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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A. Kern's statements were a "fair and true report" of the underlying civil lawsuit and criminal prosecution against Punturo—i.e., a "matter[] of public record." So they're privileged.

The Punturos' supplemental brief tries to raise a new issue. Until now, the Punturos argued that the statements attributed to Kern and the Boyers in news articles about the underlying litigation weren't "fair and true" reports that "substantially represent[ed]" the matters at issue in the Boyers' lawsuit. After nearly three years of litigating the issue, the Punturos have a new argument. They suggest that Kern's statements weren't "actually a report."[1] Because it has no basis in the text of the statutory privilege at issue here, their unpreserved argument fares no better than their original argument.[2]

The Punturos contend that the fair-reporting privilege doesn't apply "when the defamatory words are those of the publisher."[3] In other words, they seek to create a self-reporting exception to the fair-reporting privilege. But the Court of Appeals rejected this argument in *Bedford v Witte,* 318 Mich App 60; 896 NW2d 69 (2016) : "the plain language of [MCL 600.2911(3) simply does not provide an exception for cases involving … self-reporting." *Bedford,* 318 Mich App at 69. And

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[1] Punturos' Supplemental Brief at 2.

[2] The Punturos try to paper over the fact that this is the first time they have claimed that Kern's statements weren't a report by asserting (1) that the "essence" of the Court of Appeals' holding in this case was that "simply repeating the allegations in [the Boyers'] lawsuit is not a report"; and (2) that *Bedford* "primarily holds that when the defamatory words are those of the publisher, and not really even a 'report,' they are unprivileged." *Id.* at 2, 17 (quotation marks omitted). A cursory review of both the lower court's opinion and *Bedford* reveals that neither of those things are true.

[3] *Id.* at 17.

none of the case law that the Punturos cite to support their argument compels a different outcome.

To support their new argument, the Punturos rely on several non-Michigan cases where courts applied the common-law public proceedings privilege. That's an entirely different privilege. The foreign cases applying that common-law privilege have no bearing on Michigan's statutory fair-reporting privilege.

In addition, as noted in Kern's supplemental brief, in 1988 the Legislature expanded the scope of MCL 600.2911(3)'s fair-reporting privilege from reports of "public and official proceeding[s]"[4] to reports of "matters of public record, public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body."[5] So, although the pre-1988 version of the fair-reporting privilege only protected reports of official proceedings, the post-1988 version protected reports of all "matters" of public record, as well as the public records themselves. Thus, the foreign authority that the Punturos rely on—all of which involved privileges limited to official "proceedings"—is irrelevant to whether Kern's statements fall within the current version of MCL 600.2911(3).

In essence, the Punturos are inviting this Court to abolish the 1988 amendments and reinstate the pre-amendment version of MCL 600.2911(3). This Court should decline to do so. *Ray v Swager*, 501 Mich 52, 80 n 68; 903 NW2d 366

[4] MCL 600.2911 (Compiled Laws of 1970 Version) (Appx. 287a-289a).
[5] 1988 PA 396 (Enrolled as HB 4932) (Appx. 295a-297a).

(2017) ("[A] change in the language of a prior statute presumably connotes a change in meaning." (citation omitted)).

The Punturos also maintain that "simply repeating the allegations in their lawsuit is not a report of the lawsuit."[6] Relying on the portion of MCL 600.2911(3) that excludes "added" matters, they contend that most of Kern's statements were not part of the "public and official proceeding" nor "regarding the pending litigation."[7]

There are several problems with this argument. As a threshold matter, the Punturos don't identify anything about Kern's statements that was "added" or unrelated to the underlying litigation. Regardless, the Punturos' argument isn't true either. As shown in Kern's prior briefing, his comments reiterated the allegations of criminal and civil misconduct against Bryan Punturo that were raised in the Boyers' lawsuit and the Attorney General's prosecution. Indeed, the Punturos have previously acknowledged this fact. In their complaint, they alleged that Kern "regularly and aggressively talked to the media about both the Antitrust Case and the Extortion Case," which belies their new argument.[8] The Punturos are now ignoring the fact that all of the articles in which Kern made his allegedly defamatory statements centered on the civil and criminal proceedings against Bryan Punturo.

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[6] Punturos' Supplemental Brief at 2 (quotation marks omitted)
[7] *Id.* at 21.
[8] Complaint at ¶29 (Appx. 028a).

The Punturos' argument also conflicts with the plain language of MCL 600.2911(3). The fair-reporting privilege isn't limited to reports of "public and official proceedings." It applies to both the contents of public records (such as the allegations in the Boyers' complaint) and to the entire underlying "matter"—i.e., the "subject under consideration" in the underlying litigation. *Black's Law Dictionary* (11th ed. 2019) (defining "matter"). The Punturos' argument (again) conflates the common-law privilege with the statutory fair-reporting privilege at issue here.

In sum, Kern's statements—all of which were published in articles or interviews about the pending litigation—were privileged because they absolutely related to a "matter[] of public record"—i.e., the subject under consideration in the Boyers' lawsuit against Punturo. For multiple reasons, therefore, the Punturos' new argument that Kern's statements weren't a report lacks merit.

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

The Punturos argue that Kern's statements aren't "fair" or "true" because they accused Bryan Punturo of civil or criminal misconduct, i.e., defamation per se.[9] They insist that the sky will fall and Michigan defamation law will be "eviscerate[d]" if this Court holds that the privilege applies to such statements. But the entire point of a privilege is that it renders actionable conduct free from liability. *Black's Law Dictionary* (11th ed. 2019) (stating that a privilege "immunizes

[9] Punturos' Supplemental Brief at 15-16.

conduct that, under ordinary circumstances, would subject the actor to liability."). Thus, by definition, a privilege precludes liability where it would otherwise exist. MCL 600.2911(3) exemplifies this principle. The Legislature intended that MCL 600.2911(3) would bar liability where a defendant would otherwise owe damages in a libel action—i.e., where his statements were defamatory.

Nothing in the fair-reporting statute provides any basis for excluding libel actions based on allegedly defamatory accusations of criminal or civil wrongdoing from the scope of the privilege. On the contrary, MCL 600.2911(3) unambiguously states that "fair and true" reports of a matter public record—including the matters that give rise to civil and criminal complaints—are **absolutely privileged**, regardless of what the contents of those public records are.

Finally, the Punturos argue that the Court should hold that Kern's statements weren't privileged because he made them with malice and other impure motives.[10] But, as noted above, there's no exception for malice and "[a] defendant's motivation is irrelevant if a fair and true report is made of the proceeding." *Stablein v Schuster,* 183 Mich App 477 at 482; 455 NW2d 315 (1990); *Bedford,* 318 Mich App at 69. So it doesn't matter what Kern was thinking when he talked to reporters or why he did so. Rather, all that matters is whether his statements substantially represented the underlying "matter[] of public record" or a matter contained in a "written or recorded report or record generally available to the public." MCL 600.2911(3).

[10] Punturos' Supplemental Brief at 4-5, 8-11, 15, 27-31.

Here, Kern's statements repeated the Boyers' and Attorney Generals' accusations of criminal and civil misconduct in the underlying lawsuit and criminal prosecution.[11] And, as shown in his earlier briefing, nothing Kern said in any of the news articles—or the level of certainty he expressed—changed the "gist" or the "sting" of the Boyers' allegations of criminal and civil misconduct or would have a "different effect on the reader." See *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc,* 213 Mich App 317 at 325-326; 539 NW2d 774 (1995). So Kern's statements "substantially represent[s] the matter contained in the court records." *Id.* Thus, under the correct standard, Kern's comments fall squarely within MCL 600.2911(3)'s privilege.

C. *Bedford* was wrongly decided.

Bedford held that the fair-reporting privilege didn't apply to comments where a defendant "stated" during a news interview "that 'we can say with certainty' that plaintiffs broke the law in various ways." *Bedford*, 318 Mich App at 70-71. In doing so, *Bedford* created an unworkable, extra-statutory exception to the fair-reporting privilege based on the level of certainty with which the defendant made the statement. The Punturos attempt to defend *Bedford*, calling it "just an example in the specific arena of public statements about court filings, of how a statement is not really a 'report' or is not 'fair and true' is not privileged."[12] But *Bedford* did not

[11] Underlying Complaint at ¶¶17-18, 22, 42, 45 (Appx. 025a, 027a, 035a-036a); Michigan Attorney General Press Release (Appx. 057a-058a).
[12] Punturos' Supplemental Brief at 26.

speak in terms of what is or isn't a report. The Punturos are trying to make *Bedford* something that it isn't.

Even if the Punturos' reframing of *Bedford* was true, *Bedford* should be limited to its facts. That is, it should only apply where a person expressly **increases** their level of certainty by saying something like "we can say with certainty." See *Bedford*, 318 Mich App at 70-71. Kern didn't say anything like that here. His declarative sentences expressed the same level of certainty as the Boyers' and the Attorney General's complaints. So, if the Punturos' reframing of *Bedford* were correct, it doesn't apply here and the lower courts erred.

As this case demonstrates, though, the Punturos' reframing isn't correct. The lower courts treated *Bedford* as creating an entirely new exception to the fair-reporting privilege based on the "level of certainty" used by the speaker. Both the Boyers and the Attorney General asserted with certainty that Bryan Punturo had committed several crimes, including extortion and flagrant antitrust violations. And Kern repeated those allegations of criminal and civil misconduct with the exact same level of certainty as the complaints. Yet the lower court held that Kern's reiteration of the Boyers' assertions was privileged because he "stated in no uncertain terms that Punturo committed extortion and flagrant violations of MARA."[13] In other words, the court held that using declarative sentences is enough certainty to remove a report from the scope of the fair-reporting privilege.

[13] *Punturo v Kern*, unpublished opinion of the Court of Appeals at *5, issued October 16, 2018 (Docket Nos 338727, 338728, and 338732) (Appx. 012a-013a).

As a result, Bedford's level-of-certainty exception effectively requires anyone who talks about a pending civil or criminal action—reporters, attorneys, litigants, and crime victims and their families—to qualify each of their sentences with some version of "alleged" or risk being subject to defamation liability. So, as shown in Kern's earlier briefing, *Bedford* conflicts with the well-established "substantially represent[s]" test laid out in *Northland Wheels* and is unsupported by the plain language of MCL 600.2911(3). See *Northland Wheels,* 213 Mich App at 325-326 ("Under this test, minor differences are deemed immaterial if the literal truth produces the same effect.").

Furthermore, *Bedford* contains no explanation or guidance about what level of certainty is required to alter the "gist" or "sting" of a statement or change the effect that the literal truth would have on the listener or reader in situations where the underlying matter contains unequivocal assertions of criminal conduct. Thus, *Bedford* fails to provide the lower courts or future litigants with a meaningful standard for determining exactly how much "certainty" can be expressed before a statement repeating the unequivocal assertions of wrongdoing in a complaint no longer "substantially represents" that pleading. So *Bedford* was wrongly decided.

D. The Punturos fail to provide any basis for this Court to conclude that the fair-reporting privilege applies differently to attorneys.

The plain language and statutory history of MCL 600.2911(3) demonstrate that the fair-reporting privilege applies without regard to whether the statement was made by an attorney or a layperson. The Punturos don't address or even mention the text of MCL 600.2911(3) when arguing that Kern's comments shouldn't

be privileged because they violated the MRPC. The reason is simple: their argument has no statutory basis.

The ethics rules don't affect the operation of the fair-reporting privilege. The plain language of MCL 600.2911(3) provides no textual basis for concluding that the ethics rules affect the application of the fair-reporting privilege. And the statutory history unequivocally demonstrates that the profession of the individual claiming the privilege has no bearing on its application. Once again, at most, violations of the MRPC provide evidence of negligence. *Watts v Polaczyk*, 242 Mich App 600, 607 n 1; 619 NW2d 714 (2000). But whether Kern was negligent has nothing to do with whether the fair-reporting privilege applies to his statements because "[a] defendant's motivation is irrelevant" to the MCL 600.2911(3) analysis. *Stablein,* 183 Mich App at 482. So there is no basis for this Court to conclude that the fair-reporting privilege applies differently to attorneys and laypersons.

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