

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 REPLY BRIEF TO
PLAINTIFFS/APPELLEES' SUPPLEMENTAL BRIEF**

ORAL ARGUMENT REQUESTED

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1. This is “a libel action” to which MCL 600.2911(3) applies.

In their recent supplemental brief, plaintiffs agree with the research and analysis previously submitted by defendants establishing that this is “a libel action” to which MCL 600.2911(3) applies, and that “Libel includes oral statements to the media.” (Plaintiffs’ supp. brief filed 2/20/20, at p. 16). Plaintiffs also do not dispute that it is an element of their case to allege and prove that the communications complained of are “unprivileged.” *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 113 (2010) and *Mitan v Campbell*, 474 Mich 21, 24 (2005); see also *Thomas M. Cooley Law School v Doe 1*, 300 Mich App 245, 262 (2013).

2. The lower courts erred in failing to dismiss plaintiffs’ complaint under MCL 600.2911(3), where the complaint seeks to hold defendants liable for 9 news media publications and broadcasts, without any allegation or evidence that any of the 9 news media reports were not “fair and true” reports of 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 governmental notice...or record generally available to the public.”

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) and (10).

Plaintiffs’ complaint seeks to hold defendants liable for the publication of 9 news media reports about prior civil and criminal proceedings – e.g. news reports about the Attorney General’s public decision to charge Plaintiff Punturo with felony extortion. (DAA: Exh. 4: 028a-031a, Complaint, at para. 30(a)-(h)). As noted in defendants’ prior supplemental brief, Michigan common law has been generous to libel-claimants in some ways. For example, a person granting an interview to the news media can be sued for libel along with the potential news media-defendants (reporters, editors, publishers, etc),

because the common law holds that 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). Thus, plaintiffs’ complaint is a libel action here.

However, the Legislature also makes law in Michigan, and it has the power to reshape or even eliminate common law causes of action. The Legislature enacted an absolute statutory privilege for “fair and true reports” of matters of public record in MCL 600.2911(3), which it then further amended in 1989. The 1989 amendments broadened the statute’s protections for public discourse about matters of public record by extending its protections to broader categories of potential libel defendants, as well as to broader categories of public records.

As a result, Michigan law is now less generous to libel-claimants and more protective of free speech rights and interests than it once was. Plaintiffs (and other libel claimants) have “to take the bitter with the sweet.” While common law precedent allows a “libel” action to be brought against an interviewee who provides statements to the news media, the Legislature has sharply limited the libel cause of action with an absolute statutory privilege: “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...” MCL 600.2911(3). The Legislature was well within its rights to modify the common law, and to strike the balance in favor of “more free speech” and “fewer libel actions” arising out of reports on matters of public record. The Court’s duty is to enforce the statute as written.

As noted above, plaintiffs agree that this is “a libel action” to which MCL 600.2911(3) applies, and that “Libel includes oral statements to the media.” (Plaintiffs’

supp. brief filed 2/20/20, at p. 16). But plaintiffs do not contend that any of the 9 newspaper publications and radio broadcasts complained of were not “fair and true” reports of matters of public record. Nor do plaintiffs contend that anyone “added” a “libel” to any of these 9 media reports “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). Therefore, plaintiffs’ libel action is barred by the plain language of MCL 600.2911(3), as well as *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) and (C)(10).

Nonetheless, plaintiffs argue they can avoid the statutory privilege and state a claim for libel here. Plaintiffs’ arguments fail.

a. Repeating the allegations of court documents is a “report” of “matters of public record,” especially in the context of media coverage reporting on the court proceedings.

Plaintiffs argue that an interviewee’s declaratory statements repeating the allegations of a court filing – even if verbatim and in the context of “fair and true” media coverage of the court proceedings – is supposedly not a “report” of a matter of public record and not protected by the MCL 600.2911(3).

This argument fails, because it is really just an attempt to repackage an argument that flies in the face of the 1989 amendments to the statute (i.e. that the statute supposedly only protects “news reporters”) into a different semantic box. As previously briefed by defendants, the Legislature’s amendments to the statute in 1989 - which

removed the language that previously limited the protections of the statute to libel actions “brought against a reporter, editor, publisher, or proprietor of a newspaper” - means that the protections of MCL 600.2911(3) are no longer limited to “reporters” and other “media defendants.” They now extend to protect any defendant in “a libel action” based on a “fair and true report” of a matter of public record. Plaintiffs have not disputed any of this legislative history and analysis. Describing the contents of a court filing is a “report” about a matter of public record, whether or not the person describing the court filing is employed as a professional “reporter.”

Moreover, plaintiffs’ argument that an interviewee’s use of declaratory statements repeating the allegations of a court filing are not entitled to the statute’s protections on the theory that it is “not a report” would also potentially significantly expand the liability of “media defendants,” such as editors. The same “logic” plaintiffs urge here (that a declaratory repetition of the contents of a court filing is “not a report” of a matter of public record) would also apply to any number of editing decisions - whether to shorten a quotation or a story to have one less line reading “it is alleged,” or to reorganize the order of sentences or words for brevity, clarity, or readability.

Under plaintiffs’ argument, since editing decisions are not “reports,” they should not be protected by MCL 600.2911(3), even though they are incorporated into the media report for publication or broadcast to the public. Plaintiffs’ argument is contrary to the legislative intent and history, and it is incorrect. Editing decisions and the statements of interviewees are routine parts of “reports” on matters of public record, and are protected by the terms MCL 600.2911(3). Plaintiffs’ argument fails, because it ignores the legislative history expanding the statute’s protections to broader categories of defendants

in a libel action, and would instead artificially narrow the statute's protections to "reporters." Such a result would be contrary to the plain language of the statute and the 1989 amendments broadening its protections.

On pp. 17 – 22 of their supplemental brief, plaintiffs cite numerous old cases from other states that obviously do not address the 1989 amendments to MCL 600.2911(3), because they were decided decades before 1989 in many cases, and do not cite or analyze any version of MCL 600.2911(3), or any other aspect of Michigan law. These cases are not on point.

Also unpersuasive is plaintiffs' argument on p. 21 of their brief that the Court supposedly mis-framed the issues for supplemental briefing, by "wrongly assuming" (according to plaintiffs) that the statements complained of in this matter were "regarding the pending litigation":

Even this Court's statement of the issue – "whether the Court of Appeals erred in holding that appellants' allegedly defamatory statements to the media *regarding the pending litigation* were not protected under the fair reporting privilege" – **appears to wrongly assume that Defendants' statements were "regarding the pending litigation."** (Plaintiffs' supplemental brief filed 2/20/20, at p. 21.) (Bold-face added; italics in original.)

But plaintiffs are wrong about this. The Court did not "wrongly assume" that the statements complained of here were "regarding the pending litigation." That is precisely what plaintiffs alleged in their complaint. The complaint indicates that: "Both the Antitrust case and the Extortion case were covered by media outlets" (Complaint at para. 28: DAA: Exh. 4: 028a) and "Defendants regularly and aggressively talked to the media about both the Antitrust case and the Extortion case" (Complaint at para. 29: DAA: Exh. 4: 028a). Indeed, the whole thrust of plaintiffs' complaint is that Co-Defendant Kern allegedly

violated MRPC 3.6's rules about talking to the press about pending litigation. Plaintiffs' argument now that the statements complained of in this case were supposedly "not regarding the pending litigation" fail, for lack of engagement in reality and the facts set forth in their own complaint.

Plaintiffs' arguments are generally aimed at "isolating" the allegedly defamatory statements and evaluating them piecemeal, rather than in their proper "context" as required by law. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 129-130 (2010) ("allegedly defamatory statements must be analyzed in their proper context. To hold otherwise could potentially elevate form over substance.").

Take, for example, the "hypothetical" posed by plaintiffs at the top of p. 3 of their supplemental brief. Plaintiffs argue that if Kern were to tell a reporter tomorrow that "Bryan Punturo committed extortion, and antitrust violations" that this declarative statement would not be protected by MCL 600.2911(3) and plaintiffs could supposedly pursue "a libel action" against Mr. Kern - even if this hypothetical declarative statement was part of a "fair and true report" of the history of the court proceedings published by the newspaper.

Plaintiffs' hypothetical is obtuse to context, and thus incomplete and not helpful. In fact, if a newspaper reporter was investigating a story on the history of the underlying criminal and civil proceedings, and Kern was asked to explain: "What did you and the Attorney General claim in your court filings?" and Kern responded with plaintiffs' hypothetical declarative statement that "Bryan Punturo committed extortion, and antitrust violations," his statement would be a "fair and true report" of matters "of public record." Similarly, if the paper eventually published a story on the history of the criminal and civil

proceedings that contained the above question and answer, the story would also be a “fair and true” report of a “matter of public record” protected by MCL 600.2911(3).

b. Plaintiffs’ libel action is barred by MCL 600.2911(3), because the use of declarative statements that repeat or “substantially represent” the contents of the public record is a “fair and true report” of a matter of public record.

In this case, plaintiffs did not allege or prove that any of the 9 newspaper publications and radio broadcasts complained of were not “fair and true” reports of matters of public record. Nor do plaintiffs contend that anyone “added” a “libel” to any of these 9 media reports “which was not a part of the public and official proceeding or ... record generally available to the public...” MCL 600.2911(3).

Instead, plaintiffs argue they can avoid the absolute statutory privilege and state a claim for libel based on the 9 media reports (even if each of the media reports were “fair and true” reports of matters of public record, when read as a whole), because the complaint alleges that the defendants used declarative statements that repeated the allegations of the court filings.

Plaintiffs’ argument goes too far. The use of declarative statements repeating the allegations of court filings “substantially represents” the contents of matters of public record and is therefore “fair and true” under the standard adopted in *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317; 539 NW2d 774 (1995) and agreed with in *Amway Corp v Procter & Gamble Co*, 346 F3d 180, 31 Media L Rep 2441 (6th Cir 2003).

Plaintiffs acknowledge that defendants did not add any remark like “we can say with certainty,” as in *Bedford v Witte*, 318 Mich App 60 (2016). But they argue it is enough that the media reports contained declarative statements from defendants

repeating the allegations of the court filings. (See, e.g., Plaintiffs' supp. brief filed 2/20/20, at pp. 22-23). But plaintiffs' argument is contrary to the *Northland Wheels* "substantially represents" standard. It is also contrary to the *Bedford v Witte, supra* and *Amway Corp v Procter & Gamble* 346 F3d 180, 31 Media L Rep 2441 (6th Cir 2003) cases rulings that posting a copy of a court filing is protected by MCL 600.2911(3). Plaintiffs' argument is also contrary to the Sixth Circuit's decision in *Amway Corp v Procter & Gamble Co*, which interpreted the current version of MCL 600.2911(3) and noted 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.

Plaintiffs quote from a 1993 bankruptcy trial court decision several times to support their arguments here. (Plaintiffs' supp brief filed 2/20/20, at pp. 2 and 23). However, plaintiffs omit from these quotations the bankruptcy judge's observation that the privilege of MCL 600.2911(3) did not apply in that case, because "**there is no evidence of any state-court litigation from which [the media] could have obtained the same information**" which the defendant provided to the media in that case:

In any event, there is no evidence of any state-court litigation from which McClellan could have obtained the same information Thompson provided. Thompson's public-record argument is therefore unavailing.
In re Thompson, 162 BR 748, 764 (1993) (emphasis added).

Notably, too, this federal bankruptcy case was decided well before the Sixth Circuit's decision in *Amway Corp, supra*. Presumably, the federal trial court judge would have closely adhered to the Sixth Circuit's *Amway Corp, supra*, decision, if it had existed.

Plaintiffs' libel action is barred by MCL 600.2911(3) because the use of declarative statements that repeat or "substantially represent" the contents of the public record is a

“fair and true report” of a matter of public record under the plain language of MCL 600.2911(3), and the “substantially represents” standard of *Northland Wheels, supra*, and *Amway Corp v Procter & Gamble Co, supra*.

3. *Bedford v Witte* was wrongly decided to the extent it deviated from the plain language of MCL 600.2911(3), and the principles set forth in *Smith v Anonymous, Northland Wheels, Amway v Procter & Gamble* and *Ireland v Edwards*.

As noted in defendants’ prior supplemental briefs, the *Bedford v Witte* should be reversed (or at least limited) to the extent it has created a “wrinkle” in Michigan defamation law. 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 or case precedents. *Bedford* does not adequately follow and apply the statute’s plain language, or the case precedents as argued in defendants’ prior briefs.

4. Attorneys are held to “higher standards” under the Court Rules and the MRPC. But that does not provide a basis to disregard an absolute statutory privilege or to disregard important First Amendment principles.

The MCR and MRPC do not create libel liability, where the Legislature has decided to enact an absolute privilege. The statute does not provide an exception for attorneys. In the past, the statute did address and treat different “occupations” differently, but those were eliminated with the 1989 amendments.

The MCR and MRPC provide some regulation of the legal profession, beyond general laws applicable to the public. But these rules do not suggest that a jury trial on defamation claims (even where barred by a statutory privilege) is the appropriate way to

enforce the rules. The bench is better situated than jurors to enforce these rules, and trial courts regularly rule on allegations relating to attorney misconduct, or references to inadmissible evidence. Plaintiffs are certainly aware of this, as they filed a motion for sanctions with the circuit court judge, **who denied them**. (DAA: Exh. 30: 307a-308a, 314a-315a). A libel action should not be permitted as a collateral attack on a trial court's ruling sanctions should not be imposed.

Plaintiffs ignore the robust protections for public discussion about issues of public concern under the First Amendment. Probably most, if not all, cases addressing the application of MCL 600.2911(3) will involve issues of "public concern" under the First Amendment. But there can be no doubt that this case raised issues of "public concern" under the First Amendment, where the Attorney General's press release sparking much of the coverage complained of. See, e.g., *Snyder v Phelps*, 562 US 443, 453; 131 S Ct 1207, 1216; 179 L Ed 2d 172 (2011) ("Speech deals with matters of public concern when it can [1.] 'be fairly considered as relating to any matter of political, social, or other concern to the community...") (citations omitted).

5. Conclusion and 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) and (10).

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