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NO. 4-24-1076

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Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

NICHOLAS T. ANDERSON, Plaintiff and Counterdefendant-Appellee, v. MEAGAN M. SMITH, f/k/a Meagan M. Wohlfeil, Defendant and Counterplaintiff-Appellant.	)	Appeal from the Circuit Court of Schuyler County No. 18L2 Honorable Roger B. Thomson, Judge Presiding.

JUSTICE DOHERTY delivered the judgment of the court, with opinion.
Justices Steigmann and Cavanagh concurred in the judgment and opinion.

OPINION

¶ 1 Defendant Meagan M. Smith appeals from the trial court's order denying her motion to dispose of plaintiff Nicholas T. Anderson's defamation and malicious prosecution claims against her pursuant to the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq.* (West 2022)). Because the court ruled on the motion without conducting the inquiry required by the Act, we reverse the court's order and remand with directions that the court conduct that inquiry.

¶ 2 I. BACKGROUND

¶ 3 The ultimate forum for resolution of civil claims is a trial, whether before a judge or a jury. The Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq.* (West 2022)), however, provides several ways in which a civil defendant might defeat a claim via motion short of trial. A claim might be defeated based on the inadequacy shown on the face of the plaintiff's pleadings. *Id.* § 2-615. A defendant might advance a claim that some affirmative matter defeats the plaintiff's

claim. *Id.* § 2-619. Finally, a defendant may obtain summary judgment by demonstrating that the evidence marshalled by both sides is insufficient to present a triable issue. *Id.* § 2-1005. Success on any one of these motions would allow the defendant to prevail without having to defend the subject claim at trial. Moreover, where a plaintiff's claim is so patently lacking in merit that it is rightly deemed frivolous, the defendant might seek recovery of attorney fees from the plaintiff. Ill. S. Ct. R. 137 (eff. Jan. 1, 2018).

¶ 4 It is into this well-known environment that the legislature dropped the Act, presumably intending it to serve as a new and *different* vehicle for defendants facing a particular type of claim to obtain early dismissal and avoid trial. See 735 ILCS 110/30(a) (West 2022) (providing that the Act does not preclude preexisting remedies for defendants). The challenge presented by this case is understanding *how* the Act's provisions differ from the preexisting Code provisions regarding dispositive motions.

¶ 5 A. The Act

¶ 6 In 2007, the legislature passed the Act as a response to what it found was "a disturbing increase in lawsuits termed 'Strategic Lawsuits Against Public Participation' in government or 'SLAPPs.' " *Id.* § 5. "SLAPPs *** are lawsuits aimed at preventing citizens from exercising their political rights or punishing those who have done so. [Citation.] SLAPPs use the threat of money damages or the prospect of the cost of defending against the suits to silence citizen participation." *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 630 (2010). A SLAPP plaintiff "do[es] not intend to win but rather to chill [the] defendant's speech or protest activity and discourage opposition by others through delay, expense, and distraction." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 34.

¶ 7 Section 15 of the Act provides:

"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 2022).

We will use the term "Act motion" to refer to "any motion as described in Section 15." *Id.* § 20(a); see *id.* § 10 (" 'Motion' includes any motion to dismiss, for summary judgment, or to strike, or any other judicial pleading filed to dispose of a judicial claim.").

¶ 8 The Act provides for the following procedure and standards for an Act motion:

"(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 movant[']s 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." *Id.* § 20.

"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." *Id.* § 25.

¶ 9 Because the Act applies not just to SLAPPs but to discrete claims within lawsuits, we will use the term "SLAPP claim" when referring to an individual claim subject to dismissal under section 20(c) of the Act. See *id.* § 10 (" 'Judicial claim' or 'claim' include any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury."). While the Act uses the general terms " '[m]oving party' " and " '[r]esponding party' " (*id.*), for simplicity, we will use the terms specific to this case, where the Act motion has been filed by the defendant and seeks dismissal of an alleged SLAPP claim in the plaintiff's complaint. When faced with an Act motion, the trial court's task is to determine whether the challenged claim is a SLAPP claim or an ordinary claim.

¶ 10 B. Factual and Procedural History

¶ 11 1. *Undisputed Facts*

¶ 12 On June 1, 2017, the Illinois Department of Agriculture and the Schuyler County Board held a public hearing in Rushville, Illinois, regarding a proposed measure to approve a hog farming operation. The hearing was preceded by a press conference in a nearby park. Anderson and Smith both attended the press conference; Anderson supported the measure, and Smith opposed it. At some point, while another proponent of the measure was giving a television interview, Smith was positioned behind him with a protest sign that expressed opposition to the measure.

¶ 13 Anderson subsequently approached Smith; the exact details of their encounter are disputed. However, it is undisputed that Smith said, "I don't know you" and "don't touch me" during the encounter and in the presence of bystanders. Smith spoke to law enforcement officers present at the scene and told them that Anderson had shoved and assaulted her. As a result, Officer Rick Wright of the Rushville Police Department arrested Anderson and issued a citation against him for assault (720 ILCS 5/12-1 (West 2016)) but declined to issue a citation for battery. However, Anderson was later charged with battery (*id.* § 12-3) and acquitted after a bench trial on May 31, 2019.

¶ 14 2. *The Parties' Contentions*

¶ 15 Smith has brought counterclaims against Anderson for battery and intentional infliction of emotional distress. Both claims allege, among other things, that Anderson intentionally shoved her in an offensive manner and almost knocked her to the ground during their encounter. Anderson denies this allegation, asserting that he did no more than hold out his hand to offer Smith his business card.

¶ 16 Anderson has brought claims against Smith for defamation and malicious prosecution. Anderson alleges, among other things, that Smith falsely said, "you assaulted me" during their encounter and that her primary motive for participating in the battery prosecution was not to bring him to justice for the alleged battery but to retaliate against him for his work "as an advocate for pro-farming activities, including the siting of agricultural facilities," such as the proposed hog farming operation. Smith denies these allegations.

¶ 17 3. *Smith's Motion for Summary Judgment*

¶ 18 In January 2024, Smith filed a motion asking the trial court to (1) grant summary judgment in her favor on her battery counterclaim and on Anderson's claims pursuant to section

2-1005 of the Code (735 ILCS 5/2-1005 (West 2022)) or (2) dispose of Anderson's claims pursuant to the Act. The court denied Smith's motion in its entirety, finding that it presented triable issues of fact for the jury, although the court failed to explain why it denied Smith's request for relief under the Act.

¶ 19 We granted defendant's petition for leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(9) (eff. Oct. 1, 2020).

¶ 20 II. ANALYSIS

¶ 21 Although the trial court's order addressed other issues in this case, Rule 306(a)(9) limits the scope of our interlocutory review to the narrow question of whether Anderson's claims are subject to dismissal under the Act. See *Glorioso v. Sun-Times Media Holdings, LLC*, 2024 IL 130137, ¶ 1 (*Glorioso II*). We express no opinion as to the remaining issues, which we discuss only to the extent necessary to determine whether the trial court erred in denying Smith relief under the Act. See *In re Lawrence M.*, 172 Ill. 2d 523, 526 (1996); *Sandholm*, 2012 IL 111443, ¶ 58.

¶ 22 A trial court errs when its denial of relief rests on an incorrect legal standard. "When determining whether [the trial] court applied the incorrect legal standard, we must first ascertain the correct legal standard, which is a question of law subject to *de novo* review." *In re Marriage of Trapkus*, 2022 IL App (3d) 190631, ¶ 22. Ascertaining the correct interpretation of the Act is also a question of law that we review *de novo*. *People v. Howard*, 2017 IL 120443, ¶ 19. In interpreting the Act, our objective "is to ascertain and give effect to the legislature's intent." *Id.*

¶ 23 However, we are not writing on a blank slate; we are bound by the supreme court's explanation of the standard in *Walsh*, *Sandholm*, and *Glorioso II*. See *Doyle v. Hood*, 2018 IL App (2d) 171041, ¶ 35 (explaining that the supreme court's interpretation of a statute binds this court). Because *Glorioso II* is the most recent of these decisions—more recent even than the trial court's

decision in this case—we start there.

¶ 24 A. The Post-*Sandholm* Test

¶ 25 In *Glorioso II*, the supreme court articulated the relevant standard by endorsing what it called the post-*Sandholm* test:

> "The appellate court has consistently employed a three-part, post-*Sandholm* test to determine whether a lawsuit is subject to dismissal pursuant to the Act. [Citations.] Pursuant to the post-*Sandholm* test, the [defendant] has the burden to show that (1) the [defendant's] acts were in furtherance of [her] rights to petition, speak, associate, or otherwise participate in government to obtain favorable government action and (2) [the] plaintiff's claims are *solely* based on, related to, or in response to the [defendant's] exercise of these rights. [Citation.] If the [defendant] meets [her] burden under the first two prongs, in order to defeat the motion, [the] plaintiff must prove by clear and convincing evidence what is considered the third prong of the test: that the [defendant's] acts were not *genuinely* aimed at procuring favorable government action." (Emphases in original.) *Glorioso II*, 2024 IL 130137, ¶ 55.

¶ 26 In *Glorioso II*, the court explained that the first prong "requires a court to consider whether an objective person would find the [defendant's] acts were reasonably calculated to elicit a favorable government action or outcome." *Id.* ¶ 67. In contrast, the third prong is subjective rather than objective; in other words, the court must consider whether *this person's* acts were *actually* intended to elicit a favorable government action or outcome. *Id.* ¶ 67 n.3.

¶ 27 Our focus in the present case is the second prong, which originated in *Sandholm* itself (*id.* ¶ 62) and has presented difficulties for the appellate court. See *Glorioso v. Sun-Times*

Media Holdings, LLC, 2023 IL App (1st) 211526, ¶ 107 (*Glorioso I*) (Hyman, J., dissenting) (seeking "clarification and correction by our supreme court"). In *Glorioso II*, the supreme court pointedly declined to resolve the difficulties articulated by Justice Hyman's dissenting opinion in *Glorioso I* (see *Glorioso II*, 2024 IL 130137, ¶¶ 56-57), leaving *Sandholm* as the supreme court's last word on the issue.

¶ 28 B. *Sandholm*

¶ 29 *Sandholm* addressed section 15 of the Act, which requires the defendant's motion to rest "on the grounds that the [alleged SLAPP] claim is based on, relates to, or is in response to any act or acts of the [defendant] in furtherance of the [defendant's protected] rights." 735 ILCS 110/15 (West 2022). *Sandholm* construed this requirement as meaning that the "lawsuit was *initiated* solely to interfere with [the] defendant['s] protected rights." (Emphasis added.) *Glorioso II*, 2024 IL 130137, ¶ 53. In other words, the defendant must show that it is not "the *true goal* of [the] plaintiff's claims" to seek relief for damages for the defendant's allegedly wrongful act. (Emphasis added.) *Sandholm*, 2012 IL 111443, ¶ 57; accord *Glorioso II*, 2024 IL 130137, ¶ 52 ("[A] defendant's initial burden as the moving party is to show the true goal of the lawsuit is to 'chill participation in government or to stifle political expression,' rather than to seek damages for personal harm from the defendants' tortious acts."). At that point, of course, the trial court moves from the second prong of the post-*Sandholm* test to the third prong and considers the genuineness of the defendant's acts, as required by sections 15 and 20(c) of the Act. *Sandholm*, 2012 IL 111443, ¶ 53.

¶ 30 Smith argues that *Sandholm* did not merely interpret the Act but warped it beyond recognition by imposing an extrastatutory burden on defendants. See generally Emily L. Jenkinson, Note, *Sandholm v. Kuecker: The Illinois Supreme Court "SLAPPS" Away a Protection*

of Illinois Citizens' First Amendment Rights, 63 DePaul L. Rev. 1093 (2014) (endorsing a similar view). For our purposes, however, there is no difference between a burden imposed by the Act or by *Sandholm*; as an inferior court, we must faithfully apply *Sandholm* absent a change in the law, which is something that the judiciary and the legislature have both declined to do since *Sandholm* was decided. See *Glorioso II*, 2024 IL 130137, ¶ 53.

¶ 31 C. The "Meritless and Retaliatory" Standard

¶ 32 Although *Sandholm* established the "true goal" inquiry, the court spent just one brief paragraph engaging in the inquiry itself:

> "We conclude, based on the parties' pleadings, that plaintiff's lawsuit was not solely based on, related to, or in response to the acts of defendants in furtherance of the rights of petition and speech. Plaintiff's suit does not resemble in any way a strategic lawsuit intended to chill participation in government or to stifle political expression. It is apparent that the true goal of plaintiff's claims is not to interfere with and burden defendants' free speech and petition rights, but to seek damages for the personal harm to his reputation from defendants' alleged defamatory and tortious acts. Defendants have not met their burden of showing that plaintiff's suit was based solely on their petitioning activities." *Sandholm*, 2012 IL 111443, ¶ 57.

¶ 33 While *Sandholm*'s conclusion is clear enough, the standard applied to reach that conclusion has proven somewhat elusive. After *Sandholm* was decided, the First District adopted what has been called the "meritless and retaliatory" standard based on *Sandholm*'s conclusion that the Act intended "to subject only meritless, retaliatory SLAPP suits to dismissal." *Id.* ¶ 45; see *Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005, ¶ 26 (adopting this standard). As there was no clearly contrary authority, we understand that the trial court was obligated to follow

Ryan and its progeny. See *Schramer v. Tiger Athletic Ass'n of Aurora*, 351 Ill. App. 3d 1016, 1020 (2004) (noting that circuit courts are bound by the decisions of the appellate court in other districts absent a split among districts).

¶ 34 But while *Sandholm*'s interpretation of the Act binds us, *Ryan*'s interpretation of *Sandholm* does not. See *O'Casek v. Children's Home & Aid Society of Illinois*, 229 Ill. 2d 421, 440 (2008) (explaining that one district may part company from another). As we will explain, *Ryan* and its progeny misconstrued *Sandholm*, so we decline to adopt the "meritless and retaliatory" standard. *Id.*; see *Glorioso I*, 2023 IL App (1st) 211526, ¶ 73 (Hyman, J., dissenting) (positing that "a decade of appellate court decisions" since *Sandholm* "have repeatedly fallen short").

¶ 35 The primary vice of *Ryan*'s "meritless and retaliatory" standard is that it attempts to ascribe legal meaning to two words that *Sandholm* used in their rhetorical sense. We first address the flaws with this standard and then articulate what we find to be the appropriate standard for the second prong of the post-*Sandholm* test, which we believe comports with the supreme court's admittedly terse application of the standard in *Sandholm*.

¶ 36 1. *Meritless*

¶ 37 Although *Sandholm* used the word "meritless" several times when describing SLAPP claims, the word "meritless" may mean different things in different contexts. A plaintiff's claim can be described as meritless when (1) it has proceeded to trial and failed on the merits, meaning that the finder of fact has resolved the case against the plaintiff; (2) it can be resolved by an ordinary dispositive motion under the Code, meaning that the court can dispose of the claim without a trial on the merits; or (3) it is frivolous, meaning that the claim lacks even arguable merit. Attempting to incorporate any of these definitions of "merit" in the context of deciding an Act motion presents significant problems.

¶ 38 If a trial court were to apply the first definition of merit in deciding an Act motion, it would be required to preemptively resolve the factual issues of the plaintiff's claim *itself* and conclude that the claim will fail at trial. However, this approach would effectively deny the plaintiff his right to a jury trial on the claim. Put another way, if the Act allows the court to find that the defendant's acts are *immunized* from liability only by first finding that defendant *has no* liability for those acts, then the Act does not truly confer immunity; it simply shifts the role of determining liability from the jury to the court in the first instance. We must interpret the Act to avoid doubts as to whether it infringes on the plaintiff's constitutional right to a jury trial. See *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 564 (2005) ("Courts will avoid *** any construction which would raise doubts as to [a] statute's constitutionality [citation]."); see also *Sandholm*, 2012 IL 111443, ¶ 60 (emphasizing that its interpretation of the Act avoided constitutional issues). Surely the Act does not contemplate the trial court would decide "merit" in this manner.

¶ 39 The problem with the second and third approaches arises from the fact that sections 15 and 20(c) of the Act (*i.e.*, the third prong of the post-*Sandholm* test) do not *require* dismissal of the plaintiff's "meritless" claim if the defendant's conduct falls under the "sham exception." *Sandholm*, 2012 IL 111443, ¶¶ 52-53; see *Glorioso II*, 2024 IL 130137, ¶ 55 (listing this as a requirement for dismissal under the Act). This means that to dispose of a claim under the Act, the defendant would first have to make the same showing required to dispose of the claim via a motion to dismiss or a motion for summary judgment *and then* defend against allegations that her conduct was not genuinely aimed at procuring favorable government action, including the possibility of discovery on the issue. See 735 ILCS 110/20(b) (West 2022).

¶ 40 Prevailing on a traditional dispositive motion means that the plaintiff's claim is resolved, which in the pre-Act world could only be viewed as a clear victory for the defendant.

What else might be achieved by a defendant who seeks to go beyond these traditional "merits" motions by arguing that the claim is "meritless" under the Act? The additional benefits of an Act motion would effectively consist only of the 90-day time limit, stay of discovery, and possibly an award of attorney fees. But how often would these ancillary benefits convince the defendant to abandon the surefire, half-prong test of an ordinary dispositive motion and pursue dismissal pursuant to a three-prong test contingent on the genuineness of her conduct? Even here, Smith sought both forms of relief in the alternative.

¶ 41 *Ryan* and its progeny do not avoid this problem by requiring only genuinely undisputed facts that "can disprove some element of the plaintiff's claim." *Glorioso I*, 2023 IL App (1st) 211526, ¶ 56; see *Ryan*, 2012 IL App (1st) 120005, ¶ 26. If the defendant could make this showing, then she could also move for summary judgment on the claim. See 735 ILCS 5/2-1005 (West 2022) (allowing for the defendant to seek summary judgment "at any time" when she can "show that there is no genuine issue as to any material fact and that [she] is entitled to a judgment as a matter of law").

¶ 42 We will not presume that the legislature intended for the Act to create a variant of preexisting dispositive motions that requires more litigation with a lower chance of success, nor does *Sandholm* stand for such a proposition. See *People v. Gutman*, 2011 IL 110338, ¶ 12 ("[A] court presumes that the legislature did not intend to create absurd, inconvenient, or unjust results."). As the supreme court recognized in *Sandholm*, "SLAPPs are, by definition, meritless." *Sandholm*, 2012 IL 111443, ¶ 34. However, the supreme court went on to explain that " 'defendants win eighty to ninety percent of all SLAPP suits litigated on the merits.' " *Id.* (quoting John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 Loy. L.A. L. Rev. 395, 406 (1993)). If it is true that 80% to 90% of SLAPP claims fail at trial, then 10% to 20%

of them succeed; in other words, even some meritorious claims are SLAPP claims. Therefore, *Sandholm* does not stand for the principle that a SLAPP claim is meritless because it will necessarily *lose* if litigated on the merits; rather, a SLAPP claim is meritless because it does not *deserve* to be litigated on the merits.

¶ 43 2. *Retaliatory*

¶ 44 With respect to the word "retaliatory," we agree that the inquiry prescribed by *Sandholm* requires consideration of the plaintiff's "true goal" and "genuineness," but *Ryan* and its progeny fail to recognize the inherently factual nature of that inquiry. It is true that the supreme court's brief analysis of this issue was "based on the parties' pleadings," but the court predicated its conclusion on the defendants' failure to supply sufficient *evidence* supporting its "initial burden of *proving* that [the] plaintiff's lawsuit was solely 'based on, relate[d] to, or in response to' their acts." (Emphasis added.) *Id.* ¶¶ 56-57. Indeed, the supreme court specifically recognized that a defendant may support an Act motion with materials outside of the pleadings when attempting to meet its initial burden. *Id.* ¶ 54 (citing 735 ILCS 5/2-619(a)(9) (West 2008)).

¶ 45 By taking a contrary approach to determining whether a plaintiff's claim is retaliatory, *Ryan* and its progeny fail to acknowledge that a defendant's "claim of immunity is conceptually distinct from the merits of the plaintiff's claim" and presents a distinct factual inquiry involving evidence that may be unrelated to the merits of the plaintiff's claim. See *Mitchell v. Forsyth*, 472 U.S. 511, 527-29 (1985) (addressing qualified immunity for federal officials); *Barber-Colman Co. v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (1992) ("It is only in the context of the plaintiff's *claim* that it is proper to state that a defendant in a section 2-619 motion admits all well-pleaded facts. The defendant does not admit the truth of any allegations in plaintiff's complaint that may touch on the affirmative matters raised in the 2-619 motion."

(Emphasis in original.)). As such, limiting the scope of the trial court's inquiry to the face of the plaintiff's claim will simply encourage SLAPP plaintiffs to do a better job of making SLAPP claims *appear* to be ordinary claims in order to stave off an Act motion.

¶ 46 As the supreme court recognized in *Sandholm*, "SLAPPs 'masquerade as ordinary lawsuits,' " so *Ryan*'s standard will not deter the abuse of the judicial process sought to be addressed by the Act. *Sandholm*, 2012 IL 111443, ¶ 35 (quoting Kathryn W. Tate, *California's Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 Loy. L.A. L. Rev. 801, 804-05 (2000)). Accordingly, we decline to limit the scope of the trial court's inquiry in such a way.

¶ 47 D. The "True Goal" Inquiry

¶ 48 We now turn to *Sandholm* itself to consider how courts should ascertain the true goal of the plaintiff's claims. *Sandholm* explained that the inquiry turns on whether the plaintiff is "genuinely seeking relief." *Id.* ¶ 45. Although "[t]he word 'genuine' has both objective and subjective connotations" (*Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 61 (1993)), the parties' dispute turns on Anderson's subjective intent in bringing these claims, not the objective question of whether a reasonable plaintiff might have brought these claims under the circumstances. We agree that *Sandholm* calls for subjective inquiry, given that it directed courts to examine "the plaintiff's intent in bringing [the] suit" (*Sandholm*, 2012 IL 111443, ¶ 42) and compared genuineness under the second prong of the post-*Sandholm* test with genuineness under the third prong (*id.* ¶ 53; see 735 ILCS 110/15 (West 2022)), which the court has since explained calls for a subjective inquiry (*Glorioso II*, 2024 IL 130137, ¶ 67 n.3). However, a person's subjective intent may be inferred by the finder of fact based on the person's conduct as well as the circumstances. *People v. Grayer*, 2023 IL 128871, ¶ 28.

¶ 49 We also note that *Sandholm* and *Glorioso II* examined entire *lawsuits* rather than individual *claims*, asking why the "*lawsuit was initiated*." (Emphasis added.) *Glorioso II*, 2024 IL 130137, ¶ 53 (citing *Sandholm*, 2012 IL 111443, ¶ 45). Here, Smith alleges that both of Anderson's claims were initiated for the same improper purpose despite being initially filed at different times, so we decline to reach the question of how a court should address allegations that a plaintiff has different motives for bringing different claims or that his motives have changed over time.

¶ 50 We first provide some background on when courts will inquire into a plaintiff's motive, then explain the factual inquiry required by the Act, and finally address the procedure for conducting that inquiry.

¶ 51 1. *The Plaintiff's Motive*

¶ 52 Ordinarily, "[a] plaintiff's right of recovery is in no way barred by the motive which prompts him to bring the action." *Somers v. AAA Temporary Services, Inc.*, 5 Ill. App. 3d 931, 935 (1972). As such, courts have consistently held that a defendant's allegation that the plaintiff has a bad motive is not a defense to an otherwise valid claim (*id.*), although it may affect the availability of equitable remedies under the doctrine of unclean hands (see *Zahl v. Krupa*, 365 Ill. App. 3d 653, 658 (2006) ("[T]he unclean hands doctrine bars only equitable remedies and does not affect legal rights."); *Ocwen Loan Servicing, LLC v. DeGomez*, 2020 IL App (2d) 190774, ¶ 32 ("To determine whether a party acted with unclean hands, the court must look to the intent of that party."); see also *Merrill v. Dibble*, 12 Ill. App. 85, 86-87 (1882) (suggesting in *dicta* that the plaintiff's motive for bringing the suit might affect an award of punitive damages)).

¶ 53 Similarly, the plaintiff cannot salvage an invalid claim or bolster a valid claim because he has a good motive for seeking compensatory damages, such as avoiding severe financial hardship. See *McHale v. Kiswani Trucking, Inc.*, 2015 IL App (1st) 132625, ¶ 30

(explaining that the plaintiff's poverty is immaterial when only compensatory damages are sought); *Hall v. Chicago & North Western Ry. Co.*, 5 Ill. 2d 135, 151-52 (1955) ("[W]hat the plaintiff does with an award *** is of no concern to the court or jury."). Because the plaintiff's motive for bringing a claim for compensatory damages is immaterial to the question of whether the defendant wrongfully caused those damages, it is unnecessary for the plaintiff to plead and prove his good motive; indeed, the defendant could presumably move to strike such an immaterial allegation from the plaintiff's pleadings (see *Doe v. Coe*, 2019 IL 123521, ¶ 24).

¶ 54 The immateriality of the plaintiff's motive is significant here for two reasons: (1) it renders the plaintiff's motive conceptually distinct from the merits of his claim for purposes of an immunity determination and (2) a genuine factual dispute as to the plaintiff's motive is not a genuine issue of *material* fact to be addressed at a trial on the merits of a claim or defense. However, courts are not completely unconcerned with plaintiffs' motives; it has long been understood that a court has the authority to ascertain whether a plaintiff's improper motive should bar resolution of his claim on the merits. See *Mederacke v. Becker*, 129 Ill. App. 2d 434, 438 (1970) (explaining that a court has the inherent power and duty "to protect itself and litigants against harassing and vexatious litigation"); see, *e.g.*, *Wilson v. OSF Healthcare System*, 2023 IL App (4th) 220475-U, ¶ 25 (affirming the trial court's dismissal of a facially sufficient claim as a sanction for fraud on the court). For example, if the plaintiff's actual motive in bringing a suit is to lose, then the court might decline to hear the suit as collusive; similarly, if the plaintiff and the defendant have a shared motive apart from resolving the alleged dispute between themselves, such as harming a nonparty to the litigation, the court might decline to hear the case as feigned or fictitious. See *Kern v. Chicago & Eastern Illinois R.R. Co.*, 44 Ill. App. 2d 468, 472-73 (1963) (collecting cases).

¶ 55 These long-standing concerns about improperly motivated litigation are now reflected in Rule 137, which requires a signature on the plaintiff's complaint certifying that the plaintiff's claim "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Ill. S. Ct. R. 137(a) (eff. Jan. 1, 2018); see *Krautsack v. Anderson*, 223 Ill. 2d 541, 561-62 (2006) (explaining that Rule 137 encompasses vexatious, harassing, and bad-faith litigation). If the defendant does file a motion for sanctions, then she has the burden of proving the plaintiff's improper purpose (see *Kotara, LLC v. Schneider*, 2018 IL App (3d) 160525, ¶ 20), employing a subjective standard. See *Clark v. Gannett Co.*, 2018 IL App (1st) 172041, ¶ 67 (quoting *Century Road Builders, Inc. v. City of Palos Heights*, 283 Ill. App. 3d 527, 531 (1996)); see also *Krautsack*, 223 Ill. 2d at 561-62 (explaining that Rule 137 may be used to penalize vexatious, harassing, and bad-faith litigation). Before imposing sanctions on the basis of the plaintiff's improper purpose, "a hearing must be conducted to afford the parties an opportunity to present evidence to support or rebut the claim and to allow them to articulate their respective positions," and the court's ruling must be "based on adequate information." *Clark*, 2018 IL App (1st) 172041, ¶ 67; see *Walton v. Throgmorton*, 273 Ill. App. 3d 353, 357 (1995) (reversing the trial court's dismissal of a plaintiff's lawsuit where "there [wa]s no evidence of record and no claim made that [the plaintiff] or any of his attorneys signed any pleading for any improper purpose").

¶ 56 2. *Improper Motive*

¶ 57 In essence, the various inquiries described above all require the court to conclude that a person is doing something that *appears* proper but with an improper motive. The concept of improper motive is most frequently examined as an element of the tort of malicious prosecution known as "malice." See *Beaman v. Freesmeyer*, 2021 IL 125617, ¶ 141 ("Malice, as an element

of malicious prosecution, has been defined as the initiation of a prosecution for an improper motive."); *cf. Reed v. Doctor's Associates, Inc.*, 355 Ill. App. 3d 865, 875-76 (2005) (explaining that the tort of abuse of process requires a showing that the plaintiff had "an ulterior purpose or motive," meaning that the plaintiff "intended to use the action to accomplish some result that could not be accomplished through the suit itself").

¶ 58 In the context of civil claims, malice means that the "proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based." Restatement (Second) of Torts § 676 (1977); see, *e.g.*, *Miller v. Rosenberg*, 196 Ill. 2d 50, 54 (2001) (referring to a medical malpractice lawsuit filed as retribution for perceived discourtesies). Put another way, the plaintiff bringing the claim is using the litigation *process*, as opposed to the *outcome* of that process, as a weapon against the defendant. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991).

¶ 59 "[I]t is generally recognized that, because malice is incapable of positive, direct proof, it necessarily rests on inferences and deductions from the facts that are heard by the [finder] of fact." *Beaman*, 2021 IL 125617, ¶ 142. As such, when conflicting inferences may be drawn from the evidence as to whether the person acted with a proper motive, the finder of fact must determine which inference to draw. *Id.* ¶ 141. Here, Smith alleges in her Act motion that the true goal of Anderson's claims is to retaliate against her for pursuing a prosecution against him for battery.

¶ 60 With respect to Anderson's defamation claim, Anderson alleges that his goal is legitimate: to "retaliate" against Smith for defaming him. Therefore, the narrow factual question at the second prong of the post-*Sandholm* test is whether Anderson's true goal is (1) to obtain an award of damages as redress for harm to his reputation, with litigation of the defamation claim

serving as a necessary step toward that goal, or (2) to require Smith to litigate the defamation claim as retribution for pursing the battery prosecution, with an award of damages serving only as a threat and potential windfall. See *Sandholm*, 2012 IL 111443, ¶ 57; *Walsh*, 238 Ill. 2d at 630 (explaining that SLAPPs rely on the threat of money damages, as well as the cost of defending against the suit).

¶ 61 With respect to Anderson's malicious prosecution claim, the narrow distinction between the parties' positions becomes a hairline. In a strict sense, every claim of malicious prosecution is "retaliation" for the defendant's participation in government because the claim must allege "the commencement or continuance of [a previous] original criminal or civil judicial proceeding by the defendant." (Internal quotation marks omitted.) *Beaman*, 2021 IL 125617, ¶ 74 (identifying this as an element of the tort of malicious prosecution); see *Sandholm*, 2012 IL 111443, ¶ 35 (noting that SLAPPs may include claims of malicious prosecution). Therefore, the factual question at the second prong of the post-*Sandholm* test is whether Anderson's true goal is (1) to recover damages from Smith for harm resulting from her commencement of the criminal prosecution or (2) to require her to litigate the malicious prosecution claim as retribution for that same conduct.

¶ 62 Interestingly, the factual question at the third prong of the post-*Sandholm* test will be the same as another element of Anderson's malicious prosecution claim, namely, whether Smith had an improper motive in pursuing the criminal prosecution against Anderson. Compare *Beaman*, 2021 IL 125617, ¶ 140 (requiring a malicious prosecution plaintiff to prove that the defendants "were motivated by any reason other than attempting to bring the [plaintiff] to justice"), with *Glorioso II*, 2024 IL 130137, ¶ 55 (requiring an alleged SLAPP plaintiff to prove "that the [defendants'] acts were not genuinely aimed at procuring favorable government action" (emphasis

omitted)). As we will explain, however, the two inquiries will be addressed by different finders of fact.

¶ 63 3. *Procedure*

¶ 64 *Sandholm* explained that an Act motion is appropriately brought under section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)), except with the specific procedure and standard required by section 20 of the Act, *i.e.*, the post-*Sandholm* test. See *Sandholm*, 2012 IL 111443, ¶¶ 54-55; *Glorioso II*, 2024 IL 130137, ¶ 49; see also *People v. Botruff*, 212 Ill. 2d 166, 175 (2004) ("A fundamental rule of statutory construction is that where there exists a general statutory provision and a specific statutory provision, either in the same or in another act, both relating to the same subject, the specific provision controls and should be applied.").

¶ 65 We first address the general principles for analyzing a section 2-619 motion and then explain how the Act supplants that analysis in several respects.

¶ 66 a. Section 2-619

¶ 67 Section 2-619 allows for the defendant to move for dismissal of the plaintiff's claim on the grounds that it is "barred by [an] affirmative matter avoiding the legal effect of or defeating the claim," supporting the motion with an affidavit if the affirmative matter is not evident from the face of the pleading. 735 ILCS 5/2-619(a)(9) (West 2022); see *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115-16 (1993) (noting that affidavits, answers to interrogatories, and discovery depositions may be used to support a section 2-619 motion). "The phrase 'affirmative matter' encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action. [Citation.] For that reason, it is recognized that a section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the plaintiff's cause of action ***." *Id.* at 115.

¶ 68 If the defendant's evidence is inadequate to support the asserted defense, then the motion may be denied; otherwise, the burden shifts to the plaintiff to "establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven." *Id.* at 116. Using affidavits or other proof, the plaintiff must refute evidentiary facts properly asserted by the defendant, or else those facts are deemed admitted. *Id.* Otherwise, "[a]ll pleadings and supporting documents must be interpreted in the light most favorable to the [plaintiff]." *Rehfield v. Diocese of Joliet*, 2021 IL 125656, ¶ 22.

¶ 69 As trial courts are well aware, it is fundamental that a court hearing a section 2-619 motion should not weigh the evidence or make credibility determinations. *Schacht v. Lome*, 2016 IL App (1st) 141931, ¶ 33. But this is the trap that is presented when considering an Act motion embedded within a section 2-619 motion. As discussed below, an Act motion requires the court to do exactly what experience has taught is normally improper in deciding a section 2-619 motion: weigh the evidence and make findings of fact on the issues specific to the Act.

¶ 70 b. The Act

¶ 71 Under the Act and *Sandholm*, the affirmative matter that defeats the claim is the plaintiff's improper motive in bringing the claim. See *Sandholm*, 2012 IL 111443, ¶ 57; *Glorioso II*, 2024 IL 130137, ¶ 53. Because the plaintiff's motive is immaterial to the merits of the claim, it is conceptually distinct from the legal sufficiency of the claim itself. Put another way, the question of whether the plaintiff is genuinely *seeking* relief is separate from whether he is actually *entitled* to relief. See *Sandholm*, 2012 IL 111443, ¶ 45.

¶ 72 As such, a defendant filing an Act motion has the initial burden of supplying affidavits or other evidence sufficient to support a conclusion that (1) an objective person would find that her acts were reasonably calculated to elicit a favorable government action or outcome

and (2) the plaintiff's true goal is to chill participation in government or to stifle political expression, rather than to seek damages. If the defendant fails to satisfy her initial burden, the trial court must deny the motion. See *id.* ¶ 56.

¶ 73 However, if the defendant does satisfy her initial burden, the plaintiff may respond either by producing (1) evidence that the defendant's showing on either of the first two prongs is unfounded or (2) clear and convincing evidence that defendant's acts were not genuinely aimed at procuring favorable government action. If the plaintiff believes he will be unable to make this showing with the information available to him, he may attempt to establish good cause for the trial court to allow discovery on the issue of whether the defendant's acts are protected by the Act. 735 ILCS 110/20(b) (West 2022).

¶ 74 Here, a crucial difference between section 2-619 of the Code and the Act comes into play. Whereas section 2-619 contains little specification for how the motion is to be heard, section 20 of the Act provides that "a hearing and decision on the [Act] motion *must occur* within 90 days after notice of the motion is given to the [plaintiff]" and that "[t]he court *shall* grant the motion and dismiss the judicial claim unless *the court finds*" that the plaintiff has met his shifted burden of proof. (Emphases added.) *Id.* § 20(a), (c); *contra* 735 ILCS 5/2-619(c) (West 2022) (providing that the court "*may* decide the motion upon the affidavits and evidence offered by the parties" or "*may* deny the motion without prejudice" when the plaintiff's right to a jury trial is not implicated (emphases added)).

¶ 75 Accordingly, if the plaintiff manages only to create a genuine factual dispute as to one of the prongs of the post-*Sandholm* test, then the trial court must conduct an evidentiary hearing and decide the disputed factual issues *itself* using the burden-shifting framework set forth in *Glorioso II*. See *Donelson v. Hinton*, 2018 IL App (3d) 170426, ¶ 10; *cf.* 735 ILCS 5/8-907

(West 2022) (allowing the trial court to divest a reporter's privilege "only if the court, after hearing the parties, finds" that divestiture is warranted "under the particular facts and circumstances of [the] particular case"). This makes sense; to defer a finding that the plaintiff's claim is a SLAPP claim until after the claim is litigated on the merits at a jury trial deprives the defendant of the efficient resolution guaranteed by the Act. See 735 ILCS 110/5, 20(a) (West 2022); see also *Sandholm*, 2012 IL 111443, ¶ 34 (" '[D]efendants win eighty to ninety percent of all SLAPP suits litigated on the merits.' " (quoting Barker, *supra* at 406)).

¶ 76 For trial courts who have rightly obeyed the usual prohibition against making their own factual determinations in the context of a section 2-619 motion, the process described above will undoubtedly be a shock to the system. When it comes to the findings required of trial courts under the Act, however, the trial court *must* make its own findings rather than defer factual disputes to the jury. The Act requires "clear and convincing evidence," inherently an exercise in weighing the evidence. 735 ILCS 110/20(c) (West 2022). Moreover, *Glorioso II* makes clear that application of the standards it prescribes requires trial courts to make factual findings. *Glorioso II*, 2024 IL 130137, ¶ 67; see *Sandholm*, 2012 IL 111443, ¶ 56 (referring to the defendant's burden of proof).

¶ 77 The Act's requirement of judicial fact-finding raises the question of whether the Act denies the plaintiff his right to a jury trial on the challenged claim. The answer is no. With respect to the trial court's factfinding at the second prong of the post-*Sandholm* test, the right to a jury trial does not extend to the immaterial issue of whether the plaintiff has a good motive; as explained above, neither party is allowed to address the plaintiff's motive at a jury trial. Furthermore, a plaintiff cannot insist on litigating a claim for the purpose of harassment. See Ill. S. Ct. R. 137 (eff. Jan. 1, 2018); *Guttman v. Guttman*, 65 Ill. App. 2d 44, 53 (1965) ("[N]o man has a constitutional right to maintain vexatious or harassing litigation.").

¶ 78 With respect to the trial court's fact-finding at the third prong of the post-*Sandholm* test, there may be circumstances, as in this case, where the genuineness of the defendant's conduct will also be an element of the plaintiff's claim on which the plaintiff would be entitled to a jury trial *if the claim is not dismissed* pursuant to the Act. In such circumstances, however, the plaintiff's claim has already been found vexatious under the second prong, and therefore, it is unsurprising that the Act would require the plaintiff to make a sufficient factual showing to undercut the defendant's right to invoke the Act's protections; if successful, the plaintiff would retain the right to proceed to a trial on the merits.

¶ 79 If the trial court does find that the plaintiff has met his shifted burden of proof, then the plaintiff's motive again drops out of the case as usual. However, to the extent that the court's finding on the third prong overlaps with any of the issues in the case, the finding would not preclude the jury from reaching its own conclusion on those issues.

¶ 80 E. The Present Case

¶ 81 Finally, we consider the post-*Sandholm* test as it applies to this case.

¶ 82 On the first prong, Anderson does not dispute that an objective person would find that Smith's participation in the criminal prosecution was reasonably calculated to elicit a favorable government action or outcome. See *Glorioso II*, 2024 IL 130137, ¶ 67; see, *e.g.*, *Meyer v. Board of County Commissioners of Harper County*, 482 F.3d 1232, 1243 (10th Cir. 2007) (concluding that an "attempt to report an alleged criminal offense was conduct protected by the First Amendment").

¶ 83 On the second prong, the trial court concluded that Smith's motion presented triable issues of fact, albeit under *Ryan*'s "meritless and retaliatory" standard. See *Ryan*, 2012 IL App (1st) 120005, ¶ 26. This was error because the court itself was obligated to resolve the factual

issues, and in any event, we have concluded that *Ryan* was wrongly decided. As such, we reverse the trial court's order and remand with directions for it to ascertain whether Smith has supplied sufficient evidence to support a conclusion that the true goal of Anderson's claims is to chill participation in government or to stifle political expression; if not, the trial court must deny the motion. Otherwise, the trial court must ascertain whether Anderson has responded with sufficient evidence to show that (1) Smith's allegation of Anderson's improper motive is unfounded, in which case the court must deny Smith's motion, or (2) there is a genuine factual dispute as to Anderson's motive, in which case the court must hold an evidentiary hearing and make a factual finding as to whether Anderson's motive was retaliatory. If the court concludes that Anderson's motive is not retaliatory, it must deny Smith's motion; otherwise, it must proceed to the third prong of the post-*Sandholm* test.

¶ 84 If the trial court reaches the third prong and finds that Anderson has shown by clear and convincing evidence that Smith's acts were not genuinely aimed at procuring favorable government action, the court must deny Smith's motion; the court's finding will not preclude the parties from litigating any issues on the merits of their claims before the jury. Otherwise, the court must grant Smith's motion and dismiss Anderson's claims against her.

¶ 85 III. CONCLUSION

¶ 86 For the reasons stated, we reverse the trial court's order denying Smith's motion to dispose of Anderson's claims and remand for the court to determine whether Anderson's claims are subject to dismissal under the Act. We express no opinion as to Smith's counterclaims against Anderson.

¶ 87 Reversed and remanded with directions.

Decision Under Review:	Appeal from the Circuit Court of Schuyler County, No. 18-L-2; the Hon. Roger B. Thomson, Judge, presiding.
Attorneys for Appellant:	Erin Wilson Laegeler, of Wilson Laegeler Law LLC, of Rushville, for appellant.
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