No. _____

IN THE
SUPREME COURT OF ILLINOIS

Carla Burkhart and Herricane Graphics, Inc.,	)	Petition for Leave to Appeal from
	)	the Appellate Court of Illinois,
Plaintiffs-Respondents,	)	Second Judicial District, No. 2-16-
	)	0712 (Cons. Case No. 2-16-0705).
v.	)	
	)	Appeal from the Circuit Court for the
Edgar County Watchdogs, Inc., Kirk Allen,	)	18th Judicial Circuit, DuPage
Adam Andrzejewski, and Claire Ball,	)	County, Illinois, No. 2015-L-1244.
	)	
Defendants-Petitioners.	)	The Honorable Robert G. Kleeman,
	)	Judge Presiding.

ADAM ANDRZEJEWSKI'S PETITION FOR LEAVE TO APPEAL

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PRAYER FOR LEAVE TO APPEAL

Defendant-Petitioner Adam Andrzejewski ("Andrzejewski"), by his undersigned counsel, and pursuant to Supreme Court Rule 315, petitions this Court for leave to appeal from the January 17, 2017 minute order of the Appellate Court, Second Judicial District, which both denied him leave to appeal, pursuant to Supreme Court Rule 306(a)(9), from the Circuit Court's denial of his Citizen Participation Act[1] (735 ILCS 110/1, *et seq.*) ("CPA") motion to dismiss and—without allowing him briefing per S.C.R. 306(c)(7) or argument per S.C.R. 352—affirming the Circuit Court's decision on the merits.

This action arises out of the recent scandals at the College of DuPage, which have drawn significant public and governmental attention. Andrzejewski is a nationally recognized investigative journalist, and founder of multiple good-government nonprofits, whose efforts helped uncover the malfeasance at the College and secured significant changes in College policy. R. C456-74. Plaintiffs-Respondents ("Plaintiffs") are Herricane Graphics, a corporation which did business with the College of DuPage and Carla Burkhart, the owner of that corporation, who sat on the governing board of the College of DuPage Foundation ("the foundation"), an independent 501(c)(3) organization. It is undisputed that, while Burkhart controlled the flow of funds to the College as a member of the foundation board, her private corporation secured no-bid

[1] Illinois' Citizen Participation Act is an "anti-SLAPP" Act, intended to expeditiously redress "Strategic Lawsuits Against Public Participation." A majority of states—including the 5 largest U.S. states, California, Texas, Florida, New York, and Illinois—have adopted anti-SLAPP Acts. *See, e.g.*, http://www.anti-slapp.org/your-states-free-speech-protection/.

contracts and nondisclosed payments from the College. *See, e.g.*, R. C3, C468-74, C462-64.

This case presents a prototypical SLAPP: the defendant, Andrzejewski, uncovered and truthfully exposed questionable behavior by the plaintiffs in relation to a government entity. Due to the resulting public attention to that questionable behavior, the government entity terminated its relationships with those involved. Plaintiffs, having suffered monetarily due to the loss of their government relationship, then sued defendant, bringing a threadbare complaint heavy on invective and innuendo, but light on hard facts. *Cf., Sandholm*, at ¶ 33 ("The paradigm SLAPP suit is one filed by developers, unhappy with public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development.") (internal quotation omitted); *Satkar Hospitality, Inc. v. Fox Television Holdings*, 767 F.3d 701 (7th Cir. 2014).

Plaintiffs bring a single count of conspiracy to defame against Andrzejewski, based on three specific allegations, in addition to numerous unsupported and conclusory allegations. These specific allegations take issue with two articles and one interview by Andrzejewski, all published more than one year prior to the filing of the Complaint. R. C5, C20-21. In response, Andrzejewski filed a § 2-619.1 motion to dismiss, asserting the CPA pursuant to § 2-619 and other grounds pursuant to §§ 2-615 and 2-619 of the Code of Civil Procedure. Andrzejewski supported the CPA motion with a declaration, and plaintiffs provided no counter-affidavits in response. Andrzejewski contended that Plaintiffs' claims against him are "solely based on defendant's rights of petition [and] speech," *Sandholm*, at ¶ 45, because he did nothing wrong and because Plaintiffs leveled

no well-pled allegations at Andrzejewski in support of their conspiracy claim, save for allegations related to his three publications, which were time-barred and truthful.

The Circuit Court granted Andrzejewski's § 2-615 motion to dismiss without prejudice, ruling that Plaintiffs had not adequately pled an agreement to perform an unlawful act between Andrzejewski and the other Defendants. Tr., at 122-25; R. C415-18. While denying the CPA motion, the Circuit Court stated that it "wrestled" with and "was up last night thinking about" its decision on that motion—and even went so far as to note it was "not certain about this call in this case" and that the issues are "closely balanced." Tr., at 146, ln. 11-147, ln. 15; R. C439-40.

On review, despite the Circuit Court's hesitancy, the Appellate Court denied leave to appeal and summarily affirmed the interlocutory rulings of the Circuit Court. *But see, Midwest Rem Enterprises, Inc. v. Noonan*, 2015 IL App (1st) 132488, ¶ 86 (claim for conspiracy met the second prong of the *Sandholm* CPA test because of "complete absence of evidence that [the conspiracy defendant] said anything untrue to investigators or the court.").[2]

In 2012, this Court in *Sandholm* recognized that the General Assembly did not intend to cut off meritorious tort claims through the CPA and set forth a robust test for

[2] 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 prong is often expressed as requiring that a CPA movant prove a claim is "meritless" and "retaliatory." *Id.*, ¶ 45.

CPA motions. But recent lower court decisions have severely constricted the ability of CPA movants to meet the *Sandholm* test, even in prototypical SLAPP situations like this one, and even when defendants have clear defenses to the plaintiffs' claims. For instance, the Circuit Court here and various decisions of the Appellate Court have barred the use of affirmative defenses, including substantial truth, to prove a claim is "retaliatory" and "meritless" under the CPA. *See, e.g., Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 26-28 (creating distinction between substantially true and "actually true" statements in defamation context)[3]. This bar has no support in the language of the CPA, its legislative history, or the precedents of this Court.

As one judge presiding over an early SLAPP observed about these suits, "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined." *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (N.Y. Sup. Ct. 1992). Yet today, due to the uncertainty in the lower courts about the application of the CPA, Illinoisans can have little confidence in their ability to participate in government free from meritless lawsuits. And lawyers trying to predict the outcome of a CPA motion might as well be trying to divine whether the next spin of the roulette wheel at Harrah's will come up red or black. The ambiguity is on clear display in this case, where the Circuit Judge believed the CPA determination so "closely balanced" that he put on the record that he is "not certain about this call," while the reviewing panel was so certain about that same

[3] *But see, Troman v. Wood*, 62 Ill. 2d 184, 198 (1975) (defamation plaintiff must prove "that the publication was false"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 346-48 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) (burden of proving falsity on plaintiff).

determination it would deny leave to appeal and summarily affirm that interlocutory ruling, without briefing or argument.

Andrzejewski's CPA motion squarely presents some of the most critical issues facing parties, lawyers, and judges in relation to the Act.[4] Five years after *Sandholm*, this Court should grant leave to appeal here and resolve the many conflicting decisions on the CPA, so as to protect the rights of Illinoisans to robustly participate in their government.

STATEMENT REGARDING JUDGMENT AND REHEARING

The Circuit Court issued its interlocutory order denying Andrzejewski's CPA motion on July 29, 2016. (A1). The Appellate Court issued its minute order denying leave to appeal on January 17, 2017. (A2). No petition for rehearing was filed. This petition is being timely filed within thirty-five (35) days of the issuance of the Appellate Court's order.

POINTS RELIED UPON IN SEEKING REVIEW

This case satisfies each of the criteria this Court has indicated it will consider in granting discretionary review.

1. The importance of the questions presented in this case are of constitutional significance, impacting fundamental Speech and Petition rights. The CPA provides practical protection for those rights. By restricting the use of affirmative defenses in support of a CPA motion, the Circuit Court here and the Appellate Courts have erected an undue barrier to Illinoisans' ability to access the CPA, creating law unsupported by the

[4] The CPA motions of the other defendants who have filed or are filing petitions for leave to appeal in this case would provide further context on those critical issues. In accord with S.C.R. 315(h), as he did in the Circuit and Appellate Courts, Andrzejewski adopts by reference the S.C.R. 315 petitions for leave to appeal of co-defendants Edgar County Watchdogs, Inc., Kirk Allen, and Claire Ball.

text and public policy of the CPA, this Court's specific practice in *Walsh*, and this Court's CPA framework laid out in *Sandholm*. The exercise of this Court's supervisory authority is needed to reassert robust protection for citizen participation rights under the CPA.

2. More specifically, by maintaining an artificial distinction between "actually true" statements and substantially true statements, the Circuit Court here and the Appellate Courts have turned the First Amendment on its head, placing a burden on CPA movants in conflict with the standards laid out in this Court's seminal decision in *Troman v. Wood* and the United States Supreme Court's defamation jurisprudence in *Gertz* and *Hepps*.

3. The Circuit Court's decision and the order by the Appellate Court, Second District, affirming denial of Andrzejewski's CPA motion conflicts with the decision of the Appellate Court, First District, in *Noonan*, which upheld the grant of a CPA motion to a conspiracy defendant when, similar to here, there was a "complete absence of evidence that [the conspiracy defendant] said anything untrue." The exercise of this Court's supervisory authority to clarify the standards for applying a CPA motion, in the absence of well-pled facts and evidence, would aid those Illinoisans who are joined to lawsuits on vague conspiracy theories, based solely on their legitimate participation in government.

4. This Court's supervisory authority is required, in order to preserve Andrzejewski's individual right to a substantive appeal of the denial of his CPA motion, which was stripped from him by the Appellate Court's summary affirmance, without briefing per S.C.R. 306(c)(5) & 341 or argument per S.C.R. 352.[5]

[5] In the alternative to his request that this Court accept this case for appeal on the merits, Andrzejewski respectfully requests that this Court exercise its supervisory authority to direct the Appellate Court to vacate its summary affirmance and denial of leave to appeal

5. The Circuit Court erred in granting the CPA motion, and the Appellate Court erred in summarily affirming that motion. Andrzejewski proved his CPA motion at the Circuit Court by correctly arguing that he had refuted the conspiracy element of an agreement to commit an unlawful act, because (1) the complained-of publications were time-barred and not defamatory; (2) Andrzejewski's actions were not tortious but salutary; and (3) the complaint included no well-pled facts contradicting Andrzejewski's facts or otherwise supporting the formation of an agreement to commit an illegal act. In further support, he presented a declaration (1) showing the alleged publications were true; (2) proving his investigative journalism methods were above reproach; and (3) detailing his successful efforts to uncover wrongdoing and effect change at the College of DuPage. In response, Plaintiffs presented no counter-affidavits, nor did they dispute Andrzejewski's statement of facts. The facts and law establish that the claims against Andrzejewski were solely based on his protected participation in government.

6. This matter is ready for *de novo* review in this Court, as the Appellate Court's minute order of January 17, 2017 is a final order disposing of Andrzejewski's CPA motion. This matter was fully briefed and argued to the Circuit Court, with all parties having the opportunity for presentation of affidavits and counter-affidavits. There are no material issues of fact in dispute. Immediate appellate review will conserve judicial resources and significantly speed the resolution of the claims against Andrzejewski. *Rollins v. Ellwood*, 141 Ill.2d 244, 279 (1990) (an "appellate court should

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and to grant leave to appeal. *See, e.g., Drury v. Neerhof*, 45 N.E.3d 674, 675 (Ill. 2015); *Samoylovich v. Montesdeoca*, 2014 IL App (1st) 121545, ¶ 13.

grant leave to appeal if reasonably debatable grounds, fairly challenging the order, are presented.").

STATEMENT OF FACTS

This lawsuit arises out of the grave scandal and public controversy surrounding the College of DuPage. 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 nine 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 Burkhart 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.

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. 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").

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.

Procedural History

In the Circuit Court, Andrzejewski moved to dismiss the conspiracy claim pursuant to § 2-619.1, including a § 2-619 CPA motion and other §§ 2-615 and 2-619 motions. 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.[6] The Court further

[6] However, Plaintiffs' counsel also conceded that, "Well, your Honor, I believe -- I have some of your Honor's concerns." Tr., at 123, lns. 20-21; R. C416.

characterized the conspiracy count against Andrzejewski as "an attempt to shoehorn a count in to maneuver on the Statute of Limitations," Tr., at 123, lns. 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, lns. 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, lns. 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. As to 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.[7] The Court further noted that, "I think all the arguments Mr. Breen said are going

[7] 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.

to apply with equal force should an amended complaint be filed." Tr., at 147, lns. 17-19; R. C440.

On review, the Appellate Court denied leave to appeal but ruled on the merits of the Circuit Court's interlocutory order denying Defendants' CPA motions, holding that:

> "Defendants have not established that plaintiffs' claims are meritless or filed solely based on defendants' rights of petition, speech, association, or to otherwise participate in government such that dismissal pursuant to Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2016)) would be appropriate."
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> Ord., 1/17/17; A2.

ARGUMENT

1. Courts and CPA movants should not be barred from using affirmative defenses in determining whether a claim is meritless and retaliatory.

In considering the CPA motion, the Circuit Court here erred in several respects, including refusing to consider critical "affirmative matter" presented by Defendants, including affirmative defenses such as substantial truth, in the determination of whether Plaintiffs' claims are "meritless" and "retaliatory" under the CPA. Tr., p. 104, lns 14-15; R. C397 ("Affirmative defenses under this are irrelevant and that includes substantially true."). The Circuit Court based its actions on a line of Appellate Court precedent, stemming from *Garrido v. Arena*.

However, this Court in *Sandholm* laid out a multi-prong test for CPA movants, further instructing that a § 2-619 motion is an appropriate vehicle for CPA motions, and noting that such a motion "admits the legal sufficiency of the plaintiff's claims but asserts certain defects or defenses outside the pleadings which defeat the claim." *Id.*, at ¶ 54. While this Court set up a framework for analyzing a CPA motion in *Sandholm*, it did not place any limits on a defendant's right to present § 2-619 affirmative matter—whether

affirmative defenses or otherwise—or a Circuit Court's right to receive and consider that affirmative matter, in determining whether a claim is "meritless" and "retaliatory" under the CPA.

Adding a further limitation outside of § 2-619 and without foundation in the text of the CPA strikes against the command that the CPA "be construed liberally to effectuate its purposes and intent fully." 735 ILCS 110/30, 110/5. A CPA movant already "starts from behind," admitting the legal sufficiency of the plaintiff's claim under § 2-619. Each additional limitation beyond those present in *Sandholm* disrupts the careful balance struck by this Court, putting an additional weight on the scale against the right of citizens to participate in government without fear of meritless litigation.

Moreover, while this Court identified a critical concern that the CPA is "not intended to protect those who commit tortious acts," *Sandholm*, at ¶ 45, such concern is not necessarily present when a valid affirmative defense defeats a claim. Especially in light of this Court's recognition that "SLAPPs 'masquerade as ordinary lawsuits' and may include myriad causes of action," *Id.*, at ¶ 35, there are no good grounds to forbid CPA movants and courts from considering any and all affirmative defenses.

Restricting affirmative defenses also appears to run directly contrary to the practice of this Court, which analyzed the substantial truth of alleged defamations in connection with reviewing a CPA motion. *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 638 (2010) ("Walsh's description of the developers of the Sixty Thirty project appeared true on its face and turned out to be true in substance."). Further, it appears to violate the spirit, if not the letter, of a key observation of Justice Freeman's special concurrence in *Walsh*, 238 Ill. 2d at 641 ("The affirmative matter referred to encompasses

'all defenses which rely on allegations which are not negations of the essential allegations of the plaintiff's cause of action.' . . . Other examples of affirmative matter include, in defamation cases, defenses based on privilege, the innocent construction rule, fair comment and truth.") (*quoting & citing* 4 R. Michael, Illinois Practice § 41.7, at 331-32 (1989) (collecting cases)), which was cited with approval by this unanimous Court in *Sandholm*, at ¶ 54.

Specifically as to substantial truth, a statement that is substantially true is not defamatory. In fact, it is not tortious at all. Because of this, the *Garrido* court's distinction between a statement that is "actually true" and one that is substantially true is nonsensical. *Garrido* paints with too broad a brush, making sweeping statements about all affirmative defenses, holding that an affirmative defense "merely allows a defendant to avoid the legal consequences of a real injury to the plaintiff" and opining that "in general," an affirmative defense "rests upon the idea that conduct which otherwise would be actionable . . . is entitled to protection *even at the expense of uncompensated harm* to the plaintiff's reputation." Id., at ¶¶ 26-27 (emphasis in original) (internal citations & quotations omitted).

Garrido cites *Gist v. Macon County Sheriff's Department*, 284 Ill. App. 3d 367, 371 (4th Dist. 1996), for the principle that substantial truth is an affirmative defense. However, *Garrido* neglects *Gist*'s discussion of why a substantially true statement is "not actionable." *Gist* notes that:

> "While this rule is rooted in the United States Constitution . . . , it is also logically driven as falsehoods which do no incremental damage to the plaintiff's reputation do not injure the only interest that the law of

> defamation protects. Moreover, [a] fussy insistence upon literal accuracy would condemn the press to an arid, dessicated [sic] recital of bare facts."
>
> *Id.* (emphasis supplied).

While substantial truth may be an affirmative defense, the First Amendment places the burden squarely on a defamation plaintiff[8] to prove "that the publication was false." *Troman v. Wood*, 62 Ill. 2d 184, 198 (1975); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) (burden of proving falsity on plaintiff). *Garrido* thus turns Free Speech law on its head.

Garrido and its progeny should be rejected. Affirmative defenses, and especially substantial truth, are proper "affirmative matter" under § 2-619 and their consideration in connection with determining whether a claim is "retaliatory" and "meritless" is fully consistent with the text and legislative history of the CPA and this Court's precedents.

2. The Circuit and Appellate Court's orders conflict with the First District's decision on a similar conspiracy claim in *Midwest Rem Enters. v. Noonan*.

Andrzejewski is in a similar position to Mrs. Noonan in *Midwest Rem Enters. v. Noonan*. 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 *Noonan*, the record here shows no

[8] When the issue is one of public concern, which it presumably would be for any speech at issue in a CPA motion.

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. R. C456-64. As noted *passim*, Andrzejewski provided evidence to the Circuit Court showing the truth and worth of his statements and actions in uncovering the scandals at the College.[9] Yet the Circuit Court did not address or attempt to distinguish *Noonan* in its decision.

3. Plaintiffs' conspiracy claim is 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 2014 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

[9] In so doing, Andrzejewski has affirmatively 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.

"non-disclosed payments," and as "hidden transactions," and that he referred to Herricane 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" revealing that relationship would not be tortious, but a public service. "[T]he 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).

4. 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 constitutionally protected speech and petition activity. *See Sandholm*, ¶ 45.

5. Andrzejewski has been stripped of his right to substantive appeal.

This Court held in *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d at 633-34, that a CPA movant is injured if he is denied the relief of identifying a particular lawsuit as a SLAPP and receiving attorney's fees and costs, even when the underlying suit is dismissed on a § 2-615 motion. Here, by summarily affirming the Circuit Court's interlocutory ruling, the Appellate Court refused Andrzejewski his right to a substantive appeal on his CPA claim, including the briefing and argument on the merits that he is entitled to under Supreme Court Rules and applicable caselaw. *See, e.g.*, S.C.R. 301 (appeal as of right from final judgment), 306 (interlocutory appeal)[10], 341 (briefs), 352

[10] Moreover, if an Appellate Court denies leave to appeal an interlocutory Circuit Court order under S.C.R. 306, there would appear to be no basis for its continuing jurisdiction over the matter. There does not appear to be a specific provision in the Rules allowing an Appellate Court to deny leave to appeal an interlocutory order, while maintaining sufficient jurisdiction to affirm that same interlocutory order.

(when oral argument requested, to be dispensed with only if "no substantial question is presented" and "sparingly").

6. 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 this Court has similarly recognized the importance of CPA appeals by specially inviting interlocutory petitions for leave to appeal, pursuant to S.C.R. 306(a)(9).

The Appellate Court has issued an affirmance, on the merits, of the denial of Andrzejewski's CPA motion. That order is ripe for review. As noted *supra*, this matter was fully briefed and argued to the Circuit Court, and the parties had full opportunity to present relevant evidence and argument 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 doubt that such claim could be repled. Tr., at 123, lns. 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, lns. 17-19; R. C440.[11] Accepting this appeal now will prevent additional wasteful rounds

[11] 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, lns. 17-22; R. C440.

of CPA motion practice—each of which will create a new and separate claim by Defendants to be litigated on appeal. *Walsh*, 238 Ill. 2d at 633-34.

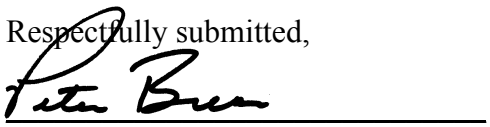
This matter is fully ready for appellate review, which will conserve judicial resources and significantly speed the resolution of the conspiracy claims in this lawsuit. The CPA expresses the intent of the General Assembly that individuals engaged in protected speech and petitioning conduct not be forced 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 admissible evidence against Andrzejewski. Plaintiffs have no compensable damages and no claims against Andrzejewski. Their purpose here is solely "intimidating, harassing, [and] punishing [Andrzejewski] for involving [himself] in public affairs." *Id.*

CONCLUSION

Plaintiff-Petitioner respectfully submits that every reason exists for this Court to accept this case to correct the erroneous decision of the Appellate Court and Circuit Court.

Dated: February 21, 2017

Respectfully submitted,



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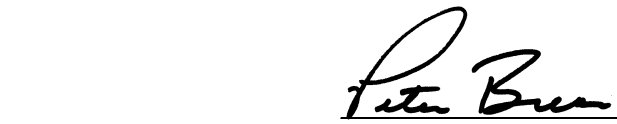
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding those matters to be appended to the brief under Rule 342(a), is 6450 words.



Peter Breen
Attorney for Defendant-Petitioner Andrzejewski

CERTIFICATE OF SERVICE

I, Peter Breen, an attorney, hereby certify that I caused one (1) copy of the foregoing Adam Andrzejewski's Petition for Leave to Appeal to be served on all counsel of record at the addresses listed below, via email, this 21st day of February, 2017.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Peter Breen

No. _____

IN THE
SUPREME COURT OF ILLINOIS

Carla Burkhart and Herricane Graphics, Inc.,	)	Petition for Leave to Appeal from
	)	the Appellate Court of Illinois,
Plaintiffs-Respondents,	)	Second Judicial District, No. 2-16-
	)	0712 (Cons. Case No. 2-16-0705).
v.	)	
	)	Appeal from the Circuit Court for the
Edgar County Watchdogs, Inc., Kirk Allen,	)	18th Judicial Circuit, DuPage
Adam Andrzejewski, and Claire Ball,	)	County, Illinois, No. 2015-L-1244.
	)	
Defendants-Petitioners.	)	The Honorable Robert G. Kleeman,
	)	Judge Presiding.

APPENDIX TO ADAM ANDRZEJEWSKI'S
PETITION FOR LEAVE TO APPEAL

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ORDER - BLANK

#2

2116 (Rev. 2/16)

STATE OF ILLINOIS **UNITED STATES OF AMERICA** **COUNTY OF DU PAGE**

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT

Burkhart

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, ~~V~~ 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

DuPage Attorney Number: 24048

Attorney for: Δ

Address: 1770 PARK ST SUITE 200

City/State/Zip: NAPERVILLE, IL 60563

Telephone Number: 630.527.1595

Email: JCISOWSKI@COLLINSLAW.COM

ENTER:

Judge

Date: July 29, 2016

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

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

CARLA BURKHART and HERRICANE GRAPHICS, INC., Plaintiffs, -vs- EDGAR COUNTY WATCHDOGS, INC., KIRK ALLEN, ADAM ADRZEJEWSKI, KATHY HAMILTON and CLAIRE BALL, Defendants.	No. 15 L 1244

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

PRESENT:

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

appeared on behalf of the Plaintiffs;

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

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

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

appeared on behalf of the Defendant, Adam Adrzejewski.

Mr. Andrzejewski -- I think he filed both 619 and 615 in addition to his Citizen Protection Act. But this is a 615 issue, do you -- is that your position or is it 619?

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

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

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

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

As I understand it and my understanding of

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

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

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

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

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

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

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

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

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

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

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

MR. FEAGANS: Understand, your Honor.

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

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

Protection Act.

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

THE COURT: We will, we will.

MR. BREEN: -- particular clients.

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

MR. COLLINS: No.

THE COURT: Do you disagree?

MR. FEAGANS: I do not disagree.

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

MR. COLLINS: That's right.

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

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

MR. COLLINS: As to Ball?

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

Mr. Breen.

MR. BREEN: Yes, your Honor.

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

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

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

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

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

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

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

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

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

With that as a background, looking at the

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

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

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

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

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

THE COURT: Go ahead.

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

THE COURT: Go right ahead.

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

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

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

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

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

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

There's another point in the briefing about Hightel Group case of the Second District. Respectfully contend that as to the issues of the -- the various issues that can come up and be considered in a retaliation context, that Hightel certainly was not overruled by Sandholm and Sandholm did not mention Hightel on that point and did not overrule the fact of what different -- different items. And it was a not an exclusive list in Hightel, that numerous items can go into this evaluation on whether something is retaliatory.

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

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

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

points.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FEAGANS: Yes, your Honor.

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

MR. COLLINS: Yes, your Honor.

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

MR. FEAGANS: That sounds fine, your Honor.

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

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

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

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

Official Court Reporter
Eighteenth Judicial Circuit of Illinois
DuPage County
C.S.R. License No. 084-002300

STATE OF ILLINOIS APPELLATE COURT SECOND DISTRICT

OFFICE OF THE CLERK
847/695-3750

APPELLATE COURT BUILDING
55 SYMPHONY WAY
ELGIN, ILLINOIS 60120-5558

Appeal from the Circuit Court of County of DuPage

Trial Court No.: 15L1244

THE COURT HAS THIS DAY, 01/17/17, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-16-0705
Cons. Cases: 2-16-0711, 2-16-0712

Burkhart, Carla et al. v. Edgar County Watchdogs, et al.

Defendants, Edgar County Watchdogs, Inc., Kirk Allen, Adam Andrzejewski, and Claire Ball, appeal the trial court's denial of their motion to dismiss in accordance with the provision of the Citizen Participation Act (Act) (735 ILCS 110/1 et seq. (West 2016)). Leave to appeal is denied as to all defendants. Defendants have not established that plaintiffs' claims are meritless or filed solely based on defendants' rights of petition, speech, association, or to otherwise participate in government such that dismissal pursuant to Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2016)) would be appropriate. We express no opinion on the actual merits of plaintiffs' causes of action. Any outstanding motions are stricken as moot.
THIS ORDER IS FINAL AND SHALL STAND AS THE MANDATE OF THIS COURT.
(Hudson, Zenoff, Burke, JJ).

Robert J. Mangan
Clerk

cc: The Collins Law Firm, P.C.
Shawn M. Collins
Jeffrey M. Cisowski
Robert L. Dawidiuk
Peter C. Breen