmental activities in *Shelbyville* and *A,C&S*, plaintiff's purchase of liability insurance in this case had no effect on the public at large. It did not make the public safer, nor did it reduce the likelihood of injury on plaintiff's property." *Id.* at 201.

For the second factor, the obligation to act, the Court determined that "although plaintiff was authorized to purchase insurance, it was not required to do so." *Id.* Nor was there a reference to a statute requiring the county to recoup alleged overcharges. *Id.* For the third factor, the necessity of spending public money, the Court noted that "the fact that public funds were used to purchase

insurance does not necessarily render it a public act. Otherwise, any use of public funds would always be considered a public act." *Id.* at 202. The Court therefore concluded that the district's purchase of insurance was private act subject to a limitations defense. *Id.*

A recent federal decision addressed the public rights test in the context of a village's claim for trespass and nuisance for flow of contaminants onto public land. *Village of DePue v. Viacom Int'l, Inc.*, 713 F.Supp.2d 774, 778 (N.D. Ill. 2010). The Court decided that the village's claims were time-barred under the Illinois cases, and reasoned that "lost potential tax and business revenues, in and of themselves, are not damages that are part of a 'public' cause of action, as they do not implicate the public's interest in health and safety, and merely affect the economic interests of the residents of the Village." *Id.* at 782.

There are two older Illinois cases, as well. In *People v. Oran*, 121 Ill. 650 (1887), the town of Oran waited 10 years to sue the town of Atlanta for money due on a land transfer. The Court decided that the 5-year statute of limitations barred the claim. *Id.* at 652-54. The Court held, "No public rights are involved in this case. The controversy relates solely to two townships…. The public will neither lose nor gain if the town of Atlanta is required to pay all of its indebtedness; nor will it affect the public if the town of Oran is required to contribute." *Id.* at 655-56.

The other older case is *People v. Knox*, 157 Ill.App. 438 (2nd Dist. 1910) (pre-1935 persuasive authority). In *Knox*, a county sought to recover allegedly excessive and wrongful funds paid to the sheriff. *Id.* at 438-39. The Court decided that the statute of limitations applied, and held that claims of municipalities are exempt from statutes of limitation only where the claims involve "governmental affairs affecting the general public." *Id.* at 439. The Court concluded that the alleged overpayments to the sheriff concerned "only private rights" because the general public "are not interested in the amount allowed for these county expenses." *Id.* at 440.

B. <u>The Audit Payments Claim: Private Rights</u>

The TTO's three claims are based on three different statutes, involve different facts, and must be considered separately for purposes of the exemption. For the Audit Payments Claim, the general public has no direct interest in which government unit – the TTO or LT – paid $511,068.60 to Baker Tilly from 1993-2012 (about $27,000/year) for the costs of LT's annual audits. The TTO admits that these payments "were knowing and intentional, i.e., payment was not accidentally made." Ex. 11 ¶ 33. This claim does not involve any public health or safety issues as in *Shelbyville* and *A,C&S*, and instead only implicates the types of expenses and inter-government financial dealings held to be private in nature in *Village of DePue*, *Knox*, and *Oran*.

The TTO argued to Judge Hall that it had an interest in reversing these payments because they were the fault of a rogue Treasurer, the now incarcerated Robert Healy. In fact, the TTO's Trustees who supervised Healy were aware of these payments. In a 1999 letter to LT and the Trustees, Healy wrote, "The trustees hire and pay for the audit of the school districts and the Treasurer's office in Lyons Township." Ex. 12 p.6. Trustee (now Judge) Neil Hartigan confirmed his belief that the TTO paid for all of the districts' audits. Ex. 13 p.25-26, 49.

On the obligation of the TTO to act on behalf of the public, the TTO contends that LT had an obligation to pay for its own audits under the School Code, and that the TTO must protect the interests of the other districts by enforcing this provision. However, Section 3-7 of the School Code states, "Each school district shall, as of June 30 of each year, cause an audit of its accounts to be made …." 105 ILCS 5/3-7. This provision also empowers the regional superintendent, in the event a district does not submit an audit, to pay for an audit and charge the cost back to the district. *Id.* This provision contains no requirement that LT pay for its own audit, a fact that the TTO's

representative deponent admitted; she testified that the statute "has no indication of who pays for an audit, just that one must be completed." Ex. 6 p.80-82.

As for the expenditure of public funds, the TTO already paid Baker Tilly years ago. There are no further funds that will be spent in connection with the Audit Payments claim, which is the same as in *Champaign County* and different than *A,C&S* and *Shelbyville*. The TTO claims that it is acting on behalf of the other school districts, and implies that it might share any recoveries with them, but that would not be an expenditure of public funds. In any event, the TTO already informed the other districts not to expect to receive any credits from the ongoing litigation or insurance recoveries due to the TTO's long history of deficit spending practices. Ex. 14.

C. The Income Allocation Claim: Private Rights

In the Income Allocation Claim, the TTO contends that the TTO overallocated to LT about $1.5 million in income over 17 years (about $88,000/year). Ex. 7 ¶ 44. There is no dispute that the TTO was solely responsible for these allocations and simply presented the end result to LT. As the TTO explains, this is a financial accounting issue among the school districts within the TTO's jurisdiction. *Id.* ¶ 43. The TTO admits it does not "have any understanding as to how or why the treasurer erroneously allocated" these funds. Ex. 6 p.172.

Although the TTO alleges that Healy overpaid LT relative to the other districts (which LT disputes), that still does not identify a public health or safety issue. This claim is an intergovernmental dispute held to a private right in *Oran*. It is not an overstatement to say that unless they read the Chicago Tribune editorials calling for the TTO's abolition, most of the general public is not even aware of the existence of the TTO or the functions it performs.

As for the obligation of the TTO to act on behalf of the public, the TTO's claim relies on Section 8-7 of the School Code, which requires the Treasurer to credit each district with the amount

of its investment earnings from the pooled investment fund. 105 ILCS 5/8-7. However, the Section 8-7 provides no support for the Income Allocation Claim. This is because the TTO, due to its incomplete financial records, does not know how much investment income it earned on the districts' pooled investments or the amounts due to LT. Ex. 15 p.12-18, 42. The TTO's claim is based solely on handwritten notes of Healy's arbitrary distributions of investment income, and the TTO's contention that LT received too big a share compared to other districts. *Id.* p.12-18, 42, 60. Section 8-7 does not state any obligation of the TTO to act on the relative overallocations.

As for the expenditure of public revenues, there are none involved in this claim. The last claimed overallocations were in 2009. The TTO does not allege that it will have to spend any new funds to remediate these credits to LT. Essentially, there are no asbestos materials to remove, and no roads to build – just accounting distributions and internal ledger entries to contest.

D. <u>The Pro Rata Claim: Private Rights</u>

The Pro Rata Claim asserts that LT underpaid or failed to pay annual bills the TTO sent LT for 2000-12. This dispute concerns an agreement to setoff LT's business function costs against the TTO's pro rata invoices, because LT performed its own accounting functions and the TTO did not have to pay for any of its own personnel to do this work.

Again, the TTO attributes this long course of dealing to unauthorized decisions of Healy that must be reversed. However, the record evidence shows otherwise. In 2000, Healy presented the Trustees with the written LT proposal on the setoff arrangement for their approval, Ex. 16 p.2, and the Trustees voted unanimously to accept it. Ex. 17 p.1. Trustee Hartigan confirmed his understanding of the TTO's agreement to pay the costs of LT's business functions through offsets to the pro rata bills throughout the relevant time period. Ex. 13 p.40-42. While it is apparent that the new leadership of the TTO is unhappy with the past Trustees' arrangement with LT, the TTO

cannot identify any interest of the general public in a contractual/billing dispute between government units, which at most would involve some shifting of funds among them.

As to any obligation of the TTO to disavow its past arrangement with the TTO, there is no statute that has a direct impact on this dispute, in contrast to the statutes present in *A,C&S* and *Shelbyville*. Although the TTO relies on general provisions in the School Code charging it with safeguarding the school districts' funds, those provisions are not specific to the present claim. If these general statutes are sufficient, then any claim of the TTO would be exempt from limitations.

As to the expenditure of public funds, the TTO will not have to spend any funds in connection with the Pro Rata Claim. The Pro Rata Claim is fundamentally a collection claim that alleges money due from past bills sent. There is no dispute that from 2000-12, the TTO was aware of the partial payments and offsets and considered the bills satisfied. If the TTO really had to charge the other districts for an alleged shortfall, and make the other districts pay in more funds, it would have done so years ago. The reality is that the TTO accounts for school funds as it sees fit. As LT noted in its Counterclaim in this case, the TTO recovered over $1 million in insurance proceeds for Healy's expense and salary thefts from the districts, but the TTO did not credit the districts' agency accounts with any of the money from these proceeds. Ex. 18 p.1-2.

Thus, for each of the TTO's three claims in this case, as a matter of law, the TTO cannot use the public rights exception to avoid the applicable statute of limitations.

VI. THE HELD IN TRUST EXCEPTION TO LIMITATIONS

As with the public rights exception, the TTO cannot meet its burden of proof, as a matter of law, on the application of the held in trust exception to the facts of this case. The held in trust exception requires that a specific pool of dispute funds be held in an expressly created trust

account. This exception does not apply to general funds of a defendant held in its agency account, like LT's account at the TTO, over which LT has sole spending authority.

The TTO's argument to Judge Hall relied on the Supreme Court's decision in *School Directors of District No. 5 v. School Directors of District No. 1*, 105 Ill. 653 (1883). The *District 5* case involves the same township treasurer system. In *District 5*, the plaintiff school district, District 5, claimed that the township treasurer collected tax revenue for District 5, but mistakenly credited revenue to the account of defendant District 1. *Id.* at 655. The Court held that District 5's claim was time-barred. Because the treasurer had credited the disputed funds to District 1's account, the treasurer no longer held them in trust: "The trustee in this case was the township treasurer, and as long as he held the money it was a trust fund in his hands, but when [the treasurer] paid it out to [District 1], or on [District 1's] orders, it was not a trust fund in [District 1's] hands which would exclude the operation of the Statute of Limitations." *Id.* at 655-56. The Court reached this conclusion even though the treasurer managed the account of District 1, which was clear because the treasurer had "paid out" disputed funds on the "orders" of District 1.

District 5's holding is consistent with Illinois law distinguishing "agency accounts" (also called "custodial accounts") from "trust accounts." In *Tucker v. Soy Capital Bank & Tr. Co.*, 2012 IL App (1st) 103303, the Court explained that a "'custody' or 'custodial' account is a type of agency account in which the custodian has the obligation to preserve and safekeep the property entrusted to him for his principal." *Id.* ¶ 32. The Court held that agency accounts are distinct from trust accounts, and that trust accounts must be expressly established. *Id.* ¶ 32-34. The Court ruled that the IRA accounts in dispute were alleged to be agency/custodial accounts and therefore were not subject to the legal protections afforded to a trust account. *Id.* ¶ 34.

The counterpoint to the *District 5* case is the Supreme Court's decision in *Bd. of Sup'rs of*

Logan County. v. City of Lincoln, 81 Ill. 156 (1876). That case explains when a pool of disputed public funds actually is held in trust and is not subject to a statute of limitations defense. In *City of Lincoln*, the city claimed ownership of a pool of disputed funds that the county received and held in the county treasury. *Id.* at 157. The Court held that because the disputed funds belonged to the city, but were held in the county treasury, the county was holding those funds in trust for the city: "The funds involved in this controversy are in the nature of trust funds, held by the county for a specific object, defined by a public law, and hence the Statute of Limitations is not available as a defense to the action." *Id.* at 158-59.

Applying this case law to the facts of the present case requires an analysis of the TTO's claims and the accounts at issue. The TTO's Trustee Michael Thiessen testified that the TTO has its own operational account as well as separate accounts for LT and the other districts. He stated that the accounts of LT and the other districts contain "agency funds which we manage on their behalf." Ex. 19 p.7-8. The Amended Complaint, which is verified and thus contains judicial admissions, repeatedly states that the TTO manages an "Agency Account" for LT. Ex. 7 ¶ 20, 21, 58. The TTO's demand for relief asks this Court for authority to take money from LT's "Agency Account." *Id.* p. 11-12. The TTO also admits that the TTO is the "custodian" of LT's funds. *Id.* ¶ 13-14. The TTO's admissions on the nature of LT's account are consistent with the School Code. 105 ILCS 5/8-6 provides that the **"**school treasurer shall have custody of the school funds" – and says nothing about holding those funds in trust.

Also, in contrast to a trust account, there is no dispute that for LT's account, only LT can authorize disbursements. The Amended Complaint admits the Treasurer can make payments from a district's agency account only upon receiving the district's "lawful instruction to the Treasurer to issue payment." *Id.* ¶ 10, 20, 21.

Accordingly, under the undisputed facts of this case, there is no legitimate question that LT's account, like District 5's account, is an agency account containing funds credited to LT; that LT has sole spending discretion; that there was no express creation of a trust for LT's account; and that LT's account does not contain funds held in trust.

Moreover, unlike in the *City of Lincoln*, the TTO is not fighting over a pool of money that the TTO received and still is holding in trust pending crediting or spending. The TTO's claims all concern monies that the TTO credited to LT's agency account long ago; paid to outside parties, on LT's orders, from LT's account; or simply did not receive from LT's account. The TTO's sole claim involving disputed funds paid into LT's account is the Income Allocation Claim, and the last alleged overpayment of interest was for FY2009. Ex. 9. Accordingly, as a matter of law, the TTO's attempts to recover funds from LT's agency account are not subject to the held in trust exception to the statute of limitations.

Conclusion

For all of the reasons in this motion, LT respectfully asks this Court to reconsider Judge Hall's ruling that LT's statute of limitations defense had to be proven at trial, and to instead determine, as a matter of law, that the 5-year statute of limitations in 735 ILCS 5/13-205 applies to the TTO's claims in the Amended Complaint, and the TTO's asserted exceptions to the statute of limitations are inapplicable to all of the TTO's claims.

LYONS TOWNSHIP HIGH SCHOOL
DISTRICT 204

By s/Jay R. Hoffman
Its Attorney

CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on July 29, 2019, he caused the foregoing pleading to be served by email on the following attorneys:

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s/Jay R. Hoffman

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff and Counter-Defendant,	)	No. 13 CH 23386
v.	)	Hon. Sophia H. Hall
LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204,	)	Calendar 14
Defendant and Counter-Plaintiff.	)	

DEFENDANT LT'S RESPONSE TO THE TTO'S SUMMARY JUDGMENT MOTION

This is the response of Defendant Lyons Township High School District 204 ("LT/District 204") to the Second Revised Summary Judgment Motion ("the TTO Motion") of Plaintiff Township Trustees of Schools ("the TTO"). As LT will explain, this entire case should be resolved by a jury trial. First, LT asserted a Counterclaim that is not subject to the TTO Motion. Second, this Court ruled in February 2018 that the applicability of the statute of limitations to the TTO's Claims cannot be resolved on summary judgment and must be decided at trial. This ruling precludes the entry of summary judgment on any of the TTO's three Claims. Third, there are serious and real disputes of material fact on both liability and damages issues critical to the TTO's Claims that require the denial of the TTO Motion.

I. THE TTO MOTION DOES NOT ADDRESS LT'S COUNTERCLAIMS.

LT's Second Amended Counterclaim ("the Counterclaim") contains two counts. Count I for Setoff alleges that the TTO and LT knowingly agreed to outsource certain business functions to LT and to offset those costs against the TTO's annual expense invoices. Count I asserts that LT is entitled to a setoff in the amounts set forth in LT's annual cost statements. Count II for Breach of Fiduciary Duty alleges that the TTO's former Treasurer stole over $1 million from the districts' funds; that the TTO

EX. B

course of decades made promises and representations to LT about how their financial dealings would be handled. The TTO acted on its own, without providing meaningful information to LT. Then, when LT's many concerns and warnings about the TTO's operations under Healy proved valid, and the TTO's corrupt Treasurer and negligent Trustees departed, a new group took over the TTO and decided to blame LT for the consequences of the TTO's own past decisions made over the prior 20 years. The affirmative defenses will prevent the unjust results that the TTO seeks to achieve in this case, and a jury should be allowed the weigh the relevant evidence.

A. First Affirmative Defense: Laches

The TTO does not contend that it is immune from a laches defense. Although the TTO argues that the First Affirmative Defense's allegations concerning prejudice are not compelling enough, the TTO fails to cite any authority for the proposition that this determination can or should be made in a summary judgment proceeding.

Under Illinois law, "laches are applied when a party's failure to timely assert a right has caused prejudice to the adverse party. The two fundamental elements of laches are lack of due diligence by the party asserting the claim and prejudice to the opposing party. *Van Milligan v. Board of Fire & Police Comm'rs*, 158 Ill. 2d 85, 89 (1994). And, as the TTO notes, the evidence supporting a laches defense against a public entity must present "unusual or extraordinary circumstances." *Id.* at 90.

LT is aware of and is comfortable with this standard. LT's laches defense expressly alleges the presence of "extraordinary circumstances." (TTO Ex. 21 ¶53-54) There is direct precedent for applying laches in the context of a trustee of schools dispute. In *Trustees of Schools v. American Surety*, 307 Ill.App. 398 (1940), the Court held that the "trustees [of schools] failed to exercise the diligence imposed on them by express statutory command," and thereby failed to uncover their treasurer's misdeeds. The Court sustained the defendants' laches defense. *Id.* at 408.

As in *American Surety*, LT's laches defense asserts that the TTO lacked diligence in pursuing its claims, given that the Treasurer and Trustees knew the operative facts but chose not to file suit for over a decade. The TTO does not contest these allegations, and only claims that LT's allegations of prejudice are insufficient. The TTO Motion (at 23) argues that LT's prejudice argument is limited to "generalized prejudice, alleging that it relied on the purported contract in formulating its budget. (Ex. 21 at ¶55.)" In fact, Paragraph 55 of the Counterclaim provides a more expansive allegation: "During the relevant time period, LT relied on its financial arrangements with the TTO in formulating budgets, allocating resources, and managing its public funds."

Furthermore, because the TTO Motion is for summary judgment and not dismissal, the TTO may not disregard the record evidence. As to all of the TTO's Claims, absent the financial arrangements between LT and the TTO, LT could and would have made aggressive efforts to seek legislative action to remove LT from the TTO's operation. (Ex. 36 p.121) Also, the TTO's long delay in filing suit prevented LT from conducting its defense before persons like TTO Trustee Joseph Nekola and LT Business Manager Leon Eich died, and TTO Trustee Donna Milich retired to Arizona, taking their recollections with them. (Ex. 16 p.67; Ex. 15 p.18, 21) Moreover, but for the TTO's long delay, LT could have obtained documentation from the TTO to use in its defense before those records were lost, presumably due to mismanagement, corruption, and a flood. (Ex. 9 p.101-02)

On the audit costs Claim, the record shows that LT used Baker Tilly as its auditor only because the TTO selected that firm and paid for its audit work. (Ex. 36 p.103) Had the TTO filed suit earlier, LT would have stopped using Baker Tilly, and instead competitively bid its audit work in order to save money. (*Id.* p.122) Also, LT's new auditors might have uncovered Healy's corruption, or at least done a better job than Baker Tilly did of protecting LT's funds. The TTO admits that Baker Tilly was derelict in its duties, given the TTO's threat to sue Baker Tilly. Also, a timely lawsuit would have meant that

all of Baker Tilly's invoices would have been available for LT's defense. (Ex. 8 p.31-33)

On the expense invoices Claim, the TTO's long delay in filing suit led to even more incomplete recordkeeping. (Ex. 9 p.161) Also, but for the TTO's lack of diligence, LT could have chosen to shift its business functions over to the TTO, as unpalatable as that might have been to LT's Board at the time. On the interest allocation Claim, had the TTO filed a timely Claim, LT could have gotten relevant data and documentation about the TTO's interest income earnings from the TTO and Baker Tilly.

B. Third and Fourth Affirmative Defenses: Promissory and Equitable Estoppel

The TTO asks this Court to enter summary judgment against the promissory and equitable estoppel defenses. As with the laches defense, LT has no quarrel with its need to present the jury with evidence of extraordinary circumstances. LT will do so at trial. The TTO argues that it cannot be subject to estoppel defenses because (a) the TTO is only "adhering to the School Code," and (b) Healy did everything complained of, and he had no authority to bind the TTO. Both of these arguments are contrary to the applicable statutes and substantial record evidence.

First, on the audit costs Claim, the Claim is not consistent with the School Code. Nothing in Section 3-7 required LT to pay for its own audit, and no statute prevented the TTO from paying for LT's audit. Also, the record evidence shows that the TTO Trustees were aware of the payments made for the audits of LT and the other member districts. The TTO Trustees approved the expenditures of the TTO's office on an annual basis, and those expenditures included LT's audit costs.

Second, on the pro rata expense claim, as Treasurer Healy admitted, LT complied with Section 8-4 in 2000-12 because it paid the pro rata invoices, and simply made setoffs to them. The TTO's FY2013 invoice does not comply with Section 8-4 because it includes special litigation costs that are not "office expenses" that can be foisted on LT. Also, based on the testimony of the TTO's own witnesses and documentary evidence, the Trustees were aware of, and re-affirmed annually, the TTO's

and sufficiency of the investments, and requests for more investment information. For example, Superintendent Kelly testified, "we used to complaint all the time about not receiving information." (Ex. 16 p.63) Business Manager Sellers pressed Healy to provide a higher rate of return in order to fulfill the TTO's statutory duties to LT. (Ex. 18 p.110-15)

On the audit costs Claim, the record shows that LT forwarded certain Baker Tilly invoices to the TTO for the TTO to pay. (*Id.* p.19) The TTO presents no legal authority stating that the voluntary payment doctrine cannot cover payments that the TTO made to Baker Tilly at LT's request, especially where the TTO is seeking to recover those payments from LT.

On the pro rata expense Claim, the TTO contends (at 26) that the setoffs of LT's business function costs against the pro rata expenses did not constitute "payments." This hyper-technical argument is unsupported by any legal authority, and it is contrary to the record evidence concerning LT's annual memos making demand and the parties' course of dealing from 2000-12. (Ex. 28)

VIII. CONCLUSION

For all of the reasons set forth in this response, the TTO Motion should be denied in its entirety, and this case should proceed to a jury trial.

Respectfully submitted,

LYONS TOWNSHIP H.S. DISTRICT 204

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
	)	No. 13 CH 23386
Plaintiff and Counter-Defendant,	)	
v.	)	Hon. Thomas M. Mulroy
LYONS TOWNSHIP H.S. DISTRICT 204,	)	Calendar I
Defendant and Counter-Plaintiff.	)	(Transferred to Law)

LT'S RESPONSE TO
THE TTO'S MOTION TO DISMISS
LT'S THIRD AND FOURTH AFFIRMATIVE DEFENSES

I. INTRODUCTION

Defendant Lyons Township High School District 204 ("LT"), by its counsel, respectfully asks this Court to deny the motion to dismiss the third and fourth affirmative defenses of LT that Plaintiff Township Trustees of Schools Township 38 North, Range 12 East ("the TTO") recently filed.

The TTO seeks to dismiss LT's third affirmative defense based on the voluntary payment doctrine. In 2017, the TTO replied to this defense. In 2018, the TTO moved for summary judgment on this defense, which motion this Court denied in July 2019. The TTO now asks this Court to create new law in Illinois by ruling that the TTO is immune from the voluntary payment doctrine. The TTO bases its position on an argument that it is immune from statutes of limitation – an argument this Court rejected in July 2019. The TTO also asks the Court to accept its view on the disputed facts of this case, and to disregard the facts that LT has alleged, in order to hold that the doctrine is factually inapt. LT's affirmative defense based on the voluntary payment doctrine is legally valid and should proceed to trial.

EX. C

In addition, the TTO asks this Court to dismiss LT's fourth affirmative defense based on the American Rule governing the recovery of attorneys' fees. The TTO previously moved to strike this affirmative defense in the 2018 case previously pending before Judge Reilly – who did not decide the motion. The TTO first asks this Court to decide that the TTO Trustees' attorneys' fees are expenses of the Treasurer's office within the meaning of Section 8-4 of the School Code. LT denied these allegations in its answer to the complaint, and the present 2-615 motion is not a proper mechanism for resolving this disputed factual issue. Also, the TTO asks this Court to decide as a matter of law that the American Rule on the recovery of attorneys' fees is inapplicable to this case. LT has presented a valid legal and factual basis for this defense, and it should be resolved after a trial on the merits.

I. THE STANDARD FOR MOTIONS TO DISMISS AFFIRMATIVE DEFENSES.

The TTO's motion to dismiss does not cite to the controlling legal standard for a motion to dismiss affirmative defenses or specify whether it is a 2-615 or 2-619 motion. However, it seems clear that the TTO's motion is brought under Section 2-615.

Under Illinois law, a motion to dismiss or strike an affirmative defense is subject to the standards of 735 ILCS 5/2-615. *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 20. "In reviewing the sufficiency of a complaint [or affirmative defense], we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. We also construe the allegations in the complaint [or affirmative defense] in the light most favorable to the [non-movant]. Thus, a cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Marshall v. Burger King Corp*., 222 Ill.2d 422, 429 (2006).

II. THE TTO'S STATEMENT OF FACTS DISREGARDS LT'S ALLEGATIONS.

The TTO's motion to dismiss does not conform to the legal standard for 2-615 motions because it disregards LT's well-pled allegations and, instead, relies on the TTO's own, disputed allegations. The TTO contends that its claims involve "undoing financial benefits granted to LT by the former Lyons Township Treasurer of Schools, Robert Healy." Motion at 1. This assertion is contrary to LT's well-pled factual allegations that the TTO Trustees were aware of the financial arrangements between LT and the TTO on setoffs to the pro rata invoices and payment for LT's annual audits; the Trustees voted unanimously to accept LT's proposal made in 2000 on the setoff arrangement; and the Trustees voted regularly to approve the statements of accounts the Treasurer presented to them for approval that included these transactions. LT's Answer, Affirmative Defenses, and Counterclaim, p. 14-15, 18-23.

There is no legal basis for the TTO's request that the Court accept the TTO's view of how the financial transactions at issue were negotiated, approved, and perpetuated, and by whom.

III. THE VOLUNTARY PAYMENTS DOCTRINE IS A VALID DEFENSE.

On 3-8-2017, LT filed its first amended affirmative defenses in this case, which included an affirmative defense based on the voluntary payment doctrine. On 4-28-2017, the TTO filed a reply that answered that affirmative defense and did not seek to dismiss it. On 9-24-2018, the TTO filed a motion for summary judgment that asked for judgment on LT's voluntary payment doctrine affirmative defense based on the same grounds raised in the present motion. On 7-31-2019, this Court denied the TTO's summary judgment motion in its entirety.

The TTO's now asks this Court to make new Illinois law, on a motion to dismiss, by holding that governmental entities are immune from the voluntary payment doctrine. The TTO argues that it should be exempt from the voluntary payment doctrine under the same principle that

it says makes it exempt from all statutes of limitation. This Court rejected this argument in the 7-31-2019 order by ruling that the TTO was not exempt.

The TTO also contends that because 5 of the other 49 states have granted immunity to municipalities and townships from the voluntary payment doctrine in cases decided between 1898 and 1943, this Court should follow that authority. This is an argument ill-suited to a motion to dismiss. The TTO further argues that some legal doctrines in Illinois are applied to municipalities only in extraordinary and compelling circumstances, such as estoppel and laches – but that is not the same thing as the blanket immunity that the TTO seeks. LT respectfully submits that if a Court is willing to entertain the creation of a new legal exemption, it would be best to do so after a full record is created at trial.

The TTO also argues, without citation to authority, that the voluntary payment doctrine is inapplicable to the facts that LT alleges. The TTO presents no legal authority stating that the voluntary payment doctrine cannot apply to payments that the TTO made to Baker Tilly at LT's request, as LT alleges. LT's Answer, Affirmative Defenses, and Counterclaim, p. 15.

The voluntary payment doctrine provides as follows: "Under the voluntary payment doctrine, money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal. Absent fraud, misrepresentation, or mistake of fact, money voluntarily paid under a claim of right to the payment, with full knowledge of the facts by the person making the payment, cannot be recovered unless the payment was made under circumstances amounting to compulsion." *Jenkins v. Concorde Acceptance Corp.*, 345 Ill.App.3d 669, 674-75 (1st Dist. 2003).

As the *Jenkins* case shows, there is no additional legal requirement that the plaintiff have made payments *directly to* the defendant as opposed to *on behalf of and at the demand of* the

defendant. In other words, LT saying "you pay these bills for us" is no different, under the legal standard for this defense, than saying "you pay us money so we can pay these bills."

On the pro rata expense claim, the TTO contends that the setoffs of LT's business function costs against the pro rata expenses did not constitute "payments." The TTO makes this argument without citation to legal authority. As LT sufficiently alleges, LT's Answer, Affirmative Defenses, and Counterclaim, p. 14-15, and as LT will show at trial, the TTO paid the costs of LT's business functions by setting those amounts off against the annual pro rata invoices.

Again, there is no additional legal requirement under the voluntary payment doctrine that a payment be made *directly in cash to* the defendant as opposed to being made *in the form of a setoff or credit against other charges to* the defendant. In other words, "you pay these costs by giving us a check" is no different, under the legal standard for this defense, than saying "you pay these costs by setting them off against your pending invoice to us."

The third affirmative defense has a valid legal basis and should proceed to trial.

III. THE AMERICAN RULE ON FEES IS A VALID DEFENSE.

In LT's answer to the complaint in this case, LT denied that the TTO's attorneys' fees and expenses incurred in its litigation with LT ("the Attorneys' Fees") were expenses of the treasurer's office within the meaning of Section 8-4 of the School Code. In LT's fourth affirmative defense, LT asserted an additional defense: even if the TTO's attorneys' fees could be considered expenses of the treasurer's office under Section 8-4, this part of the TTO's complaint is barred by a superseding legal principle – namely, the American Rule governing the recovery of attorneys' fees. The American Rule, as adopted in Illinois, requires each party in a dispute to bear its own attorneys' fees and expenses, unless there is a statute or contract that specifically allows the party to recover fees and expressly employs the words "attorneys' fees." LT's argument is that attorneys'

Conclusion

For the reasons stated in this response, the TTO's motion to dismiss LT's third and fourth affirmative defenses should be denied.

Respectfully submitted,

LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204

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