No. 5-08-0178

In the
Appellate Court of Illinois
Fifth Judicial District

REBECCA BROWN, ROBERT FURKIN, and JAMES FURKIN,

Defendants-Appellants,

v.

LOUIS I. MUND,

Plaintiff-Appellee.

Appeal from the Circuit Court of St. Clair County, Illinois,
No. 05-L-83
Twentieth Judicial Circuit, the Honorable Lloyd A. Cueto

BRIEF OF APPELLANTS REBECCA BROWN, ROBERT FURKIN, AND JAMES FURKIN

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

This appeal is based upon the trial court's denial of two motions to dismiss several of the claims brought by Louis I. Mund in his 2005 lawsuit against Rebecca Brown, Robert Furkin, and James Furkin. The two motions denied by the trial court were brought pursuant to the Illinois Citizen Participation Act (the "Act"), 735 ILCS 110/1, *et seq.*, which became law in August 2007. The trial court heard the motions on February 25, 2008 and denied them in an Order dated March 14, 2008.

The questions involved include: (1) whether the Act applies retroactively to motions to dismiss filed in response to claims predating the Act itself; and (2) whether the trial court erred when it failed to dismiss claims of abuse of process, malicious prosecution, defamation, and intentional infliction of emotional distress.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE ILLINOIS CITIZEN PARTICIPATION ACT APPLIES RETROACTIVELY.

II. WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT, PURSUANT TO THE ILLINOIS CITIZEN PARTICIPATION ACT, REBECCA BROWN AND ROBERT FURKIN'S MOTION TO DISMISS CLAIMS OF MALICIOUS PROSECUTION, ABUSE OF PROCESS, AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

III. WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT, PURSUANT TO THE ILLINOIS CITIZEN PARTICIPATION ACT, ROBERT FURKIN AND JAMES FURKIN'S MOTION TO DISMISS CLAIMS OF DEFAMATION AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

STATUTES INVOLVED

735 ILCS 110/5

Sec. 5. Public policy.

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, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. 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.

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.

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.

(Source: P.A. 95-506, eff. 8-28-07.)

735 ILCS 110/15

Sec. 15. 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.

(Source: P.A. 95-506, eff. 8-28-07.)

735 ILCS 110/20

Sec. 20. Motion procedure and standards.

(a) On the filing of any motion as described in Section 15, a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent. An appellate court shall expedite any appeal or other writ, whether interlocutory or not, from a trial court order denying that motion or from a trial court's failure to rule on that motion within 90 days after that trial court order or failure to rule.

(b) Discovery shall be suspended pending a decision on the motion. However, discovery may be taken, upon leave of court for good cause shown, on the issue of whether the movants acts are not immunized from, or are not in furtherance of acts immunized from, liability by this Act.

(c) The court shall grant the motion and dismiss the judicial claim unless the court finds that the responding 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.

(Source: P.A. 95-506, eff. 8-28-07.)

5 ILCS 70/4

Sec. 4. No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.

STATEMENT OF FACTS

This case involves several claims filed by Plaintiff-Appellee Louis I. Mund ("Mr. Mund") against various Defendants, now Appellants, namely Rebecca Brown, Robert Furkin, and James Furkin. Mr. Mund's claims against Rebecca Brown and Robert Furkin include malicious prosecution, abuse of process, and intentional infliction of emotional distress. [C793-C889] This first set of claims arose from the fact of judicial proceedings wherein Ms. Brown and Robert Furkin, at times jointly and at others individually, challenged as fraudulent Mr. Mund's acquisition of certain parcels of land in which they each asserted respective interests. With respect to those claims, Mr. Mund prays for $250,000 from Rebecca Brown and $150,000 from Robert Furkin. According to his Second Amended Complaint, these damage figures derive from Rebecca Brown and Robert Furkin's allegedly "ulterior purpose for the use of the court process of harassing [Mr. Mund], attempting to coerce a settlement … intentionally causing severe emotional distress, and causing the repeated expenditure of money to litigate the same." [C797-C878]

Mr. Mund also asserts against Robert Furkin and James Furkin claims of defamation and intentional infliction of emotional distress. [C878-C887] This second set of claims arises from a set of emails wherein James Furkin communicated to an attorney, Mark Scoggins, certain facts and inexpert legal opinions in an effort to obtain legal advice and/or representation regarding Mr. Mund's allegedly fraudulent, illegal, and unconscionable acquisition of land from Robert Furkin, James Furkin's brother. The emails were first published in compliance with an October 22, 2004 Order from the U. S. District Court for the Eastern District of Missouri, in the case styled *Furkin v. Mund*, 04-

CV-1181-RWS. In that Order, U. S. District Judge Rodney W. Sippel ordered Robert Furkin to put into evidence any proof of a prior attorney-client relationship between Mr. Scoggins and the Furkins. On October 26, 2004, Robert Furkin, by and through his attorney, complied with Judge Sippel's Order, electronically attaching the allegedly defamatory emails to a motion to disqualify Mr. Scoggins' law firm from representing a party adverse to Robert Furkin's interests in the district court action. [A-6]

With respect to this second set of claims, Mr. Mund prays for $100,000 from Robert Furkin and $100,000 from James Furkin. According to his Second Amended Complaint, these damage figures represent special damage done to Mr. Mund's "personal and business reputation" and other unspecified special damages arising from Mr. Mund's severe emotional distress. [C879-C887]

On February 1, 2008, Rebecca Brown and Robert Furkin submitted a motion to dismiss, pursuant to the Act, directed at claims of abuse of process, malicious prosecution, and intentional infliction of emotional distress. [C1744-C1762] On February 4, 2008, Robert Furkin and James Furkin submitted a motion to dismiss, pursuant to the Act, directed at claims of defamation and intentional infliction of emotional distress. [C1763-C1771] Mr. Mund neither provided a written response to Robert Furkin and James Furkin's February 4th motion nor did he produce affidavits, exhibits, or any other evidence in response to that motion.

On February 25, 2008, the trial court heard oral arguments on the two motions from attorneys representing all the parties. [R1-R17] On March 14, 2008, the trial court denied the two motions. [C1814]

On April 8, 2008, Rebecca Brown, Robert Furkin, and James Furkin filed their Notice of Appeal with the trial court. [C1806-C1807]

JURISDICTIONAL STATEMENT

This appeal is brought pursuant to the provisions of the Illinois Citizen Participation Act (the "Act"), 735 ILCS 110/1 *et seq.*, which sets forth the procedure for filing a motion to dispose of a claim 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 to petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15 (2007). The Act holds that any appellate court "shall expedite any appeal or other writ, whether interlocutory or not, from a trial court order denying that motion[.]" 735 ILCS 110/20(a) (2007).

STANDARD OF REVIEW

This is a matter of statutory interpretation. The construction of a statute is a question of law, which is reviewed *de novo*. In re Estate of Dierkes, 191 Ill.2d 326, 330 (Ill.2000); People v. Blanks, 361 Ill.App.3d 400, 407 (Ill.App.2005) (applying the *de novo* standard of review in determining the retroactive application of a statute).

ARGUMENT

A. The Illinois Citizen Participation Act Applies to Motions to Dispose of Claims Directed at Any Act or Acts In Furtherance of the Moving Party's Right to Access the Courts and File Unsuccessful Lawsuits.

1. The United States Supreme Court, as well as Illinois courts, has recognized that the constitutional right to petition encompasses the right to file unsuccessful lawsuits.

The constitutional right to petition exists in the Bill of Rights and, by way of the fourteenth amendment, in the State of Illinois. BE & K Const. Co. v. N.L.R.B., 536 U.S. 516, 524 (2002) ("The First Amendment provides, in relevant part, that Congress shall make no law abridging the right of the people to petition the Government for a redress of grievances. We have recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights[.]"); Williams v. Illinois State Scholarship Com'n, 139 Ill.2d 24, 44 (Ill.1990) (recognizing a right of access to the courts under the first, fifth, and fourteenth amendments).

It is a long-standing and uncontroversial proposition in Illinois and beyond that the right to petition encompasses a right to file lawsuits – even if they are ultimately unsuccessful. See BE & K Const., 536 U.S. at 532 ("Like successful suits, unsuccessful suits allow the public airing of disputed facts and raise matters of public concern."); Wiemer v. Havana Nat. Bank, 67 Ill.App.3d 882, 887 (Ill.App.1978) ("The law of Illinois does not impose tort liability upon those who seek to litigate their rights, even when groundless lawsuits are filed, unless the requirements for malicious prosecution or abuse of process are met."); Schwartz v. Schwartz, 366 Ill. 247, 250 (Ill.1937) ("[C]ourts should be open to litigants for the settlement of their rights without fear of prosecution for calling upon the courts to determine such rights.").

2. When construed according to Illinois judicial principles of statutory construction, the Illinois Citizen Participation Act reveals one of its goals of fortifying pre-existing protections over the right to file unsuccessful lawsuits.

In construing a statute, a court must ascertain and give effect to the legislature's intent in enacting the statute. Kirwan v. Welch, 133 Ill.2d 163, 165 (Ill.1989). Legislative intent is ascertained primarily from a consideration of the statute's language. Harvey Firemen's Association v. City of Harvey, 75 Ill.2d 358, 363 (Ill.1979). Where the language is clear and unambiguous it will be given effect without resorting to other aids for construction. People v. Boykin, 94 Ill.2d 138, 141 (Ill.1983); People v. Robinson, 89 Ill.2d 469, 475-76 (Ill.1982). A court should never depart from the plain language of a statute by reading into the statute exceptions, limitations, or conditions which conflict with the clearly expressed legislative intent. Harvey, 75 Ill.2d at 363.

The legislative intent of the Illinois Citizen Participation Act is set forth in detail within Section 5 of its provisions, and is declared as:

> 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 attorney's fees and costs to prevailing movants.

735 ILCS 110/5 (2007).

The applicability of the Act is set forth in Section 15 of its provisions, and is declared as:

> 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 (2007).

When the legislative intent and the applicability sections are read in conjunction, it becomes obvious that the Act attempts to balance the sometimes conflicting rights of persons filing lawsuits and persons exercising the right to petition. As to the latter persons, the Act indicates that it intends to protect those rights to the "maximum extent permitted by law." 735 ILCS 110/5 (2007). Subsequently, in the applicability section, the Act defines the boundaries and conditions of that protection pursuant to the same standard that has been applied in Illinois courts. More specifically, the Act announces protection over these rights when they are exercised for "procuring *favorable government action*, result, or outcome." 735 ILCS 110/15 (2007) (emphasis added). Unsurprisingly, the Act's delineation of the parameters and conditions placed on such rights corresponds closely with the parameters and conditions already afforded those rights under Illinois common law. See King v. Levin, 184 Ill.App.3d 557, 567 (Ill.App.1989) ("[T]o defeat [a person's] first amendment privilege, plaintiff must demonstrate that defendant did not act for the purpose of seeking *favorable governmental action*[.]") (emphasis added); Philip I. Mappa Interests, Ltd. v. Kendle, 196 Ill.App.3d 703, 709 (Ill.App.1990) ("Efforts to seek redress through the judicial process are protected by the first amendment right to petition the government for redress of grievances."); Wiemer, 67 Ill.App.3d at 887.

The Act's language is clear and unambiguous, and happens to state word-for-word the standard of protection previously established in Illinois. As such, no further aids of construction are needed in concluding that the Act intended to extend protections to the right to petition, which includes the right to file lawsuits in pursuit of favorable government action. See In re Jaime P., 223 Ill.2d 526, 532 (Ill.2006) (stating that the reviewing court's "inquiry must always begin with the language of the statute itself, which is the surest and most reliable indicator of the legislature's intent.").

B. The Trial Court Erred in Failing to Apply the Provisions of the Illinois Citizen Participation Act to Rebecca Brown and Robert Furkin's Motion to Dismiss Claims for Abuse of Process, Malicious Prosecution, and Intentional Infliction of Emotional Distress.

1. The Illinois Citizen Participation Act is procedural and thus applies retroactively.

Mr. Mund filed his lawsuit in February 2005, alleging common law theories of malicious prosecution and abuse of process against Mr. Furkin and Ms. Brown. [C1-C38] He amended his complaint in January 2006 to include common law claims of intentional infliction of emotional distress. [C399-C469] By contrast, the Illinois General Assembly enacted the Citizen Participation Act in August 2007 – which was 31 months after Mr. Mund filed his original complaint. Nonetheless, the procedure set forth in the Act will necessarily apply to Mund's instant lawsuit, irrespective of its date of enactment, if the Court finds that the Act itself "merely affects the remedy or law of procedure." Ogdon v. Gianakos, 415 Ill. 591, 597 (Ill.1953). The latter inquiry requires an analysis of the Act in light of case law addressing retroactivity to determine whether it merely affects the remedy or law of procedure and thus requires retroactive application. The following subsection conducts that analysis.

2. Changes in the law of remedy or procedure apply retroactively.

"In assessing whether a statute applies retroactively, this court has adopted the approach set forth by the United States Supreme Court in Landgraf[.]" Allegis Realty Investors v. Novak, 223 Ill.2d 318, 331 (Ill.2006) (referring to Landgraf v. USI Film Products, 511 U.S. 244 (1994)); Wheaton v. Suwana, 355 Ill.App.3d 506 (Ill.App.2005). In Allegis, the Illinois Supreme Court outlined and applied the Landgraf two-step inquiry, which begins with the question of whether the legislature has expressly prescribed a statute's temporal reach. 223 Ill.2d at 331. If the answer to that inquiry is no, an Illinois court must ask the second question of whether the statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Doe A. v. Diocese of Dallas, 379 Ill.App.3d 782, 789 (Ill.App.2008) (quoting Landgraf, 511 U.S. at 280). The Allegis court explained further that a statutory enactment in Illinois, the *Statute on Statutes*, must be applied in evaluating the second step. Id. (referring to 5 ILCS 70/4, which it refers to as "the general saving clause of Illinois."). According to Allegis, application of the *Statute on Statutes* entails that new statutes affecting only procedure will apply retroactively, while those that are substantive may not be applied retroactively. Id. ("Our court has recognized section 4 as a clear legislative directive as to the temporal reach of statutory amendments and repeals when none is otherwise specified: those that are procedural may be applied retroactively, while those that are substantive may not.").

The Allegis decision attributed the procedural/substantive dichotomy of the test to the provisions of the *Statute on Statutes* in Illinois. Id. Notably, the Illinois Supreme Court's application of that statute is entirely consistent with the principles of retroactive

application the high court has employed over the last half century. Ogdon, 415 Ill. at 597 (stating that when a "change of law merely affects the remedy or law of procedure, *all rights of action will be enforceable under the new procedure without regard to whether they accrued before or after such change of law and without regard to whether the suit has been instituted or not*[.]") (emphasis added); Niven v. Siqueira, 109 Ill.2d 357, 364 (Ill.1985) ("A new law which affects only procedure generally applies to litigation pending when the law takes effect."). In furtherance of this established test of retroactivity, the Illinois Supreme Court has held in no uncertain terms that while general rules of statutory construction favor the presumption of prospectivity for new laws, "*the presumption of prospectivity does not apply to changes in procedure or remedies*." First of America Trust Co. v. Armstead, 171 Ill.2d 282, 288 (Ill.1996) (emphasis added); People ex rel. Brown v. Bloodworth, 155 Ill.App.3d 901, 905 (Ill.App.1987) ("The general rule that statutes will not be applied retroactively is ordinarily inapplicable to statutes relating to remedies and forms of procedure and which do not affect substantial rights.").

Turning to the first prong of the Allegis two-step inquiry, the Act excludes any discussion of temporal reach. Thus, being that the legislature has not expressly prescribed the Act's temporal reach, advancement to the second step of the Allegis inquiry is necessary.

As dictated by the *Statute on Statutes*, as well as the several cases cited above in support of the proposition, the passage of a law that merely affects the law of remedy of procedure will be applied retroactively. There are numerous indications both within the Act and outside of it indicating that it is decidedly procedural in nature and should thus

be applied retroactively. The first of those indications comes from the Act's applicability section, which provides a procedural scheme for addressing dispositive motions. That section specifically states that the Act has application to "any motion to dispose of a claim in a judicial proceeding [relating to certain classes of claims]." 735 ILCS 110/15 (2007). This language invites and supports the conclusion that the Act does nothing more than modify the procedure and motion practice governing certain types of cases. Stated differently, the Act establishes a procedural framework by which routine dispositive motions are to be adjudicated in light of Illinois' goals of striking a proper balance between two competing sets of rights. Because dispositive motions, as contemplated by the Act, are already part and parcel of the procedural scheme in place at Illinois common law, it may be safely concluded that the Act is procedural in nature. See Ogdon, 415 Ill. at 596. (clarifying that "[p]rocedure is the machinery for carrying on the suit, including pleading, process, evidence and practice[.]").

Another indication that the Act is procedural is found in Section 5, announcing the goal of establishing "an efficient process for identification and adjudication of SLAPPs." 735 ILCS 110/5 (2007). The Act's stated endeavor is to identify suits that improperly penalize and discourage the exercise of constitutional rights, and to protect those rights by imposing an "efficient process" allowing prompt exoneration for valid exercises. Id. In so doing, the Act has authorized the use of procedural devices, namely dispositive motions, to fortify protections that the right to petition already enjoys at common law and by virtue of the documents from which it originates – the U.S. Constitution and the Illinois Constitution.

Although the Act's unambiguous language establishes that it only endeavors to create an "efficient process", one may take notice of the fact that the Act appears in Chapter 735 of the Illinois Compiled Statues, which is the same chapter housing all the Illinois Code of Civil Procedure. See 735 ILCS 5/1-101, *et seq*. One may reasonably draw the inference that the Act is procedural from the fact that it is organized under a chapter that is otherwise exclusively dedicated to procedural law.

Another indication of the Act's procedural nature is found within the comments of the Senator who sponsored the legislative bill giving birth to the Act. See Illinois Senate Floor Debate Transcript of April 20, 2007, 95th General Assembly, 29th Legislative Day, pages 14-16 (declaring to his colleagues that the proposed legislation "provides for a procedural protection"). Certainly comments by the Act's sponsor as to what the Act provides casts additional light on the Act's procedural nature.

3. Retroactive application of the Illinois Citizen Participation Act would not impair any vested rights.

As the Illinois Supreme Court held in Allegis, in confirming that a statute is genuinely procedural and thus appropriate for retroactive application, a court must evaluate whether "retroactive application of the new statute will impair rights that a party possessed when acting, increase a party's liability for past conduct, or impose new duties for transactions already completed." 223 Ill.2d at 331. Applying that test to the case at bar entails a three-part examination of whether a retroactive application of the Act would (1) impair any right that Mr. Mund had prior to the lawsuit, (2) increase Mr. Mund's liability for his conduct before suit, or (3) impose new duties for transactions Mr. Mund undertook before suit.

First, there can be no viable argument that Mr. Mund's right to petition was somehow impaired by the procedural changes announced in the Act. The Illinois Supreme Court has held that "rules of procedure, including rebuttable presumptions, may be changed by the legislature and applied retroactively … without offending any constitutional prohibition." First Nat. Bank of Chicago v. King, 165 Ill.2d 533, 542 (Ill. 1995). In reaching that holding, the King court found that "no one has a vested right in any particular mode of procedure." Id. (ruling that a new law, which increased the evidentiary standard to one of clear and convincing evidence, was procedural and thus retroactively applicable to a preexisting lawsuit); see also Deluna v. St. Elizabeth's Hosp, 147 Ill.2d 57, 73 (Ill.1992) ("It is well established that the legislature may impose reasonable limitations and conditions upon access to the courts."). According to the foregoing case law, Mr. Mund does not possess a vested right in the procedure that is to be applied in his ongoing litigation. Put simply, the fact that the Act places the burden on Mr. Mund to produce clear and convincing evidence in order to show that his lawsuit has merit compromises no right that he can identify apart from the illusory right to maintain fallible claims. Deluna, 147 Ill.2d at 73 ("The legislature may … impose requirements governing matters of procedure and the presentation of claims. Such measures do not fail on constitutional grounds because noncomplying actions may suffer dismissal."). That being the case, the Act does not impair any vested rights in the procedure it supplements. Id.

Turning to the second question of whether the Act creates a retroactive effect, Mr. Mund faces no greater liability for acts he committed before the lawsuit than he did before the change in procedure. Mr. Mund, in fact, faces no exposure to liability for his

past actions by virtue of his status as the plaintiff in this case that contains no counterclaims. Likewise, the Act does nothing to alter his status as a plaintiff who currently faces no threat of a finding of liability pursuant to his past conduct. Owing to the case's procedural posture and the absence of counterclaims, no possible resolution of the case can yield a finding of liability against Mr. Mund. Therefore, the change in procedure has not implicated any prospective liability of Mr. Mund for actions he committed prior to the lawsuit. The second consequence of retroactive application is thus answered in the negative and supports a finding that the Act is procedural and not prejudicial to any rights held by Mr. Mund.

The third and last test of retroactive effect requires an examination of whether the change in procedural law has imposed new duties upon Mr. Mund for transactions he completed prior to the current lawsuit. Again, the transactions Mr. Mund completed before February 2005 are not at issue in this lawsuit. No party to this lawsuit has asserted herein that Mr. Mund breached any duties owed to them. Likewise, Mr. Mund does not face the threat of a finding of liability for any duty he might have owed to someone in the past. As was the case with the second test, the posture of the proceedings and the absence of claims against Mr. Mund preclude any finding in this lawsuit that Mr. Mund failed in respect to duties owed in past transactions. Furthermore, the fact that the Act does not create a cause of action against Mr. Mund indicates that the Act does not implicate either the second or the third tests of retroactive effect. To be sure, those tests refer to either a person's liability or a person's duty before the lawsuit was filed. Neither of those issues is applicable in this lawsuit Therefore, the Act has no substantive impact in those regards.

The three tests of retroactive effect, having all been answered in the negative, direct a conclusion that the Act is procedural and of no impact upon any vested rights. This conclusion is entirely consistent with the Act's pronouncements on applicability, public policy, and procedures. For all the foregoing reasons, and pursuant to case law cited above, the Act must be deemed procedural and applied retroactively.

4. Mr. Mund failed to meet his burden of producing clear and convincing evidence that Rebecca Brown and Robert Furkin's exercise of their rights to petition were not aimed at procuring favorable government action.

Application of the Act to the motion filed in response to claims of malicious prosecution, abuse of process, and intentional infliction of emotional distress entails that Mr. Mund must respond with clear and convincing evidence that the transactions allegedly giving rise to those claims were not undertaken in an effort to obtain favorable government action. 735 ILCS 110/15 (2007); 735 ILCS 110/20(c). Clear and convincing evidence has been defined in Illinois courts as "proof greater than a preponderance, but not quite approaching the criminal standard of beyond a reasonable doubt." In re D.T., 212 Ill.2d 347, 362 (Ill.2004); In re John R., 339 Ill.App.3d 778, 781 (Ill.App.2003). Pursuant to the foregoing definition of "clear and convincing evidence", Mr. Mund's burden was to produce more than a preponderance of evidence showing that Rebecca Brown and Robert Furkin did not file lawsuits in order to obtain favorable government outcome. As explained below, Mr. Mund's production fell drastically short of meeting that burden.

In response to Rebecca Brown and Robert Furkin's motion to dismiss, Mr. Mund attached to his response in opposition copies of numerous pleadings, trial court orders,

and appellate court orders, constituting several boxes of documents.[1] Mr. Mund argued in his response to their motion that those documents established by clear and convincing evidence that Rebecca Brown and Robert Furkin's filing of lawsuits was not in furtherance of their respective goals of procuring favorable government outcome. [C1705-1713] Mr. Mund's proposition that these documents meet that standard assumes that their zealous pursuit of legal relief was not undertaken for the purposes of procuring favorable government actions. Pursuant to Mr. Mund's philosophy, litigation that is exhausted to the highest levels of the judiciary is an indication that the litigants did not want the judicial branch of government to take favorable action on their behalf. This philosophy contradicts logic and human nature. To be sure, rational persons would not continue to expend resources and bear expenses of litigation in the courts if they were not interested in the relief those courts could grant them. The idea that they were petitioning government for some purpose other than seeking favorable government action cannot be plausibly inferred from the fact that they stayed the course through several defeats at trial and appellate stages of litigation. However, if the latter proposition is only correct some of the time, the Act makes it incumbent upon Mr. Mund to produce more than a preponderance of evidence showing that it is more likely than not that Rebecca Brown and Robert Furkin were not petitioning the courts for a favorable outcome in those cases. Mr. Mund produced no evidence even permitting an inference that some other motivation was operative. To the contrary, and as explained further below, Mr. Mund's production of historical court documents is actually cumulative to the evidence showing that

[1] These attachments are part of the record, but unnumbered. They begin in the record at approximately C1830 and continue for at least 1800 pages, comprising four volumes of the record's Description of Exhibits.

Rebecca Brown and Robert Furkin were seeking a favorable government outcome via the claims and defenses they individually and jointly asserted.

Mr. Mund's attachment of Rebecca Brown and Robert Furkin's trial and appellate court filings actually supports the presumption that they were intent on persuading courts that they had suffered grievous losses and were entitled to relief. The fact that Mr. Mund applied for sanctions several times, each to no avail, indicates that the litigation was based upon plausible, viable legal theories that required attention of the courts for a proper determination. It is every citizen's constitutional right to seek redress from government by filing non-frivolous lawsuits, even if those suits ultimately result in a defeat. Mr. Mund's production of evidence at the trial court, showing that Rebecca Brown and Robert Furkin exercised such rights, cannot plausibly satisfy his burden of showing that they were actually attempting to achieve something other than having those rights determined by the proper arbiters of civil disputes: the courts. See Lyddon v. Shaw, 56 Ill.App.3d 815, 822 (Ill.App.1978) ("The very purpose of a court of law is to determine whether an action filed by a party has merit and we refuse to recognize a rule which would render a litigant and his attorney liable in tort for negligently (or even, willfully and wantonly) failing to determine in advance that which, ultimately, only the courts could determine."). As such, Mr. Mund's claims should have been dismissed by the trial court for his failure to produce clear and convincing evidence that Rebecca Brown and Robert Furkin were not seeking favorable government action.

C. The Illinois Citizen Participation Act Applies to Motions to Dispose of Claims Directed at Any Act or Acts In Furtherance of the Moving Party's Right to Obtain Legal Representation, Communicate Legal Theories to Assisting Lawyers, and Comply With Court Orders Requiring the Publication of Defamatory Material.

The United States Supreme Court has held that efforts to obtain effective legal representation are encompassed within constitutionally protected rights of speech, petition, and association. United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 221-222 (1967) ("We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives … the right to hire attorneys[.]"); Brotherhood of R.R. Trainment v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 7 (1964).

Likewise, Illinois appellate courts have consistently held that the right of access to the courts immunizes litigants from answering claims of defamation for statements they have made related to the litigation itself. See, e.g., Pantone v. Demos, 59 Ill.App.3d 328, 334 (Ill.App.1978) ("The obvious public interest in affording every citizen the utmost freedom of access to the courts [led to the rule] that anything said by litigants or counsel relating to the matter at issue is privileged, even though this privilege acts to deprive parties … of any civil remedy for defamatory statements made in the course of such judicial proceedings."); Macie v. Clark Equip. Co., 8 Ill.App.3d 613, 615-616 (Ill.App.1972) ("Although a party may not introduce into a judicial proceeding inflammatory matters entirely unrelated to the litigation, he is not answerable for those volunteered.").

Mr. Mund's lawsuit alleges in his Second Amended Complaint that Robert Furkin and James Furkin published defamatory communications to numerous persons identified

in the complaint, including investigators at the Internal Revenue Service and lawyers from which they both sought legal advice and representation. In support of his claims, Mr. Mund attached copies of numerous electronic communications between James Furkin and Mark C. Scoggins, an Illinois attorney, in which James Furkin sought and obtained legal advice regarding the legality of specific contractual terms and financial transactions undertaken between Mr. Mund and Robert Furkin. [C1201-C1232] James Furkin also obtained via those emails legal advice for the purpose of preparing and asserting legal claims against Mr. Mund. On October 26, 2004, the emails were published in the context of a judicial proceeding when Robert Furkin, by and through his attorney at that time, Paul Brown, attached the emails to a motion [A-6] in compliance with an order from the U. S. District Court for the Eastern District of Missouri. [A-5]

The email communications between Mr. Scoggins and James Furkin represented the latter's obvious efforts to secure representation with respect to the pursuit of legal claims. The emails, by their content, indicate that the author, James Furkin, sought intervention from both the judicial and executive branches of government in matters concerning financial transactions he believed were fraudulent. James Furkin did nothing more than exercise his constitutional rights to petition, association, and speech when he discussed with Mr. Scoggins legal theories and solicited from him recommendations of lawyers who might assist his brother if Mr. Scoggins were to decline the engagement. In attaching the emails in the Eastern District of Missouri, by and through his attorney, Robert Furkin did nothing more than exercise his right to access courts and comply with that court's October 22, 2004 order instructing him to put the emails into the court record. Irrespective of whether Robert Furkin and James Furkin's publication of the emails is

evaluated under the standard announced by the Supreme Court in United Mine Workers and Brotherhood of R.R. Trainment, or the standards announced by the Illinois appellate courts in Pantone and Macie, their respective or joint publication of those emails is immunized by the U.S. Constitution, the Illinois Constitution, Illinois common law, and, by virtue of any one of those authorities, the Illinois Citizen Participation Act.

D. The Trial Court Erred in Failing to Apply the Provisions of the Illinois Citizen Participation Act to Robert Furkin and James Furkin's Motion to Dismiss Claims for Defamation and Intentional Infliction of Emotional Distress.

1. The Illinois Citizen Participation Act is procedural and thus applies retroactively.

As outlined in subparagraph B.1, supra, the Act is procedural and should thus be applied retroactively. In the interest of conservation and in order to avoid wasteful repetition of points and authorities already discussed, subparagraph B.1 and its supporting authorities is hereby incorporated into this subparagraph D.1 by reference as if fully set forth herein.

2. Changes in the law of remedy or procedure apply retroactively.

As outlined in subparagraph B.2, supra, changes in the law of remedy or procedure apply retroactively. In the interest of conservation and in order to avoid wasteful repetition of points and authorities already discussed, subparagraph B.2 and its supporting authorities is hereby incorporated into this subparagraph D.2 by reference as if fully set forth herein.

3. Retroactive application of the Illinois Citizen Participation Act would not impair any vested rights.

As outlined in subparagraph B.3, supra, retroactive application of the Illinois Citizen Participation Act would not impair any vested rights and thus would pose no due process concerns. In the interest of conservation and in order to avoid wasteful repetition of points and authorities already discussed, subparagraph B.3 and its supporting authorities is hereby incorporated into this subparagraph D.3 by reference as if fully set forth herein.

4. Mr. Mund failed to meet his burden of producing clear and convincing evidence that Robert Furkin and James Furkin's exercise of their respective rights was not aimed at procuring favorable government action.

Although Mr. Mund submitted evidence, albeit insufficient, in response to Rebecca Brown and Robert Furkin's motion of February 1, 2008, he did not submit any evidence at all in response to Robert Furkin and James Furkin's motion of February 4, 2008. [R11-R13] In light of the fact that the emails giving rise to Mr. Mund's defamation claims were made in efforts to obtain adequate legal representation, and because those emails were only published in the context of judicial proceedings and in compliance with a District Court's Order, a considerable production of evidence would be needed to overcome the presumption that the emails communications and their later publication were not aimed at procuring favorable government action. In re D.T., 212 Ill.2d at 362 (defining clear and convincing evidence as "proof greater than a preponderance"); In re John R., 339 Ill.App.3d at 781 (same). Mr. Mund did not produce one scintilla of evidence to show that these emails were not protected from defamation claims, let alone

evidence sufficient to overcome the constitutional immunity or the presumption of absolute privilege independently recognized in Illinois.

Furthermore, Mr. Mund's submission of absolutely no evidence in response to a motion brought under the Act dictates that he failed to meet the burden of producing clear and convincing evidence as required. Notably, Mr. Mund's attorney, B. Jay Dowling, admitted at the February 25, 2008 hearing that he did not believe that Robert Furkin and James Furkin's motion to dismiss rated a written response or a production of evidence on the question of whether their actions were aimed at procuring favorable government action. [R11] ("For the record I didn't file a written response because it's the same motion that we argued two weeks ago and my response is the same.") Certainly, one cannot satisfy a standard of clear and convincing evidence without at least a threshold production of one document, object, or statement to tip the scale of preponderance in one's favor. In re D.T., 212 Ill.2d at 362; In re John R., 339 Ill.App.3d at 781. As such, the trial court erred when it failed to apply the Act, grant the motion, and dismiss Mr. Mund's claims against Robert Furkin and James Furkin for defamation and intentional infliction of emotional distress. The trial court's order should be reversed and remanded with instruction to apply the Act and dismiss all claims within the Act's purview, including the defamation claims, which Mr. Mund made no effort to support with clear and convincing evidence.

CONCLUSION

The Illinois Citizen Participation Act applies to the motion filed by Rebecca Brown and Robert Furkin as well as the motion filed by Robert Furkin and James Furkin. The Act itself was passed into law to prevent the threat of litigation from imposing a chilling effect upon, *inter alia*, the constitutional rights to petition, file lawsuits, and obtain adequate legal counsel. This is a case wherein the claims asserted against these defendants relate to their efforts to seek redress from the government for the various harms for which they believe Mr. Mund is responsible. Mr. Mund's lawsuit against Rebecca Brown, Robert Furkin, and James Furkin is the very paradigm of a SLAPP suit in that it has been brought to penalize them for exercising rights recognized in Illinois common law and in the Act. The Act is a tool of the legislature for discovering and purging Illinois courts of this type of vindictive litigation. The trial court erred in not recognizing the Act's application to these facts and to the motions brought pursuant to its provisions. As such, it must now be applied to prevent further costly and oppressive litigation against these defendants. They have already lost a majority of their family land, expended considerable costs in litigation, and have been denied relief in various judicial proceedings because of a technicality in the law, namely the running of a statute of limitations as to Rebecca Brown. To be sure, none of those judicial proceedings have ever yielded a finding that the parcels of land in question were not fraudulently transferred away from these defendants. Accordingly, it is in the interests of justice and human decency that Mr. Mund's litigation be halted as to these defendants, who have merely placed faith in the judicial branch of government to achieve what apparently cannot be achieved – an equitable return of their stolen lands.

WHEREFORE, Defendants-Appellants Rebecca Brown, Robert Furkin, and James Furkin respectfully pray that the Appellate Court reverse the trial court's order and remand the case with instructions to apply the Act and dismiss all claims sounding in malicious prosecution, abuse of process, defamation, and intentional infliction of emotional distress.

Date: July 18, 2008

Respectfully submitted,

REBECCA BROWN, ROBERT FURKIN, and JAMES FURKIN

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APPENDIX

CERTIFICATION OF BRIEF

The undersigned, an attorney, certifies that the foregoing brief conforms to the requirements of Supreme Court Rules 307 and 341. The length of this brief is 35 pages.

_____

Brian King

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that three (3) copies of the foregoing document were served, via first class U.S. mail, postage prepaid, this 18th day of July 2008, upon the following:

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