

No.

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IN THE APPELLATE COURT OF ILLINOIS,  
SECOND DISTRICT

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CARLA BURKHART and HERRICANE GRAPHICS, INC.,	)	Petition for Leave to Appeal Pursuant to SCR 306(a)(9) from the Circuit Court for the 18th Judicial Circuit
Plaintiffs-Respondents,	)	
v.	)	Case No. 2015-L-1244
EDGAR COUNTY WATCHDOGS, INC., KIRK ALLEN, ADAM ANDRZEJEWSKI, KATHY HAMILTON, and CLAIRE BALL,	)	Trial Judge: Hon. Robert G. Kleeman
Defendants-Petitioners.	)	Date of Petition for Leave: August 29, 2016
	)	Date of Denial of Order: July 29, 2016

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**DEFENDANT ADAM ANDRZEJEWSKI'S PETITION FOR LEAVE TO APPEAL  
PURSUANT TO SUPREME COURT RULE 306(a)(9)**

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**ORAL ARGUMENT REQUESTED IF PETITION GRANTED**

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Defendant Andrzejewski petitions this Court pursuant to Supreme Court Rule 306(a)(9) for leave to appeal and to reverse the Circuit Court's denial of his Motion to Dismiss Pursuant to the Citizen Participation Act ("CPA"), 735 ILCS 110/1, *et seq.*

### **Statement of Facts**<sup>1</sup>

This lawsuit arises out of the grave scandal and public controversy surrounding the College of DuPage ("COD"). Defendant Adam Andrzejewski is a citizen journalist, nationally known government watchdog, and founder of two good-government nonprofit organizations. Decl., ¶¶ 2-5; R. C456. Over the past eight years of his work as a citizen journalist and public watchdog, Andrzejewski has adhered to the rule that "every fact must have a supporting public document," and he has in place an independent rigorous editing process for his work. Decl., ¶¶ 11-12; R. C459.

In 2014, Andrzejewski uncovered key evidence of bad practices involving COD's disgraced former president, Robert Breuder, and some board members of the College of DuPage Foundation ("the foundation"), which exists to financially support COD. Decl., ¶¶ 21-32, Memo. of Understanding; R. C.461-74.

Plaintiff Carla Burkhardt is one of those foundation board members. While she served on the foundation board, controlling the flow of funds to COD, her company, Plaintiff Herricane Graphics, Inc., was receiving hundreds of thousands of dollars in payments from COD. Compl., ¶¶ 11; R. C3, Memo. of Understanding; R. C468-74, Decl., ¶¶ 26-27 (*citing sources*); R. C462-63.

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<sup>1</sup> Defendant Andrzejewski's statement of background facts and his Declaration were substantially un rebutted by Plaintiffs below, and Plaintiffs filed no counter-declarations.

Plaintiffs assert a single count of conspiracy against Andrzejewski, seeking to hold him liable for over \$1 million in actual and punitive damages, alleged to have resulted from 2015 publications by other Defendants<sup>2</sup>. However, Plaintiffs' only specific allegations against Andrzejewski are that he uncovered Plaintiffs' special arrangement and the hidden nature of the funds in *Forbes* and the *Washington Times* in 2014, over one year prior to the filing of the Complaint. Compl., ¶¶ 21-24; R. C5.

In his work in 2014, Andrzejewski uncovered and revealed to the public that millions of dollars, including a substantial portion of the payments to Herricane, were delivered by the College through an "Imprest" account, which acted to shield the payments from public scrutiny and approval by the elected Board of Trustees of the College. Decl., ¶¶ 21, 25-27, 29-32; R. C461-67, Adam Andrzejewski, *\$26 Million Selfie at Illinois Jr. College*, 9/10/14, *Forbes*, (Feb. 11, 5:00 PM), <http://www.forbes.com/sites/adamandrzejewski/2014/09/10/26-million-selfie-at-illinois-jr-college/#4b9b37f2794e> ("Other connected vendors include COD Foundation Board members—lobbyists and construction companies—received large non-disclosed payments. i.e. Herricane Graphics (\$227,157)"); *see also* Jake Griffin, *\$26 Million Spent on What? Administrators knew, but Trustees did not*, 9/17/14, *Daily Herald*, (Feb. 11, 5:00 PM), <http://www.dailyherald.com/article/20140917/news/140918556/> (describing these payments as having "skirted board scrutiny").

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<sup>2</sup> The other Defendants in this lawsuit timely filed petitions for leave to appeal pursuant to SCR 306 this past Friday, August 26, 2016. Defendants intend to file a motion to consolidate all of the defendants' appeals, as soon as case numbers are assigned to each of them. As in the Circuit Court, Andrzejewski adopts and respectfully requests that the arguments of Defendants Edgar County Watchdogs and Kirk Allen and Claire Ball in their respective petitions for leave to appeal, along with their Supporting Record, be incorporated by reference as if fully recited herein.

The use of “Imprest accounting” by the College would result in the *Washington Times* awarding COD a “Golden Hammer Award” for the worst example of government waste, fraud, corruption and abuse across America for the week. Drew Johnson, *How a college hid \$95 million in expense like booze, shooting clubs*, 10/2/14, Washington Times, (Feb. 11, 5:00 PM), <http://www.washingtontimes.com/news/2014/oct/2/golden-hammer-college-hid-95m-in-administrator-boo/?page=all> (“The College of DuPage spent \$435,365 on purchases from Herricane Graphics since 2009. Carla Burkhart, the owner of the graphic design company, is listed as a member of the College of DuPage foundation’s board of directors.”). After the Golden Hammer was awarded and further information came to light, Andrzejewski updated his earlier article. Adam Andrzejewski, *This College President Hid \$95 Million In Spending*, 10/9/14, Forbes, (Feb. 11, 5:00 PM), <http://www.forbes.com/sites/adamandrzejewski/2014/10/09/imprest-ive-this-college-president-shot-an-elephant-and-hid-95-million-in-spending/#71fe12936b0f> (noting that Herricane Graphics had actually received \$435,365 in Imprest funds over a six-year period); Decl., ¶ 27; R. C462-63.

Andrzejewski had numerous factual bases for describing vendors like Herricane and others as “connected” and COD’s accounting of payments to them from “imprest” funds as a “scheme” and as “non-disclosed.” Decl., ¶ 30-32; R. C464-67.

### **Proceedings in the Circuit Court**

In the Circuit Court, Andrzejewski moved to dismiss the conspiracy claim pursuant to the Citizen Participation Act (“CPA”), 735 ILCS 110/1, *et seq.*, and §§ 2-615 and 2-619 of the Code of Civil Procedure. Andrzejewski also filed a declaration in

support of his CPA motion. In response, Plaintiffs did not file a counter-declaration or otherwise substantially challenge Andrzejewski's recitation of the relevant facts.

On Andrzejewski's § 2-615 motion to dismiss, the Circuit Court held that an agreement to perform an unlawful act is required to make out a claim of civil conspiracy (and that it was not specifically pled), despite the urging at oral argument by Plaintiffs' counsel that parties need only "undertake a concerted act to accomplish something" to meet the agreement requirement. Tr., at 122-24; R. C415-17.<sup>3</sup> The Court further characterized the conspiracy count against Andrzejewski as "an attempt to shoehorn a count in to maneuver on the Statute of Limitations," Tr., at 123, Ins. 3-5; R. C416. The Court thus dismissed the count pursuant to 735 ILCS 5/2-615. Tr., at 125; R. C418.

While the Circuit Court noted that, "I am struggling to find that a conspiracy can never [*sic*] be successfully pled for the reasons I've cited," Tr., at 123, Ins. 16-18; R. C416, it granted the 2-615 motion without prejudice, stating that "the courts repeatedly tell me not to simply give somebody at least one opportunity to do it." Tr., at 125, Ins. 1-2; R. C418.

The Circuit Court then considered Andrzejewski's CPA motion. The Court held that Andrzejewski's conduct is protected under the CPA, the first *Sandholm* prong<sup>4</sup>. As to

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<sup>3</sup> However, Plaintiffs' counsel also conceded that, "Well, your Honor, I believe -- I have some of your Honor's concerns." Tr., at 123, Ins. 20-21; R. C416.

<sup>4</sup> The three prongs in *Sandholm v. Kuecker* are as follows: (1) "whether the suit is the type of suit the Act was intended to address . . . where it is 'based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government;" (2) whether the suit is "solely based on, relating to, or in response to 'any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government;" and (3) whether the defendants' actions were "genuinely aimed at procuring favorable government action, result, or outcome." 2012 IL 111443.

the second *Sandholm* prong, the Court stated that Andrzejewski’s CPA motion “gives me a good deal of pause” and noted that the Court “wrestled” with and “was up last night thinking about” the CPA motion, Tr., at 146, ln. 11-147, ln. 15; R. C439-40. The Court further admitted that it was “not certain about this call in this case” and that the issues are “closely balanced.” *Id.* In the final analysis of the claim, the Circuit Court was “not prepared to find that it's meritless” and thus denied the motion. Tr., at 146, lns. 19-20; R. C439.<sup>5</sup> The Court further noted that, “I think all the arguments Mr. Breen said are going to apply with equal force should an amended complaint be filed.” Tr., at 147, lns. 17-19; R. C440.

### **Grounds for the Appeal**

The Circuit Court erred in holding that the conspiracy claim against Andrzejewski was not meritless and thus denying Andrzejewski’s CPA motion. Tr., at 145-47; R. C438-40. This matter was fully briefed and argued to the Circuit Court, with full opportunity for presentation of relevant evidence. There are no material issues of fact in dispute. This matter is ready for appellate review, which will conserve judicial resources and significantly speed the resolution of the claims against Andrzejewski. *Rollins v. Ellwood*,

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<sup>5</sup> The Court did not continue on to address the third *Sandholm* prong, whether the Plaintiffs proved by clear and convincing evidence that Defendant’s actions were not “genuinely aimed at procuring favorable government action.” Plaintiffs presented no evidence below in opposition to Defendant’s Declaration, to meet their burden on this prong. Even the motive Plaintiffs ascribed to Defendants (falsely and without any factual support)—to advance the political career of Kathy Hamilton—is a proper motive, as it would be “in furtherance of the constitutional rights to petition, speech, association, and participation in government.” 735 ILCS 110/15, 110/10 (“government” includes “the electorate”).

141 Ill.2d 244, 279 (1990) (an “appellate court should grant leave to appeal if reasonably debatable grounds, fairly challenging the order, are presented.”).

**1. Andrzejewski has disproven an essential element of Plaintiffs’ conspiracy claim, rendering the claim “meritless.”**

“To establish that plaintiff’s suit was ‘solely based on’ defendant’s exercise of his political rights, defendant must show that plaintiff’s suit is meritless and was filed in retaliation against his protected activities in order to deter him from further engaging in those activities.” *Goral*, ¶ 38 (internal citations and quotations omitted). “[A] claim is ‘meritless’ under the Act if the defendant ‘disproves some essential element of the [plaintiff’s] claim.’” *Id.* (internal citations and quotations omitted).

The Complaint, ¶¶ 21-24; R. C5, alleges just three specific actions by Andrzejewski: writing September and October 2014 *Forbes* articles and giving an interview to the *Washington Times* in October 2014 about the COD scandal. Plaintiffs claim that he referred to COD’s payments to Plaintiffs as an “accounting scheme,” as “non-disclosed payments,” and as “hidden transactions,” and that he referred to Hurricane as “connected” and a “connected vendor” of COD. *Id.*

These statements are true. *See supra*; Decl., ¶¶ 24-32 & sources cited therein; R. C462-67. And even if not substantially true, words like “scheme,” “non-disclosed,” “hidden,” and “connected” are not actionable, including because they are capable of innocent construction or are statements of opinion. *See, e.g., Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 761-62 (1st Dist. 2002) (“cheating the city” not actionable). Moreover, Plaintiffs’ Complaint was filed over one year after these publications, rendering any claims or damages connected to these allegations time-barred. 735 ILCS 5/13-201.

Andrzejewski has a national reputation as a respected government watchdog and citizen journalist, not a malicious defamer. Decl., *passim*; R. C456. He has a regular practice of ensuring every fact he alleges is supported by at least one public document, and he relies on a team of editors to check his work. Decl., ¶¶ 11-12; R. C459.

Against these unrebutted facts, Plaintiffs presented nothing but amorphous conjecture—vague suppositions that Andrzejewski “supported and championed” former-COD-trustee Kathy Hamilton (Compl., ¶ 16; R. C4); that Hamilton enlisted the Watchdogs “with the support of Andrzejewski” (Compl., ¶ 18; R. C4); that Andrzejewski in an unspecified way conspired with the other Defendants “to further Hamilton’s political career” (Compl., ¶ 19; R. C4) and “attack Herricane and Burkhart in furtherance of their scheme to tarnish the COD and promote Hamilton” (Compl., ¶ 20; R. C5); and that Andrzejewski “agreed or reached a mutual understanding to undertake a campaign to unjustly and improperly attack the COD,” (Compl., ¶ 105; R. C20-21), etc.

None of these are allegations of an agreement to defame Plaintiffs: even the unsupported allegation that the Defendants intended to “attack” Plaintiffs is nonspecific and—based on Plaintiffs’ receiving payments from a public body while serving on a nonprofit board directing funds to that same public body—supposed “attacks” detailing that relationship would not be tortious. Even so, “the mere characterization of a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss. Instead, it is well established that, to allege a conspiracy, the complaint must set forth with particularity the facts and circumstances constituting the alleged conspiracy.” *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 59 (internal quotations and citations omitted); see *Green v. Rogers*, 384 Ill. App. 3d 946, 967-68 (2d Dist. 2008), *rev’d on*



*other grounds*, 234 Ill. 2d 478 (2009). Plaintiffs presented no substantive facts that Andrzejewski agreed with the other Defendants to form a conspiracy to defame Plaintiffs. *See, e.g., Scott Johansen & Hytel Group, Inc. v. Haydysch*, 2015 U.S. Dist. LEXIS 159493 (N.D. Ill. Nov. 25, 2015) (dismissing civil conspiracy count where no allegation that defendants “instituted, commenced, or otherwise participated in” the underlying torts).

Further, Andrzejewski is in a similar position to Mrs. Noonan in *Midwest Rem Enters. v. Noonan*, 2015 IL App (1st) 132488 ¶ 86. Plaintiffs there haled Mrs. Noonan into court on a conspiracy theory, alleging that she had conspired with her husband and lied in her reports to investigators to further his tortious conspiracy. The Appellate Court upheld Mrs. Noonan’s right to dismissal per the Citizen Participation Act, holding that, “[t]he complete absence of evidence that Ruth said anything untrue to investigators or the court shows both that plaintiffs filed a meritless claim against Ruth and that they named her as a defendant solely to punish her for her participation in government.” *Id.* Just as in *Midwest Rem Enters.*, the record here shows no evidence that Andrzejewski has lied or done anything wrong to Plaintiffs—to the contrary, Andrzejewski’s publications were cited favorably by others, including independent mainstream media sources. The Circuit Court did not address or attempt to distinguish *Midwest Rem Enters.* in its decision.<sup>6</sup>

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<sup>6</sup> Defendant Andrzejewski here argues that he has disproven an essential element of Plaintiffs’ conspiracy claim, a combination of two or more persons for the purpose of accomplishing by some concerted effort either an unlawful purpose or a lawful purpose by unlawful means—*e.g.*, an agreement to defame Plaintiffs. As in the Circuit Court, Andrzejewski adopts and respectfully requests that the arguments of Defendants Allen, Edgar County Watchdogs, and Claire Ball in their related appeals as to the deficiency in Plaintiffs’ conspiracy claim that no underlying tort in furtherance of the conspiracy was committed be incorporated by reference as if fully recited herein.

**2. Plaintiffs' conspiracy claim was brought in retaliation for Andrzejewski's constitutionally protected conduct.**

Retaliatory motive may be inferred from a variety of factors, including, for instance, the lack of a proper legal basis for the action or whether the facts alleged justify the damages sought. *Hytel Grp., Inc. v. Butler*, 405 Ill. App. 3d 113, 125-26 (2d Dist. 2010) (collecting cases).

As noted above, Plaintiffs failed to specifically plead or, in the face of Defendant's facts, to provide any support for an agreement to defame them involving Andrzejewski. Instead, the publications cited by Plaintiffs involving Andrzejewski are time-barred, so neither the publications nor any damages stemming from those publications are available to Plaintiffs. And, as noted in his Declaration, Andrzejewski's publications in question are absolutely true and his findings used by independent mainstream news sources. Decl., *passim*; R. C456.

Plaintiffs seek many millions of dollars in compensatory and punitive damages from Defendants, without justification or explanation. *See Hytel Grp., Inc. v. Butler*, 405 Ill. App. 3d 113, 126 (2d Dist. 2010) (claim for \$8 million "intended to strike fear into the defendant"). As noted *supra*, Plaintiffs were vendors receiving funds from a public body while at the same time controlling the flow of funds into that public body. Their payments were shielded from public view through the use of "Imprest accounting." Even apart from the backdrop of a College marred by abuses, Plaintiffs' relationship and payments would naturally raise questions worthy of public scrutiny. Whether their actions were illegal or merely ill-advised, Plaintiffs cannot credibly claim surprise that they would become "politically toxic" (Compl., ¶ 51; R. C11), once their actions were revealed to the public.

And the most significant of those public revelations—the primary cause of any alleged damages—are the ones that are time-barred: the public disclosure of (1) Plaintiffs receiving payments from the College while serving on the Foundation board and (2) Plaintiffs receiving hundreds of thousands in payments from the hidden “Imprest” funds. Those facts were disclosed and spread broadly in the public record in September and October 2014, well more than one year before the filing of this Complaint.

The Circuit Court repeatedly recognized that Plaintiffs haled Andrzejewski into court in an attempt to recover from him because of his time-barred and fully truthful 2014 publications. *See, e.g.*, Tr., at 122, 123, 145; R. C415, 416, 438. This case presents a textbook complaint of a claim brought “solely” to retaliate for constitutionally protected speech and petition: on this record, Plaintiffs have not genuinely sought relief from Andrzejewski for defamation but solely in retaliation for his truthful, time-barred, and constitutionally protected speech and petition activity. *See Sandholm*, ¶ 45.

Plaintiffs have come to Court with with blinders on: their Complaint reads as if the wide-ranging, well-documented, and nationally-reported abuses at the College of DuPage never occurred. They entirely ignore their own role in the scandal at COD. Their claim for conspiracy against Andrzejewski is threadbare, meant only to chill his constitutional rights, not to seek legitimate relief.

**3. This matter is ripe for immediate appellate review.**

The CPA presents an opportunity for an immediate factual testing of claims that implicate constitutionally protected conduct. 735 ILCS 110/5 (the CPA’s purpose is “to establish an efficient process for identification and adjudication of SLAPPs”). The General Assembly placed special emphasis on the importance of speedy hearing of CPA

motions and appeals, 735 ILCS 110/20(a), and the Supreme Court has similarly recognized the importance of CPA appeals by specially inviting interlocutory petitions for leave to appeal, such as this one, by promulgating SCR 306(a)(9).

As noted *supra*, this matter was fully briefed and argued to the Circuit Court, and the parties had full opportunity to present relevant evidence in support of or in opposition to the CPA motion. There were no significant material issues of fact identified in that briefing and argument.

While the Circuit Court dismissed the conspiracy claim without prejudice pursuant to § 2-615, the Court also expressed some doubt that such claim could be repled. Tr., at 123, Ins. 16-18; R. C416. Moreover, the Court recognized that Andrzejewski’s CPA arguments “are going to apply with equal force” to any amended complaint. Tr., at 147, Ins. 17-19; R. C440.<sup>7</sup> Accepting this appeal now will prevent additional wasteful rounds of CPA motion practice—each of which will create a new and separate claim by Defendants, which will eventually have to be litigated on appeal. *See, e.g., Wright Dev. Grp. v. Walsh*, 238 Ill. 2d 620, 633-34 (2010).

This matter is ready for appellate review, which will conserve judicial resources and significantly speed the resolution of the conspiracy claims in this lawsuit. The CPA expresses the intent of the General Assembly that individuals engaged in protected speech and petitioning conduct not be forced to pay for and suffer years of discovery and trial, all to secure a verdict in their favor that should have been granted to them at the outset. 735 ILCS 110/5. In response to the CPA motion, Plaintiffs could not provide a scintilla of

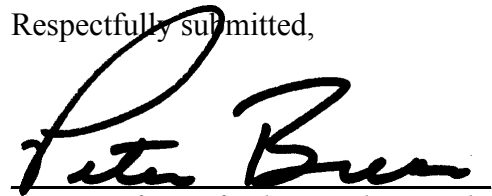
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<sup>7</sup> While the Circuit Court contemplated additional CPA motion practice on an amended complaint, it did not indicate that it would take a different course as to those additional motions. Tr., at 147, Ins. 17-22; R. C440.

admissible evidence against Andrzejewski. Plaintiffs have no compensable damages and no claims against Andrzejewski. Their purpose here is “intimidating, harassing, [and] punishing [Andrzejewski] for involving [himself] in public affairs.” *Id.*

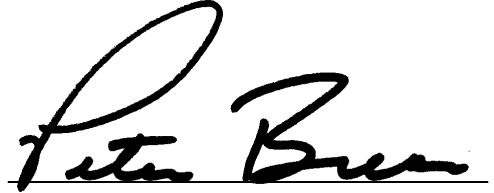
WHEREFORE, Defendant-Petitioner Andrzejewski respectfully requests that this Court grant his petition for leave to appeal, reverse the Circuit Court’s decision denying his Motion to Dismiss Pursuant to the Citizen Participation Act, and grant him all other relief on the premises to which he is justly entitled.

Respectfully submitted,

  
*Attorney for Defendant Andrzejewski*

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I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 12 pages.

A handwritten signature in black ink, appearing to read "Peter Brun", is written over a horizontal line. The signature is cursive and stylized.

No.

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IN THE APPELLATE COURT OF ILLINOIS,  
SECOND DISTRICT

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CARLA BURKHART and HERRICANE )  
GRAPHICS, INC., )  
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 v. )  
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 EDGAR COUNTY WATCHDOGS, INC., )  
KIRK ALLEN, ADAM )  
ANDRZEJEWSKI, KATHY HAMILTON, )  
and CLAIRE BALL, )  
 )  
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 Defendants-Petitioners. )

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**APPENDIX TO DEFENDANT ADAM ANDRZEJEWSKI'S PETITION FOR  
LEAVE TO APPEAL PURSUANT TO SUPREME COURT RULE 306(a)(9)**

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**TABLE OF CONTENTS OF APPENDIX**

Appendix Page No.	Date	Description
A1	7/29/16	Order on Motion to Dismiss
A2-A22	7/29/16	Selected Portions of Transcript of Hearing on Motion to Dismiss

STATE OF ILLINOIS UNITED STATES OF AMERICA COUNTY OF DU PAGE  
IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

Burkhardt

VS

ECWI, et al.

15 L 1244

CASE NUMBER

File Stamp Here

ORDER

This cause coming before the Court; the Court being fully advised in the premises, and having jurisdiction of the subject matter, IT IS HEREBY ORDERED:

- ① Defendants ECWI + Allen's Motion to Dismiss Pursuant to the Illinois CPA is denied;
- ② Defendants ECWI + Allen's Section 2-615 motion to dismiss is granted as to Counts I, II, ~~IV~~, VI, + VIII; without prejudice, and denied as to Count VII
- ③ Defendant Ball's Motion to Dismiss Pursuant to the CPA is denied.
- ④ Defendant Adam Andrzejewski's Motion to Dismiss Pursuant to the Illinois CPA is denied.
- ⑤ Defendant Adam Andrzejewski's Motion to Dismiss Pursuant to Section 2-615 is granted without prejudice;
- ⑥ Plaintiffs given 35 days to replead + file an amended pleading, or by September 2, 2016;
- ⑦ Defendants given 28 days to file responsive pleadings;
- ⑧ Case set for status September 27, 2016 at 9:00am.

Name: CISOWSKI  PRO SE

ENTER:

DuPage Attorney Number: 24048

Attorney for: A

Address: 1770 PARK ST SUITE 200

City/State/Zip: NAPERVILLE, IL 60563

Telephone Number: 630.527.1575

Email: JCISOWSKI@COLLINSLAW.COM

Judge

Date: July 29, 2016



1 STATE OF ILLINOIS )  
2 ) SS:  
3 COUNTY OF DU PAGE )

4 IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT  
5 DU PAGE COUNTY, ILLINOIS

6 CARLA BURKHART and )  
7 HERRICANE GRAPHICS, )  
8 INC., )  
9 Plaintiffs, ) No. 15 L 1244  
10 -vs- )  
11 EDGAR COUNTY WATCHDOGS, )  
12 INC., KIRK ALLEN, ADAM )  
13 ADRZEJEWSKI, KATHY )  
14 HAMILTON and CLAIRE )  
15 BALL, )  
16 Defendants. )

17 REPORT OF PROCEEDINGS had at the hearing  
18 of the above-entitled cause, before the **HONORABLE**  
19 **ROBERT G. KLEEMAN**, Judge of said court, recorded on the  
20 DuPage County Computer-Based Digital Recording System,  
21 DuPage County, Illinois, and transcribed by LIDIA T.  
22 STEFANI, Certified Shorthand Official Court Reporter,  
23 commencing on the 29th day of July A.D., 2016.  
24

1 PRESENT:

2 GRIFFIN WILLIAMS LLP, by:  
3 MR. JOSHUA M. FEAGANS,

4 appeared on behalf of the Plaintiffs;

5 THE COLLINS LAW FIRM, P.C., by:  
6 MR. SHAWN M. COLLINS and  
7 MR. JEFFREY M. CISOWSKI,

8 appeared on behalf of the Defendants,  
9 Edgar County Watchdogs, Kirk Allen and  
10 Claire Ball;

11 LAW OFFICE OF PETER BREEN, P.C., by:  
12 MR. PETER BREEN,

13 appeared on behalf of the Defendant,  
14 Adam Adrzejewski.  
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1 Mr. Andrzejewski -- I think he filed both 619 and 615  
2 in addition to his Citizen Protection Act. But this  
3 is a 615 issue, do you -- is that your position or is  
4 it 619?

5 MR. CISOWSKI: Again, since the conspiracy is  
6 predicated on the alleged defamation, it has to rise  
7 and fall just like the tortious interference in  
8 addition to the fact that there are great pleading  
9 defects on a conspiracy claim, which is subject to a  
10 higher pleading standard.

11 THE COURT: So you're asking me to consider  
12 this, at least at this point in time, under 615?

13 MR. CISOWSKI: Well, if the conspiracy fails as  
14 to Andrzejewski and Claire Ball, there can be no  
15 conspiracy so there has to be multiple actors. It's  
16 a bit of a nuance question.

17 THE COURT: Did you want to say anything briefly  
18 about the conspiracy, because I can tell you, in  
19 taking a look at Mr. Andrzejewski's pleadings -- and  
20 I'm going to give Mr. Breen a chance to be heard, if  
21 he wishes, although I'm not sure he's going to want  
22 to, I have some concerns about the conspiracy counts  
23 and they are these.

24 As I understand it and my understanding of

1 conspiracy whether it's civil or criminal, has to be  
2 an agreement to and unlawful act. And if the act  
3 is -- and I think defendants count on this to try to  
4 get Kathy Hamilton elected or advanced or whatever it  
5 is, I'm not sure that can be a conspiracy.

6 And I understand your argument at some  
7 point was a little more nuance in that it was an  
8 agreement to use defamation to get her career  
9 advanced, and I have some concerns about that,  
10 whether that could even ever constitute a conspiracy  
11 such that the defamation end of it -- I'm trying to  
12 think. I don't think you can have a conspiracy to  
13 commit theft and then use the theft that's outside  
14 the Statute of Limitations. It seems like it's an  
15 attempt and I'm not suggesting you're doing anything  
16 other than advocating with your client -- I don't  
17 want you to misunderstand what I'm saying -- but it  
18 seems like you're trying to shoehorn some of this in  
19 to get around the Statute of Limitations, which is  
20 fine. I'm not suggesting that's what you're doing  
21 but that's the interpretation I'm taking away.

22 If the attempt or the agreement is to  
23 advance the political career of an individual, that's  
24 not an unlawful purpose and the conspiracy would

1 fail. If it's to commit defamation and you want to  
2 advance that and you want to get the defamation  
3 allegations in, I think that's a bit of an attempt to  
4 shoehorn a count in to maneuver on the Statute of  
5 Limitations.

6 On top of that, the second concern I have  
7 is I think there needs to be more specificity pled  
8 with respect to the agreement of the merely saying  
9 it. I know you cited in response -- it's not in the  
10 complaint -- the -- Mr. Andrzejewski said that in one  
11 of the blogs, touting the success of both he and  
12 Watchdogs and accomplishing something. And I think  
13 you even acknowledged it wasn't in the complaint.  
14 I'm not saying it's enough, so I think there's  
15 problems with the lack of specificity of the  
16 agreement. And I'm just telling you, I am struggling  
17 to find that a conspiracy can never be successfully  
18 pled for the reasons I've cited. Did you want to be  
19 heard?

20 MR. FEAGANS: Well, your Honor, I believe -- I  
21 have some of your Honor's concerns. I believe that  
22 if you -- if you undertake a concerted act to  
23 accomplish something and one of those individuals  
24 goes off road and does something that they should not

1 be doing and it's unlawful, then the other  
2 conspirators who are in that enterprise are  
3 responsible for it.

4 THE COURT: And I thought about this. I mean, I  
5 have a lot of background in criminal, but isn't it,  
6 as a threshold matter, doesn't it have to be an  
7 agreement to do an unlawful thing, if, for  
8 instance -- and I'm not conceding anything as a young  
9 man -- but if I agreed to work for the Nixon campaign  
10 and I intended to do that lawfully, I'm not  
11 responsible for the Watergate burglars. I never  
12 agreed to do anything illegal.

13 Now, once I agree to do something illegal  
14 to further this, anybody who does anything to further  
15 that illegal agreement I'm on the hook for. And the  
16 touchstone of that, in my opinion, are the eyes of  
17 the laws. Once you agree to conduct an illegal act  
18 or enter an agreement for an illegal purpose,  
19 tortious or civil, then we're going to apply  
20 principles of agency and things like that. But if  
21 it's a lawful purpose and somebody goes rogue, I got  
22 to tell you, I think I disagree with you.

23 And here's what I'm going to do. I'm  
24 inclined to grant the 2-615 motion. If you want

1 to -- the courts repeatedly tell me not to simply  
2 give somebody at least one opportunity to do it. I  
3 think I have extended to you my concerns. I may be  
4 wrong, but at a minimum, I don't think the conspiracy  
5 and the evidence of the agreement is sufficiently  
6 pled. You've made reference that you might be able  
7 to add to it. I'm not telling you that I think that  
8 would get it done. It might, it might not. I'll  
9 keep an open mind. But I think if I grant the motion  
10 2-615, we can all take a look at see about larger  
11 issues about conspiracy, but I'm going to grant the  
12 2-615 without prejudice.

13 MR. FEAGANS: Understand, your Honor.

14 MR. CISOWSKI: Your Honor, just to clarify, it's  
15 with regard to Count 8?

16 THE COURT: Yes. Yes. And, Mr. Breen, I know  
17 you stepped up and with good reason. I didn't think  
18 you'd necessarily, but I want to make sure you have  
19 an opportunity to make a record because that is going  
20 to be my ruling as to that issue as to your client as  
21 well, but I certainly want to give you an opportunity  
22 now, or whatever you prefer, to clarify and make a  
23 record -- whatever you'd like to do -- on the  
24 conspiracy issue, not as it applies to the Citizen

1 Protection Act.

2 MR. BREEN: Okay. Certainly, your Honor. And  
3 you granted our 615 motion on conspiracy and we're  
4 glad for that. At the same time we'll be -- we'll  
5 argue the Citizen Participation Act as to  
6 our --

7 THE COURT: We will, we will.

8 MR. BREEN: -- particular clients.

9 THE COURT: Okay. I think as to Edgar County  
10 and Allen, that addresses, I think, all the motions  
11 that are pending. Do you -- your motions, do you  
12 disagree?

13 MR. COLLINS: No.

14 THE COURT: Do you disagree?

15 MR. FEAGANS: I do not disagree.

16 THE COURT: All right. Then with respect to  
17 defendant Ball, there is no 2-615 that I'm aware of.  
18 I looked and I didn't see any 2-615 or 2-619.  
19 There's simply the Citizen Participation Act.

20 MR. COLLINS: That's right.

21 THE COURT: And I understand there may be some  
22 differences here as to the -- at least in my mind you  
23 could argue some different things under the issue of  
24 whether it's meritorious, but you agree, she's



1 included, I'm inclined to give them 35 days to file  
2 whatever and then you'd have sufficient time after  
3 that to file whatever responsive pleadings you see  
4 fit. Anything else before we go on?

5 MR. COLLINS: As to Ball?

6 THE COURT: As to Ball. You're given 35 days to  
7 file any amended pleadings. None of the defendants  
8 are required to respond before that date. They're  
9 given 28 days thereafter to file whatever responsive  
10 pleadings to any of the amended complaints you file.

11 Mr. Breen.

12 MR. BREEN: Yes, your Honor.

13 THE COURT: I probably have tipped my hand and I  
14 don't mean to be anticlimactic. But I certainly  
15 would like to hear anything you'd like to tell me  
16 about the Citizen Participation Act. I think your  
17 2-619 motion as to the conspiracy, to the extent it  
18 was -- I think you mentioned it -- is not needed --  
19 doesn't need to be addressed because the 2-615 has  
20 been granted. If he files an amended one and he gets  
21 around 2-615, I'll hear you on that, but the Citizens  
22 Participation Act I don't want to leave here without  
23 hearing what you have say about that.

24 MR. BREEN: Thank you, your Honor. And as we

1 discussed earlier, I don't know if the first prong is  
2 conceded by the defendant as to -- or by the  
3 plaintiff as to Mr. Andrzejewski.

4 MR. FEAGANS: Actually, just for clarification,  
5 it is not Mr. Andrzejewski. I don't think he's  
6 produced evidence to support he was actually doing  
7 anything. In other words, his argument is I wasn't  
8 doing anything.

9 I'm not suing him because of his earlier  
10 statements, I'm suing him for his activity with --  
11 his alleged concerted activity with co-conspirators.  
12 So unless he's acknowledging he was engaged with  
13 them, he can't pass the first prong.

14 THE COURT: And I understand it, and I'm just  
15 going to say this, and Mr. Breen, I'm confident,  
16 doesn't need me to invite him to speak his mind, he  
17 can say whatever he wants. But I'm going to find for  
18 purposes of the Citizen Participation Act, I'm  
19 looking first at your complaint. I think your  
20 complaint has alleged conspiracy in whole or in part  
21 because he's advancing the candidacy of Hamilton, and  
22 I'm going to find it is within the first prong. It  
23 is activity protected by the Act. But certainly if  
24 you want to make a record should there need to make

1 appeal or whatever, Mr. Breen, you have the floor.

2 MR. BREEN: Thank you, your Honor. Throughout  
3 the complaint it talks about what Mr. Andrzejewski  
4 had done. The entire issue before the Court is an  
5 issue of public importance, deals with the College of  
6 DuPage scandal, which certainly doesn't need to be  
7 recounted here.

8 What you see, though, with Mr. Andrzejewski  
9 is that he -- really it's undisputed -- he accurately  
10 related in 2014 that the plaintiffs were receiving  
11 payments from the college while serving on the  
12 Foundation board that directs funds to that college  
13 and he did -- he also revealed with those payments  
14 that were coming to them from the college were from  
15 an imprest fund and so they were not disclosed to the  
16 elected trustees of the College of DuPage, so really  
17 since you're keeping them out of public light.  
18 That's what happened in 2014. The great uproar  
19 happened then. That was where the damage was done.  
20 You got public recitations of the Daily Herald and  
21 the Tribune, elsewhere, and that is where you see the  
22 names of the defendants -- or of the plaintiffs,  
23 rather.

24 With that as a background, looking at the

1 meritless and retaliatory analysis under the  
2 anti-SLAPP, meritlessness, you saw the plaintiffs are  
3 concerned about what Mr. Andrzejewski did in 2014,  
4 and they're trying to sue him for that under a --  
5 using a conspiracy claim for what someone else did in  
6 2015. There's no merit to that.

7 We had cited to the Court the Midwest Rem  
8 Enterprises case. This is a unique issue. How --  
9 how do you deal with a conspiracy claim under an  
10 anti-SLAPP analysis, and in Midwest Rem, they talked  
11 about the absence of evidence, anything that had been  
12 done wrong as being a factor in dealing with both  
13 meritlessness and retaliation. They also talk about  
14 the truth of what the defendant in that case had --  
15 that she had spoken nothing wrong, nothing false.

16 Here you've got the similar situation.  
17 Now, I know your Honor made some statements about  
18 substantial truths not being applicable on  
19 anti-SLAPP. It's a related issue.

20 THE COURT: It is a -- as I understand it, at  
21 stage three but -- and I can point to what I'm  
22 talking about, but at stage two, for the reasons I  
23 haven't gone into, I'm confident that it doesn't  
24 apply at that point.

1 MR. BREEN: I'm actually going to -- I'm going  
2 to respectfully disagree with you --

3 THE COURT: Go ahead.

4 MR. BREEN: -- right on that point --

5 THE COURT: Go right ahead.

6 MR. BREEN -- on the basis of Walsh versus Wright  
7 Development that -- and we're in a unique situation.  
8 The law is -- the anti-SLAPP law at the Appellate  
9 Court level is developing. The problem is the last  
10 -- the Supreme Court addressed the Citizens  
11 Participation Act.

12 The first time was Walsh versus Wright  
13 Development and in that case, the Supreme Court held  
14 that -- they held that the defamation claims did not  
15 have merit on the basis of substantial truth and so  
16 when I -- I understand Ryan v. Fox and I -- you know,  
17 there are -- I would respectfully contend that either  
18 Ryan v. Fox doesn't quite mean that substantial truth  
19 is never applicable in an anti-SLAPP context or that  
20 Ryan v. Fox was wrongly decided in light of Walsh  
21 versus Wright Development.

22 THE COURT: Okay. I see -- I see your point.

23 MR. BREEN: And I know that this is a tough  
24 one --

1 THE COURT: No. And to be honest with you, if  
2 called upon, I'll take a further look at it. I do  
3 see your argument. And I guess if I have to, I'll  
4 take a further look at it, but go ahead, Mr. Breen.

5 MR. BREEN: And I don't know that it's even  
6 necessary to get into here for this issue of  
7 conspiracy because we have Midwest Rem Enterprises  
8 case. And you've got the factors of retaliation.

9 There's another point in the briefing about  
10 Hightel Group case of the Second District.

11 Respectfully contend that as to the issues of the --  
12 the various issues that can come up and be considered  
13 in a retaliation context, that Hightel certainly was  
14 not overruled by Sandholm and Sandholm did not  
15 mention Hightel on that point and did not overrule  
16 the fact of what different -- different items. And  
17 it was a not an exclusive list in Hightel, that  
18 numerous items can go into this evaluation on whether  
19 something is retaliatory.

20 And when you look again at this issue of  
21 punitive damages and alleged actual damages for  
22 really statements that were made outside of, and  
23 clearly outside of the Statute of Limitations, you  
24 can see that evidence of intent that really the other

1 side is trying to punish Mr. Andrzejewski for  
2 statements he made that were absolutely true and that  
3 were back in 2014. That's really what they're trying  
4 to do with this case. That's really when you're  
5 looking at, you know, what are their allegations of  
6 conspiracy. Paragraphs 21 through 24 are all about  
7 what he did before the period that can even be sued  
8 for here. There's just the slight mention, I believe  
9 it's Paragraph 105 or 104, 105 in the actual  
10 conspiracy count was the only other time that he's  
11 really mentioned in substance. It shows you what  
12 they're trying to do is really to come after him  
13 specifically because they didn't like what he had  
14 said in a previous time, and they didn't like the  
15 fact that he had done a lot of things at the College  
16 of DuPage, and we've laid those out in his affidavit  
17 in detail. He actually succeeded in many ways in  
18 performing things at the college.

19 So, your Honor, not to mix the two  
20 standards, but really the retaliatory and the  
21 meritless do lean on each other in a case like this  
22 where a defendant is just being slapped onto a case  
23 as a co-conspirator for someone else's defamation and  
24 so at that end, your Honor, I wanted to make those

1 points.

2 You know, these conspiracy allegations, as  
3 well, just to reiterate, they're so broad that they  
4 would sweep in the Daily Herald, the Chicago Tribune,  
5 parties that we would say no, there's absolutely no  
6 way you could pass the straight-face test bringing  
7 them into court on this plan. I would respectfully  
8 contend that there's no way you can pass the  
9 straight-face test to bring Mr. Andrzejewski into  
10 court on this complaint. And so for those reasons,  
11 we would respectfully urge that the Court grant the  
12 Citizen Participation Act, the Citizen Participation  
13 Act motion.

14 THE COURT: And I want you to know, I mean,  
15 among other things, I appreciate your input about the  
16 issue of affirmative defenses. And you may be, at  
17 the end of the day, be right because the cases that  
18 I'm relying on I'm finding affirmative defenses  
19 aren't sufficient under fact two, our Appellate Court  
20 not Supreme Court.

21 One other one is Garrido, which I think is  
22 referred to all the time. And it does indicate, I  
23 think, pretty clearly, and I confess, I found it  
24 persuasive, an affirmative defense does not prove



1 that a plaintiff's claim is meritless. It merely  
2 allows a defendant to avoid the legal consequences of  
3 a real injury. And I know you're aware of it,  
4 Mr. Breen, but -- I'm not going to read the whole  
5 thing in, but looking at it, it refers to Sandholm.  
6 Your points are well taken as I hear you argue it.  
7 Your written motion in that regard becomes clear.

8 I'm going to stand by and follow -- even  
9 though it's a First District case -- Garrido and  
10 Ryan. You may be right, they may be wrongly decided.  
11 And if as to -- again, I'll take another look at it  
12 because it is an interesting point and you've raised  
13 some questions in a way that I haven't thought about  
14 before, but I'm going to stand by that analysis at  
15 that point. I just want to make clear that I took  
16 Garrido into account, too, which is a First District  
17 case.

18 Did you want to be heard on the Citizen  
19 Participation Act, because I know we put the cart  
20 before the horse because of the conspiracy issue  
21 coming up in -- against Edgar County and Allen, but  
22 as to the Citizen Participation Act, do you wish to  
23 be heard?

24 MR. FEAGANS: Your Honor, I don't have anything

1 else to add. I know you kind of wanted to keep the  
2 argument separate, but I've said everything I can  
3 about the matter.

4 THE COURT: I understand. And this is a  
5 different one than Garrido versus the other one,  
6 because I think Mr. Breen's points that this was just  
7 tacked on to try to get around the statute gives me a  
8 good deal of pause. I mean, again, I'm not  
9 suggesting, and I have no reason to, and I am not  
10 suggesting that anybody in filing a pleading did  
11 anything other than in good faith or whatever, but I  
12 have to tell you, just as a practice of looking at  
13 this, it seems to me this is an attempt to shoehorn a  
14 count in that would extend the Statute of Limitations  
15 so we go back and get at stuff that we can't now  
16 because a year has passed. That gives me a great  
17 deal of pause. And I've wrestled with this one. I  
18 really did. I think this is different than Kirk  
19 versus Allen. I think it's a thinner case. I'm not  
20 prepared to find that it's meritless for reasons that  
21 I think I touched on.

22 But in looking at this, I went back to my  
23 2-619 Sandholm analysis and I'm not certain about  
24 this call in this case. This is a much more closely

1 balanced call, even under the analysis that needs to  
2 be applied. I was up last night thinking about this  
3 call with this defendant under these facts and the  
4 Citizen Participation Act. I go back and forth. At  
5 the end of the day, for reasons I said earlier, I  
6 looked to as the burden and I looked to the Supreme  
7 Court's language in Sandholm. Dismissal of a lawsuit  
8 pursuant to the Act is a drastic and extraordinary  
9 remedy. I, you know, wrestled with this. I've been  
10 up for awhile thinking about this and because I'm not  
11 certain that -- that I can find it meritless and all  
12 the rest, my analysis is the same as it was under  
13 Kirk with respect to the rest of these things, except  
14 the conspiracy thing, I think, is a little bit closer  
15 to be meritless.

16 On balance, I'm going to deny the motion.  
17 I think all the arguments Mr. Breen said are going to  
18 apply with equal force should an amended complaint be  
19 filed. I'll take another look at it if called upon  
20 to do so. Mr. Breen's arguments are well taken with  
21 respect to the applicability of affirmative defenses  
22 at stage two under Sandholm, but I've gone back and  
23 forth and thought about it and it's the defendants'  
24 burden and given the standard the Supreme Court tells

1 me to apply, I'm going to respectfully deny it, and  
2 that's going to be my ruling.

3 You're asking 35 days to see if you're  
4 going to file any amended complaint against this  
5 defendant, correct?

6 MR. FEAGANS: Yes, your Honor.

7 THE COURT: 28 days if he files something after  
8 he files it to respond.

9 MR. COLLINS: Yes, your Honor.

10 THE COURT: Can we just get a status date at  
11 some point in time. Everybody is within earshot. I  
12 want to give you a chance to respond. I guess my  
13 thinking is if you file something maybe between 35  
14 and 28 days and if you give defendants enough time to  
15 tell me who's in, who's out, who wants to file what  
16 and we can set a briefing schedule maybe 45 days out  
17 from now, does that seem reasonable to you?

18 MR. FEAGANS: That sounds fine, your Honor.

19 THE COURT: So just get a 45-day date. He had  
20 filed whatever. Your pleadings are not due. I can  
21 give you a longer date if you want, but you can tell  
22 me this is what we're intending, we'd like a hearing  
23 date on these things as soon as possible.

24 MR. COLLINS: We're good with that. My clients

1       STATE OF ILLINOIS        )  
   ) SS:  
 2       COUNTY OF DU PAGE     )

3  
 4                    I, LIDIA T. STEFANI, hereby certify that  
 5       I am a Certified Shorthand Official Court Reporter  
 6       assigned to transcribe the computer based digital  
 7       recording of proceedings had of the above-entitled  
 8       cause, Administrative Order No. 99-12, and Local  
 9       Rule 1.01(d). I further certify that the foregoing,  
 10      consisting of Pages 1 to 150, inclusive, is a true and  
 11      accurate transcript hereinabove set forth.

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