CASE NO. 125133

IN THE
ILLINOIS SUPREME COURT

| | | |
|---|---|---|
| RESTORE CONSTRUCTION COMPANY, INC. and RESTORE RESTORATION, INC.<br><br>Plaintiffs-Appellees,<br><br>v.<br><br>THE BOARD OF EDUCATION OF PROVISO TOWNSHIP HIGH SCHOOLS DISTRICT 209, NETTIE-COLLINS-HART, DANIEL J. ADAMS, TRAVELERS INDEMNITY COMPANY, GALLAGHER BASSETT SERVICES, INC., MADSEN KNEPPERS AND ASSOCIATES, INC., and COLLECTIVE LIABILITY INSURANCE COOPERATIVE,<br><br>Defendants,<br><br>(The Board of Education of Proviso Township High Schools District 209, Defendant-Appellant.) | ) | On Appeal from the Illinois Appellate Court, First District, Case No. 1-18-1580<br><br>There Heard on Appeal from the Circuit Court of Cook County, Illinois County Department, Law Division Case No. 2015 L 010904<br><br>Hon. Bridgid Mary McGrath, Presiding |

# REPLY BRIEF OF DEFENDANT-APPELLANT BOARD OF EDUCATION OF PROVISO TOWNSHIP HIGH SCHOOLS DISTRICT 209

WILLIAM F. GLEASON (wgleason@hauserizzo.com)
ERIC S. GRODSKY (egrodsky@hauserizzo.com)
RAYMOND A. HAUSER (rhauser@hauserizzo.com)
HAUSER, IZZO, PETRARCA,
GLEASON & STILLMAN LLC
19730 Governors Highway, Suite 10
Flossmoor, IL 60422
(708)799-6766

ORAL ARGUMENT REQUESTED

E-FILED
12/24/2019 2:11 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

## POINTS AND AUTHORITIES

## I. A Plaintiff Cannot Recover Under Any Theory of Law When a Municipal Contract is Void *Ab Initio.*

Plaintiffs have gone to great lengths to characterize this case as a simple case of equity and the imposition of a contract implied-in-law. They avoid the proper framework for analyzing this claim. That is to determine whether the underlying contracts are void or voidable. The Plaintiffs agree that the contracts at issue were void *ab initio* which renders them utterly void.

This concession is not surprising given this Court's most recent holding on this issue. In *1550 MP Road LLC v. Teamsters Local Union No. 700*, 2019 IL 123046, the Court reviewed the validity of a lease executed by an agent of the Teamsters Local 700 "despite the fact that the members had not been notified and had not voted to authorize the agreement at a regular meeting." *See id.* at ¶30. The Court determined that the lease was void *ab initio* since the obligation was created in violation of the Property of Unincorporated Associations Act which required certain acts to occur prior to such an obligation taking place such as a meeting and a vote authorizing the same. *See id.* at ¶¶30-31. The Court recognized in *1550 MP Road LLC* with respect to voluntary associations what it had already recognized in *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 98-99 (2016), with respect to public entities, namely, that where a statute requires a vote of an entity in order to create a liability or contract, any agreement approved by an agent absent that vote is void *ab initio* as said vote is a necessary prerequisite to the ability to act.

This Court has long recognized a distinction between contracts which are void *ab initio* and those which are merely voidable. Specifically, this Court in *McGovern v. City of Chicago,* 281 Ill. 264 (1917), defined the difference in this way:

> "Contracts entered into by a municipality which are prohibited by express provision of the law, or which under no circumstances could be legally entered into, are uniformly held to be ultra vires and void, and cannot be rendered valid, as against the municipality, by receipt of the consideration of other matter of estoppel, and cannot be rendered valid and binding by any act of the municipality ratifying the same. 1 Dillon on Mun. Corp. (5th Ed.) §323. There is another class of municipal contracts which are usually classed as ultra vires but are only so in a limited or secondary sense. These are contracts that are within the general powers of the corporation, but which are void because the power was irregularly exercised, or where some portion of an entire contract exceeds the corporate powers, but other portions of the contract are within the corporate powers." *See id. citing People v. Spring Lake Drainage and Levee District,* 253 Ill. 479, 500 (1912).

This case involves the first type of case described in *McGovern.* The determination of the type of contract at issue dictates the potential for recovery by a contractor. Under a voidable contract, the second class of contracts defined by *McGovern,* the plaintiff can recover under a theory of *quantum meruit*. *D.C. Consulting Engineers, Inc. v. Batavia Park Dist.,* 143 Ill.App.3d 60, 63 (2nd Dist. 1986). When a contract is void *ab initio*, the first type of case described in *McGovern,* recovery cannot be had against a unit of government at all. This issue was addressed squarely by this Court in *Ashton v. Cook County,* 384 Ill. 287 (1943) where the Court held as follows:

> "Appellants also contend that they should be permitted to recover in *quantum meruit*. Such a recovery is founded on the implied promise of the recipient of services or material to pay for something which he has received that is of value to him. Such principle can have no application in this case for the reason that the contract were wholly void and created no rights and imposed no obligations. They come within the principle of law that where the legislature has withheld a power it is the same as though the exercise of power was prohibited by law. *Continental Ill. Nat. Bank & Trust Co. v. Peoples Trust & Savings Bank,* 366 Ill. 366, 9 N.E.2d 53. To permit recovery of compensation in these cases on a *quantum meruit* would, in legal effect, give sanction to the giving of public funds to private use for the performance of duties which the law imposed upon the State's Attorney and for which he receives the salary fixed by law."

"[I]t is impossible by any act of the city officials to create a liability against [a public entity] for the work" unless compliance with the statutory requirements to create one exists. *May v. City of Chicago,* 222 Ill. 595, 599 (1906). "To hold otherwise would be to expose the taxpayer to all the evils which statutes or ordinances passed for his protection were designed to prevent." *Hope v. City of Alton,* 214 Ill. 102, 106 (1905). There simply can be no implied contract or liability whatsoever when the statutory method by which the municipality can be bound is not followed. *Roemheld v. City of Chicago*, 231 Ill. 467, 470–71 (1907). An utterly void contract bars a party's ability to recover in *quantum meruit*. *First Nat. Bank of Springfield v. Malpractice Research, Inc.,* 179 Ill.2d 353, 365 (1997).

## II. Plaintiffs Mischaracterize and Understate the Significance of this Court's Decisions Regarding Municipalities' Actions That are Void *Ab Initio* as This Court Has Always Denied *Quantum Meruit* Recovery When There Has Been Noncompliance with a Contracting Statute.

Even though this Court expressly discussed and denied the Plaintiff's *quantum meruit* claim in *Clark v School Directors of Dist. No. 1*, 78 Ill. 474 (1875), Plaintiffs contend that *Clark* is inapposite. They are mistaken.

In *Clark*, this Court first denied the plaintiff's recovery under the "contract of purchase" because it was unauthorized and void under a purchasing statute. The court then addressed the same argument advanced by Plaintiffs: whether the plaintiff could recover in *quantum meruit* because it had "enjoyed the use of the property," even though it could not recover because the order was "void upon its face."

This Court clearly viewed the *quantum meruit* claim as an alternative to the contract recovery as it stated, "It is supposed that, although it may not be so, and though no action may lie upon it, yet there may be a liability upon a *quantum meruit,* the school directors having received and enjoyed the use of the property." Additional case law from that period makes clear that this Court was not confused as to what a recovery in *quantum meruit* was since it clearly held that it is based upon "an implied promise to pay so much as the material and labor were reasonably worth when delivered or accepted, as though no contract had ever existed." *Schillo v. McEwen,* 90 Ill. 77, 79 (1878); *William*

*Butcher Steel Works v. Atkinson,* 68 Ill. 421, 425 (1873). *Clark* is still good law and has not been distinguished at all by the Plaintiffs.

Similarly, both the appellate court and Plaintiffs dismissed *Hope v. City of Alton*, 214 Ill. 102 (1905) as inapplicable, concluding that the plaintiff sought recovery solely on a contract. This is not clearly the case. The cause of action brought in *Hope* was an action in assumpsit. *Hope v. City of Alton,* 116 Ill.App. 116, 117 (4th Dist. 1904). A general assumpsit is a claim based upon an implied contract and is a proper vehicle to assert a claim for a contract implied in law. *Bd. of Highway Comm's, Bloomington Twp. v. City of Bloomington,* 253 Ill. 164, 172-173 (1911). In assessing the claim, this Court rejected any recovery of attorneys' fees and also rejected the plaintiff's argument that fairness dictated his recovery of money, i.e. "when a city gets what it had authority to get in some way, it should pay for what it gets, whether it exercised the power in the prescribed way or not." *Hope*, 215 Ill. at 105.

In other words, the "fairness" argument proposed by the plaintiff in *Hope* and which undergirds the Plaintiffs' argument herein was specifically rejected by this Court in *Hope.* It has also been consistently rejected by this Court and Illinois appellate courts for over a century. This Court determined that the "doctrine of ultra vires is applied with greater strictness to municipal bodies than to private corporations." *Id.* Thus, since the contract was "directly prohibited by ordinance" and because "persons dealing with a municipal corporation are chargeable with notice of its power to contract," there can be

no recovery whatsoever. *Id.* at 106. "To hold otherwise would be to expose the taxpayer to all the evils which statutes or ordinances passed for his protection were designed to prevent." *Id.*

One year after *Hope*, in *May v. City of Chicago*, 222 Ill. 595 (1906), this Court again refused to hold an Illinois municipality liable in *quantum meruit* even thought it had received beneficial services. *May* is about the absence of a municipal appropriation, which Illinois courts have found akin to non-compliance with municipal purchasing statutes.

Plaintiffs suggest that this Court reached an "unremarkable conclusion" in *May* that in the absence of an appropriation, city officials could not create a liability and concluded that the Court "may have believed it was addressing only an implied in fact contract". But, this Court held that not only could a void municipal act bar the plaintiff from recovering under a contract theory, it also refused to permit recovery under *quantum meruit,* holding that "[n]o appropriation having been made for this extra work of plaintiff, it is impossible by any act of the city officials to create **a liability** against the city for work." See *Lindahl v. City of Des Plaines*, 210 Ill. App. 3d 281, 291 (1st Dist. 1991) quoting *May*, 222 Ill. at 599. (Emphasis added). As set forth above, this Court obviously understood what a recovery in *quantum meruit* was and would not permit any financial liability to be created against a municipality when the underlying arrangement was void.

Plaintiffs also attempt to diminish the significance of this Court's decision in *Roemheld v. City of Chicago*, 231 Ill. 467 (1907). Plaintiffs contend that since *Roemheld* did not use the term *quantum meruit* and because the contractor ultimately recovered against the city, this Court's discussion of a contractor's ability to recover under void contracts was dicta. However, Illinois courts have consistently adhered to its rule that where there has been noncompliance with a contracting statute, "there can be no implied contract **or implied liability**" even if the municipality accepts the benefits of such labor. *Roemheld*, 231 Ill. at 470-471. (Emphasis added). *See Selby v. Village of Winfield*, 255 Ill.App. 67, 73 (2nd Dist. 1929); *Wacker-Wabash Corp. v. City of Chicago*, 350 Ill.App. 343, 354 (1st Dist. 1953); *Galion Iron Works & Mfg. Co. v. City of Georgetown*, 322 Ill.App.498, 502 (3rd Dist. 1944); *D.C. Consulting Engineers, Inc. v. Batavia Park Dist.*, 143 Ill.App.3d at 63 (1986); *South Suburban Safeway Lines v. Regional Trans. Auth.*, 166 Ill.App.3d 361, 366 (1st Dist. 1988)

Also, as they did with the other cases, both the Plaintiffs and the appellate court too narrowly interpreted the significance of this Court's most recent decision on void actions undertaken by a municipal corporation. In *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶ 98 (2016) this Court addressed the liability of municipalities "where there has been a failure to comply with a statute or ordinance prescribing the method by which an officer or agent can bind such corporation by contract." It held that there cannot be

such liability. The cases cited by *Matthews – Roemheld, South Suburban*, and *Schiaverelli v. Chicago Transit Authority*, 355 Ill.App.3d 93 (1st Dist. 2005) – all disavow any implied liability for a void *ab initio* action even when the governmental entity benefits. It is irrelevant whether this matter is before this Court on a contract implied-in-fact or a contract implied-in-law. The policy underlying all of these cases would need to be rejected in order to support the Plaintiffs' position.

Plaintiffs only cite one Supreme Court case which they contend supports their argument: *Sexton v. City of Chicago*, 107 Ill. 323 (1883). But *Sexton* did not involve the legality of the contract at issue. Instead, *Sexton* dealt with a contractor who executed a contract with the City which relied upon a tracing provided to him by the city which differed from the plan which the city contended the work was to proceed. This Court allowed the contractor to acquiesce in the City's decision to declare the contract forfeited and to proceed on a *quantum meruit* claim. This is precisely what is permissible under a voidable contract. *See Illinois State Bar Assoc. Mut. Ins. Co. v. Coregis Ins. Co.,* 335 Ill.App.3d 156, 164 (1st Dist. 2004). Since *Sexton* did not involve a void *ab initio* contract, its holding does not assist Plaintiffs. In this case, unlike *Sexton* and *Stahlein*, discussed *infra*, there was never a bid nor an action of the Board to authorize Plaintiffs' work in the first place. The focus needs to be on the affirmative act of the public entity and its mere inaction is insufficient to support a claim for *quantum meruit*.

## III. The Illinois Appellate Court Has Also Distinguished Between Void and Voidable Contract and Held That Plaintiffs Cannot Recover Under a Contract Void *Ab Initio*.

### A. The Illinois Appellate Court Cases Relied Upon by Plaintiffs Do Not Concern Governmental Actions Void *Ab Initio*.

There are no Illinois cases permitting *quantum meruit* recovery where a municipality's actions are void *ab initio*. Plaintiffs rely primarily upon *Karen Stavins Enterprises, Inc. v. Community College District, No. 508*, 2015 IL App. (1st) 150356 and *Woodfield Lanes, Inc. v. Village of Schaumburg*, 168 Ill.App.3d 763 (1st Dist. 1988). Although *Stavins* and *Woodfield Lanes* discus contracts implied-in-law against municipal corporations, neither permits plaintiffs to recover under contracts implied-in-law where the underlying municipal action is void *ab initio*.

Plaintiffs reason that the following passage from *Stavins* demonstrates that City Colleges raised a void (rather than voidable) contract defense:

> "The grounds for dismissal asserted by City Colleges * * * is that it cannot be liable to the plaintiff absent compliance with its policies and procedures for awarding contracts which the plaintiff has failed to allege. It argues that a contract cannot be implied if the prescribed method of executing its contracts has not been followed."

*Stavins*, 2015 IL App. (1st ), ¶ 8.

City Colleges did not argue that the contracts awarded were *ultra vires* or contrary to public policy, statute, or ordinance. Instead, "City Colleges acknowledged that it [had] the authority to award the contracts" under Section 3-27.1 of the Illinois Public Community College Act (110 ILCS 805/3-27.1)." *Id.*

at ¶ 3. It only argued that that the plaintiff failed to comply with certain internal operating policies and procedures and that the contract was never signed by a person with authority to enter the contracts.

It is well-settled that internal policies and rules lack the force of law and are viewed differently than ordinances or statutes. *Bulger v. Chicago Transit Authority,* 345 Ill.App.3d 103, 119-120 (1st Dist. 2003); *People v. Williams,* 239 Ill.2d 119 (2010)(Internal operating procedures do not rise to the level of a "law" as defined in the official misconduct law.) Since City Colleges had the ability to create the obligation in question, it was a case about an irregular exercise of power rather than a void *ab initio* or ultra vires act.

Additionally, *Stavins* was decided on a motion under Section 2-615 of the Code of Civil Procedure. The failure to comply with policy was an affirmative defense which was raised by the college but which was not present on the face of the complaint. This meant that the Court only looked at the allegations set forth in the complaint and determined that a cause of action was stated without respect to the defendants' attempted affirmative defense that was not properly supported. *See id.* at ¶10.

Unlike City Colleges, the Board has set forth specific statutes which were required to be complied with in order to create an obligation against it and which limited its ability to create the financial obligation at issue. These statutory preclusions to the Board's ability to incur the financial obligation in this case were concededly not complied with and set it apart from *Stavins*.

*Woodfield Lanes*, which Plaintiffs concede is "not a perfect fit" (Response Brief pg. 22) is similarly not helpful. This is because the Village unquestionably passed a valid ordinance in which it "approved and accepted" the plaintiffs' sewer and water line work and which required the Village to paid the plaintiffs all monies collected by it pursuant to the ordinance. There was no argument that the agreement was *ultra vires* but, instead, only about whether the Village was required to comply with its ordinances. The Court found that the Village simply "failed to fulfill its duty to enforce its ordinance in order to provide compensation for plaintiff." The facts of *Woodfield Lanes* and this case are starkly different, and the Appellate Court erred when relying upon it to support its conclusion.

The only case advocated by Plaintiffs which addresses the void/voidable construct is *Stahlein v. Bd. Of Ed., Sch. Dist. No. 4, DuPage County*, 87 Ill.App.2d 28 (1967). Plaintiffs contend that principles of honesty and fair dealing rendered the school district liable in this case, but *Stahlein* concerned an irregular exercised of authority, not an *ultra vires* act.

In *Stahlein*, the board of education approved the construction contract at issue which set forth a mechanism for the approval of "extras" to be performed upon request by the architect. It later sought to deny payment of "extras" to the contractor since it did not vote on these specifically. In interpreting the contract, the Second District Court of Appeals determined that the board had lawfully permitted the contractor to perform extras.

However, the decision in *Stahlein* was based on facts that are not present here. *Stahlein* never considered whether the contract was approved by the governmental entity.

The only other Illinois case that Plaintiffs rely upon is *Town of Montebello, Hancock County v. Lehr*, 17 Ill. App. 3d 1017 (1974). That case is also distinguishable from this case. It involved a dispute between the Town and Hancock County regarding the $1,140 fee that the County had paid to an assessor to assess the personal property of individuals living in the Town. This was not undertaken by the Town due to a change in the Illinois Constitution but, after a subsequent Illinois Supreme Court holding, the County was authorized to assess the property as "omitted property". The dispute lay with the fact that the taxes assessed and collected based upon the services performed by the County were refunded based upon the fact that the U.S. Supreme Court overturned the Illinois Supreme Court's decision upon which the County relied. However, since the County acted pursuant to its proper authority under law, it does not support the Plaintiffs here. The County argued that the Town was obligated to pay for those services. The Town contended that it was under no obligation to pay the fee because a U.S. Supreme Court decision rendered after the assessor had performed his work held that the individuals should be refunded the taxes collected from them.

This case does not concern the "principles of honesty and fair dealing" which become germane in the second classification of contracts described by

*McGovern* because the underlying action was void *ab initio.* Rather, this case concerns the protection of public funds and prohibiting the Plaintiffs to profit from their own unlawful acts.

### B. Illinois Appellate Courts Have Consistently Forbid Any Recovery When an Illinois Governmental Entity Has Failed to Comply with a Contracting Statute.

In *South Suburban*, the First District Court of Appeals strongly ratified the rule that no recovery may be had under any theory – contract implied in fact, contract implied in law, or *quantum meruit* – where the municipality failed to comply with a contracting statute or ordinance.

The *South Suburban* court also articulated why the cases relied upon by the Plaintiffs, such as *Stahlein*, are inapposite. It explained that a municipality that exercises its authority irregularly, like the one in *Stahlein*, may not avoid liabilities created by a contract. But a failure to comply with a contracting statute renders the contract void *ab initio*, precluding recovery by plaintiffs. *South Suburban, 166* Ill.App.3d at 367. Even Plaintiffs agree that *Stahlein* is a case about a municipal unit exercising its powers irregularly. (Response Brief, pg. 35-36)

Plaintiffs contend (and the appellate court agreed) that *South Suburban* only stands for the proposition that a municipal corporation cannot be held liable on contracts implied in fact. (Response Brief, pg. 33). The holding of *South Suburban* is much broader. The *South Suburban* court's analysis did not stop when it determined that a municipal corporation cannot be obligated

upon an alleged implied contract which is *ultra vires*, contrary to statutes or charter provisions, or contrary to public policy." *Id.* at 366 citing 10 E. McQullin, the Law of Municipal Corporations, § 29.111(a) at 514. The court also addressed the plaintiff's "fairness" argument, i.e., that it would be unconscionable to allow the municipality to avoid paying for benefits received. *See id*. at 368. The court decisively disagreed with the plaintiffs, holding that there is "no exception" to the rule prohibiting implication of contracts where the statutorily prescribed contracting method has not been followed. *See id.* at 367-368 citing *Roemheld*, 231 Ill. at 471; *Wacker-Wabash Corp.*, 350 Ill.App at 354.

Plaintiffs' attempts to distinguish the holdings of *Galion Iron Works & Mfg. Co. v. City of Georgetown*, 322 Ill.App. 498 (3d Dist. 1944) and *Gregg v. Town of Bourbonnais*, 327 Ill.App. 253 (2nd Dist. 1945), two appellate court cases barring plaintiffs' recovery under *quantum meruit*, similarly fall flat. Plaintiffs contend that *Galion* has little application since the court identified the lawsuit therein as an afterthought. In actuality, the Court squarely addressed the *quantum meruit* claim and referred to it as a "crucial question". *See id.* at 504. Both *Galion* and *Gregg* represent additional links in the unbroken chain of jurisprudence which establishes that plaintiffs cannot recover in *quantum meruit* where the underlying contractual arrangement was void *ab initio*. The plaintiffs in those cases could not recover against the municipalities because the courts concluded, just as courts have also concluded

in *May, Hope, Roemheld, Selby, Wacker-Wabash, Schiaverelli, D.C. Consulting, and South Suburban*, that they were presumed to have known the law regarding contracting and appropriation. "To now permit the plaintiff to have a recovery would be to permit it to do indirectly what it could not lawfully do directly, and would permit the plaintiff to profit from its own unlawful acts." *Galion Iron Works & Mfg. Co.*, 322 Ill.App. at 505.

Plaintiffs here specifically seek to recover a liability indirectly when they agree that they could not recover the liability directly since there was a failure to comply with laws designed to protect public taxpayers. They seek the protection of this Court to profit from their unlawful acts and to have the Court reward their conduct. As the decades-long line of precedent establishes, the Court should not assist the Plaintiffs but, rather, should leave them where they placed themselves by failing to comport with existing law.

## IV. Fairness

### A. Plaintiffs fail to demonstrate good cause or compelling reason for this Court to abandon its prior jurisprudence on this issue.

"The doctrine of *stare decisis* 'expresses the policy of the courts to stand by precedents and not to disturb settled points.' " *People v. Espinoza,* 2015 IL 118218 ¶26. When a question has been deliberately examined and decided, the question should be considered settled and closed to further argument. *People v. Williams,* 235 Ill.2d 286, 294 (2009). *Stare decisis* is the means by which courts ensure that the law will develop in a principled and intelligible fashion, and will not merely change erratically. *Chicago Bar Ass'n v. Illinois*

*State Board of Elections,* 161 Ill.2d 502, 510 (1994). *Stare decisis,* however, is not an inexorable command. *Vitro v. Mihelcic,* 209 Ill.2d 76, 83 (2004). Any departure from *stare decisis* must be specially justified, and prior decisions should not be overruled absent good cause or compelling reasons. *Id.* Good cause exists "when governing decisions are unworkable or badly reasoned." *People v. Colon,* 225 Ill.2d 125, 146 (2007). "In general, a settled rule of law that does not contravene a statute or constitutional principle should be followed unless doing so is likely to result in serious detriment prejudicial to public interests." *Id.*

Plaintiffs wholly fail to set forth good cause or compelling reasons for this Court to undo the unbroken line of jurisprudence on this topic. Indeed, the public interests weigh substantially more in favor of the Court continuing to protect Illinois taxpayers from public contractors who fail to comply with statutes designed for their protection.

**B. Plaintiffs fairness argument has already been considered and rejected by numerous courts.**

Plaintiffs' focus on "fairness" and "fair dealing" is consistent with the way similarly situated contractors have historically argued these types of cases in Illinois. One of the premises of Plaintiffs' argument is that they are blameless, that they are entitled to recovery because they believed they were acting lawfully and pursuant to a lawful contract. They argue that there was no "knowing failure" on their part to comply with the Illinois School Code. (Response Brief, Pg. 39-40) and contend that they acted in "good faith".

The underlying premise that they acted in good faith is flawed based upon this Court's holdings. Specifically, "[a] person dealing with a municipal corporation is charged with the knowledge of the limitations of the power of that corporation for any contract attempted to be entered into by any of its officials." *May,* 222 Ill. at 599-600. This means that the Plaintiffs were imputed with the knowledge that the underlying contractual arrangements that were executed by agents of the Board were not in conformity with the statute and were, in fact, precluded by law. *See Chicago Patrolmen's Ass'n v. City of Chicago*, 56 Ill.2d 503, 507 (1974)(rejecting quasi-contractual relief where "any reliance upon [the Police Superintendent's] representations would have been unwarranted.") Engaging in conduct which was knowingly outside of the law is the antithesis of good faith.

Moreover, when evaluating "fairness", the Court should not lose sight of what is at issue. As this Court has recognized, "[c]ompetitive bidding statutes are enacted "for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption and to secure the best work or supplies at the lowest price practicable." *Court Street Steak House, Inc. v. County of Tazewell,* 163 Ill.2d 159, 165 (1994). The requirement that items be publicly voted upon and approved by a unit of government is also designed to give taxpayers information about potential liabilities and to have their elected officials determine whether said liabilities are in their best interests.

The First District Court of Appeals succinctly addressed the "fairness" argument advanced by Plaintiffs. In *McMahon v. City of Chicago*, 339 Ill.App.3d 41, 49 (1st Dist. 2003), the plaintiff argued that the City of Chicago should be held to standards of honesty and fair dealing for a contractual arrangement which was barred by law. The Court stated:

> "We do not see how honesty and fair dealing are promoted by holding the city to unauthorized informal agreements. The municipal purchasing statute circumscribes municipal contracting. It guards against " 'favoritism, improvidence, extravagance, fraud and corruption, [and helps] to secure the best work or supplies at the lowest price practicable.' " *Smith v. F.W.D. Corp.,* 106 Ill.App.3d 429, 431, 62 Ill.Dec. 453, 436 N.E.2d 35 (1982), quoting 10 McQuillin on Municipal Corporations § 29.29, at 302 (3d rev. ed.1981). The enforcement of the statute, not informal contracts, best achieves those aims."

*Id.*

Plaintiffs' remaining arguments are supported by facts which are either misstated or which are irrelevant. They contend throughout their brief that the contracts and payments were approved by the District. Of course, the Second Amended Complaint made it clear that these contracts and payments were approved by Todd Drafall, an employee of the FOP, a separate legal entity. (C. 1134-1136; C908-916).

It further contends that because board members were aware that they were performing work it means that the Board's inaction to approve the contract was irrelevant. (C. 2062). This ignores that the Board did not know of the no-bid contractual arrangement, the amount of the contract at issue or that it could ultimately be held liable. After all, the payments were coming

from an insurance carrier and being signed off on by an employee of the FOP. (C. 1136). In addition, this Court has determined that "mere non-action" of a municipal corporation is never sufficient to invoke equitable estoppel. *Patrick Engineering, Inc. v. City of Naperville,* 2012 IL 113148 ¶39. There must be either an affirmative act by the municipality itself, such as legislation, or an act by an official with express authority to bind the municipality. *See id. citing Nielsen-Massey Vanillas, Inc. v. City of Waukegan,* 276 Ill.App.3d 146, 152 (2nd Dist. 1995). As such, the Plaintiffs could never have relied upon inaction by the Board as a basis to incur debt and its assertion that this carries weight is in violation of this Court's holdings.

Plaintiffs further contend, without any authority, that "the funds sought will come from the District's casualty carrier, not the District. Restore agreed payment would be determined by the carrier." (Response Brief, pg. 37). They also claim that the Board "refused to approve the final payment from its casualty insurance carrier". (Response Brief, pg. 1).

However, Plaintiffs' own verified complaints make clear that the Board's insurance carriers stopped making payments to them. (C372; C1153; C1330-1333). The Board has not refused to approve a final payment issued by the insurance carriers; no payment has been authorized. Lastly, the Plaintiffs' prayer for relief in the *quantum meruit* claims ask for "judgment in its favor and against Defendant the School Directors of Proviso Township High Schools District 209" in certain defined amounts. (C. 2065; 2067). The judgment it is

seeking is from the Board's funds and any argument to the contrary is belied by its own pleadings. There is simply nothing that Plaintiffs can establish that shows that any judgment herein will be covered by insurance policies. Such speculation should not be given any weight.

As a matter of sound policy, Plaintiffs should not be permitted to flout the statutory requirements required to legally contract with a public entity and then collect funds from the public body. While the Plaintiffs recognize that "taxpayers require protection" its contention that a *quantum meruit* action will protect those interests is misguided. It would much better serve the interests of taxpayers to have their interests protected by vigilantly requiring compliance with competitive bidding and other statutory mechanisms designed to protect them. In fact, by imputing knowledge to contractors like the Plaintiffs, the Courts have put the risk of compliance onto contractors in order to protect taxpayers.

If recovery is permitted in equity as Plaintiffs suggest, contractors and public bodies alike could evade these requirements with impunity and open the door to abuses and practices which are deleterious to the best interests of the very taxpayers these laws are designed to protect. There would no longer be any need for competition to lower the price paid by public entities and favoritism, fraud and corruption would usurp the otherwise legally mandated quest to secure the best work for the lowest price practicable. This scenario is aggravated here since the contractual value of the work is pegged at the same

amount recoverable through a *quantum meruit* claim, namely, the "reasonable value of services". In other words, the price to be paid to the Plaintiffs would be the same under the plain language of the void contracts as in a *quantum meruit* action.

It is recognized that in implied contract cases the proper determination of damages may be difficult and often depends on the peculiar facts of the individual case with recovery usually measured by the reasonable value of the services performed. *Elliot v. Villa Park Trust and Sav. Bank,* 63 Ill.App.3d 714, 717-718 (2nd Dist. 1978). The value can be determined by relying upon the underlying contractual agreement. *Ellis v. Photo America Corp.,* 113 Ill.App.3d 493, 500-501 (1st Dist. 1983). This means, of course, that the Court could value the services in the same fashion as the underlying void contract.

Approaching the issue in this fashion further ignores the fact that while plaintiffs may be able to show a reasonable value to their services, the underlying cost savings and potential efficiencies available to the public entity by having the matter competitively bid as required by law would be lost in this arrangement. In fact, the reasonable value of the services could be higher than what would have been paid had the matter been competitively bid. In this sense, a contractor, such as Plaintiffs, could receive a windfall benefit of not having to compete and could obtain access to public work through favoritism, cronyism or for any number of other improper reasons.

Plaintiffs' contention that New York law favors their ability to recover plainly misstates New York law, which is consistent with the precedent of this State. Specifically, under New York law, "[a] plaintiff may not recover in *quantum meruit* against a municipality under a quasi-contract or unjust enrichment claim for work performed where, as here, there is a contract governing the work which is illegal and unenforceable." *Michael R. Gianatasio, PE P.C. v. City of New York,* 53 Misc.3d 757, 841 (2016) *affirmed,* 159 A.D.3d 659 (2018). "The restrictions imposed by such legislation, we recognized, are designed as a safeguard against the extravagance or corruption of officials as well as against their collusion with vendors. If we were to sanction payment of the fair and reasonable value of items sold in contravention of the bidding requirements, the vendor, having little to lose, would be encouraged to risk evasion of the statute; by the same token, if public officials were free to make such payments, the way would be open to them to accomplish by indirection what they are forbidden to do directly." *Gerzof v. Sweeney,* 22 N.Y.2d 297, 304 (1968). The case cited by Plaintiff dealt with a rare exception where the agency actually approved the contractual agreement and then failed to properly assert an affirmative defense. In review, it addressed the matter in the same fashion that a voidable contract would be considered under Illinois law.

In sum, the protections created by the statutory mechanisms should be upheld and vigilantly protected. Permitting recovery in equity for work

procured in violation of law renders those laws designed to protect taxpayers practically of no avail and to be circumvented by any public official and contractor at their whim. The protections bestowed by law to the taxpayer should be protected over the interests of contractors who knowingly execute agreements that are in violation of Illinois law. For these reasons, the outcome advocated by Plaintiffs is not tenable and should be rejected by this Court as it has been for over a century.

WHEREFORE, Defendant-Appellant, BOARD OF EDUCATION OF PROVISO TOWNSHIP HIGH SCHOOLS DISTRICT 209 prays that this Honorable Court:

1. Reverse the order and decision of the Illinois Appellate Court;
2. Affirm the Order of the Circuit Court of Cook County dismissing Restore's claims against Proviso;
3. Grant it any further relief that this Court deems just and equitable.

Respectfully submitted,

BOARD OF EDUCATION OF PROVISO TOWNSHIP HIGH SCHOOLS DISTRICT 209

By: /s/ William F. Gleason
One of Its Attorneys

WILLIAM F. GLEASON (wgleason@hauserizzo.com)
ERIC S. GRODSKY (egrodsky@hauserizzo.com)
RAYMOND A. HAUSER (rhauser@hauserizzo.com)
HAUSER, IZZO, PETRARCA,

GLEASON & STILLMAN LLC
19730 Governors Highway, Suite 10
Flossmoor, IL 60422
(708)799-6766

## CERTIFICATE OF COMPLIANCE

I, William F. Gleason, attorney for Defendant-Appellant Board of Education of Proviso Township High Schools District 209, do hereby certify that this memorandum conforms to the requirements of Rules 341(a) and (b). The length of this memorandum, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 5995 words.

/s/ *William F. Gleason*

WILLIAM F. GLEASON
ERIC S. GRODSKY
RAYMOND A. HAUSER
HAUSER, IZZO, PETRARCA,
GLEASON & STILLMAN, LLC
*Attorney for Defendant-Appellant*
19730 Governors Highway, Suite 10
Flossmoor, Illinois 60422
Telephone: (708) 799-6766
Facsimile: (708) 799-6866
wgleason@hauserizzo.com
egrodsky@hauserizzo.com
rhauser@hauserizzo.com

CASE NO. 125133

IN THE
ILLINOIS SUPREME COURT

| | | |
|---|---|---|
| RESTORE CONSTRUCTION COMPANY, INC. and RESTORE RESTORATION, INC.<br><br>Plaintiffs-Appellees,<br><br>v.<br><br>THE BOARD OF EDUCATION OF PROVISO TOWNSHIP HIGH SCHOOLS DISTRICT 209, NETTIE-COLLINS-HART, DANIEL J. ADAMS, TRAVELERS INDEMNITY COMPANY, GALLAGHER BASSETT SERVICES, INC., MADSEN KNEPPERS AND ASSOCIATES, INC., and COLLECTIVE LIABILITY INSURANCE COOPERATIVE,<br><br>Defendants,<br><br>(The Board of Education of Proviso Township High Schools District 209, Defendant-Appellant.) | ) | On Appeal from the Illinois Appellate Court, First District, Case No. 1-18-1580<br><br>There Heard on Appeal from the Circuit Court of Cook County, Illinois County Department, Law Division Case No. 2015 L 010904<br><br>Hon. Bridgid Mary McGrath, Presiding |

NOTICE OF FILING AND CERTIFICATE OF SERVICE

The undersigned, being first duly sworn, deposes and states that on December 24, 2019, there was electronically filed and served upon the Clerk of the Illinois Supreme Court the DEFENDANT-APPELLANT BOARD OF EDUCATION OF PROVISO TOWNSHIP HIGH SCHOOLS DISTRICT 209'S REPLY BRIEF and that on the same day it was provided to the attorney noted

below by placing the same in a pre-paid properly addressed envelope and placing the same in a U.S. Postal Box in Olympia Fields, and by also sending a copy of the same by email transmission to the email address set forth below.

Michael W. Rathsack
10 S. LaSalle Street
Suite 1420
Chicago, IL 60603
mrathsack@rathsack.net

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ *William F. Gleason*
William F. Gleason

WILLIAM F. GLEASON (wgleason@hauserizzo.com)
ERIC S. GRODSKY (egrodsky@hauserizzo.com)
RAYMOND A. HAUSER (rhauser@hauserizzo.com)
HAUSER, IZZO, PETRARCA,
GLEASON & STILLMAN, LLC
*Attorney for Defendant-Appellant*
19730 Governors Highway, Suite 10
Flossmoor, Illinois 60422
Telephone: (708) 799-6766
Facsimile: (708) 799-6866

E-FILED
12/24/2019 2:11 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK