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MICHIGAN SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

BRYAN PUNTURO FAWN PUNTURO, and
B&A HOLDINGS, LLC, d/b/a
ParkShore Resort, LLC,
Plaintiffs/Appellees,
v

BRACE KERN and SABURI BOYER,
Defendants,
and

DANIELLE KORT, f/k/a Danielle Boyer,
Defendant/Appellant.
_____/

MSC: 158755
COA: 338728
Grand Traverse CC: 17-032008-CZ

BRYAN PUNTURO FAWN PUNTURO, and
B&A HOLDINGS, LLC, d/b/a
ParkShore Resort, LLC,
Plaintiffs/Appellees,
v

BRACE KERN and DANIELLE KORT,
f/k/a Danielle Boyer,
Defendants,
and

SABURI BOYER,
Defendant/Appellant.
_____/

MSC: 158756
COA: 338732
Grand Traverse CC: 17-032008-CZ

DEFENDANTS/APPELLANTS BOYER AND KORT'S CORRECTED SUPPLEMENTAL BRIEF, PER THE COURT'S 11/22/19 ORDER RE: APPLICATIONS FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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Statement of Questions Presented

1. Whether, as a threshold matter, the fair reporting privilege of 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 the appellants' allegedly defamatory statements to the media regarding the pending litigation were not protected under the fair reporting privilege?

3. Whether *Bedford v Witte*, 318 Mich App 60 (2016), was wrongly decided?

4. Whether the standards for application of the statutory fair reporting privilege are different for statements made by an attorney or by a layperson-litigant?

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I. Introduction.

The Court should enter an Order reversing the court of appeals and circuit court, and remanding the case to the circuit court for the entry of an order granting summary disposition of Plaintiffs' complaint pursuant to MCR 2.116(C)(8).

Plaintiffs' complaint does not allege that any of the media reports complained of [1] did not "substantially represent" matters of public record. Nor does the complaint allege that anyone – whether the media, or one of the defendants in this case – "added" a "libel" to the reports complained of "*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*." MCL 600.2911(3) (emphasis added). Thus, plaintiffs' libel claims are barred by MCL 600.2911(3); *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317; 539 NW2d 774 (1995); and *Amway Corp v Procter & Gamble Co*, 346 F3d 180, 31 Media L Rep 2441 (6th Cir 2003) and should have been dismissed pursuant to MCR 2.116(C)(8).

Further, since plaintiffs never made any evidentiary showing that any of the media reports complained of in plaintiffs' complaint did not "substantially represent" matters of public record, or that anyone "added" a "libel" to the reports "which was not a part of the public and official proceeding or …. record generally available to the public," the claims also should have been dismissed pursuant to MCR 2.116(C)(10).

---

[1] Plaintiffs' complaint identifies portions of approximately 9 media reports covering the criminal and civil proceedings in paragraph 30(a)-(h), without providing the complete context or copies of the media reports themselves, let alone making any allegation or showing that the reports did not "substantially represent" matters of public record. The complaint is found in Defendants-Appellants' Appendix ("DAA") Exh. 4: 0219-040a.

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Michigan and federal law provide especially robust protections for public discourse about issues of public concern – whether court filings, government actions, reports, announcements or public records.

First, defamation cases in general are held to a heightened pleading standard, which requires that the 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 *Northland Wheels* case was decided on (C)(8) grounds, for example. 213 Mich App at 329. The First Amendment and judicial norms protecting free speech and discourse about issues of public concern encourages the vigorous early use of summary disposition in defamation claims. See, e.g., *Ireland v Edwards*, 230 Mich App 607, 613n4 (1998) ("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. Plaintiffs' complaint does not set forth facts showing there was any "unprivileged" publication in this case. Instead, it merely baldly asserts the publications were "unprivileged" in paragraph 53 with no factual specifics or context establishing this

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element. (DAA: Exh. 4: 036a). This is in contrast to *Northland Wheels*, *supra*, where the court noted the complaint itself attempted to plead sufficient facts to show the media publications were not privileged under MCL 600.2911(3). 213 Mich App at 327-328.

Second, after this Court's decision in *Rouch v Enquirer & News of Battle Creek Michigan*, 427 Mich 157, 398 NW2d 245 (1986) ("*Rouch I")*, the Legislature amended the statute in issue - MCL 600.2911(3) – to expand the scope of the statutory protections offered to defendants in libel actions significantly by: (1) broadly expanding the categories of public documents, notices and proceedings covered by the statute; and also (2) expanding the categories of defendants protected by the statute. Specifically, the 1989 amendment removed the language in the former version of the statute that limited the privilege's protections to libel actions "brought against a reporter, editor, publisher, or proprietor of a newspaper." [2] The Legislature's actions in amending the statute substantially expanded the protections for libel defendants, evidencing an intent to promote greater free speech and unhindered public discourse about issues of public concern, such as official proceedings, acts and matters of public record.

Third, this Court has made clear that allegedly defamatory statements cannot be viewed in isolation. Rather, they must be analyzed in their proper "context," which includes the words published simultaneously with the allegedly defamatory words:

> **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

[2] The pre-1989 version of MCL 600.2911(3) contained the quoted language, which was removed by the amendments to the statute by PA 1988, No 396 § 1, effective Jan. 1, 1989.

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> defamatory meaning. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 129-130 (2010) (emphasis added).

Fourth, the state and federal courts have also repeatedly held that the appellate courts have a special responsibility as expositors of the Constitution to make an "independent examination" of the record to ensure First Amendment freedoms are not unduly chilled by state court defamation claims. See, e.g., *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 487 NW2d 205 (1992); *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317; 539 NW2d 774 (1995), *Philadelphia Newspapers, Inc v Hepps*, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986) and *Snyder v Phelps*, 562 US 443; 131 S Ct 1207; 179 L Ed 2d 172 (2011)

In this case, where the plaintiffs never submitted copies of the media articles complained of to the lower courts for review or in support of their claims, it is clear that the lower courts did <u>not</u> adequately review the "context" of the allegedly defamatory statements, or conduct an adequate "independent examination" of the record to fulfill their role as custodians of the First Amendment.

In fairness to the lower courts, it appears they were misled by the specific narrow circumstances and rulings of the court of appeals' in *Bedford v Witte*, 318 Mich App 60; 896 NW2d 69 (2016), which the lower courts appear to have misinterpreted as implicitly discarding the well-established rules noted above and to instead permit decisions on crucial defamation and First Amendment issues to be made through a review of the allegedly defamatory statements in <u>isolation</u>, rather than in their full "context." This was profound error that warrants reversal of the lower courts here, as the error extends to numerous critical issues in the case – e.g. whether the statutory privilege applies; whether the allegedly defamatory statements are protected "opinions" or assertions of

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objective “fact”; whether they have a defamatory meaning in their context; or whether they are non-actionable under the First Amendment.

The *Bedford v Witte* case should also be reversed, to the extent it can be seen as authority permitting analysis of allegedly defamatory statements in “isolation,” rather than in their “context.” Such an approach is not permitted under this Court’s holding in *Smith v Anonymous*, 487 Mich 102, as noted above.

In sum, Plaintiffs’ did not allege or prove below that any of the media reports complained of did not "substantially represent" matters of public record. Nor did they allege or prove that anyone – whether the media, or one of the defendants in this case – “added” a “libel” to the reports complained of “*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*.” MCL 600.2911(3) (emphasis added). Thus, plaintiffs’ libel claims are barred by MCL 600.2911(3), and should have been dismissed per MCR 2.116(C)(8) and (C)(10).

II. Statement of Facts.

A. The Michigan Attorney General charged Punturo with felony extortion, after an independent investigation.

As the complaint acknowledges, the Michigan Attorney General (“AG”) and the Michigan State Police (“MSP”) conducted an investigation of potential anti-trust violations by Plaintiff Punturo, including executing a search warrant on his offices in November 2015. (DAA: Exh.4: 027a; Complaint, at para. 23). The AG filed criminal felony extortion charges against Plaintiff Bryan Punturo on May 10, 2016. (DAA: Exh.4: 027a and 032a; Complaint, at paras. 25 and 38).

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The MSP and the AG had reasonable reasons to be concerned about potential criminal misconduct by Plaintiff Bryan Punturo, the owner of a large, prominent resort in Traverse City, given his unusual, heated, and vehement communications with Defendant/Appellant 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 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.**[3]
>
> **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.**[4] **(**DAA: Exh. 30: 304a-305a, 11/6/15 email and letter from Plaintiff Bryan Punturo) (emphasis added).

---

[3] Boyer has leukemia and has undergone expensive chemotherapy treatments.

[4] Consistent with Plaintiff Punturo's threat to use his substantial means to "pursue" Boyer's wife Danielle when Boyer is "no longer in the picture," this case joined Boyer's now ex-wife Danielle Kort as a defendant.

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B. The Michigan Attorney General issues a Press Release identifying Punturo as a felony suspect to the news media and the community. This triggered public interest and media coverage.

Notably, the AG did not merely file formal criminal charges in court papers filed with the court. He also used the "bully pulpit" provided by his official power and high office to "shine a spotlight" on Plaintiff Punturo as a felony suspect and accused wrongdoer in the community by circulating a press release to the news media headlined "SCHUETTE CHARGES TRAVERSE CITY RESORT OWNER IN EXTORTION PLOT." (DAA: Exh.30: 319a-320a). The AG's press release identified Plaintiff Punturo by name and photo, and noted "Extortion is illegal, plain and simple." *Id*. The press release noted "The victim paid thousands in the alleged extortion plot, in fear of losing his business. In August 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." *Id*. at 319a. To be sure, the AG's press release also noted that a criminal charge "is merely an accusation and the defendant is presumed innocent unless proven guilty," but it was also sufficiently incendiary to create substantial public interest and media coverage and to be the true cause of any damage to reputation allegedly suffered by Plaintiff Punturo.[5] *Id*.

As the complaint indicates, the bulk of the allegedly defamatory statements complained of were made on May 10, 2016, i.e. the day the AG issued a press release about the AG's decision to file felony extortion charges against Punturo and the day of

[5] It appears to be undisputed that the attorney general is immune from any liability for defamation in this matter under governmental immunity. *See, e.g*. *Am Transmissions, Inc v Attorney General*, 454 Mich 135, 144; 560 NW2d 50, 53 (1997).

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the criminal arraignment, which triggered public interest and significant local media coverage. (DAA: Exh. 4:028a-031a; DAA: Exh. 30:319a).

As the complaint acknowledges, Defendant/Appellants Boyer and Kort were represented by a licensed attorney throughout these proceedings, Co-Defendant Brace Kern. (DAA: Exh. 4:028a-031a, Complaint, at paras. 10 and 12). Notably, Plaintiffs/Appellees' complaint attributes the vast majority of the allegedly "defamatory statements" to Co-Defendant Kern, not Defendants Boyer and Kort themselves. *Id*., at 028a-036a.

C. The underlying criminal and civil actions resolved generally favorably to Punturo, but also with substantial judicial criticism of his conduct.

While the district court judge in the criminal matter ultimately ruled that the AG's criminal extortion case was technically legally deficient, this was not an endorsement of Plaintiff/Appellee Bryan Punturo's conduct or a ruling that the AG 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. (DAA Exh. 8: 064a).

Similarly, in the underlying civil case between the parties drafted and filed by Co-Defendant Kern against Mr. Punturo, Circuit Court Judge Philip E. Rodgers Jr. 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

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"incongruous," and the Court dismissed the Second Amended Complaint, except for Count IV Intentional Infliction of Emotional Distress.

However, Judge Rodgers *explicitly considered and denied* Plaintiff/Appellee *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. (DAA: Exh. 11: 113a-114a; DAA: Exh. 12: 125a).

Consistent with these comments, on August 5, 2016, Judge Rodgers issued a written Decision and Order Granting Summary Disposition in favor of Punturo finding that *"There is evidence of threats to Plaintiffs [i.e. Defendants Boyer and Kort] 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/Appellee Punturo],"* but noting that the pleadings did not seek to avoid the contract through rescission. (DAA: Exh. 12: 121a).

D. The Punturos sue Kern, Boyer, and Kort for repeating the allegations in the criminal and civil actions in media reports.

On February 16, 2017, the Plaintiffs/Appellees filed this lawsuit against Defendants/Appellants Kern, Boyer, and Kort. In their complaint, Plaintiffs/Appellees asserted claims of Defamation, False Light Invasion of Privacy, Tortious Interference with Business Relations, and Loss of Consortium. Plaintiffs' claims against all of the defendants are largely premised on statements that Co-Defendant Attorney Kern

allegedly made to various news agencies during the course of the criminal prosecution of Bryan Punturo and the civil litigation between the parties. (DAA: Exh. 4: 028a-031a, Complaint, at para. 30(a)-(h)). The handful of statements attributed to Defendant/Appellant 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 and criminal filings of the AG, as well as his own civil attorney Kern. *Id*.

Notably, Plaintiffs/Appellees' complaint attributes the vast majority of the allegedly "defamatory statements" to Co-Defendant Kern, not Defendants Boyer and Kort. Further, Plaintiffs/Appellees' complaint alleges that Co-Defendant Kern violated his responsibilities under the Michigan Rules of Professional Conduct in making statements to the media. *Id*., at 028a. Nevertheless, Plaintiffs/Appellees claim that Defendants Boyer and Kort are vicariously liable for the statements of Co-Defendant Kern to the media under "principal-agent" concepts. *Id*., at 028a and 031a.

E. The trial court denied the Defendants' Motions for Summary Disposition.

Defendant/Appellants Boyer and Kort moved for summary disposition under MCR 2.116(C)(8) and (C)(10).[6] They argued that all of their allegedly defamatory statements are non-actionable statements of subjective opinion, fair comments on matters of public record, descriptions of his own emotional status, and rhetorical hyperbole.

Additionally, Boyer and Kort argued that clients are entitled to rely on their attorneys to comply with the MRPC in their communications with the media and had no

[6] DAA: Exh. 30: 303a-363a; DAA: Exh. 31: 380a-420a

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"right to control" their attorneys to violate the express prohibitions of the MRPC. (DAA: Exh. 30:307a-308a, 314a-315a). Therefore, a client is not vicariously liable for an attorney's statements to the media that violate the MRPC, as alleged in plaintiffs' complaint. *Id.* Further, Boyer and Kort argued that 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. *Id.*

Defendant/Appellant Kern also moved for summary disposition under MCR 2.116(C)(7) and (C)(10).[7] Kern argued that the allegedly defamatory statements fell within the statutory fair-reporting privilege contained in MCL 600.2911(3) because they were fair and true reports of the allegations contained in the felony extortion charges filed against Punturo by the AG, as well as in the civil complaint drafted and filed by Kern in the civil litigation then pending between the parties.[8]

Alternatively, Kern argued that to the extent his comments fell outside the statutory privilege, they were not capable of defamatory meaning since they were simply subjective expressions of his opinions and legal conclusions about the case. *Id.*, 139a-141a. Kern also argued that even if Kern's statements were not privileged and were capable of defamatory meaning, they still wouldn't be actionable because any reference to extortionate behavior was mere "rhetorical hyperbole" uttered in the context of a hotly contested lawsuit to express Kern's disapproval of Bryan Punturo's conduct. *Id.*, at 141a-144a. Finally, Kern argued that the Punturos' other claims all fail for the

[7] DAA: Exh. 13: 127a-146a.
[8] *Id.,* at 128a-129a, 136a-139a.

same reasons as their defamation claims because the protections and privileges that apply to the Punturos' defamation claims apply with equal force to all their claims premised on allegedly defamatory statements. *Id*., at 141a-144a.

On May 18, 2017, the Honorable Thomas G. Power of the Grand Traverse County Circuit Court entered an Order Denying Defendants/Appellants Boyer and Kern's Motions for Summary Disposition. (DAA: Exh. 1: 002a-003a).

F. Appellate proceedings.

A timely interlocutory appeal to the Court of Appeals followed, which was granted. The Court of Appeals then affirmed the trial court's decision in an unpublished decision dated October 16, 2018. (DAA: Exh. 3: 009a-019a).

Co-Defendant/Appellants Kern, Boyer and Kort filed Applications for Leave to Appeal with this Court on November 26, 2018.

On November 22, 2019, this court entered an Order directing supplemental briefing on four legal issues relevant to the Applications for Leave to Appeal. (DAA: Exh. 20: 259a-260a).

Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "The existence of a privilege that immunizes a defendant from liability for libel is a question of law that this Court reviews de novo." *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 324; 539 NW2d 774 (1995). Issues of statutory construction such as the interpretation of the privilege codified at MCL 600.2911(3) in

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issue here are reviewed de novo. See, e.g., *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016).

III. Supplemental Legal Arguments

A. The statutory fair-reporting privilege of MCL 600.2911(3) can be invoked here, because Plaintiffs' complaint is "a libel action" under longstanding common law precedent and the plain language of the statute. Further, the 1989 amendment of the statute removed the language that formerly limited this privilege to "reporters" and other "media defendants," as a part of broadening the statute's protections for public discourse about government proceedings, notices and issues of public record.

The Court ordered supplemental briefing on four issues. The first issue is:

> Whether, as a threshold matter, the fair reporting privilege of 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?

The answer is "yes," because Plaintiffs' complaint is "a libel action." The gravamen of Plaintiffs' complaint is that Defendant-Appellants supposedly actively and deliberately participated in creating libelous media publications and broadcasts, by providing defamatory statements to the media with the intent that the media publish and broadcast the libelous statements in order to harm plaintiffs. (DAA: Exh. 4: 023a-024a, 028a-031a, 033a, 035a-036a). These are libel claims under longstanding case law. Under Michigan common law, all persons who are "actively connected with and engaged in the publication of a libel are responsible for the results." *Bowerman v Detroit Free Press,* 279 Mich 480, 491; 272 NW 876 (1937), quoting *Johnson v Gerasimos,* 247 Mich 248, 252; 225 NW 636 (1929). *See also In re Simmons*, 248 Mich 297, 302–03; 226 NW 907, 908–09 (1929) (in a contempt action for statements made by an attorney during a trial which were published in the media, this Court analogized to the libel

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standards discussed in *Johnson v Gerasimos* and observed: "To be responsible for a publication a party need not have requested it or even have given his express consent. The rule is stated: 'If the statement is indicated for publication, with the intention that it will be written and published, and the purpose in that respect is carried out, the party who makes it with such intent and understanding is equally guilty as if an express request for publication had been made.' 17 R. C. L. 386.").

Plaintiffs' complaint alleges damages suffered from the media publications and broadcasts, not as a result of damage to plaintiffs' personal friendships with the reporters who heard the oral statements in person. (DAA: Exh. 4:028a-031a). The complaint also claims defamation by radio broadcasts, as well as print media publication. (DAA: Exh. 4:028a-031a, 035a-036a). The statute explicitly states that "As used in this section, 'libel' includes defamation by radio or television broadcast." MCL 600.2911(8).

Plaintiffs also made a demand for retraction, which is contemplated under the libel provisions of the statute (not slander). MCL 600.2911(2)(b). In plaintiffs' demand for retraction which was attached to and filed with the complaint), plaintiffs made clear that they were alleging that the defendant-appellants "made statements regarding Mr. Punturo and ParkShore to the media, knowing, and with the intent that, the media would publish those statements to the public at large." (DAA: Exh. 39:491a-496a). Thus, this is "a libel action" under the *Bowerman v Detroit Free Press*, *Johnson v Gerasimos,* and *In re Simmons* line of cases, as well as under MCL 600.2911(2)(b) and (8).

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Further, as noted above on p. 3, MCL 600.2911(3) was amended in 1989 to expand the scope of the statutory protections offered to defendants in libel actions significantly by: (1) broadly expanding the categories of public documents, notices and proceedings covered by the statute; and also (2) expanding the categories of defendants protected by the statute. (DAA: Exh. 26: 287a-289a and see also DAA: Exh. 29: 299a-301a).

Specifically, the 1989 amendment **removed** the language in the former version of the statute that limited the privilege's protections to libel actions "brought against a reporter, editor, publisher, or proprietor of a newspaper." There is nothing in the current version of MCL 600.2911(3) limiting the protections of the privilege to "media defendants," rather than any defendant "in a libel action." MCL 600.2911(3).

The Legislature's actions in amending the statute to delete the limitations in the former version of the statute that restricted the protections of MCL 600.2911(3) to libel actions "brought against a reporter, editor, publisher, or proprietor of a newspaper" means that those limitations are no longer in place. At least five courts have ruled that the statutory amendments mean that the protections of MCL 600.2911(3) are no longer limited to "reporters" and other "media defendants." See, e.g., *Amway Corp v Procter & Gamble Co*, 346 F3d 180, 189-190; 31 Media L Rep 2441 (6th Cir 2003), *Bedford v Witte*, 318 Mich App 60, 69-71; 896 NW2d 69 (2016); *Smith v Anonymous Joint Enterprise*, (On Remand) 2011 WL 744943 (unpubl. court of appeals decision issued March 3, 2011)(DAA: 35:468a-472a); *Kmart Corp v Areeva, Inc.* 2005 WL 2290678 (ED Mich No. Civ. 04-40342, September 20, 2005) (DAA: Exh. 36:474a-481a); and *Panian v*

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Lambrecht Assoc, Inc, 2014 WL6862923 (WD Mich No. 1:14-CV-572, signed December 3, 2014) (DAA: Exh. 37:479a-481aa).

These rulings are consistent with the statute's "plain meaning," as well as the principle that the Legislature is "presumed to be aware of the common law when enacting legislation." *Velez v Tuma*, 492 Mich 1, 16; 821 NW2d 432, 439 (2012). The Legislature amended the statute, reflecting its intent to broaden the protections significantly. The intent expressed in the statute's plain language must be given effect.

Plaintiffs' complaint is "a libel action" that complains of alleged damages resulting from publications and broadcasts of allegedly defamatory statements in written news reports and radio broadcasts. The protections of the fair reporting privilege of MCL 600.2911(3) applies to the claims set forth in plaintiffs' complaint.

B. The Court of Appeals and trial court erred in holding the appellants' allegedly defamatory statements to the media regarding the pending litigation were not protected under the statutory fair-reporting privilege of MCL 600.2911(3).

MCL 600.2911(3) provides:

> *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. MCL 600.2911(3) (emphasis added).

Plaintiffs' complaint brings libel claims regarding approximately nine allegedly libelous print media publications and radio broadcasts reporting on the AG's criminal

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charges and press release, as well as the civil proceedings between the parties. (DAA: Exh. 4: 028a-031a).

But Plaintiffs' complaint does not allege that any of the media reports complained of in the complaint were not "fair and true" reports of public record, or that they did not "substantially represent" matters of public record. Nor does the complaint allege that anyone – whether the media, or one of the defendants in this case – "added" a "libel" to the reports complained of *"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*." MCL 600.2911(3) (emphasis added). Thus, plaintiffs' libel claims are barred by MCL 600.2911(3); *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317; 539 NW2d 774 (1995); and *Amway Corp v Procter & Gamble Co*, 346 F3d 180, 31 Media L Rep 2441 (6th Cir 2003) and should have been dismissed pursuant to MCR 2.116(C)(8).

Further, since Plaintiffs never made any evidentiary showing that any of the media reports complained of in plaintiffs' complaint did not "substantially represent" matters of public record, or that anyone "added" a "libel" to the reports "which was not a part of the public and official proceeding or …. record generally available to the public," the claims also should have been dismissed pursuant to MCR 2.116(C)(10).

This Court should grant leave to appeal here and reverse the lower courts. Otherwise, the rulings of the lower courts would permit a wealthy former felony criminal defendant (Plaintiff Punturo) to follow through on his threats to use his wealth and the judicial system to retaliate and financially injure Defendants/Appellants through pressing litigation, despite no evidence or allegations whatsoever of any defamatory meaning

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communicated by the words complained of that is separate-and-distinct from the same allegedly defamatory words appearing in the public record, e.g. the AG's felony extortion charges against Plaintiff Punturo, the associated press release and the civil court filings between the parties.

The lower courts' rulings are inconsistent with MCL 600.2911(3); *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 487 NW2d 205 (1992); *Northland Wheels*, 213 Mich App 317, as well as the Sixth Circuit's decision in *Amway Corp v Procter & Gamble Co*, 346 F3d 180 (interpreting MCL 600.2911(3) and holding that **"The statute cannot be read to require the publisher to give equal time to opponents of what is in the public record. To make the reporting privilege conditional on a balanced presentation, as Amway argues, would eviscerate it."**). 346 F3d at 190. That is precisely what the lower courts did here. They were in error, and should be reversed.

The lower courts gave too narrow a reading of the absolute statutory privilege enacted by the Legislature at MCL 600.2911(3) and did not give adequate consideration to the free speech rights of crime victims and their attorneys, or the public's right to hear about matters of public record as they move through the courts, including comments on pending felony charges from the alleged crime victims and their counsel. While the felony charges brought by the AG against Punturo were ultimately dismissed by the district court, the fact remains that the words complained of in this defamation lawsuit (e.g. "extortion") are the same words contained in the public court filings, and added no defamatory word, and no "sting" beyond the public record. Thus, the absolute statutory privilege of MCL 600.2911(3) bars Punturo's defamation claim here, when the statute is

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properly interpreted consistent with free speech principles, such as the "substantial truth" doctrine discussed in this Court's decision in *Rouch*, 440 Mich 238 and the "substantially represents" standard of *Northland Wheels*, 213 Mich App 317.

Michigan and federal law provide especially robust protections for public discourse about issues of public concern – whether court filings, government actions, reports, announcements or public records.

This Court has made clear that allegedly defamatory statements cannot be viewed in isolation. Rather, they must be analyzed in their proper "context," which includes the words published simultaneously with the allegedly defamatory words:

> **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. S*mith v Anonymous Joint Enterprise*, 487 Mich 102, 129-130 (2010) (emphasis added).

The state and federal courts have repeatedly held that the appellate courts have a special responsibility as expositors of the Constitution to make an "independent examination" of the record to ensure First Amendment freedoms are not unduly chilled by state court defamation claims. See, e.g., *Rouch*, 440 Mich 238; *Northland Wheels*, 213 Mich App 317, *Philadelphia Newspapers, Inc v Hepps*, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986) and *Snyder v Phelps*, 562 US 443; 131 S Ct 1207; 179 L Ed 2d 172 (2011).

In this case, where the plaintiffs never submitted copies of the media articles complained of to the lower courts for review or in support of their claims, it is clear that the lower courts did <u>not</u> adequately review the "context" of the allegedly defamatory

statements, or conduct an adequate “independent examination” of the record to fulfill their role as custodians of the First Amendment.

In fairness to the lower courts, it appears they were misled by the specific narrow circumstances and rulings of the court of appeals’ in *Bedford v Witte*, 318 Mich App 60; 896 NW2d 69 (2016), which the lower courts appear to have misinterpreted as implicitly discarding the well-established rules noted above and to instead permit decisions on crucial defamation and First Amendment issues to be made through a review of the allegedly defamatory statements in isolation, rather than in their full “context.”

This was profound error that warrants reversal of the lower courts here, as the error extends to numerous critical issues in the case – e.g. whether the statutory privilege applies; whether the allegedly defamatory statements are protected “opinions” or assertions of objective “fact”; whether they have a defamatory meaning in their context; or whether they are non-actionable under the First Amendment.

The *Bedford v Witte,* 318 Mich App 60, case should also be reversed, to the extent it can be seen as authority permitting analysis of allegedly defamatory statements in “isolation,” rather than in their “context.” Such an approach is not permitted under this Court’s holding in *Smith v Anonymous*, 487 Mich 102, as noted above.

In sum, Plaintiffs’ did not allege or prove below that any of the media reports complained of did not "substantially represent" matters of public record. Nor did they allege or prove that anyone – whether the media, or one of the defendants in this case – “added” a “libel” to the reports complained of “*which was not a part of the public and official proceeding* or *governmental notice*, *announcement*, written or recorded report *or*

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record generally available to the public, or act or action of a public body." MCL 600.2911(3) (emphasis added). Thus, plaintiffs' libel claims are barred by MCL 600.2911(3), and should have been dismissed per MCR 2.116(C)(8) and (C)(10).

C. *Bedford v Witte* was wrongly decided to the extent that it deviated from the principles set forth by this Court in *Smith v Anonymous* and the Sixth Circuit in *Amway v Procter & Gamble*.

As noted above, the lower courts appear to have been misled by the *Bedford v Witte* decision to believe that allegedly defamatory statements can be properly analyzed in "isolation," rather than in their proper "context" as required by this Court's decision in *Smith v Anonymous* and other authoritative precedent. As a result, the lower courts did not properly apply and give effect to the statute's plain language under this Court's precedents, the *Northland Wheels* case, and the Sixth Circuit's ruling in *Amway v Procter & Gamble.*

This Court was clear in *Smith v Anonymous*. Defamatory statements cannot be viewed in isolation. Rather, they must be analyzed in their proper "context," which includes the words published simultaneously with the allegedly defamatory words:

> **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. S*mith v Anonymous Joint Enterprise*, 487 Mich 102, 129-130 (2010) (emphasis added).

The *Bedford v Witte* panel obviously lacked the authority to overturn this Court's holding in *Smith v Anonymous*, that allegedly defamatory statements must be analyzed in their proper "context." Naturally, the *Bedford* case does not purport to do so. Nor does

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Bedford purport to set aside the well-recognized rule that appellate courts have a special obligation in cases involving issues of public concern to act as custodians of the First Amendment and conduct an "independent review" of the record to ensure that constitutional free speech is not unduly "chilled" or impaired by the threat of defamation litigation. *Bedford* provides no analysis of whether the phrase it found to be "added" to the public record ("we can say with certainty") was "capable of defamatory meaning" or protected "opinion" or "hyperbole" (rather than objective "fact") in the full "context" of the CBS interview. *Bedford* did not address any of these issues. Instead, the *Bedford* panel noted in footnote # 11 that it intended to make a narrow ruling: **"We express no opinion regarding other defenses that might be available.** We merely conclude that the trial court erred in applying the fair reporting privilege to the interview and link." 318 Mich App 60, at 71 n.11.

But those questions had to be addressed under this Court's holding in *Smith v Anonymous* to properly apply defamation law and the statute. In *Smith*, a handwritten notation was penned onto a public record that contained some inaccuracies about the plaintiff, before it was mass mailed out to the community. So, there was no doubt that the handwritten notation was "added" to the public record. But that was not the end of the analysis. Instead, this Court in *Smith* remanded the case to the Court of Appeals to consider whether the statutory privilege of MCL 600.2911(3) applied, and whether the "added" handwritten caption was capable of a defamatory meaning given the full context – the handwritten notation and the typewritten public record taken together in context. The court of appeals ruled the privilege applied and the "added" language was not

actionable, and dismissed the case in *Smith v Anonymous* in its entirety, ending the case. (DAA: 35:468a-472a).

Notably, too, this Court in *Smith v Anonymous* also observed that "even false statements may be protected from defamation claims" and cited approvingly the Court of Appeals decision in *Ireland v Edwards*, 230 Mich App 607, 611–612, 584 NW2d 632 (1998), which dealt with attorney statements during litigation to the media during heated litigation, and which were deemed non-actionable:

> The Supreme Court has additionally recognized that **even a false statement may be protected from defamation claims if it cannot be reasonably interpreted as stating actual facts about an individual.** *Milkovich v. Lorain Journal Co*, 497 U.S. 1, 16–17, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). **So too has our Court of Appeals. In *Ireland v Edwards*, 230 Mich.App. 607, 611–612, 584 N.W.2d 632 (1998), an attorney representing the father in a custody dispute commented on the mother's actions and her fitness as a parent. The mother, in turn, filed a defamation claim against the attorney**. The Court of Appeals **concluded that many of the allegedly defamatory statements, when read or heard in context, "could not reasonably be understood as stating actual facts" about the mother and that the attorney's statements about the time the mother spent with the child amounted to " 'rhetorical hyperbole.' " *Id.* at 618–619, 584 N.W.2d 632. Thus, the Court of Appeals concluded that the statements were not actionable. *Id.* at 619, 584 N.W.2d 632.** *Smith v Anonymous Joint Enter*, 487 Mich 102, 116; 793 NW2d 533, 542 (2010).

The *Bedford* decision should be reversed, to the extent it has created a "wrinkle" in Michigan law by suggesting that a court can properly evaluate allegedly defamatory statements in isolation, rather than in their full "context." See, e.g., S*mith v Anonymous*. The *Bedford* case does not adequately address the requirements of defamation law, or distinguish or explain its failure to comply with S*mith v Anonymous*. Nor does it distinguish *Ireland v Edwards* (cited approvingly by *Smith*) as to defamation claims brought against an attorney for statements made in the context of litigation. *Bedford* also did not adhere to the Sixth Circuit's ruling in *Amway Corp v Procter & Gamble Co*,

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346 F3d 180 in interpreting MCL 600.2911(3) that **"The statute cannot be read to require the publisher to give equal time to opponents of what is in the public record. To make the reporting privilege conditional on a balanced presentation, as Amway argues, would eviscerate it."**). 346 F3d at 190. That is precisely what the lower courts did here. They were in error, and should be reversed. *Bedford* was wrongly decided and lead the lower courts to error here, so it should be reversed.

D. The standards for application of the fair reporting privilege are the same for statements made by an attorney or by a layperson-litigant, but the speaker's status as an attorney could in some circumstances make a difference as part of the "context" that must be considered in analyzing the meaning of allegedly defamatory statements to listeners or readers.

The Court's final issue for supplemental briefing was:

> Whether the standards for application of the fair reporting privilege are different for statements made by an attorney or by a layperson-litigant?

Under the plain language of MCL 600.2911(3), there is no language indicating an attorney's statements should be treated any differently than a lay person. However, given that "context" must be considered as a part of the analysis in defamation claims, including evaluating MCL 600.2911(3) under the *Smith v Anonymous* case, it seems reasonable to say that a speaker's status as an attorney (or as a layperson) could in some circumstances make a difference as part of the analysis of "context" that must be considered in evaluating the meaning of allegedly defamatory statements to listeners or readers.

The *Rouch* court noted that "Technical inaccuracies in legal terminology employed by nonlawyers such as those at issue here fall within this category. Numerous courts have rejected claims of falsity when based on a misuse of formal legal terminology." *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 264

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(1992) (emphasis added). Moreover, the *In re Simmons*, court noted that it was reasonable in the context of a contempt proceeding to expect a higher standard of conduct from an attorney than a lay person in communications with the media. *In re Simmons*, 248 Mich 297, 302–03; 226 NW 907, 908–09 (1929).

On the other hand, do listeners assume that attorneys may be more pugnacious and prone to engage in rhetorical hyperbole or overstated opinions in some circumstances, and to understand their role as partisan advocates in the context of media reports? Likely yes. In *Ireland v Edwards*, 230 Mich App 607 (1998) an attorney for a father in a family law case was sued for defamation, where he made twenty statements to the media, including claims that the Plaintiff Ireland was "an unfit mother" who "was never with her child." *Id*., at 611-612. 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 *Ireland* case was cited approvingly by this Court in *Smith v Anonymous Joint Enter*, 487 Mich 102, 116; 793 NW2d 533, 542 (2010).

In the present case, the role of the AG as a public attorney who holds a high law enforcement office probably minimizes the relevance of any "attorney v lay person" distinction, since the words and actions of the AG in his court filings and press release triggering most of the media coverage complained of would be likely given far more weight by the average reader than any words of appellants.

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That said, the "attorney v lay person" distinction could be relevant under some circumstances and in other contexts. *Rouch*'s observation about "Technical inaccuracies in legal terminology employed by nonlawyers" certainly holds some relevance as a principle. *Rouch*, 446 Mich at 264. But given that the AG spoke so forcefully through his actions and words here in his public filings and his press release about the allegations against Plaintiff Punturo here – and with the authority of neutrality and public office – the "private attorney v lay person" distinction is less important here.

As in *Ireland v Edwards*, where the attorney's comments to the media that the plaintiff was an "unfit mother" and "never with her child" were deemed non-actionable, the words of the private attorney Kern and his clients Boyer and Kort were also non-actionable here, both under *Ireland* itself and under MCL 600.2911(3).

IV. Conclusion & Relief Requested

The Court should enter an order reversing the court of appeals and circuit court, and remanding the case to the circuit court for the entry of an order granting summary disposition of plaintiffs' complaint pursuant to MCR 2.116(C)(8)-(10).

Defendants/Appellants Boyer and Kort asks this Court to enter an order:

1. Reversing the Court of Appeals' unpublished decision and the trial court's order denying their motions for summary disposition;

2. Remanding this case to the trial court for entry of an order granting summary disposition in defendants/appellants' favor.

JAY ZELENOCK LAW FIRM PLC

Date: January 6, 2020 By: *__/s/ Jay Zelenock*

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