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

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' ANSWER TO APPELLANT BRACE KERN'S APPLICATION FOR LEAVE TO APPEAL

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Statement of Jurisdiction

Appellees do not dispute Appellant's statement.

Standard of Review

Appellant's statement of this Court's standard of review – *de novo* – is correct.

Statement of Question Involved

Did the trial court properly rule that the *per se* defamatory statements of Defendant were not privileged as fair and true reports of public proceedings?

The trial court answered "yes."

Plaintiffs answer "yes."

Defendant answers "no."

I. Introduction.

In this application, Appellant asks this Court to authorize Michigan attorneys to violate the Michigan Rules of Professional Conduct and defame their litigation opponents publicly for profit. Defendant also requests 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 privilege whenever, and merely because, the person defamed has been sued regarding or charged with a crime of which he is legally presumed

[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).

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, under well established and consistently developed Michigan case law, such a privilege cannot apply here, because the statements of Defendant did not "substantially represent" or "merely summarize" what was alleged in pending legal proceedings. Rather, without respect to such pending proceedings, Defendant "said with certainty" that Mr. Punturo *had committed the crimes of antitrust violations and extortion*,[3] expatiating and accusing, far beyond the allegations of court documents. And, Defendant did so in clear violation of the Michigan Rules of Professional Conduct.

II. Statement of Facts.

As pleaded in Plaintiffs' complaint:

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.

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[3] *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317; 539 NW2d 774 (1995); *Bedford v Witte*, 318 Mich App 60; 901 NW2d 393 (2016).

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] log of Boyer text messages produced by Attorney General in extortion case

[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.

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**, 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 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 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;

[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.

* 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 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**.

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

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 (see Exhibit 4 to Kern's brief on appeal), 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 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). Defendant's Application, Exhibit 12. 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 Defendant's motion for summary disposition.

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 Defendant 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, "'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) Defendant was suing Punturo claiming extortion and antitrust violations; (2) Punturo was being prosecuted for extortion at Defendant's 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, Defendant 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. Defendant's arguments fail.

1. Fair reporting privilege does not apply. The case relied upon by the trial court and Court of Appeals on this issue is *Bedford v Witte*, 318 Mich App 60; 901 NW2d 393 (2016). 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.

In the instant case, Defendant claims he is in the clear, claiming "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." (Application, p. 22). This is utterly untrue. Defendant *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." 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.[7]

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 statements are *unproven allegations*. Defendant's statements to the media were not remotely presented as yet-to-be proven allegations made in legal proceedings. Instead, Defendant's statements were made as if Punturo were about to be sentenced to prison after a conviction.

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."[8]

Here, as to Defendant Kern, there was certainly no such duty to repeat anything – indeed, his duty under the ethics rules was exactly the opposite, and his conduct was completely unethical.

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[7]Judge Spector's ruling, which construes the statute cited by Defendant, MCL 600.2911(3), has been scorned by Defendant 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*.

[8]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.

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 Defendant's vituperative and unequivocal statements to the media, with the Attorney General's carefully worded and ethically compliant press release attached to Defendant's Application as Exhibit 7, it is clear that Defendant's claim that his 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.

The privilege claimed to apply appears in MCL 600.2911(3) – "a fair and true report" of the Antitrust Case and the Extortion Case.[9] Incredibly, Defendant, a Michigan licensed attorney, comes before this Court, claiming that his accusations against Plaintiffs, in complete and utter violation of

[9]See *Sherwood v Evening News Ass'n*, 256 Mich 318, 321; 239 NW 305 (1931)(holding privileged "[f]air *and impartial* reports of judicial, executive, legislative, or other public official proceedings")(emphasis added).

MRPC 3.6, made to coerce payment of $750,000 to his client, were "fair" and "true." As noted in the Introduction section above, Defendant's 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, is defined by the ethics rules. Any other rule leads to lawlessness. 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)(**Exhibit 4**) 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.

Defendant relies 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), and claims it conflict with *Bedford*. 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, Defendant went much further than implication – he claimed with absolute certainty that Punturo had, in fact, *committed crimes*.

Bedford, in holding that comments about court filings that did not "merely summarize what was alleged," 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" – 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. 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 Defendant in this case that would turn defamation law on its head.

Thus, the trial court properly rejected Defendant's argument that his *per se* defamatory statements were privileged, and correctly denied Defendant's motion.

2. Defendant, a licensed attorney, should have known better. As noted above, 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 as a basis for its ruling, they support that ruling.[10]

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[10]See *CenTra, Inc v Estrin*, 538 F3d 402 (CA 6 2008)(**Exhibit 5**), 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**)("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**)(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**)(MRPC "admissible as evidence in a malpractice action, where they are

Moreover, as a licensed attorney, Kern should have known that unequivocal accusations of criminal acts, *while cases were pending in which courts would be determining the correctness of those accusations*, was a reckless act – but in his quest for money, for his clients and presumably his contingent fee, he forged ahead, undaunted – despite the ready ability to see he would likely be proven wrong. Plaintiffs' pleadings are more than sufficient on this. In addition to the demonstrated improper profit motives of Defendants, Plaintiffs have shown:

(1) outright knowing falsehoods, e.g., the claims that Punturo told Boyer "I will crush you," "make your life a living hell," "bury you"; "mentioned the word 'demise' probably a dozen times." All of these statements are utterly false, as alleged in Plaintiffs' pleadings;

(2) at least reckless accusations of antitrust violations based upon

(a) claiming as criminally illegal, a lease contract not severely restraining trade, pursued by Boyer (at the same time he was chasing at least three other parties for a similar deal), drafted by Boyer, signed by Boyer, and benefiting Boyer by eliminating Plaintiffs as parasailing competitors (with trial court stating in dismissing antitrust – illegal contract claims that "Plaintiffs now claim, somewhat illogically, that the lack of parasailing competition severely restrained trade and *negatively* impacted their business," see Kern's brief, Exhibit 12, page 6), and

(b) "monopoly" claims against Plaintiffs who had a 0% parasailing market share, and not even a boat to compete with Boyer at all, much less with "unfair competition" (with trial court in dismissing antitrust – monopoly claim stating "Defendants were

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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.

not engaged in the parasailing market and had no market power, therefore it is incongruous and nonsensical for Plaintiffs to claim they are owed damages under MCL 445.773," see Kern's brief, Exhibit 12, page 7); and

(3) at least reckless accusations of extortion despite the utter lack of

(a) any "threat" other than to legally compete with Boyer, a constitutionally protected activity,[11] or

(b) any credible claim that Boyer signed the lease against his will,[12]

both of which are essential elements of an extortion claim. *People v Harris*, 495 Mich 120; 845 NW2d 477 (2014).

That these accusations were recklessly false is supported by their immediate rejection – on (C)(8) dismissal and at a criminal preliminary examination – by the Grand Traverse County courts.

3. Other issues.

Defendant's citation to the comments of Grand Traverse County District Court Judge Phillips and Circuit Judge Rodgers about Punturo in dismissing the extortion and antitrust cases are silly, *ad hominem* and irrelevant attacks. Defendant makes a show of quoting these dismissing judges' negative comments about Plaintiff Bryan Punturo; however, all of these comments were made in

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[11] *Meyer v Nebraska*, 262 US 390, 399 (1923)(individual's constitutional right "to engage in any of the common occupations of life"); *Carolene Products Co v Thomson*, 276 Mich 172, 178; 267 NW 608 (1936)("The Constitution guarantees to citizens the general right to engage in any business which does not harm the public.")

[12] See **Exhibit F**, excerpt of Eric Harding testimony in the extortion case, stating Boyer was "bragging about" or "proud" of securing the lease with Punturo, and **Exhibit G**, third page, Bates #157, text messages produced by the Attorney General in the extortion case between Casey Punturo and Boyer, where Boyer confirms after signing the lease with Punturo, "everything is done and everyone's happy."

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.

In any event, the judges' comments are wholly irrelevant to the issues in this appeal, and are obvious attempts to sling more mud, which have as their genesis Defendant's lack of any better method to support his arguments. They are consistent with "an oft-quoted adage: If the law is against you, argue the facts; if the facts are against you, argue the law; and if they both are against you, pound the table and attack your opponent," *United States v Griffin*, 84 F3d 912, 927 (CA 7 1996). Lacking valid legal and factual arguments, Defendant continues his attack on his opponent.

IV. Request for Relief.

In his zeal to part Plaintiffs from $750,000 of their money, Defendant repetitively, deliberately, aggressively and publicly defamed Plaintiffs, just as he threatened to do if Plaintiffs did not pay the $750,000. The privilege defense he asserts lacks legal merit. Accordingly, Plaintiffs/Appellees request that this Court AFFIRM the trial court's denial of Defendant's motion; and REMAND this case to the trial court for further proceedings.

Dated: January 19, 2018

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