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STATE OF MICHIGAN

IN THE MICHIGAN 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,

vs

BRACE KERN, an individual,
Defendant-Appellant.
and

SABURI BOYER AND DANIELLE KORT, f/k/a Danielle Boyer, individuals,
Defendants.

Supreme Court Docket No:
COA Docket No: 338727

Grand Traverse Circuit Court
No. 17-32008-CZ
Hon. Thomas G. Power

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Notice of Filing Supreme Court Application for Leave to Appeal

Michigan Supreme Court Docket No.
Michigan Court of Appeals No. 338727
Grand Traverse County Circuit Court No. 17-32008-CZ

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To:

Angela DiSessa, District Clerk
Michigan Court of Appeals
201 W. Big Beaver Rd, Ste 800
Troy, MI 48084-4127

Clerk of the Court
Grand Traverse County Circuit Court
328 Washington St, Ste 300
Traverse City, MI 49684 *(w/ $25 filing fee)*

PLEASE TAKE NOTICE that Defendant-Appellant Bruce Kern has filed an Application for Leave to Appeal to the Michigan Supreme Court in the above-referenced matter.

COLLINS EINHORN FARRELL PC

By: */s/ Jonathan B. Koch*
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November 26, 2018

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STATE OF MICHIGAN

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

SABURI BOYER AND DANIELLE KORT, f/k/a Danielle Boyer, individuals,
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Supreme Court Docket No:
COA Docket No: 338727

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No. 17-32008-CZ
Hon. Thomas G. Power

DEFENDANT-APPELLANT BRACE KERN'S APPLICATION FOR LEAVE TO APPEAL

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Order Appealed from and Jurisdictional Statement

On May 18, 2017, Grand Traverse Circuit Court Judge Thomas G. Power entered an order denying defendant-appellant Brace Kern's motion for summary disposition under MCR 2.116(C)(7) and (C)(10).[1] On June 8, 2017 Kern timely filed an application for leave to appeal Judge Power's ruling with the Court of Appeals, which was granted on December 5, 2017. See MCR 7.205(A).[2] After another round of briefing and holding oral argument, the Court of Appeals issued an unpublished opinion affirming Judge Power's ruling on October 16, 2018.[3]

Under MCL 600.215 and MCR 7.305(C)(2)(a), this Court may grant leave to appeal after a decision of the Court of Appeals. Under MCR 7.305(C)(2)(a), Kern's application for leave to appeal is timely because he is filing it within forty-two days of the Court of Appeals' unpublished opinion.

[1] **Exhibit 1**, 5/18/17 Order Denying Summary Disposition.
[2] **Exhibit 2**, Court of Appeals Order Granting Leave to Appeal.
[3] **Exhibit 3**, *Punturo v Kern*, unpublished opinion of the Court of Appeals, issued October 16, 2018 (Docket Nos 338727, 338728, and 338732).

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Statement of Question Presented

I.

The fair-reporting privilege protects statements that are a "fair and true report of matters in a public record," i.e., statements that substantially represent the matter contained in the court records. MCL 600.2911(3). The Punturos base their claims on statements where Kern substantially repeated allegations from pleadings he filed on behalf of his clients, as well as the then-pending criminal extortion charges against Bryan Punturo. Does the fair-reporting privilege bar their claims?

The trial court answered: "No."

The Court of Appeals answered: "No."

Plaintiffs-appellees answers: "No."

Defendant-appellant Kern answers: "Yes."

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Reasons Why This Court Should Grant Leave to Appeal

Defendant-appellant Brace Kern filed a complaint on behalf of his clients, defendants Saburi Boyer and Danielle Kort.[4] When he was interviewed about that litigation, he repeated the allegations from that complaint. Based on Kern's comments, plaintiffs-appellees Bryan and Fawn Punturo (and their company, B&A Holdings) filed this lawsuit against Kern and the Boyers, raising claims of defamation, false light invasion of privacy, tortious interference with business relations, and loss of consortium.

Even though Michigan has a statutory privilege that protects the "fair and true report of matters of public record,"[5] the trial court and the Court of Appeals held that Kern's repetition of the allegations in his clients' complaint wasn't privileged. Both courts based their rulings on a recently-published Court of Appeals opinion, *Bedford v Witte*, 318 Mich App 60; 896 NW2d 69 (2016).[6] In *Bedford* the Court of Appeals held that the fair-reporting privilege didn't apply to a defendant's comments because he prefaced his repetition of the allegations from a complaint with "we can say with certainty."

This case illustrates the problem with *Bedford*: it creates an extra-statutory exception to the privilege based on the "level of certainty" expressed by the speaker

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[4] During the underlying lawsuit, Danielle was married to Saburi and known as Danielle Boyer. All references to the Boyers include both Saburi Boyer and Danielle Kort.

[5] MCL 600.2911(3).

[6] The *Bedford* defendants applied for leave to appeal to this Court, but their application was dismissed by stipulation after the case settled. See Docket for *Bedford v Witte*, Supreme Court Case Nos. 327372, 327373).

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and "conflicts with…another decision of the Court of Appeals,"[7] by effectively overruling the well-established "substantially represent[s]" test laid out in *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 325-326; 539 NW2d 774 (1995). *Bedford* also provides no guidance regarding what level of certainty has to be expressed before the fair-reporting privilege doesn't apply. So, in addition to being unmoored from the text of MCL 600.2911(3), Bedford's "level of certainty" standard is unworkably vague.

Here, Kern substantially repeated the allegations in his clients' complaint. Under MCL 600.2911(3) and *Northland Wheels*, that's a "fair and true report," regardless of any subjective assessment of his level of certainty. Yet the trial court and the Court of Appeals both understood *Bedford* to obviate the privilege. Thus, *Bedford* created a wrinkle in the fabric of Michigan law. And the *Bedford* defendant's application for leave to appeal was dismissed by stipulation before this Court had a chance to address it. As a result, this case gives this Court its first opportunity to iron out that wrinkle.

Under the *Bedford* standard, lawyers have no guidepost for what they can or cannot say about matters of public record. So this Court should grant leave to appeal in this case in order to provide guidance to the bench and bar by clarifying the scope of the fair-reporting privilege under MCL 600.2911(3).

[7] MCL 7.305(B)(5).

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Statement of Facts

A. The underlying dispute between the Boyers and Bryan Punturo resulted in the Boyers suing Punturo for extortion and antitrust violations and the Michigan Attorney General charging Punturo with felony extortion.

Before 2006, Saburi Boyer operated a parasailing business in East Grand Traverse Bay at the Punturos' beachfront resort (known as ParkShore) for several years.[8] In 2006, Boyer moved his parasailing operation to a different beachfront hotel about half a mile away from ParkShore.[9] From then until the summer of 2013, the Punturos' son Casey provided parasailing services at ParkShore.[10]

In spring 2014, Boyer bought all of the assets of Casey's parasailing business.[11] Around the same time, Boyer and Bryan Punturo executed a "Parasailing Exclusivity Agreement."[12] Under that agreement, the Boyers gave Punturo $19,000 per year (for a total of $57,000), in exchange for Punturo's promise not to compete with Boyer's parasailing business or let the ParkShore resort be used for parasailing for a three-year period.[13]

When the Boyers missed a payment, Punturo sued for breach of contract.[14] Boyer hired Kern to represent him in that lawsuit. Based on the Parasailing Exclusivity Agreement and correspondence from Punturo, Kern came to believe that

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[8] **Exhibit 4**, Complaint, ¶5, 13. Bryan Punturo is a part owner and manager of the ParkShore and Fawn Punturo, works there. *Id.* at ¶¶6-7.
[9] *Id.* at ¶17.
[10] *Id.* at ¶18.
[11] *Id.* at ¶19(a).
[12] **Exhibit 5**, Parasailing Exclusivity Agreement.
[13] *Id.*
[14] Ex.4, Complaint at ¶21.

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Punturo had extorted the Boyers into paying for the Parasailing Exclusivity Agreement and, in doing so, violated the Michigan Antitrust Reform Act.

B. The Boyers (represented by Kern) sued Punturo, alleging that he coerced and extorted them into paying him for a non-compete agreement through threats of physical and financial harm.

As a result, in February 2016, the Boyers and their company (represented by Kern) sued Bryan Punturo and one of his companies alleging that Punturo coerced them into signing the Parasailing Exclusivity Agreement by threatening them with physical and financial harm.[15] In addition, Kern reported Punturo to the Michigan Attorney General's office, which opened a criminal investigation.[16]

As a result of the investigation, the Attorney General charged Bryan Punturo with one count of Felony Extortion for threatening to run the Boyers out of business if he wasn't paid thousands of dollars.[17] At the preliminary examination, the district court explained that "[w]hat Mr. Punturo did, in my opinion was **nasty and mean-spirited, reprehensible conduct in the way he negotiated**."[18] But, because the court found that the prosecution hadn't presented sufficient evidence that Punturo had threatened to do anything illegal, it declined to bind him over on the extortion charges, which were dismissed in September 2016.[19]

The Boyers' original complaint contained two counts: (1) Count I – Flagrant Antitrust Violation, and (2) Count II – Intentional Infliction of Emotional Distress

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[15] **Exhibit 6**, Underlying Complaint at ¶16.
[16] **Exhibit 7**, Michigan Attorney General Press Release.
[17] *Id.*
[18] **Exhibit 8**, Preliminary Examination Hearing Transcript, p. 5 (emphasis added).
[19] *Id.*; **Exhibit 9**, 9/29/16 District Court Order in Criminal Case.

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(on Saburi Boyer's behalf only). The Boyers alleged that Bryan Punturo had threatened to run them out of business by driving parasailing prices down unless they agreed to sign the Parasailing Exclusivity Agreement and pay him not to compete with them: "Through threats of physical, financial, and reputational harm to [the Boyers], [Punturo] **coerced and extorted** [them] into signing a Parasailing Exclusivity Agreement and a Personal Guaranty."[20]

They also alleged that the Parasailing Exclusivity Agreement violated MCL 445.772 and MCL 445.723 of the Michigan Antitrust Reform Act.[21] In their view, the Punturo's conduct "was **flagrant and intentional** because it was meant to, and did, threaten, intimidate and scare [the Boyers] into paying [Punturo] to not cause them harm."[22] So, in the Boyers' view, Punturo engaged in "conduct of **extortion and antitrust violations.**"[23]

The Boyers also claimed that Punturo had engaged in "threats, coercion, **extortion, antitrust violations**, and vulgar correspondence."[24] Furthermore, they alleged that Punturo violated MCL 750.213 [Malicious threats to extort money] because "[t]hrough oral and written communications, [Punturo] **maliciously threatened injury** to [them] **with the intent to extort money** from them through the unlawful agreement."[25]

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[20] *Id.* at ¶¶9, 16 (emphasis added).
[21] *Id.* at ¶¶17-18.
[22] *Id.* at ¶22 (emphasis added).
[23] See *id.* at 32 (emphasis added).
[24] *Id.* at 42 (emphasis added).
[25] *Id.* at 45 (emphasis added).

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In May 2016, the Boyers filed an amended complaint that split their antitrust claim into one claim alleging a violation of MCL 445.772 and one claim alleging a violation of MCL 445.723 and added a claim of intentional interference with a contract/business expectancy. The next month, the Boyers filed a second amended complaint that added a claim of unjust enrichment.[26] Both amended complaints contained the same factual allegations about Punturo's extortion, threats, and antitrust violations.[27]

Punturo moved for summary disposition. At the hearing, the circuit acknowledged that "[Punturo's] clear behavior that's documented in text messages or e-mails is **abhorrent, it's ridiculous, it's absurd, it's immature, [and] it's stupid**."[28] However, the trial court granted the motion with respect to the Boyers' antitrust, interference, and unjust enrichment claims, but denied the motion regarding the intentional infliction of emotional distress.[29] Just over two weeks later, the parties stipulated to dismissal without prejudice of the Boyers' intentional infliction claim.

C. The Punturos sued the Boyers and Kern for repeating the allegations in their lawsuit in news articles.

In February 2017, the Punturos filed this lawsuit against Kern and the Boyers. They assert four claims: Count I – Defamation; Count II – False Light

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[26] **Exhibit 10**, Underlying Second Amended Complaint.
[27] See generally *id.*
[28] **Exhibit 11**, 7/11/16 Summary Disposition Hearing Transcript, p. 23 (emphasis added).
[29] **Exhibit 12**, 8/5/16 Decision and Order Granting Summary Disposition in Underlying Case.

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Invasion of Privacy; Count III – Tortious Interference with Business Relations; and Count IV – Loss of Consortium.[30] All of the Punturos' claims against Kern are premised on statements that Kern allegedly made to various news agencies (and were subsequently published online or in print) during the course of the underlying lawsuit and criminal prosecution of Bryan Punturo.[31]

The Punturo's allege that on February 28, 2016—five days after Kern filed the underlying lawsuit for the Boyers[32]—the Traverse City Record-Eagle reported that "Kern said the correspondence proved Punturo flagrantly violated state antitrust laws." The article also quoted Kern as saying "The contract itself is an agreement to limit competition…[s]o that violates the (Michigan) Antitrust Reform Act in [and] of itself."[33]

The Punturos also point to five news articles published on May 10, 2016—the day of Punturo's arraignment on criminal extortion charges.[34] The Traverse City Record-Eagle quoted Kern as saying that because "[t]here was extortion for the past two years" the Attorney General's charges were "a long time coming" and it was "a vindicating day for [the Boyers]."[35] Kern also explained why he reported Punturo to the Attorney General when he first saw the non-compete contract: "I realized it violated antitrust laws."[36] He also opined that the suits against Punturo were

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[30] Ex. 4, Complaint.
[31] *Id.* at ¶30.
[32] See Ex. 6, Underlying Complaint.
[33] Ex. 4, Complaint at ¶30(a).
[34] *Id.* at ¶30(b)-(e).
[35] *Id.* at ¶30(b).
[36] *Id.*

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newsworthy because they involve "significant threats" and "significant sums of money."[37]

In a 7&4 News television report, Kern commented on Punturo's threats against the Boyers—e.g., "I will crush you, I will make your life a living hell." In a 9&10 News website interview, Kern discussed the differences between the criminal charges against Punturo and the Boyers' civil lawsuit: "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 [violated] anti-trust laws and there's also a claim for intentional infliction of emotional distress."[38] In another 9&10 News article, Kern again discussed how the Boyers felt about the Attorney General bringing charges against Punturo: "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."[39] And, in an Interlochen Public Radio article, Kern again discussed the threats Punturo made to Saburi Boyer: "Essentially, what [Punturo] 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.'"[40]

The Punturos also identify statements attributed to Kern in a Northern Express article from November 2016 in which Kern discussed what led him to report Punturo to the Michigan Attorney General: "As soon as I saw the contract,

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[37] *Id.*
[38] *Id.* at 30(d).
[39] *Id.* at 30(e).
[40] *Id.* at 30(f).

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I'm like 'This is an antitrust violation, this is a covenant not to compete, this is extortion."[41]

The Punturos allege that all of the above statements were defamatory because they "falsely impugn [Punturo and his company] in their business and/or falsely impute the commission of crimes."[42]

D. The trial court denied Kern's motion for summary disposition.

Kern moved for summary disposition under MCR 2.116(C)(7) and (C)(10).[43] He argued that all of Kern's allegedly defamatory statements fell within the statutory fair-reporting privilege contained in MCL 600.2911(3) because they were fair and accurate reports of the allegations contained in the Boyers' complaint in their underlying lawsuit against Punturo, as well as the then-pending felony extortion charges filed against Punturo by the Michigan Attorney General.[44] As a result, all of the Punturos' claims failed as a matter of law.

In response, the Punturos argued that the statutory fair-reporting privilege doesn't apply because "[Kern's] statements were much more than, 'we have alleged' that Punturo committed the crimes of antitrust complaint or the Attorney General's carefully worded press release."[45] The Punturos maintained that *Bedford v Witte,* 318 Mich App 60; 896 NW2d 69 (2016), supports their claim because, "[Kern] stated

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[41] *Id.* at 30(g).
[42] *Id.* at 35.
[43] **Exhibit 13**, Kern's Summary Disposition Motion.
[44] *Id.* at 2-3, 10-13. Kern also argued that his statements weren't actionable because they were merely his subjective opinion and rhetorical hyperbole. Those arguments aren't at issue in Kern's application to this Court.
[45] **Exhibit 14**, Punturo's Response to Kern's Summary Disposition Motion, 1.

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with certainty that Punturo had committed these crimes."[46] The Punturos didn't respond to, or in any way dispute, Kern's argument that if their defamation claim fails, their remaining claims fail as well.

In reply, Kern explained that a statement doesn't have to quote the public record verbatim to be privileged under MCL 600.2911(3).[47] Although the Punturos ignored the correct standard, the privilege applies as long as the "**information … substantially represent[s] the matter contained in the court records**" –i.e., "where the 'gist' or the 'sting' of the article is substantially true, that is, where the inaccuracy does not alter the complexion of the charge and would have no different effect on the reader." *Northland Wheels*, 213 Mich App at 325-326 (emphasis added).[48] Kern also explained that *Bedford* is distinguishable because, in that case, the defendant's comments—"that 'we can say with certainty' that plaintiffs broke the law in various ways"—didn't "merely summarize what was alleged…in the federal complaint."[49] In contrast, here, Kern didn't say anything that expressed an increased level of certainty or otherwise meaningfully altered the effect that the literal truth of the Boyers' and Attorney General's allegations would have on the recipient of the information.[50]

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[46] *Id.*
[47] **Exhibit 15**, Kern's Reply brief, p. 2.
[48] *Id.*
[49] *Id.* at 2-3.
[50] *Id.* Without obtaining leave from the circuit court, the Punturos also filed a sur-reply that reiterated their arguments that the fair-reporting privilege doesn't apply. **Exhibit 16**, Punturos' Sur-Reply.

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At the summary disposition hearing, Grand Traverse Circuit Court Judge Power recognized that the standard for determining whether the fair-reporting privilege applies articulated by the Court of Appeals in *Bedford*—i.e., the focus on the level of certainty—doesn't provide a workable level of guidance for trial courts: "**This whole thing is kind of a never-never land because we're putting great difference based upon microscopic differences in the way things are said**."[51] He also recognized that the underlying civil case and the Attorney General's criminal prosecution directly accused the Punturos of flagrant antitrust violations and criminal extortion: "[W]hat happened in the proceeding is criminal charges were brought and then, ultimately, of course, were dismissed prior to bind over, but at the time the comments were made, the charges had been brought and that pretty much was it."[52] But, Judge Power opined that Kern's "statements do say that [the Punturos] actually did it."[53] Thus, he concluded that Kern's statements didn't fall within the statutory fair-reporting privilege because "it appears to me that the statements we have are at least as much as in *Bedford v Witte* and probably more."[54] Accordingly, Judge Power denied Kern's motion for summary disposition regarding the Punturos' claims.[55]

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[51] **Exhibit** 17, 5/8/17 Summary Disposition Hearing Transcript at 24.
[52] *Id.* at 58.
[53] *Id.*
[54] *Id.* at 59.
[55] Ex. 1, 5/18/17 Order Denying Summary Disposition.

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Kern applied the Court of Appeals for leave to appeal Judge Power's denial of his summary disposition motion.[56] Boyer and Kort also filed applications for leave to appeal.[57] In July 2017, Judge Power stayed all trial court proceedings pending resolution of this appeal.[58] In December 2017, the Court of Appeals granted all three applications and consolidated the cases.[59]

E. The Court of Appeals affirmed Judge Power's denial of Kern's summary disposition motion in an unpublished opinion.

In October 2018, the Court of Appeals issued an unpublished opinion affirming the trial court because it "properly determined that MCL 600.2911(3) and this Court's interpretation thereof in *Bedford*,…were binding and determinative in the instant case."[60] The Court began its analysis by stating that "[i]n *Bedford*, this Court did not clarify exactly what words were used by the defendants to indicate that the plaintiffs committed crimes with certainty" but that, here, "the record is clear that defendants made statements, with certainty, that Punturo committed extortion and violations of MARA."[61]

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[56] See Docket Entries for Michigan Court of Appeals Case No. 338727.
[57] See Docket Entries for Michigan Court of Appeals Cases No. 338728 (Kort) and 338732 (Boyer)
[58] **Exhibit 18**, Trial Court Stay Order. At the hearing, Judge Power commented on the need for this Court's clarification of the proper scope of the "fair reporting" privilege in light of *Bedford*.
[59] Ex. 2, Court of Appeals Order Granting Leave to Appeal. The Punturos subsequently filed a cross-claim of appeal arguing that the trial court should have granted summary disposition in their favor under MCR 2.116(I)(2). See Docket Entries for Michigan Court of Appeals Case No. 338727
[60] Ex. 3, *Punturo v Kern*, unpublished opinion at 6.
[61] *Id.* at 7.

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After reviewing Kern's allegedly defamatory statement, the Court of Appeals concluded that "the reasoning provided by this Court in *Bedford* is applicable to the present case, even if defendants never used the phrase 'with certainty.'"[62] The panel explained that "[t]he crux of the *Bedford* case was that the public record contains only unproven allegations, not that actual crimes were committed."[63] But, "[d]espite the content of the public record, defendants stated in no uncertain terms that Punturo committed extortion and flagrant violations of MARA."[64] As a result, the Court concluded that Kern's statements weren't privileged because "the level of certainty" that he expressed "alter[ed] the effect the literal truth would have on the recipient of that information."[65] So the panel held that "the trial court properly denied defendants' motions for summary disposition on that ground."[66]

Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of immunity granted by law. Courts must consider affidavits, depositions, admissions, or other documentary evidence (if submitted), see MCR 2.116(G)(5), and may accept the contents of the complaint as true unless the allegations are

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*, quoting *Bedford*, 318 Mich App at 71.
[66] *Id.* at 7. The Court also rejected Kern's opinion and rhetorical hyperbole arguments. *Id.* at 7-11. But, as noted above, those arguments are not at issue in this appeal.

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contradicted by the supporting documentation. See *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006).

A motion under MCR 2.116(C)(10) tests the factual support for the parties' claims and defenses. The Court considers all the evidence submitted by the parties in the light most favorable to the nonmoving party. *Maiden*, 461 Mich at 119-120. But summary disposition should be granted when the nonmoving party fails to submit evidence to create a genuine issue of material fact for trial. *Id.* at 120.

"The existence of a privilege that immunizes a defendant from liability for libel is a question of law that this Court reviews de novo." *Northland Wheels*, 213 Mich App at 324. Similarly, to the extent this case involves interpretation of the fair-reporting privilege state, MCL 600.2911(3), "[q]uestions of statutory interpretation are reviewed de novo." *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016).

Issue I – Michigan's Fair-Reporting Privilege

The fair-reporting privilege protects statements that are a "fair and true report of matters in a public record," i.e., statements that substantially represent the matter contained in the court records. MCL 600.2911(3). The Punturos base their claims on statements where Kern that substantially repeated allegations from pleadings he filed, as well as the then-pending criminal extortion charges against Bryan Punturo. So the Punturos' claims are barred by the fair-reporting privilege.

A defamation claim must be based on "an unprivileged communication to a third party." *Thomas M. Cooley Law Sch v Doe 1,* 300 Mich App 245, 262; 833 NW2d 331 (2013). Generally, "[a] communication is defamatory if it tends to so

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harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010). But not all defamatory statements are actionable. *Ireland v Edwards,* 230 Mich App 607, 614; 584 NW2d 632 (1998). Even if a statement is otherwise defamatory, it can't support a cause of action if it's privileged. For example, MCL 600.2911(3)'s "fair-reporting privilege" protects statements that "substantially represent the matters contained in the court records" (like the allegations contained in a complaint). *Northland Wheels*, 213 Mich App at 325.

A. The fair-reporting privilege

The Michigan Legislature codified a broad fair-reporting privilege in MCL 600.2911(3), which provides, in pertinent part, that "[d]amages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a…record generally available to the public." MCL 600.2911(3). Under the plain language of MCL 600.2911(3) "[a] defendant's motivation is irrelevant if a fair and true report is made of the proceeding." *Stablein v Schuster,* 183 Mich App 477, 482; 455 NW2d 315 (1990). So there's no exception for malice or self-reporting. See *Bedford,* 318 Mich App at 69 (holding "that the plain language of the statute simply does not provide an exception for cases involving malice (however plaintiffs try to define it) or self-reporting").

Based on the clear and unambiguous statutory language, Michigan's fair-reporting privilege protects "fair and true" reports of matters contained in records

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that are generally available to the public. MCL 600.2911(3). However, a report doesn't have to quote the public record verbatim for a statement to be privileged. Rather, the "fair and true" requirement is satisfied as long as the "**information… substantially represent[s] the matter contained in the court records**." See *Northland Wheels,* 213 Mich App at 325-326 (applying the statutory fair-reporting standard to news articles about a court proceeding) (emphasis added).

That "standard is met, and a defendant is not liable, where the **'gist'** or the **'sting'** of the article is substantially true, that is, where the inaccuracy does not alter the complexion of the charge and **would have no different effect on the reader**." *Id.* (emphasis added). "Under this test, minor differences are deemed immaterial if the **literal truth produces the same effect**." *Id.* at 325. (emphasis added).

In *Northland Wheels*, a business brought a libel action against newspapers that published articles regarding a shooting that occurred near the business. *Id*. at 319. The newspapers claimed that their respective stories were based upon official police accounts of the shooting, and, therefore, were privileged under the fair-reporting privilege. The Court of Appeals agreed with the newspapers, and held that the fair-reporting privilege applied to the articles to the extent they represented "fair and true" reports of matters contained in police department records. *Id*. at 326.

After recognizing the "substantially represent" standard and reviewing the public records, the Court of Appeals concluded that, although there were several

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factual inaccuracies in the defendants' articles, "[n]either the 'sting' nor the 'gist' of defendants' articles would have a different effect on the reader's mind than the literal truth." *Id.* at 328. The Court did find that a statement in one of the articles implying that the business was unsafe didn't fall within the scope of fair-reporting privilege. But that was only "because it was not gleaned from police records about the shooting"—i.e., it didn't "substantially represent the matter contained in the [public] records." *Id.* at 325, 328.[67]

The "substantially represent" standard is well-established—it's been recognized and applied by Michigan's appellate courts for decades. See, e.g., *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157, 167; 398 NW2d 245 (1986); *Koniak v Heritage Newspapers, Inc*, 190 Mich App 516, 523; 476 NW2d 447 (1991); *McCracken v Evening News Ass'n*, 3 Mich App 32, 38-39; 141 NW2d 694 (1966).

Recently, in *Bedford*, the Court of Appeals purported to reaffirm the "substantially represent" standard from *Northland Wheels* and held that the fair-reporting privilege protected the defendants' publishing of an allegedly defamatory complaint on a law firm website. *Bedford*, 318 Mich App at 66-67. But it didn't stop there. The Court of Appeals also decided that the fair-reporting privilege didn't apply to comments made by one of the defendants in a news interview where he "stated that '**we can say with certainty**' that plaintiffs broke the law in various

[67] The Court ultimately concluded that the unprivileged statement, which implied that the business was unsafe by referencing that the shooting occurred near the business and neighbors stated that problems occurred when young people congregated in that area, was insufficient to establish defamation. *Id.* at 327-328.

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ways." *Id.* at 70-71 (emphasis added). The Court of Appeals concluded that *Bedford* defendant's comments didn't "merely summarize what was alleged—but not yet adjudicated—in the federal complaint." *Id.* at 71. That's because, in the court's view, the added phrase—"with certainty"—affected the way a reader would perceive the information: "**Given the level of certainty expressed**…**his words** did alter the effect the literal truth would have on the recipient of the information." *Id.* (emphasis added). So the court held that the defendant's statement "went beyond the public record" and thus, fell outside the fair-reporting privilege. *Id.*

As a result, *Bedford* creates an entirely new exception to the fair-reporting privilege based on the "level of certainty" expressed by the speaker. Nothing in the plain language of MCL 600.2911(3) supports drawing a distinction between different levels of certainty. So *Bedford* conflicts with the plain language of the statute that creates the fair-reporting privilege. It would effectively require defendants to repeat their allegations verbatim or qualify each statement (which was expressly rejected in *Northland Wheels*). If they didn't—i.e., if they paraphrased the contents of the public record using declarative sentences—they would be taking the risk that their statements weren't privilege because they somehow expressed a heightened level of certainty. But, whether said with certainty or qualifications, a statement can "substantially represent" the content of a public record without quoting it verbatim. So *Bedford* cannot be reconciled with the well-established "substantially represent[s]" test laid out in *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 325-326; 539

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NW2d 774 (1995). As a result, it "conflicts with…another decision of the Court of Appeals." MCR 7.305(B)(5).

In addition to being unmoored from the statutory text (and in conflict with the prior Court of Appeals' precedent), *Bedford's* "level of certainty" exception is unworkably vague. Aside from referencing the specific words used by the defendant in that case, the *Bedford* panel failed to provide any explanation or guidance regarding what level of certainty has to be expressed before the "gist" or "sting" of a statement changes the effect that the literal truth would have on the listener or reader. Thus, *Bedford* leaves future courts, lawyers, and citizens guessing whether the "level of certainty" exception to the fair-reporting privilege is limited to situations where the defendant expressly states a heightened level of certainty—e.g., by saying "we can say with certainty"—or whether it applies whenever a defendant speaks about a public record with some unspecified level of certainty.

As this case demonstrates, that's a problem. Here, the Court of Appeals concluded that "the reasoning provided by this Court in *Bedford* is applicable to the present case, even if defendants never used the phrase 'with certainty.'"[68] The panel's basis for that conclusion is that "[t]he crux of the *Bedford* case was that the public record contains only unproven allegations, not that actual crimes were committed."[69] So, even though Kern never said anything like "we can say with certainty," the Court of Appeals concluded that his comments fell outside the fair-

[68] Ex. 3, *Punturo v Kern*, unpublished opinion at 7.
[69] *Id.*

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reporting privilege because he "stated in no uncertain terms that Punturo committed extortion and flagrant violations of MARA"—even though that's exactly what the Boyers' complaint alleged.[70]

Without any clarification regarding how to apply this new "level of certainty" gloss on the *Northland Wheels*' "substantially represent[s]" standard, *Bedford* doesn't give trial courts or practicing attorneys a workable standard for evaluating whether a statement is privileged or not. Instead, it creates the potential for cases where, like here, an attorney is subject to defamation claims for simply repeating the allegations from his or her clients' pleadings.

As shown below, Kern substantially repeated the allegations in the Boyers' complaint. So, under MCL 600.2911(3) and *Northland Wheels*, his statements were privileged as a "fair and true report," regardless of any subjective assessment of his level of certainty. Yet the trial court and the Court of Appeals both understood *Bedford* to obviate the privilege. Thus, *Bedford* wrinkled the fabric of Michigan law. And, since the *Bedford* defendant's application was withdrawn by stipulation after the parties settled, this case presents the first opportunity for this Court to fix that problem.[71]

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[70] *Id.*

[71] See **Exhibit 19**, Docket Sheet for *Bedford v Witte*, Supreme Court Case Nos. 155034, 155035

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B. Kern's allegedly defamatory statements reiterated the Boyers' and the Attorney General's allegations that Punturo flagrantly violated antitrust laws, threatened them, and committed criminal extortion. So they "substantially represent[ed]" the contents of the underlying pleadings and are, thus, protected by Michigan's fair-reporting privilege.

The Court of Appeals held that Kern's statements don't fall within the fair-reporting privilege because he "stated in no uncertain terms that Punturo committed extortion and flagrant violations of MARA."[72] Likewise, Judge Power concluded that Kern's statements weren't privileged because they implied "that [the Punturos] actually did it."[73] But that's true of any allegation. Complaints don't preface every allegation with some variation of "allege." So quoting a complaint verbatim could be said to imply that the defendant "actually did it." [74] Without explaining why, Judge Power opined "that the statements we have are at least as much as in *Bedford v Witte* and probably more."[75] He was incorrect and *Bedford* is wrong because its unworkable standard led Judge Power (and the Court of Appeals) to that conclusion.

The Punturos have contended that *Bedford* supports their argument that Kern's statements weren't privileged because of the level of certainty he expressed. **It doesn't.** Recall that in *Bedford*, the Court of Appeals held that the fair-reporting privilege didn't apply because the defendant's comments—"that 'we can say with certainty' that plaintiffs broke the law in various ways"—didn't "merely summarize

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[72] Ex. 3, *Punturo v Kern*, unpublished opinion at 7.
[73] Ex. 17, 5/8/17 Summary Disposition Hearing Transcript at 58.
[74] See *id.*
[75] *Id.* at 59.

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what was alleged…in the federal complaint." *Bedford*, 318 Mich App at 71. The panel reasoned that because of the increased "level of certainty expressed…his words did alter the effect the literal truth would have on the recipient of the information." *Id.*

But, despite the lower courts' and the Punturos' assertion to the contrary, Kern didn't say anything like that here. Nor did his allegedly defamatory statements 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. Nothing about Kern's statements expressed an increased level of certainty. Indeed, *Bedford* didn't limit the fair-reporting privilege to instances when a defendant hedges his comments by saying something along the lines of "we have alleged." Instead, it reaffirmed the "substantially represent" standard from *Northland Wheels*. *Bedford*, 318 Mich App at 66-67. But, as noted above, although *Bedford* reaffirmed the "substantially represent" standard and didn't expressly require attorneys to preface their comments with "we have alleged," this case illustrates that that's exactly how it's being interpreted.

The Punturos' complain that Kern accused them of anti-trust violations and extortion.[76] But that's exactly what the Boyers alleged in their complaint and the Attorney General accused Punturo of doing in the criminal proceedings. The Boyers unequivocally pled that Bryan Punturo engaged in "conduct of **extortion and**

[76] *Id.* at ¶¶30, 32.

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antitrust violations" as well as "threats, coercion, **extortion, antitrust violations**, and vulgar correspondence."[77] They also alleged that he used "**threats** of physical, financial, and reputational harm" to "coerce[] and **extort**[] [them] into signing a Parasailing Exclusivity Agreement and a Personal Guaranty."[78]

The Boyers also specifically pled that Punturo violated Michigan's criminal law against extortion, MCL 750.213 [Malicious threats to extort money] because "[t]hrough oral and written communications, [Punturo] **maliciously threatened injury** to [them] **with the intent to extort money** from them through the unlawful agreement."[79] And they pled that Punturo "**flagrant[ly]** and intentional[ly]" violated MCL 445.772 and MCL 445.723 of the Michigan Antitrust Reform Act.[80] Similarly, the Attorney General charged Punturo with felony extortion for "threatening to allegedly run a parasailing company out of business if he was not paid thousands of dollars."[81]

The Boyers' (and the Attorney General's) pleadings are public records. And Kern's allegedly defamatory statements simply reiterated the allegations contained in those public records. For example, one article reported that Kern said that "Punturo flagrantly violated state antitrust laws" and quoted him as saying that the Parasailing Exclusivity Agreement "violates the (Michigan) Antitrust Reform Act in

[77] See Ex. 6, Underlying Complaint at ¶¶ 32, 42 (emphasis added).
[78] *Id.* at ¶¶9, 16 (emphasis added).
[79] *Id.* at ¶ 45.
[80] *Id.* at ¶¶ 17-18.
[81] Ex. 7, Michigan Attorney General Press Release.

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of itself."[82] That's paragraphs 16 through 22 of the Boyers' Underlying Second Amended Complaint, as well as "Count I – Flagrant Antitrust Violation – Unlawful Contract (MCL 445.772)" and "Count II – Flagrant Antitrust Violation – Unlawful Monopoly (MCL 445.773)."[83]

Similarly, in another article, Kern discussed what led him to report Punturo to the Michigan Attorney General: "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."[84] Another article quoted Kern's discussion of the differences between the criminal charges against Punturo and the Boyers' civil lawsuit: "Extortion is one aspect of our case, but ours seeks to prove that the unlawful contract that Mr. Punturo extorted my clients into…signing [violated] anti-trust laws and there's also a claim for intentional infliction of emotional distress."[85] Yet another article quoted Kern as saying that "[t]here was extortion" by Bryan Punturo.[86] But that's exactly what the Boyers' complaint accused Punturo of doing. Indeed, the Boyers' underlying pleadings are littered with specific references to Punturo's extortion.

For example, in paragraph 16 of their Underlying Complaint, the Boyers claimed that "[t]hrough threats of physical, financial and reputational harm to Plaintiffs, Defendants coerced and extorted Plaintiffs into signing a Parasailing

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[82] Ex. 4, Complaint at ¶30(a).
[83] Ex. 10, Underlying Second Amended Complaint at ¶¶16-22 and pp. 9, 13; see also Ex. 6, Underlying Complaint at ¶¶16-22, 32 (including "Count I – Flagrant Antitrust Violation).
[84] Ex. 4, Complaint at 30(g).
[85] *Id.* at 30(d).
[86] *Id.* at ¶30(b).

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Exclusivity Agreement."[87] Similarly, in the Underlying Second Amended Complaint, paragraph 32 referenced "[Punturo's] conduct of extortion and antitrust violations;" paragraph 42 stated that "Defendants extorted Plaintiffs into entering into a parasailing exclusivity agreement by threatening them with physical, financial and reputational harm;" and paragraph 72 stated that "Defendants' threats, coercion, extortion, antitrust violations, and vulgar correspondence to Plaintiffs were extreme and outrageous conduct."[88] Indeed, the Boyers' complaint even expressly accused Punturo of violating Michigan's criminal laws against extortion: "[t]hrough oral and written communications, [Punturo] maliciously threatened injury to [them] **with the intent to extort money** from them through the unlawful agreement. **MCL § 750.213 Malicious threats to extort money**."[89]

In other words, Kern's statements repeated the **exact substance** of his clients' complaint for extortion and antitrust violations as well as the Attorney General's criminal extortion charges against Punturo.[90] Even though Kern didn't repeat the allegations of criminal and civil misconduct verbatim, at the very least, his statements "substantially represent[ed] the matter contained in the court records"—i.e., the allegations that Punturo engaged in "**extortion and antitrust violations.**"[91] See *Northland Wheels,* 213 Mich App at 325-326. And Kern didn't

[87] Ex. 6, Underlying Complaint at ¶16.
[88] Ex. 10, Underlying Second Amended Complaint at ¶¶32, 42, 72
[89] Ex. 6, Underlying Complaint at 45 (emphasis added); Ex. 10, Underlying Second Amended Complaint at ¶92.
[90] See Ex. 6, Underlying Complaint at ¶32.
[91] *Id.*

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say anything in any of the news articles—or express a level of heightened certainty—that would change the "gist" or the "sting" of the Boyers' allegations or have a "different effect on the reader" than the allegations of criminal and civil misconduct that were contained in the public records. See *id.* So the fair-reporting privilege protects Kerns' statements. As a result, the Punturos' defamation claim fails as a matter of law and must be dismissed.

The Punturos have also argued that Kern's statements weren't protected by the statutory fair reporting privilege because he didn't preface everything he said in the news interviews with the phrase "we have alleged."[92] **They're wrong.** There's no "we have alleged" requirement in MCL 600.2911(3). The proper statutory standard is whether the "**information … substantially represent[s] the matter contained in the court records**." *Northland Wheels*, 213 Mich App at 325-326. (emphasis added). A report doesn't have to quote the public record verbatim for a statement to be privileged under MCL 600.2911(3). And it doesn't have to preface every sentence with "we have alleged." The Punturos' argument that it does is made up; there's no statutory (or legal) basis for it. Indeed, even when an attorney publishes an exact copy of a complaint, each paragraph isn't prefaced by the word "allege." The Punturos' argument—and the Court of Appeals' interpretation of *Bedford* in this case—doesn't reconcile with *Bedford's* clearly-stated holding that the fair-reporting privilege protects verbatim repetitions of a complaint.

[92] Ex. 14, Punturo's Response to Kern's Summary Disposition Motion at 1.

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Finally, the Punturos have previously relied on *Bedford* to argue that the fair-reporting privilege doesn't apply to Kern's statements because of the level of certainty he expressed. **Again, they're wrong.** As noted above, *Bedford* held that the fair reporting privilege didn't apply because the defendant's specific comments—"that 'we can say with certainty' that plaintiffs broke the law in various ways"—didn't "merely summarize what was alleged…in the federal complaint." *Bedford*, 318 Mich App 60. The panel reasoned that because of the increased "level of certainty expressed…his words did alter the effect the literal truth would have on the recipient of the information." *Id.*

Despite the Punturos' emphatic insistence to the contrary, Kern didn't say anything like "we can say with certainty." None of his allegedly defamatory statements expressed an increased level of certainty. Instead, Kern merely repeated the allegations of criminal and civil misconduct raised in the Boyers' underlying complaint and in the Attorney General's case against Punturo using declarative sentences—e.g., "I realized it violated antitrust laws," "I recognized extortion,"[93] "this is an antitrust violation," "this is extortion."[94] While those are certainly statements, they weren't made with any increased level of certainty.[95] So *Bedford* is distinguishable even if its standard deemed to apply.

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[93] If Kern hadn't "recognized" any potential violations, he couldn't have drafted the Boyers' complaint and filed their lawsuit against Punturo. Indeed, this is true of any attorney who files suit on behalf of his or her clients.

[94] Ex. 4, Complaint at ¶30.

[95] The *Bedford* Court didn't limit the fair reporting privilege to when a defendant prefaced his comments with "we have alleged." Instead, it reaffirmed the

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In sum, Kern's allegedly defamatory statements were a privileged "fair and accurate" report under *Northland Wheels*. The underlying lawsuit and the Attorney General's prosecution are both "matter[s] of public record" and "public…proceeding[s]," and the Boyers' underlying complaint is a "record generally available to the public." MCL 600.2911(3). And Kern's statements "substantially represent[ed] the matter contained in the court records"—i.e., the allegations that Punturo engaged in "extortion and antitrust violations." *Northland Wheels*, 213 Mich App at 325-326.[96] Furthermore, nothing that Kern said in any of the news articles—nor the level of certainty he expressed—would change the "gist" or the "sting" of the Boyers' allegations of criminal and civil misconduct or have a "different effect on the reader." See *Northland Wheels,* 213 Mich App at 325-326. It follows the fair-reporting privilege protects Kern's statements and bars the Punturos' defamation claim. So the Punturos' defamation claim—and, by extension, their entire case[97]—fails as a matter of law and must be dismissed.

"substantially represent" standard from *Northland Wheels*. *Bedford*, 318 Mich App at 66-67.

[96] Ex. 6, Underlying Complaint at ¶32.

[97] The Punturos' claims of false light invasion of privacy, tortious interference with business relations, and loss of consortium against Kern are all based on the same privileged and protected statements as their defamation claim—i.e., the statements contained in news articles. So the fair-reporting privilege applies with equal force: "[W]here the alleged tortious conduct 'is a defendant's utterance of negative statements concerning a plaintiff, **privileged speech is a defense**.'" *Sarkar v Doe*, 318 Mich App 156, 201 n 24; 897 NW2d 207 (2016), quoting *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995) (emphasis added). Accordingly, just like their defamation claim, the Punturos additional claims all fail as a matter of law. The Punturos have never disputed that point.

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Conclusion & Relief Requested

Defendant-appellant Kern asks this Court to grant leave to appeal in this case in order to provide guidance to the bench and bar by clarifying what constitutes a "fair and accurate" report under MCL 600.2911(3).

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November 26, 2018

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STATE OF MICHIGAN

IN THE MICHIGAN 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,

vs

BRACE KERN, an individual,
Defendants-Appellants.

and

SABURI BOYER AND DANIELLE KORT, f/k/a Danielle Boyer, individuals,
Defendants.

Supreme Court Docket No:
COA Docket No: 338727

Grand Traverse Circuit Court
No. 17-32008-CZ
Hon. Thomas G. Power

Certificate of Service

Beverly A. Sutherlin says that on the 26th day of November 2018, she served a copy of *Notice of Filing Supreme Court Application for Leave to Appeal* on:

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Traverse City, MI 49684 *(w/$25 filing fee)*

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/s/ Beverly A. Sutherlin