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.

MSC Docket No: 158749
COA Docket No: 338727

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

DEFENDANT-APPELLANT BRACE KERN'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

MOOTHART & SARAFA, PLC
JONATHAN R. MOOTHART (P40678)
9815 Miami Beach Road. P.O.Box 243
Williamsburg, MI 49690
(231) 947-8048
jon@moothartlaw.com
Attorney for Plaintiffs-Appellees

JAY ZELENOCK LAW FIRM PLC
JAY ZELENOCK (P58836)
309 E. Front St.
Traverse City, MI 49684
(231) 929-9529
jay@zelenocklaw.com
Attorney for Defendants Boyer and Kort

COLLINS EINHORN FARRELL PC
MICHAEL J. SULLIVAN (P35599)
MICHAEL J. COOK (P71511)
JONATHAN B. KOCH (P80408)
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
jonathan.koch@ceflawyers.com
Attorneys for Defendant-Appellant Kern

YEAGER DAVISON & DAY PC
PHILLIP K. YEAGER (P33761)
4690 Fulton Street, Suite 102
Ada, MI 49301-8454
(616) 949-6252
pky@ydd-law.com
Attorney for Defendant-Appellant Kern

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A. The Punturos fail to rebut Kern's argument that his allegedly defamatory statements were protected by Michigan's fair-reporting privilege because they "substantially represented" the accusations of criminal and civil misconduct raised in the Boyers' civil suit and the Attorney General's criminal prosecution.

In response to Kern's application, the Punturos assert that it would be "abhorrent" and "absurd" for this Court to hold that Kern's statements were privileged because he accused Bryan Punturo of criminal and civil misconduct—extortion and antitrust violations—even though he was simply repeating the allegations raised in the Boyers' underlying civil lawsuit and the Attorney General's criminal prosecution.[1] In other words, the Punturos' argument boils down to one single point: that the fair-reporting privilege doesn't protect accusations of civil or criminal misconduct.

They're wrong. Nothing in the fair-reporting statute indicates that the Michigan Legislature intended to exclude accusations of criminal or civil wrongdoing contained in the public record from the scope of the privilege. On the contrary, MCL 600.2911(3) clearly and unambiguously states that "fair and true" reports of a matter public record—including the matters that give rise to civil and criminal complaints—are **absolutely privileged**, regardless of what the contents of those public records are.

The crux of the Punturos' privilege argument is that Kern's statements can't be a "fair and true" report of a public record under MCL 600.2911(3) because he

[1] Punturos' Response to Kern's Application at 2, 16-18.

accused them of anti-trust violations and extortion. But that's exactly what the Boyers and the Attorney General accused Punturo of doing in the underlying lawsuit and criminal prosecution. For example, the Boyers expressly alleged that Punturo: (1) engaged in "threats, coercion, **extortion, antitrust violations**, and vulgar correspondence," (2) violated Michigan's criminal law against extortion, MCL 750.213, and (3) "flagrant[ly] and intentional[ly]" violated MCL 445.772 and MCL 445.723 of the Michigan Antitrust Reform Act. [2] Similarly, the Attorney General charged Punturo with felony extortion.[3] Furthermore, 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. So his comments are absolutely privileged under MCL 600.2911(3).

That's true *even if* Kern didn't repeat the allegations of criminal and civil misconduct verbatim. A statement doesn't have to directly quote the public record to be covered by the fair-reporting privilege. Rather, the privilege applies as long as the "**information…substantially represent[s] the matter contained in the court records**." *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 325-326; 539 NW2d 774 (1995). This standard is met "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

[2] Underlying Complaint at ¶¶17-18, 22, 42, 45 (Attached as Exhibit 6 to Kern's Application).
[3] Michigan Attorney General Press Release (Attached as Exhibit 7 to Kern's Application).

effect on the reader." *Id.* **The Punturos' response to Kern's application fails to address this standard.**

As shown in Kern's application, it's clear that the fair reporting privilege protects Kerns' statements when the correct standard is applied. Nothing Kern allegedly said in any of the news articles—or the level of certainty he expressed—changed 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. Thus, Kern's statements "substantially represent[ed] the matter contained in the court records"—i.e., the Boyers' allegations that Punturo engaged in "extortion and antitrust violations."[4] See *Northland Wheels,* 213 Mich App at 325-326. So his comments were absolutely privileged.

The Punturos continue to rely on *Bedford v Witte,* 318 Mich App 60; 896 NW2d 69 (2016), to argue that the privilege doesn't apply to Kern's statements because of the "level of certainty" he expressed. Recall that, in *Bedford*, this Court 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." *Id.*

Here, despite the Punturos' emphatic insistence to the contrary, Kern didn't say anything like that. Instead, he merely reiterated the allegations of extortion and antitrust violations raised in the Boyers' underlying complaint and in the Attorney General's case against Punturo using declarative sentences—e.g., "I

[4] Underlying Complaint at ¶32 (Attached as Exhibit 6 to Kern's Application).

realized it violated antitrust laws," "I recognized extortion,"[5] "this is an antitrust violation," "this is extortion."[6] Thus, nothing in any of his allegedly defamatory statements expressed any increased level of certainty.[7]

Furthermore, the Punturos never address Kern's argument that *Bedford*'s "level of certainty" exception is unworkably vague. Indeed, they don't even attempt to explain how *Bedford* can be reconciled with the text of MCL 600.2911(3) or the well-established "substantially represent[s]" test laid out in *Northland Wheels*, 213 Mich App at 325-326. Nor do they explain how future courts, lawyers, and citizens could reasonably determine whether a report of a public record is privileged or not under *Bedford*'s "level of certainty" standard.

In addition to misreading *Bedford* and ignoring *Northland Wheels*, the Punturos' continue to rely on *Timmis v Bennett*, 352 Mich 355; 89 NW2d 748 (1958), and *In re Thompson*, 162 BR 748 (ED Mich BR, 1993). But their reliance is misplaced because both of those cases were decided **before** the *Northland Wheels* Court clarified the "substantially represents" standard in 1995. Furthermore, *Timmis* dealt with the common law judicial proceedings privilege and was decided thirty years before the Legislature broadened the fair reporting privilege by

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[5] Again, 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.
[6] Complaint at ¶30 (Attached as Exhibit 4 to Kern's Application).
[7] 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 "substantially represent" standard from *Northland Wheels*. *Bedford*, 318 Mich App at 66-67.

amending § 2911(3). 1988 PA 396 (Effective January 1, 1989). So it doesn't have anything to do with the dispositive legal issue in this appeal—i.e., whether Kern's comments are covered by MCL 600.2911(3)'s statutory fair-reporting privilege. Like *Timmis*, *Thompson* applied the obsolete pre-*Northland Wheels* standard. And it's not even a Michigan case (nor is *Am Chem Soc v Leadscope, Inc*, 133 Ohio St 3d 366; 978 NE2d 832 (Ohio 2012), another case the Punturos have relied on).

The Punturos also argue that the fair-reporting privilege cannot protect Kern's statements because they are "defamation *per se*."[8] That argument is just a distraction. If a statement is "defamation *per se*," that simply means that it's actionable "even in the absence of an ability to prove actual or special damages." *Hope-Jackson v Washington*, 311 Mich App 602, 620-621; 877 NW2d 736 (2015); *Ghanam v Does*, 303 Mich App 522, 545; 845 NW2d 128 (2014) ("Accusations of criminal activity are considered 'defamation per se' under the law and so do not require proof of damage to the plaintiff's reputation."). But the plain language of MCL 600.2911(3) provides no indication that the Legislature intended to exclude reports of allegations of criminal and civil misconduct from the scope of the fair-reporting privilege. And, whether or not the Punturos can prove "actionability of the statement irrespective of special harm (defamation per se)" has nothing to do with whether they can prove that Kern's allegedly defamatory statements were "an unprivileged communication to a third party." See *Mitan v Campbell*, 474 Mich 21,

[8] Punturos' Response to Kern's Application at 1.

24; 706 NW2d 420 (2005). So the Punturos' defamation *per se* argument is simply beside the point.

The Punturos' assertion that Kern's statements weren't privileged because they violated the Michigan Rules of Professional Conduct is similarly meritless. Nothing in the plain language of MCR 600.2911(3) indicates that the ethics rules have anything to do with the scope of the fair-reporting privilege. And violations of the MRPC don't give rise to a civil cause of action. MRPC 1.0(b); *Watts v Polaczyk*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000). So, even assuming that Kern violated the MRPC (he didn't), the Punturos' allegation that Kern violated MRPC 3.6 is just another attempt to distract from the dispositive issue in this appeal—i.e., whether Kern's statements were privileged.

By relying on outdated and irrelevant authority—and ignoring the binding authority that *does apply*—the Punturos continue to sidestep the key issue in this case: whether Kern's statements substantially represented the Boyers' underlying claims and, thus, whether Michigan fair-reporting statutory privilege bars the Punturos' claims. But, to resolve that issue, there are only three things that matter: (1) the Boyers' (and the Attorney General's) pleadings are public records; (2) those pleadings expressly allege that Bryan Punturo "flagrantly" violated antitrust laws, committed criminal extortion; and threatened the Boyers with physical, financial, and emotional harm; and (3) Kern's allegedly defamatory statements reiterated the substance of those allegations. Thus, Kern's comments are absolutely privileged under MCL 600.2911(3).

Nothing the Punturos say in their brief changes that. So, no matter how hard they thump the table, the Punturos' defamation claim—and, by extension, their entire case[9]—fails as a matter of law. It follows that the trial court erred by denying Kern's motion for summary disposition and the Court of Appeals erred by affirming that ruling. This Court should grant leave to reverse that ruling and clarify the scope of *Bedford's* unworkable "level of certainty" exception to MCL 600.2911(3)'s fair-reporting privilege.

COLLINS EINHORN FARRELL PC

By: */s/ Jonathan B. Koch*
MICHAEL J. SULLIVAN (P35599)
MICHAEL J. COOK (P71511)
JONATHAN B. KOCH (P80408)
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141
Jonathan.Koch@ceflawyers.com
Attorneys for Defendant-Appellant Kern

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[9] In their response, the Punturos don't dispute that any defenses that apply to their defamation claim apply with equal force to all of their remaining claims because they're based on the same privileged and protected statements.