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

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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 See MCR 7.205(A).[2] After another round of briefing and holding oral argument, the Court of Appeals issued an unpublished opinion affirming Judge Power's ruling on October 16, 2018.[3]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, MCR 7.303(B)(1), and MCR 7.305(H)(1), this Court may grant leave to appeal or order other relief after a decision of the Court of Appeals. An application for leave to appeal is timely when it is filed within forty-two days of the Court of Appeals' opinion. MCR 7.305(C)(2)(a). Here, Kern timely filed his application for leave to appeal on June 8, 2017.

On November 22, 2019, this Court directed the clerk to schedule oral argument on Kern's application (and co-defendants-appellants Saburi Boyer's and Danielle Kort's applications).[4] This Court directed the parties to file supplemental briefs addressing the following issues:

> (1) whether, as a threshold matter, the fair reporting privilege, MCL 600.2911(3)—which can only be invoked "in a libel action"—applies in a case in which the appellants are not the media companies that published the

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[1] 5/18/17 Order Denying Summary Disposition (Appx. 002a-003a).
[2] Court of Appeals Order Granting Leave to Appeal (Appx. 005a-007a).
[3] *Punturo v Kern*, unpublished opinion of the Court of Appeals, issued October 16, 2018 (Docket Nos 338727, 338728, and 338732) (Appx. 009a-019a).
[4] MOAA Order (Appx. 259a-260a). During the underlying lawsuit, Danielle was married to Saburi and known as Danielle Boyer. All references to the Boyers include both Saburi and Danielle Kort.

allegedly defamatory statements, but are instead the persons who furnished the oral statements to the media;

(2) whether the Court of Appeals erred in holding that the appellants' allegedly defamatory statements to the media regarding the pending litigation were not protected under the fair reporting privilege;

(3) whether *Bedford v Witte*, 318 Mich App 60 (2016), was wrongly decided;

(4) whether the standards for application of the statutory fair reporting privilege are different for statements made by an attorney or by a layperson-litigant.[5]

[5] *Id.*

Statement of Questions Presented

I.

Michigan's fair-reporting privilege applies in a "libel action"—a judicial proceeding premised on defamatory statements made in any form of fixed medium. Michigan also treats claims based on subsequently published interviews as libel if the defendant encouraged or authorized publication. Here, the Punturos sued Kern for statements made in a fixed medium (a television interview) and interviews that Kern allegedly caused to be published. Is the Punturos' lawsuit a "libel action" under MCL 600.2911(3)?

The trial court did not address this issue.

The Court of Appeals did not address this issue.

Plaintiffs-appellees have not raised this issue.

Defendant-appellant Kern answers: "Yes."

II.

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, as well as the then-pending criminal extortion charges against Bryan Punturo. Does the fair-reporting privilege bar the Punturos' claims?

The trial court answered: "No."

The Court of Appeals answered: "No."

Plaintiffs-appellees answers: "No."

Defendant-appellant Kern answers: "Yes."

III.

Michigan courts should not read additional requirements into statutes. The plain language of MCL 600.2911(3) provides no exception from the fair-reporting privilege based on the level of certainty with which the allegedly defamatory statements were expressed. Yet courts have read *Bedford v Witte* to impose such an exception. *Bedford* thus conflicts with the plain language of MCL 600.2911(3). Was *Bedford* wrongly decided?

The trial court answered: "No."

The Court of Appeals answered: "No."

Plaintiffs-appellees answers: "No."

Defendant-appellant Kern answers: "Yes."

IV.

Michigan courts should not read additional requirements into statutes. The plain language of the fair-reporting privilege statute, MCL 600.2911(3), provides no basis for applying a different standard to statements by attorneys (or any other profession, for that matter) than to statements by laypeople. Should Court impose such a standard?

The trial court answered: "No."

The Court of Appeals answered: "No."

Plaintiffs-appellees answer: "Yes."

Defendant-appellant Kern answers: "No."

Introduction

The Punturos claim that Kern defamed them by repeating the allegations from his clients' complaint in interviews with news outlets that were broadcast on television or published in print and online. Michigan law protects from libel actions based on the publication or broadcast of a "fair and true report" of matters of public record. It's a broad statutory privilege; one that the Legislature amended to make broader after this Court interpreted it narrowly. Kern's statements about his clients' lawsuit against the Punturos (a matter of public record) reflecting what his clients' complaint (a public record) alleged fall within the privilege's protections.

Lawyers often say that libel is written and slander is spoken. That's true, but incomplete. The term "libel" reaches further than the written word. As both the privilege statute and this Court's case law confirm, libel includes any statement—even oral statements—that the speaker authorized or knew would be published in a fixed medium, like radio or television broadcasts. Kern's statements to news reporters are a classic example of that oft-forgotten form of libel.

The lone qualification for the privilege is that the statement must be "fair and true." Under long-standing Michigan law, a statement that substantially represents the matter is fair and true. There's no additional qualification for the privilege. It doesn't distinguish based on the speaker's profession. And it doesn't hinge on whether the defendant spoke "with certainty" or in declarative sentences. A statement is privileged when it substantially represents the public record. Kern's statements were substantively indistinguishable from the allegations in the complaint. So, under its plain terms, the statutory privilege applies.

This case gives this Court several opportunities. It gives this Court the opportunity to align the statutory privilege with the broad reach that the Legislature intended. It gives this Court the opportunity to remind the bar that libel includes, but isn't limited to writings. And it gives this Court the opportunity to overrule the unworkable extra-statutory "level of certainty" exception to the privilege that the Court of Appeals recently created. Michigan needs this Court's guidance on the scope of MCL 600.2911(3)'s fair-reporting privilege. This Court should either issue an opinion on Kern's application or grant leave to appeal to do exactly that.

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.[6] In 2006, Boyer moved his parasailing operation to a different beachfront hotel about half a mile away from ParkShore.[7] From then until the summer of 2013, the Punturos' son Casey provided parasailing services at ParkShore.[8]

[6] Complaint, ¶5, 13, (Appx. 023a-024a, 025a). Bryan Punturo is a part owner and manager of the ParkShore and Fawn Punturo, works there. *Id.* at ¶¶6-7 (Appx. 024a).
[7] *Id.* at ¶17 (Appx. 025a).
[8] *Id.* at ¶18 (Appx. 025a).

In spring 2014, Boyer bought all of the assets of Casey's parasailing business.[9] Around the same time, Boyer and Bryan Punturo executed a "Parasailing Exclusivity Agreement."[10] 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.[11]

When the Boyers missed a payment, Punturo sued for breach of contract.[12] Boyer hired Kern to represent him in that lawsuit. Based on the Parasailing Exclusivity Agreement and correspondence from Punturo, Kern came to believe that 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.[13] In addition, Kern reported Punturo to the Michigan Attorney General's office, which opened a criminal investigation.[14]

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[9] *Id.* at ¶19(a) (Appx. 026a).
[10] Parasailing Exclusivity Agreement (Appx. 042a-044a).
[11] *Id.*
[12] Complaint at ¶21 (Appx. 027a).
[13] Underlying Complaint at ¶16 (Appx. 050a).
[14] Michigan Attorney General Press Release (Appx. 057a-058a).

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.[15] 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**."[16] 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.[17]

The Boyers' original complaint contained two counts: (1) Count I – Flagrant Antitrust Violation, and (2) Count II – Intentional Infliction of Emotional Distress (on Saburi Boyer's behalf only).[18] 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."[19]

They also alleged that the Parasailing Exclusivity Agreement violated MCL 445.772 and MCL 445.723 of the Michigan Antitrust Reform Act.[20] In their view,

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[15] *Id.*
[16] Preliminary Examination Hearing Transcript, p. 5 (emphasis added) (Appx. 064a).
[17] *Id.*; 9/29/16 District Court Order in Criminal Case (Appx. 068a).
[18] See generally, Underlying Complaint (Appx. 046a-055a).
[19] *Id.* at ¶¶9, 16 (emphasis added) (Appx. 048a, 050a).
[20] *Id.* at ¶¶17-18 (Appx. 050a).

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."[21] So, in the Boyers' view, Punturo engaged in "conduct of **extortion and antitrust violations.**"[22]

The Boyers also claimed that Punturo had engaged in "threats, coercion, **extortion, antitrust violations**, and vulgar correspondence."[23] 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."[24]

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.[25] Both amended complaints contained the same factual allegations about Punturo's extortion, threats, and antitrust violations.[26]

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[21] *Id.* at ¶22 (emphasis added) (Appx. 051a).
[22] See *id.* at 32 (emphasis added) (Appx. 052a).
[23] *Id.* at 42 (emphasis added) (Appx. 054a).
[24] *Id.* at 45 (emphasis added) (Appx. 054a).
[25] Underlying Second Amended Complaint (Appx. 070a-090a).
[26] See generally *id.*

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**."[27] 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.[28] 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 Invasion of Privacy; Count III – Tortious Interference with Business Relations; and Count IV – Loss of Consortium.[29] 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.[30]

The Punturo's allege that on February 28, 2016—five days after Kern filed the underlying lawsuit for the Boyers[31]—the Traverse City Record-Eagle reported

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[27] 7/11/16 Summary Disposition Hearing Transcript, p. 23 (emphasis added) (Appx. 114a).
[28] 8/5/16 Decision and Order Granting Summary Disposition in Underlying Case (Appx. 118a-125a).
[29] Complaint (Appx. 021a-040a).
[30] *Id.* at ¶30 (Appx. 028a).
[31] See Underlying Complaint (Appx. 046a-055a).

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."[32]

The Punturos also point to five news articles published on May 10, 2016—the day of Punturo's arraignment on extortion charges.[33] The Traverse City Record-Eagle quoted Kern as saying that because "[t]here was extortion for the past two years" the criminal charges were "a long time coming" and it was "a vindicating day for [the Boyers]."[34] Kern also explained that he reported Punturo to the Attorney General when he first saw the non-compete contract because he "realized it violated antitrust laws."[35] He also opined that the suits against Punturo were newsworthy because they involved "significant threats" and "significant sums of money."[36]

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."[37] 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

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[32] Complaint at ¶30(a) (Appx. 028a).
[33] *Id.* at ¶30(b)-(e) (Appx. 028a-030a).
[34] *Id.* at ¶30(b) (Appx. 028a).
[35] *Id.*
[36] *Id.*
[37] *Id.* at ¶30(c) (Appx. 029a).

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 why he reported 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."[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

[38] *Id.* at 30(d) (Appx. 030a).
[39] *Id.* at 30(e) (Appx. 030a).
[40] *Id.* at 30(f) (Appx. 030a).
[41] *Id.* at 30(g) (Appx. 031a).
[42] *Id.* at 35 (Appx. 032a).
[43] Kern's Summary Disposition Motion (Appx. 127a-146a).

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 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

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[44] *Id.* at 2-3, 10-13 (Appx. 128a-129a, 136a-139a). 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] Punturo's Response to Kern's Summary Disposition Motion, 1 (Appx. 149a).

[46] *Id.*

[47] Kern's Reply brief, p. 2 (Appx. 171a).

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]

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

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[48] *Id.*
[49] *Id.* at 2-3 (Appx. 171a-172a).
[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. Punturos' Sur-Reply (Appx. 176a-181a).
[51] 5/8/17 Summary Disposition Hearing Transcript at 24 (Appx. 206a).

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]

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]

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[52] *Id.* at 58 (Appx. 240a).
[53] *Id.*
[54] *Id.* at 59 (Appx. 241a).
[55] 5/18/17 Order Denying Summary Disposition (Appx. 002a-003a).
[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] Trial Court Stay Order (Appx. 248a-250a). 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] Court of Appeals Order Granting Leave to Appeal (Appx. 005a-007a). 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

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]

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

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[60] *Punturo v Kern,* unpublished opinion at 6 (Appx. 012a-013a).
[61] *Id.* at 7.
[62] *Id* (Appx. 012a).
[63] *Id.*
[64] *Id.*

recipient of that information."[65] So the panel held that "the trial court properly denied defendants' motions for summary disposition on that ground."[66]

Kern applied for leave to appeal and, in November 2019, this Court ordered oral argument on the application.[67]

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 all documentary evidence submitted, see MCR 2.116(G)(5), and may accept the contents of the complaint as true unless the allegations are contradicted by the supporting documentation. See *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006). "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 Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 324; 539 NW2d 774 (1995). Similarly, to the extent this case involves interpretation of the fair-reporting privilege statute, MCL 600.2911(3), "[q]uestions of statutory interpretation are reviewed de novo." *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016).

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[65] *Id.*, quoting *Bedford*, 318 Mich App at 71 (Appx. 012a-013a).
[66] *Id.* at 7 (Appx. 012a-013a). The Court also rejected Kern's opinion and rhetorical hyperbole arguments. *Id.* at 7-11 (Appx. 014a-015a). But, as noted above, those arguments are not at issue in this appeal.
[67] MOAA Order (Appx. 259a-260a).

Argument I

Michigan's fair-reporting privilege applies in a "libel action"—a judicial proceeding premised on defamatory statements made in any form of fixed medium. Michigan also treats claims based on subsequently published interviews as libel if the defendant encouraged or authorized publication. Here, the Punturos sued Kern for statements made in a fixed medium (a television interview) and interviews that Kern allegedly caused to be published. So the Punturos' lawsuit is a "libel action" under MCL 600.2911(3).

The first issue that this Court asked the parties to brief is "whether, as a threshold matter, the fair reporting privilege, MCL 600.2911(3) — which can only be invoked 'in a libel action' — applies in a case in which the appellants are not the media companies that published the allegedly defamatory statements, but are instead the persons who furnished the oral statements to the media."[68] The answer is yes. The Punturo's action is based on statements that were broadcast on television or that Kern encouraged the media to publish. So, under Michigan law, this is a "libel action" and Kern can invoke the fair-reporting privilege as a defense.

A. Under MCL 600.2911(3), a "libel action" means a judicial proceeding because of an allegedly defamatory statement that was expressed in a fixed medium, regardless of the communication form.

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). So, even if a statement is otherwise defamatory, it can't support a cause of action if it's privileged. The Michigan Legislature codified a broad fair-reporting

[68] MOAA Order (Appx. 259a-260a).

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." The common understanding of the difference between libel and slander is that the former is written and the latter is spoken. See *Glazer v Lamkin*, 201 Mich App 432, 438; 506 NW2d 570 (1993) ("Slander (libel) per se exists where the words spoken (written) are false and malicious and are injurious to a person in that person's profession or employment."). That's an oversimplication, which, in this case, is deceptive because "libel" encompasses more than written defamation.

When construing a statute, this Court's "primary goal is to ascertain and give effect to the intent of the Legislature." *People v Lewis*, 503 Mich 162, 165; 926 NW2d 706 (2018) (citation omitted). This Court begins its analysis by examining "the statute's express language, which offers the most reliable evidence of the Legislature's intent." *Dye by Siporin & Assocs, Inc v Esurance Prop & Cas Ins Co*, 504 Mich App 167, 180; 934 NW2d 674 (2019). If the statutory language is "clear and unambiguous, the statute must be applied as written." *Id.* at 180.

MCL 600.2911(8) provides that, for the purposes of the fair-reporting statute "'libel' includes defamation by a radio or television broadcast." The Legislature's use of the word "includes" means that MCL 600.2911(8) doesn't exhaustively define "libel." *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 171 n 3; 895 NW2d 154 (2017), quoting *Samantar v Yousuf*, 560 US 305, 317; 130 S Ct 2278; 176 L Ed

2d 1047 (2010) (stating that the "use of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive"); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012) at 132 ("[T]he word include does not ordinarily introduce an exhaustive list"). So, while it provides some examples indicating that "libel" isn't limited to written defamation, MCL 600.2911 doesn't provide a complete definition of the term. So it "must be accorded its plain and ordinary meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008), citing MCL 8.3a. A legal term of art like "libel" must "be construed in accordance with its peculiar and appropriate legal meaning." *Brackett*, 482 Mich at 276, citing MCL 8.3a. When interpreting undefined legal terms of art, "it is appropriate to consult a legal dictionary." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 559 n 41; 886 NW2d 113 (2016).

Black's Law Dictionary (11th ed. 2019) defines "libel" as "[a] defamatory statement expressed in a fixed medium, esp. writing but also a picture, sign, or electronic broadcast" and "[t]he act of making such a statement; the unprivileged publication of defamatory matter by written or printed words, by its embodiment in physical form or by **any other form of communication** that has the potentially harmful qualities characteristic of written or printed words." *Id.* (emphasis added).

Based on those definitions and MCL 600.2911(8), "libel" isn't limited to written defamation. Rather, it includes a defamatory statement in "any…form of communication" that is "expressed in a fixed medium" and has a similar potential

for harm as the written word, including statements that are recorded and broadcast by radio or television. *Id.*

B. This Court's libel jurisprudence establishes that a claim sounds in libel if it is based on a statement made during an interview so long as the person being interviewed authorized or in any way contributed to the subsequent publication or broadcast of the statement.

Michigan has an extensive common law of libel. Common-law rules are not abolished by implication *Kefgen v Davidson*, 241 Mich App 611, 618 n 4; 617 NW2d 351 (2000). And Michigan courts presume that the Legislature "act[s] with an understanding of common-law principles," and reads statutes in light of previously established common-law rules *Id.* at 618 n 4; see also *Nummer v Dep't of Treasury,* 448 Mich 534, 544; 533 NW2d 250 (1995). So, in addition to considering the legal dictionary definition, this Court should construe the term "libel" in accord with Michigan's common law. *Kefgen*, 241 Mich App at 618 n 4.

In Michigan, the longstanding "general rule" is "that all persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication." *Bowerman v Detroit Free Press*, 287 Mich 443, 451; 283 NW 642 (1939). That is, "all persons who are actively connected with and engaged in the publication of a libel are responsible for the results." *Bowerman v Detroit Free Press,* 279 Mich. 480, 491; 272 NW 876 (1937) (citation omitted); *Grinnell v Cable-Nelson Piano Co*, 169 Mich 183, 191, 135 NW 92 (1912) ("The rule is well settled that all persons who have been engaged in, or have been in any way connected with, the publication of a libel are responsible therefor."); *Pollasky v Minchener*, 81 Mich

280, 290; 46 NW 5 (1890) (A person is responsible for a libelous statement if they are "in any way concerned in writing, printing, publishing, or selling a libel.").

This Court's opinion in *Wheaton v Beecher*, 66 Mich 307; 33 NW 503 (1887), demonstrates how this principle works. There, the plaintiff sued the defendants for libel based on statements about the plaintiff that he made in an interview and were later published in the Detroit Evening News. *Id.* at 307. After the trial court entered a directed verdict in the defendant's favor, the plaintiff appealed.

This Court held that the plaintiff had presented evidence to support a libel claim. It noted that "there can be no question…that the language imputed to [defendant], used with the intent and purpose charged in the declaration, was libelous, and must be regarded so upon its face." *Id.* at 309. It then explained that the plaintiff presented evidence "tending to show that the defendant authorized the publication of the libel." *Id.* at 311. As a result, the Court reversed the directed verdict and ordered a new trial. *Id.*

In re Simmons, 248 Mich 297; 226 NW 907 (1929), is also instructive. There, this Court addressed whether the trial court had jurisdiction to hold the defendant in contempt of court for making statements in an interview that were ultimately published in a newspaper. The key determination was "whether defendant was responsible for the publication of his statement." *Id.* at 303-304. To answer that question, this Court drew from libel law. *Id.*

The Court observed that, in the libel context, "[e]very one who requests, procures or commands another to publish a libel is answerable as though he

published it himself." *Id.* (citation omitted). The request for publication doesn't have to be express; a request to publish "may be inferred from the defendant's conduct in sending his manuscript to the editor of a magazine, **or in making a statement to the reporter of a newspaper**, with the knowledge that they will be sure to publish it, and without any effort to restrain their so doing." *Id.* (emphasis added and citation omitted). So the determination whether a person was "guilty of libel" hinged on whether they knew or intended that their statements would be published. *Id.* at 304. It isn't libel when a person "casually makes a false statement to another, with no purpose or intention that it shall be written, printed, or published, even though the other person be a reporter for a newspaper." *Id.* at 304 (citation omitted). That's slander. But, "if a person knowingly dictates a slander to a reporter for publication, and knowing that it would be published, and it is afterward published as given by him, he is responsible for a libel." *Id.* (citation omitted). In *Simmons*, this Court held that the trial court "was justified in holding defendant responsible for the publication of his statement," because the defendant made the offending statements with the knowledge that the reporter would publish them. *Id.* at 305. In other words, he committed libel.

Johnson v Gerasimos, 247 Mich 248; 225 NW 636 (1929), provides a counterexample of a defendant who didn't actively contribute or cause a statement to be published. There, the plaintiff sued the defendant for publishing a libel based on oral statements that he made in two interviews that were published in the Detroit News and the Detroit Free Press. *Id.* at 249-251. The only difference

between the two interviews was that the Detroit News reporter "introduced herself and told where she was from," and the Free Press reporter didn't tell the defendant "that he was a reporter or what purpose he had in interrogating him." *Id.* at 251. After the trial court entered a judgment for plaintiff, the defendant appealed, arguing that he wasn't responsible for the Detroit News or Free Press publishing of his statements. *Id.* at 251-252. On appeal, this Court addressed whether the defendant could be "held for libel upon a newspaper article printed without either his express or implied consent or authority" and whether it matters that he knew the identity of the Detroit News reporter. *Id.* at 252.

The Court began by noting "that all actively connected with and engaged in the publication of a libel are responsible for the results." *Id.* at 252. It then stated that a defendant "cause[s] a defamatory matter to be published," where they "furnished the information upon which a libel was based…to a newspaper reporter, knowing that the latter intended to publish the story," even if the defendant didn't expressly request that the statement be published. *Id.* (citation omitted). The Court also explained that a defendant isn't responsible for a libelous publication unless there is evidence "that the defendant in any way procured, requested, commanded or induced the printing of the matters set forth in the complaint." *Id.* at 253. Ultimately, this Court concluded that the defendant wasn't responsible for either

newspaper article because there was no evidence that he had caused either interview to be published. *Id.* at 254-255.[69]

C. The statutory history of MCL 600.2911(3) bolsters the conclusion that the fair-reporting privilege applies to statements made in interviews by non-media defendants.

In addition to its plain meaning and relevant common-law history, the statutory history of MCL 600.2911(3) demonstrates that the Legislature intended the fair-reporting privilege to broadly apply to all reports of public records (and matters of public record), including oral statements that the media subsequently publishes. Statutory history is the "narrative of 'the statutes repealed or amended by the statute under consideration.'" *People v Pinkney*, 501 Mich 259, 277 n 41; 912 NW2d 535 (2018), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 256. It's different from legislative history because it "form[s] part of the context of the statute" and, thus, "can

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[69] Consistent with this Court's case law, the Court of Appeals has repeatedly applied a libel framework to defamation claims arising out of statements that a defendant made during an interview that was subsequently broadcast or published. *Duran v Detroit News, Inc*, 200 Mich App 622, 632-634; 504 NW2d 715 (1993) (employing a libel framework to analyze defamation claims arising out of newspaper articles and a television interview given by one of the defendants); *Croton v Gillis*, 104 Mich App 104, 106, 109; 304 NW2d 820 (1981) (holding that plaintiff's claim sounded in libel where he alleged that the defendant "defamed plaintiff by his statements to a staff writer for the Daily Times News in Mt. Pleasant which were published in that newspaper on Wednesday, December 29, 1976, and were repeated in radio broadcasts"); *Underhill v Seibert*, unpublished opinion of the Court of Appeals, issued May 20, 2010 (Docket No. 291639) (Appx. 262a-267a) (using libel framework to analyze defamation claim based on an attorney's comments during an interview with a reporter); *Bracco v Vercruysse*, unpublished opinion of the Court of Appeals, issued May 30, 1997 (Docket No. 185303) (Appx. 269a-275a) (using libel framework to analyze defamation claim based on statements that an attorney made during a phone conversation with a reporter and that were recorded and incorporated into a radio broadcast).

properly be presumed to have been before all the members of the legislature when they voted." *Ray v Swager*, 501 Mich 52, 80 n 68; 903 NW2d 366 (2017), quoting *Reading Law* at 256. As a result, "a change in the language of a prior statute presumably connotes a change in meaning." *Id.*

Consequently, when construing a statute, this Court "must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009); *Lawrence Baking Co. v. Unemployment Compensation Comm*, 308 Mich 198, 205; 13 NW2d 260 (1944) ("It may be presumed that by the 1941 amendment the legislature intended to change the meaning of the existing law."). Here, MCL 600.2911(3)'s statutory history reveals that the Legislature intended that the fair-reporting privilege would broadly apply to protect reports of public matters by non-media defendants.

1. Before 1988, MCL 600.2911(3) limited the fair-reporting privilege to libel actions against newspaper defendants, where the alleged libel involved a report of an official "proceeding."

Michigan's fair-reporting privilege originated in 1931.[70] At the time, it stated: "No damages shall be awarded in any libel action brought against a reporter, editor, publisher or proprietor of a newspaper for the publication therein of a fair and true report of any public and official proceeding."[71] In 1961, the Legislature enacted the

[70] 1931 PA 279 (1931 CL 14469) (Appx. 277a-278a). The privilege did not appear in the immediately prior version of the compiled laws from 1929. See 1929 CL 14469 (Appx. 280a-282a).
[71] 1931 PA 279 (1931 CL 14469) (Appx. 277a-278a).

same language as MCL 600.2911(3).[72] The statute remained unchanged until after this Court's opinion in *Rouch v Enquirer & News of Battle Creek*, 427 Mich 157; 398 NW2d 245 (1986) ("*Rouch I*"). There, the plaintiff sued a newspaper for libel after it falsely reported that he had been charged with "CSC in the 1st degree" (although the plaintiff had been arrested he "was never formally charged with the crime, and ultimately, someone else was.") *Id.* at 160-161. The newspaper had obtained the erroneous information during a phone call with the police. *Id.* at 161.

The trial court granted summary disposition for the defendant based on MCL 600.2911(3), but the Court of Appeals reversed, holding that "because no warrant was issued in this case, there were no 'official proceedings' and the statute was inapplicable." *Id.* at 161-164. This Court agreed that MCL 600.2911(3)'s fair-reporting privilege didn't apply to the newspaper's article. The Court explained that "a fair reading of the 'public and official proceedings' language" dictated that it wasn't "intended to be a 'government action,' 'arrest record,' or 'public records' privilege." *Id.* at 171. "If such a broader scope had been intended," the Court said, "the necessary words could easily have been employed." *Id.* at 171.

This Court also observed that "[t]he words "official proceeding' evoke notions of adjudicatory action, rather than of government action generally." *Id.* at 172. But it concluded that "an arrest that amounts to no more than an apprehension is not a 'proceeding' under the statute." *Id.* at 172-173. So this Court held that "the

[72] 1961 PA 236 (Appx. 284a-285a); MCL 600.2911 (Compiled Laws of 1970 Version) (Appx. 287a-289a).

information orally furnished to the [newspaper defendant] in support of it does not, as such, enjoy the privilege afforded by the 'public and official proceedings' statute [MCL 600.2911(3)]." *Id.* at 172-173.

2. In 1988, the Legislature broadened the scope of the fair-reporting privilege by extending it to reports of public matters and public records, applying it to non-media defendants, and including television and radio broadcasts within the definition of libel.

The Legislature amended MCL 600.2911(3) in response to *Rouch I*.[73] So, just two years after *Rouch I*, it enacted 1988 PA 396.[74] The Legislature made three key changes to MCL 600.2911 that are relevant to the outcome of this case.[75]

First, the Legislature expanded the scope of the fair-reporting privilege from reports of "public and official proceeding[s]"[76] to reports of "matters of public record, public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body."[77] Thus, where the pre-1988 version of the fair-reporting privilege only protected reports of government proceedings, the post-1988 version protected reports of all "matters" of public record, as well as the public records themselves.

Second, the Legislature removed the language that limited the fair-reporting privilege to libel actions in which the defendant was "a reporter, editor, publisher,

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[73] See House Legislative Analyses of the 1988 Amendment to MCL 600.2911(3) (Appx. 291a-293a) (noting that the bill that would amend the statute was introduced in response to *Rouch I*).
[74] 1988 PA 396 (Enrolled as HB 4932) (Appx. 295a-297a).
[75] 1988 PA 396 (Version Documenting Changes) (Appx. 299a-301a).
[76] MCL 600.2911 (Compiled Laws of 1970 Version) (Appx. 287a-289a).
[77] 1988 PA 396 (Enrolled as HB 4932) (Appx. 295a-297a).

or proprietor of a newspaper."[78] By doing so, the Legislature eliminated the restriction that the fair-reporting privilege could only be invoked by media defendants. In other words, the Legislature extended the fair-reporting privilege's protection to non-media defendants like Kern and the Boyers.

Third, the Legislature added MCL 600.2911(8) which provides that, for the purposes of the fair-reporting privilege, the term "'libel' includes defamation by a radio or television broadcast."[79] In other words, the Legislature expressly defined "libel" to include non-written statements uttered on the radio or television.

In sum, the 1988 amendment to MCL 600.2911(3) expanded the scope of the fair-reporting privilege to all matters of public record, removed the restriction that only media defendants could invoke it, and expanded the definition of libel to include oral statements made during interviews.

D. The Punturos allege that Kern defamed them during a television broadcast and by causing his interviews with reporters to be published online and in print. So this is a libel action for the purposes of MCL 600.2911(3).

This lawsuit is a "libel action" under both the plain meaning of that term as it appears in MCL 600.2911(3) and Michigan's common-law treatment of defamation claims based on subsequently published interviews. Recall that, according to its plain meaning, a "libel action" is a civil "judicial proceeding" arising out of an allegedly defamatory statement that was "expressed in a fixed medium." *Black's Law Dictionary* (11th ed); See *Ronnisch*, 499 Mich at 560. The statement doesn't

[78] *Id.*; See MCL 600.2911 (Compiled Laws of 1970 Version) (Appx. 287-289).
[79] *Id.*

have to be written to be libel; rather, it can be made in "any…form of communication" that has a similar potential for harm as the written word, including statements made during television and radio broadcasts. *Black's Law Dictionary* (11th ed); MCL 600.2911(8).

The Punturos sued Kern based on statements that he made during a television interview that was recorded and broadcast by 7&4 News on May 10, 2016.[80] Their complaint specifically references that "television report."[81] The statements that Kern made during his television interview were expressed in a fixed medium—video and audio recordings—with the same potential for harm as the written word. See *Black's Law Dictionary* (11th ed). And, because Kern's statements were part of a television broadcast, they fall within MCL 600.2911(8)'s definition of libel. So the Punturos' claim based on Kern's statements in the television report are for libel. And, since this lawsuit is a civil judicial proceeding based on those statements, it is a "libel action" under MCL 600.2911(3).

In addition the statements that Kern made during the 7&4 television broadcast, the Punturos allege that he made numerous other defamatory statements in interviews with reporters that were subsequently published in print and online by the Traverse City Record-Eagle, 9&10 News, Interlochen Public Radio, and Northern Express.[82] The Punturos' claims based on Kern's statements during those interviews are also for libel.

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[80] Complaint at ¶¶30(c) (Appx. 029a).
[81] *Id.*
[82] Complaint at ¶¶30(a)-(b), (d)-(g) (Appx. 028a, 030a-031a).

As noted above, this Court has held that a claim of defamation based on oral statements that were subsequently published in print by a news outlet sounds in libel as long as the defendant "cause[d]," "authorized," or was "in any way connected with, the publication of a libel are responsible therefore." *Bowerman*, 287 Mich at 451; *Wheaton*, 66 Mich at 311; *Grinnell*, 169 Mich at 443. And, "[e]very one who requests, procures or commands another to publish a libel is answerable as though he published it himself." *Simmons*, 248 Mich at 303-304. That's true even if the request for publication wasn't express because a request to publish "may be inferred from the defendant's conduct…in making a statement to the reporter of a newspaper, with the knowledge that they will be sure to publish it, and without any effort to restrain their so doing." *Id.* (citation omitted).

The Punturos cannot seriously dispute that Kern "cause[d]" or "authorized" the publication of his statements about them in the various online and print news outlets. Indeed, that's exactly what they've been claiming since this lawsuit began. For example, in their complaint, the Punturos allege that:

- Kern "regularly and aggressively talked to the media about both the Antitrust Case and the Extortion Case" in order to drive settlement negotiations.[83]
- During a phone conversation with the Punturos' then and current attorney, Kern threatened that he would talk to the media to "blow it up" into "a bigger story."[84]
- After Bryan Punturo was arraigned, "Kern…as threatened, **helped the Traverse City Record-Eagle, as well as 7&4 News, 9&10 News, and Interlochen Public Radio, 'blow it up' into a 'bigger story' by**

[83] Complaint at ¶29 (Appx. 028a).
[84] *Id.* at ¶40(a)-(g) (Appx. 033a-034a).

> **granting interviews** and unequivocally accusing Plaintiffs Punturo and ParkShore of criminal acts and otherwise defaming [them].'[85]

The Punturos made similar assertions in their briefs to this Court.[86] Given the Punturos' emphatic insistence that Kern "helped" to publish his allegedly defamatory statements, it should be undisputed that, at the very least, Kern "authorized the publication of the libel." *Wheaton*, 66 Mich at 311. As such, the Punturos' defamation claim against Kern sounds in libel.

The Punturos may argue that MCL 600.2911(3) doesn't apply to the statements that Kern made during the television broadcast (or the newspaper and radio interviews), based on this Court's statement in *Rouch I* that "the information orally furnished to [a newspaper] does not, as such, enjoy the privilege afforded by the 'public and official proceedings' statute [MCL 600.2911(3)]." 427 Mich at 172-173. But that argument lacks merit too. As shown above, *Rouch I* based its holding on an outdated version of the statute that was later amended to abrogate that holding. And *Rouch I* wasn't about who could claim the privilege but, rather, about whether an oral report of an arrest constituted a "public and official proceeding." *Id.* So, simply put, in light of the changes to MCL 600.2911(3) that significantly broadened the scope of the fair-reporting privilege, *Rouch I* is inapposite.

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[85] *Id.* at ¶45 (Appx. 035a) (emphasis added).
[86] For example, the Punturos have claimed that "Kern…**helped** the media 'blow it up' into a 'bigger story' by granting interviews and adding to their other unequivocal accusations of criminal acts." Punturos MSC ALA Response at 8 (emphasis added). Indeed, the Punturos have even admitted that " [Kern] began **publishing**" the Boyers' allegations of criminal and civil misconduct by "telling the press things." *Id.* at 12 (emphasis added).

E. The fair-reporting privilege applies to the entire "libel action." So its protection encompasses any and all claims based on an alleged libel.

The Punturos may argue that, even if their defamation claim sounds in libel (and, thus, falls within the fair-reporting privilege), the privilege doesn't apply to their remaining claims. That argument lacks merit.

MCL 600.2911(3) also doesn't define "action." Like libel, "action" is a legal term of art. This Court has recognized that "[a]n 'action' is 'a civil or criminal judicial proceeding.'" *Ronnisch*, 499 Mich at 560, quoting *Black's Law Dictionary* (10th ed) (cleaned up); see also *Black's Law Dictionary* (11th ed) (defining "action" as "[a] civil or criminal judicial proceeding."). It's well-established that an action is different than a claim. *Ronnisch*, 499 Mich at 560 n 44 (Although the terms "action" and "claim" are "often used synonymously," they "do not strictly and technically have the same meaning."); *Otto v Village of Highland Park*, 204 Mich 74, 80; 169 NW 904 (1918) (same). An "action" is the proceeding itself and "a claim consists of facts giving rise to a right asserted in a judicial proceeding." *Id.*, quoting *CAM Constr v Lake Edgewood Condo Ass'n,* 465 Mich. 549, 555; 640 NW2d 256 (2002); see also, *Black's Law Dictionary* (11th ed. 2019) (defining "claim" as "[a] statement that something yet to be proved is true" and "[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional."). Thus, an "action encompasses the claims asserted" within the proceeding. *Ronnisch*, 499 Mich at 560.

It follows that, for the purposes of MCL 600.2911(3), the term "libel action" means a civil judicial proceeding based on an allegedly defamatory statement that

was "expressed in a fixed medium," including "any…form of communication" that has a similar potential for harm as the written word, like a television broadcast or an audio recording of an oral interview. *Black's Law Dictionary* (11th ed). And, because the fair-reporting privilege applies to a "libel action"— the entire judicial proceeding—it isn't limited just to libel claims; rather it protects against all claims that were asserted in the proceeding. See *Ronnisch*, 499 Mich at 560. Indeed, it's well-established that "where 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); *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995).

Here, the Punturos initiated this judicial proceeding against Kern—i.e., the "action"—based on his statements during the 7&4 television broadcast and the interviews that were published by the news media. As shown above, those statements were libel rather than slander. So this is a "libel action" under MCL 600.2911(3). And, because the fair-reporting privilege applies to the "action"— the entire judicial proceeding—it isn't limited just to libel claims; rather it "encompasses" all of "the claims asserted" in the action. *Ronnisch*, 499 Mich at 560. Furthermore, it's well-established that "where 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); *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d

24 (1995). For multiple reasons, therefore, just like their defamation claim, the Punturos additional claims all fail as a matter of law.[87]

In sum, this is a "libel action" under MCL 600.2911(3) to which the fair-reporting privilege applies.

Issue II

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, as well as the then-pending criminal extortion charges against Bryan Punturo. So the Punturos' claims are barred by the fair-reporting privilege.

A. Background defamation law and the fair-reporting privilege

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

[87] This same logic applies to the extent that this Court finds that any of Kern's individual statements are slander rather than libel.

Michigan courts have long held that 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[s]" standard and reviewing the public records, the Court of Appeals concluded that, although there were several 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.[88]

The "substantially represent" standard is well-established; Michigan's appellate courts have recognized and applied it for decades. See, e.g., *Rouch I*, 427 Mich at 167; *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238; 487 NW2d 205 (1992) ("*Rouch II*"); *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).

B. Kern's allegedly defamatory statements reiterated the Boyers' and the Attorney General's allegations of extortion and antitrust violations. 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."[89] Likewise, Judge Power concluded that Kern's statements weren't privileged because they implied "that [the Punturos] actually did it."[90] But that's true of any allegation. Nothing could more

[88] The Court ultimately concluded that the unprivileged statement was insufficient to establish defamation. *Id.* at 327-328.
[89] *Punturo v Kern*, unpublished opinion at 7 (Appx. 012a-013a).
[90] 5/8/17 Summary Disposition Hearing Transcript at 58 (Appx. 240a).

fairly and truly report a record than to quote it. Because complaints don't preface every allegation with some variation of "allege," quoting a complaint verbatim could be said to imply that the defendant "actually did it."[91] So the lower courts' analysis would exclude a direct quote from the protection of the fair-reporting privilege.

Throughout this case, the Punturos have contended that *Bedford v Witte*, 318 Mich App 60; 896 NW2d 69 (2016), supports their argument that Kern's statements weren't privileged because of the level of certainty he expressed. It doesn't.[92] 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 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…[the defendant's] words did alter the effect the literal truth would have on the recipient of the information." *Id.*

Despite the lower courts' and the Punturos' assertion to the contrary, Kern didn't say anything comparable to the defendant's statement in *Bedford*. His allegedly defamatory statements didn't express an increased level of certainty. Instead, he merely used declarative sentences that repeated the allegations raised in the Boyers' underlying complaint and in the Attorney General's case against Punturo. Even under *Bedford*, it was a fair and true report of matters of public record.

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[91] See *id.*

[92] And, to the extent it does support the Punturos' position, *Bedford* was wrongly decided as shown in Issue III.

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.[93] Kern's statements fall well within that standard.

The Punturos' complain that Kern accused them of anti-trust violations and extortion.[94] But antitrust violations and extortion are 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 antitrust violations**" as well as "threats, coercion, **extortion, antitrust violations**, and vulgar correspondence."[95] 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."[96]

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

[93] As noted below in Issue III, this case illustrates that *Bedford* is being interpreted to require attorneys to preface their comments with "we have alleged."
[94] *Id.* at ¶¶30, 32 (Appx. 028a-031a).
[95] See Underlying Complaint at ¶¶ 32, 42 (emphasis added) (Appx. 052a, 054a).
[96] *Id.* at ¶¶9, 16 (emphasis added) (Appx. 048a, 050a).

unlawful agreement."[97] And they pled that Punturo "**flagrant[ly]** and intentional[ly]" violated MCL 445.772 and MCL 445.723 of the Michigan Antitrust Reform Act.[98] 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."[99]

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 of itself."[100] 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)."[101]

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."[102]

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[97] *Id.* at ¶ 45 (Appx. 054a).
[98] *Id.* at ¶¶ 17-18 (Appx. 050a).
[99] Michigan Attorney General Press Release (Appx. 057-058a).
[100] Complaint at ¶30(a) (Appx. 028a).
[101] Underlying Second Amended Complaint at ¶¶16-22 and pp. 9, 13 (Appx. 074a-075a, 072a); see also Underlying Complaint at ¶¶16-22, 32 (Appx. 050a-051a, 052a) (including "Count I – Flagrant Antitrust Violation).
[102] Complaint at 30(g) (Appx. 031a).

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."[103] Yet another article quoted Kern as saying that "[t]here was extortion" by Bryan Punturo.[104] But that's exactly what the Boyers' complaint accused Punturo of doing.

Paragraph 16 of the Boyers' Underlying Complaint claimed that "[t]hrough threats of physical, financial and reputational harm to Plaintiffs, Defendants coerced and extorted Plaintiffs into signing a Parasailing Exclusivity Agreement."[105] 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."[106] 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**

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[103] *Id.* at 30(d) (Appx. 030a).
[104] *Id.* at ¶30(b) (Appx. 028a).
[105] Underlying Complaint at ¶16 (Appx. 050a).
[106] Underlying Second Amended Complaint at ¶¶32, 42, 72 (Appx. 076a, 078a, 084a).

intent to extort money from them through the unlawful agreement. **MCL § 750.213 Malicious threats to extort money**."[107]

In short, Kern's statements repeated the **exact substance** of his clients' complaint and the Attorney General's charges against Punturo.[108] Kern didn't repeat the allegations of criminal and civil misconduct verbatim. But he didn't have to. His statements only needed to "substantially represent the matter contained in the court records"—i.e., the allegations that Punturo engaged in **extortion and antitrust violations.**[109] *Northland Wheels,* 213 Mich App at 325-326. And Kern didn't say anything in any of the news articles—or express an increased 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 misconduct 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.

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."[110] **They're wrong.** Again, the complaint doesn't preface every statement with "we allege" and, certainly, quoting the complaint verbatim would be a fair and true report of it. See *Bedford,* 318 Mich App at 69-71 (holding that the fair-reporting privilege protects verbatim

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[107] Underlying Complaint at 45 (Appx. 054a) (emphasis added); Underlying Second Amended Complaint at ¶92 (Appx. 088a).
[108] See Underlying Complaint at ¶32 (Appx. 052a).
[109] *Id.*
[110] Punturo's Response to Kern's Summary Disposition Motion at 1 (Appx. 149a).

repetitions of a complaint). So there's no "we have alleged" requirement in MCL 600.2911(3). The Punturos' argument is made up; there's no statutory basis for it.

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). 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.[111] 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 that the fair-reporting privilege protects Kern's statements and bars the Punturos' claims. The lower courts erred. This Court should reverse and remand for entry of summary disposition or, alternatively, grant leave to appeal.

[111] Underlying Complaint at ¶32 (Appx. 052a).

Issue III

Michigan courts should not read additional requirements into statutes. The plain language of MCL 600.2911(3) provides no exception from the fair-reporting privilege based on the level of certainty with which the allegedly defamatory statements were expressed. Yet courts have read *Bedford v Witte* to impose such an exception. *Bedford* thus conflicts with the plain language of MCL 600.2911(3). So it was wrongly decided.

The third issue this Court asked the parties to brief was "whether *Bedford v Witte*, 318 Mich App 60 (2016), was wrongly decided."[112] As shown above in Issue II, *Bedford* is distinguishable from this case based on its facts. Regardless, it's wrongly decided because it created an exception to the fair-reporting privilege based on the level of certainty with which the defendant made the statement that has no basis in the text of MCL 600.2911(3).

In *Bedford*, the Court of Appeals held 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 ways." *Bedford*, 318 Mich App at 70-71 (emphasis added). The court explained that the 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"—changed 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.*

[112] MOAA Order (Appx. 259a-260a).

(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.*

Bedford could be limited to its facts—where a defendant says "we can say with certainty." *Bedford*, 318 Mich App at 70-71. But, as this case demonstrates, lower courts have treated *Bedford* as if it created an entirely new exception to the fair-reporting privilege based on the "level of certainty" used by the speaker.

Here, for example, the Court of Appeals relied on *Bedford*'s level-of-certainty exception to hold that the fair-reporting privilege doesn't apply because Kern used declarative sentences to repeat the allegations of criminal and civil misconduct raised in the Boyers' underlying complaint and in the Attorney General's case against Punturo. If using declarative sentences to reiterate the allegations in a complaint provides enough certainty for a statement to fall outside the scope of the fair-reporting privilege, Bedford's level-of-certainty exception would effectively require defendants to repeat their allegations verbatim or qualify each statement with the caveat "we are alleging" (a position that was rejected in *Northland Wheels*). If they didn't—i.e., if they paraphrased the contents of the public record using declarative sentences—they would run 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" a matter of public record without quoting the public record verbatim.

It follows that *Bedford* cannot be reconciled with the well-established "substantially represent[s]" test laid out in *Northland Wheels*, 213 Mich App at 325-

326. As a result, it "conflicts with…another decision of the Court of Appeals." MCR 7.305(B)(5). And nothing in the plain language of MCL 600.2911(3) enables courts to distinguish between different levels of certainty or exclude individuals who use declarative sentences from the fair-reporting privilege. So *Bedford* conflicts with the plain language of the statute that creates the fair-reporting privilege.

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 to guess 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.

This case demonstrates just how unworkable *Bedford's* level-of-certainty analysis is. 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.'"[113] It explained that "[t]he crux of the *Bedford* case was that the public record contains only unproven allegations, not that actual

[113] *Punturo v Kern*, unpublished opinion at 7 (Appx. 012a-013a).

crimes were committed."[114] So, even though Kern never said anything like "we can say with certainty," the Court of Appeals held that his comments weren't privileged because he "stated in no uncertain terms that Punturo committed extortion and flagrant violations of MARA."[115] But, as shown above, extortion and flagrant antitrust violations are exactly what the Boyers' alleged in their complaint.

As a result, it isn't at all clear how much "certainty" is required before a statement repeating the allegations in a complaint no longer "substantially represents" that pleading. Is the required level of certainty a phrase like "we can say with certainty"? Or is it using declarative sentences? Do you have to preface each statement with "we have alleged"? Or is it enough to say that once at the beginning of the interview? *Bedford* doesn't provide guidance on any of these issues. Instead, it leaves the bench, the bar, and the public to guess about whether a given statement was expressed with enough certainty to void the fair-reporting privilege. Stated differently, *Bedford* fails to give trial courts or attorneys a meaningful 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 above, 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

[114] *Id.*
[115] *Id.*

level of certainty. Yet the trial court and the Court of Appeals both understood *Bedford* to obviate the privilege. As a result, *Bedford* is inconsistent with the plain language of MCL 600.2911(3) and prior Court of Appeals precedent. For multiple reasons, therefore, *Bedford* was wrongly decided. This Court should reverse the current Court of Appeals' opinion and, in doing so, overrule *Bedford*.

Issue IV

Michigan courts should not read additional requirements into statutes. The plain language of the fair-reporting privilege statute, MCL 600.2911(3), provides no basis for applying a different standard to statements by attorneys (or any other profession, for that matter) than to statements by laypeople. So this Court should decline to impose such a standard.

This Court asked the parties to address is "whether the standards for application of the statutory fair reporting privilege are different for statements made by an attorney or by a layperson-litigant."[116] Like the other issues, this issue hinges on the language of MCL 600.2911(3). Because the statute doesn't differentiate based on who allegedly committed the libel, the standards aren't different for statements made by an attorney or a layperson.

A. The plain language of MCL 600.2911(3) demonstrates that the Legislature intended the fair-reporting privilege to apply without regard to the profession of the defendant.

Again, this Court ascertains legislative intent from the plain language of the statute. *Lewis*, 503 Mich at 165 (citation omitted); *Dye*, 504 Mich App at 180. "A necessary corollary of this principle is that 'a court may read nothing into an

[116] MOAA Order (Appx. 259a-260a).

unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'" *Lewis*, 503 Mich at 165, quoting *People v Phillips*, 469 Mich 390, 395; 666 NW2d 657 (2003). Thus, this Court "do[es] not read requirements into a statute where none appear in the plain language and the statute is unambiguous." *Nickola v MIC Gen Ins Co*, 500 Mich 115, 126; 894 NW2d 552 (2017) (citation omitted); see also *Jones v Grand Ledge Pub Sch*, 349 Mich 1, 11; 84 NW2d 327 (1957) ("It is not within the province of this Court to read therein a mandate that the [L]egislature has not seen fit to incorporate."). Along the same lines, this Court will not "rewrite the plain statutory language [or] substitute [its] own policy decisions for those already made by the Legislature." *Michigan Assoc of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019), quoting *DeBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000).

Nothing in the plain language of MCL 600.2911(3) provides any indication that the Legislature intended that the standard for applying the fair-reporting privilege to attorneys is different than the standard for lay people. Nor does the statutory language provides any basis for applying the privilege differently based on the profession of the person making the statement. On the contrary, the language of the fair-reporting privilege has nothing do with the identity or mindset of the defendant; rather, the only statutory criteria for applying the privilege are focused on the content of the report and its relationship to the matter being reported. That is, for a published or broadcast statement to be privileged, the only requirement is that it must be "a fair and true report" of "matters of public record, a public and

official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public..." MCL 600.2911(3).

Whether a report is a "fair and true" reflection of the underlying public record (or matter of public record) has nothing to do with the profession of the person who made the report. It follows that a defendant's status as an attorney doesn't affect the application of the fair-reporting privilege. So, it would be contrary to the plain language of MCL 600.2911(3) to apply a different standard when a statement is made by an attorney rather than a layperson. This Court should decline to do so.

B. The statutory history of MCL 600.2911(3) confirms that the fair-reporting privilege applies without regard to the profession of the defendant.

The statutory history of MCL 600.2911(3) further supports this conclusion. As noted above in Issue I, before 1988, MCL 600.2911(3) limited the application of the fair-reporting privilege to libel actions "brought against a reporter, editor, publisher, or proprietor of a newspaper."[117] But in 1988—in direct response to this Court's holding in *Rouch I* that the fair-reporting privilege doesn't apply to information that is "orally furnished" to a media defendant—the Legislature removed that restriction.[118] See *Rouch I*, 427 Mich at 172-173. That amendment is "presumed to change the meaning of an existing statute." *In re Cliffman*, 500 Mich 968; 892 NW2d 380 (2017) (Young, J., dissenting); *Bush*, 484 Mich at 167. It follows that, since 1988, the statutory fair-reporting privilege applies without regard to the profession—or media status—of the defendant. If this Court were to interpret MCL

[117] MCL 600.2911 (Compiled Laws of 1970 Version) (Appx. 287a-289a).
[118] 1988 PA 396 (Enrolled as HB 4932) (Appx. 295a-297a).

600.2911(3) as imposing a different standard on a defendant like Kern solely because of his status as an attorney, it would fail to reflect the legislative intent reflected in the Legislature's 1988 amendment that broadened the scope of the fair-reporting privilege. So it should avoid that reading.

C. A defendant's state of mind doesn't affect how the fair-reporting privilege applies.

The conclusion that the plain language of MCL 600.2911(3) doesn't impose on different standard on attorneys is also bolstered by the fact that the fair-reporting privilege applies without regard to the defendant's state of mind. The Court of Appeals has concluded that the plain language of MCL 600.2911(3) demonstrates that "[a] defendant's motivation is irrelevant if a fair and true report is made of the proceeding." *Stablein,* 183 Mich App at 482. As a result, there's no exception for malice or self-reporting. See *Kefgen*, 241 Mich App at 618; *Bedford,* 318 Mich App at 69. As a result, the consistency between the public record and the "gist" and "sting" of the report—and not the mindset or the profession of the person making the report—determines whether the fair-reporting privilege applies. *Rouch II*, 440 Mich 238. So there is no basis in the text of MCL 600.2911(3) for this Court to conclude that the fair-reporting privilege applies differently to attorneys and laypersons.

The Punturos may argue that, in the past, this Court has recognized that when "considering the purpose, intent, and understanding of a person who makes statements to a newspaper reporter, the parties and circumstances should be taken into consideration" and that an "attorney at law fairly may be held to a greater degree of circumspection than a layman." *In re Simmons*, 248 Mich at 304-305. In

Simmons, this Court addressed whether the trial court had jurisdiction to hold the defendant in contempt of court for making statements in an interview that was ultimately published in a newspaper. The fair-reporting privilege had nothing to do with the Court's analysis. Instead, it concluded that a politically prominent attorney's statements were libelous because he frequently contacted newspapers and reporters and knew how interviews were obtained and published. Since he "knew the reporter intended to publish his statement" and that his "reply to the request for permission to quote him was a consent and authorization of publication," -*Simmons* held that the attorney was responsible for the publication of the comments about an ongoing lawsuit that he made during the interview. *Id.*

Despite its commentary about when an attorney should know that an interview will be published, *Simmons* doesn't support the proposition that attorneys and laypeople should be treated differently for the purposes of the fair-reporting privilege under MCL 600.2911(3).

D. The attorney ethics rules don't affect whether the fair-reporting privilege applies to Kern's statements.

Throughout this case, the Punturos have tried to avoid the fair-reporting privilege by claiming that Kern violated the rules of professional conduct. Nothing in the plain language of MCR 600.2911(3) indicates that the ethics rules affect the application of the fair-reporting privilege. It's well-established that 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); *Matter of Green Charitable Trust*, 172

Mich App 298, 327; 431 NW2d 492 (1988) (ethics violations should be dealt with through attorney discipline process, not a civil lawsuit).

And, while violations may provide evidence of negligence, whether or not Kern was negligent (he wasn't) has nothing to do with whether the fair-reporting privilege applies to his statements. As noted above, "[a] defendant's motivation is irrelevant" to the MCL 600.2911(3) analysis. *Stablein,* 183 Mich App at 482. And, if there's no exception to the privilege for malice, there certainly can't be an exception for carelessness or negligence. See *Kefgen*, 241 Mich App at 618.

For multiple reasons, therefore, there is no basis for this Court to hold that the fair-reporting privilege applies to attorneys differently than to laypeople.

Conclusion & Relief Requested

For the reasons stated above and in his application, defendant-appellant Kern asks this Court to reverse the ruling of the Court of Appeals and remand this case to the trial court for entry of summary disposition in Kern's favor. Alternatively, this Court should 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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