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Revised Rule 243

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On July 1, 2012, new Illinois Supreme Court Rule 243 became effective. The new Rule gives the trial judge in civil cases discretion to permit jurors to submit written questions to be directed to witnesses. The Rule sets forth some of the procedures to be used when the trial judge decides to permit the jurors to submit questions but the decision whether to permit the jurors to submit questions rests entirely with the trial judge. According to the Supreme Court's announcement, all the federal circuits and at least half of all the states allow jurors to submit written questions.

Basics of the Procedure Under Supreme Court Rule 243

It is likely that Illinois' judges have always had the discretion to allow jurors to submit questions, but the new Rule expressly gives trial judges that discretion. First, and foremost, the Rule is wholly permissive; its does not require judges to allow jurors to ask questions, it merely formalizes the procedure to allow the practice. See Rule 243(a). The procedure does not require that questions be allowed of every witness. See Rule 243(b). It would seem experts would be the type of witnesses for which the Rule would be most helpful. In one situation in which the procedure was allowed many years ago in an Illinois state court, we were told that after several hours of testimony from an expert for the plaintiff regarding soil cores in an environmental contamination case, the parties completed their examination and one of the jurors submitted a question: "What is a soil core?" Imagine the thoughts going through the head of the lawyer who had presented this witness, knowing that at least one juror had no understanding what he had heard for the last several hours. At least because the court was allowing questions to be asked by jurors, the lawyer was able to have the question asked and have some comfort that with the question asked, the juror would then better understand the witness' testimony.

The Rule provides that the trial judge will decide whether to permit written questions after the questioning of the witness is completed by counsel for all parties. If the trial judge decides to permit written questions, the questions are collected by the bailiff. Jurors are not limited to posing a single question. The jurors are not to discuss the questions at that time. The proposed questions are then made part of the record. See Rule 243(b).

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On the inside

Then, outside the presence of the jurors, the judge will read the question to all counsel, allow counsel to see the written question and allow counsel an opportunity to object to each question. The judge will rule on any objections at that time and the question "will be either admitted, modified, or excluded." See Rule 243(c). Although unlikely, it is possible the judge and counsel will be unable to understand a proposed question. At least one judge we spoke to indicated he would consider asking the juror for clarification.

The court then asks the questions that are ruled permissible with instructions to the witness to "not exceed the scope of the question." All counsel will then be provided an opportunity to ask follow-up questions, limited to the scope of the new testimony. See Rule 243(d).

Although the Rule does not specifically require it, we assume even excluded questions will be read to the jury. According to the Rule, if questions are not asked or are modified, the judge shall inform the jurors "that they shall not concern themselves with the reason for the exclusion or modification of any question submitted and that such measures are taken by the court in accordance with the rules of evidence that govern the case." See Rule 243(e).

Another alternative, not addressed by the Rule, but which could certainly arise and does not seem disallowed by the Rule, is that a question could better be answered by a later witness than the one to which the jurors have posed it. Counsel could ask the court to advise the jurors that a later witness will be able to answer the question and the question will be posed to that witness. This would seem to be a procedure that would provide the best possible answer to the juror's question.

In that regard, several of the lawyers we spoke with who have tried cases in which jurors were permitted to submit questions commented they often limit follow-up questions or decline the opportunity entirely if they are not certain how the witness will respond to follow-up questions. Those lawyers preferred to address juror questions with a properly prepared later witness to be absolutely certain of the answers the witness will provide. All the judges and lawyers we spoke with agreed that every juror question, even the ones the judge refuses to ask, give the lawyers valuable insight into issues they will need to focus on with later witnesses.

Concerns of Counsel and Manner to Address These Issues

There are concerns amongst members of the bar related to this procedure, but in speaking with judges from both the state and federal bench who have allowed jurors to submit questions, those concerns were universally rejected. In speaking with these judges, it becomes apparent that the efficacy of the procedure largely will be determined by the quality and judgment of the trial judge. That aside, the following are the principal issues of concern that were raised and the manner with which they are likely to be dealt with by judges.

First, concerns expressed by counsel about the length of time that the procedure would take were found, based on the experience of the judges that have used the procedure, to be unfounded. Often times the questions are submitted after a witness is on the stand for a long period of time, such as an expert, and a break is going to be taken after that witness in any event. At the break the questions submitted by the jurors are discussed, it is decided whether any of the questions will be asked, and then the questions that make the cut can be asked and any follow-up done in short order before the next witness is called. The judges did not find that this procedure extended the trial in any meaningful way and to the extent that it did, the quality of the questions asked and the insight gained from the questions by counsel far outweighed any extra time.

Second, questions by jurors raising issues that they are not to consider, such as insurance or seat belts, were found by the judges to be much better dealt with through an admonition to the jury at the time the issue is raised than waiting until the end of trial or not being addressed at all as is often the case. Currently, jurors who are wondering about issues they are not to consider have no way of knowing those are issues they should not

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concern themselves with. Allowing juror questions will surface those issues and allow the judge to provide a proper admonishment.

Rule 243(e) specifically deals with admonishing jurors regarding issues that they should not concern themselves with and, to the extent possible, removing the issue from their consideration. This section of the Rule is mandatory in a situation in which a question is submitted and not asked or is modified. Accordingly, counsel should do more than simply object to an improper juror question. Counsel should ask for an appropriate admonition. Failing to ask for the admonition may waive any error on appeal.

Third, and one of the biggest concerns to the lawyers we spoke to, is that issues may be raised by jurors that the parties have decided not to address or would violate Rule 213(f) or may raise issues that the opposing side did not consider and thereby educate those lawyers. The judges stated that in such a situation where both parties agreed not to address an issue or would violate Rule 213(f), that they would likely refuse the question and instruct the jury accordingly. However, in situations where the jurors raise issues that educate the opponent, the judges found that it is a trial lawyers job to adapt his case accordingly. This loss of control, while likely to be frustrating to trial lawyers, is not likely to bother the court.

Enthusiasm for Procedure by Judges

The judges we spoke to were most enthusiastic about this procedure because it keeps jurors involved in the trial and makes the jurors part of the process. According to one judge, "jurors LOVE being allowed to ask questions" and they ask "GREAT questions." Another judge thought it was an absolutely necessary part of the trial. While not every one of the jurors questions will be asked, the judges found that because jurors' questions were either asked or reasons were given why the question was not asked, jurors felt they were part of the process and were much more satisfied with the process. The judges also found that it was very helpful because counsel had a much better sense of the questions and issues the jurors were asking themselves and counsel could focus on the actual issues that are important to the jurors. Finally, it provided the opportunity for the judge to dispel in the jury's mind concerns that were not relevant.

While there might not be any way to prove it, one judge suggested that allowing jurors to ask questions may cut down on jurors doing their own research on the internet. Previously, jurors with questions had no way to satisfy that curiosity and were tempted to get answers to those questions in the way they get answers to all other questions: a Google search. Jurors with questions will now have an outlet for those questions and will have one less reason to turn to the internet.

Conclusion

Despite the trepidation amongst members of bar regarding this procedure, every member of the bench we spoke to that has used the procedure expressed enthusiastic support. As one judge commented: "Why wouldn't you want to know what the jury is thinking?" We suspect that with the passage of Rule 243, this enthusiasm will permeate the bench as judges learn more about the process and the procedure will become more and more common. Accordingly, it will be the task of practitioners to adapt to this procedure, make sure they are preserving their record by objecting to questions and asking for admonitions, and to accept one further trial wrinkle that you cannot control. ■

* The authors wish to acknowledge the following judges who generously agreed to share their experiences allowing jurors to submit written questions: Honorable James F. Holderman, Honorable J. Edward Prochaska and the Honorable Warren D. Wolfson.

The Admissibility of a Plaintiff's Health Insurance (Or Lack Thereof)

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Illinois law is relatively well-settled that plaintiffs are barred from introducing evidence that defendants have *liability* insurance. See *Kavanaugh v. Parret*, 379 Ill. 273, 40 N.E.2d 500 (1942)("It is improper to inform the jury, either directly or indirectly, that the defendant is insured against liability.") and *Reed v. Barton,* 55 Ill. App. 2d 67, 204 N.E.2d 136 (1965). Typically, evidence of the existence of *health* insurance, or lack thereof, is equally inadmissible during a trial due to the prejudicial effect it may have against a plaintiff as a collateral source. Pursuant to the collateral source rule in Illinois, evidence of damages to an injured plaintiff that will be paid by a source such as a health insurer, is inadmissible. In theory, defendant tortfeasors should not benefit by being relieved of the financial responsibility for the damages they caused due to the introduction of collateral sources to the jury. See *Wills v. Foster*, 892 N.E.2d 1018 (IL Sup. Ct., 2008). Recently, however, the Appellate Court for the Fifth District of Illinois held that the existence of a plaintiff's health insurance, or the lack of it, may be admitted in certain circumstances.

In *Vanoosting v. Sellars*, 970 N.E.2d 614, (5th Dist. 2012), the plaintiff was rear-ended by the defendant and claimed personal injuries, seeking damages for past and future pain and suffering, disability, loss of a normal life, and loss of earning capacity. The defendant admitted negligence and the case was tried on damages only. During the first trial, the trial court declared a mistrial due to a juror issue.

During the subsequent trial, the defendant's attorney cross-examined the plaintiff and she admitted she had not had treatment for any of her injuries in the preceding three years. On re-direct, plaintiff's attorney asked the plaintiff if she had health insurance and she simply answered "no." The trial court subsequently declared a second mistrial due to that question and answer.

During the third trial, plaintiff's attorney preserved the issue of the admissibility of plaintiff's lack of health insurance through an offer of proof. In the offer of proof, plaintiff testified that she did not seek treatment because she did not have health insurance and did not have the ability to pay for treatment. She testified that if the jury awarded her damages for future medical expenses, she planned to seek further physical therapy and/or water therapy to treat her neck and back pain. In opening statements, the defense counsel told the jury that plaintiff had not seen a doctor since 2008. Plaintiff then testified that even though she requested a clean bill of health from her doctor six weeks after the incident in order to secure a job, she was still in pain and started seeing a specialized dentist for jaw problems that she related to the accident. The testimony that she did not seek treatment due to the lack of health insurance and the inability to pay was not allowed. The defendant did not present a case in chief. The jury ultimately found in favor of the plaintiff in the amount of $30,286.46. However, plaintiff appealed, arguing that she was deprived a fair trial when the trial court refused to allow her to testify that she did not seek medical care due to her lack of health insurance.

The Appellate Court for the Fifth District of Illinois unanimously reversed the trial court's ruling on the exclusion of the health insurance testimony and remanded the case to the trial court for a fourth trial. The Appellate

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Court found the plaintiff's explanation of her failure to seek medical treatment to be relevant testimony. The Appellate Court concluded that plaintiff's lack of health insurance was relevant because plaintiff's failure "to seek further treatment due to her lack of insurance is of consequence to her claim for future medical expenses and to the rebuttal of the defense theory that she no longer has pain and suffering or a need for treatment due to her lack of treatment in the last three years."

The Appellate Court continued: "[T]he contested testimony relates directly to the central controversy of the case, namely, the extent of the plaintiff's damages and whether the plaintiff is entitled to damages for future pain and suffering, medical expenses and loss of a normal life. This is especially true in light of defense counsel's strategy of repeatedly highlighting the fact that plaintiff had no treatment for her injuries in the three years prior to trial in his cross examination of witnesses and closing argument."

The Appellate Court was careful to point out the potential impact that the plaintiff's financial position may have on the sympathies of the jury, but nevertheless concluded it was a risk worth taking. It explained that the trial court, upon request, could have restricted the evidence to its proper purpose and scope and instructed the jury accordingly.

Although this case is likely only "persuasive" in nature, for many defense attorneys outside of the Fifth District, the underlying issue may prove to be common and will likely arise in many cases that proceed to trial, no matter where the courtroom is located in Illinois. Plaintiffs' attorneys may attempt to use the case as binding authority, claiming no other case law exists to the contrary in the other districts.

Defense Strategies

Defense attorneys should be wary of this case. Large gaps in treatment could now be explained away by plaintiffs simply testifying that they did not have health insurance. Moreover, due to the current poor job market, it is possible that a larger percentage of jurors could relate to the plaintiff's explanation, not to mention the sympathies this testimony may elicit in jurors as the Appellate Court for the Fifth District recognized. Plaintiffs' attorneys will likely begin citing this case in *motions in limine* as well.

It seems more important now, due to this case, to explore this issue during a plaintiff's deposition. If a plaintiff had large gaps in treatment, be sure to ask why. Why did the plaintiff fail to see a doctor that could simply file a lien with the auto insurance carrier? Why did the plaintiff fail to go to a public hospital, such as Stroger Hospital in Chicago (whose primary mission is to treat the indigent and those without health insurance)? Did the plaintiff seek out other sources of health care coverage, such as Medicaid?

Although this case is likely only "persuasive" in nature, for many defense attorneys outside of the Fifth District, the underlying issue may prove to be common and will likely arise in many cases that proceed to trial, no matter where the courtroom is located in Illinois. Plaintiffs' attorneys may attempt to use the case as binding authority, claiming no other case law exists to the contrary in the other districts. "Under the rule currently followed in this State, rulings of an appellate court of any district are binding precedent on all the circuit courts if there are no contrary rulings of another district on the same issue but the rulings are not binding precedent upon the other

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districts of the appellate court." *People v. Collings*, 95 Ill. App. 3d 325, 329, 420 N.E.2d 203, 206 (1981) citing *People v. Spahr*, 56 Ill. App. 3d 434, 14 Ill.Dec. 208, 371 N.E.2d 1261) (1978).

Factual similarity is a key factor in choosing among persuasive decisions. If the legal issues are the same, the decision based on the most closely matching factual situations will usually be the stronger persuasive authority for a trial judge. A plaintiff's lack of health insurance will be a simple fact to point out in asking that a Court allow such evidence pursuant to the *Vanoosting* decision.

However, in this case, the Appellate Court for the Fifth District appears to have disregarded or ignored precedent in other Illinois districts on this issue. A number of cases have held evidence that plaintiff did not receive medical treatment because they could not afford it, to be inadmissible. See *Wellner v. New York Life Insurance Co.*, 331 Ill.App. 360, 73 N.E.2d 156 (1st Dist. 1947)(The financial status of the plaintiff or defendant is irrelevant and reference to it during the trial would be prejudicial. The jury should not decide this case based upon sympathy for the plaintiff's financial status.) *Rush v. Hamdy*, 255 Ill. App. 3d 352 (4th Dist. 1993)(the financial condition of the parties is irrelevant and often prejudicial. Such evidence appeals to the sympathy of the jury for presumably the jury will favor those least able to bear the loss. If undue emphasis is placed on the irrelevant evidence, or if the jury's verdict is affected by it, then reversal is warranted.) Obviously, a strong argument could be made that a plaintiff's lack of health insurance is a reference to the financial condition of the plaintiff which would be too prejudicial to allow into evidence.

The Appellate Court for the Fifth District noted that Illinois Rule of Evidence 403 explicitly states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." In practice, it seems almost routine that trial judges find lack of health insurance or inability to pay for treatment, to be too prejudicial so as to outweigh any probative value. Therefore such evidence is inadmissible.

A stronger argument to make in opposition to a proposed *motion in limine* by a plaintiff on this issue is to argue that if the plaintiff *did* have health insurance, such information would be inadmissible because it has no probative value, and even if it did have probative value, the evidence would be overly prejudicial to the plaintiff. On the other hand, the fact that a plaintiff does *not* have health insurance should not change the ultimate decision on admissibility. As set forth previously, there are ways to obtain health care without insurance, and therefore the lack of insurance would not have any probative value. But, even if a court found that there was probative value, the prejudicial effect against the defendant should outweigh the probative value, because the lack of health insurance would be evidence of the "financial status" or "financial condition" of the plaintiff. As set forth in the *Wellner* and *Rush* cases and their progeny, this evidence should not be allowed. In essence, plaintiffs should not be allowed to submit evidence of health insurance only when it helps them. Plaintiffs should not be allowed to have their cake and eat it too. ■

The Citizen Participation Act

by Anthony G. Joseph
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The Citizen Participation Act (hereafter referred to as the "CPA" or "the Act") is an anti-SLAPP (Strategic Lawsuits Against Public Participation) statute enacted in Illinois that is designed to prevent against the chilling effect of civil lawsuits aimed at preventing citizens from exercising their constitutional rights to petition, speak and associate freely and communicate with the government.

Prior to the enactment of the CPA, the Illinois General Assembly recognized that "the threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of important constitutional rights." *735 ILCS 110/5* (2010). SLAPPs use the threat of money damages or the prospect of the cost of defending the lawsuits to silence citizen participation. *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 630 (2010).

A SLAPP suit typically alleges defamation, business torts, antitrust, intentional infliction of emotional distress, invasion of privacy, civil rights violations, constitutional rights violations, conspiracy, nuisance, judicial abuse process and malicious prosecution. *Shoreline Towers Condo. Ass'n v. Gassman*, 404 Ill. App. 3d 1013 (1st Dist. 2010). A plaintiff's intention in filing of these types of suits is not necessarily to prevail on the claim, but to silence speech through the threat of damages and litigation expenses. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 119 (2nd Dist. 2010). Plaintiffs in SLAPP suits do not intend to win but rather to chill a defendant's speech or protest activity and discourage opposition by others through delay, expense and distraction. John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 Loy. L.A. L. Rev. 395, 403-05 (1993).

Plaintiffs in SLAPP suits do not intend to win but rather to chill a defendant's speech or protest activity and discourage opposition by others through delay, expense and distraction.

Characteristics of the Citizen Participation Act

When a motion to dismiss is filed pursuant to the Act, "a hearing and decision on the motion must occur within 90 days after notice of motion is given to the Respondent." *735 ILCS 110-10 (a)* (West 2008). Discovery is suspended pending a decision on the motion. *735 ILCS 110-10 (b)* (West 2008). "Discovery may be taken, upon leave of court for good cause shown, on the issue of whether the movant's acts are not immunized from, or are not in furtherance of the acts immunized from liability by this Act." *Id*. "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." *735 ILCS 110-10 (c)* (West 2008).

One other section of the Act that was rather peculiar in nature was the section on attorney's fees. 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). Prior to the Illinois Supreme Court's decision in *Sandholm v. Kuecker*, 962 N.E.2d 418 (2012), there was some question what sort of "reasonable attorney's fees and costs incurred in connection with the motion" actually meant.

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Sandholm v. Kuecker

In *Sandholm*, the issue before the Illinois Supreme Court was the applicability of the Act to a lawsuit alleging intentional torts based on alleged statements by various defendants attacking the plaintiff's reputation. Procedurally, the circuit court dismissed the plaintiff's action and found that the defendants were immune from liability under the Act. With respect to the issue of attorney's fees, the circuit court awarded the defendant's attorney's fees in the amount of $54,000 pursuant to the Act. However, the circuit court limited the attorney's fees to those which specifically could be linked to those fees connected to work done under the Act. Therefore, the plaintiff appealed the dismissal of the entire action and the defendants filed a cross-appeal seeking an expansion of the attorney's fees to include those fees associated with the entire defense.

On appeal, the circuit court's ruling was affirmed. The Appellate Court for the Second District of Illinois held that it "could not agree that the Act only applies to acts made during a government proceeding because it applies to any acts of the moving party in furtherance of the moving party's rights of petition, speech, and association or to otherwise participate in government. *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 856 (2nd Dist. 2010). Moreover, the Appellate Court found that the defendant's action of removing the plaintiff as head basketball coach was an act in furtherance of their right to participate in government with the goal to obtain favorable government action. *Id*. at 864. The Appellate Court further held it was undisputed that the plaintiff's lawsuit was based on or in response to the defendants' actions. *Id*.

In *Sandholm*, the plaintiff, who was a head basketball coach at a public high school, filed a defamation action and other causes of action against the defendants. The lawsuit stemmed from the defendants' efforts to have the plaintiff removed as the head basketball coach. The defendants made various statements criticizing the plaintiff's coaching style to the school board and in various letters and internet postings. For example, one defendant sent the school board an email stating, "many people tell me the plaintiff's half time speeches are so profanity laced they want to leave the locker room." Other defendants published statements on a local web site that called the plaintiff a "psycho nut who walks in circles and is only coaching for his glory." Yet another defendant posted a letter to a newspaper that wanted to force the plaintiff to "stop his utilization of verbal abuse, emotional abuse, bullying and belittling—all aimed toward his players, as well as power conflicts with his fellow coaches." Following a series of additional comments and writings in the local media, the school board voted to remove the plaintiff from his position of head basketball coach.

Section 15 of the Act describes the type of motion to which the Act applies to and states as follows:

> "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).

With respect to Section 15 of the Act, the Illinois Supreme Court reasoned that where "a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not solely based on the defendant's rights of petition, speech, association, or participation in government." *Sandholm v. Kuecker*, 962 N.E.2d 418, 430 (Ill. 2012). Thus, the suit would not be subject to dismissal

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under the Act. *Id.* The Supreme Court went on to note that it is clear from the express language of the Act that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute. *Id*.

The Supreme Court also reasoned that it was entirely possible that defendants could spread malicious lies about an individual, while in the course of genuinely petitioning the government for a favorable result. *Id.* at 433. Plaintiff alleged that defendants defamed him by making statements that plaintiff abused children, did not get along with colleagues, and performed poorly at his job. The Supreme Court further held that assuming those statements constituted actionable defamation, it was irrelevant as to whether the defendants were genuinely attempting to achieve a favorable governmental result by pressuring the school board into firing the plaintiff. *Id.* at 433.

The Court also held that plaintiff's lawsuit was not based on, related to, or in response to the acts of the defendants in furtherance of the rights of petition and speech. *Id*. at 434. Plaintiff's suit did not resemble, in any way, a strategic lawsuit intended to chill participation in government or to stifle political expression. *Id.* Plaintiff's claims did not interfere with and burden defendants' free speech and petition rights, but sought damages for the personal harm to his reputation from defendants' alleged defamatory and tortious acts. *Id*. Therefore, the plaintiff's Complaint, seeking redress for damages from defamation, did not constitute a SLAPP and was therefore not subject to dismissal under the Act. *Id*. at 433. The Court went a step further and held that the lawsuit was not even within the purview of the Act. *Id*. at 434.

On the issue of attorney's fees, the Court held attorney's fees incurred in connection with the motion include only those fees which can specifically be delineated as incurred in connection with the motion to dismiss filed under the Act. *Id*. at 435. Any fees incurred which are not specifically connected to the motion to dismiss pursuant to the act are not allowed. *Id*. On this issue of attorneys' fees, this is a significant ruling insofar as a defendant can no longer file a motion to dismiss under the Act and seek attorney's fees for the defense of the entire action.

The Illinois Supreme Court has found that the Act does not protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute.

Conclusion

The protections of the Citizen Participation Act, when afforded to the Defendants, are no longer as expansive in their scope. The Illinois Supreme Court has found that the Act does not protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute. Moreover, the Citizen Participation Act no longer provides a potentially lucrative windfall to defendants who file motions to dismiss pursuant to the Citizen Participation Act, as they can no longer seek attorney's fees beyond those specifically connected with the motion to dismiss. ■

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