

IN THE IOWA SUPREME COURT

JAYSEN MCCLEARY,

Plaintiff,

vs.

CLARK KAUFFMAN,
DES MOINES REGISTER

Defendants.

CASE NO. EQCE082353

EMERGENCY

COMBINED APPLICATIONS
FOR: Interlocutory Appeal AND
Writ of Certiorari

Immediate Stay Requested

COMES NOW the petitioner for his combined interlocutory appeal and writ of certiorari where he states the following respectfully in support:

1. The petitioner seeks an emergency extraordinary remedy of a prior restraint upon a media defendant and an individual acting outside the scope of his employment, who intends to violate the Iowa R. Ct. 34.4 and make the specific identity of Attorney Doe case known and violate the Polk County District Court's protective order, see attached, covering highly confidential medical and financial records that were inadvertently filed in EDMS. These are not a matter of public concern, is privileged and confidential and would damage the undersigned's and his clients' due process rights if this information is revealed to the public in pending litigation as well as do irreparable harm.
2. The district court denied the temporary injunction today, without doing the required analysis to weigh the balance of harms as it pertains to pending clients and the plaintiffs due process rights, nor did it determine if the speech was a matter of public concern (the private medical, financial and identity of Attorney Doe is not a matter of public concern).
3. For the defendants to have first amendment protection, the subject matter must be a matter of public concern.¹

¹ The theory [*299] of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 298-99, 84 S. Ct. 710, 736 (1964). Emphasis added.

4. A media defendant is not entitled to first amendment protection unless the subject matter is a matter of public concern² when the Plaintiff has demonstrated the speech is unprotected. Public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. *City of San Diego v. Roe*, 543 U.S. 77, 78, 125 S. Ct. 521, 522 (2004).
5. Public concern protection serves the constitutional goal of "assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Dun & Bradstreet*, 472 U.S. at 759, 105 S. Ct. at 2945, 86 L. Ed. 2d at 602 (citation and internal quotation marks omitted). **On the other hand, "purely private disputes such as a lawsuit in which the impact is limited primarily to the parties involved, even though perhaps of interest to the public, are insufficient to create a matter of public concern." Nickerson, 542 N.W.2d at 511. (emphasis added).**
6. Plaintiff contends that Clark Kauffman as a private individual does not have a constitutional right to freedom of the press and whether he is working outside the scope of his employment is a matter for the fact finder. This issue is similar to the Iowa Supreme Court case in *Godfrey* where the Governor of Iowa was accused of acting outside of the scope of his employment when he terminated Mr. Godfrey's employment. *Godfrey v. State*, 847 N.W.2d 578 (Iowa 2014). Mr. Kauffman is accused of conspiring with the City to defame the undersigned and damage a multi-million-dollar case where the City was liable.
7. Even if this presented a case where the First Amendment protection is presumed in a criminal matter, the defendant fails the three-part test adopted by the Iowa Supreme Court.
 - a. A similar three-prong test has been used in prior restraint cases where the competing interests are virtually the same (fair trial right and freedom

² Given that, as established above, **the public concern requirement applies to free speech prior restraint cases** just as it does to free speech retaliation cases, there is no reason to think that the Second Circuit would reason or conclude any differently if presented with the question of whether the public concern requirement applies to a non-retaliation associational claim. I therefore hold that, in order to state a viable First Amendment free association claim, Plaintiff must allege that the associational activity at issue touches upon a matter of public concern. *Rutherford v. Katonah-Lewisboro Sch. Dist.*, 670 F. Supp. 2d 230, 246 (S.D.N.Y. 2009). (Emphasis added).

of press). *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562, 96 S. Ct. 2791, 2804, 49 L. Ed. 2d 683, 699 (1976) (before restraining publication court should consider (1) nature and extent of pretrial news coverage, (2) whether other measures would be likely to mitigate the effect of unrestrained pretrial publicity, and (3) how effectively a restraining order would operate to prevent the threatened danger). See *Des Moines Register and Tribune Co. v. Osmundson*, 248 N.W.2d 493, 499 (Iowa 1976).

- b. In this case the prior restraint would prevent the threatened danger as the speech is not a matter of public concern and is subject to a protective order.
8. "The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the community, with decent standards, would say he had no concern." Restatement § 652D, Comment h; see *Virgil v. Time, Inc.*, 527 F.2d at 1129. *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 302 (Iowa 1979).
 9. When, "the court document was not filed as a public record at the time of the publication, the newspaper cannot rely on the public documents privilege. *Johnson v. Nickerson*, 542 N.W.2d 506 (Iowa 1996).
 10. The district court also failed to address whether the documents in the defendant's possession are protected from disclosure to the public by Iowa Code section 622.10; Iowa Code chapter 228; the federal HIPAA Privacy Rule, by the Iowa and Federal constitutional right to privacy; and whether 34.4 protects the plaintiff from being identified in the public as a specific Attorney Doe before the Iowa Supreme Court.

WHEREFORE, the petitioner seeks an immediate stay and temporary injunction to preserve the status quo and prevent the intended violation of the protective order, irreparable damage to the plaintiff, protect the plaintiff's constitutional right to privacy, and to protect the plaintiff's multiple clients right to due process under the Iowa and Federal constitution during pending litigation where the article will irreparably harm the

petitioner and his client's right to due process in pending litigation as the defendant's also intend to violate the Iowa R. Ct. 34.4.

CERTIFICATE OF SERVICE

I certify that on December 8, 2017, I electronically filed the foregoing with the Clerk of Court using the electronic filing system and a true copy of the foregoing was electronically sent via the Clerk of Court, or was sent by the undersigned via U.S. Mail or via facsimile to the following below pursuant to the Iowa Rule of Civil Procedure 1.442 and Federal Rule of Civil Procedure 5.

/s/Jaysen McCleary

Jaysen McCleary

Respectfully submitted,

/s/Jaysen McCleary

Jaysen McCleary AT0012101
Bela Animal Legal Defense and
Rescue
4807 Kingman Blvd
Des Moines, Iowa 50311
(515) 557-0660
jaysenmccleary@gmail.com
Plaintiff