In the Court of Appeals For the State of Michigan

SCOTTSDALE CAPITAL ADVISORS CORPORATION,

Plaintiff-Appellee,

v.

MORNINGLIGHTMOUNTAIN, LLC, and MICHAEL GOODE,

Defendants-Appellants,

–and–

DOES 1–10,

Defendants–Not Participating.

Docket No. 348702

Kalamazoo County Circuit Court
Case No.: 18-0153-CZ
HON. ALEXANDER C. LIPSEY

REPLY IN SUPPORT OF APPLICATION FOR INTERLOCUTORY APPEAL

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REPLY[1]

"[T]he courts in libel actions have recognized the need for affording summary [disposition] to defendants in order to avoid the 'chilling effect' on freedom of speech and press." *Ireland* v. *Edwards*, 230 Mich. App. 607, 613 n.4 (1998).

I. SPECIAL PLEADING STANDARD

Scottsdale argues *Bose Corp.* does not set a higher pleading standard. OPP'N 4. While true, Defendants did not cite *Bose Corp.* for that proposition. *Bose Corp.* says courts have a constitutional duty to rigorously review the sufficiency of defamation claims—to sit up a little straighter and review defamation pleadings more closely than in the run-of-the-mill case.

Next, Scottsdale argues that *Gonyea* does not mention the First Amendment. Defendants did not cite *Gonyea* for that proposition, either. *Gonyea* recognized a higher pleading standard for defamation cases. Specific allegations are required; "general allegations" are insufficient:

> The elements of a claim of defamation . . . ***must be specifically pleaded, including the allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the alleged defamatory words***.
>
> * * *
>
> In the case before us, plaintiff made ***general*** allegations that [the] statements … were false, malicious, and slanderous … ***These general allegations were not a sufficient allegation of malice.***

Gonyea v. *Motor Parts Fed. Credit Union*, 192 Mich. App 74, 77, 80 (1991) (emphases added). We are a notice-pleading state, *Dalley* v. *Dykema Gossett*, 287 Mich. App. 296, 305 (2010), yet defamation claims must be specifically pleaded. Why? Because First Amendment interests are at stake:

> I concur … that this Court has a ***constitutional duty*** to independently evaluate the evidence in defamation cases [on C10 review] … However, ***as a threshold matter, I suggest plaintiff's failure to allege and identify in his pleading***, … specifically which statements he

[1] Whenever Scottsdale disagrees with Defendants' interpretation of case law or facts in the record, it accuses Defendants of deceiving the Court. OPP'N 6, 8, 10, 12. Disagreement is fine; invective is not. It may pass for acceptable advocacy in California, but not in Michigan. *Grievance Adm'r* v. *Fieger*, 476 Mich. 231, 241–247 (2006) (discussing the role of civility in our profession).

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> considered to be materially false ***and*** how the newspaper either was negligent or reckless in publishing the story, were proper grounds for summary judgment.
>
> * * *
>
> The relatively simple requirement of ***pleading facts*** to support allegations of material falsity, negligence, or reckless disregard for the truth should be followed by plaintiffs in defamation actions, and, ***pursuant to MCR 2.116(C)(8)***, defendant should have been entitled to summary disposition on this ground alone ***a decade ago***.

Rouch v. *Battle Creek Enquirer (On Remand) (Rouch II)*, 440 Mich. 238, 271–272 (1992) (Riley, J., concurring) (emphases added). This Court long ago adopted Justice Riley's concurring analysis as its own, in private-figure cases. *Trost* v. *Buckstop Lure Co., Inc.*, 249 Mich. App. 580, 587 n.2 (2002); *Royal Palace Homes, Inc.* v. *Channel 7 of Det., Inc.*, 197 Mich. App. 48, 52–53 (1992). The circuit court therefore erred when it failed to assess Defendants' motion under the correct standard.

II. REVIEW OF THE FULL ARTICLE

A. *FINRA Decision.* Scottsdale says the court considered the FINRA Decision but did not find it "dispositive." OPP'N 5. Defendants interpret the court's remarks differently. It declined to decide under C8 whether the Statement was provably false or hyperbole, whether it was defamatory, or whether fault was adequately pleaded, saying that these are matters that must be considered under C10 because they require proofs:

> [T]he ***question of negligence, hyperbole, of whether in fact there is falsehood involved, where in fact the statement itself is defamatory in nature goes to, in essence, proofs that may or may not be available*** to the Plaintiff. The arguments raised, the citation as to the various—both the FINRA report .... [and] a whole lot of matters that don't necessarily touch on this particular issue, ***all of those are considerations that the Court might well determine in a (C)(10) motion as dispositive*** of this proceeding, but I am not considering this as dispositive in a (C)(8) proceeding.

MOTION HR'G TR. 30:21–31:6 (emphases added) (APPX. 48a–49a). In other words, the court would not consider the FINRA report at the C8 stage because negligence, hyperbole, falsity, and defamation are *fact* questions that cannot be answered without looking beyond the pleadings. But

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these are actually *questions of law*. SACK ON DEFAMATION § 4:3.7 nn. 291, 293 (5th ed. 2018) (whether statement is provably false); *Ireland*, 230 Mich. App. at 619 (whether statement is capable of defamatory meaning); SACK § 2:4.16 (same); *Rouch II*, 440 Mich. at 271–272 (Riley, J., concur-ring) (whether fault is adequately pleaded).

Scottsdale claims that the Statement misrepresents the FINRA Decision. There is only one way to determine whether Scottsdale is right (*i.e.*, whether the Statement is provably false): the court must review the FINRA Decision. Yet, the court specifically says it would not consider the decision "as dispositive" in a C8 proceeding. The most reasonable interpretation of the court's statement is that it did not consider the FINRA Decision or the other linked materials because it thought they were outside the pleadings—as it had ruled before. ORDER DENYING FIRST MOT. SUMM. DISPO. 5 (APPX. 10a). But these materials are part of the pleadings. APP'N 9–10, Part II.

B. ***Hyperlinks.*** Scottsdale objects to Defendants' interpretation of *Adelson* as deceptive and misleading. OPP'N 6. Not so. Defendants cite two *Adelson* decisions, a federal case and a Nevada case that involved a certified question. Scottsdale focuses on the fact that the federal decision characterizes hyperlinks as the equivalent of footnote attributions. *Ibid.* This is why Defendants used the "see" signal for that decision, which "should be used when the cited authority does not directly support the text." Mich. App. Op. Manual § 1.3.

The Nevada decision approaches hyperlinks somewhat differently, and in a manner fully consistent with the proposition for which Defendants cited it. The Nevada Supreme Court noted that: (1) hyperlinks "provide strong attribution ***because they allow direct access*** to underlying materials, are intuitively easy to use, and are extremely prevalent online"; and (2) "a reader can click on a hyperlink ***and immediately determine*** whether official proceedings are implicated." *Adelson* v. *Harris*, 402 P.3d 665, 669 (Nev. 2017) (emphases added). Although it is "clear that [courts] must consider ***more than*** the underlying source material connecting to a hyperlink," *id.* at 669 (emphasis added), *Adelson* can be fairly read to hold that courts must ***at least*** look to the hyperlinked material when assessing whether the fair-report privilege applies.

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The procedural history of *Adelson* is also noteworthy. The plaintiff sued in federal court. The defendant prevailed on a motion to dismiss under Rule 12(b)(6)—the federal cognate to our Rule 2.116(C)(8). *Adelson* v. *Harris*, 973 F. Supp. 2d 467, 471 (SDNY 2013). On appeal, the Second Circuit certified two questions to the Nevada Supreme Court, one of them relating to the hyperlink issue. Ultimately, the Second Circuit affirmed the dismissal. Thus, the *Adelson* cases support the notion that it is proper to look to linked material *when assessing the pleadings*.

Importantly, when discussing hyperlinks, the federal district court noted that the SEC considers hyperlinks in an online offering to be akin to including the contents of the second site in the same delivery envelope as the prospectus. *Id.* at 484 (citing SEC Release No. 7233, 1995 WL 588462 (Oct. 6, 1995)).

The court also offered public policy reasons for protecting defendants who hyperlink their sources from defamation claims:

> Moreover, protecting defendants who hyperlink to their sources is good public policy, as it fosters the facile dissemination of knowledge on the Internet. It is true, of course, that shielding defendants who hyperlink to their sources makes it more difficult to redress defamation in cyberspace. But this is only so because Internet readers have far easier access to a commentator's sources. It is to be expected, and celebrated, that the increasing access to information should decrease the need for defamation suits.

Id. at 485.

The court also analyzed a case that is similar to ours, which held that linked information is part of an online article. *Adelson*, 973 F. Supp. at 485 (analyzing *Nicosia* v. *De Rooy*, 72 F. Supp. 2d 1093 (ND Cal. 1999). In *Nicosia*, the defendant argued that his online post, which accused the plaintiff of committing embezzlement, constituted nonfactual opinion on disclosed facts found in other articles that he hyperlinked in his post. The plaintiff, like Scottsdale does here, argued that the challenged statement "must be read in isolation from the other [hyperlinked] articles because the … posting which contained the allegation did not include any underlying facts." *Nicosia*, 72 F. Supp. 2d at 1103. The court *rejected* the plaintiff's contention: "The[hyperlinked] articles were ***at***

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least as connected to the news group posting as the back page of a newspaper is connected to the front. ***Thus, the Court considers the articles part of the context of the embezzlement accusation*.**" *Ibid.* (emphases added).

Defendants also bring to the Court's attention *Fridman* v. *BuzzFeed, Inc.*, —A.D.3d—; 2019 N.Y. Slip. Op. 03473 (N.Y. App. May 2, 2019), a New York decision addressing the hyperlink issue that was published just days after they filed their Application. EXHIBIT 1. *Fridman* supports Defendants' position that courts should assess linked material in online articles. There, a plaintiff sued BuzzFeed for defamation over a story about the Steele dossier. The court relied on hyperlinks to a CNN article and the Steel dossier in the BuzzFeed story to apply the fair-report privilege. Although the fair-report privilege (which drove the analyses in *Adelson* and *Fridman*) is not at issue here, the substantial-truth doctrine and fair-comment privilege are. Both of these defenses rely on the truth of the challenged Statement, which must be read in its full context, including the entirety of the full article. APP'N 9–10, 13–15, 17.

Here, Scottsdale claims that Defendants misrepresented the FINRA Decision. If the FINRA Decision is part of the Article as Defendants argue, then the challenged statement must be assessed against the FINRA Decision, as it is part of the full context of the Article. Thus, the question of whether the FINRA Decision is part of the Article is a central legal question on appeal. Like *Fridman* and *Adelson*, if leave is granted, the Court should hold that all materials hyperlinked, embedded, or otherwise accessible in or through an online article are part of the article and must be considered on a C8 challenge to a complaint.[2]

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[2] Scottsdale's citations to *Doctor's Data, Inc.* v. *Barrett*, 170 F. Supp. 3d 1087 (ND Ill. 2016), and *In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (CA3 2012), are inapposite. In *Doctor's Data*, the court held that a hyperlink—by itself—did not constitute a *publication* of the linked materials. *Doctor's Data*, 170 F. Supp. 3d at 1137. The court did not need to decide whether it could look to the linked materials for purposes of assessing falsity, substantial truth, or any of the other elements of defamation. Similarly, in *Philadelphia Newspapers*, the court held that a hyperlink is not an act of *republication* that would restart the clock on the statute of limitations. *In re Phila. Newspapers*, 690 F.3d at 173–175. The court did not need to decide whether it could look to the linked materials because the claim was barred.

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III. THE STATEMENT IS NOT PROVABLY FALSE

Scottsdale has pleaded only one allegedly false and defamatory *statement*. Defendants have focused on why the Statement is not provably false or, in the alternative, why it is substantially true. APP'N 10–17. Scottsdale, however, argues that the *Article* is provably false. OPP'N 6–8. If Scottsdale is now claiming that the entire Article is false, then it has utterly failed to meet the requirement that its pleading recite the words of the libel, why each sentence in the Article is false, the level of fault and facts supporting the existence of fault, etc.

Scottsdale is also preoccupied with labels. It says the challenged Statement isn't "conjecture" or "hyperbole." OPP'N 7. But the law isn't concerned with how the statement is labeled. It is concerned with whether the Statement is, objectively, provably false. *Ireland*, 230 Mich. App. at 616.

Scottsdale still insists that it can use survey evidence to establish falsity, OPP'N 7–8, but it does not cite a single Michigan case allowing such evidence. Nor does Scottsdale cite a case from anywhere else in the country allowing such evidence to prove any element in a defamation case.

IV. THE STATEMENT IS SUBSTANTIALLY TRUE

Here again, Scottsdale spends several pages arguing why the *Article* is not substantially true, instead of addressing the issue at hand: is the *Statement* substantially true? OPP'N 8–11. Nowhere in its Opposition does Scottsdale deny that the Statement, as written, is not materially false. Compare APP'N 11–12, Part IV.A, with OPP'N 8–11. The case rides wholly on the unreasonable implication that Scottsdale draws from the juxtaposition of the headline and the Statement, without taking the FINRA Decision into account.[3] OPP'N 8-11.

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[3] This is why Scottsdale's reliance on *Hawkins* v. *Mercy Health Services, Inc.*, 230 Mich. App. 315 (1998), is misplaced. There, a hospital stated that a nurse had been terminated for her involvement in administering an overdose, when she has actually been terminated for denying that she participated in a conversation criticizing the doctor's standard of care. Here, FINRA fined Scottsdale $1.5 million, ***and Defendants accurately reported that***. Defendants also observed that those who had followed pump-and-dump schemes over the last few years would know of Scottsdale. For the reasons explained in Part IV.A–B of the Application, this is nonfactual

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Scottsdale says it is entitled to have reasonable inferences construed in its favor. *Id.* at 8. True enough. But the emphasis is on the word *reasonable*. It is not entitled to *all* inferences, only reasonable ones. The headline is: "FINRA fines Scottsdale Capital Advisors $1.5 million." THIRD AM. COMPL. ¶ 14 (Appx. 801a). Scottsdale concedes this is true. *Ibid.* The Statement is: "If you have followed penny stocks and pump and dumps for a few years, then you know Scottsdale Capital Advisors." *Id.* at ¶ 13. The rest of the paragraph explains that Scottsdale was one of the few brokers left that continued to allow the deposit and sale of illiquid penny stocks, and that many of the accounts frozen in the Biozoom pump-and-dump scheme were held at Scottsdale. Scottsdale no longer claims these are false statements. ARTICLE 1–2 (Appx. 823a–824a). Ergo, they are presumptively true. Scottsdale does not deny that FINRA found Scottsdale to have repeatedly failed to exercise its gatekeeping role to detect and prevent pump-and-dump frauds in the penny-stock market. See OPP'N 8–10. See also FINRA Decision 104 (APPX. 972a).

Scottsdale argues that Defendants are trying to rewrite the Article. *Id.* at 9. To the contrary, Defendants insist only that the challenged Statement be read in context, as the law requires. *Sanders* v. *Evening News Ass'n*, 313 Mich 334, 340 (1946); *Croton* v. *Gillis*, 104 Mich App 104, 108 (1981). The FINRA Decision is part of the Article. Scottsdale says the juxtaposition of the headline and the Statement would cause the reasonable audience to infer that FINRA had fined Scottsdale for engaging in a pump-and-dump scheme. THIRD AM. COMPL. ¶ 14 (Appx. 801a). But that is *unreasonable* when the Statement is read in context with the FINRA Decision, which explains that Scottsdale failed to prevent such schemes because of lax procedures. APP. 13–15. Scottsdale argues the "damage is done" before the reader gets to the FINRA Decision, but the law presumes a reasonable audience, not a lazy one. Courts must read a challenged statement in context, fairly and reasonably construing *the entire article* to determine whether the statement is libelous. *Sanders*, 313 Mich. at 340; *Croton*, 104 Mich. App. at 108.

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comment and substantially true, as supported by the FINRA Decision's reference to the Bahamian and Panamanian pump-and-dumps that involved Scottsdale accounts. APP'N 11–17.

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Even assuming *arguendo* that the reasonable audience would draw the inference Scottsdale urges, the reasonable audience—here, sophisticated consumers of news concerning the penny-stock market, see *Air Wisc. Airlines Corp.* v. *Hoeper*, 71 U.S. 237, 246–251 (2014)—would not infer that Defendants intentionally accused Scottsdale of engaging in *criminal* conduct from a report about a *civil* fine imposed by a *civil* regulatory authority. APP. 16. Even if the reasonable audience somehow made this unreasonable inference, Scottsdale refuses to acknowledge that a libel defendant "is not responsible for every defamatory implication a reader might draw from his report of true facts, absent evidence that he *intended* the defamatory implication." *Royal Palace Homes*, 197 Mich. App. at 56. In the context of the Article (including the FINRA Decision), the gist and sting of the Statement is that FINRA fined Scottsdale for regulatory violations related to pump-and-dump schemes. Nowhere does the Article mention crimes, cite criminal statutes, or refer to prosecutors, prison, or anything else that would suggest that Defendants *intended* to convey the defamatory implication that Scottsdale asks the Court to draw from their words.

V. FAIR COMMENT PRIVILEGE

The existence of an *unprivileged* statement of fact is an element of a defamation claim that must be pleaded. In *MacGriff* v. *Van Antwerp*, 327 Mich. 200, 204–205 (1950), the plaintiffs alleged that prosecutors, police, and other governmental officials had conspired to defame them. Because the officials' actions were performed in an official capacity, they were privileged. To proceed, the plaintiff needed to plead specific illegal acts to overcome the privilege. Having failed to do so, the Court affirmed the dismissal of the claim. Thus, *MacGriff* stands for the proposition that a defamation plaintiff must plead in avoidance of a privilege that is evident from the face of the complaint. Scottsdale does not acknowledge *MacGriff*. See OPP'N ii, 11–12.

Privileges in defamation cases fall into one of two broad categories, an absolute privilege and a qualified privilege. SACK § 8.1. Absolute privileges apply by virtue of the speaker's status or position. *Id.* at § 8:1. All other privileges are qualified privileges, because their application depends in part on the content of the statement. *Ibid.*

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The fair-comment privilege, which protects public discourse by sheltering communications about matters of public concern, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 13 (1990), is a qualified privilege that extends to comments on facts that are readily accessible to the reader. See *Sarkar* v. *Doe*, 318 Mich. App. 156, 191 (2016) (anonymous posts regarding a professor's alleged scientific misconduct were protected speech when based on underlying facts available to the reader); SACK § 4:4.2 n.307 (citing RESTATEMENT (FIRST) OF TORTS § 606(a)(ii)). Citing *Van Vliet* v. *Vander Naald*, 290 Mich. 365, 371 (1939), the Michigan Supreme Court reaffirmed in *Dadd* v. *Mt. Hope Church*, 486 Mich. 857 n.1 (2010), that the plaintiff bears the burden of proving that a statement was made with actual malice, if a qualified privilege applies. Scottsdale unjustly accuses Defendants of "misrepresenting" *Dadd*, claiming that it does not involve the fair-comment privilege. OPP'N 12. In point of fact, the case reaffirms an 80-year-old rule that applies to qualified privileges, and the fair-comment privilege is a qualified privilege.

Scottsdale does not deny that the FINRA Decision is newsworthy for the reasons Defendants argue in their Application, so the public-concern element is satisfied. Compare APP'N 18 with OPP'N 11–12. Defendants not only disclose the existence of the FINRA Decision in the Article, but they also provide readers a link to access it, so the accessibility element is satisfied. ANSWER, THIRD AM. COMPL., EXH. A at 1 (APPX. 823a). Thus, the only issue is whether the Statement is comment or fact. Scottsdale contends that the Statement, and the implications Scottsdale asks the Court to draw from them, are untrue statements of fact. OPP'N 11–12. Defendants disagree for two reasons.

First, the Statement is akin to saying: "if you've been watching news about pump-and-dumps over the last few years, Scottsdale is a name you'll recognize." That's comment, not fact.

Second, even if it were *arguendo* a statement of fact, the privilege still applies on the facts as pleaded. Although Scottsdale says it was fined only for an "administrative failure"—it did not have the proper registration and it did not fall into an exemption, OPP'N 12—that's just sanitizing the facts. By law, Scottsdale could not sell securities without a registration unless it qualified for

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an exemption. 15 U.S.C. § 77e(a)(1). An exemption exists under SEC Rule 144, if a number of conditions are met. Among those conditions: if "red flags" exist, then a "searching inquiry" must be made to ensure the sale is lawful. If a searching inquiry is not performed, then the exemption is lost. See *World Trade Fin. Corp.* v. *SEC*, 739 F.3d 1243, 1247–1250 (CA9 2014). See also APP. 13–14. FINRA found that Scottsdale was on notice that it was being used to facilitate sham trans-actions, yet it still failed to guard against such activity in the future. APP. 13–15. Thus, the "administrative failure" was failing to scrutinize transactions, which allowed pump-and-dump schemes to go forward. For all its protestations, *Scottsdale has never disputed this analysis*.

VI. FAULT NOT ADEQUATELY PLEADED

Scottsdale alleges that a reasonable journalist "reads the documents he cites." THIRD AM. COMPL. ¶ 22 (APPX. 803a). The Article in which the Statement appears quotes from the FINRA report at length. The only reasonable inference is that Mr. Goode read the report.

Scottsdale also alleges that a reasonable journalist would not report or imply that a fine for procedural noncompliance is the equivalent of a fine for intentional pump-and-dump activity. *Ibid.* On its face, Defendants did not report this. Proceeding on a defamation-by-implication theory requires Scottsdale to plead facts from which the Court can infer that Defendants *intended* the implication. As argued in Part IV.B of their Application, APP'N 13, 16, and in Part IV, *supra*, Scottsdale has pleaded no such facts from which the reasonable audience of readers who are well-versed in the microcap market could find that Defendants intended the inference Scottsdale urges.

CONCLUSION

For these reasons, and those in the Application, the Court should grant leave to appeal.

Respectfully submitted,

BUTZEL LONG, P.C.

Dated: June 6, 2019

JOSEPH E. RICHOTTE (P70902)
DOAA K. AL-HOWAISHY (P82089)
Counsel for MLM and Michael Goode

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Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9185 Mikhail Fridman, et al., Index 154895/17
Plaintiffs-Appellants,

-against-

BuzzFeed, Inc., et al.,
Defendants-Respondents.

Carter Ledyard & Milburn LLP, New York (Alan S. Lewis of counsel), for appellants.

Davis Wright Tremaine LLP, New York (Nathan Siegel of counsel), for respondents.

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered May 7, 2018, which, insofar as appealed from, denied plaintiffs' motion to dismiss defendants' first affirmative defense, unanimously affirmed, without costs.

As in Gubarev v BuzzFeed, Inc. (2018 US Dist LEXIS 97246 [SD Fla 2018]), the motion court properly denied plaintiffs' motion to dismiss defendants' first affirmative defense--the fair and true report privilege as codified in New York Civil Rights Law section 74--which shields publishers from civil liability for claims of defamation when the alleged defamatory statements are published to report accurately about official government activity. While the instant case involves a different set of alleged defamatory statements than Gubarev, we find that, as in that case, an ordinary reader of the publications at issue here, a BuzzFeed article, which hyperlinked a CNN article and the embedded dossier compiled by Christopher Steele, which included a confidential report containing the alleged defamatory statements about plaintiffs, would have concluded that there were official proceedings, such as classified briefings and/or an FBI investigation concerning the dossier as a whole, including the confidential report relating to plaintiffs.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 2, 2019

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CLERK

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STATE OF MICHIGAN
MI Court of Appeals

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