

**STATE OF MICHIGAN**  
**IN THE COURT OF APPEALS**

FAZLUL SARKAR,

Plaintiff–Appellant,

COA Case No. 326667

vs.

Wayne County Circuit Court  
Case No. 14-013099-CZ (Gibson, J.)

JOHN and/or JANE DOE(S),

Defendants,

THE PUBPEER FOUNDATION,

Appellee.

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FAZLUL SARKAR,

Plaintiff–Appellee,

COA Case No. 326691

vs.

Wayne County Circuit Court  
Case No. 14-013099-CZ (Gibson, J.)

JOHN and/or JANE DOE(S),

Defendants,

THE PUBPEER FOUNDATION,

Appellant.

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**PUBPEER’S MOTION FOR LEAVE TO FILE REPLY TO RESPONSE TO MOTION**

Pursuant to IOP 7.211(B)-2, The PubPeer Foundation moves the Court for leave to file a reply to Dr. Sarkar’s Response to PubPeer’s motion for leave to file supplemental brief. The purpose of PubPeer’s reply, attached as Exhibit A, is to respond to (1) Dr. Sarkar’s erroneous argument that PubPeer’s motion lacked legal justification, and (2) his accusation that PubPeer’s counsel have engaged in professional misconduct and his related request for costs. For these reasons, PubPeer requests that the Court grant this motion and accept the attached reply as filed.

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Respectfully submitted,

October 28, 2016

/s/ Daniel S. Korobkin  
Daniel S. Korobkin (P72842)  
American Civil Liberties Union Fund  
of Michigan  
2966 Woodward Avenue  
Detroit, MI 48201  
(313) 578-6824  
dkorobkin@aclumich.org

Alex Abdo (admitted *pro hac vice*)  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
(212) 549-2500  
aabdo@aclu.org

Nicholas J. Jollymore (admitted *pro hac vice*)  
Jollymore Law Office, P.C.  
425 First Street  
San Francisco, CA 94105  
(415) 829-8238  
nicholas@jollymorelaw.com

Attorneys for The PubPeer Foundation

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**EXHIBIT A**

**STATE OF MICHIGAN**  
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**PUBPEER’S REPLY TO DR. SARKAR’S RESPONSE TO MOTION FOR LEAVE TO  
FILE SUPPLEMENTAL BRIEF**

PubPeer’s motion for leave to file supplemental brief sought to bring to this Court’s attention new evidence—not available during the circuit-court proceedings or even at the time of the argument on appeal—that is directly relevant to two of the legal issues on appeal. Dr. Sarkar’s response suggests that PubPeer’s counsel have engaged in professional misconduct for

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even bringing that evidence to the Court's attention. PubPeer feels compelled to respond with two brief points.

First, it is unquestionably within this Court's discretion to allow a party to supplement the record on appeal. The "Court of Appeals may, at any time . . . in its discretion, and on the terms it deems just . . . permit amendments, corrections, or additions to the transcript or record." MCR 7.216(A)(4). See, e.g., *People v Lee*, 314 Mich App 266, at \*1 n 3 (2016) (considering new evidence on appeal because it related to an issue that had been raised in the lower court and the parties did not dispute its authenticity); *People v Nash*, 244 Mich App 93, 100 (2000) (considering new affidavit on appeal because it clarified the existing record). Here, PubPeer seeks to bring to the Court's attention the conclusions of an investigation conducted by Wayne State University that were not previously available and that go directly to the core of Dr. Sarkar's defamation claim. He may view the conclusions of that report as unwelcome, but they are undeniably relevant because they go directly to the truth or falsity of the statements at issue in this defamation case and thus highlight the danger of permitting a defamation plaintiff to strip speakers of their constitutional right to remain anonymous absent some showing of evidentiary merit.

Second, Dr. Sarkar is wrong in suggesting that PubPeer's counsel committed professional misconduct in bringing this new and relevant evidence to the Court's attention. As an initial matter, there is some irony in the fact that Dr. Sarkar has accused PubPeer's counsel of professional misconduct—the very sort of accusation he challenges as defamatory in this case. Of course, the accusation is not defamatory for a number of reasons, including that it is merely an opinion based on publicly disclosed facts. PubPeer's counsel would defend Dr. Sarkar's right to state that opinion, as they have the right of PubPeer's commenters to state theirs. But while

PubPeer's counsel would defend Dr. Sarkar's right to make the accusation, the accusation reflects a misunderstanding of the law.

Neither of the rules from the Michigan Rules of Professional Conduct he cites applies to statements made at oral argument or in legal pleadings. Rule 3.4(e) applies only "during trial," out of a concern that the unsupported innuendo of counsel might influence "the minds of the jurors." *People v. Kosters*, 437 Mich 937, 948 (1991). And Rule 3.6 applies only to "an extrajudicial statement," not to legal argumentation made directly to a court. Moreover, Rule 3.4(e) applies only to information that counsel "does not reasonably believe is relevant or that will not be supported by admissible evidence." Here, the conclusions of Wayne State's investigation are obviously relevant (and any defendants against whom Dr. Sarkar's claims are permitted to proceed will almost certainly seek to admit them into evidence) because, as stated above, they go directly to the truth or falsity of the statements at issue in this defamation case.<sup>1</sup>

For these reasons, PubPeer respectfully requests that the Court grant the motion for leave to file supplemental brief and deny Dr. Sarkar's request for costs.

Respectfully submitted,

/s/ Daniel S. Korobkin

Daniel S. Korobkin (P72842)  
American Civil Liberties Union Fund  
of Michigan  
2966 Woodward Avenue  
Detroit, MI 48201

October 28, 2016

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<sup>1</sup> Dr. Sarkar's response also appears to suggest that PubPeer's counsel is responsible for having made the Wayne State University investigation public. See Response at 3. This is not true. PubPeer's counsel first learned of the investigation from published retractions of a number of Dr. Sarkar's papers, several of which noted that the retractions were made following an investigation by Wayne State University. See, e.g., *Retraction*, CANCER, July 29, 2016, <http://onlinelibrary.wiley.com/doi/10.1002/cncr.30215/full> ("The above article . . . has been retracted . . . following an investigation by Wayne State University into the research activities of the second and last authors [including Dr. Sarkar].").

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dkorobkin@aclumich.org

Alex Abdo (admitted *pro hac vice*)  
American Civil Liberties Union Foundation  
125 Broad Street, 18th Floor  
New York, NY 10004  
(212) 549-2500  
aabdo@aclu.org

Nicholas J. Jollymore (admitted *pro hac vice*)  
Jollymore Law Office, P.C.  
425 First Street  
San Francisco, CA 94105  
(415) 829-8238  
nicholas@jollymorelaw.com

Attorneys for The PubPeer Foundation

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