**THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| MEANITH HUON,<br>Plaintiff,<br><br>-against-<br><br>ABOVETHELAW.COM, DAVID LAT, ELIE MYSTAL, BREAKINGMEDIA.COM, JOHN LERNER, DAVID MINKIN, BREAKING MEDIA, JOHN DOES 1 TO 100, GAWKER MEDIA A/K/A GAWKER.COM, JEZEBEL.COM, NICK DENTON, IRIN CARMON, GABY DARBYSHIRE, JOHN DOES 101 TO 200, LAWYERGOSSIP.COM, JOHN DOE NO. 201, NEWNATION.ORG A/K/A NEWNATION.TV A/K/A NEW NATION NEWS, JOHN DOE NO. 401, JOHN DOE NO. 402, JOHN DOE NO. 403,<br><br>Defendants | CIVIL ACTION NO.:<br>1:11-CV-3054 (MEA JTG) |

**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT**

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**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT**

**NOW COME THE DEFENDANTS**, Gawker Media a/k/a Gawker.com, Jezebel.com, Nick Denton, Irin Carmon, and Gaby Darbyshire (collectively, "Gawker," or "Defendants"), by their attorneys, Oren Giskan and David Feige of Giskan Solotaroff Anderson & Stewart LLP, and move this court to dismiss plaintiff's complaint pursuant to Fed. R. Civ. Pro. 12(b)(6) for failing to state a claim upon which relief can be granted, the Illinois Citizen Participation Act (ICPA) 735 ILCS 110/5, which protects speech in the face of Strategic Lawsuits Against Public Participation (SLAPPs), Section 230 of the Communications Decency Act, which protects Defendants against liability for comments posted on Defendants website by third parties and

republication, 805 ILCS 180/10-10, which immunizes managers, the doctrine of "incremental harm," and basic rules of statutory construction, which prevent plaintiff from suing under criminal laws such as cyberstalking and cyberbullying that provide no private civil right of action.

## PRELIMINARY STATEMENT

In a somewhat rambling second amended complaint, Meanith Huon ("Plaintiff") seeks to bring an action against the Defendants for a kitchen sink of tortuous conduct including intentional infliction of emotional distress, defamation, defamation *per se*, false light, cyberstalking, cyberbullying, and civil conspiracy. All of plaintiff's claims arise out of an eleven sentence item posted on a website (Jezebel.com) which accurately reported on a separate lawsuit Plaintiff filed against co-defendant AbovetheLaw.com. (Plaintiff sued AbovetheLaw.com for reporting on a rape he was charged with).[1] At the root of this lawsuit is a serial plaintiff who has repeatedly been charged with crimes relating to the sexual abuse of women, seeking 100 million dollars for damage to his reputation allegedly caused by an eleven sentence item on a website that concerned one of the many lawsuits he filed in his continuing attempts to squelch coverage of his alleged criminal behavior.

## THE PARTIES

**PLAINTIFF Meanith Huon** is an Illinois attorney, serial plaintiff, and former criminal defendant who has filed multiple lawsuits against news organizations that have reported on the criminal allegations filed against him. In July 2008, Plaintiff was arrested after he allegedly

[1] . **The rape plaintiff then charged with is <u>not</u> the same as the criminal charges brought against plaintiff in docket #11231631 in which Plaintiff was charged with fondling the breasts and vagina of a woman after posing as a William Morris Agent.**

forced a woman to have oral sex with him, fondled her vaginal area and her breasts and refused to let her out of the car while driving on I-55 into Madison County. The woman allegedly was lured over the Internet by the possibility of a job. The alleged victim told authorities she talked to Huon by telephone and got the impression that the job was promoting alcohol sales in area taverns. She met Huon in downtown St. Louis, and he offered to drive her to a local saloon to check out how the business was going. However, they did not go to the tavern, and Huon instead allegedly sexually abused and assaulted her, according to the account of Capt. Brad Wells of the Madison County Sheriff's Department (attached hereto as Defense Exhibit A) (http://www.thetelegraph.com/articles/woman-29407-accused-chicago.html#ixzz1VmD2PbxF). The woman eventually jumped out of the car and contacted police.

Subsequent to his arrest on the sexual assault charges, Plaintiff was arrested again, this time for using the internet to harass and cyberstalk the alleged victim in the first case. In that case he was accused of contacting his alleged victim via the Internet and communicating indirectly with her in such a way as to cause her emotional distress, as well as maintaining an Internet Web page or Web site to harass the victim or an immediate family member.

After Plaintiff was acquitted of the 2008 sexual assault charges, he began (as described below) a campaign of lawsuits against numerous government and media defendants who had in some way reported on his case. These suits now include the instant Gawker defendants whose tortuous conduct seems to stem from reporting on these lawsuits and linking to an article plaintiff found offensive. Subsequent to filing the raft of suits, including the instant suit, Plaintiff, was charged with posing as "Nick Kew" a casting agent for the William Morris, and thereafter committing four counts of battery involving the fondling of the breasts and vaginal area of the complainant.

**DEFENDANT** Gawker Media a/k/a Gawker.com operates news and information websites which report on a wide variety of topics including media and politics. Among the websites operated by Defendant Gawker Media are defendant Gawker.com and defendant Jezebel.com. Defendant Nick Denton, is the founder of Gawker Media, and Defendant Gaby Darbyshire is the Chief Operating Officer of Gawker Media. Defendant Irin Carmon is a reporter for Jezebel.com.

## STATEMENT OF FACTS

On or about May 6, 2010, a website known as abovethelaw.com published a story concerning rape charges then pending against Plaintiff. Plaintiff subsequently filed suit against abovethelaw.com for $50 million for what plaintiff believed were tortuous inaccuracies in the abovethelaw.com article. Upon plaintiff's acquittal of the rape charges against him, plaintiff also sued Madison County, Illinois, and numerous other defendants for a number of torts related to his arrest. On or about May 11, 2011, defendant Jezebel.com published a brief eleven sentence item concerning Plaintiff's lawsuit against Abovethelaw.com, which included a hyperlink to the abovethelaw.com article. Plaintiff then sued the instant defendants. On July 5th, Plaintiff, accompanied by his lawyer Kent Delgado turned himself in to area three detectives where, he was charged with posing as Nick Kew, a casting agent for the William Morris agency, and thereafter committing four counts of battery for fondling the breasts, buttocks and vagina of the complaining witness.

In a rambling complaint, naming corporate defendants, the websites themselves, managers of said sites, the author of the jezebel.com article, posters who commented on the weblog, and several hundred john doe defendants, plaintiff now claims a kitchen sink of tortuous activity.

For his troubles he seeks entitlement to compensatory damages, punitive damages in the amount of $100 million, injunctive relief preventing retaliation, the transfer of Defendants' domain names, injunctive relief preventing any other party from relying on Defendants' article as a source, and costs.

## ARGUMENT

### I. AS PLAINTIFF'S MODUS OPERANDI IS TO SUE ANYONE WHO WRITES ABOUT, LINKS TO, OR OTHERWISE MENTIONS THE CRIMINAL ACTIVITY HE HAS BEEN PUBLICLY ACCUSED OF, HIS COMPLAINT IS PRECISELY THE SORT OF ACTION THAT SHOULD BE DISMISSED PURSUANT TO THE ILLINOIS CITIZEN PARTICIPATION ACT, AS A LAWSUIT IN RETALIATION FOR DEFENDANTS' CONSTITUTIONAL EXERCISE OF FREE SPEECH.

The defendants are involved in the operation of a website that provides information to the public concerning a wide variety of issues. In its signature style, Gawker Media through its various websites covers politics, international relations, crime, media, and Hollywood. In a typical day, stories about the inner workings of the Wall Street Journal share space with articles concerning Libya, Michelle Bachman, or a jailhouse wedding. Beyond informing and entertaining, Gawker also provides a forum for citizens to voice their own concerns and issues. Because of these actions, the defendants must now defend themselves against a harassment suit claiming defamation, brought by a serial litigant with the clear purpose of stifling reporting concerning his alleged crimes.

Illinois recently made a resounding statement against precisely this sort of abuse of the defamation laws when it enacted an "anti-SLAPP" statute, known as the Citizen Participation Act (CPA). The CPA, 735 ILCS 110/1 et seq., which became effective in 2007, emphasizes that "abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs" (735 ILCS 110/5) and decrees that "[a]cts in furtherance of the constitutional rights to petition, speech,

association, and participation in government are immune from liability, regardless of intent or purpose . . . ." 735 ILCS 110/15. Because the Act clearly immunizes the very activities that form the basis of Plaintiff's suit, he cannot pursue his claim, and The Court should dismiss this case with prejudice and award the defendants their attorneys' fees pursuant to the statute.

### A. The Citizen Participation Act Modified Illinois Defamation Law[2] And Provides A Procedure For Quick Resolution Of SLAPPs

The Citizen Participation Act (CPA), which became law in 2007, is an "anti-SLAPP" statute. That is, it provides a mechanism for defendants to squash lawsuits, such as this one, that seek to punish their exercise of free speech rights – "'Strategic Lawsuits Against Public Participation' in government or 'SLAPPs' as they are popularly called." 735 ILCS 110/5.

The CPA broadly immunizes speech. "Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15 (emphasis added). In this context, "government" is defined to include not only a "branch, department, agency, [or] employee" of a state, but also "the electorate." 735 ILCS 110/10. The CPA itself contains a detailed explanation of its purpose:

> Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, **arguments,**

[2] Illinois law applies to Huon's claims. The article at issue was published in more than one state via the Internet, and Huon alleges that he resides in Illinois. "When the defamatory statement is communicated in many different states, it makes sense to apply the law of the plaintiff's domicile, and that is the usual result in Illinois." Kamelgard v. Macura, 585 F.3d 334, 341 (7th Cir. 2009).

> **and other expressions provided by citizens are vital to . . . the operation of government [and] the making of public policy and decisions** . . . . The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, **speech**, association, and government participation. . . .
>
> The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.
>
> It is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an efficient process for identification and adjudication of SLAPPs; and to provide for attorney's fees and costs to prevailing movants.

735 ILCS 110/5 (emphasis added).

The CPA sets up a procedure for the early resolution of a SLAPP. Its procedures apply whenever a defendant files a motion – including a "motion to dismiss, for summary judgment, or to strike" – "on the grounds that the claim 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." 735 ILCS 110/10, 15. Importantly, the CPA places a burden on the plaintiff, providing that "the court shall . . . dismiss the [lawsuit] unless the court finds that the [plaintiff] has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by [the CPA]." 735 ILCS 110/20(c) (emphasis added). The CPA further protects against retaliatory lawsuits by providing that the **Court "shall award" a successful moving defendant "reasonable attorney's fees and costs incurred in connection with the motion."** 735 ILCS 110/25. The CPA requires that "hearing and decision . . . occur within 90 days after

notice of the motion." 735 ILCS 110/20(a). No discovery may occur while the motion is pending, other than, "upon leave of court for good cause shown," discovery limited to determining whether the CPA's immunity applies. 735 ILCS 110/20(b). For the reasons explained below, such discovery is generally not required because the initial determination of the application of the CPA is an objective test.

### B. The Citizen Participation Act Provides Broad Immunity For Exercise Of Free Speech Rights

The CPA's scope is "expansive." Shoreline Towers Condominium Ass'n v. Gassman, 936 N.E.2d 1198, 1206, 404 Ill. App. 3d 1013 (Ill. App. Ct. 1st Dist. 2010). It provides immunity for all exercise of free speech rights and the right to petition and contains only a single exception, which does not apply to this case. The CPA changed Illinois's substantive defamation law and "provid[es] a new, qualified privilege for any defamatory statements communicated in furtherance of one's right to petition, speak, assemble, or otherwise participate in government." Sandholm v. Kuecker, No. 2-09-1015, 2010 Ill. App. Lexis 1095, at *29 (Ill. 2d Dist. Oct. 18, 2010) (PLA granted Jan. 26, 2011) (attached hereto as Exhibit D). The CPA "grant[s] more protection for speech than the common law provides, when the speech occurs in the exercise of the right to participate in government." Id., 2010 Ill. App. Lexis 1095, at *32.

The CPA's protection is not limited to statements made in government proceedings. "The Act states that it applies 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.'" Id., 2010 Ill. App. Lexis 1095, at *42 (court's emphasis). Nothing in the CPA "suggests a requirement of direct appeal to a government official." Wright Dev. Group, LLC v. Walsh, 238 Ill. 2d 620, 638, 939 N.E.2d 389 (2010) (holding that defendant's statements to a

newspaper reporter were protected from liability under the CPA). "The Act does not protect only public outcry regarding matters of significant public concern, nor does it require the use of a public forum in order for a citizen to be protected." Shoreline Towers, 936 N.E.2d 1198, 1207 (holding statements to a newspaper protected from liability under the CPA). Applying this reasoning, the Sandholm court described statements posted to websites and other public statements as "part of the process of influencing the government to make a decision in the petitioner's favor," and explicitly held that the CPA applies to media defendants that "participated in this process by providing a forum for defendants to speak about their position." Sandholm, 2010 Ill. App. Lexis 1095, at *57.

To be clear, the immunity granted under the CPA applies even in cases where the defendant would otherwise be liable for defamation. Indeed, in Shoreline Towers, the appellate court affirmed dismissal of a defamation claim without conducting any analysis of whether the statement was actually false and defamatory. See 936 N.E.2d at 1205-07.

### C. The CPA Applies In Federal Court

The Citizen Participation Act applies in federal court because it is a substantive state law that does not cover the same subject matter as any federal rule. Every federal appeals court to consider this question has agreed. See Godin v. Schencks, 629 F.3d 79, 2010 U.S. App. Lexis 25980 (1st Cir. Me. 2010) (attached hereto as Exhibit E); Henry v. Lake Charles Am. Press LLC, 566 F.3d 164 (5th Cir. La. 2009); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. Cal. 1999); see also CanaRx Servs., Inc. v. LIN Television Corp., 2008 U.S. Dist. Lexis 42236 (S.D. Ind. May 29, 2008) (applying Indiana's anti-SLAPP statute). The Godin opinion provides an extremely detailed analysis of this question in light of the

Supreme Court's decision in Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (U.S 2010).[3]

In Godin, the court explained that, after Shady Grove, a federal court deciding whether to apply a state law in a diversity case should not examine state law for a direct conflict with a federal procedure, but instead "ask if the federal rule is 'sufficiently broad to control the issue before the court.'" Godin, 2010 U.S. App. Lexis 25980, at *17 (citing Shady Grove, 130 S. Ct. at 1451 (Stevens, J., concurring)). If a federal rule is "sufficiently broad" and is in fact procedural, then the court must apply the federal rule. Godin, 2010 U.S. App. Lexis 25980, at *17. If the federal rule is not "sufficiently broad," then the court employs the principles of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), to determine whether the state law should apply.

The Godin court held that Maine's anti-SLAPP statute is substantive and does not occupy the same "field" as more general federal procedural rules, F.R.C.P. 12(b)(6) and 56. This Court should reach the same conclusion concerning the CPA. The CPA is "part of [Illinois's] framework of substantive rights or remedies." Godin, 2010 U.S. App. Lexis 25980, at *20-21 (citing Shady Grove, 130 S. Ct. at 1451 (Stevens, J., concurring)). "[N]either Fed. R. Civ. P. 12(b)(6) nor Fed. R. Civ. P. 56 . . . was meant to control the particular issues under" the CPA, "answer the same question," or "address the same subject." See Godin, 2010 U.S. App. Lexis 25980, at *18, 23-24 (quoting Shady Grove, 130 S. Ct. at 1437, 1440). While Rules 12(b)(6) and 56 "are general federal procedures governing all categories of cases," the CPA "is only addressed to special procedures for state claims based on a defendant's petitioning activity" and other immunized activities. Id., 2010 U.S. App. Lexis 25980, at *24. Illinois, like Maine, has its

[3] The Ninth Circuit's reasoning in Lockheed is similar to Godin in many respects. However, Godin appears to provide a more up-to-date analysis, relying heavily on the recent Supreme Court ruling in Shady Grove.

own general procedural rules for motions to dismiss and motions for summary judgment. See 735 ILCS 5/2-615, 2-619, 2-1005. This "further supports the view that [Illinois] has not created a substitute to the Federal Rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in Rules 12 and 56 . . . ." Godin, 2010 U.S. App. Lexis 25980, at *24-25; see Lockheed, 190 F.3d at 972 ("[T]here is no indication that Rules 8, 12, and 56 were intended to "occupy the field" with respect to pretrial procedures aimed at weeding out meritless claims.").

The CPA shares other substantive aspects with Maine's anti-SLAPP statute. Like Maine's statute, the CPA "shifts the burden to plaintiff to defeat the special motion." Godin, 2010 U.S. App. Lexis 25980, at *26. The CPA "determines the scope of plaintiff's burden," Id., requiring that the plaintiff meet his burden by clear and convincing evidence. 735 ILCS 110/20(c). "[I]t is long settled that the allocation of burden of proof is substantive in nature and controlled by state law." Godin, 2010 U.S. App. Lexis 25980, at *26-27 (citing Palmer v. Hoffman, 318 U.S. 109, 117 (1943)). The CPA also provides for fee-shifting to a successful movant. Godin, 2010 U.S. App. Lexis 25980, at *26. Federal Rules 12(b)(6) and 56 do not include any such provisions. Id., 2010 U.S. App. Lexis 25980, at *26-27. "It is not the province of either Rule 12 or Rule 56 to supply substantive defenses or the elements of plaintiffs' proof to causes of action, either state or federal." Id., 2010 U.S. App. Lexis 25980, at *27.

In light of this analysis, the Godin court determined that "[d]eclining to apply [Maine's anti-SLAPP statute] in federal court would . . . result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court" and would encourage forum shopping." Id., 2010 U.S. App. Lexis 25980, at *32-33; see also Lockheed, 190 F.3d at 973 (reaching the same conclusion concerning California's anti-SLAPP

statute). A similar forum-shopping concern arises with respect to the CPA. A plaintiff should not be permitted to avoid the strong, substantive defenses that the CPA provides simply by bringing his claims in federal court.

### D. Defendants' Actions in Publishing the Article Are Immunized Under The CPA

Defendants' actions in publishing the article at issue here are immunized under the CPA because they are "[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government" 735 ILCS 110/15. Indeed Huon's hundred million dollar damage claim is precisely the sort of harassing case the statute was designed to quickly dispose of. Huon has shown himself to be a serial plaintiff, suing with impunity almost anyone who has dared to report on the various criminal charges related to sexual assault that have been levied against him on. There is certainly a public interest in knowing about alleged sex crimes, and indeed, there has been a great deal of legislative effort and attention to tracking and reporting on sex offenders. Reporting on allegations of sexual assault, especially in the context of a defendant who allegedly used the internet, to pose as someone else in order to lure women into meeting him, are of the utmost importance. It is curious, and somewhat frightening that the defendants Huon has targeted for his harassing lawsuits are those who publish on the internet—precisely the place he has used as a stalking ground on at least two occasions, and the very tool he has used in the past for bullying.

Because it is objectively clear that Defendants' actions are not "sham" petitioning activity, their actions do not fall within the "sham" exception, immunity fully applies, and the Court therefore should dismiss Huon's claim and award attorneys' fees.

## II. PLAINTIFF'S CLAIMS AGAINST NICK DENTON AND GABY DARBYSHIRE MUST BE DISMISSED PURSUANT TO 805 ILCS 180/10-10(A).

In an attempt to maximize the intimidating nature of his lawsuit by suing as many people as possible, Plaintiff has named two officers of Gawker Media, Nick Denton and Gaby Darbyshire. Plaintiff has provided no apparent reason for naming said officers beyond his apparent general desire to sue people. Sadly such a desire is legally unavailing. The shotgun approach to naming defendants is not new to Plaintiff. Indeed, in addition to the 17 named defendants and 400 John Doe defendants in the current case, Plaintiff has previously sued 15 other individuals and the city of Chicago concerning related subject matter.

805 ILCS 180/10-10(a) provides that "[T]he debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager."

As Gawker Media is a limited liability company, this statute clearly applies to Denton and Darbyshire. Absent any additional allegations (which are not present in Plaintiff's complaint) the alleged torts of the company cannot be translated onto its managers. Therefore, all claims against defendants Denton and Darbyshire personally must be dismissed. Moreover given the lack of good faith, nee, vexatiousness of Plaintiff's conduct in the instant matter, Defendants would ask the court to consider sanctions under Fed. R. Civ. Pro. Rule 11.

## III. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT BARS ANY CLAIMS AGAINST DEFENDANTS FOR READERS' COMMENTS AND RE-PUBLICATION.

Here again, Plaintiff's shotgun approach to naming defendants has run him afoul of established law. In his zeal to sue everyone who has ever said anything about Plaintiff that Plaintiff doesn't like, Plaintiff has named hundreds of John Doe Defendants who commented on the various articles written about Plaintiff, or in Gawker's case, about the lawsuit he brought against abovethelaw.com. Not satisfied to merely name them, however, Plaintiff has also alleged that the Gawker defendants are liable for these third party comments. Indeed, as detailed in the charts attached hereto as Defendants' Exhibit F, almost every one of his allegations against the Gawker defendants concerns information or statements contained in comments, or in a post other than the actual Jezebel.com item. See: Pl.'s Compl. ¶ 54, 55, 56, 70, 71, 76.

Section 230 of the Communications Decency Act states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). A website is an interactive computer service when it enables computer access by multiple users to a computer server. See, e.g., Dimeo v. Max, 248 Fed. App'x. 280, 282 (3rd Cir. 2007). In other words, "an online information system must not be treated as the publisher or speaker of any information provided by someone else." Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008) (internal quotation marks omitted). This law preempts any state law to the contrary: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

Plaintiff's own complaint establishes that Defendants provide an interactive computer

service, such that readers may post commentary in the "comments" section of each article. Pl.'s Compl. ¶ 16. Plaintiff's defamation claim treats Defendants as the publishers of the posts at issue and seeks to hold them liable for alleged harm arising from the posts. Pl.'s Compl. ¶ 118(3). However, Plaintiff also acknowledges that the posts at issue were provided by other content providers, namely, the readers who wrote the posts. Pl.'s Compl. ¶ 56, 71, 76. These pleadings thus establish the applicability of Section 230. See Shiamili v. Real Estate Group of New York, Inc., 892 N.Y.S.2d 52, 54 (N.Y. App. Div. 2009), aff'd 2011 N.Y. LEXIS 1452 (N.Y. June 14, 2011). Moreover, the core of Plaintiff's complaints against the Gawker defendants concerns statements that were not even contained in the Jezebel.com post, but rather in the Abovethelaw.com post which was linked to. In such a case, the Gawker defendants were merely re-publishers of such statements and are entitled to CDA immunity. As many courts have observed, The CDA is worded broadly enough to protect not only ISPs, but also individuals who operate websites and web forums to which other individuals can freely post content. Donato v. Moldow, 374 N.J. Super. 475, 487-88 (App. Div. 2005) (citing cases). Plaintiffs' allegations in this case—are essentially that the Gawker Defendants republished a defamatory web posting. As multiple courts have accepted, there is no relevant distinction between a user who knowingly allows content to be posted to a website he or she controls and a user who takes affirmative steps to republish another person's content; CDA immunity applies to both. *See* Barrett v. Rosenthal, 40 Cal. 4th 33, 62 (Cal. 2006); Carafano v. Metrosplash.com Inc., 339 F.3d 1119, 1123-25 (9th Cir. Cal. 2003); Ben Ezra, Weinstein, and Co., Inc. v. Am. Online Inc., 206 F.3d 390 (10th Cir. N.M. 2000). As the Ninth Circuit aptly noted in Batzel v. Smith, 333 F.3d 1018, 1032 (2003), "The scope of immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance."

Similarly, it does not matter *how* Defendants republished the alleged defamatory statements—whether by email, website post, or some other method. The point is that the Gawker defendants—acted as re-publishers of another person's information, and as such they are protected by the CDA.

Consequently, Section 230 stands as an absolute bar to every one of Plaintiff's claims. As above, Plaintiff's claims are so far off base and so beyond any good faith construction of established law that they cry out for sanction.

## IV. PLAINTIFF'S INVOCATION OF "CYBERSTALKING" FAILS BECAUSE CYBERSTALKING IS NOT A CIVIL CAUSE OF ACTION.

Though Plaintiff claims a law degree, his complaint confuses something most law students understand by the time they receive their first year course schedules—civil and criminal laws are different. The fact that there is a criminal statute on the books does not in itself create a civil private right of action nor does it necessarily insure that a claim will sound in tort. It is understandable that Plaintiff is familiar with the "cyberstalking" statute. He has, after all been criminally charged with violating it. Even more reason for him to understand the nature of the statute. Still, in Pl.'s Compl. ¶ 104-109, Plaintiff seeks to criminally charge defendants with a felony under Illinois Law.

Either Plaintiff is actually confused as to whether or not he has the power to prosecute on behalf of the State of Illinois—a particularly curious state of affairs for someone who has been, on more than one occasion a criminal defendant, or these counts are merely a continuation of the legal harassment typical of the rest of Plaintiff's pleading.

Contrary to Plaintiff's belief, he cannot bring a claim for cyberstalking in a civil lawsuit. According to the Illinois statute he himself cites, cyberstalking is solely criminal, and there is no

associated civil right of action. 720 ILCS 5/12-7.5(b) ("Cyberstalking is a Class 4 felony; a second or subsequent conviction is a Class 3 felony."). This count too runs so far afield as to qualify as fully frivolous under Fed. R. Civ Pro. Rule 11, and this claim too merits sanction.

## V. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Essentially what Plaintiff has brought in the instant action are a jumbled series of labels and conclusions as detailed in the charts attached hereto as Defendants' Exhibit F. In a rambling cut and paste job, plaintiff lists many things that bother him, and dozens of facts he wishes someone would report on. What he fails to do, however is actually state a cause of action. In the subsequent paragraphs and charts attached hereto as Exhibit F, defendants will address each claim.

### A. Plaintiff Does Not Establish All, or Any, of the Elements Required to Sustain Each Count of the Complaint He Has Filed.

For a claim to survive a 12(b)(6) motion, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). As detailed in the charts attached hereto as Defendants' Exhibit F, because much of what Plaintiff considers defamatory isn't even contained in the Jezebel.com item, because the post falls squarely within the fair report of judicial proceedings doctrine, because plaintiff has failed to properly allege defamation *per se* and because Plaintiff has been publicly charged in criminal court with sexual assault, witness tampering, cyberstalking and in a separate case, four counts of battery, he cannot sufficiently allege special damages, each count of his complaint must be dismissed.

**1. Plaintiff's defamation and false light claims fail as a matter of law.**

None of Plaintiff's allegations concerning the Jezebel.com support a claim for defamation or any other theory of recovery. First, many of the statements that Plaintiff identifies clearly would not "tend[ ] to cause such harm to [Plaintiff's] reputation . . . that it lowers [Plaintiff] in the eyes of the community or deters third persons from associating with him." Parker v. House O'Lite Corp., 324 Ill. App. 3d 1014, 1020 (Ill. App. Ct. 1st Dist. 2001). Second, the statements that Plaintiff takes issue with are immunized as the fair report of judicial proceedings, and finally, many of the statements Plaintiff takes issue with are not actually contained in the Jezebel.com item.

**i. Much of what Plaintiff considers defamatory is not even contained in the Jezebel.com item.**

Plaintiff has sued over a number of items, whose *absence* from Plaintiff's eleven sentence item, in Plaintiff's mind constitute defamation. See Compl. ¶ 74(a)-(n) (e.g. Plaintiff's claims defendants omitted that "Abovethelaw.com intentionally published false statements" (Compl. ¶ 74(b)), that the alleged victim "sustained minor injuries from walking or running in a cornfield" **(**Compl. ¶ 74(e)), that "there was no DNA evidence of semen and the complainant never went to the hospital (Compl. ¶ 74(h))**)**. While these items are addressed in the chart attached, it is worth mentioning that there is nothing in the law that supports plaintiffs theory of recovery concerning omitted items.

**ii. The Post provides a fair report of judicial proceedings.**

The information in the Post that Plaintiff claims is defamatory is in fact protected from

liability by the First Amendment as a fair and accurate report of his arrest, trial and his lawsuit against instant co-defendants. Indeed, as the chart attached hereto as Defendants' Exhibit F will clearly demonstrate, *every single sentence, and every single allegation in Defendants' Post is imunized under this rule*. The Accurate reports of court proceedings are privileged against liability by the First Amendment, even if the information stated in those proceedings is otherwise false or defamatory. O'Donnell v. Field Enters., Inc., 145 Ill. App. 3d 1032, 1036 (Ill. App. Ct. 1st Dist. 1986). "The fair report privilege . . . promotes our system of self-governance by serving the public's interest in official proceedings, including judicial proceedings." Solaia Tech., LLC v. Specialty Publ. Co., 221 Ill. 2d 558, 585 (Ill. 2006). "If the news media cannot report what it sees and hears at governmental and public proceedings merely because it believes or knows that the information is false, then self-censorship by the news media would result." O'Donnell, 145 Ill. App. 3d at 1036. Thus, "the fair report privilege overcomes allegations of either common law or actual malice." Solaia, 221 Ill. 2d at 587. A report need not be a "complete report of the proceedings" to be privileged "so long as it is a fair abridgment" or "substantially correct account" of the proceedings. Id. at 589 (quoting Restatement (Second) of Torts § 611, cmt. f, at 300 (1977)); O'Donnell, 145 Ill. App. 3d at 1036.

To evaluate the fair report privilege, the Court may take judicial notice of the transcript of the first day of Plaintiff's trial, which are attached to co-defendants Abovethelaw.com's motion and are incorporated by reference here. The court may also take judicial notice of Plaintiff's initial complaint and subsequent proceedings in the instant matter, as well as the certified copies of Plaintiff's arrests, attached hereto as Exhibit B and Exhibit C. See Ray v. City of Chicago, 629 F.3d 660, 665 (7th Cir. Ill. 2011) ("[D]istrict courts may take judicial notice of certain documents—including records of administrative actions—when deciding motions to dismiss.");

Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429 (7th Cir. Ill. 1993) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim."); United States v. Hope, 906 F.2d 254, 260 (7th Cir. Ill. 1990) (taking judicial notice of state court hearing transcript).

Quite simply, every bit of the eleven sentences in the Jezebel item concerning the newspaper reports or Plaintiff's lawsuit is non-actionable opinion or rhetorical hyperbole. Only statements of fact, not opinion, can be defamatory; "[t]here is no such thing as a false idea or opinion." O'Donnell, 145 Ill. App. 3d at 1039-40 (affirming dismissal of defamation claim based on editorial concerning criminal investigations and arrests because "it is clear that the ideas and opinions in the item do not imply undisclosed defamatory facts as their bases" and "[t]o the extent that the editorial makes disclosed factual statements, the statements are privileged" under the fair report privilege.); see, e.g., Horowitz v. Baker, 168 Ill. App. 3d 603 (Ill. App. Ct. 3d Dist. 1988) (affirming dismissal of a defamation claim, holding that statements in a newspaper article describing a previously-reported transaction as a "cozy little deal" and a "rip off" were "rhetorical hyperbole" and "an average reader would not regard the statements as factual reporting"). Each and every one of the statements that Plaintiff claims are defamatory fall into this category – discussion of the newspaper report on the trial that does not assert any additional facts about the trial. Such statements are protected opinion or mere rhetorical hyperbole.

**iii. The Post is not defamatory per se and Plaintiff has not alleged special damages.**

Plaintiff's defamation claim also fails because he has alleged only defamation per quod, not per se, and has not alleged special damages. A plaintiff alleging defamation per se need not allege special damages. Five categories of statements are defamatory per se: "(1) words that

impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication." Solaia, 221 Ill. 2d at 579-80.

Plaintiff has not alleged defamation per se, although that is how he designates Count IV of the Complaint. In that count, Plaintiff does not specify which of the defamation per se categories the statements fall under, but he presumably relies on the first category listed above – that the Post "impute[s] that [he] committed a crime." In fact, however, Plaintiff does not deny that he was charged with multiple counts of sexual assault and cyberstalking and went to trial; he only claims that it was inaccurate to state or suggest that those charges stemmed from complaints from more than one woman. (Compl. ¶ 74(c)). This claimed inaccuracy is not defamatory per se. See Hahn v. Konstanty, 684 N.Y.S.2d 38 (N.Y. App. Div. 3d Dept't 1999) (holding that alleged inaccuracies in reporting of criminal proceedings were not defamatory per se, where plaintiffs were in fact charged with a crime); Schaefer v. Hearst Corp., 5 Med. L. Rptr. 1734, 1736 (Md. Super. Ct., Baltimore City 1979) (same).

Because Plaintiff has not alleged defamation per se, he must allege defamation per quod, which requires that he plead and prove special damages. "[U]nderlying the strict pleading rule in libel per quod cases is the need of the courts to be able to dismiss groundless defamation cases at an early stage of the litigation." Spelson v. CBS, Inc., 581 F. Supp. 1195, 1201-02 (N.D. Ill. 1984). This rule applies in federal court pursuant to Rule 9(g). See Spelson, 581 F. Supp. at 1201 ("[T]he allegation of special damage must be explicit.") (quotation omitted).

Plaintiff has not met his pleading burden for a claim of defamation per quod because he has not

alleged special damages. “General allegations, such as damage to an individual’s health or reputation, economic loss, and emotional distress, are insufficient to support an action per quod.” Schaffer v. Zekman, 196 Ill. App. 3d 727, 733 (1st Dist. 1990). Plaintiff generally states that he has incurred “special damages,” “damage to business, trade, profession and occupation ... in a sum to be determined at time of trial,” and “the loss of his professional reputation.” (Compl. Count I ¶ 114, Count III ¶¶ 115, 119.) Such general statements are not sufficient allegations of special damages. See Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 270 (7th Cir. 1983). Because Plaintiff has not alleged defamation per se and has not alleged special damages to support a claim of defamation per quod, the Court should dismiss his defamation claims against the Defendants.

**2. Count II, intentional infliction of emotional distress, fails to state a claim because there is no showing of extreme and outrageous behavior intended to inflict emotional distress, nor a showing that Plaintiff suffered emotional distress.**

To state a claim for intentional infliction of emotional distress, Plaintiff must show that first, Defendants’ conduct was extreme and outrageous, going beyond all possible bounds of decency; second, that Defendants intended to inflict severe emotional distress or knew that there was a high probability that their conduct would inflict severe emotional distress; and third, that Defendants’ conduct did cause severe emotional distress. Naeem v. McKesson Drug Co., 444 F.3d 593, 605 (7th Cir. Ill. 2006); Green v. Chicago Tribune Co., 286 Ill. App. 3d 1, 11 (Ill. App. Ct. 1st Dist. 1996).

Here, too, Plaintiff’s claim must fail. First, Plaintiff alleges no facts or circumstances to suggest that Defendants’ behavior is extreme or outrageous; instead, Defendant states mere conclusions that fail to meet the required pleading standard. Cf. Twombly, 550 U.S. at 555.

Even if the court finds that Plaintiff did plead sufficient facts, nothing in Defendants' behavior was extreme or outrageous, going beyond all possible bounds of human decency. Writing and posting an eleven sentence item about Plaintiff's lawsuit is well within the realm of Defendants' job as journalists and publishers, and is nowhere near the level of extreme and outrageous behavior required to state a claim for intentional infliction of emotional distress. Second, Plaintiff again fails to allege non-speculative facts to show that Defendants intended to or knew that there was a high probability that their conduct would inflict severe emotional distress. Third, Plaintiff makes no showing anywhere in his complaint that he has suffered any damages. Plaintiff asserts that he has "suffered a loss of social status, esteem, and acceptance, causing him to experience shame, severe emotional distress, and impairment of normal social functioning…in excess of $100 million dollars [sic]," Pl.'s Compl. ¶ 113(1), and that he has "suffered injury in his business, all to the [sic] Mr. Huon's special damages in an amount to be proven at trial," Pl.'s Compl. ¶ 114(1); see also Pl.'s Compl. ¶ 116(1), 115(3), 119(3), 120(3). However, assertions that do not rise above the level of speculation are not sufficient to state a claim for which relief can be granted. Twombly 550 U.S. at 555; see also Salamone v. Hollinger Int'l, Inc., 347 Ill. App. 3d 837 (finding as insufficient assertions that members of the plaintiff's community ceased associating with him, repeat customers ceased patronizing his grocery store, and that he suffered jokes and ridicule from his community, sleeplessness, depression, and weight loss). A failure to prove special damages is, in itself, fatal to a defamation claim. See Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1226 (7th Cir. Ill. 1993). Of course any damage to Plaintiff's reputation alleged caused by an eleven sentence item which reported on a lawsuit Plaintiff filed against Abovethelaw.com must be considered in the context of Plaintiff's extent reputation in the wake of his publicized arrest in connection with allegations of rape, witness tampering, and

cyberstalking.

**3. Plaintiff fails to state a claim for civil conspiracy, because there is no evidence of an agreement, nor is there sufficient showing of a tortious or unlawful act.**

To state a claim for civil conspiracy, Plaintiff must prove: (1) an agreement between a combination of two or more persons to accomplish by concerted action either an unlawful purpose or a lawful purpose by unlawful means, (2) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act. Fritz v. Johnson, 807 N.E.2d 461, 470 (Ill. 2004); Reuter v. MasterCard Int'l, Inc., 397 Ill. App. 3d 915, 928 (Ill. App. Ct. 5th Dist. 2010). Moreover, Plaintiff must allege an injury caused by Defendants. Reuter v. MasterCard Int'l, Inc., 397 Ill. App. 3d 915, 927 (Ill. App. Ct. 2010). Finally, "a conspiracy claim alleging a tort as the underlying wrongful act is duplicative where the underlying tort has been pled," Thermodyne Food Serv. Prods. V. McDonald's Corp., 940 F.Supp. 1300, 1310 (N.D. Ill. 1996), because allowing a separate claim for civil conspiracy would lead to double damages. Id. First, Plaintiff has not made any showing of fact suggesting that any Gawker defendant has made any agreement with any other defendant listed. Cf. Twombly, 550 U.S. at 555. In Reuter v. MasterCard Int'l, Inc., 397 Ill. App. 3d 915, 928 (Ill. App. Ct. 5th Dist. 2010), the court held that while the plaintiff alleged sufficient facts to demonstrate knowledge of illegal acts, the plaintiff failed to allege sufficient facts to demonstrate an agreement. Here, Plaintiff falls far short of alleging sufficient facts to demonstrate that any Gawker defendants had any knowledge of any illegal facts, much less that there was any agreement whatsoever.

Second, even if a Gawker defendant had made an agreement with any other defendant, the second factor must fail because Plaintiff fails to allege sufficiently that any of the Gawker defendants committed any overt tortious or unlawful act, in furtherance of an alleged conspiracy or otherwise. See Hurst v. Capital Cities Media, Inc., 323 Ill. App. 3d 812, 823 (Ill. App. Ct. 5th

Dist. 2001) ("Conspiracy is not a separate and distinct tort in Illinois. . . . There is no cause of action unless an overt, tortious, or unlawful act is done that, in absence of the conspiracy, would give rise to a claim for relief."). In addition, the allegations of this count are so vague as to fail to state a claim under Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (U.S. 2009). Plaintiff alleges that each of the twelve named defendants (and, presumably, the numerous "John Does") "agreed with another Defendant to participate in an unlawful act of cyberstalking, cyberbullying, defaming [sic] Mr. Huon" and "performed an overt act . . . in furtherance of the common scheme." (Compl. ¶¶ 106-07.) That allegation simply states elements for a claim of conspiracy and does not apprise any of the Defendants of any specific conduct that Plaintiff asserts gives rise to his claim. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 555, 557).

### B. Defendants' Conduct In Writing About And Linking to an Article About One of Plaintiff's Several Lawsuits, Could Not Cause Additional Damage to a Serial Plaintiff Already Widely Known to Have Been Criminally Charged With Sexual Assault, and Witness Tampering. Thus Defendants' Conduct Is Immunized By the Doctrine of "Incremental Harm"

At the root of this lawsuit is a serial plaintiff who has repeatedly been charged with crimes relating to the sexual abuse of women, seeking 100 million dollars from a website that posted an eleven sentence item about one of his several lawsuits. In evaluating whether as a matter of law, anything contained in the Gawker Defendants' brief item was capable of causing additional damage to Plaintiff's reputation, the court can take judicial notice that prior to the publication of Defendants' article, plaintiff had been publicly criminally charged with four counts of criminal

sexual abuse, one count of unlawful restraint, one count of harassment of a witness, and one count of cyberstalking. In addition, the court can take judicial notice of the fact that Plaintiff was subsequently arrested and criminally charged with posing as "Nick Kew" a casting agent for the William Morris agency, and thereafter committing four counts of battery for fondling the breasts and vaginal region of a woman he lured over the internet.

The doctrine of incremental harm is "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.'" Gist v. Macon County Sheriff's Dep't, 284 Ill. App. 3d 367, 371, 671 N.E.2d 1154, 1157 (Ill. App. Ct. 4th Dist. 1996) (quoting Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1228 (7th Cir. Ill. 1993). "Falsehoods that do not harm the plaintiff's reputation more than a full recital of the true facts about him would do are . . . not actionable." Haynes, 8 F.3d at 1228. A publication "that contains a false statement is actionable only when 'significantly greater opprobrium' results from the report containing the falsehood than would result from the report without the falsehood." Id. (quoting Herron v. King Broadcasting Co., 776 P.2d 98, 102 (Wash. 1989). As a matter of law, there was nothing in Defendants' brief item that could have brought greater opprobrium upon plaintiff, than his actions and status have already assumed.

## CONCLUSION

For all the forgoing reasons defendants hereby pray that the court dismiss each and every count of the plaintiff's case, and award costs and fees and other such relief as the court should deem appropriate.

Dated: New York, New York
September 29, 2011

Respectfully Submitted,

GAWKER MEDIA A/K/A GAWKER.COM, JEZEBEL.COM, NICK DENTON, IRIN CARMON & GABY DARBYSHIRE,

By: /S/ Oren Giskan
One of their attorneys

Oren S. Giskan
GISKAN SOLOTAROFF ANDERSON
& STEWART LLP
11 Broadway, Suite 2150
New York, NY 10004
T: 212.847-8315
F: 646.520.3235
ogiskan@gslawny.com

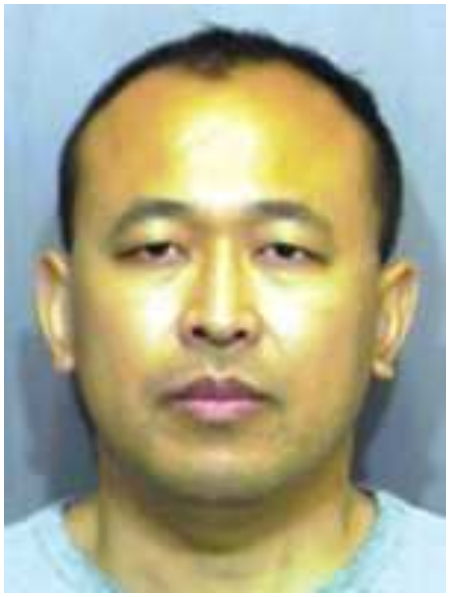
Cc: David Feige
GISKAN SOLOTAROFF ANDERSON
& STEWART LLP
11 Broadway, Suite 2150
New York, NY 10004
T: 212.847-8315
F: 646.520.3235
David@DavidFeige.com

# EXHIBIT A

THETELEGRAPH.com
We deliver the River Bend – and more.

# Chicago lawyer accused of harassing woman

By SANFORD J. SCHMIDT
2009-07-23 22:07:48



EDWARDSVILLE — A Chicago lawyer arrested and charged last year with criminal sexual assault, sexual abuse and unlawful restraint now faces charges of harassing his alleged victim and cyber stalking.

Meanith Huon, 39, was charged this week in Madison County Circuit Court with harassment of a witness and cyber stalking.

He is accused of contacting his alleged victim of last year via the Internet and communicating indirectly with her in such a way as to cause her emotional distress.

He also is accused of maintaining an Internet Web page or Web site to harass the victim or an immediate family member.

After being arrested last year for allegedly forcing the victim to perform sexual acts while driving on Interstate 55 in Madison County, he posted $10,000 cash bond and went back to Chicago.

Authorities say Huon began posting comments directed at the alleged victim, telling her he loves her and claiming that God wants them to be together.

The postings include a wide variety of professions of love, along with religious references. As recently as July 17, he posted: "I haven't kissed anyone since you kissed me. I miss you. There's nothing I can do about it. I follow God's Commandments. I walk the line because I love you."

He also posted "10 reasons why I'd make a good husband for you." The No. 1 reason was listed as "God brought us together." The suspect also allegedly posted the words: "We'd have great kids. My brains. Your looks."

Huon was arrested in early July 2008 after he allegedly forced a woman to have oral sex with him, fondled her vaginal area and her breasts and refused to let her out of the car while driving on I-55 into Madison County.

The woman allegedly was lured over the Internet by the possibility of a job.

She told authorities she talked to Huon by telephone and got the impression that the job was promoting alcohol sales in area taverns. She met Huon in downtown St. Louis, and he offered to drive her to a local saloon to check out how the business was going.

However, they did not go to the tavern, and Huon instead allegedly sexually abused and assaulted her, Capt. Brad Wells of the Madison County Sheriff's Department said last year. The woman eventually jumped out of the car and contacted police.

Police found evidence on the most recent case by obtaining a search warrant for the company that operates the Web site used by Huon. Once the evidence was obtained, Huon again was arrested July 19, this time at his home in Chicago, where he was being held Thursday in lieu of $75,000 bail.

Huon still is awaiting trial on the original Madison County charges, authorities said.

# EXHIBIT B

07/02/2008 Scanned

# IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
# MADISON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

No. 08-CF- 1496
Class

FILED
JUL 02 2008
CLERK OF CIRCUIT COURT #32
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MEANITH NMI HUON
M/A DOB 02/22/70

Defendant

## INFORMATION

*William A. Mudge, State's Attorney in and for the County of Madison, State of Illinois, in the name and by the authority of the People of the State of Illinois, charges that:*

## MEANITH NMI HUON

*On the 29th day of June, 2008, at and in the County of Madison, in the State of Illinois, committed the offense of:*

**COUNT I: CRIMINAL SEXUAL ASSAULT (CLASS 1)** in that said defendant, committed an act of sexual penetration upon D.C., in that by the use of force the said defendant placed his penis in the mouth of D.C., in violation of 720 ILCS 5/12-13(a)(1), and against the peace and dignity of the said People of the State of Illinois.

**COUNT II: CRIMINAL SEXUAL ASSAULT (CLASS 1)** in that said defendant, committed an act of sexual penetration upon D.C., in that by the use of force the said defendant placed his finger in the vagina of D.C., in violation of 720 ILCS 5/12-13(a)(1), and against the peace and dignity of the said People of the State of Illinois.

**COUNT III: CRIMINAL SEXUAL ABUSE (CLASS 4)** in that said defendant, committed an act of sexual conduct with D.C., in that said defendant, by the use of force intentionally fondled the breast of D.C. for the purpose of the sexual arousal of the defendant, in violation of 720 ILCS 5/12-15(a)(1), and against the peace and dignity of the said People of the State of Illinois.

**COUNT IV: CRIMINAL SEXUAL ABUSE (CLASS 4)** in that said defendant, committed an act of sexual conduct with D.C., in that said defendant, by the use of force intentionally touched the vagina of D.C. for the purpose of the sexual arousal of the defendant, in violation of 720 ILCS 5/12-15(a)(1), and against the peace and dignity of the said People of the State of Illinois.

**COUNT V: UNLAWFUL RESTRAINT (CLASS 4)** in that said defendant knowingly and without authority detained D.C. , in that the said defendant repeatedly refused to allow D.C. to exit his vehicle, a Honda Civic, in violation of 720 ILCS 5/10-3(a), and against the peace and dignity of the said People of the State of Illinois.

William A. Mudge
*State's Attorney, Madison County, Illinois*

Bail is set at $ 100,000

JUDGE

The undersigned on oath, says that the facts set forth in the foregoing information are true in substance and matter of fact.

Madison County Sheriff's Department #10

SWORN to before me this 2nd day of July, 2008.

Notary Public

"OFFICIAL SEAL"
JENNIFER E. HAWKINS
Notary Public, State of Illinois
My commission expires 02/15/2010

# EXHIBIT C

07/17/2009Scanned

# IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT
# MADISON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

No. 09-CF- 1688

FILED

JUL 17 2009

CLERK OF CIRCUIT COURT #36
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

MEANITH NMI HUON
M/A DOB 02/22/70

Defendant

## INFORMATION

*William A. Mudge, State's Attorney in and for the County of Madison, State of Illinois, in the name and by the authority of the People of the State of Illinois, charges that:*

## MEANITH NMI HUON

*At and in the County of Madison, in the State of Illinois, committed the offense of:*

**COUNT I: HARASSMENT OF A WITNESS (CLASS 2)** Between the 11th day of July, and the 17th day of July, 2009 in that said defendant with the intent to harass D.C., a person who is expected to serve as a witness in a legal proceeding, communicated indirectly with D.C. in such a manner as to produce emotional distress, in violation of 720 ILCS 5/32-4a, and against the peace and dignity of the said People of the State of Illinois.

**COUNT II: CYBERSTALKING (CLASS 4)** On or about the 11th day of July and the 17th day of July, 2009 in that said defendant knowingly and without legal justification, created and maintained an internet website or webpage which is accessible to one or more third parties for a period of at least twenty-four hours, and which contains statements harassing another person and which places that person or a family member of that person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint, in violation of 720 ILCS 5/12-7.5, and against the peace and dignity of the said People of the State of Illinois.

William A. Mudge
*State's Attorney, Madison County, Illinois*

Bail is set at $ 75,000

Janet Heflin
JUDGE

CH/JH

The undersigned on oath, says that the facts set forth in the foregoing information are true in substance and matter of fact.

310
Madison County Sheriff's Department

SWORN to before me this 17th day of July, 2009.

J. Hawkins
Notary Public

"OFFICIAL SEAL"
JENNIFER E. HAWKINS
Notary Public, State of Illinois
My commission expires 02/15/2010

# EXHIBIT D

**STEVE SANDHOLM, Plaintiff-Appellant and Cross-Appellee, v. RICHARD KUECKER, ARDIS KUECKER, GLEN HUGHES, AL KNICKREHM, TIM OLIVER, DAN BURKE, DAVID DEETS, MARY MAHAN-DEATHERAGE, NRG MEDIA, LLC, GREG DEATHERAGE, ROBERT SHOMAKER, and NEIL PETERSEN, Defendants-Appellees and Cross-Appellants (Michael Venier, Defendant-Appellee).**

**No. 2-09-1015**

**APPELLATE COURT OF ILLINOIS, SECOND DISTRICT**

***405 Ill. App. 3d 835*; *942 N.E.2d 544*; *2010 Ill. App. LEXIS 1095*; *347 Ill. Dec. 341*; *38 Media L. Rep. 2377***

**October 18, 2010, Filed**

**SUBSEQUENT HISTORY:** Released for Publication December 3, 2010.
Appeal granted by *Sandholm v. Kuecker, 239 Ill. 2d 589, 943 N.E.2d 1109, 2011 Ill. LEXIS 186, 348 Ill. Dec. 199 (2011)*
Later proceeding at *Sandholm v. Kuecker, 2011 Ill. LEXIS 1133 (Ill., Sept. 21, 2011)*

**PRIOR HISTORY: [***1]**
Appeal from the Circuit Court of Lee County. No. 08-L-19. Honorable David L. Jeffrey, Judge, Presiding.

**DISPOSITION:** Affirmed.

**COUNSEL:** For Steve Sandholm, Appellant: Stephen T. Fieweger, Katz, Huntoon & Fieweger, P.C., Moline, IL.

For Al Knickrehm, NRG Media, LLC, Appellees/Cross Appellants: Richard E. Lieberman, Michael R. Lieber, Jacob P. Hildner, McGuireWoods LLP, Chicago, IL.

For Dan Burke, Greg Deatherage, David Deets, Glen Hughes, Mary Mahan-Deatherage, Tim Oliver, Neil Petersen, Robert Shomaker, Appellees/Cross Appellants: Linda A. Giesen, Dixon & Giesen Law Offices, Dixon, IL.

For Ardis Kuecker, Richard Kuecker, Appellees/Cross Appellants: James W. Mertes, Magen J. Mertes, Mertes & Mertes, P.C., Sterling, IL.

For Michael Venier, Appellee: Jeffrey J. Zucchi, Clark, Justen, Zucchi & Frost, Ltd., Rockford, IL.

**JUDGES:** JUSTICE BOWMAN delivered the opinion of the court. O'MALLEY and SCHOSTOK, JJ., concur.

**OPINION BY:** BOWMAN

**OPINION**

**[*838] [**550]** JUSTICE BOWMAN delivered the opinion of the court:

Plaintiff, Steve Sandholm, appeals the trial court's dismissal of his complaint, which alleged various counts of defamation, false light, and tortious interference, against defendants, Richard Kuecker, Ardis Kuecker, Glen Hughes, Michael Venier, Al Knickrehm, Tim Oliver, Dan Burke, David Deets, Mary Mahan-Deatherage, NRG Media, LLC, Greg Deatherage, Robert Shomaker, and Neil Petersen. The trial court dismissed plaintiff's complaint upon finding that the Citizen Participation **[*839]** Act (Act) (*735 ILCS 110/1 et seq.* (West 2008)) provided defendants immunity from the claims alleged by plaintiff. Plaintiff appeals, arguing that the Act is unconstitutional and, alternatively, does not apply to the facts alleged in his complaint. Except Venier, defendants cross-appeal the attorney fee award, arguing that the trial court improperly limited the fees they could recover to those connected to the motion to dismiss. We affirm the judgment of the trial **[***2]** court on all points.

I. BACKGROUND

This is a case of first impression involving interpretation of the Act, Illinois's anti-SLAPP ("Strategic Lawsuit Against Public Participation") statute. The term "SLAPP" was developed by University of Denver professors George Pring and Penelope Canan, and the "Public Participation" referred to involves concerned citizens acting primarily on matters relating to the public interest. See M. Sobczak, *SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, *28 N. Ill. U. L. Rev. 559, 563 (Summer 2008)*. In a typical SLAPP case, citizens oppose a developer's plan and petition their local government to stop the developer in some way. The developer then sues the citizens for intentional interference with prospective business and eventually the lawsuit is thrown out, but the citizens are financially strained in the process of defending the suit.

While the Act's clear objective as an anti-SLAPP statute is to provide citizens with an immediate way to dispose of such lawsuits, the Act was written more broadly than such statutes in other states and more broadly than Pring and Canan had defined. SLAPP lawsuits were originally defined **[***3]** as involving a right to petition and a matter of public concern. M. Sobczak, *SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, *28 N. Ill. U. L. Rev. 559, 573 (Summer 2008)*. The Act exceeds that definition by including the rights to speak, assemble, or otherwise participate in government, and it is not limited to matters of social or civic concern. The ramifications of the Act are presented before this court in the context of a defamation lawsuit. The facts below are derived from the record before us.

**[**551]** On April 25, 2008, plaintiff filed his initial complaint, which was later amended on May 9, 2008, June 27, 2008, and November 17, 2008. The third amended complaint alleged the following. Plaintiff was hired as a teacher and head basketball coach at Dixon High School for the 1999-2000 school year. For the 2003-04 school year, plaintiff was assigned the additional position of athletic director for Dixon High School. Plaintiff had always received positive performance evaluations during his time at Dixon High School. Beginning in February **[*840]** 2008, defendants started a campaign to have plaintiff removed as basketball coach and athletic director due to their **[***4]** disagreement with his coaching style. Defendants approached principal Michael Grady, superintendent James Brown, and members of the Dixon School District Board to complain about plaintiff's coaching style and performance. When the board and school administration did not remove plaintiff from those positions, defendants continued to campaign against him, forming a group known as the "Save Dixon Sports Committee."

Count I alleged defamation *per se* against Richard Kuecker. Richard published defamatory statements concerning plaintiff's abilities as a basketball coach and athletic director. Attached to the complaint was a February 28, 2008, letter that Richard authored and published on the "Save Dixon Sports" Web site. The letter made defamatory and false statements including that plaintiff only criticized athletes, badgered, humiliated, and bullied players, and was excessively abusive. Richard sent to the school board a petition making similar accusations, which was also posted on the Web site. On March 21, 2008, on WIXN radio, AM 1460, Richard, along with Michael Venier, Glen Hughes, and

Al Knickrehm, discussed his dissatisfaction with the school board's failure to remove plaintiff as **[***5]** coach. Knickrehm was the general manager of the radio station, and he had requested that the others appear on the program. Richard stated on the program that plaintiff adversely performed his job, that his coaching philosophy was to verbally abuse, bully, discourage, and desecrate players, and that plaintiff needed to be fired. Richard, along with other members of the "Save Dixon Sports Committee," posted the radio program on its Web site through April 10, 2008. Also posted on the Web site were additional statements from Richard and others criticizing plaintiff's coaching style and the school board's failure to remove him as coach and athletic director. Richard e-mailed to Matt Trowbridge, a reporter for the Rockford Register Star, defamatory statements, including that plaintiff was a bad coach and an embarrassment to the community and that his abusive behavior amounted to bullying.

An April 10, 2008, letter addressed to Doug Lee, the president of the Dixon school board, was signed by Richard and other members of the "Save Dixon Sports Committee" and published on the Web site. The letter described plaintiff as verbally abusive and unfit to hold the positions that he held. The letter **[***6]** further described defendants' complaints about the school board and the administration not conducting a full investigation and their failure to address the complaints at a March 19, 2008, school board meeting. On April 16, 2008, Richard told **[*841]** a reporter for the Rockford Register Star that the situation was not about plaintiff's coaching ability but about his verbal abuse.

Count I alleged that Richard's defamatory statements: imputed to plaintiff an inability to perform his job and/or a lack of integrity in the discharge of his duties; prejudiced plaintiff's ability to perform his duties; and implied that he engaged in criminal activity.

**[**552]** Count II alleged defamation *per se* against Glen Hughes and reiterated much of the same conduct alleged against Richard. Count III alleged defamation *per se* against Michael Venier and reiterated much of the same conduct alleged against Richard. An e-mail dated March 11, 2008, that Michael sent to a Dixon school board member was also attached. The e-mail criticized plaintiff for his "criticizing to the brink of abuse, demands bordering on slavery, [and] serious void of true citizenship." Count IV alleged defamation *per se* against Tim Oliver, alleging much **[***7]** of the same conduct alleged against Richard and the others. Counts V and VI alleged defamation *per se* against Dan Burke and Mary Mahan-Deatherage, respectively, alleging much of the same conduct alleged against Richard and the others. In addition, on April 24, 2008, Mary was quoted in the Dixon Gazette, "Why does there have be an instance of where someone is shoved or pushed? Why can't all these instances of abuse over 10 years...isn't that enough to fire him?" Counts VII and VIII alleged defamation *per se* against David Deets and Greg Deatherage, respectively, and alleged much of the same conduct alleged against the others. Additionally, Greg was alleged to have published Richard's February 28 letter on the Northern Illinois Sports Beat Web site. On March 23, 2008, Greg published on that Web site statements that plaintiff was a "psyco [*sic*] nut [who] talks in circles and is only coaching for his glory" and that he did not care about the players. On April 10, also on that site, Greg wrote about plaintiff, "It is his twisted pshyco [*sic*] babble and his abuse of power that we have had enough of" and that plaintiff was a tough, old school coach who tried to break the players down. Greg also **[***8]** allegedly wrote on the Web site saukvalleynews.com that plaintiff abused his power, that plaintiff claimed that girls' sports were not really sports, that plaintiff stated that the Dixon Boosters were a bunch of losers, that plaintiff thought that anyone who did not play basketball was not loyal, and that plaintiff stated that he did not owe the people of Dixon anything.

Count IX alleged defamation *per se* against Ardis Kuecker, alleging much of the same conduct alleged against the others. In addition, a letter to the editor written by Ardis was attached. Ardis's letter was published on March 26, 2008, and stated that plaintiff utilized verbal and emotional abuse, bullying, and belittling in his coaching style. On **[*842]** March 12, 2008, Ardis stated to superintendent James Brown that during timeouts plaintiff yelled instead of prepared, that he would pick out a "whipping boy" each year, that he was a negative person, and that she feared retaliation from him. Count X alleged defamation *per se* against Robert Shomaker and alleged that Shomaker wrote a letter to school board member Carolyn Brechon. In the April 10, 2008, letter, Shomaker stated that plaintiff had threatened Shomaker's son that **[***9]** his bad attitude would prevent him from making the varsity team, and he added that many other parents had similar stories about plaintiff's threatening behaviors. Shomaker also e-mailed Brechon on February 29, 2008, and stated that plaintiff's half-time speeches were profanity-laced, that he used profanity during practices as well, and that he

called his players "fucking morons."

Count XI alleged defamation *per se* against Al Knickrehm. Knickrehm was the general manager of NRG Media, which operated AM and FM radio stations in Dixon. The count alleged that Knickrehm made defamatory statements by participating in the petition to the school board to have plaintiff removed. Additionally, Knickrehm invited Michael Venier, Richard Kuecker, and Glen Hughes to appear **[**553]** on the program on his radio station on March 21, 2008. During the program, defamatory statements were made about plaintiff, as summarized in the description of the count against Richard. Knickrehm further allowed the "Save Dixon Sports Committee" to post the radio program on its Web site for repeated publication. On April 16, 2008, Knickrehm told reporter Trowbridge that plaintiff had "absolutely ripped the management of WIXN on **[***10]** its own radio station." Count XII alleged defamation *per se* against NRG Media, LLC, making the same allegations as count XI.

Plaintiff alleged false light and invasion of privacy, alleging the same conduct described in the defamation counts, in the following counts: count XIII (Michael Venier); count XIV (Richard Kuecker); count XV (Glen Hughes); count XVI (Mary Mahan-Deatherage); count XVII (David Deets); count XVIII (Dan Burke); count XIX (Tim Oliver); count XX (Greg Deatherage); count XXI (Al Knickrehm); count XXII (NRG Media, LLC); and count XXVI (Robert Shomaker).

Count XXIII alleged interference with plaintiff's business expectancy, alleging the same conduct that supported the defamation *per se* and false light claims.

Count XXIV alleged slander *per se* against Neil Petersen. Petersen was a school board member who stated in a March 21, 2008, letter to other school board members that the school board's proposed code-of-conduct response to the complaints about plaintiff was a "slap in the **[*843]** face" to parents and that the board's decision to retain plaintiff was jeopardizing funding from local business entities for extracurricular activities. Count XXV alleged against Petersen intentional **[***11]** interference with plaintiff's business expectancy, for the same statements supporting count XXIV.

On April 23, 2008, the school board removed plaintiff as basketball coach, but he was retained as the school's athletic director.

On July 3, 2008, in response to plaintiff's second amended complaint, NRG Media and Knickrehm filed a motion to dismiss pursuant to *section 2--615* of the Code of Civil Procedure (Code) *735 ILCS 5/2--615* (West 2008) [1], arguing that the Act barred plaintiff's claims, that the alleged statements were protected opinions, that plaintiff failed to allege facts supporting that any statement was made with actual malice, which was a required element because plaintiff was a public figure, and that plaintiff failed to state all elements of each claim. On July 7, 2008, Michael Venier filed a similar motion to dismiss. Also on July 7, Glen Hughes, Tim Oliver, Dan Burke, David Deets, Mary Mahan-Deatherage, and Greg Deatherage filed a similar motion to dismiss. On July 8, Richard and Ardis Kuecker and Robert Shomaker and Neil Petersen filed similar motions to dismiss.

1 The motion to dismiss was a combined motion under *sections 2--615* and *2--619* of the Code, although the motion **[***12]** itself references only *section 2--615*.

On August 26, 2008, the trial court heard the motions to dismiss. After the parties' arguments, the trial court took the matter under advisement. On November 17, 2008, after a flurry of responses and replies, plaintiff filed a motion for leave to file a third amended complaint, which added count XXVI. In the meantime, on December 10, 2008, the trial court issued a detailed memorandum opinion and order on the matter. We summarize the trial court's order now, and we will further explore these issues in our analysis section.

**[**554]** The trial court acknowledged that defendants moved to dismiss under *section 2--615* of the Code, attacking the legal sufficiency of the complaint. However, defendants argued that the complaint should be dismissed for numerous reasons and that the Act provided the most well-founded reason. In reviewing the Act's history, public policy, intent, and broad-reaching language, the trial court determined that the Act barred plaintiff's complaint. The trial court

stated that the Act applied to any claim based on, related to, or in response to any act or acts of the moving party in furtherance of the moving party's rights to petition, speak, **[***13]** assemble, or otherwise participate in government. In this case, defendants first sought action at a school board meeting but were unhappy with the result. Defendants sought to gain support **[*844]** for their position by publicizing their grievances against plaintiff, and their conduct did result in a reconsideration of the school board's initial decision.

The trial court acknowledged that *section 15* of the Act appeared ambiguous in that it both excluded inquiry as to the subjective intent or purpose of the acts in furtherance of the moving party's rights and then included inquiry as to the genuine aim of those acts. The trial court determined that the legislature's intent was to adopt the standard in *City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991)*, which adopted the *Noerr-Pennington* doctrine--derived from *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, and *United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. The gist of this doctrine is that even if a speaker was motivated by an illegal purpose in petitioning the government, **[***14]** as long as the actions constituted a genuine effort at petitioning for government action, they were immune from liability. *City of Columbia, 499 U.S. at 380, 113 L. Ed. 2d at 398, 111 S. Ct. at 1354*. The only exception, known as the "sham" exception, applies when the speaker's actions were not genuinely aimed at procuring government action. *City of Columbia, 499 U.S. at 380, 113 L. Ed. 2d at 398, 111 S. Ct. at 1354*. Thus, the trial court concluded that the ambiguity was to be resolved by determining whether the speaker's acts were genuinely aimed at procuring favorable government action and that an inquiry into the subjective intent or malice is not allowed unless the objective test fails. Having determined that defendants here acted in furtherance of their desire that the school board remove plaintiff as coach and athletic director, the trial court held that the Act barred plaintiff's complaint in its entirety. It dismissed all 25 counts of plaintiff's second amended complaint.

On December 29, 2008, plaintiff moved for reconsideration. On January 2, 2009, defendants objected to plaintiff's motion for leave to file a third amended complaint. On March 30, 2009, defendants collectively **[***15]** moved for reasonable attorney fees under *section 25* of the Act. On May 15, 2009, the trial court denied plaintiff's motion to reconsider. It also addressed plaintiff's third amended complaint, stating that much of the complaint was identical to the second amended complaint. The only new allegations were contained in counts X and XXVI against Shomaker. Specifically, the amendments addressed alleged defamatory conduct in May or June 2008. The court allowed the third amended complaint to be filed as to counts X and XXVI. Shomaker moved to dismiss both counts on May 18, 2009. On July 23, **[*845]** 2009, the trial court granted Shomaker's motion to dismiss counts X and XXVI on grounds the Act barred plaintiff's action.

**[**555]** On May 18, 2009, Clark, Justen & Zucchi filed an affidavit in support of attorney fees totaling $ 15,991.28, for work performed on behalf of Venier. Dixon & Giesen filed an affidavit in support of attorney fees totaling $ 26,295.88, for work performed on behalf of Oliver, Burke, Deets, the Deatherages, Hughes, Shomaker, and Petersen. Pignatelli & Mertes filed an affidavit in support of attorney fees totaling $ 11,811, for work performed on behalf of the Kueckers. McGuireWoods filed **[***16]** an affidavit in support of attorney fees totaling $ 212,192.32, for work performed on behalf of NRG Media and Knickrehm. Plaintiff objected to the attorney fees claimed by McGuireWoods, arguing that such fees were unreasonable and unconscionable.

On July 15, 2009, the trial court rendered a decision on attorney fees. The court noted that it had advised the parties that requests for attorney fees should be limited to the portions of the case that dealt with the application of the Act. The parties had spent a substantial amount of time advocating other potential defenses besides the Act, and there was no provision for attorney fees for those defenses. The court further did not accept costs for travel time for attorneys who resided outside Lee County. The trial court noted the disparity in hourly fees, which ranged from $ 140 per hour to $ 508 per hour. The court determined that the reasonable hourly rate rested at $ 200 and that any fees charged in excess of $ 200 per hour would not be granted. The court further rejected McGuireWoods' charges for assistants, librarians, and WestLaw, as those were overhead costs; it also rejected McGuireWoods' charges for an attorney who was retained by **[***17]** an insurance company and was not an attorney with McGuireWoods. The court ordered the parties to revise their fee petitions accordingly.

As ordered, counsel for the various defendants filed revised petitions as follows: Pignatelli & Mertes, on behalf of the Kueckers, $ 1,560; Clark, Justen & Zucchi, on behalf of Venier, $ 11,229.28; Dixon & Giesen, on behalf of Oliver, Burke, Deets, the Deatherages, Hughes, Shomaker, and Petersen, $ 8,771.50; and McGuireWoods, on behalf of NRG Media and Knickrehm, $ 32,940. All attorneys filed motions for reconsideration of the trial court's decision to limit the fees to those incurred preparing the portions of the motions to dismiss based *only* on the Act.

On September 18, 2009, the trial court issued its final order, stating that it believed $ 200 per hour was the reasonable hourly rate charged by attorneys in Lee County for this type of legal work. It also believed that *section 25* of the Act limited attorney fees to those incurred in connection with the motions based on the Act. Plaintiff **[*846]** did not respond to the revised fee petitions. The court granted the fees contained in the revised petitions.

Plaintiff timely appealed, seeking reversal of the dismissal **[***18]** of his complaint and reversal of the award of attorney fees. Except Venier, defendants all timely filed notices of cross-appeal, seeking expansion of the attorney fee awards to include those fees associated with the entire defense.

II. ANALYSIS

On appeal, plaintiff argues that: (1) the Act deprives him of his constitutional right to remedies for his injuries; (2) the Act is unconstitutional because it violates the *due process and equal protection clauses*; (3) defendants' conduct was not performed with the genuine aim of procuring favorable government action; and (4) the trial court failed to strike a balance between the rights of persons to file lawsuits and the constitutional rights of persons to petition and participate in the government. Defendants **[**556]** counter that the Act is broad, applicable to the facts of the case at bar, and constitutional, both facially and as applied. Thus, the trial court did not err in applying the Act and dismissing plaintiff's complaint.

At oral argument, the parties acknowledged there was some confusion as to whether the trial court dismissed plaintiff's complaint under *section 2--615* of the Code or under the Act. Despite the parties' and the trial court's **[***19]** references to dismissal pursuant to *section 2--615*, the dismissal was pursuant to the Act. The Act provides a procedure for dismissal similar to *section 2--619(a)(9)* of the Code (*735 ILCS 5/2--619(a)(9)* (West 2008)), since it does not attack the legal sufficiency of a claim but rather provides another method to defeat the claim. See *735 ILCS 110/20* (West 2008). A motion to dismiss under *section 2--619* admits the legal sufficiency of the plaintiff's complaint but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claims. *River Plaza Homeowner's Ass'n v. Healey, 389 Ill. App. 3d 268, 275, 904 N.E.2d 1102, 328 Ill. Dec. 592 (2009)*. Likewise, we would consider the facts legally sufficient when considering dismissal under the Act. The Code allows for a combined motion to dismiss with respect to *sections 2--615* and *2--619. 735 ILCS 5/2--619.1* (West 2008). "A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of *Sections 2--615*, *2--619*, or *2--1005*." *735 ILCS 5/2--619.1* (West 2008). The Code further provides that each part shall clearly show the points or grounds relied upon under the section upon which it is based. *735 ILCS 5/2--619.1* **[***20]** (West 2008). Accordingly, it follows that a motion under *section 2--615* or *2--619* combined with a motion under the Act would be allowed. **[*847]** Although "hybrid" motions are improper, a reviewing court will review the dismissal if doing so would serve the interests of judicial economy and the nonmoving party was not prejudiced. *Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A., 286 Ill. App. 3d 48, 63, 676 N.E.2d 206, 221 Ill. Dec. 685 (1996)*. Here, although the grounds for defendants' motions were somewhat intertwined, it does not appear that plaintiff was prejudiced, as there was no objection to the manner in which defendants presented their motions and no party raises this issue on appeal. Further, the Act provides a new procedural method for dismissal, and defendants' arguments pertaining to the Act were separated sufficiently to be understood. Therefore, we will review the dismissal pursuant to the Act, using *section 2--619* principles as guidelines.

The purpose of a *section 2--619* motion is to dispose of issues of law and easily proved issues of fact early in the litigation. *Czarobski v. Lata, 227 Ill. 2d 364, 369, 882 N.E.2d 536, 317 Ill. Dec. 656 (2008)*. When ruling on a *section 2--619* motion, the court must construe the pleadings and supporting documents **[***21]** in the light most favorable to

the nonmoving party. *Czarobski, 227 Ill. 2d at 369*. The court must accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that can reasonably be drawn in the plaintiff's favor. *Barber v. American Airlines, Inc., 398 Ill. App. 3d 868, 878, 925 N.E.2d 1240, 339 Ill. Dec. 119 (2010)*. In ruling on the motion to dismiss, the court may consider pleadings, depositions, and affidavits on record. *Barber, 398 Ill. App. 3d at 878*. The reviewing court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent an issue of material fact, whether **[**557]** dismissal was proper as a matter of law. *Czarobski, 227 Ill. 2d at 369*. Even if the trial court dismissed on an improper ground, we may affirm the dismissal on any proper basis found in the record. *Barber, 398 Ill. App. 3d at 878*. Our review is *de novo. Czarobski, 227 Ill. 2d at 369*.

The Act, which became effective August 28, 2007, is relatively short. *Section 5* declares the Act's public policy, which we quote in relevant part:

> "[I]t is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and **[***22]** participate freely in the process of government must be encouraged and safeguarded with great diligence. ***
>
> Civil actions for money damages have been filed against citizens and organizations of this State as a result of their valid exercise of their constitutional rights to petition, speak freely, associate freely, and otherwise participate in and communicate with government. There has been a disturbing increase in lawsuits termed 'Strategic Lawsuits Against Public Participation' in government or 'SLAPPs' as they are popularly called.
>
> **[*848]** The threat of SLAPPs significantly chills and diminishes citizen participation in government ***. This abuse *** has been used as a means of intimidating, harassing, or punishing citizens *** for involving themselves in public affairs.
>
> It is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an efficient process for identification and **[***23]** adjudication of SLAPPs; and to provide for attorney's fees and costs to the prevailing movants." *735 ILCS 110/5* (West 2008).

*Section 15* of the Act provides:

> "Applicability. This Act applies to any motion to dispose of a claim in a judicial proceeding on the grounds that the claim 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.
>
> Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." *735 ILCS 110/15* (West 2008).

*Section 20* guides motion practice relating to the Act. *Section 20(a)* provides that upon the filing of any motion under *section 15*, "a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent." *735 ILCS 110/20(a)* (West 2008). We note that plaintiff, in his motion for reconsideration, argued that the trial court lost jurisdiction to rule upon the motion. That argument **[***24]** was rejected by the trial court because the expedition of the ruling was to benefit defendants, not plaintiff, and because some of the delays were due to

plaintiff's filing amended complaints. The parties have not raised this issue on appeal.

*Section 20(a)* further provides that the "appellate court shall expedite any appeal or other writ, whether interlocutory or not, **[**558]** from a trial court order denying that motion or from a trial court's failure to rule." *735 ILCS 110/20(a)* (West 2008). Here, the trial court granted the motion; therefore, we need not address this section. *Cf. Mund v. Brown, 393 Ill. App. 3d 994, 998-99, 913 N.E.2d 1225, 332 Ill. Dec. 935 (2009)* (holding this provision of *section 20(a)* in conflict with supreme court rules regarding interlocutory jurisdiction and unenforceable).

*Section 20(c)* provides that the "court shall grant the motion and dismiss the judicial claim unless the court finds that the responding **[*849]** party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act." *735 ILCS 110/20(c)* (West 2008). *Section 20(c)*, therefore, shifts the moving party's normal burden, to show that an affirmative **[***25]** defense bars the plaintiff's claims, to the nonmoving party, who must show that the Act does not apply. See *Kedzie & 103rd Currency Exchange v. Hodge, 156 Ill. 2d 112, 116, 619 N.E.2d 732, 189 Ill. Dec. 31 (1993)* (the defendant has the burden of proving the affirmative defense in a *section 2--619* motion to dismiss). However, even when the defendant has the burden to prove that an affirmative defense applies, the burden then shifts to the plaintiff to show that the defense is unfounded or requires the resolution of an issue of material fact before it is proven.

A. Overview of Defamation Law

Before progressing, we briefly discuss the general principles of defamation law, as the Act changes the common-law rules of defamation by protecting otherwise defamatory speech when made while exercising one's right to petition government. A statement is defamatory if it tends to harm a person's reputation to the extent that it lowers that person in the eyes of the community or deters others from associating with that person. *Tuite v. Corbitt, 224 Ill. 2d 490, 501, 866 N.E.2d 114, 310 Ill. Dec. 303 (2006)*. Statements may be considered defamatory *per se* or *per quod. Tuite, 224 Ill. 2d at 501*. A statement is defamatory *per se* if its defamatory character is obvious and **[***26]** apparent on its face and injury to the plaintiff's reputation may be presumed. *Tuite, 224 Ill. 2d at 501*. Plaintiff here alleged only defamation *per se*. There are five categories of *per se* defamatory statements: (1) statements imputing the commission of a crime; (2) statements imputing infection with a loathsome communicable disease; (3) statements imputing an inability to perform or want of integrity in performing employment duties; (4) statements imputing a lack of ability or otherwise prejudicing a person in his or her profession or business; and (5) statements imputing adultery or fornication. *Tuite, 224 Ill. 2d at 501*.

Several situations may render otherwise *per se* defamatory statements not actionable. For instance, a defendant is not liable for a defamatory statement if the statement is true; only substantial truth is required for this defense to apply. *J. Maki Construction Co. v. Chicago Regional Council of Carpenters, 379 Ill. App. 3d 189, 203, 882 N.E.2d 1173, 318 Ill. Dec. 50 (2008)*. A *per se* defamatory statement is not actionable if it is reasonably capable of an innocent construction. *Solaia Technology, LLC v. Specialty Publishing Co., 221 Ill. 2d 558, 580, 852 N.E.2d 825, 304 Ill. Dec. 369 (2006)*. Likewise, if the *per se* defamatory statement **[***27]** constitutes an expression of an opinion, it **[*850]** may enjoy constitutional protection under the *first amendment*. *Solaia, 221 Ill. 2d at 581*. **[**559]** There are limitations, however, even when a statement implicates first amendment protection. Couching a factual assertion as an opinion will not free it from a defamation claim. *J. Maki, 379 Ill. App. 3d at 200*. Other limitations are also implicated when the *first amendment* is triggered in certain situations. See *Gertz v. Welch, 418 U.S. 323, 342-43, 41 L. Ed. 2d 789, 807, 94 S. Ct. 2997, 3008-09 (1974)* (public figures may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or reckless disregard for truth or with "actual malice," whereas private individuals do not need to show actual malice and are held to the less-stringent negligence standard (see also *Troman v. Wood, 62 Ill. 2d 184, 194-198, 340 N.E.2d 292 (1976))*).

Certain privileges may also make *per se* defamatory statements not actionable. Two classes of privileges exist: absolute privilege and conditional or qualified privilege. *Solaia, 221 Ill. 2d at 585*. The fair report privilege, which protects statements published about statements **[***28]** made in official court proceedings, is a qualified privilege.

*Solaia, 221 Ill. 2d at 585*. Statements made by legislators or private citizens during legislative proceedings are absolutely privileged (*Krueger v. Lewis, 359 Ill. App. 3d 515, 521-22, 834 N.E.2d 457, 295 Ill. Dec. 876 (2005))*, as are statements made during the course of judicial or quasi-judicial proceedings, when the statements are related to the proceedings (*Bushell v. Caterpillar, Inc., 291 Ill. App. 3d 559, 561-64, 683 N.E.2d 1286, 225 Ill. Dec. 623 (1997))*. An absolute privilege provides a complete bar to a defamation claim, regardless of the defendant's motive or the unreasonableness of the conduct. *Naleway v. Agnich, 386 Ill. App. 3d 635, 639, 897 N.E.2d 902, 325 Ill. Dec. 363 (2008)*. "A qualified privilege protects communications that would normally be defamatory and actionable, in order to effect the policy of protecting honest communications of misinformation in certain favored circumstances and thus facilitate the availability of correct information." *Naleway, 386 Ill. App. 3d at 639*. A qualified privilege, however, may be exceeded and the privilege is defeated in circumstances where the defendant makes false statements with an intent to injure or with reckless disregard for the truth. *Naleway, 386 Ill. App. 3d at 639*. **[***29]** Three types of situations in which a conditional or qualified privilege exists are: (1) situations that involve some interest of the person who publishes the defamatory matter; (2) situations that involve some interest of the person to whom the matter is published or of some third person; and (3) situations that involve a recognized interest of the public. *Myers v. Levy, 348 Ill. App. 3d 906, 914, 808 N.E.2d 1139, 283 Ill. Dec. 851 (2004)*.

Plaintiff also alleged several false light claims. A false light claim must allege that: (1) the defendant's actions placed the plaintiff **[*851]** in a false light before the public; (2) the false light would be highly offensive to a reasonable person; and (3) the defendant acted with actual malice, that is, with knowledge of the falsity of the statement or with a reckless disregard for whether the statement was true or false. *Duncan v. Peterson, 359 Ill. App. 3d 1034, 1047, 835 N.E.2d 411, 296 Ill. Dec. 377 (2005)*.

With this framework of defamation law in mind, the Act alters existing defamation law by providing a new, qualified privilege for any defamatory statements communicated in furtherance of **[**560]** one's right to petition, speak, assemble, or otherwise participate in government. The privilege is qualified because it may be exceeded **[***30]** if the statements are not made with the genuine aim at procuring a favorable government action. With this understanding of the Act, we proceed to consider plaintiff's claim that the Act is unconstitutional and, alternatively, that it does not apply to the facts of this case.

B. Constitutionality of the Act

Plaintiff first attacks the Act's constitutionality in two different ways: (1) it violates his right to a remedy for his injuries; and (2) it violates the due process and *equal protection clauses of the Illinois* and *United States Constitutions*.

*Article I, section 12, of the Illinois Constitution* provides:

> "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." *Ill. Const. 1970, art. I, § 12*.

Plaintiff argues, albeit briefly and unsupported by case law, that the Act provides blanket immunity, allowing violations of his right to privacy and allowing persistent *per se* defamatory statements to be made about him with no remedy for the damage to his reputation. We reject plaintiff's argument. *Article I, section 12*, has been held to represent **[***31]** an expression of philosophy rather than a mandate for a certain remedy in any specific form. *Defend v. Lascelles, 149 Ill. App. 3d 630, 642, 500 N.E.2d 712, 102 Ill. Dec. 819 (1986)*. The *Defend* court acknowledged that persons defamed in judicial proceedings have been left without redress because of the public policy favoring the free and open administration of justice, and it cited to *Nolin v. Nolin, 68 Ill. App. 2d 54, 215 N.E.2d 21 (1966)*, for support that *article I, section 12*, has never been interpreted to abolish immunities extended for the protection of a recognized public interest. *Defend, 149 Ill. App. 3d at 642-43*. Other privileges or immunities have been determined not to violate *section 12 of article I*, as well. See *Michigan Avenue National Bank v. County of Cook, 191 Ill. 2d 493, 519-20, 732 N.E.2d 528, 247 Ill. Dec. 473 (2000)* (holding Tort Immunity Act did not violate constitutional right to remedy); *Steffa v.*

*Stanley, 39 Ill. App. 3d 915, 350 N.E.2d 886 (1976)* (finding spousal immunity did not violate constitutional right to **[*852]** remedy). The legislature has the inherent power to repeal or change the common law and may do away with all or part of it. *Michigan Avenue, 191 Ill. 2d at 519*. Here, the legislature specifically stated that the purpose of the Act was to protect **[***32]** the rights of citizens to participate freely in government and government processes. Contrary to plaintiff's characterization that the Act provides "blanket immunity" for persons to defame others, the Act provides protection for such statements only when made "in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." *735 ILCS 110/15* (West 2008). The Act provides a qualified privilege, granting more protection for speech than the common law provides, when the speech occurs in the exercise of the right to participate in government. Thus, the legislature's enactment of the *Act* cannot be said to violate *section 12 of article I of the Illinois Constitution.*

Next, plaintiff argues that the Act deprived him of his due process and equal protection rights under both the Illinois and United States Constitutions. He argues that the Act creates a separate **[**561]** classification of persons--public employees--who, unlike others outside that class, are deprived of remedies for personal injuries. The guarantee of equal protection requires that the government treat similarly situated individuals in a similar manner. *Jacobson v. Department of Public Aid, 171 Ill. 2d 314, 322, 664 N.E.2d 1024, 216 Ill. Dec. 96 (1996)*. **[***33]** While the State is not precluded from enacting legislation that draws distinctions between different categories of people, the State is prohibited from according different treatment to persons who have been placed in different categories on the basis of criteria wholly unrelated to the purpose of the legislation. *Jacobson, 171 Ill. 2d at 322*. In reviewing a claim that a statute violates equal protection, the court applies different levels of scrutiny, depending on the nature of the statutory classification involved. *Jacobson, 171 Ill. 2d at 322-23*. Classifications based on race or national origin or affecting fundamental rights are strictly scrutinized. *Jacobson, 171 Ill. 2d at 323*. Intermediate scrutiny applies to discriminatory classifications based on sex or illegitimacy. *Jacobson, 171 Ill. 2d at 323*. In all other cases, the court employs only a rational basis review. *Jacobson, 171 Ill. 2d at 323*.

In this case, plaintiff argues that the Act unequally affects public employees, which would trigger rational basis review. However, in reading the plain language of the statute, we cannot agree that the *Act* places public employees in a special category at all. The Act applies to any moving **[***34]** party whose alleged acts were in furtherance of the moving party's rights to petition, speak, assemble, or otherwise participate in government. Plaintiff himself, a government employee, **[*853]** may use the Act as a shield if he were facing a similar lawsuit for his participation in a government process. We reject plaintiff's allusion that *Jarrow Formulas, Inc. v. LaMarche, 31 Cal. 4th 728, 74 P.3d 737, 3 Cal. Rptr. 3d 636 (2003)*, somehow supports his position that anti-SLAPP statutes are misused in protecting tortious misconduct. *Jarrow* merely held that a malicious prosecution claim, while covered by California's anti-SLAPP statute, was properly dismissed under the statute because the plaintiff failed to prove that it had a probability of prevailing on the claim. *Jarrow, 31 Cal. 4th at 742-44, 74 P.3d at 746-47, 3 Cal. Rptr. 3d at 646-48*. Further, California's statute is much less broad than the Act and thus its case law, while perhaps instructive, is not persuasive. See *Cal. Civ. Proc. Code § 425.16* (West 2010). Therefore, we reject plaintiff's equal protection argument because the Act applies to all citizens meeting the criteria for its application. It is true that if plaintiff were employed **[***35]** by a private school, the Act likely would not apply because his removal would not involve a government process or achieving a government result, but that is because the intention of the statute is to protect citizens' constitutional rights to participate in government, not to get involved in privately operated businesses.

At oral argument and in his reply brief, plaintiff rejected defendants' claim that the Act is constitutional because remedies have been removed by other statutes that provide absolute or qualified privileges, such as judicial proceedings privileges or those provided by the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (*745 ILCS 10/1--101 et seq.* (West 2006)). Plaintiff raised *Myers and McDonald v. Smith, 472 U.S. 479, 86 L. Ed. 2d 384, 105 S. Ct. 2787 (1985)*, in support. These cases raise an interesting issue that plaintiff failed to **[**562]** raise in his opening brief. The facts of *Myers* are strikingly similar to the facts of this case. In *Myers*, a parent made public statements against a high school football coach, seeking his removal. *Myers, 348 Ill. App. 3d at 910*. The coach filed a defamation lawsuit; the defendant moved for summary **[***36]** judgment; and the trial court granted

summary judgment on the basis that the statements were privileged because they were directed toward the school, a governmental body. *Myers, 348 Ill. App. 3d at 912*. The trial court further concluded that the defendant did not act with actual malice, because he genuinely believed the veracity of his statements, including statements about the coach's performance. *Myers, 348 Ill. App. 3d at 912-13*. The plaintiff appealed, and the defendant argued that summary judgment was appropriate under the *Noerr-Pennington* doctrine. This court disagreed, stating that the *Noerr-Pennington* doctrine did not apply in the context of defamation claims. *Myers, 348 Ill. App. 3d* **[*854]** *at 918*. Instead, this court applied *McDonald* and declined to elevate the right to petition to an absolute immunity for defamatory statements. *Myers, 348 Ill. App. 3d at 919*.

In *McDonald*, the plaintiff sued the defendant for sending libelous letters to President Reagan with the intention that he not hire the plaintiff for a United States Attorney position. *McDonald, 472 U.S. at 480, 86 L. Ed. 2d at 387, 105 S. Ct. at 2789*. The defendant moved for a judgment on the pleadings, arguing that the petition **[***37]** clause of the *first amendment* provided absolute immunity for his statements. *McDonald, 472 U.S. at 481, 86 L. Ed. 2d at 387, 105 S. Ct. at 2789*. The Supreme Court disagreed, stating that it was not prepared to conclude that "the Framers of the *First Amendment* understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right." *McDonald, 472 U.S. at 484, 86 L. Ed. 2d at 389, 105 S. Ct. at 2790*. The Supreme Court further stated that "[t]o accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status," despite the fact that the petition clause was "inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble." *McDonald, 472 U.S. at 485, 86 L. Ed. 2d at 390, 105 S. Ct. at 2791*. The Supreme Court found "no sound basis for granting greater constitutional protection to statements made in a petition" than other first amendment expressions, stating that "the right to petition is guaranteed; the right to commit libel with impunity is not." *McDonald, 472 U.S. at 485, 86 L. Ed. 2d at 390, 105 S. Ct. at 2791*.

Prior to *Myers*, the *Noerr-Pennington* **[***38]** doctrine was extended to civil claims outside the antitrust arena. *King v. Levin, 184 Ill. App. 3d 557, 560, 540 N.E.2d 492, 132 Ill. Dec. 752 (1989)*. The Illinois Supreme Court addressed the extent to which acts petitioning a legislative body were privileged, in *Arlington Heights National Bank v. Arlington Heights Federal Savings & Loan Ass'n, 37 Ill. 2d 546, 229 N.E.2d 514 (1967)*, where, in the context of a zoning ordinance situation, it determined that the right to petition was not absolute and that wrongful conduct by a person who had "actual malice" was not protected by the privilege. *Arlington Heights, 37 Ill. 2d at 551*; *King, 184 Ill. App. 3d at 560* (applying *Arlington Heights* standard in real estate development situation). However, the doctrine has not been applied in the context of defamation.

**[**563]** After *Myers*, the legislature acted, intentionally or unintentionally, to extend the *Noerr-Pennington* doctrine beyond the arena of antitrust or zoning litigation. Under the Act, the right to petition government is guaranteed and in so petitioning, one also has the right to commit libel with impunity, as long as he does so with the genuine aim of procuring government action. As stated, the legislature has the inherent **[*855]** power to repeal or **[***39]** change the common law and provide privileges or immunities that affect a plaintiff's right to a remedy. Here, in protecting the rights of citizens to participate in government, the legislature provided a qualified privilege to speak even with actual malice. While this court may agree with plaintiff that the Act is broad, changing the landscape of defamation law, it is not this court's role to rewrite the statute. That is the duty of the legislature. See *DeSmet v. County of Rock Island, Illinois, 219 Ill. 2d 497, 510, 848 N.E.2d 1030, 302 Ill. Dec. 466 (2006)* ("This court may not legislate, rewrite or extend legislation. If a statute, as enacted, seems to operate in certain cases unjustly or inappropriately, the appeal must be to the General Assembly, and not to this court"). Plaintiff has not provided us with a valid argument to strike down the *Act* on constitutional grounds. To the extent plaintiff alludes to grounds that the Act is unconstitutional other than those discussed here, we find those arguments forfeited for lack of development and citation to legal support. See 210 Ill. 2d *R. 341(h)(7)*; *Bohne v. La Salle National Bank, 399 Ill. App. 3d 485, 926 N.E.2d 976, 339 Ill. Dec. 501, 513 (2010)*. Having determined that plaintiff's constitutional attacks **[***40]** fail, we next consider the Act's applicability to plaintiff's complaint.

C. Applicability of the Act

Plaintiff's last two arguments involve the applicability of the Act to the facts of this case. Plaintiff argues that the trial court erred in determining that the Act protected defendants' statements made outside the actual petition to the school board. Further, the trial court failed to strike a balance between plaintiff's right to file a lawsuit and defendants' right to participate in government. Defendants argue that the *Act* was written broadly enough that it applies to their statements made outside the petition and the school board meeting and that the trial court did not have the authority to give more weight to plaintiff's right to file a lawsuit. We agree with defendants.

Considering plaintiff's arguments in turn, we are required to interpret the Act, using general rules of statutory construction. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Abruzzo v. City of Park Ridge, 231 Ill. 2d 324, 332, 898 N.E.2d 631, 325 Ill. Dec. 584 (2008)*. The best indication of the legislature's intent is the statutory language, given its plain and ordinary meaning. *Abruzzo, 231 Ill. 2d at 332*. **[***41]** When the language of the statute is clear and unambiguous, it must be applied without resorting to aids of construction. *Abruzzo, 231 Ill. 2d at 332*. In determining intent, we consider the statute in its entirety, and words and phrases are not to be read in isolation. *Abruzzo, 231 Ill. 2d at 332-33*. A statute is ambiguous when it is capable of being understood in two or more different senses by **[*856]** reasonably well-informed persons. *Ready v. United/Goedecke Services, Inc., 232 Ill. 2d 369, 377, 905 N.E.2d 725, 328 Ill. Dec. 836 (2008)*. When a statute is ambiguous, the court may use tools of interpretation to ascertain the meaning of a provision. *Ready, 232 Ill. 2d at 379-80*.

**[**564]** According to the plain language of the Act, the privilege will apply where: (1) the defendant's acts were in furtherance of his rights to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the plaintiff's claim is based on, related to, or in response to the defendant's "acts in furtherance"; and (3) the plaintiff fails to produce clear and convincing evidence that the defendant's acts were *not* genuinely aimed at procuring favorable government action. As defendants argue, the plain language of **[***42]** the Act provides that the Act "shall be construed liberally to effectuate its purposes and intent fully." *735 ILCS 110/30(b)* (West 2008). *Section 5* of the Act sets forth its purpose and intent in significant depth.

As to the "acts in furtherance" portion of the Act, plaintiff argues that the Act should be read to cover only acts performed during a government proceeding. Acts or statements made during legislative, judicial, or quasi-judicial proceedings are already protected by absolute or qualified privileges, including the protection of the right to petition the government as established by the *Noerr-Pennington* doctrine. See *King, 184 Ill. App. 3d at 559* (identifying the qualified privilege outlined by the *Noerr-Pennington* doctrine for persons engaged in activities designed to influence government action). Considering the general statutory construction rules, and the Act's plain language, we cannot agree with plaintiff that the Act applies *only* to acts made during a government proceeding. The Act states that it applies 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." (Emphasis **[***43]** added.) *735 ILCS 110/15* (West 2008).

Regarding the latter portion of *section 15*, the trial court concluded that the language providing that "[a]cts in furtherance ***are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome" was ambiguous. It then concluded, based on the legislative history of the Act, that the legislature intended to adopt the *Noerr-Pennington* doctrine, which includes the "sham" **[***44]** exception for acts performed without a genuine aim at procuring government action. We agree that this clause is ambiguous. While this section removes any consideration of intent or purpose, it then requires the court to consider intent as to whether the acts were made with the genuine aim of procuring government action. The directive on intent is unclear **[*857]** as to whether the court should consider the intent of the defendant's acts on a subjective or an objective basis. Because we deem this section ambiguous on its face, we resort to statutory construction aids to determine whether to use a subjective or an objective basis in deciding whether the acts were genuinely aimed at procuring government action.

We first look to the legislative history of the Act. There was not much discussion when the Act was passed, despite attempts at getting anti-SLAPP statutes passed in previous years (see E. Madiar & T. Sheehan, *Illinois' New Anti-SLAPP Statute*, 96 Ill. B.J. 620 (December 2008)). The Act was sponsored by Senator John Cullerton. Senator

Cullerton stated the following about the Act before the Senate voted to pass the bill:

> "This bill is in response to a threat of what's called Strategic Lawsuits **[***45]** Against Public Policy [*sic*] (Participation). It's referred to as a SLAPP, legislation that a number of other states have--have passed. And what it's about is to--address the concern that certain lawsuits **[**565]** that could be filed that significantly would chill and diminish citizen participation in government or voluntary public service or the exercise of those constitutional rights. So, what the bill does is to first declare the public policy that we want to encourage, obviously, our citizens to--their constitutional rights--to exercise their constitutional rights of free speech and the right to petition and redress grievances. And then it provides for a procedural protection, if you will, when they are sued. And I'll give you an example, let's say a community organization makes recommendations to a local alderman concerning zoning changes. They just give advice, then the party that might not agree with the decision, the vote of the alderman, they--that person, that landowner would file a lawsuit, not just against the municipality, but also against the community organization that gave the advice. Even though all they were doing was giving advice to their elected officials. So, that's what **[***46]** the purpose of the bill is. We worked out an--an agreement with the--the trial lawyers so they are no--no longer in opposition. Municipal League is in favor." 95th Ill. Gen. Assem., Senate Proceedings, April 20, 2007, at 15-16 (statements of Senator Cullerton).

Likewise, in the House, there was little debate. Representative Jack Franks made the following comments before the bill passed in the House:

> "This Bill has been around for awhile. Now, Representative Feigenholtz worked on it awhile ago, Senator Obama had it as well had Senator Dillard. This year we were fortunate in that we got the parties together and there's no longer any opposition. The ACLU, **[*858]** the Illinois Municipal League and ITLA have...are all proponents. And what this Bill does is it codifies the standard in a 1991 U.S. Supreme Court case, the *City of Columbia v. Omni Outdoor Advertising* when dealing with citizens participation lawsuits. And the reason why we're putting this Bill forward is that oftentimes folks who speak out whether they're running for office or are in office are sued by people to try to get them to shut up, to try to chill their ability to speak and it's wrong and it's not what we're about. And this Bill **[***47]** would take away many of those abuses that we'd see. I can tell you in my county, it'd be in the Village of Richmond, there was two (2) gentlemen running for trustees who were...who won but they were sued by a developer, threatened with bankruptcy, not being able to pay their legal fees, even though the...the developer's lawsuit was thrown out on three (3) separate occasions and that would stop the type of abuse. I'd be glad to answer any questions.
>
> * * *
>
> Black: Representative, Representative Sacia brought a Bill up a few days ago where a constituent had to pay seven thousand dollars ($ 7,000) to get out of being named a defendant in a lawsuit because he went to a hearing and signed in...
>
> Franks: Right.
>
> Black: ...in as an opponent and I don't recall what the project or the issue was in Representative Sacia's district. But anyway, I mentioned at the time these slap lawsuits are often used to inhibit our participation. So, the bottom line is this Bill would then make it easier for someone who is hit with one of those suits to seek immediate relief and there'd be...not name the defendant and so not to chill public participation and expression when you want to speak **[**566]** out against something that's going **[***48]** on in your district, correct?

Franks: Absolutely.

Black: All right. Great.

Franks: *** It's an expedited hearing that they have to do within ninety (90) days and it also shifts the burden on the plaintiff and should the plaintiff lose, they'd have to pay the defendant's attorneys fees.

* * *

Feigenholtz: I, too, rise in support of this legislation. It is a remedy to an issue that also occurred in my legislative district a few years ago. *** I believe that we really need to begin to put in these safeguards for people who speak out in pub...in public forums and are endangered by people who don't appreciate the *First Amendment* very much. ***

**[*859]** * * *

Mathias: So, Representative Franks, I just want to make sure I got this right. You're trying to make sure that people are not shut up at...

Franks: Right.

Mathias: ...at board meetings and places like that. Is that correct?

Franks: Or whether they're running for office, as well.

Mathias: Right.

Franks: Because what happened like in our area, in Richmond, these folks who were running for office were not included in the insurance that the village had and the mayor wouldn't include them.

Mathias: And so, you're doing it by shutting up the people who are trying to **[***49]** shut them up. Is that correct?

Franks: I'm not...I'm not sure I understand the question. No, I'm not saying...

Mathias: And you're trying to shut up the people who are doing the lawsuits, right?

Franks: What I'm trying...I'm trying to bring some sanity to it..

Mathias: Okay.

Franks: ...and if they want to fi...Anybody can file a lawsuit.

Mathias: Yes.

Franks: Anybody with a pen can file a lawsuit.

Mathias: Representative, I'm supporting your legislation

Franks: Good, good.

Speaker Hannig: Any further discussion? Representative Franks to close.

Franks: I appreciate the folks who spoke on this. And let's join the twenty-two (22) other states that

> have this type of legislation, so we can keep the process going and not stifle public discussion and not put a chilling effect on people who want to speak their minds." 95th Ill. Gen. Assem., House Proceedings, May 31, 2007, at 58-61 (statements of Representatives Franks, Black, and Mathias).

Based on Representative Franks' reference to *City of Columbia*, we agree with the trial court that the legislature intended to adopt the *Noerr-Pennington* doctrine. However, that doctrine is more complicated than the legislative debates and the Act itself provide. The *Noerr-Pennington* **[***50]** doctrine originated in the antitrust arena, presenting a limit on antitrust liability by protecting companies' lobbying efforts, which stem from *first amendment* guarantees of free speech and freedom to petition the government. D. Davis, *The Fraud Exception to the Noerr-Pennington Doctrine in Judicial and Administrative Proceedings*, **[*860]** *69 U. Chi. L. Rev. 325, 328 (Winter 2002)*. The *Noerr* case involved a group of truckers who sued several railroad **[**567]** companies, alleging that they violated the Sherman Act by engaging in a negative publicity campaign against the trucking industry in an effort to damage the industry. *Noerr, 365 U.S. at 129, 5 L. Ed. 2d at 466, 81 S. Ct. at 525*. The railroads admitted conducting the campaign in an effort to influence the passage of certain state laws affecting truck weight limits and tax rates. The Supreme Court found in favor of the railroads, finding that the Sherman Act did not regulate political activity and would otherwise infringe on the railroads' right to petition government. *Noerr, 365 U.S. at 144, 5 L. Ed. 2d at 475, 81 S. Ct. at 533*. The *Noerr* Court limited its holding, stating that there may be situations where conduct is a "mere sham" to cover what **[***51]** is actually an attempt to interfere with business relationships of a competitor, implicating the Sherman Act. *Noerr, 365 U.S. at 144, 5 L. Ed. 2d at 475, 81 S. Ct. at 533*. *Pennington* upheld the same antitrust immunity doctrine where coal companies and unions persuaded the Labor Department to establish minimum wages for employees of contractors, which frustrated the non-unionized companies' efforts to compete. *Pennington, 381 U.S. at 660, 14 L. Ed. 2d at 630-31, 85 S. Ct. at 1588*. The antitrust immunity was expanded to protect administrative proceedings in *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 30 L. Ed. 2d 642, 646, 92 S. Ct. 609, 611-12 (1972)*, where a group of highway carriers alleged a conspiracy by other carriers to bring state and federal proceedings before courts or agencies to prevent them from receiving operating rights.

The "sham exception" to the *Noerr-Pennington* protection was mentioned in *Noerr* and was discussed in greater detail in *City of Columbia*, which Representative Franks referenced during the legislative hearings. In *City of Columbia*, Omni, filed an antitrust lawsuit against Columbia Advertising, after Columbia had petitioned the **[***52]** government to enact billboard zoning limitations that hampered Omni's ability to compete with it. *City of Columbia, 499 U.S. at 367-68, 113 L. Ed. 2d at 390, 111 S. Ct. at 1347*. The Supreme Court stated that the sham exception encompassed situations in which "persons use the governmental *process--as* opposed to the *outcome* of the process--as an anticompetitive weapon." (Emphasis in original.) *City of Columbia, 499 U.S. at 380, 113 L. Ed. 2d at 398, 111 S. Ct. at 1354*. The Court defined a sham situation as one involving a defendant whose activities are " 'not genuinely aimed at procuring favorable government action,'" and not one who simply uses improper means to achieve the desired governmental result. *City of Columbia, 499 U.S. at 380, 113 L. Ed. 2d at 398, 111 S. Ct. at 1354*, quoting *Allied Tube &* **[*861]** *Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 n.4, 100 L. Ed. 2d 497, 505 n.4, 108 S. Ct. 1931, 1937 n.4 (1988)*. The Court concluded that while Columbia had "indisputably set out to disrupt Omni's business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* **[***53]** of that lobbying and consideration, viz., the zoning ordinances." (Emphasis in original.) *City of Columbia, 499 U.S. at 381, 113 L. Ed. 2d at 398, 111 S. Ct. at 1354*.

The Supreme Court, however, further explained the sham exception approximately one year after *City of Columbia, in Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61, 123 L. Ed. 2d 611, 623-24, 113 S. Ct. 1920, 1928 (1993)*, in which it announced a two-part test for the exception to apply. In *Professional Real Estate*, Columbia Pictures sued Professional Real Estate Investors (PRE) for an alleged **[**568]** copyright infringement; PRE countersued, charging Columbia with antitrust violations and alleging that its copyright action was a mere sham that "cloaked underlying acts of monopolization and conspiracy to restrain trade." *Professional Real Estate Investors, 508 U.S. at 52, 123 L. Ed. 2d at 618, 113 S. Ct. at 1924*. Columbia argued that filing the copyright lawsuit

was immune under *Noerr*. The Supreme Court, after a discussion about the confusion in determining a sham, set forth the two-part test:

> "First, [Columbia's] lawsuit must be objectively baseless in the sense that no reasonable **[***54]** litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals 'an attempt to interfere *directly* with the business relationships of a competitor' [citation] through the 'use [of] the governmental *process--as* opposed to the *outcome* of that process--as an anticompetitive weapon.' " (Emphasis in original.) *Professional Real Estate, 508 U.S. at 60-61, 123 L. Ed. 2d at 624, 113 S. Ct. at 1928*, quoting *City of Columbia, 499 U.S. at 380, 113 L. Ed. 2d at 398, 111 S. Ct. at 1354*.

Thus, the Court explained that this two-part test for the sham exception requires a plaintiff to disprove a challenged lawsuit's legal viability (objective motivation) before a court would entertain evidence of the economic viability (subjective motivation), and if that plaintiff succeeds, **[***55]** he still has to prove his antitrust claim. *Professional Real* **[*862]** *Estate, 508 U.S. at 61, 123 L. Ed. 2d at 624, 113 S. Ct. at 1928*. Proving a sham "merely deprives the defendant of immunity." *Professional Real Estate, 508 U.S. at 61, 123 L. Ed. 2d at 624, 113 S. Ct. at 1928*. The Court went on to explain that confusion over determining whether the sham exception applied stemmed from the Court's previous use of the word "genuine" to denote the opposite of "sham." *Professional Real Estate, 508 U.S. at 61, 123 L. Ed. 2d at 624, 113 S. Ct. at 1928*. The Court stated that "genuine" had both subjective and objective connotations, defining the word as meaning (1) " 'actually having the reputed or apparent qualities or character'; and (2) 'sincerely and honestly felt or experienced.' " *Professional Real Estate, 508 U.S. at 61, 123 L. Ed. 2d at 624, 113 S. Ct. at 1929*, quoting Webster's Third New International Dictionary 948 (1986). Thus, to be a sham, "litigation must fail to be 'genuine' in both senses of the word." *Professional Real Estate, 508 U.S. at 61, 123 L. Ed. 2d at 624-25, 113 S. Ct. at 1929*.

Turning to the Act, if the legislature's intent was to adopt the standards set forth in *City of* **[***56]** *Columbia*, then the Act is adopting the two-part analysis employed to determine whether the party's acts in furtherance were "genuinely aimed at procuring favorable government action." The words of the Act in *section 15*, although ambiguously written, correspond with the Supreme Court's analysis. Subjective intent is considered only when one's conduct is *not* genuinely aimed at procuring favorable government action. Applying the doctrine and its sham exception to the facts of this case requires the court to first consider whether objective persons could have reasonably expected to procure a favorable government outcome (plaintiff's removal) through a public campaign like defendants' **[**569]** campaign against plaintiff. If the answer to that question is "yes," then the court need not consider the subjective intent of defendants' conduct. If the answer is "no," then the court would consider whether defendants' subjective intent was not to achieve a government outcome that may interfere with plaintiff but rather to interfere with plaintiff by using the governmental process itself.

Here, defendants' acts did, in fact, lead to their desired outcome that the school board remove plaintiff as coach of **[***57]** the basketball team. Regardless of the actual outcome, even plaintiff admitted that defendants continued to seek his removal after the school board denied their petition. In plaintiff's own words in his complaint, the statements alleged all surrounded defendants' "campaign to have [plaintiff] removed as basketball coach and athletic director due [to] their disagreement with his coaching style." Defendants first complained to the Dixon High School principal, the superintendent, and members of the school board. After a school board **[*863]** meeting that did not end in a favorable result for defendants, defendants sought to gain more support through a Web site and speaking publicly. This is part of the process of influencing the government to make a decision in a petitioner's favor. Defendants had a right to participate in this process. The statements alleged in plaintiff's complaint criticized plaintiff's coaching style and related to the need for plaintiff to be removed from his positions. NRG and Knickrehm participated in this process by providing

a forum for defendants to speak about their position. [2] Some of the statements made were in the form of letters or comments posted on Web sites. **[***58]** Plaintiff argues that because the school board already heard defendants' complaints once, defendants' ensuing campaign was malicious and not intended at obtaining a favorable government outcome. Plaintiff ignores the possibility that the school board could hear defendants' complaints more than once and change its mind. Plaintiff also ignores the reality that oftentimes governmental bodies react to increasing numbers or public pressure. Here, the trial court determined on an objective basis, and we agree using the same objective standard, that reasonable persons could expect the school board to change its initial decision after the campaign placed public pressure on the board.

2 Plaintiff argues at one point that NRG and Knickrehm have no protection because they are members of the media. However, the Act does not exclude media defendants from its protection.

Whether a school board decision is a "government process" is answered by the plain language of the Act. That defendants sought the removal of plaintiff as athletic director and coach of the Dixon basketball team is undisputed. Dixon High School was a public school, and plaintiff was a public high school employee. The Act defines "government" **[***59]** as "a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, a subdivision of a state, or another public authority including the electorate." *735 ILCS 110/10* (West 2008). Defendants sought action by the school board, and the school board acts under the authority granted to it by the laws of the state. See *105 ILCS 5/10 et seq.* (West 2008). Further, a federal court has previously deemed a campaign to remove a school principal as "classic political speech," as "it is direct involvement in governance." *Stevens v. Tillman, 855 F.2d 394, 403 (7th Cir. 1988)*. Therefore, with regard to the first, objective test, **[**570]** plaintiff did not disprove that objective persons in defendants' position could reasonably believe that they could succeed in achieving their desired government outcome. Because the objective test was answered in the positive, **[*864]** we need not consider the defendants' subjective intent. As the Act states, defendants are "immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action." *735 ILCS 110/15* (West 2008). "Intent or purpose" **[***60]** is not considered unless a reasonable person could not expect a favorable government outcome. Thus, we agree with the trial court that defendants acted in furtherance of their rights to participate in government with the goal to obtain favorable government action. [3]

3 We need not address plaintiff's argument that the trial court misapplied Scheidler v. Trombley, No. 07--L--513 (September 2, 2008), and Shoreline Towers Condominium Association v. Gassman, No. 07--CH--6273 (March 25, 2008), as those circuit court orders were not binding on the trial court and are not binding on this court. Further, those cases are factually distinguishable: cause No. 07--L--513, Scheidler, did not involve statements other than a direct statement to a governmental body; and cause No. 07--CH--06273, Shoreline, applied the Act except as to statements that were clearly unrelated to the defendant's government participation.

The Act next requires that plaintiff's claim must be based on, related to, or in response to defendants' acts in furtherance of their rights to petition, speak, assemble, or otherwise participate in government. It is undisputed that plaintiff's lawsuit was based on or in response to defendants' **[***61]** "acts in furtherance."

Finally, the Act mandates dismissal of plaintiff's complaint if plaintiff failed to produce clear and convincing evidence that the defendants' acts were *not* genuinely aimed at procuring favorable government action. Plaintiff argues only that the Act should not apply because defendants' statements at issue were not made directly to the Dixon school board or during any hearing or governmental proceeding. As discussed, the statements did not need to be made within a petition or during a hearing, but needed only to be made within defendants' participation in the government process, which includes acts of gaining public support to influence favorable government action. Also, as we discussed, plaintiff failed to disprove the objective test--that reasonable persons could expect a favorable government outcome.

Plaintiff briefly argues that there is nothing in the Act eliminating his common-law causes of action. A plain reading of the Act provides that it applies to any motion to dispose of a "claim in a judicial proceeding" and that the Act

defines "judicial claim" or "claim" to include "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial **[***62]** pleading or filing alleging injury." *735 ILCS 110/10* (West 2008). Thus, the Act plainly applies to plaintiff's complaint, which set out causes of action that alleged injury.

**[*865]** Next, plaintiff argues that the trial court failed to strike a balance, as *section 5* of the Act requires, between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak, assemble, or otherwise participate in government. We disagree with plaintiff. The public policy in *section 5* states that the purpose of the Act is to "strike a balance" between these competing interests, but *section 20* mandates dismissal when its requirements are met. The trial court struck the intended balance by properly applying the provisions of the Act. The legislature presumably struck the balance by passing the Act itself, and it is not the court's role to rewrite a statute that **[**571]** appears to lead to unjust results when interpreted as written. See *DeSmet, 219 Ill. 2d at 510*. As defendant Venier argues in his brief, the legislature often strikes balances between competing interests when enacting statutes, such as the Tort Immunity Act's balancing of the government's need to provide necessary **[***63]** services to the public and an injured citizen's need to seek redress for injuries sustained as a result of such services. The courts, however, are bound to interpret statutes as written and not to strike balances that the legislature already struck.

D. Attorney Fees

Defendants, with the exception of defendant Venier, cross-appealed the trial court's decision limiting the attorney fees awarded. As stated earlier, the trial court awarded attorney fees per *section 25* of the Act (*735 ILCS 110/25* (West 2008)), limiting the fees to those incurred preparing the portions of the motions to dismiss based on the Act. Defendants argue that they should have been able to collect fees associated with the defense of the case from the filing of the complaint through the dismissal. A party may be awarded attorney fees only when the fees are specifically allowed by statute or by a contract between the parties. *Grate v. Grzetich, 373 Ill. App. 3d 228, 231, 867 N.E.2d 577, 310 Ill. Dec. 886 (2007)*. When a court with proper statutory authority to award attorney fees exercises that authority, we review its decision under an abuse-of-discretion standard. *Grate, 373 Ill. App. 3d at 231*. Whether a court has the authority to grant attorney fees **[***64]** is a question of law that we review *de novo. Grate, 373 Ill. App. 3d at 231*.

*Section 25* of the Act provides that the "court shall award a moving party who prevails in a motion under this Act reasonable attorney's fees and costs incurred in connection with the motion." *735 ILCS 110/25* (West 2008). Because the parties' dispute involves the interpretation of this statutory provision, we review *de novo* whether the Act's language encompasses a broader range of attorney fees than the trial court awarded. We review the reasonableness of the amount of fees under an abuse-of-discretion standard.

**[*866]** Plaintiff conceded during trial court proceedings that *section 25* mandated that the trial court grant attorney fees for defendants. The parties dispute what fees are covered by *section 25*. NRG and Knickrehm argue that the unambiguous, plain language of the Act provides that fees for *all* of their attorneys' time spent in defending the lawsuit should be included as expenses incurred "in connection with the motion." In the alternative, NRG and Knickrehm argue that if we find *section 25* ambiguous, it should be interpreted broadly to avoid undermining the policy and purpose of the Act, which is to prevent **[***65]** defendants from bearing the costs of such suits. Further, NRG and Knickrehm argue that courts have held in other contexts that when awarding attorney fees, the fees are not to be "chopped" where the attorneys are dealing with a common core of facts and similar legal theories. Counsel for Hughes, Deets, the Deatherages, Petersen, and Shomaker makes the same arguments as counsel for NRG and Knickrehm. Additionally, counsel argues that much of the fees that the trial court excluded were caused by plaintiff's actions, including: (1) plaintiff amended his complaint three times, requiring defendants to analyze and respond to four pleadings; (2) plaintiff sought discovery while the motions to dismiss were pending, requiring defendants to file motions to quash subpoenas and objections to interrogatories; and (3) plaintiff objected to Shomaker's **[**572]** request to file an additional motion to dismiss in response to the new allegations pleaded in the third amended complaint, requiring additional time expended on the defense. The Kueckers' counsel argues that the trial court improperly relied upon an affidavit by attorney Douglas Lee in determining that $ 200 per hour was a reasonable rate for attorneys **[***66]** in Lee County. Lee's affidavit was submitted by plaintiff. Counsel for the Kueckers submits that its affidavit asserting the rate of $ 215

per hour was consistent and should have been accepted by the court.

Defendants rely on *Hensley v. Eckerhart, 461 U.S. 424, 426, 76 L. Ed. 2d 40, 46, 103 S. Ct. 1933, 1935 (1983)*, to support their position that their fees may not be "chopped" by claim or legal theory and that they are entitled to fees for their entire defense. We reject that *Hensley* is applicable here, for two reasons: (1) the issue in *Hensley* involved different claims that were intertwined and factually and legally related and proceeded to trial; and (2) the statute in *Hensley* broadly stated that " 'the court, in its discretion, may allow the prevailing party, *** a reasonable attorney's fee as part of the costs,'" and the Court found that it could not separate the costs among the claims. *Hensley, 461 U.S. at 426, 76 L. Ed. 2d at 46, 103 S. Ct. at 1935*, quoting *42 U.S.C. § 1988 (1982)*. In *Pietrzyk v. Oak Lawn Pavilion, Inc., 329 Ill. App. 3d 1043, 1051, 769 N.E.2d 134, 263 Ill. Dec. 932 (2002)*, the court distinguished *Hensley* when determining **[*867]** whether the plaintiff could recover attorney fees for her failed wrongful **[***67]** death claim under the fee provision of her successful Nursing Home Care Act (*210 ILCS 45/1--101 et seq.* (West 1996)) claim. The court held that the plaintiff could not seek refuge under *Hensley's* "claim-chopping" protection where there was no confusion as to what portion of fees went towards the Nursing Home Care Act claim (the plaintiff's counsel was to receive one-third of the award). *Pietrzyk, 329 Ill. App. 3d at 1051*. The court stated that since common law prohibited a prevailing party from recovering attorney fees, statutes that allow such fees are to be strictly construed. *Pietrzyk, 329 Ill. App. 3d at 1051*. The court further stated that while the *Hensley* "common core of facts" doctrine could be used as a shield to prevent the reduction of attorney fees by "claim-chopping" based on the limited success of recovery, the doctrine may not be used as a sword to obtain fees that are not otherwise covered by the statute that authorizes such fees. *Pietrzyk, 329 Ill. App. 3d at 1051*. In this case, the motions to dismiss and costs related to them may be separated from other costs, such as costs for filing other motions and drafting other arguments not based on the Act within the motion **[***68]** to dismiss. Therefore, we do not find that we are bound by *Hensley* to accept any and all fees submitted by defendants.

We use the same statutory interpretation rules stated earlier in this opinion. *Section 25* contains the language "in connection with the motion." The phrase "in connection with" has been deemed both ambiguous (*Ness v. Ford Motor Co., 835 F. Supp. 453, 458 (N.D. Ill. 1993)* (in context of insurance contract and construing ambiguity broadly and in favor of insured)) and unambiguous (*Fuja v. Benefit Trust Life Insurance Co., 18 F.3d 1405, 1410 (7th Cir. 1994)* (in context of medical insurance provision, construed narrowly)). The phrase may be read broadly, as defendants argue, or narrowly, as the trial court did. Under defendants' interpretation, reasonable fees may be collected for work performed researching and preparing all parts of the motions to dismiss as well as **[**573]** other costs incurred while the motion were pending, including responding to plaintiff's discovery motions. The trial court interpreted *section 25* narrowly to cover only the time it took defendants to research and draft their motions to dismiss under the Act, excluding all other costs related to other matters. **[***69]** We find the phrase "in connection with" as used in this statute to be ambiguous because it is capable of being understood in two or more different senses by reasonably well-informed persons. Certain work tasks, defendants argue, overlap between the Act and other defenses and are impossible to separate because the attorneys were faced with a common core of facts and law. Because we find *section 25* to be ambiguous, we may look beyond its plain language to determine its meaning.

**[*868]** Defendants cite to *Containment Technologies Group, Inc. v. American Society of Health System Pharmacists, No. 1:07--CV--0997, 2009 U.S. Dist. LEXIS 76270 (S.D. Ind. August 26, 2009)*, which rejected the plaintiff's argument that the fee award should be limited to time spent actually preparing the motion to dismiss under Indiana's anti-SLAPP statute. However, that case is distinguishable because the language of Indiana's fee provision states that the prevailing defendant "is entitled to recover reasonable attorney's fees and costs." Ind. Code Ann. § 34--7--7--7 (Michie 2008). The Indiana fee-shifting provision is void of the potentially limiting language in our state's provision, and thus the defendant was entitled to recover for all time reasonably **[***70]** spent on the litigation, not just the motion itself.

California's interpretation of its anti-SLAPP statute provides some limited guidance. California's anti-SLAPP fee-shifting provision, which does not contain the potentially limiting language "in connection with," states that "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." *Cal.*

*Civ. Proc. Code § 425.16* (Deering 2010). In *Kearney v. Foley & Lardner, 553 F. Supp. 2d 1178 (S.D. Cal. 2008)*, the court considered whether a defendant who succeeded in striking the plaintiff's state claims under the anti-SLAPP statute could recover fees for his motion to dismiss federal claims under different theories. The court held that the defendant could recover fees for the entirety of the motion to strike and fees for the portion of his motion to dismiss the federal claims that was based on the *Noerr-Pennington* doctrine but no other fees for the remaining separate and distinct defenses. *Kearney, 553 F. Supp. 2d at 1186-87*. **[***71]** Therefore, even under California's broader fee-shifting provision, the court still limited recovery of fees to those associated directly with the anti-SLAPP motion.

Reading the entirety of the Act, we know that its purpose, in part, is to identify and adjudicate SLAPPs in an efficient manner and to provide for attorney fees and costs for prevailing movants. *735 ILCS 110/5* (2008). The Act also instructs that it "shall be construed liberally to effectuate its purposes and intent fully." *735 ILCS 110/30(b)* (West 2008). From the legislative debates on the Act, we know that the Act was intended to eliminate ongoing, costly litigation by providing a special, expedited means to dismiss such lawsuits. See 95th Ill. Gen. Assem., House Proceedings, May 31, 2007, at 59 (statements of Representative Franks ("It's an expedited hearing they have to do within ninety (90) days and it also shifts the burden on the plaintiff and should the plaintiff lose, they'd have to pay the defendant's attorneys fees")). Based on this history and on the language of the Act, we conclude that the Act was intended to **[*869]** minimize attorney fees and litigation costs by **[**574]** providing defendants an avenue by which to easily and **[***72]** efficiently dispose of these types of lawsuits. We do not find that the language "in connection with" encompasses *all* costs of litigation, as defendants argue. Such a broad interpretation would defy logic where defendants pursue other defenses that are *not* connected to a motion under the Act. Considering the statute in its entirety, and the plain meaning of "in connection with," read in context of the statute and its purposes and intent, we believe that defendants are limited to recovering only those fees associated with bringing the motion to dismiss on grounds based on the Act, as the trial court determined.

That being said, we next consider whether the trial court's determination of "reasonable" fees was an abuse of discretion. In paragraph five of their joint motion for clarification of allowable attorney fees, defendants listed the following as "activities" that did not "fit comfortably" in the court's order to amend their fee petitions to include only those efforts directed at the Act:

> "a) Intake communications with clients
>
> b) Status communications with clients
>
> c) Fact investigation
>
> d) Witness and client interviews
>
> e) Responding to discovery requests
>
> f) Motion practice regarding staying **[***73]** discovery
>
> g) Gathering and reviewing documents
>
> h) Argument of the motion to dismiss, wherein numerous legal defenses are raised but not delineated
>
> i) Preparation for argument of the motion to dismiss, for which time spent on particular legal defenses is not delineated
>
> j) Attendance of status hearings and other hearings not specifically devoted to any particular legal defenses."

The trial court, in response to defendants' joint motion, issued its clarifying order. The clarifying order stated that

defendants' motions raised various defenses, including the Act, the Illinois fair reporting privilege, opinion speech, and the need to show actual malice. [4] The court granted defendants relief pursuant to the Act, and the Act allowed for fees associated with the motion. The court advised:

> "Thus, the only fees which the Court can allow are those which can specifically be allocated to the preparation and argument of the [Act] motion. Therefore, none of the activity set forth in paragraph 5 of the Defendants' joint motion should be included in the attorney's **[*870]** fees calculation unless it can be specifically identified as pertaining to the preparation and argument of the motion under the [Act]. The Court **[***74]** understands that this may mean that some general time which [is] incapable of being delineated may not be compensable to the Defendants. However, the statute limits attorney's fees compensation to that which can be specifically related to the motion under the [Act]."

4 These defenses were contained in defendants' motions to dismiss pursuant to *section 2--615*, arguing that plaintiff failed to state a proper claim.

We do not find that the trial court's determination of fees and costs associated with the motions brought under the Act was an abuse of discretion. A defendant bears the burden of presenting sufficient evidence from which the trial court can render a decision as to the reasonableness of his fees. *Gambino v. Boulevard Mortgage Corp., 398 Ill. App. 3d 21, 66, 922 N.E.2d 380, 337 Ill. Dec. 257 (2009)*. An appropriate fee consists of reasonable **[**575]** charges for reasonable services. *Gambino, 398 Ill. App. 3d at 66*. Justification of fees requires more than a mere compilation of hours multiplied by a fixed hourly rate or bills issued to clients, as this type of data does not provide the court with sufficient information as to the fees' reasonableness. *Gambino, 398 Ill. App. 3d at 66*. A petition for fees must specify the services **[***75]** performed, who performed them, the time expended, and the hourly rate charged. *Gambino, 398 Ill. App. 3d at 66*. "[I]t is incumbent upon the petitioner to present detailed records maintained during the course of the litigation containing facts and computations upon which the charges are predicated." *Gambino, 398 Ill. App. 3d at 66*. The trial court's clarification order merely ordered defendants' attorneys to provide such details in their fee petitions. Defendants counter that it is impossible to separate the time spent on work related to the Act from that related to other defenses. However, the burden was on the attorneys to track their work in a detailed fashion.

Once a fee petition is submitted, the trial court considers factors including the skill and standing of the attorneys, the nature of the case, the novelty or difficulty of the issues involved, the importance of the matter, the degree of responsibility required, the usual and customary charges for comparable services, the benefit to the client, and the reasonable connection of the fees to the amount involved in the litigation. *Gambino, 398 Ill. App. 3d at 66*. The trial court considered these factors and the affidavits submitted **[***76]** by the various defense attorneys and by plaintiff and determined that the hourly rates ranged from $ 140 to over $ 500. It determined that most of the rates were close to $ 200 per hour, and it determined that this was a reasonable hourly rate. We do not find that the trial court abused its discretion in setting **[*871]** the hourly rate at $ 200. The Kueckers [5] argues that the trial court did not hear testimony from attorney Lee regarding the reasonableness of the $ 200 rate. However, the trial court is not required to hold an evidentiary hearing on the reasonableness of attorney fees. *Aurora East School District v. Dover, 363 Ill. App. 3d 1048, 1058, 846 N.E.2d 623, 301 Ill. Dec. 298 (2006)*. A nonevidentiary proceeding is proper so long as the trial court can determine from the available evidence what amount would be reasonable and the opposing party has an opportunity to be heard. *Aurora East School District, 363 Ill. App. 3d at 1058*. In this case, the trial court had sufficient evidence before it, and plaintiff had an opportunity to be heard, to determine the reasonable fees to be awarded. We, therefore, affirm the trial court's judgment that the Act allows a prevailing defendant recovery for only those attorney fees associated **[***77]** with a motion based upon the Act, and we affirm the trial court's selection of a reasonable hourly rate of $ 200 and its award of reasonable fees.

5 The remaining defendants do not take issue with the trial court's determination that $ 200 was a reasonable hourly rate.

We further reject defendants' arguments that limiting fees would have a "chilling effect" on citizens who desire to participate in government, because they would risk having to pay a majority of their attorney fees. Dixon & Giesen argues that "it is not reasonable to expect that an attorney could file a motion to **[**576]** dismiss under the [Act] without first having to take the steps necessary to determine the applicability of the [Act]. Under the trial court's narrow definition the fees generated to do intake communications with the client; investigate the facts; interview witnesses; attend general status or other court required appearances along with numerous other necessary steps in effective representation would not be included." This is not true under the trial court's or this court's order. If these tasks were performed in preparation of the motions to dismiss pursuant to the Act, the fees charged were recoverable. If those **[***78]** tasks overlapped issues, the attorneys were required to adjust the fees sought to reflect the time spent pursuing the motions based on the Act. While it may seem in defendants' view that the Act is impractical because it does not take into account that defense attorneys may litigate other defenses simultaneously, we remind defendants that it is not this court's place to rewrite the statute.

III. CONCLUSION

We conclude that the trial court properly applied the Act and therefore properly dismissed plaintiff's complaint in its entirety. We further agree that the trial court properly limited attorney fees to **[*872]** those associated with the motions brought under the Act and nothing more. Accordingly, we affirm the judgment of the circuit court of Lee County.

Affirmed.

O'MALLEY and SCHOSTOK, JJ., concur.

# EXHIBIT E

**PAT GODIN, Plaintiff, Appellee, v. PATTY SCHENCKS, JOLEEN NICELY, and DONNA METTA, Defendants, Appellants, SCHOOL UNION #134 and MACHIASPORT SCHOOL DEPARTMENT BOARD OF DIRECTORS, Defendants.**

**No. 09-2324**

**UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

***629 F.3d 79*; *2010 U.S. App. LEXIS 25980*; *31 I.E.R. Cas. (BNA) 1101***

**December 22, 2010, Decided**

**SUBSEQUENT HISTORY:** As Amended January 7, 2011.

**PRIOR HISTORY: [**1]**
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE. Hon. John A. Woodcock, Jr., U.S. District Judge.
*Godin v. Sch. Union 134, 2009 U.S. Dist. LEXIS 78156 (D. Me., Aug. 31, 2009)*

**COUNSEL:** John B. Lucy, with whom Richardson Whitman Large & Badger was on brief, for appellant Joleen Nicely.

John M. R. Paterson, Eben Albert-Knopp, and Bernstein Shur on brief for appellant Patty Schencks.

David A. Strock and Fisher & Phillips, LLP on brief for appellant Donna Metta.

Sandra Hylander Collier for appellee.

**JUDGES:** Before Lynch, Chief Judge, Torruella and Howard, Circuit Judges.

**OPINION BY:** LYNCH

**OPINION**

**[*80]** LYNCH, Chief Judge. Pat Godin, the former principal of the Fort O'Brien Elementary School in Machiasport, Maine, brought suit against the Machiasport School Department Board of Directors ("Machiasport") and School Union No. 134 in March 2009, alleging a violation of her due process rights under *42 U.S.C. § 1983*. She also sued three individual school system employees who had separately stated in meetings with **[*81]** officials their views that Godin had acted abusively toward students at the school. Plaintiff brought state-law claims that these allegations were defamatory and led the school system to terminate her employment; the school system says her job was terminated due to budgetary shortfalls.

Many **[**2]** states have enacted special statutory protections for individuals, like the individual school system

employees in this case, named as defendants as a result of the exercise of their constitutional rights to petition the government. These anti-"SLAPP" ("strategic litigation against public participation") laws provide such defendants with procedural and substantive defenses meant to prevent meritless suits from imposing significant litigation costs and chilling protected speech. The two federal appellate courts that have addressed whether they must enforce these state anti-SLAPP statutes in federal proceedings have concluded that they must. See *Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164 (5th Cir. 2009)*; *United States ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963 (9th Cir. 1999)*. See also *Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 845-47 (9th Cir. 2001)* (limiting application of one anti-SLAPP provision where information was within exclusive control of the defendant). This question, here as it applies to Maine's anti-SLAPP statute, is one of first impression for this court, and lies at the center of this appeal. We hold the Maine anti-SLAPP statute must be **[**3]** applied.

I.

Basic background facts set the stage. Shortly after Godin began working as a teacher and principal at the Fort O'Brien Elementary School in August 2006, Machiasport began receiving complaints from other employees concerning her conduct toward students, including complaints from the three individual defendants, Patty Schencks, Joleen Nicely, and Donna Metta. [1] Machiasport conducted an investigation of Godin's conduct in May 2008. The June 4, 2008 investigation report concluded that the allegations that Godin's conduct was abusive and inappropriate were not supported.

1 Nicely offered statements to both the Superintendent of Schools and the School Board that she felt Godin's treatment of an eight-year-old child, which Nicely observed first hand, was "inappropriate and abusive." Schencks reported to Maine's Department of Health and Human Services and the Maine State Police her observation of Godin's December 2007 treatment of a four-year-old child. Metta informed the Machiasport School Board that, on two occasions in January 2007, she observed Godin treat a student in a manner that in her view was abusive.

Two days after the report was issued, Godin received notice from the Superintendent **[**4]** of Machiasport Schools that her employment contract, which would have expired in 2011, was being terminated due to budgetary constraints caused by "significant subsidy loss." Godin was told that her position would be filled by a "teaching principal," which occurred on August 12, 2008.

On March 2, 2009, Godin brought suit in federal court, asserting a federal claim under *42 U.S.C. § 1983* against the Union and Machiasport, and a number of state claims, including claims against the individual defendants for interference with advantageous contractual relationships and defamation. [2]

2 Godin's other state claims include a breach of contract claim against the Union and Machiasport and a claim for punitive damages against all defendants.

The individual defendants filed a special motion to dismiss under Maine's anti-SLAPP **[*82]** statute, which creates a special process by which a defendant may move to dismiss any claim that arises from the defendant's exercise of the right of petition under either the United States Constitution or the Constitution of Maine. [3] *Me. Rev. Stat. tit. 14, § 556* ("*Section 556*"). Godin does not dispute that her claims against the individual defendants are based on conduct that **[**5]** falls within the statute's broad definition of "a party's exercise of its right of petition." *Me. Rev. Stat. tit. 14, § 556*.

3 The federal Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *U.S. Const. amend. I.*

The Maine Constitution provides: "The people have a right at all times in an orderly and peaceable manner to assemble to consult upon the common good, to give instructions to their representatives, and to request, of either department of the government by petition or remonstrance, redress of their wrongs and grievances." *Me.*

*Const. art. 1, § 15*.

The statute provides that once a defendant brings such a "special motion to dismiss" and demonstrates that the claims in question are based on the defendant's petitioning activity, the court "shall advance [the motion] so that it may be heard and determined with as little delay as possible." Id. The court shall grant the special motion "unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any **[**6]** reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party." Id. In assessing whether to grant the special motion, "the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Id. A court may order discovery specific to the *Section 556* motion for good cause shown. Id. Evidence considered in reviewing a special motion to dismiss should be viewed "in the light most favorable to the moving party because the responding party bears the burden of proof when the statute applies." *Morse Bros., Inc. v. Webster, 2001 ME 70, 772 A.2d 842, 849 (Me. 2001)*.

The district court denied the individual defendants' special motion under *Section 556*, holding that *Section 556* conflicts with *Fed. R. Civ. P. 12* and *56* and so does not apply in federal court.

This interlocutory appeal raises issues of first impression within this circuit, namely: (1) whether, under the collateral order doctrine, this court has appellate jurisdiction over an interlocutory appeal from an order denying a special motion to dismiss brought under *Section 556* on the basis that *Section 556* cannot **[**7]** be reconciled with federal procedure; and (2) whether *Section 556* applies in federal court proceedings. We hold on the facts here that we have appellate jurisdiction and that the district court erred in not applying Maine's anti-SLAPP statute, *Me. Rev. Stat. tit. 14, § 556*. We reverse and remand for further proceedings, including proceedings under *Section 556*.

II.

We address two preliminary jurisdictional issues: (1) whether federal subject-matter jurisdiction exists over the state-law claims against the non-diverse individual defendants even though no federal claim has been brought against them, and (2) whether this court has appellate jurisdiction over the individual defendants' interlocutory appeal by virtue of the collateral order doctrine.

**[*83]** A. Federal Subject-Matter Jurisdiction: The Supplemental Jurisdiction Doctrine

Although the parties have not questioned subject-matter jurisdiction over the claims at issue, "a court has an obligation to inquire sua sponte into its subject matter jurisdiction, and to proceed no further if such jurisdiction is wanting." *In re Recticel Foam Corp., 859 F.2d 1000, 1002 (1st Cir. 1988)*.

In her complaint, Godin asserts federal question jurisdiction pursuant **[**8]** to *28 U.S.C. § 1343 et seq.* as to the claims against the school system, and that there exists a common nucleus of operative facts between the state claims and her federal claims sufficient to establish supplemental jurisdiction under *28 U.S.C. § 1367*.

With certain exceptions not applicable here, a federal court may exercise supplemental jurisdiction over state-law claims "that are so related to claims in the action within [a court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." [4] *28 U.S.C. § 1367(a)*. While it might be questioned whether Godin's state-law claims that her job termination was caused by defamatory comments from the individual defendants arise out of the same transaction as her federal claim that the schools did not afford due process in reaching the termination decision, that is not the test. See *Global NAPs, Inc. v. Verizon New England Inc., 603 F.3d 71, 88 (1st Cir. 2010)* ("No Supreme Court case had ever established the same transaction-or-occurrence test as the boundary of Article III case-or-controversy requirement." (citing *United Mine Workers of America v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*)). **[**9]** We conclude it would not offend the Constitution to assert supplemental jurisdiction over Godin's state-law claims. [5] Accordingly, supplemental jurisdiction exists over Godin's state-law claims under *§ 1367(a)*.

4 *Section 1367(a)* further provides that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." *28 U.S.C. § 1367(a)*. That *§ 1367(a)* confers on federal courts jurisdiction over state-law claims against non-diverse parties--often termed "pendent party jurisdiction"--is particularly clear in light of that statute's origins. See 13D Wright & Miller, Federal Practice and Procedure § 3567, at 320-23 (3d ed. 2008) (describing *§ 1367*'s enactment as directly responsive to the Supreme Court's holding in *Finley v. United States, 490 U.S. 545, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989)*, that the Federal Tort Claims Act does not allow for the assertion of pendent jurisdiction over additional parties).

5 Because the issue is one of whether there is subject-matter jurisdiction based on the pleadings, we reach this conclusion having accepted as true the well-pleaded facts of Godin's complaint and assessed them in the light most favorable to her theory of liability. See *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 20 (1st Cir. 2009)*.

B. **[**10]** Appellate Jurisdiction: The Collateral Order Doctrine

Godin objects that we lack appellate jurisdiction, arguing that the order denying application of *Section 556* does not meet the requirements of the collateral order doctrine. "The burden of establishing jurisdiction rests with the party who asserts its existence," here the three individual defendants. *Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546, 551 (1st Cir. 2005)*.

The collateral order doctrine "allows courts to hear appeals from judgments that are not complete and final if they 'fall in that small class which finally determine claims of right separable from, **[*84]** and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 123 n.13 (1st Cir. 2003)* (quoting *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)*). For the collateral order doctrine to apply, the interlocutory order must present: (1) a conclusive decision, (2) distinct from the merits of the action, (3) on an important issue, (4) which would effectively be **[**11]** unreviewable on appeal from a final judgment. *Awuah v. Coverall N. Am. Inc., 585 F.3d 479, 480 (1st Cir. 2009)*; see also *Will v. Hallock, 546 U.S. 345, 349, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)*.

Three federal circuit decisions hold there is appellate jurisdiction over an order denying an anti-SLAPP motion to dismiss, *Hilton v. Hallmark Cards, 580 F.3d 874, 880 (9th Cir. 2009)*, *Henry, 566 F.3d at 181*, and *Batzel v. Smith, 333 F.3d 1018, 1024-26 (9th Cir. 2003)*, while one, also from the Ninth Circuit, holds to the contrary, see *Englert v. MacDonell, 551 F.3d 1099 (9th Cir. 2009)*.

The issue here is narrower and concerned only with the immediate appealability of an order that a state anti-SLAPP statute does not apply at all to federal court proceedings due to Federal *Rules 12* and *56*. We defer to another day resolution of the question of whether an order addressed to the merits of a ruling under an anti-SLAPP statute is immediately appealable.

We have appellate jurisdiction. First, the order conclusively decides that relief under Maine's *Section 556* is unavailable to the individual defendants. The relevant inquiry for collateral order doctrine purposes is whether the order is conclusive as to "the disputed question," not **[**12]** the action as a whole. *Will, 546 U.S. at 349* (quoting *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993)*).

Second, the issue of whether a defendant can utilize *Section 556* in federal court is distinct from the merits of Godin's action. The legal issue before us is not so intertwined with factual issues as to make it "highly unlikely to affect, or even be consequential to, anyone aside from the parties." *Lee-Barnes v. Puerto Ven Quarry Corp., 513 F.3d 20, 26 (1st Cir. 2008)*.

Third, this appeal raises an important issue of law because the issue raised is "weightier than the societal interests advanced by the ordinary operation of final judgment principles." [6] Id. (quoting *Gill v. Gulfstream Park Racing Ass'n*

*Inc., 399 F.3d 391, 399 (1st Cir. 2005))* (internal quotation marks omitted). The seminal Supreme Court case of Cohen v. Beneficial Industrial Loan Corporation itself involved an interlocutory appeal from a district court's determination that a state statute was not applicable to a state-law claim brought in federal court. [7] *337 U.S.* **[*85]** *at 546*. The Cohen court permitted interlocutory review, and in so doing, carved out the collateral order doctrine. Likewise, **[**13]** the parallel question of whether this state anti-SLAPP statute applies to a state-law claim brought in federal court qualifies as "too important to be denied review." Id.

6 Because of the important public interests at stake, *Will v. Hallock, 546 U.S. 345, 353, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)*, contrary to Godin's arguments, reinforces our conclusion.

7 The New Jersey statute at issue in Cohen made the plaintiff in a stockholder's derivative action "liable for all expenses, including attorney's fees, of the defense" and required "security for their payment as a condition of prosecuting the action." *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 543, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)*.

Finally, the order appealed from would be effectively unreviewable on appeal from a final judgment. It is relevant, but not conclusive, that the Maine Supreme Court's interpretation of *Section 556* has led it to permit interlocutory appeals of orders denying special motions to dismiss in its own courts, because "a failure to grant review of these decisions at this stage would impose additional litigation costs on defendants, the very harm the statute seeks to avoid, and would result in a loss of defendants' substantial rights." *Schelling v. Lindell, 2008 ME 59, 942 A.2d 1226, 1229-30 (Me. 2008)*; **[**14]** see also *Maietta Const., Inc. v. Wainwright, 2004 ME 53, 847 A.2d 1169, 1173 (Me. 2004)* (discussing purpose of *Section 556*).

That is relevant not because state law determines the availability of appellate review here--it does not--but rather because "lawmakers wanted to protect speakers from the trial itself rather than merely from liability." *Batzel, 333 F.3d at 1025*; see also *Englert, 551 F.3d at 1107* (whether state anti-SLAPP statute provides for interlocutory appeals is significant to whether interlocutory appeals should be permitted in federal courts). [8] There is a "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges." *Midland Asphalt Corp. v. United States, 489 U.S. 794, 801, 109 S. Ct. 1494, 103 L. Ed. 2d 879 (1989)* (quoting *United States v. Hollywood Motor Car Co., 458 U.S. 263, 269, 102 S. Ct. 3081, 73 L. Ed. 2d 754 (1982)*) (internal quotation marks omitted). We conclude that the order at issue here involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 499, 109 S. Ct. 1976, 104 L. Ed. 2d 548 (1989)* (quoting *Midland Asphalt Corp., 489 U.S. at 799*) (internal quotation mark omitted).

8 Godin's reliance on Englert is thus misplaced. **[**15]** There, in dismissing the defendants' consolidated interlocutory appeals on the basis that an order denying an anti-SLAPP motion could be effectively reviewed after final judgment, the Ninth Circuit found it important that Oregon's anti-SLAPP statute did not itself make interlocutory appeals available in state-court proceedings. *Englert v. MacDonell, 551 F.3d 1099, 1106-07 (9th Cir. 2009)*. *Englert*, with its heavy reliance on the view of Oregon law regarding the availability of interlocutory appeals, cuts against Godin's position given the availability of such appeals in this context under Maine law.

III.

The district court's order rests on a determination of law, which we review de novo. See *Levin v. Dalva Bros. Inc., 459 F.3d 68, 73 (1st Cir. 2006)*. It is often said that a federal court sitting in diversity jurisdiction [9] applies the state's substantive law and the federal procedural rules. See *Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)*; *Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*; *Hoyos v. Telecorp. Comm., Inc., 488 F.3d 1, 5 (1st Cir. 2007)*; *Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc., 145 F.3d 463, 478 (1st Cir. 1998)*. [10] At **[*86]** the same time, **[**16]** there is what we have called "an enduring conundrum--the line between substance and procedure." *United States v. Poland, 562 F.3d 35, 40 (1st Cir. 2009)*. What are matters of substance and what are matters of procedure is difficult to distinguish, and the two are not mutually exclusive categories. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1450, 176 L. Ed. 2d*

*311 (2010)* (Stevens, J., concurring).

9 Our analysis regarding this pendent state-law claim proceeds as it would were this a state-law claim brought in federal court by virtue of diversity jurisdiction. See *Doty v. Sewall, 908 F.2d 1053, 1063 (1st Cir. 1990)*.
10 We have held that a nominally procedural state rule authorizing an award of attorney's fees as a sanction for obstinate litigation is substantive for purposes of Erie analysis. *Servicios Comerciales Andinos, S.A. v. Gen. Elec. Del Caribe, Inc., 145 F.3d 463, 478 (1st Cir. 1998)*. State conflict of laws rules are also considered substantive. *Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4, 96 S. Ct. 167, 46 L. Ed. 2d 3 (1975)*.

Here, the issue falls into the special category concerning the relationship between the Federal Rules of Civil Procedure and a state statute that governs both procedure **[**17]** and substance in the state courts. The issue is whether *Federal Rules of Civil Procedure 12(b)(6)* and *56* preclude application of *Section 556* in federal court. This is not the classic Erie question. Compare *Erie R. Co., 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188*, with *Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)*.

Until the last several decades, federal courts addressing similar issues posed the relevant question, as articulated in *Walker v. Armco Steel Corp., 446 U.S. 740, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)*, as whether there was a "direct conflict" between a state law and a federal rule of civil procedure. *Id. at 752*. That is no longer the initial question. See *Stewart Org., Inc., v. Ricoh Corp., 487 U.S. 22, 26, 108 S. Ct. 2239, 101 L. Ed. 2d 22 & n.4 (1988)*. [11] In getting at the potential rub in the relationship between a Federal Rule of Procedure and the state law, courts now ask if the federal rule is "sufficiently broad to control the issue before the court." *Shady Grove, 130 S. Ct. at 1451* (Stevens, J., concurring) (quoting *Walker, 446 U.S. at 749-50*). If so, then the federal rule must be given effect despite the existence of competing state law so long as the rule complies with the Rules Enabling Act, *28 U.S.C. § 2072*. [12] Id.

11 This shift was described in our opinion in *Gil de Rebollo v. Miami Heat Ass'ns, Inc., 137 F.3d 56, 65 n.5 (1st Cir. 1998)*. **[**18]** One concern motivating the shift was the fact that it "would make no sense for the supremacy of federal law to wane precisely because there is no state law directly on point." *Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 n.4, 108 S. Ct. 2239, 101 L. Ed. 2d 22 (1988)*. Another concern may well be that the supremacy of the Federal Rules should not depend only on whether there is a direct conflict.
12 The caveat exists because "[t]he [Federal] Civil Rules cannot roam at will." *McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13, 21 (1st Cir. 1991)*. They must relate to practice or procedure, *28 U.S.C. § 2072(a)*, and may not "abridge, enlarge, or modify any substantive right," *28 U.S.C. § 2072(b)*.

We conclude that neither *Fed. R. Civ. P. 12(b)(6)* nor *Fed. R. Civ. P. 56*, on a straightforward reading of its language, was meant to control the particular issues under *Section 556* before the district court. Given this result we do not reach the next level question as to whether *Rules 12(b)(6)* and *56* comply with the Rules Enabling Act.

Our conclusion that *Rules 12* (particularly *Rule 12(b)(6)*) and *56* do not control *Section 556* proceedings does not end the analysis. If a federal rule is not so broad as to control the issues raised, **[**19]** a federal court might nonetheless decline to apply state law if so declining would better advance the dual aims of Erie: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna, 380 U.S. at 468*; see **[*87]** also *Shady Grove, 130 S. Ct. at 1437*; *Walker, 446 U.S. at 752-53*. As to this prong of the analysis, we hold that the dual purposes of *Erie* are best served by enforcement of *Section 556* in federal court.

A. *Federal Rules of Civil Procedure 12* and *56* are not Sufficiently Broad to Control *Section 556* Proceedings

The test of whether a federal rule is "sufficiently broad to control the issue before the court," *Walker, 446 U.S. at 749-50*, was most recently examined by the Supreme Court in *Shady Grove, 130 S. Ct. 1431, 176 L. Ed. 2d 311*. The question presented was whether a New York Rule, *N.Y.C.P.L.R. § 901(b)*, which prevents parties from bringing class action lawsuits on claims seeking the minimum measure of recovery imposed by statute, was preempted by *Fed. R. Civ. P. 23* in diversity cases. Writing for a five member majority, Justice Scalia concluded that, because *§ 901(b)* "attempts

to answer the same question" as *Rule 23*, namely, the categorical question of when a class **[**20]** action may be brought, *§ 901(b)* could not be applied to bar class actions in federal diversity cases, so long as *Rule 23* complies with the Rules Enabling Act. *Id. at 1437*.

Joined only by three other Justices, Justice Scalia went on to reason that *Rule 23*'s validity under the Rules Enabling Act depends entirely on whether it "really regulate[s] procedure," which he concluded it did. *Id. at 1442* (plurality opinion) (quoting *Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S. Ct. 422, 85 L. Ed. 479 (1941)*). This conclusion was reached without any inquiry into whether *§ 901(b)* was procedural or substantive, as in his view that question "makes no difference" for Rules Enabling Act purposes. *Id. at 1444*.

Justice Stevens joined the Court's narrow holding that *Rule 23* was sufficiently broad to preempt *§ 901(b)*, and that *Rule 23* complied with the Rules Enabling Act. *Id. at 1448* (Stevens, J., concurring). But in a concurring opinion, joined in relevant part by four other Justices, he held that whether a Federal Rule is valid under the Rules Enabling Act depends not on the Federal Rule alone, but also on the nature of the state rule it seeks to displace. *Id. at 1452-53*. The critical question is not "whether the state law at issue **[**21]** takes the form of what is traditionally described as substantive or procedural," but rather "whether the state law actually is part of a State's framework of substantive rights or remedies." *Id. at 1449*. Justice Stevens also noted that this inquiry under the Rules Enabling Act "may well bleed back" into the inquiry of whether a Federal Rule is sufficiently broad to control the issue before the court. *Id. at 1452*. This is so because a Federal Rule "cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." Id. To avoid such a result, the concurrence concludes, "[w]hen a federal rule appears to abridge, enlarge, or modify a substantive right, federal courts must consider whether the rule can reasonably be interpreted to avoid that impermissible result." Id.

The Court's fractured holding regarding when a Federal Rule is "sufficiently broad" to control an issue of state law is given content by other language used by the Court. The concepts of congruence, co-extensiveness, difference, and direct or indirect **[**22]** conflict continue to play a role in the analysis. Shady Grove uses the language of "potential conflict," "compatible" and "collision with state law." *Id. at 1440-42* (majority opinion). The plurality also characterizes the first step of the analysis **[*88]** as "determining whether the federal and state rules can be reconciled (because they answer different questions)". *Id. at 1445* (plurality opinion); see also *id. at 1451* (Stevens, J., concurring) (stating the first step of the analysis asks whether the federal rule leaves "no room for the operation of seemingly conflicting state law."). Our own case law also provides guidance. See *Morel v. Daimler Chrysler AG, 565 F.3d 20, 24 (1st Cir. 2009)* (asking whether the state rule is "inconsistent"); *Gil de Rebollo v. Miami Heat Ass'ns, Inc., 137 F.3d 56, 65 n.5 (1st Cir. 1998)* (asking about "potential conflict"). And we give the federal rules a literal reading. See *Walker, 446 U.S. at 750 n.9*.

We also take some guidance from history. *Fed. R. Civ. P. 23.1*, which governs shareholder derivative suits, is not so broad as to cover some state bond requirements for such suits. *Cohen, 337 U.S. at 555-57*. But the class action *Rule 23* is broad enough to preclude **[**23]** state prohibitions on certain class actions seeking penalties or statutory minimum damages. *Shady Grove, 130 S. Ct. at 1431*. It is also commonly accepted that in diversity cases state statutes of limitations apply. [13] *Guaranty Trust Co. v. York, 326 U.S. 99, 110, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945)*. And *Fed. R. Civ. P. 15(c)*, governing the relation back of complaints, displaces an inconsistent state rule. *Morel, 565 F.3d at 24*.

> 13 As a consequence, state rules that are integral to the state statute of limitations usually apply in federal court; federal rules are not so broad as to cover these state rules. See 17A J. Moore et al., *Moore's Federal Practice § 124.03[2][a]* (3d ed. 2009). For example, *Fed. R. Civ. P. 3*, which concerns commencing an action in federal court, is not broad enough to control state laws integral to the limitations issue. See *Walker v. Armco Steel Corp., 446 U.S. 740, 751-52, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)*.

Applying these principles to the case before us, we conclude that *Fed. R. Civ. P. 12(b)(6)*, [14] which governs motions to dismiss on the pleadings, and *Fed. R. Civ. P. 56*, which governs motions for summary judgment, are not so

broad as to cover the issues within the scope of *Section 556*. To use the language of Shady Grove, *Rules 12* and *56* do not **[**24]** "attempt[] to answer the same question," *Shady Grove, 130 S. Ct. at 1437*, nor do they "address the same subject," *id. at 1440*, as *Section 556*.

> 14 Our analysis with regard to *Rule 12(b)(6)* applies with equal force to *Rule 12(c)*, which Godin also asserts preempts *Section 556*. See *Fed. R. Civ. P. 12(c)*.

Federal *Rules 12(b)(6)* and *56* are addressed to different (but related) subject-matters. *Section 556* on its face is not addressed to either of these procedures, which are general federal procedures governing all categories of cases. *Section 556* is only addressed to special procedures for state claims based on a defendant's petitioning activity. In contrast to the state statute in *Shady Grove*, *Section 556* does not seek to displace the Federal Rules or have *Rules 12(b)(6)* and *56* cease to function. Cf. *Morel, 565 F.3d at 24*. In addition, *Rules 12(b)(6)* and *56* do not purport to apply only to suits challenging the defendants' exercise of their constitutional petitioning rights. Maine itself has general procedural rules which are the equivalents of *Fed. R. Civ. P. 12(b)(6)* and *56*. See Me. R. Civ. P. 12; Me. R. Civ. P. 56. That fact further supports the view that Maine has not created a substitute **[**25]** to the Federal Rules, but instead created a supplemental and substantive rule to provide added protections, beyond those in *Rules 12* and *56*, to defendants who are named as parties because of constitutional petitioning activities.

**[*89]** *Rule 12(b)(6)* serves to provide a mechanism to test the sufficiency of the complaint. See *Iqbal v. Ashcroft, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. *Section 556*, by contrast, provides a mechanism for a defendant to move to dismiss a claim on an entirely different basis: that the claims in question rest on the defendant's protected petitioning conduct and that the plaintiff cannot meet the special rules Maine has created to protect such petitioning activity against lawsuits.

The federal summary judgment rule, *Rule 56*, creates a process for parties to secure judgment before trial on the basis that there are no disputed material issues of fact, and as a matter of law, one party is entitled to judgment. Inherent in *Rule 56* is that a fact-finder's evaluation of material factual disputes is not required. But *Section 556* serves the entirely distinct function of protecting those specific defendants that have been targeted with litigation on the basis of their protected speech. **[**26]** When applicable, *Section 556* requires a court to consider whether the defendant's conduct had a reasonable basis in fact or law, and whether that conduct caused actual injury. *Fed. R. Civ. P. 56* cannot be said to control those issues.

*Section 556* has both substantive and procedural aspects. One of the substantive aspects of *Section 556* shifts the burden to plaintiff to defeat the special motion. *Section 556* also determines the scope of plaintiff's burden, requiring plaintiff to demonstrate that the defendant's activity "(1) was without 'reasonable factual support,' and (2) was without an 'arguable basis in law.'" *Schelling, 942 A.2d at 1229* (quoting *Me. Rev. Stat. tit. 14, § 556*). Further, *Section 556* substantively alters the type of harm actionable--that is, plaintiff must show the defendant's conduct "resulted in 'actual injury' to the plaintiff." Id. (quoting *Me. Rev. Stat. tit. 14, § 556*). [15]

> 15 In addition, *Section 556* allows courts to award attorney's fees and costs to a defendant that successfully brings a special motion to dismiss, a statutory element we have previously determined to be substantive. See *Servicios Comerciales Andinos, S.A., 145 F.3d at 478*.

Neither *Fed. R. Civ. P. 12(b)(6)* **[**27]** nor *Fed. R. Civ. P. 56* determines which party bears the burden of proof on a state-law created cause of action. See, e.g., *Coll v. PB Diagnostic Syst., Inc., 50 F.3d 1115, 1121 (1st Cir. 1995)*. And it is long settled that the allocation of burden of proof is substantive in nature and controlled by state law. *Palmer v. Hoffman, 318 U.S. 109, 117, 63 S. Ct. 477, 87 L. Ed. 645 (1943)*; *Am. Title Ins. Co. v. E. W. Fin. Corp., 959 F.2d 345, 348 (1st Cir. 1992)*.

Further, *Section 556* provides substantive legal defenses to defendants and alters what plaintiffs must prove to prevail. It is not the province of either *Rule 12* or *Rule 56* to supply substantive defenses or the elements of plaintiffs'

proof to causes of action, either state or federal. [16]

16 The similarities between *Section 556* and *Rules 12* and *56* as mechanisms to efficiently dispose with meritless claims before trial occurs does not resolve the issue. Such an abstracted framing of the breadth of the Federal Rules is inappropriate. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1441 n.7, 176 L. Ed. 2d 311 (2010)* (embracing the suggestion that Federal Rules should be read "to **[**28]** avoid 'substantial variations [in outcomes] between state and federal litigation'") (alteration in original) (quoting *Semtek Int'l Inc., v. Lockheed Martin Corp., 531 U.S. 497, 504, 121 S. Ct. 1021, 149 L. Ed. 2d 32 (2001)).*

Because *Section 556* is "so intertwined with a state right or remedy that it functions to define the scope of the state-created right," it cannot be displaced by *Rule 12(b)(6)* or *Rule 56*. *Shady Grove, 130 S. Ct. at 1452* (Stevens, J., concurring). **[*90]** Further, if *Rules 12(b)(6)* and *56* were thought to preempt application of all of *Section 556*, a serious question might be raised under the Rules Enabling Act. Id. In light of our conclusion that *Section 556* is not displaced, we need not reach this issue.

Given that neither *Fed. R. Civ. P. 12(b)(6)* nor *Fed. R. Civ. P. 56* is so broad as to encompass the special *Section 556* proceedings, we might go no further. We do acknowledge the district court's concern about some differences in the mechanics, particularly as to the record on which the motion is evaluated. Whether the procedures outlined in *Section 556* will in fact depart from those of *Rule 12* and *Rule 56* will depend on the particulars in a given case of the claim and defense. Some *Section 556* motions, like **[**29]** *Rule 12(b)(6)* motions, [17] will be resolved on the pleadings. In other cases, *Section 556* will permit courts to look beyond the pleadings to affidavits and materials of record, as *Rule 56* does. In this way, some *Section 556* motions, depending on the particulars of a case, will be resolved just as summary judgment motions under *Fed. R. Civ. P. 56* are. [18]

17 Even in assessing 12(b)(6) motions, the scope of materials considered depends somewhat on the particular case. For example, courts can take account of materials outside the pleadings if they are undisputed matters of public record. See *In re Colonial Mortg. Bankers Corp., 324 F.3d 12, 19 (1st Cir. 2003)*.

18 There may be a concern that *Section 556*, to the extent it might be read to allow, contrary to *Rule 56*, a judge to resolve a disputed material issue of fact, would then preclude a party from exercising its Seventh Amendment rights to trial by jury on disputed issues of material fact. Cf. *Pease v. Rathbun-Jones Eng'g Co., 243 U.S. 273, 278, 37 S. Ct. 283, 61 L. Ed. 715 (1917)* (summary judgment does not violate *Seventh Amendment*). But *Section 556* is a relatively young statute, not much construed by the state courts, and there is no reason to think the state courts would construe *Section 556* so as to be incompatible with the *Seventh Amendment*. Although the *Seventh Amendment* has not been incorporated against the states, *Curtis v. Loether, 415 U.S. 189, 192 n.6, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974)*, Maine's constitution itself provides that "[i]n all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced." *Me. Const. art. I, § 20*. This provision has "historically been construed as guaranteeing the right to a trial by jury in civil cases unless it is demonstrated that such a right did not exist at the time of the adoption of [Maine's] Constitution." *Smith v. Hawthorne, 2006 ME 19, 892 A.2d 433, 444 (Me. 2006)*. We do note that the heightened pleading standard under the Private Securities Litigation Reform Act (PSLRA) does not violate the *Seventh Amendment*. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 327 & n.8, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*.

Godin emphasizes that *Section 556* has the potential in a particular case to give the individual defendants a dispositive ruling without affording discovery, thus bringing *Section 556* in conflict with *Fed. R. Civ. P. 56*. Cf. *Metabolife, 264 F.3d at 845-47*. Godin has not shown any actual conflict. While *Section 556* provides that discovery proceedings are stayed upon the filing of a special motion to dismiss, the statute also provides that a court may, upon good cause shown, order that specific discovery be conducted. *Me. Rev. Stat. tit. 14, § 556*. **[**30]** The Maine statute, in imposing on the opponent of the motion the burden of justifying discovery, is consistent with the allocation of burdens under *Rule 56(d)*, formerly *Rule 56(f)*. [19] If a federal court would allow discovery under *Fed. R. Civ. P. 56(d)* **[*91]** then, in our view, that would constitute good cause under the Maine statute.

19 *Fed. R. Civ. P. 56* was amended, effective December 1, 2010. The substance of the rule has not materially changed. We find it just and practicable to cite the new rule. See *Silva v. Witschen, 19 F.3d 725, 727-29 (1st Cir. 1994)*; *Freund v. Fleetwood Enters., Inc., 956 F.2d 354, 363 (1st Cir. 1992)*.

The limiting effect that *Section 556* has on discovery is not materially different from the effect of *Rule 12* proceedings and, in some instances, *Rule 56* proceedings. Neither *Rule 12* nor *Rule 56 of the federal rules of procedure* purport to be so broad as to preclude additional mechanisms meant to curtail rights-dampening litigation through the modification of pleading standards. The Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, is a federal version of such an additional mechanism to the Federal Rules, meant to apply to **[**31]** a discrete category of cases. "Designed to curb perceived abuses of the *§ 10(b)* private action," the PSLRA created a higher standard for pleading scienter in any *§ 10(b)* claim. [20] *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 320, 321, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*. We recognize that the fact that Congress may create special procedures in addition to those under the Federal Rules does not itself mean that the Federal Rules would not displace a similar state-law special procedure. See *Shady Grove, 130 S. Ct. at 1438*. Still, the existence of the PSLRA provides some support to our conclusion that Congress, in approving *Rules 12* and *56*, did not intend to preclude special rules designed to make it more difficult to bring certain types of actions where state law defines the cause of action.

20 "Under the PSLRA's heightened pleading instructions, any private securities complaint alleging that the defendant made a false or misleading statement must: (1) 'specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading' . . . and (2) 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" **[**32]** *Tellabs, Inc., 551 U.S. at 321* (citing *15 U.S.C. § 78u-4(b)*).

In sum, "there is no indication that *Rules . . . 12* and *56* were intended to 'occupy the field' with respect to pretrial procedures aimed at weeding out meritless claims." *Newsham, 190 F.3d at 972*; see also *Henry, 566 F.3d at 169-70* (enforcing Louisiana's anti-SLAPP statute in federal court). Rather, *Rules 12* and *56* "can exist side by side" with *Section 556*, "each controlling its own intended sphere of coverage without conflict." *Newsham, 190 F.3d at 972* (quoting *Walker, 446 U.S. at 752*) (internal quotation marks omitted).

B. Declining to Apply *Section 556* in Federal Court Would Disserve the Dual Aims of Erie

Here, application of *Section 556* would best serve the "'twin aims of the *Erie* rule: discouragement of forum shopping and inequitable administration of the laws.'" *Commercial Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 773* (quoting *Stewart, 487 U.S. at 27 n.6 (1988)*). "If application of federal law would disserve these two policies, state law applies." Id.

Plainly, *Section 556* substantively alters Maine-law claims that are based on a defendant's protected petitioning activity by shifting the burden to the plaintiff **[**33]** and altering the showing the plaintiff must make. *Me. Rev. Stat. tit. 14, § 556*. *Section 556* also allows courts to award attorney's fees to prevailing defendants, and alters the traditional common-law rule that, in libel cases, a plaintiff need not demonstrate specific damages to recover on a claim, as alleging "damages per se" does not satisfy *Section 556*'s actual injury standard. See *Schelling, 942 A.2d at 1232* (citing *Restatement (Second) of Torts § 569, cmt. b* (1977)).

**[*92]** Declining to apply *Section 556* in federal court would thus result in an inequitable administration of justice between a defense asserted in state court and the same defense asserted in federal court. See *Commercial Union Ins. Co., 41 F.3d at 773*. Likewise, were *Section 556* not to apply in federal court, the incentives for forum shopping would be strong: electing to bring state-law claims in federal as opposed to state court would allow a plaintiff to avoid *Section 556*'s burden-shifting framework, rely upon the common law's per se damages rule, and circumvent any liability for a defendant's attorney's fees or costs.

IV.

Because neither *Fed. R. Civ. P. 12(b)(6)* nor *Fed. R. Civ. P. 56* is sufficiently broad to control the **[**34]** issues raised by the individual defendants' *Section 556* special motion, we conclude the district court erred in denying the motion on the basis that *Section 556* was displaced. Holding to the contrary would deprive the individual defendants of *Section 556* protection solely on account of the fact that they are joined as defendants in this litigation with Machiasport and the Union, against whom federal claims are raised. Such an outcome would directly contravene *Erie*'s aims.

We reverse the district court's order, and remand so that the district court may consider the merits of the individual defendants' special motion to dismiss under *Section 556* in the first instance. No costs are awarded

# EXHIBIT F

# Exhibit F

This chart lists Plaintiff's allegations, then indicates which of Gawker's arguments applies to that allegation. The key at the bottom of each page explains the abbreviations.

| Plaintiff's Allegation (emphases in original) | Simply Not in Jezebel.com Post | Not Defamation Per Se | Unspecified Statement | R | OC | Section 230 Immunity | O | F | Paragraph | The Post actually states… |
|---|---|---|---|---|---|---|---|---|---|---|
| Defendants republished or disseminated the same defamatory article from Abovethelaw.com without explaining that the article contained false statements. Defendants falsely stated that Abovethelaw.com was "sloppy". Defendant, Abovethelaw.com, intentionally disseminated false statements regarding Mr. Huon. | X | X | X | X | X | X | | | 61 | If Meanith Huon gets his way, blogger sloppiness may cost ATL $50 million. |
| Defendants, Jezebel.com, Gawker Media a/k/a Gawker.com, Nick Denton, Gabby Darbyshire, Irin Carmon, disseminated and published the defamatory statements and comments worldwide via the Internet. | | X | X | | | | | | 48 | |
| Defendants provided a link to the Abovethelaw.com article containing defamatory statements regarding Mr. Huon As of July 10, 2011, the link continues to remain even though Abovethelaw.com has removed its defamatory article from the Abovethelaw.com website. | | X | X | | | X | | | 53 | |
| On information and belief, John Doe No. 101 a/k/a Andpreciouslittleofthat, posted and edited a post to read: "Ed: Two seconds of proper Googling will get you to Mr. Huon's firm webpage, complete with his phone number, should you want to call and offer any critiques. | X | X | | | X | X | | | 56 | |
| Defendants continued to make false statements insisting that Mr. Huon was a serial rapist and that "**The lesson learned: Google only takes you so far**." | | X | | X | X | | X | | 62 | "And this, people, is why God invented Google," wrote Mystal in the original post, linking to articles that in fact described the same case. The lesson learned: Google only takes you so far. |
| Defendants engaged in retaliatory and vigilante justice by cyberstalking and cyberbullying Mr. Huon, posting his booking photo on its website and encouraging readers to Google Mr. Huon's telephone number and address and to contact him. | X | X | X | | | | | | 64 | |
| Defendants knew that Abovethelaw.com had published false statements regarding Mr. Huon. Nevertheless, Defendants rushed to judge and convict Mr. Huon as a rapist within days of this lawsuit being filed against Abovethelaw.com. | X | | X | | | | | | 68 | |
| In fact, Defendants engaged in the same reckless or intentional misconduct as Abovethelaw.com. Defendants intentionally misrepresented the news stories about the same woman in different incidents. Defendants writes that " . . . blogger Elie Mystal mistakenly believes that news accounts of the **same incident** are different incidents that should have tipped the woman off that Huon was a serial offender." (Emphasis supplied.) However, the news stories were of **different allegations–not the same incident--** made by the same woman in 2008 and 2009. Defendants either never read the news stories or intentionally misrepresented the news stories. | | X | | X | X | X | X | | 69 | His beef with Above The Law stems from a roundup post entitled "Rape Potpurri," in which blogger Elie Mystal **mistakenly** believes that news accounts of the same incident are different incidents that should have tipped the woman off that Huon was a serial offender. (emphasis added) |
| Multiple Commenter Statements | X | | | | | X | X | | 71 (a)-(l) | |

F = Fair Report, O = Opinion/Rhetorical Hyperbole, R = Not tending to harm Plaintiff's reputation, OC = Not of and concerning the Plaintiff

# Exhibit F

| Plaintiff's Allegation (emphases in original) | Simply Not in Jezebel.com Post | Not Defamation Per Se | Unspecified Statement | R | OC | Section 230 Immunity | O | F | Paragraph | The Post actually states… |
|---|---|---|---|---|---|---|---|---|---|---|
| Omitted that "Mr. Huon sued Abovethelaw.com for publishing false statements, including allegations that he invented a game to meet women." | X | | | | | | | | 74 (a) | |
| Omitted that "Abovethelaw.com intentionally published false statements. It was not “blogger sloppiness”." | X | | | | | | | | 74 (b) | |
| Omitted that "The complainant that is the subject of all the news articles is the same woman." | X | | | | | | | | 74 (c) | |
| Omitted that "The jury was not allowed to consider the consent defense and, thus, the jury found that no sexual contact took place. The trial judge had barred the consent defense." | X | | | | | | | | 74 (d) | |
| Omitted that "The complainant sustained minor injuries from walking or running in a cornfield." | X | | | | | | | | 74 (e) | |
| Omitted that "There was no evidence of a Craigslist ad for a job for promotional modeling. There was no evidence that Mr. Huon represented himself as a talent scout." | X | | | | | | | | 74 (f) | |
| Omitted that "The video evidence at trial showed Mr. Huon, dressed in shorts, on a Sunday afternoon with the complainant, in a bar." | X | | | | | | | | 74 (g) | |
| Omitted that "There was no DNA evidence of semen and the complainant never went to the hospital." | X | | | | | | | | 74 (h) | |
| Omitted that "The police never interviewed witnesses at the scene who testified at trial that the complainant gave different versions of the alleged incident." | X | | | | | | | | 74 (i) | |
| Omitted that "The police asked the complainant to call Mr. Huon to arrange a private meeting and to ask for money." | X | | | | | | | | 74 (j) | |
| Omitted that "The complainant had gone drinking with Mr. Huon at several bars for hours." | X | | | | | | | | 74 (k) | |
| Omitted that "There was no evidence presented that the complainant jumped out of a moving car." | X | | | | | | | | 74 (l) | |
| Omitted that "There was no evidence of force presented at trial. The police report stated that complainant alleged that Mr. Huon raised his voice but that Mr. Huon never threatened the complainant." | X | | | | | | | | 74 (m) | |
| Omitted that "The photograph of the complainant showed no injuries (besides from her walking in a cornfield barefoot) and showed her clothes to be completely intact with no tears." | X | | | | | | | | 74 (n) | |
| Multiple Allegations of False Statements | | X | | | | X | X | X | 75 (a)-(g) | |

F = Fair Report, O = Opinion/Rhetorical Hyperbole, R = Not tending to harm Plaintiff's reputation, OC = Not of and concerning the Plaintiff

# Exhibit F

**Where applicable, the chart cites to pages of the transcript of Plaintiff's trial that demonstrate the applicability of the fair report privilege.**

| Eleven Sentence Item on Jezebel.com | Source | Opinion | Fair Report | Section 230 | Non-Defamatory |
|---|---|---|---|---|---|
| A Chicago man who was acquitted on a sexual assault charge is suing the legal blog Above The Law for implying that he's a serial rapist. | Instant Lawsuit | | X | | X |
| If Meanith Huon gets his way, blogger sloppiness may cost ATL $50 million. | Instant Lawsuit | X | | | X |
| Huon, a lawyer, was initially charged with two counts of sexual assault, two counts of sexual abuse, and one count of unlawful restraint. | Exhibit B | | X | | X |
| A woman had jumped out of his car, ran through a cornfield barefoot, and knocked on a random person's door saying he had forced her into sexual activity. | Trans. 169-171, 177, 184 | | X | | X |
| She later said she believed she was spending time with him for a job opportunity related to alcohol promotions, until he allegedly yelled at her to perform oral sex. | Trans. 195-227 | | X | | X |
| Huon's version was that it was a consensual encounter, and partly on the strength of a bartender's testimony that the woman had been drinking and asked where to go to have fun, the jury believed him. | Trans. 150-157 | | X | | X |
| Huon is also suing local law enforcement authorities in Madison County, Illinois for prosecutorial misconduct. | Northern District of Illinois, Eastern Division: Case: 1:11-cv-0305 | | X | | X |
| His beef with Above The Law stems from a roundup post entitled "Rape Potpurri," in which blogger Elie Mystal mistakenly believes that news accounts of the same incident are different incidents that should have tipped the woman off that Huon was a serial offender. | Instant Lawsuit | X | X | | X |
| "The content of the article were [sic] defamatory in that it incorrectly and recklessly portrayed Mr. Huon as a serial rapist by treating the same complaining witness as three different women," says the complaint, according to *Forbes*. | Forbes Article (Exhibit G) | | | X | X |
| "And this, people, is why God invented Google," wrote Mystal in the original post, linking to articles that in fact described the same case. | Above the Law | | | X | X |
| The lesson learned: Google only takes you so far. | N/A | X | | | X |

# EXHIBIT G

**Jeff Bercovici**, Forbes Staff
I cover media, technology and the intersection of the two.
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5/11/2011 @ 1:44PM | 4,067 views

# Lawyer Sues Legal Blog for $50M Over Rape Story

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Getting publicly accused of committing rape is bad enough. Getting publicly accused of committing multiple rapes is considerably worse. Is the difference between the first and the second worth $50 million?

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MEANITH HUON, Plaintiff,
v. CIVIL ACTION NO.
JURY TRIAL DEMA

ABOVETHELAW.COM,
DAVID LAT,
ELIE MYSTAL,
BREAKINGMEDIA.COM,
JOHN LERNER,
DAVID MINKIN,
BREAKING MEDIA,
JOHN DOES 1 to 100, Defendants,

COMPLAINT



That's how much Chicago attorney Meanith Huon is seeking in damages from Above The Law, a legal-industry gossip blog, and its parent company, Breaking Media. Huon filed suit on May 6 in a federal district court in Illinois, claiming that an erroneous blog post has caused him emotional distress, destroyed his reputation and hurt his ability to find employment.

At issue is a story published May 6, 2010 — the suit was filed exactly one year later to fall within the statute of limitations — titled "Rape Potpourri." The author, Elie Mystal, linked to a story about Huon, who was arrested and charged with sexual assault and unlawful restraint after a woman accused him of picking her up under false pretenses — he allegedly told her he was recruiting models to do alcohol promotions — and groping her in a moving car.

"And this, people, is why God invented Google," wrote Mystal. "Had the victim Googled Huon, she would have found stories like this." Mystal then linked to two other articles, one about Huon being charged with sexual assault and another about him being charged with cyber-stalking.

What Mystal failed to make clear — apparently because he didn't realize it — was that all three articles were about the same incident and victim. (The victim alleged that Huon harassed her over the internet after the initial assault.) "The content of the article were [sic] defamatory in that it incorrectly and recklessly portrayed Mr. Huon as a serial rapist by treating the same complaining witness as three different women," reads Huon's filing. The disputed post hasn't been corrected, but it does contain an update noting that Huon was



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Forbes Staff
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I've been covering the business of news, information and entertainment in one form or another for more than 10 years. Most recently, I was part of the Great Premium Content Experiment at AOL as a media columnist for the business website DailyFinance. Before that, I created a media blog for Conde Nast Portfolio (R.I.P.). Earlier, I was part of the re-

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acquitted of the sexual assault charges.

In addition to $50 million in punitive damages or "an amount to be determined at trial," Huon, who is representing himself in the case, is seeking control of Above The Law's web domain. In a separate suit, Huon is suing Madison County and the police officers involved in the case for $130 million.

Huon and Mystal both declined to comment, as did Above The Law managing editor David Lat, who is also named as a defendant.

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