No. _____

In the Supreme Court of the United States

ALFONSO IGNACIO VIGGERS,
Petitioner,
v.

MARIA DE LA MERCED VIGGERS,
Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Michigan

PETITION FOR WRIT OF CERTIORARI

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May 24, 2018

QUESTIONS PRESENTED

I. Whether a plaintiff has been deprived of the equal protection of the laws where, under defendant's belated pretext of mental illness, a court favors the defendant despite evidence of (1) defamation per se made with actual malice; and (2) defendant's tortious interference in the forms of harassment and defamation as intervening -and perhaps proximate- cause in the loss of plaintiff's business relationship and expectancy.

II. Whether deprivation of due process occurs where (1) discovery on a central non-party's heavily redacted records is precluded notwithstanding the non-party's silent fraud, its inconsistencies under oath, and the crime-fraud exception to the attorney-client privilege; (2) the court ignores the central non-party's deliberate failure to produce a key witness despite an order by the court; (3) discovery on Respondent's husband is precluded under pretext of spousal privilege notwithstanding (i) that some of the discovery transcends the scope of spousal privilege, and (ii) the husband's subsequent acts to harm Petitioner forfeit the privilege; (4) the court precludes for no actual reason the discovery on the header information of Respondent's email activity, which she uses for much of her unlawful activity; and (5) the trial judge should have recused herself from the instant case due to (i) her vested interests in the central non-party, and (ii) her domestic involvement in a situation similar to Respondent's mental illness.

PARTIES TO THE PROCEEDING

Alfonso Ignacio Viggers San Mamés is plaintiff-appellant below, and petitioner in this Court.

María de la Merced Viggers Anaya is defendant-appellee below, and respondent in this Court. Respondent is Petitioner's stepmother, currently married to Petitioner's father. For simplicity, Petitioner's father is herein referred to as Respondent's husband.

The parties have not interacted since Petitioner was five (5) years old.

Rule 29.6 statement does not apply to the instant petition.

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PETITION FOR WRIT OF CERTIORARI

The instant petition is timely brought before this Court after Michigan courts patently departed from the established laws regarding defamation and tortious interference (via harassment), thwarting in the process each and every initiative that Petitioner pursued toward the ascertainment of the truth.

The law is clear in that a defendant litigating on the basis of mental illness is not exempt from liability for his or her misconduct. But here, the Michigan courts suppressed the laws -both substantive and procedural- to force an outcome that endorses unlawful behavior. The Michigan courts additionally indulged in speculation and unsupported assertions to explain why discovery allegedly is unwarranted. These are altogether the antithesis of Due Process.

Neither the trial judge's (concealed) domestic involvement in a situation of mental illness nor the ties that various Michigan judges have with a public university justifies a judicial rewriting of the laws so as to accommodate the defendant's misconduct and to disregard the inequitable, obstructionist approach the non-party University of Michigan has been taking in the instant matters.

OPINIONS BELOW

On March 5, 2018, the Supreme Court of Michigan denied Petitioner's timely Application for Leave to Appeal (MSC#156447), App.1a, regarding the unpublished opinion the Michigan Court of Appeals released on August 10, 2017.

On March 16, 2016, the trial court granted Respondent's motion for summary disposition. On March 23, 2016, the same court denied Petitioner's motion to vacate summary disposition.

While the appellate review was pending, the appellate court denied Petitioner's motions to expand the record on appeal (introducing newly discovered evidence), for reconsideration thereof, and to reassign the case to a different trial judge upon conclusion of the appellate review. Despite a want of jurisdiction, the trial court entered two rulings: a moot and inaccurate *nunc pro tunc* order on May 23, 2016; and a *sua sponte* order denying Petitioner's motion for relief from judgment (regarding the newly discovered evidence) on March 27, 2017.

On August 10, 2017, the Michigan appellate court released its unpublished opinion affirming the orders of the trial court.

JURISDICTION

On March 5, 2018, the Supreme Court of Michigan denied Petitioner's Application for Leave to Appeal. A motion for reconsideration would have been moot or improper because it would be one that "merely presents the same issues ruled on by the court". MCR 2.119(F)(3) and 7.311(G).

This Court should find probable jurisdiction because the decisions by the Michigan courts herein are in conflict with decisions issued by this Court and by several state courts of last resort, including that of Michigan itself. Even where constitutional protection is denied on non-federal grounds, it is the province of this Court to inquire

whether the decision of the state court rests upon a fair or substantial basis, *Lawrence v. State Tax Comm.*, 286 U.S. 276, 283 (1932).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment, Section 1, of the Constitution of the United States provides in relevant part: "*No state shall [...] deny to any person within its jurisdiction the equal protection of the laws*".

The Constitution of Michigan in its Article I § 2 begins with similar terms: "*No person shall be denied the equal protection of the laws*".

STATEMENT OF THE CASE

A. Legal Background.

1. Defamation Per Se and Defamation with Special Damages.

Unprivileged, false statements are defamatory per se (or actionable in themselves) when these (1) impute to the defamed person the commission of serious crimes (typically felonies) (2) impute moral turpitude, or (3) prejudice the defamed individual in his profession or trade. *Lakin v. Rund*, 873 N.W.2d 590 (2016) is the latest reflection of Michigan's agreement with this consensus. The Michigan court points to *Mains v. Whiting*, 87 Mich. 172, 180, 181; 49 N.W. 559 (1891) (which in turn cites *Pollard v. Lyon*, 91 U.S. 225, 226) as an authority on defamation per se, *Lakin, supra.*

Michigan law also grants recovery of economic damages if "*the defamatory falsehood concerns the private individual and was published negligently*", MCL 600.2911(7).

Where defamation per se has occurred, the person defamed is entitled to recover damages, *Slater v. Walter*, 148 Mich. 650, 652-653 (1907). If defamation is published maliciously, the person defamed may recover "substantial damages" even where no special damages could be shown, *Whittemore v. Weiss*, 33 Mich. 348, 353 (1876) (cited in *Burden v. Elias Bros. Big Boy Restaurants*, 613 N.W.2d 378, 382 (2000)). By implication, recovery is **not conditioned** on third parties testifying that they relied on -or believed in- the defamatory publications. Recovery of *substantial* damages for defamation per se depends on whether the defamatory statements are made "*with 'actual malice' -that is, with knowledge that it was false or with reckless disregard of whether it was false or not*", *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

2. Tortious Interference with Business Relationship.

Claims of tortious interference are not always wholly derivative of an offense of defamation. Tortious interference may occur through bribery, conspiracy, sabotage, harassment, and so forth. In a context of sabotage and harassment, the *chilling effect* on the third party may occur regardless of the third party's reliance on the defamatory statements that underlie the harassment.

The *prima facie* elements of tortious interference focus on the defendant's *intent.* In particular, many jurisdictions "*support the general proposition that a person who is*

considered insane may still be capable of entertaining the intent to commit certain tortious acts even though he entertains that intent as a consequence of his delusion or affliction", *Rajspic v. Nationwide Mut. Ins. Co.*, 718 P.2d 1167, 1170 (1986). The Michigan court adopted that proposition in *Auto-Owners Ins. Co. v. Churchman*, 440 Mich. 560 (1992), emphasizing that it applies regardless of whether or not a mentally ill person may be unable to form a criminal intent.

Nothing in the aforementioned general proposition limits its application to the insurance context. In fact, *Edwards v. State*, 521 S.W.3d 107 (2017), and *People v. Oelerich*, 78 N.E.3d (2017) (Petn. for Leave to Appeal denied) reinforce the proposition that psychosis does not render a defendant unable to appreciate the criminality of his or her conduct, and does not render him or her unable to conform to the requirements of the law. The Michigan court materially coincides on this point, *People v. Carpenter*, 464 Mich. 223, 236 (2001) (a defendant may not present evidence of diminished mental capacity for the purpose of negating specific intent). This strengthens the argument that psychosis or mental illness cannot negate the dispositive issue of *intent*.

B. Factual Background.

Petitioner was employed by the intermediary Al-Azhar Pacha (Mr. Pacha) to work for the University of Michigan (the University) as systems and database consultant. Except for the semester between Petitioner's resignation in 2012 and his subsequent rehire, his employment lasted

from July of 2007 to July of 2015. In December of 2014, Petitioner accepted the University's offer of employment. Petitioner would become the University's employee immediately upon USCIS's approval of the work visa that the University was to pursue for him. In March of 2015, the University informed Petitioner that "*We can have H-1B approval in as little as 6 weeks (with premium processing, which your Department has requested)*". App.55a#1.

Also in March of 2015, Respondent began harassing the University employees by making false and defamatory statements about Petitioner. It is unclear how Respondent identified Petitioner's workplace and how Respondent learned that the University was in the process to hire Petitioner. App.55a#2. In the course of her defamatory publications, Respondent falsely accused Petitioner of several crimes classified as felonies in the Michigan penal code. Some of the calumnies doubly prejudice Petitioner in his profession: Respondent falsely imputed to Petitioner the hacking of systems and the abuse of credentials. Respondent repeatedly sought to identify Petitioner's direct employer.

Respondent's harassment caused to the University increasing annoyance and alarm. Respondent eventually reproached the employees for allegedly aiding Petitioner, and Respondent made other statements that the University perceived as veiled threats. App.55a#3. On April 22, the University's Human Resources Administrator Amy Ranno (Ms. Ranno) informed

her colleague that "*we **unexpectedly** are now in the process of **investigating** an issue involving [Petitioner] and a family member contacting the University and the FBI [...] you may need to **put this on hold** *", App.55a#4, (emphasis added). On April 29, Ms. Ranno notified Petitioner that Respondent continued her course of conduct; that Respondent had been committed to the University's psychiatric unit; that Petitioner's hire process was suspended as the result of Respondent's actions; and that Respondent's situation was reflecting poorly on Petitioner. The University's reactions toward Petitioner are unfair because Petitioner has not interacted with Respondent since Petitioner was five (5) years old. More important, the University's decision is incompetent because weeks earlier Ms. Ranno declined Petitioner's offer to provide court records documenting Respondent's history of misconduct.

Petitioner sought a Personal Protection Order 15-941-PH (PPO) against Respondent. The PPO was granted *ex parte* on May 1, 2015, which specifically prohibits Respondent "*contacting employer of or clients of petitioner*". App.55a#5. That same day, Respondent emailed to the University Executive Director Richard Robben (Director Robben) that "*you might end up in a very bad situation*". App.55a#6.

Petitioner submitted to the University a scan of the PPO and asked to be notified if Respondent approaches the University again. Despite verbal assurances that the University would resume the hire process, records show that the University

never did so. App.57a#29. In fact, the University inexplicably concealed from Petitioner that the University Police Department offered to "*meet with him and discuss security options*" apropos of Respondent and the PPO issued against her. App.55a#7-8.

After several attempts, Law Enforcement served the PPO upon Respondent on July 21, 2015, at 9:45AM. App.#5. Less than six hours later, Mr. Pacha emailed the University with the false accusation that Petitioner sent direct threats to him. Mr. Pacha requested to meet as soon as possible with the University. App.55a#9. A day later, Mr. Pacha falsely told the University that Petitioner threatened him to tortiously interfere with Mr. Pacha's business once Petitioner becomes employee of the University. These and the subsequent interactions between the University and Mr. Pacha were unbeknownst to Petitioner because both entities unjustifiably concealed from Petitioner the matter. Petitioner learned of these events only when discovery in the instant lawsuit was at an advanced stage.

The detrimental, lasting effects of Respondent's unlawful conduct is palpable from Ms. Ranno's email to her coworker on July 21, 2015, stating that "*new issues keep cropping up around [Petitioner] that make me hesitate to move more quickly*", in reference to Petitioner's hire process. App.55a#10. Other than Mr. Pacha's unprecedented calumnies on July 21, the only issues ever cropping up around Petitioner were those caused by Respondent since March of 2015.

On July 30, Mr. Pacha informed Petitioner that he was terminated effective immediately. Upon Petitioner's inquiry, Mr. Pacha's stated excuse for termination was a pair of emails that Petitioner sent to him a month earlier. While announcing the termination, Mr. Pacha called an employee of the University to intentionally impress on Petitioner the false and misleading appearance that the decision to terminate him was made impromptu. On July 31, the University notified Petitioner of its decision to withdraw the offer of employment due to unspecified "additional information". App.55a#11.

C. Proceedings Below.

1. Respondent Pleads the Affirmative Defense of Truth, and the University Incurs Discovery Fraud.

Petitioner filed in pro per the complaint against Respondent on August 7, 2015. Petitioner attached to the complaint two exhibits reproducing some of the defamatory publications Respondent sent to the University. The pleadings and exhibits meet the *prima facie* elements of defamation per se, defamation per quod, and tortious interference in the form of harassment.

Respondent pleaded the affirmative defense of *truth*. App.55a#12. Although her efforts to prove that defense were obviously doomed and fruitless, Respondent never duly amended her affirmative defenses. More notorious is Respondent's refusal to retract her false defamatory statements, something that Petitioner requested apropos of

Respondent's belated pretext of being delusional at the time of her misconduct. App.55a#13.

Petitioner served upon the University a subpoena duces tecum on August 12, seeking to identify any and all persons "*bringing accusatory testimony against [Petitioner]*". App.56a#14. Four weeks later, the University produced records that incriminate Respondent only, and which Petitioner already had in their redacted form. Nothing in the production was useful to identify the additional information the University alleged in its letter of July 31, 2015.

During discovery, the University intentionally and repeatedly misled Petitioner when he made direct inquiries about the incomplete production. In October, the University through its HR employee Mr. Lund insisted that "*The University responded fully to the subpoena. Everything requested was provided by the University. There are no more documents in response to the subpoena*". App.56a#15. The incompleteness of production was first evidenced when Mr. Lund belatedly stated that "*Information, and the source of that information, gathered between the time the contingent offer was made and subsequently rescinded is confidential, and will not be released to you*" App.56a#16. By then, Petitioner had filed a motion for summary judgment because all the evidence pointed to Respondent as the only culprit of Petitioner's injuries. Additional evidence of the University's discovery fraud surfaced when subpoenaed telephone companies produced records of Respondent's phone calls to the

University and which the University unjustifiably concealed from Petitioner.

2. The University Drastically Changes Its Tactic, but Nonetheless Keeps Obstructing Discovery.

Hitherto all records pointed to Respondent as the only wrongdoer, but on November 17 the University drastically changed its tactic and released additional records. The University released them only in anticipation of the deposition it arranged with Respondent's counsel. The University's supplemental response to Petitioner's subpoena duces tecum included, for the first time ever, Mr. Pacha's defamatory email dated July 21. From then on, the University stubbornly denied that Respondent had anything to do with the University's adverse decisions about Petitioner.

The deposition witness was an associate director of name Lukeland Gentles (Mr. Gentles). Unlike Ms. Ranno, Director Robben, and other employees, Mr. Gentles is notoriously absent in the subpoenaed records. He is neither referenced nor included in the University's deliberations about how to proceed about the escalation of Respondent's misconduct. App.56a#17. Even Respondent was unaware of Mr. Gentles, whereas Respondent profusely harassed his supervisor, Director Robben. App.56a#18. While appearing clueless about the matter, Mr. Gentles was quick to advance his false and speculative theory of why the University suspended Petitioner's hire process since April of 2015. App.56a#19.

By contrast, Ms. Ranno feigned amnesia during her deposition, despite her central involvement in the discussions regarding Respondent's misconduct. One day after Ms. Ranno's deposition, in December of 2015, the University released another supplemental response to the subpoena. That included an email dated July 27, 2015, between two employees of the University. The email begins with "*Per our conversation. This will give you some of the details regarding [Petitioner]*", the rest of that page being redacted and followed by three entirely redacted pages. App.56a#20. That subpar "compliance" with subpoenas obviously is useless in the ascertainment of the truth. Petitioner moved to compel the disclosure of records, but to no avail.

3. The Trial Court Thwarts Discovery, and Rushes to Dismiss the Case.

The trial court systematically thwarted Petitioner's discovery efforts. The judge ignored each and every inconsistency and discovery fraud that Petitioner denounced before the court. The judge acknowledged that the redacted documents are "*directly relevant to [Petitioner's] claims in this matter*", but ruled in favor of the University under pretext of the attorney-client privilege. App.56a#21.

The judge further prevented Petitioner from conducting discovery on Respondent's husband -even on matters that transcend the statutory scope of spousal privilege- and on the non-content information of Respondent's email activity.

Despite the court's order authorizing Petitioner to take the deposition of Director Robben, the judge henceforth ignored Petitioner's denouncement that the University was ignoring Petitioner's follow-up requests. App.56a#22. Instead, the judge rushed to close the case before Petitioner could take the deposition.

At the hearing for Respondent's motion for summary disposition, on March 16, 2016, the judge denied that Respondent harmed Petitioner. Under pretext of Respondent's psychosis and mental illness, the judge also denied that Respondent made her defamatory publications with actual malice. To negate actual malice, the judge alleged that the complexity of Respondent's acts is *not inconsistent* with Respondent's mental illness. App.44a-45a. The judge ignored guidance from MCL 768.21a, which examines whether a defendant's crimes are *caused* by the defendant's mental illness (rather than being merely consistent or contemporaneous with it).

After his motion to vacate the ruling for summary disposition was denied, Petitioner timely appealed in the Michigan court of appeals in April of 2016. Coincidentally, in July of 2016 the University terminated Director Robben and promoted Mr. Gentles.

4. Newly Discovered Evidence Emerges During the Appellate Backlog, but the Appellate Court Rejects It.

During the appellate backlog, Respondent continued violating the PPO. At some point, Respondent forgot to conceal her cell phone

number in two of her harassing calls to Petitioner. With that proof of Respondent's violations, Petitioner brought criminal contempt proceedings against Respondent in November of 2016.

Respondent and her husband reacted by filing in trial court a multitude of false accusations similar to the ones made by Respondent at the University in 2015. App.56a#23. Respondent's renewed calumnies demonstrate that her defamatory publications in year 2015 are made with actual malice, rather than as a result of her mental illness and commitment to a psychiatric unit. Since the husband does not have any mental illness, the similarity of their false accusations reinforce the proof of Respondent's actual malice.

Additionally, the husband's deliberate injection himself into related judicial proceedings to harm Petitioner constitute an equitable waiver of the spousal privilege by which he avoided Petitioner's discovery efforts in December of 2015.

Respondent's husband requested a PPO against Petitioner, filing in trial court various records from his former workplace dating back to year 2012. Some records reflect the chilling effect that Respondent's intrusion caused among the husband's former coworkers few months before he was terminated from his employment.

The aforementioned records constitute newly discovered evidence that Petitioner had been pursuing during discovery. Petitioner filed them in the appellate court (MCR 7.216(A)(4), per jurisdictional grounds of the moment), while also meeting the deadline per MCR 2.612(C)(1)(b)-(c)

(Michigan's equivalent of FRCP 60(b)(2)-(3)). The appellate court inexplicably denied the motion as well as any other alternative to incorporate that new, relevant, and non-cumulative evidence. App.38a-39a.

Petitioner then filed the newly discovered evidence in trial court, asking that court to refrain from making any ruling until jurisdiction is returned from the appellate court and a hearing on that new evidence can take place. App.17a-37a. The trial judge disregarded Petitioner's request and instead rushed to deny *sua sponte* Petitioner's motion under pretext of lack of jurisdiction, App.14a., precisely the reason why Petitioner asked that court not to issue a ruling at all.

5. The Trial Judge's Misconduct Unveils An Unconstitutional Risk of Bias.

The trial judge drew public attention in the Spring of 2017, after Law Enforcement reported that the judge violated criminal provisions. These findings occurred during police investigations of the judge's adopted son's tragic death. The judge's answers during the police interrogatory reveal that the judge was intimately involved in a situation of mental illness at the time she presided the instant case. App.56a#24.

The judge's involvement in her domestic situation of mental illness should have prompted her to recuse herself from the instant case, or at least allow the parties to assess the risk of judicial bias. However, the judge failed to do so, despite knowing that Respondent was clinging to the pretext of mental illness for the purpose of eluding

liabilities. Interestingly, the judge's domestic situation linked her to the University, there being where her son (just like Respondent) had undergone treatment.

Petitioner also noticed that the judge portrayed herself in her facebook page as employee of the University since April of 2015. App.57a#25. Her self-portrayal is inaccurate, but this and her son's psychiatric treatment at the University help to explain why she systematically declined to address the inconsistencies and discovery fraud the University committed herein. Whether regarded as mere wishful thinking or as her confusion about being employed at the University, the judge's false self-portrayal casts serious doubts as to her judicial impartiality and/or as to her fitness for fact-finding on matters that clearly implicate the University.

These findings and the trial judge's improper entry of rulings while lacking jurisdiction prompted Petitioner to file a motion in the appellate court to have the case reassigned to a different trial judge upon completion of the appellate review. The appellate court denied Petitioner's motion.

6. Michigan Upper Courts Leave All Rulings Unchanged.

The appellate court affirmed the trial court's rulings via an unpublished opinion containing material inaccuracies. App.2a-12a. The appellate court made false statements such as "*[Petitioner] did not allege defamation per se in his complaint*" and that there is no evidence that Respondent

made the defamatory publications with actual malice.

The appellate court also ignored the University's inconsistencies and pattern of concealment. Instead, the court limited itself to repeating one of Ms. Ranno's unavailing pretexts on why Petitioner's hire process remained suspended by the time Mr. Pacha defamed him.

Regarding the University's heavily redacted records under pretext of the attorney-client privilege, the appellate court tried to shift the blame on Petitioner for not filing a motion to file the records sealed and have the appellate court review them.

The appellate court omitted the stretching of the spousal privilege and also disregarded the statutory exception enacted in MCL 600.2162 (3)(d) (Respondent's personal wrong or injury to her husband in the same defamatory publications). Instead, the appellate court made the inapposite allegation that this issue "*had no bearing on [Petitioner's] defamation claim against her*".

Lastly, the appellate court made the unsupported and dubious argument that "*whether [Respondent] violated a personal protection order is irrelevant to [Petitioner's] claims that her communications damaged him*".

On March 5, 2018, the Michigan Supreme Court denied Petitioner's Application for Leave to Appeal, for being allegedly unpersuaded that the issues merit review.

REASONS FOR GRANTING THE PETITION

Michigan courts maneuvered from all fronts to deprive Petitioner of his right to due process. Here, Michigan courts refuse to enforce precedential decisions that coincide with those released by this Court, Michigan's top court, and many other jurisdictions, despite that these decisions have not "*been clearly overruled or superseded [by the Michigan court]*", *Associated Builders v. City of Lansing*, 880 N.W.2d 765, 772 (2016). A Writ and/or summary reversal is warranted because Respondent simply cannot overcome the established law and the evidence.

I. PETITIONER HAS BEEN UNDENIABLY HARMED BY RESPONDENT'S MISCONDUCT, WHENCE LAW ENTITLES HIM TO AN AWARD OF DAMAGES.

A. Defamation Per Se Prejudices Petitioner, Yet the Michigan Appellate Court Eludes Review by Misrepresenting His Pleadings.

To elude the review of matters, the appellate court blatantly denied (in a footnote) that Petitioner pleaded defamation per se. App.12a. The third page of Petitioner's complaint reads in pertinent part: "*Defendant maliciously accused Plaintiff of over a dozen felonies knowing them to be false (MCL 750.411a): hacking, larceny, conspiracy, damage to personalty*". Exhibit B of the complaint reproduces Respondent's calumnies.

In *Lakin, supra*, the Michigan court remanded with directions to assess whether the false statement at issue imputes to the defamed plaintiff a crime that "*would subject the person to*

an infamous punishment " as dispositive of occurrence of defamation per se.

Accordingly, the appellate court identified the criterion of infamous crime as that which is "*[punishable with] imprisonment for more than 1 year or an offense expressly designated by law to be a felony* ", *Lakin v. Rund*, 896 N.W.2d 76, 83 (2016, On Remand).

Michigan statutes MCL 750.540, MCL 750.157a/.410a, and MCL 750.209 establish that the offenses of hacking, conspiracy, and damage to personalty, respectively, are felonies and/or "*would subject the person to an infamous punishment*", *Lakin (on remand), supra.*

Here, defamation per se is premised on the same facts pleaded in Petitioner's complaint, whence it is unclear how exactly the appellate court expects defamation per se to be pleaded. This being a non-lawyer's pro se complaint which materially complies with the fact-pleading standard and with the Michigan Court Rules, the appellate court should have proceeded as it was instructed to do in *Lakin, supra.* Instead the appellate court departed from the widely adopted principle that "*however inartfully pleaded [...] the allegations of the pro se complaint [...] we hold to less stringent standards than formal pleadings drafted by lawyers* ", *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Equal protection of the laws shall compel all Michigan courts to follow the decisions by the Michigan's top court (such as *Mains, supra*) because those decisions have not "*been clearly*

overruled or superseded ", *Associated Builders, supra.*

Respondent's false and frequent accusations of hacking are actionable in themselves also because Petitioner is a systems and database consultant, and therefore hacking is "*especially injurious to the plaintiff's reputation because of the particular demands or qualifications of plaintiff's vocation*", *Cottrel v. Smith*, 788 S.E.2d 772, 81-82 (2016). Similarly *Mains, supra at 180*; *Pollard 91 U.S., supra at 226.*

B. Respondent Made Her False and Defamatory Statements with Actual Malice.

Through the language of "*knowing them to be false*", Petitioner pleaded Respondent's actual malice in the aforementioned excerpt of the complaint (see previous subsection). Despite being served with a printout of her multiple defamatory publications to Director Robben (exhibit B in the complaint), Respondent through counsel pleaded the affirmative defense of *truth.* App.55a#12.

Although the defense of *truth* cannot lead to an independent lawsuit insofar as it is made during judicial proceedings, "*publications of a libel which a defendant has made subsequent to the one complained of have been held admissible as evidence tending to show the existence of malice at the time of the original publication*", *Peisner v. Detroit Free Press, Inc.*, 104 Mich.App. 59, 64-65 (1981) (citing *Thibault v. Sessions*, 101 Mich. 279 (1894) and *Smith v. Hubbell*, 142 Mich. 637 (1906)).

In light of Respondent's unavailing defense of *truth*, and her pretext of having made the defamatory statements while being mentally ill, Petitioner subsequently requested her to retract her false and defamatory statements. Respondent simply declined the request by answering that "*MCR 2.310 does not require Defendant to create a retraction letter*". App#13. Such refusal constitutes further proof of actual malice. See *Vigil v. Rice*, 397 P.2d 719 (1964). The Michigan court states in *White v. Taylor Distributing Co., Inc.*, 753 N.W.2d 591, 595 (2008) that "*We do not assess the defendant's credibility. But under legal and factual circumstances, we do not ignore the inconsistencies in the defendant's statements*", yet that is precisely what Michigan courts have been doing in the instant case: They deliberately ignore every material inconsistency that Respondent as well as non-parties incurred.

The record on appeal shows that in year 2014 Respondent falsely accused her husband of domestic violence. App.56a#26. Under Michigan Rules of Evidence rules (MRE 404(b)(1)), such false accusations constitute prior act evidence which is admissible as proof of *knowledge* and others mental states. Because *knowledge* is relevant to the issue of *actual malice*, such prior act evidence reflects unfavorably on Respondent's habitual attitude toward the truth. *Greer v. Abraham*, 489 S.W.3d 440, 444 (Tex. 2016).

If the appellate court believes that Petitioner did not prove actual malice, then it should have allowed Petitioner to expand the record with the

newly discovered evidence, evidence which Petitioner actively pursued in trial court. But no court of justice shall disavow the proofs in the record on appeal, then reject the newly discovered evidence, and lastly purport the unconscionable conclusion that the petitioner did *not* meet his burden of proof.

C. Respondent's False and Defamatory Publications Harmed Petitioner's Reputation.

Despite *post hoc* efforts by Ms. Ranno to exonerate Respondent, Ms. Ranno's emails reflect the detrimental effect that Respondent's calumnies about Petitioner had on his hitherto impeccable reputation.

On May 5, 2015, Ms. Ranno emailed her supervisor with the remark that "*I told [Petitioner] the [work] visa process had been paused until this was cleared up*". App.57a#27. Ms. Ranno's referenced necessity to *clear up* reflects -at the very least- the University's doubt on who to believe: the Petitioner known for several years for his integrity and bright performance at the University, or the unknown Respondent who suddenly began harassing the University with a plethora of false accusations of felonies. This loss of Petitioner's reputation (or the University's doubts thereon) was severe enough that it prompted the University to pause the work visa process for which it previously had requested premium processing. App.57a#28.

The supreme court of Texas reviewed a similar controversy in *Brady v. Klentzman*, 515 S.W.3d

878, 887 (2017): The plaintiff was defamed in an article and, based on concerns from the publication, his employer asked him to quit. The request for the plaintiff to quit "*serve[s] as proof for loss of reputation*", *Id.* The Texas court concluded that "*[Plaintiff] later resumed work at the same business, but this does not change that he presented evidence of the article's previous injury to his reputation*".

Asking a defamed person to quit because of false publications is materially indistinguishable from suspending a process to hire the defamed person "*until this was cleared up*". Either decision by the employer demonstrates that the false and defamatory statements deters that employer from associating with the defamed person.

Assuming -without conceding- that the University eventually resumed the visa process, the Michigan court still cannot reasonably justify its departure from the conclusion the Texas court reached in *Brady* (to wit, the loss of plaintiff's reputation).

Whereas the plaintiff in *Brady* was fortunate enough to get his job back, Ms. Ranno in her email on July 21, 2015, states that she still "*hesitate[s] to move more quickly*" in regard to Petitioner's hire process. App.55a#10. The University's file reflects that the hire process remained stalled ever since the University suspended it in April of 2015. App.57a#29. And Ms. Ranno's prolonged hesitance -as reflected in her email in July of 2015- highlights the permanent loss of Petitioner's

reputation, the harm caused by Respondent's tortious interference, or both.

Further evidence of Respondent's negative impact on Petitioner's reputation is that the University made no effort whatsoever to inquire of Petitioner whether he had anything to say about or -even better- to disprove the false and scandalous accusations Mr. Pacha made on July 21 and 22. The University has guidelines to give candidates who have been convicted of a crime the opportunity to explain why they should not be precluded from employment at the University. App#30. The University's deliberate decision to deprive Petitioner of such an opportunity, granted so openly to persons with criminal convictions, is very telling of the loss of Petitioner's reputation as per Respondent's defamatory publications.

D. Respondent's Harassment of the University Constitutes Tortious Interference with Business Relation or Expectancy.

To preempt Michigan courts' denial that Petitioner pleaded tortious interference, pages 28-29 of his Application for Leave to Appeal identify the pleadings [in the complaint] that satisfy each prima facie element of the tort.

Ms. Ranno's emails on April 22 and May 5, 2015, unequivocally reflect that Respondent's misconduct prompted the University to suspend Petitioner's hire process. App.57a#31.

Also on April 28, Respondent told a University employee that "*bad things will happen to [the University]*" and that the University "*will be sorry*"

if it hired Petitioner. App.57a#32. In another email dated April 29, 2015, Ms. Ranno informed other employees that she asked Respondent to stop contacting the University. App.57a#33. And, despite Respondent's answer that "*she understood not to call here anymore*", the record of the case reflects that Respondent kept harassing the University in the subsequent days (for instance, see App.55a#6).

The persistence of Respondent's misconduct justifiably causes any reasonable person to be concerned, and others' awareness of Respondent's mental illness only worsens the alarming perception of her acts of harassment. Even Ms. Ranno testified at deposition that there was "*concern that the situation was escalating*". App.57a#34. The University's concealment from Petitioner that the police department offered "*to meet with him and discuss security options*" also signals the University's determination since May of 2015 to start parting ways with Petitioner.

E. Ms. Ranno's Effort to Negate the Effect of Respondent's Misconduct is Inapposite and Inconsistent.

The Michigan courts rely on Ms. Ranno's excuse at deposition that her "*workload and her inability to access the proper forms*" prevented her from resuming the hire process. App.6a. However, an analogy illustrates the incoherence of Ms. Ranno's portrayal:

Defendant Alice shoots Bob; the paramedics are dispatched to the scene; an opportunistic third-party kicks Bob (here, Mr. Pacha's

calumnies as the straw that broke the camel's back), causing Bob's death before the paramedics arrive at the scene. Ms. Ranno's disingenuous pretext about her "*workload and her inability to access the proper forms*" and that "*this had nothing to do with Respondent*" is tantamount to the paramedic's testimony that "*we didn't save the victim because there was a lot of traffic and I couldn't access the roads, but the victim's death had nothing to do with the defendant's acts*". Michigan courts should not ignore such inconsistencies if they pretend they follow *White, supra.*

The bulk of the hire process is something another department of the University performs. That department depended on Ms. Ranno's minor -albeit imprescindible- task of filling a form, and the record on appeal reflects that Ms. Ranno spent much more effort deliberating about Respondent's misconduct than what it would take Ms. Ranno to do her part so as to allow the hiring to move forward.

II. THE ASCERTAINMENT OF THE TRUTH REQUIRES DUE PROCESS AND THE REVERSAL OF VARIOUS WRONGS COMMITTED OR PERMITED BY THE MICHIGAN COURTS.

Notwithstanding their equitable and legal duty, non-parties University, Respondent's husband, and Mr. Pacha have produced pieces of evidence (that is, by "dribs and drabs"), and only when they deem it circumstantially convenient.

The University has at all times been very careful not to disclose any information of Respondent's acts that would constitute a violation of the PPO. The latest instance of Respondent's misconduct as reported by the University is the email Respondent sent to Director Robben on May 1, 2015, at 9:46AM, twenty nine minutes prior to the granting of the Ex Parte PPO. Respondent's relentless harassment of the University in the preceding months makes it quite dubious that Respondent magically ceased and desisted from her misconduct just few moments prior to the granting of a PPO, a PPO of which was unaware because Law Enforcement served it upon her on July 21.

The lapse of few hours between the serving of the PPO and Mr. Pacha's false accusations suggests that both events are connected and traceable to Respondent. Mr. Pacha's urgent message to the University on July 21 has a striking resemblance with some of Respondent's calumnies (to wit, the abuse of credentials or threats therefor that Respondent and Mr. Pacha, respectively, falsely imputed to Petitioner).

Mr. Pacha's belated pretext is centered on two emails Petitioner sent to him a month earlier, yet Mr. Pacha cannot reasonably explain why he calumniated Petitioner precisely on July 21 few hours after the PPO was served upon Respondent. This sort of Mr. Pacha's "subconscious" synchronization with the serving of the PPO is untenable in the context of (1) Respondent's efforts to identify Petitioner's employer [Mr. Pacha]; (2)

Respondent's history of harassment of her husband's coworkers and her violation of the restraining orders granted during her husband's divorce proceedings; and (3) the fact that both Mr. Pacha and the University fraudulently concealed -for over three months- their interactions despite Petitioner's subpoena and direct inquiries.

Mr. Pacha and the University strive to convey that there is mere, random coincidence in the timing of events on July 21, but that pretense fails any standard of proof.

Reversal of the discovery rulings is fundamental because the underlying discovery initiatives will identify who abetted -and insists to conceal- Respondent's misconduct and the effects thereof.

A. The University's Conduct Forfeits Its Alleged Attorney-Client Privilege.

The University's significant redaction of records affects communications from as early as April 28, 2015, when only Respondent was seeking to harm Petitioner. However, the trial court chose not to inspect those records. The trial court only reviewed *in camera* the email of five pages (not five emails, as the appellate court misstates) dated July 27, 2015.

During *in camera* review, the court acknowledged that the email of July 27 is *directly relevant* to Petitioner's claims. The trial court concluded that the record is protected by the attorney-client privilege, yet the court also stated that it contained legal advice "*regarding firing/hiring decisions*". App#21.

At the outset, the University should be judicially estopped from asserting the attorney-client privilege: After the instant case was closed, federal court dismissed on grounds of *sovereign immunity* Petitioner's civil action against the University for breach of contract and promissory estoppel: *Viggers v. Board of Regents of the University of Michigan*, Case No. 16-10263 (E.D. Mich., Southern Division, Mar. 29, 2016). The University's successful assertion of sovereign immunity in these inextricably linked matters henceforth moots its attorney-client privilege. The dismissal of Petitioner's civil action in federal court precludes the University's need for continued concealment of matters that are to be found only in the University redacted and other not-yet-produced files.

Three equitable, alternative grounds strike the University's attorney-client privilege:

1. The Example of *Stafford Trading, Inc.*

From the review *in camera* of the email dated July 27, 2015, it appears that the email at issue forwards one or more communications. Because the entirely redacted email impedes Petitioner to identify any of the participants in the embedded communications, the attorney-client privilege should be deemed waived as it was ruled in *Stafford Trading, Inc. v. Lovely*, No. 05-C-4868 (treating an email that forwarded another email as two separate communications and holding that privilege was waived for both if either one was sent to an unidentified recipient).

There is an equitable reason for making a ruling such as the one in *Stafford, supra*: That extent of concealment severely impairs the ascertainment of the truth. The concealment and heavy redaction in the instant matter cannot be less aggravating than in *Stafford*: Here, it is impossible to identify the individuals involved, the number, circumstances, and dates of the (embedded or otherwise) communications.

It is likewise inconsistent for the University to first assure that it fully complied with the subpoena (hitherto incriminating Respondent only, and without barely specifying what -if any- records are protected by the attorney-client privilege), and two months later release *"some of the details regarding [Petitioner]* " which are entirely redacted under pretext of being privileged.

2. Crime-Fraud Exception in Furtherance of Future Breach of Contract.

The University's suspension and subsequent withdrawal of the offer of Petitioner's employment is pleaded (and evidenced, at least in part) in the complaint as one of the consequences of Respondent's misconduct.

The University's email dated December 5, 2014, meets the elements of a common-law contract for prospective relationship. The record outlines the only two conditions for starting employment at the University: visa approval, and a successful background check. App.57a#35.

The University suspended Petitioner's hire process since April of 2015 for reasons alien to the

pair of conditions outlined in the formed contract. The University's subsequent letter in July of 2015 reflects its decision to withdraw the offer of employment, once again (1) without a USCIS's denial of a visa for Petitioner, and (2) without conducting a background check.

Because the University (1) did not even honor its [contractually implicit] duty to file with the USCIS a request for Petitioner's work visa, and (2) never pursued a background check, the University's suspension and withdrawal constitute breaches of the contract the University memorialized on December 5, 2014. Any assertion to the contrary would lead to the absurdity that [Petitioner's] background check means Respondent's acts of harassment and/or all the unsolicited, unverified, false, and defamatory publications the University entertained.

Therefore, the trial court's admission that the record at issue contains "*legal advice regarding firing/hiring decisions*" answers in the affirmative "*[t]he dispositive question [of] whether the attorney-client communications are part of the client's effort to commit a crime or perpetrate a fraud*", *State Ex. Rel. Allstate v. Madden*, 601 S.E.2d 25, 37 (2004) (citations omitted).

3. Silent Fraud and Undue Hardship.

The Michigan court has established that "*Fraud may also be committed by suppressing facts -silent fraud- where circumstances establish a legal duty to make full disclosure. Such a duty of full disclosure may arise when a party has expressed to another some particularized concern*

or made a direct inquiry", *Bank of Am. v. First Am. Title Ins. Co.*, 499 Mich. 74, 878 N.W.2d 816, 831-833 (2016).

The University's duty of full disclosure has risen on various occasions, including (1) the subpoena duces tecum, served upon the University on August 12, 2015, (requesting records "*by Respondent, all other complainants (if any) and all other alleged witnesses bringing accusatory testimony against [Petitioner]*"); and (2) on September 7, 2015, when Petitioner emailed Ms. Ranno to inquire about the alleged "additional information", given the incompleteness and inconclusiveness of the University's subpoena production. App.57a#36.

The University repeatedly failed its duty of full disclosure through its misrepresentations in October of 2015 as to full compliance, and as per Ms. Ranno's admission at deposition that she did not reply to Petitioner's September email. Instances of this sort where the University suppresses facts undeniably constitute silent fraud as defined by the Michigan court in *Bank of Am, supra.*

Because the University's concealment of subpoena records was knowingly made in furtherance of Respondent's and Mr. Pacha's misconduct, the crime-fraud exception to the privilege should apply notwithstanding that the University subsequently changed its mind and desisted from concealing from Petitioner some records that incriminate Respondent and Mr. Pacha. See *State Ex. Rel. Allstate, supra at 37*.

> "*In the context of the crime/fraud exception to the lawyer-client privilege, 'fraud' would include the commission and/or attempted commission of fraud on the court or on a third person [...]. [T]he fraud or crime contemplated need not have been actually committed; the mere intent to perpetrate the wrongdoing will suffice.*" (citations omitted, quotation marks in original).

The University's maneuvers toward depositions further weaken its asserted privilege: (1) it produced Mr. Gentles as witness, who purportedly was clueless about all the disruptions Respondent caused to Petitioner's hire process; (2) Ms. Ranno feigned amnesia about matters and deliberations where she was centrally involved; and (3) the University never produced for deposition Director Robben, whom Respondent harassed profusely. This Court has stated that "*production [of facts hidden in an attorney's file] might be justified where the witnesses are no longer available or can be reached only with difficulty*", *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Since Ms. Ranno ignored Petitioner's inquiry, hardly cooperated during her deposition, and the University has terminated Director Robben, neither of these two central witnesses can be considered available.

Furthermore, Petitioner cannot spend unlimited resources to depose other employees of the University hoping that anyone will have the knowledge and integrity to disclose the *directly relevant* information the trial court identified.

Producing the unredacted records at issue is in agreement with the principle stated by this Court: "*Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had*", *Hickman, supra.*

The appellate court blames Petitioner for not requesting that the original unredacted emails be included in the lower court file. App.9a-10a,12a. But the appellate court completely misses the point. The appellate court is not asked to assess whether the records are protected by the attorney-client privilege. The core of Petitioner's argument is that the University's course of conduct (in addition to the court's remarks during the review in camera) strikes the attorney-client privilege.

B. Discovery on Respondent's Husband.

Some rulings and inferences of fact (to wit, the court's denial that Respondent made defamatory statements with actual malice) are moot issues because Respondent and her husband have waived much of the relief the trial court granted to them. Since November of 2016, both individuals have been filing false accusations (including frivolous requests for PPOs) to harm Petitioner. See *Shifflet v. Shifflet*, 891 S.W.2d 392, 394 (1995) ("*Waivers are essentially unilateral, resulting as a legal consequence from some act or conduct of [the] party against whom it operates, and no act of [the] party in whose favor it is made is necessary to complete it*").

Nevertheless, the appellate opinion warrants reversal because it creates wrongful law of the case and encourages further abuse of discretion. For instance, the appellate false denial that Petitioner pleaded defamation per se affords to the trial court the ideal pretext to elude such pleaded claim as well as the growing evidence of Respondent's actual malice. The trial court already showed its eagerness to prolong the miscarriage of justice:

Given the unsolved jurisdictional dilemma regarding newly discovered evidence that emerges while the appellate review is pending, Petitioner followed the two alternatives outlined by *Dean & Longhofer*, App.54a-55a, only to see each court arbitrarily dismiss the evidence. By doing so, the Michigan courts embody an unflattering contrast with the D.C. Court of Appeals in *Brewer v. Office of Employee Appeals*, 163 A.3d 799, 804 (2017) (granting the relief because "*[t]he record shows an unbroken effort by a pro se petitioner [...] to properly comply with somewhat arcane filing rules*").

The appellate assertion that Respondent's personal wrong to her husband in her publications to defame Petitioner "*had no bearing on Petitioner's defamation claim against Respondent*" is quite speculative. The substance of the husband's false accusations in November of 2016 demonstrate the relevance of ascertaining the extent to which the husband may have instigated Respondent's misconduct to harm Petitioner. That may warrant judicial proceedings against the

husband as well. In the alternative, the absence of such instigation would evidence how he (and, by implication, others such as the University) actually rely on Respondent's calumnies.

C. Discovery on Respondent's Email Activity.

The appellate court purports that Respondent's admission that she made the defamatory publications precludes further scrutiny on her email activity. App.10a-11a. That assertion simply cannot outweigh *U.S. v. Forrester*, 512 F.3d 500, 510 (9th Cir.2008) (e-mail and internet users have no expectation of privacy to/from addresses of their messages).

The appellate court makes the credulous allegation that Respondent provided *all* e-mails related to Petitioner. App.11a. The University similarly misrepresented that it fully complied with the subpoena, and Petitioner subsequently disproved it. Therefore, it is disturbing that now the appellate court gives a vote of confidence that Respondent has provided *all* the e-mails. Enacting laws such as the Electronic Communications Privacy Act (18 U.S.C. § 2510 et seq.) and the Stored Communications Act (18 U.S.C. Chapter 121 §§ 2701-2702) serve to remedy the obviousness that wrongdoers will not disclose their misconduct which has not yet been discovered elsewhere. Respondent will never be the first entity to disclose that she violated the PPO.

Likewise, it is extremely wrong for the appellate court to assert that "*whether [Respondent] violated a personal protection order is irrelevant to [Petitioner's] claims that her*

communications damaged him". App.11a. The PPO explicitly prohibited Respondent to approach Petitioner's employer or clients. Evidence that Respondent violated the PPO would have far reaching implications uncovering perjury, conspiracy, fraud on the court, and abetting of criminal contempt. If it turns out that Respondent actually contacted the University again, it would (1) constitute additional evidence of the University's silent fraud; and/or (2) debunk the pretext that Mr. Pacha's calumnies are what prompted the University to withdraw the offer of employment. Alternatively, the discovery that Respondent contacted Mr. Pacha would imply that (3) the University tortiously informed Respondent who was Petitioner's direct employer; and that (4) Mr. Pacha falsely accused Petitioner despite knowing that he should have reported Respondent instead. Much to the University's and Mr. Pacha's embarrassment, evidence of this sort would truly explain the bizarre coincidence in the timing of events on July 21, 2015.

D. Disqualification of the Trial Judge Is Warranted.

The trial court knew about Respondent's mental illness, and it knew that Petitioner waived trial by jury. This combination of circumstances should have prompted the trial judge to recuse herself from the case because -simultaneous with the instant proceedings- the judge was domestically involved in the situation of her son's mental illness.

Under a realistic appraisal of psychological tendencies and human tendencies, the judge's domestic situation subjects the adjudicative functions herein to an unconstitutional risk of actual bias or prejudgment that "*must be forbidden if the guarantee of due process is to be adequately implemented*", *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). It is a foreseeable human tendency that the judge might see in each person with mental illness a reflection of her son. But the judge's choice not to even bring up this matter for Petitioner's assessment of risk of judicial bias severely weakens any presumption of judicial honesty or integrity, *Id.* Given the great relevance of the University in the instant case, the coincidence that the judge's son received recurrent treatment at the University's psychiatric unit can only increase the risk of bias.

Likewise, the prejudice from the judge's false portrayal of herself as employee of the University is threefold: (1) it is worrisome that an official entrusted with fact-finding mistakenly believes to be affiliated in the capacity she portrayed; (2) the judge might have unconstitutional sympathy toward Respondent insofar as customer at the psychiatric unit of the judge's alleged employer; and (3) the simultaneity between her alleged employment at the University and her presiding of the instant proceedings suggests her interest to protect the image of her alleged employer despite the University's unbecoming decisions against Petitioner because of Respondent's misconduct. Whereas the judge's employment at the University

might be illusory, its impact on the instant case is real and detrimental.

CONCLUSION

For the foregoing reasons, the petition should be granted and the rulings by the Michigan court should be summarily reversed.

Respectfully submitted,

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