

No. 1-10-0413

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FIFTH DIVISION
March 31, 2011

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT BOIKO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 05 L 14649
)	
MONTI & ASSOCIATES, INC., an Illinois corporation, d/b/a)	
MA-Line; and NORVEY, INC., a California corporation,)	The Honorable
)	Allen S. Goldberg,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

ORDER

HELD: Where plaintiff entered into a proposed Assignment with the local school district seeking to purchase from it the right to sue defendants, the Assignment was void since the school district did not possess this right in the first instance; rather, the school board, and not the school district, was the entity which possessed the nondelegable right to sue, and it never agreed to transfer this right to plaintiff.

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Plaintiff-appellant Robert Boiko (plaintiff) brought suit against defendants-appellees Monti & Associates, Inc., an Illinois corporation, d/b/a MA-Line, and Norvey Inc., a California corporation (defendants or as named), for fraud. Norvey filed a motion for summary judgment and, following a hearing, the trial court granted its motion. Thereafter, Monti filed a motion for summary judgment adopting Norvey's claims, and the trial court granted its motion as well. Plaintiff appeals, contending that the trial court erred in granting summary judgment for defendants because genuine issues of material fact remain. He asks that we reverse the trial court's orders and remand this cause for further proceedings, including trial. For the following reasons, we affirm.

BACKGROUND

In his fourth amended complaint, plaintiff alleged that defendants sold and distributed a product known as Zoom Spout Oiler with Turbine Oil to be used on electrical and mechanical equipment. At various points in the 1990s and early 2000s, Fremont School District #79 (District) acquired and used this product on its equipment. Plaintiff alleged that the product damaged the motors, bearings and rotating assemblies of the District's equipment, and he brought suit for fraud asserting that defendants made false representations concerning the product. In his complaint, plaintiff claimed that he was "the actual and bona fide owner of the cause of action," which he had "purchased *** from [the District] by way of an Assignment of the cause of action."

The facts surrounding the Assignment are relatively undisputed. In September 2005, plaintiff prepared a written Assignment regarding the Zoom Spout Oiler cause of action. The

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Assignment, which comprised a single page, stated:

"FOR A VALUABLE CONSIDERATION, FREMONT SCHOOL DISTRICT #79 hereby assigns to [plaintiff] all claims, demands, entitlements, suits, actions, judgment, administrative award, and the proceeds thereof, and all causes of action which it now has, and which it may have thereafter, by reason of any liability of [defendants] *** entitling FREMONT SCHOOL DISTRICT #79 to any recovery of awards, damages, monies from them ***. This [A]ssignment shall be all of the right, title and interest of FREMONT SCHOOL DISTRICT #79 in any such claims, demands, entitlement, suits *** against [defendants] and by virtue of this Assignment, [plaintiff] is authorized and empowered to take any and all necessary steps *** to recover on the same, and any such recovery shall be the sole and exclusive property of [plaintiff]."

At the end of the body of the Assignment, plaintiff included the following:

"FREMONT SCHOOL DISTRICT #79
28885 N. Fremont Center Road
Mundelein, Illinois."

Plaintiff also left a signature line with the name "Dr. Rick Taylor, Superintendent" typed beneath it, and a line for the date.

The facts contained in the record indicate that plaintiff gave the unsigned Assignment to Michael Moon, the director of buildings and grounds for the District, who was to present it to Dr. Taylor. Plaintiff also gave Moon a check in the amount of \$500; plaintiff made the check payable to "Fremont School District #79" and hand-wrote on the front of it in the "Memo"

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section "Assignment of Claims--Zoom Spout." Soon thereafter, Moon returned the Assignment to plaintiff. The Assignment was signed by Dr. Taylor and dated September 8, 2005. In addition, plaintiff's check was deposited into the District's bank account.

Eventually, plaintiff filed his complaint against defendants for fraud. After some discovery, Norvey filed a motion to dismiss the cause, asserting, in part, that the Assignment was void because under the law, only the Board of Education for Fremont School District #79 (Board), and not the District (with which plaintiff had made the agreement), had the power to assign away the claim against defendants. While agreeing with Norvey's assertions, the trial court nonetheless denied its motion to dismiss, finding that there was evidence that the Board "ratified, approved or had notice of the Assignment."

Discovery in the cause continued. In an affidavit, Andrew Searle, the District's director of business, attested that he oversees the District's finances. In response to subpoenas, Searle produced both plaintiff's \$500 check and the Assignment. He explained that when checks are received by the District, a support staff employee deposits them in the District's bank account and a deposit slip is returned to him for his records; the Board is not consulted before or after the deposit is made, the Board does not ratify the deposit in any way, and the Board is not provided with a statement identifying the persons or entities whose funds were deposited into the District's bank account. Searle further testified that the Board does not approve, nor is required to give approval of, the funds deposited in the District's bank account and, prior to June 30, 2009, the Board was not informed of plaintiff's \$500 check.

Sandra Bickley, the Board's president, also presented an affidavit. In it, Bickley attested

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that the Board may only take action by a vote of a majority of those members present at a duly called public meeting of the Board at which a quorum is present. She described that the Board has never voted to assign any rights or claims to plaintiff, nor has the Assignment ever been discussed at any duly called and legally conducted meeting of the Board. Moreover, Bickley stated that the Board has never taken any action to approve or ratify the Assignment. Finally, Bickley attested that the Board was not given notice of plaintiff's \$500 check when it was deposited into the District's bank account and had no notice of the Assignment or the check until at least August 15, 2009.

Following this discovery, Norvey filed a motion for summary judgment, arguing that the Assignment was void because neither Taylor nor the District had the power to make the Assignment and the Board never had notice of or ratified the Assignment. The trial court granted Norvey's motion. In its memorandum opinion and order, the court found that, while Taylor acted as an agent for the District, he did not act as an agent for the Board, which is the only entity that possessed the right to make the Assignment. In addition, the court found that no evidence had been submitted to prove that the Board knew of the deposit or Assignment or that it had voted to approve the Assignment as required by the Illinois School Code (105 ILCS 5/10 *et seq.* (West 2006)). Accordingly, the court held:

"[W]e find that there is no genuine issue of material fact that the Board did not assign legal rights to [p]laintiff. Nor did it ratify, approve or have notice of the Assignment. We find that the Assignment is void."

Following the trial court's grant of summary judgment in favor of Norvey and against plaintiff,

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Monti filed its own motion for summary judgment, adopting Norvey's briefs and argument. The trial court granted Monti's motion for summary judgment, declaring the Assignment void for the same reasons it had articulated in the memorandum opinion and order it issued when it granted Norvey's motion for summary judgment.

ANALYSIS

On appeal, plaintiff contends that the trial court erred in granting summary judgment to Norvey and Monti. Specifically, he argues that the court's finding that the Assignment is void "constituted plain error" because, he asserts, the record "is replete with genuine issues of material fact on the issue of the validity of the Assignment." He claims that "substantial evidence exists" demonstrating that the Board had notice of and ratified the Assignment, including his allegations of an agency relationship between the Board and Taylor, as well as between the Board and Moon; Searle's production of the Assignment and check; the deposit of his check into the District's bank account; and the Board's failure to repay him or to repudiate the Assignment. We disagree.

Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001); accord *Purtill v. Hess*, 111 Ill. 2d 229, 240-44 (1986); *Zakoff v. Chicago Transit Authority*, 336 Ill. App. 3d 415, 420 (2002). While this relief has been called a "drastic measure," it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill.

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2d at 35 (quoting *Purtill*, 111 Ill. 2d at 240). Appellate review of a trial court's grant of summary judgment is *de novo* (see *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 370 (2007); accord *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992); *Zakoff*, 336 Ill. App. 3d at 420), and reversal will occur only if we find that a genuine issue of material fact exists (see *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988)).

We find no such issue herein, as we find that the Assignment was clearly void.

We begin with the general and well-established rules regarding assignments. An assignment "is the transfer of some identifiable property, claim, or right from the assignor to the assignee." *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 403 Ill. App. 3d 1, 5 (2010); accord *A.J. Maggio Co. v. Willis*, 316 Ill. App. 3d 1043, 1047 (2000). The assignment operates to transfer to the assignee all the right, title and interest the assignor possesses in the thing assigned, "such that the assignee stands in the shoes of the assignor." *YPI*, 430 Ill. App. 3d at 5; accord *Maggio*, 316 Ill. App. 3d at 1047. For the assignment to be valid, the assignor must actually or potentially possess the thing being assigned. See *Maggio*, 316 Ill. App. 3d at 1047; *Daugherty v. Blaase*, 191 Ill. App. 3d 496, 498 (1989) ("Illinois law mandates that an assignor actually or potentially possesses the entity to be assigned"). If the assignor does not so possess the thing being assigned, the assignment is void. See *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 350 (2000). Furthermore, the assignee can obtain no greater right or interest than that possessed by the assignor, since the assignor "cannot convey that which he does not have." *Maggio*, 316 Ill. App. 3d at 1047; accord *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 779 (2009); *Owens*, 316 Ill. App. 3d at 350.

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In addition, we note that there is a clear legal distinction between school districts and school boards. A school district is “a quasi-municipal corporation” created by the State. *Board of Education of Bremen High School district No. 228 v. Mitchell*, 387 Ill. App. 3d 117, 120 (2008) (citing *Board of Education, Joliet Township High School District No. 204 v. Board of Education, Lincoln Way Community High School District No. 210*, 231 Ill. 2d 184, 203 (2008)). As such, it has no inherent powers of its own; rather, it may only act through its agents and officials. See *People ex rel. Birkett v. City of Chicago*, 325 Ill. App. 3d 196, 204 (2001). Essentially, a school district is solely a “geographical area” (*Cooney v. Society of Mount Carmel*, 75 Ill. 2d 430, 433 (1979)), that comprises merely “ ‘the territory included within its corporate boundaries’ ” (*Bremen High*, 387 Ill. App. 3d at 120 (quoting *Board of Education of District No. 88, Cook County v. Home Real Estate Improvement Corp.*, 378 Ill. 298, 303 (1941))).

In contrast, a school board “ ‘furnishes the method and machinery for the government and the management of the district.’ ” *Bremen High*, 387 Ill. App. 3d at 120 (quoting *Home Real Estate*, 378 Ill. at 303). The Illinois School Code (Code) mandates that the board is “the governing body through which a school district operates.” *Bremen High*, 387 Ill. App. 3d at 121 (citing 105 ILCS 5/1-3 (West 2006), and 105 ILCS 5/10-10 (West 2006) (“[a]ll school districts *** shall be governed by a board of education”)). Pursuant to the Code, the board retains all the powers expressly granted to it thereunder, as well as any implied powers necessary to effectuate its authority. See 105 ILCS 5/10-20 (West 2006); *Bremen High*, 387 Ill. App. 3d at 121 (citing *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill. 2d 389, 403 (1987); accord *Nuding v. Board of Education of Cerro Gordo Community Unit School District No. 100*,

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Piatt County, Illinois, 313 Ill. App. 3d 344, 350 (2000) (Code’s express grant of authority to board also includes conference of broad implied and incidental powers).

At the same time, however, the board is limited to its express powers. See *Best Bus Joint Venture v. Board of Education of the City of Chicago*, 288 Ill. App. 3d 770, 778 (1997); *Evans v. Benjamin School District No. 25*, 134 Ill. App. 3d 875, 880 (1985) (“[s]tatutes conferring authority on a board must be considered not only as a grant of power, but as a limitation thereof”). And, these powers are discretionary. See, e.g., *Brought v. Board of Education of Mount Prospect Public School District No. 57*, 136 Ill. App. 3d 486 (1985) (discretion lays with board where legislature empowered it to perform certain function); see also *Illinois Education Association Local Community High School District 218 v. Board of Education of School District 218 Cook County*, 62 Ill. 2d 127, 130 (1975) (where Code expressly imposes duty on school board, this duty is discretionary); *Daleanes v. Board of Education of Benjamin Elementary School District 25, DuPage County*, 120 Ill. App. 3d 505 (1983); *Stroh v. Casner*, 201 Ill. App. 281 (1916). As such, and pursuant to the doctrine of nondelegability, a board “may not delegate to another the exercise of its discretionary duties and responsibilities.” *Board of Trustees, Prairie State College v. Illinois Educational Labor Relations Board*, 173 Ill. App. 3d 395, 413 (1988) (this ensures the people’s right to have these discretionary powers exercised by those whom they elected to serve on board); accord *District 218*, 62 Ill. 2d at 130 (discretionary duty expressly reserved to board via Code cannot be delegated); *Proviso Council of West Suburban Teachers Union, Local 571 v. Board of Education, Proviso Township High Schools, District 209, Cook County*, 160 Ill. App. 3d 1020, 1029 (1987) (board cannot delegate substantive

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discretionary decisions).

Particular to the instant cause, a district lacks the capacity to sue or participate in court proceedings on its own behalf. See *Bremen High*, 387 Ill. App. 3d at 124 (district is only authorized to do so if specifically allowed in the context of a companion statute); accord *Home Real Estate*, 378 Ill. at 306; *Birkett*, 325 Ill. App. 3d at 204. Instead, the Code makes clear that the right to sue or be sued belongs wholly and exclusively to the board. 105 ILCS 5/10-2 (West 2006); *Bremen High*, 387 Ill. App. 3d at 124. Accordingly, then, the right to sue or be sued, as expressly reserved to the board via the Code, is a discretionary duty which cannot be delegated away by anyone--a board member, a school employee or the district. See, e.g., *District 218*, 62 Ill. 2d at 130; *Prairie State College*, 173 Ill. App. 3d at 413; *Proviso Council*, 160 Ill. App. 3d at 1029.

In the instant cause, the Assignment, which plaintiff himself drafted, sought to transfer the District's right to sue defendants regarding Zoom Spout to plaintiff in exchange for \$500. Specifically, plaintiff wrote that "FREMONT SCHOOL DISTRICT #79 hereby assigns" to him "all causes of action which it now has, and which it may have thereafter *** entitling FREMONT SCHOOL DISTRICT #79 to any recovery of awards, damages, [and] monies." He also wrote that the Assignment was to comprise "all of the right, title and interest of FREMONT SCHOOL DISTRICT #79 in any such claims, demands, entitlement, [and] suits" against defendants. In the Assignment, plaintiff only referred to the right that the District possessed in the Zoom Spout litigation, not the Board's. In fact, plaintiff never mentioned the Board anywhere in the Assignment or in his check, which he made payable to the District and not to the Board. Nor did

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plaintiff address the Assignment to the Board or any of its members but, rather, only to the District's offices. And, he gave the Assignment to Moon, the District's director of buildings and grounds, to give to Taylor, the District's superintendent--never to the Board or any of its members.

Clearly, the Assignment plaintiff drafted was between him and the District, and reflected an assignment of rights in the Zoom Spout litigation from the District to him, so that he would stand in the shoes of the District with respect to defendants. The problem arises, however, with the application of the Code. As we have discussed, pursuant to it, the right to sue, which plaintiff sought to obtain here, belongs exclusively and solely to the Board, not the District. While the District lacks the capacity to sue defendants, the Code dictates that the right to sue them is an express duty of the Board--a duty that is, consequently, discretionary and cannot be delegated away by anyone but the Board. Essentially, the District here did not possess the right which plaintiff sought to transfer to himself. See, *e.g.*, *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004) (mistakes and ambiguities in contracts are construed against the drafter). And, if the District did not possess this right, it could not transfer it to plaintiff; the District could not assign to plaintiff a right which it did not, and does not, have. Accordingly, the Assignment is void. See *Maggio*, 316 Ill. App. 3d at 1047; accord *Apollo*, 398 Ill. App. 3d at 779; *Owens*, 316 Ill. App. 3d at 350; *Daugherty*, 191 Ill. App. 3d at 498.

Plaintiff's arguments that the evidence presented shows "genuine issues of material fact"

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remaining are not supported by the record. Plaintiff asserts that because Taylor,¹ as superintendent, was an employee of the Board, he was an agent of the Board when he made the Assignment and his knowledge of it, along with his actions, must be imputed to the Board which, in turn, ratified the Assignment by failing to repudiate it and/or return his check. Plaintiff relies heavily on Taylor's employment contract for his assertion. However, his arguments cannot stand, for several reasons.

First, on a primary level, there is no indication that Taylor signed the Assignment in a capacity which would even hint that he was an agent of the Board. Rather, plaintiff included the District's office address right above the signature line he provided for Taylor, whom he identified solely as "Superintendent." If anything, this would lead us to infer that Taylor signed the Assignment as the superintendent of the District, not as the Board, as a member of the Board or as an agent for the Board.

Turning to Taylor's employment contract, we find nothing in it giving him a right, duty or power, as an employee (or even more specifically as the superintendent), to assign or transfer the Board's legal right to sue away from it and to someone else. Rather, from our review of the contract, we find no provisions speaking to this. Plaintiff's citations to provisions in the contract naming Taylor the "Chief Executive Officer" in "charge of the administration of" the District "under the policies of the" Board, and plaintiff's repeated references to the Board president's signature on Taylor's employment contract, do not support his contentions. That these import an

¹Plaintiff makes the same argument, although more subtly, about Moon, the director of the District's buildings and grounds. Our discussion regarding Taylor as superintendent applies in the same manner to plaintiff's argument regarding Moon.

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agency relationship between Taylor and the Board is a tenuous conclusion at best which in no way overcomes the law as we have described it.

While the contract, along with the Board's Rules of Governance, describe that the superintendent and the Board have complementary roles, these documents make clear that the superintendent is the District's chief officer, not the Board's; the Board merely considers the superintendent's recommendations on subjects at issue. While the superintendent is to develop plans and programs to implement policies for the District's operation, it is the Board who adopts these policies for him to implement. The superintendent's "duties and responsibilities" include "those incidental to" his office, "those set forth in [his] job description," "the attainment of the student performance and academic improvement goals" as described in his employment contract, "those obligation imposed" by the Code, "and to perform other professional duties customarily performed by a Superintendent." There is nothing in Taylor's contract that would make the assignment of the Board's right to sue defendants a duty "incidental to" his office, nor does plaintiff point us to any evidence demonstrating that this is part of Taylor's job description, has anything to do with academic goals, or is a duty customarily performed by a superintendent. Looking at the Code, section 10-21.4 describes in detail the duties of superintendents. These include administrative duties; making recommendations to the Board regarding teacher employment, course study, and financial operation of the District; notification; record-keeping; and reporting. See 105 ILCS 5/10-24.1 (West 2006). There is nothing in this section that indicates a superintendent would be able to assign away the otherwise discretionary, nondelegable right to sue belonging expressly to the Board.

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Even if we were to somehow conclude that Taylor was the Board's agent, we cannot find, as plaintiff would have us, that Taylor's knowledge of the Assignment could be imputed to the Board or that the Board ratified the Assignment in any way. In fact, the evidence proves the contrary. Our courts have held that knowledge possessed by one member of a school board cannot automatically be imputed to the board as a whole. See, e.g., *First National Bank at East St. Louis v. Board of Education, School District No. 189*, 68 Ill. App. 3d 21, 25 (1979) (notice to board president was not notice to board where notice was never given to board as whole); accord *SEDOL Teachers Union, Lake County Federation of Teachers, Local 504 v. Illinois Educational Labor Relations Board*, 282 Ill. App. 3d 804, 813-14 (1996) (board member's action could not be imputed to board as whole). Rather, the Code mandates that a board can only conduct official business at a regular or special meeting. See 105 ILCS 5/10-6 (West 2006) ("No official business shall be transacted by [a board's] directors except at a regular or a special meeting"). And, more specific to the instant cause, pursuant to this Board's Rules of Governance, "official action by the Board may only occur at a duly called and legally conducted meeting at which a quorum of the Board is legally present." The Board's Rules of Governance further state that "Board members, as individuals, have no authority over school affairs, except as provided by law or as authorized by the Board."

Assuming, then (which we do solely for the sake of argument), that Taylor did have knowledge of the Assignment, it is irrelevant. So too would be the assumption that Taylor, as the superintendent or an employee of the Board, was a member of the Board. This is because plaintiff cannot point us to any special or regular meeting conducted by the Board at which the

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Assignment was even discussed, let alone any duly called and legally conducted meeting at which a quorum was present. In direct opposition, Board president Bickley's affidavit forecloses any notion that such a meeting ever took place. In addition to attesting that the Board had no notice of the Assignment or plaintiff's check until August 2009, Bickley clearly testified that the Board has never voted to assign any rights or claims to plaintiff, nor has the Assignment ever been discussed at any duly called and legally conducted meeting of the Board. Plaintiff has not disputed this and has not provided any evidence to the contrary. Ultimately, then, regardless of what Taylor knew or may have known, without such action by the Board, ratification of the Assignment could not have occurred.

In a final attempt to save his case, plaintiff asserts that none of this matters because, pursuant to section 10-20.21(b-5) of the Code, the Assignment did not need to be approved by the Board in order to bind it. Again, we disagree.

Section 10-20.21(b-5) of the Code states that “all contracts and agreements that pertain to goods and services that are intended to generate additional revenue and other remuneration for the school district in excess of \$1,000 *** [are] to be approved by the school board.” 105 ILCS 5/10-20.21(b-5) (West 2006). Plaintiff claims that since he only paid \$500 for the Assignment of the right to sue defendants, the Board was not required to approve the transaction between him and the District. However, plaintiff's reliance on this section of the Code is entirely misplaced, as it is plainly inapplicable to the instant cause.

Section 10-20.21(b-5) comprised an amendment to the Code and did not become effective until July 1, 2006. See 105 ILCS 5/10-20.21(b-5) (West 2006). This is almost one year

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after plaintiff drafted the Assignment in September 2005. Therefore, this section was not even in existence, let alone in effect, at the time of the September 8, 2005, date when Taylor signed the Assignment which, according to plaintiff, was the date the District allegedly transferred the right to sue defendants to him.

The only way plaintiff's claim would have merit would, then, be a retroactive application of section 10-20.21(b-5). This cannot occur here. It is true that section 10-20.21(b-5) itself is silent as to whether it can be applied retroactively or only prospectively. See 105 ILCS 5/10-20.21(b-5) (West 2006). However, when a new statute is silent as to its temporal reach, we look to see whether the statute is procedural or substantive in nature. See *Doe v. University of Chicago*, 404 Ill. App. 3d 1006, 1012 (2010). If it is substantive, namely, if it establishes, creates or defines a right, it cannot be applied retroactively. See *Doe*, 404 Ill. App. 3d at 1012 (substantive revisions to law cannot be applied retroactively); accord *Deicke Center v. Illinois Health Facilities Planning Board*, 389 Ill. App. 3d 300, 303-05 (2009) (substantive amendments or changes in statutes, which establish, create or define a right, cannot be applied retroactively). Section 10-20.21(b-5) established and created a new right within the District to enter into contracts for goods and services less than \$1,000. It is substantive in nature. Thus, it cannot be applied retroactively to September 2005, the operative date relevant to the instant cause. Therefore, section 10-20.21(b-5) does not apply here and plaintiff's argument is rendered invalid.²

²We note for the record that plaintiff presented this same argument regarding section 10-20.21(b-5) of the Code to the trial court. In granting the defendant's motions for summary judgment, that court found the argument without merit because it did not view the Assignment to

CONCLUSION

For all the foregoing reasons, we find that no genuine issues of material fact remain regarding the Assignment. Accordingly, we affirm the judgment of the trial court granting summary judgment in favor of defendants and against plaintiff.

Affirmed.

be a “contract for good or services” as required by the section. Regardless of that conclusion, we note that, since we are operating under a *de novo* standard of review, we may affirm the trial court’s ultimate holding on any ground appearing in the record. See *Wilkerson v. Paul H. Schwendener, Inc.*, 379 Ill. App. 3d 491, 493 (2008); *Howard v. Firmand*, 378 Ill. App. 3d 147, 149 (2007). Because section 10-20.21(b-5) is so clearly and plainly inapplicable here due to its inability to be applied retroactively, we choose to use this ground to constitute the basis of our affirmance of the trial court’s grant of summary judgment.