

IN THE MICHIGAN COURT OF APPEALS

Consolidated Cases:

FAZLUL SARKAR,

Plaintiff-Appellant,

vs.

JOHN and/or JANE DOE(S),

Defendant(s)-Appellee(s),

and

PUBPEER LLC,

Non-party Appellee.

COA Case No. 326667

Wayne Co. Circuit Court
Case No. 14-013099-CZ
Hon. Sheila Ann Gibson

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COA Case No. 326691

Wayne Co. Circuit Court
Case No. 14-013099-CZ
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**PLAINTIFF-APPELLANT AND PLAINTIFF-APPELLEE FAZLUL SARKAR'S
RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF**

Dr. Fazlul Sarkar opposes PubPeer's Motion for Leave to file a supplemental brief, as follows:

FACTS

During oral argument on October 4, 2016, attorney Alex Abdo for PubPeer informed the panel that Dr. Sarkar was subject to an investigation by Wayne State University. The Court quickly interrupted Mr. Abdo, recognizing the investigation was not part of the appellate record, but the damage was done. A reporter for *The Scientist Magazine* used the occasion to learn about the investigation, make inquiries with Wayne State, and obtain the investigation file under the Freedom of Information Act.¹

The same day the reporter's article appeared, PubPeer filed a motion with the Court of Appeals to supplement the appellate record with Wayne State's investigative findings against Dr. Sarkar.

ARGUMENT

PubPeer's motion makes no mention of the legal standards for supplementing the appellate record, instead arguing that "Wayne State's investigative findings, and their release in response to a FOIA request, are directly relevant to two of the questions presented by this appeal: ..."

¹ See Robert Grant's four articles in *The Scientist*: "Michigan State Court of Appeals Hears Arguments in PubPeer Litigation," October 5, 2016 [<http://www.the-scientist.com/?articles.view/articleNo/47198/title/Michigan-State-Court-of-Appeals-Hears-Arguments-in-PubPeer-Litigation/>]; "Misconduct Finding Could Impact PubPeer Litigation", October 19, 2016 [<http://www.the-scientist.com/?articles.view/articleNo/47307/title/Misconduct-Finding-Could-Impact-PubPeer-Litigation/>]; "Investigation Finds Pathologist Guilty of Systemic Misconduct," October 19, 2016 [<http://www.the-scientist.com/?articles.view/articleNo/47297/title/Investigation-Finds-Pathologist-Guilty-of-Systemic-Misconduct>; this article is attached to PubPeer's motion]; and "PubPeer Requests that Court Consider Misconduct Investigation," October 20, 2016 [<http://www.the-scientist.com/?articles.view/articleNo/47319/title/PubPeer-Requests-that-Court-Consider-Misconduct-Investigation/>]. Mr. Abdo is quoted in the latter article saying "The fact that this report is now out there should inform the way the court decides the legal question."

There is no legal justification for supplementing the appellate record. The law is well settled that matters outside the appellate record are not properly before the appellate court, and may not be considered. “References to facts outside the record developed in the trial court will not be considered by the court of appeals.” *Wiand v. Wiand*, 178 Mich App 137 (1989). The *Wiand* court relied on MCR 7.210 (A) which provides that appeals to the Court of Appeals are heard on the original record, specifying that record “consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced.” [MCR 7.210] [Also see *People v. Eccles*, 260 Mich App 379 (2004)]

More troubling, PubPeer’s counsel’s actions may raise a question under the Rules of Professional Conduct. Rule 3.4 (d) prohibits an attorney from, “during trial, allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in an issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.” Rule 3.6 on Trial Publicity “sets forth a basic general prohibition against a lawyer’s making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” [MRPC 3.6, Comment]. Rule 3.6 (a) states that “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Mr. Abdo’s statement was extrajudicial in the sense that it was outside the record in the case, and his intent to influence the tribunal with this non-record information is crystal clear from his present motion – as well as various quotes in the articles cited in footnote 1.

Furthermore, it is of no import that Mr. Abdo is taking advantage of the acts of another, especially where the reporter made the FOIA request in response to Mr. Abdo's reference to facts outside the record. MRPC 8.4 makes states that professional misconduct may be accomplished "through the acts of another." Even given the initial benefit of the doubt, that his reference to the misconduct investigation by Wayne State at oral argument was inadvertent, such doubt was erased when PubPeer's motion was filed the same day the article appeared, with the inflammatory article attached to the motion.

RELIEF REQUESTED

For the above reasons, PubPeer's motion to supplement the appellate record with any evidence concerning Wayne State's investigation of Dr. Sarkar should be denied, with costs to Dr. Sarkar.

Respectfully submitted,

NACHT & ROUMEL, P.C.

/s/ Nicholas Roumel

Nicholas Roumel
Attorneys for Plaintiff

October 26, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2016, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,

NACHT & ROUMEL, P.C.

/s/ Nicholas Roumel

Nicholas Roumel
Attorneys for Plaintiff

October 26, 2016