2019 IL App (2d) 19-0026-U
No. 2-19-0026
Order filed September 10, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JAMES M. SWEENEY and INTERNATIONAL UNION OF OPERATING ENGINEEERS, LOCAL 150, AFL-CIO,	)	Appeal from the Circuit Court of McHenry County.
Plaintiffs-Appellees,	)	
v.	)	No. 17-CH-482
ALGONQUIN TOWNSHIP ROAD DISTRICT,	)	
Defendant and Counterplaintiff -Appellant.	)	
(International Union of Operating Engineers, Local 150, AFL-CIO, Plaintiff and Counterdefendant-Appellee; Andrew Gasser, Algonquin Township Highway Commissioner, Counterplaintiff-Appellant.)	)	Honorable Daniel L. Jasica Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Birkett and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in dismissing the counterclaims, and it did not err in granting judgment for plaintiffs on their FOIA complaint. In addition, counterplaintiffs did not provide an adequate record to review the court's findings

on fees and contempt, and we therefore resolved those issues in favor of plaintiffs. Accordingly, we affirmed.

¶ 2 Plaintiffs, James M. Sweeney and the International Union of Operating Engineers, Local 150, AFL-CIO (Local 150), alleged violations of the Illinois Freedom of Information Act (FOIA) (5 ILCS 140, *et seq.* (West 2016)) against defendant, Algonquin Township Road District (Road District). Sweeney was the President-Business Manager of Local 150.

¶ 3 Defendants and counterplaintiffs, Andrew Gasser and the Road District,[1] filed a counterclaim against Local 150 alleging, in relevant part, that the collective bargaining agreement (CBA) between Local 150 and the Road District was invalid. Gasser was the Algonquin Township Highway Commissioner (Commissioner) and served as head of the Road District.

¶ 4 Plaintiffs moved for judgment on the pleadings, and defendants moved for summary judgment. The circuit court granted plaintiffs' motion and denied defendants' motion. Plaintiffs then petitioned for costs, attorney fees, and sanctions. Local 150 also petitioned for a rule to show cause. Defendants filed a premature notice of appeal in November 2018, but on this court's own motion on April 18, 2019, we deemed defendants' January 14, 2019, amended notice of appeal timely. Defendants argue that the circuit court erred in dismissing their counterclaim, compelling arbitration, denying their motion for summary judgment, awarding fees to plaintiffs, and finding Gasser in indirect civil contempt.

[1] The notice of appeal labels both Gasser and the Road District as defendants and counterplaintiffs. The record, however, shows that the only named defendant was the Road District. As a convenience for this disposition, we hereinafter refer to Gasser and the Road District collectively as defendants.

¶ 5 We affirm.

¶ 6 I. BACKGROUND

¶ 7 On April 10, 2017, the Illinois Labor Relations Board (ILRB) certified Local 150 as the exclusive representative for certain Road District employees for purposes of collective bargaining. Local 150 was certified to represent employees with the following titles: highway worker, laborer, foreman, and mechanic. All other employees of the Road District were not represented. On April 25, 2017, Local 150 and the Road District executed a CBA. At that time, the Road District was headed by then-Commissioner Robert Miller.

¶ 8 On May 15, 2017, Gasser commenced his term as Commissioner, succeeding Miller. That same day, Gasser terminated three Road District employees. Two employees were relatives of Miller. Local 150 filed grievances pursuant to the CBA, and Gasser responded that he would repudiate any labor agreement executed during Miller's term as Commissioner. Local 150 also demanded arbitration of the grievances pursuant to the CBA. Prior to assuming the office of Commissioner, Gasser sent a letter to Local 150 objecting to any contract impacting his upcoming term of office without including him in the bargaining.

¶ 9 On June 12, 2017, Local 150 served a FOIA request on the Road District. In its FOIA request, Local 150 sought "[a]ll emails to and from Andrew Gasser from April 15, 2017 to present, including personal emails used for Algonquin Township business." The Road District received the FOIA request the same day. On June 19, 2017, the Road District responded that the request was unduly burdensome.

¶ 10 On June 23, 2017, plaintiffs filed their complaint against the Road District. They alleged multiple violations of FOIA arising from plaintiffs' FOIA request. Plaintiffs alleged that, at all times relevant to their action, the Road District was a public body in Illinois. Plaintiffs continued

that the Road District improperly denied their FOIA request for several reasons, including that their request was not unduly burdensome and that the Road District never extended them an opportunity to confer to reduce the request pursuant to section 3(g) of FOIA (5 ILCS 140/3(g) (West 2016)). Plaintiffs therefore sought a declaration that the Road District violated FOIA; an order requiring the Road District to provide the requested documents; an injunction prohibiting future FOIA violations; an award of costs and attorney fees; and a civil penalty against the Road District for each FOIA violation.

¶ 11 A. Counterclaims

¶ 12 Defendants filed their answer and counterclaim on July 3, 2017. In their answer, they denied the FOIA allegations against them. In their counterclaim, defendants alleged that the CBA was not enforceable and asked the court to enjoin enforcement of the CBA's provisions. Plaintiffs filed a combined motion dismiss the counterclaim pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)).

¶ 13 On July 25, 2017, plaintiffs also moved pursuant to section 2 of the Uniform Arbitration Act (710 ILCS 5/2 (West 2016)) to compel arbitration of their grievances in the event that they would prevail on defendants' counterclaim.

¶ 14 The circuit court granted Local 150's motion to dismiss defendants' counterclaim without prejudice, and defendants filed a four-count amended counterclaim alleging that the CBA was invalid and seeking declaratory and injunctive relief. Specifically, count I alleged that the CBA was invalid because it was an expense in excess of $20,000 requiring board approval in violation of section 85-30 of the Township Code (60 ILCS 1/85-30 (West 2016)). Count II alleged that the CBA improperly restricted Gasser's statutory powers as Commissioner, including the Commissioner's ability to fire employees and respond to the needs of the community. Count III

alleged violations of the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2016)) during the negotiation and execution of the CBA, and it additionally alleged that Miller could not enter a contract extending beyond his term as Commissioner. Finally, Count IV alleged that Miller engaged in improper bargaining negotiations.

¶ 15 Plaintiffs filed a section 2-619.1 combined motion to dismiss the amended counterclaim. Pursuant to section 2-615, they argued that count I was based on an irrelevant statute; that the CBA was lawful in term and scope; that there was no Open Meetings Act violation because the Commissioner was not a public body; and that there was no improper direct dealing during CBA negotiations. Pursuant to section 2-619, plaintiffs argued that counts II, III, and IV were time-barred; that the ILRB had exclusive jurisdiction of counts II and IV; and that count III could not be brought against Local 150.

¶ 16 On March 9, 2018, the circuit court granted plaintiffs' motion to dismiss in its entirety. At the hearing on the motion to dismiss, the court explained that count I failed as a matter of law because the CBA negotiations were not subject to section 85-30 of the Township Code (60 ILCS 1/85-30 (West 2016)). Rather, section 6-201.7 of the Illinois Highway Code (Highway Code) (605 ILCS 5/6-201.7 (West 2016)) applied to the Road District.

¶ 17 On count II, the court explained that CBAs by their "very nature" can span administrations, and therefore the count failed. Turning to count III, the court found that Local 150 was not a public body and therefore it could not grant any relief under the Open Meetings Act. Finally, the court explained that count IV was attempting to assert "some sort of conflict of interest claim because of the benefits that are received by family members of the former commissioner," but benefits to family members were not benefits to the person signing the contract. In addition, the court did not believe the Commissioner could have a claim for any

"direct dealing," and if he did, it would be more appropriate to bring before a labor relations board. However, the court found that the issue was not yet fully briefed. The court granted defendants leave to file a second amended counterclaim.

¶ 18 Defendants filed their second amended counterclaim on April 14, 2018, substantially restating the four counts from their first amended counterclaim. In the alternative, they added a fifth count for civil conspiracy. Count V alleged that the CBA was executed "not in furtherance of any public purpose, but rather was executed for the purpose of perpetuating graft and patronage" to benefit the financial interests of Miller and his family.

¶ 19 Plaintiffs moved to dismiss the second amended counterclaim on May 8, 2018, for similar reasons to its motion to dismiss counts I through IV of the first amended counterclaim. In addition, plaintiffs argued that count V should be dismissed because there was no independent unlawful action to support civil conspiracy and the ILRB had exclusive jurisdiction over the claim.

¶ 20 The circuit court granted plaintiffs' motion to dismiss the second amended counterclaim on August 21, 2018, dismissing all claims with prejudice. At the hearing on the same day, the court reasoned as follows. Count I of the second amended counterclaim contained the "exact same allegations" as count I of the first amended counterclaim plus allegations that the Algonquin Township exercised control over the Commissioner. Regardless of the Township's authority over the Commissioner and the Road District, the court dismissed count I for the same reason as before: the provision of the Algonquin Township Code that defendants relied upon did not apply to the Road District. The court also dismissed count II for the same reason as before: CBAs in Illinois may span multiple years and span between administrations.

¶ 21 The court continued that count III of the second amended counterclaim "basically replicate[d]" count III of the first amended counterclaim. Defendants additionally argued that the Road District was a public body under the Open Meetings Act, even if it consisted of only one person, but the court noted that defendants did not cite any authority for their argument and the court did not find any. The court concluded that the Commissioner, acting as a sole official, was not a body under the Open Meetings Act. Count IV was also identical to the prior counterclaims' count IV, and it failed to state a viable cause of action. Therefore, it was dismissed.

¶ 22 Finally, the court dismissed count V because there was no allegation that the CBA negotiations or execution were tortious or unlawful. There were no facts pled beyond those already pled in counts I through IV. In defendants' response, they argued that the conspiracy claim was rooted in conversion, fraud, or official misconduct. These theories were not alleged in the second amended counterclaim, and nevertheless, the court did not see how the facts of the case demonstrated any unlawful act. Conversion did not fit because it concerned holding personal property that another had an immediate and unconditional right to, and official misconduct failed because it required some underlying allegation that a public official acted in excess of lawful authority. The court believed Miller had authority to enter an agreement that survived his term in office. "Other than alleging there is a conspiracy," there were simply no allegations of unlawful acts.

¶ 23 After disposing of the counterclaim, the court granted plaintiffs' motion to compel arbitration of their grievances pursuant to the CBA on September 20, 2018.

¶ 24 B. FOIA Complaint

¶ 25 In their FOIA complaint, plaintiffs moved pursuant to section 2-615(e) of the Code (735 ILCS 5/2-615(e) (West 2016)) for judgment on the pleadings. In their September 11, 2018,

motion, plaintiffs argued that the Road District failed to comply with section 3(g) of FOIA (5 ILCS 140/3(g) (West 2016)), and that the Road District's denial of their FOIA request was improper, willful, and intentional, and that it had acted in bad faith.

¶ 26 Two days later, the Road District moved for summary judgment on plaintiffs' FOIA complaint. It argued, in pertinent part, that FOIA did not apply because the Road District was not a "public body" under FOIA.

¶ 27 Prior to the court's hearing on the parties' dispositive motions, Local 150 filed a petition for rule to show cause for indirect civil contempt against Gasser, Gasser's counsel, and the Road District. The October 17, 2018, petition was based on defendants' failure to comply with the court's September 20, 2018, order compelling arbitration of the former Road District employees' pending grievances.

¶ 28 The circuit court granted plaintiffs' motion for judgment on the pleadings and denied the Road District's motion for summary judgment. At an October 23, 2018, hearing, the court explained its order as follows. First addressing the Road District's motion for summary judgment, the court concluded that the Road District was a public body for purposes of FOIA because the Road District qualified as a municipal corporation. Because the Road District was a public body, defendants' motion for summary judgment failed.

¶ 29 The court also clarified its reasoning for dismissing count III of defendants' amended counterclaims. It explained that its decision was sound, but it had used imprecise language in its reasoning. The court specifically stated "I do not conclude that the Road District is exempt from *** the Open Meetings Act because it's not a public body. I conclude that no meeting occurred when Mr. Miller approved the [CBA], at least as that term is defined under the Open Meetings Act."

¶ 30 The court then turned to plaintiffs' motion for judgment on the pleadings. It reiterated that the Road District was a public body under FOIA, and it found that the Road District did not properly invoke section 3(g) of FOIA's undue burden exception. The Road District made no offer to confer to narrow the request, nor did it explain why a response would be unduly burdensome. Therefore, the court concluded that, as a matter of law, the Road District violated FOIA.

¶ 31 The court found that, pursuant to section 11(i) of FOIA (5 ILCS 140/11(i) (West 2016)), plaintiffs had prevailed on their FOIA claim against the Road District, and therefore they were entitled to reasonable attorney fees and costs. The court continued, however, that the Road District did not act willfully or intentionally, nor did it act in bad faith in its FOIA response.

¶ 32 Finally, the court issued a rule to show cause against Gasser concerning the arbitration of grievances. The court did not think it was appropriate to issue a rule against the Road District itself because it was not an individual. The court set a hearing on the rule to show cause for December 11, 2018.

¶ 33 C. Post-Judgment Motions

¶ 34 On November 6, 2018, plaintiffs moved for attorney fees and costs under both FOIA and the Open Meetings Act, and they also moved for Illinois Supreme Court Rule 137 sanctions (eff. Jan. 1, 2018). While the briefs indicate that the court awarded fees to plaintiffs in January 2019, the common law record contains no entries after defendants' notice of appeal on November 21, 2018. The final hearing in the report of proceedings is from December 11, 2018. There, the court granted the Road District additional time to respond to plaintiffs' fee petitions, granted Gasser additional time to respond to the rule to show cause, and set a hearing for plaintiffs' fee petitions for January 10, 2019.

¶ 35 II. ANALYSIS

¶ 36 Defendants make several arguments on appeal. At the outset, we note that defendants have failed to provide an adequate record for review of multiple orders. In particular, defendants seek reversal of three orders not present in the record: a January 10, 2019, order awarding attorney fees; a January 10, 2019, order amending the court's order to compel arbitration; and a March 1, 2019, order finding Gasser in indirect civil contempt. In defendants' reply brief, they attach an order from January 10, 2019, as an exhibit. The order states that plaintiffs' petition for fees pursuant to FOIA was granted; plaintiffs' petition for fees pursuant to the Open Meetings Act was denied; plaintiffs' motion for sanctions was denied; defendants' motion to stay was denied; and plaintiffs' petition for rule to show cause and for indirect civil contempt was denied. The order also states that court's reasons for the order were made in open court, but defendants do not attach a transcript of the hearing.

¶ 37 Attachments to briefs are not included in the record on appeal and are not properly before the appellate court. *Wickman v. Illinois Property Tax Appeal Board*, 387 Ill. App. 3d 414, 416 (2008). Defendants did not move to supplement the record. Accordingly, we do not consider the attached order in our review.

¶ 38 Not only are the three orders concerning fees, arbitration, and contempt absent from the record, but also we do not have any transcript of the relevant hearings. An appellant has a duty to provide an adequate record for review, and any doubt arising for the insufficiency of the record is resolved in the appellee's favor. *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 679 (2000). Accordingly, we resolve defendants' arguments over fees, amendments to the arbitration order, and contempt in favor of plaintiffs.

¶ 39 In addition, an appellant's argument "shall contain the contentions of the appellant *** *with citation of the authorities and the pages of the record relied on*." (Emphasis added.) Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). The failure to develop argument with citation to authority and the record violates Rule 341 and results in forfeiture of the issue. *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18. Here, portions of defendant's argument are without any citations, and other portions of argument are barely developed. To the extent that defendants' arguments are not developed and supported with citations, we do not consider those arguments, as noted *infra*.

Defendants remaining arguments are divided among the court's orders dismissing their first and second amended counterclaims, compelling arbitration, and denying their motion for summary judgment on plaintiffs' FOIA complaint. We address each in turn.

¶ 40 A. Counterclaims

¶ 41 Defendants advance multiple theories to argue that the circuit court erred in dismissing their counterclaims. We review the grant of a motion to dismiss *de novo*. *Glasgow v. Associated Banc-Corp.*, 2012 IL App (2d) 111303, ¶ 11.

¶ 42 1. Purchase of Services

¶ 43 Defendants first argue that the CBA is a "sham" and is actually an illegally disguised employment contract. They argue that the circuit court, at the pleadings stage, should have taken these allegations in their counterclaim as true. They continue that Local 150 mischaracterized the facts and law in its motion to dismiss.

¶ 44 Defendants' argument—to the extent that it is intended as argument and not a thematic summary—is undeveloped and does not cite any authority or any page in the record in support.

As stated *supra* ¶ 38, failure to develop argument with citation to authority and to the record results in forfeiture of the argument.

¶ 45 Defendants continue that count I of their counterclaims should not have been dismissed because the CBA violated section 85-30 of the Township Code (60 ILCS 1/85-30 (West 2016)), in that the CBA was for a purchase of services in excess of $20,000. Therefore, they argue that the additional, unmet requirements of section 85-30 applied. Plaintiffs respond that the Road District was not governed by section 85-30. Rather, section 6-201.7 of the Highway Code governed the Road District. Plaintiffs stress that the Road District and the Algonquin Township are separate entities.

¶ 46 We agree with plaintiffs. The circuit court correctly concluded that section 85-30 did not apply to the Road District. There is no dispute that the Road District was a separate unit of government from the Algonquin Township. To wit, in their reply brief, defendants state "The Road District is a distinct entity separate from the Township." Here, section 85-30 of the Township Code clearly applies to the Algonquin Township. 60 ILCS 1/85-30 (West 2016) ("Any purchase by a *township* for services, materials, equipment, or supplies in excess of $20,000 ***." (Emphasis added.)). However, the Road District was not a township, and section 6-201.7 of the Highway Code governs the Commissioner's authority in a road district. See 605 ILCS 5/6-201, 201.7 (West 2016) (delineating functions of the Commissioner). Under section 6-201.7, the Commissioner has to hold a bidding process when the cost of contracted materials, supplies, etc., exceeds $20,000. 605 ILCS 5/6-201.7 (West 2016). This section excepts contracts for professional services. *Id.* Regardless of whether the CBA qualified as materials, supplies, or equipment under either statute, the circuit court properly dismissed count one of defendants'

counterclaim because the Road District was not a township subject to section 85-30 of the Township Code.

¶ 47 2. Commissioner's Powers

¶ 48 Defendants' brief turns to "Gasser's Powers." They are likely referencing their argument before the trial court on count II of their counterclaims that the CBA improperly restricted Gasser's statutory powers as Commissioner. Their argument in their brief, however, is one sentence—apparently copied and pasted from their memorandum in opposition to plaintiffs' motion to dismiss their second amended counterclaim—that reads "In addition to the authority previously cited, *see* [citation omitted]." This is inadequate argument under Rule 341, and the issue of the Commissioner's statutory powers is forfeited. See *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010) ("This court *** is not a repository into which an appellant may foist the burden of argument and research." (Internal quotation marks omitted.)).

¶ 49 3. Direct Dealing

¶ 50 Turning to count IV of their counterclaims, defendants also argue that the CBA was the result of improper direct dealings between the Road District and Local 150, in that Miller refused to bargain in good faith. They allege that he violated sections 315/10(a)(1) and (4) of Illinois Public Labor Relations Act (IPLR Act) (5 ILCS 315/10(a)(1), (4) (West 2016)). They also argue that Local 150 failed to bargain in good faith in violation of the IPLR Act. See 5 ILCS 315/10(b)(1), (4) (West 2016). They continue that Miller's daughter, Rebecca Lee, and her husband, Derek Lee, negotiated the terms and conditions of the CBA. Derek was a Road District employee, and defendants' argue there was at least an appearance of a conflict of interest.

¶ 51 Plaintiffs respond that (1) no facts in the counterclaim demonstrate unlawful bargaining and (2) an alleged violation of the IPLR Act was not properly before the circuit court and is not properly before this court.

¶ 52 We agree with plaintiffs that defendants' argument is not properly before us. Defendants allege violations of the IPLR Act, specifically unfair labor practices under section 315/10 of the IPLR Act. Such violations are the exclusive jurisdiction of the ILRB. See *Cessna v. City of Danville*, 296 Ill. App. 3d 156, 161-64 (1998) (ILRB had exclusive jurisdiction over unfair labor practice claims); *Foley v. American Federation of State, County, & Municipal Employees, Council 31, Local No. 2258*, 199 Ill. App. 3d 6, 9-10 (1990) (ILRB had exclusive jurisdiction over breach of fair representation claims). The circuit court lacked jurisdiction to hear the alleged unfair labor practice violations, and therefore it properly granted the motion to dismiss.

¶ 53 4. Open Meetings Act

¶ 54 Defendants next argue that the circuit court erred in dismissing count III of their counterclaim for violations of the Open Meetings Act. They argue that the Road District was a public body and that the Open Meetings Act applied to the Road District. They contend that communications between Miller and Local 150 concerning the CBA amounted to a meeting.

¶ 55 Defendants' argument fails as a matter of law. The circuit court reasonably concluded that Miller, as a sole official, did not hold a meeting to conduct his public business. Moreover, we note that section 2(c)(2) of the Open Meetings Act (5 ILCS 120/2(c)(2) (West 2016)) specifically excepts collective negotiating matters between a public body and its employees or their representatives. Thus, the Road District did not have to hold an open meeting when negotiating the CBA, even if it had several officers negotiating.

¶ 56 The circuit court, in addition to finding that the Open Meetings Act did not apply, also concluded that such a claim was time-barred. We have already concluded that the circuit court properly found the Open Meetings Act was applicable. Therefore, we need not address defendants' argument that their Open Meetings Act allegation was timely.

¶ 57 5. Civil Conspiracy

¶ 58 Defendants argue that the circuit court erred in dismissing count V of their second amended counterclaim alleging a civil conspiracy. In support, they cite the allegations of their counterclaims. They argue that the execution of the CBA was an overt act in furtherance of a conspiracy and that the CBA itself was a conspiracy in furtherance of other overt acts.

¶ 59 Plaintiffs respond that defendants' argument fails for several reasons, including that civil conspiracy is not an independent tort and that plaintiffs did not commit any unlawful act.

¶ 60 Civil conspiracy is an intentional tort requiring proof that a defendant knowingly and voluntarily participated in a common scheme to commit an unlawful act. *Duncan v. Peterson*, 359 Ill. App. 3d 1034, 1050 (2005). The elements of a civil conspiracy are (1) a combination of two or more persons (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means (3) in furtherance of which one of the conspirators committed an overt tortious or unlawful act. *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 923 (2007). The mere characterization of some combination of acts as a conspiracy is insufficient to survive a motion to dismiss. *Id.*

¶ 61 Here, defendants argue the unlawful act is the CBA itself. Yet, CBAs are not inherently unlawful, and defendants' other four counts arguing this particular CBA was unlawful have already failed. Moreover, defendants' counterclaim merely characterizes a combination of acts by plaintiffs as a conspiracy, which is insufficient to survive a motion to dismiss. To the extent

that defendants argue the unlawful act was constructive fraud, conversion, or official misconduct, we reject those arguments *infra*. Accordingly, there was no sufficiently pled unlawful act, and the circuit court properly dismissed count V.

¶ 62 6. Constructive Fraud

¶ 63 In addition to the five counts in their second amended complaint, defendants argue the second amended complaint successfully stated a claim for constructive fraud. They argue that Miller, as a public official during his time as Commissioner, had a fiduciary duty to the public, and he breached his fiduciary duty by refusing to bargain in good faith and by executing the CBA.

¶ 64 Plaintiffs respond that defendants never actually pled constructive fraud. Rather, the issue of constructive fraud was raised only in response to Local 150's motion to dismiss the second amended counterclaim. Plaintiffs continue that regardless of the failure to properly raise the issue, defendants did not state a claim for constructive fraud. They argue there were no specific and particular facts alleging what misrepresentations Miller made, when they were made, or to whom they were made. Rather, the claim was a repackaged allegation of defendants' direct dealing count.

¶ 65 We agree with plaintiffs and reject defendants' argument. A party may establish fraud under one of two theories: actual fraud or constructive fraud. *Farmer City State Bank v. Guingrich*, 139 Ill. App. 3d 416, 425 (1985). Constructive fraud is any act, statement, or omission that amounts to a positive fraud or is construed as a fraud because it has a detrimental effect on public interests or public confidence. *Mitchell v. Norman James Construction Co.*, 291 Ill. App. 3d 927933 (1997). It most frequently arises when there is a breach of a fiduciary relationship. *Id.* at 934. To state a claim for constructive fraud, the facts constituting the fraud

must be set forth in the complaint. *LaSalle National Trust, N.A. v. Board of Directors of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d 449, 456 (1997).

¶ 66 Importantly, fraud "must be pleaded with sufficient specificity, particularity and certainty to apprise the opposing party of what he is called upon to answer." *Board of Education of City of Chicago v. A, C and S, Inc.*, 131 Ill. 2d 428, 457 (1989). Here, the counterclaim did not contain a count for fraud. Only in response to Local 150's motion to dismiss did defendants allege that Miller had engaged in a constructive fraud. Even then, their allegations were insufficiently specific, particular, or certain. Defendants concluded that Miller breached a fiduciary duty because he did not bargain in good faith by engaging in inappropriate direct dealing, but we have already rejected defendants' argument that the counterclaim stated a claim for direct dealing. Defendants' argument that negotiating and executing the CBA amounted to a breach of fiduciary duty is conclusory, and the circuit court did not err in dismissing the constructive fraud allegations.

¶ 67 7. Conversion

¶ 68 Defendants assert that their second amended counterclaim stated a claim for conversion. They claim that the CBA gave the Miller family and Local 150 members control over "millions of dollars of funds and equipment" and that defendants have the right to immediate possession of that property.

¶ 69 We reject defendants' argument. First, as with constructive fraud, defendants never actually pled conversion in their counterclaim. The issue of conversion was raised in response to plaintiffs' arguments at a hearing, and even then, defendants failed to make specific allegations. To prove conversion, one must allege four elements, including a defendant's "unauthorized and wrongful assumption of control, dominion, or ownership over the plaintiff's *personal property*."

(Emphasis added.) *Bill Marek's The Competitive Edge, Inc. v. Mickelson Group, Inc.*, 346 Ill. App. 3d 996, 1003 (2004). Here, the CBA was not a contract for personal property but instead was a contract for the terms and conditions for Road District employees' employment. Because there were no allegations that plaintiffs assumed control of defendants' personal property—defendants argued before the circuit court that that conversion was supported by "the totality of the circumstances"—the circuit court properly dismissed this argument as a matter of law.

¶ 70 8. Official Misconduct

¶ 71 Similar to defendants' argument for constructive fraud and conversion, defendants argue the second amended counterclaim stated a claim for official misconduct despite failing to plead it in their counterclaim. Defendants cite section 33-3 of the Criminal Code of 2012 (Criminal Code) 720 ILCS 5/33-3 (West 2016)) as the basis for official misconduct. In the alternative, they conclude that the CBA violates the Illinois Constitution, although they do not explain how the CBA violates it.

¶ 72 At the hearing on the motion to dismiss their second amended counterclaim, defendants argued that the basis for official misconduct was "the totality of the behavior of the [Commissioner] in combination with transferring assets to himself, his family, and done in concert with Local 150," including the CBA's provision providing employees cell phones. Defendants also agreed with the court that their official misconduct claim was necessarily dependent on their argument that Miller did not have authority to enter a CBA that extended beyond the term of his office.

¶ 73 Defendants' official misconduct argument fails. First, as plaintiffs persuasively argue, section 33-3 of the Criminal Code does not provide for a private, civil action. Second, defendants' constitutional argument is undeveloped and unsupported, and is therefore deemed

forfeited. See *supra* ¶ 38. Finally, defendants' conclusory allegations of misconduct, raised for the first time in response to a motion to dismiss, are insufficient to survive a motion to dismiss, and the circuit court did not err in dismissing them.

¶ 74 9. Preemption

¶ 75 Defendants include additional argument that "[t]here can be no pre-emption where there is no labor contract." It is not entirely clear what defendants mean by preemption in this context, but to the extent they argue that their unfair labor practices claims are not the exclusive jurisdiction of the ILRB, we have already rejected that argument. See *supra* ¶¶ 50-52.

¶ 76 Having rejected all of defendants' counterclaim arguments, we conclude that the circuit court did not err in dismissing defendants' first and second amended counterclaims.

¶ 77 B. Arbitration Order

¶ 78 Defendants ask that we reverse the circuit court's order to compel arbitration. However, they do not specifically argue why the order compelling arbitration is wrong, except to suggest that, in their argument against fees and contempt, there is nothing to arbitrate. Because we concluded that the court properly dismissed defendants' first and second amended counterclaims (*supra* ¶ 76), there is no basis to conclude the CBA was invalid. Therefore, there is no basis to reverse the order compelling arbitration. Accordingly, the September 20, 2018, order compelling arbitration is affirmed.

¶ 79 C. FOIA Judgment

¶ 80 Turning to plaintiffs' FOIA complaint, defendants argue that the circuit court should have denied plaintiffs' motion for judgment on the pleadings and granted their motion for summary judgment because the Road District is not, for purposes of FOIA, a "public body." They argue that the Road District is not a municipal corporation and is not a subsidiary of any public body.

They compare the definition of "public body" in FOIA to its definition in the Open Meetings Act, arguing that the circuit court could not have determined the Road District was a public body under FOIA after it already determined it was not a public body under the Open Meetings Act.

¶ 81 Plaintiffs respond that the Road District is a public body under the plain language of FOIA. They argue that the Road District is a municipal corporation or, in the alternative, a subsidiary body of the Algonquin Township public body.

¶ 82 We review a circuit court's rulings on both a motion for summary judgment and a motion for judgment on the pleadings *de novo*. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 65.

¶ 83 We first reject defendants' invitation to compare the definitions of a public body under FOIA and the Open Meetings Act.[2] During the hearing on defendants' motion for summary judgment, the circuit court clarified its ruling dismissing count III of the amended counterclaims. It did not conclude that the Road District was a public body under the Open Meetings Act. Instead, it ruled that Miller, as a sole official, was not subject to the act's public meeting requirement. See *supra* ¶ 28.

¶ 84 We agree with plaintiffs that the Road District is a municipal corporation under FOIA. FOIA defines a public body in relevant part as follows:

> " 'Public body' means all legislative, executive, administrative, or advisory bodies of the State, ***, counties, *townships*, cities, villages, incorporated towns, school districts and *all other municipal corporations*, *** *any subsidiary bodies of any of the*

[2] Ironically, we note that in defense of their counterclaim, defendants argue that the Road District is a public body under the Open Meetings Act.

foregoing including but not limited to committees and subcommittees thereof." (Emphases added.) 5 ILCS 140/2(a) (West 2016).

When construing a statute, we must ascertain and give effect to the intent of the legislature. *Nelson v. Kendall County*, 2014 IL 116303, ¶ 23. The best evidence of legislative intent is the language of the statute given its plain, ordinary, and popularly understood meaning. *Id.*

¶ 85 Here, plaintiffs are correct that Illinois has long recognized road districts as municipal corporations. *Board of Directors for Leveeing Wabash River v. Houston*, 71 Ill 318, 322 (1874) ("All municipal corporations are created by the State *** to administer the local affairs of the city, town or district incorporated. Counties, school district and road districts, are invested with corporate powers."). In fact, the corporate status of road districts is codified in the Highway Code. 605 ILCS 5/6-107 (West 2016) ("Road districts have corporate capacity to exercise the powers granted thereto."); see also *id.* § 6-106 (addressing the corporate name of road districts in counties without townships). Under the Highway Code, each township is called and considered a road district for the purposes of construction, repair, maintenance, financing and supervision of township roads. *Id.* § 6-102. Because the Road District is a municipal corporation under section 2(a) of FOIA (5 ILCS 140/2(a) (West 2016)), it is a public body.

¶ 86 Having already determined that the Road District is a municipal corporation, we need not determine if it is also a subsidiary body. Nevertheless, we believe that the Road District satisfies the definition of a subsidiary body under section 2(a) of FOIA. A township is a public body under the plain language of the statute (5 ILCS 140/2(a) (West 2016)), and there is no dispute that Algonquin Township is a township. Courts look to three factors in evaluating whether an entity is a subsidiary body under section 2(a) of FOIA: (1) whether the entity has a legal existence independent of governmental resolution; (2) the nature of the entity's functions; and

(3) the degree of governmental control exerted. *Better Government Ass'n v. Illinois High School Ass'n*, 2016 IL App (1st) 151356, ¶ 21. Applying these factors, we observe that Illinois road districts are created by statute (see 605 ILCS 5/6-101 (West 2016)), that each township is considered and called a road district (605 ILCS 5/6-102 (West 2016), that their purpose is to assist townships with construction, repair, maintenance, financing, and supervision of township roads (*id.*), and that they have jurisdiction of the roads with powers and duties defined by statute (605 ILCS 5/6-101; see also 605 ILCS 5/6-107 (West 2016) (corporate powers)). The Highway Code also provides for the office of an elected highway commissioner, and it sets out his powers and duties. See *id.* § 6-112; *Franks v. Township of Riley, McHenry County*, 50 Ill. App. 3d 99, 100 (1977) ("A highway commissioner is a statutory officer and can exercise only those powers as are conferred *** by statute."). Accordingly, the Road District also satisfies the statutory definition of a public body because it is a subsidiary of the Algonquin Township, itself a public body.

¶ 87 FOIA's explicit purpose is to promote full and complete access to information regarding the affairs of government and the official acts of public officials. 5 ILCS 140/1 (West 2016). We note that, while defendants argue against disclosure, much of defendants' argument on appeal concerns the Road District's public duties and allegations that its former Commissioner violated his public duties. In fact, defendants begin their Summary of Argument by stating "[t]his appeal arises out of an unprecedented set of facts wherein a *public office holder* sought to act in a way to retain the power conferred for his limited term of office." Given the undisputed public nature of the Road District, our holding that the Road District is a public body aligns with FOIA's stated purpose.

¶ 88 D. Plaintiffs' Motion for Sanctions

¶ 89 Before this court, plaintiffs moved for sanctions pursuant to Illinois Supreme Court Rules 137 (eff. Jan. 1, 2018) and 375(b) (eff. Feb. 1, 1994), requesting that we grant attorney fees and that we strike defendants' reply brief. They argue that defendants' reply brief contains multiple false statements, including incorrect quotes from their brief. For the following reasons, we grant plaintiffs' motion in part by striking portions of the reply brief.

¶ 90 We agree with plaintiffs that defendants' reply brief misstates portions of their brief. In their reply brief, defendants claim that plaintiffs admitted they "never paid any legal fees" and that they performed work at "no cost to its members." Plaintiffs' brief admits neither. In fact, plaintiffs' brief reads "Local 150 performed the work on this case for its members, *at a cost to its members*, and is therefore entitled to recover fees." (Emphasis added.)

¶ 91 In particular, on page 11 of their reply brief, defendants argue that plaintiffs' brief reads, "Local 150 performed the work on this case for its members, *at no cost to its members*, and is therefore entitled to recover fees." (Emphasis added.) On page 13, they quote plaintiffs' brief as saying it provides services "to its members at no cost." Whether intended or not, these are false statements, represented as direct quotations attributed to the opposing party. We admonish defendants' counsel to adhere to his ethical obligations of candor (Ill. R. Prof'l Conduct R. 3.3 (eff. Jan. 1, 2010)) and diligence (Ill. R. Prof'l Conduct R. 1.3 (eff. Jan. 1, 2010)) before this court, and to adhere to this court's rules governing the briefs.

¶ 92 Moreover, regardless of defendants' argument over fees, we reiterate their failure to provide an adequate record for review of fees. Given the reply brief's misstatements over fees and counsel's failure to provide a record for review of his arguments, we believe it is appropriate to strike portions of the reply brief related to attorney fees. We therefore grant plaintiffs' motion in part by striking pages 2, 3, 10, 11, 12, and 13 of defendants' reply brief.

¶ 93 III. CONCLUSION

¶ 94 For the reasons stated, we affirm the judgment of the McHenry County circuit court. We also grant in part plaintiffs' motion for sanctions by striking pages 2, 3, and 10-13 of the reply brief.

¶ 95 Affirmed.