No.

IN THE
SUPREME COURT OF ILLINOIS

WRIGHT DEVELOPMENT GROUP, LLC a limited liability company,	)	**Petition for Leave to Appeal from the Appellate Court, First Judicial District**
Plaintiff-Respondent,	)	**No. 08-2783**
v.	)	
JOHN WALSH, an individual;	)	
Defendant-Petitioner,	)	**There heard on Appeal from the Circuit Court of Cook County, Illinois The Honorable Thomas P. Quinn Trial Judge**
PIONEER NEWSPAPER, INC., a Delaware corporation d/b/a NEWS STAR; and SUN-TIMES MEDIA GROUP, INC., a Delaware corporation,	)	
Defendants.	)	

PETITIONER-DEFENDANT JOHN WALSH'S PETITION FOR LEAVE TO APPEAL PURSUANT TO SUPREME COURT RULE 315

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November 16, 2009

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ORAL ARGUMENT REQUESTED

PRAYER FOR LEAVE TO APPEAL

Petitioner-Defendant John Walsh ("Walsh"), pursuant to Illinois Supreme Court Rule 315(a), respectfully petitions this Court for leave to appeal and for reversal of the Illinois Appellate Court, First Judicial District's September 29, 2009 Rule 23 Order ("Order"), which dismissed this appeal as moot. (See, Order, attached as Exhibit A.) On October 14, 2009, Walsh filed a Petition for Rehearing and for a Rule 316 Certificate of Importance ("Petition for Rehearing") arguing that the Order should be withdrawn because, in dismissing the appeal as moot, the Appellate Court: (i) vitiated Walsh's statutorily-created immunity and his substantive rights to appeal under Illinois' new Anti-SLAPP statute, the Citizen Participation Act ("Act") (735 ILCS 110/1 (West 2007)); and (ii) caused a split among the District Courts regarding the proper application of such rights. The Appellate Court denied Walsh's Petition for Rehearing on October 19, 2009. As explained below, Walsh respectfully submits that reversal of the Order is appropriate and resolution of the appeal on the merits is warranted.

STATEMENT OF POINTS RELIED ON FOR REVERSAL

I. In Finding this Appeal Moot, the Appellate Court Created a Split Among the District Courts Regarding the Proper Application of the Substantive Rights Under the Citizen Participation Act, and Resolution on this Issue is Required so that Jurisprudence Under the Act will be Consistent.

The issues raised herein are matters of first impression in this Court and consideration of this appeal is necessary to resolve a conflict between the Appellate Courts on a vital issue. The First District's holding that Walsh did not have the right to appeal the trial court's decision on his Motion to Dismiss Under the Act is contrary to the holding of the Fifth District in *Mund v. Brown*, 913 N.E.2d 1225, 332 Ill.Dec. 935 (5th Dist. 2009) (Petition for Leave to Appeal filed on September 25, 2009 and currently

pending for November Term 2009, Case No. 109207). Thus, consideration of this appeal will serve to resolve an inconsistency among the Appellate Courts regarding an important issue of law.

II. Public Policy and the Act's Legislative History Require Reversal Because Walsh has a Statutory Right to Appellate Review of the Trial Court's Denial of His Motion to Dismiss Under the Act, Irrespective of the Fact that He Prevailed in the Trial Court on other Grounds.

After the trial court denied Walsh's Motion to Dismiss Under the Act, he prevailed on a Section 2-615 motion to dismiss the defamation claim under the innocent-construction rule. Walsh's ultimate victory confirms that this case is, indeed, a SLAPP suit as defined by the Act, and such a victory does not vitiate Walsh's substantive right to appellate review of the trial court's denial of his immunity. This statutory construction promotes good public policy because a trial court's erroneous decision on the issue of immunity should not bar a victim of a SLAPP from recovering his statutorily-mandated attorneys' fees simply because the SLAPP victim obtained a favorable judgment on grounds other than immunity. Moreover, if this Court finds the language of the Act ambiguous, Walsh's interpretation of the language of the Act is consistent with the Act's legislative intent.

III. Walsh's Appeal is Not Moot Because He Was Denied Substantive Rights By the Trial Court.

This appeal is not moot and reversal is warranted because Walsh did not receive all that he sought in the trial court. Although Walsh ultimately obtained final judgment in his favor, the trial court denied his substantive rights to immunity and attorneys' fees, which need to be finally adjudicated and enforced.

IV. Reversal is Appropriate Because in Holding That Walsh's Appeal is Moot, the Stated Purpose of the Act is Thwarted and the Protections Afforded Under the Act to Victims of SLAPPs are now Illusory.

The stated purpose of the Act is to identify and eliminate SLAPPs. 735 ILCS 110/5. Therefore, the only just way to realize the goals of the Act is to allow appellate review of a trial court's order denying a motion to dismiss under the Act. In holding that Walsh's appeal is moot, the Appellate Court rendered the protections and rights afforded to victims of SLAPPs illusory.

FACTUAL BACKGROUND

Wright LLC filed a Complaint for Defamation ("Complaint") against John Walsh and a media group alleging defamation *per se*. (R. C3.) The allegations in the Complaint are based on purportedly defamatory statements Walsh made to a newspaper reporter about Plaintiff's faulty work while he was at a public forum ("Public Meeting") held and sponsored by Chicago Alderman Mary Ann Smith. (R. C4-6.) Walsh's statements to the reporter were republished on August 8, 2007 in the Pioneer Newspaper by Defendants Pioneer Newspapers, Inc., and Sun-Times Media Group, Inc. (*Id.*)

Walsh is the President of the 6030 Condominium Association ("Association"), which was involved in a lawsuit against various entities responsible for the conversion of the building into condominiums ("6030 Lawsuit"). (R. C3-5.) The defendants in the 6030 Lawsuit include Sixty Thirty, LLC; Wright Management, LLC; W. Andrew Wright; and James A. Wright. (*Id.*) Andrew and James A. Wright are also the principals of Wright Development Group, LLC ("Wright LLC"), the Plaintiff in this case. (R. C191.)

On July 10, 2007, Alderman Smith's office held the Public Meeting for 48th Ward residents, so they could communicate the problems they had experienced with developers

and contractors building and renovating condominium buildings in the 48th Ward. (R. C267.) The Public Meeting was prompted by the receipt of numerous complaints from Ward residents who believed that they had been defrauded by developers and contractors or found the work they performed to be shoddy. (*Id.*) Alderman Smith, in turn, would use the citizen input to determine the need for legislative action by her office and whether her constituents' complaints warranted referral to the City of Chicago's Law Department for investigation and potential legal action. (R. C267-68.)

Walsh understood the purpose for the Public Meeting was to allow Alderman Smith and her staff the opportunity to solicit community input and participation so that they could take local government action to resolve Walsh's and other constituents' problems. (R. C265.) This belief is consistent with Alderman Smith's public notice for the Public Meeting. (R. C269.) Walsh testified that he attended the Public Meeting for the purpose of providing information to his elected representative and her staff regarding problems his Association experienced with the developers of his condominium building and to secure favorable government action. (R. C265.) He believed it was important to publicly speak about this subject to raise community awareness of the types of problems the Association was dealing with as a result of the condominium conversion. (*Id.*)

When Walsh spoke at the Public Meeting, he discussed the problems his Association had encountered and the fact that the Association filed the 6030 Lawsuit against its developers. (*Id.*) During the Public Meeting, Walsh was approached by a woman who identified herself as a reporter for a local newspaper covering the meeting. (*Id.*) She asked Walsh (and other citizens) follow-up questions about their meeting testimony. (*Id.*) After answering the reporter's questions, Walsh left the meeting with

another participant while other citizens remained at the Ward office and continued to converse with the Alderman's representatives. (R. C935, 943.)

PROCEDURAL HISTORY

Walsh and the media defendants responded to the Complaint with motions to dismiss the defamation claims under Section 2-615, and briefing schedules were entered with respect to those motions. (R. C49-133,171-187.) Prior to completion of the briefing on those motions, on April 15, 2008, Walsh filed a separate Motion to Dismiss Plaintiff's Complaint under the Citizen Participation Act ("MTDCPA") and a supporting memorandum of law. (R. C219-273.) Since a favorable ruling on the MTDCPA would result in a dismissal of the case with prejudice, Walsh sought and was granted a stay of the briefing on the previously-filed Section 2-615 motions. (R. C212-216, 274.) Pursuant to 735 ILCS 110/20, the trial court allowed Plaintiff limited discovery relating only to "the issue of whether Walsh's acts are not immunized, or were not in furtherance of acts immunized from, liability under the Citizen Participation Act." (R. C274.) Limited discovery was taken and on July 29, 2008, the trial court held a hearing with respect to the MTDCPA. At the hearing, the trial court ruled in favor of Wright LLC, denied Walsh's motion, and entered an order in this regard. (R. C1036, 1053-1074.) The trial court also entered orders to resume briefing on the previously-filed Section 2-615 motions. (R. C1035, 1037.)

Section 20(a) of the Act provides for an immediate right to appellate review of an order denying a motion to dismiss under the Act. *See* 735 ILCS 110/20 (expedited dismissal and appeal procedures). However, Walsh was barred from exercising his right to immediately appeal the circuit court's interlocutory order under Section 20(a) of the Act because Illinois Supreme Court Rule 307 does not currently allow such an appeal by

right. Appellate jurisdiction is controlled by the Illinois Supreme Court Rules and those Rules are not yet in harmony with the appellate rights found in Section 20(a). Walsh, accordingly, filed a Motion to Reconsider or Alternatively for the Entry of an Order Under Illinois Supreme Court Rule 308 so that proper jurisdiction would be conferred to obtain immediate appellate review. (R. C1040-88.) At presentment of the motion, the trial court denied the Motion to Reconsider and refused Walsh's request for entry of Rule 308 findings. (R. C1089.)

When the trial court denied this motion, Walsh was left in a legal purgatory. The circuit court's rulings deprived Walsh of: (i) his immunity under the Act; (ii) his ability to obtain immediate appellate review mandated under the Act; and (iii) an opportunity for appellate review under Illinois Supreme Court Rule 308. The normal judicial process – including application of the current court rules and procedures – could not adequately resolve the issues Walsh was facing. Due to these circumstances, the only vehicle available for Walsh to exercise his statutory rights to appeal was to file in this Court a Motion for a Supervisory Order.

On September 2, 2008, Walsh filed in this Court a Rule 383 Motion for a Supervisory Order and Supporting Explanatory Suggestions ("Rule 383 Motion"), which requested the Court's intervention and proposed the following suggestions to resolve the issues facing Walsh: (1) the Court should address the merits of Walsh's appeal and find that the circuit court erred when it denied Walsh's motion to dismiss under the Act; (2) alternatively, the Court should vacate the circuit court's order denying Walsh's request for the entry of Rule 308 findings; and (3) the Court should consider amending Supreme

Court Rule 307 to permit future litigants the right to immediate appeal as outlined under the Act. (Supplement Record ("SR") C12-40.)

This Court entered several orders relating to briefing on the Rule 383 Motion and several briefs were filed relating to the Rule 383 Motion. (SR. C 12-142.) While the Rule 383 Motion was pending in this Court, proceedings continued in the circuit court, wherein the parties completed briefing and presented oral arguments on the previously-filed Section 2-615 motions to dismiss. (R. C1143-1154) On September 26, 2008 – based on the innocent-construction rule – the trial court granted the separately-filed Section 2-615 motions to dismiss and entered a final judgment order dismissing Plaintiff's case with prejudice. (R. C1175-78.) On October 3, 2008, Plaintiff Wright LLC filed in this Court an Emergency Motion to Supplement the Record to Include the Circuit Court's Order Dismissing the Case With Prejudice ("Emergency Motion to Supplement the Record"), wherein it argued that due to the circuit court dismissing the case with prejudice, Walsh's Rule 383 Motion should be denied because it was rendered moot. (SR. C129-137.) In order to preserve appellate jurisdiction under Illinois Supreme Court Rules 301 and 303, on October 6, 2008, Walsh timely filing his Notice of Appeal in the circuit court. (R. C1160-61.) On October 7, 2008, this Court entered an order denying Walsh's Rule 383 Motion. (SR. C142.)

ARGUMENT

The Appellate Court, without any urging by the Appellee and without hearing an oral argument, entered a Rule 23 Order finding that Walsh's appeal is moot. The Court reasoned that because Walsh was successful in getting this lawsuit dismissed under 5/2-615, he obtained all the relief requested in the trial court and, as such, there is no longer a justiciable controversy. This appeal is not moot because Walsh brought the subject

motion to dismiss under Illinois' Anti-SLAPP Act, which confers affirmative and substantive rights and benefits to victims of SLAPPs – rights that cannot be addressed or resolved under 735 ILCS 5/2-615. The Appellate Court erred because under the plain language of Section 20(a) of Act, Walsh has a substantive right to appellate review of the trial court's decision denying his MTDCPA. Independent of that statutory right, this case also involves an actual and justiciable controversy because, when the trial court erred in denying Walsh's MTDCPA, he was denied his statutory immunity and mandatory attorneys' fees – rights that were not resolved in his favor upon final judgment. If the Order is allowed to stand, the stated purpose of the Act will be thwarted and the protections and rights afforded to victims of SLAPPs under the Act will be nothing more than illusory. Therefore, although final judgment ultimately was entered in Walsh's favor, this Court should reverse the Order, find that a justiciable controversy exists, and either resolve the merits of Walsh's appeal or remand the case to the Appellate Court for a decision on the merits.

I. REVERSAL IS WARRANTED BECAUSE THE APPELLATE COURTS ARE SPLIT ON THE PROPER APPLICATION OF SECTION 20 OF THE ACT.

When the Appellate Court dismissed this appeal as moot it held that Walsh "has already obtained the relief he sought and, any action by this court would constitute an advisory opinion." (See, Order at 3.) This ruling should be reversed because it misapprehends what occurred in the trial court and ignores the plain language of Illinois' new Anti-SLAPP statute. SLAPPs or "Strategic Lawsuits Against Public Participation" are civil lawsuits aimed at preventing citizens from exercising their political rights or

punishing those who have done so.[1] 735 ILCS 110/5. Put differently, SLAPPs use the threat of money damages or sheer cost of defending against the meritless suits to silence citizen participation. 735 ILCS 110/5. The Act specifically finds that there has been a "disturbing increase" in SLAPPs in Illinois and these suits are an "abuse of the judicial process" which serve only to chill and diminish citizen participation in the government process. *Id.*

A request to dismiss a case under the Act is very different from the typical request to dismiss under 5/2-615 or 5/2-619 because the Act confers substantive rights upon, and outlines a specific procedure for, victims of SLAPPs to move for disposal of the claim under the Act. In fact, the Act includes a section entitled "Motion Procedure and Standards" which outlines a new, statutorily-created process to dispose of a judicial claim under 735 ILCS 110/20. This right is independent of and markedly different from any other procedural mechanism a defendant may employ to end a lawsuit (i.e., 735 ILCS 5/2-615; 5/2-619 and 5/2-1005).

A. The Citizen Participation Act Provides Walsh A Substantive Right To Appellate Review Of The Trial Court's Denial Of His Motion To Dismiss Under The Act.

This appeal is not moot because the following language of Section 20 of the Act creates a substantive right to appellate review of trial court orders denying a motion to dispose of the lawsuit brought pursuant to the Act: "An appellate court shall expedite any

[1] A commentator recently made the following observations about SLAPP suits: "A plaintiff bringing a SLAPP suit is not necessarily interested in winning the case. Rather, SLAPP suits are used to deter or to punish a party for exercising its political rights by forcing that party to waste time and resources defending its petitioning activity in court.... Even if a party that has been the target of a SLAPP suit ultimately wins in court, the party may have spent months or years defending the suit and accumulated significant legal fees." (SR 701-02) (*See,* Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 Val. U. L. Rev. 1235, 1237 (2007).

appeal or other writ, whether interlocutory or not, from a trial court order denying that motion...." 735 ILCS 110/20(a). At the time the trial court denied the MTDCPA, Walsh was barred from exercising his right to immediately appeal the trial court's interlocutory order under Section 20(a) of the Act because Supreme Court Rule 307 does not currently allow such an appeal by right. Walsh recognized that an attempt to advance an appeal of the trial court's interlocutory order pursuant to the Act at the time it was entered in the trial court would have been improper under Illinois Supreme Court precedent – a conclusion that the Illinois Appellate Court recently validated in *Mund v. Brown*, 913 N.E.2d at 1229-30.

After the trial court denied Walsh's request for a Rule 308 Order, Walsh sought a supervisory order from this Court under Rule 383 for review of the trial court's interlocutory order. This Court denied Walsh's request for a supervisory order four days after Plaintiff-Appellee filed in this Court its Emergency Motion to Supplement the Record, wherein it argued that due to the circuit court dismissing the case with prejudice, Walsh's Rule 383 Motion for review of the trial court's interlocutory order should be denied because it was rendered moot. (Supplemental RV 1, C 129-137.) In fact, in that Emergency Motion, Plaintiff-Appellee specifically argued to this Court in favor of the very position that Walsh is taking here: "Walsh is entitled to appeal the [interlocutory ruling on his MTDCPA] as a result of the Court's entry of the [final order]." (Supplemental RV 1, C 131.) Thus, even as Plaintiff-Appellee concedes, upon the granting of Walsh's 2-615 motion – Walsh, at long last, was allowed to appeal the trial court's interlocutory order under Supreme Court Rule 303. With the Appellate Court's Order, however, Walsh is now placed in the perverse position of being denied *any*

appellate review whatsoever—a circumstance clearly contrary to the recent decision in *Mund v. Brown* and the plain language of the Act itself.

In *Mund*, a SLAPP victim attempted to appeal the trial court's interlocutory order that denied his motion to dismiss under the Act solely upon Section 20(a) of the Act. The *Mund* court held that while the right to immediate appeal contained in the Act is not currently operative because the Illinois Supreme Court Rules are not yet in harmony with the appellate rights under the Act, a SLAPP victim could still appeal the interlocutory order upon the entry of a final judgment. *See Mund*, 913 N.E.2d at 1230 ("Under the same principles, Section 20(a) would not confer jurisdiction on this court *in the absence of a final judgment*, and to the extent the Act would attempt to provide for appeals from less than final judgments, it would be unconstitutional.") (emphasis added). Thus, in the wake of *Mund*, and unless or until this Court amends Rule 307, a SLAPP victim must simply wait until the trial court enters final judgment before obtaining appellate review of the trial court's interlocutory order—a point in time when the appellate court indisputably has jurisdiction to hear the appeal. *See, Knapp v. Bulun*, 911 N.E.2d 541, 546, 331 Ill.Dec. 720, 725 (1st Dist. 2009) ("An appeal from a final judgment draws into issue all previous interlocutory orders that produced the final judgment."). That is precisely what Walsh did here. Thus, if this Court allows the Order to stand, there will be a split among the First and the Fifth Districts of the Appellate Court with respect to a defendant's appellate rights under Section 20(a) of the Act.

Indeed, this Court should reverse the Order because the Act contemplates and clearly allows for defendants – upon final judgment – to appeal trial court orders denying a putative SLAPP victim's motion to dispose under the Act. This is so because the Act

does not restrict a defendant's appellate rights to an interlocutory order. The Act expressly includes the right to appeal the only other type of order – a final order: "An 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) (emphasis added). When discerning the meaning of a statute, this Court has consistently instructed that a court's duty is to give effect to the intent of the legislature. *Hadley v. Illinois Dept. of Corrections*, 224 Ill.2d 365, 371, 864 N.E.2d 162, 165 (2007). Under this principle, Section 20 can only be read to create a substantive right to appeal because the language "whether interlocutory or not" is not mere surplusage and must be read to convey its ordinary meaning in light of other relevant portions of the Act. See, *Land v. Bd of Ed. of the City of Chicago*, 202 Ill. 2d 414, 422, 781 N.E.2d 249, 255 (2002). Inherent in the directive that an appellate court "shall expedite" any appeal from a trial court order denying a motion to dispose is the directive that the appellate court should "hear" the appeal in the first place.

Additionally, this right to review in the appellate court of "any appeal" is not predicated on a SLAPP victim losing the case and appealing an adverse final judgment. To the contrary, the Act must be read to confer a substantive right to have the appellate court determine if the case is a SLAPP and whether the defendant is entitled to his attorneys' fees. This is the only fair reading of the Act, particularly in light of 735 ILCS 110/30 ("This Act shall be construed liberally to effectuate its purposes and intent fully.")

B. Public Policy Favors Walsh's Position.

This Court has instructed that in all cases of statutory construction, courts may "consider the purpose behind the Act and the evils sought to be remedied, as well as the consequences that would result from construing it one way or the other...." *Maddux, et*

al., v. Blagojevich, 233 Ill.2d 508, 911 N.E.2d 979, 983 (2009). Walsh's statutory construction promotes good public policy because a trial court's erroneous decision should not bar a victim of a SLAPP from recovering his attorneys' fees upon a favorable judgment. It is generally understood that a plaintiff-SLAPPer's reason for engaging in a SLAPP suit will always be to inhibit or punish another for the exercises of First Amendment activity. So, a plaintiff-SLAPPer achieves his goals by requiring the SLAPP victim to suffer the mental and emotional stress associated with litigation and to incur significant attorney's fees in defending the litigation. Simply by filing the frivolous lawsuit, the plaintiff-SLAPPer has succeeded in chilling, deterring, and even punishing the other side. These are precisely the "evils sought to be remedied" by the Act. *Id.*

Indeed, there are significant public policy reasons to allow appellate review of erroneous trial court orders denying a motion to dismiss under the Act – irrespective of how the final judgment in the case has been determined. The Legislature expressly found that "[t]he 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." 735 ILCS 110/5. The stated goals of Illinois' anti-SLAPP statute are to address and remedy the "abuse of the judicial process" by SLAPPers and to deter the "chilling" effect of SLAPP suits upon the public's ability exercise their constitutional rights – which includes the cost put forth to defend such suits. And the stated purpose of the Act is "to protect and encourage public participation in government to the maximum extent permitted by law." Simply put, a plaintiff-SLAPPer should not benefit from and avoid the remedial consequences of filing a SLAPP suit under the Act due to an erroneous trial court decision on a motion to dispose under the Act. Otherwise,

a plaintiff-SLAPPer would succeed in all the wrongdoing that should trigger a SLAPP victim's eligibility for attorney's fees, but because of the trial court's erroneous decision, the SLAPP victim is cheated of the very redress afforded by the Legislature.

Other courts interpreting similar Anti-SLAPP statutes have followed this logic. When California enacted its Anti-SLAPP statute in the 1990s, the California courts were wrestling with its proper application. In *Lui v. Moore*, 69 Cal. App. 4th 745, 747-48, 81 Cal. Rpt. 2d 807 (2nd Dist. 1999), the California Appellate Court addressed the question of whether the plaintiff in a SLAPP suit can – by the device of dismissing the SLAPP prior to a hearing on the defendant's motion to strike under the Anti-SLAPP statute – avoid paying the attorney's fees incurred by the defendant in defending the suit. After the Plaintiff in *Lui* dismissed the case, the trial court refused to hear the motion to strike because, given that the case was dismissed, the motion was essentially moot. *Id.* at 749.

Similar to Walsh here, the defendant in *Lui* was barred from review of his motion (albeit, in the trial court as opposed to the appellate court) because the case was dismissed. In reversing the trial court's decision not to hear the Anti-SLAPP motion to strike, the appellate court took into consideration the very purpose of California's Anti-SLAPP statute and stated as follows:

> If indeed respondent's cross-complaint against appellant is a SLAPP suit, then the decision to not hear the merit's of appellant's motion to strike deprives appellant of the monetary relief which the Legislature intended to give her, while at the same time it relieves respondents of the punishment which [the Anti-SLAPP statute] imposes on persons who use the court to chill others' exercise of their constitutional rights.

Id. at 748. The court reasoned that "an adjudication in favor of the defendant on the merits of the defendant's motion to strike provides both financial relief in the form of fees and costs, as well as a vindication of society's constitutional interests." *Id.* at 752.

Under these same principles, this Court should reverse the Order and find that where a plaintiff in an alleged SLAPP suit has his complaint dismissed or otherwise disposed of in the trial court, appellate review of a trial court's denial of a defendant's motion under the Act is proper because full "adjudication in favor of the defendant on the merits of the defendant's motion to [dispose] provides both financial relief in the form of fees and costs, as well as a vindication of society's constitutional interests." *Id.*

C. The Legislative History Supports Walsh's Position.

Additionally, Walsh's interpretation of the language of the Act is consistent with the legislative intent. If, in the event, this Court finds the language of the Act ambiguous, it must look to the Act's legislative history and transcripts of the legislative debates to resolve the ambiguity. *See, People v. Collins*, 214 Ill.2d 206, 214, 824 N.E.2d 262, 266 (2005). The Act's legislative history establishes that the General Assembly intended the Act to apply to instances where citizens win the suit, but are burdened by attorney's fees. State Representative Jack Franks, the House sponsor of the legislation that became the Act, explained that the Act was, in part, a response to a developer's defamation suit against two of his constituents. He stated that the victims of the SLAPP got the lawsuit "thrown out on three separate occasions" but were threatened with bankruptcy because they were unable to pay their legal fees.[2] Here, Walsh also is a defendant in a defamation lawsuit brought by a developer and Walsh also succeeded in getting the frivolous lawsuit

[2] *See* 95th Ill. Gen. Assem., House Proceedings, May 31, 2007, (statement of House Representative Jack Franks) ("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 get them to shut up, to try to chill their ability to speak and its wrong and its not what we're about . . . . [I]n my county . . . there were two 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 developers lawsuit was thrown out on three separate occasions and [Senate Bill 1434] would stop [that] type of abuse."). (R. C1081.)

thrown out, but he too is now burdened by significant legal fees from defending this action. In light of the genesis for enacting legislation to protect victims of SLAPPs, Walsh should not be punished and denied redress because of an erroneous trial court decision. Accordingly, the language of 20(a) must be read to allow Walsh to appeal the trial court's ruling on his MTDCPA upon final judgment.

II. ALTERNATIVELY, THE APPEAL IS NOT MOOT BECAUSE WALSH WAS DENIED SUBSTANTIVE RIGHTS BY THE TRIAL COURT.

Even if this Court finds that the Act does not expressly provide Walsh a statutory right to review the trial court's decision on his MTDCPA, the appeal nevertheless is not moot. In dismissing the appeal as moot, the Court stated: "In essence, Walsh got exactly the relief he sought (i.e. dismissal of the complaint), albeit on a different basis (i.e. pursuant to section 2-615 rather than the Act)." (*See*, Order at 3.) This holding is incorrect because Walsh did not get the relief he sought in the trial court. In his MTDCPA, Walsh requested the trial court to (1) identify this case as a SLAPP case as defined under the Act; (2) dispose of this case with prejudice within the timeframe and under the procedures set forth in 735 ILCS 110/1; and (3) set a date certain for Walsh to present a petition to recover his attorneys' fees which are mandatory under the Act. (R. C219-20.) Recovery of attorneys' fees is a substantive and protectable right of SLAPP victims under the Act. 735 ILCS 110/25. By entering judgment on the 5/2-615 motion – instead of granting Walsh's MTDCPA and allowing Walsh to obtain his attorneys' fees – there was, in fact, an injury to Walsh's legally cognizable interests. Thus, by any measure, Walsh did not get as the Appellate Court stated, "exactly the relief he sought" (Order at 3) because he was denied these substantive and protectable rights.

A. Motions To Dispose Under The Act Should Be Treated, For Purposes Of Appellate Review, As Independent Statutory Causes of Action.

Put differently, the Court should treat Walsh's request for disposal of the lawsuit under the Act as an independent statutory cause of action that is akin to a counterclaim by Walsh. *See e.g., PRA III, LLC v. Hund*, 364 Ill.App.3d 378, 381, 846 N.E.2d 965, 967 (3rd Dist. 2006) (holding defendant's appeal was not moot in an action where the plaintiff's complaint was dismissed and defendant brought an appeal on an independent cause of action). When the trial court denied his MTDCPA, Walsh was denied substantive rights in the trial court (i.e., immunity and attorneys' fees). The moment he became a defendant in this lawsuit and a victim of this SLAPP, Walsh began to incur damages in the form of attorneys' fees which he has a statutory right to recover under the Act. Justice requires this Court to give meaning and effect to Walsh's statutory rights. Even though Walsh prevailed under 5/2-615, he nevertheless has collateral statutory rights under the Act including the right to mandatory attorney's fees which must be finally determined and enforced. As such, the Appellate Court's Order overlooked the unique nature of the issue on review and it should be reversed.

B. In Other Contexts, Reviewing Courts Have Heard Appeals Of Prevailing Defendants Regarding Denial Of Attorneys Fees By The Trial Court.

The Act became law barely two years ago. As such, it was a matter of first impression in the Appellate Court whether a successful defendant has the right to appeal an interlocutory denial of defendant's attorneys' fees under the Act. However, jurisprudence under the Illinois Consumer Fraud Act provides some analogous case law to guide this Court in this matter. Section 10a(c) of the Consumer Fraud Act states that a court "may award ... reasonable attorney's fees and costs to the prevailing party." (815

ILCS 505/10a(c) (West 2007)). Pursuant to this substantive right, reviewing courts routinely allow successful defendants to appeal trial court decisions relating to the denial of attorneys' fees or the amount of awards under Section 10a(c). *See, e.g., Krautsack v. Anderson et al.*, 223 Ill.2d 541, 551, 861 N.E.2d 633, 642, (2006); *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill.App.3d 399, 407, 911 N.E.2d 1049, 1057 (1st Dist. 2009) In such cases, the appeal by the successful defendant-appellant was heard in the reviewing court because – although each defendant obtained the relief it sought (i.e., dismissal of the action, summary judgment) – a review was warranted because the defendant was denied a substantive right by the trial court (attorneys' fees under the CFA). This Court should make a similar finding with respect to Walsh's appeal here.

Such a finding makes sense in the context of this case because if a successful defendant in a Consumer Fraud Act case has the right to appeal the amount of *discretionary* attorneys' fees a trial court awards, surely a successful defendant in a SLAPP case, who succeeded in getting the lawsuit tossed on alternative grounds, should be allowed appellate review of whether he is entitled to the Act's immunity and the *mandatory* attorneys' fees under the Act. In both instances, substantive rights to attorneys' fees are involved and in both instances, appellate review is required.

III. HOLDING WALSH'S APPEAL TO BE MOOT WOULD LEAD TO AN UNJUST OR ABSURD RESULT.

As noted, the stated purpose of the Act is to identify and eliminate SLAPPs. 735 ILCS 110/5. The Act not only immunizes citizens, like Walsh, who exercise their political rights from such claims, but also provides for the expedited disposal of these claims in the circuit court and a substantive right to appeal a trial court's denial of a motion to dispose of the claim in the appellate court so that citizens are not burdened with

the expense of defending against these claims. Therefore, the only just way to realize the goals of the Act is to allow appellate review of a trial court's order denying a motion to dismiss under the Act – irrespective of how final judgment in the case has been determined.

A finding that Walsh's appeal is moot will render the protections and rights afforded to victims of SLAPPs illusory. *C.f., Krautsack v. Anderson et al.*, 223 Ill.2d 541, 559, 861 N.E.2d 633, 646, (2006) ("without the ability to recover attorneys fees, the protections of the [Consumer Fraud] Act are illusory.") As a practical matter, in all cases where trial courts err in denying a motion to dispose of the case under the Act, ***true*** victims of SLAPPs – like Walsh here – will ultimately get the frivolous case decided in his/her favor either as a result of motion practice (5/2-615; 5/2-619; 5/2-1005) or at the conclusion of a trial. *See e.g.*, 95th Ill. Gen. Assem., House Proceedings, May 31, 2007, (statement of House Representative Jack Franks) (the purpose of the Act is to address cases such as the case in his county where "the developers lawsuit was thrown out on three separate occasions"). If such a SLAPP victim, like Walsh here, is thereafter barred from seeking review of the trial court's erroneous interlocutory decision (and consequently being barred from recovering his attorneys' fees), then all trial court orders declining to dispose of a claim under the Act *in true SLAPP suits* will be, in essence, unreviewable decisions.

Said differently, although Walsh was trapped in a SLAPP suit – which was proven to be a SLAPP because it was dismissed based on the innocent-construction rule – and he was forced to spend tens-of-thousands of dollars defending himself in a SLAPP, based on the Appellate Court's Order and *Mund v. Brown*, he is barred from obtaining the

substantive relief he requested under the Act and recovering his attorney's fees because trial courts' erroneous rulings on Motions to Dismiss Under the Act are effectively unreviewable. This is an absurd result that cannot stand. *Land,* 202 Ill. 2d at 422 ("[W]e presume that the legislature, when it enacted the statute, did not intend absurdity, inconvenience, or injustice.").

CONCLUSION

In dismissing this appeal as moot, the Appellate Court overlooked the fact that under the plain language of Section 20(a) of Act, Walsh has a substantive right to appellate review of the trial court's decision denying his Motion to Dismiss Under the Citizen Participation Act. Independent of that right, this case also involves an actual and justiciable controversy because when the trial court erred in denying his motion, Walsh was denied his statutory immunity and mandatory attorneys' fees. As such, this Court should find that a justiciable controversy exists and reverse the Order. Walsh respectfully request the Court to either resolve the merits of Walsh's appeal in this Court, remand the case to the Appellate Court for a decision on the merits, or to exercise its supervisory authority and enter any further order it deems just and appropriate.

Respectfully submitted,

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Dated: November 16, 2009