STATE OF MICHIGAN

IN THE SUPREME COURT

BRYAN PUNTURO AND FAWN PUNTURO, husband and wife, and B&A HOLDINGS, LLC d/b/a ParkShore Resort, a Michigan limited liability company,

Plaintiffs/Appellees/Cross-Appellants,

BRACE KERN, an individual, and SAUBURI BOYER AND DANIELLE KORT, f/k/a Danielle Boyer, individuals,

Defendants/Appellants/Cross-Appellees.

MSC Docket No. 158749
MSC Docket No. 158755
MSC Docket No. 158556

COA File No. 338727
Consolidated into:
COA File No. 338728
COA File No. 338732

Lower Court File No: 17-32008-CZ
Hon. Thomas G. Power

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APPELLEES' SUPPLEMENTAL BRIEF

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Statement of Questions Involved

1. As a threshold matter, does the fair reporting privilege, MCL 600.2911(3) – which can only be invoked "in a libel action" – apply, where, as here, appellants are not the media companies that published the allegedly defamatory states, but are instead the persons who furnished the oral statements to the media?

2. Did the Court of Appeals err in holding that the appellants' allegedly defamatory statements to the media regarding the pending litigation were not protected under the fair reporting privilege?

3. Was *Bedford v Witte*, 318 Mich App 60 (2016), wrongly decided?

4. Are the standards for application of the statutory fair reporting privilege different for statements made by an attorney or by a layperson-litigant?

I. Introduction.

In this application, Defendants/Appellants ask this Court to authorize Michigan attorneys to violate the Michigan Rules of Professional Conduct and defame their litigation opponents publicly, for their profit and the profit of their clients. Defendants also request that this Court eviscerate hundreds of years of hornbook defamation law – that "words imputing the commission of a criminal offense," in this case, unequivocally and brashly stated to every media outlet that would listen, which are defamation *per se*[1] and have been such from the beginnings of Michigan appellate decisions and indeed from the waking hours of the Republic,[2] shall hereafter be uniformly cloaked with an absolute

[1]MCL 600.2911(1).

[2]See, e.g., *Bronson v Bruce*, 59 Mich 467, 472; 26 NW 671 (1886), citing *Commonwealth v Clap*, 4 Mass 163 (1808).

privilege whenever, and merely because, the person defamed has been sued regarding or charged with a crime of which he is legally presumed innocent until proven guilty beyond a reasonable doubt. Such a result would be abhorrent. No "fair and true" reporting privilege could or should apply in this circumstance.

Moreover, to invoke the privilege, Defendants must establish that the defamatory statements, in addition to being "fair and true," are actually a "report." Put differently, in order for a defamatory publication to be a "fair and true report" of a criminal or civil proceeding, *it must actually be a* ***report*** *of that proceeding*; not just, as Defendant Kern describes his conduct, "repeating the allegations in the lawsuit." "Punturo committed extortion" and "Punturo committed antitrust violations" – to the extent accurately described, as Kern does in his brief, as "repeating the allegations in their lawsuit" – are not a "report of a proceeding." The court in *Merritt v Thompson (In re Thompson)*, 162 BR 748, 764 (Bankr ED MI 1993), explained this concept with simple aplomb:

> There is a subtle but fundamental difference between saying "I testified at trial that X is a pervert" versus "X is a pervert." Because the latter assertion describes the speaker's present state of mind, it clearly goes beyond the simple recitation of a fact that can be verified by reference to court documents. . . . more in the nature of a reaffirmation of her suspicions about Merritt, rather than a neutral account of allegations made in state court.

Cases from courts nationwide, discussed below, confirm this simple concept.

This simple concept – that simply "repeating the allegations in their lawsuit" is not a "report" of the lawsuit – is the essence of the astute holding of the Court of Appeals in this case below, quoted by Kern on page 42 of his supplemental brief – "[t]he crux of the *Bedford* case was that the public record contains only unproven allegations, not that actual crimes were committed."

In this regard, the Court is invited to consider a simple hypothetical. Tomorrow, Kern tells a reporter at the Traverse City Record-Eagle:

"Bryan Punturo committed extortion, and antitrust violations."

Such a statement is no more or less than, as Kern puts it in his brief, "repeating the allegations" in the 2016 suit and the criminal complaint. Kern's civil suit says, "Punturo committed antitrust violations." The criminal complaint says, "Punturo committed extortion." According to Defendants, this means when they go to the media and make these same claims, "repeating the allegations" in those court documents, they are simply "reporting" about the "proceedings." As the Court of Appeals summarized Defendants' position, "[a]fter all, defendants used declarative statements in their court pleadings, so their use thereof in statements to the media literally reflected the public record." *Punturo v Kern*, dkt no 338727, 2018 WL 5276142, at *4 (Mich App October, 16, 2018)(Kern's Apx. 3, 009a – 019a).

This hypothetical highlights the fallacy of equating a "fair and true report" of a court proceeding with "repeating the allegations" in a court document. Of course, given that more than three years ago, (1) Kern's suit alleging antitrust violations by Kern was dismissed on summary disposition; and (2) the criminal complaint alleging extortion did not survive the preliminary examination in the district court and was dismissed; no one would seriously consider such a statement, now, "Bryan Punturo committed extortion, and antitrust violations," as a "fair and true report of public proceedings." Merely "repeating the allegations" in the court documents – a euphemism for simply defaming Punturo by accusing him of crimes – would not be today, a "report" of anything – and it was not any more of a "report" when Defendants made the defamatory accusations in 2016.

Regarding the specific questions presented in this Court's November 22, 2019 order:

1. Plaintiffs concur with Defendants' analysis of the libel issue. Case law is sufficiently clear, that when a person utters verbal defamation to the media, that defamation is "libel" for which the interviewed person is liable, when published. Accordingly, Plaintiffs will not brief this issue.[3]

2. The Court of Appeals did not err in its analysis in this case. Contrary to Defendants' claims that their defamatory statements were "reports" of court documents that were "fair and true," the Court of Appeals adroitly discerned that "*[d]espite* the content of the public record, defendants stated in no uncertain terms that Punturo committed extortion and flagrant violations of MARA." *Punturo v Kern*, dkt no 338727, 2018 WL 5276142, at *5 (October, 16, 2018)(Kern's Apx. 3, 009a – 019a)(emphasis added).

3. *Bedford v Witte* was not wrongly decided as it applies to the facts of this case. In holding that the use of the phrase "we can say with certainty," put the statements in that case outside the privilege, the Court of Appeals was simply holding that such an unequivocal declaration was not a "report" at all, but rather, was an accusation largely unrelated to the underlying lawsuit; and that it certainly was neither "fair" nor "true" because it in no way "substantially represented" the underlying suit.

4. The standard for an attorney's statements to the media is higher than that of a layperson. There can be no question that Kern's defamatory statements to the media were clear violations of MRPC 3.6, and on the facts pleaded, were made in the fulfillment of a threat to make

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[3] *Cf. Farley v Reichlin*, dkt no 195162, 1998 WL 1991802 (Mich App April, 3, 1998) at *5 (**Exhibit 9,** Apx. 39b-43b)("defendant cites no authority for the proposition that the libel provision of M.C.L. § 600.2911(4); MSA 27A.2911(4) applies to plaintiff's slander claim"). This holding, based upon no real adversarial process testing, is not sufficient to overcome the law and logic on the other side of the issue.

them if Punturo did not pay Kern and his clients $750,000. The case cited by both Defendants, *Smith v Anonymous Joint Enter*, dkt no 275297, 2011 WL 744943, at *5 (Mich App March, 3, 2011)(Kern's Apx. 35, 468a – 472a), states "'Fair' is defined as 'free from bias, dishonest[y], or injustice . . . legitimate, sought, done, given . . .' while 'true' is defined as 'being in accordance with the actual state or conditions; conforming to reality or fact ... real; genuine; authentic . . . .'" Using this standard, Kern's defamatory accusations fail the test – they were biased, dishonest, unjust, illegitimate, and were neither genuine nor authentic because they did not conform to reality or fact, because, as the *Bedford* court put it, the "comments did not merely summarize what was alleged—but not yet adjudicated" in the antitrust suit and extortion prosecution. *Bedford v Witte*, 318 Mich App 60, 71; 896 NW2d 69 (2016).

Moreover, the honor, dignity, and legitimacy of the legal profession require that "fair and true," *at the very least*, mean "not in clear violation of the ethics rules." "I will go to the press and defame you, including by accusing you of crimes including in connection with cases I am directly interested in, unless you write my clients a large check," is not conduct this Court should tolerate, much less encourage. The ruling in this case is as important to the legal community in Michigan, as it is to the parties.

II. Statement of Facts.

As pleaded in Plaintiffs' complaint (Kern's Apx. 4, 021a – 040a):

Plaintiff Bryan Punturo is a Traverse City businessman, who owns 50% of Plaintiff B&A Holdings, LLC, the operating company for the ParkShore Resort on East Grand Traverse Bay. He manages and operates the ParkShore, performing a wide range of duties including hiring of employees, oversight, tending bar, cooking in the ParkShore restaurant, and also repair, maintenance,

and other duties. Plaintiff Fawn Punturo, who has joined in this case for loss of consortium, is Bryan Punturo's spouse, and is also employed by the ParkShore, with duties that include management, oversight, working the front desk, and booking and coordinating special events including weddings and other large group gatherings that are a significant and important part of the ParkShore's business activities and income. Plaintiffs are private figures, and the success of their business depends upon their reputations for honesty and legal and fair dealing and business character.

Defendant Brace Kern, is a Michigan licensed attorney, who at all relevant times acted as legal counsel to Boyers. In connection with the Boyers' 2016 divorce, Danielle Boyer's name was changed to "Danielle Christine Kort."

From approximately 2003 – 2006, Defendant Saburi Boyer ("Boyer") operated a parasailing business at the ParkShore, sub-leasing, through his company Traverse Bay Parasail, LLC, ParkShore beach leased by Break'n Waves, Inc., a company owned by Eric Harding. In 2006, Boyer stopped operating at the ParkShore and moved to a different location at the Sugar Beach Resort Hotel, just East of and approximately .4 miles from the ParkShore.

After Boyer left the ParkShore, and through the Summer of 2013, parasailing at the ParkShore was provided through a company owned and operated by Casey Punturo, who is Bryan Punturo's son. Casey's business was in active competition with Boyer's company. In the Spring and Summer of 2014, Boyer began to take steps to limit and/or eliminate competition in the parasailing business on East Grand Traverse Bay, including:

a. Purchasing the assets of Casey Punturo's business, which purchase closed on or about April 29, 2014, to eliminate Casey Punturo as a competitor;

b. Threatening legal action against, and cutthroat competition with, and eventually procuring, without monetary consideration, a 7-year non-compete agreement with, Dave O'Dell, a Florida parasailing operator who was considering operating a parasailing business on East Grand Traverse Bay in competition with Boyer (**Exhibit A**,[4] Apx. 01b - 04b, log of Boyer text messages produced by Attorney General in extortion case showing Boyer texts to O'Dell and Casey Punturo, and subsequent non-compete signed by O'Dell);

c. Aggressively initiating and pursuing discussions and negotiations with Punturo regarding, and eventually preparing and signing, a lease agreement requiring Punturo to refrain from competing with Boyer; and

d. Aggressively pursuing a similar non-compete agreement with Eric Harding, who was considering, and eventually commenced, operation of a parasailing business in competition with Boyer on East Grand Traverse Bay. **Exhibit B**, Apx. 05b - 19b, emails and text messages between Boyer and Harding.

Due to bad weather conditions for parasailing in 2014, and Boyer becoming financially overextended in his business, Boyer defaulted in payments on his asset purchase agreement with Casey Punturo and the lease with Punturo. Punturo filed suit to collect the amount due, requesting damages of $24,500. Boyer did not respond to Punturo's suit. Instead, with the guidance and at the advice of Defendant Kern ("Kern"), Boyer contacted, first, the Grand Traverse County prosecutor's office, and when it declined the case, the Michigan Attorney General, accusing Punturo of antitrust

[4]Attached *lettered* exhibits are identical to those attached to Plaintiffs' motion papers in the trial court. *Numbered* exhibits are either other identified record exhibits or non-Michigan cases.

violations. In November, 2015, the Attorney General and the Michigan State Police raided Plaintiffs' offices, confiscated the hard drive of Plaintiffs' computer, and contacted counsel for Punturo, explaining Punturo was being investigated for criminal antitrust activity.

In February, 2016, Kern on behalf of Boyers sued Punturo and ParkShore in the Grand Traverse County Circuit Court ("the Antitrust Case"), for violations of the Michigan Antitrust Reform Act and other claims, including tortious interference and unjust enrichment, and demanding damages of $781,500 plus attorney fees. Three months later, and in May, 2016, the Attorney General charged Punturo with extortion, a 20-year felony ("the Extortion Case").

After filing the Antitrust case, Kern granted an interview to the Traverse City Record-Eagle. In that publication on **February 28, 2016**, appeared the following:

a.[5] "Kern said the **correspondence proved Punturo flagrantly violated state antitrust laws." "The contract** itself is an agreement to limit competition," Kern said. "So **that violates the (Michigan) Antitrust Reform Act** in of itself."

As noted, when the Michigan Attorney General brought the Extortion Case in May, 2016, the Antitrust case was pending in the Grand Traverse County Circuit Court. The arraignment in the Extortion Case was scheduled for Tuesday, May 10, 2016. It was at this point that Defendants began to threaten to more aggressively communicate with the news media.

On Friday, May 6, 2016, Kern left a voice mail with Plaintiffs' attorney, that he "was calling to discuss a settlement offer that'll help get your client out of hot water on Tuesday morning" – with "Tuesday morning" being Tuesday, May 10, 2016 – the date and time of Bryan Punturo's arraignment on felony extortion charges. Plaintiffs' counsel returned Kern's call, asking what the

[5]Each of the defamatory publications is denominated in Plaintiffs' complaint by letter. The first is "a.," a February 28, 2016 Traverse City Record-Eagle article. Letters "b." through "h." follow below.

settlement offer was and how it would help get his client "out of hot water." During the telephone conference, Kern stated, among other things, that:

* the "best opportunity to help out" Punturo in the criminal case was to "make it right by my clients";
* that the way to do this would be for Punturo to settle the pending antitrust case by buying Boyers' parasailing business, with assets worth, at the very most, $250,000, for $800,000;
* that Punturo could then use the purchase of Boyers' business as a defense in the Extortion Case by explaining it was a way for Punturo to "mitigate the harm, pay restitution, and just make it right";
* that Punturo would be required to pay restitution in the Extortion Case and Kern's proposal would lessen the impact of the victim statements, by Punturo having shown he was sorry and wanted to make up for the harm he had caused Boyers and obtain their forgiveness, and that this would "deflate the sails of the Attorney General";
* that Kern was going to amend the complaint in the Antitrust Case adding additional facts in affidavits from Boyers and other documents that would make Punturo look bad;
* that he had already gotten a call from the Traverse City Record-Eagle about the upcoming arraignment and the Record-Eagle planned to be there. Of course, Kern had already accused Punturo of antitrust violations in the Record-Eagle on February 28, 2016, so this threat was consistent with Kern's past conduct;
* that if Kern had to file an amended complaint on Monday, May 9, 2016, the day before the arraignment in the Extortion Case, with the additional things attached, "they're gonna couple that with what happens on Tuesday morning and blow it up" into "a bigger story";

* that if Judge Rodgers "never sees that whole nastiness play out" it would be better for Punturo at the extortion sentencing, comparing Punturo's possible fate in the Extortion Case to that of the defendant in the Grand Traverse County case of *People v Derek Bailey*, in which the defendant had been, four days earlier on May 2, 2016, sentenced to 25 – 50 years in prison, and warning Punturo's attorney that Judge Rodgers had been "ticked off the most" by Defendant Bailey's refusal to accept responsibility for what he did;[6]

* that the proposal Kern was offering was a way for Punturo to be able to claim that even before he got criminally arraigned, he "was already trying to make it right" with a covenant not to compete that would be legal, and although the prior covenant not to compete extracted from Punturo by Boyer was (according to Kern) illegal, that Punturo could say that before he might not have gone about it the right way but that could be explained by claiming "we're not all that familiar with antitrust up here [in Northern Michigan]";

* that Punturo buying Boyer's parasailing business would "legitimize the unlawful contract" and perhaps would take the intent away from the Extortion Case and show "an eagerness to correct the behavior."

Two days later, and on May 8, 2016, Kern e-mailed Punturo's counsel, reducing the money requested in exchange for not talking to the Record-Eagle on Tuesday morning, to $750,000, and stating that as a part of the proposed deal, "[m]y clients will publicly acknowledge that they are impressed by Bryan taking a proactive approach to rectify any harm caused by any misunderstandings and that all has been forgiven and forgotten," and also, that "[m]y clients will

[6]See *People v Bailey*, unpublished opinion affirming sentence at dkt no 332984 (Mich App November 28, 2017).

appear as subpoenaed to do so, or requested by your client to do so, to inform any relevant parties that they bear no hard feelings," and that "[t]here will be a non-disparagement agreement through which neither will speak ill of each other moving forward." **Exhibit C**, Apx. 20b - 21b.

The May 8, 2016 e-mail also states "[s]ince your client has more going on with both his situation and taking over the business, we are open to hearing his concerns/requests," and "[w]e think this will produce the most positive result for everyone." The next day, May 9, 2016, Kern left a voice mail for Plaintiffs' counsel, stating he was "just calling to see where we stand." Punturo's counsel did not respond to these communications. At 5:01 p.m. on May 9, 2016, as threatened in the May 6 phone call, Kern filed an amended complaint in the Antitrust Case, and also as threatened, on "Tuesday morning" (May 10) after the arraignment, Kern and Boyers helped the media "blow it up" into a "bigger story" by granting interviews and adding to their other unequivocal accusations of criminal acts by Plaintiffs, and otherwise defaming Plaintiffs:

b. "Tuesday morning" – May 10, 2016 (website) and May 11, 2016 (print) Traverse City Record-Eagle:

Boyer said Punturo made statements that made the hairs on his neck stand up. **"He told me that he was going to make my life a living hell**," Boyer said. "That **he was going to crush me** and everything that was important to me. I believed every word of it."

Kern called the charge against Punturo "a long time coming" for Boyer and Boyer's wife. "It's a vindicating day for my clients," he said. "**There was extortion for the past two years.**"

The Boyers eventually stopped paying the contract. Kern said Punturo at one point texted Boyer's wife asking for money while her husband was hospitalized. That's when she approached Kern with the contract, he said. "At which time, **I realized it violated antitrust laws**," Kern said. "And then she showed me some correspondence Mr. Punturo had sent them to induce them into signing the agreement, and **I recognized extortion**."

Moothart argued in a response that Punturo's messages . . . were made to collect a rightfully owed debt. It stated that the Boyers initiated the contract, based on a text message Saburi Boyer sent Punturo. Kern said **the correspondence showed** otherwise. He said he doesn't know of any other

antitrust case with such significant extortion. "This one involves more significant threats, and more significant sums of money," he said. "It affects the Traverse City tourism business, which is a very important industry to this area."

Boyer said he hoped Punturo would have a change of heart in his future dealings. "**My biggest goal from this is Bryan would think twice before hurting anyone else**," he said. "I've been living in fear so long, I really don't want to live in fear."

c. May 10, 2016 7&4 News television report

Kern: "disgusted that it goes on around here"

Reporter: "In court today, Saburi Boyer's attorney says over the course of nearly two years his client paid Bryan Punturo, owner of the ParkShore Resort, $19,000 a year not to run him out of parasailing business with below cost prices."

Kern: "They paid it for a year and a half until last year my client got cancer, was in a medically induced coma and unable to make the payment to Mr. Punturo who began texting his wife 'where's my money?'"

Reporter: "After shelling out nearly $35,000 the payments stopped – that's when **Kern says malicious threats started coming Boyers' way**."

Kern: "He said on the phone, '**I will crush you, I will make your life a living hell**.' In a letter after my client was unable to pay it like I said had **mentioned the word 'demise' probably a dozen times**."

Reporter: "Why do you think they paid?"

Kern: "Fear. Believing it."

Reporter: "Is it really that serious, the tourism industry up here that they would go this far?"

Kern: "Yes."

Reporter: "As to why Boyer paid Punturo the money in the first place, his **attorney says his clients felt paying the extortion money** was the lesser of two evils he was given – pay up or lose business."

d. May 10, 2016 9&10 News interview, published on website:

"**I was living in fear**," says one of the Traverse Bay Parasail owners.

Saburi Boyer says after he and his wife bought parasailing equipment for their business from East Bay Parasail, Bryan Punturo, owner of the Parkshore Resort, began sending threats back in May of 2014, demanding $19,000 a year.

By paying Punturo, Saburi and Danielle Boyer say they lost a lot of money and more.

"**Extortion money and losing all that cash flow** hurt our ability to do business," Saburi Boyer said. "I ended up having to lay a couple people off."

The Boyers' civil attorney, Brace Kern, says, "Extortion is one aspect of our case, but ours seeks to prove that the unlawful contract that Mr. Punturo extorted my clients into the signing anti-trust laws and there's also a claim for intentional affliction of emotional distress."

e. May 10, 2016 9&10 News website:

The **Boyers say** they were tired of living in fear and **went to a lawyer who discovered anti-trust law violations** and went to the attorney general.

Brace Kern represents Traverse Bay Parasailing, **saying Punturo violated anti-trust laws** and caused emotional distress. "Today is a vindicating day for my clients, and it's been a long time coming. They are **glad that the attorney general takes anti-trust violations and extortion seriously**. This is something that I don't think Traverse City needs or wants, so **it's nice to see them put an end to this conduct**," says Traverse Bay Parasailing owners' attorney Brace Kern.

f. Interlochen Public Radio website May 10, 2016:

Attorney Brace Kern represents the alleged victim – Saburi Boyer – in an ongoing civil case. "Essentially, what he did was tell my client, 'Give me $19,000 a year or I'm going to run you out of business with **unfair competition** … below cost prices,'" says Kern. Kern says Punturo threatened in telephone messages to "**make your life a living hell**."

Later news reports continued the onslaught:

g. Northern Express November 19, 2016

Boyer said he later learned that Bryan Punturo forbade his son to sell the boat to him but that Casey defied his father. "That is what I think infuriated (Bryan) to a new level," Kern said. "As soon as I saw the contract, I'm like, '**This is an antitrust violation**, this is a covenant not to compete, **this is extortion**," Kern said. "That's when I contacted the attorney general's office."

With a new boat, Boyer needed more dock space. He said he decided to approach Punturo. He said he hoped enough time had passed, and he could lease space at the ParkShore again. "That's

when he said, I've got a better idea. Why don't you **stay the hell off my dock and pay me anyway**," Boyer said in an interview.

Boyer maintains he wasn't trying to corner the market and **that he only paid Punturo out of fear**. "I felt like **I was being extorted** through this entire timeline," Boyer said. "When I was going through it, I felt like it was going on every day."

h. Interlochen Public Radio radio interview and published on IPR website November 21, 2016:

"He basically ran over me verbally, and I froze," says Boyer. "My wife told me I turned white as a ghost. I froze up, didn't have much at all to say, he told me he was going to **make my life a living hell, that he was going to crush me** and everything that mattered to me, and that **he was going to bury me** by the end of this. I just froze up and took it. I realized that **he was very motivated to hurt me**. **Whether that was business or personal, I was in fear**."

Both the Antitrust Case and the Extortion Case were covered by media outlets; however, except for one announcement upon filing the Extortion Case (Kern's Apx. 7, 057a – 058a), the Attorney General did not talk to the media. Yet, and despite Michigan Rules of Professional Conduct 3.6 regarding "Trial Publicity," as set forth above, Defendant Kern repeatedly and aggressively talked to the media about both the Antitrust Case and the Extortion Case; and he did so with the express purpose of fulfilling his pre-"Tuesday morning" threats to embarrass and humiliate Plaintiffs Punturo and ParkShore and despoil their reputation, to coerce Plaintiffs to pay them money, for relief from the onslaught of his defamatory statements to the media.

All of the antitrust, unjust enrichment, and tortious interference claims filed by Kern on behalf of Boyers were dismissed by the Grand Traverse County Circuit Court pursuant to MCR 2.116(C)(8). Kern's Apx. 12, 118a – 125a. Then, the Extortion Case was dismissed by the Grand Traverse County District Court at the preliminary examination stage. Although the Michigan Attorney General initially appealed the District Court's ruling, the appeal was later voluntarily

dismissed and the criminal case is now closed. This suit followed and, as noted, the trial court denied Defendants' motions for summary disposition, and the Court of Appeals affirmed.

III. Argument.

A. Preliminary issues.

First, it is clear that as required by applicable case law, Plaintiffs have set forth the specific words uttered by Defendants claimed to be defamatory, and the recitation above demonstrates as a threshold matter that many of these statements unequivocally accused Punturo of antitrust violations and extortion. The other, accompanying statements "must be examined 'in [their] totality in the context in which [they were] uttered or published,'" and "a court must consider all the words used in allegedly defamatory material, 'not merely a particular phrase or sentence.'" In sum, and as Boyers argue almost exclusively in their brief, "'context' must be considered when an alleged defamatory statement is reviewed for a determination of whether it implies a defamatory meaning." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 129; 793 NW2d 533 (2010).

Here, the context was (1) Defendants were suing Punturo claiming extortion and antitrust violations; (2) Punturo was being prosecuted for extortion at Defendants' request and urging; (3) using a 25-50 year sentence handed down 4 days earlier as an example of what could happen to Punturo, Kern had threatened to take his, and the Attorney General's, as-yet unproven allegations of criminal conduct to the media, if Plaintiffs did not fork over $750,000; and (4) when Plaintiffs did not pay up, Defendants began publishing unequivocal criminal accusations, telling the press things such as "correspondence proved Punturo flagrantly violated state antitrust laws"; "the contract . . . violates the Michigan Antitrust Reform Act"; "there was extortion for the past two years"; "correspondence showed . . . significant extortion"; "I realized it violated antitrust laws"; "I

recognized extortion"; "paying the extortion money"; "Punturo flagrantly violated antitrust laws"; "glad the attorney general takes antitrust violations and extortion seriously"; "this is an antitrust violation"; "this is extortion." In this context, the other false statements, some by the Boyers, such as references to specific threats – "he was going to hurt me,""bury me," etc., all refer and relate to and support in context, the accusations of criminal acts, and as such, are properly a part of the defamation sued for.

Second, it is clear that false accusations of antitrust violations and extortion, are defamation *per se*. In *Lakin v Rund*, 318 Mich App 127; 896 NW2d 76 (2016), the Court of Appeals held that "words charging an individual with a crime only constitute defamation per se if the crime involves moral turpitude or would subject the person to an infamous punishment." Whether punishment is "infamous" is determined by whether the crime is punishable by incarceration in prison as opposed to jail ("certain crimes that the Legislature has labeled 'misdemeanor' may also be considered a felony for purposes of the Code of Criminal Procedure and result in a prison sentence"). Here, Defendants accused Punturo of extortion, a 20-year felony, MCL 750.213, and antitrust violation, nominally a misdemeanor but punishable by up to two years of imprisonment, MCL 445.779. Thus, although Plaintiffs have pleaded special damages, they need not prove any, because under applicable law, damages are presumed under the *per se* standard for their claims. *Burden v Elias Bros*, 240 Mich App 723; 613 NW2d 378 (2000).

B. Issues designated by this Court for briefing.

1. Libel includes oral statements made to the media.

As noted, Plaintiffs agree with Defendants on this issue.

2. The Court of Appeals did not err in holding that the appellants' allegedly defamatory statements to the media regarding the pending litigation were not protected under the fair reporting privilege.

a. Simply repeating the allegations of court documents is not a "report."

As explained in the introduction section, above, the analysis of whether this privilege applies, involves assessing (1) whether it is a "report"; and then, (2) whether the report is "fair and true." The lynchpin of the Court of Appeals' ruling was:

> The crux of the *Bedford* case was that the public record contains only unproven allegations, not that actual crimes were committed. Despite the content of the public record, defendants stated in no uncertain terms that Punturo committed extortion and flagrant violations of MARA. Therefore, as the panel in *Bedfor*d reasoned, "[g]iven the level of certainty expressed, we conclude that his words did alter the effect the literal truth would have on the recipient of the information, and thus the 'fair and true' standard in MCL 600.2911(3) was not satisfied." *Bedford*, 318 Mich. App. at 71.

Punturo v Kern, (Mich App October, 16, 2018) dkt no 338727, 2018 WL 5276142, at *5 (Kern's Apx. 3, 009a – 019a). Although this ruling sets forth generally a reliance on the "fair and true" element, Plaintiffs submit that it primarily holds that when the defamatory words are those of the publisher, and not really even a "report," they are unprivileged. This principle is ancient, and axiomatic, in United States jurisprudence.

One of the more incisive statements of this maxim was set forth by the Illinois Supreme Court in the 1871 case of *Storey v Wallace*, 60 Ill 51 (1871). In that case, the Chicago Times reported that one James Wallace apparently drank himself to death upon finding, upon his return to Chicago from a three year army enlistment, his wife with a three month old child that he could not have fathered. His wife, Mary, sued the Times because she claimed James had been present for the conception and that the story was false.

The Times defended on the basis that "the libellous paragraph was only a statement of the evidence given at the coroner's inquest, to which reference is made in the article, and that its publication was therefore privileged." *Id*., 60 Ill at 53–54. The Court observed that "[i]t has become the settled law, both of England and of this country, that a faithful report of the proceedings of courts of justice is a privileged publication, and shall not be held a cause of action for libel," *id*. at 54, but then stated:

> [T]he libellous paragraph does not purport, upon its face, to be a report of the evidence given upon the coroner's inquest. That the plaintiff was guilty of adultery, is stated as a fact on the authority of the newspaper, and not as evidence given upon the inquest. The imputation is then made, on the same authority, that this adultery of the wife caused her husband to leave his home, and led to his intemperate habits, and finally to his death. After giving utterance to this monstrous libel, and giving it all the weight of its own authority, the paper states the fact that an inquest had been held, and what was the verdict. It nowhere professes to give the evidence, or to base its statements upon it, and only by a remote inference would the reader suppose that the facts alleged in the paragraph were derived solely from the testimony before the coroner. That this paragraph does not fall within the rule of privileged publications is, then, too plain for argument. The newspaper was not professing to report evidence, but gave these statements to the public, upon its own responsibility, as true, and that responsibility it can not now evade.

In *Storey*, of course, the coroner's inquest did not say that Mary was an adultress, and in the case at bar, the Antitrust Case and the Extortion Case did say that Punturo committed crimes. But the point is, that defamation published by the publisher, that "was not professing to report evidence," and not based on the proceeding it is supposed to be a report of, is no report at all.

Many other courts have reached the same result. In *Vosbury v Utica Daily Press Co*, 105 Misc 134, 138–39; 172 NYS 609, 611–12 (1918), an architect sued claiming the newspaper had defamed him with claims that the local school was dangerous to the children, including that the roof was in danger of collapse and was a hazard to the children, because of his poor design. The paper

defended with the claim that the article was privileged "because it was a fair and true report of the public and official proceedings had and taken by the school board of the city of Binghamton." *Id*., 105 Misc at 137. The court stated:

> The article in its entirety is not, and does not, purport to be a report of the official proceedings of the school board of the city of Binghamton. It does not attribute the words of the article to any official of the city of Binghamton or intimate those words were the expressed opinion of the officials at some public meeting. It may be that a portion of the article may have been based upon facts, which were developed at the meeting of the school board; but the last sentence thereof clearly appears to be an expression of opinion on the part of the reporter, to wit: 'This development does not speak very well for those who designed and built Binghamton's new high school.' A newspaper reporter may report everything that occurs publicly, without fear of any action, provided only that his reports are fair and accurate, and not interspersed with comments of his own. The reporter must add nothing of his own. He must not state his opinion of the conduct of the parties [citations omitted]. Obviously, where a libelous article shows on its face that it is not a report of any public proceedings, but purports to be the publisher's own statements and comments, a defense of privilege is unavailable.

Similarly, in *Lewis v Hayes*, 165 Cal 527, 530–31; 132 P 1022, 1023 (1913), the California Supreme Court defined

> a 'privileged publication' to be one made 'By a fair and true report, without malice, in a public journal, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, or of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.' But two facts, each independent of the other, destroy the asserted privileged character of this publication. The first is that it nowhere purports to be a report of any public official proceeding or of anything said in the course thereof.

And in *Williams v Pulitzer Broad Co*, 706 SW2d 508, 511 (Mo App 1986), suit was filed over a television report that the station claimed was privileged as a report of the investigation of Special Aldermanic Committee on Health and Hospitals, a committee of the Board of Aldermen of St. Louis. But the court held the privilege did not apply. It stated:

> The story, as telecast, was not a story concerning aldermanic proceedings; rather, it was about Robert P. Williams, the "convicted thief." On the 10:00 p.m. report, Emory led in from the studio with the statement "aldermanic investigators have uncovered the case of a convicted thief who has held two city jobs at one time." This statement was not connected with any specific alderman or committee, nor was any information given as to how or when this information was made public. Instead, he simply went on to give the "thief's" name, and say "Chris Condon has the details," which were contained in a slightly shortened version of the videotape report broadcast at 6:00 p.m. Once again, we have a story concerning Williams, and not a story concerning aldermanic proceedings. . . . *to be privileged, the news items in question must purport to be a report of a proceeding* which is entitled to be covered by the privilege. [Citations omitted]. Otherwise, the statements become the unprivileged statements of the publisher, and not the privileged statements of the committee.

Emphasis added. See also *Whitcomb v Hearst Corp*, 329 Mass 193, 201; 107 NE2d 295, 300 (1952)(finding liability where publisher "went far beyond anything contained in these communications and embellished their articles with biographical matter *plainly identifying the plaintiff as the culprit* — a thing which the alleged official communications had not clearly done . . ."))(emphasis added); *Medico v Time, Inc*, 509 F Supp 268, 280 (ED Pa, 1980), aff'd 643 F2d 134 (CA 3 1981)("the privilege does not seem to apply when the defendant publishes the allegedly defamatory statements without attribution"); *Hughes v Washington Daily News Co*, 193 F2d 922, 923; 90 US App DC 155, 156 (1952)("It is well settled that the publication of any statement by a newspaper made upon its own authority, and not purporting to be a report of official proceedings or statements is not privileged . . . . The publication constitutes a charge by the person uttering it, and he is responsible therefor")(internal quotations omitted).

The holdings of these cases are congruent with the second portion of the applicable Michigan statute, MCL 600.2911(3) – "This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or contained in the report of anything said or done

at the time and place of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, which was not a part of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body." Obviously, most of the statements made by Defendants are "not a part of the public and official proceeding" they claim to have been "reporting" about.

Even this Court's statement of the issue – "whether the Court of Appeals erred in holding that appellants' allegedly defamatory statements to the media *regarding the pending litigation* were not protected under the fair reporting privilege" – appears to wrongly assume that Defendants' statements were "regarding the pending litigation." It is not necessary to repeat the many unequivocal statements of Defendants listed above, as pleaded verbatim in Plaintiffs' complaint, to establish that many of them are *not* "regarding the pending litigation," and *none* of them are anything close to a "report" of the Antitrust Case or the Extortion Case. Instead, they are simply claims that Punturo committed crimes. Kern claims in his brief, page 34, that the privilege applies because he only "used declarative sentences that repeated the allegations in the Boyers' underlying complaint and in the Attorney General's case against Punturo." A cursory review of the allegations made shows that this is not even true – but even if it were, such a repetition is not a "report" that is "fair and true," any more than, as discussed in the Introduction section, above, announcing such "declarative sentences" now, after everything has been summarily dismissed, would be a "report" or "fair and true."[7] As the above case law makes clear, a "report of a proceeding" begins, at the very

[7]See, e.g., *Klentzman v Brady*, 456 SW3d 239, 253 (Tex App 2014), aff'd 515 SW3d 878 (Tex 2017)(an article referring to MIP charge, ensuing trial on that charge, and an expunction order, but omitting that "a jury acquitted" the plaintiff of the MIP charge, "was not a fair, true, and complete account").

least, with a report that there is a proceeding, and then ensuring that the statements made are *about the proceeding*, not about the plaintiff. A mere reiteration of the allegations of the court documents is no "report" at all.

b. Defendants' statements were neither "fair" nor "true."

Bedford v Witte, 318 Mich App 60; 901 NW2d 393 (2016), is the latest and best collection of law on this subject. In *Bedford*, the Court of Appeals held that the fair reporting privilege applied to the filing of the complaint and its publication on the filing attorneys' website, but also held that it did not apply where the defendant's media comments were "an expansion beyond the public record." The Court of Appeals stated:

> Witte's comments did not merely summarize what was alleged—but not yet adjudicated—in the federal complaint. He stated that "we can say with certainty" that plaintiffs broke the law in various ways. Given the level of certainty expressed, we conclude that his words did alter the effect the literal truth would have on the recipient of the information, and thus the "fair and true" standard in MCL 600.2911(3) was not satisfied.

As noted above, Plaintiffs believe that the "certainty" distinction is best understood as drawing a line between what is a "report" of a court proceeding, and what is just an unequivocal and personal accusation of crimes. But, in the instant case, Defendant Kern asserts he is in the clear even on the "certainty" issue, claiming, on page 34 of his brief, that "Kern didn't say anything comparable to the defendant's statement in *Bedford*. His allegedly defamatory statements didn't express an increased level of certainty. Instead, he merely used declarative sentences that repeated the allegations raised in the Boyers' underlying complaint and in the Attorney General's case against Punturo."

This is utterly untrue. Defendants *said* Punturo committed crimes "with certainty" – "correspondence proved Punturo flagrantly violated state antitrust laws"; "the contract . . . violates the Michigan Antitrust Reform Act"; "there was extortion for the past two years"; "correspondence showed . . . significant extortion"; "I realized it violated antitrust laws"; "I recognized extortion"; "paying the extortion money"; "Punturo flagrantly violated antitrust laws"; "glad the attorney general takes antitrust violations and extortion seriously"; "this is an antitrust violation"; "this is extortion"; "he said he doesn't know of any other antitrust case with such significant extortion."

Thus, under *Bedford*, denial of summary disposition was entirely proper. As the venerable Hon. Arthur J. Spector explained in *Merritt v Thompson (In re Thompson)*, 162 BR 748, 764 (Bankr ED MI 1993):

> [I]t would appear that Thompson is correct in arguing that she can be held liable for defamation only to the extent that she provided McClellan with information that could not be gleaned from the public record of the state-court action.
>
> However, Thompson overlooks an important distinction in making this argument. There is a subtle but fundamental difference between saying "I testified at trial that X is a pervert" versus "X is a pervert." Because the latter assertion describes the speaker's present state of mind, it **clearly goes beyond the simple recitation of a fact that can be verified by reference to court documents**. And Thompson's statements to McClellan were more in the nature of a reaffirmation of her suspicions about Merritt, rather than a neutral account of allegations made in state court.[8]

Clearly, pleadings in civil cases and complaints in criminal cases often state things pretty unequivocally. But, of course, it is always understood, and part of the entire legal system, that these

[8]Judge Spector's ruling, which construes the statute at issue, MCL 600.2911(3), has been scorned by Defendants as "outdated" and the complaint that "it's not even a Michigan case." Obviously, a decision of a Michigan federal bankruptcy court is not binding precedent. Yet, the simple and clear wisdom of Judge Spector, who served from 1984–2002 as a United States Bankruptcy Judge in the Eastern District of Michigan, where he was Chief Judge the last three years, is persuasive, and completely consistent with the Court of Appeals' ruling in *Bedford*.

statements are *unproven allegations*. Defendants' statements to the media were not remotely presented as yet-to-be proven allegations made in legal proceedings. Instead, Defendants' statements were made as if Punturo were about to be sentenced to prison after a conviction. They were neither fair nor true.

In the *analogous* context of the judicial proceedings privilege, this Court held in *Timmis v Bennett*, 352 Mich 355, 365; 89 NW2d 748, 753 (1958), that an attorney's statements in a letter regarding which he contemplated bringing suit were not privileged, because the privilege does not apply to statements "not uttered in the course of a judicial proceeding" and that "[a] repetition of privileged words uttered in the course of judicial proceedings, when no public or private duty requires an attorney to repeat them, may place him on the same footing as anyone else who utters defamatory statements about another." This Court's decision in *Timmis* is also congruent with *Bedford*, as well as *Thompson*, and shows consistency in Michigan appellate decisions in rejecting legal theories of defendants seeking to claim that statements they made to the press or public deserve the same privilege protection as what they have said (verbally or in writing) in court.

Defendants rely heavily upon the Court of Appeals' opinion in the case of *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317; 539 NW2d 774 (1995). Yet, *Northland Wheels* is completely consistent with *Bedford* and it actually supports Plaintiffs' position. In *Northland Wheels*, the Court of Appeals held first that news reports of police records of shootings outside the plaintiff's business were not actionable under the fair reporting privilege, because they were merely a "fair and true report of police records." *Id*., 213 Mich App at 327; 538 NW2d at 779.

However, the Court of Appeals also held that some of the defendants' statements were *not* protected by the privilege, because they "may imply that plaintiff's skating rink is unsafe because

a shooting occurred outside the rink and neighbors mentioned that problems do occur when young people congregate in the area," and they were "not gleaned from police records about the shooting." *Id*., 213 Mich App at 328; 539 NW2d at 779–80. The Court of Appeals nevertheless affirmed dismissal – because the article did not imply that the plaintiff "participated in, encouraged, or negligently permitted the shooting to occur on its outdoor premises," "it is not defamatory to say that the victims were shot in or near plaintiff's parking lot." *Id*., 213 Mich App at 328; 539 NW2d at 780.

Obviously, *Northland Wheels* is simply inapposite on its facts, and to the extent it might apply, it holds that **merely "implying" that which is not directly taken from public records is outside the privilege**. In the instant case, Defendants went much further than implication – they claimed with absolute certainty that Punturo had, in fact, *committed crimes*.

In sum, the ruling of the Court of Appeals in this case was correct, and consistent with the jurisprudence of Michigan, and the broader common law. No reversal is warranted.

3. *Bedford v Witte* was correctly decided.

As noted above, the crux of *Bedford*, as the Court of Appeals ruled in this case, "was that the public record contains only unproven allegations, not that actual crimes were committed." This, too, is consistent with the jurisprudence of Michigan, and the broader common law. If a defamatory statement is not *actually a report* of court proceedings, it is not privileged. If it is not fair or true, it is not privileged. This is not a difficult thing to understand or apply. Contrary to Kern's claim on page 43 of his brief, *Bedford* does not "leave the bench, the bar, and the public to guess about whether a given statement was expressed with enough certainty to void the fair-reporting privilege."

So long as the report is really a report, and the report substantially represents the thing reported, the privilege applies.

Moreover, *Bedford*, in holding that comments about court filings that did not "merely summarize what was alleged" are not privileged, does not conflict with prior law or confuse any legal standard. In *Northland Wheels*, the Court of Appeals properly held that extrapolative implications of a lack of safety "not gleaned from police records" were not privileged – another way of saying, as did the *Bedford* court, that these implications did not "merely summarize" what appeared in the court records. The reason that the statements in *Bedford* were over the line, was that they went beyond a summary of allegations, to unequivocal statements that the plaintiffs had broken the law – just like this case.

Bedford is not a broad new judicial pronouncement; instead, it is just an example in the specific arena of public statements about court filings, of how a statement is not really a "report" or is not "fair and true," is not privileged. It is a guideline for public statements about people accused of a crime. Such a ruling is not a "wrinkle" in the law; it is a proper interpretation and application of law that has existed for hundreds of years, declining to create the permissive, unnecessary and destructive exception requested by Defendants in this case that would turn defamation *per se* law on its head.

4. Lawyers are, and should be, held to a higher standard.

Kern's duty here was the opposite of what he did. MRPC 3.6, while allowing lawyer comments to the media on basic facts "without elaboration," prohibits any "extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative

proceeding in the matter," which expressly includes a statement that relates to "(1) the character, credibility, reputation, or criminal record of a party, [or] of a suspect in a criminal investigation . . .; and (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration." Indeed, Rule 3.6 even *prohibits a statement to the press* "(6) . . . *that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty*" (emphasis supplied).

When one contrasts Defendants' vituperative and unequivocal statements to the media, with the Attorney General's carefully worded and ethically compliant press release (Kern's Apx. 7, 057a – 058a), it is particularly clear that Defendants' claim that Kern's statements, as the Court of Appeals put it in *Bedford*, "merely summarize what was alleged" by the Michigan Attorney General in the Extortion Case, or by Defendants in the Antitrust Case, is specious.

As noted, to be privileged the report must be a report (it was not); and also, it must be "fair and true" – and as the Court of Appeals has ruled, "'Fair' is defined as 'free from bias, dishonest[y], or injustice . . . legitimate, sought, done, given . . .' while 'true' is defined as 'being in accordance with the actual state or conditions; conforming to reality or fact ... real; genuine; authentic . . . .'" *Smith v Anonymous Joint Enter*, dkt no 275297, 2011 WL 744943, at *5 (Mich App March, 3, 2011)(Kern's Apx. 35, 468a – 472a). Incredibly, Defendant, a Michigan licensed attorney, comes before this Court, claiming that his accusations against Plaintiffs, in complete and utter violation of MRPC 3.6, made to coerce payment of $750,000 to his client, demanded as part of a settlement he proffered "that'll help get your client out of hot water" in the criminal case he had inaugurated, were "fair" and "true." As noted in the Introduction section above, Defendants' reading of Michigan law

would result in the absurd situation in which "words imputing the commission of a criminal offense," which are defamation *per se* pursuant to MCL 600.2911(1), would always be absolutely privileged whenever, and merely because, the person defamed has been sued with allegations regarding, or charged with, a crime of which he is legally presumed innocent until proven guilty beyond a reasonable doubt – a sacrosanct principle of American jurisprudence.

Put bluntly, what is "fair" and "true" for a lawyer to do in this State, what is "free from bias, dishonest[y], or injustice . . . legitimate, sought, done, given . . .' [and] real; genuine; authentic" is defined by the ethics rules. Any other rule leads to lawlessness, fosters greed and unfettered avarice, and leaves our profession in the gutter. Kern would have this Court hold that in spite of – and with spite toward – the rules of our profession, lawyers can, in order to enrich themselves and their clients, say anything to the media they want, about anybody they want, with impunity and immunity from liability. All they need to do is first sue their target, and they can defame away.

The opinion of the Ohio Supreme Court in *Am Chem Soc v Leadscope, Inc*, 133 Ohio St 3d 366, 392; 978 NE2d 832, 854–55 (2012) demonstrates the relationship between a violation of Rule 3.6 and defamation:

> We make clear that Ohio law imposes no blanket prohibition on an attorney's communications to the media. Attorneys and their clients retain a panoply of First Amendment rights and are free to speak to the public about their claims and defenses provided that they do not exceed the contours of protected speech and ethical rules that impose reasonable and necessary limitations on attorneys' extrajudicial statements. See Prof.Cond.R. 3.6 ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter"). Thus, while we do not muzzle an attorney representing a party in a proceeding, **attorneys are not given carte blanche to defame others under the guise of litigation**.

Emphasis added. See also *Green Acres Trust v London*, 141 Ariz 609, 615; 688 P2d 617, 623 (1984), a judicial proceedings privilege case construing the predecessor to Rule 3.6 (DR 7–107(G)). In *Green Acres*, the court quoted DR 7–107(G) – "a lawyer may not make or participate in making an extra-judicial statement which he expects will be disseminated by means of public communication which will likely interfere with the fairness of an adjudicative proceeding," and held:

> [I]nflicting unnecessary harm and defaming the adversary during a press conference cannot be considered as legitimately advancing a client's interest. Therefore, by denying the absolute privilege in this case, we do not curtail zealous representation. We simply decide that "an attorney who wishes to litigate his case in the press will do so at his own risk."

Kern's comments to the media were gross violations of MRPC 3.6. These violations are relevant and admissible evidence under Michigan law, and although not cited by the trial court or the Court of Appeals as a basis for their rulings, they support those rulings.[9] This is not a matter of malice, or "motivation." It is, simply, that what might be a "fair and true" report for a layperson,

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[9]See *CenTra, Inc v Estrin*, 538 F3d 402 (CA 6 2008), a suit for breach of contract, fiduciary duty, and malpractice, the court cited decisions of the Michigan Court of Appeals and held that although "a violation of Michigan's Rules of Professional Conduct does not by itself give rise to an actionable claim," *id*. at 410, and "a plaintiff cannot seek damages for a violation of the Michigan Rules of Professional Conduct," such a violation "may be probative in establishing an independent cause of action," *id*., citing *Evans & Luptak, PLC v Lizza*, 251 Mich App 187; 650 NW2d 364 (2002)(holding fee agreement unenforceable as contrary to rules, stating the rules are admissible and relevant under Michigan law); *Recker v Malson*, dkt no 268230, 2006 WL 2380960, at *3 (Mich App Aug 17, 2006)(**Exhibit 6**, Apx. 22b - 24b)("plaintiffs do not rely solely on the rules to establish their claim, but instead refer to the rules only as evidence of the standard of care"); *Deluca v Jehle*, dkt no 266073, 2007 WL 914350 at *2-*3 (Mich App March 27, 2007)(**Exhibit 7**, Apx. 25b - 28b)(no error in the trial court's jury instruction that "[i]f you find the defendant violated the Michigan Rules of Professional Conduct you may infer that the defendant was negligent"). See also *Trierwiler v Varnum, Riddering, Schmidt & Howlett*, LLP, dkt no 256511, 2006 WL 1161546 at *7 (Mich App May 2, 2006)(**Exhibit 8**, Apx. 29b - 38b)(MRPC "admissible as evidence in a malpractice action, where they are relevant to the alleged deficient conduct at issue and where their probative value is not outweighed by their prejudicial effect"). Unpublished opinions are cited where no published authority was located.

does not qualify if the defamatory comments are made by a licensed attorney, an officer of the court, with the duties of investiture and the rules of our profession as his guide.

C. Other issues.

Defendants' citation to the comments of Grand Traverse County District Court Judge Phillips and Circuit Judge Rodgers in dismissing the extortion and antitrust cases are silly, *ad hominem* and irrelevant attacks. Defendants make a show of quoting these dismissing judges' negative comments about Plaintiff Bryan Punturo; however, all of these comments were made in proceedings (civil (C)(8) motion and criminal preliminary examination), the subjects of which were unrefuted allegations of Boyers, which those judges held were legally insufficient. In other words, given the procedural status of the cases at the time the comments were made, these judges, in the process of summarily rejecting all of the claims against Punturo, had never even heard Punturo's side of the story. Boyers' repeated reference to Punturo as a "wealthy former felony criminal defendant" is cut of similarly cheap cloth.

In any event, the judges' comments and Punturo's status as a "former felony defendant" are wholly irrelevant to the issues in this appeal, and are obvious attempts to sling more mud, which have as their genesis Defendants' lack of any better method to support their arguments. The "logic" of these attacks is of the same ilk referred to by the Supreme Court of the Territory of Michigan in the case of *United States v John P Sheldon*, 5 Blume Sup Ct Trans 337 (Mich 1829) as the "great quantity of irrelevant and declamatory matter which the defendant has thrown into his written argument," regarding which the justice in that case assured the reader, "all this, and much more of the like kind have passed by me like the idle wind, and are forgotten in the necessary consideration of the important topics really connected with this case."

IV. Request for Relief.

In their zeal to part Plaintiffs from $750,000 of their money, Defendants repetitively, deliberately, aggressively and publicly defamed Plaintiffs, just as Kern threatened they would do if Plaintiffs did not pay the $750,000. The privilege defense they asserts lacks legal merit, and the issues were properly decided by the Court of Appeals. Accordingly, Plaintiffs/Appellees request that this Court DENY Appellants' application for leave; AFFIRM the trial court's denial of Defendants' motions; and REMAND this case to the trial court for further proceedings.

Dated: February 20, 2020

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