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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

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

vs

BRACE KERN, an individual,
Defendant-Appellant.

and

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

MSC Docket No: 158749
COA Docket No: 338727

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

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Defendant-Appellants' Appendix

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APPENDIX 1

FILED
Bonnie Scheele
Grand Traverse 13th Circuit Court
05/18/2017

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STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT, COUNTY OF GRAND TRAVERSE

BRYAN PUNTURO AND FAWN PUNTURO,
husband and wife,

and

B&A HOLDINGS, LLC d/b/a ParkShore Resort,
a Michigan limited liability company,

Plaintiffs,

v

BRACE KERN,
an individual,

and

SAUBURI BOYER AND DANIELLE KORT, f/k/a
Danielle Boyer,
individuals,

Defendants.

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

Order Regarding Defendants' Motions for Summary Disposition and Plaintiffs' Cross Motion for Partial Summary Disposition Pursuant to MCR 2.116(I)(2)

_____/

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Order Regarding Defendants' Motions for Summary Disposition and Plaintiffs' Cross Motion for Partial Summary Disposition Pursuant to MCR 2.116(I)(2)

The Court, having reviewed Defendant Brace Kern's Motion for Summary Disposition, Defendant Boyer's Motion for Summary Disposition, Defendant Danielle Kort's Motion for Summary Disposition, Plaintiffs' response thereto and Plaintiffs' Cross Motion for Partial Summary Disposition Pursuant to MCR 2.116(I)(2), and Defendants' reply thereto, and Plaintiffs' surreply, and having conducted a hearing thereon in open court on May 8, 2017, and being otherwise fully advised in the premises, HEREBY ORDERS that Defendants' motions for summary disposition and Plaintiffs' cross motion for partial summary disposition pursuant to MCR 2.116(I)(2) are hereby DENIED for the reasons stated on the record. This order does not resolve the last pending claim or close the case.

IT IS SO ORDERED.

05/18/2017
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Dated: _____

THOMAS G. POWER, CIRCUIT COURT JUDGE, P24270

Hon. Thomas G. Power

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APPENDIX 2

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Court of Appeals, State of Michigan

ORDER

Bryan Punturo v Brace Kern

Docket No. 338728

LC No. 17-032008-CZ

Stephen L. Borrello
Presiding Judge

Peter D. O'Connell

Michael F. Gadola
Judges

The Court orders that the application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).

On the Court's own motion pursuant to MCR 7.126(A)(7), the Court orders that this case be CONSOLIDATED with the leave applications filed in Docket No. 338727 (Punturo v Brace Kern, appellant) and Docket No. 338732 (Punturo v Saburi Boyer, appellant).

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC - 5 2017
Date

Chief Clerk

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Court of Appeals, State of Michigan

ORDER

Bryan Punturo v Brace Kern

Docket No. 338732

LC No. 17-032008-CZ

Stephen L. Borrello
Presiding Judge

Peter D. O'Connell

Michael F. Gadola
Judges

The Court orders that the application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).

On the Court's own motion pursuant to MCR 7.126(A)(7), the Court orders that this case be CONSOLIDATED with the leave applications filed in Docket No. 338727 (Punturo v Brace Kern, appellant) and Docket No. 338728 (Punturo v Danielle Kort, appellant).

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC - 5 2017
Date

Chief Clerk

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Court of Appeals, State of Michigan

ORDER

Bryan Punturo v Brace Kern

Docket No. 338727

LC No. 17-032008-CZ

Stephen L. Borrello
Presiding Judge

Peter D. O'Connell

Michael F. Gadola
Judges

The Court orders that the application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).

On the Court's own motion pursuant to MCR 7.126(A)(7), the Court orders that this case be CONSOLIDATED with the leave applications filed in Docket No. 338728 (Punturo v Danielle Kort, appellant) and Docket No. 338732 (Punturo v Saburi Boyer, appellant).

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC - 5 2017
Date

Chief Clerk

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APPENDIX 3

Puntero v Kern

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2018 WL 5276142
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Bryan PUNTURO, Fawn Punturo, and B & A Holdings, LLC, doing business as Parkshore Resort, LLC, Plaintiffs-Appellees/Cross-Appellants,
v.
Brace KERN, Defendant-Appellant/Cross-Appellee,
and
Saburi Boyer and Danielle Kort, formerly known as Danielle Boyer, Defendants.
Bryan Punturo, Fawn Punturo, and B & A Holdings, LLC, doing business as Parkshore Resort, LLC, Plaintiffs-Appellees/Cross-Appellants,
v.
Brace Kern and Saburi Boyer, Defendants,
and
Danielle Kort, formerly known as Danielle Boyer, Defendant-Appellant/Cross-Appellee.
Bryan Punturo, Fawn Punturo, and B & A Holdings, LLC, doing business as Parkshore Resort, LLC, Plaintiffs-Appellees/Cross-Appellants,
v.
Brace Kern and Danielle Kort, formerly known as Danielle Boyer, Defendants,
and
Saburi Boyer, Defendant-Appellant/Cross-Appellee.

No. 338727, No. 338728, No. 338732
|
October 16, 2018

Grand Traverse Circuit Court, LC No. 17-032008-CZ

Before: Beckering, P.J., and Riordan and Cameron, JJ.

Opinion

Per Curiam.

***1** In this consolidated appeal arising out of a claim of defamation, defendants appeal by leave granted and plaintiffs cross-appeal the order of the trial court denying defendants' motions and plaintiffs' cross-motion for summary disposition. [1] We affirm.

I. FACTUAL BACKGROUND & PROCEDURAL HISTORY

Defendant Saburi Boyer operated a parasailing business in Traverse City. In an effort to limit competition, Boyer [2] began negotiations with plaintiff Bryan Punturo, who owned and operated a hotel and conference facility on the water. Punturo threatened to begin a parasailing business, charge much lower prices than Boyer, and put him out of business. Punturo informed Boyer that he would not do so if Boyer agreed to pay him $19,000 per year. Boyer agreed and signed an exclusivity agreement.

After complying with the contract for some time, Boyer stopped making payments. Punturo contacted Boyer and his wife, defendant Danielle Kort, seeking continued payments. According to defendants, Punturo was aggressive and inappropriate in his attempts. Eventually, Boyer and Kort contacted defendant Brace Kern, an attorney, to represent them and determine if there was any legal recourse for them against Punturo. Kern reviewed the contract and the communications between the parties and found what he believed to be violations of the Michigan Antitrust Reform Act (MARA), MCL 445.771 *et seq.* Kern reported those findings to the Michigan Attorney General (AG) and filed a civil suit against Punturo, alleging "flagrant violations" of MARA. Upon reviewing the case, the AG filed felony extortion charges against Punturo. The AG subsequently issued a press release, describing the circumstances behind the alleged crime. The press release ended with the following disclaimer: "A criminal charge is merely an accusation and the defendant is presumed innocent unless proven guilty."

Following the AG's press release, the Traverse City area news media picked up on the story. Kern contacted Punturo's attorney to discuss settling the civil suit. Kern reported that Boyer and Kort were willing to settle their claim for $750,000, and in exchange, they would report their satisfaction with the resolution of the case to the news media. According to Punturo, the e-mail insinuated that bad press would be detrimental to Punturo's pending criminal charges. Punturo refused the

Puntero v Kern

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settlement offers. Subsequently, over the course of several interviews, defendants made statements to different news media outlets, including newspapers, television, and radio stations, about the case. Kern and Boyer both stated, on several occasions, that Punturo had committed extortion in his dealings with Boyer. Kern also stated that Punturo violated MARA. Boyer and Kort explained that they were in fear of Punturo, that he used threatening, vulgar language, and that they reported the issue to Kern, who discovered antitrust violations.

***2** Eventually, both the civil and criminal suits pending against Punturo were dismissed. The district court determined that there was not probable cause to believe that Punturo committed any crimes, so refused to bind the case over. The civil case was summarily disposed after the trial court explained that there had not been any MARA violations, considering Boyer himself was a party to the allegedly violative contract.

Plaintiffs followed up by filing the instant litigation, in which they asserted that defendants' statements were defamatory. Plaintiffs contended that the statements were accusations of crimes, and thus defamation per se, and that Boyer and Kort could be held vicariously liable for the statements of their attorney, Kern. Defendants, in lieu of filing answers, each filed motions for summary disposition. All of the defendants argued that their statements were protected by Michigan's fair-reporting privilege, MCL 600.2911(3), or were protected under the First Amendment as opinion or rhetorical hyperbole. Boyer and Kort argued separately that they could not be held vicariously liable for the statements of Kern, and that their individual statements were not capable of defamatory meaning.

Plaintiffs argued to the contrary, asserting that the fair-reporting privilege did not apply to statements that crimes had been committed with certainty when only charges were pending, and that defendants' statements were accusations of criminal conduct, not expressions of opinion or rhetorical hyperbole. Further, because there was a question of fact whether Kern made the defamatory statements in furtherance of Boyer and Kort's lawsuit against Punturo, they could be held vicariously liable for his statements. Plaintiffs also argued that summary disposition was warranted in their favor pursuant to MCR 2.116(I)(2) where they had pleaded and proved a claim of defamation per se.

Defendants replied, insisting that the fair-reporting privilege applied because their statements reflected the accusations made in the public record, and that their use of the words "extortion" and "anti-trust" violations merely were statements amounting to subjective opinion or rhetorical hyperbole. Boyer and Kort argued that they could only be held responsible for Kern's torts if they were in control of his statements, which they could not be, because his statements violated MRPC 3.6, which necessarily fell outside their authority to control his representation.

The trial court considered those arguments and agreed with plaintiffs on the issue of the fair-reporting privilege, speech protected as opinion or rhetorical hyperbole, and vicarious liability. The trial court then denied defendants' motions for summary disposition. The trial court also denied plaintiffs' cross-motion for summary disposition, reasoning that there still remained questions of fact regarding other elements of a defamation claim. This appeal followed.

II. DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

Defendants argue that the trial court erred in denying their motions for summary disposition. Although the trial court did not clarify under which subsection of MCR 2.116(C) it considered defendants' motions for summary disposition, Kern cited MCR 2.116(C)(7) and (C)(10), while Boyer and Kort cited (C)(8) and (C)(10). "Because the trial court considered factual matters outside the four corners of the complaint, we will review whether summary disposition was appropriate under MCR 2.116(C)(10)." *Edwards v. Detroit News, Inc.*, 322 Mich. App. 1, 11; 910 N.W.2d 394 (2017). "This Court [ ] reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10)." *Pace v. Edel-Harrelson*, 499 Mich. 1, 5; 878 N.W.2d 784 (2016). A motion for summary disposition pursuant to MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Joseph v. Auto Club Ins. Assoc.*, 491 Mich. 200, 206; 815 N.W.2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden*

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v. Rozwood, 461 Mich. 109, 120; 597 N.W.2d 817 (1999). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Id.* "A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Bennett v. Detroit Police Chief*, 274 Mich. App. 307, 317; 732 N.W.2d 164 (2006).

A. THE FAIR-REPORTING PRIVILEGE

***3** Defendants argue that their statements were protected by the fair-reporting privilege, and therefore, summary disposition was warranted. We disagree.

1. STANDARD OF REVIEW & APPLICABLE LAW

Questions involving statutory interpretation are reviewed de novo. *Ingham Co. v. Mich. Co. Rd. Comm. Self-Insurance Pool*, 321 Mich. App. 574, 579; 909 N.W.2d 533 (2017). Similarly, "[t]he existence of a privilege that immunizes a defendant from liability for [defamation] is a question of law that this Court determines de novo." *Northland Wheels Roller Skating Ctr., Inc. v. Detroit Free Press, Inc.*, 213 Mich. App. 317, 324; 539 N.W.2d 774 (1995).

"A defamatory communication is one that tends to harm the reputation of a person so as to lower him in the estimation of the community or deter others from associating or dealing with him." *Lawrence v. Burdi*, 314 Mich. App. 203, 214; 886 N.W.2d 748 (2016) (quotation marks omitted). In actions alleging defamation, a plaintiff "must plead ... with specificity by identifying the exact language that the plaintiff alleges to be defamatory." *Sarkar v. Doe*, 318 Mich. App. 156, 184; 897 N.W.2d 207 (2016) (quotation marks omitted). A claim for defamation requires proof of four elements:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. [*Edwards*, 322 Mich. App. at 12, quoting *Lakin v. Rund*, 318 Mich. App. 127, 133; 896 N.W.2d 76 (2016).]

However, "[n]ot all defamatory statements ... are actionable." *Edwards*, 322 Mich. App. at 13. As one example, "[p]rivilege can be used as a defense in a defamation action." *Bedford v. Witte*, 318 Mich. App. 60, 65; 896 N.W.2d 69 (2016). "The defense of privilege is grounded in public policy; in certain situations, the criticism uttered by the defendant is sufficiently important to justify protecting such criticism notwithstanding the harm done to the person at whom the criticism is directed." *Id.* The Legislature codified one such privilege at MCL 600.2911(3), which in relevant part states:

> Damages 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 governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report.

This statutory subsection is often referred to as "Michigan's statutory fair reporting privilege." See *Smith v. Anonymous Joint Enterprise*, 487 Mich. 102, 131; 793 N.W.2d 533 (2010).

The Michigan Supreme Court recently restated the proper procedure for statutory interpretation:

> In interpreting [a statute], our goal is to give effect to the Legislature's intent, focusing first on the statute's plain language. In doing so, we examine the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme. When a statute's language is unambiguous, the Legislature must have intended

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> the meaning clearly expressed, and the statute must be enforced as written. [*Ronnisch Constr. Group v. Lofts on the Nine, LLC*, 499 Mich. 544, 552; 886 N.W.2d 113 (2016) (internal citations omitted).]

***4** Therefore, we first turn the language of the fair reporting privilege to determine whether defendants are entitled to protection thereunder. See *id.* "In order for a report to be privileged under this statute, the report must be 'fair and true ....' " *Bedford*, 318 Mich. App. at 66, quoting MCL 600.2911(3). "In other words, the report must 'substantially represent' the public record or other pertinent matter." *Bedford*, 318 Mich. App. at 66. "Under this test, minor differences are deemed immaterial if the literal truth produces the same effect." *Northland Wheels*, 213 Mich. App. at 325. Stated differently, "[i]f any inaccuracy does not alter the effect the literal truth would have on the recipient of the information, the pertinent standard has been satisfied." *Bedford*, 318 Mich. App. at 66. In determining whether a statement is "substantially true," this Court has been directed to consider the "gist" or "sting" of the statements. *Northland Wheels*, 213 Mich. App. at 325. "The statute excepts from the privilege libels that are not a part of the public and official proceeding or governmental notice, written record or record generally available to the public." *Id.* at 71 (brackets omitted), quoting *Amway Corp. v. Procter & Gamble Co.*, 346 F 3d 180, 187 (CA 6, 2003).

2. ANALYSIS

The trial court properly denied summary disposition to defendants because the fair-reporting privilege is inapplicable in the present case. The parties argue regarding whether the statements at issue were "fair and true" reports of the public record filings in the civil and criminal court cases against Punturo. Plaintiffs insist that the public record contained only accusations and unproven assertions of different crimes, whereas the statements made by defendants to the various news media outlets were statements of fact that such crimes were committed. Plaintiffs assert that the fair reporting privilege applies to statements tempered with qualifiers regarding the fact that criminal charges and civil complaints merely are allegations and not proven facts. Defendants went outside the privilege when stating that Punturo committed felony extortion and criminal violations of MARA. On the contrary, defendants argue that the "gist" or "sting" of the statements appropriately summarized the allegations made in the criminal charges and civil complaint, so were protected by the privilege. After all, defendants used declarative statements in their court pleadings, so their use thereof in statements to the media literally reflected the public record.

The trial court properly determined that MCL 600.2911(3) and this Court's interpretation thereof in *Bedford*, 318 Mich. App. at 71, were binding and determinative in the instant case. Therein, this Court reasoned that statements by a lawyer were not protected under the privilege when his "comments did not merely summarize what was alleged—but not yet adjudicated—in the federal complaint," but instead expressed with certainty "that plaintiffs broke the law in various ways." *Id.* "Given the level of certainty expressed, we conclude that his words did alter the effect the literal truth would have on the recipient of the information, and thus the 'fair and true' standard in MCL 600.2911(3) was not satisfied." *Bedford*, 318 Mich. App. at 71.

In *Bedford*, this Court did not clarify exactly what words were used by the defendants to indicate that the plaintiffs committed crimes with certainty. However, the record is clear that defendants made statements, with certainty, that Punturo committed extortion and violations of MARA. For example, Kern said that Punturo "flagrantly violated state antitrust laws," and that his contract with Boyer "violate[d] [MARA] in of [sic] itself." Kern stated that "[t]here was extortion for the past two years." Kern also specified that, after reviewing the contract and communications between Punturo and Boyer, he "recognized extortion," and "realized it violated antitrust laws ...." Kern even clarified that he did not "know of any other antitrust case with such significant extortion." Kern also told the news media "[a]s soon as I saw the contract, I'm like, 'This is an antitrust violation, this is a covenant not to compete, this is extortion.' " There also were statements attributed to Kort and Boyer individually that amounted to objective statements that Punturo had committed a crime or violated state antitrust laws.

***5** After reviewing those statements, the reasoning provided by this Court in *Bedford* is applicable to the present case, even if defendants never used the phrase "with certainty." The crux of the *Bedford* case was that

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

Our previous decision in *Bedford*, 318 Mich. App. at 71, is binding and dispositive that the fair-reporting privilege was not applicable to the relevant statements at issue. Consequently, the trial court properly denied defendants' motions for summary disposition on that ground.

B. PROTECTED SPEECH

Defendants argue that the trial court should have granted their motions for summary disposition as their speech was protected as opinion or rhetorical hyperbole. We disagree.

1. STANDARD OF REVIEW & APPLICABLE LAW

"Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide." *Sarkar*, 318 Mich. App. at 179 (quotation marks omitted). "Where no such meaning is possible, summary disposition is appropriate." *Ireland v. Edwards*, 230 Mich. App. 607, 619; 584 N.W.2d 632 (1998).

"To be considered defamatory, statements must assert facts that are 'provable as false.' " *Ghanam v. Does*, 303 Mich. App. 522, 545; 845 N.W.2d 128 (2014), quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19; 110 S.Ct. 2695; 111 L.Ed. 2d 1 (1990). For examples of statements that are not "provable as false" and thus protected by the First Amendment of the United States Constitution, this Court has identified "expressions of opinion," "rhetorical hyperbole," and "imaginative expression often found in satires, parodies, and cartoons ...." *Hope-Jackson v. Washington*, 311 Mich. App. 602, 621-622; 877 N.W.2d 736 (2015). More specifically, "[t]he First Amendment protects communications that 'cannot be reasonably interpreted as stating actual facts about the plaintiff,' i.e., 'expressions of opinion are protected.' " *Edwards*, 322 Mich. App. at 13, quoting *Ireland*, 230 Mich. App. at 614. However, "[e]ven statements couched in terms of opinion may often imply an assertion of objective fact and, thus, can be defamatory." *Ghanam*, 303 Mich. App. at 545. "As explained by the United States Supreme Court, the statement 'In my opinion Jones is a liar' may cause just as much damage to a person's reputation as the statement 'Jones is a liar.' " *Smith*, 487 Mich. at 128, citing *Milkovich*, 497 U.S. at 18-19.

Generally, "[a]ccusations of criminal activity are considered 'defamation per se' under the law and so do not require proof of damage to the plaintiff's reputation." *Ghanam*, 303 Mich. App. at 545. "However, not all statements that can be read as accusations of a crime or misconduct should be considered assertions of fact." *Id.* "Courts recognize that '[t]echnical inaccuracies in legal terminology employed by nonlawyers,' particularly when 'the popular sense of a term may not be technically accurate,' should not form the basis for recovery." *Hope-Jackson*, 311 Mich. App. at 623, quoting *Rouch v. Enquirer & News of Battle Creek (After Remand)*, 440 Mich. 238, 264; 487 N.W.2d 205 (1992). "Terms such as 'blackmailer,' 'traitor,' 'crook,' 'steal,' and 'criminal activities' must be read in context to determine whether they are merely exaggerations of the type often used in public commentary." *Hope-Jackson*, 311 Mich. App. at 622, quoting *Ghanam*, 303 Mich. App. at 546, citing *Greenbelt Coop Publishing Ass'n., Inc. v. Bresler*, 398 U.S. 6, 14; 90 S.Ct. 1537; 26 L.Ed. 2d 6 (1970). "If a reasonable reader would understand such words as merely 'rhetorical hyperbole' meant to express strong disapproval rather than an accusation of a crime or actual misconduct, they cannot be regarded as defamatory." *Hope-Jackson*, 311 Mich. App. at 623. "The context and forum in which statements appear also affect whether a reasonable reader would interpret the statements as asserting provable facts ...." *Sarkar*, 318 Mich. App. at 179 (quotation marks omitted). Ultimately, when considering if a statement is an opinion or rhetorical hyperbole that is not provable as false, "[t]he dispositive question ... is whether a reasonable fact-finder could conclude that the statement implies a defamatory meaning." *Smith*, 487 Mich. at 128.

2. ANALYSIS

***6** The trial court properly denied defendants' motion for summary disposition on the grounds of speech protected

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as opinion or rhetorical hyperbole. Defendants first argue that their statements to the news media merely were expressions of their opinion, and therefore not provable as false. Kern made a multitude of statements that specifically and directly accused Punturo of violating MARA and committing extortion. Kern made sure to clarify that he discovered this malfeasance after reviewing the contract between Boyer and Punturo and the communications sent by Punturo to Boyer and Kort. The statements were not couched in opinion, and even if words suggesting personal opinions were used, they implied "an assertion of objective fact and, thus, can be defamatory." *Ghanam*, 303 Mich. App. at 545. In the simplest terms, based on Kern's words, a reasonable juror could conclude that Kern was stating that Punturo committed extortion and violated MARA as an objective fact, and therefore, "implie[d] a defamatory meaning," which is actionable. *Smith*, 487 Mich. at 128.

Kern attempts to counter this evidence by asserting that the context of the statement reveals that he just was stating his subjective opinion. Kern reasons that because he was the attorney representing Boyer and Kort in their litigation against Punturo, any reasonable juror would know that he only subjectively believed his clients were correct that Punturo committed the alleged malfeasance. According to Kern, an average consumer of the news would not confuse his vigorous advocacy with assertion of objective fact. However, this Court previously has held that "an attorney is never justified in knowingly making false statements about an opposing party." *Ireland*, 230 Mich. App. at 615. To wit, in the *Ireland* case, this Court considered a defamation action against a lawyer that represented one parent in a custody dispute. *Id.* at 610. Due to a controversial ruling by the trial court, the case received media attention. *Id.* at 611. Over the course of several interviews with news media, the defendant attorney claimed, among other things, that the opposing parent had abused and neglected the subject child. *Id.* at 611-612. When the custody case ended, the opposing parent sued the defendant attorney for defamation. *Id.* at 612.

The defendant argued that her words were not capable of defamatory meaning because they merely expressed her subjective opinion or amounted to rhetorical hyperbole. *Id.* at 616-618. This Court agreed for certain statements, citing that the defendant attorney's statements that the opposing parent was "unfit" were a matter of opinion, while statements that the opposing parent "never spent a moment" with the child were rhetorical hyperbole. *Id.* at 617-619 & n. 9. Consequently, those statements were not provable as false and thus not capable of defamatory meaning. *Id.* For the remaining statements, however, this Court determined that those were "at least potentially capable of defamatory meaning." *Id.* at 619. "The statements that suggested that [the opposing parent] abused her child are clearly defamatory, as is the statement that [the opposing parent] was a liar." *Id.* In sum, at least two of the statements made by the defendant attorney regarding the opposing party were capable of defamatory meaning. [3]

Here, Kern attempts to shield himself from liability by asserting that he just was advocating for his clients. However, the defendant attorney in *Ireland* was doing the same thing when accusing the opposing parent of neglect, abuse, and being a liar. The *Ireland* Court was not willing to call those statements "opinions" even given that the statements were made in the interest of advocacy. As stated, "an attorney is never justified in knowingly making false statements about an opposing party." *Id.* at 615. Thus, Kern's argument that his statements were protected as opinion and not provable as false is without merit. *Smith*, 487 Mich. at 128; *Ireland*, 230 Mich. App. at 615.

***7** Boyer and Kort also argue that the statements individually attributed to them were protected as expressions of opinion. A close reading of those statements by Boyer reveals that they were not expressions of opinion. Instead, the statements were made as objective facts. Boyer stated that Punturo threatened him, extorted him, and sought to put him out of business with allegedly illegal business tactics. Boyer's accusations are capable of defamatory meaning and were not protected as opinions because they were provable as false. [4] *Smith*, 487 Mich. at 128.

Kort's sole statement expresses an objective fact that Kern discovered that Punturo committed violations of Michigan's anti-trust statute. While that very well may be a truthful assertion, our role is not to make that determination. Instead, the only issue before this Court is whether the statement was an assertion of opinion. Because the record shows it was not, and Punturo could prove the statement was false by showing he did not

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violate MARA, the statement is actionable. See *Ghanam*, 303 Mich. App. at 545.

Next, defendants argue that their statements amounted to rhetorical hyperbole and thus were not capable of defamatory meaning. Specifically, they allege that their use of the words "extortion" or "anti-trust" violations would not be taken as actual allegations of crimes committed. This Court and the United States Supreme Court have acknowledged that sometimes the use of words that correlate with specific crimes are not meant to be actual accusations of those crimes. *Greenbelt Coop*, 398 U.S. at 14; *Hope-Jackson*, 311 Mich. App. at 622. However, "[l]anguage that accuses or strongly implies that someone is involved in illegal conduct crosses the line dividing strongly worded opinion from accusation of a crime." *Kevorkian v. American Med. Ass'n.*, 237 Mich. App. 1, 8; 602 N.W.2d 233 (1999). The present case is the latter instead of the former because the statements of defendants specifically accused Punturo of committing extortion and criminal violations of MARA. See *id.*

While in some cases, using words like "anti-trust" and "extortion" might be written off as rhetorical hyperbole, they cannot be here for two reasons. First, as we previously have noted, the context of a statement matters when considering how a reasonable juror would interpret it. *Sarkar*, 318 Mich. App. at 179. In this case, the statements came after defendants filed a civil suit accusing Punturo of "flagrant violations" of MARA and reported those findings to the AG, and after the AG responded by filing felony extortion charges against Punturo. Thus, defendants' statements took place in an atmosphere where Punturo was literally being charged with one of the crimes defendants were accusing Punturo of committing —extortion. The context would urge the reader to look past the meaning of "extortion" in the common parlance, and instead assume that it was an accusation that a crime was committed. Similarly, defendants were not using "anti-trust" to suggest questionable business practices, but instead were specifically accusing Punturo of violating a Michigan statute. In several of the statements, Kern goes as far as identifying the name of the statute itself, citing MARA. Therefore, based on the context of the statements, a reasonable juror would likely consider the statements as accusations of a crime, not just rhetorical hyperbole. *Sarkar*, 318 Mich. App. at 179; *Kevorkian*, 237 Mich. App. at 8.

***8** Second, with regard to Kern only, his reliance on protection for rhetorical hyperbole is entirely misplaced. The protection is provided because laypersons often use legal words in a manner that does not comport with the meaning of those words in a strictly legal sense. The example used by the United States Supreme Court was "blackmail." While the word may have a specific legal meaning, the general public uses it to describe many other situations, such as improper bargaining techniques, some of which may not be illegal. See *Greenbelt Coop*, 398 U.S. at 14. Kern, however, is not a member of the general public. He is an attorney. Therefore, when he uses a specific legal term to describe a person's behavior, a reasonable juror would be well-supported in understanding that term as an accusation of a specific crime, not rhetorical hyperbole. To wit, this Court previously used the term "nonlawyer" when describing the protection afforded: "Courts recognize that '[t]echnical inaccuracies in legal terminology employed by nonlawyers,' particularly when 'the popular sense of a term may not be technically accurate,' should not form the basis for recovery." *Hope-Jackson*, 311 Mich. App. at 623, quoting *Rouch*, 440 Mich. at 264. This is not the situation here and Kern's statements are not entitled to such protection.

The trial court properly denied defendants' motion for summary disposition on the grounds of speech protected as opinion or rhetorical hyperbole.

C. VICARIOUS LIABILITY

Boyer and Kort argue that their motions for summary disposition should have been granted where they cannot be held vicariously liable for the torts of their lawyer, Kern. We disagree.

1. STANDARD OF REVIEW & APPLICABLE LAW

"When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact ...." *St. Clair Intermediate Sch. Dist. v. Intermediate Ed. Ass'n./Mich. Ed. Ass'n.*, 458 Mich. 540, 556-557; 581 N.W.2d 707 (1998) (quotation marks omitted). Whether one party can be held vicariously liable for the actions of another is a question of

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law that this Court reviews de novo. See *Rogers v. JB Hunt Transp., Inc.*, 466 Mich. 645, 650; 649 N.W.2d 23 (2002).

"An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal." *Stephenson v. Golden*, 279 Mich. 710, 734; 276 N.W. 849 (1937) (quotation marks omitted). With respect to agencies, "we consider 'the relations of the parties as they in fact exist under their agreements or acts' and note that in its broadest sense agency 'includes every relation in which one person acts for or represents another by his authority.' " *St. Clair Intermediate Sch. Dist.*, 458 Mich. at 557, quoting *Saums v. Parfet*, 270 Mich. 165, 170-171; 258 N.W. 235 (1935). "[F]undamental to the existence of an agency relationship is the right to control the conduct of the agent ... with respect to the matters entrusted to him." *St. Clair Intermediate Sch. Dist.*, 458 Mich. at 558 (citation omitted).

"In an agency relationship, it is the power or ability of the principal to control the agent that justifies the imposition of vicarious liability." *Laster v. Henry Ford Health Sys.*, 316 Mich. App. 726, 735; 892 N.W.2d 442 (2016). "A principal may be vicariously liable to a third party for harms inflicted by his or her agent even though the principal did not participate by act or omission in the agent's tort." *Bailey v. Schaaf (On Remand)*, 304 Mich. App. 324, 347; 852 N.W.2d 180 (2014), vacated on other grounds 497 Mich. 927 (2014). "Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omission, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other." *Al-Shimmari v. Detroit Med. Ctr.*, 477 Mich. 280, 294; 731 N.W.2d 29 (2007) (quotation marks omitted). "[V]icarious liability may [ ] attach through the concept of agency" irrespective of an employer-employee relationship. *Laster*, 316 Mich. App. at 735. "The principal is held to have done what the agent has done. The law contemplates that the agent's acts are the principal's acts and that the principal 'is constructively present at them all.' " *Nippa v. Botsford Gen. Hosp.*, 257 Mich. App. 387, 391; 668 N.W.2d 628 (2003), quoting *Smith v. Webster*, 23 Mich. 298, 299-300 (1871).

***9** "The legal relationship between attorneys and their clients is one example of an agency relationship." *Russell v. Detroit*, 321 Mich. App. 628, 641; 909 N.W.2d 507 (2017). The principal's liability, however, is limited to "the torts of his agent committed in the scope of the agency." *St. Paul Fire & Marine Ins. Co. v. Ingall*, 228 Mich. App. 101, 109; 577 N.W.2d 188 (1998). "The authority of an agent to bind a principal may be either actual or apparent." *Alar v. Mercy Mem. Hosp.*, 208 Mich. App. 518, 528; 529 N.W.2d 318 (1995). This Court previously has held a principal accountable for an intentional tort (fraud) of the principal's agent, so long as that tort was committed in the scope of the agency " 'even though the principal was ignorant thereof and the agent, in so doing, exceeded his authority or acted in violation of his principal's instructions.' " *Kuebler v. Equitable Life Assurance Society of the U.S.*, 219 Mich. App. 1, 8-9; 555 N.W.2d 496 (1996), quoting *Bleam v. Sterling Ins. Co.*, 360 Mich. 208, 213; 103 N.W.2d 466 (1960).

2. ANALYSIS

Questions of fact remain regarding whether Boyer and Kort can be held vicariously liable for Kern's allegedly defamatory statements. Boyer and Kort hired Kern to represent them in their litigation with Punturo. Kern, therefore, was an agent for Boyer and Kort, who acted as the principal. *Russell*, 321 Mich. App. at 641. Consequently, Kort and Boyer were liable for the torts committed by Kern so long as he performed the tortious conduct within the scope of the agency. *St. Paul Fire & Marine Ins. Co.*, 228 Mich. App. at 109. In addressing the scope of the agency, this Court must consider "the relations of the parties as they in fact exist under their agreements or acts ...." *St. Clair Intermediate Sch. Dist.*, 458 Mich. at 557 (quotation marks omitted). The record, premature though it may be, shows that there is at least a question of fact regarding whether Kern's allegedly defamatory statements were made within the scope of the agency. Kern was hired to litigate Kort and Boyer's claims against Punturo, which included possible settlement negotiations. As alleged by Punturo, Kern sent at least one e-mail threatening that he and his clients would go to the news media with less than flattering information if Punturo refused to settle the civil case for a large sum of money. According to Punturo, Kern insinuated that the bad press from Kern, Boyer, and Kort would lead to negative consequences in Punturo's then pending criminal case. If that alleged purpose is true, Kern's statements undoubtedly would be considered within the scope of his agency. After all, a lawyer's agency certainly includes the ability to negotiate desirable settlement terms. "When

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there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact ....” *Id.* at 556-557 (quotation marks omitted). Consequently, because there remained a question of fact regarding whether Kort and Boyer could be held vicariously liable for the allegedly defamatory statements of their agent/attorney, Kern, summary disposition properly was denied. *Id.*

Kort and Boyer counter that Kern's statements to the media were not within the scope of his agency because those statements violated MRPC 3.6, which in relevant part provides that attorneys involved in the “litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Boyer and Kort's argument relies on the presupposition that a statement made in violation of MRPC 3.6 must necessarily fall outside of Kern's authority as their agent. Assuming, without deciding that Kern violated MRPC 3.6, Kort and Boyer's argument is without merit. As this Court previously has held, when an agent commits a tort within the scope of the agency, it is irrelevant that the “the principal was ignorant thereof and the agent, in so doing, exceeded his authority or acted in violation of his principal's instructions.’ ” *Kuebler*, 219 Mich. App. at 8-9 (quotation marks omitted). Thus, it is inconsequential that Kort and Boyer did not know that Kern intended to make defamatory statements or that the making of defamatory statements was outside the authority delegated to Kern as their agent. *Kuebler*, 219 Mich. App. at 8-9.

***10** One hundred and forty-five years ago, our Supreme Court reasoned similarly in a case involving a client being sued for the tortious conduct of the client's attorney. *Foster v. Wiley*, 27 Mich. 244 (1873). The plaintiff in that case sued the defendant for “taking from his possession a certain carriage.” *Id.* at 245. Previously, the defendant had obtained judgment against the plaintiff for possession of the carriage. *Id.* However, the plaintiff contended that the judgment had been wrongfully obtained and therefore provided no legal grounds for the repossession of the carriage. *Id.* at 245-246. “It [was] not claimed that [the defendant] personally directed the issue of execution, but it is conceded that it was ordered out by [defendant's attorney], into whose hands for collection [the defendant] had placed the demand upon which judgment had been recovered.” *Id.* at 246. The Court considered “whether, where one places a demand in the hands of an attorney for collection, he is to be held as approving and adopting whatever is done by the attorney in respect to the demand for the ostensible purpose of collecting it ....” *Id.* The Court was especially concerned that, where the attorney repossessed the carriage without any authority of law, his actions amounted to a “naked tort.” *Id.* at 247. The Court acknowledged the defendant's argument that the attorney “alone must be held responsible for the trespass which followed, unless affirmative evidence is given that the client was consenting to his action.” *Id.*

The *Foster* Court recognized some authority suggesting that an attorney must be held individually responsible because the client, “in suing out an execution[,] must be assumed to have intended a lawful exercise of authority by the officer, and not unlawful action.” *Id.* at 248. After citing additional legal authority to the contrary, the Court provided the following analysis and conclusion:

> There is a plain difference between a trespass committed on a third party in assumed execution of process, and one committed on the [plaintiff] under process sued out irregularly. A [client] can never be held to intend a trespass to third persons; but when one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand, and consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the [plaintiff] in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law. Such seems to be the result of the authorities. It follows that the circuit court erred

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> in holding [the defendant] not liable.
> [*Id.* at 248-249.]

The reasoning of the Court in *Foster* is consistent with the agency principles here. The Court reasoned that when an attorney acts in the scope of the agency, the principal is liable for the torts committed by the attorney, even where such acts would be considered to be outside of the client's expectation that the attorney would only perform the duties in a lawful manner. *Id.* When an attorney's actions are within the scope of the agency, they are considered to be "approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law." *Id.*

The application of *Foster* to this case is clear. Boyer and Kort retained Kern as their attorney, or agent, to litigate their issues with Punturo. The scope of Kern's agency included, "such action as [he], in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand ...." *Id.* There is at least a question of fact that Kern considered his actions "legal, proper, and necessary" to achieve a beneficial settlement for Kort and Boyer. *Id.* It is irrelevant if those actions "prove to be unwarranted by the law," because Kort and Boyer, as the principals, are considered by the law to have performed the acts themselves. *Id.* "The principal is held to have done what the agent has done. The law contemplates that the agent's acts are the principal's acts and that the principal 'is constructively present at them all.' " *Nippa*, 257 Mich. App. at 391, quoting *Smith*, 23 Mich. at 299-300. Consequently, any violation of the MRPC ultimately was irrelevant and summary disposition properly was denied.

III. PLAINTIFFS' CROSS-MOTION FOR SUMMARY DISPOSITION

***11** Plaintiffs argue that the trial court should have granted their cross-motion for summary disposition where there was no question of fact that defendant committed defamation per se. We disagree.

A. STANDARD OF REVIEW

"This Court reviews de novo the grant or denial of a motion for summary disposition ...." *Lowrey v. LMPS & LMPJ, Inc.*, 500 Mich. 1, 5; 890 N.W.2d 344 (2016). "If, after careful review of the evidence, it appears to the trial court that there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law, then summary disposition is properly granted under MCR 2.116(I)(2)." *Lockwood v. Township of Ellington*, 323 Mich. App. 392, 401; —— N.W.2d —— (2018).

B. APPLICABLE LAW & ANALYSIS

As discussed, *supra*, a claim for defamation requires proof of four elements, one of which is "either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Ghanam*, 303 Mich. App. at 544, quoting *Smith*, 487 Mich. at 113. "It has long been established that 'words charging the commission of a crime are defamatory per se, and hence, injury to the reputation of the person defamed is presumed to the extent that the failure to prove damages is not a ground for dismissal.' " *Lawrence*, 314 Mich. App. at 214, quoting *Burden v. Elias Bros. Big Boy Restaurants*, 240 Mich. App. 723, 727-728; 613 N.W.2d 378 (2000). "MCL 600.2911(1) is the codification of the common-law principle that words imputing a lack of chastity or the commission of a crime constitute defamation per se and are actionable even in the absence of an ability to prove actual or special damages ...." *Burden*, 240 Mich. App. at 728. "Where defamation per se has occurred, the person defamed is entitled to recover general damages in at least a nominal amount." *Id.* In short, a claim of defamation per se fulfills the fourth element by excusing a plaintiff from proving special harm. *Ghanam*, 303 Mich. App. at 544.

A claim of defamation per se, however, does not necessarily satisfy the other three elements of a defamation claim, which include, "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher ...." *Edwards*, 322 Mich. App. at 12, quoting *Lakin*, 318 Mich. App. at 133. While plaintiffs contend that the other three elements are fulfilled as well, the record does not support that assertion. Even if plaintiffs had presented unrebutted evidence that the statements were false, defamatory, and communicated to a third party in an unprivileged manner, summary disposition still properly was denied. The parties have yet to litigate regarding or stipulate to Punturo's status here. If the trial court were to find Punturo to

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be a limited-purpose public figure because of the media attention regarding Punturo's behavior in the Traverse City tourism industry, then Punturo would be required to prove actual malice. *Ghanam*, 303 Mich. App. at 544. While Punturo undoubtedly would argue that he was a private figure, the determination requires a review of "the nature and extent of the individual's participation in the controversy," because "[a] private person can become a limited-purpose public figure when he voluntarily injects himself or is drawn into a particular controversy and assumes a special prominence in the resolution of that public controversy." *New Franklin Enterprises v. Sabo*, 192 Mich. App. 219, 222; 480 N.W.2d 326 (1991), citing *Wolston v. Reader's Digest Ass'n., Inc.*, 443 U.S. 157, 166-167; 99 S.Ct. 2701; 61 L.Ed. 2d 450 (1979). The record is too limited to make such determinations at this time.

***12** Furthermore, even if Punturo were to be considered a private person, there are heightened requirements for proof of falsity when the issue involved is one of public interest. *Locricchio v. Evening News Ass'n.*, 438 Mich. 84, 113; 476 N.W.2d 112 (1991), citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-769; 106 S.Ct. 1558; 89 L.Ed. 2d 783 (1986). Given that the actual newspapers and all of the communications between the parties have not been produced at the trial court level, the questions of whether the issue was one of public interest and whether plaintiffs satisfied their burden to prove falsity, remain unanswered. Lastly, even if Punturo can be considered a private individual, and the statements were made on a private matter, Punturo still would be required to prove negligence, the third element of a defamation claim. *Edwards*, 322 Mich. App. at 12. Given the limited record before this Court and the trial court, that is a question that cannot yet be answered. For example, when investigating the claims made against Punturo, the AG determined that he had probable cause to charge Punturo with felony extortion. Without reviewing the documents considered by the AG, it is not possible to determine whether defendants' statements were negligently made. Considering that defendants have yet to file a responsive pleading or conduct discovery of any kind, the record has not yet developed. After discovery, the trial court on summary disposition, or a jury during trial, will be required to consider whether defendants' statements that Punturo committed crimes was negligent, even if it ultimately was proven false. See *id.*

In sum, plaintiffs' cross-motion for summary disposition was properly denied where there still remained questions of law and fact to be resolved.

IV. CONCLUSION

The trial court properly denied the motions and cross-motion for summary disposition on the grounds presented. We express no opinion regarding other potential defenses to plaintiffs' claims of defamation.

Affirmed.

All Citations

Not Reported in N.W. Rptr., 2018 WL 5276142

Footnotes

1 *Punturo v. Kern*, unpublished order of the Court of Appeals, entered December 5, 2017 (Docket Nos. 338727, 338728, & 338732).

2 This opinion will refer to Saburi Boyer as "Boyer" and Danielle Kort, formerly known as Danielle Boyer, as "Kort."

3 The panel in *Ireland*, 230 Mich. App. at 622-624, ultimately determined that even the potentially defamatory statements required summary disposition because there was no genuine issue of material fact that the defendant attorney did not act with actual malice. Proof of actual malice was required because the parties stipulated that the opposing parent was a limited-purpose public figure. *Id.* at 615 & n. 5. As discussed, *infra*, no such stipulation exists in the present case and the parties have yet to litigate the issue.

4 We express no opinion, considering the premature nature of the record, whether Boyer's statements actually were false. That issue has yet to be litigated and is not before us on appeal.

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APPENDIX 4

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Approved, SCAO

Original - Court
1st copy - Defendant

2nd copy - Plaintiff
3rd copy - Return

STATE OF MICHIGAN JUDICIAL DISTRICT 13TH JUDICIAL CIRCUIT COUNTY PROBATE	SUMMONS AND COMPLAINT	CASE NO. 17 - 32008 - CZ

Court address
280 Washington St., Suite 206, Traverse City, MI 49684

Court telephone no.
(231) 922-4710

Plaintiff's name(s), address(es), and telephone no(s).		Defendant's name(s), address(es), and telephone no(s).
BRYAN PUNTURO and FAWN PUNTURO, husband and wife, and B & A HOLDINGS, LLC, d/b/a ParkShore Resort, a Michigan limited liability company	v	BRACE KERN 3434 Veterans Drive Traverse City, MI 49686 231.492.0277
Plaintiff's attorney, bar no., address, and telephone no. Jonathan R. Moothart (P40678) Moothart & Sarafa, PLC PO Box 243 Williamsburg, MI 49690-0243 (231) 947-8048		COPY

SUMMONS NOTICE TO THE DEFENDANT: In the name of the people of the State of Michigan you are notified:

1. You are being sued.
2. YOU HAVE 21 DAYS after receiving this summons to file a written answer with the court and serve a copy on the other party or take other lawful action with the court (28 days if you were served by mail or you were served outside this state). (MCR 2.111[C])
3. If you do not answer or take other action within the time allowed, judgment may be entered against you for the relief demanded in the complaint.

Issued	This summons expires	Court clerk
2.16.17	5.17.17	[signature] Deputy

*This summons is invalid unless served on or before its expiration date. This document must be sealed by the seal of the court.

COMPLAINT *Instruction: The following is information that is required to be in the caption of every complaint and is to be completed by the plaintiff. Actual allegations and the claim for relief must be stated on additional complaint pages and attached to this form.*

☐ This is a business case in which all or part of the action includes a business or commercial dispute under MCL 600.8035.

Family Division Cases

☐ There is no other pending or resolved action within the jurisdiction of the family division of circuit court involving the family or family members of the parties.

☐ An action within the jurisdiction of the family division of the circuit court involving the family or family members of the parties has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.

General Civil Cases

☑ There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

☐ A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in _____ Court.

The action ☐ remains ☐ is no longer pending. The docket number and the judge assigned to the action are:

Docket no.	Judge	Bar no.

VENUE

Plaintiff(s) residence (include city, township, or village)	Defendant(s) residence (include city, township, or village)
Traverse City, MI	Traverse City, MI
Place where action arose or business conducted Grand Traverse County	

02/16/2017
Date

[signature]
Signature of attorney/plaintiff

If you require special accommodations to use the court because of a disability or if you require a foreign language interpreter to help you fully participate in court proceedings, please contact the court immediately to make arrangements.

MC 01 (5/15) SUMMONS AND COMPLAINT MCR 2.102(B)(11), MCR 2.104, MCR 2.105, MCR 2.107, MCR 2.113(C)(2)(a), (b), MCR 3.206(A)

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COPY

STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT, COUNTY OF GRAND TRAVERSE

BRYAN PUNTURO AND FAWN PUNTURO,
husband and wife,

and

B&A HOLDINGS, LLC d/b/a ParkShore Resort,
a Michigan limited liability company,

Plaintiffs,

v

File No: 17 - 32008 - CZ
Hon.

BRACE KERN,
an individual,

and

SAUBURI BOYER AND DANIELLE KORT, f/k/a
Danielle Boyer,
individuals,

Defendants.

/

Jonathan R. Moothart (P40678)
Moothart & Sarafa, PLC
Attorneys for Plaintiff
9815 Miami Beach Rd.
P.O. Box 243
Williamsburg, MI 49690
(231) 947-8048

/

COMPLAINT AND JURY DEMAND

THERE IS NO OTHER PENDING OR RESOLVED CIVIL ACTION ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCE ALLEGED IN THE COMPLAINT

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General Allegations

Introduction

1. This is a lawsuit for recovery of damages and attorney fees for injuries inflicted upon Plaintiffs by Defendants, by the wrongful accusation and publication of false and defamatory statements by Defendants regarding Plaintiffs Bryan Punturo and B&A Holdings, LLC d/b/a ParkShore Resort, which statements also tortiously interfered with the business relations of Plaintiffs.

2. As more specifically described below, the false and defamatory statements for which suit is brought were made by Defendants deliberately, for the purpose of getting Plaintiffs to pay Defendants money, and included false accusations that Plaintiffs Bryan Punturo and B&A Holdings, LLC d/b/a ParkShore Resort had committed crimes subject to infamous punishment, including extortion and violations of the Michigan Antitrust Reform Act.

3. Although Defendants' defamatory statements were proved false and unsupported by the dismissal of a suit against Mr. Punturo and the ParkShore claiming damages and a criminal prosecution against Mr. Punturo instigated by Defendants, the correct outcome in those cases does not correct the harm caused to Plaintiffs, so they file this lawsuit with more particular allegations below.

Parties, Jurisdiction and Venue

4. Plaintiffs Bryan and Fawn Punturo ("Punturos") are individuals residing in Grand Traverse County, Michigan, and doing business in Grand Traverse County, Michigan.

5. Plaintiff B&A Holdings, LLC d/b/a ParkShore Resort ("ParkShore") is a Michigan limited liability company doing business in Grand Traverse County, Michigan. ParkShore is the

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operating entity for the hotel and conference facility on East Grand Traverse Bay known as the ParkShore Resort.

6. Plaintiff Bryan Punturo is a 50% owner of the ParkShore and is the primary manager of the ParkShore, performing a wide range of duties including management, hiring of employees, oversight, tending bar, cooking in the ParkShore restaurant, and also repair, maintenance, and other duties.

7. Plaintiff Fawn Punturo is Bryan Punturo's spouse, and is also employed by the ParkShore, performing a wide range of duties including management, oversight, working the front desk, and booking and coordinating special events including weddings and other large group gatherings that are a significant and important part of the ParkShore's business activities and income.

8. Punturos are private figure business people who depend upon their reputations for honesty and legal and fair dealing for the success of their business and careers. ParkShore is similarly dependent for its success upon its reputation for honesty, credit, efficiency and other business character.

9. Defendant, Brace Kern, is an individual residing and doing business in Grand Traverse County, Michigan.

10. Defendant Kern is an attorney licensed to practice law in Michigan and as such, is subject to the Michigan Rules of Professional Conduct in regard to ethical obligations, and is otherwise charged with knowledge of the law, and his responsibilities and obligations under the law.

11. Defendants Saburi and Danielle Boyer ("Boyers") are individuals residing and doing business in Grand Traverse County, Michigan. On September 19, 2019, Danielle Boyer's name was

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changed to "Danielle Christine Kort," but she will be referred to herein by her prior name of Boyer to preserve context.

12. At all times relevant hereto, Defendant Kern was the agent of Boyers, acting as their attorney in regard to all statements made and actions taken by Defendant Kern complained of in this pleading.

13. The acts of Defendants complained of in this pleading, and some or all of the damages flowing therefrom and caused thereby, occurred in Grand Traverse County, Michigan.

14. The amount in controversy in this case exceeds $25,000, and venue and jurisdiction are proper and convenient in this Court.

Facts Common to All Counts

15. From approximately 2003 – 2006, Defendant Saburi Boyer ("Boyer") operated a parasailing business from the ParkShore property. Boyer secured space to operate this business by sub-leasing, through his company Traverse Bay Parasail, LLC, property at the ParkShore which had been leased from the ParkShore by Break'n Waves, Inc., a company owned by Eric Harding.

16. At no time while Boyer operated a parasailing business on the ParkShore property, did there exist any lease or other contract between one or more of Plaintiffs and Boyer or his company.

17. In 2006, Boyer stopped operating at the ParkShore and moved to a different location at the Sugar Beach Resort Hotel, just East of and approximately .4 miles from the ParkShore.

18. After Boyer left the ParkShore, and through the Summer of 2013, parasailing at the ParkShore was provided through a company owned and operated by Casey Punturo, who is the son of Plaintiff Bryan Punturo ("Punturo"), which was in active competition with Boyer's company.

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19. In the Spring and Summer of 2014, Boyer began to take steps to limit and/or eliminate competition in the parasailing business on East Grand Traverse Bay. These steps included:

a. Purchasing the assets of Casey Punturo's business, which purchase closed on or about April 29, 2014, for the primary and possibly sole purpose of eliminating Casey Punturo as a competitior;

b. Threatening legal action against, and cutthroat competition with, and eventually procuring, without monetary consideration, a 7-year non-compete agreement with, Dave O'Dell, a Florida parasailing operator who was considering operating a parasailing business on East Grand Traverse Bay in competition with Boyer;

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

d. Aggressively pursuing a similar non-compete agreement with Eric Harding, who was considering, and eventually commenced, operation of a parasailing business in competition with Boyer on East Grand Traverse Bay between the ParkShore and Boyer's location at the Sugar Beach.

20. For reasons which included bad weather conditions for parasailing in 2014, and that Boyer became financially overextended in his business, Boyer defaulted in payments on his asset purchase agreement with Casey Punturo, and also defaulted in his payments to Punturo on the lease agreement pursued, drafted and signed by Boyer.

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21. When Boyer defaulted on his agreement with Punturo, Punturo threatened and then commenced legal action against Boyer to collect the amount due. The suit requested damages of $24,500.

22. Boyer did not file responsive pleadings to Punturo's suit. Instead, with the guidance and at the advice of Defendant Kern ("Kern"), Boyer contacted, upon information and belief, first, the Grand Traverse County prosecutor's office, and when that office declined to take the case, the Michigan Attorney General, accusing Punturo of violations of the Michigan Antitrust Reform Act.

23. Thereafter, and in November, 2015, representatives of the Michigan Attorney General and the Michigan State police raided the offices of the ParkShore with a search warrant, confiscated the hard drive of Punturo's computer, and contacted counsel for Punturo, explaining Punturo was being investigated for criminal antitrust activity.

24. Later, and in February, 2016, Kern filed a lawsuit against Punturo and ParkShore in this Court ("the Antitrust Case"), alleging violations of the Michigan Antitrust Reform Act along with other claims in the originally filed and later amended pleadings, including tortious interference and unjust enrichment, and demanding damages of $781,500 plus attorney fees and other relief.

25. In May, 2016, the Michigan Attorney General commenced a criminal case against Punturo, not for antitrust violations, but for extortion, a felony punishable by 20 years in prison ("the Extortion Case").

26. All of Boyer's antitrust, unjust enrichment, and tortious interference claims were dismissed by this Court upon motion pursuant to MCR 2.116(C)(8) without Punturo or ParkShore ever filing a responsive pleading.

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27. Moreover, the Extortion Case was dismissed by the Grand Traverse County District Court at the preliminary examination stage, and Punturo was not bound over for trial. Although the Michigan Attorney General initially appealed the District Court's ruling, the appeal was later voluntarily dismissed and the criminal case is now closed.

28. Both the Antitrust Case and the Extortion Case were covered by media outlets; however, other than one announcement at the time the Extortion Case was filed, the Michigan Attorney General did not talk to the media, at all.

29. Yet, and despite the clear prohibitions (as to Defendant Kern) in Michigan Rules of Professional Conduct 3.6 regarding "Trial Publicity," Defendants regularly and aggressively talked to the media about both the Antitrust Case and the Extortion Case; and, as the following paragraphs demonstrate, they did so with the express purpose of embarrasing, humiliating, and otherwise harming Plaintiffs Punturo and ParkShore and their reputation, all motivated by their desire to coerce said Plaintiffs to pay them money not owed to them, for relief from the onslaught of defamatory and tortious statements to the media.

30. The statements made by Defendants as reported by the various news media included, without limitation, the following:

a. **February 28, 2016 Traverse City Record-Eagle:**

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

b. **May 10, 2016 (website) and May 11, 2016 (print) Traverse City Record-Eagle:**

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

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

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

Moothart argued in a response that Punturo's messages . . . were made to collect a rightfully owed debt. It stated that the Boyers initiated the contract, based on a text message Saburi Boyer sent Punturo. Kern said the correspondence showed otherwise. He said he doesn't know of any other antitrust case with such significant extortion. "This one involves more significant threats, and more significant sums of money," he said. "It affects the Traverse City tourism business, which is a very important industry to this area."

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

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

Kern: "disgusted that it goes on around here"

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

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

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

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

Reporter: "Why do you think they paid?"

Kern: "Fear. Believing it."

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

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Kern: "Yes."

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

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

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

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

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

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

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

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

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

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

f. Interlochen Public Radio website May 10, 2016:

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

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g. Northern Express November 19, 2016

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

With a new boat, Boyer needed more dock space. He said he decided to approach Punturo. He said he hoped enough time had passed, and he could lease space at the ParkShore again. "That's when he said, I've got a better idea. Why don't you stay the hell off my dock and pay me anyway," Boyer said in an interview.

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

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

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

31. The above-quoted statements of Defendants, either directly by Kern and/or Boyer and/or Boyers, or by Boyers by and through their attorney and agent Kern, accuse Plaintiffs Punturo and ParkShore of committing, and/or involvement in a conspiracy to commit, criminal acts subject to infamous punishment, including antitrust violations and extortion.

32. The above-quoted statements of Defendants, either directly by Kern and/or Boyer and/or Boyers, or by Boyers by and through their attorney and agent Kern, also accuse Plaintiffs Punturo and ParkShore of threats to harm Boyers for financial gain, and dishonest and/or unfair and/or illegal, immoral or unethical acts; and also that Plaintiffs Punturo and ParkShore lack honesty, ethics, openness, and objectivity in their business dealings.

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33. The above-quoted statements of Defendants were of and concerning Plaintiffs Punturo and/or ParkShore, as the case may be, for reasons which include without limitation that:

a. All statements were directly of and concerning Plaintiff Punturo:

b. The antitrust violations claimed to exist were based upon a contract to which ParkShore was a party;

c. By way of colloquium, the defamatory meaning of statements not directly referencing ParkShore attach to ParkShore, for reasons which include without limitation the identification of the ParkShore as the site of Boyer's prior business, the image of the ParkShore sign, hotel and beach in media reports, references to tourism in the Grand Traverse Region, references to Punturo as the owner of the ParkShore in the media, and the general identity of Punturo with the ParkShore.

34. The above-quoted statements of Defendants were factual in nature and were untrue.

35. As such, the above-quoted statements of Defendants constitute defamation *per se* under Michigan law, as they falsely impugn Plaintiffs Punturo and ParkShore in their business, and/or falsely impute the commission of crimes.

36. The above-quoted statements of Defendants were also, upon information and belief, made with actual malice and common law malice, and at least negligently.

37. Without limitation, Defendants' malicious motivations in one or more of the above-quoted statements is evidenced by the following facts.

38. The arraignment in the Extortion Case was scheduled for Tuesday, May 10, 2016. On Friday, May 6, Kern, for and on behalf of Boyers, left a voice mail with Plaintiffs' attorney, who

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stated he "was calling to discuss a settlement offer that'll help get your client out of hot water on Tuesday morning."

39. Accordingly, Plaintiff's counsel returned Kern's call on May 6, 2016, asking what the settlement offer was and how it would help get his client out of hot water on the following Tuesday morning, when the arraignment was scheduled.

40. During the telephone conference, Kern stated, among other things, that:

a. The "best opportunity to help out" Punturo in the criminal case was to "make it right by my clients";

b. The way to do this would be for Punturo to settle the pending antitrust case by buying Boyer's parasailing business, with assets worth, at the very most, $250,000, for $800,000;

c. Punturo could then use the purchase of Boyer's business as a defense in the Extortion case by explaining it was a way for Punturo to "mitigate the harm, pay restitution, and just make it right";

d. Punturo would be required to pay restitution in the Extortion Case and Kern's proposal would lessen the impact of the victim statements, by Punturo having shown he was sorry and wanted to make up for the harm he had caused Boyers and obtain their forgiveness, and that this would "deflate the sails of the Attorney General":

e. Kern was going to amend the complaint in the Antitrust Case adding additional facts in affidavits from Boyers and other documents that would make Punturo look bad; that he had already gotten a call from the Traverse City Record-Eagle that about the

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upcoming arraignment and the Record-Eagle planned to be there; and that if Kern had to file an amended complaint on Monday, May 9, 2016, the day before the arraignment in the Extortion Case, with the additional things attached, "they're gonna couple that with what happens on Tuesday morning and blow it up" into "a bigger story";

f. If Judge Rodgers "never sees that whole nastiness play out" it would be better for Punturo at the extortion sentencing, comparing Puturo's possible fate in the Extortion Case to that of the defendant in the Grand Traverse County case of *People v Derek Bailey*, in which the defendant was sentenced to 25 years in prison, and warning Punturo's attorney that Judge Rodgers had been "ticked off the most" by Defendant Bailey's refusal to accept responsibility for what he did, and that the proposal Kern was offering was a way for Punturo to be able to claim that even before he got criminally arraigned, he "was already trying to make it right" with a covenant not to compete that would be legal, and although the prior covenant not to compete was (according to Kern) illegal, that Punturo could say that before he might not have gone about it the right way but that could be explained by claiming "we're not all that familiar with antitrust up here"; and

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

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41. Two days later, on May 8, 2016, Kern e-mailed Punturo's counsel regarding the proposal, reducing the money requested to $750,000, and stating among other things that as a part of the proposed deal, "[m]y clients will publicly acknowledge that they are impressed by Bryan taking a proactive approach to rectify any harm caused by any misunderstandings and that all has been forgiven and forgotten," and also, that "[m]y clients will appear as subpoenaed to do so, or requested by your client to do so, to inform any relevant parties that they bear no hard feelings," and that "[t]here will be a non-disparagement agreement through which neither will speak ill of each other moving forward." Exhibit A.

42. The May 8, 2016 e-mail also states "[s]ince your client has more going on with both his situation and taking over the business, we are open to hearing his concerns/requests," and "[w]e think this will produce the most positive result for everyone." Punturo's counsel did not respond to the e-mail.

43. The next day, May 9, 2016, Kern left a voice mail for Plaintiffs' counsel, stating he was "just calling to see where we stand." This message was left at 1:53 p.m. Punturo's counsel did not respond to this message.

44. At 5:01 p.m. the same day, on May 9, 2016, as threatened in the May 6 phone call, Kern filed an amended complaint in the Antitrust Case with additional documents and an extensive affidavit signed by Defendant Danielle Boyer.

45. Moreover, and as outlined above, on May 10 after the arraignment, Kern and Boyer, 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 granting interviews and

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unequivocally accusing Plaintiffs Punturo and ParkShore of criminal acts and otherwise defaming said Plaintiffs as outlined and detailed above.

46. On February 3 and 6, 2017, Plaintiffs, through counsel, served upon Defendants demands for retraction of the above-quoted defamatory statements and requests that Defendants cease and desist from publishing further such statements. **Exhibit B.**

47. Defendants did not retract any of the statements made.

Count I: Defamation

48. Plaintiffs incorporate by reference the preceding paragraphs of this complaint.

49. Defendants' statements set forth above were of and concerning Plaintiffs Punturo and ParkShore.

50. Defendants' statements set forth above were false.

51. Defendants' statements set forth above were made knowingly and willfully, with a reckless disregard for their truth or falsity, or at least in a negligent manner.

52. Defendants' statements were made with actual malice and common law malice.

53. Defendants' statements were unprivileged publications or communications to third parties.

54. Defendants' statements as set forth above indeed did harm the reputation of Plaintiffs Punturo and ParkShore, including without limitation as to said Plaintiffs' character and business character, honesty, integrity, ethics, and morality, and to thereby expose Plaintiff Punturo to contempt and ridicule, to interfere with Plaintiff Punturo's ability to enjoy the society, support, and

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friendship of other persons, and to injure and damage the business of Punturo and ParkShore and their ability to do business.

55. Defendant's false statements are actionable *per se*, and although actual and economic damages have resulted therefrom, injury and damages resulting therefrom are also presumed to exist.

56. Plaintiffs are entitled to recover attorney fees in this action pursuant to MCL 600.2911(7).

WHEREFORE, Plaintiffs Punturo and ParkShore request this Court enter judgment in their favor and against Defendant for presumed, actual, exemplary and punitive damages in excess of $25,000, in whatever specific amount this Court deems just and allowable by law, together with interest as an element of damages, statutory judgment interest since the date of filing of this complaint, costs of suit, and to the extent allowable by law, all actual attorney fees and costs incurred by Plaintiffs in this action, and such other and further relief that this Court deems just and equitable.

Count II – False Light Invasion of Privacy

57. Plaintiffs incorporate by reference the preceding paragraphs of this complaint.

58. Defendants' statements as set forth above were broadcast to a large number of people, and/or to the public in general.

59. Defendants' statements as set forth above were broadcasts of information that were unreasonable, highly objectionable, and highly offensive to a reasonable person, for reasons which include without limitation that such statements attributed to Punturo characteristics, conduct or beliefs that were false and placed Punturo in a false position, in other words, otherwise than Punturo is.

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WHEREFORE, Plaintiff Bryan Punturo requests this Court enter judgment in his favor and against Defendant for presumed, actual, exemplary and punitive damages in excess of $25,000, in whatever specific amount this Court deems just and allowable by law, together with interest as an element of damages, statutory judgment interest since the date of filing of this complaint, costs of suit, and to the extent allowable by law, all actual attorney fees and costs incurred by Plaintiff in this action, and such other and further relief that this Court deems just and equitable.

Count III – Tortious Interference With Business Relations

60. Plaintiffs restate and reallege, as if fully set forth herein, all preceding paragraphs of these pleadings.

61. Plaintiffs Punturo and ParkShore had business relationships or expectancies with prospective customers in their business, including without limitation hotel guests and customers scheduling parties and weddings at the ParkShore.

62. Defendants were aware of these business relationships and expectancies.

63. Defendants' acts and statements as outlined above, were intentional and improper interference with Plaintiffs' business relationships and expectancies, because they were unlawful acts in whole or in part and/or or lawful acts committed with malice and without justification, for the purpose of invading Plaintiffs Punturo's and ParkShore's business relationships and expectancies, and without limitation, in fulfillment of threats made to coerce said Plaintiffs to pay them money.

64. Defendants' actions and statements continue to cause disruption of and damage to said Plaintiffs' business relationships or expectancies.

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65. Defendants' interference with said Plaintiffs' business relationships and expectancies has damaged Plaintiffs, including in particular, and without limitation, the loss of a substantial amount of wedding and party bookings.

66. By way of example, no less than 37 parties who had booked weddings for the Summer of 2016, called Plaintiff Fawn Punturo with concerns regarding the continued viability of the ParkShore's operations and business, because no one wants to schedule a wedding at a venue that may be unable to service the needs indicated for such a momentous event.

67. Such wedding and similar bookings for Summer 2017 have fallen off precipitously from prior years, and Plaintiffs are informed and believe that this is directly and proximately caused by the acts and statements of Defendants as outlined and detailed above.

WHEREFORE, Plaintiffs Punturo and ParkShore request judgment in their favor and against Defendants, in whatever amount in excess of $25,000 that this Court deems just and allowable by law, as compensation for Defendants' intentional interference, interest as an element of damages, statutory judgment interest, all legally awardable attorney fees and costs, and such other and further relief that this Court deems just and equitable.

Count IV – Loss of Consortium

68. Plaintiffs restate and reallege, as if fully set forth herein, all preceding paragraphs of these pleadings.

69. As the direct and proximate result of the brutal onslaught of Defendants' media blitz, Plaintiff Bryan Punturo was severely damaged and hampered in his efforts as a partner and spouse to Plaintiff Fawn Punturo, who, despite Bryan Punturo's best efforts, naturally suffered a loss of

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love, companionship, society, comfort, sexual relations, solace, aid, assistance, enjoyment, conjugal affection, felicity, advice, counsel, cooperation, and mutual service.

WHEREFORE, Plaintiff Fawn Punturo requests that this Court enter judgment in her behalf and against Defendants for presumed, actual, exemplary and punitive damages in whatever amount in excess of $25,000 this Court deems just and allowable by law, plus interest, costs, and attorney fees, and whatever other and further relief this Court deems just and equitable.

Jury Demand

Plaintiffs demand a trial by jury.

Date: February 16, 2017

MOOTHART & SARAFA, PLC

By: /s/ Jonathan R. Moothart

Jonathan R. Moothart (P40678)
Attorney for Plaintiffs
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APPENDIX 5

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Parasailing Exclusivity Agreement

This Exclusivity Agreement (this "Agreement") is made effective as of May 7, 2014, between **Traverse Bay Parasail LLC** and **Saburi Boyer** of 4357 Thorn Crest, Traverse City, Michigan 49685 as its owner (collectively the "**Lessee**") and the **B & A Holdings LLC** (dba the "**ParkShore Resort**") and **Bryan Punturo** of 1401 US 31 North, Traverse City, MI 49686 (the "**Premises**"), as its owner (collectively the "**Lessor**").

Whereas Lessee and Lessor (collectively referred to herein as the "Parties") desire to enter into an exclusive agreement with regard to the use of the Premises for Parasailing Activities;

Whereas Lessee and Lessor are entering into this Agreement in good faith and are relying on its terms;

Whereas Saburi Boyer and Bryan Punturo have the appropriate legal capacity and intent to bind themselves personally and their respective business entities, which they have entered into this agreement on behalf of;

Covenants of the Agreement. Now, therefore, for and in consideration of the mutual covenants contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

Exclusive Use Rights. During the Exclusivity Period, the Lessor shall not lease, rent, use, occupy, or suffer or permit to be occupied, any part of the Premises or any other premises owned or controlled, directly or indirectly, either by Lessor, its successors, heirs, or assigns, or Lessor's principal owners, stockholders, directors, or officers or their assignees (the "Owners"), which are within **25 miles** of the Premises for the purpose of conducting therein or for use in Parasailing; and further, that if Lessor or owners own any land, or hereinafter during the term of this lease Lessor or Owners acquire any land including for purchase, lease, or use within such distance of the Premises, neither will convey the same without imposing thereon a restriction to secure compliance with the terms of this lease.

Covenant Not to Compete. During the Exclusivity Period, the Lessor agrees not to compete with Lessee by engaging in any Parasailing Activities within **25 miles** of the Premises, either directly or indirectly, through any affiliated party, agent, tenant, employee, family member, or otherwise, and Lessor shall not solicit, initiate, encourage, or entertain any offers or proposals relating to the operation of Parasailing Activities by Competitors of the Lessee. Lessor shall not receive or be deemed to receive any payment, right or other benefit either directly or indirectly from any Competitor of the Lessee. Lessor will not directly or indirectly own, manage, operate or invest in a Parasailing Business nor will its principal owners or affiliates be employed by, advise, consult with any firm or professional corporation engaged in the service of Parasailing within the restricted area and timeframe. In the event that the Court of competent jurisdiction finds any provision hereof to be unreasonable or unenforceable, by virtue of its scope, geographic area, or duration, the parties agree that said court shall modify and enforce said provisions to the fullest extent consistent with Michigan Law. Lessor acknowledges that the restrictions contained herein are reasonable as to time and scope and geographic area, necessary to protect the interests of Lessee and are not unduly burdensome to Lessor.

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Non-Disclosure Agreement. The terms of this Agreement are confidential, and the Parties shall not disclose the transaction or its terms to other parties outside of employees, family and associates that are intimately involved within the context of this relationship and except to their legal and tax advisors who shall also be bound to confidentiality, or as otherwise established in a separate Non-Disclosure Agreement (the "**Non-Disclosure**"), to the extent one is made.

Payment. In consideration for aforementioned covenants, Lessee promises to make annual payments (the "Lease Payment") to Lessor in the amount of $19,000 (nineteen thousand US dollars) per year. In each year of the Exclusivity Period, scheduled payments for that year shall be made as follows, unless otherwise modified by agreement of the parties, except the initial payment of $10,000 which will be paid upon execution of this Agreement rather than on April 1st:

Payment 1 - $10,000 April 1

Payment 2 - $4,500 July 1

Payment 3 - $4,500 August 1

Payments will be made payable to ParkShore Resort and expensed as a dockage fee. Lessor will issue a W-9 for the payments received so that Lessee can submit 1099-Misc for the payments made. Any Payment not received prior to the dates listed above will carry a Late Payment Fee of $1,000. If any Payment is not received within 10 days of the due date, it will cause this contract to be in default and will cause this Agreement to be terminated immediately thereafter. Payments will be personally guaranteed by both Saburi and Danielle Boyer as evidenced by the accompanying Guarantee Agreement.

Exclusivity Period. "Exclusivity Period" shall mean the Three **Year Period** starting May 7, 2014 and ending on October 31, 2016

Parasailing Activities. "Parasailing Activities" shall mean any and all aspects of parasailing operations, including, but not limited to, tangible and intangible assets, revenues, contract rights, trade names, employees, non-employee service providers, and other business relationships, etc.

Competitors. "Competitors" shall mean any person other than Lessee who is or has previously engaged in Parasailing Activities, desires to engage in future Parasailing Activities, or otherwise adversely impacts the Lessee in its lawful conduct of Parasailing Activities.

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IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

SIGNED, SEALED, AND DELIVERED

in the presence of:

Witness: DocuSigned by: Danielle Boyer 5/7/2014 15D54D0EBD85424... (Sign)

DocuSigned by: Saburi Boyer 5/7/2014 6EBBB80731B84A9...

Traverse Bay Parasail, LLC

Witness Name: Danielle Boyer

By Saburi Boyer (as Member-Manager)

SIGNED, SEALED, AND DELIVERED

in the presence of:

Witness: DocuSigned by: Danielle Boyer 5/7/2014 15D54D0EBD85424... (Sign)

DocuSigned by: Bryan Punturo 5/7/2014 64E1BEE5C8624B5...

B & A Holdings LLC

Witness Name: Danielle Boyer

By Bryan Punturo (as Member-Manager)

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APPENDIX 6

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STATE OF MICHIGAN
IN THE 13TH CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

SABURI & DANIELLE BOYER, and
TRAVERSE BAY PARASAIL, LLC, a
Michigan Limited Liability Company,

Plaintiffs,

v

BRYAN PUNTURO, individually, and
B & A HOLDINGS, LLC, a Michigan
Limited Liability Company,

Defendants.

Case No.: 16-_____-CP

Hon. _____

Brace Kern (P75695)
BEK Law, PLC
Attorney for Plaintiffs
3434 Veterans Drive
Traverse City, MI 49684
(231) 492-0277
Kern@LAW-BEK.com

There is a resolved civil action that arose out of the transaction or occurrence alleged in the Complaint. Defendants herein filed the action in 86th District Court to enforce the unlawful contract that is the subject of this matter. That case was assigned Case No. 15-1870-GC to the Honorable Michael Stepka. However, Defendants herein, as Plaintiffs in that matter, entered a dismissal without prejudice before Plaintiffs herein filed an Answer or appearance. **[Exhibit "1"]**.

COMPLAINT & JURY DEMAND

Plaintiffs, SABURI & DANIELLE BOYER and TRAVERSE BAY PARASAIL, LLC (collectively hereinafter "Plaintiffs"), by and through their attorney, Brace Kern of BEK LAW, PLC, for their Complaint and Demand for a Jury Trial on all issues, hereby state as follows:

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THE PARTIES, VENUE & JURISDICTION

1. Plaintiffs SABURI & DANIELLE BOYER are individuals residing in the County of Grand Traverse, State of Michigan.

2. Plaintiff TRAVERSE BAY PARASAIL, LLC is a Michigan limited liability company that has a place of business in the County of Grand Traverse, conducts business in the County of Grand Traverse, and has its registered office in the County of Grand Traverse.

3. Defendant BRYAN PUNTURO is an individual doing business in the County of Grand Traverse.

4. Defendant B & A HOLDINGS, LLC is a Michigan limited liability company that has a place of business in the County of Grand Traverse, conducts business in the County of Grand Traverse, and has its registered office in the County of Grand Traverse.

5. Venue is proper in Grand Traverse County based upon MCL §§ 600.1621(a) and 600.1629(1)(a)(i)&(ii).

6. Circuit court is the proper venue because this action sounds in a violation of the Michigan Antitrust Reform Act (1984 PA 274, as amended by 1987 PA 243) (hereinafter, the "Act"), which must be brought in a circuit court where venue is proper without regard to the amount in controversy. MCL § 445.775

7. This Court has jurisdiction over the subject matter of this lawsuit pursuant to MCL §§ 600.701, 600.705, 600.711, 600.715, 600.745 and 600.8035.

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COUNT I – FLAGRANT ANTITRUST VIOLATION

8. Plaintiffs restate each and every allegation contained herein as though fully set forth in this enumerated paragraph.

9. Defendants threatened, for the specifically articulated purpose of running Plaintiffs out of business, to unlawfully compete with Plaintiffs by controlling, fixing, and maintaining parasailing prices on East Grand Traverse Bay far below the market rate unless Plaintiffs agreed to pay Defendants to not compete with them.

10. In an unsuccessful attempt to avoid the harm threatened, Plaintiffs offered to lease space at the ParkShore Resort and pay rent to Defendants.

11. Defendants refused Plaintiffs' lease offer and countered "I would like to throw out a consideration not yet explored. That would be where you simply buy out my competition rights. Thus, you would secure the market as you desire and would not have to worry about me in the market... I would be willing to consider a non-compete for the sum of $20,000 per season."

12. Defendants threatened and coerced Plaintiffs by bragging about Defendants' history of price-fixing related to his Mirage Tanning Centers in Fort Wayne.

13. Defendants warned: "Please understand the decision may not be fully a financial consideration. This accessory business is simply a hobby for me and I don't have to make money at it. I can put a boat on the water without a payment as well and I can run trips all day and all summer at ½ the going rate or less. If I choose to, I can put two boats out there doing this and it won't change my lifestyle. I am currently doing exactly this with my tanning stores in Fort Wayne... I took my prices to $19. A few tried

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to join me but they had no staying power and returned to higher numbers. Two have since closed up shop. We now run to capacity every day and slowly they are dropping out of the market. I am not trying to scare you or intimidate you, I am just being straight forward... I can derail your position by doing exactly what I just presented and it does not have to make sense as general business practices dictate."

14. Defendants threatened: "The situation I spoke of in Fort Wayne has now come full circle. I have successfully taken so many customers off the table with my pricing that the competition wants to come to a truce... If you want to see proof of this go to our Mirage tanning website... At this point I have secured boats, crews and equipment. All are positioned and waiting for me to make the final move. If it set up an operation, I will not compete with you. We will not play on a level playing field. I will run a program that leaves you with no business... I will run two boats and $35 tandems. With this I will do 150-200 customers a day which is basically what the market has to offer... As I stated, I don't have to live off this and this scenario creates losses and basis considerations that simply don't harm me. For you, I can only speculate your fate... You are $8,000 away from stopping all of this. You can look at it as insurance that pays a premium. I will offer you the deal for 3 years... I will give you until 6pm today to give me an answer. If you elect to do the deal, I will have docs drafted and we will execute within 24 hours. At that time the first seasons payment will be due in full. These are my terms, the choice is yours. It's $8,000 away if you chose to take it. If not, the game is on exactly as I have spelled it out for you."

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15. Shortly thereafter, Plaintiffs spoke to Defendants over the telephone when Defendants gave Plaintiffs an ultimatum of paying them $19,000 per year for a non-compete agreement, or not only would Defendants run them out of business but "I will crush you" and "I will make your life a living hell."

16. Through threats of physical, financial and reputational harm to Plaintiffs, Defendants coerced and extorted Plaintiffs into signing a Parasailing Exclusivity Agreement and a Personal Guaranty (hereinafter, the "Agreement"). **[Exhibit "1"** at Exhibit "A"**]**.

17. The Agreement is unlawful because it is a contract between 2 or more persons in restraint of, or to monopolize, trade or commerce in the Traverse City parasailing market. MCL § 445.772 Unlawful contract, combination, or conspiracy.

18. The Agreement is unlawful because it seeks to exclude and limit competition and establish a monopoly in the Traverse City parasailing market. MCL § 445.773 Unlawful monopoly.

19. Defendants knew the Agreement was an unlawful restraint of trade because they insisted that it be written up as if between a Lessor and a Lessee, despite the fact that nothing was being leased.

20. Defendants knew the Agreement was an unlawful restraint of trade because they changed the title of the Agreement from "Covenant Not to Compete" to "Parasailing Exclusivity Agreement."

21. Defendants knew the Agreement was an unlawful restraint of trade because, in 1997, Assistant Attorney General Robert C. Ward, Jr. ordered Defendants to

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immediately halt their price-fixing efforts after the Mirage Tanning Center's competitors reported receiving threatening phone calls. **[Exhibit "2"]**.

22. Defendants' conduct toward Plaintiffs was flagrant and intentional because it was meant to, and did, threaten, intimidate and scare Plaintiffs into paying Defendants to not cause them harm, and Defendants have a history of such threatening behavior.

23. Defendants' verbal and written threats of physical, financial and reputational harm constitute coercion within the meaning of MCL § 750.462a(b)(i), and therefore violate the Michigan Penal Code.

24. Defendants' verbal and written threats of adverse financial consequences to Plaintiffs if they refused to sign the Agreement constitute financial harm within the meaning of MCL § 750.462a(e)(ii) & (iv), and are therefore unlawful.

25. Defendants' verbal and written threats constitute force within the meaning of MCL § 750.462a(f), and are therefore unlawful.

26. Reluctantly, Plaintiffs acquiesced by signing the Agreement and paying Defendants to not cause them harm.

27. Defendants received, as proceeds of extortion in violation of 18 USCA § 880, over $35,500 in cash from Plaintiffs.

28. Additionally, at the time Defendants proposed the Agreement, Defendants were aware of the existence of a contract between Plaintiffs and Defendant PUNTURO's son, known as the Asset Purchase Agreement (hereinafter "APA").

29. Even if Defendants were not aware of the APA, Defendants were aware of Plaintiffs' business relationship with Defendant PUNTURO's son.

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30. Defendants were aware of Plaintiffs' expectancy of purchasing all of the assets of Defendant PUNTURO's son's parasailing business.

31. As a direct and proximate result of having to pay Defendants extortion money, Plaintiffs were compelled to breach the APA.

32. Defendants' conduct of extortion and antitrust violations were an intentional and unjustified instigation of Plaintiffs' breach of the APA.

33. The compelled breach of the APA caused Plaintiffs to lose a $25,000 deposit that they had paid to Defendant PUNTURO's son at the time of executing the APA.

34. The compelled breach also caused Plaintiffs to lose a parasailing boat to Defendant PUNTURO's son, which lost Plaintiffs over $60,000 that was tied up in the boat upon default.

35. As a direct and proximate result of the loss of the parasailing boat and over $60,500 in lost operating capital, Plaintiffs sustained business losses arising from the inability to offer as many parasailing rides as would have been probable with the additional boat and operating capital.

36. The business losses sustained, as a result of the compelled breach of the APA, total approximately $140,000 in net proceeds from the 2014 and 2015 parasailing seasons.

37. When Plaintiffs failed to make an installment payment, Defendants wrote to Plaintiffs "[a]s you now have seen, and most likely knew, I am not like the rest. I have the means to pursue you and when I do so, I will take it full court. I will not settle until you are out of business. I will put a boat out with crews that run $39 tandems to the

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point that you will not have a trip next year. I will market it beyond your wildest imagination so that not one customer enters the county that does not know about ParkShore Parasail. You instilled this hatred within me, you defaulted on your agreement to abate me, and now you will realize my resolve to witness your demise."

38. Plaintiffs, as "person[s] threatened with injury or injured directly in his or her business or property by a violation of this act," seek "appropriate injunctive or other equitable relief against immediate irreparable harm, actual damages sustained by reason of a violation of this act, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees." MCL § 445.778(2).

39. Plaintiffs seek injunctive and equitable relief to prevent Defendants from following through on their threats of physical violence as well as on their price-fixing threats through a new parasailing business that Defendants recently started once Plaintiffs refused to pay any more extortion money. **[Exhibit "3"]**.

40. Plaintiffs seek trebling of the actual damages sustained based upon Defendants' flagrant violation of the Act. MCL § 445.778(2).

WHEREFORE, as a direct and proximate result of Defendants' violations of the Act, Plaintiffs demand actual damages sustained, in the amount of Two Hundred Sixty Thousand Five Hundred dollars ($260,500), trebled for a total award of Seven Hundred Eighty-One Thousand Five Hundred dollars ($781,500), plus appropriate injunctive and equitable relief, statutory interest, taxable costs, reasonable attorney's fees, and any other and further relief that this Court deems just and proper.

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COUNT II – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(On behalf of Plaintiff Mr. Boyer only)

41. Plaintiffs restate each and every allegation contained herein as though fully set forth in this enumerated paragraph.

42. Defendants' threats, coercion, extortion, antitrust violations, and vulgar correspondence to Plaintiffs were extreme and outrageous conduct that went beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community.

43. Defendants wrote to Mr. BOYER wherein he threatened "I would like to make sure there is no misunderstanding on what I think of you and where I will take you" "... now you will realize my resolve to witness your demise."

44. Defendants knowingly wrote to Plaintiffs with the intent to cause annoyance and to extort money from them. MCL § 750.390 Malicious annoyance by writing.

45. Through oral and written communications, Defendants maliciously threatened injury to Plaintiffs with the intent to extort money from them through the unlawful Agreement. MCL § 750.213 Malicious threats to extort money.

46. Defendants' conduct was intentional, or at least reckless, as it threatened, intimidated and scared Plaintiffs into paying Defendants to not cause them harm.

47. As a direct and proximate result of Defendants' conduct, Mr. BOYER suffered anxiety attacks, extremely elevated blood pressure, chest tightness and pains, and cardiac fluttering.

48. Due to his symptomology arising from the severe emotional distress, Mr. BOYER was denied clinical infusion of necessary chemotherapy treatments.

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49. Acknowledging Mr. BOYER's illness and using it as a point of leverage to compel the payment of extortion money, Defendants wrote that "[t]he disease will prevail and you will leave this world... I will welcome the judgment against Danielle as well and pursue her when you are no longer in the picture."

50. As a result, Mr. BOYER suffered severe emotional distress that was directly and proximately caused by Defendants' conduct that no reasonable man could be expected to endure.

WHEREFORE, Plaintiff Mr. BOYER prays for an award of damages for suffering severe emotional distress caused by Defendants' extreme and outrageous conduct of threatening, coercing, and harassing Plaintiffs into paying money to avoid unlawful harm, and for such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury on all counts.

Respectfully submitted,

BEK Law, PLC

Dated: February 23, 2016

By: Brace Kern

Brace Kern
Attorney for Plaintiffs
3434 Veterans Drive
Traverse City, MI 49684
(231) 492-0277
Kern@LAW-BEK.com

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APPENDIX 7

Press Release

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State of Michigan
Attorney General
Bill Schuette

Schuette Charges Traverse City Resort Owner in Extortion Plot

May 10, 2016

LANSING - Michigan Attorney General Bill Schuette today charged Traverse City resort owner Bryan Punturo, 58 of Williamsburg, with one count of Felony Extortion after threatening to allegedly run a parasailing company out of business if he was not paid thousands of dollars.

If convicted, Punturo faces up to 20 years in prison or up to a $10,000 fine.

"Extortion is illegal, plain and simple," said Schuette. "The actions allegedly taken here were a threat to another person's livelihood and are not a good business practice."

Punturo was arraigned before Judge Thomas Phillips of the 86th District Court on Tuesday, May 10, 2016. Bond was set at $100,000/personal recognizance with additional conditions of not leaving the state without prior approval of the court and other standard terms and conditions. Punturo's next court appearance is scheduled for May 23, 2016 at the 86th District Court.

Case Background

In the summer of 2014, Bryan Punturo allegedly threatened to run the owner of a local parasailing company out of business unless he was paid $19,000 per year. Punturo allegedly threatened that he had both the people and the resources to ensure the parasailing company went out of business. The victim paid thousands in the alleged extortion plot, in fear of losing his business. In August of 2015, an attorney for the victim contacted the Department of Attorney General regarding the extortion plot. An investigation was opened by the Department of Attorney General and has provided the evidence that resulted in the charges filed today.

A criminal charge is merely an accusation and the defendant is presumed innocent unless proven guilty.

Def-Appellants' Appendix 55a

Press Release

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Def-Appellants' Appendix 558a

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APPENDIX 8

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STATE OF MICHIGAN

IN THE 86TH DISTRICT COURT FOR THE COUNTY OF GRAND TRAVERSE

THE PEOPLE OF THE STATE OF MICHIGAN

V File No.: 16-3005-FY-1

BRYAN STEPHEN PUNTURO,

Defendant.

_____/

PRELIMINARY EXAMINATION - CONTINUED
EXCERPT OF PROCEEDINGS

BEFORE THE HONORABLE THOMAS J. PHILLIPS, DISTRICT COURT JUDGE

Traverse City, Michigan - Thursday, September 29, 2016

APPEARANCES:

For the People:
MR. MATTHEW K. PAYOK P64776
Assistant Attorney General
Corporate Oversight Division of Dept of Attorney General
525 Ottawa Street, Floor 6
Lansing, Michigan 48933
(517) 241-3033

For the Defendant:
MR. JONATHAN R. MOOTHART P40678
Moothart & Sarafa PLC
9915 Miami Beach Road
Post Office Box 243
Williamsburg, Michigan 49690
(231) 947-8048

MR. RICHARD C. KRAUSS P27553
Foster Swift Collins & Smith PC
313 South Washington Square
Lansing, Michigan 48933
(517) 371-8100

RECORDED BY:
Ms. Mary Wenger-Townsend, CER#8729
Certified Electronic Recorder

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PAGE

WITNESS: FOR PEOPLE

None.

WITNESS: FOR DEFENDANT

None.

EXHIBITS: IDENTIFIED RECEIVED

None.

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Traverse City, Michigan

Thursday, September 29, 2016 - 2:57 p.m.

(At 2:57 p.m., beginning of excerpt of proceedings)

THE COURT: Okay. Thank you all for your patience. I wanted to read *Morrissey* one last time, and I do appreciate that. And I wanted to look at the statute one last time.

This is an interesting case on several grounds. I looked at this case as far as Michigan is concerned, as the case that hasn't been decided before. I don't think *Morrissey* is really on point, in my opinion. I think it discusses a lot of issues, but it does not in my reading of it, talk about whether the issue before the *Morrissey* court was whether the threat was doing something legal. And the *Morrissey* case looked to me like that the person may have not been represented at the trial level; I don't know that. But maybe he was, because it talks about the defendant not objecting to jury instructions, as opposed to the defense attorney not objecting. But that really doesn't matter. But it does look like that whoever was going forward with that case could have done a better job at raising issues. I don't think this issue was raised there, or if it was it was not preserved on appeal. And we also have the issue that it is a non-published decision. I don't think it offers any guidance in this case.

Mr. Boyer wanted a situation where he didn't have to worry about competition. He apparently wanted a monopoly for

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his businesses. And that's what he ultimately got in this case. It's possible that he paid more than he wanted to pay because of what the defendant said -- probable, when you look at probable cause.

I think what the defendant did in this case, and his negotiations, was threaten Mr. Boyer with financial ruin basically, by saying that he would compete with him and he would put him out of business he would compete so well, which probably made Mr. Boyer want the non-compete even more.

When we look at the statute there are basically two different crimes set forth in the statute. One was maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property of another, basically. And if you threaten to accuse someone of a crime, that in itself is not illegal. I mean, it happens every day. It becomes illegal when someone says, "If you don't pay me money I will go to the prosecutor and tell them that you did this crime." So that is set out as a separate crime, under the statute.

And you have to wonder why that was set out separately, because if it -- if you can maliciously threaten an injury by doing a legal act, would that not be included in the second definition? I think that there is a reason that we have the two-part definition unrelated to doing something that

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is legal, to threaten something that is legal, reporting a crime. The other where we have the communication of maliciously threatening an injury to a person. Otherwise it would make no sense to have the two separate definitions because the first would be included in the second.

What Mr. Punturo did, in my opinion, was nasty and mean-spirited, reprehensible conduct in the way he negotiated. But there's been no law presented that what he did was illegal. Maybe it should be illegal. Maybe the Attorney General said that they have not looked into that fully as to whether it was an anti-trust violation. Maybe that should be done. As to whether it should be illegal or not, obviously, that's not in the Court's providence.

I find that the facts even taken in the way that most favor the prosecutor in this case, do not show criminal activity; there was no threat to do anything that was illegal.

I'm sure this case will go up, and up, and up, probably. And then we will ultimately get a, hopefully a clearer definition of what is legal and illegal.

So I base my decision on what I indicated, and I do adopt the briefs and arguments of the defense in making this decision. Obviously, this case will be probably appealed to the Circuit Court, and you're welcome to do that.

I find that as we go up in court's we usually find smarter judges too. Thank you.

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I think you did an excellent job, as did you. Thank you, all.

MR. MOOTHART: Your Honor, pursuant to the statute, 766.13, we would request that the Court discharge the defendant in an order.

MR. PAYOK: No objection with that, Your Honor.

THE COURT: Okay. Based upon my decision the defendant is discharged, bond cancelled. Thank you.

MR. MOOTHART: Thank you.

MR. PAYOK: Thank you, Your Honor.

THE COURT: It was a privilege to have both of you in my court. I'm sorry I had to disappoint one of you.

MR. MOOTHART: Thank you, Your Honor.

MR. PAYOK: All I can ask is that you give it your time and consideration, and you certainly did that.

MR. MOOTHART: And the last brief was written, for the most part, by Mr. Kraus. I don't want to deceive the Court with the idea that somehow that was all my drafting.

THE COURT: Mr. Kraus, are you still here?

MR. KRAUS: Yes, I am, Your Honor.

THE COURT: Thank you.

MR. KRAUS: Thank you.

THE BAILIFF: All rise.

(At 3:05 p.m., proceeding concluded)

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STATE OF MICHIGAN)
)
COUNTY OF GRAND TRAVERSE)

I certify that this transcript, consisting of 7 pages, is a complete, true, and correct transcript of the excerpt of proceedings and testimony taken in this case on Thursday, September 29, 2016.

11/15/2016
Date

Mary Wenger-Town
Ms. Mary Wenger-Townsend, CER#8729
Certified Electronic Recorder
280 Washington Street, Ste 121
Traverse City, MI 49684
(231) 922-4543

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APPENDIX 9

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86th DISTRICT COURT
280 WASHINGTON
TRAVERSE CITY, MI 49684

Court Recorder: MW

ACTION IN COURT

DEFENDANT: BRYAN STEPHEN PUNTURO ✓

CASE NO. 16-3005-FY-1

ADDRESS: 399 SAILVIEW LANE
CITY/STATE/ZIP CODE: WILLIAMSBURG, MI 49690

DOB: 9/21/1957
AGENCY ARRESTING: ATTORNEY GENERAL-CRIMINAL DIV

ATTORNEY: JONATHAN R MOOTHART ✓ Atty. A.G. M. Payok ✓

CTN NO. 961690047801
COMPLAINT NO. 2015011795

CHARGED OFFENSES
1. EXTORTION
2.
3.
4.

ATTORNEY
- ☐ WILL HIRE ATTORNEY
- ☐ REQUESTS ATTORNEY
- ☐ COURT APPOINTS ☐ COURT DENIES
- ☐ WILL REPRESENT SELF ☐ JAIL WAIVED

TYPE OF ACTION:

☐ ARRAIGNMENT ☐ WAIVES RIGHTS ☐ WAIVES ATTY ☐ MIRANDA GIVEN
☐ BW ARRAIGNMENT VERDICT/PLEA: CT 1 ☐ G ☐ NG ☐ MUTE ☐ NC ☐ DEFERRED
☐ VIDEO ARRN CT 2 ☐ G ☐ NG ☐ MUTE ☐ NC
☐ VIDEO BW ARRN CT 3 ☐ G ☐ NG ☐ MUTE ☐ NC ☐ DELAYED
☐ MOTION CT 4 ☐ G ☐ NG ☐ MUTE ☐ NC
☐ TRIAL BY COURT ☐ ACCEPTED ☐ REFUSED
☐ TRIAL BY JURY Cont.
☒ DISMISS ~~CT(S)~~ CASE
☒ PRELIM ☒ HELD ☐ WAIVED AMT ☐ BOUND OVER ☐ 21-DAY RULE WAIVED
☐ OTHER:_____ ☐ SEND NOTICE
☐ DEFT. FAILED TO APPEAR FOR_____ ☐ FORFEIT BOND, ISSUE BW Bond $_____

BOND: ☐ SET ☐ CONTINUED ☐ REDUCED ☐ RAISED ☐ FORFEITED ☐ REINSTATED
BOND AMOUNT: $_____ ☐ PR ☐ 10% ☐ C/S ☐ WITH ALL SAME TERMS & CONDITIONS
BOND CONDITIONS: ☐ NOT TO CONSUME OR POSSESS ALCOHOL OR DRUGS/INCLUDING MEDICAL MARIJUANA
OR ☐ MIND OR MOOD ALTERING SUBSTANCE ☐ NO NON-PRESCRIBED MEDICATIONS
☐ _____X DAILY PBT ☐ RANDOM PBT _____X MONTHLY ☐ DISCRETIONARY PBT
☐ BENCHMARK URINE SCREEN ☐ URINE SCREEN _____X MONTHLY ☐ DISCRETIONARY URINE SCREENS
☐ NO BARS/CASINOS ☐ NO WEAPONS OF ANY KIND ☐ NO VIOLENT/INTIMIDATING/HARRASSING BEHAVIOR
☐ RESPECT COURT STAFF/CARE PROVIDERS ☐ PROVIDE ALL MEDICATION PRESCRIPTIONS TO CRIMINAL CLERK
☐ NOT TO OPERATE M/V W/O VALID LICENSE/REG/INS ☐ NOT OPERATE W/PRESENCE OF ALCH/ILLEGAL OR CONTROLLED SUB

COURT ORDERS: ☐ PSI ☐ Criminal History ☐ Restitution ☐ Alcohol/Drug Assessment
☐ MENS Group Assessment ☐ Mental Health Assessment Pay Fee & Follow Recommendations
☐ To be fingerprinted immediately ☐ See Probation Dept. Today

SENTENCE: Probation for _____days/months
Fines $_____ Costs $_____ CV Fund $_____ JS $_____
CA Atty $_____ Restitution $_____ PAO Costs $_____
Arresting Agency Fee $_____ PAY TODAY OR SEE COLLECTIONS DEPT.

Jail:_____days credit for_____days to be served starting_____
AMOUNTS NOT PAID W/IN 56 DAYS OF DATE OWED SUBJECT TO 20% LATE PENALTY

ADDITIONAL COURT ORDERS: BOND CANCELLED

DEFENDANT: YOU MUST NEXT APPEAR IN COURT FOR:

☐	PRETRIAL/PROBABLE CAUSE CONF	ON_____	AT 9:00 / 8:30 AM
☐	PRELIMINARY EXAMINATION	ON_____	AT 11:00 AM
☐	SENTENCING	ON_____	AT 10:15 AM
☐	JURY SELECTION	ON_____	AT 1:00 PM
☐	JURY TRIAL	ON_____	AT 1:30 PM
☐	DRUG COURT REVIEW HEARING	ON_____	AT 8:00 AM
☐	OTHER:	ON_____	AT_____AM/PM.

SO ORDERED:_____ DISTRICT JUDGE/MAGISTRATE DATE: 9/29/16

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APPENDIX 10

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STATE OF MICHIGAN
IN THE 13TH CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

SABURI & DANIELLE BOYER, and
TRAVERSE BAY PARASAIL, LLC, a
Michigan Limited Liability Company,

Plaintiffs,

v

BRYAN PUNTURO, individually, and
B & A HOLDINGS, LLC, a Michigan
Limited Liability Company,

Defendants.

Case No.: 16-31459-CP

Hon. Philip E. Rodgers, Jr.

Brace Kern (P75695)
BEK Law, PLC
Attorney for Plaintiffs
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Traverse City, MI 49684
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Kern@LAW-BEK.com

Jonathan R. Moothart (P40678)
Moothart & Sarafa, PLC
Attorney for Defendants
PO Box 243
Williamsburg, MI 49690
(231) 947-8048
jon@moothartlaw.com

There is a resolved civil action that arose out of the transaction or occurrence alleged in the Complaint. Defendants herein filed the action in 86th District Court to enforce the unlawful contract that is the subject of this matter. That case was assigned Case No. 15-1870-GC to the Honorable Michael Stepka. However, Defendants herein, as Plaintiffs in that matter, entered a dismissal without prejudice before Plaintiffs herein filed an Answer or appearance. **[Exhibit 1].**

SECOND AMENDED VERIFIED COMPLAINT & JURY DEMAND

Plaintiffs, SABURI & DANIELLE BOYER and TRAVERSE BAY PARASAIL, LLC (collectively hereinafter "Plaintiffs"), by and through their attorney, Brace Kern of BEK LAW, PLC, hereby state as follows for their Second Amended Verified Complaint and Demand for a Jury Trial on all issues:

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THE PARTIES, VENUE & JURISDICTION

1. Plaintiffs SABURI & DANIELLE BOYER are individuals residing in the County of Grand Traverse, State of Michigan.

2. Plaintiff TRAVERSE BAY PARASAIL, LLC is a Michigan limited liability company that has a place of business in the County of Grand Traverse, conducts business in the County of Grand Traverse, and has its registered office in the County of Grand Traverse.

3. Defendant BRYAN PUNTURO is an individual doing business in the County of Grand Traverse.

4. Defendant B & A HOLDINGS, LLC is a Michigan limited liability company that has a place of business in the County of Grand Traverse, conducts business in the County of Grand Traverse, and has its registered office in the County of Grand Traverse.

5. Venue is proper in Grand Traverse County based upon MCL §§ 600.1621(a) and 600.1629(1)(a)(i)&(ii).

6. Circuit court is the proper venue because this action sounds in a violation of the Michigan Antitrust Reform Act (1984 PA 274, as amended by 1987 PA 243) (hereinafter, the "Act"), which must be brought in a circuit court where venue is proper without regard to the amount in controversy. MCL § 445.775

7. This Court has jurisdiction over the subject matter of this lawsuit pursuant to MCL §§ 600.701, 600.705, 600.711, 600.715, 600.745 and 600.8035.

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GENERAL ALLEGATIONS

8. Plaintiffs restate each and every allegation contained herein as though fully set forth in this enumerated paragraph.

9. Defendants threatened, for the specifically articulated purpose of running Plaintiffs out of business, to unlawfully compete with Plaintiffs by controlling, fixing, and maintaining parasailing prices on East Grand Traverse Bay far below the market rate unless Plaintiffs agreed to pay Defendants to not compete with them.

10. In an unsuccessful attempt to avoid the harm threatened, Plaintiffs offered to lease space at the ParkShore Resort and pay rent to Defendants.

11. Defendants refused Plaintiffs' lease offer and countered "I would like to throw out a consideration not yet explored. That would be where you simply buy out my competition rights. Thus, you would secure the market as you desire and would not have to worry about me in the market... I would be willing to consider a non-compete for the sum of $20,000 per season."

12. Defendants threatened and coerced Plaintiffs by bragging about Defendants' history of price-fixing related to his Mirage Tanning Centers in Fort Wayne.

13. Defendants warned: "Please understand the decision may not be fully a financial consideration. This accessory business is simply a hobby for me and I don't have to make money at it. I can put a boat on the water without a payment as well and I can run trips all day and all summer at ½ the going rate or less. If I choose to, I can put two boats out there doing this and it won't change my lifestyle. I am currently doing exactly this with my tanning stores in Fort Wayne... I took my prices to $19. A few tried

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to join me but they had no staying power and returned to higher numbers. Two have since closed up shop. We now run to capacity every day and slowly they are dropping out of the market. I am not trying to scare you or intimidate you, I am just being straight forward... I can derail your position by doing exactly what I just presented and it does not have to make sense as general business practices dictate."

14. Defendants threatened: "The situation I spoke of in Fort Wayne has now come full circle. I have successfully taken so many customers off the table with my pricing that the competition wants to come to a truce... If you want to see proof of this go to our Mirage tanning website... At this point I have secured boats, crews and equipment. All are positioned and waiting for me to make the final move. If it set up an operation, I will not compete with you. We will not play on a level playing field. I will run a program that leaves you with no business... I will run two boats and $35 tandems. With this I will do 150-200 customers a day which is basically what the market has to offer... As I stated, I don't have to live off this and this scenario creates losses and basis considerations that simply don't harm me. For you, I can only speculate your fate... You are $8,000 away from stopping all of this. You can look at it as insurance that pays a premium. I will offer you the deal for 3 years... I will give you until 6pm today to give me an answer. If you elect to do the deal, I will have docs drafted and we will execute within 24 hours. At that time the first seasons payment will be due in full. These are my terms, the choice is yours. It's $8,000 away if you chose to take it. If not, the game is on exactly as I have spelled it out for you."

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15. Shortly thereafter, Plaintiffs spoke to Defendants over the telephone when Defendants gave Plaintiffs an ultimatum of paying them $19,000 per year for a non-compete agreement, or not only would Defendants run them out of business but "I will crush you" and "I will make your life a living hell."

16. Through threats of physical, financial and reputational harm to Plaintiffs, Defendants coerced and extorted Plaintiffs into signing a Parasailing Exclusivity Agreement and a Personal Guaranty (hereinafter, the "Agreement"). **[Exhibit 1** at Exhibit A**]**.

17. The Agreement is unlawful because it is a contract between 2 or more persons in restraint of, or to monopolize, trade or commerce in the Traverse City parasailing market. MCL § 445.772 Unlawful contract, combination, or conspiracy.

18. The Agreement is unlawful because it seeks to exclude and limit competition and establish a monopoly in the Traverse City parasailing market. MCL § 445.773 Unlawful monopoly.

19. Defendants knew the Agreement was an unlawful restraint of trade because they insisted that it be written up as if between a Lessor and a Lessee, despite the fact that nothing was being leased.

20. Defendants knew the Agreement was an unlawful restraint of trade because they changed the title of the Agreement from "Covenant Not to Compete" to "Parasailing Exclusivity Agreement."

21. Defendants knew the Agreement was an unlawful restraint of trade because, in 1997, Assistant Attorney General Robert C. Ward, Jr. ordered Defendants to

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immediately halt their price-fixing efforts after the Mirage Tanning Center's competitors reported receiving threatening phone calls. **[Exhibit 2]**.

22. Defendants' conduct toward Plaintiffs was flagrant and intentional because it was meant to, and did, threaten, intimidate and scare Plaintiffs into paying Defendants to not cause them harm, and Defendants have a history of such threatening behavior.

23. Defendants' verbal and written threats of physical, financial and reputational harm constitute coercion within the meaning of MCL § 750.462a(b)(i), and therefore violate the Michigan Penal Code.

24. Defendants' verbal and written threats of adverse financial consequences to Plaintiffs if they refused to sign the Agreement constitute financial harm within the meaning of MCL § 750.462a(e)(ii) & (iv), and are therefore unlawful.

25. Defendants' verbal and written threats constitute force within the meaning of MCL § 750.462a(f), and are therefore unlawful.

26. Reluctantly, Plaintiffs acquiesced by signing the Agreement and paying Defendants to not cause them harm.

27. Defendants received, as proceeds of extortion in violation of 18 USCA § 880, over $35,500 in cash from Plaintiffs.

28. Additionally, at the time Defendants proposed the Agreement, Defendants were aware of the existence of a contract between Plaintiffs and Defendant PUNTURO's son, known as the Asset Purchase Agreement (hereinafter "APA").

29. Even if Defendants were not aware of the APA, Defendants were aware of Plaintiffs' business relationship with Defendant PUNTURO's son.

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30. Defendants were aware of Plaintiffs' expectancy of purchasing all of the assets of Defendant PUNTURO's son's parasailing business.

31. As a direct and proximate result of having to pay Defendants extortion money, Plaintiffs were compelled to breach the APA.

32. Defendants' conduct of extortion and antitrust violations were an intentional and unjustified instigation of Plaintiffs' breach of the APA.

33. The compelled breach of the APA caused Plaintiffs to lose a $25,000 deposit that they had paid to Defendant PUNTURO's son at the time of executing the APA.

34. The compelled breach also caused Plaintiffs to lose a parasailing boat to Defendant PUNTURO's son, which lost Plaintiffs over $60,000 that was tied up in the boat upon default.

35. As a direct and proximate result of the loss of the parasailing boat and over $60,500 in lost operating capital, Plaintiffs sustained business losses arising from the inability to offer as many parasailing rides as would have been probable with the additional boat and operating capital.

36. The business losses sustained, as a result of the compelled breach of the APA, total approximately $140,000 in net proceeds from the 2014 and 2015 parasailing seasons.

37. When Plaintiffs failed to make an installment payment, Defendants wrote to Plaintiffs "[a]s you now have seen, and most likely knew, I am not like the rest. I have the means to pursue you and when I do so, I will take it full court. I will not settle until you are out of business. I will put a boat out with crews that run $39 tandems to the

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point that you will not have a trip next year. I will market it beyond your wildest imagination so that not one customer enters the county that does not know about ParkShore Parasail. You instilled this hatred within me, you defaulted on your agreement to abate me, and now you will realize my resolve to witness your demise."

38. Plaintiffs, as "person[s] threatened with injury or injured directly in his or her business or property by a violation of this act," seek "appropriate injunctive or other equitable relief against immediate irreparable harm, actual damages sustained by reason of a violation of this act, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees." MCL § 445.778(2).

39. Plaintiffs seek injunctive and equitable relief to prevent Defendants from following through on their threats of physical violence as well as on their price-fixing threats through a new parasailing business that Defendants recently started once Plaintiffs refused to pay any more extortion money. **[Exhibit 3]**.

40. Plaintiffs seek trebling of the actual damages sustained based upon Defendants' flagrant violation of the Act. MCL § 445.778(2).

WHEREFORE, as a direct and proximate result of Defendants' violations of the Act, Plaintiffs demand actual damages sustained, in the amount of Two Hundred Sixty Thousand Five Hundred dollars ($260,500), trebled for a total award of Seven Hundred Eighty-One Thousand Five Hundred dollars ($781,500), plus appropriate injunctive and equitable relief, statutory interest, taxable costs, reasonable attorney's fees, and any other and further relief that this Court deems just and proper.

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COUNT I – FLAGRANT ANTITRUST VIOLATION – UNLAWFUL CONTRACT (MCL 445.772)

41. Plaintiffs restate each and every allegation contained herein as though fully set forth in this enumerated paragraph.

42. Defendants extorted Plaintiffs into entering into a parasailing exclusivity agreement by threatening them with physical, financial and reputational harm.

43. Historically, Mr. Punturo was part of a group who physically assaulted Mr. Boyer outside of Travino's Restaurant after Mr. Boyer confronted Mr. Punturo for throwing away a new rack of Traverses Bay Parasailing marketing materials.

44. Moments before the parasailing exclusivity agreement was executed by Plaintiffs, Defendants threatened Plaintiffs and provided an ultimatum of paying them $19,000 per year for a non-compete agreement, or not only would Defendants run them out of business but Mr. Punturo told Mr. Boyer "I will crush you" and "I will make your life a living hell."

45. On May 5, 2014, Defendants created the idea of selling their competition rights by writing: "*I would like to throw out a consideration* ***not yet explored***. That would be *where you simply buy out* ***my competition rights***. Thus, *you would* ***secure the market*** as you desire and would *not have to worry about me in the market*... I would be willing to consider a non-compete for the sum of $20,000 per season." **[Exhibit 4].**

46. By the sale of Defendants' competition rights, Defendants meant that they were offering to accept payment in exchange for not competing with Plaintiffs in the local parasailing market. **[Exhibit 5, pg. 3, #5].**

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47. Plaintiffs tried to obtain a lease and avoid a non-compete which they saw no value in as they wrote "with a lease I would at least get dockage, signage, parking, and foot traffic. With a non-compete I'm not sure what I would get." **[Exhibit 4, pg. 4]**.

48. In response, Mr. Punturo explained that he intended to initiate predatory pricing by writing that his actions "may not fully be a financial consideration... and *I don't have to make money at it*. I can put a boat on the water... and I can run trips all day and all summer at *½ the going rate or less*" which is a below cost price even without Mr. Punturo's overhead of a lease or valid parasailing operator's insurance.

49. Mr. Punturo continued his threats of below cost price fixing by explaining how the temporary losses would not hurt him when he wrote "I can put two boats out there doing this and *it won't change my lifestyle*."

50. Then, Mr. Punturo coerced Plaintiffs by bragging about his other successful price fixing efforts by writing "I am currently doing exactly this with my tanning stores in Fort Wayne... I took my prices to $19... Two have since closed up shop... slowly they are dropping out of the market... I am not ***trying to scare you or intimidate you***, I am just being straight forward."

51. Mr. Punturo admitted that his proposed business plan was to lose money through the parasailing business just to run Plaintiffs out of business, which short terms losses would be offset by his Resort and Tanning Salon profits until such time as the parasailing competition was gone so that he would then have a monopoly over the market when he wrote "*I can derail your position* by doing exactly what I just presented and *it does not have to make sense* as general business practices dictate. The paper losses I

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would incur would simply reduce my tax liability within the big picture along with *creating some large financial basis on the books for a future return* to offset. I am not *trying to start a hostile conversation* here."

52. The Parasailing Exclusivity Agreement severely restrained trade in the Traverse Bay area parasailing market because it sought to exclude any competition from occurring at the primary historical location, and it increased the cost per ride to consumers during the 2014 season as Plaintiffs had to raise their prices to cover the costs added by the Parasailing Exclusivity Agreement, which significantly reduced the number of rides provided by Plaintiffs during the 2014 season.

53. Plaintiffs did not benefit from the Parasailing Exclusivity Agreement, rather Plaintiffs lost customers and revenues from their attempt to cover the costs of the Parasailing Exclusivity Agreement by increasing the cost per ride to consumers.

54. Defendants possess the primary location for parasailing in the history of this industry in this market, and there are few other locations viable for such a business.

55. Since 1996, there has always been a parasailing business operating out of the site of the ParkShore Resort, which no other Resort can claim.

56. Defendants admitted that the Parasailing Exclusivity Agreement sought to exclude parasailing from that ParkShore Resort location. **[Exhibit 5, pg. 7, #28]**.

57. Historically, there has never been more than two parasailing business operating in the Traverse Bay area at the same time.

58. Since 2002, nobody other than Mr. Punturo and his son have been competing with Plaintiffs.

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59. After Defendants forced the Parasailing Exclusivity Agreement on Plaintiffs, Mr. Punturo's business partner in his Mirage Tanning Salons, Eric Harding, began leasing space at Break'n Waves to a new parasailing competitor, Judd Fifarek of Grant Traverse Parasail, on whose website the ParkShore Resort advertises.

60. Although Mr. Boyer agreed to provide a non-compete agreement template, Defendants were extorting him to do so and also dictated all of the terms to be contained therein, including: the amount of payments, the timeframes therein, who needed to be parties, that Plaintiffs needed to execute Personal Guarantees, that the title of the agreement be changed to "parasailing exclusivity agreement," that the party identifications therein be changed to lessor and lessee despite the fact that nothing was being leased, that Defendants reserved the right to final edits, and that if Plaintiffs failed to immediately provide a template then Defendants would write the agreement themselves, which terms Plaintiffs feared would worsen if they allowed Defendants to do so. **[Exhibit 6]**.

61. Plaintiffs were against the idea of signing the agreement and committed themselves to standing up to Defendants, until Mr. Boyer spoke to Mr. Punturo on the telephone and Mr. Punturo threatened "I will crush you" and "I will make your life a living hell," after which Plaintiffs felt like they had to sign the agreement to keep Defendants from causing them significant harm. **[Exhibit 7]**.

62. An exception to the wrongful-conduct rule applies here because the parties do not stand in pari delicto because Defendants culpability is greater than Plaintiffs because Plaintiffs were acting under circumstances of oppression, imposition, hardship,

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undue influence, and great inequality of bargaining power and age. **[Exhibit 8, pg. 7, ¶ D. Different Degrees of Culpability]**.

WHEREFORE, as a direct and proximate result of Defendants' violations of the Act, Plaintiffs demand actual damages sustained, in the amount of Two Hundred Sixty Thousand Five Hundred dollars ($260,500), trebled for a total award of Seven Hundred Eighty-One Thousand Five Hundred dollars ($781,500), plus appropriate injunctive and equitable relief, statutory interest, taxable costs, reasonable attorney's fees, and any other and further relief that this Court deems just and proper.

COUNT II – FLAGRANT ANTITRUST VIOLATION – UNLAWFUL MONOPOLY (MCL 445.773)

63. Plaintiffs restate each and every allegation contained herein as though fully set forth in this enumerated paragraph.

64. Mr. Punturo's other businesses and financial capabilities created within him the requisite market power necessary to sustain short term losses in the parasailing industry until such time as the competing businesses went out of business at which time Defendants intended to possess a monopoly with an expectation of a large future return.

65. As written by Defendants in acknowledging that their plan included taking losses until Plaintiffs were out of business: "The paper losses I would incur would simply reduce my tax liability within the big picture along with creating some large financial basis on the books for a future return to offset." **[Exhibit 4, pg. 5]**.

66. While Defendants' short term losses would temporarily benefit consumers through below cost rides, once Defendants ran all of the competition out of business the ultimate cost to consumers was to be higher in the long run because consumers would

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have to pay much higher prices, due to the lack of competition, to offset the prior losses that Defendants took to obtain the monopoly.

67. As written by Defendants to demonstrate their market power: "If I set up an operation, I will not compete with you. We will not play on a level playing field. I will run a program that leaves you with no business..." "[t]his property is the most profitable hotel on the bay..." "we have income coming from every direction..." "I have the lot across the street that I will shuttle from so the hotel does not feel the burden..." "[w]ith my ability to market it throughout the online presence of the ParkShore I am sure I can increase the business awareness. Also a factor is the history of the location. We have 20+ years of rental operation s at our location and it is a staple within the community..." "[i]f I take $220,000 out of the market, you will have no use for the second boat in operation that you speak of..." "[a]s I state, I don't have to live off this and this scenario creates losses and basis considerations that simply don't harm me. **[Exhibit 4]**.

68. Defendants even admitted that their plan to derail Plaintiffs' business did not make sense as general business practices dictate when Defendants wrote: "I can derail your position by doing exactly what I just presented and it does not have to make sense as general business practices dictate." **[Exhibit 4, pg. 3]**.

69. Defendants bragged about how their increased market power assists them in bullying competitors that cannot afford long term losses when they wrote: "Please understand that the decision may not be fully a financial consideration. This accessory business is simply a hobby for me and I don't have to make money at it..." "and it won't change my lifestyle. I am currently doing exactly this with my tanning stores in Fort

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Wayne..." "[a] few tried to join me but they had no staying power and returned to the higher numbers. Two have since closed up shop. We now run to capacity every day and slowly they are dropping out of the market. I am not trying to scare or intimidate you, I am just being straight forward." **[Exhibit 4, pg. 3]**.

70. Defendants intended to create a monopoly as evidenced by their written attempt to implicate Plaintiffs as the party who desired a monopoly when Defendants wrote to Plaintiffs: "I do understand your desire to *take the market*," and "[t]hus, you would *secure the market* as you desire." **[Exhibit 4, pg. 5]**. Regardless of the projected implication that it was Plaintiffs' desire for a monopoly, Defendants acknowledgement that the Parasailing Exclusivity Agreement would enable Plaintiffs to "take the market" and "secure the market" is an admission by Defendants that the Parasailing Exclusivity Agreement was intended to create a monopoly in the local parasailing market.

71. Defendants' ability to exclude competition from the historic primary location for parasailing in the local market, coupled with Defendants' deeper pockets, prior involvement in the industry, willingness and financial capacity to suffer loses for the purpose of forcing competition out of business, and Defendants' inside knowledge of the pending merger between Plaintiffs and Plaintiffs' only competitor bestowed Defendants with the requisite market power to dictate whether Plaintiffs would possess a monopoly in the local parasailing market during the 2014 season.

72. When Defendants extorted Plaintiffs into signing the Parasailing Exclusivity Agreement, Traverse Bay Parasail was the only parasailing business in the market

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because Plaintiffs had fairly purchased the only other competitor, which was Mr. Punturo's son's parasailing business.

73. Defendants' exclusion of the primary historical location for parasailing in the local market for the purpose of generating income from the sale of their competition rights created a severe restraint to local parasailing as Plaintiffs became the only parasailing business in the area during the 2014 season.

74. Regardless of whether being the only parasailing provider in the local market created a monopoly, Defendants act of selling their competition rights while acknowledging that the effect would provide Plaintiffs with the market power to "take" and "secure the market" constitutes an attempt to create an unlawful monopoly.

75. After the Parasailing Exclusivity Agreement caused Plaintiffs to become the sole parasailing provider in the area, Plaintiffs had to raise their price per ride to cover the costs of the payments to Defendants under the Parasailing Exclusivity Agreement.

76. As a result of the added cost of paying Defendants, the 2014 local parasailing consuming market suffered from paying higher costs per ride than they would have paid in the absence of the Parasailing Exclusivity Agreement, and Plaintiffs suffered decreased revenues due to a decline in the consuming market's willingness to bear the costs added because of the Parasailing Exclusivity Agreement.

77. As a direct and proximate result of Defendants' extortion of Plaintiffs through the Parasailing Exclusivity Agreement, Defendants attempted to, and did, create a monopoly during the 2014 season in the local parasailing market that resulted in higher

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prices being charged to consumers and decreased revenues to Plaintiffs who neither wanted a monopoly imposed upon them nor benefitted from it.

WHEREFORE, as a direct and proximate result of Defendants' violations of the Act, Plaintiffs demand actual damages sustained, in the amount of Two Hundred Sixty Thousand Five Hundred dollars ($260,500), trebled for a total award of Seven Hundred Eighty-One Thousand Five Hundred dollars ($781,500), plus appropriate injunctive and equitable relief, statutory interest, taxable costs, reasonable attorney's fees, and any other and further relief that this Court deems just and proper.

COUNT III – INTENTIONAL INTERFERENCE WITH A CONTRACT / BUSINESS EXPECTANCY

78. Plaintiffs restate each and every allegation contained herein as though fully set forth in this enumerated paragraph.

79. Defendants were aware of the existence of a contract between Plaintiffs and Defendant PUNTURO's son, known as the Asset Purchase Agreement (hereinafter "APA").

80. Even if Defendants were not aware of the APA, Defendants were aware of Plaintiffs' business relationship with Defendant PUNTURO's son.

81. Defendants were aware of Plaintiffs' expectancy of purchasing all of the assets of Defendant PUNTURO's son's parasailing business.

82. As a direct and proximate result of having to pay Defendants extortion money, Plaintiffs were compelled to breach the APA.

83. Defendants' conduct of extortion and antitrust violations were an intentional and unjustified instigation of Plaintiffs' breach of the APA.

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84. The compelled breach of the APA caused Plaintiffs to lose a $25,000 deposit that they had paid to Defendant PUNTURO's son at the time of executing the APA.

85. The compelled breach also caused Plaintiffs to lose a parasailing boat to Defendant PUNTURO's son, which lost Plaintiffs over $60,000 that was tied up in the boat upon default.

86. As a direct and proximate result of the loss of the parasailing boat and over $60,500 in lost operating capital, Plaintiffs sustained business losses arising from the inability to offer as many parasailing rides as would have been probable with the additional boat and operating capital.

87. The business losses sustained, as a result of the compelled breach of the APA, total approximately $140,000 in net proceeds from the 2014 and 2015 parasailing seasons.

WHEREFORE, as a direct and proximate result of Defendants' extortion and intentional interference with Plaintiffs' Asset Purchase Agreement or expectancy therefrom, Plaintiffs demand actual damages sustained, in the amount of Two Hundred Sixty Thousand Five Hundred dollars ($260,500), plus appropriate injunctive and equitable relief, statutory interest, taxable costs, reasonable attorney's fees, and any other and further relief that this Court deems just and proper.

COUNT IV – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(*On behalf of Plaintiff Mr. Boyer only*)

88. Plaintiffs restate each and every allegation contained herein as though fully set forth in this enumerated paragraph.

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89. Defendants' threats, coercion, extortion, antitrust violations, and vulgar correspondence to Plaintiffs were extreme and outrageous conduct that went beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community.

90. Defendants wrote to Mr. BOYER wherein he threatened "I would like to make sure there is no misunderstanding on what I think of you and where I will take you" "... now you will realize my resolve to witness your demise." **[Exhibit 9]**.

91. Defendants knowingly wrote to Plaintiffs with the intent to cause annoyance and to extort money from them. MCL § 750.390 Malicious annoyance by writing.

92. Through oral and written communications, Defendants maliciously threatened injury to Plaintiffs with the intent to extort money from them through the unlawful Agreement. MCL § 750.213 Malicious threats to extort money.

93. Defendants' conduct was intentional, or at least reckless, as it threatened, intimidated and scared Plaintiffs into paying Defendants to not cause them harm.

94. As a direct and proximate result of Defendants' conduct, Mr. BOYER suffered anxiety attacks, extremely elevated blood pressure, chest tightness and pains, and cardiac fluttering.

95. Due to his symptomology arising from the severe emotional distress, Mr. BOYER was denied clinical infusion of necessary chemotherapy treatments.

96. Acknowledging Mr. BOYER's illness and using it as a point of leverage to compel the payment of extortion money, Defendants wrote that "[t]he disease will prevail

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and you will leave this world... I will welcome the judgment against Danielle as well and pursue her when you are no longer in the picture."

97. As a result, Mr. BOYER suffered severe emotional distress that was directly and proximately caused by Defendants' conduct that no reasonable man could be expected to endure.

WHEREFORE, Plaintiff Mr. BOYER prays for an award of damages for suffering severe emotional distress caused by Defendants' extreme and outrageous conduct of threatening, coercing, and harassing Plaintiffs into paying money to avoid unlawful harm, and for such other and further relief as this Court deems just and proper.

COUNT V – UNJUST ENRICHMENT

98. Plaintiffs restate each and every allegation contained herein as though fully set forth in this enumerated paragraph.

99. Michigan case law has long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another.

100. Through malicious threats of force and harm, Defendants coerced and extorted Plaintiffs into signing the Parasailing Exclusivity Agreement and paying Defendants to not cause them harm.

101. Due to the unenforceability of the Parasailing Exclusivity Agreement that was executed under duress, coercion and extortion, no adequate legal remedy exists and, therefore, the law will imply a contract in order to prevent unjust enrichment because Defendants inequitably received and retained a benefit from Plaintiffs.

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102. Defendants received a benefit from Plaintiffs in an amount exceeding $35,000.

103. Plaintiffs received no benefit from being extorted out of $35,000.

104. Through the wrongful receipt and retention of extortion funds from Plaintiffs in an amount exceeding $35,000, Defendants have been unjustly and inequitably enriched at Plaintiffs' expense.

WHEREFORE, Plaintiffs pray for an award of restitutionary damages for paying Defendants over $35,000 in extorted funds from which Plaintiffs received no benefit and it would be unjust and inequitable to allow Defendants to retain the funds extorted, and for such other and further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs demand a trial by jury on all counts.

VERIFICATION

I, Saburi Boyer, hereby verify the truth and accuracy of the information contained within this Complaint.

Respectfully submitted,

Dated: June 20, 2016 By: Saburi Boyer

BEK Law, PLC

Dated: June 20, 2016 By: Brace Kern

Attorney for Plaintiffs
3434 Veterans Drive
Traverse City, MI 49684
(231) 492-0277
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APPENDIX 11

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1 STATE OF MICHIGAN

2 IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

3

4 SABURI & DANIELLE BOYER,
Plaintiff

5

v. Case No. 16-31459-CP

6

BRYAN PUNTURO,

7 Defendant,

8

9 MOTION

10

11 BEFORE THE HONORABLE PHILIP E. RODGERS, JR.

12 Monday, July 11, 2016 - Traverse City, Michigan

13

APPEARANCES:

14

For the Plaintiff: BRACE KERN (P75695)

15 3434 Veterans Dr.
Traverse City, Michigan 49684

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17

For the Defendant: JONATHAN R. MOOTHART (P40678)

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20

21

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Traverse City, Michigan 49684

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24

25

Appellant's Exhibit H

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1 I N D E X

2 WITNESSES

3 None

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5 EXHIBITS

6 None

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1 Traverse City, Michigan
2 Monday, July 11, 2016 - at 10:12 a.m.
3 (Court and counsel present)
4 THE COURT: Boyer versus Punturo, time and date
5 set for a renewed motion for summary disposition.
6 Good morning.
7 MR. KERN: Good morning, Judge, Brace Kern, for
8 the plaintiff.
9 THE COURT: Mr. Moothart.
10 MR. MOOTHART: Hi.
11 THE COURT: Your appearance for the record.
12 MR. MOOTHART: Yes. Jon Moothart for the
13 record.
14 THE COURT: And, hello.
15 MR. MOOTHART: Defendants in the case.
16 THE COURT: Let's begin.
17 MR. MOOTHART: Your Honor, again, I'll start by
18 asking if you have any questions?
19 THE COURT: Not at this point.
20 MR. MOOTHART: This is a motion regarding
21 several counts of the plaintiff's complaint, I'll go
22 through those in the order they appear in the complaint.
23 Count I is under Section 1 of the Sherman
24 Act/really Section 2 of the Michigan Act, illegal
25 contract combination of conspiracy, this is different

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1 from the other count, which is a monopoly claim. As the
2 Court observed in our last go around on this, and the
3 Court did see our reply brief. We made clear in our
4 reply brief whether or not there is a per se violation
5 even alleged as a threshold matter there has to be an
6 allegation, and a credible allegation. I found it
7 interesting the plaintiff cited the Twombly case, I think
8 that's pretty much the cutting edge of summary
9 disposition pleading dismissal case law, it has to be a
10 reasonably plausible pleading.
11 And, anyway, on severe restraint of trade the
12 removal of one potential competitor doesn't cut it.
13 Again, facts alleged in the complaint, this is a
14 parasailing business, the person being "restrained" has
15 no boat, no parachute, no parasail business operating
16 from his location. And, I think it's interesting the
17 reasoning he has no parasail business operating from his
18 location is because Mr. Boyer bought that business that
19 was operating there from my client's son, so he shut that
20 down. And, then he shut down my client with signing a
21 contract with him and yet his allegation is there is a
22 severe restraint of trade by the conclusion of this
23 merely potential competitor in a business where you drive
24 a boat around on a public waterway on a bay in Lake
25 Michigan which is contiguous to several states in the St.

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1 Lawrence Seaway. And, most importantly, in a market
2 where the plaintiff's complaint itself alleges the recent
3 entry of a new competitor 100' from the Parkshore Resort
4 on East Bay. I don't think you can read plaintiff's
5 complaint as alleging any restraint of trade, certainly
6 no material restraint of trade and certainly absolutely
7 clearly as a matter of law, as they would be required to
8 allege a severe restraint of trade, it doesn't allege
9 that. And, again, it doesn't matter whether it's
10 allegedly per se or not. We cited the Michigan
11 Psychotherapy Clinics, the Barrows case and Jefferson
12 Parish case as a threshold matter you have to show that
13 there is a substantial and severe restraint to justify
14 per se condemnation even if it is arguably per se
15 illegal. And, on that issue of whether or not it's per
16 se illegal, the plaintiff's cited cases in four areas,
17 they cites cases regarding per se illegality of
18 territorial allocation, market allocation, customer
19 restrictions and group boycotts from various sort of
20 confusing array of concurring and consenting opinions. I
21 don't know if the Court noticed that a lot of law they
22 cited is from descents, but it really doesn't matter,
23 because this case involves none of these.
24 The first category of cases cited by the
25 plaintiff's, territorial allocation and market

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1 allocation. You take west bay, I'll take east bay, I
2 won't take people from rides on west bay, you promise not
3 to take rides from people on east bay. We stay out of
4 each others territory, or we stay out of each others
5 market. The noncompete in this case is a one way
6 noncompete, it gives Mr. Boyer east bay free of Mr.
7 Punturo and a 25 mile radius around the Parkshore,
8 doesn't limit Mr. Boyer in any way. It's not splitting
9 up territory, it's not territory allocation, it's not a
10 market allocation, it's not a customer restriction.
11 That's another category of cases they cite, you sell to
12 or buy from these customers in Wisconsin and I'll sell to
13 or buy from these customers over here in Michigan or
14 that's also territorial, maybe not a good argument or
15 maybe not a good example. But, people above $250,000 in
16 income and people below $250,000 in income, we'll split
17 it up that way; again, that's not present here. So we're
18 getting a one way restriction on one of the parties.
19 And, it's certainly not a group boycott let's we all get
20 together as big players in the say we agree, we say,
21 we're not going to sell to or buy from that guy, we don't
22 like him. There is not one case cited in the plaintiff's
23 brief that this type of contract that's at issue in this
24 case is a per se violation. Even if we assume contrary
25 to the other allegations in the complaint that there was

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1 an allegation of severe restraint of trade, which would
2 be necessary to even allege a per se violation.
3 Also, there is no anti-trust injury alleged,
4 and this is what the Court focused on at the last hearing
5 as well as the severe restraint. The Court said, how do
6 you get to sue somebody for signing a contract with you
7 and claim the contract is illegal? I have it laid out
8 what the Court said about it. What that concern,
9 intellectual problem as the Court described, boils down
10 to is there is no anti-trust injury. Even if the
11 contract were somehow to be deemed to run afoul with the
12 anti-trust law, one party to such contract can't sue the
13 other. You have to prove in an anti-trust case, and this
14 is the Tennessee and Truck Stop case we cited, that the
15 plaintiff's injury must result -- have to allege in this
16 case, plaintiff's injury resulted from the decrease in
17 competition. Damages must flow from the alleged
18 anti-competitive aspects of the agreement in order for
19 there to be anti-trust injury. Plaintiff can only
20 recover if the loss stems from a competition reducing
21 aspect or a fact of the defendant's behavior.
22 The plaintiffs complaint about in this case is
23 that they were forced to pay the defendants so plaintiffs
24 could continue to operate their parasailing business
25 without competition from defendants, it's not anti-trust

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1 injury. Anti-trust injury is -- I mean, in this case we
2 have Mr. Boyer buys Mr. Punturo's son's business, drafts
3 and signs a contract precluding Mr. Punturo from bidding
4 and he claims that contract is illegal, it's ridiculous,
5 it doesn't allege any anti-competitive harm. A proper
6 plaintiff is a consumer that comes along and says, hey,
7 you guys made this deal and I have to pay twice as much
8 to go for a parasail ride, that's anti-trust injury.
9 Not, you made a deal with me and I paid you not to
10 compete with me and I'm going to sue you for not
11 competing, it's silly. In addition to being silly and
12 contrary to common sense, it doesn't always work this
13 way, but anti-trust law is based on common sense and
14 injury of a type that anti-trust laws was designed to
15 address, which is competition has been reduced and there
16 is damage from the reduction of competition, not from
17 payments to reduce competition or from the inability to
18 make the payments to introduce competition. From the
19 actual reduction of competition itself I was harmed, and
20 that can ipso facto never be one of the parties to an
21 alleged illegal contract making that claim.
22 And, as we said in our reply brief, the
23 anti-trust injury requirement is even more important if
24 you are going to call something a per se violation. If
25 you are going to, in the interest of efficiency, say all

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1 these types of contracts are per se illegal because of
2 the way that they are entered into, I made that argument
3 about how I think that's not the case, but even if you
4 assumed it were the anti-trust injury is required for
5 anti-trust injury as in the Atlantic Richfield case, 1990
6 US Supreme Court says, underscored, even more important
7 in showing injury.
8 So, that's Count I of the complaint, that's
9 what plaintiffs responded to in their response to the
10 motion, that's it, and they didn't respond to anything
11 else.
12 But our motion is also about a few other
13 counts, the monopoly claim. Again, the alleged per se
14 illegality of a contract is only relevant to Section 1 of
15 the Sherman Act, Section 2 of the Michigan Act contract
16 combination of conspiracy, it's not relevant. There are
17 doctrines of per se illegality and group boycotts and
18 things like that. But, if you are going to say this is a
19 per se illegal contract because it's a horizontal
20 restraint of trade that has nothing to do with the
21 monopoly claim. So to the extent there was some thought
22 that, a ha, I figured out I have an argument that this is
23 per se illegal therefore I don't need to worry about
24 market power, market share and my allegation that I admit
25 that you didn't try to create your own monopoly you tried

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1 to impose one on me is incorrect. Those are essential
2 elements of the monopoly claim. But, there has been no
3 attempt to respond to a motion on any of those things.
4 And, you know, I briefed this already, I argued
5 it once, it wasn't responded to this time, a mere threat
6 is not enough. There is no attempt because there is no
7 affirmative act alleged to establish a monopoly. There's
8 no market share, no market power and a proposed entry
9 into the market that you're not in yet as a matter of law
10 insufficient basis for this claim, decided in the Pastore
11 case, the Dahl case, the same case. I'm going to go
12 compete with you some day and plaintiff said that guy
13 said he was going to compete with me and he said that and
14 I think I would have a monopoly if he did, the Courts
15 uniformly held it's not enough, it's no good, and, again,
16 that's not what they are saying. They are saying, well,
17 you induced us somehow to create our monopoly for us or
18 impose it on us, and there is no anti-trust injury
19 either. Anti-trust injury on a monopoly is a consumer or
20 a -- typically a consumer that says prices are too high
21 because of this monopoly.
22 This Court's specifically directed an amended
23 complaint to address the predatory pricing scheme claim,
24 which I guess has been abandoned now, I'm not sure, that
25 the lack of market power of the defendants and the

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1 admissions that -- the admission that the defendants did
2 not try to create their own monopoly and there is nothing
3 in there in their response.
4 Your Honor, it's troubling, their response
5 says, and this is a quote directly from their response,
6 Page 3, every case cited by the defendants was based on
7 Federal Rule 56 or (C)(10), that's what it says. First
8 of all, I can't imagine how it matters whether a case
9 citing the law was after trial or what kind of motion it
10 was based on. But, relevant especially to our request
11 for sanctions, I think this is an important thing for the
12 Court to see and understand. We cited cases in our
13 brief, anti-trust cases, that were decided on class
14 certification motions after trial, that's the Brunswick
15 case on Rule 56, on Rule 12C, judgment on the pleadings.
16 And, we also contrary to this claim that -- I mean, which
17 I guess implies we didn't cite any, every case cited by
18 the defense was based on Federal Rule of Procedure 56.
19 We cited two cases under Rule 12. Rule 12B6, the Brunson
20 Communs case, this is on the monopoly claim, the Court
21 held that the fact defendants products may herein after
22 replace all competition does not mean defendant has
23 actual monopoly power, that's Pastore, the Dahl concept,
24 future entry into market, that was on decided on 12B6.
25 The Court said penalties for anti-trust violations are

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1 severe and is a good social policy as well as legal
2 requisite to require specific allegations which clear
3 precedent demand before allowing the anti-trust case to
4 proceed. And, we also cited Tennessee Truck Stop case,
5 which is a Sixth Circuit case, this is on the other Count
6 I, contract combination of conspiracy. Sixth Circuit
7 case, where the Court held alleged violation must reduce
8 competition and plaintiffs injury must result from
9 decrease in that competition rather than some other
10 consequence of defendant's action, that's Hornbook
11 anti-trust law. And, the Tennessee Truck Stop case, 6th
12 Circuit, said at the end, sometimes, and this is to the
13 point of what kind of case, what kind of motion, or after
14 trial, or whatever it is, that generated the opinion of
15 law, the Court says sometimes as in the Brunswick case it
16 is not until after a full blown trial that it is
17 determined that there has been no anti-trust injury, if
18 this determination can be made with confidence on the
19 basis of the complaint it is better to cut the string
20 before substantial costs of litigating anti-trust cases
21 have occurred. All right. These are cases we cited.
22 The plaintiffs told you every case cited by the
23 defendants was based on Federal Rule 56 or (C)(10), so it
24 was obvious they didn't read the cases we cited before
25 they told you that the cases we cited were not based on

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1 Rule 12B6. And, also the cases that we cited that were
2 based on Rule 12B6, specifically said why it was
3 important where the complaint fails to state a claim that
4 you dismiss it under Rule 12B6 or in Michigan under Rule
5 (C)(8). They would say something so blatantly false it's
6 emblematic of the frivolous of these proceedings.
7 Count I and Count II, anti-trust claims should
8 be dismissed and sanctions should be awarded.
9 I also have some brief comments about the other
10 counts of the complaint.
11 Count III is tortuous interference, we move to
12 dismiss this, again, there is no response.
13 THE COURT: There is not any point in
14 addressing something that wasn't responded to in writing.
15 MR. MOOTHART: Not unless you want me to, your
16 Honor.
17 THE COURT: I don't.
18 MR. MOOTHART: Same would be true, your Honor,
19 of -- would be true of the unjust enrichment claim
20 recently added, there is no response to the motion on
21 that as well.
22 There is an expressed contract covering the
23 same subject matter, the only thing I would remind the
24 Court, and the reason I'm doing this is it might have
25 only been in my first motion on this. But, if it is I

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1 think it's only in my first motion in terms of wrongful
2 acts that could support a tortuous interference claim.
3 We cited two cases in our motion, the Hayes case and the
4 Dahl case, threats to compete and drive another guy out
5 of business are not illegal, it has to be more than a
6 mere threat. Even a statement that that's made with
7 malice is not illegal, assuming there were, so.
8 Thank you.
9 THE COURT: All right, thank you.
10 Mr. Kern.
11 MR. KERN: Thank you.
12 Beginning with Count I for the unlawful
13 contract, what was referenced as far as (C)(8) motions
14 was there was no authority cited as to the pleading
15 requirements. And, since this is a (C)(8) motion we are
16 pointing out there is no special requirement for pleading
17 an anti-trust claim. Now, so, what we did is we attached
18 a copy of the contract to say this is unlawful, we
19 indicate why. And, I think the pleadings adequately put
20 them on notice of a claim that they are facing, that is
21 the minimum requirements for (C)(8), motion as to the
22 Court's considerations of rule, reason, pleading
23 requirements, we made some adjustments to the complaint.
24 Number one was requisite market power. We
25 indicated there are only two parasailing businesses in

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1 Traverse City, historically over 20 years one has been at
2 Parkshore Resort, that is the market power of the
3 defendants for one in this pre-discovery case. This
4 contract removed 50 percent of the competition, the only
5 competition in parasailing in this market.
6 Second, as far as severe restraint of trade, we
7 are pointing out the difference between 50 percent of the
8 market is a severe restraint, if you take half of that
9 away you are going to effect the market.
10 And, I can move right into damages that the
11 Court found troubling. And, it said, I don't understand
12 how one competitor can be claiming damages from another
13 competitor agreeing not to compete with them. You have
14 to look at this business, a parasailing business is an
15 impulse recreational activity, people generally do it
16 because they see it going on as they are coming into
17 town. These boats ride along US-31 and are there only
18 for a short period of time, when their run is completed
19 they are way out of sight from shore. They have wind
20 considerations, depth considerations, crowds on the water
21 they are trying to avoid. But, when they are driving
22 along US-31 with that boat and parachute advertising on
23 that parachute generates most calls, customers see it and
24 say that's cool, I want to do that.
25 Now, with my client's boat as it runs by that

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1 shoreline it's only there for a brief period of time and
2 gone and out of view. When there's more competitors on
3 the water, more parasailing businesses, those are coming
4 in right behind, and there's more shoots and more boats
5 flying along US-31 and it overall improves the market for
6 parasailing, more people see it, more people say I want
7 to do it. They get to a hotel room, see a flier, it says
8 Traverse City Parasail and that's what I saw out there
9 I'm going to call it up and do it and they impulsively do
10 it. Now, you'll learn from discovery that in 2014 when
11 there was only my client's business on the water there
12 was a drop out significantly in the parasailing market
13 that was due to lack of advertising. You don't have that
14 other business running along the water and more
15 visibility then the overall market suffers and my client
16 suffered as a result of that. The contract is what
17 created that impact on the commerce on parasailing on
18 East Bay. So, my client lost business. It's the same
19 thing for the American dairy farmers, you'll notice "you
20 got milk" campaign, that is not one single business
21 trying to promote its sale of milk, it's trying to sell
22 the overall customer interests in that market and they
23 assume competitors will get their market share from that.
24 You take one major competitor, the only competitor in
25 parasailing, take that boat off the water, it reduces the

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1 availability of the product availability.
2 Aside from that, there's the most obvious
3 $35,000 paid in advancement of the unlawful contract, I
4 don't know how that can be said in anything other than
5 the anti-trust violation damages.
6 Now, as for the contract itself. The last time
7 that the Court considered whether it was properly pled,
8 it did so primarily off the cases cited by the defendant
9 due admittedly to lack of citing by plaintiffs not
10 realizing we are getting into talking about the full
11 substance of the anti-trust claim rather than just are
12 the defendants on notice of the claim that's been
13 asserted against them.
14 And, as we get into this anti-trust claim, the
15 first step is a step the defendants skipped, their whole
16 brief went right past determining what type of conspiracy
17 it is before saying, you didn't plead requisite market
18 power severe restraint in trade. They skipped the
19 identification of, is this horizontal conspiracy or
20 vertical conspiracy?
21 Horizontal conspiracy is between competitors.
22 A vertical conspiracy is when a manufacture and
23 distributor conspired together. Right now there is a new
24 one rising in the law about InBev, the beer company, the
25 Belgian company that bought out Bud Light. They see a

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1 rise in the craft brew businesses and they want to
2 discourage craft brews so they are creating an incentive
3 program to distributors, saying if you sell 98 percent of
4 InBev products then we're going to give you a bonus.
5 And, the craft breweries are saying, is this going to be
6 an anti-trust violation, that's your vertical conspiracy,
7 it's between your manufacturer and your distributor.
8 We have two competitors, Mr. Punturo, we
9 already added his exhibits, demonstrated his
10 competitiveness in this industry. He has an
11 advertisement that he created in order to start a
12 business as soon as my client quit paying, we just
13 recently received e-mails that demonstrate he was trying
14 to create that business as soon as he learned about my
15 client's agreement to purchase the other parasailing
16 business on the water. He even said in his papers, I got
17 the boats, the people, everything is in motion ready to
18 go. He was a competitor for over 20 years, he himself
19 drove the boat out there on the water, he got in trouble
20 from the Coast Guard for not having a captain's license
21 and doing that. He is a competitor, therefore is
22 horizontal conspiracy. The conspiracy is the contract
23 itself, an agreement combination between two people to
24 restrain trade. Two people are competitors and therefore
25 it's a horizontal conspiracy.

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1 Now, what type of conspiracy gets into reading
2 the contract itself. A market allocation is identified
3 by the language of the contract as 25 geographical miles.
4 Within this 25 geographical mile area that market is
5 going to be allocated from one competitor to the other
6 competitor, it's a direct unreasonable per se illegal
7 contract for that reason alone.
8 Then, you get into the second aspect of it, the
9 customer limitation. We will not touch any parasailing
10 customer, it didn't have anything to do with running
11 boats off there, jet skis, any other kind of water
12 recreational activity was I will stay out of your market
13 for 25 miles and stay away from parasailing customers for
14 25 miles. So it becomes not only a market allocation,
15 but also a customer litigation, you combine those two
16 together there can be no other explanation other than
17 unreasonable per se. And, Mr. Moothart would like to say
18 that the removal of one potential competitor does not cut
19 it when it comes to severe restraint of trade, that
20 cannot possibly be the scenario when there are only two
21 competitors in the entire area, there are three in the
22 entire state, you have Mackinaw and you have Traverse
23 City, anybody who wants to parasail in Michigan that's
24 the only place you are going. Once this contract was
25 signed it went from three options to two options.

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1 Now, when you get into the Wrongful Conduct
2 Rule, which we already previously argued is an
3 affirmative defense and need not be pleaded against from
4 the plaintiff's side of the view; nonetheless, we cited
5 the case of Orzel, which defines the differing degrees of
6 culpability. If one person acting under duress,
7 coercion, extortion enters into the contract they
8 certainly have a different degree of culpability than the
9 person who coerced them, intimidated them or extorted
10 them, and that gives my client the ability to overcome
11 the wrongful conduct rule affirmative defense. That's
12 for predatory price fixing, that is where Mr. Moothart is
13 correct, this is only threats. He made threats of
14 unlawful price fixing in order to coerce and extort my
15 client into signing the contract, those threats are not
16 the act that's being complained of. The act is the
17 contract. The act is what's wrong, the contract itself,
18 not the threats that got him to sign the contract. So
19 there is no predatory price fixing in itself claim, that
20 is just a demonstration of the threats being made to
21 induce, coerce my client into signing the agreement.
22 The monopoly claim is essentially Count I. But
23 without regard to the contract, the contract is then the
24 act of the attempt to monopolize. These two claims are
25 alternative theories for lack of a better word, one does

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1 not require any attempt to monopolize, two does. But two
2 does not require a contract, but one does. We believe we
3 have both scenarios here because of the severe restraint
4 being there is only one competitor and it becomes a
5 monopoly when you take it out of the market. Because
6 this is premature we didn't know the full scenario in
7 which they were attempting to monopolize, as much as we
8 now learned from the criminal aspect going on. As it
9 turns out once Mr. Punturo signed the agreement and took
10 himself out of market and left only one business it was
11 believed at that time we thought a monopoly was being
12 created in my client. Now it turns out that we learned
13 his business partner, defendant's business partner in the
14 tanning salon is the next competitor to enter the market
15 in parasailing. And, Mr. Punturo helped set up his
16 protege, Eric Harding, in his own business to compete
17 with Mr. Boyer. And, after having already got Mr. Boyer
18 to sign this agreement to pay him $20,000 per year not to
19 compete out of that document he now increased my client's
20 overhead by 20 grand above what Mr. Harding has to pay.
21 Mr. Harding can now undercut the market in his own way
22 because he doesn't have to pay $20,000 that my client has
23 to pay.
24 Now, I'm sure there is more we're going to
25 learn through the process of discovery when it comes to

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1 the acts in order to monopolize that business with Eric
2 Harding, we just do not yet have that information, we
3 just received a bunch recently.
4 When you get into the other claims of tortuous
5 interference, it's concerning that I hear the Courts say
6 you are not interested in hearing a response to something
7 that wasn't responded to in the brief.
8 THE COURT: That's right. I'm not here to
9 listen to arguments that you didn't care to put into your
10 brief, I never do that.
11 MR. KERN: If the complaint is adequately pled
12 for tortuous interference it should need any bolstering
13 from a brief to stand.
14 THE COURT: Sobeit. You don't get to argue
15 something you didn't write about.
16 MR. KERN: Fair enough. That's the only point
17 I wanted to make is we rest on our pleadings being
18 adequately pled when it comes to the issues of tortuous
19 interference.
20 THE COURT: Mr. Kern, I would think even you
21 would have to recognize, this does seem a bit upside
22 down. I would have assumed, without having read all
23 these briefs, you would have been here initially to argue
24 that the contract was unenforceable, it was induced by
25 fraud and coercion, your client was perhaps in some

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1 fashion extorted and seeks restitution of money he's
2 paid. Instead, you are telling me your client signed the
3 contract, that the threats weren't the wrong, that the
4 contracts the wrong, your client signs a contract to
5 reduce competition but that the competition would be
6 better for him and would make his business more
7 profitable. But, you are complaining because the
8 defendant has sent someone else to be a competitor, whose
9 competition theoretically would benefit your client.
10 I'm going to take a look at this, I'll give you
11 a written opinion.
12 I guess I'm going to be candid on the record, I
13 think I was before. Again, this is not an area which I
14 claim to have any expertise, but I will acknowledge that
15 what's happening here, the clear behavior that's
16 documented in text messages or e-mails is abhorrent, it's
17 ridiculous, it's absurd, it's immature, it's stupid.
18 But, the way you are going about addressing it, you've
19 got be baffled.
20 So I'm going to take another look at this. I
21 will --
22 MR. KERN: The unjust enrichment claim does
23 what you mentioned about seeking restitution, that's
24 exactly what it is when a contract is unenforceable.
25 THE COURT: Maybe that's all you've got left, I

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1 don't know, I'll take a look at it.
2 MR. KERN: In the intentional interference
3 claim he understands there is a contract with this client
4 and extorts him into paying and breaches the contract as
5 a direct intentional tortuous interference that was
6 originally pled in the anti-trust claim but only
7 separated out in the next amended complaint to be
8 separate and apart from anti-trust label attached to it.
9 THE COURT: 14 to 28 days you'll get a written
10 opinion.
11 MR. MOOTHART: Your Honor --
12 THE COURT: No, sir, I've had enough. Thank
13 you think, I've had enough.
14 MR. KERN: Thank you, your Honor.
15 MR. MOOTHART: Thank you, your Honor.
16 (11:13 a.m. - proceedings concluded)
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1
2 CERTIFICATE OF OFFICIAL COURT REPORTER
3
4 STATE OF MICHIGAN
5 COUNTY OF GRAND TRAVERSE
6
7 I, Karen M. Copeland, Official Court Reporter in and for
8 the County of Grand Traverse, State of Michigan, do
9 hereby certify that this is a true and correct transcript
10 of my stenotype notes with the assistance of
11 Computer-Assisted Transcription to the best of my ability
12 of the proceedings held before the Honorable Philip E.
13 Rodgers, Jr., Circuit Court Judge in the matter of BOYER
14 v. PUNTURO, File No. 16-31459-CP, on Monday, July 11,
15 2016.
16
17
18
19 S/: Karen M. Copeland
Karen M. Copeland, CSR-6054, RPR
20 Official Court Reporter
21
22 Dated: This 28th day of November, 2016
23
24
25

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APPENDIX 12

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

SABURI & DANIELLE BOYER, and
TRAVERSE BAY PARASAIL, LLC, a
Michigan Limited Liability Company,

Plaintiffs,

v

File No. 2016031459CP
HON. PHILIP E. RODGERS, JR.

BRYAN PUNTURO, individually, and
B & A HOLDINGS, LLC, a Michigan
Limited Liability Company,

Defendants.
/

Brace E. Kern (P75695)
Attorney for Plaintiffs

Jonathan R. Moothart (P40678)
Attorney for Defendants

DECISION AND ORDER GRANTING
DEFENDANTS' RENEWED MOTION FOR SUMMARY DISPOSITION

Saburi Boyer and Danielle Boyer own and operate Traverse Bay Parasail, LLC (collectively the "Plaintiffs"). Bryan Punturo, through his company B & A Holdings, LLC, (collectively the "Defendants") is an owner of the Parkshore Resort on East Bay. Traverse Bay Parasail operates out of the Parkshore Resort. On May 7, 2014, Defendants and Plaintiffs entered into a "Parasailing Exclusivity Agreement."[1] The Agreement prohibits Defendants from leasing, renting, using or occupying the Parkshore, or any property within 25 miles, for the purpose of conducting parasailing activities for a period of three years.[2] Furthermore, in exchange for a total of $57,000, the Defendants agreed not to compete with the Plaintiffs by

[1] Incorporated into and attached to the Agreement was a Personal Guaranty. The Agreement and Guaranty together shall be referred to as the Contract.
[2] See Parasailing Exclusivity Agreement.

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"engaging in any Parasailing Activities within 25 miles of the [Parkshore], either directly or indirectly" until October 31, 2016.[3]

The Plaintiffs filed a two-count Complaint on February 23, 2016.[4] On May 10, 2016, Plaintiffs filed an Amended Complaint, alleging Flagrant Antitrust Violation – Unlawful Contract (Count I), Flagrant Antitrust Violation – Unlawful Monopoly (Count II), Intentional Interference with a Contract/Business Expectancy (Count III) and Intentional Infliction of Emotional Distress (Count IV).[5] Plaintiffs then filed a Second Amended Complaint on June 20, 2016.[6] In each complaint filed, Plaintiffs claim that Defendants threatened to unlawfully compete with Plaintiffs by controlling, fixing and maintaining parasailing prices below the market rate unless Plaintiffs paid Defendants not to compete. Furthermore, Plaintiffs claim they were coerced into signing the Contract through "threats of physical, financial and reputational harm."[7]

On May 27, 2016, Defendants filed a Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and for Sanctions Pursuant to MCR 2.114, MCR 2.625(A)(2) and MCL § 600.2591. The motion requests that the Court dismiss, with prejudice, Counts I, II and III of the Plaintiffs' Amended Complaint. The Court heard oral arguments by the parties on July 11, 2016. After review of the evidence submitted and careful consideration of the parties' claims, the Court now issues this written decision and order for the reasons stated herein.

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, tests the legal sufficiency of a claim.[8] Only the legal basis of the complaint is examined.[9] The factual allegations of the complaint are accepted as true, along

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[3] *Id.* The parties agreed that Plaintiffs would pay $19,000 for each year of the Exclusivity Agreement, versus a lump sum payment. Defendants previously filed a complaint in the 86th District Court, Case No. 15-1870-GC, against the Plaintiffs for breach of contract for failure to pay pursuant to the Contract.

[4] Count I alleged Flagrant Antitrust Violation and Count II alleged Intentional Infliction of Emotional Distress, as to Saburi Boyer only.

[5] Count IV pertains only to Saburi Boyer.

[6] The Second Amended Complaint adds a fifth count (V) for unjust enrichment.

[7] The Second Amended Complaint states, "Although Mr. Boyer agreed to provide a non-compete template, Defendants were extorting him to do so and also dictated all of the terms to be contained therein, including: the amount of payments, the timeframes therein, who needed to be parties, that Plaintiffs needed to execute Personal Guarantees, that the title of the agreement be changed to "parasailing exclusivity agreement," that the party identifications therein be changed to lessor and lessee despite the fact that nothing was being leased, that Defendants reserved the right to final edits, and that if Plaintiffs failed to immediately provide a template then Defendants would write the agreement themselves, which terms Plaintiffs feared would worsen if they allowed Defendants to do so."

[8] *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998).

[9] *Feyz v Mercy Mem Hosp*, 475 Mich 663; 719 NW2d 1 (2006).

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with any inferences which may fairly be drawn therefrom.[10] Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied.[11] However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action.[12]

The Second Amended Complaint maintains that the Contract is unlawful because it is an agreement between two or more persons in restraint of, or to monopolize trade or commerce in the Traverse City parasailing market and because it seeks to exclude and limit competition and establish a monopoly in the Traverse City parasailing market. Count I asserts that the Contract "severely restrained trade in the Traverse Bay area parasailing market because it sought to exclude any competition from occurring at the primary historical location, and it increased the cost per ride to consumers during the 2014 season." Count II asserts that Defendants intended to create a monopoly in the local parasailing market by entering into the Contract with Plaintiffs and withdrawing completely from the parasailing business. Count III asserts that the Plaintiffs were forced to breach a separate contract to purchase parasailing equipment due to the payments required by under the Contract, stating, "the compelled breach...caused Plaintiffs to lose a $25,000 deposit...a parasailing boat...$60,500 in lost operating capital [and] $140,000 in net proceeds from the 2014 and 2015 parasailing seasons." Finally, Count V asserts that Defendants coerced and extorted Plaintiffs into signing the Contract and thus, Defendants inequitably and unjustly received and retained a benefit from Plaintiffs in an amount exceeding $35,000.

Before the Court discusses the above Counts, it will first address the Plaintiffs' suggestion that the Contract was adhesive in nature and that it was entered into under duress.[13] The question as to what constitutes duress as a basis for invalidation of a contract is a question of law, but whether duress exists in a particular case is a question of fact.[14] Duress, as a basis of

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[10] *Id.*

[11] *Mills v White Castle Sys Inc,* 167 Mich App 202, 205; 421 NW2d 631 (1988).

[12] *NuVision v Dunscombe,* 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). See also, *Roberts v Pinkins,* 171 Mich App 648, 651; 430 NW2d 808 (1988).

[13] Contracts of adhesion are characterized as agreements prepared by one party, which are offered for rejection or acceptance, without opportunity for bargaining and under the circumstances that the second party cannot obtain the desired product or service except by acquiescing to the agreement. *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). A party may avoid enforcement of an adhesive contract only by establishing one of the traditional contract defenses, such as fraud duress, unconscionability or waiver. *Id.* However, Plaintiffs have not pled rescission of the Contract in any of their complaints.

[14] *Norton v Mich State Hwy Dept*, 315 Mich 313; 24 NW2d 132 (1946).

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invalidation of contract means compulsion or constraint by which a person is illegally forced to do or forebear some act and may be by violence threatened, the violence or threats being such to inspire a person of ordinary firmness with fear of serious injury to person, reputation or fortune.[15] Coercion as basis for invalidation of a contract means application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.[16]

While evidence of duress could invalidate the parties' Contract, the Plaintiffs are, in fact, seeking damages *pursuant to* the Contract.[17] Therefore, as Counts I, II and III are premised on the existence of the Contract, the Court will not address the Plaintiffs' claims of extortion/duress and will analyze the parties' claims pursuant to the terms stated in the Contract. In addition, Plaintiffs' Count V, unjust enrichment, fails as a matter of law for the same reason.

Whether a party has been unjustly enriched is a question of fact, however, whether a claim for unjust enrichment can be maintained is a question of law.[18] To sustain a claim for unjust enrichment, the plaintiff must establish (1) the receipt of the benefit by defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of a benefit by the defendant. The law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit by another.[19] However, a contract will be implied *only* if there is no express contract covering the same subject matter.[20] When there is an express contract between the parties covering the same subject matter, summary disposition of an unjust enrichment claim is properly granted.[21]

With regard to Plaintiffs' claim for unjust enrichment, it is undisputed that the parties entered into a Contract regarding parasailing activities in and surrounding Traverse City. Avoidance of the Contract, or rescission, on the ground of duress would entitle the Plaintiffs to

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[15] *Id.*

[16] *Id.* Moral duress consists of imposition, oppression, under influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weaknesses of another. *Id.*

[17] There is evidence of threats to the Plaintiffs which preceded the Contract and Plaintiffs' could have could have claimed duress under an adhesion contract, sought rescission and return of the money paid to Defendants.

[18] *Morris Pumps v Centerline Piping, Inc.*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

[19] *Id.* at 194.

[20] *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). On a claim of unjust enrichment, a contract cannot be implied when an express contract already addresses the pertinent subject matter that allegedly created the inequity. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127; 676 NW2d 633 (2003). Unjust enrichment is an equitable doctrine to justify a quasi-contractual remedy that operates in the absence of an express contract. *Wuliger v Manufacturers Life Ins Co*, 567 F 3d 787 (CA 6, 2009).

[21] *Belle Isle Grill, supra* at 479.

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restitution for any benefit they conferred on the Defendants by way of part performance or reliance.[22] However, the Plaintiffs cannot maintain a claim for unjust enrichment because there is a preexisting express contract covering the same subject matter and rescission has not been pled. Therefore, as to Count V, the Plaintiffs have failed to state a claim on which relief can be granted.

It is axiomatic that antitrust laws are passed for the protection of competition, not competitors.[23] To establish a cause for relief by reason of a violation of the antitrust laws of the United States by a defendant, an individual plaintiff must allege that such violation was the proximate cause of special injury to his business or property, as distinguished from injury to other persons or to the public.[24] It is not enough to allege something forbidden by the antitrust laws and to claim general damage resulting therefrom, but the complaint asserting a statutory cause of action must affirmatively show the nature and character of the injury suffered, and that it was an injury to the plaintiff's business or property within the meaning of the statute.[25] More specifically, the Michigan Antitrust Reform Act (MARA) prohibits contracts, combinations and conspiracies in restraint of trade or commerce, allows certain agreements not to compete, prohibits monopolies and attempts to monopolize trade or commerce and provides remedies, fines and penalties for violations of the act.[26] Under MARA, a contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.[27] Further, MARA prohibits the establishment, maintenance or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing or maintaining prices.[28]

The United States Supreme Court has held that, where new entry into certain market is easy, the requisite anticompetitive danger is lacking and summary disposition of the case is

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[22] American Law Institute, Contracts, 2d, § 376, p 222.
[23] *Brown Shoe Co. v United States*, 370 US 294, 320; 82 S Ct 1502; 8 L Ed 2d 510 (1962).
[24] *Sunbeam Corp v Payless Drug Stores*, 113 F Supp 31, 42 (ND Cal, 1953).
[25] *Id.*
[26] Act 274 of 1984; MCL § 445.771 *et seq.* In analyzing claims under MARA, state and federal precedent are relevant and "courts shall give due deference to the interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason." MCL § 445.784(2).
[27] MCL § 445.772.
[28] MCL § 445.773.

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appropriate.[29] To successfully prosecute monopoly claims, claimants must prove that violators possessed monopoly power in the relevant market and willfully acquired, maintained or used that power by anticompetitive or exclusionary means.[30] To show an antitrust injury, a party must prove that the claimed loss flowed from an anticompetitive aspect of the contract or conspiracy, not aspects that were neutral or beneficial to competition, even if there was a per se violation of the antitrust laws.[31] An antitrust violation may be per se illegal, however, the rule of per se illegality is only applicable to those cases which exhibit severe restraints of trade with little or no public benefit.[32] The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.[33]

In this particular case, the Contract limited the parasailing competition in the Traverse City area because Defendants were, at the time, the only competitors of the Plaintiffs. Therefore, the Plaintiffs were beneficiaries under the Contract and potentially increased their business as the sole parasailing providers. However, the Plaintiffs now claim, somewhat illogically, that the lack of parasailing competition severely restrained trade and *negatively* impacted their business.

First, and perhaps most importantly, the Plaintiffs entered into a Contract to limit competition by the Defendants. Yet, when Defendants fulfilled their obligations under the Contract, the Plaintiffs filed suit claiming restraint of trade and unlawful monopoly. Common sense and law dictate that plaintiffs who are not harmed by and/or who actually benefit from anticompetitive conduct do not suffer an antitrust injury and do not have standing to bring an antitrust claim. Here, as drafters of and the intended beneficiaries of the Contract, the Plaintiffs cannot now claim that they were actually harmed or suffered injuries when they received the benefit of their bargain, which was for the Defendants not to provide parasailing activities.

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[29] *Brooke Group Ltd. v Brown & Williamson Tobacco Corp.*, 509 US 209; 113 S Ct 2578; 125 L Ed 2d 168 (1993).
[30] *Chase v Northwest Airlines Corp.*, 49 F Supp 2d 553, 565 (ED Mich, 1999).
[31] Establishment of a per se violation of MARA does not mean that an antitrust injury was shown. *Manitou North America, Inc. v McCormick Intern., LLC*, unpublished opinion per curiam of the Court of Appeals, issued February 2, 2016 (Docket No. 324063). Proof of an antitrust injury and of a per se violation are distinct matters and must be established independently. *Atlantic Richfield Co v USA Petroleum Co*, 495 US 328, 344; 110 S Ct 1884; 109 L Ed 2d 333 (1990).
[32] *Mich Ass'n of Psychotherapy Clinics v Blue Cross and Blue Shield of Mich*, 118 Mich App 505, 514; 325 NW2d 471 (1982). If there is no per se violation of the statute, the court applies the "rule of reason" and determines in each case whether the facts, when weighed by the court in light of reason, reveal either a forbidden undue effect upon trade or an intent so unduly to affect it. *Standard Oil Co of NJ v United States*, 221 US 1; 31 S Ct 502; 55 L Ed 619 (1911).
[33] *Atlantic Richfield Co, supra.*

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Second, the Contract only limited competition from the Defendants and for a temporary time period. Plaintiffs have admitted that there are now additional parties serving the local parasailing market and after the Contract expires on October 31, 2016, Defendants may again provide parasailing activities locally. There is no evidence that entry into the local parasailing market is limited or difficult or that the parties' Contract severely restrained the parasailing trade.

Finally, the Plaintiffs cannot claim that the Defendants violated MARA by possessing monopoly power in the parasailing market because the Defendants were not even providing parasailing services during the Contract period. Any parasailing monopoly power would have been possessed by the Plaintiffs because they were the only providers during the 2014 and 2015 seasons. Defendants were not engaged in the parasailing market and had no market power, therefore, it is incongruous and nonsensical for Plaintiffs to claim they are owed damages under MCL § 445.773. The Plaintiffs factual allegations in Counts I and II are insufficient as a matter of law and fail to state actionable claims under MARA.

With regard to Count III, Plaintiffs claim they were forced to breach a separate contract to purchase parasailing equipment due to the payments required by under the Contract with Defendants. One who alleges tortious interference with a contract or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invalidating the contractual rights or business relationship of another.[34]

Plaintiffs suggest that the "per se wrongful acts" in this case were violations of MARA and extortion by the Defendants. However, the money paid by the Plaintiffs was done so pursuant to the Contract and this Court does not find any evidence that Defendants violated MARA. Moreover, the Plaintiffs have not alleged that Defendants committed any lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship with another. Without evidence of per se wrongful acts or malicious and unjustified lawful acts, the Plaintiffs have failed to state a claim on which relief can be granted.

For the reasons stated herein, the Court grants the Defendants' Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and dismisses Counts I, II, III and V of the

[34] *Stanton v Dachille*, 186 Mich App 247; 463 NW2d 479 (1990).

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Plaintiffs' Second Amended Complaint.[35] Plaintiffs' Count IV, Intentional Infliction of Emotional Distress, as to Suburi Boyer, has not been resolved and the case remains open pending the remaining claim.

IT IS SO ORDERED.

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PHILIP E. RODGERS, JR., CIRCUIT COURT JUDGE, P29082

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

[35] While a party pleading a frivolous claim or defense is subject to sanctions, the Court will not assess damages in this case. MCR 2.114(F).

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APPENDIX 13

FILED
Bonnie Scheele
Grand Traverse 13th Circuit Court
03/20/2017

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LAW OFFICES COLLINS EINHORN FARRELL PC 4000 Town Center, 9th Floor Southfield, MI 48075 (248) 355-4141

STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT, COUNTY OF GRAND TRAVERSE

BRYAN PUNTURO AND FAWN PUNTURO,
husband and wife,

and

B&A HOLDINGS, LLC d/b/a ParkShore Resort,
a Michigan limited liability company,

Plaintiffs,

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

v

BRACE KERN,
an individual,

and

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

Defendants.
_____/

MOOTHART & SARAFA, PLC
JONATHAN R. MOOTHART (P40678)
Attorney for Plaintiffs
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Williamsburg, MI 49690
(231) 947-8048

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JONATHAN B. KOCH (P80408)
Attorney for Defendant Brace Kern
4000 Town Center, 9th Floor
Southfield, MI 48075
(248) 355-4141

_____/

Defendant Brace Kern's Motion for Summary Disposition

Defendant Brace Kern, through his attorneys, Collins Einhorn Farrell PC, brings this motion for summary disposition pursuant to MCR 2.116(C)(7) and/or MCR 2.116(C)(10) in lieu of his answer, seeking dismissal of plaintiffs' claims against him, for the reasons stated in the attached brief.

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COLLINS EINHORN FARRELL PC

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March 20, 2017

Brief in Support of Defendant Brace Kern's
Motion for Summary Disposition

Introduction

This case arises out of a dispute between members of the world of commercial parasailing in East Grand Traverse Bay. In the underlying lawsuit, defendants Saburi Boyer and Danielle Kort[1] (represented by defendant Brace Kern) alleged that plaintiff Bryan Punturo extorted them into paying him for an agreement not to compete with their parasailing business. In this case, plaintiffs Bryan and Fawn Punturo (and their company, B&A Holdings) claim that during the course of the underlying lawsuit, Kern made numerous allegedly defamatory statements that were published in various news articles. Based on those statements, the Punturos assert claims of defamation, false light invasion of privacy, tortious interference with business relations and loss of consortium.

All of Kern's allegedly defamatory statements 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. The fair-reporting privilege contained in MCL 600.2911(3) protects "the publication or broadcast of a fair and true report of matters of public record, a public and

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

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official proceeding, or of a...record generally available to the public." MCL 600.2911(3). The underlying lawsuit and the criminal proceedings against Punturo are both "matter[s] of public record" and "public...proceeding[s]." *See* MCL 600.2911(3). And the Boyers' complaint in that lawsuit is a "record generally available to the public." *Id.* So, because Kern merely reiterated the contents of the Boyers' pleadings and Punturo's criminal charges, the fair reporting privilege contained in MCL 600.2911(3) protects Kerns' statements and bars the Punturos' defamation claim.

Alternatively, to the extent Kern's comments didn't reiterate the allegations in the Boyers' complaint or the criminal proceedings, they were simply subjective expressions of Kern's opinions and legal conclusions about the case. As such, Kern's statements aren't actionable because they aren't "provable as false." See *Ireland v. Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998). Furthermore, even if Kern's statements weren't privileged (they are) and were capable of defamatory meaning (they aren't), they still wouldn't be actionable because any reference to Bryan Punturo's extortionate behavior was mere "rhetorical hyperbole" uttered in the context of a hotly contested lawsuit.

Furthermore, the protections and privileges that apply to defamation claims apply with equal force to other claims premised on allegedly defamatory statements. Here, all of the Punturos' remaining claims against Kern are based on the same privileged and protected statements as their defamation claim.

Consequently, summary disposition is warranted and all of the Punturos claims against Kern should be dismissed.

Statement of Facts

A. The underlying dispute between the Boyers and Bryan Punturo results in the Michigan Attorney General charging Punturo with felony extortion.

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Before 2006, Saburi Boyer operated a parasailing business in East Grand Traverse Bay at the Punturos' beachfront resort (known as ParkShore) for several years.[2] In 2006, Boyer moved his parasailing operation to a different beachfront hotel about half a mile away from Parkshore.[3] From then until the summer of 2013, the Punturos' son Casey provided parasailing services at ParkShore.[4]

In spring 2014, Boyer bought all of the assets of Casey's parasailing business.[5] Around the same time, Boyer and Bryan Punturo executed a "Parasailing Exclusivity Agreement."[6] 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.[7]

When the Boyers missed a payment, Punturo sued for breach of contract.[8] Boyer hired Kern to represent him in that lawsuit. Based on the Parasailing Exclusivity Agreement and correspondence sent by Punturo to the Boyers, 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. So he reported Punturo to the Michigan Attorney General's office, which opened a criminal investigation.[9] 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.[10]

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[2] **Exhibit 1**, Complaint, ¶5, 13. Bryan Punturo is a part owner and manager of the ParkShore and Fawn Punturo, works there. *Id.* at ¶¶6-7.
[3] *Id.* at ¶17.
[4] *Id.* at ¶18.
[5] *Id.* at ¶19(a).
[6] **Exhibit 2**, Parasailing Exclusivity Agreement.
[7] *Id.*
[8] Ex. 1, Complaint at ¶21.
[9] **Exhibit 3**, Michigan Attorney General Press Release.
[10] *Id.*

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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**."[11] But, because the court found that Punturo hadn't threatened to do anything illegal, it declined to bind him over on the extortion charges, which were dismissed in September 2016.[12]

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

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] 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).

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."[14]

The Boyers contended that the Parasailing Exclusivity Agreement violated MCL 445.772 and MCL 445.723 of the Michigan Antitrust Reform Act.[15] In their view, the Punturo's conduct "was **flagrant and intentional** because it was meant to, and did, threaten, intimidate

[11] **Exhibit 4**, Preliminary Examination Hearing Transcript, p. 5.
[12] *Id.*; **Exhibit 5**, 9/29/16 District Court Order in Criminal Case.
[13] **Exhibit 6**, Underlying Complaint at ¶16.
[14] *Id.* at ¶¶9, 16 (emphasis added).
[15] *Id.* at ¶¶17-18.

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and scare [the Boyers] into paying [Punturo] to not cause them harm."[16] So, in the Boyers' view, Punturo engaged in "conduct of **extortion and antitrust violations.**"[17]

The Boyers also claimed that Punturo had engaged in "threats, coercion, **extortion, antitrust violations**, and vulgar correspondence."[18] 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."[19]

In May 2016, the Boyers filed an amended complaint that split their antitrust claim and added a claim intentional interference with a contract/business expectancy. The next month, the Boyers filed a second amended complaint that added a claim of unjust enrichment.[20] Both amended complaints contained the same factual allegations about Punturo's extortion, threats, and antitrust violations.[21]

Punturo moved for summary disposition. At the hearing, the circuit acknowledged "that what's happening here, [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."[22] 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.[23] Just over two weeks later, the parties stipulated to dismissal without prejudice of the Boyers' intentional infliction claim.

C. The Punturos sue the Boyers and Kern for reiterating the allegations in their lawsuit in news articles.

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[16] *Id.* at ¶22 (emphasis added).
[17] See *id.* at 32 (emphasis added).
[18] *Id.* at 42 (emphasis added).
[19] *Id.* at 45.
[20] **Exhibit 7**, Underlying Second Amended Complaint.
[21] See generally *id.*
[22] 7/11/16 Summary Disposition Hearing Transcript, p. 23.
[23] **Exhibit 8**, 8/5/16 Decision and Order Granting Summary Disposition in Underlying Case.

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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.[24] Each of the Punturos' claims is 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.[25]

The Punturo's allege that on February 28, 2016—five days after Kern filed the underlying lawsuit for the Boyers[26]—the Traverse City Record-Eagle reported that "Kern said the correspondence proved Punturo flagrantly violated state antitrust laws." The article also quoted Kern as saying "The contract itself is an agreement to limit competition...[s]o that violates the (Michigan) Antitrust Reform Act in of itself."[27]

The Punturos also point to five news articles published on May 10, 2016—i.e., the day of Punturo's arraignment on criminal extortion charges.[28] The Traverse City Record-Eagle quoted Kern as saying that because "[t]here was extortion for the past two years" the Attorney General's charges were "a long time coming" and it was "a vindicating day for [the Boyers]."[29] Kern also explained why he reported Punturo to the Attorney General when he first saw the non-compete contract "I realized it violated antitrust laws."[30] He also opined that the suits against Punturo were newsworthy because they involve "significant threats" and "significant sums of money."[31]

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[24] Ex. 1, Complaint.
[25] *Id.* at ¶30.
[26] See Ex. 6, Underlying Complaint.
[27] Ex. 1, Complaint at ¶30(a).
[28] *Id.* at ¶30(b)-(e).
[29] *Id.* at ¶30(b).
[30] *Id.*
[31] *Id.*

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In a 7&4 News television report, Kern commented on Punturo's threats against the Boyers—e.g., "I will crush you, I will make your life a living hell." In a 9&10 News website interview, Kern discussed the differences between the criminal charges against Punturo and the Boyers' civil lawsuit: "Extortion is one aspect of our case, but ours seeks to prove that the unlawful contract that Mr. Punturo extorted my clients into the signing [violated] anti-trust laws and there's also a claim for intentional infliction of emotional distress."[32] 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."[33] 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.'"[34]

The Punturos also identify statements attributed to Kern in a Northern Express article from November 2016 in which Kern discussed what led him to report Punturo to the Michigan Attorney General: "As soon as I saw the contract, I'm like 'This is an antitrust violation, this is a covenant not to compete, this is extortion."[35]

The Punturo's 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."[36]

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[32] *Id.* at 30(d).
[33] *Id.* at 30(e).
[34] *Id.* at 30(f).
[35] *Id.* at 30(g).
[36] *Id.* at 35.

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Standard of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of immunity granted by law. Courts must consider affidavits, depositions, admissions, or other documentary evidence (if submitted), see MCR 2.116(G)(5), and may accept the contents of the complaint as true unless the allegations are contradicted by the supporting documentation. See *Kloian v Schwartz*, 272 Mich App 232, 235; 725 NW2d 671 (2006).

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

Argument

The fair-reporting privilege contained in MCL 600.2911(3) protects statements that are a "fair and true report of matters in a public record." The Punturos' claims are based on statements by Kern that simply reiterated allegations from pleadings he filed on the Boyers' behalf, as well as Punturo's criminal prosecution. So the fair-reporting privilege bars such claims. Alternatively, Kern's statements aren't actionable under a defamation theory because, to the extent they weren't privileged, they were assertions of his subjective opinion and/or "rhetorical hyperbole."

To establish a cause of action for defamation against Kern, the Punturos must establish the following elements:

> (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. [*Thomas M. Cooley Law Sch v Doe 1*, 300 Mich App 245, 262; 833 NW2d 331 (2013) (citation omitted).]

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Generally, "[a] communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113; 793 NW2d 533 (2010). But not all defamatory statements are actionable. *Ireland*, 230 Mich App at 614. Even if a statement is otherwise defamatory, it can't support a cause of action if it's privileged. For example, MCL 600.2911(3)'s "fair-reporting privilege" protects statements that "substantially represent the matters contained in the court records" (like the allegations contained in a complaint). *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 325; 539 NW2d 774 (1995).

And, in order to support a claim of defamation, a statement must be "provable as false." *Ireland*, 230 Mich App at 616. Assertions of subjective opinions can't be proven false, so they aren't actionable. *Id.* at 616-617; see also *Kevorkian v Am Med Ass'n*, 237 Mich App 1, 5-6; 602 NW2d 233 (1999). Furthermore, certain types of speech are protected even if they are facially factual and capable of being proven false: "[C]ertain statements, although factual on their face, and provable as false, could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff." *Ireland*, 230 Mich App at 617. "Speech that can reasonably be interpreted as communicating 'rhetorical hyperbole,' 'parody,' or 'vigorous epithet' is constitutionally protected." *In re Chmura (After Remand)*, 464 Mich. 58, 72; 626 NW2d 876 (2001).

A. The statutory fair reporting privilege protects "fair and true" reports of matters contained in records that are generally available to the public. Here, Kern simply reiterated the allegations by the Boyers and the Attorney General that Punturo violated antitrust laws, threatened them with physical and financial harm, and committed extortion. So Kern's statements are protected by the "fair reporting" privilege.

The Michigan Legislature has codified a broad fair-reporting privilege in MCL 600.2911(3). It provides, in pertinent part, that "[d]amages shall not be awarded in a libel

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action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a...record generally available to the public." MCL 600.2911(3).

Under the plain language of MCL 600.2911(3) "[a] defendant's motivation is irrelevant if a fair and true report is made of the proceeding." *Stablein v. Schuster*, 183 Mich.App 477, 482; 455 NW2d 315 (1990). So there's no exception for malice. See *Bedford v. Witte*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket Nos. 327372, 327373); slip op at 5 (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.").[37]

For a statement to be privileged under § 2911(3), the report of the public record's contents must be "fair and true...." *Id.* But the report doesn't have to quote the record verbatim. 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). This "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.*

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 court held that the statutory fair reporting privilege, MCL 600.2911(3), applied to the articles to the extent they represented "fair and true" reports of matters contained in police department records. *Id.* at 326. Specifically, the court noted, a statement in one of the articles that could imply the business was unsafe – referencing that the shooting occurred near the business and neighbors

[37] Attached as **Exhibit 9.**

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stated that problems occurred when young people congregated in that area – was insufficient to establish defamation. *Id.* at 327-328.

Recently, in *Bedford*, the Court of Appeals reaffirmed the "substantially represent" standard from *Northland Wheels* and held that the fair reporting privilege protected the defendants' publishing of an allegedly defamatory complaint on a law firm website. *Bedford*, slip op at 5. The Court also went on to find that the fair reporting privilege didn't apply to comments made by one of the defendants in a news interview. *Id.* at 6. But, unlike Kern's comments in this case, the *Bedford* defendant's comments didn't "merely summarize what was alleged—but not yet adjudicated—in the federal complaint." *Id.* Instead, the defendant "stated that 'we can say with certainty' that plaintiffs broke the law in various ways." *Id.* The Court of Appeals held that "[g]iven the level of certainty expressed...his words did alter the effect the literal truth would have on the recipient of the information," and thus, fell outside the fair reporting privilege. *Id.*

In this case, Kern didn't say anything like that at any point in any of the allegedly defamatory news articles.[38] Instead, the quotes attributed to Kern in the various news articles simply reiterated the allegations raised in the Boyers' underlying complaint and in the Attorney General's criminal prosecution of Punturo. The Punturos' complain that Kern accused them of anti-trust violations and extortion.[39] But that's exactly what the Boyers alleged in their complaint and the Attorney General accused Punturo of doing in the criminal proceedings. The Boyers claimed that Punturo had engaged in "threats, coercion, **extortion, antitrust violations**, and vulgar correspondence."[40] They alleged that Punturo violated Michigan's criminal law against extortion, MCL 750.213 [Malicious threats to extort money]

[38] See Ex. 1, Complaint at ¶30.
[39] *Id.* at ¶¶30, 32.
[40] See Ex. 6, Underlying Complaint at 42.

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and flagrantly violated MCL 445.772 and MCL 445.723 of the Michigan Antitrust Reform Act.[41] 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."[42]

In other words, Kern's statements mirrored the Boyers' allegations that Punturo engaged in "**extortion and antitrust violations,**" as well as the criminal charges against Punturo.[43] Even if Kern didn't repeat the Boyers' allegations verbatim, his statements "substantially represent[ed] the matter contained in the court records"—i.e., the Boyers' pleadings. See *Northland Wheels*, 213 Mich App at 325-326. Nothing that Kern said in the news articles would change the "gist" or the "sting" of the allegations in the Boyers' complaint, nor would it have a "different effect on the reader." See *id.*

So, under the standard enunciated by the Court of Appeals in *Northland Wheels*, Kern's allegedly defamatory statements constituted a "fair and accurate" report of the allegations in Boyers' complaint in the underlying lawsuit and the criminal charges against Punturo. The underlying lawsuit and the Attorney General's prosecution are both "matter[s] of public record" and "public...proceeding[s]." *Id.* And the Boyers' underlying complaint is a "record generally available to the public." *Id.* It follows that the fair reporting privilege contained in MCL 600.2911(3) protects Kerns' statements and bars the Punturos' defamation claim. For that reason alone, summary disposition is warranted and the Punturos' claims against Kern should be dismissed.

B. Alternatively, Kern's comments were simply expressions of opinion by the plaintiffs' counsel in context of the underlying lawsuit. They were assertions of subjective opinion and, thus, not provable as false. So they aren't actionable under a defamation theory.

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[41] *Id.* at ¶17-18, 45.
[42] Ex. 3, Michigan Attorney General Press Release.
[43] See Ex. 6, Underlying Complaint at ¶32.

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All of Kern's allegedly defamatory statements are protected under MCL 600.2911(3) as "fair and accurate" reporting of the allegations of extortion, antitrust violations, and threats contained in the Boyers' complaint. But, to the extent Kern's statements don't precisely track the Boyers' pleadings or the Attorney General's extortion charges, they were simply expressions of Kern's opinion in his capacity as the Boyers' attorney.

Expressions of opinion aren't actionable under a defamation theory of liability. *Ireland v Edwards*, 230 Mich App 607, 614; 584 NW2d 632 (1998), citing *Milkovich v Lorain Journal Co*, 497 US 1, 20; 110 S Ct 2695; 111 L Ed 2d 1 (1990). Courts determine whether a statement of opinion is protected by examining whether the statement is "provable as false." *Ireland*, 230 Mich App at 616; *Ghanam v Does*, 303 Mich App 522, 544; 845 NW2d 128 (2014) ("Whether a statement is actually capable of defamatory meaning is a preliminary question of law for the court to decide."). If there is no way to determine whether the statement is accurate in an objective sense, it is a constitutionally protected statement of opinion and may not serve as the basis for a defamation action. *Id.*

For example, in *Ireland* an attorney stated that the plaintiff was not a "fit mother." 230 Mich App at 611. That statement, "like the question whether someone is abysmally ignorant, is necessarily subjective." *Id.* at 617. Similarly, the statement that the child "suffered a fractured arm because of [the mother's] neglect" was "not provable as false and, thus, [was] protected opinion." *Id.* at 620. There was no dispute that the child had indeed broken her arm, or that this injury occurred while the child was with her mother. *Id.* The point of contention was whether the mother's "neglect" was the cause, as the defendant asserted, and the court concluded that the statement was subjective. *Id.*

Here, to the extent the statements attributed to Kern in the various news articles aren't protected by the fair reporting privilege, they were nothing more than his subjective opinions

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of Punturo's treatment of the Boyers during the underlying dispute. Aside from any specific statutory meaning, "extort" means "to obtain from a person by force, intimidation, or undue or illegal power" and "extortion" means "the act or practice of extorting."[44] In the news articles, just like the defendant's statements in *Ireland*, Kern's legal conclusions about the opposing party in the underlying lawsuit were a matter of subjective opinion. And, because Kern used the term "extortion" to express a legal (rather than factual) conclusion about Punturo's negotiation of the Parasailing Exclusivity Agreement—i.e., in the general (rather than criminal) sense—it follows that they aren't actionable under a defamation theory.

C. Alternatively, any reference to Bryan Punturo's extortionate behavior was mere "rhetorical hyperbole" uttered in the context of a hotly-contested lawsuit. So, even if Kern's statements weren't privileged (they are) and were capable of defamatory meaning (they aren't), they still wouldn't subject him to defamation liability.

Even if Kern's statements weren't privileged (they are) and were factual assertions capable of being proven false (they aren't), they still wouldn't be actionable because any reference to Bryan Punturo's extortionate behavior was mere "rhetorical hyperbole" said in the context of a hotly contested lawsuit. Under the defense of "rhetorical hyperbole," a statement is not actionable, although factual and provably false, if it "could not be interpreted by a reasonable listener or reader as stating actual facts about the plaintiff." *Ireland v Edwards*, 230 Mich App 607, 617 (1998). Such statements are protected by the First Amendment. *Id.* "[S]tatements must be viewed in context to determine whether they are capable of defamatory interpretation, or whether they constitute no more than 'rhetorical hyperbole' or 'vigorous epithet.'" *Kevorkian*, 237 Mich App at 7, citing Ireland, supra at 618, citing *Greenbelt Cooperative Publishing Ass'n, Inc v Bresler*, 398 US 6; 90 S Ct 1537; 26 L Ed 2d 6 (1970).

The Court of Appeals has found "that '[e]xaggerated language used to express opinion, such as 'blackmailer,' 'traitor,' or 'crook,' does not become actionable merely because it could

[44] *Merriam-Webster's Collegiate Dictionary* (11th ed 2014).

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be taken out of context as accusing someone of a crime.'" *Kevorkian*, 237 Mich App at 8, quoting *Hodgins v Times Herald Co*, 169 Mich App 245, 253; 425 NW2d 522 (1988) and citing *Ireland*, 230 Mich App at 618; see also *Greenbelt*, 398 US at 14.

In *Kevorkian*, the plaintiff, Jack Kevorkian, sued the American Medical Association ("AMA"), the Michigan State Medical Society ("MSMS"), and several individual officers of both organizations, asserting that he had been defamed when the AMA sent a letter to the MSMS making statements about Kevorkian's controversial support of assisted suicide. Kevorkian alleged that the MSMS also published those statements. The allegedly defamatory remarks were statements saying that Kevorkian "perverts the idea of the caring and committed physician," "serves merely as a reckless instrument of death," "poses a great threat to the public," and engages in "criminal practices." *Kevorkian*, 237 Mich App at 4.

Kevorkian claimed that these statements were defamatory because they portrayed him as a murderer. The trial court ruled that the statements were not constitutionally protected and thus denied the defendants' motion for summary disposition. Id. at 4-5. The Court of Appeals, however, reversed and held that summary disposition was appropriate. The court decided that there were several bases for finding that the statements were not actionable. The court held that "because the statements also are necessarily subjective and could also be reasonably understood as not stating actual facts, they are either nonactionable rhetorical hyperbole or must be accorded the special solicitude reserved for protected opinion." Id. at 13.

Here, the Punturos' claims center on Kern's allegedly defamatory statements that Bryan Punturo engaged in "extortion" or "extorted" the Boyers' into signing the Parasailing exclusivity agreement. Michigan's appellate courts haven't addressed whether the terms "extortion" or "extort" constitute rhetorical hyperbole. But numerous federal and foreign courts have. They have repeatedly concluded that, when used in the context of contentious litigation or business dispute, variations of the word "extort" are nothing more "than rhetorical

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hyperbole, a vigorous epithet used by those who considered [a] negotiating position extremely unreasonable." See *Greenbelt*, 398 US at 14.

For example, in *Brodkorb v Minnesota*, unpublished opinion of the United States District Court for the District of Minnesota, issued February 13, 2013 (No.); 2013 WL 588231 at *12,[45] the district court recognized that "the definition of the verb 'extort' is not limited to solely criminal conduct—it is also used colloquially." And, because the defendant used the term in the context of "heated" litigation, the court concluded that "extort" was used in a generalized sense, and not as a label for punishable criminal offenses, and was, thus, not defamatory. *Id.*

Similarly, in *Hogan v Winder*, 762 F.3d 1096, 1107-1108 (CA 10, 2014), the Tenth Circuit Court of Appeals addressed the plaintiff's claims that he was defamed by reports that he had been "accused of extortion." The Tenth Circuit recognized that "**accusations of extortion are a familiar rhetorical device**" and that "we all know of colloquial or hyperbolic uses of the term." *Id.* at 1108 (emphasis added). And it concluded that, "[n]o objective reader would believe, after reading the word 'extortion' in context, that [plaintiff] had committed a crime." Instead, "the reasonable reader would realize not only that the accusation was made in the heat of a nasty employment dispute but also that the objectionable terms were hyperbole and rhetorical flourish." *Id.*; see also *Friedman v Bloomberg LP*, 180 F.Supp.3d 137, 157 (D Conn, 2016) ("A reasonable reader would understand the use of the word 'extort' to be 'rhetorical hyperbole, a vigorous epithet' and the statement to reflect [defendant's] belief that an upset former employee had filed a frivolous lawsuit against [defendant] to get money."); *Novecon, Ltd v Bulgarian-American Enterprise Fund*, 977 F.Supp. 52, 56 (DDC, 1997) (Charges of "extortion" in letter relating to business dispute "amounted to rhetorical hyperbole that is not readily susceptible to factual verification").

[45] Attached as **Exhibit 10**.

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This case, like many of the cases listed above, arises out of a long and highly-contentious history between Bryan Punturo and Saburi Boyer. In the underlying litigation, the Boyers alleged that Bryan Punturo threatened to run them out of business if they didn't agree to pay him for the Parasailing Exclusivity Agreement: "If I set up a[parasailing operation] I will not compete with you....I will run a program that leaves you with no business."[46] They claimed that Punturo threatened them with physical and financial harm: "**I will crush you**" and "**I will make your life a living hell**."[47] And, when the Boyers fell behind on their payments to Punturo, they alleged that he continued to threaten them: "You instilled this hatred within me, you defaulted on your agreement to abate me, and **now you will realize my resolve to witness your demise**."[48] Indeed, the Boyers also alleged that, before the underlying lawsuit was filed, "Punturo was part of a group **who physically assaulted Mr. Boyer**."[49]

Kern made his statements in the context of a highly-contentious lawsuit in which his clients alleged egregious conduct by Punturo. Kern clearly disapproved of the business tactics and negotiating style Punturo used to obtain the Boyers' money in exchange and felt they were anything but reasonable. So, like the statements at issue the above cases, Kern's repeated uses of the term "extort" (or one of its variations) in the news articles "were obviously expressions of disapproval regarding" Bryan Punturo forcing the Boyers to pay him money by threatening them with harm. See *Ireland*, 230 Mich App at 638.

Here, any reasonable person reading Kern's remarks would have recognized that they were made in the context of a nasty business dispute and understood that he used the terms "extort" or "extortion" as rhetorical flourishes to express his strong disapproval of Punturo's behavior. So, Kern's statements were nothing more rhetorical hyperbole.

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[46] Ex. 7, Underlying Second Amended Complaint at ¶14-16.
[47] *Id.* at ¶15 (emphasis added).
[48] *Id.* at ¶37 (emphasis added).
[49] *Id.* at ¶43 (emphasis added).

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D. The protections and privileges that apply to defamation claims apply with equal force to other claims premised on allegedly defamatory statements. Here, all of the Punturos' remaining claims against Kern are based on the same privileged and protected statements as their defamation claim. So they're barred for the same reasons.

In addition to their defamation claims, the Punturos also assert claims of: (a) false light invasion of privacy (Count II); (b) tortious interference with business relations (Count III); and (c) loss of consortium (Count IV).[50] But, with respect to Kern, all of the Punturos' other claims are based on the same privileged and protected statements as their defamation claim—i.e., the statements contained in news articles—and fail for the same reasons.[51]

When invasion of privacy and tortious interference claims are based on a defendant's allegedly defamatory statements, the same speech protections that would apply in a defamation lawsuit apply in "any other type of lawsuit." *Sarkar v Doe*, __ Mich App __; __ NW2d __ (2016), slip op at 27;[52] *Ireland*, 230 Mich App at 624-625 (applying defamation protections to a false light invasion of privacy claim); *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995) (applying defamation protections to a tortious interference with business relations claim). In other words, "where the alleged tortious conduct 'is a defendant's utterance of negative statements concerning a plaintiff, **privileged speech is a defense**.'" *Sarkar*, __ Mich App at 27 n 24, quoting *Lakeshore*, 212 Mich App at 401.

Here, all of the Punturos' claims against Kern are premised on the same allegedly defamatory statements quoted in the various news articles. So the same defenses that apply to the Punturos' defamation claim apply to their invasion of privacy, tortious interference, and loss of consortium claims. And, for the same reasons stated above, the Punturos' remaining claims fail as a matter of law and summary disposition is appropriate.

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[50] See generally, Ex. 1, Complaint.
[51] *Id.* at ¶¶58-59, 63-64, 69.
[52] Attached as **Exhibit 11**.

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Conclusion & Relief Requested

For the above-stated reasons, the Punturos' claims against Brace Kern all fail as a matter of law. Accordingly, this Court should grant summary disposition in Kern's favor under MCR 2.116(C)(7) and/or MCR 2.116(C)(10).

COLLINS EINHORN FARRELL PC

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March 20, 2017

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings this 20th day March, 2017

By: _____ U.S. Mail
_____ Hand Delivered
_____ Facsimile
_x_ TrueFiling (E-filing)

/s/ Sue L. Lustig
Sue L. Lustig

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APPENDIX 14

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STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT, COUNTY OF GRAND TRAVERSE

BRYAN PUNTURO AND FAWN PUNTURO,
husband and wife,

and

B&A HOLDINGS, LLC d/b/a ParkShore Resort,
a Michigan limited liability company,

Plaintiffs,

v

BRACE KERN,
an individual,

and

SAUBURI BOYER AND DANIELLE KORT, f/k/a
Danielle Boyer,
individuals,

Defendants.

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

Plaintiffs' Response to Defendants' Motions for Summary Disposition And Cross Motion for Partial Summary Disposition Pursuant to MCR 2.116(I)(2)

_____/

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I. Introduction.

Defendants have made several arguments in support of summary disposition, none of which is valid. Following is a list of the principal issues with a brief explanation of Plaintiffs' response.

1. Fair reporting privilege. This privilege does not apply, because Defendants' statements were much more than, "we have alleged" that Punturo committed the crimes of antitrust violations and extortion; more than simply a recitation of the allegations of Defendants' antitrust complaint or the Attorney General's carefully worded press release. Instead, Defendants stated with certainty that Punturo had committed these crimes.

2. Opinion and hyperbole not actionable. This defense is invalid because Defendants did not merely generally accuse Punturo of being a bad guy. Rather, they unequivocally accused him of criminal acts, not only provable as false, but actually proven false, as reflected in the orders of this Court and the Grand Traverse County District Court. Especially given that Defendants' statements to the press were made while Punturo was being prosecuted for the crime of extortion, their claim that "extortion" is just a general buzzword rings hollow. Finally, case law is clear that language that accuses or strongly implies criminal activity is not subject to an "opinion" defense. Because Defendants' statements accusing Punturo of crimes were defamation *per se*, Punturo is entitled to partial summary disposition as to liability for these statements. MCR 2.116(I)(2).

3. Statements of attorney not attributable to client. This defense fails because the cases cited by Boyers are not attorney-client cases, and many of the statements were made by Boyers themselves. Applicable case law is clear that the attorney's statements are attributable to the client.

4. Statements in settlement negotiations inadmissible. This argument is a red herring, because Kern's statements in settlement negotiations are proffered to show malice and bad faith – that his subsequent defamatory statements were the fulfillment of a threat to make them if Punturo

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did not cave in to his demand for payment of $750,000. They are not proffered, as prohibited by MRE 408, and are wholly irrelevant regarding, any motive "to prove liability for or invalidity of the [antitrust] claim or its amount." Thus, they are admissible, and also, critically relevant.

5. Plaintiffs are public figures. This is absolutely false, and even if Plaintiffs were public figures this would only mean that they might have to prove, as pleaded, actual malice to support their claims – not that their case should be dismissed.

In sum, the above arguments, and as the following discussion shows, Defendants' other claims, are insufficient to support their motions, and they should be denied.

II. Facts.

As pleaded in Plaintiffs' complaint:

Plaintiff Bryan Punturo is a local businessman, who owns 50% of Plaintiff B&A Holdings, LLC, the operating company for the ParkShore Resort on East Grand Traverse Bay. He manages and operates the ParkShore, performing a wide range of duties including hiring of employees, oversight, tending bar, cooking in the ParkShore restaurant, and also repair, maintenance, and other duties. Plaintiff Fawn Punturo is Bryan Punturo's spouse, and is also employed by the ParkShore, with duties that include management, oversight, working the front desk, and booking and coordinating special events including weddings and other large group gatherings that are a significant and important part of the ParkShore's business activities and income. Punturos are private figure business people who depend upon their reputations for honesty and legal and fair dealing for the success of their business and careers. ParkShore is similarly dependent for its success upon its reputation for honesty, credit, efficiency and other business character.

Defendant Brace Kern, is a licensed attorney known to this Court, who at all relevant times acted as legal counsel to Defendants Saburi and Danielle Boyer ("Boyers"). In connection with the

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Boyers' 2016 divorce, Danielle Boyer's name was changed to "Danielle Christine Kort," but she will be referred to herein by her prior name of Boyer to preserve context.

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

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

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

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

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

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

Due to bad weather conditions for parasailing in 2014, and Boyer becoming financially overextended in his business, Boyer defaulted in payments on his asset purchase agreement with Casey Punturo and the lease with Punturo. Punturo filed suit to collect the amount due, requesting damages of $24,500. Boyer did not respond to Punturo's suit. Instead, with the guidance and at the advice of Defendant Kern ("Kern"), Boyer contacted, first, the Grand Traverse County prosecutor's office, and when it declined the case, the Michigan Attorney General, accusing Punturo of antitrust violations. In November, 2015, the Attorney General and the Michigan State Police raided Plaintiffs' offices, confiscated the hard drive of Plaintiffs' computer, and contacted counsel for Punturo, explaining Punturo was being investigated for criminal antitrust activity.

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

All of Boyer's antitrust, unjust enrichment, and tortious interference claims were dismissed by this Court pursuant to MCR 2.116(C)(8). Then, the Extortion Case was dismissed by the Grand Traverse County District Court at the preliminary examination stage. Although the Michigan Attorney General initially appealed the District Court's ruling, the appeal was later voluntarily dismissed and the criminal case is now closed.

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Both the Antitrust Case and the Extortion Case were covered by media outlets; however, except for one announcement upon filing the Extortion Case, the Attorney General did not talk to the media. Yet, and despite (as to Defendant Kern) Michigan Rules of Professional Conduct 3.6 regarding "Trial Publicity," Defendants repeatedly and aggressively talked to the media about both the Antitrust Case and the Extortion Case; and they did so with the express purpose of embarrassing and harming Plaintiffs Punturo and ParkShore and their reputation, to coerce Plaintiffs to pay them money, for relief from the onslaught of defamatory statements to the media.

The statements made by Defendants as reported by the various news media included, without limitation, the following (with emphases supplied):

a. February 28, 2016 Traverse City Record-Eagle:

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

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

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

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

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

Moothart argued in a response that Punturo's messages . . . were made to collect a rightfully owed debt. It stated that the Boyers initiated the contract, based on a text message Saburi Boyer sent Punturo. Kern said **the correspondence showed** otherwise. He said he doesn't know of any other **antitrust case with such significant extortion**. "This one involves more significant threats, and more significant sums of money," he said. "It affects the Traverse City tourism business, which is a very important industry to this area."

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

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

Kern: "disgusted that it goes on around here"

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

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

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

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

Reporter: "Why do you think they paid?"

Kern: "Fear. Believing it."

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

Kern: "Yes."

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

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

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

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

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

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

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

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

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

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

f. Interlochen Public Radio website May 10, 2016:

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

g. Northern Express November 19, 2016

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

With a new boat, Boyer needed more dock space. He said he decided to approach Punturo. He said he hoped enough time had passed, and he could lease space at the ParkShore again. "That's when he said, I've got a better idea. Why don't you **stay the hell off my dock and pay me anyway**," Boyer said in an interview.

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

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

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

The facts pleaded in Plaintiffs' complaint demonstrate Defendants' motives and malice. The arraignment in the Extortion Case was scheduled for Tuesday, May 10, 2016. On Friday, May 6, Kern left a voice mail with Plaintiffs' attorney, that he "was calling to discuss a settlement offer that'll help get your client out of hot water on Tuesday morning." Plaintiff's counsel returned Kern's call, asking what the settlement offer was and how it would help get his client out of hot water. During the telephone conference, Kern stated, among other things, that the "best opportunity to help out" Punturo in the criminal case was to "make it right by my clients"; that the way to do this would be for Punturo to settle the pending antitrust case by buying Boyer's parasailing business, with assets worth, at the very most, $250,000, for $800,000; that Punturo could then use the purchase of Boyer's business as a defense in the Extortion case by explaining it was a way for Punturo to "mitigate the harm, pay restitution, and just make it right"; that Punturo would be required to pay restitution in the Extortion Case and Kern's proposal would lessen the impact of the victim statements, by Punturo having shown he was sorry and wanted to make up for the harm he had caused Boyers and obtain their forgiveness, and that this would "deflate the sails of the Attorney General"; that Kern was going to amend the complaint in the Antitrust Case adding additional facts in affidavits from Boyers and other documents that would make Punturo look bad; that he had already gotten a call from the Traverse City Record-Eagle about the upcoming arraignment and the Record-Eagle planned to be there; and that if Kern had to file an amended complaint on Monday, May 9, 2016, the day before

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the arraignment in the Extortion Case, with the additional things attached, "they're gonna couple that with what happens on Tuesday morning and blow it up" into "a bigger story"; that If Judge Rodgers "never sees that whole nastiness play out" it would be better for Punturo at the extortion sentencing, comparing Punturo's possible fate in the Extortion Case to that of the defendant in the Grand Traverse County case of *People v Derek Bailey*, in which the defendant was sentenced to 25 years in prison, and warning Punturo's attorney that Judge Rodgers had been "ticked off the most" by Defendant Bailey's refusal to accept responsibility for what he did, and that the proposal Kern was offering was a way for Punturo to be able to claim that even before he got criminally arraigned, he "was already trying to make it right" with a covenant not to compete that would be legal, and although the prior covenant not to compete was (according to Kern) illegal, that Punturo could say that before he might not have gone about it the right way but that could be explained by claiming "we're not all that familiar with antitrust up here"; and Punturo buying Boyer's parasailing business would "legitimize the unlawful contract" and perhaps would take the intent away from the Extortion Case and show "an eagerness to correct the behavior."

Two days later, on May 8, 2016, Kern e-mailed Punturo's counsel, reducing the money requested to $750,000, and stating that as a part of the proposed deal, "[m]y clients will publicly acknowledge that they are impressed by Bryan taking a proactive approach to rectify any harm caused by any misunderstandings and that all has been forgiven and forgotten," and also, that "[m]y clients will appear as subpoenaed to do so, or requested by your client to do so, to inform any relevant parties that they bear no hard feelings," and that "[t]here will be a non-disparagement agreement through which neither will speak ill of each other moving forward." **Exhibit C**.

The May 8, 2016 e-mail also states "[s]ince your client has more going on with both his situation and taking over the business, we are open to hearing his concerns/requests," and "[w]e

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think this will produce the most positive result for everyone." The next day, May 9, 2016, Kern left a voice mail for Plaintiffs' counsel, stating he was "just calling to see where we stand." Punturo's counsel did not respond to these communications. At 5:01 p.m. on May 9, 2016, as threatened in the May 6 phone call, Kern filed an amended complaint in the Antitrust Case, and also as threatened, on May 10 after the arraignment, Kern and Boyer helped the media "blow it up" into a "bigger story" by granting interviews and unequivocally accusing Plaintiffs Punturo and ParkShore of criminal acts and otherwise defaming Plaintiffs as detailed above.

As noted, Boyers' antitrust claims suffered (C)(8) dismissal before Judge Rodgers, and the extortion case did not survive preliminary examination. This suit followed.

III. Argument.

A. Preliminary issues.

First, it is clear that as required by the case law cited by Defendants, Plaintiffs have set forth the specific words uttered by Defendants claimed to be defamatory, and the recitation above demonstrates as a threshold matter that many of these statements unequivocally accused Punturo of antitrust violations and extortion. Every other statement "must be examined 'in its totality in the context in which it was uttered or published,'" and "a court must consider all the words used in allegedly defamatory material, 'not merely a particular phrase or sentence.'" In sum, "'context' must be considered when an alleged defamatory statement is reviewed for a determination of whether it implies a defamatory meaning." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 129; 793 NW2d 533, 548–49 (2010).

Here, the context was (1) Defendants were suing Punturo claiming extortion and antitrust violations; (2) Punturo was being prosecuted for extortion; and (3) Defendants were unequivocally telling the press things such as "Punturo flagrantly violated antitrust laws," "there was extortion for

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the past two years," "I realized it violated antitrust laws," "I recognized extortion," "correspondence showed . . . significant extortion," "paying the extortion money," "glad the attorney general takes antitrust violations and extortion seriously," "this is an antitrust violation," "this is extortion," and "I was being extorted." In this context, the other false statements, such as references to specific threats – "he was going to hurt me,""bury me," etc., all refer and relate to and support in context, the accusations of criminal acts, and as such, are properly a part of the defamation sued for.

Second, it is clear that false accusations of antitrust violations and extortion, are defamation *per se*. In *Lakin v Rund*, – Mich App –, – NW2d –, 2016 WL 7022886 (2016)(**Exhibit D**), the Court of Appeals held that "words charging an individual with a crime only constitute defamation *per se* if the crime involves moral turpitude or would subject the person to an infamous punishment." Whether punishment is "infamous" is determined by whether the crime is punishable by incarceration in prison as opposed to jail ("certain crimes that the Legislature has labeled 'misdemeanor' may also be considered a felony for purposes of the Code of Criminal Procedure and result in a prison sentence"). Here, Defendants accused Punturo of extortion, a 20-year felony, MCL 750.213, and antitrust violation, nominally a misdemeanor but punishable by up to two years of imprisonment, MCL 445.779. Thus, although Plaintiffs have pleaded special damages, they need not prove any, under applicable law, because damages are presumed under the *per se* standard for their claims. *Burden v Elias Bros*, 240 Mich App 723; 613 NW2d 378 (2000).

B. Defendants' arguments fail.

1. Fair reporting privilege does not apply. In support of this argument, Defendants cite *Bedford v Witte*, – Mich App –, – NW2d –, 2016 WL 6884212 (2016)(**Exhibit E**). In that case, the court held that the privilege applied to the filing of the complaint and its publication on the filing

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attorneys' website, but also held that it did not apply where the Defendant's media comments were "an expansion beyond the public record." The court stated:

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

In the instant case, Defendants claim they are in the clear, merely because they did not actually utter the words "we can say with certainty" when accusing Punturo of crimes. Yet, Defendants *said* Punturo committed crimes "with certainty" – "the contract . . . violates the Michigan Antitrust Reform Act"; "there was extortion for the past two years"; "correspondence showed . . . significant extortion"; "I realized it violated antitrust laws"; "I recognized extortion"; "paying the extortion money"; "Punturo flagrantly violated antitrust laws"; "glad the attorney general takes antitrust violations and extortion seriously"; "this is an antitrust violation"; "this is extortion"; "I was being extorted." Thus, under the very case cited by Defendants, summary disposition is not proper. As the court in *Merritt v Thompson (In re Thompson)*, 162 BR 748, 764 (Bankr ED MI 1993) stated:

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

In *Timmis v Bennett*, 352 Mich 355, 365; 89 NW2d 748, 753 (1958), the court held that an attorney's statements in a letter regarding which he contemplated bringing suit were not privileged,

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because the privilege does not apply to statements "not uttered in the course of a judicial proceeding" and that "[a] repetition of privileged words uttered in the course of judicial proceedings, when no public or private duty requires an attorney to repeat them, may place him on the same footing as anyone else who utters defamatory statements about another." Here, as to Defendant Kern, there was certainly no such duty to repeat anything – indeed, MRPC 3.6 *prohibits* any "extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter," which expressly includes a statement that relates to "(1) the character, credibility, reputation, or criminal record of a party, [or] of a suspect in a criminal investigation . . .; and (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration." Indeed, Rule 3.6 even prohibits a statement to the press "(6) . . . that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty."[1]

Thus, summary disposition as to liability, for defamation *per se*, should be granted to Plaintiff Punturo, not Defendants, pursuant to MCR 2.116(I)(2).

2. Defendants' statements were not mere opinion or hyperbole. This defense is easily rejected. First, our Court of Appeals has stated that 'the United States Supreme Court has rejected the idea that all statements of opinion are protected and has directed that the defamatory statement must be provable as false to be actionable." *Kevorkian v Am Med Ass'n*, 237 Mich App

[1]When one contrasts Defendants' vituperative and unequivocal statements to the media, with the Attorney General's carefully worded press release attached to Defendant Kern's papers as Exhibit 3, it is clear that Boyers' claim that their statements were "made in reliance on the publicly announced opinion of the Michigan Attorney General," is specious.

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1, 5; 602 NW2d 233, 236 (1999). If a statement is purely opinion it is not actionable, but a protected "opinion" means something that is purely a subjective assertion ("in my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" – not actionable) versus factually verifiable statements ("In my opinion Mayor Jones is a liar"– actionable). *Id*.

Defendants essentially argue that every accusation of criminal conduct, especially by a lawyer, is a protected "opinion." Aside from the absurdity of vitiating the established *per se* rule for accusations of criminal conduct, "[d]irect accusations or inferences of criminal conduct or wrongdoing are not protected as opinion . . . . There is no First Amendment protection for 'a charge which could reasonably be understood as imputing specific criminal conduct or other wrongful acts.'" *Hodgins v Times Herald Co*, 169 Mich App 245, 253-254; 425 NW2d 522, 527 (1988). As the court stated in *Kevorkian*, actionable statements include "direct accusations or inferences of criminal conduct [citing *Hodgins*]. Language that accuses or strongly implies that someone is involved in illegal conduct crosses the line dividing strongly worded opinion from accusation of a crime." *Kevorkian*, 237 Mich App at 8, 602 NW2d at 237.

Nor can Defendants' statements be viewed as mere rhetorical hyperbole, – "[e]xaggerated language used to express opinion, such as 'blackmailer,' 'traitor' or 'crook,'" that "does not become actionable merely because it could be taken out of context as accusing someone of a crime." *Id*. Punturo, who had been sued for antitrust violations and who was being prosecuted for extortion, is not taking Defendants' accusations "out of context" – just the opposite. The context in which Defendants' statements were actually made clearly shows their meaning as defamation *per se*.[2]

[2]Although obviously not actionable and wholly irrelevant to this case anyway, real examples of "rhetorical hyperbole" can be found in the cited comments of Judge Phillips and Judge Rodgers about Punturo in dismissing the extortion and antitrust cases.

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3. Statements of attorney are attributable to client. First, as noted above, many of the defamatory statements were made directly by the Boyers, including Danielle Boyer, e.g., "the Boyers say they were tired of living in fear and went to a lawyer who discovered anti-trust law violations"; "Boyer maintains . . . I was being extorted." Second, Boyers cite only two general principal-agent cases, neither of which involve attribution of the statements of an attorney to a client. Applicable case law shows that Boyers are liable for their attorney's statements. In *Foster v Wiley*, 27 Mich 244; 15 Am Rep 185 (1873), the client was sued for an improper execution against the plaintiff's property issued by his lawyer. The court characterized the lawyer's action as a "naked tort," and observed that the defendant's claim, just like Boyers' in this case, was that "no presumption of his client's agency can be indulged in, and he alone must be held responsible for the trespass which followed, unless affirmative evidence is given that the client was consenting to his action." *Id*., 27 Mich at 247. The court rejected this claim and held the client liable, stating:

> A plaintiff can never be held to intend a trespass to third persons; but when one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand, and consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law.

Id. at 249. See also *Brown v Spiegel*, 156 Mich 138, 142; 120 NW 579 (1909)("[a] general authority to commence suits will warrant an attorney in attaching property, and render the client liable for any damages"); *Capital Dredge and Dock Corp v City of Detroit*, 800 F2d 525, 533 (CA 6 1986)("the client is generally responsible for the attorney's actions even though the client has not authorized the attorney to commit the tortious acts" unless "the attorney 'has no purpose of serving the [client's] interests'")(applying Michigan law).

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Courts in other States have reached similar holdings in the specific context of defamation and other tort cases. *Union Mut Life Ins Co v Thomas*, 83 F 803, 806 (CA 9 1897)(libelous statements made by "duly-authorized counsel of the insurance company, in an action pending against it, must be presumed, until the contrary is shown, to have been the answer of the insurance company, and to contain matter duly authorized by it"); *Med Informatics Engg, Inc v Orthopaedics Ne, PC*, 458 F Supp 2d 716, 727 (ND Ind 2006) (client "could potentially be liable for [his attorney] Hohman's statement if Hohman acted within the scope of his authority as [client's] agent"); *SouthTrust Bank v Jones, Morrison, Womack & Dearing*, PC, 939 So 2d 885, 905–06 (Ala Civ App 2005)(in a malicious prosecution and abuse of process case, holding "a [client] principal is liable for the intentional torts of its [attorney] agent-even if the agent's acts were unknown to the principal, were outside the scope of the agent's authority, and were contrary to the principal's express directions-if the agent's acts were in furtherance of the principal's business and not wholly for the gratification of the agent's personal objectives"); *Racoosin v LeSchack & Grodensky, P C*, 103 Misc 2d 629, 634; 426 NYS2d 707 (1980)(wilful interference with property case – "once Consolidated Edison authorized Grodensky to collect this claim, it became liable for his tort under familiar principles of principal and agent; and it is no defense that it did not authorize the commission of a tort").

In the case at bar, Boyers have cited to no law remotely implying that they are not liable for the acts of their retained legal counsel. And although Michigan law is clear that such liability is not dependent upon Boyers having granted Kern authority to defame Punturo or even knowing that he was doing it, the facts pleaded make it clear that Boyers stood arm in arm with Kern, making their own concurrent defamatory statements; that Kern's statements were not outside the scope of his authority as Boyers' agents; and that Kern's statements were in no way "wholly for the gratification of [his] personal objectives." Indeed, Kern's statements to the press after Punturo's arraignment on

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May 10, 2016, were simply in fulfillment of his threat to make them if Punturo did not pay Boyers $750,000. In sum, there is no question of Boyers' liability for their attorney's defamatory statements, which were calculated to extract money from Punturo to be paid to Boyers.

4. Kern's statements in settlement negotiations are admissible. Simply, MRE 408 prohibits evidence of settlement negotiations "to prove liability for or invalidity of the claim or its amount." Punturo is not proffering Kern's statements to prove he only owed Boyers $750,000, but rather, to show that Boyers are liable for Kern's statements as outlined above, and Defendants' actual and common law malice and reckless disregard for the truth of their statements by demonstrating their improper profit motive – as opposed to any "fair reporting" or other benign motive.[3]

5. Plaintiffs are not public figures. Defendants do not say whether they claim Plaintiffs are general or limited public figures – but they are neither. First, designation as a "general-purpose public figure" "has been applied sparingly by courts. Courts have tended to limit the designation to those persons whose names have become household words." *Bufalino v Detroit Magazine, Inc*, 433 Mich 766, 788–89; 449 NW2d 410, 420 (1989).[4] "Absent clear evidence of

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[3]"A plaintiff can prove actual malice with circumstantial evidence of a defendant's state of mind and motives." *Osak v Univ of Michigan Regents*, dkt no 306239, 2012 WL 5061640, at *5 (Mich App October 18, 2012), and "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence, and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Smith v Anonymous Joint Enter*, 487 Mich 102, 116; 793 NW2d 533, 542 (2010). See also *Lawrence v Fox*, 357 Mich 134, 141–42; 97 NW2d 719, 723 (1959)("actual malice" can be found if "the primary motive [is] the gratification of personal hostility, spite, or ill-will"); *Huson v Dale*, 19 Mich 17, 31 (1869)("repetition of the same charge on other occasions, or other facts tending to show a vindictive motive"); *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5, 9 (2001)(deliberate alteration of words uttered by plaintiff resulting in a material change in the meaning conveyed by the statement establishes actual malice).

[4]In contrast to the Plaintiffs in this case, the court in *Bufalino* observed that "The following plaintiffs have been treated as general-purpose public figures, either by designation or consent: Johnny Carson, late-night television personality; William F. Buckley, political commentator, author, and television talk-show host; the Church of Scientology; William Loeb, political commentator and

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general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.*, 433 Mich at 781; 449 NW2d at 416–17 (citing *Gertz v Robert Welch, Inc*, 418 US 323 (1974)). As to this "limited public figure" concept, the Michigan Court of Appeals has stated:

> A private person becomes a limited-purpose public figure when he voluntarily injects himself or is drawn into a particular public controversy and assumes a special prominence in the resolution of that public controversy. However, a private individual is not automatically transformed into a limited-purpose public figure merely by becoming involved in or associated with a matter that attracts public attention; the court must look to the nature and extent of the individual's participation in the controversy.

Hodgins v Times Herald Co, 166 Mich App 245, 256-257; 422 NW2d 522, 528 (1988)(internal citations omitted).

Plaintiffs in this case have not "voluntarily injected" themselves into any public controversy, nor have they "assumed special prominence" in resolution of any public controversy. At most, as the result of Defendants' media blitz, they may have unwittingly become "involved in or associated with a matter that attracts public attention." The court's analysis in *Bufalino* is instructive:

> Bufalino has brought actions in the past against others for allegedly defaming him, but such resort to legal process does not make him a public figure for the purposes of that particular controversy even if such actions were newsworthy. Bufalino in his capacity as an attorney might have represented notorious clients. But this would not render him a limited-purpose public figure respecting organized crime, even if such representation was a matter of media interest and notice.

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publisher of the Manchester Union Leader; Bebe Rebozo, close friend of President Nixon." *Id.*, 433 Mich at 789; 449 NW2d at 420 (internal citations omitted).

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Bufalino, *supra*, 433 Mich at 790; 449 NW2d at 421. The best that Defendants can do is allege that Punturo has been involved in other suits in the past, and that the extortion and antitrust cases against him, that he obviously did not institute, attracted some public attention. Under the above-cited standards, this is insufficient to change his private figure status.

Moreover, even if Plaintiffs were public figures, this would not support dismissal of their claims; instead, it *might* require them to establish actual malice.[5] Plaintiffs' pleadings are more than sufficient on this. In addition to the demonstrated improper profit motives of Defendants, Plaintiffs have shown (1) outright knowing falsehoods, e.g., the claims that Punturo told Boyer "I will crush you," "make your life a living hell," "bury you"; "mentioned the word 'demise' probably a dozen times"; (2) at least reckless accusations of antitrust violations based upon (a) claiming as illegal, a lease contract not severely restraining trade, pursued by Boyer (at the same time he was chasing at least three other parties for a similar deal), drafted by Boyer, signed by Boyer, and benefiting Boyer by eliminating Plaintiffs as parasailing competitors, and (b) "monopoly" claims against Plaintiffs who had no parasailing market share, or even a boat to compete with Boyer at all, much less with "unfair competition"; and (3) at least reckless accusations of extortion despite the utter lack of (a) any "threat" other than to *legally* compete with Boyer, a constitutionally protected activity,[6] or (b)

---

[5]See *Burden v Elias Bros*, 240 Mich App 723; 613 NW2d 378 (2000)(actual malice not required when defamation is *per se*); *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 268; 833 NW2d 331, 345 (2013)(actual malice and *per se* are separate inquiries).

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

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any credible claim that Boyer signed the lease against his will[7] – all of which are basic elements of an extortion claim. *People v Harris*, 495 Mich 120; 845 NW2d 477 (2014). That these accusations were recklessly false is supported by their immediate rejection – on (C)(8) dismissal and at a criminal preliminary examination – by this Court and the District Court.

IV. Conclusion.

It is clear that unkind words were spoken by both sides of this case against the other. However, this case is not a kindness contest. In their zeal to part Plaintiffs from $750,000 of their money, Defendants repetitively, deliberately, aggressively and publicly defamed Plaintiffs. All of the defenses they assert in their motions lack legal merit. Accordingly, Plaintiffs request that this court deny the motions, award them their costs and fees, and grant Plaintiffs partial summary disposition pursuant to MCR 2.116(I)(2), for liability of Defendants on Plaintiffs' claims of defamation *per se.*

Date: April 24, 2017

MOOTHART & SARAFA, PLC

By: /s/ Jonathan R. Moothart

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

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APPENDIX 15

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STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT, COUNTY OF GRAND TRAVERSE

BRYAN PUNTURO AND FAWN PUNTURO,
husband and wife,

and

B&A HOLDINGS, LLC d/b/a ParkShore Resort,
a Michigan limited liability company,

Plaintiffs,

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

v

BRACE KERN,
an individual,

and

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

Defendants.
_____/

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Defendant Brace Kern's Reply to Plaintiffs' Response to His Motion for Summary Disposition

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1. **Kern's allegedly defamatory statements "substantially represented" the accusations of criminal and civil misconduct raised in the Boyers' civil suit and the Attorney General's criminal prosecution. So the statutory "fair reporting" privilege protects Kern's statements and the Punturos' defamation claim fails as a matter of law.**

In their response, the Punturos assert 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."[1] **They're wrong.** Michigan's statutory fair-reporting privilege protects "fair and true" reports of matters contained in records that are generally available to the public. MCL 600.2911(3). But a report doesn't have to quote the public record verbatim for a statement to be privileged. 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) (emphasis added). 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 effect on the reader." *Id.*

The Punturos contend that *Bedford v. Witte*, ___ Mich App ___; ___ NW2d ___ (2016) (Docket Nos. 327372, 327373),[2] supports their argument that Kern's statements weren't privileged because of the level of certainty he expressed. **It doesn't.** 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." *Id.* The panel reasoned that because of the increased "level of certainty expressed...his words did alter the effect the literal truth would have on the recipient of the information." *Id.* But, despite the Punturos' assertion to the contrary, Kern didn't say anything like that here nor did his allegedly

[1] Punturos' Response at 1.
[2] Attached as Exhibit 9 to Kern's Motion.

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defamatory statements express an increased level of certainty. He merely used declarative sentences that repeated the allegations raised in the Boyers' underlying complaint and in the Attorney General's case against Punturo—e.g., "I realized it violated antitrust laws," "I recognized extortion," "this is an antitrust violation," "this is extortion."[3] While those are statements, they weren't made "with certainty.[4]

The Punturos' reliance on *Timmis v Bennett*, 352 Mich 355 (1958), and *In re Thompson*, 162 BR 748 (ED BR, 1993) is also misplaced because both were decided **before** the Court of Appeals clarified the "substantially represents" standard in 1995 in *Northland Wheels*. Furthermore, *Timmis* dealt with the common law judicial proceedings privilege rather than the statutory fair reporting privilege and was decided thirty years before the Legislature broadened the fair reporting privilege by amending § 2911(3). 1988 PA 396 (Effective January 1, 1989). *Thompson* is also distinguishable—not only did it apply an outdated standard, it's not even a Michigan case.[5]

In their response, the Punturos completely ignore the correct standard for determining if the fair reporting privilege applies to this case—i.e., whether Kern's statements "**substantially represent[ed]**" the matters contained in the Boyers' (and the Attorney General's) pleadings. See *Northland Wheels*, 213 Mich App at 325-326. And when the correct standard is applied, it's clear that the fair reporting privilege protects Kerns' statements.

The Punturos' maintain that Kern defamed them by accusing them of anti-trust violations and extortion. But that's exactly what the Boyers and the Attorney General accused

[3] Complaint at ¶30, Attached as Exhibit 1 to Kern's Motion.

[4] 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*, slip op at 5.

[5] The Punturos' also claim that Kern violated Michigan Rule of Professional Conduct 3.6. But, even assuming that Kern violated the MRPC (he didn't), the Punturos' allegation that Kern violated MRPC 3.6 is just a distraction from the dispositive issue in this case—i.e., whether Kern's statements substantially represented the allegations contained in the underlying lawsuit—because 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).

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Punturo of doing in the underlying lawsuit and criminal prosecution. The Attorney General charged Punturo with felony extortion and the Boyers claimed that Punturo engaged in "threats, coercion, **extortion, antitrust violations**, and vulgar correspondence," violated Michigan's criminal law against extortion, MCL 750.213, and flagrantly violated MCL 445.772 and MCL 445.723 of the Michigan Antitrust Reform Act. [6]

Even if Kern didn't repeat the allegations of criminal and civil misconduct verbatim, at the very least, 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.**"[7] See *Northland Wheels*, 213 Mich App at 325-326. 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 *id.* Consequently, the fair reporting privilege contained in MCL 600.2911(3) protects Kerns' statements. So the Punturos' defamation claim—and, by extension, their entire case[8]—fails as a matter of law and must be dismissed.

2. **To the extent Kern's statements didn't "substantially represent" the Boyers' and Attorney General's allegations of criminal and civil misconduct against Punturo, they were simply expressions of opinion or rhetorical hyperbole.**

In the underlying lawsuit, the Boyers alleged that Punturo committed extortion and violated antitrust laws. And the Attorney General charged Punturo with felony extortion. To the extent Kern's statements accused Punturo of extortion or antitrust violations, they "substantially represent" the allegations in the Boyers' pleadings and the Attorney General's extortion charges, and thus, were a statutorily privileged "fair and accurate" reporting of a public record. MCL 600.2911(3). Alternatively, to the extent that Kern didn't just reiterate the allegations in the Boyers' pleadings or the Attorney General's extortion charges, his statements

[6] Underlying Complaint at ¶¶17-18, 42, 45 (Attached as Exhibit 6 to Kern's Motion); Michigan Attorney General Press Release (Attached as Exhibit 3 to Kern's Motion).
[7] Underlying Complaint at ¶32.
[8] 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.

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were nothing more expressions of subjective opinion about Punturo's treatment of the Boyers or mere "rhetorical hyperbole" said in the context of a hotly-contested lawsuit.

The Punturos argue that the opinion and rhetorical hyperbole defenses asserted by Kern are "invalid because [Kern] did not merely generally accuse Punturo of being a bad guy....[But] [r]ather, [he] unequivocally accused him of criminal acts."[9] But they can't have it both ways. Kern asserted subjective opinion and rhetorical hyperbole arguments as alternatives to his statutory fair reporting privilege argument. If Kern's statements reiterated the allegations in the Boyers' underlying civil case or the Attorney General's criminal prosecution —i.e., because they accused Punturo of criminal or civil wrongdoing—they were privileged under § 2911(3). But to the extent Kern's statements are alleged to have deviated somewhat from the underlying complaint—e.g., there was daylight between the pleadings and Kern's use of declarative sentences or references to Punturo's verbal threats—they were nothing more than his subjective opinion or rhetorical hyperbole. Either way, they fail to state a valid claim of defamation and summary disposition is warranted.

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April 27, 2017

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings this 27th day April, 2017

By: ____ U.S. Mail
____ Hand Delivered
__x__ TrueFiling (E-filing)

/s/ Sue L. Lustig
Sue L. Lustig

[9] Punturos' Response at 1.

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APPENDIX 16

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STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT, COUNTY OF GRAND TRAVERSE

BRYAN PUNTURO AND FAWN PUNTURO,
husband and wife,

and

B&A HOLDINGS, LLC d/b/a ParkShore Resort,
a Michigan limited liability company,

Plaintiffs,

v

BRACE KERN,
an individual,

and

SAUBURI BOYER AND DANIELLE KORT, f/k/a
Danielle Boyer,
individuals,

Defendants.

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

Plaintiffs' *Surreply* to Defendants' Replies Regarding Motions for Summary Disposition And Cross Motion for Partial Summary Disposition Pursuant to MCR 2.116(I)(2)

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Plaintiffs submit the following brief list of bullet points in surreply to Defendants' responses.

1. Kern's ethics violations are relevant to, but not the basis of, Plaintiffs' claims.

Notably, other than Kern's conclusory statement that "he didn't" violate Rule 3.6 (reply, footnote 5) Defendants do not even attempt to argue that Kern complied with that rule. Boyers claim relevant (without citation to any authority) that they were not "neutrals" and that "the public understands the role of attorneys as 'advocates,'" but the point is, Rule 3.6 makes clear that the attorney's role as an "advocate" expressly excludes the statements made by Kern to the press.

More importantly, Plaintiffs did not sue Kern for violating the ethics rules. Suit was filed for Kern's defamatory comments to the media, as detailed in the complaint. Thus, Boyers' claim that they are not "liable for [Kern's] violations of the Rules of Professional Conduct" (reply, pp. 4-5) is inapposite. Kern's observation, in footnote 5 of his reply, that "violations of the MRPC don't give rise to a civil cause of action," is irrelevant for the same reason.

And, although Plaintiffs' causes of action are not dependent upon proof of Kern's ethics violations, those violations are relevant in this case as evidence of recklessness or negligence. In *CenTra, Inc v Estrin*, 538 F3d 402 (CA 6 2008)(**Exhibit H**), a suit for breach of contract, fiduciary duty, and malpractice, the court cited decisions of the Michigan Court of Appeals and held that although "a violation of Michigan's Rules of Professional Conduct does not by itself give rise to an actionable claim," *id*. at 410, and "a plaintiff cannot seek damages for a violation of the Michigan Rules of Professional Conduct," such a violation "may be probative in establishing an independent cause of action," *id*., citing *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 650 N.W.2d 364 (2002)(holding fee agreement unenforceable as contrary to rules, stating the rules are admissible and relevant under Michigan law); *Recker v Malson*, dkt no 268230, 2006 WL 2380960, at *3 (Mich

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App Aug17, 2006)(**Exhibit I**)("plaintiffs do not rely solely on the rules to establish their claim, but instead refer to the rules only as evidence of the standard of care"); *Deluca v Jehle*, dkt no 266073, 2007 WL 914350 at *2-*3 (Mich App March 27, 2007)(**Exhibit J**)(no error in the trial court's jury instruction that "[i]f you find the defendant violated the Michigan Rules of Professional Conduct you may infer that the defendant was negligent"). See also *Trierwiler v Varnum, Riddering, Schmidt & Howlett*, LLP, dkt no 256511, 2006 WL 1161546 at *7 (Mich App May 2, 2006)(**Exhibit K**)(MRPC "admissible as evidence in a malpractice action, where they are relevant to the alleged deficient conduct at issue and where their probative value is not outweighed by their prejudicial effect").

Here, MCL 600.2911(7) expressly authorizes a defamation action based upon a statement that "was published negligently, " and recklessness supports actual malice. Put bluntly, given the prohibitions of MRPC 3.6, Kern had no business saying what he said to the media; violating the ethics rules is a reckless thing for a lawyer to do; and this violation, although not actionable in itself, is nevertheless at least evidence of recklessness or negligence.

Additionally, as noted in Plaintiffs' response, to the extent Kern might claim he had a duty or right to defame Plaintiffs to the media, his violation of Rule 3.6 rebuts such a claim. Again, however, this supports, but does not constitute, Plaintiff's causes of action.

2. Plaintiff's failure to sue the media or the Attorney General is irrelevant. Boyers cite no law holding that a Plaintiff's failure to sue other potentially liable defamation defendants entitles the sued defendants to summary disposition. For what it is worth, first, suit against the Attorney General, who was eminently careful with his press release and otherwise enjoys nearly complete immunity, would be ridiculous based on facts known to Plaintiffs at present. As for the media, what they did was report what Boyers and Kern said to them; and, presumably unlike the

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media, Boyers and Kern knew or should have known their statements to be false and/or reckless. Given the proof issues involved in claiming that the media were negligent or reckless in publishing what the putative victims and their attorney told them, Plaintiffs simply decided that discretion might be the better part of valor, and sued the people initially responsible for publishing the defamation.

3. *Northland Wheels* supports Plaintiffs' claims. Kern relies heavily on this case, but it actually supports Plaintiffs' position. In *Northland Wheels*, the Court of Appeals held first that news reports of police records of shootings outside the plaintiff's business were not actionable under the fair reporting privilege, because they were merely a "fair and true report of police records." *Id.*, 213 Mich App at 327; 538 NW2d at 779.

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

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

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4. Kern's statements were not mere opinion or hyperbole.

Kern claims that "to the extent that Kern didn't just reiterate the allegations in the Boyers' pleadings or the Attorney General's extortion charges, they were nothing more [than] expressions of subjective opinion about Punturo's treatment of the Boyers or mere 'rhetocial hyperbole' said in the context of a hotly-contested lawsuit." Yet, as noted in Plaintiffs' response, "[d]irect accusations or inferences of criminal conduct or wrongdoing are not protected as opinion . . . . There is no First Amendment protection for 'a charge which could reasonably be understood as imputing specific criminal conduct or other wrongful acts.'" *Hodgins v Times Herald Co*, 169 Mich App 245, 253-254; 425 NW2d 522, 527 (1988). "Language that accuses or strongly implies that someone is involved in illegal conduct crosses the line dividing strongly worded opinion from accusation of a crime." *Kevorkian*, 237 Mich App at 8, 602 NW2d at 237. Especially when *uttered by a licensed attorney*, such "opinions" are simply *per se* defamation.

Moreover, whether or not something is "hyperbole" is not determined by how "hotly contested" a dispute between the plaintiff and defendant might have been; rather, it is assessed based upon whether the words uttered are "provable as false." "She is an unfit mother" is hyperbole; "Punturo flagrantly violated antitrust laws," "there was extortion for the past two years," "I realized it violated antitrust laws," "I recognized extortion," "correspondence showed . . . significant extortion," "paying the extortion money," "glad the attorney general takes antitrust violations and extortion seriously," "this is an antitrust violation," "this is extortion," and "I was being extorted"; fall into the actionable category.

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5. Boyers are liable for their attorneys' statements.

Although scorning Plaintiffs' citations to "cases from the 1800's and from other States," Boyers provide the Court with absolutely no contrary authority. The best that they can do is to mischaracterize Plaintiffs' claims as stating "a client is liable for an attorney's violation of the Michigan Rules of Professional Conduct." Summary disposition on this legal issue is therefore appropriate in favor of Plaintiffs.

6. Plaintiffs are entitled to partial summary disposition and sanctions.

Defendants' reply briefs demonstrate that Plaintiffs are entitled to summary disposition as to liability. Defendants unequivocally made public accusations, to the media, of the commission of crimes, that were proved false, in court. Defendants have no defense to this *per se* part of Plaintiffs' claims. And, the reply briefs also demonstrate the frivolous character of Defendants' motions. They challenge nearly none of Defendant's response arguments, and the challenges they do make, show clearly that these motions should never have been filed.

Accordingly, Plaintiffs request that this court deny the motions, award them their costs and fees, and grant Plaintiffs partial summary disposition pursuant to MCR 2.116(I)(2), for liability of Defendants on Plaintiffs' claims of defamation *per se.*

Date: April 28, 2017

MOOTHART & SARAFA, PLC

By: /s/ Jonathan R. Moothart

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APPENDIX 17

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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

Plaintiffs,

vs.

BRACE KERN, an individual, and SABURI BOYER and DANIELLE KORT, f/k/a DANIELLE BOYER, individuals,

Defendants.

FILE 17-32008-CZ
Hon. Thomas G. Power

TRANSCRIPT OF PROCEEDINGS

before the Honorable Thomas G. Power, Circuit Court Judge, presiding on Monday, May 8, 2017 in Traverse City, Michigan.

APPEARANCES:

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1 (APPEARANCES CONTINUED)

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1 THE COURT: Punturo versus Kort.
2 MR. SULLIVAN: Good morning, your Honor.
3 Michael Sullivan on behalf of Defendant Brace Kern.
4 MR. DAY: Meigs Day also on behalf of Mr. Kern.
5 MR. ZELENOCK: Jay Zelenock for Saburi Boyer
6 and Danielle Kort.
7 THE COURT: Mr. Moothart is here for the
8 Plaintiff. This is File 17-32008 and why don't we agree
9 that everybody doesn't like each other and go home. How
10 would that be?
11 MR. SULLIVAN: I would take that as long as --
12 THE COURT: You get a ceremonial pillow fight
13 out of this. You get the parties' opportunity to wail on
14 each other. I am just trying to get to the heart of the
15 case and what it's really about. That's all.
16 Summary disposition was filed by Kern and also
17 by Kort and Boyer. Now, that's an interesting question.
18 Doesn't have anything to do with the motion, but, Mr.
19 Moothart, there are two kinds of statements that are made,
20 one violating antitrust laws and the other one extortion.
21 I can understand extortion is a claim of a
22 criminal act. How is saying someone violated the antitrust
23 laws attributing moral turpitude or whatever the standard
24 is. I read that. I assumed that violation --
25 MR. MOOTHART: Well, it didn't say a civil

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1 violation of the antitrust law. What the claim was, what
2 the statement was correspondence proved Punturo flagrantly
3 violated antitrust laws.
4 THE COURT: You're right up there with
5 Microsoft. What's the problem?
6 MR. MOOTHART: Well, the first call I got from
7 the Attorney General was that they were investigating Mr.
8 Punturo for criminal antitrust violations.
9 THE COURT: The allegedly defamatory statement.
10 Mr. Kern said -- I am looking at Page 5 of your brief --
11 Kern said the correspondence proved Punturo flagrantly
12 violated State antitrust laws.
13 MR. MOOTHART: Right.
14 THE COURT: And I'm wondering it is not really
15 part of this motion, but I mean I didn't read -- somehow it
16 doesn't -- it sounds like a civil violation, but extortion
17 certainly is a claim of --
18 MR. MOOTHART: -- it certainly is. I mean,
19 your Honor, clearly antitrust violations do have criminal
20 penalties. We have cited the statute. It is a two-year --
21 THE COURT: -- okay. I get to talk over you.
22 You can't talk over me.
23 MR. MOOTHART: You're right.
24 THE COURT: Not fair, but that's the way it is.
25 Hold it just a minute.

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MR. MOOTHART: We have cited the statute for criminal penalties for antitrust violations and it is what the prosecutors refer to as a --

THE COURT: -- I suppose at some point the question is an antitrust violation, is it a claim of a crime and is it a crime that involves moral turpitude or would subject a person to an infamous punishment, but that's not part of this motion, but at some point somebody might want to raise that.

MR. MOOTHART: I have briefed that issue in my brief, your Honor, and because it is punishable by imprisonment as opposed to County Jail, it is infamous punishment. No question of it. I briefed that.

THE COURT: Now --

MR. MOOTHART: -- we can cover it again at some point in the future, but --

THE COURT: -- hold it just a minute. I am going to ask more questions. You each get a full chance to talk here in a minute.

MR. MOOTHART: It's on Page 11 of my brief, your Honor, the Lakin case.

THE COURT: I missed Page 11 because that's when they brought in Francisco Rodriguez on Saturday night and I missed the whole case.

MR. MOOTHART: The first time or the second

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1 time?
2 THE COURT: That was Saturday night. Sunday
3 night was a later page in one of their briefs. Hold it just
4 a minute.
5 MR. MOOTHART: Feel like I have been waiting my
6 whole life for a closer.
7 THE COURT: Mr. Sullivan or Mr. Day, is your
8 primary reason for dismissing the claims against Kern that
9 they weren't libelous statements or that one of the
10 privileges arrived, a fair commentary?
11 MR. SULLIVAN: Yes, your Honor. It is the fair
12 and true reports privilege, which is the basis of our
13 motion.
14 THE COURT: All right, because there is some
15 law that if you do more than just report what the charges
16 are and Mr. Kern was pretty definite that this is a flagrant
17 example of extortion and antitrust violation. He went
18 beyond just the claims that are made.
19 MR. SULLIVAN: I would probably disagree with
20 you there, judge, because -- you are correct that he did not
21 recite the claims word for word, but the law doesn't require
22 that. The law says that so long as the fair and true report
23 essentially gives the gist of what's involved in the public
24 record, then that's good enough. We don't have to say
25 before everything we say outside of the courtroom it has

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1 been alleged. We don't have to say, for example, in my
2 opinion it is. The law doesn't require that.
3 All the law requires is a fair and true report
4 and it essentially says the privilege applies so long as the
5 information -- and I am quoting now from the Northland
6 Wheels case -- substantially represents the matters
7 contained in the public record. So the fact that we don't
8 use the exact same words is not the driving force here.
9 There is a case out there that talks about when
10 a lawyer said things "with certain degrees of certainty" but
11 if you look at what my client said here, it is not akin to
12 that. It is not the same. He was basically saying listen.
13 I mean quite frankly we can go through and read to you what
14 the allegations were that were contained within the public
15 record and if someone were to read those allegations, the
16 next question becomes is what my client said any worse than
17 that and the answer is no.
18 You captured the gist of what was said in the
19 public record and that's all. It doesn't have to be word
20 for word and the case law does not say that we have to say
21 it has been alleged or that we say it is in my opinion.
22 There was a sentence in the Northland Wheels
23 case that says what the Court asks itself is whether the
24 gist or the sting of the statements substantially represent
25 the matters in the public record. Here it is pretty clear

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1 to us that they do. The words aren't identical, but the
2 gist of this thing is.
3 THE COURT: Well, I am looking at its reason,
4 but the public opinion, Bedford v Witte, and I assume
5 somebody cited this.
6 MR. SULLIVAN: We both did.
7 THE COURT: All right, and that's a 2016 case.
8 I don't have the cite yet to the Michigan Appellate Report,
9 but November 2016 Docket Numbers 14-11752 and 11813 and in
10 that case they seem to say that there was a television
11 interview that was in question in that case and which the
12 lawyer was stating, "We can say with certainty that
13 Plaintiffs broke the law in various ways. Given the level
14 of certainty expressed, we conclude that his words did alter
15 the effect that the literal truth would have had," the
16 literal truth being an accurate report of the substance of
17 the charges. So how do we -- why did Bedford get decided
18 that way?
19 MR. SULLIVAN: Because in Bedford there was
20 specific language the Court cited to that said, "We can say
21 with certainty," and the Court settled upon that language
22 and said the lawyer or the speaker was doing more than
23 representing what is in the public record.
24 What my client says is close to that, judge.
25 He said -- and I am quoting from both briefs here -- "I

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1 realize that it violated certain antitrust claims. I
2 recognized extortion." This is extortion. This isn't
3 antitrust violation. Those are exactly what the claims
4 were. If we add the words "in my opinion," does that change
5 the gist of what was said there? If we look at what was
6 alleged in the public record, first of all, we had a
7 criminal filing by the Attorney General's Office of
8 extortion so you can certainly then say, "Hey, this case is
9 about extortion."
10 We look at the allegations in the civil
11 complaint which alleged Count One a flagrant antitrust
12 violation. If you read the civil complaint, it says it
13 alleged that Punturo said, "I will crush you. I will make
14 your life a living hell through threats of physical,
15 financial and reputational harm." The civil complaint says
16 that the Defendant Punturo knew it was an unlawful
17 restriction of trade.
18 The civil complaint goes on to say that Punturo
19 said, "You instilled this hatred within me. You defaulted
20 on your agreement to bait me and now you realize my resolve
21 to witness your demise." We can't suggest that the three or
22 four things that Plaintiffs contend are actionable by my
23 client are even close to or as bad as what is contained in
24 the civil record.
25 So the question is did we convey the gist of

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1 what was contained within the public record, I think it is
2 pretty clear that we did. Anybody reading the public record
3 would have quite frankly a worse view of the facts than they
4 would upon reading what my client had to say and all the law
5 says is the privilege applies as long as the information
6 substantially represents the matter contained in the public
7 record and where the alleged inaccuracy does not alter the
8 complexion of the charge and would have no different effect
9 on the reader.
10 So let's compare. Somebody reads the civil
11 complaint. Somebody reads the Attorney General charge.
12 What do they think? Then, they read what my client said.
13 What do they think? Do they think the same thing? Quite
14 frankly, if they read the civil complaint and the Attorney
15 General's charge, they have a more clearer understanding of
16 exactly what the charges are.
17 My client is not obligated to quote from the
18 record nor to fairly represent, Judge. Quite frankly, if
19 the public were to have sat in the hearing in the District
20 Court when the District Court judge said what Mr. Punturo
21 did in my opinion was nasty and mean-spirited, reprehensible
22 conduct in the way he negotiated. If the public were to sit
23 in Judge Rodgers' courtroom when he was --
24 THE COURT: That's a good question. Why aren't
25 we in Judge Rodgers' courtroom? This is his case.

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1 MR. SULLIVAN: Unfortunately, he's no longer on
2 the bench, Judge.
3 THE COURT: Well, there's another Judge Rodgers
4 called Judge Elsenheimer. That would have been a great
5 spot. He is a much nicer person than I am, too.
6 All right, go ahead, but somebody put on their
7 complaint there are no pending or closed civil actions
8 related to this subject matter.
9 MR. SULLIVAN: That's an issue for another day,
10 I'd be happy to consider that, Judge, but what I was about
11 so say --
12 THE COURT: You know, I just take notes. I
13 understand. You've got a point.
14 MR. SULLIVAN: If somebody were to be sitting
15 in Judge Rodgers' courtroom when they were arguing the
16 motion to dismiss, what he said even while dismissing a part
17 of the case, Punturo's clear behavior as documented in text
18 messages or emails is abhorrent, it's ridiculous, it's
19 absurd, it's immature and it's stupid.
20 MR. MOOTHART: Your Honor, is the point here to
21 further defame Mr. Punturo?
22 MR. SULLIVAN: No.
23 THE COURT: This is an absolute privilege and
24 you guys --
25 MR. MOOTHART: -- I understand that, but it's

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1 irrelevant.
2 MR. SULLIVAN: That's exactly the point, Judge.
3 That's exactly the point because I could have walked out on
4 the steps of this courtroom right now and say that Judge
5 Rodgers said the following: privileged. I could walk out on
6 the steps of the courtroom and walk down to the local paper
7 and say exactly what Judge Rodgers said and I could read
8 everything I just said about what's contained in the civil
9 record and it would be absolutely privileged.
10 MR. MOOTHART: Guess what? It's not defamatory
11 because it's rhetorical hyperbole.
12 MR. SULLIVAN: I'll take that as well.
13 THE COURT: Okay. Now, hold it just a minute.
14 If you guys want to talk to each other, go out in the hall.
15 You wait your turn. Anything further?
16 MR. SULLIVAN: No. I think, your Honor --
17 THE COURT: I am having trouble with this
18 Bedford v Witte.
19 MR. ZELENOCK: Can I offer a comment on that
20 case, your Honor?
21 THE COURT: Briefly, and then we'll hear from
22 Mr. Moothart, who is patiently waiting his turn.
23 MR. ZELENOCK: I appreciate it. Bedford v
24 Witte, I think the most important thing in the case it does
25 give that the statutory privilege is absolute. Malice has

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1 nothing to do with it. Allegations of per se has nothing to
2 do with it. All the arguments about defamation per se that
3 have been repeated are totally irrelevant to this case.
4 THE COURT: As to the question of that specific
5 privilege they're irrelevant.
6 MR. ZELENOCK: To that and everything at issue
7 in this motion because there's no case law that says what
8 does defamation per se mean. I know that we lawyers all
9 like to use Latin.
10 THE COURT: A criminal act. That is all of the
11 magic words that seems to cover pretty much every criminal
12 act.
13 MR. ZELENOCK: That's how it's categorized.
14 what does it mean and what it means is that you don't have
15 to plead special damages. They pled special damages in this
16 case. There is no case saying that if a -- that if an
17 allegedly defamatory communication is deemed defamation per
18 se that that gets around the statutory privilege, but also
19 opinion, rhetorical hyperbole and so forth. It just means
20 you don't have to plead special damages which they did if
21 they lost some things.
22 On the Bedford case, the important point of the
23 Bedford case is that after making clear that it's an
24 absolute privilege that can't be destroyed by malice, making
25 clear that it doesn't matter that it was a self-report

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1 meaning the attorneys themselves were the original authors
2 of the complaint and then they posted it on a website in
3 addition to --
4 THE COURT: -- posting a complaint is not a
5 problem.
6 MR. ZELENOCK: That's right, but the most
7 important part of the case is where they say after they say
8 we can say with certainty adds something, they drop a
9 Footnote 11 that says, "We express no opinion regarding
10 other defenses that might be available. We merely conclude
11 that the trial court erred in applying the fair reporting
12 privilege to the interview," and blink. So, in other words,
13 issues of opinion are not addressed. Issues of rhetorical
14 hyperbole are not addressed.
15 THE COURT: We've got all day. We got all
16 that.
17 Mr. Moothart, any response on the Bedford v
18 Witte case?
19 MR. MOOTHART: Well, sure. I mean we can say
20 with certainty -- we know for sure -- we can say with
21 certainty that the Court of Appeals said that is different
22 from just barely reporting what was in the Court record just
23 by saying we can say with certainty and as we have argued in
24 our brief, Defendants in this case didn't say, "We can say
25 with certainty that." They just said it all with certainty.

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"I realize it violated antitrust laws. There was extortion for the last two years. I recognized extortion. Punturo flagrantly violated antitrust laws. This is extortion. I was being extorted. Glad the Attorney General takes antitrust violations and extortion seriously."

I guess according to what the Defendants are arguing here today anytime anybody sued for or accused of -- sued for something that's criminal activity or accused of a crime, you can go and tell the press they are guilty of it because that's what the charges say in the complaint or in the criminal complaint. You can go out and say they did it.

Well, I guess there's nothing left in the defamation law then, defamation per se in circumstances where there are actually charges pending. Well, that can't be right. The literal truth of what is going on in that courtroom and the person that has been charged with a crime, they have been sued for an antitrust violation. not that they're guilty of it. The public record and a fair and true account of the public record isn't just going out and saying -- repeating reading your complaint on the street and saying "correspondence showed significant extortion, this is extortion, I was being extorted."

A fair and true report is this lawsuit has been filed. Here's a copy of it. That's what the Bedford case found. You can put that on your website and when you go out

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1 and say, "what's in my client we can say with certainty is
2 true," which is actually what they did. They said it with
3 certainty. That is an expansion beyond the public record.
4 Judge Spector, one of my old heros from the
5 bankruptcy system said in his opinion, "There's a
6 fundamental difference between saying I testified at trial
7 that X is a pervert versus X is a pervert. Because the
8 latter assertion described the speaker's present state of
9 mind, it clearly goes beyond the simple recitation of fact
10 that can be verified by reference to a court document.
11 THE COURT: Why? What kind of a law makes a
12 distinction in terms of whether it is actionable or not and
13 then saying, "I testified under oath in Court that X is a
14 pervert," as opposed to saying, "X is in fact a pervert." I
15 mean it is the same thing and yet apparently there's some
16 authority that --
17 MR. MOOTHART: -- you know, first of all, there
18 are two privileges. There is a judicial proceedings
19 privilege which you talked about before that anything you
20 say in this courtroom for the most part --
21 THE COURT: That's not what we're dealing with
22 here.
23 MR. MOOTHART: It is privileged to begin with
24 and so when you go out and do a fair and true report of
25 something that was privileged to begin with, that's

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1 privileged, too, but the privilege can't eat up the whole
2 body of case law about defamation per se simply because
3 charges have been filed. Charges have been filed. I mean
4 the Ethics Rules say you are not supposed to go out and say
5 anything about even somebody being charged with a crime, a
6 lawyer.
7 THE COURT: To be honest, those Ethics Rules on
8 that point are written by a bunch of people who aren't
9 thinking about -- they have public proceedings and surely
10 you can't just -- I mean that's a way too strict rule than
11 what really happened.
12 MR. MOOTHART: The Attorney General followed it
13 to the letter. Their press release says at the bottom of it
14 that a criminal charge is only an accusation and the
15 Defendant is innocent until proven guilty and those Ethics
16 Rules are written by people who can take my law license
17 away. I try to follow them. I really try to. I read them
18 before I go -- every time I go talk to the press I read that
19 rule.
20 THE COURT: I must have read them at sometime,
21 but go ahead.
22 MR. MOOTHART: So anyway the point is that
23 Bedford -- we know for sure what it says -- is somebody is
24 saying we can say with certainty that somebody did this and
25 here in this case the Defendants did say with certainty.

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They didn't say we say with certainty. They just went out and did it. What's the difference?

I mean I fail to see that distinction and there's no privilege here. Otherwise, like I said, anytime somebody is accused of a crime by the prosecutor you can go out and claim they are guilty to the press and it is privileged because that's what the prosecutor is saying. He says they're guilty so I am going to, too. That can't be the rule.

THE COURT: Okay. I will tell you what. Why don't we see if there's any other question I had. Hold it just a minute. Question. This is not a motion which I am supposed to go through each and every statement and decide which ones might be eligible to go to the jury on defamation?

MR. SULLIVAN: This is a motion asking the Court to dismiss the entire claim based on the facts --

THE COURT: -- I don't need to go through each and every statement at this time.

MR. SULLIVAN: I don't think you do, judge.

THE COURT: I'll save that for later. Okay, I'll tell you what. I'll see if I had any other questions and then we'll -- why don't I let everybody speak their piece, the moving parties first and then hear from Mr. Moothart and see where we're at. Go ahead, Mr. Sullivan.

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1 MR. SULLIVAN: Thank you, Judge. I am going to
2 try not to say things that I have already said. I'm going
3 to try to hone in on what I think the Court is thinking
4 about with respect to the Bedford case and I want to point
5 out that in Bedford, which both sides cited to, judge, the
6 question there was does the effect of the words used alter
7 the effect the literal truth would have on the recipient of
8 the information. That's a quote from Bedford and I give you
9 that quote because I think it allays the concern that the
10 Court has with respect to this issue about whether my client
11 said anything with certainty or not.
12 The difference between saying something with
13 certainty and merely using a declarative sentence, which I
14 would suggest is what my client was doing here, there's a
15 difference and quite frankly when Mr. Moothart stands up and
16 talks about -- well, he said this was a flagrant violation
17 of the antitrust laws.
18 Well, as a matter of fact, this whole complaint
19 -- Count One says flagrant antitrust violation and the
20 reason that language is in there is not material to this
21 motion, but it is actually language from the Antitrust
22 Statute, but the point is saying this was a flagrant
23 antitrust violation is not going beyond the pleadings in the
24 civil action and there is no question that my client can say
25 to anybody he wants what's contained within the civil

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1 action.
2 I read to you a number of the allegations in
3 the civil complaint. I won't do it again. I don't want to
4 belabor that point, but anybody reading the civil complaint
5 and the AG prosecution would be left with a certain view of
6 the case and the only question this Court has to reach for
7 purposes of deciding whether the fair reporting privilege
8 applies or not is whether the gist is the same.
9 I suppose you might say that a lawyer in a
10 situation like this -- I mean we need to have -- the reason
11 this statute exists, this fair reporting privilege exists is
12 that people do have a right to say what happens in a public
13 forum. What happens here is fair game. What happens in
14 pleadings is fair game and we know from the Northland Wheels
15 case I don't have to walk out there and quote it word for
16 word. I can give the gist of it. I can give the gravamen
17 of it and that's enough and we can't come back and simply
18 say that because I don't use exactly the same words that are
19 contained within the public record, that that somehow takes
20 it outside the statute.
21 The Court's choice of that language in the
22 Bedford case was chosen for a reason because in that case
23 that language was deemed to alter the effect the literal
24 truth would have on the recipient of the information. Here
25 we don't have that.

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1 All we have is a lawyer saying, "I realized it
2 violated antitrust claims." Well, he'd better. He just
3 filed them. "I recognized extortion." Good thing he did
4 because that was the nature of the claim that the Attorney
5 General filed. This is extortion. Well, somebody had to
6 think it was extortion or they wouldn't have filed a civil
7 complaint, asserted extortion, and the AG wouldn't have
8 filed a criminal complaint asserting extortion.
9 This is an antitrust violation. Darned right
10 it is. I just filed it. Count One, flagrant antitrust
11 violation. So that's all my client's doing. He is not
12 changing the effect the literal truth would have on the
13 recipient of the information. So I recognize the Court's
14 issue with Bedford v Witte, but I don't think that the Court
15 ought to be troubled by it and as Mr. Zelenock ably points
16 out, if we get past the fair reporting privilege, we still
17 got protected opinion because if you take any of the
18 statements that Plaintiffs are complaining about, "I
19 realized it violated antitrust claims," "I recognized
20 extortion," if you substitute the words "in my opinion this
21 is extortion," does that change the gist of it? No.
22 "In my opinion this is an antitrust violation."
23 well, it had better be your opinion it is an antitrust
24 violation or you shouldn't have filed it. So you don't have
25 to preface everything you say with the words "in my opinion"

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in order to have it be opinion.

You saw the Ireland case that we cited in our brief. In that case the Plaintiff said that she was not a fit mother. It was alleged that she had neglected her children. Those are criminal charges. That is child abuse, but that was not deemed to be protected opinion and then we get on to the rhetorical hyperbole argument and we get into the famous Kevorkian case where apparently there were statements in that case about Kevorkian being an instrument of death.

THE COURT: I thought he was proud of that.

MR. SULLIVAN: He kind of was. That's why the Court looked at it and said rhetorical hyperbole, just like use of the words blackmail, traitor, crook, extortion.

There's a Tenth Circuit case we cite in our brief, Hogan v Winder. The Tenth Circuit says accusations of extortion are a familiar rhetorical device. I might say about a Plaintiff's lawyer in a case in a facilitation he's trying to extort some money out of me. Have I accused him of a crime? No. That means he trying to use what leverage he can to get more money out of me. Those are the things that are protected opinion and are protected rhetorical hyperbole.

So without reiterating the information that I gave the Court in my answers to the Court's questions, I

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1 would say the Court has three very sound grounds to dismiss
2 this case. There's no question that the statute, the fair
3 and true report statute, says damages shall not be awarded
4 in a libel action for the publication or broadcast of a fair
5 and true report of matters of public record, a public or
6 official proceeding or a record generally available to the
7 public.
8 I read to the Court today what was available
9 in the public record. It cannot be credibly said that what
10 was available in the public record differed substantially
11 from what my client said outside of the courtroom. The gist
12 was the same. It conveyed the same meaning.
13 There's a key provision in one of the cases
14 that says does it convey -- would it have any different
15 effect on the reader. So read what my client said and read
16 what the complaint in the civil action said, read what the
17 criminal matter said. It has the same effect on the reader
18 and quite frankly if you read the civil complaint and you
19 read the criminal prosecution, far worse.
20 So to suggest that somehow my client's
21 statements to the press made this matter worse is just not
22 consistent with the record here, judge. Anybody reading the
23 civil action or hearing what even the judges said in
24 connection with the civil or the criminal action would not
25 come away with a worse impression of this Defendant or this

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1 Plaintiff than they would from simply reading the public
2 records. So we think you have got three very sound grounds
3 to dismiss the case.
4 THE COURT: And what three? I thought there
5 was just one.
6 MR. SULLIVAN: No. We've got the fair and true
7 report.
8 THE COURT: That's the one I've got.
9 MR. SULLIVAN: We have got opinion. We have
10 talked about that. The fact that what my client says is
11 protected opinion and we also have rhetorical hyperbole.
12 The Ireland case that I mentioned a few minutes
13 ago, that's the opinion case and there's a whole section in
14 the brief that discusses that and there's nothing here in
15 what my client said that takes it outside of that opinion.
16 You don't have to say the words "in my opinion" in order to
17 express one and as I pointed out a second ago, don't you
18 think it should have been his opinion that it was an
19 antitrust violation if he filed one? Don't you think it
20 should have been his opinion that this was extortion?
21 THE COURT: This whole thing is kind of a
22 never-never land because we're putting great difference
23 based upon microscopic differences in the way things are
24 said.
25 MR. SULLIVAN: Yes, we are and we have to be

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1 careful about that, don't we?
2 THE COURT: But those are the -- I mean that's
3 what we've got.
4 MR. SULLIVAN: That's why we have that language
5 that I quoted back to the Court. Did that additional
6 language that the Court was troubled with in Bedford, did it
7 alter the effect the literal truth would have on the
8 recipient of the information. I think the answer to that
9 question couldn't be any clearer, Judge. It doesn't alter
10 the effect of the literal truth. If somebody had read the
11 civil complaint or the criminal prosecution --
12 THE COURT: -- I can say with certainty that
13 the Plaintiff broke the law by obstructing justice. Well,
14 obviously, the lawyer wouldn't think that if he hadn't made
15 those charges. So it's a never-never land, but these are --
16 well, this could be the case that goes to the Michigan
17 Supreme Court and we can straighten all this out.
18 MR. SULLIVAN: Maybe it should, but I think we
19 put a very tough burden on lawyers or anybody commenting on
20 a public record if we're going to say --
21 THE COURT: -- well, it's a minefield out
22 there. You've got to be careful how you say it.
23 MR. SULLIVAN: It is, but the law is very clear
24 that we don't have to quote it exactly. All we have to do
25 is get the gist of it. My client got the gist of it and he

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1 shouldn't be punished for it here.
2 THE COURT: All right.
3 MR. SULLIVAN: Thank you.
4 THE COURT: Okay. Mr. Zelenock?
5 MR. ZELENOCK: First, all the Defendants in
6 this case are entitled to summary disposition because the
7 Plaintiff's complaint fails to plead and show how there was
8 any unprivileged defamatory meaning and the whole context
9 that survives is actionable after given appropriate
10 application to the broad blanket of privilege provided by
11 the fair reporting absolute statutory privilege and when you
12 look at in this case after the Attorney General's public
13 charges and press release publically condemning Punturo's
14 conduct and it's a lot broader than just saying if you look
15 at my Exhibit A -- I'm sure it is submitted otherwhere, too
16 -- the top law enforcement officer in the State of Michigan
17 not only thought that extortion charges were warranted, but
18 also thought this issue was of public concern and public
19 interest enough to issue a public press release and very
20 specifically himself, not an Assistant Attorney General,
21 talk about, "extortion is illegal plain and simple," said
22 Schuette. "The actions allegedly taken here were a threat
23 to another person's livelihood and not a good business
24 practice."
25 THE COURT: The actions of the legislature.

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1 MR. ZELENOCK: He did put that in. I'll grant
2 you that. There is no case law -- he goes on in the bottom
3 if you look at the bottom of Exhibit A, "Yes," he says,
4 "allegedly threatened to run the owner of a local parasail
5 company out of business. He allegedly threatened he had
6 both the people and the resources to insure the parasailing
7 company went out of business. The victims paid thousands in
8 the alleged extortion plot."
9 It does say that, but again the important thing
10 I pointed out earlier in terms of the Bedford v Witte case
11 it says, "The only thing we're addressing is whether this
12 statutory privilege applies," and by the way the case
13 clearly held that it applied to most of the communication
14 involved so --
15 THE COURT: Well, it applied to the posting of
16 the complaint on the law firm's website because the
17 complaint is obviously a fair and true report of what the
18 complaint says.
19 MR. ZELENOCK: Right, yes, and the interview
20 about the complaint other than that the phrase that we can
21 say with certainty which they said that adds something and
22 the statute itself says if you add something, not a little
23 distinct -- I think significantly distinct -- not if you
24 don't make clear that it's an allegation and the Bedford v
25 Witte case notes the statute that gives the privilege also

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1 says if you add something and they say citing the Amway case
2 that did add something to say we can say with certainty.
3 Mr. Moothart acknowledged that nobody said we
4 can say with certainty or words to that effect. He's trying
5 to broaden Bedford v Witte to say, "Well, if you don't
6 include a loophole for always an allegation," that's not
7 what the statute says. That's not what Bedford v Witte
8 says.
9 In addition to that, as I mentioned earlier,
10 Footnote 11, very clear. The only thing we are addressing
11 is this statutory privilege which is absolute and the only
12 -- and they go on to say, "We're merely addressing that and
13 not other issues like the Ireland v Edwards case." Ireland
14 v Edwards is the case and it's been cited in the briefs.
15 THE COURT: That's where some lawyer says she's
16 a bad mother.
17 MR. ZELENOCK: She said she's an unfit mother
18 and importantly --
19 THE COURT: -- and that requires -- that
20 becomes a matter of opinion because it requires a lot of
21 proof and then personal opinion about whether the conduct of
22 the mother really was such as to make her unfit. I mean I
23 always love the case of the guy up in Antrim years ago who
24 had an outhouse and Protective Services went after him
25 because he was not taking care of his kids. Whether an

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1 outhouse is abuse of children depends on -- is a matter of
2 opinion. If you grew up in an upper, middle class suburb in
3 Detroit I suppose it is. If you grow up in a rural area,
4 probably is nothing.
5 MR. ZELENOCK: Though importantly, I agree with
6 that. I would point out that they didn't say, "Oh, well,
7 here's" -- at least Ireland that attorney gave 20 statements
8 to the media at various times and they included she's an
9 unfit mother repeatedly in conclusory terms, not, "Oh, I
10 think she's unfit because, you know, she gives her
11 unfashionable clothes." She said she's an unfit mother.
12 In addition to that, very importantly, and this
13 I don't think anyone touched on in the brief, but Ireland,
14 an attorney case, and I will note that the clients were not
15 sued and in the Bedford v Witte case the clients are not
16 defendants in that case and I point that out for Boyer and
17 Kort who -- you know, Danielle Kort, not one statement in
18 the complaint is attributed to her.
19 THE COURT: I was going to wonder about that
20 because I saw some things attributed to Boyer and some of
21 them I am doubtful would support defamation.
22 MR. ZELENOCK: Nothing and I pointed out in the
23 brief the motion I filed for Danielle Kort, the ex-wife who
24 has moved to the DC-Maryland area and being held back for
25 this, not one sentence. They referenced that she signed an

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1 affidavit that they admit was attached to a first amended
2 complaint. Obviously, absolutely privileged, no contact.
3 She's entitled to summary disposition on (C)(8) grounds
4 period.
5 THE COURT: Is that part of your motion today?
6 MR. ZELENOCK: Yes, absolutely.
7 THE COURT: Because Mr. Moothart is going to
8 point to the thing that makes Kort liable. Now, Kort is
9 alleged to be liable vicariously through her attorney's
10 actions, but in terms of direct liability, Mr. Moothart is
11 going to -- I know what he's going to do. He's going to
12 stand up and say, "You got me," and he's going to let her
13 go.
14 MR. ZELENOCK: I'll bet you're right. So I
15 look forward to that. I am ready to continue when the Court
16 is ready.
17 THE COURT: All right. Go ahead.
18 MR. ZELENOCK: In Ireland v Edwards that case
19 also holds that the allegation the lawyer made talking to
20 the media that the child suffered a broken arm due to
21 Ireland's neglect was also protected opinion because the
22 opinion about whether it was caused by neglect is a
23 subjective, not provably false. So the point is and I
24 mentioned it in the briefs the context -- Northland Wheels
25 the case Mr. Sullivan discussed talks about the fact that in

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1 that case the Plaintiff's complaint not only alleged the
2 defamatory statements, but also that they were unprivileged
3 and went in to show how the contact showed they were
4 defamatory.
5 Here we have them deliberately extracted and
6 only the statements attributed to the clients with no
7 mention of how there could be any defamatory meaning given
8 the damage done and notably there are no cases cited where a
9 criminal defendant, even one who prevails whether on a
10 dismissal or jury verdict goes on to prevail in a defamation
11 suit. So Mr. Moothart sort of suggested that would be
12 crazy. You know, that can't possibly be. I would suggest
13 that with the amount of -- when you have a public official
14 making an independent investigation, an independent decision
15 to not only charge, but also to issue a press release
16 bringing --
17 THE COURT: -- well, the Attorney General
18 always issues a press release.
19 MR. ZELENOCK: I don't think he does in every
20 case, no. I think that that's, you know.
21 THE COURT: He issues a lot of press releases.
22 MR. ZELENOCK: Well, so where are then the
23 numerous cases where defendants have brought successful
24 defamation cases after they prevail? There aren't any. The
25 point is this privilege is very broad and I think all

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1 Defendants are entitled under Ireland v Edwards the
2 extremely broad protection that's given to opinion and I do
3 understand the Bedford v Witte issue, but Mr. Moothart is
4 acknowledging, nobody said, nobody added something as the
5 statute requires saying, "I know for sure, it's certain,
6 there is no question," anything like that and again going
7 then to my clients -- obviously, I argued all Defendants. I
8 don't represent Mr. Kern, but as to the lay people, I have
9 made the point about Danielle Kort. No statements
10 attributed to her, whatsoever.
11 Mr. Boyer, almost no comments are attributed to
12 him and I have cited in the reply brief the case of Rouch
13 which is a Michigan Supreme Court case that says that a lay
14 person stating an opinion about an alleged crime is not
15 something where that's viewed as provably false and in this
16 context consider the allegations in the complaint.
17 Almost every statement attributed to my client,
18 which by the way there are a handful at best, are in light
19 of the fact that the Attorney General of the State of
20 Michigan was of the opinion that this constituted extortion
21 and not only publically charged, but publically said so in a
22 press release.
23 Now, the Courts disagreed with that opinion
24 issuing as if they had issued a written opinion what would
25 it be labeled, opinion, not fact, but that Rouch case from

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1 the Michigan Supreme Court making the distinction for lay
2 people using terms, I think when you consider the context
3 here which is the Attorney General has just publically
4 announced that in his opinion it is extortion, how in the
5 world are lay people not on an issue of clear public
6 interest and public concern, no question about it, it's a
7 Court matter. The Attorney General has issued a press
8 release in an interview in the media, which is concededly
9 fair and neutral presenting it and part of this context is
10 the Attorney General's own allegations.
11 There are no allegations in Plaintiff's
12 complaint explaining how in light of the fact -- they point
13 out the Attorney General's press releases so, you know,
14 allegedly neutral.
15 I mean I think anyone who reads this in its
16 entirety knows this is what created any damage that has been
17 suffered, if any, but this is part of the context that all
18 the comments are made of and there's no defamatory meaning
19 once you look at the entire context that includes his
20 disclaimers that it's an allegation and I think that when
21 you look at -- Mr. Moothart's brief cites dicta I think
22 repeatedly from the Kevorkian case trying to suggest that if
23 something is a defamation per se that that undoes the
24 doctrines of opinion, fair comment, rhetorical hyperbole.
25 It doesn't say that, but more importantly

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1 what's the holding of Kevorkian's case. They say yeah, it's
2 fair to say that the American Medical Association charged
3 him with murder. They said he's a killer. They said he's
4 an instrument of death and they said he's committing crimes
5 and a reasonable person could connect those dots and say the
6 crime they're talking about is murder, the highest crime,
7 and it's not capable of defamatory meaning and it's also
8 just really an opinion and really rhetorical hyperbole in a
9 case where the people disagree about things and don't like
10 each other.
11 THE COURT: Well, I'm having a little trouble
12 with that one because Kevorkian -- that issue of assisted
13 suicide was an issue of great public interest and public
14 discussion so it's almost a little different than whether
15 some parasail operator did something wrong or not.
16 MR. ZELENOCK: This case here does not involve
17 assisted suicide and I do think there's some difference.
18 What's the difference though in terms of if you apply the
19 doctrine and similarly Ireland v Edwards, okay, the case
20 that's been cited in the briefs.
21 Ireland v Edwards is attorneys relating to a
22 family law dispute. That is not a public debate at the
23 National level about assisted suicide. It is attorneys and
24 a Family Law dispute who gave 20 statements to the media
25 including a statement that the mother -- due to her neglect

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the child suffered a broken arm due to Ireland's neglect and they say in the whole context all the statements are opinion and don't attribute defamatory meaning and I think here the context has not been adequately distinguished in any way and I do think that -- you know, I think the complaint should be dismissed in its entirety, but if it wasn't, absolutely I think the Court would have to require the Plaintiff to go through and acknowledge -- well, a lot of these clearly are covered by the statutory privilege, no question about it. Those are not actionable and they have to be lined out of the complaint.

THE COURT: Now, is today the day I am supposed to go though all these statements one at a time with tweezers and pick which ones we can use and can't?

MR. ZELENOCK: Well, I agree with Mr. Sullivan's position that no, because today is the day that you should enter an order dismissing the claim in its entirety, but I think it's incumbent upon the Plaintiff to show how -- which statements are they alleging are unprivileged and so many of these statements -- I believe every single statement, but certainly the ones attributed to my clients -- Danielle Kort, that's easy, there's none and then in terms of Saburi Boyer, he is a lay person in the -- following the Attorney General saying it's extortion and then using those words.

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1 The context of that to anyone watching those
2 media reports which are not adequately set forth and
3 distinguished as the context in Plaintiff's complaint is,
4 oh, it looks like there's some public action and charges
5 being made and they have taken a few statements from the
6 victim or the alleged victim and people would get that from
7 the context of those reports.
8 Where is the case where a crime victim or
9 alleged crime victim has been sued in this matter and I
10 think that the Court should dismiss it in its entirety.
11 If it decided that there were some possibility
12 that some claims would be outside the privilege, I think
13 absolutely the Court would have to order that the Plaintiff
14 file an amended complaint identifying statements that are
15 claimed to have added something beyond what the statutory
16 privilege applies.
17 THE COURT: Refresh my memory. In Bedford v
18 Witte had criminal charges been filed?
19 MR. ZELENOCK: I don't believe so. I think it
20 was a civil complaint. That's an important distinction,
21 too. There was no -- I mean here you have such emphatic
22 action by public officials creating a context and public
23 interest in a story that's quite distinguishable from a
24 private lawsuit that's not just part of an interview, but
25 then also given publicity to on a website.

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1 The Ireland v Edwards case I think is the most
2 on point though I would say, too, in terms of leaving Mr.
3 Kern's motion for a moment to my clients, the Rouch case
4 from the Supreme Court says -- and I cited it in the brief
5 in the quote -- that a lay person using technical legal
6 terms does not mean that it's automatically provably false
7 or defamatory and I think that in this case, you know, and I
8 briefed it at some length, Danielle Kort, just absolutely
9 nothing attributed to her and then in terms of agency
10 principles I think that, you know, Mr. Moothart sort of
11 criticizes the case law I've cited and I know he feels I
12 have done the same to his and I guess that's our job, but
13 the case law I have cited talks about the fact that agent --
14 principal-agent relationships are in Michigan and those are
15 controlling cases. They do not involve the attorney
16 context, but I pointed out there's numerous cases where only
17 the attorney was sued for the attorney's communication to
18 the media.
19 It makes no sense. Those cases hold that there
20 has to be a right to control. There is no right to have --
21 to control your attorney in a way that ends up having them
22 violate the Rules of Professional Conduct and I don't agree
23 that it violated the Rules of Professional Conduct, but I
24 think that the idea that anytime, you know, I suggested
25 anytime somebody is doing something that might promote their

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1 client's interest, that that's enough to attach
2 principal-agent liability really.
3 So if I, God forbid, hit somebody driving here
4 to court today because it's in my client's interest, he
5 would be liable under principal-agent theories? No. There
6 has to be some practical level of and legal right to control
7 so I think --
8 THE COURT: -- Mr. Moothart alleges that a lot
9 of this was part of an effort to extract a settlement from
10 the now Plaintiffs Punturo and there's some email traffic
11 that would support that theory. So if he's trying to get a
12 settlement and he does things pursuant to an effort to get a
13 settlement, that would be kind of within the scope of what
14 he was doing for his clients.
15 MR. ZELENOCK: I understand the argument. I
16 respectfully disagree with it in the sense that the example
17 I just gave. So if an attorney driving to court is involved
18 in a car accident and they are doing something in their
19 client's interest, I mean coming to court and attending a
20 hearing --
21 THE COURT: -- well, let's say you are driving
22 to a deposition somewhere for their client and that would be
23 only for that purpose. I mean it's not like driving to
24 court.
25 MR. ZELENOCK: Sure. I drove to Grand Rapids

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1 recently for a deposition in a different matter. Do we
2 really believe that under the cases in Michigan that I have
3 cited that the Courts would say the client is liable for an
4 accident?
5 THE COURT: I should think so, right. Mr.
6 Moothart? No. We'll get your comment in a moment.
7 MR. MOOTHART: That's a little different.
8 MR. ZELENOCK: And I agree with that, but I
9 think that when the allegation is that the communications
10 violated Rules of Professional Responsibility, that Mr.
11 Moothart has not cited a case where there was that kind of
12 allegation and you have a bright-line legal rule prohibiting
13 --
14 THE COURT: He has cited the Alabama Civil
15 Court of Appeals.
16 MR. ZELENOCK: Saying?
17 THE COURT: It says here, "In a malicious
18 prosecution and abuse of process case" -- I am quoting from
19 Mr. Moothart's brief -- "a [client] principal is liable for
20 the intentional torts of its [attorney] agent even if the
21 agent's acts were unknown to the principal, were outside the
22 scope of the agent's authority and were contrary to the
23 principal's express directions if the agent's acts were in
24 furtherance of the principal's business and not wholly for
25 the gratification of the agent's personal objectives." So

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1 says the Court of Appeals of Alabama.
2 MR. ZELENOCK: Sure. I think that a malicious
3 prosecution case is a lot more akin to a frivolous motion --
4 motion for frivolous fees case that was presented to Judge
5 Rodgers and rejected, but malicious prosecution certainly
6 involves -- it doesn't involve communication to the media
7 that's prohibited by the Rules of Professional Conduct.
8 Malicious prosecution involves you filed the lawsuit that
9 was inappropriate and 2.114 --
10 THE COURT: How about the court in North
11 Dakota? Do you want that?
12 MR. ZELENOCK: I think we should go with the
13 Michigan Supreme Court and Court of Appeals decisions that I
14 cite both which there's a theoretical argument for agency,
15 but there's an absence of adequate control and they say that
16 doesn't create a principal-agency liability or joint
17 liability.
18 THE COURT: Northern District of Indiana.
19 That's close to Michigan.
20 MR. ZELENOCK: It's closer. That's good.
21 Well, the Sixth Circuit case which is the -- I believe the
22 only case citing Michigan law that's referenced is a case
23 that involved an attorney having apparent authority to
24 negotiate a settlement agreement and I think that that is
25 highly distinguishable in the sense of how else would you

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1 ever negotiate a settlement agreement if an attorney
2 couldn't negotiate it. Are the parties going to meet ex
3 parte from their attorneys and negotiate something? I mean
4 that's not going to happen. Everyone knows attorneys have
5 the apparent authority to negotiate settlement agreements so
6 I think that's distinguishable, also.
7 So, in any event, I think that very clearly
8 here there's no question that if we went through the
9 complaint -- again, I think the whole complaint should be
10 dismissed, but if not, there's absolutely --
11 THE COURT: -- I've got a problem. I've got
12 800 new cases a year. I can't spend a whole day on one case
13 so we need to wrap this up. Mr. Moothart needs to get his
14 chance to speak.
15 MR. ZELENOCK: Just in summation then, I think
16 the case should be dismissed in its entirety. If not, the
17 vast, vast, vast majority of the claims are clearly covered
18 by the blanket of privilege. There's been no showing that
19 anything was added which is what the statute requires.
20 There's nothing saying you have to say oh, it's election and
21 that opinion on rhetorical hyperbole applies. Thank you.
22 THE COURT: Okay. We'll go ahead and take a
23 break.
24
25 (At which time a recess was taken.)

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1 THE COURT: Mr. Moothart?
2 MR. MOOTHART: I will try to make this brief.
3 THE COURT: That would be great.
4 MR. MOOTHART: You said I think the key thing
5 earlier if you say we can say with certainty which is what
6 the Bedford case says takes it outside the public record. I
7 mean that's Mr. Sullivan's argument here today. You better
8 be able to say it with certainty so you can file a lawsuit.
9 You better be able to say it with certainty. The Attorney
10 General filed charges on that.
11 Well, if that's the case, I guess the Court of
12 Appeals got it wrong in Bedford because they said when you
13 say it with certainty -- or it's my version of it -- they
14 say when you utter the words "we can say with certainty" and
15 then they talk about given the level of certainty expressed,
16 that's an expansion beyond the public record. Then, it's
17 actionable. Well, I don't see the difference. I challenge
18 anybody to explain the difference between that and the
19 statements in this case.
20 The literal truth here is that there are cases
21 -- a civil case and a criminal case where it has been
22 alleged that there are antitrust violations and extortion.
23 That's literal truth. Literal truth is there are cases
24 where this has been alleged. Literal truth is not that
25 there were flagrant antitrust violations and Mr. Punturo

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1 committed extortion and that's what they said.
2 Northland Wheels is not supportive of the
3 Defendant's claims for dismissal here. Northland Wheels
4 wasn't somebody going out and talking about a lawsuit or a
5 criminal case being filed. Northland Wheels was a newspaper
6 that had "gleaned from police records" certain things.
7 The Court in Northland Wheels said that
8 privilege didn't apply to one of the things that the
9 newspaper said and what the newspaper said that it didn't
10 apply to was the implication that statements that "may imply
11 that Plaintiff's skating rink is unsafe because a shooting
12 occurred outside the rink and neighbors mentioned that
13 problems do occur when young people congregate in the area."
14 That was not gleaned from the police records.
15 That was a newspaper going off and adding things of what was
16 in the public record which was the police record and the
17 Court said that since that wasn't gleaned from police
18 records about the shooting, then it's not protected by the
19 fair reporting privilege, but the Court said we find it not
20 actionable anyway because they didn't say that the
21 Plaintiff, the rink owner, participated, encouraged and
22 negligently permitted the shooting to occur, but anyway the
23 point is that doesn't apply here. I mean there's no
24 allegation that they are not saying that Mr. Punturo
25 participated in the extortion or the antitrust violation,

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1 But the point of Northland Wheels is that it
2 holds that merely implying something that's not directly
3 taken from the public records is outside the privilege, even
4 the implication in regard to something that is not directly
5 taken from the public records is outside the privilege.
6 That's what Northland Wheels says. That's what it really
7 says.
8 Speaking about what cases really say, the
9 Kevorkian case was, as the Court observed, about our very
10 public situation and the first thing that the Court of
11 Appeals said in Kevorkian was that Jack Kevorkian was a
12 public figure and they say he voluntarily exposed himself to
13 the risk of defamation by injecting himself into public
14 controversy.
15 Additionally, the parties don't dispute that
16 the issue of assisted suicide is a matter of public concern
17 and they say based upon this and based upon the alleged
18 defamatory statements that suggest he's a murderer, they say
19 that those statements do not by implication or otherwise
20 considering all the circumstances so harm Plaintiff's
21 reputation as to lower that reputation in the community or
22 to deter third persons from associating with him because
23 he's libel-proof.
24 THE COURT: All right.
25 MR. MOOTHART: They say that Plaintiff's

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1 reputation in the community and not the nation is such that
2 the effect of more people calling him either a murderer or a
3 saint is de minimis and they say this case is limited on its
4 facts. The fact that somebody got away with calling Jack
5 Kevorkian a murderer has nothing to do with whether somebody
6 should get away with accusing Bryan Punturo with extortion
7 or antitrust violations.
8 Opinion. We cited the law on that. I mean the
9 opinion -- you can't say in my opinion somebody committed
10 extortion and get away with it. You can't ever say opinion
11 is not a defense to an accusation of criminal conduct.
12 That's the Hodgins v Times Herald case we cited on Page 4 of
13 our brief.
14 THE COURT: What does Miss Kort say that is
15 directly liable?
16 MR. MOOTHART: Well, first of all, there are
17 two things, obviously, and I'll cover the vicarious
18 liability.
19 THE COURT: Just for curiousity's sake.
20 MR. MOOTHART: I got something. You know, I'll
21 allow you. She was not as public -- as much in the public
22 eye as her attorney or her husband at the time, but she did
23 say and this is on Page 7 of our brief (e). The quote is,
24 "the Boyers say they were tired of living in fear and went
25 to a lawyer who discovered antitrust law violations."

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1 THE COURT: Now, what about that is not true?
2 Technically saying we're tired of living in fear, that
3 doesn't say anything. Went to a lawyer who discovered
4 antitrust -- I mean that's true. He may have been wrong and
5 I think Judge Rodgers held that was wrong, but what is
6 untrue about saying "We went to a lawyer and he discovered
7 antitrust violations."
8 MR. MOOTHART: Well, there weren't any
9 antitrust violations is what's untrue about it.
10 THE COURT: Well, except that they are not
11 saying -- they went to a lawyer who discovered antitrust
12 violations which is literally true. They did go to a lawyer
13 who said he discovered it.
14 MR. MOOTHART: He didn't discover it. He said,
15 "This is an antitrust violation."
16 THE COURT: Have you got anything better on
17 Miss Kort?
18 MR. MOOTHART: Not -- no, it doesn't. Not on
19 things that she said directly herself. No, it does not.
20 THE COURT: So your claim against her, really
21 that's not going to do it -- is vicarious through her
22 attorney.
23 MR. MOOTHART: If you don't like this, yes.
24 THE COURT: That one doesn't help.
25 MR. MOOTHART: I concede that. I mean I said

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to begin with there's not a lot of quotes from her in the press.

THE COURT: You are not inclined to practice catch and release litigation and let this one go?

MR. MOOTHART: Not today.

THE COURT: And take her off the hook and put her back in the stream and pull her by the tail so you get the water over the gills and let her go?

MR. MOOTHART: Yes. I'd rather settle this case than stand here and argue, but I can't.

THE COURT: You guys don't want to settle this case. This is a matter of principle.

MR. MOOTHART: Anyway, the point is Hodgins says direct accusations or inferences of criminal conduct or wrongdoing are not protected as opinion. Language that accuses or strongly implies that someone is involved in illegal conduct crosses the line dividing strongly-worded opinion from accusation of a crime. Not just accuses, but strongly implies that someone is involved in illegal conduct. I mean this is not even close.

THE COURT: All right. Wrap it up. What we are going to do, I've got a pro con that I have got to do and then we're going to have lunch. You guys are going to have to come back a little later so I can give you a decision.

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1 MR. MOOTHART: I want to have just a couple
2 more minutes, your Honor. The Rouch case, counsel says well
3 that means a lay person stating a crime is committed that
4 can't be provably false. I wrote that down.
5 Then what Rouch says -- Rouch says when the
6 newspaper published, the guy was charged with a crime when
7 he had really only just been arrested and hadn't been
8 arraigned yet. That was the technical legal term. Charged
9 versus arrest. Here we've got people saying he committed
10 extortion. That's not the difference between charged and
11 arrest. That's the difference between a 20-year felony and
12 walking around free and the idea that somehow this is
13 hyperbole, "Oh, he extorted me," it was highway robbery.
14 Well, do you know what? If he had just been
15 charged in Judge Phillips' courtroom with highway robbery
16 and then you go out and say he committed highway robbery,
17 that is not in any way, shape or form hyperbole. I mean
18 you've got to look at the context.
19 They're saying that -- saying that there was
20 extortion for the last two years -- five minutes after he
21 was just arraigned for extortion, saying that to the
22 newspaper, "Well, I didn't really mean it. I just meant
23 that he was kind of a sharp practitioner and kind of ripped
24 me off." I mean that's silly.
25 There's some, I guess, idea that because nobody

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1 sued the client in the Ireland case that means that lawyer
2 was smarter than me is the point, I guess, which could be,
3 but I mean it doesn't have anything to do with liability or
4 the law.
5 If you hit somebody by accident on your way to
6 a deposition is not the same as threatening to defame
7 somebody in order to get a settlement and then following
8 through on the threat the next day. I think you picked up
9 on that.
10 Yes. There's an Alabama case. There's a Court
11 of Appeals, Ninth Circuit Court of Appeals case. Boy, they
12 are in rough shape these days in the press, but that's a
13 libel case where they held the client libel for the
14 attorney's statements and most importantly -- I mean counsel
15 says that the Sixth Circuit Case, this Capital Dredge case
16 is the only Michigan law case I cited. It's not.
17 I cited two cases, Foster v Wiley. This case
18 law is old, but good and the Court said -- this is the last
19 thing I'll say -- "a Plaintiff can never be held to" -- they
20 said, "This is a naked tort." That's the way they described
21 this case, that they were dealing with a naked tort. I
22 think that's what this is.
23 And they say, "A Plaintiff can never be held to
24 intend a trespass to third persons; but when one puts his
25 case against another into the hands of an attorney for suit,

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1 it is a reasonable presumption that the authority he intends
2 to confer upon the attorney includes such action as the
3 latter in his superior knowledge of the law may decide to be
4 legal, proper and necessary and the actions are so far as
5 they affect the defendant in the suit as approved by the
6 client in advance and therefore as his act, even though they
7 prove to be unwarranted by the law," and so it's all well
8 and good to say, well, that doesn't make sense. Where's the
9 contrary law? There is no contrary law.
10 THE COURT: What we're going to do here is I've
11 got other things I've got to do, but I don't want to let you
12 get away. We'll make a decision later today and I'll give
13 you plenty of time. You can go walk around the beautiful
14 Boardman neighborhood together and all of the attorneys
15 exchange an offer. You said you wanted to settle it.
16 MR. MOOTHART: Absolutely.
17 THE COURT: Great. That's a wonderful idea and
18 we'll come back at -- let's make it 3:30 and we'll put your
19 settlement on the record. How would that be?
20 MR. MOOTHART: That would be great.
21 Your Honor, one more thing. I just want to
22 remind the Court of the content of this thing that
23 supposedly is the basis of all the Defendant's statements.
24 It's Exhibit 3 to Defendant Kern's motion for summary
25 disposition.

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It's Attorney General Schuette's press release. "Schuette today charged Traverse City resort owner. If convicted, the actions allegedly taken here -- Punturo allegedly threatened the alleged extortion plot and then at the bottom it says: "A criminal charge is merely an accusation and the defendant is presumed innocent unless proven guilty."

THE COURT: We know that he didn't really mean that though, did he?

MR. MOOTHART: Well, do you know what? He followed the Ethics Rules --

THE COURT: -- I'm just kidding --

MR. MOOTHART: -- and he protected himself from what was otherwise -- he probably was immune anyway, but I mean this is the way you do it.

THE COURT: A fair and true report of what happened, okay.

MR. MOOTHART: Thank you, your Honor.

THE COURT: See you at 3:30. We'll see where we're at if guys don't have a settlement.

MR. MOOTHART: 3:30, your Honor?

THE COURT: Yes.

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(Whereupon, this case was adjourned until 3:30 p.m.)

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(Whereupon, at 4:00 p.m. Court was reconvened in this matter)

THE COURT: All right. Okay. This case arises out of a conduct of parasailing, which is a recreational activity in the summertime, because if it was done in the spring, people would die out there of hypothermia so really mid to late summer and maybe into the fall on East Bay and occasionally different people try and run a business doing that.

The Defendants Boyer had such a business and Mr. Punturo, the Plaintiff, either himself or through his family, had such a business and then later on sold it to Boyer and then there was some discussion of Mr. Punturo getting back into the business, threatening to basically charge less and drive Boyer out of business. All good clean capitalist fun.

In any event, they reached some agreement about Mr. Punturo not doing that in exchange for some money and agreements were signed and then at some point after that

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there was a claim made that the arrangements that Mr. Punturo had engaged in that those constituted violations of the antitrust law.

There was a civil lawsuit filed which Judge Rodgers handled. He granted summary disposition deciding that there was no violation of the antitrust law. I believe that was appealed, was it?

MR. MOOTHART: No, your Honor.

THE COURT: Okay. Then, in addition, the Attorney General got interested in the case and in due course brought criminal charges against Mr. Punturo for extortion and for violating the antitrust law, a criminal violation, and that, of course, attracted some publicity.

Defendant Kern, who had represented Boyer in the civil antitrust litigation, was quoted in a number of places making statements that Mr. Punturo had, in fact, engaged in extortion and antitrust violations and was quite certain in his statements that that is what had happened and basically stated he had committed criminal acts violating the antitrust law and committing extortion.

The criminal case -- at some point I guess it did not survive the bind over in District Court. Was there an appeal of that refusal to bind over?

MR. MOOTHART: Yes, your Honor.

THE COURT: And Judge Rodgers affirmed?

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1 MR. MOOTHART: All that happened was that the
2 Attorney General gathered some additional facts to determine
3 --
4 THE COURT: -- so he did not pursue the appeal
5 to a conclusion?
6 MR. MOOTHART: That's correct.
7 THE COURT: So the civil antitrust case and the
8 criminal extortion and antitrust case are now over.
9 The Plaintiff in this case, Mr. Punturo, has
10 sued Mr. Kern, who was attorney for the Boyers and the
11 Boyers -- now, apparently the Boyers have separated and are
12 now divorced and the former Mrs. Boyer is now Danielle Kort
13 and she was one of the Plaintiffs in the antitrust case and,
14 of course, Mr. Boyer was.
15 There are statements attributed to Mr. Boyer
16 which are claimed to be defamatory as are the statements of
17 Mr. Kern and that's what the case is about. The motions
18 have been filed by Kort, Kern and Boyer.
19 The elements of a cause of action for
20 defamation are a false or defamatory statement concerning
21 the Plaintiff. If you are accusing somebody of violating
22 the criminal law, there is some thought about how it has got
23 to be an infamous crime or some kind of serious punishment.
24 Certainly, extortion covers that and the antitrust violation
25 claim, to the extent it is interpreted as a criminal act,

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1 might well also. So the question of whether it is false or
2 not, which we're not to yet.
3 The second element is an unprivileged
4 communication to a third party. It is said that Mr. Kern --
5 so the second part is an unprivileged communication to a
6 third party. Well, these were on the news media several
7 different ways, newspaper, television, National Public
8 Radio, other things, the Northern Express.
9 The argument is that these are privileged.
10 There are two privileges that have been suggested. One has
11 to do with statements, an absolute privilege for statements
12 made during the conduct of litigation and that is
13 interpreted as statements made actually as part of the
14 litigation process. Comments or statements made to the
15 press are not part of that absolute privilege.
16 There is another privilege, which is the one I
17 think that the parties are concentrating on, which is the
18 privilege to make a fair and true report of matters of
19 public record or official proceedings and it is argued that
20 Mr. Kern's comments were fair and true reports of what was
21 occurring in court.
22 It's important to understand that this
23 privilege, which is found at MCL 600.2911, is an exception
24 to the general rule of liability for defamation. I am
25 assuming for purposes of this discussion only that there was

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1 -- that these comments were defamatory and that they were
2 not true.
3 Those are both issues that may need to be
4 pursued further, but the privilege is an exception for
5 liability for that libel or slander and it states here in
6 (3) damages shall not be awarded in a libel action for
7 publication or broadcast of a fair and true report of
8 matters of public record, a public and official proceeding
9 or of a governmental notice, announcement, written or
10 recorded report or record generally available to the public.
11 Mr. Moothart has set forth on Pages 5, 6 and 7
12 of his brief statements that he says were made by the
13 defendant, most of which are attributable to Mr. Kern who
14 was attorney for the Boyers including statements in the
15 Record-Eagle that Punturo flagrantly violated the antitrust
16 laws.
17 It goes on to say, "In connection with the
18 Record-Eagle article that he reviewed the situation and was
19 approached by the Punturos and at that time I realized they
20 had violated the antitrust laws which he showed me
21 correspondence Mr. Punturo had sent them to induce them into
22 signing the agreement and I recognized extortion."
23 Kern said the correspondence showed otherwise,
24 meaning it wasn't just an effort to collect a debt. He
25 doesn't know of any other antitrust case with such

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1 significant extortion.
2 National Public Radio -- no, no -- 7 & 4 News
3 -- the reporter says the attorney says his clients felt they
4 were paying extortion money was the lesser of two evils he
5 was given to pay up or lose his business. There are some
6 statements attributable to Mr. Boyer, also.
7 Then, in 9 & 10 News, Mr. Kern is said to have
8 stated that Punturo violated antitrust laws and they are
9 glad the Attorney General takes antitrust violations and
10 extortion seriously and in the Northern Express, "As soon as
11 I saw the contract, I am like this is an antitrust
12 violation, this is a covenant not to compete and this is
13 extortion."
14 My own view is an antitrust violation doesn't
15 amount to anything, but extortion is a pretty serious thing
16 to say.
17 Then Mr. Boyer made reference to being extorted
18 and so forth.
19 The question is if you are going to qualify
20 under this privilege, it has to be "a fair and true report"
21 of what happened, of what is going on in the proceeding and
22 so to some extent we're in the position of evaluating
23 whether someone's speech is fair and true and is a report of
24 what happened in the proceeding and what happened in the
25 proceeding is criminal charges were brought and then

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1 ultimately, of course, were dismissed prior to bind over,
2 but at the time the comments were made, the charges had been
3 brought and that pretty much was it, but the statements do
4 say that they actually did it, it's an extreme example, it
5 is clear extortion, it's a clear antitrust violation.
6 This seems to me to be similar to Bedford v
7 Witte which the parties have cited which I don't have a
8 volume and page cite because it is so new. It is November
9 of 2016.
10 I have got some Kent Circuit Court file numbers
11 -- oh, yes -- Court of Appeals Docket Numbers 327372 and
12 327373 and in that case Witte, who was a lawyer, stated, "We
13 can say with certainty that Plaintiff broke the law by
14 obstructing justice," and that was deemed by the Court of
15 Appeals not to be a fair and true report of what was --
16 remember, it has got to be a fair report of what was going
17 on in the underlying case -- and the Court of Appeals said
18 that the interview and posting of the link to the interview
19 -- this is a TV interview where this happened -- of course,
20 it clearly didn't fall into the judicial proceedings
21 privilege because it wasn't part of the proceeding itself,
22 but it goes onto state, "Witte's comments" -- this is near
23 the end of the case -- "Witte's comments did not merely
24 summarize what was alleged but not yet adjudicated in the
25 Federal complaint." He stated, "We can say with certainty

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1 that plaintiffs broke the law in various ways."
2 Given the level of certainty expressed, we
3 conclude that his words did not alter the effect the literal
4 truth would have had on the recipient of the information --
5 did alter the effect the literal truth would have on the
6 recipient of the information and thus the fair and true
7 standard was not satisfied.
8 Now, it will be interesting to see whether
9 Bedford gets appealed, but in any event it appears to me
10 that the statements we have are at least as much as in
11 Bedford v Witte and probably more. So it doesn't mean
12 there's liability, but I don't think it qualifies for a fair
13 and true report privilege contained in MCL 600.2911.
14 There are other elements of the defamation
15 cause of action, most of which we're not talking about here
16 today. The third element is fault amounting to at least
17 negligence.
18 Now, probably Mr. Punturo is a private actor
19 and not a public figure of any kind, but there still has to
20 be showing of negligence on the speaker's part and I'm not
21 exactly sure that I know what that means, but you have to
22 show -- I mean one can say something that isn't true and
23 then we have got the question of is it true or not and
24 that's another question, although that might be res
25 judicata. I am not sure, but you have got to show fault at

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1 least amounting to negligence and the fourth element is
2 either defamation per se, i.e it is actionable without
3 respect -- without regard to whether there's a specific
4 special harm or the existence of special harm caused by the
5 publication and that issue is not before us at this time.
6 So although the assertion of committing a
7 particular extortion would seem to me probably qualifies as
8 defamation per se if it meets the other standards.
9 It is suggested these are expressions of
10 opinion. It is not stated as an expression of opinion and
11 it is not obvious expression of an opinion when you say
12 definitely guilty of extortion.
13 Now, you could argue, well, that's just his
14 opinion, but he stated as if it was clear and was fully
15 established and so I don't think the opinion defense on at
16 least some of these would be sufficient.
17 There's talk about whether the Punturos can be
18 responsible for Mr. Kern's comments if, in fact, they turn
19 out to be actionable and there is reference -- actually,
20 this comes from Mr. Moothart's brief at Page 16 -- well,
21 actually has to do with the counter-motion, but an attorney
22 if -- again, we have to take the version most favorable to
23 the Plaintiff in deciding a motion by Defendants, but
24 Plaintiff has some evidence that this occurred
25 contemporaneous with attempts to negotiate a settlement and

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1 that Mr. Kern could get his client to help Mr. Punturo out
2 with his then-pending criminal matters. Particularly, if
3 there was a settlement and the number of $750,000 was
4 mentioned. It was a substantial sum certainly.
5 So Mr. Kern's actions might well have been
6 deemed to be in furtherance of a settlement on behalf of his
7 clients and I think there would be vicarious responsibility
8 for that or could be given the facts most favorable to the
9 Plaintiff.
10 Now, there is a counter motion for summary
11 disposition and a lot of these things -- I'm going to deny
12 that -- there's a lot of questions like is there really
13 negligence on Mr. Kern's behalf in making these statements
14 or did he have good reason to make them and it just turns
15 out to be wrong. I mean if you blow a stop sign, that's
16 still negligence.
17 A question of vicarious responsibility and on
18 Page 16 of Mr. Moothart's brief this is attributed to Union
19 Mutual Life Insurance Co. v Thomas 83 Federal Report 803,
20 Ninth Circuit Court from 1897. That's probably the best
21 state of the law you could possibly have because I found
22 stuff in the '80's "and '90's and the 1800s is the best
23 law. You read those cases, four pages long. You read a
24 modern case and it's an afternoon's work. It is about 200
25 pages.

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A Supreme Court decision is a book, the evil of the word processor in the practice of law, but in any event libelous statements made by duly-authorized counsel of the insurance company in an action pending against it must be presumed until the contrary is shown to have been the answer of the insurance company and to contain matter duly authorized by it. So you can show to the contrary. I mean we don't know what the relationships were and I think the question of whether there is vicarious liability is also a fact question so I'm going to deny the cross-motion for summary disposition on liability.

Do we have a scheduling order in place yet?

MR. MOOTHART: Yes.

THE COURT: Have you got pre-trial statements yet?

MR. MOOTHART: We submitted pre-trial statements.

THE COURT: When they come in, we'll issue a scheduling order and move forward. Who would like to prepare an order?

MR. MOOTHART: Your Honor, I can just prepare an order that says the motions of defendant and all the parties for summary disposition are denied for the reasons set forth on the record.

MR. SULLIVAN: That's fine by me, judge.

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THE COURT: All right. Sounds good. Thank you.

MR. MOOTHART: Thank you.

MR. SULLIVAN: Thank you for your time today, judge.

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1 C E R T I F I C A T E

2

3 I, JAMES M. LINDSAY, an acting Official Court
4 Reporter of the 13th Judicial Circuit Court, State of
5 Michigan, do hereby certify that the foregoing pages
6 comprise a full, true and correct transcript of the
7 proceedings had in connection with the above-entitled cause.

8

9 Dated this 15th day of May, 2017.

10 James M. Lindsay

11 _____
JAMES M. LINDSAY, RMR, CSR 301
12 Acting Official Court Reporter

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STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

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

vs

BRACE KERN, an individual,
Defendant-Appellant.

and

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

MSC Docket No: 158749
COA Docket No: 338727

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

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Attorney for Defendant-Appellant Kern

Defendant-Appellants' Appendix

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APPENDIX 18

FILED
Bonnie Scheele
Grand Traverse 13th Circuit Court
07/18/2017

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LAW OFFICES COLLINS EINHORN FARRELL PC 4000 Town Center, 9th Floor Southfield, MI 48075 (248) 355-4141

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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

Plaintiffs,

v

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

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

Defendants.

_____/

MOOTHART & SARAFA, PLC
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YEAGER DAVISON & DAY PC
Phillip K. Yeager (P33761)
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_____/

ORDER GRANTING MOTION FOR STAY OF PROCEEDINGS PENDING OUTCOME OF APPLICATIONS FOR LEAVE TO APPEAL

At a session of said Court held on:

_____

PRESENT: HON. _____
Circuit Court Judge

Defendants having filed a Motion to Stay Proceedings and/or for a Protective Order Staying Discovery, Plaintiff having filed a written response, the Court having heard oral argument

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in open court on Monday, July 10, 2017, and the Court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that proceedings in this matter are stayed pending the outcome of the Applications for Leave to Appeal referenced within Defendant's motion, for the reasons stated on the record. The stay shall remain in place until such time as Defendant's Applications for Leave to Appeal are resolved by the Michigan Court of Appeals and/or the Michigan Supreme Court.

07/17/2017
04:54PM

THOMAS G. POWER, CIRCUIT COURT JUDGE, P24270

Circuit Court Judge

Approved as to form only:

JONATHAN R. MOOTHART (P40678)
Attorney for Plaintiffs

MICHAEL J. SULLIVAN (P35599)
JAMES J. HUNTER (P74829)
Attorneys for Defendant Brace Kern

Jay Zelenock (P58836)
Attorneys for Defendants Boyer and Kort

Phillip K. Yeager (P33761)
Attorney for Defendant Brace Kern

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LAW OFFICES COLLINS EINHORN FARRELL PC 4000 Town Center, 9th Floor Southfield, MI 48075 (248) 355-4141

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_____
Circuit Court Judge

Approved as to form only:

_____
JONATHAN R. MOOTHART (P40678)
Attorney for Plaintiffs

_____
MICHAEL J. SULLIVAN (P35599)
JAMES J. HUNTER (P74829)
Attorneys for Defendant Brace Kern

_____
Jay Zelenock (P58836)
Attorneys for Defendants Boyer and Kort

7/11/17
_____
Phillip K. Yeager (P33761)
Attorney for Defendant Brace Kern

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APPENDIX 19

Docket Sheet Bedford

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Home Cases, Opinions & Orders

Case Search

Case Docket Number Search Results - 155034

Appellate Docket Sheet

COA Case Number: 327372

MSC Case Number: 155034

MICHAEL J BEDFORD V DEREK S WITTE

1	BEDFORD MICHAEL J Oral Argument: Y Timely: Y	PL-AT	RET	(79440) **GUTIERREZ MICHAEL L**
2	WITTE DEREK S Oral Argument: Y Timely: Y	DF-AE	RET	(67207) **KLAUS KATHLEEN H**
3	HOYER JORDAN C	DF-AE	SAM	
4	LAW OFFICES OF JORDAN C HOYER PLLC	DF-AE	SAM	

COA Status: Case Concluded; File Archived **MSC Status:** Closed

Consolidations:

327373 GARY STEWART JR V DEREK S WITTE (Case Concluded; File Archived)

05/13/2015 1 Claim of Appeal - Civil
Proof of Service Date: 05/13/2015
Jurisdictional Checklist: Y
Register of Actions: Y
Attorney: 36905 - SILVER LEE T

03/27/2015 2 Order Appealed From
From: KENT CIRCUIT COURT
Case Number: 14-011752-CZ
Trial Court Judge: 38156 TRUSOCK MARK A
Nature of Case:
Summary Disposition Granted

05/13/2015 3 Notice Of Filing Transcript
Date: 04/06/2015
Reporter: 1428 - KNIFFEN-OATES TRACY L
Filed By Attorney: 36905 - SILVER LEE T
Hearings:
03/27/2015

05/13/2015 4 Transcript Filed By Party
Date: 05/13/2015
Reporter: 1428 - KNIFFEN-OATES TRACY L
Filed By Attorney: 36905 - SILVER LEE T
Hearings:
03/27/2015

06/09/2015 7 Submitted On Administrative Motion Docket
District: D

06/10/2015 8 Order: Consolidate - Administrative
View document in PDF format
Event: 7 Submitted On Administrative Motion Docket

RECEIVED by MSC 1/3/2020 3:56:19 PM

Panel: MJT
Comments: Consl: 327372, 327373

06/10/2015 11 Docketing Statement MCR 7.204H
For Party: 1 BEDFORD MICHAEL J PL-AT
Proof of Service Date: 06/10/2015
Filed By Attorney: 79440 - GUTIERREZ MICHAEL L

07/08/2015 12 Brief: Appellant
Proof of Service Date: 07/08/2015
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 79440 - GUTIERREZ MICHAEL L
For Party: 1 BEDFORD MICHAEL J PL-AT

07/08/2015 13 Appearance - Appellant
Date: 07/08/2015
For Party: 1 BEDFORD MICHAEL J PL-AT
Attorney: 36905 - SILVER LEE T

08/12/2015 14 Brief: Appellee
Proof of Service Date: 08/12/2015
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 67207 - KLAUS KATHLEEN H
For Party: 2 WITTE DEREK S DF-AE

08/13/2015 15 Noticed
Record: REQST
Mail Date: 08/14/2015

08/21/2015 17 Brief: Reply
Proof of Service Date: 08/21/2015
Filed By Attorney: 36905 - SILVER LEE T
For Party: 1 BEDFORD MICHAEL J PL-AT

08/24/2015 16 Record Filed
Comments: 3 FILES (TRNS INCL); 2 LCT PLDGS

10/29/2015 19 Copy Request Fulfilled
Date: 10/29/2015
Attorney: 52622 - DEPERNO MATTHEW S

07/05/2016 33 Appearance - Appellant
Date: 07/05/2016
For Party: 1 BEDFORD MICHAEL J PL-AT
Attorney: 79440 - GUTIERREZ MICHAEL L

07/06/2016 29 Submitted on Case Call
District: G
Item #: 10
Panel: CMM,DHS,PMM

11/22/2016 38 Opinion - Authored - Published
View document in PDF format
Pages: 6
Panel: CMM,DHS,PMM
Author: PMM
Result: Affirm in Part, Reverse in Part, Remanded
Comments: Remanded for further proceedings consistent with Opinion.

12/29/2016 40 SCt: Application for Leave to SCt
Supreme Court No: 155034

RECEIVED by MSC 1/3/2020 3:56:19 PM

Answer Due: 01/26/2017
Fee: E-Pay
For Party: 2
Attorney: 67207 - KLAUS KATHLEEN H
Comments: Same application 155034 - 155035, ALL EVENTS IN 155034

01/03/2017 41 SCt Case Caption
Proof Of Service Date: 01/03/2017
Filed By Pro Per

01/11/2017 42 Supreme Court - File & Record Sent To
File Location: Z
Comments: sc#155034 3 lcf(trs incl);2 lc pld

01/13/2017 43 SCt: COA and TCt Received
5 files

01/25/2017 44 SCt: Answer - SCt Application/Complaint
Filing Date: 01/25/2017
For Party: 1 BEDFORD MICHAEL J PL-AT
Filed By Attorney: 79440 - GUTIERREZ MICHAEL L

02/14/2017 45 SCt: Reply - SCt Application/Complaint
Filing Date: 02/14/2017
For Party: 2 WITTE DEREK S DF-AE
Filed By Attorney: 67207 - KLAUS KATHLEEN H

05/26/2017 46 Michigan Appeals Reports Publication
318 Mich App 60

08/31/2017 47 SCt: Stipulation Filed
Filing Date: 08/31/2017
For Party: 2 WITTE DEREK S DF-AE
Filed By Attorney: 67207 - KLAUS KATHLEEN H
Comments: Stipulation to dismiss application

09/15/2017 48 SCt Order: Close
View document in PDF format
Comments: Dismiss by stip w/ prejudice and w/o costs.

09/18/2017 49 Supreme Court - File Ret`d By - Close Out
File Location: F

Case Listing Complete

Docket Sheet Bedford

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Home Cases, Opinions & Orders

Case Search

Case Docket Number Search Results - 155035

Appellate Docket Sheet

COA Case Number: 327373

MSC Case Number: 155035

GARY STEWART JR V DEREK S WITTE

1	STEWART GARY JR Oral Argument: Y Timely: Y	PL-AT	RET	(79440) **GUTIERREZ MICHAEL L**
2	WITTE DEREK S Oral Argument: Y Timely: Y	DF-AE	RET	(67207) **KLAUS KATHLEEN H**
3	HOYER JORDAN C	DF-AE	SAM	
4	LAW OFFICES OF JORDAN C HOYER PLLC	DF-AE	SAM	

COA Status: Case Concluded; File Archived **MSC Status:** Closed

Consolidations:

327372 MICHAEL J BEDFORD V DEREK S WITTE (Case Concluded; File Archived)

05/13/2015 1 Claim of Appeal - Civil
- Proof of Service Date: 05/13/2015
- Jurisdictional Checklist: Y
- Register of Actions: Y
- Attorney: 36905 - SILVER LEE T

03/27/2015 2 Order Appealed From
- From: KENT CIRCUIT COURT
- Case Number: 14-011813-CZ
- Trial Court Judge: 38156 TRUSOCK MARK A
- Nature of Case:
  - Summary Disposition Granted

05/13/2015 3 Notice Of Filing Transcript
- Date: 04/06/2015
- Reporter: 1428 - KNIFFEN-OATES TRACY L
- Filed By Attorney: 36905 - SILVER LEE T
- Hearings:
  - 03/27/2015

05/13/2015 4 Transcript Filed By Party
- Date: 05/13/2015
- Reporter: 1428 - KNIFFEN-OATES TRACY L
- Filed By Attorney: 36905 - SILVER LEE T
- Hearings:
  - 03/27/2015

06/09/2015 7 Submitted On Administrative Motion Docket
- District: D

06/10/2015 8 Order: Consolidate - Administrative
- View document in PDF format
- Panel: MJT

Docket Sheet Bedford

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Comments: Consl: 327372, 327373

06/10/2015 11 Docketing Statement MCR 7.204H
For Party: 1 STEWART GARY JR PL-AT
Proof of Service Date: 06/10/2015
Filed By Attorney: 79440 - GUTIERREZ MICHAEL L

07/08/2015 12 Brief: Appellant
Proof of Service Date: 07/08/2015
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 79440 - GUTIERREZ MICHAEL L
For Party: 1 STEWART GARY JR PL-AT

07/08/2015 13 Appearance - Appellant
Date: 07/08/2015
For Party: 1 STEWART GARY JR PL-AT
Attorney: 36905 - SILVER LEE T

08/12/2015 14 Brief: Appellee
Proof of Service Date: 08/12/2015
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 67207 - KLAUS KATHLEEN H
For Party: 2 WITTE DEREK S DF-AE

08/13/2015 15 Noticed
Record: REQST
Mail Date: 08/14/2015

08/20/2015 16 Record Filed
Comments: 2 FILES (TRNS INCL); 2 LCT PLDGS

08/21/2015 18 Brief: Reply
Proof of Service Date: 08/21/2015
Filed By Attorney: 36905 - SILVER LEE T
For Party: 1 STEWART GARY JR PL-AT

07/05/2016 31 Appearance - Appellant
Date: 07/05/2016
For Party: 1 STEWART GARY JR PL-AT
Attorney: 79440 - GUTIERREZ MICHAEL L

07/06/2016 27 Submitted on Case Call
District: G
Item #: 10
Panel: CMM,DHS,PMM

11/22/2016 36 Opinion - Authored - Published
View document in PDF format
Pages: 6
Panel: CMM,DHS,PMM
Author: PMM
Result: Affirm in Part, Reverse in Part, Remanded
Comments: Remanded for further proceedings consistent with Opinion.

12/29/2016 38 SCt: Application for Leave to SCt
Supreme Court No: 155035
Answer Due: 01/26/2017
Fee: E-Pay
For Party: 2
Attorney: 67207 - KLAUS KATHLEEN H
Comments: Same application 155034 - 155035, ALL EVENTS IN 155034

Docket Sheet Bedford

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01/11/2017 39 Supreme Court - File & Record Sent To

File Location: Z

Comments: sc#155035 2 lcf(trs incl);2 lc pld

05/26/2017 41 Michigan Appeals Reports Publication

318 Mich App 60

09/15/2017 43 SCt Order: Close

View document in PDF format

Comments: Dismiss by stip w/ prejudice and w/o costs.

09/18/2017 44 Supreme Court - File Ret`d By - Close Out

File Location: F

Case Listing Complete

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APPENDIX 20

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Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

November 22, 2019

158749
158755-6

BRYAN PUNTURO, FAWN PUNTURO, and
B & A HOLDINGS, LLC, d/b/a PARKSHORE
RESORT, LLC,
Plaintiffs-Appellees,

v

SC: 158749
COA: 338727
Grand Traverse CC: 17-032008-CZ

BRACE KERN,
Defendant-Appellant,
and

SABURI BOYER and DANIELLE KORT,
f/k/a DANIELLE BOYER,
Defendants.
_____/

BRYAN PUNTURO, FAWN PUNTURO, and
B & A HOLDINGS, LLC, d/b/a PARKSHORE
RESORT, LLC,
Plaintiffs-Appellees,

v

SC: 158755
COA: 338728
Grand Traverse CC: 17-032008-CZ

BRACE KERN and SABURI BOYER,
Defendants,
and

DANIELLE KORT, f/k/a DANIELLE BOYER,
Defendant-Appellant.
_____/

BRYAN PUNTURO, FAWN PUNTURO, and
B & A HOLDINGS, LLC, d/b/a PARKSHORE
RESORT, LLC,
Plaintiffs-Appellees,

v

SC: 158756
COA: 338732
Grand Traverse CC: 17-032008-CZ

BRACE KERN and DANIELLE KORT,
f/k/a DANIELLE BOYER,
Defendants,
and

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SABURI BOYER,
Defendant-Appellant.
_____/

On order of the Court, the applications for leave to appeal the October 16, 2018 judgment of the Court of Appeals are considered. We direct the Clerk to schedule oral argument on the applications. MCR 7.305(H)(1).

The appellants shall file supplemental briefs within 42 days of the date of this order addressing: (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 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; and (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. In addition to the brief, the appellants shall electronically file appendices conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellants' briefs. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendices filed by the appellants. Replies, if any, must be filed by the appellants within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The time allowed for oral argument shall be 30 minutes: 15 minutes for appellants, to be divided at their discretion, and 15 minutes for appellees. MCR 7.314(B)(1).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Punturo v Kern*, Docket No. 158749, only and served on the parties in both cases.

SEAL OF THE MICHIGAN SUPREME COURT · LANSING · DISCITE JUSTITIAM MONITI

t1119

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 22, 2019

Clerk

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APPENDIX 21

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2010 WL 2016310
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

John H. UNDERHILL, Plaintiff–Appellant,
v.
James T. SEIBERT, Defendant–Appellee.

Docket No. 291639.
|
May 20, 2010.

West KeySummary

1 **Libel and Slander**
Criticism and Comment on Public Matters; Public Figures

Attorney was a public figure, for purposes of attorney's libel claim against township treasurer. Attorney voluntarily injected himself into a public controversy regarding township's failure to forward employee withholding taxes to the Internal Revenue Service (IRS) by attending township board meeting, demanding an investigation, and accepting position as township attorney to investigate the matter. The allegedly libelous statements related to attorney's handling of the matter, which was a highly public concern within the township.

Alger Circuit Court; LC No. 07–004554–CZ.

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

Opinion

PER CURIAM.

***1** In this defamation action, plaintiff John Underhill appeals as of right from an order granting summary disposition to defendant James Siebert under MCR 2.116(C)(8) and (10). We conclude that the trial court erred in granting Siebert's motion under MCR 2.116(C)(8). But because the submitted evidence establishes that (1) Underhill was a limited-purpose public figure and (2) Underhill cannot establish that Siebert's statements were made with actual malice, summary disposition under MCR 2.116(C)(10) was proper. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Siebert is the former treasurer for Burt Township. In 2006, it was discovered that Burt Township officials had not forwarded employee withholding taxes to the Internal Revenue Service for several years, resulting in substantial penalties and interest. Underhill, an attorney, attended a township board meeting and demanded an investigation. The township ultimately hired Underhill as township attorney to investigate the matter. As the trial court stated in its opinion, "[o]ver the course of the next several months, the rumor mill apparently went into overdrive and the matter of failure to make payroll contributions apparently morphed into an all out investigation of matters personal to various Board members." It is apparent that Underhill believed that Siebert, as township treasurer, was ultimately responsible for the withholding tax matter, as well as other improprieties. However, an auditor found no evidence of embezzlement, no criminal charges were ever brought, and the township board ultimately voted for Underhill to end his investigation.

In November 2006, Siebert sent an email to John Pepin, a reporter for the *Marquette Mining Journal,* who had previously interviewed Siebert and written an article about the investigation. The email stated in part that an auditor had investigated the township's financial situation, had found no evidence of embezzlement, and had opined that the problem was with "the system," not with the people involved. Siebert asserted that "[a]nyone with any concern for this community would then have ended the investigation." Siebert then continued with the following statement, which is the subject of this defamation action:

> However, Queen Karen Bryz [1] and King John Underhill not only continued [the investigation] but made it a witch hunt, according to Judge Start [sic] "a one man grand jury."

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> They delayed reporting the results of the audit and fed the people distorted information,[ ]half truths, no truths and downright lies in order to justify their existance [sic] and continue to be in charge.

On November 26, 2006, Pepin wrote a newspaper article concerning the investigation that stated, in pertinent part:

> Seibert said an auditor hired to assess the township's financial situation reported publicly he found no evidence of embezzlement. Seibert said Bryz and Underhill should have then ended the probe, but they didn't.
>
> ***2** "They delayed reporting the results of the audit and fed the people distorted information, half-truths, no truths and downright lies in order to justify their existence and continue to be in charge," Seibert said.

Underhill thereafter filed this defamation action against Siebert. Underhill alleged that Siebert was quoted in the local newspaper as making untrue and malicious statements about Underhill, "as set out in the attached exhibit A." Exhibit A to the complaint was a copy of Pepin's newspaper article. Underhill alleged that Siebert had refused to publish a retraction. Underhill also alleged that he had suffered damages as a result of the defamation. Underhill did not quote the defamatory statements in the complaint, nor did he mention Siebert's email to Pepin.

Siebert moved for summary disposition, alleging that Underhill had failed to plead his defamation claim with sufficient specificity. Siebert also alleged that Underhill was a limited public figure and there were no allegations or evidence that Siebert had acted with actual malice. Underhill responded, offering to file an amended complaint setting out the defamatory statements with more specificity. Underhill also conceded that he was a limited-purpose public figure, but proffered facts that he believed showed that Siebert acted with malice. After hearing oral arguments on the motion, the trial court decided that Siebert's motion was premature.

Underhill then filed an amended complaint that added numerous allegations concerning the facts of the underlying financial controversy. Concerning the defamation, Underhill alleged that on November 8, 2006, Siebert sent Pepin an email, and Underhill attached the email to the complaint. Underhill also quoted in his complaint the defamatory statement contained in the email. Underhill then alleged that on November 26, 2006, the newspaper published an article "quoting the accusations from Siebert's email as cited above." Underhill attached the newspaper article to his complaint. Underhill alleged that Siebert's statements were false and were made with malice. Underhill alleged that Siebert's attacks were part of a pattern of conduct designed to obscure any investigation into Siebert's alleged wrongdoings. Underhill alleged that Siebert had refused to publish a retraction of the statements and that Underhill had suffered damages.

Siebert again moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Siebert argued that, despite filing an amended complaint, Underhill had failed to plead defamation with sufficient specificity. Siebert also argued that Underhill was unable to show actual malice. Underhill responded, arguing that his amended complaint was sufficiently specific. Underhill also now argued that there was a factual dispute concerning whether he was a public figure at the time that Siebert made his defamatory statements because he had already resigned. In any event, Underhill argued, there was evidence that Siebert acted with malice, creating a question of fact for the jury, and Siebert had failed to show otherwise.

***3** During oral arguments on the motion, defense counsel focused on deposition evidence indicating that the challenged statements were true, and that Siebert believed them to be true. Defense counsel also argued that Underhill had conceded the public figure issue in his deposition. And defense counsel withdrew his specificity argument, stating that Underhill had corrected that defect in his amended complaint.

The trial court found that Underhill's amended complaint was no more specific than the first concerning the alleged defamation. The trial court added that Underhill had "misrepresented" the allegedly defamatory statements by quoting from Siebert's email to Pepin rather than the newspaper article. "The only conclusion the Court can reach, based on the Underhill's pleadings, is that they lack the requisite detail to support a claim for libel and, therefore, the claim must be denied."

The trial court also found that Underhill had admitted to being a limited-purpose public figure. The trial court added that, even if he had not so conceded, it would nevertheless conclude that Underhill was a limited-purpose public figure because he inserted himself into the controversy

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concerning the township's financial problems. According to the trial court, this conclusion was confirmed by the fact that Underhill resigned his position as township attorney when the investigation was terminated. The trial court went on to find that Siebert's statements were not made with malice. The trial court explained that Siebert's email reflected an intent to provide Pepin with a summary of Siebert's perspectives and opinions concerning the Burt Township controversy, and "fails to support a claim by clear and convincing evidence that actual malice was intended." Even the particular statement accusing Underhill of delaying the reporting of the results of the audit was an expression of opinion rather than an expression of fact made with reckless disregard of its truth or falsity. According to the trial court, holding Siebert liable for such expressions of opinion would have a chilling effect on First Amendment expression. The trial court was "satisfied that the specific facts necessary to maintain an action for libel are unsupported and the general allegations are clearly unenforceable." Therefore, the trial court dismissed Underhill's amended complaint with prejudice. Underhill now appeals.

II. SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

A. STANDARD OF REVIEW

Underhill argues that he did state claims on which relief could be granted and that the trial court erred in finding that his amended complaint was not "specific enough."

Under MCR 2.116(C)(8), a party may move for summary disposition on the ground that the opposing party has failed to state a claim on which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone.[2] "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant."[3] The motion "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' "[4] A trial court's decision on a motion for summary disposition is reviewed de novo.[5]

B. ANALYSIS

***4** The elements of libel are: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."[6] Claims of libel must be pleaded with specificity.[7] The plaintiff must specifically identify the statements that he considers to be defamatory.[8]

Although Underhill's original complaint failed to quote the allegedly defamatory statements, he filed an amended complaint in which he quoted the portion of Siebert's email to Pepin that he alleged was defamatory. Moreover, Siebert was evidently aware of the precise nature of Underhill's claim because, after Underhill filed his amended complaint, he withdrew his specificity objection. Because Underhill specifically identified the statements that he was alleging were defamatory, we conclude that the trial court erred in granting Siebert's motion under MCR 2.116(C)(8).

III. SUMMARY DISPOSITION UNDER MCR 2.116(C)(10)

A. STANDARD OF REVIEW

Underhill argues that the trial court erred when it granted Siebert's motion for summary disposition to the extent that it found that no genuine issue of material fact existed.

Although the trial court's opinion refers only to MCR 2.116(C)(8), Siebert also moved for summary disposition under MCR 2.116(C)(10), Underhill responded to the motion by submitting documentary evidence in an attempt to establish a genuine issue of material fact for trial, and the trial court referred to evidence outside the pleadings when granting the motion, thereby implicating MCR 2.116(C)(10). And, where, as here, the trial court grants a motion for summary disposition brought pursuant to both MCR 2.116(C)(8) and (C)(10), and it is clear that the court looked beyond the pleadings, this Court "will treat the motions as having been granted pursuant to MCR 2.116(C)(10)," which "tests whether there is factual support for a claim."[9]

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled

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to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[10] The non-moving party then has the burden to produce admissible evidence to establish disputed facts.[11] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[12] We review de novo the trial court's ruling on a motion for summary disposition.[13]

B. PUBLIC FIGURE STATUS

We reject Underhill's argument that there is a question of fact whether he was a public figure at the time the statements were made. In response to Siebert's first motion for summary disposition, Underhill conceded that he was a limited-purpose public figure and, accordingly, that it would be necessary to show that Siebert made the challenged statements with actual malice. And a party may not seek redress on appeal by taking a position contrary to that argued in the trial court.[14]

***5** Regardless, a person who "project[s] himself into the arena of public policy, public controversy and pressing public concern" is a public figure.[15] A public figure is deemed to have "voluntarily expose[d] [himself] to the risk of defamation by injecting [himself] into public controversy."[16] In this case, Underhill voluntarily agreed to investigate allegations of public wrongdoing involving Burt Township, and the allegedly defamatory statements related to Underhill's handling of this matter, which was a highly public concern within the township. Thus, there is no genuine issue of material fact concerning Underhill's status as a public figure.

C. MALICE

"Where a public figure is involved in a defamation case, the public figure must prove by clear and convincing evidence that the publication was a defamatory falsehood and was made with actual malice, i.e., with knowledge of falsity or with reckless disregard for the truth."[17]

> Reckless disregard for the truth is not established merely by showing that the statements were made with preconceived objectives or insufficient investigation. Furthermore, ill will, spite or even hatred, standing alone, do not amount to actual malice. 'Reckless disregard' is not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether the publisher in fact entertained serious doubts concerning the truth of the statements published.[18]

Clear and convincing evidence is "the most demanding standard applied in civil cases."[19] "This showing must produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."[20]

Here, Underhill erroneously argues that actual malice is always a question of fact. Rather, "[w]hether the evidence is sufficient to support a finding of malice constitutes a question of law."[21] Thus, in the context of a motion for summary disposition, a reviewing court must decide whether the submitted evidence, viewed most favorably to the plaintiff, is sufficient to permit a trier of fact to find actual malice, by clear and convincing evidence.[22]

In this case, Underhill submitted voluminous evidence in opposition to Siebert's motion. For the most part, the evidence focused on providing factual support for Underhill's beliefs of wrongdoing by township officials and on whether Siebert's statements that Underhill had lied and delayed reporting the audit results could literally be proven as false. However, whether Siebert acted with malice does not depend on the literal truth or falsity of the allegedly defamatory statements, but rather on Siebert's knowledge when the statements were made. We agree with Siebert that the submitted evidence fails to support a finding of malice.

***6** Most telling is the surrounding context of the allegedly defamatory statements, in which Siebert explained that an independent audit had uncovered no evidence of wrongdoing and that the township board had become impatient with Underhill's investigation and voted, by a four to one margin, to end the investigation. Moreover, the submitted evidence shows that Underhill was aware of the deep division within the community and of the fact that certain people were strongly opposed to continuing the investigation. The evidence also shows that others within the community shared Siebert's beliefs that Underhill had unjustifiably delayed reporting the audit results and had distorted the truth. Although it is apparent from the submitted evidence that

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Underhill strongly believes that he was justified in conducting his investigation, and conducted it in a proper manner, it is also apparent that Siebert strongly believed that his accusations against Underhill were true and justified, that they were supported by objective facts, and that they were shared by others in the community. Against this backdrop, even if a trier of fact could ultimately find that Siebert's statements were not literally true, the evidence did not clearly and convincingly support a finding that Siebert acted with knowledge that his statements were false, or that he in fact entertained serious doubts concerning the truth of the statements. [23]

We conclude that Siebert was entitled to summary disposition under MCR 2.116(C)(10) because the submitted evidence demonstrates that (1) Underhill was a limited-public figure and (2) Underhill could not establish that Siebert made the challenged statements with actual malice. In light of this conclusion, it is unnecessary to address Underhill's additional arguments regarding the elements of publication and whether the challenged statements are actionable statements of opinion.

IV. DISQUALIFICATION

Underhill argues that the trial judge should have disqualified himself from hearing this case because his prior service as township attorney created an appearance of impropriety. "Generally, to preserve this issue for appellate review, a motion to disqualify must be filed within 14 days after the moving party discovers the basis for disqualification[.]" [24] In this case, Underhill was aware of the trial judge's prior service as township attorney, but never filed a motion for disqualification or argued that an appearance of impropriety should preclude the judge from hearing this case. Therefore, we decline to address this issue. [25]

We affirm.

All Citations

Not Reported in N.W.2d, 2010 WL 2016310

Footnotes

1 Karen Bryz became township supervisor and manager during the investigation.
2 *Maiden v. Rozwood,* 461 Mich. 109, 119, 597 N.W.2d 817 (1999).
3 *Id.*
4 *Id.,* quoting *Wade v. Dept. of Corrections,* 439 Mich. 158, 162, 483 N.W.2d 26 (1992).
5 *Allen v. Keating,* 205 Mich.App. 560, 562, 517 N.W.2d 830 (1994).
6 *Rouch v. Enquirer & News of Battle Creek (After Remand),* 440 Mich. 238, 251, 487 N.W.2d 205 (1992).
7 *Royal Palace Homes, Inc. v. Channel 7 of Detroit, Inc.,* 197 Mich.App. 48, 52, 495 N.W.2d 392 (1992).
8 *Id.* at 52–53, 495 N.W.2d 392.
9 *Kefgen v. Davidson,* 241 Mich.App. 611, 616, 617 N.W.2d 351 (2000).
10 MCR 2.116(G)(3)(b) and (4); *Maiden,* 461 Mich. at 120, 597 N.W.2d 817.
11 *Neubacher v. Globe Furniture Rentals,* 205 Mich.App. 418, 420, 522 N.W.2d 335 (1994).
12 MCR 2.116(G)(5); *Maiden,* 461 Mich. at 120, 597 N.W.2d 817.
13 *Tillman v. Great Lakes Truck Ctr., Inc.,* 277 Mich.App. 47, 48, 742 N.W.2d 622 (2007).
14 *Phinney v. Perlmutter,* 222 Mich.App. 513, 544, 564 N.W.2d 532 (1997).
15 *Hayes v. Booth Newspapers, Inc.,* 97 Mich.App. 758, 773–774, 295 N.W.2d 858 (1980).
16 *Kevorkian v. American Med. Ass'n,* 237 Mich.App. 1, 11, 602 N.W.2d 233 (1999) (internal quotation and citation omitted).
17 *Id.* at 9, 602 N.W.2d 233; see also *Tomkiewicz v. Detroit News, Inc.,* 246 Mich.App. 662, 676–677, 635 N.W.2d 36 (2001)
18 *Tomkiewicz,* 246 Mich.App. at 677, 635 N.W.2d 36 (internal quotations and citation omitted).
19 *Hunter v. Hunter,* 484 Mich. 247, 265, 771 N.W.2d 694 (2009).
20 *Id.* (internal quotations and citation omitted).
21 *Tomkiewicz,* 246 Mich.App. at 677, 635 N.W.2d 36.
22 *Id.*

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23 As this Court observed in *Ireland v. Edwards,* 230 Mich.App. 607, 624, 584 N.W.2d 632 (1998), it is possible "that this result effectively protects statements that may very well have been false." "However, the First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* (internal quotations and citation omitted).

24 *Kloian v. Schwartz,* 272 Mich.App. 232, 245, 725 N.W.2d 671 (2006); see also MCR 2.003(D)(1)(a).

25 *Kroll v. Crest Plastics, Inc.,* 142 Mich.App. 284, 291, 369 N.W.2d 487 (1985).

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APPENDIX 22

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1997 WL 33349374
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Kenneth C. BRACCO and Beverly Bracco, Plaintiffs-Appellees/Cross-Appellants,
v.
Robert VERCRUYSSE and Butzel Long, P.C., Defendants-Appellants/Cross-Appellees.

No. 185303.
|
May 30, 1997.

Before: O'CONNELL, P.J., and SAWYER and MARKMAN, JJ.

UNPUBLISHED

PER CURIAM.

***1** In this defamation action, the trial court denied both parties' motions for summary disposition. MCR 2.116(C)(8) and (10). Defendants appeal by leave granted and plaintiffs cross appeal. We reverse the trial court's decision as to defendants' motion.

Defendant Vercruysse is an attorney with defendant Butzel Long, P .C., and was defense counsel for Michigan Technological University in a wrongful discharge lawsuit brought by plaintiffs following the termination of plaintiff Kenneth C. Bracco's employment there. Mr. Bracco was fired from his job as a public safety officer at the university on grounds of "theft," because he took some packages of yogurt covered raisins from a snack bar at the university after the till was closed. Plaintiffs maintained that the termination was unjustified because the university had a policy of giving free food to security and other university personnel and to outside police officers. Judge Quinnell rendered his findings of fact and conclusions of law on the claims against the university in a lengthy opinion issued February 10, 1993

Judge Quinnell found that Mr. Bracco had a just cause employment contract at the university, but that Mr. Bracco's admitted actions, as the university perceived them, amounted to just cause for discharge under the university's policy regarding discharge for theft. However, Judge Quinnell found that Mr. Bracco did not commit theft because he honestly believed he was entitled to take the food under the circumstances:

11. In order that there be no misunderstanding of what is to follow in this opinion, and based on facts and evidence known now, I conclude beyond any question that defendant did not commit theft; he had a subjectively honest belief that he had a right to eat the food under the circumstances. See CJI2d 7.5.

12. However, I also conclude that, based on the facts known to them at the time of the termination, the officials of MTU responsible for it were acting in good faith, were acting reasonably (subject to the Due Process discussion to follow), and that the perceived theft amounted to just cause for discharge under standards set by MTU.

Judge Quinnell also found that Mr. Bracco was deprived of procedural due process, noting that Bracco was not given an adequate opportunity to present mitigating facts in his defense, such as proof that other university employees had taken free food in the past. In this regard, Judge Quinnell found it more likely than not that an opportunity to present this information would have affected the university's ultimate decisions:

> 49. It seems more probable than not that any reasonable decision maker here would have reached a different decision if further facts had been made known prior to any decision being made. At the time of the decision, the decision maker knew that Bracco had been informed of the accusation, the statements against him, and that he had admitted the conduct alleged. With even minimal further time and counsel, the decision maker would have found that every other employee of the Public Safety Department had eaten free food at the Memorial Union as a matter of common practice, although the timing and nature of the food eaten might be somewhat differently described by the various officers; this hypothetical

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reasonable decision maker would have known that MTU had invited officers from other police departments to do so for many years, and they had done so; the decision maker would have found that although some officers proclaimed that they ate only when invited to do so by the janitors, other employees including a former student manager and at least one of the janitors themselves thought that the public safety officers had the same right to eat at the union after the till was closed as did the janitors themselves, and the janitors themselves had enjoyed that privilege for many years; that perhaps there was some lack of understanding of the "free food" policy after hours, that as a matter of sound personnel management the decision maker should formulate a policy regarding the practice, and that any discipline given to plaintiff Bracco could not differ significantly from the discipline given to every other public safety officer.

***2** Shortly after Judge Quinnell's February 10, 1993, opinion was released, plaintiffs' attorney, Hunter Watson, issued a press release stating that Judge Quinnell's decision included a "complete exoneration" of Mr. Bracco from "erroneous allegations of theft associated with his firing," and that the court's decision "makes it clear that this finding of Mr. Bracco's innocence is beyond any question." A radio reporter received the press release and called defendant Vercruysse for a response. Apparently, the reporter tape-recorded Vercruysse's remarks over the telephone and then incorporated those statements into her news story which was broadcast by the station on at least two occasions on February 17, 1993. The broadcast, in its entirety, was as follows:
Michigan Technological University's legal counsel said yesterday that MTU considers a decision in a recent case a win for the University. The case involves an employee who MTU fired in August, 1987 for taking some candy from the snack bar. MTU attorney, Bob Vercruysse:

"It clearly holds the University has a right to terminate employees who commit what the University deems is acts of theft. The Judge hasn't issued a final decision as to what remedy he is going to issue, if any at all, for what he found to be a deficiency in procedural due process. Now, procedural due process is something that there's a lot of dispute in the law in terms of exactly what you've got to do with respect to and that's an area for us to consider when we see the Judge's final ruling in the case."

The defense attorney for former MTU employee, Ken Bracco, said earlier this week that Judge Quinnell found Bracco had not been given due process for the offense, that the University had fired Bracco within less than four hours after notifying him of the charges. Defense counsel, Hunter Watson, also said the Judge's ruling proved Mr. Bracco's innocence beyond any question. Vercruysse said he disputes that:

"It was not common policy to have people take yogurt-covered raisins off of a rack and stuff 'em in their pocket and walk out and that's what the Judge found that Mr. Bracco did. That's pretty clearly something that you and I wouldn't do if we walked into a snack bar or an area where they sell things. It's just not an appropriate thing to do."

MTU attorney Vercruysse said the Judge has asked for both sides to file briefs before the Judge decides what, if any, awards are given to Ken Bracco for what Vercruysse says was a technical violation of Bracco's due process rights.

Although the radio station made another broadcast approximately two months later clarifying Judge Quinnell's decision by directly quoting ¶ 11 of his February 10, 1993, opinion, plaintiffs filed this defamation lawsuit against defendants alleging that Vercruysse had falsely accused Mr. Bracco of theft (plaintiffs also sued Michigan Technological University, but the university has since been dismissed from the case by stipulation).

***3** The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kennedy v. Auto Club,* 215

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Mich.App 264, 266; 544 NW2d 750 (1996). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *ETT Ambulance Service Corp v. Rockford Ambulance, Inc,* 204 Mich.App 392, 395-396; 516 NW2d 498 (1994). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Allen v. Keating,* 205 Mich.App 560, 562; 517 NW2d 830 (1994). Summary disposition pursuant to MCR 2.116(C)(10) is proper when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Allstate Ins Co v. Elassal,* 203 Mich.App 548, 552; 512 NW2d 856 (1994).

The standard of review is further governed by case law holding that, in a case involving alleged libel of a public figure, the reviewing court must make an independent examination of the record to assure that the judgment does not constitute an intrusion on the field of protected free expression. *New York Times v. Sullivan,* 376 U.S. 254, 285; 84 S Ct 710; 11 L.Ed.2d 686 (1964); *Garvelink v. Detroit News,* 206 Mich.App 604; 522 NW2d 883 (1994). [1]

The parties' arguments can best be analyzed in the following sequence: 1) whether Bracco was a public figure and whether the alleged conduct was related to his duties; 2) whether the statement was a statement of material fact and whether it was capable of defamatory interpretation; and 3) whether the statement was made with actual malice.

Whether Bracco was a public figure for purposes of libel law:

Defendants assert that "[c]ourts have uniformly declared law enforcement officials to be 'public officials' under the libel law," citing *St Amant v. Thompson,* 390 U.S. 727; 88 S Ct 1323; 20 L.Ed.2d 262 (1968). However, at least one court examined the actual duties of a deputy sheriff and found as a matter of law that he was not a public figure. *McCusker v. Valley News,* 428 A.2d 493 (NH 1981). It is not clear that Bracco was a "law enforcement officer" or that he would be a public figure as a matter of law. We therefore undertake an analysis of whether Bracco was a private or public figure. *Buffalino v. Detroit Magazine,* 433 Mich. 766, 772; 449 NW2d 410 (1989).

At the time he was terminated, Bracco's position was classified as a "Facilities Security Officer." In that position, he was responsible for the keys of MTU. Like other security personnel, Bracco carried a "grand master" key. He was also responsible for issuance and receipt of all keys to all university buildings. When he worked in the key room, Bracco wore civilian clothes. However, Bracco wore a uniform on a regular basis as the employee who worked the "bump shift," that is the one who filled in for others when they vacationed or were otherwise absent from work. He would generally work one day each week in uniform. During the summer it was not unusual to spend a week in uniform. He drove a "regular police car" and delivered cash bags from university offices to local banks. When on patrol, Bracco checked to be sure buildings were locked, surveyed parking lots, and responded to an "occasional domestic problem." He carried handcuffs, had the authority to make arrests and had done so. In addition, he was deputized by the county sheriff and the city police. He carried "three credentials": Houghton County Sheriff, Houghton City Police and Michigan Tech.

***4** Whether an individual is a public official is a question of law. *Rosenblatt v. Baer,* 383 U.S. 75, 88; 86 S Ct 669, 677; 15 L.Ed.2d 597, 607 (1966). In *Peterfish v. Frantz,* 168 Mich.App 43; 424 NW2d 25 (1988), a panel of this Court summarized the appropriate analysis of the public figure's status:

In *Rosenblatt v. Baer,* 383 U.S. 75; 86 S Ct 669; 15 L Ed [2d] 597 (1966), the United States Supreme Court, in defining for the first time the term "public official," stated:

"It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." 383 U.S. at 85; 86 S Ct at 676.

By way of elaboration on the Court's definition, it continued:

"Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and

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performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply." 383 U.S. at 86; 86 S Ct at 676.

Finally, the Court pointed out, by way of footnote:
"The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." 383 U.S. at 87 n 13; 86 S Ct at 676 n 13.

A public employee is not ipso facto a public figure. See, e.g., *Moss v. Stockard,* 580 A.2d 1011 (DC App 1990) (college women's basketball coach), and *True v. Ladner,* 513 A.2d 257 (Me 1986) (public school teacher). Receipt of public funds alone is not sufficient to make a private person a public figure. *Hutchinson v. Proxmire,* 443 U.S. 111, 136; 99 S Ct 2675, 2688; 61 L.Ed.2d 411 (1979).

In *Peterfish, supra,* this Court determined that the contract compliance officer of the City of Battle Creek was a public official. In its analysis, the Court considered the facts of that plaintiff's employment:
She is paid through use of public funds and her position is not one filled by election. Indeed, she was placed in the position by the finance director of the city, the personnel director of the city, and the former purchasing agent/risk manager of the city respectively. She serves at the discretion of the city's mayor, vice-mayor, manager and commissioners. As indicated, her duties include the monitoring of various construction projects let by the city for compliance with affirmative action requirements, with minority hiring standards, with local hiring requirements and with prevailing wage standards. Plaintiff monitors "anything that has to do with the money that an employee is paid on any project." She also monitors projects funded by local, state and federal moneys. She has, however, no authority to monitor projects not let by the city, nor has she any authority to monitor projects funded through private sources or economic development bonds. She only acts upon receiving orders from her superiors.

***5** Further, plaintiff administers the city's program for certification of women- and minority-owned businesses. Finally, she conducts equal opportunity employment reviews for financial assistance on all businesses seeking tax abatements. [168 Mich.App 51-52.]

The panel concluded that the plaintiff was a public official within the meaning of *Rosenblatt. Peterfish, supra,* 168 Mich.App 52. The panel relied on the following factors: 1) Although she did not have independent authority to initiate monitoring of construction projects, she was charged with that responsibility;

2) As a result, she was required to have a broad knowledge of law and administrative rule;

3) She was charged with collecting information;

4) Her decisions affected wages paid to local workers;

5) Her decisions had a direct impact on whether local businesses received tax abatements and minority-owned classification; she also affected employment of workers.

As a result, the plaintiff's position was of "such apparent importance that the public has an independent interest in her qualifications and in her performance of her duties beyond the general public interest in the qualifications of all government employees." *Id.* In comparison, Kenneth Bracco:

1) Could not initiate the choice of campus locks and keys, but was charged with the responsibility of maintaining the entire system;

2) Had the power to arrest, and was thus charged with knowledge of state and federal law;

3) Could conduct criminal investigations and could therefore under power of law gather information on private citizens;

4) Made decisions on a routine basis affecting the security of substantial property assets of the state as well as the rights of faculty, staff and students.

We conclude that Bracco was a public figure. As a security guard, Bracco wore a uniform, was empowered to make arrests, and was responsible for securing an entire public college campus. He was paid from public funds. He carried deputy's cards from the city and the county, and he was on duty as a campus security officer at the time of the alleged events. This is not to say that every government-employed security officer can be so classified, but Bracco's position in the relatively self-contained community of the college campus elevated his status within that community. In

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Waterson v. Cleveland State Univ, 639 N.E.2d 1236 (Ohio App, 1994), the court found that the deputy chief of a university police department was a public figure for purposes of his defamation suit. The *Waterson* court observed that the public in general has a significant interest in the performance of law enforcement officers, and

> Similarly, the students and faculty of CSU have a significant interest in the qualifications, performance and conduct of officers of the CSU police department, as they rely on these officers for their campus security and are more likely to have day-to-day contact with them than with the officers of the greater Cleveland community. [*Id.,* p 1238.]

***6** Although Michigan Technological University may not be of the size of Cleveland State University, the students and faculty of MTU would look on a uniformed guard as authoritative and rely upon him for protection. Plaintiffs' assertion that Bracco was a mere locksmith does not withstand analysis.

Similarly, plaintiffs' assertion that the alleged theft was unrelated to Bracco's police function is untenable. As indicated, Judge Quinnell found that while on his meal break during work and while wearing his uniform, Bracco visited the snack bar and pocketed the raisins. An act of alleged theft by a uniformed security guard while on duty cannot be considered unrelated to his police-like duties. Further, while the alleged incidents giving rise to his dismissal did not occur at a time Bracco acted as a county or city deputy, the acts impinged upon the character of a security officer who had the authority to act as such when so directed.

Whether the statement was one of opinion or material fact and whether it was capable of a defamatory interpretation:

Regardless of whether Bracco was a public or private figure, a statement must be reasonably interpreted as stating an actual fact about an individual, or the statement is an opinion protected by the First Amendment. This Court is required to undertake an independent review of the pleadings and the statement to guard against a forbidden intrusion on the realm of protected speech. *Lakeshore Community Hosp, Inc v Perry,* 212 Mich.App 396, 402; 538 NW2d 24 (1995); *Garvelink, supra,* 206 Mich.App 609. A statement of fact must be shown to be false to be actionable. *Linebaugh v. Sheraton Michigan Corp,* 198 Mich.App 335, 338; 497 NW2d 585 (1993).

The statement by Vercruysse was separated into two parts with intervening narrative by the news reporter.[2] The first portion of the statement appears to be a true statement of fact regarding the decision of the judge:

"It clearly holds the University has a right to terminate employees who commit what the University deems is acts of theft. The Judge hasn't issued a final decision as to what remedy he is going to issue, if any at all, for what he found to be a deficiency in procedural due process. Now, procedural due process is something that there's a lot of dispute in the law in terms of exactly what you've got to do with respect to and that's an area for us to consider when we see the Judge's final ruling in the case."

That statement is true and consistent with Judge Quinnell's findings of fact and conclusions of law. In paragraph 12, the judge wrote:

> 12. However, I also conclude that, based on the facts known to them at the time of the termination, the officials of MTU responsible for it were acting in good faith, were acting reasonably (subject to the Due Process discussion to follow), and that the perceived theft amounted to just cause for discharge under standards set by MTU.

Given the context of the underlying litigation, a suit for wrongful discharge, the judge had decided that Bracco was a just-cause rather than an at-will employee. *Toussaint v Blue Cross & Blue Shield of Michigan,* 408 Mich. 579; 292 NW2d 880 (1980). However, MTU prevailed in the Court of Claims because, as Judge Quinnell found, MTU had just cause to terminate Bracco and acted reasonably and in good faith. Vercruysse's statement is true: the judge found that MTU could discharge an employee for an act deemed to be theft. Vercruysse's explanation of due process concerns does not affect plaintiff Bracco in this context.

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***7** The second portion of Vercruysse's statement appears to be mixed opinion and fact:
"It was not common policy to have people take yogurt-covered raisins off of a rack and stuff 'em in their pocket and walk out and that's what the Judge found that Mr. Bracco did. That's pretty clearly something that you and I wouldn't do if we walked into a snack bar or an area where they sell things. It's just not an appropriate thing to do."

Judge Quinnell found that Bracco admitted the alleged conduct: he had helped himself to packaged snacks on display at the school's snack bar. Whether there was a "free-food" policy at MTU was a disputed fact at trial, but the trial judge found that other guards who ate free food at the snack bar did so only after being invited by a custodian. Vercruysse's statement again agrees with the trial judge's findings of fact. The statement that "[I]t was not common policy to have people take yogurt-covered raisins off of a rack and stuff 'em in their pocket and walk out" is consistent with the judge's findings that the policy was unclear and that other security personnel ate free food only after invited to do so. The statement of fact is not false.

Finally, the statement as to appropriateness of the conduct appears to be an expression of evaluative opinion: "That's pretty clearly something that you and I wouldn't do if we walked into a snack bar or an area where they sell things. It's just not an appropriate thing to do." If a statement can reasonably be interpreted as stating "actual facts" about a public figure plaintiff, the statement is protected under the First Amendment. *Lakeshore Community Hosp, Inc, supra,* 212 Mich.App 402; *Garvelink, supra,* 206 Mich.App 609.

It should be noted that it was the reporter, and not Vercruysse, who said, "Defense counsel, Hunter Watson, also said the Judge's ruling proved Mr. Bracco's innocence beyond any question. *Vercruysse said he disputes that.*" (Emphasis added.) That reportorial interpretation is a somewhat inflammatory characterization of the statement. Vercruysse disagreed with Watson regarding the import of Judge Quinnell's opinion. Vercruysse's statement was not an inaccurate representation when viewed in context.

On cross appeal, plaintiffs argue that the conduct described by Vercruysse in his statement can only be interpreted as accusing Bracco of shoplifting. The reader should recall that the judge found as fact that Bracco admitted the conduct. A publication of admitted conduct in this case is not defamatory.

Malice:

"The First and Fourteenth Amendments of the United States Constitution prohibit public figures from recovering damages caused by a defendant's statement unless they prove that the statement was a defamatory falsehood and that it was made with actual malice, that is, that it was made with knowledge that it was false or with reckless disregard of whether it was false or not." [*Lakeshore Community Hosp, Inc, supra,* 212 Mich.App 402, citing *New York Times Co v. Sullivan,* 376 U.S. 254; 84 S Ct 710; 11 L.Ed.2d 686 (1964), and *Curtis Publishing Co v. Butts,* 388 U.S. 130, 87 S Ct 1975, 18 L.Ed.2d 1094 (1967).]

***8** In the instant case, the factual portions of the statement accurately reflect the trial judge's findings of fact and conclusions of law. The statement was not false and was therefore not made with malice.

Affirmed in part, reversed in part and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

MARKMAN, J., (concurring).
I concur with the majority opinion except that I believe its analysis concerning whether plaintiff was a "public figure" for purposes of the libel law is unnecessary. As the majority correctly observes, "regardless of whether Bracco was a public or private figure, a statement must be reasonably interpreted as stating an actual fact about an individual ..." as opposed to mere opinion. Because defendant's statements were mere opinion-or else were clearly factual assertions-no libel occurred here. It is therefore unnecessary to address the question whether plaintiff is properly characterized as a "public" or "private" figure for purposes of the libel law.

All Citations

Not Reported in N.W.2d, 1997 WL 33349374

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Footnotes

1 Defendants aver that summary disposition is a preferred disposition of a public interest libel case, and that doubts, if any, are to be resolved in defendants' favor. *Lins v. Evening News Ass'n,* 129 Mich.App 419; 342 NW2d 573 (1983). *Lins* applied that standard only in a case where the plaintiff was a public figure and the defendant was a publication or other public medium. *Lins, supra,* 129 Mich.App 425-426. *Lins* is inapplicable to the instant case.

2 It is important to separate Vercruysse's statements from those of the radio reporter. Vercruysse is not responsible for the reporter's words.

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APPENDIX 23

1931 PA 279 (1931 CL 14469)

Provided, however, That in any township or city having a population of less than thirty-five thousand, the clerk may receive applications for registration up to and including the second Saturday preceding any such election or primary election. The clerk of any township or city shall not be required to receive any application for registration at any other place than his office or the place or places designated for receiving registrations pursuant to the provisions of this act, but may in his discretion receive such application wherever he may be. In case any township or city clerk does not regularly keep his office open daily during certain hours he shall not be required to be at his office for the purpose of receiving applications for registration on any particular day nor during any specific hours of any day except as provided in the next following section.

Approved June 6, 1931.

[No. 279.]

AN ACT to amend section nineteen of chapter twenty of act number three hundred fourteen of the public acts of nineteen hundred fifteen, entitled "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms of civil actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act", being section fourteen thousand four hundred sixty-nine of the compiled laws of nineteen hundred twenty-nine.

The People of the State of Michigan enact:

Section amended. Section 1. Section nineteen of chapter twenty of act number three hundred fourteen of the public acts of nineteen hundred fifteen, entitled "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms of civil actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act", being section fourteen thousand four hundred sixty-nine of the compiled laws of nineteen hundred twenty-nine, is hereby amended to read as follows:

14469 Civil action for slander or libel; notice of justification; mitigating circumstances; newspaper report of public proceeding. Sec. 19. If the defendant in any action for slander or for publishing a libel, shall give notice in his justification that the words spoken or published were true, such notice, though not maintained by the evidence, shall not, in any case, be of itself proof of the malice charged in the declaration. In any action for slander or for publishing a libel, the defendant may prove mitigating circumstances, including the sources of his information and the grounds for his belief, notwithstanding that he has pleaded or attempted to prove a justification. No damages shall be awarded in any libel action brought against a re-

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porter, editor, publisher or proprietor of a newspaper for the publication therein of a fair and true report of any public and official proceeding, or for any heading of the report which is a fair and true headnote of the article published: *Provided, however,* That this privilege shall not apply to a libel contained in any matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of the public and official proceeding which was not a part thereof.

This act is ordered to take immediate effect.

Approved June 6, 1931.

[No. 280.]

AN ACT to amend act number two hundred six of the public acts of eighteen hundred ninety-three, entitled "An act to provide for the assessment of property and the levy (and collection) of taxes thereon, and for the collection of taxes heretofore and hereafter levied; making such taxes a lien on the lands taxed, establishing and continuing such lien, providing for the sale and conveyance of lands delinquent for taxes, and for the inspection and disposition of lands bid off to the state and not redeemed or purchased; and to repeal act number two hundred of the public acts of eighteen hundred ninety-one, and all other acts and parts of acts in anywise contravening any of the provisions of this act", being sections three thousand three hundred eighty-nine to three thousand five hundred fifty-one, inclusive, of the compiled laws of nineteen hundred twenty-nine, by adding a new section thereto to stand as section one hundred thirty-one-a thereof.

The People of the State of Michigan enact:

Section added. Section 1. Act number two hundred six of the public acts of eighteen hundred ninety-three, entitled "An act to provide for the assessment of property and the levy (and collection) of taxes thereon, and for the collection of taxes heretofore and hereafter levied; making such taxes a lien on the lands taxed, establishing and continuing such lien, providing for the sale and conveyance of lands delinquent for taxes, and for the inspection and disposition of lands bid off to the state and not redeemed or purchased; and to repeal act number two hundred of the public acts of eighteen hundred ninety-one, and all other acts and parts of acts in anywise contravening any of the provisions of this act", being sections three thousand three hundred eighty-nine to three thousand five hundred fifty-one, inclusive, of the compiled laws of nineteen hundred twenty-nine, is hereby amended by adding a new section thereto to stand as section one hundred thirty-one-a thereof, said added section to read as follows:

Land deeded to state for delinquent taxes; certificate of non-delinquency; conveyance to owner; distribution of moneys received. Sec. 131-a. When any lands have been deeded to the state of Michigan as provided in sections one hundred twenty-seven and one hundred twenty-seven-a of this act, and the auditor general shall certify that said land was not delinquent for any reason for the taxes of one or more of said years for which the same was deeded and that the taxes of any one or more of said years should be cancelled, and further certify to the amount due on said land as delinquent taxes, interest and penalties, the director of conservation is hereby authorized and empowered to convey the land described in such certificate to the record title owner thereof, upon payment of any and all amounts due as certified

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APPENDIX 24

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HISTORY: C. L. '15, 12754. This section re-enacts Sec. 46 of R. S. '46, Ch. 107, being C. L. '57, 4547;—C. L. '71, 6191;—How. 7775;—C. L. '97, 10414.

CASE MADE: See Compilers' § 15507 and notes, also subd. 7 of Compilers § 13941.

An agreed case is equivalent to a finding of facts by a court or a special verdict. Goodrich v. Detroit, 12 Mich. 279, 288. It is not a stipulation of evidence. Goodrich v. Detroit, supra. This statute has no reference to a case where judgment is rendered upon general evidence. Hedges v. Hibbard, 46 Mich. 551, 552, 9 N. W. 849; Chatterton v. Parrott, 46 Mich. 432, 9 N. W. 482.

14469 Civil action for slander or libel; notice of justification. SEC. 19. If the defendant in any action for slander or for publishing a libel, shall give notice in his justification, that the words spoken or published were true, such notice, though not maintained by the evidence, shall not, in any case, be of itself proof of the malice charged in the declaration.

HISTORY: C. L. '15, 12755. This section re-enacts Sec. 47 of R. S. '46, Ch. 107, being C. L. '57, 4548;—C. L. '71, 6192;—How. 7776;—C. L. '97, 10415.

CONSTITUTION: See Const. II, 18.

CRIMINAL SLANDER AND LIBEL: See Compilers' § 16812 et seq.

LIMITATION OF ACTION: See Compilers' § 13976 subd. 5.

CONTRIBUTION: By joint tort feasors in libel cases, see Compilers' § 14497.

NOTICE OF DEFENSE: Under the practice of giving notice of defenses which, at common law, were specially pleaded, this statute does not make a notice of justification evidence of malice, or treat it as a republication of the libel, and no facts are put in issue except those declared on. Wheaton v. Beecher, 79 Mich. 443, 44 N. W. 927. See Thompson v. Bowers, 1 Doug. (Mich.) 321, as to sufficiency of notice. Omission of a plea of justification admits the falsity of a slander declared upon. Fowler v. Gilbert, 38 Mich. 292.

EVIDENCE: See Compilers' § 14474. Under our statute the mere failure to prove a justification is not sufficient to create an inference of malice from the plea or notice. Proctor v. Houghtaling, 37 Mich. 41, 46. See Thompson v. Bowers, 1 Doug. (Mich.) 321; Moyer v. Pine, 4 Mich. 409; Farr v. Rasco, 9 Mich. 353; Porter v. Henderson, 11 Mich. 20; Huson v. Dale, 19 Mich. 17; Whittemore v. Weiss, 33 Mich. 348; Peoples v. Post & Tribune, 54 Mich. 457, 20 N. W. 528; Jastrzembski v. Marxhausen, 120 Mich. 677, 683, 79 N. D. 935.

Instruction *held* not to tell jury that they might consider unsustained notice of justification as evidence of malice, but that it might be considered in connection with other facts established. Rabior v. Kelley, 194 Mich. 107, 160 N. W. 392.

14470 Same; imputation of unchastity actionable. SEC. 20. Words imputing to any female a want of chastity shall be deemed to be actionable in themselves, and shall subject the person who shall utter and publish such words, to an action on the case for slander, in the same manner as the uttering and publishing of words imputing the commission of a criminal offense.

HISTORY: C. L. '15, 12756. This section re-enacts Sec. 31 of R. S. '46, Ch. 107, being C. L. '57, 4532;—C. L. '71, 6176;—How. 7760;—C. L. '97, 10401.

CONSTRUED: What may be proved without averment of special damages. Burt v. McBain, 29 Mich. 260. Words imputing to a woman a want of chastity are actionable per se. Richter v. Stolze, 158 Mich. 594, 123 N. W. 13. See also Warren v. Ray, 155 Mich. 91, 118 N. W. 741; Leonard v. Pope, 27 Mich. 145, 146.

14471 Same; damages. SEC. 21. In suits brought for the recovery of damages for libel or slander in this state, the plaintiff shall be entitled to recover only such actual damages as he may have suffered in respect to his property, business, trade, profession, occupation or feelings.

HISTORY: C. L. '15, 12757. This section re-enacts Sec. 1 of Act 216 of 1895, being C. L. '97, 10423.

CONSTITUTIONALITY: Act 216 of 1895, Sec. 1, cannot take away the right to recover damages to one's reputation. Andrews v. Booth, 148 Mich. 333, 111 N. W. 1059; McGee v. Baumgartner, 121 Mich. 287, 291, 80 N. W. 21; Park v. Free Press Co., 72 Mich. 560, 40 N. W. 731. See also Derham v. Derham, 123 Mich. 451, 455, 82 N. W. 218. As to constitutionality, see further Smedley v. Soule, 125 Mich. 192, 199, 84 N. W. 63.

CONSTRUED: Act 216 of 1895 does not attempt to deprive a party of his right of action for any libel or slander which existed at the common law. Smedley v. Soule, 125 Mich. 192, 199, 84 N. W. 63. It is not necessary to specially plead injury to the feelings, nor does the law require proof beyond the proof of the slander before it will presume injury to the feelings. Cribbs v. Yore, 119 Mich. 237, 239, 77 N. W. 927. Attorney fees paid to bring an action for slander are not recoverable in the action brought. Warren v. Ray, 155 Mich. 91, 93, 118 N. W. 741. See Loranger v. Loranger, 115 Mich. 681, 686, 74 N. W. 228.

14472 Same; specification of damages to feelings. SEC. 22. In awarding damages to the plaintiff in any suit brought for the recovery of damages for libel or slander in this state, the jury shall in all cases specify the amount awarded for damages to feelings separately from the amount awarded for other damages mentioned in the foregoing section.

HISTORY: C. L. '15, 12758. This section re-enacts Sec. 2 of Act 216 of 1895, being C. L. '97, 10424.

CONSTRUED: The object of the statute is to separate damages for injured feelings from those to property, business, trade, profession or occupation. McGee v. Baumgartner, 121 Mich. 287, 291, 80 N. W. 21. A party desiring a separate finding as to injury to feelings should request the court that the jury be so instructed. Field v. Magee, 122 Mich. 556, 559, 81 N. W. 354; McCormick v. Hawkins, 169 Mich. 641, 650, 135 N W. 1066. See also Hewitt v. Morley, 111 Mich. 187, 192, 69 N. W. 245; Loranger v.

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Loranger, 115 Mich. 681, 74 N. W. 228; Derham v. Derham, 123 Mich. 451, 82 N. W. 218; Smedley v. Soule, 125 Mich. 192, 199, 84 N. W. 63; Line v. Spies, 139 Mich. 484, 490, 102 N. W. 993.

14473 Same; exemplary or punitive damages. SEC. 23. No exemplary or punitive damages shall be recovered unless the plaintiff shall before bringing suit give notice by mail or otherwise to the defendant to publish a retraction of the libel, and allow the defendant a reasonable time in which to publish such retraction, and make such amends as are reasonable and possible under the circumstances of the case; and proof of the publication or correction shall be admissible in evidence under the general issue on the question of a good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages: *Provided,* That the retraction shall be published in the same type and in the same editions of the paper as the original libel, and so far as practicable in the same position.

HISTORY: C. L. '15, 12759. This section re-enacts Sec. 3 of Act 216 of 1895, being C. L. '97, 10425.

Sec. 4 of Act 216 of 1895 repeals Act 233 of 1885, being How. 7782a-c, and Act 229 of 1889, being How. 7782d-e, "and all other acts and parts of acts contravening."

FORMER LAW CONSTRUED: Couch v. Mining Journal Co., 130 Mich. 294, 89 N. W. 936; Lawrence v. Herald Pub. Co., 158 Mich. 459, 122 N. W. 1084; Guston v. Evening Press Co., 172 Mich. 311, 312, 137 N. W. 674; Gripman v. Kitchel, 173 Mich. 242, 138 N. W. 1041. As to the act of 1885, see Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731. Retraction under act of 1889. Davis v. Marxhausen, 103 Mich. 315, 61 N. W. 504.

Verdict in action for slander awarding separate amounts for "damage for character" and "damage for suffering" was a substantial compliance with the antecedent of this section. Maclejewski v. Rychart, 192 Mich. 530, 159 N. W. 479.

14474 Civil action for libel; defenses. SEC. 24. In actions brought for the recovery of damages for libel in this state, it shall be competent for the defendant or defendants in such action to show in evidence upon the trial of such action that the plaintiff in such action has heretofore recovered a judgment or judgments for damages in an action or actions for libel or libels to the same, or substantially the same purport or effect as the libel for the recovery of damages for which such action has been brought, or that the plaintiff in such action has theretofore brought an action or actions for such libel or has received or agreed to receive compensation for such a libel.

HISTORY: C. L. '15, 12760. This section re-enacts Sec. 1 of Act 94 of 1905, changing first word "on" to "in", which, however, was not expressly repealed by this act.

Sec. 2 of Act 94 of 1905 provided, that said act shall apply to the trial of actions now pending as well as to the trial of actions which may hereafter be brought.

14475 Same; notice to and intervention of joint tort feasors. SEC. 25. Any defendant or defendants against whom any suit shall be begun for the purpose of recovering damages arising from the publication of any libel, and on whom a declaration or other process in such suit shall have been served, may, at any time within fifteen [15] days after such service, serve on any other person liable to contribute to such defendant under the provisions of section one [1] of act two hundred thirty-three [233] of the public acts of nineteen hundred eleven [1911], relating to the liability of joint tort feasors in certain cases, a notice of the pendency of such suit; which notice shall state the name of the plaintiff or plaintiffs therein, the name of the court in which the same is pending, and shall be accompanied by a true copy of the declaration filed in said suit, if such declaration shall have been filed prior to the service of such notice. And such person on whom such notice shall have been so served shall have the right to appear within fifteen [15] days from the time of the service on him of such notice, and intervene in such suit and defend the same. Such person, if he so appears, shall have the same rights and liabilities in respect to pleadings and process as if he were an original party defendant in such suit, and such suit shall not be considered at issue until the same is at issue as to such intervening party. And in case he shall fail after such notice to so appear in and defend such suit the final judgment rendered therein shall be conclusive against him in any action for contribution under the provisions of said act.

HISTORY: C. L. '15, 12761. This section supersedes Sec. 2 of Act 233 of 1911.

NOTE: Sec. 1 of Act 233 of 1911, above referred to, is Compilers' § 14497.

FORMER LAW CITED: Kirby v. Soule, 178 Mich. 406, 413, 144 N. W. 837.

14476 Suggestion upon record; service on adverse party, pleading. SEC. 26. Whenever a suggestion shall be made upon the record, or in any stage of the proceedings in any cause, which the adverse party shall have a right to controvert, a copy of such suggestion shall be served upon the adverse party or his attorney, in the same manner as other pleadings, and such party may plead thereto, according to the practice of the court, in the same manner, and within the same time, as to a declaration.

HISTORY: C. L. '15, 12762. This section re-enacts Sec. 32 of R. S. '46, Ch. 107, being C. L. '57, 4533;—C. L. '71, 6177;—How. 7761;—C. L. '97, 10402.

FORMER LAW CONSTRUED: Bliss v. Caille Bros. Co., 149 Mich. 601, 604, 113 N. W. 317; Caille Bros. Co. v. Saginaw Cir. Judge, 155 Mich. 480, 481, 120 N. W. 6; Huebel Co. v. MacKinnon, 186 Mich. 617, 152 N. W. 1098. See note to Turner v. St. Clair Tunnel Co., 102 Mich. 574, 575, 61 N. W. 72.

14477 Same; trial of issue. SEC. 27. If an issue of fact be joined upon any such suggestion, the same shall be tried, and judgment rendered thereon, as on other issues.

HISTORY: C. L. '15, 12763. This section re-enacts Sec. 33 of R. S. '46, Ch. 107, being C. L. '57, 4534;—C. L. '71, 6178;—How. 7762;—C. L. '97, 10403.

See note to preceding section.

14478 Same; judgment. SEC. 28. The party making such suggestion may be non-suited, and may have judgment of non pros or discontinuance entered against him, for the same causes, and in the same cases as in suits at law.

HISTORY: C. L. '15, 12764. This section re-enacts Sec. 34 of R. S. '46, Ch. 107, being C. L. '57, 4535;—C. L. '71, 6179;—How. 7763;—C. L. '97, 10404.

See note to Compilers' § 14476.

14479 Malpractice, action. SEC. 29. If any person professing or holding himself out to be a physician or surgeon, shall be guilty of any malpractice, an action on the case may be maintained against such person so professing, and the rules of the common law, applicable to such actions against licensed physicians and surgeons, shall be applicable to such actions on the case; and such malpractice, may be given in evidence, in bar of any action for services rendered by such person so professing.

HISTORY: C. L. '15, 12765. This section re-enacts Act 287 of 1865, being C. L. '71, 6198;—How. 7782;—C. L. '97, 10426.

LIMITATION OF ACTION: See Compilers' § 13976 subd. 4.

MALPRACTICE: Norris v. Kent Cir. Judge, 100 Mich. 256, 58 N. W. 1006; Vandenberg v. Slagh, 150 Mich. 225, 230, 114 N. W. 72. Law relative to malpractice of person professing or holding himself out as physician or surgeon *held* inapplicable to licensed physician and surgeon. Leslie v. Mollica, 236 Mich. 610, 211 N. W. 267. One setting up malpractice as defense to physician's action for fees in justice court is barred from bringing suit thereafter for malpractice. Leslie v. Mollica, supra.

UNPROFESSIONAL CONDUCT: By physicians and surgeons, see Compilers' § 6739 and notes thereto. As to practice of osteopathy without compliance with law, see Compilers' § 6762. As to unlawful practice by optometrists, see Compilers' § 6788.

PROCEEDINGS FOR ENFORCEMENT OF INDIVIDUAL LIABILITY OF STOCKHOLDERS.

14480 Enforcement of liability; exception as to labor debts. SEC. 30. Whenever, by the constitution or laws of this state, the stockholders of any corporation are individually liable for any debts of such corporation, the remedy for the enforcement of such liability shall be as hereinafter prescribed, and not otherwise: *Provided,* That this and the next succeeding twelve [12] sections shall not apply to cases where the suit is for labor, and the action is brought by the person who performed the labor, or his assignees.

HISTORY: C. L. '15, 12766. This section re-enacts Sec. 1 of Act 141 of 1877, being How. 4886;—C. L. '97, 8554, changing word "act" to "and the next succeeding twelve sections" and adding words "or his assignees," which, however, was not expressly repealed by this act.

CONSTITUTIONALITY: For a consideration of the leading provisions of this act and a discussion of its constitutionality, see Ripley v. Evans, 87 Mich. 217, 49 N. W. 504.

CONSTRUED: Act 141 of 1877, superseded by this and the following 12 sections is a general law applicable to all corporations, and designed to prescribe the procedure for enforcing the liability of stockholders. Musselman v. Wright, 107 Mich. 639, 65 N. W. 569.

LIABILITY OF STOCKHOLDERS: For chapter in the general corporation law, see Compilers' § 10018 et seq.

Compare Pettibone v. McGraw, 6 Mich. 441;

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APPENDIX 25

1961 PA 236

600.2909 Stockholders' individual liability for corporate debts, enforcement; labor debts. [M.S.A. 27A.2909]

Sec. 2909. Whenever any stockholders are individually liable for the debts of a corporation the remedy for the enforcement of their liability shall be as prescribed by the court rules and not otherwise. This section does not apply to actions for labor performed when the action is brought by the person who performed the labor or his assignees.

600.2910 Action for seduction. [M.S.A. 27A.2910]

Sec. 2910. Actions for seduction are subject to the following provisions and limitations:

(1) In any action for seduction it is necessary to allege and prove that the female seduced was not 18 years of age or over at the time of the seduction.

(2) In any action for seduction it is not necessary to allege or prove any loss of services in consequence of the seduction.

(3) An action for seduction may be brought by the seduced female's mother, father, or guardian.

600.2911 Imputation of unchastity. [M.S.A. 27A.2911]

Sec. 2911. (1) Words imputing a lack of chastity to any female are actionable in themselves and subject the person who uttered or published them to a civil action for the slander in the same manner as the uttering or publishing of words imputing the commission of a criminal offense.

Libel or slander; damages, actual, exemplary, retraction.

(2) (a) Except as provided in (b), in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he has suffered in respect to his property, business, trade, profession, occupation, or feelings.

(b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. The retraction shall be published in the same size type, in the same editions and as far as practicable, in substantially the same position as the original libel.

Same; justification; newspaper's fair report of public proceeding, privilege.

(3) If the defendant in any action for slander or libel gives notice in his justification that the words spoken or published were true, this notice shall not be of itself proof of the malice charged in the complaint though not sustained by the evidence. In any action for slander or for publishing a libel even though the defendant has pleaded or attempted to prove a justification he may prove mitigating circumstances including the sources of his information and the ground for his belief. No damages shall be awarded in any libel action brought against a reporter, editor, publisher, or proprietor of a newspaper for the publication in it of a fair and true report of any public and official proceeding, or for any heading of the report which is a fair and true headnote of the article published. This privilege shall not apply to a libel which is contained in any matter added by any person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding which was not a part of the public and official proceeding.

Same; contribution from persons jointly responsible; exception as to sellers; author's liability to printer or publisher.

(4) Any person or persons against whom a judgment is recovered for damages arising out of the authorship or publication of a libel is entitled to recover contribution in a civil action from all persons who were originally jointly liable for the libel with the defendant or defendants, whether joined as defendants or not, to the same extent as and with

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1961 PA 236

the same effect that joint sureties are liable to contribute to each other in cases where they are sureties on the same contract. Where the libel has been published in any newspaper, magazine, or other periodical publication the servants and agents of the publisher of the periodical, and the news agents and other persons who have been connected with the libel only by selling or distributing the publication containing the libel and who have not acted maliciously in selling or publishing the libel, shall not be required to contribute and shall not be taken into account in determining the amount that any joint tort feasor is required to contribute under the provisions of this section. And if the author of the libel acted maliciously in composing or securing the printing or the publication of the libel and the printer, publisher, or distributor of the libel acted in good faith and without malice in printing and publishing the libel the author of the libel is liable in a civil action to that printer, publisher, or distributor for the entire amount of the damages which are recovered against and paid by that printer, publisher, or distributor.

Previous judgment for plaintiff.

(5) In actions brought for the recovery of damages for libel in this state, it is competent for the defendant or defendants in such action to show in evidence upon the trial of such action that the plaintiff in such action has heretofore recovered a judgment or judgments for damages in an action or actions for libel or libels to the same, or substantially the same purport or effect as the libel for the recovery of damages for which such action has been brought, or that the plaintiff in such action has heretofore brought an action or actions for such libel or has received or agreed to receive compensation for such a libel.

600.2912 Actions for malpractice; member of state licensed profession. [M.S.A. 27A.2912]

Sec. 2912. (1) A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable against any person who holds himself out to be a member of a state licensed profession.

(2) Malpractice may be given in evidence in defense to any action for services rendered by the member of a state licensed profession, or person holding himself out to be a member of a state licensed profession.

600.2913 Malicious or wilful destruction of property by minors; limitation on recovery of damages from parents. [M.S.A. 27A.2913]

Sec. 2913. (1) Any municipal corporation, county, township, village, school district, department of the state of Michigan, person, partnership, corporation, association, or any incorporated or unincorporated religious organization is entitled to recover damages in an amount not to exceed $300.00 in a civil action in a court of competent jurisdiction against the parents of any minor who:

(a) is under 18 years of age, and

(b) is living with his parents, and

(c) has maliciously or wilfully destroyed real, personal, or mixed property which belongs to the municipal corporation, county, township, village, school district, department of the state of Michigan, person, partnership, corporation, association, or religious association.

(2) The amount which may be recovered against the parents in section (1) above is limited to actual damages not exceeding $300.00 plus taxable court costs.

600.2914 Discharge in bankruptcy; cancellation of judgment, procedure. [M.S.A. 27A.2914]

Sec. 2914. After a bankrupt has been discharged from his debts pursuant to the federal laws relating to bankruptcy, the bankrupt, his receiver, his trustee, or any other interested person or corporation may apply to have a judgment debt canceled and discharged of record upon proof of the bankrupt's discharge. Application for equitable relief shall be made to the court in which the judgment was rendered against the bankrupt, or if it

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APPENDIX 26

MCL 600.2911 (Comp Laws 1970)

Michigan Laws, Statutes, &c.

MICHIGAN COMPILED LAWS

1970

COMPILED AND ARRANGED UNDER AUTHORITY OF PUBLIC ACT 193 OF 1970

STATE OF MICHIGAN

VOLUME V

COMPILED AND PUBLISHED BY THE
MICHIGAN LEGISLATIVE COUNCIL

PRINTED BY
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ANN ARBOR, MICHIGAN

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600.2909 Stockholders, individual liability for corporate debts; enforcement; labor debts.

Sec. 2909. Whenever any stockholders are individually liable for the debts of a corporation the remedy for the enforcement of their liability shall be as prescribed by the court rules and not otherwise. This section does not apply to actions for labor performed when the action is brought by the person who performed the labor or his assignees.

HISTORY: New 1961, p. 516, Act 236, Eff. Jan. 1, 1963.

600.2910 Action for seduction.

Sec. 2910. Actions for seduction are subject to the following provisions and limitations:

(1) In any action for seduction it is necessary to allege and prove that the female seduced was not 18 years of age or over at the time of the seduction.

(2) In any action for seduction it is not necessary to allege or prove any loss of services in consequence of the seduction.

(3) An action for seduction may be brought by the seduced female's mother, father, or guardian.

HISTORY: New 1961, p. 516, Act 236, Eff. Jan. 1, 1963.

600.2911 Imputation of unchastity.

Sec. 2911. (1) Words imputing a lack of chastity to any female are actionable in themselves and subject the person who uttered or published them to a civil action for the slander in the same manner as the uttering or publishing of words imputing the commission of a criminal offense.

Libel or slander; damages, actual, exemplary, retraction.

(2) (a) Except as provided in (b), in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he has suffered in respect to his property, business, trade, profession, occupation, or feelings.

(b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. The retraction shall be published in the same size type, in the same editions and as far as practicable, in substantially the same position as the original libel.

Same; justification; newspaper's fair report of public proceeding, privilege.

(3) If the defendant in any action for slander or libel gives notice in his justification that the words spoken or published were true, this notice shall not be of itself proof of the malice charged in the complaint though not sustained by the evidence. In any action for slander or for publishing a libel even though the defendant has pleaded or attempted to prove a justification he may prove mitigating circumstances including the sources of his information and the ground for his belief. No damages shall be awarded in any libel action brought against a reporter, editor, publisher, or proprietor of a newspaper for the publication in it of a fair and true report of any public and official proceeding, or for any heading of the report which is a fair and true headnote of the article published. This privilege shall not apply to a libel which is contained in any matter added by any person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding which was not a part of the public and official proceeding.

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MCL 600.2911 (Comp Laws 1970)

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Same; contribution from persons jointly responsible; exception as to sellers; author's liability to printer or publisher.

(4) Any person or persons against whom a judgment is recovered for damages arising out of the authorship or publication of a libel is entitled to recover contribution in a civil action from all persons who were originally jointly liable for the libel with the defendant or defendants, whether joined as defendants or not, to the same extent as and with the same effect that joint sureties are liable to contribute to each other in cases where they are sureties on the same contract. Where the libel has been published in any newspaper, magazine, or other periodical publication the servants and agents of the publisher of the periodical, and the news agents and other persons who have been connected with the libel only by selling or distributing the publication containing the libel and who have not acted maliciously in selling or publishing the libel, shall not be required to contribute and shall not be taken into account in determining the amount that any joint tort feasor is required to contribute under the provisions of this section. And if the author of the libel acted maliciously in composing or securing the printing or the publication of the libel and the printer, publisher, or distributor of the libel acted in good faith and without malice in printing and publishing the libel the author of the libel is liable in a civil action to that printer, publisher, or distributor for the entire amount of the damages which are recovered against and paid by that printer, publisher, or distributor.

Previous judgment for plaintiff.

(5) In actions brought for the recovery of damages for libel in this state, it is competent for the defendant or defendants in such action to show in evidence upon the trial of such action that the plaintiff in such action has heretofore recovered a judgment or judgments for damages in an action or actions for libel or libels to the same, or substantially the same purport or effect as the libel for the recovery of damages for which such action has been brought, or that the plaintiff in such action has heretofore brought an action or actions for such libel or has received or agreed to receive compensation for such a libel.

HISTORY: New 1961, p. 516, Act 236, Eff. Jan. 1, 1963.

600.2912 Actions for malpractice; member of state licensed profession.

Sec. 2912. (1) A civil action for malpractice may be maintained against any person professing or holding himself out to be a member of a state licensed profession. The rules of the common law applicable to actions against members of a state licensed profession, for malpractice, are applicable against any person who holds himself out to be a member of a state licensed profession.

(2) Malpractice may be given in evidence in defense to any action for services rendered by the member of a state licensed profession, or person holding himself out to be a member of a state licensed profession.

HISTORY: New 1961, p. 517, Act 236, Eff. Jan. 1, 1963.

600.2913 Malicious or wilful destruction by minors; recovery of damages from parents.

Sec. 2913. (1) Any municipal corporation, county, township, village, school district, department of the state of Michigan, person, partnership, corporation, association, or any incorporated or unincorporated religious organization may recover damages in an amount not to exceed $1,500.00 in a civil action in a court of competent jurisdiction against the parents or parent of any unemancipated minor under 18 years of age, living with his parents or parent, who has maliciously or wilfully destroyed real, personal or mixed property which belongs to the municipal corporation, county, township, village, school district, department of the state of Michigan, person, partnership, corpo-

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APPENDIX 27

House Leg Analysis

House
Legislative
Analysis
Section

Washington Square Building, Suite 1025
Lansing, Michigan 48909
Phone. 517/373-6466

LIBEL, SLANDER ACTIONS

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House Bill 4932 (Substitute H-3)
First Analysis (6-15-88)

Sponsor: Rep. William R. Bryant, Jr.
Committee: Judiciary

THE APPARENT PROBLEM:

In December 1986, the Michigan Supreme Court decided Rouch v. Enquirer & News of Battle Creek (398 N.W.2d 245, 427 Mich. 157), a case in which the plaintiff charged a newspaper with libel for publishing information obtained from police on the plaintiff's arrest for rape. The plaintiff was never formally charged or arraigned, and was released on a personal recognizance bond; another man was later arrested, arraigned, and cleared of the crime.

In Rouch, which came before the court through a series pretrial motions and appeals, the court interpreted libel law in a manner that many say changed the application of the law in Michigan. The Revised Judicature Act says that damages may not be awarded in any libel action against a newspaper for the publication of an accurate report of any public and official proceeding. To the court, "the term 'official proceeding' evoked notions of adjudicatory action, rather than of government action generally." The court concluded that "an arrest that amounts to no more than an apprehension is not a 'proceeding' under the statute," and held that the information supplied to and published by the newspaper was not protected by the statutory privilege applying to reports of public and official proceedings. This reading of the law appears unduly restrictive and contrary to long-standing interpretation of it; amendments to clarify the scope of the statutory "official proceedings" privilege have been proposed.

The Rouch decision has also been criticized for its treatment of another aspect of libel law, that of the "public interest" privilege, which raises issues of the degree to which reports on matters of public interest should be protected from damage suits. The court, after reviewing and analyzing various state and federal appellate decisions, held that in a case where a private person (as opposed to a public figure) brings an action on a report involving a matter of public concern, the applicable standard for determining whether damages are to be allowed is negligence, rather than actual malice (malice in this sense does not mean that a statement was made with ill will, but rather with knowledge of its falsity or with reckless disregard for the truth). Many have found fault with the court's analysis of the public interest privilege, and seek to have statute express what until Rouch had been thought to be the law in Michigan: that a report of a public matter is not to be actionable unless the report was malicious, in addition to being false.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act to do the following:

- extend existing libel provisions that protect an accurate report of a public and official proceeding to matters of public record; a governmental notice, announcement, report or record generally available to the public; and an act or action of a public body.
- provide that an action for libel or slander could not be brought based upon a communication involving public figures or matters of public or general concern unless the claim was sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard for whether it was false.
- specifically include radio and television broadcasts within the libel law.

MCL 600.2911

FISCAL IMPLICATIONS:

The House Fiscal Agency says that the bill would have no fiscal implications. (6-14-88)

ARGUMENTS:

For:

The importance of a free press to report on matters of public interest is indisputable. If the press is constrained by the threat of unbridled libel suits for publishing accurate accounts of public matters, the public is, to paraphrase one editor, deprived of important information upon which it can form opinions about its government. As it stands, the Rouch decision likely would have a chilling effect on the reporting of information from police records. Further, it appears that the decision would allow a private person to collect libel damages upon showing negligence on the part of a newspaper reporting on a public matter, rather than the actual malice that previously had been required in Michigan. That standard had been articulated by Michigan case law and in effect countenanced by the United States Supreme Court in its 1974 decision on Gertz v. Robert Welch, Inc. (94 S. Ct. 2997). In Gertz, the court held that "as long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." The bill would overrule the Rouch decision, and basically restore Michigan libel law to its prior condition. The bill would relieve the media from undue restraints on reporting from public documents or discussing matters of public concern.

Against:

While Gertz prohibits states from permitting recovery of punitive damages absent a showing of actual malice, it does allow recovery of actual damages upon a showing of negligence in a report of a public matter involving a private individual. The bill should follow Gertz in this regard; to do otherwise would be contrary to the basic common law position and the practice in the majority of the states. More importantly, the bill would excuse the media from having to employ reasonable care in reporting on, for instance, what a private individual said in a public

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Def-Appellants' Appendix 291a

forum or on a public issue. The bill would broaden the public interest privilege beyond what it should be.

POSITIONS:

The Michigan Association of Broadcasters strongly supports the bill. (6-13-88)

The Michigan Press Association supports the bill. (6-10-88)

The Michigan Trial Lawyers Association does not oppose the bill except for a provision that significantly diverges from the basic common law of defamation as it applies to private persons. (6-10-88)

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House
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Section

Washington Square Building, Suite 1025
Lansing, Michigan 48909
Phone: 517/373-6466

House Leg Analysis

LIBEL, SLANDER ACTIONS

House Bill 4932 as enrolled
Second Analysis (1-27-89)

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Sponsor: Rep. William R. Bryant, Jr.
House Committee: Judiciary
Senate Committee: Judiciary

THE APPARENT PROBLEM:

In December 1986, the Michigan Supreme Court decided Rouch v. Enquirer & News of Battle Creek (398 N.W.2d 245, 427 Mich. 157), a case in which the plaintiff charged a newspaper with libel for publishing information obtained from police on the plaintiff's arrest for rape. The plaintiff was never formally charged or arraigned, and was released on a personal recognizance bond; another man was later arrested, arraigned, and cleared of the crime.

In Rouch, which came before the court through a series pretrial motions and appeals, the court interpreted libel law in a manner that many say changed the application of the law in Michigan. The Revised Judicature Act says that damages may not be awarded in any libel action against a newspaper for the publication of an accurate report of any public and official proceeding. To the court, "the term 'official proceeding' evoked notions of adjudicatory action, rather than of government action generally." The court concluded that "an arrest that amounts to no more than an apprehension is not a 'proceeding' under the statute," and held that the information supplied to and published by the newspaper was not protected by the statutory privilege applying to reports of public and official proceedings. This reading of the law appears unduly restrictive and contrary to long-standing interpretation of it; amendments to clarify the scope of the statutory "official proceedings" privilege have been proposed.

The Rouch decision has also been criticized for its treatment of another aspect of libel law, that of the "public interest" privilege, which raises issues of the degree to which reports on matters of public interest should be protected from damage suits. The court, after reviewing and analyzing various state and federal appellate decisions, held that in a case where a private person (as opposed to a public figure) brings an action on a report involving a matter of public concern, the applicable standard for determining whether damages are to be allowed is negligence, rather than actual malice (malice in this sense does not mean that a statement was made with ill will, but rather with knowledge of its falsity or with reckless disregard for the truth). Many have found fault with the court's analysis of the public interest privilege, and seek to have statute express what until Rouch had been thought to be the law in Michigan: that a report of a public matter is not to be actionable unless the report was malicious, in addition to being false.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act to do the following:

- extend existing libel provisions that protect an accurate report of a public and official proceeding to matters of public record; a governmental notice, announcement, report or record generally available to the public; and an act or action of a public body.
- provide that an action for libel or slander could not be brought based upon a communication involving public figures unless the claim was sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard for whether it was false.
- provide that a action for libel or slander could not be brought based upon a communication involving a private individual unless the defamatory falsehood concerned the private individual and was published negligently. Recovery under this provision would be limited to economic damages, including attorney fees.
- specifically include radio and television broadcasts within the libel law.

The bill would take effect January 1, 1989, and would apply to any cause of action arising on or after that date.

MCL 600.2911

FISCAL IMPLICATIONS:

The House Fiscal Agency says that the bill would have no fiscal implications. (1-18-89)

ARGUMENTS:

For:

The importance of a free press to report on matters of public interest is indisputable. If the press is constrained by the threat of unbridled libel suits for publishing accurate accounts of public matters, the public is, to paraphrase one editor, deprived of important information upon which it can form opinions about its government. As it stands, the Rouch decision likely would have a chilling effect on the reporting of information from police records. The bill would overrule the Rouch decision, and do much to restore Michigan libel law to its prior condition. The bill would relieve the media from undue restraints on reporting from public documents or discussing matters of public concern.

For:

In its 1974 decision on Gertz v. Robert Welch, Inc. (94 S. Ct. 2997), the United States Supreme Court allowed recovery of actual damages upon a showing of negligence in a report of a public matter involving a private individual. The bill follows Gertz in this regard; to do otherwise would be contrary to the basic common law position and the practice in the majority of the states. The bill thus would not excuse the media from having to employ reasonable care in reporting on, for instance, what a private individual said in a public forum or on a public issue.

H.B. 4932 (1-27-89)

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APPENDIX 28

1988 PA 396 (Enrolled as HB 4932)

The People of the State of Michigan enact:

Section amended; Michigan penal code.

Section 1. Section 540e of Act No. 328 of the Public Acts of 1931, being section 750.540e of the Michigan Compiled Laws, is amended to read as follows:

750.540e Malicious use of service provided by communications common carrier. [M.S.A. 28.808(5)]

Sec. 540e. (1) Any person is guilty of a misdemeanor who maliciously uses any service provided by a communications common carrier with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy any other person, or to disturb the peace and quiet of any other person by any of the following:

(a) Threatening physical harm or damage to any person or property in the course of a telephone conversation.

(b) Falsely and deliberately reporting by telephone or telegraph message that any person has been injured, has suddenly taken ill, has suffered death, or has been the victim of a crime, or of an accident.

(c) Deliberately refusing or failing to disengage a connection between a telephone and another telephone or between a telephone and other equipment provided for the transmission of messages by telephone, thereby interfering with any communications service.

(d) Using any vulgar, indecent, obscene, or offensive language or suggesting any lewd or lascivious act in the course of a telephone conversation.

(e) Repeatedly initiating a telephone call and, without speaking, deliberately hanging up or breaking the telephone connection as or after the telephone call is answered.

(f) Making an unsolicited commercial telephone call which is received between the hours of 9 p.m. and 9 a.m. For the purpose of this subdivision, "an unsolicited commercial telephone call" means a call made by a person or recording device, on behalf of a person, corporation, or other entity, soliciting business or contributions.

(g) Deliberately calling a telephone of another person in a repetitive manner which causes interruption in telephone service or prevents the person from utilizing his or her telephone service.

(2) Any person violating this section may be imprisoned for not more than 6 months, or fined not more than $500.00, or both. An offense is committed under this section if the communication either originates or terminates or both originates and terminates in this state and may be prosecuted at the place of origination or termination.

Approved December 21, 1988.
Filed with Secretary of State December 22, 1988.

[No. 396]

(HB 4932)

AN ACT to amend section 2911 of Act No. 236 of the Public Acts of 1961, entitled as amended "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of

the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act," being section 600.2911 of the Michigan Compiled Laws.

The People of the State of Michigan enact:

Section amended; revised judicature act of 1961.

Section 1. Section 2911 of Act No. 236 of the Public Acts of 1961, being section 600.2911 of the Michigan Compiled Laws, is amended to read as follows:

600.2911 Action for libel or slander. [M.S.A. 27A.2911]

Sec. 2911. (1) Words imputing a lack of chastity to any female or male are actionable in themselves and subject the person who uttered or published them to a civil action for the slander in the same manner as the uttering or publishing of words imputing the commission of a criminal offense.

(2)(a) Except as provided in subdivision (b), in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he or she has suffered in respect to his or her property, business, trade, profession, occupation, or feelings.

(b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his or her action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. For libel based on a radio or television broadcast, the retraction shall be made in the same manner and at the same time of the day as the original libel; for libel based on a publication, the retraction shall be published in the same size type, in the same editions and as far as practicable, in substantially the same position as the original libel; and for other libel, the retraction shall be published or communicated in substantially the same manner as the original libel.

(3) If the defendant in any action for slander or libel gives notice in a justification that the words spoken or published were true, this notice shall not be of itself proof of the malice charged in the complaint though not sustained by the evidence. In an action for slander or for publishing or broadcasting a libel even though the defendant has pleaded or attempted to prove a justification he or she may prove mitigating circumstances including the sources of his or her information and the ground for his or her belief. Damages 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 governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report. This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, which was not a part of the public and official proceeding or

governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body.

(4) A person against whom a judgment is recovered for damages arising out of the authorship or publication of a libel is entitled to recover contribution in a civil action from all persons who were originally jointly liable for the libel with the defendant or defendants, whether joined as defendants or not, to the same extent as and with the same effect that joint sureties are liable to contribute to each other in cases where they are sureties on the same contract. If the libel has been published in a newspaper, magazine, or other periodical publication or by a radio or television broadcast, the servants and agents of the publisher or proprietor of the periodical or radio or television station or network, and the news agents and other persons who have been connected with the libel only by selling or distributing the publication containing the libel and who have not acted maliciously in selling or publishing the libel, shall not be required to contribute and shall not be taken into account in determining the amount that any joint tort feasor is required to contribute under the provisions of this section. If the author of the libel acted maliciously in composing or securing the printing or the publication of the libel and the printer, publisher, or distributor of the libel acted in good faith and without malice in printing and publishing the libel, the author of the libel is liable in a civil action to that printer, publisher, or distributor for the entire amount of the damages which are recovered against and paid by that printer, publisher, or distributor.

(5) In actions brought for the recovery of damages for libel in this state, it is competent for the defendant or defendants in the action to show in evidence upon the trial of the action that the plaintiff in the action has previously recovered a judgment for damages in an action for libel to the same or substantially the same purport or effect as the libel for the recovery of damages for which the action has been brought, or that the plaintiff in the action has previously brought an action for the libel or has received or agreed to receive compensation for the libel.

(6) An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

(7) An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

(8) As used in this section, "libel" includes defamation by a radio or television broadcast.

Applicability; effective date.

Section 2. (1) This amendatory act shall apply to any cause of action arising on or after January 1, 1989.

(2) This amendatory act shall take effect January 1, 1989.

This act is ordered to take immediate effect.
Approved December 23, 1988.
Filed with Secretary of State December 27, 1988.

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APPENDIX 29

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1988 Mich. Legis. Serv. 396 (West)

MICHIGAN

1988 PUBLIC ACTS, RESOLUTIONS, AND

EXECUTIVE REORGANIZATION ORDERS

Eighty-Fourth Legislature, Regular Session

Additions are indicated by <<+ UPPERCASE +>>

Deletions by <<- *** ->>

Changes in tabular material are not indicated

PUBLIC ACT NO. 396

H.B.No. 4932

LIBEL OR SLANDER—BROADCASTS, GOVERNMENTAL NOTICES, ETC.—PROOF

AN ACT to amend section 2911 of Act No. 236 of the Public Acts of 1961, entitled as amended "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act," being section 600.2911 of the Michigan Compiled Laws.

The People of the State of Michigan enact:

MI ST 600.2911

Section 1. Section 2911 of Act No. 236 of the Public Acts of 1961, being section 600.2911 of the Michigan Compiled Laws, is amended to read as follows:

M.C.L.A. § 600.2911

Sec. 2911. (1) Words imputing a lack of chastity to any female <<+OR MALE+>> are actionable in themselves and subject the person who uttered or published them to a civil action for the slander in the same manner as the uttering or publishing of words imputing the commission of a criminal offense.

(2)(a) Except as provided in <<+SUBDIVISION+>> (b), in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he <<+OR SHE+>> has suffered in respect to his <<+OR HER+>> property, business, trade, profession, occupation, or feelings.

(b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his <<+OR HER+>> action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. <<+FOR LIBEL BASED ON A RADIO OR TELEVISION BROADCAST, THE RETRACTION SHALL BE MADE IN THE SAME MANNER AND AT THE SAME TIME OF THE DAY AS THE ORIGINAL LIBEL; FOR LIBEL BASED ON A PUBLICATION, THE+>> retraction shall be published in the same size type, in the same editions and as far as practicable, in substantially the same position as the original libel<<+; AND

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FOR OTHER LIBEL, THE RETRACTION SHALL BE PUBLISHED OR COMMUNICATED IN SUBSTANTIALLY THE SAME MANNER AS THE ORIGINAL LIBEL+>>.

(3) If the defendant in any action for slander or libel gives notice in <<+ A+>> justification that the words spoken or published were true, this notice shall not be of itself proof of the malice charged in the complaint though not sustained by the evidence. In <<+AN+>> action for slander or for publishing <<+OR BROADCASTING+>> a libel even though the defendant has pleaded or attempted to prove a justification he <<+OR SHE+>> may prove mitigating circumstances including the sources of his <<+OR HER+>> information and the ground for his <<+OR HER+>> belief. <<+DAMAGES+>> 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 GOVERNMENTAL NOTICE, ANNOUNCEMENT, WRITTEN OR RECORDED REPORT OR RECORD GENERALLY AVAILABLE TO THE PUBLIC, OR ACT OR ACTION OF A PUBLIC BODY,+>> or for <<+A+>> heading of the report which is a fair and true headnote of the <<+REPORT+>>. This privilege shall not apply to a libel which is contained in <<+A+>> matter added by <<+A+>> person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding <<+OR GOVERNMENTAL NOTICE, ANNOUNCEMENT, WRITTEN OR RECORDED REPORT OR RECORD GENERALLY AVAILABLE TO THE PUBLIC, OR ACT OR ACTION OF A PUBLIC BODY,+>> which was not a part of the public and official proceeding <<+OR GOVERNMENTAL NOTICE, ANNOUNCEMENT, WRITTEN OR RECORDED REPORT OR RECORD GENERALLY AVAILABLE TO THE PUBLIC, OR ACT OR ACTION OF A PUBLIC BODY+>>.

(4) <<+A+>> person <<-* * * ->>against whom a judgment is recovered for damages arising out of the authorship or publication of a libel is entitled to recover contribution in a civil action from all persons who were originally jointly liable for the libel with the defendant or defendants, whether joined as defendants or not, to the same extent as and with the same effect that joint sureties are liable to contribute to each other in cases where they are sureties on the same contract. <<+IF+>> the libel has been published in <<+A+>> newspaper, magazine, or other periodical publication <<+OR BY A RADIO OR TELEVISION BROADCAST+>>, the servants and agents of the publisher <<+OR PROPRIETOR+>> of the periodical <<+OR RADIO OR TELEVISION STATION OR NETWORK+>>, and the news agents and other persons who have been connected with the libel only by selling or distributing the publication containing the libel and who have not acted maliciously in selling or publishing the libel, shall not be required to contribute and shall not be taken into account in determining the amount that any joint tort feasor is required to contribute under the provisions of this section. <<+IF+>> the author of the libel acted maliciously in composing or securing the printing or the publication of the libel and the printer, publisher, or distributor of the libel acted in good faith and without malice in printing and publishing the libel, the author of the libel is liable in a civil action to that printer, publisher, or distributor for the entire amount of the damages which are recovered against and paid by that printer, publisher, or distributor.

(5) In actions brought for the recovery of damages for libel in this state, it is competent for the defendant or defendants in <<+THE+>> action to show in evidence upon the trial of <<+THE+>> action that the plaintiff in <<+ THE+>> action has <<+PREVIOUSLY+>> recovered a judgment <<-* * * ->> for damages in an action <<-* * * ->>for libel <<-* * * ->>to the same <<-* * * ->>or substantially the same purport or effect as the libel for the recovery of damages for which <<+THE+>> action has been brought, or that the plaintiff in <<+THE+>> action has <<+PREVIOUSLY+>> brought an action <<-* * * ->>for <<+THE+>> libel or has received or agreed to receive compensation for <<+THE+>> libel.

<<+(6) AN ACTION FOR LIBEL OR SLANDER SHALL NOT BE BROUGHT BASED UPON A COMMUNICATION INVOLVING PUBLIC OFFICIALS OR PUBLIC FIGURES UNLESS THE CLAIM IS SUSTAINED BY CLEAR AND CONVINCING PROOF THAT THE DEFAMATORY FALSEHOOD WAS PUBLISHED WITH KNOWLEDGE THAT IT WAS FALSE OR WITH RECKLESS DISREGARD OF WHETHER OR NOT IT WAS FALSE.+>>

<<+(7) AN ACTION FOR LIBEL OR SLANDER SHALL NOT BE BROUGHT BASED UPON A COMMUNICATION INVOLVING A PRIVATE INDIVIDUAL UNLESS THE DEFAMATORY FALSEHOOD CONCERNS THE PRIVATE INDIVIDUAL AND WAS PUBLISHED NEGLIGENTLY. RECOVERY UNDER THIS PROVISION SHALL BE LIMITED TO ECONOMIC DAMAGES INCLUDING ATTORNEY FEES.+>>

<<+(8) AS USED IN THIS SECTION, “LIBEL” INCLUDES DEFAMATION BY A RADIO OR TELEVISION BROADCAST.+>>

MI ST 600.2911, note

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M.C.L.A. § 600.2911, note

Section 2. (1) This amendatory act shall apply to any cause of action arising on or after January 1, 1989.

(2) This amendatory act shall take effect January 1, 1989.

This act is ordered to take immediate effect.

Approved December 23, 1988.

Filed December 27, 1988.

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APPENDIX 30

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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

Plaintiffs,

v

Case No. 17-32008-CZ
Judge: Thomas G. Power

BRACE KERN, an individual, and
SABURI BOYER and DANIELLE KORT, f/k/a
Danielle Boyer,

Defendants.
_____/

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_____/

DEFENDANT BOYER'S MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant Saburi Boyer, by counsel, and moves for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) as follows:

1. This is a defamation action arising out of a prior criminal action filed by the Michigan Attorney General against Plaintiff Bryan Punturo.

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2. As the complaint admits, the Michigan Attorney General and the Michigan State Police conducted an investigation of potential anti-trust violations by Plaintiff Punturo, including executing a search warrant on his offices in November 2015. (Complaint, at para. 23).

3. As the complaint admits, the Michigan Attorney General filed criminal felony extortion charges against Plaintiff Bryan Punturo (not anti-trust charges) on May 10, 2016. (Complaint, at paras. 25 and 38).

4. As the complaint admits, Defendant Saburi Boyer was represented by a licensed attorney throughout these matters, Co-Defendant Brace Kern. (Complaint, at paras. 10 and 12).

5. As the complaint indicates, the bulk of the allegedly defamatory statements complained of were made on May 10, 2016, i.e. the day the Michigan Attorney General issued a press release about the Attorney General's decision to file criminal extortion charges against Punturo and the day of the criminal arraignment. (**Exhibit A**, Attorney General's 5/10/16 Press Release; see also Complaint, at para. 30(b)-(f)).

6. The Michigan State Police and Michigan Attorney General had reasonable reasons to be concerned and to investigate potential criminal misconduct by Plaintiff Bryan Punturo, given his unusual, heated, and vehement communications with Defendant Saburi Boyer:

> **I would like to make sure there is no misunderstanding on what I think of you and where I will take you.**
>
> **You, Saburi, are the most evil person I have ever known…I have the means to pursue you and when I do so, I will take it full court. I will not settle until you are out of business... You instilled this hatred**

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within me, you defaulted on your agreement to abate me, and now you will realize my resolve to witness your demise....

Once again in your life you have driven someone to retaliate with action that is not in their character. The sorry end to your life of underhanded business dealings is right in the mirror. What do you have for it all? Not much that I can see. An old truck, a used boat, a legacy of hatred, millions of dollars in hospital debt, and a life ending disease.[1]

I am sure it has occurred to you that your health is only on hold. The disease will prevail and you will leave this world. I am sorry to say, that you will not be missed by the long trail of people you have interacted with on a business level. Find comfort in that within your bible because that is the only place you can hide from the reality of the world you have created.... I even have an offer to participate in the legal costs of taking you down. You have just opened the door for us all. Enjoy the ride.... I will welcome the judgement (sic) against Daniel (sic) as well and pursue her when you are no longer in the picture. (Exhibit B, 11/6/15 email and letter from Plaintiff Bryan Punturo to Defendant Saburi Boyer).

7. Co-Defendant Kern has filed a motion for summary disposition as to all claims in Plaintiffs' complaint, arguing correctly that all of the allegedly defamatory statements claimed in Plaintiffs' complaint are non-actionable as a matter of law and must be dismissed, because:

A. they are fair and accurate reports of matters contained in the public record and thus barred by the "fair reporting" privilege of common law and statute, e.g. MCL 600.2911(3);

B. they are protected expressions of subjective "opinion" or "rhetorical hyperbole" and thus barred as non-actionable "opinion" and "hyperbole" under, for example, *Ireland v Edwards*, 230 Mich App 607 (1998)(In the context of hotly-disputed child custody matter, defendant-attorney for the father made twenty statements to the media, including claims that the Plaintiff Ireland was "an unfit mother" who "was never with her child." The trial court granted summary disposition to the defendant-attorney, and the court of appeals affirmed, reasoning that the attorney's statements to the media that Plaintiff Ireland "was an unfit mother" was a non-actionable statement of subjective opinion and that she "was never

[1] Defendant Saburi Boyer has leukemia and has undergone expensive chemotherapy treatments.

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with her child" was non-actionable rhetorical hyperbole. 230 Mich App at 611-612 and 617-618).

8. Co-Defendant Kern also correctly notes in his brief that the legal protections and privileges for free speech in defamation claims apply with equal force to "alternative legal theories" based on the same facts and thus require summary disposition of the remainder of the complaint's "alternative legal theories," as well as the defamation claims. See, e.g., *Ireland v Edwards*, 230 Mich App 607, 624 (1998)("It is clear these limitations are not exclusive to defamation claims. We conclude that these limitations apply to all of plaintiff's claims in this case.").

9. Defendant Boyer concurs with Co-Defendant Kern's motion for summary disposition, as it correctly points out that Plaintiffs' claims must be dismissed in their entirety. See, e.g., *Ireland v Edwards*, supra, 230 Mich App at 613 n4("Summary judgment is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest and concern." *Id. quoting Lins v Evening News Ass'n*, 129 Mich App 419, 425 (1983)).

10. Further, Defendant Boyer is entitled to summary disposition on Plaintiffs' claims that Boyer is liable for the statements of Co-Defendants Kern under supposed "principal-agent" principles. These claims fail as a matter of law and must be dismissed pursuant to MCR 2.116(C)(8)-(10).

11. Plaintiffs' complaint attributes the vast majority of the allegedly "defamatory statements" to Co-Defendant Kern, not Defendant Boyer. (Complaint, at para. 30(a)-(h)).

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12. Further, Plaintiffs' complaint alleges that Co-Defendant Kern violated his responsibilities under the Michigan Rules of Professional Responsibility in making statements to the media. (Complaint, at paras. 29).

13. Nevertheless, Plaintiffs apparently claim that Defendant Boyer is liable for the statements of Co-Defendant Kern to the media under "principal -agent" concepts. (See Complaint, at para. 12 and 31).

14. However, these "principal - agent" claims fail as a matter of law.

15. The "right to control" is at the heart of "principal - agent" liability. See, e.g., *Sherman v Korff*, 353 Mich 387 (1958)(Driver-wife not an "agent" of passenger-husband, despite his technical legal "right to control" the car as an owner of the vehicle) and *Little v Howard Johnson Company*, 183 Mich App 675 (1990)(Franchisor not vicariously liable for slip-and-fall at franchisee's business, because it did not have sufficient control of the details of franchisee's business, despite contractual rights to determine numerous issues about the business).

16. Attorneys are licensed professionals with independent legal responsibility to comply with the Michigan Rules of Professional Conduct.

17. As a matter of law, clients do not have a "right to control" their attorney to act or speak in a manner that violates the MRPC. Thus, a client is not vicariously liable for an attorney's statements to the media in violation of the MRPC. See, e.g., *Sherman v Korff*, *supra*, 353 Mich 387 and *Little v Howard Johnson Company*, *supra*, 183 Mich App 675 (1990).

18. As a matter of law, clients are entitled to rely on their attorneys to comply with the MRPC, including in their communications with the media.

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19. As a practical matter, layperson-clients do not have knowledge of the MRPC or a duty to guarantee their attorney complies with the MRPC. They owe no duty to do so; rather, it is the attorney's duty to do so. Thus, Plaintiffs' "agency" claims fail as a matter of law.

WHEREFORE, Plaintiff Boyer respectfully requests the Court enter an Order granting his motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10).

JAY ZELENOCK LAW FIRM PLC

Date: March 20, 2017

By: *__/s/ Jay Zelenock*

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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

Plaintiffs,

v

Case No. 17-32008-CZ
Judge: Thomas G. Power

BRACE KERN, an individual, and
SABURI BOYER and DANIELLE KORT, f/k/a
Danielle Boyer,

Defendants.
_____/

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DEFENDANT BOYER'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

Judge Rodgers found there was "evidence of threats"; that Mr. Punturo's conduct was "abhorrent"; and expressly considered and denied his motion for sanctions:

It is undisputed that Defendant Boyer was represented by Co-Defendant Brace Kern, a licensed Michigan attorney, throughout the matters complained of in the

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complaint. (Complaint, at paras. 10 and 12). Understandably concerned about Plaintiff Bryan Punturo's conduct and communications (see, e.g., **Exhibit B** and para. 6 of this motion), Co-Defendant Kern approached the Michigan Attorney General, who in turn conducted an independent investigation and concluded that criminal extortion charges were warranted. (See, e.g., **Exhibit A**). As the complaint acknowledges, the Michigan Attorney General filed criminal extortion charges against Plaintiff Bryan Punturo, rather than the "anti-trust" claims that Co-Defendant Kern raised. (Complaint, at paras. 22 -25). The Attorney General is an independent public official and acted on the basis of his own investigation and legal conclusions about Plaintiff Punturo's conduct.

While the District Court judge in the criminal matter ultimately ruled that the Attorney General's criminal extortion case was technically legally deficient, this was not an endorsement of Plaintiff Bryan Punturo's conduct or a ruling that the Attorney General had engaged in misconduct or filed frivolous pleadings in bringing the charges against Mr. Punturo. The District Court judge noted:

> "What Mr. Punturo did, in my opinion, was nasty and mean-spirited, reprehensible conduct in the way he negotiated. But, there's been no law presented that what he did was illegal. Maybe it should be illegal. Maybe the Attorney General said that they have not looked into that fully as to whether it was an anti-trust violation. Maybe that should be done." (**Exhibit C**, September 29, 2016 Grand Traverse District Preliminary Exam transcript at 5:6-16).

In the civil case drafted and filed by Co-Defendant Kern against Mr. Punturo, Judge Rodgers took issue with aspects of Mr. Kern's approach to the case and some of the arguments and pleadings he filed. It appears that Mr. Kern (a newer attorney, P75695) framed some of the legal issues and arguments in a manner Judge Rodgers found to be "illogical" and "incongruous," and the Court dismissed the Second Amended

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Complaint, except for Count IV Intentional Infliction of Emotional Distress. However, Judge Rodgers explicitly considered and denied Plaintiff Punturo's motion for sanctions, while describing Mr. Kern's approach to the case as "a bit upside down" and Mr. Punturo's behavior as "abhorrent" and "stupid":

> "I would think even you [i.e. Kern] would have to recognize, this does seem a bit upside down. I would have assumed, without having read all these briefs, you would have been here initially to argue that the contract was unenforceable, it was induced by fraud and coercion… Instead, your (sic) telling me your client signed the contract, that the threats weren't the wrong, that the contracts the wrong… I will acknowledge that what's happening here, the clear behavior that's documented in text messages or emails is abhorrent, it's ridiculous, it's absurd, it's immature, it's stupid. But the way you are going about addressing it, you've got be (sic) baffled."(**Exhibit D**, July 11, 2016 Grand Traverse Circuit Court hearing transcript at 22:20-23:4 and 23:14-19).

Subsequently, consistent with these comments, Judge Rodgers issued a written Decision and Order on August 5, 2016 finding that **"There is evidence of threats to Plaintiffs [i.e. Defendant Boyer] which preceded the Contract and Plaintiffs could have claimed duress under an adhesion contract, sought rescission and return of the money paid to Defendants [i.e. Plaintiff Punturo],"** but noting that the pleadings did not seek to avoid the contract through rescission. (**Exhibit E**, 8/5/16 Decision and Order, at p. 4, first full paragraph and note 17).

Judge Rodgers also expressly considered and denied the motion for monetary sanctions raised by Plaintiff Punturo in the civil matter. (**Exhibit E**, at p. 8, note 35). Upon information and belief, Punturo filed a claim of appeal as of right with the Court of Appeals, which dismissed the claim of appeal for lack of jurisdiction, and Punturo recently filed an application for leave to appeal Judge Rodgers' decision denying monetary sanctions with the Court of Appeals.

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Defamation pleading principles and summary disposition:

Defamation cases are held to a heightened pleading standard, requiring that exact words of the alleged defamation be set forth explicitly in the complaint. See, e.g., *Thomas M. Cooley Law School v Doe 1*, 300 Mich App 245, 262-263 (2013)("A plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory. For a claim of libel, a plaintiff must plead " '*the very words of the libel....* ' " Id. notes omitted)). This permits early use of summary disposition based on the complaint under the (C)(8) standard. The First Amendment and free speech values encourage the vigorous early use of summary disposition in defamation claims. See, e.g., *Ireland v Edwards*, supra, 230 Mich App at 613 n4("Summary judgment is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest and concern." *Id. quoting Lins v Evening News Ass'n*, 129 Mich App 419, 425 (1983)). It is an element of a defamation claim and the plaintiffs' burden to establish that the communication complained of was "unprivileged." See, e.g., *Thomas M. Cooley Law School v Doe 1, supra*, 300 Mich App at 262.

Concurrence with Co-Defendant Kern's motion for summary disposition:

In this case, Plaintiffs' claims are barred. As argued in greater detail in the motion for summary disposition filed by Co-Defendant Kern, all of the allegedly defamatory statements claimed in Plaintiffs' complaint are non-actionable as a matter of law and must be dismissed, because:

A. they are fair and accurate reports of matters contained in the public record and thus barred by the "fair reporting" privilege of common law and statute, e.g. MCL 600.2911(3);

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B. they are protected expressions of subjective "opinion" or "rhetorical hyperbole" and thus barred as non-actionable "opinion" and "hyperbole" under, for example, *Ireland v Edwards*, 230 Mich App 607 (1998)(In the context of hotly-disputed child custody matter, defendant-attorney for the father made twenty statements to the media, including claims that the Plaintiff Ireland was "an unfit mother" who "was never with her child." The trial court granted summary disposition to the defendant-attorney, and the court of appeals affirmed, reasoning that the attorney's statements to the media that Plaintiff Ireland "was an unfit mother" was a non-actionable statement of subjective opinion and that she "was never with her child" was non-actionable rhetorical hyperbole. 230 Mich App at 611-612 and 617-618).

The context of all of the alleged comments on the criminal charges and the civil litigation (whether by Kern or Boyer) were understood by any reasonable listener to be statements of opinion from litigants about matters publicly disputed in litigation. Neither portrayed themselves as "neutrals" or were reasonably understood as neutral.

Notably, the great bulk of the statements claimed to be defamatory in the complaint were made by Co-Defendant Kern, not Defendant Boyer. The handful of statements attributed to Defendant Saburi Boyer are essentially descriptions of his own state of mind (he was "fearful") and opinions and legal conclusions (e.g. "extortion") that were made in reliance on the publicly-announced opinion of the Michigan Attorney General. They also track Judge Phillips' comments that Punturo engaged in **"nasty and mean-spirited, reprehensible conduct"** and Judge Rodgers' finding that **"There is evidence of threats to Plaintiffs (i.e. Defendant Boyer) which preceded the Contract and Plaintiffs could have claimed duress under an adhesion contract, sought rescission and return of the money paid to Defendants (i.e. Plaintiff Punturo)."** (**Exhibit E**, at p. 4, note 17). As a matter of law, the statements attributed to Defendant Saburi Boyer are non-actionable statements of subjective opinion, fair

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comment on matters of public record, descriptions of his own emotional status and rhetorical hyperbole. They must be dismissed.

The legal protections and privileges for free speech in defamation claims apply with equal force to "alternative legal theories" based on the same facts and thus require summary disposition of the remainder of the complaint's "alternative legal theories," as well as the defamation claims. See, e.g., *Ireland v Edwards*, 230 Mich App 607, 624 (1998)("It is clear these limitations are not exclusive to defamation claims. We conclude that these limitations apply to all of plaintiff's claims in this case."). Thus, Plaintiffs' non-defamation claims must be dismissed.

"Principal – Agent" claims fail as a matter of law:

Defendant Boyer is also entitled to summary disposition on Plaintiffs' claims that Boyer is allegedly liable for the statements of Co-Defendants Kern under supposed "principal-agent" principles. These claims fail as a matter of law and must be dismissed pursuant to MCR 2.116(C)(8)(10).

Plaintiffs' complaint attributes the vast majority of the allegedly "defamatory statements" to Co-Defendant Kern, not Defendant Boyer. (Complaint, at para. 30(a)-(h)). Further, Plaintiffs' complaint alleges that Co-Defendant Kern violated his responsibilities under the Michigan Rules of Professional Responsibility in making statements to the media. (Complaint, at paras. 29). Nevertheless, Plaintiffs apparently claim that Defendant Boyer is liable for the statements of Co-Defendant Kern to the media under "principal -agent" concepts. (See Complaint, at para. 12 and 31).

However, these "principal - agent" claims fail as a matter of law. The "right to control" is at the heart of "principal - agent" liability. See, e.g., *Sherman v Korff*, 353

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Mich 387 (1958)(Driver-wife not an "agent" of passenger-husband, despite his technical legal "right to control" the car as an owner of the vehicle) and *Little v Howard Johnson Company*, 183 Mich App 675 (1990)(Franchisor not vicariously liable for slip-and-fall at franchisee's business, because it did not have sufficient control of the details of franchisee's business, despite contractual rights to determine numerous issues about the business).

Attorneys are licensed professionals with independent legal responsibility to comply with the Michigan Rules of Professional Conduct. As a matter of law, clients do not have a "right to control" their attorney to act or speak in a manner that violates the MRPC. Thus, a client is not vicariously liable for an attorney's statements to the media in violation of the MRPC. See, e.g., *Sherman v Korff*, *supra*, 353 Mich 387 and *Little v Howard Johnson Company*, *supra*, 183 Mich App 675 (1990).

As a matter of law, clients are entitled to rely on their attorneys to comply with the MRPC, including in their communications with the media. As a practical matter, layperson-clients do not have knowledge of the MRPC or a duty to guarantee their attorney complies with the MRPC. They owe no duty to do so; rather, it is the attorney's duty to choose their words carefully and comply with the MRPC. Thus, Plaintiffs' "agency" claims fail as a matter of law. Notably, in key cases where attorneys have been sued for defamation, their clients have not been named as co-defendants. See, e.g., *Ireland v Edwards*, *supra*, 230 Mich App 607(opposing attorney sued for defamation for 20 statements to media during acrimonious family law dispute) and *Oesterle v Wallace*, 272 Mich App 260 (2006)(attorneys and law firms sued for defamation allegedly arising from comments in settlement communication).

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Finally, the complaint's allegations about alleged settlement discussions between Mr. Moothart and Mr. Kern are inadmissible under MRE 408("Evidence of conduct and statements made in compromise negotiations is likewise inadmissible") and non-actionable. See *Oesterle v Wallace*, 272 Mich App 260 (2006)(absolute privilege applicable to allegedly defamatory statements made during judicial proceedings applies to attorney's statements in settlement letter). The emails attached as Exhibit A to the complaint also show that Mr. Kern was responding to Mr. Moothart's request that he forward a settlement proposal to him: "Brace: Thanks for your call on Friday, May 6 regarding a possible settlement of the above case. I have discussed the matter with my client. We would appreciate further details regarding your proposal with specific numbers and terms. Thank you. Jon" (Exhibit A to complaint). Mr. Kern's reply explicitly indicates it is protected by MRE 408 and there is nothing in Mr. Moothart's email to the contrary, or reflecting any notion that Mr. Kern had done anything inappropriate in any of their dealings.

WHEREFORE, Defendant Boyer respectfully requests the Court enter an Order dismissing Plaintiffs' Complaint pursuant to MCR 2.116(c)(8) and (C)(10).

JAY ZELENOCK LAW FIRM PLC

Date: March 20, 2017

By: *__/s/ Jay Zelenock*

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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

Plaintiffs,

v

Case No. 17-32008-CZ
Judge: Thomas G. Power

BRACE KERN, an individual, and
SABURI BOYER and DANIELLE KORT, f/k/a
Danielle Boyer,

Defendants.
_____/

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_____/

INDEX OF EXHIBITS TO DEFENDANT BOYER'S MOTION FOR SUMMARY DISPOSITION

Exhibit A: Attorney General's 5/10/16 Press Release

Exhibit B: 11/6/15 email and letter from Plaintiff Bryan Punturo to Defendant Saburi

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Boyer

Exhibit C: 9/29/16 Grand Traverse District preliminary Exam transcript at 5:6-16

Exhibit D: 7/11/16 Grand Traverse Circuit Court hearing transcript at 22:20-23:14-19

Exhibit E: 8/5/16 Decision and Order

Date: March 20, 2017

JAY ZELENOCK LAW FIRM PLC
By: *__/s/ Jay Zelenock__*

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Boyer's MSD
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Schuette Charges Traverse City Resort Owner in Extortion Plot

May 10, 2016

LANSING - Michigan Attorney General Bill Schuette today charged Traverse City resort owner Bryan Punturo, 58 of Williamsburg, with one count of Felony Extortion after threatening to allegedly run a parasailing company out of business if he was not paid thousands of dollars.

If convicted, Punturo faces up to 20 years in prison or up to a $10,000 fine.

"Extortion is illegal, plain and simple," said Schuette. "The actions allegedly taken here were a threat to another person's livelihood and are not a good business practice."

Punturo was arraigned before Judge Thomas Phillips of the 86th District Court on Tuesday, May 10, 2016. Bond was set at $100,000/personal recognizance with additional conditions of not leaving the state without prior approval of the court and other standard terms and conditions. Punturo's next court appearance is scheduled for May 23, 2016 at the 86th District Court.

Case Background

In the summer of 2014, Bryan Punturo allegedly threatened to run the owner of a local parasailing company out of business unless he was paid $19,000 per year. Punturo allegedly threatened that he had both the people and the resources to ensure the parasailing company went out of business. The victim paid thousands in the alleged extortion plot, in fear of losing his business. In August of 2015, an attorney for the victim contacted the Department of Attorney General regarding the extortion plot. An investigation was opened by the Department of Attorney General and has provided the evidence that resulted in the charges filed today.

A criminal charge is merely an accusation and the defendant is presumed innocent unless proven guilty.

Def-Appellants' Appendix, 319a

Boyer's MSD
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Def-Appellants' Appendix, 320a

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---------- Forwarded message ----------
From: **Bryan Punturo** <b.punturo@yahoo.com>
Date: Friday, November 6, 2015
Subject: A summary of where we came from and where we are going.
To: Saburi Boyer <captainsaburi@hotmail.com>

I would like to make sure there is no misunderstanding on what I think of you and where I will take you.

DEFENDANT'S EXHIBIT
B

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You, Saburi, are the most evil person I have ever known that can walk the street with your head held up high and not even realize the hatred you spread in the world. Years ago I watched you manipulate Eric and leave him with the marketing bills he created on your behalf as you negotiated a better deal for yourself with the Labelles. As with everything, there was an ethical and unethical way to accomplish your goal and you chose the unethical. Then there are the experiences that followed on the bay with our boat and you and your crews. You viciously attacked every day as if it were your last. You had no regard for common courtesies that are typical in everyday life for normal people. You personally told us that given the right opportunity you would run Casey, his boat, and his customers in the air right up on the beach. I, personally, was driving the boat several times when you tried your antics to get me in the corner. Fortunately, you are not the only one that is skilled on the water and you could never trap me or Casey as you hoped for.

Then there is the legacy you left behind in Florida. We had your competition calling us inquiring about coming to Traverse City with only one goal in mind, to run you out of business and repay the hatred you bread within them. That is quite a talent you have. They were willing to come 1000 miles North with no regard for making money, just to ruin you. You take rational people who can work beside anyone and turn them into a hostile adversary with your antics. Even when your captain was able to put aside your group hate effort and ask for assistance when he ran out of gas, you could not honor his commitment to pay for the service. A mere $100 to rescue a boat load of customers from Deep Water Point and save what little face you have left in the industry and you refuse to make the payment. No matter where I go in the business, the mere mention of your name generates examples of your unethical, hate driven actions which leave behind respectable business persons with a vengeance to settle with you.

Your lack of respect for agreements, contracts, relationships etc. all place you in a field of your own. And through it all, you maintain a high regard for yourself. Even when you break your neck on your boat entertaining a group of strippers, you manage to retain your self-esteem.

Then there is the backbone of your framework, your sacred bible. You carry this book and share your scriptures at will with others. You hide behind it as no one I have ever seen. Through this book you manage to manipulate your perception of your actions as not being manifested in the evil nature that embodies your thoughts and actions. As has always been the case, the book can be interpreted to mean just about anything and you have taken it to an all new level. You have a trail of hostile relationships that you have willfully created and yet I am told that you sleep with a clean conscience. A rational person who lived by these standards and actions would know what they represent and accept it. You do not, you paint for yourself a portrait of yourself as godly and righteous. I am sorry to inform you that your words and actions tell a completely different story.

I was not really wanting a deal with you two years ago because like the others, I wanted nothing but to run you out of business. This is what you do to people. Then in the 11th hour I agreed to the deal. Needless to say, now you defaulted. Then you are ignorant enough to ask, "What am I getting for the payment". This simply displays your ability to fragment your thoughts. You know exactly why you are obligated to the payments but you can step back and ignore the obvious and try and manipulate the situation into something that it is not.

As you now have seen, and most likely knew, I am not like the rest. I have the means to pursue you and when I do so, I will take it full court. I will not settle until you are out of business. I will put a boat out with crews that run $39 tandems to the point that you will not have a trip next year. I will market it beyond your wildest imagination so that not one customer enters the county that does not know about

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ParkShore Parasail. You instilled this hatred within me, you defaulted on your agreement to abate me, and now you will realize my resolve to witness your demise.

I would have left it all behind if you had honored the commitment you made but that is not the case. Once again in your life you have driven someone to retaliate with action that is not within their character. The sorry end to your life of underhanded business dealings is right in the mirror. What do you have for it all? Not much that I can see. An old truck, a used boat, a legacy of hatred, millions of dollars in hospital debt, and a life ending disease.

I am sure it has occurred to you that your health is only on hold. The disease will prevail and you will leave this world. I am sorry to say, that you will not be missed by the long trail of people you have interacted with on a business level. Find comfort in that within your bible because that is the only place you can hide from the reality of the world you have created.

The boys from the South are eager to participate in your demise on the bay of Traverse City. I even have an offer to participate in the legal costs of taking you down. You have just opened the door for us all. Enjoy the ride.

And by the way, if you think bankruptcy is your escape, as you have circulated, I welcome that as well. You know the consequences of that, and the $10,000 it will take you to get there. And don't forget, you will have to bankrupt the business as well as each of you personally. I will welcome the judgement against Daniel as well and pursue her when you are no longer in the picture. And then you might have a simple thought of liquidating your minimal assets to avoid collection. You might want to check the law on this as the lookback period will not allow it and I will be the one to prove it to you. So, the final result of your lifetime of evil will be bankruptcy which will be ample vindication for all of us that you interfaced with.

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STATE OF MICHIGAN

IN THE 86TH DISTRICT COURT FOR THE COUNTY OF GRAND TRAVERSE

THE PEOPLE OF THE STATE OF MICHIGAN

V File No : 16-3005-FY-1

BRYAN STEPHEN PUNTURO,

Defendant.

PRELIMINARY EXAMINATION - CONTINUED
EXCERPT OF PROCEEDINGS

BEFORE THE HONORABLE THOMAS J. PHILLIPS, DISTRICT COURT JUDGE

Traverse City, Michigan - Thursday, September 22, 2016

APPEARANCES:

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RECORDED BY:

Ms. Mary Wenger-Townsend, CERT[illegible]
Certified Electronic Recorder

DEFENDANT'S EXHIBIT C

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WITNESS: FOR PEOPLE

None.

WITNESS: FOR DEFENDANT

None.

EXHIBITS: IDENTIFIED RECEIVED

None.

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1 Traverse City, Michigan
2 Thursday, September 29, 2016 - 2:57 p.m.
3 (At 2:57 p.m., beginning of excerpt of proceedings)
4 THE COURT: Okay. Thank you all for your patience.
5 I wanted to read *Morrissey* one last time, and I do appreciate
6 that. And I wanted to look at the statute one last time.
7 This is an interesting case on several grounds. I
8 looked at this case as far as Michigan is concerned, as the
9 case that hasn't been decided before. I don't think *Morrissey*
10 is really on point, in my opinion. I think it discusses a lot
11 of issues, but it does not in my reading of it, talk about
12 whether the issue before the *Morrissey* court was whether the
13 threat was doing something legal. And the *Morrissey* case
14 looked to me like that the person may have not been
15 represented at the trial level; I don't know that. But maybe
16 he was, because it talks about the defendant not objecting to
17 jury instructions, as opposed to the defense attorney not
18 objecting. But that really doesn't matter. But it does look
19 like that whoever was going forward with that case could have
20 done a better job at raising issues. I don't think this issue
21 was raised there, or if it was it was not preserved on appeal.
22 And we also have the issue that it is a non-published
23 decision. I don't think it offers any guidance in this case.
24 Mr. Boyer wanted a situation where he didn't have to
25 worry about competition. He apparently wanted a monopoly for

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his businesses. And that's what he ultimately got in this case. It's possible that he paid more than he wanted to pay because of what the defendant said -- probable, when you look at probable cause.

I think what the defendant did in this case, and his negotiations, was threaten Mr. Boyer with financial ruin basically, by saying that he would compete with him and he would put him out of business he would compete so well, which probably made Mr. Boyer want the non-compete even more.

When we look at the statute there are basically two different crimes set forth in the statute. One was maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property of another, basically. And if you threaten to accuse someone of a crime, that in itself is not illegal. I mean, it happens every day. It becomes illegal when someone says, "If you don't pay me money I will go to the prosecutor and tell them that you did this crime." So that is set out as a separate crime, under the statute.

And you have to wonder why that was set out separately, because if it -- if you can maliciously threaten an injury by doing a legal act, would that not be included in the second definition? I think that there is a reason that we have the two-part definition unrelated to doing something that

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is legal, to threaten something that is legal, reporting a crime. The other where we have the communication of maliciously threatening an injury to a person. Otherwise it would make no sense to have the two separate definitions because the first would be included in the second.

What Mr. Punturo did, in my opinion, was nasty and mean-spirited, reprehensible conduct in the way he negotiated. But there's been no law presented that what he did was illegal. Maybe it should be illegal. Maybe the Attorney General said that they have not looked into that fully as to whether it was an anti-trust violation. Maybe that should be done. As to whether it should be illegal or not, obviously, that's not in the Court's providence.

I find that the facts even taken in the way that most favor the prosecutor in this case, do not show criminal activity; there was no threat to do anything that was illegal.

I'm sure this case will go up, and up, and up, probably. And then we will ultimately get a, hopefully a clearer definition of what is legal and illegal.

So I base my decision on what I indicated, and I do accept the briefs and arguments of the defense in making this decision. Obviously, this case will be probably appealed to the Circuit Court, and you're welcome to do that.

I find that as we go up in court's we usually find smarter judges too. Thank you.

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I think you did an excellent job, as did you. Thank you, all.

MR. MOOTHART: Your Honor, pursuant to the statute, 766.13, we would request that the Court discharge the defendant in an order.

MR. PAYOK: No objection with that, Your Honor.

THE COURT: Okay. Based upon my decision the defendant is discharged, bond cancelled. Thank you.

MR. MOOTHART: Thank you.

MR. PAYOK: Thank you, Your Honor.

THE COURT: It was a privilege to have both of you in my court. I'm sorry I had to disappoint one of you.

MR. MOOTHART: Thank you, Your Honor.

MR. PAYOK: All I can ask is that you give it your time and consideration, and you certainly did that.

MR. MOOTHART: And the last brief was written, for the most part, by Mr. Kraus. I don't want to deceive the Court with the idea that somehow that was all my drafting.

THE COURT: Mr. Kraus, are you still here?

MR. KRAUS: Yes, I am, Your Honor.

THE COURT: Thank you.

MR. KRAUS: Thank you.

THE BAILIFF: All rise.

(At 3:05 p.m., proceeding concluded)

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STATE OF MICHIGAN)
)
COUNTY OF GRAND TRAVERSE)

I certify that this transcript, consisting of 7 pages, is a complete, true, and correct transcript of the excerpt of proceedings and testimony taken in this case on Thursday, September 29, 2016.

11/15/2016
Date

Mary Wenger-Townsend

Ms. Mary Wenger-Townsend, CER#8723
Certified Electronic Recorder
280 Washington Street, Ste 121
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Boyer's MSD

DEFENDANT'S EXHIBIT

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

SABURI & DANIELLE BOYER,
Plaintiff

v. Case No. 16-31459-CP

BRYAN PUNTURO,
Defendant,

MOTION

BEFORE THE HONORABLE PHILIP E. RODGERS, JR.

Monday, July 11, 2016 - Traverse City, Michigan

APPEARANCES:

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1 I N D E X

2 WITNESSES

3 None

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5 EXHIBITS

6 None

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1 Traverse City, Michigan
2 Monday, July 11, 2016 - at 10:12 a.m.
3 (Court and counsel present)
4 THE COURT: Boyer versus Punturo, time and date
5 set for a renewed motion for summary disposition.
6 Good morning.
7 MR. KERN: Good morning, Judge, Brace Kern, for
8 the plaintiff.
9 THE COURT: Mr. Moothart.
10 MR. MOOTHART: Hi.
11 THE COURT: Your appearance for the record.
12 MR. MOOTHART: Yes. Jon Moothart for the
13 record.
14 THE COURT: And, hello.
15 MR. MOOTHART: Defendants in the case.
16 THE COURT: Let's begin.
17 MR. MOOTHART: Your Honor, again, I'll start by
18 asking if you have any questions?
19 THE COURT: Not at this point.
20 MR. MOOTHART: This is a motion regarding
21 several counts of the plaintiff's complaint, I'll go
22 through those in the order they appear in the complaint.
23 Count I is under Section 1 of the Sherman
24 Act/really Section 2 of the Michigan Act, illegal
25 contract combination of conspiracy, this is different

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1 from the other count, which is a monopoly claim. As the
2 Court observed in our last go around on this, and the
3 Court did see our reply brief. We made clear in our
4 reply brief whether or not there is a per se violation
5 even alleged as a threshold matter there has to be an
6 allegation, and a credible allegation. I found it
7 interesting the plaintiff cited the Twombly case, I think
8 that's pretty much the cutting edge of summary
9 disposition pleading dismissal case law, it has to be a
10 reasonably plausible pleading.
11 And, anyway, on severe restraint of trade the
12 removal of one potential competitor doesn't cut it.
13 Again, facts alleged in the complaint, this is a
14 parasailing business, the person being "restrained" has
15 no boat, no parachute, no parasail business operating
16 from his location. And, I think it's interesting the
17 reasoning he has no parasail business operating from his
18 location is because Mr. Boyer bought that business that
19 was operating there from my client's son, so he shut that
20 down. And, then he shut down my client with signing a
21 contract with him and yet his allegation is there is a
22 severe restraint of trade by the conclusion of this
23 merely potential competitor in a business where you drive
24 a boat around on a public waterway on a bay in Lake
25 Michigan which is contiguous to several states in the St.

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1 Lawrence Seaway. And, most importantly, in a market
2 where the plaintiff's complaint itself alleges the recent
3 entry of a new competitor 100' from the Parkshore Resort
4 on East Bay. I don't think you can read plaintiff's
5 complaint as alleging any restraint of trade, certainly
6 no material restraint of trade and certainly absolutely
7 clearly as a matter of law, as they would be required to
8 allege a severe restraint of trade, it doesn't allege
9 that. And, again, it doesn't matter whether it's
10 allegedly per se or not. We cited the Michigan
11 Psychotherapy Clinics, the Barrows case and Jefferson
12 Parish case as a threshold matter you have to show that
13 there is a substantial and severe restraint to justify
14 per se condemnation even if it is arguably per se
15 illegal. And, on that issue of whether or not it's per
16 se illegal, the plaintiff's cited cases in four areas,
17 they cites cases regarding per se illegality of
18 territorial allocation, market allocation, customer
19 restrictions and group boycotts from various sort of
20 confusing array of concurring and consenting opinions. I
21 don't know if the Court noticed that a lot of law they
22 cited is from descents, but it really doesn't matter,
23 because this case involves none of these.
24 The first category of cases cited by the
25 plaintiff's, territorial allocation and market

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1 allocation. You take west bay, I'll take east bay, I
2 won't take people from rides on west bay, you promise not
3 to take rides from people on east bay. We stay out of
4 each others territory, or we stay out of each others
5 market. The noncompete in this case is a one way
6 noncompete, it gives Mr. Boyer east bay free of Mr.
7 Punturo and a 25 mile radius around the Parkshore,
8 doesn't limit Mr. Boyer in any way. It's not splitting
9 up territory, it's not territory allocation, it's not a
10 market allocation, it's not a customer restriction.
11 That's another category of cases they cite, you sell to
12 or buy from these customers in Wisconsin and I'll sell to
13 or buy from these customers over here in Michigan or
14 that's also territorial, maybe not a good argument or
15 maybe not a good example. But, people above $250,000 in
16 income and people below $250,000 in income, we'll split
17 it up that way; again, that's not present here. So we're
18 getting a one way restriction on one of the parties.
19 And, it's certainly not a group boycott let's we all get
20 together as big players in the say we agree, we say,
21 we're not going to sell to or buy from that guy, we don't
22 like him. There is not one case cited in the plaintiff's
23 brief that this type of contract that's at issue in this
24 case is a per se violation. Even if we assume contrary
25 to the other allegations in the complaint that there was

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1 an allegation of severe restraint of trade, which would
2 be necessary to even allege a per se violation.
3 Also, there is no anti-trust injury alleged,
4 and this is what the Court focused on at the last hearing
5 as well as the severe restraint. The Court said, how do
6 you get to sue somebody for signing a contract with you
7 and claim the contract is illegal? I have it laid out
8 what the Court said about it. What that concern,
9 intellectual problem as the Court described, boils down
10 to is there is no anti-trust injury. Even if the
11 contract were somehow to be deemed to run afoul with the
12 anti-trust law, one party to such contract can't sue the
13 other. You have to prove in an anti-trust case, and this
14 is the Tennessee and Truck Stop case we cited, that the
15 plaintiff's injury must result -- have to allege in this
16 case, plaintiff's injury resulted from the decrease in
17 competition. Damages must flow from the alleged
18 anti-competitive aspects of the agreement in order for
19 there to be anti-trust injury. Plaintiff can only
20 recover if the loss stems from a competition reducing
21 aspect or a fact of the defendant's behavior.
22 The plaintiffs complaint about in this case is
23 that they were forced to pay the defendants so plaintiffs
24 could continue to operate their parasailing business
25 without competition from defendants, it's not anti-trust

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1 injury. Anti-trust injury is -- I mean, in this case we
2 have Mr. Boyer buys Mr. Punturo's son's business, drafts
3 and signs a contract precluding Mr. Punturo from bidding
4 and he claims that contract is illegal, it's ridiculous,
5 it doesn't allege any anti-competitive harm. A proper
6 plaintiff is a consumer that comes along and says, hey,
7 you guys made this deal and I have to pay twice as much
8 to go for a parasail ride, that's anti-trust injury.
9 Not, you made a deal with me and I paid you not to
10 compete with me and I'm going to sue you for not
11 competing, it's silly. In addition to being silly and
12 contrary to common sense, it doesn't always work this
13 way, but anti-trust law is based on common sense and
14 injury of a type that anti-trust laws was designed to
15 address, which is competition has been reduced and there
16 is damage from the reduction of competition, not from
17 payments to reduce competition or from the inability to
18 make the payments to introduce competition. From the
19 actual reduction of competition itself I was harmed, and
20 that can ipso facto never be one of the parties to an
21 alleged illegal contract making that claim.
22 And, as we said in our reply brief, the
23 anti-trust injury requirement is even more important if
24 you are going to call something a per se violation. If
25 you are going to, in the interest of efficiency, say all

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1 these types of contracts are per se illegal because of
2 the way that they are entered into, I made that argument
3 about how I think that's not the case, but even if you
4 assumed it were the anti-trust injury is required for
5 anti-trust injury as in the Atlantic Richfield case, 1990
6 US Supreme Court says, underscored, even more important
7 in showing injury.
8 So, that's Count I of the complaint, that's
9 what plaintiffs responded to in their response to the
10 motion, that's it, and they didn't respond to anything
11 else.
12 But our motion is also about a few other
13 counts, the monopoly claim. Again, the alleged per se
14 illegality of a contract is only relevant to Section 1 of
15 the Sherman Act, Section 2 of the Michigan Act contract
16 combination of conspiracy, it's not relevant. There are
17 doctrines of per se illegality and group boycotts and
18 things like that. But, if you are going to say this is a
19 per se illegal contract because it's a horizontal
20 restraint of trade that has nothing to do with the
21 monopoly claim. So to the extent there was some thought
22 that, a ha, I figured out I have an argument that this is
23 per se illegal therefore I don't need to worry about
24 market power, market share and my allegation that I admit
25 that you didn't try to create your own monopoly you tried

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1 to impose one on me is incorrect. Those are essential
2 elements of the monopoly claim. But, there has been no
3 attempt to respond to a motion on any of those things.
4 And, you know, I briefed this already, I argued
5 it once, it wasn't responded to this time, a mere threat
6 is not enough. There is no attempt because there is no
7 affirmative act alleged to establish a monopoly. There's
8 no market share, no market power and a proposed entry
9 into the market that you're not in yet as a matter of law
10 insufficient basis for this claim, decided in the Pastore
11 case, the Dahl case, the same case. I'm going to go
12 compete with you some day and plaintiff said that guy
13 said he was going to compete with me and he said that and
14 I think I would have a monopoly if he did, the Courts
15 uniformly held it's not enough, it's no good, and, again,
16 that's not what they are saying. They are saying, well,
17 you induced us somehow to create our monopoly for us or
18 impose it on us, and there is no anti-trust injury
19 either. Anti-trust injury on a monopoly is a consumer or
20 a -- typically a consumer that says prices are too high
21 because of this monopoly.
22 This Court's specifically directed an amended
23 complaint to address the predatory pricing scheme claim,
24 which I guess has been abandoned now, I'm not sure, that
25 the lack of market power of the defendants and the

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1 admissions that -- the admission that the defendants did
2 not try to create their own monopoly and there is nothing
3 in there in their response.
4 Your Honor, it's troubling, their response
5 says, and this is a quote directly from their response,
6 Page 3, every case cited by the defendants was based on
7 Federal Rule 56 or (C)(10), that's what it says. First
8 of all, I can't imagine how it matters whether a case
9 citing the law was after trial or what kind of motion it
10 was based on. But, relevant especially to our request
11 for sanctions, I think this is an important thing for the
12 Court to see and understand. We cited cases in our
13 brief, anti-trust cases, that were decided on class
14 certification motions after trial, that's the Brunswick
15 case on Rule 56, on Rule 12C, judgment on the pleadings.
16 And, we also contrary to this claim that -- I mean, which
17 I guess implies we didn't cite any, every case cited by
18 the defense was based on Federal Rule of Procedure 56.
19 We cited two cases under Rule 12. Rule 12B6, the Brunson
20 Communs case, this is on the monopoly claim, the Court
21 held that the fact defendants products may herein after
22 replace all competition does not mean defendant has
23 actual monopoly power, that's Pastore, the Dahl concept,
24 future entry into market, that was on decided on 12B6.
25 The Court said penalties for anti-trust violations are

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1 severe and is a good social policy as well as legal
2 requisite to require specific allegations which clear
3 precedent demand before allowing the anti-trust case to
4 proceed. And, we also cited Tennessee Truck Stop case,
5 which is a Sixth Circuit case, this is on the other Count
6 I, contract combination of conspiracy. Sixth Circuit
7 case, where the Court held alleged violation must reduce
8 competition and plaintiffs injury must result from
9 decrease in that competition rather than some other
10 consequence of defendant's action, that's Hornbook
11 anti-trust law. And, the Tennessee Truck Stop case, 6th
12 Circuit, said at the end, sometimes, and this is to the
13 point of what kind of case, what kind of motion, or after
14 trial, or whatever it is, that generated the opinion of
15 law, the Court says sometimes as in the Brunswick case it
16 is not until after a full blown trial that it is
17 determined that there has been no anti-trust injury, if
18 this determination can be made with confidence on the
19 basis of the complaint it is better to cut the string
20 before substantial costs of litigating anti-trust cases
21 have occurred. All right. These are cases we cited.
22 The plaintiffs told you every case cited by the
23 defendants was based on Federal Rule 56 or (C)(10), so it
24 was obvious they didn't read the cases we cited before
25 they told you that the cases we cited were not based on

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1 Rule 12B6. And, also the cases that we cited that were
2 based on Rule 12B6, specifically said why it was
3 important where the complaint fails to state a claim that
4 you dismiss it under Rule 12B6 or in Michigan under Rule
5 (C)(8). They would say something so blatantly false it's
6 emblematic of the frivolous of these proceedings.
7 Count I and Count II, anti-trust claims should
8 be dismissed and sanctions should be awarded.
9 I also have some brief comments about the other
10 counts of the complaint.
11 Count III is tortuous interference, we move to
12 dismiss this, again, there is no response.
13 THE COURT: There is not any point in
14 addressing something that wasn't responded to in writing.
15 MR. MOOTHART: Not unless you want me to, your
16 Honor.
17 THE COURT: I don't.
18 MR. MOOTHART: Same would be true, your Honor,
19 of -- would be true of the unjust enrichment claim
20 recently added, there is no response to the motion on
21 that as well.
22 There is an expressed contract covering the
23 same subject matter, the only thing I would remind the
24 Court, and the reason I'm doing this is it might have
25 only been in my first motion on this. But, if it is I

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1 think it's only in my first motion in terms of wrongful
2 acts that could support a tortuous interference claim.
3 We cited two cases in our motion, the Hayes case and the
4 Dahl case, threats to compete and drive another guy out
5 of business are not illegal, it has to be more than a
6 mere threat. Even a statement that that's made with
7 malice is not illegal, assuming there were, so.
8 Thank you.
9 THE COURT: All right, thank you.
10 Mr. Kern.
11 MR. KERN: Thank you.
12 Beginning with Count I for the unlawful
13 contract, what was referenced as far as (C)(8) motions
14 was there was no authority cited as to the pleading
15 requirements. And, since this is a (C)(8) motion we are
16 pointing out there is no special requirement for pleading
17 an anti-trust claim. Now, so, what we did is we attached
18 a copy of the contract to say this is unlawful, we
19 indicate why. And, I think the pleadings adequately put
20 them on notice of a claim that they are facing, that is
21 the minimum requirements for (C)(8), motion as to the
22 Court's considerations of rule, reason, pleading
23 requirements, we made some adjustments to the complaint.
24 Number one was requisite market power. We
25 indicated there are only two parasailing businesses in

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1 Traverse City, historically over 20 years one has been at
2 Parkshore Resort, that is the market power of the
3 defendants for one in this pre-discovery case. This
4 contract removed 50 percent of the competition, the only
5 competition in parasailing in this market.
6 Second, as far as severe restraint of trade, we
7 are pointing out the difference between 50 percent of the
8 market is a severe restraint, if you take half of that
9 away you are going to effect the market.
10 And, I can move right into damages that the
11 Court found troubling. And, it said, I don't understand
12 how one competitor can be claiming damages from another
13 competitor agreeing not to compete with them. You have
14 to look at this business, a parasailing business is an
15 impulse recreational activity, people generally do it
16 because they see it going on as they are coming into
17 town. These boats ride along US-31 and are there only
18 for a short period of time, when their run is completed
19 they are way out of sight from shore. They have wind
20 considerations, depth considerations, crowds on the water
21 they are trying to avoid. But, when they are driving
22 along US-31 with that boat and parachute advertising on
23 that parachute generates most calls, customers see it and
24 say that's cool, I want to do that.
25 Now, with my client's boat as it runs by that

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1 shoreline it's only there for a brief period of time and
2 gone and out of view. When there's more competitors on
3 the water, more parasailing businesses, those are coming
4 in right behind, and there's more shoots and more boats
5 flying along US-31 and it overall improves the market for
6 parasailing, more people see it, more people say I want
7 to do it. They get to a hotel room, see a flier, it says
8 Traverse City Parasail and that's what I saw out there
9 I'm going to call it up and do it and they impulsively do
10 it. Now, you'll learn from discovery that in 2014 when
11 there was only my client's business on the water there
12 was a drop out significantly in the parasailing market
13 that was due to lack of advertising. You don't have that
14 other business running along the water and more
15 visibility then the overall market suffers and my client
16 suffered as a result of that. The contract is what
17 created that impact on the commerce on parasailing on
18 East Bay. So, my client lost business. It's the same
19 thing for the American dairy farmers, you'll notice "you
20 got milk" campaign, that is not one single business
21 trying to promote its sale of milk, it's trying to sell
22 the overall customer interests in that market and they
23 assume competitors will get their market share from that.
24 You take one major competitor, the only competitor in
25 parasailing, take that boat off the water, it reduces the

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1 availability of the product availability.
2 Aside from that, there's the most obvious
3 $35,000 paid in advancement of the unlawful contract, I
4 don't know how that can be said in anything other than
5 the anti-trust violation damages.
6 Now, as for the contract itself. The last time
7 that the Court considered whether it was properly pled,
8 it did so primarily off the cases cited by the defendant
9 due admittedly to lack of citing by plaintiffs not
10 realizing we are getting into talking about the full
11 substance of the anti-trust claim rather than just are
12 the defendants on notice of the claim that's been
13 asserted against them.
14 And, as we get into this anti-trust claim, the
15 first step is a step the defendants skipped, their whole
16 brief went right past determining what type of conspiracy
17 it is before saying, you didn't plead requisite market
18 power severe restraint in trade. They skipped the
19 identification of, is this horizontal conspiracy or
20 vertical conspiracy?
21 Horizontal conspiracy is between competitors.
22 A vertical conspiracy is when a manufacture and
23 distributor conspired together. Right now there is a new
24 one rising in the law about InBev, the beer company, the
25 Belgian company that bought out Bud Light. They see a

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1 rise in the craft brew businesses and they want to
2 discourage craft brews so they are creating an incentive
3 program to distributors, saying if you sell 98 percent of
4 InBev products then we're going to give you a bonus.
5 And, the craft breweries are saying, is this going to be
6 an anti-trust violation, that's your vertical conspiracy,
7 it's between your manufacturer and your distributor.
8 We have two competitors, Mr. Punturo, we
9 already added his exhibits, demonstrated his
10 competitiveness in this industry. He has an
11 advertisement that he created in order to start a
12 business as soon as my client quit paying, we just
13 recently received e-mails that demonstrate he was trying
14 to create that business as soon as he learned about my
15 client's agreement to purchase the other parasailing
16 business on the water. He even said in his papers, I got
17 the boats, the people, everything is in motion ready to
18 go. He was a competitor for over 20 years, he himself
19 drove the boat out there on the water, he got in trouble
20 from the Coast Guard for not having a captain's license
21 and doing that. He is a competitor, therefore is
22 horizontal conspiracy. The conspiracy is the contract
23 itself, an agreement combination between two people to
24 restrain trade. Two people are competitors and therefore
25 it's a horizontal conspiracy.

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1 Now, what type of conspiracy gets into reading
2 the contract itself. A market allocation is identified
3 by the language of the contract as 25 geographical miles.
4 Within this 25 geographical mile area that market is
5 going to be allocated from one competitor to the other
6 competitor, it's a direct unreasonable per se illegal
7 contract for that reason alone.
8 Then, you get into the second aspect of it, the
9 customer limitation. We will not touch any parasailing
10 customer, it didn't have anything to do with running
11 boats off there, jet skis, any other kind of water
12 recreational activity was I will stay out of your market
13 for 25 miles and stay away from parasailing customers for
14 25 miles. So it becomes not only a market allocation,
15 but also a customer litigation, you combine those two
16 together there can be no other explanation other than
17 unreasonable per se. And, Mr. Moothart would like to say
18 that the removal of one potential competitor does not cut
19 it when it comes to severe restraint of trade, that
20 cannot possibly be the scenario when there are only two
21 competitors in the entire area, there are three in the
22 entire state, you have Mackinaw and you have Traverse
23 City, anybody who wants to parasail in Michigan that's
24 the only place you are going. Once this contract was
25 signed it went from three options to two options.

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1 Now, when you get into the Wrongful Conduct
2 Rule, which we already previously argued is an
3 affirmative defense and need not be pleaded against from
4 the plaintiff's side of the view; nonetheless, we cited
5 the case of Orzel, which defines the differing degrees of
6 culpability. If one person acting under duress,
7 coercion, extortion enters into the contract they
8 certainly have a different degree of culpability than the
9 person who coerced them, intimidated them or extorted
10 them, and that gives my client the ability to overcome
11 the wrongful conduct rule affirmative defense. That's
12 for predatory price fixing, that is where Mr. Moothart is
13 correct, this is only threats. He made threats of
14 unlawful price fixing in order to coerce and extort my
15 client into signing the contract, those threats are not
16 the act that's being complained of. The act is the
17 contract. The act is what's wrong, the contract itself,
18 not the threats that got him to sign the contract. So
19 there is no predatory price fixing in itself claim, that
20 is just a demonstration of the threats being made to
21 induce, coerce my client into signing the agreement.
22 The monopoly claim is essentially Count I. But
23 without regard to the contract, the contract is then the
24 act of the attempt to monopolize. These two claims are
25 alternative theories for lack of a better word, one does

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1 not require any attempt to monopolize, two does. But two
2 does not require a contract, but one does. We believe we
3 have both scenarios here because of the severe restraint
4 being there is only one competitor and it becomes a
5 monopoly when you take it out of the market. Because
6 this is premature we didn't know the full scenario in
7 which they were attempting to monopolize, as much as we
8 now learned from the criminal aspect going on. As it
9 turns out once Mr. Punturo signed the agreement and took
10 himself out of market and left only one business it was
11 believed at that time we thought a monopoly was being
12 created in my client. Now it turns out that we learned
13 his business partner, defendant's business partner in the
14 tanning salon is the next competitor to enter the market
15 in parasailing. And, Mr. Punturo helped set up his
16 protege, Eric Harding, in his own business to compete
17 with Mr. Boyer. And, after having already got Mr. Boyer
18 to sign this agreement to pay him $20,000 per year not to
19 compete out of that document he now increased my client's
20 overhead by 20 grand above what Mr. Harding has to pay.
21 Mr. Harding can now undercut the market in his own way
22 because he doesn't have to pay $20,000 that my client has
23 to pay.
24 Now, I'm sure there is more we're going to
25 learn through the process of discovery when it comes to

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1 the acts in order to monopolize that business with Eric
2 Harding, we just do not yet have that information, we
3 just received a bunch recently.
4 When you get into the other claims of tortuous
5 interference, it's concerning that I hear the Courts say
6 you are not interested in hearing a response to something
7 that wasn't responded to in the brief.
8 THE COURT: That's right. I'm not here to
9 listen to arguments that you didn't care to put into your
10 brief, I never do that.
11 MR. KERN: If the complaint is adequately pled
12 for tortuous interference it should need any bolstering
13 from a brief to stand.
14 THE COURT: Sobeit. You don't get to argue
15 something you didn't write about.
16 MR. KERN: Fair enough. That's the only point
17 I wanted to make is we rest on our pleadings being
18 adequately pled when it comes to the issues of tortuous
19 interference.
20 THE COURT: Mr. Kern, I would think even you
21 would have to recognize, this does seem a bit upside
22 down. I would have assumed, without having read all
23 these briefs, you would have been here initially to argue
24 that the contract was unenforceable, it was induced by
25 fraud and coercion, your client was perhaps in some

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1 fashion extorted and seeks restitution of money he's
2 paid. Instead, you are telling me your client signed the
3 contract, that the threats weren't the wrong, that the
4 contracts the wrong, your client signs a contract to
5 reduce competition but that the competition would be
6 better for him and would make his business more
7 profitable. But, you are complaining because the
8 defendant has sent someone else to be a competitor, whose
9 competition theoretically would benefit your client.
10 I'm going to take a look at this, I'll give you
11 a written opinion.
12 I guess I'm going to be candid on the record, I
13 think I was before. Again, this is not an area which I
14 claim to have any expertise, but I will acknowledge that
15 what's happening here, the clear behavior that's
16 documented in text messages or e-mails is abhorrent, it's
17 ridiculous, it's absurd, it's immature, it's stupid.
18 But, the way you are going about addressing it, you've
19 got be baffled.
20 So I'm going to take another look at this. I
21 will --
22 MR. KERN: The unjust enrichment claim does
23 what you mentioned about seeking restitution, that's
24 exactly what it is when a contract is unenforceable.
25 THE COURT: Maybe that's all you've got left, I

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1 don't know, I'll take a look at it.
2 MR. KERN: In the intentional interference
3 claim he understands there is a contract with this client
4 and extorts him into paying and breaches the contract as
5 a direct intentional tortuous interference that was
6 originally pled in the anti-trust claim but only
7 separated out in the next amended complaint to be
8 separate and apart from anti-trust label attached to it.
9 THE COURT: 14 to 28 days you'll get a written
10 opinion.
11 MR. MOOTHART: Your Honor --
12 THE COURT: No, sir, I've had enough. Thank
13 you think, I've had enough.
14 MR. KERN: Thank you, your Honor.
15 MR. MOOTHART: Thank you, your Honor.
16 (11:13 a.m. - proceedings concluded)
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1
2 CERTIFICATE OF OFFICIAL COURT REPORTER
3
4 STATE OF MICHIGAN
5 COUNTY OF GRAND TRAVERSE
6
7 I, Karen M. Copeland, Official Court Reporter in and for
8 the County of Grand Traverse, State of Michigan, do
9 hereby certify that this is a true and correct transcript
10 of my stenotype notes with the assistance of
11 Computer-Assisted Transcription to the best of my ability
12 of the proceedings held before the Honorable Philip E.
13 Rodgers, Jr., Circuit Court Judge in the matter of BOYER
14 v. PUNTURO, File No. 16-31459-CP, on Monday, July 11,
15 2016.
16
17
18
19 S/: Karen M. Copeland
Karen M. Copeland, CSR-6054, RPR
20 Official Court Reporter
21
22 Dated: This 28th day of November, 2016
23
24
25

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

SABURI & DANIELLE BOYER, and
TRAVERSE BAY PARASAIL, LLC, a
Michigan Limited Liability Company,

Plaintiffs,

v

File No. 2016031459CP
HON. PHILIP E. RODGERS, JR.

BRYAN PUNTURO, individually, and
B & A HOLDINGS, LLC, a Michigan
Limited Liability Company,

Defendants.
/

Brace E. Kern (P75695)
Attorney for Plaintiffs

Jonathan R. Moothart (P40678)
Attorney for Defendants

DECISION AND ORDER GRANTING
DEFENDANTS' RENEWED MOTION FOR SUMMARY DISPOSITION

Saburi Boyer and Danielle Boyer own and operate Traverse Bay Parasail, LLC (collectively the "Plaintiffs"). Bryan Punturo, through his company B & A Holdings, LLC, (collectively the "Defendants") is an owner of the Parkshore Resort on East Bay. Traverse Bay Parasail operates out of the Parkshore Resort. On May 7, 2014, Defendants and Plaintiffs entered into a "Parasailing Exclusivity Agreement."[1] The Agreement prohibits Defendants from leasing, renting, using or occupying the Parkshore, or any property within 25 miles, for the purpose of conducting parasailing activities for a period of three years.[2] Furthermore, in exchange for a total of $57,000, the Defendants agreed not to compete with the Plaintiffs by

[1] Incorporated into and attached to the Agreement was a Personal Guaranty. The Agreement and Guaranty together shall be referred to as the Contract.
[2] See Parasailing Exclusivity Agreement.

DEFENDANT'S EXHIBIT E

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"engaging in any Parasailing Activities within 25 miles of the [Parkshore], either directly or indirectly" until October 31, 2016.[3]

The Plaintiffs filed a two-count Complaint on February 23, 2016.[4] On May 10, 2016, Plaintiffs filed an Amended Complaint, alleging Flagrant Antitrust Violation – Unlawful Contract (Count I), Flagrant Antitrust Violation – Unlawful Monopoly (Count II), Intentional Interference with a Contract/Business Expectancy (Count III) and Intentional Infliction of Emotional Distress (Count IV).[5] Plaintiffs then filed a Second Amended Complaint on June 20, 2016.[6] In each complaint filed, Plaintiffs claim that Defendants threatened to unlawfully compete with Plaintiffs by controlling, fixing and maintaining parasailing prices below the market rate unless Plaintiffs paid Defendants not to compete. Furthermore, Plaintiffs claim they were coerced into signing the Contract through "threats of physical, financial and reputational harm."[7]

On May 27, 2016, Defendants filed a Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and for Sanctions Pursuant to MCR 2.114, MCR 2.625(A)(2) and MCL § 600.2591. The motion requests that the Court dismiss, with prejudice, Counts I, II and III of the Plaintiffs' Amended Complaint. The Court heard oral arguments by the parties on July 11, 2016. After review of the evidence submitted and careful consideration of the parties' claims, the Court now issues this written decision and order for the reasons stated herein.

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, tests the legal sufficiency of a claim.[8] Only the legal basis of the complaint is examined.[9] The factual allegations of the complaint are accepted as true, along

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[3] *Id.* The parties agreed that Plaintiffs would pay $19,000 for each year of the Exclusivity Agreement, versus a lump sum payment. Defendants previously filed a complaint in the 86th District Court, Case No. 15-1870-GC, against the Plaintiffs for breach of contract for failure to pay pursuant to the Contract.

[4] Count I alleged Flagrant Antitrust Violation and Count II alleged Intentional Infliction of Emotional Distress, as to Saburi Boyer only.

[5] Count IV pertains only to Saburi Boyer.

[6] The Second Amended Complaint adds a fifth count (V) for unjust enrichment.

[7] The Second Amended Complaint states, "Although Mr. Boyer agreed to provide a non-compete template, Defendants were extorting him to do so and also dictated all of the terms to be contained therein, including: the amount of payments, the timeframes therein, who needed to be parties, that Plaintiffs needed to execute Personal Guarantees, that the title of the agreement be changed to "parasailing exclusivity agreement," that the party identifications therein be changed to lessor and lessee despite the fact that nothing was being leased, that Defendants reserved the right to final edits, and that if Plaintiffs failed to immediately provide a template then Defendants would write the agreement themselves, which terms Plaintiffs feared would worsen if they allowed Defendants to do so."

[8] *Spiek v Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998).

[9] *Feyz v Mercy Mem Hosp*, 475 Mich 663; 719 NW2d 1 (2006).

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with any inferences which may fairly be drawn therefrom.[10] Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied.[11] However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action.[12]

The Second Amended Complaint maintains that the Contract is unlawful because it is an agreement between two or more persons in restraint of, or to monopolize trade or commerce in the Traverse City parasailing market and because it seeks to exclude and limit competition and establish a monopoly in the Traverse City parasailing market. Count I asserts that the Contract "severely restrained trade in the Traverse Bay area parasailing market because it sought to exclude any competition from occurring at the primary historical location, and it increased the cost per ride to consumers during the 2014 season." Count II asserts that Defendants intended to create a monopoly in the local parasailing market by entering into the Contract with Plaintiffs and withdrawing completely from the parasailing business. Count III asserts that the Plaintiffs were forced to breach a separate contract to purchase parasailing equipment due to the payments required by under the Contract, stating, "the compelled breach…caused Plaintiffs to lose a $25,000 deposit…a parasailing boat…$60,500 in lost operating capital [and] $140,000 in net proceeds from the 2014 and 2015 parasailing seasons." Finally, Count V asserts that Defendants coerced and extorted Plaintiffs into signing the Contract and thus, Defendants inequitably and unjustly received and retained a benefit from Plaintiffs in an amount exceeding $35,000.

Before the Court discusses the above Counts, it will first address the Plaintiffs' suggestion that the Contract was adhesive in nature and that it was entered into under duress.[13] The question as to what constitutes duress as a basis for invalidation of a contract is a question of law, but whether duress exists in a particular case is a question of fact.[14] Duress, as a basis of

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[10] *Id.*

[11] *Mills v White Castle Sys Inc,* 167 Mich App 202, 205; 421 NW2d 631 (1988).

[12] *NuVision v Dunscombe,* 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). See also, *Roberts v Pinkins,* 171 Mich App 648, 651; 430 NW2d 808 (1988).

[13] Contracts of adhesion are characterized as agreements prepared by one party, which are offered for rejection or acceptance, without opportunity for bargaining and under the circumstances that the second party cannot obtain the desired product or service except by acquiescing to the agreement. *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005). A party may avoid enforcement of an adhesive contract only by establishing one of the traditional contract defenses, such as fraud duress, unconscionability or waiver. *Id.* However, Plaintiffs have not pled rescission of the Contract in any of their complaints.

[14] *Norton v Mich State Hwy Dept*, 315 Mich 313; 24 NW2d 132 (1946).

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invalidation of contract means compulsion or constraint by which a person is illegally forced to do or forebear some act and may be by violence threatened, the violence or threats being such to inspire a person of ordinary firmness with fear of serious injury to person, reputation or fortune.[15] Coercion as basis for invalidation of a contract means application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.[16]

While evidence of duress could invalidate the parties' Contract, the Plaintiffs are, in fact, seeking damages *pursuant to* the Contract.[17] Therefore, as Counts I, II and III are premised on the existence of the Contract, the Court will not address the Plaintiffs' claims of extortion/duress and will analyze the parties' claims pursuant to the terms stated in the Contract. In addition, Plaintiffs' Count V, unjust enrichment, fails as a matter of law for the same reason.

Whether a party has been unjustly enriched is a question of fact, however, whether a claim for unjust enrichment can be maintained is a question of law.[18] To sustain a claim for unjust enrichment, the plaintiff must establish (1) the receipt of the benefit by defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of a benefit by the defendant. The law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit by another.[19] However, a contract will be implied *only* if there is no express contract covering the same subject matter.[20] When there is an express contract between the parties covering the same subject matter, summary disposition of an unjust enrichment claim is properly granted.[21]

With regard to Plaintiffs' claim for unjust enrichment, it is undisputed that the parties entered into a Contract regarding parasailing activities in and surrounding Traverse City. Avoidance of the Contract, or rescission, on the ground of duress would entitle the Plaintiffs to

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[15] *Id.*

[16] *Id.* Moral duress consists of imposition, oppression, under influence, or the taking of undue advantage of the business or financial stress or extreme necessities or weaknesses of another. *Id.*

[17] There is evidence of threats to the Plaintiffs which preceded the Contract and Plaintiffs' could have could have claimed duress under an adhesion contract, sought rescission and return of the money paid to Defendants.

[18] *Morris Pumps v Centerline Piping, Inc.*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

[19] *Id.* at 194.

[20] *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). On a claim of unjust enrichment, a contract cannot be implied when an express contract already addresses the pertinent subject matter that allegedly created the inequity. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127; 676 NW2d 633 (2003). Unjust enrichment is an equitable doctrine to justify a quasi-contractual remedy that operates in the absence of an express contract. *Wuliger v Manufacturers Life Ins Co*, 567 F 3d 787 (CA 6, 2009).

[21] *Belle Isle Grill, supra* at 479.

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restitution for any benefit they conferred on the Defendants by way of part performance or reliance.[22] However, the Plaintiffs cannot maintain a claim for unjust enrichment because there is a preexisting express contract covering the same subject matter and rescission has not been pled. Therefore, as to Count V, the Plaintiffs have failed to state a claim on which relief can be granted.

It is axiomatic that antitrust laws are passed for the protection of competition, not competitors.[23] To establish a cause for relief by reason of a violation of the antitrust laws of the United States by a defendant, an individual plaintiff must allege that such violation was the proximate cause of special injury to his business or property, as distinguished from injury to other persons or to the public.[24] It is not enough to allege something forbidden by the antitrust laws and to claim general damage resulting therefrom, but the complaint asserting a statutory cause of action must affirmatively show the nature and character of the injury suffered, and that it was an injury to the plaintiff's business or property within the meaning of the statute.[25] More specifically, the Michigan Antitrust Reform Act (MARA) prohibits contracts, combinations and conspiracies in restraint of trade or commerce, allows certain agreements not to compete, prohibits monopolies and attempts to monopolize trade or commerce and provides remedies, fines and penalties for violations of the act.[26] Under MARA, a contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful.[27] Further, MARA prohibits the establishment, maintenance or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing or maintaining prices.[28]

The United States Supreme Court has held that, where new entry into certain market is easy, the requisite anticompetitive danger is lacking and summary disposition of the case is

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[22] American Law Institute, Contracts, 2d, § 376, p 222.
[23] *Brown Shoe Co. v United States*, 370 US 294, 320; 82 S Ct 1502; 8 L Ed 2d 510 (1962).
[24] *Sunbeam Corp v Payless Drug Stores*, 113 F Supp 31, 42 (ND Cal, 1953).
[25] *Id.*
[26] Act 274 of 1984; MCL § 445.771 *et seq.* In analyzing claims under MARA, state and federal precedent are relevant and "courts shall give due deference to the interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason." MCL § 445.784(2).
[27] MCL § 445.772.
[28] MCL § 445.773.

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appropriate.[29] To successfully prosecute monopoly claims, claimants must prove that violators possessed monopoly power in the relevant market and willfully acquired, maintained or used that power by anticompetitive or exclusionary means.[30] To show an antitrust injury, a party must prove that the claimed loss flowed from an anticompetitive aspect of the contract or conspiracy, not aspects that were neutral or beneficial to competition, even if there was a per se violation of the antitrust laws.[31] An antitrust violation may be per se illegal, however, the rule of per se illegality is only applicable to those cases which exhibit severe restraints of trade with little or no public benefit.[32] The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.[33]

In this particular case, the Contract limited the parasailing competition in the Traverse City area because Defendants were, at the time, the only competitors of the Plaintiffs. Therefore, the Plaintiffs were beneficiaries under the Contract and potentially increased their business as the sole parasailing providers. However, the Plaintiffs now claim, somewhat illogically, that the lack of parasailing competition severely restrained trade and *negatively* impacted their business.

First, and perhaps most importantly, the Plaintiffs entered into a Contract to limit competition by the Defendants. Yet, when Defendants fulfilled their obligations under the Contract, the Plaintiffs filed suit claiming restraint of trade and unlawful monopoly. Common sense and law dictate that plaintiffs who are not harmed by and/or who actually benefit from anticompetitive conduct do not suffer an antitrust injury and do not have standing to bring an antitrust claim. Here, as drafters of and the intended beneficiaries of the Contract, the Plaintiffs cannot now claim that they were actually harmed or suffered injuries when they received the benefit of their bargain, which was for the Defendants not to provide parasailing activities.

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[29] *Brooke Group Ltd. v Brown & Williamson Tobacco Corp.*, 509 US 209; 113 S Ct 2578; 125 L Ed 2d 168 (1993).
[30] *Chase v Northwest Airlines Corp.*, 49 F Supp 2d 553, 565 (ED Mich, 1999).
[31] Establishment of a per se violation of MARA does not mean that an antitrust injury was shown. *Manitou North America, Inc. v McCormick Intern., LLC*, unpublished opinion per curiam of the Court of Appeals, issued February 2, 2016 (Docket No. 324063). Proof of an antitrust injury and of a per se violation are distinct matters and must be established independently. *Atlantic Richfield Co v USA Petroleum Co*, 495 US 328, 344; 110 S Ct 1884; 109 L Ed 2d 333 (1990).
[32] *Mich Ass'n of Psychotherapy Clinics v Blue Cross and Blue Shield of Mich*, 118 Mich App 505, 514; 325 NW2d 471 (1982). If there is no per se violation of the statute, the court applies the "rule of reason" and determines in each case whether the facts, when weighed by the court in light of reason, reveal either a forbidden undue effect upon trade or an intent so unduly to affect it. *Standard Oil Co of NJ v United States*, 221 US 1; 31 S Ct 502; 55 L Ed 619 (1911).
[33] *Atlantic Richfield Co, supra.*

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Second, the Contract only limited competition from the Defendants and for a temporary time period. Plaintiffs have admitted that there are now additional parties serving the local parasailing market and after the Contract expires on October 31, 2016, Defendants may again provide parasailing activities locally. There is no evidence that entry into the local parasailing market is limited or difficult or that the parties' Contract severely restrained the parasailing trade.

Finally, the Plaintiffs cannot claim that the Defendants violated MARA by possessing monopoly power in the parasailing market because the Defendants were not even providing parasailing services during the Contract period. Any parasailing monopoly power would have been possessed by the Plaintiffs because they were the only providers during the 2014 and 2015 seasons. Defendants were not engaged in the parasailing market and had no market power, therefore, it is incongruous and nonsensical for Plaintiffs to claim they are owed damages under MCL § 445.773. The Plaintiffs factual allegations in Counts I and II are insufficient as a matter of law and fail to state actionable claims under MARA.

With regard to Count III, Plaintiffs claim they were forced to breach a separate contract to purchase parasailing equipment due to the payments required by under the Contract with Defendants. One who alleges tortious interference with a contract or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invalidating the contractual rights or business relationship of another.[34]

Plaintiffs suggest that the "per se wrongful acts" in this case were violations of MARA and extortion by the Defendants. However, the money paid by the Plaintiffs was done so pursuant to the Contract and this Court does not find any evidence that Defendants violated MARA. Moreover, the Plaintiffs have not alleged that Defendants committed any lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship with another. Without evidence of per se wrongful acts or malicious and unjustified lawful acts, the Plaintiffs have failed to state a claim on which relief can be granted.

For the reasons stated herein, the Court grants the Defendants' Renewed Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) and dismisses Counts I, II, III and V of the

[34] *Stanton v Dachille*, 186 Mich App 247; 463 NW2d 479 (1990).

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Plaintiffs' Second Amended Complaint.[35] Plaintiffs' Count IV, Intentional Infliction of Emotional Distress, as to Suburi Boyer, has not been resolved and the case remains open pending the remaining claim.

IT IS SO ORDERED.

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PHILIP E. RODGERS, JR., CIRCUIT COURT JUDGE, P29082

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

[35] While a party pleading a frivolous claim or defense is subject to sanctions, the Court will not assess damages in this case. MCR 2.114(F).

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APPENDIX 31

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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

Plaintiffs,

v

Case No. 17-32008-CZ
Judge: Thomas G. Power

BRACE KERN, an individual, and
SABURI BOYER and DANIELLE KORT, f/k/a
Danielle Boyer,

Defendants.
_____/

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DEFENDANT DANIELLE KORT'S MOTION FOR SUMMARY DISPOSITION AND CONCURRENCE WITH CO-DEFENDANTS' SUMMARY DISPOSITION MOTIONS SET FOR HEARING ON MAY 1, 2017

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NOW COMES Defendant Danielle Kort, by counsel, and moves for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) as follows:

1. This is a defamation action arising out of a prior criminal action filed by the Michigan Attorney General against Plaintiff Bryan Punturo.

2. Co-Defendants Kern and Boyer filed motions for summary disposition in lieu of answers on March 20 and the hearing on those motions is set for May 1, 2017.

3. Defendant Kort concurs with those motions.

4. Further, Plaintiffs' complaint attributes no actionable statements to Defendant Danielle Kort. Instead, it attributes allegedly defamatory statements to Co-Defendants Kern and Boyer (her attorney in the prior action and her ex-husband, respectively).

5. Plaintiffs' Complaint fails to state a claim against Defendant Danielle Kort, and must be dismissed for the reasons set forth in the motions for summary disposition filed by Co-Defendants Kern and Boyer, and for the reasons set forth in the attached brief of law.

WHEREFORE, Defendant Kort respectfully requests the Court enter an Order granting her motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10).

JAY ZELENOCK LAW FIRM PLC

Date: March 30, 2017

By: *__/s/ Jay Zelenock*

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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

Plaintiffs,

v

Case No. 17-32008-CZ
Judge: Thomas G. Power

BRACE KERN, an individual, and
SABURI BOYER and DANIELLE KORT, f/k/a
Danielle Boyer,

Defendants.
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DEFENDANT KORT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

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Defamation pleading principles and summary disposition:

Defamation cases are held to a heightened pleading standard, requiring that exact words of the alleged defamation be set forth explicitly in the complaint. See, e.g., *Thomas M. Cooley Law School v Doe 1*, 300 Mich App 245, 262-263 (2013)("A plaintiff claiming defamation must plead a defamation claim with specificity by identifying the exact language that the plaintiff alleges to be defamatory. For a claim of libel, a plaintiff must plead " '*the very words of the libel....* ' " Id. notes omitted)). This permits early use of summary disposition based on the complaint under the (C)(8) standard. The First Amendment and free speech values encourage the vigorous early use of summary disposition in defamation claims. See, e.g., *Ireland v Edwards*, supra, 230 Mich App at 613 n4("Summary judgment is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest and concern." *Id. quoting Lins v Evening News Ass'n*, 129 Mich App 419, 425 (1983)). It is an element of a defamation claim and the plaintiffs' burden to establish that the communication complained of was "unprivileged." See, e.g., *Thomas M. Cooley Law School v Doe 1*, *supra*, 300 Mich App at 262.

Application:

In this case, Plaintiffs' complaint attributes no actionable statements to Defendant Danielle Kort. Instead, it attributes allegedly defamatory statements to Co-Defendants Kern and Boyer (her attorney in the prior action and her ex-husband, respectively). The complaint alleges that Danielle Kort signed an affidavit filed to support pleadings in a prior litigation. (Complaint, at para. 44). However, the complaint does not set forth any

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allegedly defamatory statements contained in the affidavit. Id. Further, the complaint offers no factual allegations showing how the affidavit is not "privileged," as a document filed in a judicial proceeding. It is well-settled that statements made in pleadings in a lawsuit are absolutely privileged and cannot form the basis of a libel suit and that statements made in judicial proceedings are absolutely privileged. See, e.g., *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695, 108 NW2d 761, 762 (1961) and *Couch v Schultz*, 193 Mich App 292, 294, 483 NW2d 684, 685 (1992). Thus, Kort's affidavit is non-actionable as a matter of law. The complaint must be dismissed.

Concurrence with Co-Defendants' motions for summary disposition:

In this case, Plaintiffs' claims are barred as they are privileged, opinion, fair comment on issues of public concern and otherwise non-actionable as a matter of law as argued in greater detail in the motions for summary disposition filed by Co-Defendants Kern and Boyer. The context of all of the alleged comments on the criminal charges and the civil litigation (whether by Kern or Boyer) were understood by any reasonable listener to be statements of opinion from litigants about matters publicly disputed in litigation. Neither portrayed themselves as "neutrals" or were reasonably understood as neutral. Notably, no defamatory statements are attributed to Defendant Kort as outlined above. Further, the legal protections and privileges for free speech in defamation claims apply with equal force to "alternative legal theories" based on the same facts and thus require summary disposition of the remainder of the complaint's "alternative legal theories," as well as the defamation claims. See, e.g., *Ireland v Edwards*, 230 Mich App 607, 624 (1998)("It is clear these limitations are not exclusive to

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defamation claims. We conclude that these limitations apply to all of plaintiff's claims in this case."). Thus, Plaintiffs' non-defamation claims must be dismissed.

Plaintiffs' claims are barred by MCL 600.2911(6):

The Constitution and MCL 600.2911(6) bar claims for defamation brought by "public figures," unless a high standard is met:

> An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false. MCL 600.2911(6).

"Where one has 'projected himself into the arena of public policy, public controversy and pressing public concern, he is precluded by the constitution from recovering for published nonmalicious defamatory statements of and concerning him" under the "actual malice" standard set forth in *New York Times v Sullivan*, 376 US 254, 84 SCt 710, 11 LEd2d 686 (1964). *Hayes v Booth Newspapers, Inc*, 97 Mich App 758, 773 (1980). Plaintiffs Punturo and Park Shore Resort are "public figures" as to public discussion of proper (or improper) business and negotiation techniques in the East Bay tourism industry in Traverse City. Plaintiffs are prominent local business figures and the Park Shore is a large resort along East Bay beach and US 31 North. In addition to operating and marketing a high profile, high visibility resort business, Plaintiff Punturo has been active in business litigation and commenting on business practices in the East Bay tourism industry, including operating a website criticizing the business practices of the Tamarack Lodge (another East Bay resort less than a mile away), and hiring picketers to stand along the US 31 North highway during the busy summer tourism

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season to give additional publicity to his website offering scathing public criticism of the Tamarack's business practices and the alleged harm to investors. (**Exhibit A**, Park Shore Resort; **Exhibit B**, Tamarack Lodge; **Exhibit C**, google maps .7 distance between Park Shore and Tamarack; and **Exhibit D**, "Tamarack Lodge Developer Suing Investor, The Ticker October 8, 2013). Compare *Lins v Evening News Ass'n*, 129 Mich App 419, 425 (1983)(Labor union officials referred to as "thieves, thugs, stupid men, crooked officials, animals and union hoods" by newspaper were "public figures") and *Hayes v Booth Newspapers, Inc*, 97 Mich App 758, 773 (1980)(trial attorney "public figure" as to trial issues, where he made statements to the media).

Plaintiffs' complaint does not allege facts establishing that Defendant Kort made any statement with "actual malice" under the standard set forth in *New York Times v Sullivan*, 376 US 254, 84 SCt 710, 11 Led2d 686 (1964). "'Actual malice' here means knowledge of the falsity of the published statements or reckless indifference as to whether they were true or false. Actual malice is to be distinguished from a bad or corrupt motive or some personal spite or desire to injure the plaintiff." *Hayes v Booth Newspapers, Inc*, *supra*, 97 Mich App at 774. "In order for a public figure to establish actual malice, that class of plaintiff must prove that the defendant in fact entertained serious doubts as to the truth of his publication, at least absent proof of a knowing falsehood." Id. 97 Mich App at 775. It is an element of a defamation claim and the plaintiffs' burden to establish that the communication complained of was "unprivileged." See, e.g., *Thomas M. Cooley Law School v Doe 1*, *supra*, 300 Mich App at 262. Plaintiffs' complaint fails to state a claim and must be dismissed.

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WHEREFORE, Defendant Kort respectfully requests the Court enter an Order dismissing Plaintiffs' Complaint pursuant to MCR 2.116(C)(8) and (C)(10).

JAY ZELENOCK LAW FIRM PLC

Date: March 30, 2017

By: *__/s/ Jay Zelenock__*

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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

Plaintiffs,

v

Case No. 17-32008-CZ
Judge: Thomas G. Power

BRACE KERN, an individual, and SABURI BOYER and DANIELLE KORT, f/k/a Danielle Boyer,

Defendants.
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INDEX OF EXHIBITS
DEFENDANT KORT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

Exhibit A Park Shore Resort Photo

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Exhibit B Tamarack Lodge Photo

Exhibit C Google map showing .7 distance between Park Shore and Tamarack

Exhibit D Tamarack Lodge Developer Suing Investor, The Ticker October 8, 2013

JAY ZELENOCK LAW FIRM PLC

Date: March 30, 2017

By: *__/s/ Jay Zelenock__*

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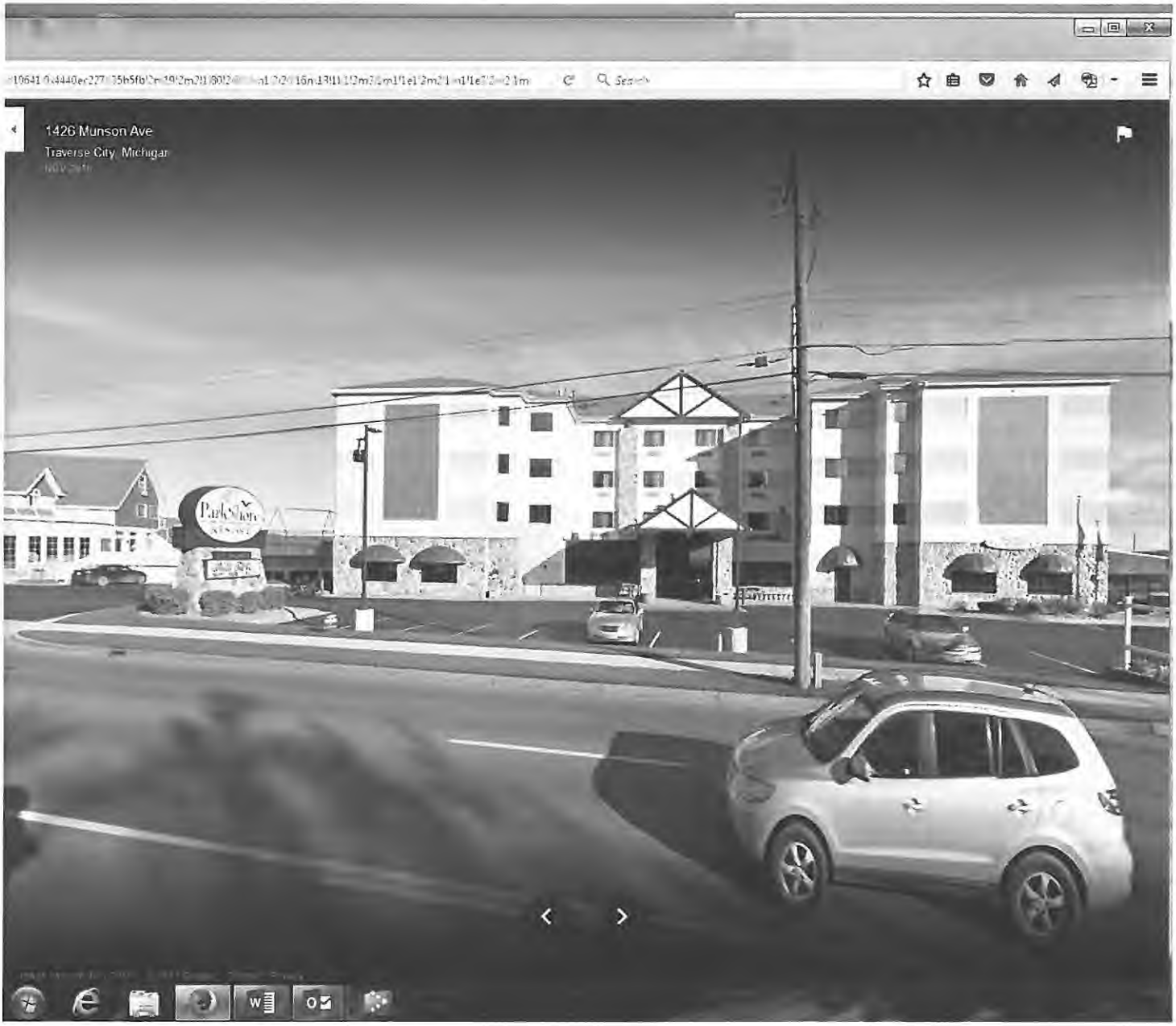

DEFENDANT'S EXHIBIT
A

Kort's MSD

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DEFENDANT'S EXHIBIT
B

Kort's MSD

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Google Maps google maps parkshore resort, traverse city to Tamarack Lodge Resort

Drive 0.7 mile, 1 min

via US-31 N — 1 min

Fastest route, the usual traffic — 0.7 mile

8:46 AM–8:51 AM — 5 min

14

via US-31 N — 14 min

0.7 mile

DEFENDANT'S EXHIBIT

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TICKER News

Thursday, March 30, 2017

Today's News Share

Tamarack Lodge Developer Suing Investor

By Beth Milligan

October 8, 2013

Two prominent local developers will square off in court after exchanging accusations of deception, financial mismanagement and damaged community standing stemming from a soured investment deal at Tamarack Lodge in Traverse City.

Richard "R.C." Hermann, owner and developer of the US-31 resort and fractional condo ownership complex, filed a lawsuit Friday in Grand Traverse County 13th Circuit Court against Bryan Punturo, owner of Parkshore Resort and a Tamarack investor. Hermann is accusing Punturo of defamation, false light invasion of privacy and tortious interference with a business relationship.

The lawsuit was prompted by Punturo's creation in August of a public website on which he accuses Hermann of being "financially insolvent" and lays out a detailed, unflattering investment history of Tamarack Lodge. That history depicts Hermann as deceiving backers, misrepresenting the company's fiscal health and failing to meet promised development benchmarks, among other claims.

Punturo, who invested $50,000 in the project in 2005, says he was promised repayment within 36 months at an interest rate of 25 percent, for a yield of $87,500 at maturity. After the repayment period came and went, he and other investors were informed sales at Tamarack were not up to projections and repayment wasn't feasible, Punturo alleges.

In the ensuing years, he continues, additional investors have been recruited to shore up losses in the development, while members of the original backing class saw their shares repeatedly diluted and are still awaiting repayment.

Hermann acknowledges "the recession significantly hurt the pace of sales at Tamarack and put us several years behind in the execution of our original business plan," but calls the details presented on Punturo's website "masterful works of fiction." He says the majority of his investors agreed to contribute more capital and voted for new financial terms to cover the project's recession setbacks, and that Punturo had his shares diluted under that vote since he declined to participate in the new terms.

"(Punturo) recently demanded that either I or the venture redeem or buy out his minority investment, which is in clear violation of the venture operating agreement," Hermann says. "I declined...and he followed with a clear threat to kill the condominium sales program."

Punturo's website is an attempt to make good on that threat, argues Hermann, as was his hiring of picketers over this past busy summer tourist season to stand outside Tamarack Lodge with a sign displaying the URL for the website. Hermann says Punturo's actions have caused him "substantial economic injury" and "loss of esteem and standing in the community."

For his part, Punturo counters that his goal was simply to inform prospective buyers of the "underlying facts" regarding the venture, so they could make an "informed decision" on whether or not to invest in the development.

"I realize the liability I potentially face with my approach, (but) I have been advised by counsel that I cannot be held liable as long as I can prove that the information is indeed fact," Punturo says. "My information is very accurate, or I would not take a chance in presenting it as I have."

Hermann – who is represented by Traverse City-based Kuhn, Darling, Boyd & Quandt, PLC in the lawsuit – says he intends to "vigorously pursue...all legal options which are available, including claims for significant damages." Once a copy of the complaint and summons has been delivered to Punturo, the investor will have 28 days to respond to the lawsuit in court.

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DEFENDANT'S EXHIBIT

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APPENDIX 32

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiffs/Appellees/Cross-Appellants,

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

Defendants/Appellants/Cross-Appellees.

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

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

_____/

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APPELLEES' AND CROSS-APPELLANTS' *JOINT* BRIEF ON APPEAL

REGARDING AND IN RESPONSE TO
BRIEFS ON APPEAL OF DEFENDANTS/APPELLANTS/CROSS-APPELLEES
SABURI BOYER AND DANIELLE KORT

ORAL ARGUMENT REQUESTED

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiffs/Appellees/Cross-Appellants,

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

Defendants/Appellants/Cross-Appellees.

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

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

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Statement of Jurisdiction

This Court has jurisdiction of this application pursuant to MCR 7.203(B)(1) and MCR 7.205(E)(3). The May 18, 2016 order of the trial court is not a final judgment appealable as of right, but is reviewable on leave granted.

Standard of Review

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

Statement of Questions Involved

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

The trial court answered "yes."

Plaintiffs answer "yes."

Defendants answer "no."

B. Did the trial court properly rule that the *per se* defamatory statements of Defendants and their attorney were not mere opinion or hyperbole?

The trial court answered "yes."

Plaintiffs answer "yes."

Defendants answer "no."

C. Did the trial court properly rule that factual issues precluded summary disposition on Defendants' claim that they could not be liable for the *per se* defamatory statements of their attorney as a matter of law?

The trial court answered "yes."

Plaintiffs answer "yes."

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Defendants answer "no."

D. Did the trial court err in denying Plaintiffs' motion for summary disposition pursuant to MCR 2.116(I)(2)?

The trial court answered "no."

Plaintiffs answer "yes."

Defendants answer "no."

I. Introduction.

Defendants Boyer and Kort, represented by the same attorneys, have made nearly identical arguments, and Defendant Kort has concurred in the briefs on appeal of Defendants Kern and Boyer, stating on page 14 of her brief on appeal that "[f]or the sake of brevity, Ms. Kort will not repeat all the arguments of Co-Defendants Kern and Boyer here." Plaintiffs will file a separate joint brief as Appellees and Cross Appellants to the Kern brief on appeal, but to avoid repetition in their response to the briefs of Defendants Boyer and Kort, will combine their arguments into one brief. Facts and arguments specific to only Defendant Kort will be so designated.

Defendants have made three arguments in support of their application, none of which is valid. Following is a list of the principal issues with a brief explanation of Plaintiffs' response. Also, Plaintiffs should have been, but were not, granted summary disposition as to Defendants' liability for *per se* defamatory statements they made; argument regarding that issue follows in the appropriate section of this brief.

A. Fair reporting privilege. This privilege does not apply, because the statements of Defendants and their attorney (hereinafter referred to as "Defendants" unless otherwise indicated) did much more than "merely summarize what was alleged" in pending legal proceedings. Rather,

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Defendants "said with certainty" that Punturo committed the crimes of antitrust violations and extortion.[1] And, Defendants' attorney did so in clear violation of the Michigan Rules of Professional Conduct. Under Defendants' perverse reading of Michigan law, "words imputing the commission of a criminal offense," which are defamation *per se*[2] and have been such from the beginnings of Michigan appellate decisions,[3] would be uniformly cloaked with an absolute privilege whenever, and merely because, the person defamed has been sued regarding or charged with a crime of which he is legally presumed innocent until proven guilty beyond a reasonable doubt.

B. Opinion and hyperbole. This defense is invalid because Defendants did not merely generally accuse Punturo of being a "crook." Rather, Defendants unequivocally accused him of specific criminal acts, not only provable as false, but actually proven false, as reflected in the orders of the Grand Traverse County District and Circuit Courts. Especially given that Defendants' statements to the press were made while Punturo was being (1) sued by Defendants for antitrust violations; and (2) prosecuted for the crime of extortion, their claim that "extortion" is just a general buzzword rings hollow. Finally, case law is clear that language that accuses or strongly implies criminal activity is simply not subject to an "opinion" defense.

C. Liability for *per se* defamatory statements of attorney. Defendants claim that the trial court erred in ruling that fact issues precluded summary disposition in their favor, arguing that they are not liable for statements made to the press by their lawyer, as a matter of law. Yet, they cite not one case so holding, and fail to address the fact that what they themselves characterize as "the

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[1]*Bedford v Witte*, 318 Mich App 60, 901 NW2d 393 (2016).

[2]MCL 600.2911(1).

[3]See, e.g., *Bronson v Bruce*, 59 Mich 467, 472; 26 NW 671 (1886).

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bulk" of the defamatory statements were made in fulfillment of their lawyer's threat to make them, on the day he threatened to make them, in that lawyer's failed attempt to coerce Plaintiffs into paying Defendant Boyer and Defendant Kort f/k/a Boyer ("Boyers") $750,000, in exchange for which this lawyer said Boyers would help Plaintiff Bryan Punturo "get out of hot water" in criminal proceedings instituted against him by the Michigan Attorney General at Defendants' urging.

The truth is that applicable case law from both Michigan and other States shows that Boyers were and remain liable for their attorney's statements, and that the trial court's ruling that fact issues existed was actually overly generous in Boyers' favor.

II. Statement of Facts.

As pleaded in Plaintiffs' complaint:

Plaintiff Bryan Punturo is a Traverse City businessman, who owns 50% of Plaintiff B&A Holdings, LLC, the operating company for the ParkShore Resort on East Grand Traverse Bay. He manages and operates the ParkShore, performing a wide range of duties including hiring of employees, oversight, tending bar, cooking in the ParkShore restaurant, and also repair, maintenance, and other duties. Plaintiff Fawn Punturo, who has joined in this case for loss of consortium, is Bryan Punturo's spouse, and is also employed by the ParkShore, with duties that include management, oversight, working the front desk, and booking and coordinating special events including weddings and other large group gatherings that are a significant and important part of the ParkShore's business activities and income. Plaintiffs are private figures, and the success of their business depends upon their reputations for honesty and legal and fair dealing and business character.

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

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

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

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

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

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

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showing Boyer texts to O'Dell and Casey Punturo, and subsequent non-compete signed by O'Dell);

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

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

Due to bad weather conditions for parasailing in 2014, and Boyer becoming financially overextended in his business, Boyer defaulted in payments on his asset purchase agreement with Casey Punturo and the lease with Punturo. Punturo filed suit to collect the amount due, requesting damages of $24,500. Boyer did not respond to Punturo's suit. Instead, with the guidance and at the advice of Defendant Kern ("Kern"), Boyer contacted, first, the Grand Traverse County prosecutor's office, and when it declined the case, the Michigan Attorney General, accusing Punturo of antitrust violations. In November, 2015, the Attorney General and the Michigan State Police raided Plaintiffs' offices, confiscated the hard drive of Plaintiffs' computer, and contacted counsel for Punturo, explaining Punturo was being investigated for criminal antitrust activity.

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

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with extortion, a 20-year felony ("the Extortion Case"). **The Court should note that in Defendants' brief, Defendants list the order of these events in reverse chronological order. The Court should note that the Antitrust Case was filed in February, 2016, three months prior to the filing of the Extortion Case.**

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

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

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

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

* the "best opportunity to help out" Punturo in the criminal case was to "make it right by my clients";

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

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* that the way to do this would be for Punturo to settle the pending antitrust case by buying Boyers' parasailing business, with assets worth, at the very most, $250,000, for $800,000;
* that Punturo could then use the purchase of Boyers' business as a defense in the Extortion Case by explaining it was a way for Punturo to "mitigate the harm, pay restitution, and just make it right";
* that Punturo would be required to pay restitution in the Extortion Case and Kern's proposal would lessen the impact of the victim statements, by Punturo having shown he was sorry and wanted to make up for the harm he had caused Boyers and obtain their forgiveness, and that this would "deflate the sails of the Attorney General";
* that Kern was going to amend the complaint in the Antitrust Case adding additional facts in affidavits from Boyers and other documents that would make Punturo look bad;
* that he had already gotten a call from the Traverse City Record-Eagle about the upcoming arraignment and the Record-Eagle planned to be there. Of course, Kern had already accused Punturo of antitrust violations in the Record-Eagle on February 28, 2016, so this threat was consistent with Kern's past conduct;
* that if Kern had to file an amended complaint on Monday, May 9, 2016, the day before the arraignment in the Extortion Case, with the additional things attached, "they're gonna couple that with what happens on Tuesday morning and blow it up" into "a bigger story";
* that if Judge Rodgers "never sees that whole nastiness play out" it would be better for Punturo at the extortion sentencing, comparing Punturo's possible fate in the Extortion Case to that of the defendant in the Grand Traverse County case of *People v Derek Bailey*, in which the defendant had been, four days earlier on May 2, 2016, sentenced to 25 – 50 years

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in prison, and warning Punturo's attorney that Judge Rodgers had been "ticked off the most" by Defendant Bailey's refusal to accept responsibility for what he did;[6]

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

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

Two days later, on May 8, 2016, Kern e-mailed Punturo's counsel, reducing the money requested in exchange for not talking to the Record-Eagle on Tuesday morning, to $750,000, and stating that as a part of the proposed deal, "[m]y clients will publicly acknowledge that they are impressed by Bryan taking a proactive approach to rectify any harm caused by any misunderstandings and that all has been forgiven and forgotten," and also, that "[m]y clients will appear as subpoenaed to do so, or requested by your client to do so, to inform any relevant parties that they bear no hard feelings," and that "[t]here will be a non-disparagement agreement through which neither will speak ill of each other moving forward." **Exhibit C**.

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

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

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

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

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

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

Moothart argued in a response that Punturo's messages . . . were made to collect a rightfully owed debt. It stated that the Boyers initiated the contract, based on a text message Saburi Boyer sent Punturo. Kern said **the correspondence showed** otherwise. He said he doesn't know of any other **antitrust case with such significant extortion**. "This one involves more significant threats, and more significant sums of money," he said. "It affects the Traverse City tourism business, which is a very important industry to this area."

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

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

Kern: "disgusted that it goes on around here"

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

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

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

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

Reporter: "Why do you think they paid?"

Kern: "Fear. Believing it."

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

Kern: "Yes."

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

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

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

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

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

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

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

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

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

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

f. Interlochen Public Radio website May 10, 2016:

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

Later news reports continued the onslaught:

g. Northern Express November 19, 2016

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

With a new boat, Boyer needed more dock space. He said he decided to approach Punturo. He said he hoped enough time had passed, and he could lease space at the ParkShore again. "That's when he said, I've got a better idea. Why don't you **stay the hell off my dock and pay me anyway**," Boyer said in an interview.

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

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

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

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

Facts specific to Kort appeal. Of particular note in regard to Defendant Kort's application for leave, the amended complaint filed in the Antitrust Case on May 9 (**Exhibit 7**) named three plaintiffs – (1) Defendant Kort; (2) her husband Saburi Boyer; and (3) the operating company for their parasailing business, Traverse Bay Parasail, LLC. It contained four counts – (1) flagrant antitrust violation for unlawful contract, requesting damages of $781,500 plus attorney fees; (2) flagrant antitrust violation for unlawful monopoly, again requesting damages of $781,500 plus attorney fees; (3) intentional interference with contract/business expectancy, requesting damages of

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$260,500 plus attorney fees; and (4) intentional infliction of emotional distress, requesting an unspecified amount of damages. Although the intentional interference count specified that it was brought "On behalf of Plaintiff Mr. Boyer only," **Exhibit 7**, p. 18, all three remaining counts were brought on behalf of all three plaintiffs, including Defendant Kort.

All of Boyers' antitrust, unjust enrichment, and tortious interference claims were dismissed by the Grand Traverse County Circuit Court pursuant to MCR 2.116(C)(8). Then, the Extortion Case was dismissed by the Grand Traverse County District Court at the preliminary examination stage. Although the Michigan Attorney General initially appealed the District Court's ruling, the appeal was later voluntarily dismissed and the criminal case is now closed.[7] This suit followed and, as noted, the trial court denied Defendants' motion for summary disposition.

III. Argument.

A. Preliminary issues.

First, it is clear that as required by applicable case law, Plaintiffs have set forth the specific words uttered by Defendants claimed to be defamatory, and the recitation above demonstrates as a threshold matter that many of these statements unequivocally accused Punturo of antitrust violations and extortion. The other, accompanying statements "must be examined 'in [their] totality in the context in which [they were] uttered or published,'" and "a court must consider all the words used in allegedly defamatory material, 'not merely a particular phrase or sentence.'" In sum, "'context'

[7]Defendant makes a show of quoting the *dismissing judges*' negative comments about Plaintiff Bryan Punturo; however, all of these comments were made in proceedings (civil (C)(8) motion and criminal preliminary examination), the subjects of which were unrefuted allegations of Boyers, which those judges held were legally insufficient. In other words, given the procedural status of the cases at the time the comments were made, these judges had never heard Punturo's side of the story. In any event, the judges' comments are wholly irrelevant to the issues in this appeal.

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must be considered when an alleged defamatory statement is reviewed for a determination of whether it implies a defamatory meaning." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 129; 793 NW2d 533 (2010).

Here, the context was (1) Defendants were suing Punturo claiming extortion and antitrust violations; (2) Punturo was being prosecuted for extortion at Defendants' request and urging; (3) using a 25-50 year sentence handed down 4 days earlier as an example of what could happen to Punturo, Kern had threatened to take his, and the Attorney General's, as-yet unproven allegations of criminal conduct to the media, if Plaintiffs did not fork over $750,000; and (4) when Plaintiffs did not pay up, Defendants began publishing their unequivocal criminal accusations, telling the press things such as "Punturo flagrantly violated antitrust laws," "there was extortion for the past two years," "I realized it violated antitrust laws," "I recognized extortion," "correspondence showed . . . significant extortion," "paying the extortion money," "glad the attorney general takes antitrust violations and extortion seriously," "I was being extorted," "extortion money," "this is an antitrust violation," and "this is extortion." In this context, the other false statements, such as references to specific threats – "he was going to hurt me,""bury me," etc., all refer and relate to and support in context, the accusations of criminal acts, and as such, are properly a part of the defamation sued for.

Second, it is clear that false accusations of antitrust violations and extortion, are defamation *per se*. In *Lakin v Rund*, 318 Mich App 127, 896 NW2d 76 (2016), this Court held that "words charging an individual with a crime only constitute defamation per se if the crime involves moral turpitude or would subject the person to an infamous punishment." Whether punishment is "infamous" is determined by whether the crime is punishable by incarceration in prison as opposed to jail ("certain crimes that the Legislature has labeled 'misdemeanor' may also be

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considered a felony for purposes of the Code of Criminal Procedure and result in a prison sentence"). Here, Defendants accused Punturo of extortion, a 20-year felony, MCL 750.213, and antitrust violation, nominally a misdemeanor but punishable by up to two years of imprisonment, MCL 445.779. Thus, although Plaintiffs have pleaded special damages, they need not prove any, because under applicable law, damages are presumed under the *per se* standard for their claims. *Burden v Elias Bros*, 240 Mich App 723; 613 NW2d 378 (2000).

B. Defendants' arguments fail.

1. Fair reporting privilege does not apply. The case relied upon by the trial court on this issue is *Bedford v Witte*, 318 Mich App 60, 901 NW2d 393 (2016). Notably, Defendants assiduously avoid discussing or even mentioning *Bedford* at all in their appeal briefs. In *Bedford*, this Court held that the fair reporting privilege applied to the filing of the complaint and its publication on the filing attorneys' website, but also held that it did not apply where the Defendant's media comments were "an expansion beyond the public record." This Court stated:

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

In the instant case, Defendants claim they are in the clear, perhaps merely because Defendants did not actually utter the words "we can say with certainty" when accusing Punturo of crimes. Yet, Defendants *said* Punturo committed crimes "with certainty" – "the contract . . . violates the Michigan Antitrust Reform Act"; "there was extortion for the past two years"; "correspondence showed . . . significant extortion"; "I realized it violated antitrust laws"; "I recognized extortion";

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"paying the extortion money"; "Punturo flagrantly violated antitrust laws"; "glad the attorney general takes antitrust violations and extortion seriously"; "I was being extorted"; "this is an antitrust violation"; "this is extortion." Thus, under *Bedford*, denial of summary disposition was entirely proper. As the court in *Merritt v Thompson (In re Thompson)*, 162 BR 748, 764 (Bankr ED MI 1993) stated:

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

In the analogous context of the judicial proceedings privilege, this Court held in *Timmis v Bennett*, 352 Mich 355, 365; 89 NW2d 748, 753 (1958), that an attorney's statements in a letter regarding which he contemplated bringing suit were not privileged, because the privilege does not apply to statements "not uttered in the course of a judicial proceeding" and that "[a] repetition of privileged words uttered in the course of judicial proceedings, when no public or private duty requires an attorney to repeat them, may place him on the same footing as anyone else who utters defamatory statements about another."

Here, as to Defendant Kern, there was certainly no such duty to repeat anything – indeed, MRPC 3.6, while allowing lawyer comments on basic facts "without elaboration," prohibits any "extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an

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adjudicative proceeding in the matter," which expressly includes a statement that relates to "(1) the character, credibility, reputation, or criminal record of a party, [or] of a suspect in a criminal investigation . . .; and (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration." Indeed, Rule 3.6 even *prohibits a statement to the press* "(6) . . . *that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty*" (emphasis supplied). When one contrasts Defendants' vituperative and unequivocal statements to the media, with the Attorney General's carefully worded and ethically compliant press release attached to Defendant Boyer's application as Exhibit D (referenced at p. 12 of Defendant Boyer's brief), it is clear that Defendants' claim that their and their attorney's statements, as this Court put it in *Bedford*, "merely summarize what was alleged" by the Michigan Attorney General in the Extortion Case, or by Defendants in the Antitrust Case, is specious.

The privilege claimed to apply appears in MCL 600.2911(3) – "a fair and true report" of the Antitrust Case and the Extortion Case.[8] Even Boyers do not claim that Kern did not violate Rule 3.6, or that Kern, a Michigan licensed attorney, can credibly claim that his accusations against Plaintiffs, in complete and utter violation of MRPC 3.6, were "fair" and "true." As noted in the Introduction section above, such a reading of Michigan law would result in the absurd situation in which "words imputing the commission of a criminal offense," which are defamation *per se* pursuant to MCL 600.2911(1), would *always be absolutely privileged* whenever, and merely because, the person

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

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defamed has been sued with allegations regarding, or charged with, a crime of which he is legally presumed innocent until proven guilty beyond a reasonable doubt – a sacrosanct principle of American jurisprudence, generally known to anyone who has taken a civics class in high school.

The opinion of the Ohio Supreme Court in *Am Chem Soc v Leadscope, Inc*, 133 Ohio St 3d 366, 392; 978 NE2d 832, 854–55 (2012)(**Exhibit 1**) demonstrates the relationship between a violation of Rule 3.6 and defamation:

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

Defendants rely heavily on this Court's ruling in the case of *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 264; 487 NW2d 205 (1992), for its holding that "[t]echnical inaccuracies in legal terminology employed by nonlawyers such as those at issue here fall within this category [of commonplace and non-defamatory misconceptions]. Numerous courts have rejected claims of falsity when based on a misuse of formal legal terminology. We have recognized that the popular sense of a term may not be technically accurate." Fair enough. Yet, Boyers fail to explain the "technical inaccuracy" actually at issue in *Rouch* – the newspaper had published that the plaintiff was "charged" with sexual assault, when he had only been arrested and booked, but never arraigned, with the police eventually pursuing another suspect. *Id*., 440 Mich at 249-250. Unremarkably, the

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Michigan Supreme Court held that the newspaper's error was not actionable under the "technical inaccuracy by a layman" principle cited.

Obviously, this case is much different. Boyers' apparent claim – that because they are laypeople, they did not comprehend what "extortion" meant, and that their repeated use of the term was an innocent mistake, all while Punturo was undergoing active prosecution for extortion at Boyers' urging – is just silly. Of course, given the trial court's ruling that fact issues exist, Boyers are certainly free to attempt to sell this story to the jury, but it fails as a basis for dismissal as a matter of law.

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

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

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

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

2. Defendants' statements were not mere opinion or hyperbole. This defense is, put bluntly, frivolous. First, this Court has stated that "the United States Supreme Court has rejected the idea that all statements of opinion are protected and has directed that the defamatory statement must be provable as false to be actionable." *Kevorkian v Am Med Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999). If a statement is purely opinion it is not actionable, but a protected "opinion" means something that is purely a subjective assertion ("in my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" – not actionable) versus factually verifiable statements ("In my opinion Mayor Jones is a liar"– actionable). *Id.*

Defendants argue that every accusation of criminal conduct, where there are underlying civil or criminal proceedings containing allegations of such, is a non-actionable "opinion." Aside from the above-noted absurdity of vitiating the established *per se* rule for accusations of criminal conduct, "[d]irect accusations or inferences of criminal conduct or wrongdoing are not protected as opinion . . . . There is no First Amendment protection for 'a charge which could reasonably be understood as imputing specific criminal conduct or other wrongful acts.'" *Hodgins v Times Herald Co*, 169 Mich App 245, 253-254; 425 NW2d 522 (1988). As this Court stated in *Kevorkian*, actionable

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statements include "direct accusations or inferences of criminal conduct [citing *Hodgins*]. Language that accuses or strongly implies that someone is involved in illegal conduct crosses the line dividing strongly worded opinion from accusation of a crime." *Kevorkian*, 237 Mich App at 8, 602 NW2d at 237.

Nor can the statements of Defendants and their attorney be viewed as mere rhetorical hyperbole, – "[e]xaggerated language used to express opinion, such as 'blackmailer,' 'traitor' or 'crook,'" that "does not become actionable merely because it could be taken out of context as accusing someone of a crime." *Id*. Punturo, who had been **sued for antitrust violations** and who was being **prosecuted for extortion**, is not taking Defendants' accusations "out of context" – just the opposite. The context in which Defendants' statements were actually made clearly shows their meaning as defamation *per se*. Moreover, Defendants' citations to cases involving businesspeople who made "colloquial or hyperbolic" references to extortion, where no criminal charges had been filed, are simply inapt here – and it is difficult to imagine a "colloquial or hyperbolic" accusation of "flagrant antitrust violations."[9][10]

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[9]Although obviously not actionable and wholly irrelevant to this case anyway, real examples of "rhetorical hyperbole" can be found in the cited comments of Judge Phillips and Judge Rodgers about Punturo in dismissing the extortion and antitrust cases.

[10]Cases cited by Defendant include *Greenbelt Co-op Pub Ass'n v Bresler*, 398 US 6 (1970)("use of term 'blackmail,' in characterizing negotiating position of public figure, who was seeking zoning variances at time city was attempting to acquire from him another tract"); *Hogan v Winder*, 762 F3d 1096, 1108 (CA 10 2014)(accusation of "extortion" as rhetorical flourish made by lawyer in a letter discussing the parties' employment dispute); *Friedman v Bloomberg LP*, 180 F Supp 3d 137 (D Conn 2016)("reasonable reader would have understood employer's use of word "extort" against upset former employee as statement to reflect its belief that employee had filed frivolous lawsuit against it in order to get money, and thus statement was non-actionable rhetorical hyperbole or vigorous epithet, not libelous statement of fact"); *Novecon, Ltd v Bulgarian-Am Enter Fund*, 977 F Supp 52, 56 (DDC 1997), aff'd 190 F3d 556; 338 US App DC 67 (1999)(business dispute over "failed real estate venture in Sofia, Bulgaria" (see *Novecon, Ltd v Bulgarian-Am Enter*

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Similarly, any citation to *Kevorkian, supra* on this issue is inapt. In that case, this Court stated "we strongly emphasize that our conclusions are limited strictly to the facts of this case," 237 Mich App at 10, explaining that "with respect to the issue of assisted suicide, plaintiff is virtually 'libel proof,' *id*. at p. 11, because "plaintiff's reputation in the community, if not the nation, is such that the effect of more people calling him either a murderer or a saint is *de minimis*." *Id*. at p. 12.

3. There are at least fact issues regarding Defendants' liability for their attorney's *per se* defamatory statements. First, as noted above, many of the defamatory statements were made directly by the Boyers, including Danielle Boyer, e.g., "the Boyers say they were tired of living in fear and went to a lawyer who discovered anti-trust law violations"; "Boyer maintains . . . I was being extorted"; "'extortion money and losing all that cash flow hurt our ability to do business,' Saburi Boyer said"; "I realized that he was very motivated to hurt me. Whether that was business or personal, I was in fear." Second, Boyers cite only three general principal-agent cases, none of which involve attribution of the statements of an attorney to a client. Applicable case law shows that Boyers are liable for their attorney's statements.

In *Foster v Wiley*, 27 Mich 244; 15 Am Rep 185 (1873), the client was sued for an improper execution against the plaintiff's property issued by his lawyer. The court characterized the lawyer's

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Fund, 967 F Supp 1382, 1383 (DDC 1997)), court ruling "charges of deception and 'extortion' in defendants' letter amounted to rhetorical hyperbole that is not readily susceptible to factual verification").

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action as a "naked tort," and observed that the defendant's claim, just like Boyers' in this case (regarding defamation law and compliance with the MRPC), was that "no presumption of his client's agency can be indulged in, and he alone must be held responsible for the trespass which followed, unless affirmative evidence is given that the client was consenting to his action." *Id.*, 27 Mich at 247. The Michigan Supreme Court rejected this claim and held the client liable, stating:

> A plaintiff can never be held to intend a trespass to third persons; but when one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand, and consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, **even though they prove to be unwarranted by the law**.

Id. at 249 (emphasis added). See also *Brown v Spiegel*, 156 Mich 138, 142; 120 NW 579 (1909)("[a] general authority to commence suits will warrant an attorney in attaching property, and render the client liable for any damages"); *Capital Dredge and Dock Corp v City of Detroit*, 800 F2d 525, 533 (CA 6 1986)("the client is generally responsible for the attorney's actions even though the client has not authorized the attorney to commit the tortious acts" unless "the attorney 'has no purpose of serving the [client's] interests'")(applying Michigan law).

Courts in other States have reached similar holdings in the specific context of defamation and other tort cases. *Union Mut Life Ins Co v Thomas*, 83 F 803, 806 (CA 9 1897)(**Exhibit 2**)(libelous statements made by "duly-authorized counsel of the insurance company, in an action pending against it, must be presumed, until the contrary is shown, to have been the answer of the insurance company, and to contain matter duly authorized by it"); *Med Informatics Engg, Inc v Orthopaedics Ne, PC*, 458 F Supp 2d 716, 727 (ND Ind 2006)(**Exhibit 3**)(client "could potentially be liable for [his

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attorney] Hohman's statement if Hohman acted within the scope of his authority as [client's] agent"); *SouthTrust Bank v Jones, Morrison, Womack & Dearing, PC*, 939 So 2d 885, 905–06 (Ala Civ App 2005)(**Exhibit 4**)(in a malicious prosecution and abuse of process case, holding "a [client] principal is liable for the intentional torts of its [attorney] agent-even if the agent's acts were unknown to the principal, were outside the scope of the agent's authority, and were contrary to the principal's express directions-if the agent's acts were in furtherance of the principal's business and not wholly for the gratification of the agent's personal objectives"); *Racoosin v LeSchack & Grodensky, P C*, 103 Misc 2d 629, 634; 426 NYS2d 707 (1980)(**Exhibit 5**)(wilful interference with property case – "once Consolidated Edison authorized Grodensky to collect this claim, it became liable for his tort under familiar principles of principal and agent; and it is no defense that it did not authorize the commission of a tort").

In the case at bar, Boyers have cited to no law remotely implying that they are not liable for the acts of their retained legal counsel. And although Michigan law is clear that such liability is not dependent upon Boyers having granted Kern authority to defame Punturo or even knowing that he was doing it, the facts pleaded make it clear that Boyers stood arm in arm with Kern, making their own concurrent defamatory statements; that Kern's statements were not outside the scope of his authority as Boyers' agents; and that Kern's statements were in no way "wholly for the gratification of [his] personal objectives," *SouthTrust, supra*, nor did "the attorney 'ha[ve] no purpose of serving the [client's] interests,'" *Capital Dredge & Dock, supra*. Indeed, Kern's statements to the press after Punturo's arraignment on May 10, 2016, were simply in fulfillment of his threat to make them if Punturo did not pay Boyers $750,000. In sum, there is no question of Boyers' liability for their

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attorney's defamatory statements, which were calculated to extract money from Punturo to be paid to Boyers.

Of course, as the Michigan Supreme Court observed in *Foster*, *supra*, "[a] plaintiff can never be held to intend a trespass to third persons [or an ethical violation by his attorney, or that his attorney expose him to defamation liability]; but when one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the **authority** he intends to confer upon the attorney **includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand**, **and consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law [including rules of ethics or the law of defamation]**." Emphasis added.

Despite the *Foster* court's sanguine statement that "[a] plaintiff can never be held to intend" untoward acts by his attorneys, it is undisputed that Boyers hired Kern to get them money – a lot of it – from Plaintiffs. As the trial court observed:

> Plaintiff has some evidence that this [Kern's comments to the media] occurred contemporaneous with attempts to negotiate a settlement and that Mr. Kern could get his client to help Mr. Punturo out with his then-pending criminal matters. Particularly, if there was a settlement offer and the number of $750,000 was mentioned. It was a substantial sum certainly. So Mr. Kern's actions might well have been deemed to be in furtherance of a settlement on behalf of his clients and I think there would be vicarious responsibility for that or could be given the facts most favorable to the Plaintiff.

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May 8, 2017 transcript, **Exhibit 6**, pp. 60-61. As if to emphasize the fact issue-based nature of its ruling, the trial court also denied Plaintiffs' cross motion for summary disposition under MCR 2.116(I)(2), stating:

> [Y]ou can show to the contrary. I mean we don't know what the relationships were and I think the question of whether there is vicarious liability is also a fact question so I'm going to deny the cross-motion for summary disposition on liability.

Id., p. 61.

Given the unequivocal ruling of the Michigan Supreme Court in *Foster*, *supra*, Plaintiffs believe that the trial court erred in failing to rule in their favor on this issue as a matter of law; however, what is clear is that for purposes of Boyers' appeal, the trial court certainly did not err by ruling that, at least, fact issues precluded summary disposition for Boyers on the issue.

Even if, as asserted by Defendants, and contrary to the case law in Michigan and elsewhere which is applicable directly to attorney and client, some "control test" appertains to Kern's acts in regard to whether or not they should be imputed to his clients, the one case Defendants cite that involves a professional supports Plaintiff's position. In this case, *Laster v Henry Ford Health Sys*, 316 Mich App 726 ; 892 NW2d 442 (2016), this Court held that a hospital was not liable for the malpractice of an independent contractor physician merely because the physician was on a list of agreed "on-call" doctors with the hospital. First, this Court observed that

> Henry Ford had very little control over Dr. Lim, and no "control over the method of his ... work." *Campbell*, 273 Mich.App. at 234, 731 N.W.2d 112. His on-call responsibilities notwithstanding, Dr. Lim was generally free to see as many or as few patients as he desired, he could generally select his own patients, he did not and was not required to use the administrative machinery of the hospital to bill patients, and he was part of an entirely separate practice with its own staff and employees. Also, the hospital never paid Dr. Lim for his services, and he was free to obtain privileges at other hospitals. The mere fact that a physician is required to maintain privileges

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> at a hospital and undertake on-call responsibilities is not sufficient under Michigan law to constitute control over the physician's professional practice of medicine.

Laster, *supra*, 316 Mich App at 737. This Court then stated:

> Henry Ford did not retain any, much less sufficient, control and direction of Dr. Lim's actual work, i.e., his practice of medicine. It is key to our holding that the on-call policy relied on by plaintiff and the trial court does not give Henry Ford the right to address or control how any on-call physician, including Dr. Lim, diagnoses or treats a patient. Importantly, there is no record evidence that Henry Ford directed, supervised, or otherwise had any input on how Dr. Lim made his diagnosis or conducted surgery. Accordingly, because plaintiff's medical malpractice claim is predicated on Dr. Lim's exercise of professional judgment—over which the hospital had no control or influence—we hold that under Michigan's control test, Dr. Lim was not an agent of Henry Ford.

Id., 316 Mich App at 738–39.

Of course, the principal difference between this case and *Laster* is that here, the professional at issue is a lawyer, not a doctor; and the client, not the hospital, is the boss. Just as a patient would have control over the doctor's treatment, the client has control over the lawyer's representation. Indeed, it is the *lawyer's function* to speak on his client's behalf.

More importantly, in *Laster*, this Court found it dispositive that the hospital "never paid Dr. Lim for his services" and stated "it is key to our holding that the on-call policy . . . does not address or control how any on-call physician, including Dr. Lim, diagnoses or treats a patient. Importantly, there is no record evidence that Henry Ford directed, supervised, or otherwise had any input on how Dr. Lim made his diagnosis or conducted surgery." Contrast the case at bar, in which the clients clearly pay the lawyer for his services; the clients certainly address and control how the lawyer "diagnoses or treats" their legal issues; and the clients "directed, supervised, and otherwise [had] input" on how the lawyer "made his diagnosis or conducted" the legal representation. In sum, *Laster*, to the extent it applies at all, applies to support Plaintiffs' position in this case.

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4. Arguments specific to Defendant Kort. Defendant Kort has concurred in the brief of Defendant Boyer, and her arguments are, as noted above, essentially identical to those of Defendant Boyer. On a few points, however, particular and separate emphasis is needed, as follows.

First, Defendant Kort's claim that she did not make any of the statements claimed to be defamatory is untrue. As noted above, at least one of the known statements sued for was made directly by Defendant Kort, i.e., "the Boyers say they were tired of living in fear and went to a lawyer who discovered anti-trust law violations." Thus, Defendant's claim in her brief, p. 3, that "Plaintiffs do not realistically dispute that their complaint identifies no allegedly defamatory statements by Defendant Kort," is untrue.

More importantly, however, and as noted above, there are at least fact issues as to the liability of Defendant Kort for the statements of her lawyer, and the arguments above apply to show that the case law is in Plaintiffs' favor on this issue. In this regard, Defendant Kort is entirely and equally as linked to Kern, as is her ex-husband. Kern's statements to the press after Punturo's arraignment on May 10, 2016, were simply in fulfillment of his May 6 threats to make them, if Plaintiffs did not pay Boyers $750,000. And, the $800,000 demanded by Kern in the May 6 phone call, and the $750,000 in the May 8 email (**Exhibit C**), are congruent with the $781,500 damages demand in the amended complaint filed May 9 (**Exhibit 7**) for the first two counts of that amended complaint, for antitrust violations – claims made by Kern specifically on behalf of and as the attorney for Defendant Kort.

Moreover, Defendant Kort was not only a named plaintiff in the Antitrust Case; Kern's comments to the press also showed she had an interest in prosecuting Punturo and implied she had an interest in Traverse Bay Parasail, LLC, the entity plaintiff in the Antitrust Case. In his May 10,

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2016 statements to the Record-Eagle, "Kern called the [extortion] charge against Punturo 'a long time coming' for Boyer *and Boyer's wife*. It's a vindicating day for *my clients*." Emphasis added. And, in the May 10 9&10 News interview, Boyer indicated "he and *his wife* bought parasailing equipment for *their* business." The article also states "[b]y paying Punturo, Saburi and Danielle Boyer say *they* lost a lost of money and more. 'Extortion money and losing all that cash flow hurt *our* ability to do business,' Saburi Boyer said." Emphases added. Thus, although the complaint in the Antitrust Case (**Exhibit 7**) does not say who owns Traverse Bay Parasail, LLC, it appears that Defendant Kort owned it, or at least shared financial or management interests in it, with her husband, Mr. Boyer.

Similarly, Kern's demands in the May 6 phone call and the May 8 email were specifically on behalf of Defendant Kort. In the phone call, he said that "the best opportunity" for Punturo to help himself in the criminal case was to "make it right by *my clients*." Emphasis added. And in the May 8 email (**Exhibit C**), Kern offered that in exchange for the $750,000, "*[m]y clients* will publicly acknowledge that *they* are impressed by Bryan taking a proactive approach to rectify any harm caused by any misunderstandings and that all has been forgiven and forgotten," and also, that "*[m]y clients* will appear as subpoenaed to do so, or requested by your client to do so, to inform any relevant parties that *they* bear no hard feelings," and that "[s]ince your client has more going on with both his situation and taking over the business, *we* are open to hearing his concerns/requests," and "*[w]e* think this will produce the most positive result *for everyone*."

Thus, it is also evident that the demands made in the May 6 phone call and the May 8 email were equally on Defendant Kort's behalf, and that Kern's subsequent "or else" defamatory comments on Tuesday morning, May 10, like the other comments by Kern and both Boyers, were all in

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furtherance of the same goals shared by all three Defendants, just as Plaintiffs have pleaded and the trial court ruled were factually and legally viable – a concerted, cooperative effort between lawyer and clients to use the combination of litigation and defamation to coerce Plaintiffs to pay them the money demanded in the amended complaint.[11]

Finally, Defendant Kort attempts (brief, pp. 10-11) to mischaracterize Plaintiffs' claims as being based upon an affidavit she filed in the Antitrust Case. This is a straw man. Plaintiffs are not suing Defendant Kort for something she said in an affidavit filed with a court. Although the filing of the affidavit certainly shows Defendant Kort's full participation with Kern in all of the Defendants' efforts to separate Plaintiffs from their money, Plaintiffs' claims are based upon the above-cited *per se* defamatory statements, not Defendant Kort's affidavit.

5. Other issues. First, Defendants attribute significance to the fact that Plaintiffs did not sue the media. Obviously, they cite no law holding that a plaintiff's failure to sue other potentially liable defamation defendants, entitles the sued defendants to summary disposition. For what it is worth, the media simply reported what Boyers and Kern said to them; and, presumably unlike the media, Boyers and Kern knew or should have known their statements to be false and/or reckless. The media were not the ones demanding $750,000 and offering to help Punturo "get out of hot water" if he paid them off. Moreover, given the proof issues involved in claiming that the media were negligent or reckless in publishing what the putative victims and their attorney told them, Plaintiffs simply decided that discretion might be the better part of valor, and sued the people initially responsible for publishing the defamation.

[11]Further discovery may also reveal an agency relationship between the Boyers within the LLC that gives rise to Defendant Kort's liability for the statements of Defendant Saburi Boyer.

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Second, Defendants attribute significance to the fact that in defamation cases cited that were against lawyers, plaintiffs did not also sue the clients. Obviously, this is irrelevant.

Third, and as their first salvo, Defendants quote from a letter from Punturo to Defendant Boyer, on November 16, 2015, *18 months after the May, 2014 acts that the Attorney General claimed constituted extortion*, oddly claiming it shows "the Michigan State Police and the Michigan Attorney General had reasonable reasons to be concerned and to investigate potential criminal misconduct" by Punturo. This letter is even more irrelevant to this case than it was to the Extortion Case. That Defendants led with this – transparently just to prejudice the Court against Plaintiffs, speaks volumes about their legal position.

In the unlikely event that this letter is ever actually considered as evidence in this case, Plaintiffs have more than ample explanation for its content – much of which is already evident just from a review of Plaintiffs' complaint, and the frivolous and vexatious manipulations of the civil and criminal legal proceedings, not to mention the media, that Mr. Boyer has engaged in just to get money from Plaintiffs. Mr. Boyer's attempt to paint himself as an innocent victim, based on *one private letter* sent to him by Punturo containing some naughty *words*, is completely belied by Boyer's numerous, consistent, and unabashedly rapacious *public words and actions* designed to, and which undisputedly have, caused Plaintiffs significant, real, and undeserved injury.

Finally, Defendant attributes significance to claims that "[n]either Kern nor Boyer portrayed themselves as 'neutrals' or were reasonably understood as neutral. The public understands the role of attorneys as 'advocates,' rather than neutral arbiters of objective fact, and also understands the adversarial, disputed nature of matters in litigation" (application, p. 5). Obviously, none of this is

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remotely relevant to anything in this case. There is no "non-neutral advocate" privilege to *per se* defame one's litigation opponent.

IV. Plaintiffs' cross appeal.

Pursuant to Mich App IOP 7.212(E), Appellees also submit argument on their cross appeal in this joint brief. Simply, it is evident from the above-quoted statements of Defendants, and the applicable law, that Defendants' publications are defamation *per se* and that Plaintiffs were and are entitled to a ruling under MCR 2.116(I)(2) of Defendants' liability for these *per se* statements. The trial court denied this cross motion, basing its denial on two rulings. First, the trial court stated that

> there is a counter motion for summary disposition and a lot of these things – I'm going to deny that – there's a lot of questions like is there really negligence on Mr. Kern's behalf in making these statements or did he have good reason to make them and it just turns out to be wrong. I mean if you blow a stop sign, that's still negligence.

May 8, 2017 transcript, **Exhibit 6**, p. 61, lines 10-16. In denying relief to Plaintiffs on this ground, the trial court erred. Simply, Defendants all knew that Punturo had not been convicted of extortion – indeed, he had only just been arraigned when they started their campaign of defamatory attacks – and they also knew that they had proved absolutely nothing in regard to their antitrust claims. Yet, they unequivocally stated Punturo had committed antitrust violations and felony extortion.

Moreover, Kern, a licensed attorney, announced Punturo's unqualified criminal guilt to the media, in direct violation of his ethics obligations – in fulfillment of his specific threat to do just that if Punturos did not pay $750,000. Put bluntly, he knew better. This goes far beyond mere negligence – it is a direct and clear intent to injure. There is no issue of fact here.

Next, the trial court ruled there were fact issues regarding Boyers' liability for Kern's statements to the media:

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> A question of vicarious responsibility and on Page 16 of Mr. Moothart's brief this is attributed to *Union Mutual Life Insurance Co. v Thomas*, 83 Federal Report 803, Ninth Circuit Court from 1897. . . [I]n any event libelous statements made by duly-authorized counsel of the insurance company in an action pending against it must be presumed until the contrary is shown to have been the answer of the insurance company and to contain matter duly authorized by it. So you can show to the contrary. I mean we don't know what the relationships were and I think the question of whether there is vicarious liability is also a fact question so I'm going to deny the cross-motion for summary disposition on liability.

First, even if Boyers were not liable for Kern's statements, Plaintiffs were nevertheless entitled to summary disposition as to liability on the statements made by Boyers themselves. Second, under all actually applicable law, all as cited above, Boyers are simply liable for what Kern said. Indeed, as the trial court observed:

> Plaintiff has some evidence that this [Kern's comments to the media] occurred contemporaneous with attempts to negotiate a settlement and that Mr. Kern could get his client to help Mr. Punturo out with his then-pending criminal matters. Particularly, if there was a settlement offer and the number of $750,000 was mentioned. It was a substantial sum certainly. So Mr. Kern's actions might well have been deemed to be in furtherance of a settlement on behalf of his clients and I think there would be vicarious responsibility for that or could be given the facts most favorable to the Plaintiff.

May 8, 2017 transcript, **Exhibit 6**, pp. 60-61. The point here is, even given facts most favorable to the *Defendants* it is clear that Kern's defamatory statements, in fulfillment of specific threats to make them, had to have been on behalf of Boyers, as their attorney, to get them money for their antitrust claims. Kern did not have a claim against Punturo – only the Boyers did. He could not have been acting on his own behalf. Accordingly this rationale for denying Plaintiffs' cross-motion was flawed, and the trial court erred in failing to grant summary disposition to Plaintiffs.

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V. Request for Relief.

It is clear that this case involves allegations of unkind words spoken by both sides of this case against the other.[12] However, this case is not a kindness contest. In their zeal to part Plaintiffs from $750,000 of their money, Boyers and their attorney repetitively, deliberately, aggressively and publicly defamed Plaintiffs, just as their attorney threatened to do if Plaintiffs did not pay them $750,000. The privilege defense they assert in their briefs lacks legal merit, and the opinion/hyperbole defense is utterly frivolous. Accordingly, Plaintiffs/Appellees/Cross Appellants request that this Court AFFIRM the trial court's denial of Defendants' motion; as to the opinion/hyperbole defense, award costs for a vexatious appeal on this Court's own initiative pursuant to MCR 7.216(C)(1); REVERSE the trial court's denial of Plaintiffs' cross motion for summary disposition; and REMAND this case to the trial court for a determination of appropriate fee awards and for further proceedings.

Dated: March 18, 2018

MOOTHART & SARAFA, PLC

By: /s/ Jonathan R. Moothart

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[12]Notably, Defendant's allegations of Punturo's threats to Boyers to "make your life a living hell," bury you," and "crush you," among others, are disputed, unproven, and actually a part of Plaintiffs' defamation case against Defendants, because they are untrue.

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APPENDIX 33

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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

Plaintiffs/Appellees/Cross-Appellants,

v

BRACE KERN, an individual; SABURI BOYER and DANIELLE KORT, f/k/a Danielle Boyer,

Defendants/Appellees/Cross-Appellees.
_____/

COA File: 338727

(Consolidated with 338728 and 338732)

Lower Court Case No. 17-32008-CZ

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APPELLANTS/DEFENDANTS BOYER AND KORT'S MOTION TO EXPAND RECORD (TO INCLUDE THE "MEDIA STORIES" RELIED ON BY APPELLEES/PLAINTIFFS)

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NOW COME Appellants/Defendants Boyer and Kort, by counsel, and pursuant to MCR 7.216(A)(4) move the Court to enter an Order expanding the record to include the "media stories" that are the subject of Appellees/Plaintiffs' defamation complaint and the "context" of the allegedly unprivileged defamatory statements complained of by Plaintiffs:

1. This is a defamation lawsuit brought by a former criminal defendant, Appellee/Plaintiff Bryan Punturo, against the alleged crime victim, Saburi Boyer, and Mr. Boyer's attorney, Brace Kern, for statements they allegedly made in media stories covering the felony extortion charges filed by the Michigan Attorney General against Mr. Punturo, as well as civil litigation between the parties. All of the allegedly defamatory statements complained of were made within published media stories. (See, e.g., Complaint dated 2/16/17, at paragraph 30(a)-(h)).

2. It is clear that "allegedly defamatory statements must be analyzed in their proper context." *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 129-130 (2010).

3. "Context" includes the words published at about the same time as the allegedly defamatory words – e.g. the media stories/reports in which the statements appeared. As our Supreme Court indicated in the *Smith v Anonymous Joint Enterprise* case:

> **We agree that allegedly defamatory statements must be analyzed in their proper context.** To hold otherwise could potentially elevate form over substance. Thus, on remand, **the handwritten caption in this case should be viewed in context with the Stewart report as a whole, instead of relying merely on the use of a question mark** as punctuation and use of the word "Alledged [sic]," **to determine whether it is capable of defamatory meaning**. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 129-130 (2010) (emphasis added).

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4. The media stories/reports referenced in the complaint provide "context" that must be considered in evaluating the defamation claims in this matter. See, id.; see also Appellant Boyer's Brief on Appeal filed 2/27/18, at pp. 4-6. Appellees/Plaintiffs also acknowledge that "context must be considered when an alleged defamatory statement is reviewed for a determination of whether it implies a defamatory meaning." Appellees/Plaintiffs' Brief on Appeal filed 3/18/18, at pp. 14-15).

5. Appellees/Plaintiffs furnished the media stories/reports in issue in their discovery answers served July 7, 2017. (**Exhibit A**, Appellees/Plaintiffs Answers to Defendant Boyer's First Discovery dated 7/7/17, answer to Request for Production #1 (requesting the "media reports," at Bates' stamped pages 1-30). This was after the circuit court ruled on the motions for summary disposition at a hearing on May 8, 2017.

6. The Court should grant the motion to expand the record to include the "media stories" complained of by Appellees/Plaintiffs that are attached as **Exhibit A**, because these media stories show the "context" of the allegedly defamatory statements in issue, and "allegedly defamatory statements must be analyzed in their proper context." S*mith v Anonymous Joint Enterprise*, 487 Mich 102, 129-130 (2010).

7. Further, the Court should also grant the motion to expand the record to include the "media stories" complained of by Appellees/Plaintiffs attached as **Exhibit A**, because the media stories debunk misstatements of fact made by Appellees/Plaintiffs in their recent Brief on Appeal filed on March 18, 2018.

First, in that recent Brief on Appeal, Appellees/Plaintiffs claim that **"the media simply reported what Boyers and Kern said to them"** in an apparent effort to minimize the "context" provided by the neutral media stories. (See Appellees/Plaintiffs' Brief on

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Appeal filed 3/18/18, at p. 31, second full paragraph, line 4). However, a review of the media stories (**Exhibit A**) will allow the Court to evaluate for itself whether the media only reported "what Boyers and Kern said to them," or actually provided substantial, additional "context," including information from the Attorney General, from the criminal and civil proceedings, and from the statements of Appellee/Plaintiff Mr. Punturo and his own counsel – i.e. information and "context" well-beyond merely repeating "what Boyers and Kern said." (See, e.g., **Exhibit A**, bates' stamped pages 1-30).

Second, in that recent Brief on Appeal, Appellees/Plaintiffs also claim that the email/letter from Mr. Punturo to Defendant Boyer dated November 16, 2015 (that was quoted on pp. 2-3 of Boyer's Brief on Appeal filed on 2/27/18) was supposedly "irrelevant" to the criminal extortion case filed against Mr. Punturo by the Attorney General, and (supposedly) <u>not</u> a reason that the Michigan State police and Attorney General were concerned about Mr. Punturo's conduct. (Appellees/Plaintiffs' Brief on Appeal filed 3/18/18, at p. 32, second paragraph, lines 1-5). However, a review of the media stories (**Exhibit A**) will allow the Court to see that Mr. Punturo's menacing words in that email/letter of November 16, 2015 were in fact relied on by the attorney general in the criminal prosecution, as the media stories show that the Prosector quoted from that very letter from Mr. Punturo in the criminal proceedings: "Punturo faced 20 years in prison. To send him there, the state relied on the emails and text messages Punturo had sent to Boyer. **Prosecutor Matthew Payok read aloud from the letter Punturo wrote – the one where he said, 'You instilled this hatred within me… and now you will realize my resolve to witness your demise.' 'There's hatred dripping in that letter," Payok told [District Court Judge] Thomas Phillips**." (**Exhibit A**, bates' stamped p. 28, top of

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page). This is the same November 16, 2015 email/letter from Mr. Punturo quoted in Mr. Boyer's Brief on Appeal, as can be seen from a comparison of the quotes. (Compare **Exhibit A**, bates' p. 28 with Boyer's Brief on Appeal filed 2/27/18, at p. 2 last line – p. 3, lines 2-3). Clearly, the State thought Mr. Punturo's hateful words were "relevant" to the felony criminal charges against Mr. Punturo, notwithstanding the claims to the contrary in Appellees/Plaintiffs' Brief on Appeal filed on 3/18/18. Thus, the Court should grant the motion to expand the record.

WHEREFORE, Appellants/Defendants Boyer and Kort respectfully request that the Court enter an Order expanding the record to include the "media stories" that are the subject of Appellees/Plaintiffs' defamation complaint (attached as **Exhibit A**, Appellees/Plaintiffs Answers to Defendant Boyer's First Discovery dated 7/7/17, answer to Request for Production #1, including the "media reports" at Bates' stamped pages 1-30).

Date: March 26, 2018

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STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT, COUNTY OF GRAND TRAVERSE

BRYAN PUNTURO AND FAWN PUNTURO,
husband and wife,

and

B&A HOLDINGS, LLC d/b/a ParkShore Resort,
a Michigan limited liability company,

Plaintiffs,

v

BRACE KERN,
an individual,

and

SAUBURI BOYER AND DANIELLE KORT, f/k/a
Danielle Boyer,
individuals,

Defendants.

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

Plaintiffs' Answers and Objections to Defendant Boyer's First Discovery to Plaintiffs

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PLAINTIFF'S EXHIBIT
A

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REQUESTS FOR PRODUCTION

1. Defendant requests the Plaintiffs produce the following:

a. Complete copies of all articles, broadcasts, media reports, and publications of any kind you complain of in this matter, including but not limited to those listed in your complaint.

See attached, Bates nos. 1 – 30. Right of supplementation reserved. As explained in Plaintiffs' counsel's telephone call to Boyers' counsel on July 7, 2017, video and audio recordings in digital format are not produced herewith but will be produced reasonably soon.

b. Any investigative reports or police reports.

There are none as of this time, as to this case. If what is being requested is investigative materials from the Michigan Attorney General, such are objected to as irrelevant and/or not reasonably calculated to lead to the discovery of admissible evidence. In any event, a complete copy of the AG file was provided to Attorney Kern while he represented Boyers, so they already have all of these documents.

1. Any and all employment records. (In the alternative, the attached authorization for release of employment information may be signed and returned.)

Objection, irrelevant, overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence. No release was attached.

2. Your education records. (In the alternative, the attached authorization for release of education records may be signed and returned.)

Objection, irrelevant, overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence. No release was attached.

c. Any documents or records which would prove your claim for losses or damages claimed i[n] plaintiffs' complaint, whether economic or non-economic.

Documents are being complied and will be provided. Dr. Lehrer will provide report and explanations. See also Plaintiffs' exhibit list, filed with the Court. As explained in Plaintiffs' counsel's telephone call to Boyers' counsel on July 7, 2017, video and audio recordings in digital format are not produced herewith but will be produced reasonably soon.

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Published media reports

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February 28, 2016 Traverse City Record-Eagle

Appellant's Mot to Expand
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Business owner files civil complaint

SUIT

GT businessman accused of antitrust violation, threats

GT businessman accused of antitrust violation, threats

COURTS

BY MATT TROUTMAN

mtroutman@record-eagle.com

TRAVERSE CITY — A Grand Traverse County businessman could face legal turbulence over accusations he sought to create a monopoly in the local parasailing market.

A lawsuit filed this week in 13th Circuit Court states Bryan Punturo extorted Saburi Boyer, who owns Traverse Bay Parasail, by threatening to drive him out of business if he didn't shell out $19,000 per year.

Punturo fired off "vulgar correspondence" to Saburi Boyer and Boyer's wife that "coerced" them into signing an illegal parasailing exclusivity agreement, according to the complaint. "I will crush you," the complaint states Punturo told the Boyers. The complaint seeks more than $781,000 in damages and accuses Punturo, who didn't respond to multiple requests for comment, of committing a flagrant antitrust violation and intentional infliction of emotional distress. Saburi Boyer's attorney Brace Kern said it's the only antitrust case he knows about in Grand Traverse County.

"The contract itself is an agreement to limit competition," Kern said. "So that violates the (Michigan) Antitrust Reform Act in of itself."

State records list Punturo as the resident agent for B & A Holdings, LLC, the listed owner of the property on which ParkShore Resort sits. That's where Saburi Boyer said he operated his parasailing business for about five years in a landlord-tenant relationship.

SEE SUIT PAGE 5A

The circuit court complaint includes lengthy quotations claimed to be from emails Punturo sent and accuses him of committing malicious threats to extort money, a felony.

FROM PAGE 1A

But Boyer said it's when he moved to Sugar Beach Resort that Punturo and Punturo's son opened a parasailing business with the same name. The name issue prompted Boyer to bring forward a 2006 trade infringement civil case that was eventually dismissed.

Boyer said he ran afoul of Punturo years later after Punturo's son sold him assets from the competing parasailing business.

The complaint states Punturo threatened to run the Boyers out of business by "controlling, fixing, and maintaining parasailing prices on East Grand Traverse Bay far below the market rate unless plaintiffs agreed to pay defendants to not compete with them."

Boyer said the threats prompted him to sign a 2014 non-compete agreement, and pledge to pay $19,000 per year to Punturo.

"We felt like it was the lesser of two evils," Boyer said.

The complaint states that agreement is unlawful because "it seeks to exclude and limit competition and establish a monopoly in the Traverse City parasailing market."

The Boyers shelled out more than $35,000 in cash to Punturo, according to the complaint. It states those payments prompted the Boyers to break an agreement with Punturo's son, caused them to lose a $25,000 deposit, $60,000 related to a parasailing boat and $140,000 in net proceeds from the loss of business.

The Boyers eventually stopped paying Punturo and received a missive from him, in which he claimed he would not "settle until (the Boyers) are out of business," the complaint states.

"You instilled this hatred within me, you defaulted on your agreement to abate me, and now you will realize my resolve to witness your demise," Punturo wrote, according to the complaint.

The circuit court complaint includes lengthy quotations claimed to be from emails Punturo sent and accuses him of committing malicious threats to extort money, a felony. Kern said the correspondence proved Punturo flagrantly violated state antitrust laws.

Eighty-sixth District Court records state in October 2015 that Punturo opened a case accusing the Boyers of breach of contract. It included a copy of a "parasailing exclusivity agreement." Boyer's circuit complaint states Punturo changed that agreement's title from "covenant not to compete."

Appellant's Mot to Expand
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Punturo dropped that case in December. Jonathan Moothart, his attorney in the case, also didn't return a call for comment.

Sunday, 02/28/2016 Pag.A01

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Def-Appellants' Appendix 432a

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May 10, 2016 (website) and May 11, 2016 (print)
Traverse City Record-Eagle

Appellant's Mot to Expand

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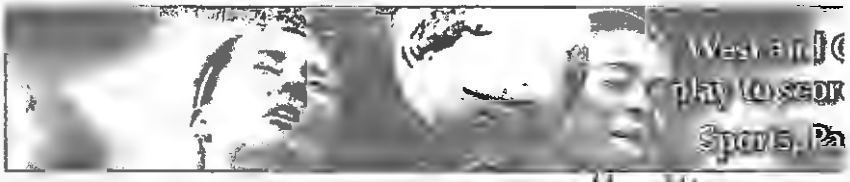

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Wednesday, May 11, 2016 WEDNESDAY

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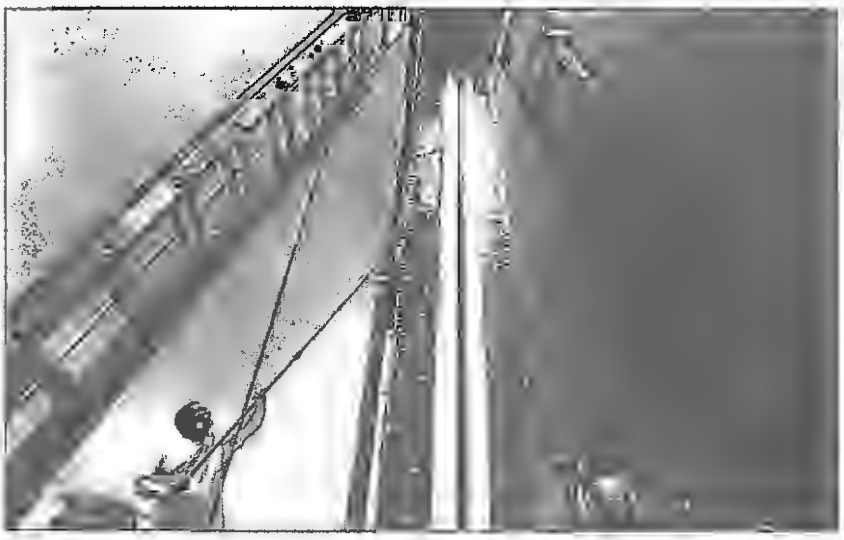

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R.J. Stein of Surfaces, Inc., paints a wall on the Warehouse MRKT on Hall Street in Traverse City.

CRIME

Resort owner accused of extortion

AG: Punturo threatened to drive company out of business

"My biggest goal from this is Bryan (Punturo) would think twice before hurting anyone else. I've been living in fear so long, I really don't want to live in fear."

Saburi Boyer, local businessman

BY MATT TROUTMAN
mtroutman@record-eagle.com

TRAVERSE CITY — Threats from a local businessman forced Saburi Boyer to shell out about $35,000 to keep his Traverse Bay Parasail company aloft, according to Michigan attorney general's officials.

But Boyer barely spoke about the money following a Tuesday arraignment for ParkShore Resort owner Bryan Punturo, 58, of Williamsburg, who faces a felony extortion charge. He instead recalled how his dealings with Punturo sparked two years of fear and anxiety.

Boyer said Punturo made statements that made the hairs on his neck stand up.

"He told me that he was going to make my life a living hell," Boyer said. "That he was going to crush me and everything that was important to me. I believed every word of it."

Punturo is accused of threatening to run Boyer's parasailing company out of business if Boyer didn't pay him $19,000 per year. The accusation is outlined in a criminal complaint hand-delivered to 86th District Court by a special agent for the Michigan Attorney General's Office.

Many of those threats were made in writing, the document states. Court filings in a parallel civil case state Punturo fired off "vulgar correspondence" to Boyer, stating he would witness Boyer's "demise."

Punturo

Attorney Jonathan Moothart, who represented Punturo in the arraignment, declined comment on the case.

"The case is without merit and we intend to prove it," Moothart said.

The case covers similar ground to an ongoing 13th Circuit Court civil case Boyer's attorney Brace Kern filed against Punturo.

SEE PUNTURO PAGE 2A

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PUNTURO

Resort owner accused of extortion

Punturo is barred from contacting the Boyers and leaving Michigan. He's scheduled to appear for a May 26 preliminary examination.

FROM PAGE 1A

That filing seeks more than $781,000 in damages and accuses Punturo of committing flagrant violations of antitrust law and intentionally inflicting emotional distress.

Kern called the charge against Punturo "a long time coming" for Boyer and Boyer's wife.

"It's a vindicating day for my clients," he said. "There was extortion for the past two years."

Court documents state Punturo in May 2014 made a series of threats against the Boyers. That's when the Boyers signed a non-compete agreement with Punturo to keep him from driving their parasailing company out of business, according to civil case files.

Kern argued in a civil complaint that not only was the agreement illegal, but that Punturo also violated antitrust laws by attempting to create a monopoly in the local parasailing market. Moothart, in a response, argued that parasailing on a public waterway "simply cannot be monopolized."

Documents in the criminal extortion case state Punturo "made additional threats indicating that he ran a similar scheme regarding tanning salons" that forced several competitors out of business.

The civil filing states Punturo engaged in price fixing in the Fort Wayne, Indiana, tanning market. A 2004 federal court filing in that case accuses Punturo of violating the Civil Racketeer Influenced and Corrupt Organization Act, among other civil charges, but the case was dismissed in 2006.

The Boyers eventually stopped paying the contract. Kern said Punturo at one point texted Boyer's wife asking for money while her husband was hospitalized. That's when she approached Kern with the contract, he said.

"At which time, I realized it violated antitrust laws," Kern said. "And then she showed me some correspondence Mr. Punturo had sent them to induce them into signing the agreement, and I recognized extortion."

Kern contacted the Michigan Attorney General's Office antitrust division and asked for assistance. Punturo sued Boyer to get money from the contract, but withdrew the suit after attorney general's officials executed a search warrant at the resort.

The civil filing includes excerpts from correspondence Punturo sent, including an email in which he states he "will not settle" until Boyer is out of business.

"You instilled this hatred within me, you defaulted on your agreement to abate me, and now you will realize my resolve to witness your demise," the email states.

Moothart argued in a response that Punturo's messages could be considered "unkind," "hyperbolic" and "grandiose," but were made to collect a rightfully owed debt. It stated that the Boyers initiated the contract, based on a text message Saburi Boyer sent Punturo.

Kern said the correspondence showed otherwise. He said he doesn't know of any other antitrust case with such significant extortion.

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

A conviction on an extortion charge carries a penalty of up to 20 years in prison. Judge Thomas J. Phillips during the arraignment twice asked Punturo if he understood the charge.

"Yes," Punturo said.

Pete Ackerly, a special agent with the attorney general's office, told Phillips he reached an agreement with Moothart that Punturo should be given a personal recognizance bond. Phillips set a bond at $100,000 and told Punturo he wouldn't have to post money on the bond unless he violated its conditions.

Punturo is barred from contacting the Boyers and leaving Michigan. He's scheduled to appear for a May 26 preliminary examination.

Boyer said he hoped Punturo would have a change of heart in his future dealings.

"My biggest goal from this is Bryan would think twice before hurting anyone else," he said. "I've been living in fear so long, I really don't want to live in fear."

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9&10 NEWS Northern Michigan's News Leader

State Attorney General Charges Traverse City Resort Owner

Posted: May 10, 2016 7:22 PM EDT
Updated: May 18, 2016 1:15 AM EDT

By Megan Woods, Reporter CONNECT

"I didn't think we had a choice but to give in to his demands."

A Traverse City Resort Owner is now charged with extortion and demanding money from another local business owner.

The state attorney general's office says Bryan Punturo threatened to get Traverse Bay Parasail shut down if the owners didn't give him thousands of dollars.

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

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

It turns out Punturo's son owned East Bay Parasail.

Saburi Boyer says they received threats via email and text.

"Threats of running me out of business, threats of how he had deep pockets and he could basically afford not to make money and could run me out of business," Boyer said.

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

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

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

Tuesday, Punturo was charged with criminal extortion, but that won't be all.

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

With both the criminal and civil cases in the works, Saburi Boyer says they are relieved.

"It's not easy, but it feels good to have the support of the justice system behind me."

Bryan Punturo's attorney denied an on-camera interview, but gave a statement: "This case against Mr. Punturo is meritless and they attend to prove that."

Punturo will be back in court for the criminal extortion charges later this month.

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May 10, 2016 9&10 News interview, published on website

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9&10 NEWS Northern Michigan's News Leader

ParkShore Resort Owner Accused of Extortion

Posted: May 10, 2016 10:45 AM EDT
Updated: May 17, 2016 10:45 AM EDT

By Megan Woods, Reporter CONNECT

A Traverse City resort owner is charged with extortion.

Attorney General Bill Shuette's office says he was threatening to run a parasailing company out of business if the owner didn't pay him thousands of dollars.

The attorney general's office charged ParkShore Resort owner, Bryan Punturo with extorting thousands of dollars from the owners of Traverse Bay Parasailing.

That's a felony with a maximum sentence of 20 years.

The attorney general says Punturo threatened to compete with the owners of a local parasailing company if they did not pay him $19,000 a year.

They say it started in May 2014.

The attorney general got involved after a local attorney started pursuing a civil case.

Brace Kern represents Traverse Bay Parasailing, saying Punturo violated anti-trust laws and caused emotional distress.

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

Bryan Punturo is due back in court for the extortion criminal charges later this month.

We'll have more on Punturo's extortion charge on 9&10 News at 5 and 6.

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Traverse City resort owner charged with extortion

By AARON SELBIG (/PEOPLE/AARON-SELBIG) • MAY 10, 2016

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Bryan Punturo is accused of extorting money from the owners of a competing parasailing business.

CREDIT MICHIGAN ATTORNEY GENERAL'S OFFICE

The Michigan Attorney General's office has accused a Traverse City resort owner of extortion.

Attorney General Bill Schuette says 58-year-old Bryan Punturo, owner of the ParkShore resort, threatened the owners of a competing parasailing business on Grand Traverse Bay. Puntoro allegedly convinced the victim to pay him in exchange for not forcing the victim out of business.

Attorney Brace Kern represents the alleged victim – Saburi Boyer – in an ongoing civil case.

"Essentially, what he did was tell my client, 'Give me $19,000 a year or I'm going to run you out of business with unfair competition … below cost prices,'" says Kern.

Kern says Punturo threatened in telephone messages to "make your life a living hell."

He says the contract started in May 2014 and continued until last summer, when his client was diagnosed with cancer and could no longer make payments to Punturo. Boyer is seeking restitution and damages in the amount of $760,000.

Kern says he tipped off the Attorney General's office about the alleged extortion plot.

"Extortion is illegal, plain and simple," Schuette said, in a press release. "The actions allegedly taken here were a threat to another person's livelihood and are not a good business practice."

If convicted, Punturo could face 20 years in prison. His bail was set Tuesday at $100,000.

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SUN, WIND AND A CUTTHROAT BUSINESS ON THE BAY

Patrick Sullivan - November 19th, 2016

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An extortion case that sprung out of bad blood between a resort owner and a parasail operator could help determine when aggressive business tactics become criminal

Saburi Boyer was in a coma when he stopped making payments on a contract he'd signed with an East Grand Traverse Bay resort owner to ensure his parasailing operation wouldn't be run out of business.

Boyer's wife, Danielle, didn't like the messages demanding payment she received in the hospital from the owner of the Park- Shore Resort, Bryan Punturo, so she sought out a lawyer, Brace Kern, who asked to look at that noncompete contract.

"As soon as I saw the contract, I'm like, 'This is an antitrust violation, this is a covenant not to compete, this is extortion," Kern said. "That's when I contacted the attorney general's office."

Michigan Attorney General Bill Schuette answered. There was an investigation. Charges were filed. A press conference was held at the courthouse in Traverse City. Punturo, 59, was charged with extortion and faced 20 years in prison.

The case didn't hold up, however. 86th District Court Judge Thomas Phillips dismissed the charge in the face of an aggressive defense mounted by Punturo's lawyer, Jonathan Moothart. Phillips determined that what Punturo did might have been reprehensible, but it wasn't a crime.

Now Schuette's office is appealing Phillip's decision in a case that could draw the line between aggressive business tactics and a criminal act.

THE SEED OF A DISPUTE

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There are three places in Michigan where you can parasail. One is in Mackinaw City. The other two are on East Bay near Traverse City.

People pay $60 or $100 per rider, they get strapped into a harness under a sail, they stand on a platform at the back of a speedboat, and then as the boat accelerates, the sail fills with air and they lift into the sky. Rides last 10 to 12 minutes and reach 400 feet into the air.

The dispute over parasailing on East Bay started in 2006 when Boyer struck out on his own after subleasing space at Punturo's resort for several years.

Boyer, 35, said when he tried to move his business, Traverse Bay Parasail, from the ParkShore Resort to the Sugar Beach Resort, he more or less ended up at war with Punturo.

"He told me that if I went to a competing hotel, that I was driving away business from his property to a competitor of his, that it was just as if I was taking money out of his pocket and putting it in mine," Boyer testified.

Boyer left for Sugar Beach, and Punturo set up his son with a parasailing business. Boyer said he and Punturo's son, Casey, were able to patch things up and peacefully operate parasailing businesses together on East Bay.

"I actually really liked to compete with Casey. It was friendly; we both made money," Boyer said. "I do believe that more shoots up in the sky bring in more business."

A FATHER BETRAYED

The peace fell apart in 2014 when Casey Punturo decided to get out of the parasailing business and decided to sell his boat.

Boyer said when the younger Punturo offered to sell his boat to him, he asked why he wouldn't sell it to his father or to another East Bay businessman and boating competitor, Eric Harding. Boyer said Casey Punturo told him they weren't interested.

Boyer said he wanted the boat because he wanted to expand his business. The transaction, though, caused a rift between father and son and seemed to open up the wounds from eight years before.

Boyer said he later learned that Bryan Punturo forbade his son to sell the boat to him but that Casey defied his father. "That is what I think infuriated (Bryan) to a new level," Kern said.

Bryan Punturo denied that he or Harding had been offered to buy the boat. He said the sale of the boat created a conflict between him and his son because he believed Boyer was taking advantage of Casey.

Around that time, Boyer learned that the elder Punturo was trying to recruit a parasail operator to come to his resort to undercut Boyer's prices and run him out of business.

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

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

Punturo demanded Boyer pay him $20,000 a year for "competition rights," Boyer said. He said Punturo promised to undercut his prices and ruin him if he didn't pay.

"I was flabbergasted. I was befuddled. I had never seen anything like that before," Boyer testified. "I was very scared and intimidated. ... He said it himself. He's financially capable of running me out of business without it affecting him financially. And he's done it before."

'I FROZE UP IN FEAR'

Boyer testified that it all happened extremely fast, and he had no time to think about it.

Boyer offered to pay $60,000 over five years.

Punturo rejected the offer. Boyer first received the "competition rights" offer at 11 a.m. on May 5, 2014. On May 6, he received an email at 10:47 a.m. that he had a 24-hour "hard deadline" to answer.

Punturo reiterated his threat in a phone call at the deadline, Boyer said.

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"I felt backed into a corner," he testified.

"If I didn't pay him the $20,000 a year, he was going to make my life a living hell, he was going to crush me and everything that matters to me, and he was going to bury me by the end of this."

By the end of the call, Punturo was no longer calm and cool as he had been in earlier conversations, Boyer testified. Punturo was now yelling into the phone.

"I froze up in fear," Boyer told the court. Punturo gave Boyer five minutes to talk to his wife. They'd already talked and decided he shouldn't take the deal. But now Boyer said he believed he had no choice.

He testified that he told his wife: "I'm really sorry. I don't want to be a coward, but I don't think we have a choice in the matter."

Boyer was told to draw up the contract. He said he agreed because he figured that would be better than to have Punturo draw it up.

That Boyer drew up the contract, not Punturo, would become a significant part of Punturo's defense.

Boyer paid in installments, but the following year the payments stopped when Boyer was admitted to Munson Medical Center for what he thought was the flu. When he woke up from a medically induced coma, he discovered he had leukemia. (Boyer is currently in remission and doing well.)

A COURT CASE STALLED

When the preliminary exam to determine whether there was probable cause to take Punturo to trial on the extortion charge began on June 24, it looked at first as though it might be a breezy hearing — one witness, some arguments and then to circuit court where a trial date could be set.

Assistant Attorney General Matthew Payok told Phillips, the district court judge, that one witness would establish the three elements of extortion he needed to prove. The legal elements that comprise extortion are that a threat was made, that the threat promised to injure person or property, and that the threat was carried out for profit.

"This is a one-count charge, your honor," Payok said. "We believe we have one witness to call that will establish those three elements."

It didn't turn out to be so straightforward. The hearing dragged on for hours, and when the day was over, the lawyers still had more to talk about. The hearing was stayed for another day and another witness and, after more hearings, more testimony, more arguments and thousands of pages of briefs filed with the district court, the preliminary exam finally concluded on Sept. 29 when Phillips found that prosecutors failed to produce adequate evidence that a crime had been committed.

They'd proved the defendant did some "nasty, mean-spirited and reprehensible" things, Phillips said, but they didn't prove a crime. Moothart said he was pleased with the result, but he disagreed with Phillips' characterization of his client.

"First of all, let me say this: I have all the respect in the world for Judge Phillips, and he is a very good judge and a hardworking guy," Moothart said. "Having said that, Judge Phillips only heard one side of the story."

Moothart said if Punturo would have testified — which defendants don't do at preliminary examinations — another side of the case would have come out.

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PUNTURO FIRES BACK

In an interview with the Express, Punturo said Boyer approached him to make a deal in 2014. He said he doesn't understand the criminal charges because it seemed to him like it was Boyer who wanted to corner the parasailing market on East Bay.

Boyer wanted to lease space at the Park- Shore dock after he purchased Punturo's son's boat, but Punturo said he didn't want to have Boyer back at his resort.

"I had no intentions with having a relationship with Saburi Boyer because I'd had them in the past and they all went bad," Punturo said.

Punturo said he planned to run his own parasailing business.

He said Boyer was the first to make threats. He pointed to a text message Boyer sent him that promised he would out-compete Punturo, and Punturo wouldn't survive if he got into parasailing because Boyer had so much more experience.

"He said, 'What will it take for you not to go in business against me?'" Punturo said.

In the trail of emails and text messages, it is Punturo who introduces the idea of "competition rights," but Punturo said he believes that's what Boyer wanted.

And that's what Boyer got. Punturo said it was a mutually beneficial contract, and the only reason it went sour was the weather in the summer of 2014 — it was too cold and windy.

Punturo said if that season were normal, Boyer would have made enough money to pay the contract and keep a nice profit for himself. Instead, the parasailing business on East Bay was terrible that year, and Boyer fell behind on payments.

"Everything was pretty simple and innocent and straightforward business until Saburi went to Brace Kern and said, 'Oh my god, I'm being sued because of a contract," Punturo said.

He said he believes his behavior looked reprehensible to Phillips after the preliminary hearing testimony because of a message he'd written in anger to Boyer after Boyer became ill in which Punturo called him out and demanded payment. He said he was provoked and had been angry when he wrote that.

"It makes me look bad, but if you take it in the proper context (in light of the series of events that transpired between the two), it's all very palatable and understanding," Punturo said.

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

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A WITNESS FOR THE DEFENSE

Punturo's actions might have been aggressive, but they were legal, Moothart argued.

"Operating a lawful business is a constitutional right," Moothart said.

The heart of Moothart's argument is that it isn't against the law to threaten to do something that's legal, and undercutting a competitor isn't against the law.

Moothart called a single witness, Harding, the parasailing competitor, to counter some of Boyer's testimony.

Harding, a 42-year-old who's known Punturo for 25 years and Boyer for at least 15, testified that he leased space at Punturo's resort where he ran a parasailing and boat rental business. He hired Boyer as a captain in the early 2000s. For a while they operated the parasailing business as 50-50 partners until Boyer bought him out.

Harding stayed on as the owner of the boat rental business, and they worked side by side until 2006, when Boyer moved to the Sugar Beach Resort.

In 2014, when Casey Punturo sold his parasailing boat to Boyer, Harding ran his business at a property he leased just down the beach from the ParkShore Resort.

He said Boyer repeatedly approached him that spring, interested in coming to terms with Harding in an effort to make sure Harding didn't compete against his parasailing business.

Harding said Boyer offered him three choices — to pay him not to have a parasailing business at his dock, to let Boyer pick up parasailing customers from his dock and pay him a percentage, or to install a computer program Harding could use to refer customers to Boyer in exchange for a cut. When Harding refused the offers, he said Boyer proposed they agree upon a minimum price for parasail rides over the bay.

"He said there's no reason for anybody to be flying in Traverse City for less than $100 a person," Harding testified.

Boyer denied that he ever attempted to set prices or offered to pay Harding not to compete against him.

"There was never any mention of a noncompete from me to Eric or to Bryan," he said.

CASE DISMISSED

In his ruling, Phillips found that Punturo's actions skirted close to criminality but didn't cross the line.

The rationale for that lies in case law, which has found that extortion must include the threat of an illegal act, Phillips said in his decision. In other words, something like, "Pay me or I'm going to burn your house down."

Phillips ruled that prosecutors didn't prove an illegal threat in this case.

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But that didn't stop Phillips from commenting on what he thought of Punturo's actions and whether they perhaps should be illegal.

"What Mr. Punturo did in my opinion was nasty and mean-spirited, reprehensible conduct in the way he negotiated. But there's been no law presented that what he did was illegal. Maybe it should be illegal," Phillips said. "As for whether it should be illegal or not, obviously, that's not this court's providence."

Phillips predicted the case would "go up and up and up" in the appellate court system because presented a legal question in need of clarity.

The Michigan attorney general's office has filed a notice of appeal to the 13th Circuit Court but hasn't yet submitted arguments. A spokesperson from the attorney general's office did not respond to messages seeking comment.

Kern filed a federal lawsuit on Boyer's behalf that seeks $750,000 in damages from Punturo. Moothart said he had not seen a copy of the lawsuit.

Nonetheless, that noncompete contract is long gone. Punturo found a new operator to run a parasailing business at his resort, Grand Traverse Parasail. Boyer still runs his parasailing business on East Bay, and his website is taking reservations for the 2017 season.

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

Appellant's Mot to Expand
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AARON SELBIG

If you've spent a summer day on the beaches of Grand Traverse Bay, you've probably seen parasailers soaring across the sky. Parasailing is a popular, fun way to get out on the water, but the Traverse City parasailing business also has a cutthroat side.

That came out earlier this year, when a hotel owner was accused of extortion. The State Attorney General said Bryan Punturo intimidated a competing parasailing operator, Saburi Boyer, into paying him big money.

That was the version of events that played out in court. The case was widely covered by the press, but another side of the story was never told – and it paints an entirely different picture.

Listen

14:21

When a Traverse City resort owner was charged with extorting a competitor in the parasailing business, the case made headlines. But in court, the full story was never told.

Saburi Boyer has owned Traverse Bay Parasail for 20 years.

"Most Americans, they work 50 or 51 weeks out of the year," says Boyer. "They work really hard, and anticipate and save up for that one week where they get to have a family vacation. We're blessed enough to be a part of that."

(http://mediad.publicbroadcasting.net/p/wiaa/files/styles/x_large/public/201611/IMG_6435_0.JPG)

Captain Chris Poehlman watches a trio of parasailers.

CREDIT AARON SELBIG

Boyer looks like he spends his days on the water. He's tan and muscular. He wears dark sunglasses and a "Love Michigan" hat. He says during the busiest stretch of the summer, he sometimes has more business than he can handle.

Six years ago, Boyer worked a little way down the beach, at the Park Shore Resort – for resort owner Bryan Punturo.

A 'friendly' partnership goes sour

"It was friendly," says Boyer. "It was a little bit of an arms-length business transaction. I paid him rent, he cashed the check and that was pretty much it."

The business relationship between the two men went along like that until 2006, when Boyer moved from the beach in front of the Park Shore to Sugar Beach Resort, where he is now.

Boyer says Punturo wasn't happy about that. And when Boyer bought out Punturo's son, Casey – that's when the emails and phone calls started. Boyer says Punturo sounded mad, and he threatened to run Boyer out of business.

"He was going to offer rides not for a little less, not for a lot less, but for about a quarter or a fifth of the going rate," he says. "He told me that he was willing to lose hundreds of thousands of dollars, if that's what it took. He told me that he was certain that, at some point in time, I would go out of business. It was only a matter of time."

The emails and messages grew more frequent, and more threatening. Punturo said he would "bury" Boyer. He said he would "make him pay." In one email, Punturo wrote, "You instilled this hatred within me … and now you will realize my resolve to witness your demise."

"It was personal for him," says Boyer.

(http://mediad.publicbroadcasting.net/p/wiaa/files/styles/x_large/public/201611/IMG_6105_0.JPG)

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The phone call

The situation escalated for months, until a phone call one night in 2014. Boyer says Punturo told him time was up. He was ready to begin his plan to run Traverse Bay Parasail out of business. The only thing that would stop him would be if Boyer agreed to pay him $19,000 a year.

(http://mediad.publicbroadcasting.net/p/wiaa/files/styles/x_large/public/201611/punturo.court_1.JPG)

Bryan Punturo [right] listens to Judge Thomas Phillips during a hearing.

CREDIT AARON SELBIG

Saburi Boyer

CREDIT AARON SELBIG

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

After the phone call, Boyer accepted Punturo's deal, and he started writing him checks.

Bryan Punturo has a history of strong-arm business tactics. In 2004, he was accused of inflating the value of four tanning salons he sold in Indiana.

Then in 2013, in Traverse City, Punturo was unhappy that his investment in the Tamarack Lodge hadn't panned out, so he hired picketers to stand outside the lodge during the busy summer season.

Both of those cases went to court, but none of the charges against Punturo stuck.

A devastating diagnosis

By the summer of 2015, Saburi Boyer had bigger problems than Bryan Punturo.

"I thought I had the flu, and I was super stressed about this whole ordeal with Bryan," he says. "I just thought I was sick from stress. I ended up going into the hospital and finding out, after I had woken up from a medically-induced coma, that I had leukemia."

Boyer was 34 years old – healthy and fit. The diagnosis was devastating. While Boyer was going through chemotherapy, Punturo wanted his money.

"Bryan had been trying to get paid while I was in the hospital," says Boyer. "I was in a coma. I wasn't writing any checks. He wanted to know where his money was, and wanted it now."

Punturo turned his attention – through texts and emails – to Boyer's wife, Danielle. And that was the last straw for Boyer.

Danielle took the contract to the family attorney, Brace Kern, who filed a civil case, alleging Punturo broke antitrust laws. He also thought the State of Michigan might be interested.

"So I contacted the Attorney General Antitrust Division, sent them a copy of the contract and said, what's your opinion?'" says Kern.

"Usually extortion is 'burn your house down and break your legs.'" - Jonathan Moothart

In May, the Attorney General's office sent a press release to news organizations in northern Michigan, announcing extortion charges against Bryan Punturo.

It would be the first extortion case tried in the 86th District Court since anyone could remember.

'There's hatred dripping in that letter'

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Def-Appellants' Appendix 454

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Punturo's attorney, Jonathan Moothart, argued that just because Punturo said some "mean" things to Saburi Boyer – and threatened to out-compete him in the parasailing business – that does not rise to the level of extortion.

"Extortion is unusual to begin with and this is even more unusual, because usually extortion is 'burn your house down and break your legs.' And that's not present here," said Moothart in court.

Punturo faced 20 years in prison. To send him there, the state relied on the emails and text messages Punturo had sent to Boyer.

Prosecutor Matthew Payok read aloud from the letter Punturo wrote – the one where he said, "You instilled this hatred within me ... and now you will realize my resolve to witness your demise."

"There's hatred dripping in that letter," Payok told Thomas Phillips.

After weeks of trying to get his side of the story, Bryan Punturo agreed to talk. We met at his lawyer's home on Elk Lake. Punturo laid down a stack of documents that never made it into court – emails and text messages from Saburi Boyer.

The contract

The first thing he showed was that the actual contract they signed – the $19,000 contract we heard so much about in court – was drawn up by Saburi Boyer.

Punturo says the whole agreement was Boyer's idea.

"I think when you review all the text messages and emails, you'll see there's no indication whatsoever of fear in his voice," says Punturo. "Saburi has been an aggressive, diligent businessman his entire life. I couldn't intimidate him if I wanted to."

Punturo and his attorney say Boyer was aggressively pursuing a plan to become the only parasailing operator on Grand Traverse Bay.

1:18 PM Called O'dell

4:21 PM I text Dave, "I'll get to the point. I've caught wind that you're thinking about putting a boat up North in Traverse City. I don't know if you're seriously considering it or not, but I strongly r recommend you give that up quick. We just agreed a couple months ago to mutually leave each other alone. I don't mess with you in Florida and you don't mess with me in Michigan. There's no way I'm gonna let you get away with putting a boat next in my hometown without coming after you in every way I know how that is legal. I own 4 parasail boats still and 3 of them need a home! I can't even tell you how badly everyone down south wants me to come back down there. I want you to leave me alone and you gave me your word that with or without a piece of paper, you would honor that agreement. Please give me a call"

4:23 PM Spoke to Bryan over phone about renting space from Park

(http://mediad.publicbroadcasting.net/p/wiaa/files/styles/x_large/public/201611/fullsizerender_3_.jpg)

In a text message, Saburi Boyer warns Dave O'Dell "don't mess with me in Michigan."

First, Boyer bought out Casey Punturo. Then he got aggressive with Dave O'Dell, a parasailing operator in Florida who was considering opening up shop in Traverse City. In a text message to O'Dell in May of 2014, Boyer said, "don't mess with me in Michigan. There's no way I'm

Def-Appellants' Appendix 45a

Appellant's Motion Expand
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gonna let you get away with putting a boat … in my hometown without coming after you in every way I know how that is legal."

After O'Dell backed down, Boyer offered to buy out another competitor, Eric Harding. Harding rejected Boyer's offer, and Punturo says that's when he first heard from Boyer.

Punturo says Boyer offered three options, including paying Punturo "to do nothing."

Text and email records show no animosity during the contract negotiation. Boyer was trying to sell Punturo on the contract, saying he should take it so he wouldn't have to hassle with vendors or parking. In one email, Boyer said, "I think my proposal is more than fair. Please let me know what you think."

They finally settled on a deal, and Boyer drew up the contract.

"After we structured our deal and we went away, everything was fine," says Punturo. "Eighteen months later, he defaulted on our deal. When he defaulted, I knew the mistake I made getting into a relationship with him."

Punturo says the only reason things got heated between the two men was because Boyer stopped paying. He admits he did pursue Boyer for the money he was owed, and he used language that he regrets now. He says he could've been more "diplomatic."

the next few years.

I know you are considering your options. I think my proposal is more than fair. I intend to figure this out with you promptly so that we can both move forward with whatever our plans are either way. Please let me know what you think.

Thanks,
Saburi

I'm available by phone.

Sent from my iPhone

On May 5, 2014, at 2:13 PM, Saburi Boyer wrote:

Im all about focusing on the facts and weighing them thoughtfully. please feel free to call me if you want to discuss as email can sometimes distort intended tone or mask it. I would like to be as clear as possible with our communications.

Thanks

Saburi

Sent from my iPhone

(http://mediad.publicbroadcasting.net/p/wiaa/files/styles/x_large/public/201611/fullsizerender_4_.jpg)

In an email, Saburi Boyer tells Bryan Punturo "I think my proposal is more than fair."

Guns and badges

But he had no clue how far things would go until several weeks later, when he got a phone call from his office.

"My secretary called me one day and asked me what on earth is going on, because we had six armed state officers in back jumpsuits, with guns and badges, knocking on the door saying, 'We're doing a search of your corporate offices,'" says Punturo.

"Saburi lied to everybody. He took the facts on the table [and] he manipulated them to the point where he appeared to be the victim."

Last month, Judge Thomas Phillips threw out the extortion charges. Phillips called Punturo's behavior "nasty, mean-spirited and reprehensible," but he ruled that nothing he did was illegal.

Punturo's attorney, Jonathan Moothart, is happy about the verdict, but he notes that since it was a hearing and not a full trial, the court – and the public – never got to hear the full case against Saburi Boyer.

"We never really got to tell our side of the story," says Moothart. "Indeed, today is really the first time that's occurred. And so I wouldn't put too much stock in statements of judges, as much as I respect them, who really haven't heard everything yet."

State's attorneys have declined to comment on whether they will appeal to the circuit court.

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Asked about the contract he signed with Punturo, Boyer admitted he was the one who drew it up.

"I guess if you want to be technical about it, I produced the physical contract. Yes," he said in a phone interview.

Boyer says he wrote the contract under duress, and in terms dictated by Punturo. He also says there was a big difference between what was said in emails and what was said over the phone.

"Bryan has shown aggressive behavior, not just toward me but toward many others … in Traverse City, in Fort Wayne, Indiana, in the tanning business," says Boyer. "So it's really convenient for him to say that I'm the aggressor, but I'd like you to point out one thing that I said that was

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aggressive … one thing that I did that was aggressive."

(http://mediad.publicbroadcasting.net/p/wiaa/files/styles/x_large/public/201611/punturo.mugshot.jpg)

Bryan Punturo's mugshot was all over the news when he was charged with extortion.

The fallout

Boyer says this experience has been hard on him, and it's taken a toll on his marriage.

Punturo is glad the criminal case against him was thrown out, but the damage is done.

"Oh, it's brutal," he says. "It weighs on you heavy. You wake up at three o'clock in the morning, thinking through the facts and the details. It's been a long, hard process."

Punturo says he's paid thousands in attorney fees, and after his name and mugshot were all over the news, his business suffered.

"Saburi lied to everybody," he says. "He took the facts on the table [and] he manipulated them to the point where he appeared to be the victim. And the fact that it could run this far, this long, and could cost this much money is just inconceivable."

Punturo and his attorney are now considering a lawsuit against Boyer.

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STATE OF MICHIGAN

IN THE 13TH CIRCUIT COURT, COUNTY OF GRAND TRAVERSE

BRYAN PUNTURO AND FAWN PUNTURO,
husband and wife,

and

B&A HOLDINGS, LLC d/b/a ParkShore Resort,
a Michigan limited liability company,

Plaintiffs,

v

BRACE KERN,
an individual,

and

SAUBURI BOYER AND DANIELLE KORT, f/k/a
Danielle Boyer,
individuals,

Defendants.

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

PROOF OF SERVICE

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PROOF OF SERVICE

I, Nancy Kim-Moothart, certify that on this 7th day of July, 2017, I did cause to be served a copy of **Plaintiffs' Answers and Objections to Defendant Boyer's First Discovery to Plaintiffs** (***signed as to Objections; unsigned as to Answers***) and **Proof of Service** upon Defendants' attorneys of record listed in the caption of this case at their addresses listed in the caption of this case via first class mail, postage prepaid.

I declare under penalty of perjury that the statement above is true to the best of my information, knowledge, and belief.

Dated: July 7, 2017

/s/ Nancy Kim-Moothart
Nancy Kim-Moothart

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APPENDIX 34

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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

Plaintiffs/Appellees/Cross-Appellants,

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

Defendants/Appellants/Cross-Appellees.

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

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

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Plaintiffs/Appellees' Response to Motion of Appellants Boyer and Kort to Expand Record

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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husband and wife, and B&A HOLDINGS, LLC
d/b/a ParkShore Resort,
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Plaintiffs/Appellees/Cross-Appellants,

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COA File No. 338727
COA File No. 338732

Lower Court File No: 17-32008-CZ
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BRACE KERN,
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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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Consistent with "an oft-quoted adage: If the law is against you, argue the facts; if the facts are against you, argue the law; and if they both are against you, pound the table and attack your opponent," *United States v Griffin*, 84 F3d 912, 927 (CA 7, 1996), Boyer and Kort continue their attack on their opponent, Bryan Punturo.

It is certainly true that, as Appellants' motion states, Bryan Punturo *was* a criminal defendant. He was *charged* with extortion, at the behest and urging of Boyer and his attorney, all as part of an attempt to extract $750,000 from Punturo. It is also true that this ill-fated and baseless extortion charge never made it past the preliminary examination stage of the criminal proceedings. It was dismissed by the Grand Traverse County District Court because the crime of extortion requires proof – or, in the District Court, proof only of probable cause – of an illegal act by the defendant, which the District Court found lacking.

The acts of Punturo allegedly supporting the extortion charge occurred, according to the Attorney General's pleadings, in May, 2014. The Attorney General certainly did, as Appellants' motion states, "rel[y] on . . . in the criminal prosecution," a letter written by Punturo **a year and a half after these May, 2014 acts**. This November 16, 2015, letter written by Punturo is the same one that is repeatedly and prominently featured in Appellants' briefs in the trial court and this Court. Punturo's claim that this letter was and is irrelevant is not mere opinion – simply, despite the Attorney General's reliance on it, this letter was not found to support even probable cause in the District Court, as evidenced by the dismissal of the charges by that court.

Yet, Boyer and Kort now come before this Court, asking that the record be expanded, in order to be able to argue for the significance of not only the 2015 letter, but also, the Assistant Attorney General's comments in court about the letter, quoted in news articles, that "there's hatred dripping

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in that letter." Essentially, Boyer's and Kort's argument is that Punturo said bad things to them in a private letter, so they should get a free pass to defame Punturo in newspapers, and on television and on the radio. As they would have it, "he had it coming. Ignore what we said about him that was published nationwide. Ignore the facts. Ignore the law. Our opponent is a bad guy and deserved to be defamed by us. Just look at what he said in this letter!"

Obviously, this case is not about what Punturo said to Boyer in a private letter written 18 months after the communications claimed to support the extortion charge. It is about what the Defendants in this case, said about Punturo, to the media – while he was being prosecuted and while they were demanding $750,000 in exchange for helping him to "get him out of hot water" in the pending prosecution – all as their attorney, Defendant Brace Kern stated, when he demanded the $750,000 from Punturo. Neither this letter, nor the Assistant Attorney General's media-quoted arguments about it, supplies any relevant "context," at all, to assess the defamatory statements made by these Defendants, or any factual or legal issue before this Court.

And, even if relevant, copies of these news reports were never a part of the record before the trial court. They certainly could have been – they are all publicly available on the Internet on the various websites of the media outlets. That is where Punturo's counsel obtained copies of them, to answer the discovery in the trial court. Boyer and Kort could have provided copies to the trial court, but did not. Now, they come to this Court requesting that this Court decide their appeal, not *de novo* on the record below, but on additional facts and evidence never considered by the trial court. Obviously, there is a lot of evidence that Punturo will present at trial that is not in the record of this appeal either – but this Court's job is not to sift through all of the possible evidence and try the case,

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even on liability. Its job is to determine whether the trial court erred in denying these Defendants' motions for summary disposition – on the record on which the trial court made this ruling.

As is well established, "[t]his Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783, 791 (2002). Although "MCR 7.216(A)(4) gives this Court authority to permit additions to the record[,] [s]ee *People v. Nash*, 244 Mich.App 93, 99-100; 625 NW2d 87 (2000), . . . this Court has refused a party's request to expand the record where the trial court had not considered the evidence in rendering a decision. See *Coburn v. Coburn*, 230 Mich.App 118, 122; 583 NW2d 490 (1998), *rev'd on other grounds* 459 Mich. 875 (1998); *Golden v. Baghdoian*, 222 Mich.App 220, 222 n 2, 564 NW2d 505 (1997)." *Triad Mech, Inc v Rhodes*, No. 276616, 2008 WL 942267, at *2 (Mich App April 8, 2008). Matters more typically the subject of motions to expand the record are "subsequent events, particularly those rendering an appeal moot or otherwise directly affecting the viability of the appeal, [which] may and assuredly should be promptly brought to the attention of the appellate court." *Coburn*, supra, 230 Mich App at 123.

In sum, Appellants' transparent attempt to sling more mud, which has as its genesis a lack of any better method to support their arguments, should be rejected, because only the record below should be the basis of this Court's review.

Dated: April 2, 2018

MOOTHART & SARAFA, PLC

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APPENDIX 35

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2011 WL 744943
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Derith SMITH, Plaintiff–Appellee,
v.
ANONYMOUS JOINT ENTERPRISE, George Preston, Mary Barrows, Village of Suttons Bay, Charles Stewart, Noel Flohe, and John Stanek, Defendants,
and
Donald Barrows, Defendant–Appellant.
Derith Smith, Plaintiff–Appellee,
v.
Anonymous Joint Enterprise, George Preston, Donald Barrows, Mary Barrows, Village of Suttons Bay, Charles Stewart, and Noel Flohe, Defendants,
and
John Stanek, Defendant–Appellant.
Derith Smith, Plaintiff–Appellee,
v.
Donald Barrows and John Stanek, Defendants,
and
Noel Flohe, Defendant–Appellant.

Nos. 275297, 275316, 275463.
|
March 3, 2011.

Leelanau Circuit Court; LC No. 05–006952–CZ.

Before: SAAD, P.J., and FORT HOOD and BORRELLO, JJ.

ON REMAND

PER CURIAM.

*1 This case concerns whether a cause of action for defamation exists based on the distribution of a report from plaintiff's personnel file and is on remand from our Supreme Court. *Smith v. Anonymous Joint Enterprise*, 487 Mich. 102; —— NW2d —— (2010). We reverse and remand for entry of judgment in favor of the remaining defendants Donald Barrows and John Stanek.[1]

This case arises from a dispute between political adversaries. Plaintiff and defendants, Donald Barrows and John Stanek, were involved in local politics. Plaintiff worked for the Village of Suttons Bay. During her employment, the village manager, Charles Stewart, prepared a report to the personnel committee to address various issues regarding plaintiff's employment. She was terminated from her employment with the village, but never saw the report that was placed in her personnel file. After plaintiff was elected as the supervisor of Elmwood Township, defendants obtained a copy of the report. The report was mailed to residents in the local and surrounding communities and distributed at a meeting. Someone added a handwritten caption on the document that stated, "Attention: Suttons Bay Villagers Alledged (sic) Misuse of Taxpayer Funds?" The employee who was the subject of the report was only identified as "Deri." Someone also handwrote "Derrick (sic) Smith" on the report. Ultimately, plaintiff pursued a defamation action against defendants, Barrows and Stanek, and Noel Flohe, the men who acknowledged mailing the personnel report. The jury rendered a monetary award in favor of plaintiff with the additional requirement that defendants publicly apologize to her. We reversed the jury verdict, holding that plaintiff, a public figure, failed to meet her burden of proof with regard to the actual malice requirement. Our Supreme Court reversed and remanded, stating:

> In this case, we decide whether plaintiff, Derith Smith, presented clear and convincing evidence at trial to support the jury's finding that defendants John Stanek, Donald Barrows, and Noel Flohe defamed plaintiff by mass-mailing copies of a personnel report containing false information about her. After conducting an independent review of the record, we conclude there exists clear and convincing evidence that Stanek and Barrows acted with "actual malice," but that plaintiff has failed to meet her evidentiary burden as to Flohe.

Accordingly, we affirm the result reached by the Court of Appeals as to Flohe, but reverse the result it reached as to Stanek and Barrows. We remand this matter to the Court of Appeals for consideration of defendants' other issues, including whether the handwritten caption on the mailed report constitutes a non-defamatory statement of opinion when considered in its context within the report as a whole, whether the caption is provable as false, and whether defendants are entitled to the protection afforded

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by Michigan's statutory fair reporting privilege. [*Smith*, 487 Mich. at 106.]

*2 We allowed the parties to file supplemental briefs to address the remaining issues. After reviewing the briefs and the evidence, we once again reverse the jury verdict and remand for entry of judgment of no cause of action in favor of defendants Barrows and Stanek.

I. False and Defamatory Statements

Defendants first allege that plaintiff failed to sustain her burden of proving that false and defamatory statements had been published. Plaintiff contends that this issue is not preserved for appellate review because it was not raised in the original brief on appeal to this Court and is outside the scope of the Supreme Court remand. We conclude that the statement of this issue and its resolution are consistent with the Supreme Court directive that we address "whether the handwritten caption on the mailed report constitutes a non-defamatory statement of opinion when considered in its context within the report as a whole...."

"The First and Fourteenth Amendments of the United States Constitution prohibit public figures from recovering damages caused by a defendant's statement unless they prove that the statement was a defamatory falsehood and that it was made with actual malice...." *Lakeshore Community Hosp., Inc. v. Perry*, 212 Mich.App 396, 402; 538 NW2d 24 (1995). Libel is a "statement of and concerning the plaintiff which is false in some material respect and is communicated to a third person by written or printed words and has a tendency to harm the plaintiff's reputation." *Fisher v. Detroit Free Press, Inc.*, 158 Mich.App 409, 413; 404 NW2d 765 (1987). "A libel may consist of a statement of fact or a statement in the form of an opinion, but a statement of opinion is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Id.* Plaintiff has the burden of proving the elements of an alleged libel. *Id.* "The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Mitan v. Campbell*, 474 Mich. 21, 24; 706 NW2d 420 (2005). However, when a defamation case involves a public figure, there is an additional requirement that there be clear and convincing evidence of actual malice. *Faxon v. Michigan Republican State Central Comm.*, 244 Mich.App 468, 474; 624 NW2d 509 (2001). When addressing a defamation action, the appellate court must conduct an independent examination of the record to prevent forbidden intrusions into the field of free expression. *Id.* at 473. A libel case challenging the constitutionality of public discourse must be carefully examined with regard to falsity to ensure that precious liberties established and ordained by the Constitution are followed. *Rouch v. Enquirer & News of Battle Creek (After Remand)*, 440 Mich. 238, 253; 487 NW2d 205 (1992). Thus, an independent examination of the whole record is designed to ensure that the judgment does not constitute a forbidden intrusion into the field of free expression. *Id.* at 254 (further citation omitted). This independent review is premised on the fear that juries might give "short shrift to important First Amendment rights," and reflects the inherent doubt that juries will recognize the line between unconditionally guaranteed speech and legitimately regulated speech. *Id.* at 253–254, 258.

*3 In the present case, a review of the Stewart report as a whole with the handwritten caption reveals that it does not contain false and defamatory statements that are actionable. The report was a summary of events surrounding plaintiff's employment that needed to be resolved. After the appointment of a new clerk, plaintiff was allowed to remain employed with the village, but her duties and salary were not definitively resolved. Stewart wrote a report to address the problems, but acknowledged that his report was based on his understanding, assumptions, and hearsay. Indeed, Stewart was not involved with plaintiff's initial employment with the village. The report did contain information that was not correct when it improperly identified plaintiff as an independent contractor and reported that she did not receive a W–2. Statements concerning an individual's employment status and entitlement to benefits are not defamatory. The report delineated Stewart's opinion that plaintiff obtained a higher rate of pay for her bookkeeper position by waiting until he worked from home to take the issue up with the treasurer. This opinion was subjective and premised on the timing of the event. The report clearly reflects that it was Stewart's subjective opinion. Moreover, the report acknowledged that plaintiff sought and received approval for the higher rate of pay. The handwritten caption reflects a question premised on the content of the report. Under the circumstances, the report and handwritten caption are not actionable, but rather constitute non-defamatory statements of opinion. *Mitan*, 474 Mich. at 24; *Fisher*, 158 Mich.App at 413.

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II. Provable as False

Next, our Supreme Court has directed us to address whether the handwritten caption is provable as false. All statements are not actionable; rather, to be actionable, a statement must be provable as false. *Ireland v. Edwards*, 230 Mich.App 607, 616; 584 NW2d 632 (1998) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17–20; 110 S Ct 2695; 111 L.Ed.2d 1 (1990)). A statement is provable as false if it is an objectively verifiable event, but a statement is not actionable if it is a subjective assertion. *Ireland*, 230 Mich.App at 616. The handwritten caption questions whether plaintiff misused taxpayer funds and is not provable as false. Again, it is premised on the report that addressed the subjective timing of plaintiff's questioning of her pay rate and to whom the question was directed. The caption reflects a commentary on the content of the Stewart report. We conclude that the caption on the Stewart report is not provable as false. Therefore, plaintiff cannot meet her burden of proving the elements of defamation. *Fisher*, 158 Mich.App at 413.

III. MCL 600.2911(3)—The Fair Reporting Privilege

This issue is moot in light of our resolution of issues I and II. However, because of the Supreme Court's instruction that we address it, we conclude that the fair reporting privilege applies to the Stewart report.

*4 Issues of statutory construction present questions of law subject to de novo review. *Hunter v. Hunter*, 484 Mich. 247, 257; 771 NW2d 694 (2009). The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature. *In re Certified Question*, 433 Mich. 710, 722; 449 NW2d 660 (1989); *Amburgey v. Sauder*, 238 Mich.App 228, 231–232; 605 NW2d 84 (1999). Once the intention of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *Certified Question*, 433 Mich. at 722. The language of the statute expresses the legislative intent. *Dep't. of Transp v. Tomkins*, 481 Mich. 184, 191; 749 NW2d 716 (2008). The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. *Id.* Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id.* Terms that are not defined must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions. *Halloran v. Bhan*, 470 Mich. 572, 578; 683 NW2d 129 (2004). Application of the law to the facts is reviewed de novo. *Centennial Healthcare Mgt. Corp. v. Dep't. of Consumer & Industry Servs.*, 254 Mich.App 275, 284; 657 NW2d 746 (2002).

MCL 600.2911 states, in relevant part:

> (3) If the defendant in any action for slander or libel gives notice in a justification that the words spoken or published were true, this notice shall not be of itself proof of the malice charged in the complaint though not sustained by the evidence. In an action for slander or for publishing or broadcasting a libel even though the defendant has pleaded or attempted to prove a justification he or she may prove mitigating circumstances including the sources of his or her information and the ground for his or her belief. *Damages 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 governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report. This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, which was not a part of the public and official proceeding or governmental notice, announcement, written or recorded report or record*

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> *generally available to the public or act or action of a public body.* [Emphasis added.]

*5 Plaintiff contends that this provision is irrelevant because the privilege only applies to media defendants, not private individuals. Although prior versions of the fair reporting privilege limited its application to members of the media, subsequent revisions removed this language. The plain language of the statute in its current form contains no qualification regarding the type of defendant to which the privilege applies. *Tomkins*, 481 Mich. at 191. Therefore, plaintiff's challenge is without merit.

The plain language of MCL 600.2911(3) states that damages shall not be awarded in a libel action for the publication "of a fair and true report of matters of public record ... or for a heading of the report which is a fair and true headnote of the report." Plaintiff contends that Stewart acknowledged at trial that information contained in the report was incorrect, and therefore, the document cannot constitute a fair and true report. We disagree. The terms "fair" and "true" are not defined in the statute. "Fair" is defined as "free from bias, dishonest, or injustice ... legitimate, sought, done, given ..." while "true" is defined as "being in accordance with the actual state or conditions; conforming to reality or fact ... real; genuine; authentic...." Random House Webster's College Dictionary, pp 472, 1403 respectively. To qualify as "fair and true," the "gist" of the article must be substantially true. *Northland Wheels Roller Skating Ctr., Inc. v. Detroit Free Press, Inc.*, 213 Mich.App 317, 325; 539 NW2d 774 (1995) (quotation omitted). Minor differences or inaccuracies are deemed immaterial if they do not alter the "complexion" of the publication. *Id.*

At trial, Stewart acknowledged that statements contained in his written report were not correct. However, if one reviews the memorandum as a whole, the document was prepared to resolve the issues surrounding the clerk and bookkeeper position. Stewart acknowledged that some events occurred before he was hired. At times, he stated in the report that it was prepared based on his understanding, his assumptions, and his information from third parties. In light of these qualifications contained throughout the document, the Stewart document was a fair and true report of the information that Stewart had at that time. That is, the "gist" of the report was substantially true. *Northland Skating*, 213 Mich.App at 325. With regard to the publication with the added caption as a headnote, we note that it addresses the same questions contained in the Stewart document. Specifically, whether plaintiff deliberately raised the issue of her salary when Stewart was out of the office and whether she raised the inquiry to the appropriate person. We conclude that the fair reporting privilege applies in light of the preface in the report regarding the basis of the information and the qualifications. The inaccuracies contained in the report did not alter the complexion of the publication. *Id.*

*6 Plaintiff also contends that MCL 600.2911(3) does not apply because the report is not a public record subject to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* At trial, Stewart asserted that his report was placed in plaintiff's personnel file, was a public record, and was subject to FOIA. In the trial court, plaintiff did not present a witness from the village to contradict this testimony. In the supplemental brief filed on remand, plaintiff asserts that the Stewart report was not subject to FOIA because it was a preliminary report exempt from disclosure. MCL 15.243(m). However, MCL 15.243(m) provides that the exemption does not apply unless the public body shows that the interest in ensuring frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. In the present case, plaintiff presented no testimony from any village employee that if a FOIA request had been made, an exemption from disclosure for frank communication would have been requested. More importantly, the plain language of MCL 600.2911(3) does not provide that the term "public record" is limited to the definition found in FOIA and is exclusively governed by FOIA and its exemptions.[2] *Tomkins*, 481 Mich. at 191. Therefore, plaintiff's challenge is without merit.

IV. The Public Apology

In light of our other rulings this issue is moot. However, to comply with the Supreme Court order, we also vacate the inclusion of a public apology in the judgment pursuant to the jury's verdict. The propriety of the jury's sua sponte inclusion of an apology on the verdict form was raised, addressed, and decided in the trial court, and therefore, it is preserved for appellate review. *Michigan's Adventure, Inc. v. Dalton Twp.* — Mich.App —; — NW2d — (2010), (Docket No. 292148 issued October 21, 2010); *Polkton Twp v. Pellegrom*, 265 Mich.App 88, 95; 693 NW2d 170 (2005). "An inquiry into the nature, scope, and elements of a remedy is a question of law that is reviewed de novo." *Auto-Owners Ins. Co. v. Amoco Prod. Co.*, 468 Mich. 53, 57; 658 NW2d 460 (2003).

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Jurisdiction over equitable questions belongs to the judiciary, and juries are not permitted to devise specific remedies. *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 274, 285; 42 NW 827 (1889). When a jury renders a verdict that includes equitable remedies, that portion of the verdict is surplusage and does not affect the validity of the remainder of the verdict. *Robertson & Wilson Scale & Supply Co. v. Richman*, 212 Mich. 334, 339–340; 180 NW 470 (1920). Accordingly, the inclusion of a public apology on the jury verdict form was erroneous.

Reversed and remanded for entry of judgment of no cause of action.

All Citations

Not Reported in N.W.2d, 2011 WL 744943

Footnotes

1 The Supreme Court held that there was insufficient evidence of "actual malice" by defendant Noel Flohe, and therefore, we resolve the issues surrounding defendants Barrows and Stanek only. *Smith*, 487 Mich. at 106.

2 MCL 600.2911(3) does not define "public record" and does not refer to FOIA for the definition of public record.

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APPENDIX 36

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2005 WL 2290678
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan, Southern Division.

KMART CORPORATION, Plaintiff,
v.
AREEVA, INC., et al., Defendants.

No. Civ. 04-40342.
|
Sept. 20, 2005.

Attorneys and Law Firms

Brian L. Levine, Frederick R. Juckniess, Miller, Canfield, Ann Arbor, MI, Jonathan W. Fountain, Michael W. Hartmann, Miller, Canfield, Detroit, MI, for Plaintiff.

Brian E. Etzel, Clark Hill, David S. Mendelson, David S. Mendelson Assoc., Birmingham, MI, Michael W. Groebe, Jennifer S. Buckley, Timothy D. Wittlinger, Clark Hill, Mary K. Deon, Matthew J. Lund, Pepper Hamilton, Detroit, MI, for Defendants.

ORDER GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS AND GRANTING PLAINTIFF'S MOTION FOR A JUDGMENT ON THE PLEADINGS

GADOLA, J.

*1 Before the Court are three motions: Defendants Areeva and Facca's Motion to Dismiss, filed on January 21, 2005 [docket entry 25]; Defendant Cesca's Motion to Dismiss, filed on January 21, 2005 [docket entry 33]; and Plaintiff Kmart's Motion to Dismiss, filed on April 8, 2005 [docket entry 56]. The Court held a hearing on these motions on September 13, 2005. For the reasons set forth below, the Court grants Defendants' motions to dismiss in part, and dismisses the rest of motions without prejudice, while granting Plaintiff leave to amend its complaint. The Court also grants Plaintiff's motion for a judgment on the pleadings.

I. Background

On November, 23, 2004 Plaintiff Kmart filed its complaint, in diversity, against Defendants William Mayville, Andrew Facca, Fabio Cesca, and Areeva, Inc. ("Areeva"). Plaintiff filed an amended complaint soon after on December 10, 2004. In fourteen federal and state claims, Plaintiff Kmart alleges that Mayville, a senior Kmart employee, conspired with Areeva and two of Areeva's employees, Facca and Cesca, to defraud Kmart of millions of dollars. Defendants Areeva and Facca filed one motion to dismiss the claims, and Defendant Cesca filed a similar motion to dismiss. [1]

Shortly after the complaint was filed, on December 12, 2004, the Detroit News and Free Press published a front-page article entitled "Kmart: Manager stole millions." The article summarized the allegations made by Plaintiff its amended complaint. The article also contained a quote from Stephen Pagnani, a "spokesman" for Plaintiff Kmart, who said, "The fact that we filed the lawsuit demonstrates that we caught him." In response to the newspaper article, Defendant Mayville filed counterclaims against Plaintiff: defamation, false light invasion of privacy, and injurious falsehood. In response to the counterclaims, Plaintiff filed a motion for judgment on the pleadings, pursuant to Fed.R.Civ.P. 12(c).

II. Defendants' Motions to Dismiss

A. Counts 1-12

Against Counts 1-12, Defendants bring a variety of arguments for why these counts should be dismissed in their entirety, or with respect to certain Defendants. Defendants' primary argument supporting their motions to dismiss is that Plaintiff has failed to plead sufficiently several of the counts contained in the amended complaint. In the responses to the motions to dismiss, Plaintiff disputes all of Defendants' arguments, but also requests, should this Court find any of the claims to be pled insufficiently, that Plaintiff have an opportunity to file a second amended complaint.

Leave to amend a pleading "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). The Court believes that an amended complaint would be a benefit to the case in the current situation, and thus would serve the interests of justice. At the hearing, Plaintiff stated that it now had much more information concerning Defendants and their actions than what Plaintiff knew at the time the first Amended complaint was filed, and that such information would shore up any alleged deficiencies in the complaint. Plaintiff also conceded that their breach of contract claim (Count 9) was too broad, incorrectly including some of the individual defendants. Furthermore, during the hearing, it became obvious to the Court that some of the facts alleged in the First Amended Complaint would benefit from clarification, including, for example, the current citizenship of Defendant Areeva, the

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number of employees at Areeva, and Defendant Cesca's past employment status with Areeva.

*2 Plaintiff has indicated both at the hearing and in its response briefs that it is willing to file an amended complaint. An amended complaint would not only clarify the causes of action before this court, but would enable Plaintiff to include any additional information gathered over the past several months. This might in turn address Defendants' concerns about the alleged deficiency of pleadings currently found in Plaintiff's amended complaint.

Therefore, the Court orders Plaintiff to amend its pleadings in a manner not inconsistent with this order. The Court also dismisses without prejudice Defendants' motions with regard to Counts 1-12, without deciding the motions on their merits.

B. Counts 13 and 14

Defendants move to strike Count 13, "Constructive Trust and Accounting," because it is redundant. Count 13 is not properly a separate claim or cause of action, but rather, it is a request by Plaintiff for certain relief in addition to its money damages, relief that Plaintiff asks for elsewhere in its amended complaint or which has already, in part, been granted. In Count 13, Plaintiff requests "the imposition of a constructive trust," "an accounting" of the property, and an order restraining Defendants from disposing of assets. At the end of each of the previous twelve counts, Plaintiff requests "the imposition of a constructive trust" and "equitable accounting." Further, the assets in dispute have been placed in escrow through the Stipulated Order filed on December 16, 2004. Thus, in the interests of simplifying the counts in this case, the Court dismisses Count 13 as unnecessary, while retaining Plaintiff's requests for relief through a constructive trust and equitable accounting contained in Counts 1-12.

Defendants also move to dismiss Count 14, "Preservation Order," because it is moot. In this count, Plaintiff requests that the Court issue an order "for the preservation and non-destruction of evidence that may be related to the litigations, including, but not limited to, all documents removed from Kmart by the defendants and the laptop which Areeva used during its work with Kmart." In this Court's Stipulated Order from December 16, 2004, Paragraph 8 stated:

> All parties to this action shall preserve any and all evidence related to any work by the defendants that involved Kmart, and shall not conceal or dispose of any documents or records related to such work, including documents or records maintained on laptops/computers used in connection with such work, to the extent that any such documents, evidence, or records are in a party's possession, custody or control.

Count 14 requests the same relief that has been granted in this December 16, 2004 Stipulated Order. Therefore, the Court dismisses Count 14 as moot.

III. Plaintiff's Motion to Dismiss

Defendant Mayville has filed three counts (defamation, false light invasion of privacy, and injurious falsehood) in a counterclaim against Plaintiff. Pursuant to Fed.R.Civ.P. 12(c), Plaintiff moved for a judgment on the pleadings. When, as here, a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) challenges the legal basis of the complaint, the motion is treated under the standards for motions to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. *See Kramer v. Van Dyke Pub. Schs.*, 918 F.Supp. 1100, 1104 (E.D.Mich.1996) (Gadola, J.)

*3 All three claims made by Defendant Mayville rely on the statement by the Kmart spokesman: "The fact that we filed the lawsuit demonstrates that we caught him." In its motion for a judgment on the pleadings, Plaintiff argues that the offensive statement by the Kmart spokesman is privileged under Michigan's Fair Reporting Privilege, and thus Mayville's counterclaims should be dismissed as a matter of law. Mayville's counter-argument is that the Fair Reporting Privilege does not apply to the spokesman's statement. This issue of whether the spokesman statement is privileged or not is a question of law that can be determined on the pleadings. *See Koniak v. Heritage Newspapers, Inc.*, 190 Mich.App. 516, 476 N.W.2d 447, 449 (Mich.Ct.App.1991) ("The question whether a privilege exists, immunizing a libel defendant from liability, is one of law.").

The governing statute, Michigan's Fair Reporting Privilege, states:

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> Damages 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 governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report. This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or contained in the report of anything said or done at the time and place of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, which was not a part of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body.

M.C.L. § 600.2911(3) (emphasis added).

For the most part, the Detroit Free Press newspaper article simply summarizes the allegations that Plaintiff made in its complaint. It is clear that all of these allegations made in the newspaper article are covered by the Fair Reporting Privilege, because they are simply the publication "of a fair and true report of matters of public record." M.C.L. § 600.2911(3). *See Amway Corp. v. Procter & Gamble Co.*, 346 F.3d 180, 187-88 (6th Cir.2003) ("[A] party's publication of any actual court filing or statement made in a judicial proceeding is privileged because the public has a legitimate interest in accessing and viewing that type of information."). Further, a verbatim repetition of the matters of public record is not required for the privilege to apply. Instead, Michigan appeals courts have stated that in order to be a "fair and true report", "[t]he information obtained and published must *substantially represent* the matter contained in the court records ... such a standard is met, and a defendant is not liable, where the "gist" or the "sting" of the article is substantially true." *Koniak v. Heritage Newspapers, Inc.*, 190 Mich.App. 516, 476 N.W.2d 447, 450 (Mich.Ct.App.1991) (emphasis added).

*4 Throughout Kmart's 181-paragraph Amended Complaint, Kmart makes many allegations that would fall squarely within the Fair Reporting Privilege, as they are matters of public record: that Mayville "was selling goods to Areeva for prices lower than fair market value" (Amend. Compl. at ¶ 71); that, in so doing, Mayville "conspired to defraud Kmart of millions of dollars" (Amend. Compl. at ¶ 1); and that this unlawful conduct "would have continued, perhaps indefinitely, had Kmart not uncovered the scheme." (Amend. Compl. at ¶ 89). The spokesman statement, "The fact that we filed the lawsuit demonstrates that we caught him," does not add anything additional to the already privileged allegations. Instead, it simply reiterates the allegations: that Plaintiff Kmart uncovered the person involved in the fraudulent scheme, and a resulting lawsuit has been filed against him. The statement "substantially represents" the matters of the amended complaint, matters of public record which are privileged under Michigan's Fair Reporting Privilege. Therefore, the Court finds that the statement made by Plaintiff's spokesman is privileged as a matter of law, and thus finds for Plaintiff against Defendant Mayville's counterclaims.

IV. Conclusion

For the reasons stated above, IT IS HEREBY ORDERED that Defendants' Motions to Dismiss [docket entries 25 and 33] are GRANTED IN PART as to Counts 13 and 14 which are hereby DISMISSED, and the remainders of the Motions are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff shall, within fourteen (14) days of the filing of this order, FILE AN AMENDED COMPLAINT not inconsistent with this order. Failure to file an amended complaint within that time may result in a dismissal of Plaintiff's claims.

IT IS FURTHER ORDERED that Plaintiff's Motion for Judgment on the Pleadings [docket entry 56] is GRANTED and Defendant Mayville's Counterclaims [included in docket entry 29] are DISMISSED.

SO ORDERED.

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All Citations

Not Reported in F.Supp.2d, 2005 WL 2290678

Footnotes

1 Defendant Mayville filed a concurrence on February 10, 2005, agreeing with both of Defendants' motions to dismiss. Since the concurrence is not a motion seeking relief, but simply concurs in the reasoning of the other Defendants, the Court need not consider the concurrence.

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APPENDIX 37

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2014 WL 6862923
Only the Westlaw citation is currently available.
United States District Court,
W.D. Michigan,
Southern Division.

Jeffrey PANIAN, an individual, Jill Panian, an individual, and Fair Housing Center Of West Michigan, a Michigan non-profit corporation, Plaintiffs,
v.
LAMBRECHT ASSOCIATES, INC., a Michigan corporation, Burton Ridge, L.L.C., a Michigan limited liability company, Eastgate Village, L.L.C., a Michigan limited liability company, and Lakewood Hills, L.L.C., a Michigan limited liability company, Defendants/Counter–Plaintiffs,
v.
Fair Housing Center of West Michigan, a Michigan non-profit corporation, Plaintiff/Counter–Defendant.

No. 1:14–CV–572.
|
Signed Dec. 3, 2014.

Attorneys and Law Firms

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Sara Grey Lachman, Sarah K. Willey, Miller Johnson PLC, Kalamazoo, MI, for Defendants/Counter-Plaintiffs.

OPINION

ROBERT HOLMES BELL, District Judge.

*1 This action is before the Court on Plaintiff Fair Housing Center of West Michigan's Rule 12(b)(6) motion to dismiss Defendants' counterclaim for defamation. (ECF No. 12.) For the reasons that follow, the motion will be granted.

I.

Plaintiffs Jeffrey and Jill Panian, a married couple with three children, and the Fair Housing Center of West Michigan (the "Center") filed this action against Lambrecht Associates, Inc., Burton Ridge, L.L.C., Eastgate Village L.L.C., and Lakewood Hills, L .L.C., alleging housing discrimination on the basis of familial status and age.[1] Through this action Plaintiffs challenge Defendants' policy of prohibiting more than two adults or more than two children from living in a two-bedroom unit.

After Plaintiffs filed suit, Elizabeth Stoddard, Director of Advocacy for the Center, was interviewed by the media, and an article based on that interview was published on MLive, an on-line newspaper. Defendants have filed a counterclaim against the Center, alleging that the Center defamed Defendants by portraying Defendants of being ignorant of fair housing standards or willfully violating anti-discrimination laws. (CounterCl. ¶ 1, ECF No. 9.) The Center has filed a motion to dismiss the counterclaim for failure to state a claim on which relief can be granted.

II.

Under the federal notice pleading standards, a complaint must contain "a short and plain statement of the claim showing how the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2). The complaint need not contain detailed factual allegations, but it must include more than labels, conclusions, and formulaic recitations of the elements of a cause of action. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court must " 'construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff,' " but " 'need not accept as true legal conclusions or unwarranted factual inferences.' " *Hunter v. Sec'y of U.S. Army,* 565 F.3d 986, 992 (6th Cir.2009) (quoting *Jones v. City of Cincinnati,* 521 F.3d 555, 559 (6th Cir.2008)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly,* 550 U.S. at 555). To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts that "state a claim to relief that is plausible on its face," and that, if accepted as true, are sufficient to "raise

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a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

"A defamatory communication is one that tends to harm the reputation of a person so as to lower him in the estimation of the community or deter others from associating or dealing with him." *Am. Transmission, Inc. v. Channel 7 of Detroit, Inc.*, 239 Mich.App. 695, 609 N.W.2d 607, 611 (Mich.Ct.App.2000) (citing *Hawkins v. Mercy Health Servs., Inc.*, 230 Mich.App. 315, 583 N.W.2d 725, 729–30 (Mich.Ct.App.1998)). However, not all defamatory statements are actionable. *Ireland v. Edwards*, 230 Mich.App. 607, 584 N.W.2d 632, 636 (Mich.Ct.App.1998). "If a statement cannot be reasonably interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment." *Id.* (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990); *Garvelink v. Detroit News*, 206 Mich.App. 604, 522 N.W.2d 883, 886 (Mich.Ct.App.1994)). In order to be actionable, a statement must be "provable as false," as in the case of an objectively verifiable event as opposed to a subjective assertion. *Id.* at 637, 522 N.W.2d 883 (citing *Milkovich*, 497 U.S. at 17–22). In other words, "[t]o constitute defamation, a statement must purport to 'stat[e] actual facts about the plaintiff' and must contain enough objective matter to be 'provable as false.' " *Elias v. Fed. Home Loan Mortg. Corp.*, 581 F. App'x 461, —— (6th Cir.2014) (quoting *Ireland*, 584 N.W.2d at 636–37.) "[A] statement of opinion may be defamatory when it implies assertions of objective facts." *Smith v. Anonymous Joint Enter.*, 487 Mich. 102, 793 N.W.2d 533, 548 (Mich.2010).

***2** The Center has attached matters outside the pleadings to its Rule 12(b)(6) motion to dismiss. The Court has elected not to consider these matters, and accordingly is not treating the motion as one for summary judgment under Rule 56. *See* Fed.R.Civ.P. 12(d).

The elements of a defamation claim are: "(1) a false and defamatory statement about the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 527 (6th Cir.2014) (citing *Mitan v. Campbell*, 474 Mich. 21, 706 N.W.2d 420, 421 (Mich.2005)). "Once the plaintiff has met his burden as to these common-law elements, the defendant brings forth his defenses of truth or privilege." *Postill v. Booth Newspapers, Inc.*, 118 Mich.App. 608, 325 N.W.2d 511, 516 (Mich.Ct.App.1982).

Although Michigan recognizes defamation by implication without a direct showing of a false statement, it still requires proof that the defamatory implications are materially false. *Locricchio v. Evening News Ass'n*, 438 Mich. 84, 476 N.W.2d 112, 132 (Mich.1991); *Am. Transmission*, 609 N.W.2d at 611. Moreover, "claims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle." *Locricchio*, 476 N.W.2d at 129.

Defendants allege in their counterclaim that the Center defamed it when its Director of Advocacy made the following statements to a reporter:

> We don't see this very often in the larger apartment communities. I think primarily because that community is more informed on fair housing issues.

(CounterCl.¶ 12.) Defendants allege that Stoddard's statements "can be taken to mean only that Lambrecht Management and the Communities violated fair housing laws and either (a) despite being businesses that are focused on managing housing communities, they are ignorant of fair housing standards or (b) they are informed but willfully violate anti-discrimination laws." (*Id.* at ¶ 13, 476 N.W.2d 112.) Defendants allege that the statements are false because they have not violated the fair housing laws and because they are appropriately informed on fair housing standards. (*Id.* at ¶ 18, 476 N.W.2d 112.)

The Center moves for dismissal of the counterclaim based on its contention that the statements at issue are not false and defamatory statements about Defendants, and because, even if defamatory, they are protected by the fair reporting privilege.

For purposes of this opinion, the Court accepts Defendants' contention that the word "this" in the first statement, "We don't see this very often in the larger apartment communities," refers to the allegations in the complaint that Defendants violated fair housing laws. (Defs.' Resp. Br. 3, ECF No. 15.) To the extent Stoddard's statements imply that Defendants violated the law by discriminating on the basis of familial

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status, the statements add nothing to what was alleged in the publicly-filed complaint, and fall within the protection of Michigan's statutory fair reporting privilege. *See* Mich. Comp. Laws § 600.2911(3) ("Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record ...."); *Amway Corp. v. Procter & Gamble Co.*, 346 F.3d 180, 187–88 (6th Cir.2003) (holding that the privilege extends to the party who filed the complaint).

*3 Defendants recognize the fair reporting privilege, but contend that the statements went beyond what was alleged in the complaint. It is unclear whether "larger apartment communities" in the first sentence refers to communities larger than Defendants' communities, or to communities the same size as Defendants. Defendants contend that the article described Defendants as larger apartment communities. (Defs.' Br. 8.) Under either reading, Stoddard's statement that they do not often see such violations in larger apartment communities adds little objective information beyond the protected allegation that Defendants discriminated in violation of the law. Moreover, because the statement does not specify what a "larger" community is or what "often" means, it is not provable as false. The statement, "I think primarily because that community is more informed on fair housing issues," similarly does not state any actual facts about Defendants. It is a comparison between larger communities and smaller communities, and is a qualitative generalization based on Stoddard's experience that larger apartment communities tend to be more informed than smaller apartment communities on fair housing issues. The statements are opinions about the characteristics of large apartment communities in general. Contrary to Defendants' assertions,[2] the statements, individually or in combination, do not imply that Defendants willfully violated the law, or that Defendants are ignorant of fair housing issues. Moreover, even if the statements could be interpreted to imply that Defendants willfully violated the law or were ignorant of the law, the statements would be protected under the fair reporting privilege because the complaint itself alleges that Defendants' conduct was "willful, intentional, and knowing, and/or has been, and is, implemented with callous and reckless disregard for Plaintiffs' rights under the law." (Compl. ¶ 45, ECF No. 1.)

In *National Fair Housing Alliance v. Town & Country–Sterling Heights, Inc.*, No. 07–10385, 2008 WL 4826299 (E.D.Mich. Aug.19, 2008), the district court denied a motion to dismiss a defamation claim based on its determination that the statement that the defendant was the "worst [the plaintiff had] ever seen when it comes to discriminatory [housing] practices" was sufficient to raise a claim for relief above the level of speculation. *Id.* at *7. The Court is not persuaded by Defendants' contention that Stoddard's statements should similarly survive a motion to dismiss. Stoddard's statements are far more ambiguous and significantly less objective than the statement at issue in *Town & Country*. Even if Stoddard's statements are broadly interpreted to imply that discrimination on the basis of familial status is rare in large communities, or that Defendants are less informed on housing issues than other communities, they simply do not state or imply any material facts about Defendants that are objective or specific enough to be provable as false. *See Ireland*, 584 N.W.2d at 636–37. Who may or may not be more informed on a legal issue is an unprovable statement of opinion. Defendants' counterclaim for defamation does not allege facts that "state a claim to relief that is plausible on its face," and that, if accepted as true, are sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570. Accordingly, the Center's motion to dismiss will be granted.

*4 An order consistent with this opinion will be entered.

All Citations

Not Reported in F.Supp.3d, 2014 WL 6862923

Footnotes

1 Defendant Lambrecht manages three multi-family residential properties owned by Defendants Burton Ridge, L.L.C., Eastgate Village L.L.C., and Lakewood Hills, L.L.C.

2 Defendants paraphrase Stoddard's statement as follows: "The Center stated that other large communities follow the law because they are more informed on fair housing issues and Lambrecht and the Communities do not follow the law because they are ignorant on fair housing issues or because they willfully discriminate." (Defs.' Br. 10, ECF No. 15.)

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APPENDIX 38

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Circuit Court Civil Records 13th Circuit Court

Grand Traverse County 13TH CIRCUIT COURT-- Phone (231) 922-4710
280 WASHINGTON ST -- SUITE 206
TRAVERSE CITY, MI 49684

Case #: 2017-32008 CZ **County:** Grand Traverse
Case Type: OTHER GENERAL CIVIL

Trial Type: **Jury Demand:**
Judge: POWER, THOMAS G. **P-Number:** 24270
Date Issued: 02/16/2017 **Date Closed:** 07/17/2017 **Date Expired:**
Date Reopened: **Date Reclosed:**
Disposition: OTHER **Code:** IS INACTIVE STATUS
Disposition Date: 07/17/2017 **Judgment for:**

Litigants

Name	Plaintiff/Defendant	Attorney	P-Number	Alias
PUNTURO, BRYAN	Plaintiff	MOOTHART, JONATHAN R.	40678	
PUNTURO, FAWN	Plaintiff	MOOTHART, JONATHAN R.	40678	
KORT, DANIELLE	Defendant	ZELENOCK, JAY	58836	BOYER, DANIELLE
BOYER, SAUBURI	Defendant	ZELENOCK, JAY	58836	
KERN, BRACE	Defendant	YEAGER, PHILLIP K.	33761	

Court Proceedings

Date	Action	Proceeding
02/16/2017	SI	RECEIPT #169487/ENTRY & JURY FEE PD
		COMPLAINT & JURY DEMAND/MOOTHART
		SUMMONS & COMPLAINT (EXP 5-17-17) X 3
03/01/2017		$25 REMOVED FROM THE ELECTRONIC FILING FEE FUND
		HOLDING ACCOUNT

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03/02/2017	SV	OFFICER CERT/BRACE KERN SERVED PERSONALLY 2-19-17
		POS/TRUEFILED
03/02/2017	SV	OFFICER CERT/SAUBURI BOYER SERVED PERSONALLY ON
		2-21-17
		POS/TRUEFILED
03/17/2017		POS/DEF APPEARANCE
03/17/2017	AP	APPEARANCE OF YEAGER DAVISON & DAY PC AS CO
		COUNSEL FOR DEF BRACE KERN/YEAGER
		POS/TRUEFILED
03/20/2017	MO	RECEIPT #170153/MOT FEE PD
		DEF BOYER'S MOT FOR SUMRY DISPO/ZELENOCK
		INDEX OF EXHIBITS TO DEF BOYER'S MOT FOR SUMRY
		DISPO/ZELENOCK
		POS/TRUEFILED
		POS/TRUEFILED
03/20/2017	MB	DEF BOYER'S BRIEF IN SUPPORT OF MOT FOR SUMRY
		DISPO/ZELENOCK
03/20/2017	MO	RECEIPT # 170176/MOT FEE PD
		DEF BRACE KERN'S MOT FOR SUMMARY DISPO W/BRIEF IN
		SUPPORT W/POS/KOCH
		EXHIBITS 8-10/KOCH
		EXHIBIT 11/KOCH
		EXHIBIT 1-4/KOCH
		EXHIBIT 5-7/KOCH ,
		POS/TRUFILED
03/22/2017	HRG	NOTICE OF MOT/DEF BOYER'S MOT FOR SUMMARY DISPO
		5-8-17 @ 10:30 AM/TGP
03/22/2017	HRG	NOTICE OF MOT/DEF BRACE KERN'S MOT FOR SUMMARY
		DISPO 5-8-17 @ 10:30 AM/TGP
03/23/2017	HRG	AMENDED NOTICE OF MOTION/DEFENDANT BOYER'S MOTION
		FOR SUMMARY DISPOSITION 4-20-17 @ 11 AM/TGP
03/23/2017	HRG	AMENDED NOTICE OF MOTION/DEFENDANT BRACE KERN'S
		MOTION FOR SUMMARY DISPOSITION 4-20-17 @ 11 AM
		/TGP
03/24/2017	HRG	AMENDED NOTICE OF MOTION/DEFENDANT BOYER'S MOTION
		FOR SUMMARY DISPOSITION 5-1-17 @ 3 PM/TGP
03/24/2017	HRG	AMENDED NOTICE OF MOTION/DEFENDANT BRACE KERN'S
		MOTION FOR SUMMARY DISPOSITION 5-1-17 @ 3 PM/TGP
03/27/2017	CPT	CIVIL PRE TRIAL STMT DUE 4-10-17
03/30/2017	MB	DEF KORT'S BRIEF IN SUPPORT OF MOT FOR SUMMARY
		DISPO/ZELENOCK

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		INDEX OF EXHIBITS TO DEF KORT'S BRIEF IN SUPPORT
		OF MOT FOR SUMMARY DISPO/ZELENOCK
		POS/TRUEFILED
		POS/TRUEFILED
03/30/2017	MO	RECEIPT # 170390/MOT FEE PD
		DEF DANIELLE KORT'S MOT FOR SUMMARY DISPO & CON-
		CURRENCE W/CO-DEF SUMMARY DISP MOTIONS SET FOR
		HRG ON 5-1-17/ZELENOCK
		POS/TRUEFILED
03/31/2017	HRG	NOTICE OF MOT HRG: DEF MOT FOR SUMRY DISPO 5-1-17
		@ 3PM/TGP
04/07/2017	PTS	DEF SABURI BOYER & DANIELLE KORT PRE-TRIAL STMT/
		ZELENOCK
		POS/TRUEFILED
04/07/2017	PTS	DEF BRACE KERN PRE-TRIAL STATEMENT/YAEGER
		POS/TRUEFILED
04/10/2017	PTS	PL PRE-TRIAL STATEMENT/MOOTHART
		POS/TRUEFILED
04/20/2017	SCO	CIVIL SCHEDULING CONFERENCE ORD/TGP
04/20/2017	HRG	NOTICE OF SETTLEMENT CONFERENCE 10-10-17 @ 9:00 AM
		/TGP
04/20/2017	JT	NOTICE OF JURY TRIAL 11-8, 11-9, 11-14 & 11-15-17
		@ 8:30 AM/TGP
04/24/2017	MR	PL RESPONSE TO DEF MOT FOR SUMMARY DISPO & CROSS
		MOT FOR PARTIAL SUMMARY DISPO PURSUANT TO MCR
		2.116(I)(2)/MOOTHART
		EXHIBITS A-G TO PL RESPONSE TO DEF MOT FOR SUMMARY
		DISPO & CROSS MOT FOR PARTIAL SUMMARY DISPO PUR-
		SUANT TO MCR 2.116(I)(2)/MOOTHART
		POS/TRUEFILED ,
04/27/2017	MR	DEF BRACE KERN'S REPLY TO PL RESPONSE TO HIS MOT
		FOR SUMMARY DISPO W/POS/KOCH
		POS/TRUEFILED
04/27/2017	MB	DEF SABURI BOYER & DANIELLE KORT'S REPLY TO PL
		ANSWER TO THE MOT FOR SUMMARY DISPO/ZELENOCK
		POS/TRUEFILED
04/28/2017	MR	PL SURREPLY TO DEF REPLIES REGARDING MOTIONS FOR
		SUMRY
04/28/2017	MR	PL SURREPLY TO DEF REPLIES REGARDING MOTIONS FOR
		SUMRY DISPO & CROSS MOT FOR PARTIAL SUMRY DISPO
		PURSUANT TO MCR 2.116(I)(2)/MOOTHART

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		EXBS H THROUGH K TO PL SURREPLY/MOOTHART
		POS/TRUEFILED
04/28/2017	HRG	AMENDED NOTICE OF MOT RE DEF BRACE KERN MOT FOR
		SUMRY DISPO 5-8-17 @ 10AM/TGP
04/28/2017	HRG	AMENDED NOTICE OF MOT: DEF BOYER'S MOT FOR SUMRY
		DISPO 5-8-17 @ 10AM/TGP
04/28/2017	HRG	AMENDED NOTICE OF MOT: DEF DANIELLE KORT'S MOT FOR
		SUMRY DISPO 5-8-17 @ 10AM/TGP
05/03/2017	SV	AFFIDAVIT OF PROCESS SERVER/DANIELLE KORT F/K/A
		DANIELLE BOYER SERVED PERSONALLY ON 3-14-17
		POS/TRUEFILED
05/08/2017		++HEARD ON THE RECORD, JIM LINDSAY, CSR 301++
05/09/2017		CORRESPONDENCE FROM THIS COURT RE SCHEDULING
		CONFLICT
05/11/2017	NOE	NOTICE OF SUBMISSION OF ORD W/PROPOSED ORD RE:
		DEF MOT FOR SUMMARY DISPO & PL CROSS MOT FOR
		SUMMARY DISPO PURSUANT TO MCR 2.116(I)(2)/
		MOOTHART
		POS/TRUFILED
05/18/2017	OR	ORD REGARDING DEF MOTIONS FOR SUMRY DISPO & PL
		CROSS MOT FOR PARTIAL SUMRY DISPO PURSUANT TO
		MCR 2.116(I)(2)/TGP
		POS/TRUEFILED
05/26/2017		DEF BOYER & KORT'S LIST OF WITNESSES & EXHIBITS/
		ZELENOCK
		POS/TRUEFILED
05/26/2017		POS/DEF BOYER & KORT'S OFFERS OF JDG TO PL
		POS/TRUEFILED
05/26/2017		DEF BRACE KERN'S EXB LIST W/POS/HUNTER
		DEF BRACE KERN'S WITNESS LIST W/POS/HUNTER
		POS/TRUEFILED
05/26/2017		PL PRELIMINARY WITNESS & EXB LIST/MOOTHART
		POS/TRUEFILED
06/09/2017		PL 1ST DISCOVERY REQUESTS TO DEFS/MOOTHART
		POS/PL DISCOVERY
		POS/TRUEFILED
06/09/2017	A	RECEIPT #171935/FEE PD
		NOTICE OF FILING SUPREME COURT APPLICATION FOR
		LEAVE TO APPEAL/KOCH
		POS/TRUEFILED
06/12/2017		POS/PL 2ND DISCOVERY REQUESTS

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06/21/2017	MO	RECEIPT #172141/MOT FEE PD
		DEF BRACE KERN MOT TO STAY PROCEEDINGS AND/OR FOR
		A PROTECTIVE ORDER STAYING DISCOVERY/SULLIVAN
		POS/TRUEFILED
06/21/2017	MB	BRIEF IN SUPPORT OF DEF BRACE KERN MOT TOT SAY
		PROCEEDINGS AND/OR FOR A PROTECTIVE ORDER STAYING
		DISCOVERY W/POS/SULLIVAN
		POS/TRUEFILED
06/21/2017	HRG	NOTICE OF HRG 7-10-17 @ 8AM/SULLIVAN
		POS/TRUEFILED
06/30/2017	MO	RECEIPT #172357/MOT FEE PD
		DEFS BOYER & KORT MOT TO STAY PROCEEDINGS AND/OR
		FOR A PROTECTIVE ORDER STAYING DISCOVERY/ZELENOCK
		POS/TRUEFILED
06/30/2017	MB	BRIEF IN SUPPORT OF DEFS BOYER & KORT MOT TO STAY
		PROCEEDINGS AND/OR FOR A PROTECTIVE ORDER STAYING
		DISCOVERY/ZELENOCK
		POS/TRUEFILED
06/30/2017	HRG	NOTICE OF HRG 7-10-17 @ 10AM/ZELENOCK
		POS/TRUEFILED
06/30/2017	HRG	AMD NOTICE OF HRG/DEFS MOT TO STAY PROCEEDINGS ON
		7-10-17 @ 8:00 AM/ZELENOCK
		POS/TRUEFILED
07/05/2017	MO	RECEIPT # 172453/MOT FEE PD
		EMERGENCY MOT FOR EX PARTE RELIEF FROM DISCOVERY
		PENDING HRG ON MOT FOR STAY W/POS/SULLIVAN
		POS/TRUEFILED
07/05/2017	MR	PL RESPONSE TO DEF KERN'S EMERGENCY MOT FOR EX
		PARTE RELIEF FROM DISCOVERY PENDING HRG ON MOT
		FOR STAY/MOOTHART
		EXHIBIT A/MOOTHART
		POS/TRUFILED
07/06/2017	HRG	NOTICE OF MOT/DEF EMERG MOT FOR EX PARTE RELIEF
		FROM DISCOVERY PENDING HRG ON MOT FOR STAY ON
		7-10-17 @ 8:00 AM/TGP
07/06/2017	MR	PL RESPONSE TO DEF MOTIONS FOR STAY AND/OR PRO-
		TECTIVE ORD/MOOTHART
		EXHIBITS 1, 2, 3, & C/MOOTHART
		POS/TRUEFILED
07/10/2017		DEFS BOYER & KORT'S ANSWERS TO PL 1ST DISCOVERY
		REQUESTS (INCLUDING REQUESTS FOR ADMISSIONS)/

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		ZELENOCK
		POS/ANSWERS
		POS/TRUFILED
07/10/2017		POS/PL ANSWERS & OBJECTIONS TO DEF 1ST DISCOVERY
		POS/TRUFILED
07/10/2017		++HEARING ON THE RECORD, JIM LINDSAY CSR 301++
		MOT TO STAY PROCEEDINGS, EX PARTE RELIEF
07/18/2017	IS	**ORD GRANTING MOT FOR STAY OF PROCEEDINGS PENDING
		OUTCOME OF APPLICATIONS FOR LEAVE TO APPEAL/TGP**
		POS/TRUEFILED
12/11/2017		COPY OF ORDER FROM COURT OF APPEALS, ST OF MICH/
		APPLICATION FOR LEAVE TO APPEAL IS GRANTED/
		DOCKET # 338727
12/11/2017		COPY OF ORDER FROM COURT OF APPEALS, ST OF MICH/
		APPLICATION FOR LEAVE TO APPEAL IS GRANTED/
		DOCKET # 338728
12/11/2017		COPY OF ORDER FROM COURT OF APPEALS, ST OF MICH/
		APPLICATION FOR LEAVE TO APPEAL IS GRANTED/
		DOCKET # 338732
04/12/2018		COPY OF COURT OF APPEALS ORDER: MOTION TO EXPAND
		THE RECORD IS DENIED
04/27/2018		--FILE ELECTRONICALLY SENT TO COURT OF APPEALS--
10/19/2018	CPT	CIVIL PRE TRIAL STMT DUE 11-2-18
11/02/2018	PTS	PL PRE-TRIAL STATEMENT/MOOTHART
		POS/MIFILE
11/02/2018	PTS	DEF BRACE KERN'S PRE TRIAL STMT W/POS/SULLIVAN/
		YEAGER
		POS/MIFILE
11/02/2018	PTS	DEF SABURI BOYER'S & DANIELLE KORT'S PRETRIAL STMT
		/ZELENOCK
		POS/MIFILE
11/07/2018	SCO	CIVIL SCHEDULING CONFERENCE ORD/TGP
11/08/2018	HRG	NOTICE OF SETTLEMENT CONFERENCE 4-16-19 @ 9:00 AM
		/TGP
11/08/2018	JT	NOTICE OF JURY TRIAL 5-8, 5-9, 5-14 & 5-15-19 @
		8:30 AM/TGP
11/14/2018	OBJ	DEF BOYER & KORT'S OBJ TO CIVIL SCHEDULING CON-
		FERENCE ORD/BELL
		POS/MIFILED
11/14/2018	HRG	NOTICE OF MOT/DEF BOYER & KORT'S OBJ TO CIVIL
		SCHEDULING CONFERENCE ORD 12-5-18 @ 8:00 AM/TGP

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11/14/2018		UNDELIVERABLE MAIL RETURNED/CIVIL PRE TRIAL STMT
		SENT TO THE DEF
11/16/2018	HRG	NOTICE OF HRG MOT TO ENFORCE STAY OF PROCEEDINGS/
		TOMASEK
		POS/MIFILE
11/16/2018	MO	RECEIPT # 182848/MOT FEE PD
		DEF BRACE KERN'S MOT TO ENFORCE STAY OF PROCEED-
		INGS W/BRIEF IN SUPPORT W/POS/TOMASEK
		POS/MIFILE
11/16/2018	MR	DEF BOYER & KORT REPLY TO CO-DEF KERN MOT TO EN-
		FORCE STAY OF PROCEEDINGS/BELL
		POS/MIFILE
11/27/2018	CA	RECEIPT # 183054/APPEAL FEE PD
		NOTICE OF FILING SUPREMEM COURT APPLICATION FOR
		LEAVE TO APPEAL/KOCH
11/28/2018		NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL
		BY DEF/APPELLANT SABURI BOYER & DANIELLE KORT/
		ZELENOCK
		POS/NOTICE
		POS/MIFILE
11/30/2018	MR	PL RESPONSE TO DEF MOT TO STAY AND/OR PROTECTIVE
		ORD/MOOTHART
		POS/MIFILE
11/30/2018		UNDELIVERABLE MAIL RETURNED BY USPS SENT TO DEF
		BOYER (KORT) X 2