

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JAYSEN MCCLEARY,

Plaintiff,

vs.

CLARK KAUFFMAN,
DES MOINES REGISTER

Defendants.

CASE NO. EQCE082353

1.904(2) MOTION

COMES NOW the Plaintiff and for his 1.904(2)¹ motion the plaintiff states the following respectfully in support:

1. For the defendants to have first amendment protection, the subject matter must be a matter of public concern. This court did not perform the required analysis to determine if the subject matter was a matter of public concern as requested at the hearing. It is obvious the plaintiff's confidential medical and financial records are not *a matter of public concern*², however, this court did not address this requirement before denying the temporary injunction.
2. With all due respect this court misapprehended the uniqueness of the facts in this case and the prevailing law where this case fits into the narrow exception for a prior restraint to preserve the status quo and this court did not perform the required analysis in also determining the likelihood of success and the balance of harms.

¹ A motion pursuant to rule 1.904(2) is essential to preservation of error when a trial court fails to resolve an issue, claim, or defense, or other theory properly submitted to it for adjudication. *City of Fort Dodge v. Civil Serv. Comm'n*, 562 N.W.2d 438, 440 (Iowa Ct. App. 1997). The rule's purpose is to advise counsel and the appellate court of the basis for the district court's decision in order that counsel may direct an attack upon specific adverse findings or lack of findings in the ruling, in the event of an appeal. *Id.* If no motion pursuant to rule 1.904(2) is made, no opportunity is provided to the district court for correction of a ruling, if any correction is appropriate. Issues must ordinarily be presented to and passed upon by the district court before they may be raised and adjudicated on appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). This motion is providing this Court an opportunity to correct vital errors of fact and law in its ruling from December 8, 2017.

² 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.

3. A media defendant is not entitled to first amendment protection unless the subject matter is a matter of public concern³. 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).
4. Defendant has violated the protective order that was entered originally on February 23, 2017 and confirmed again on November 16, 2017.
5. This same legal principle applies to the defendants' intent to publish that I am the specific attorney in an Attorney Doe, violating Iowa R. Ct. 34.4 to purely harm my reputation in front of all courts that my clients have pending litigation in front of around the state of Iowa. See Mr. Kauffman's remark where he is notice that this is a private fact that is not is not available to the public. Moreover, the Supreme Court of Iowa redacted all filings and took down the video of attorney doe arguing the case.

ATTORNEY DOE: You say, "You cannot print that I am the lawyer who accused a Polk County judge of being "no better than the scum" sentenced to jail. I have never confirmed this, you have repeatedly said it is me but I have not confirmed this. There is information where I have stated that I was in an attorney doe case but I have never indicated what case number and there are several attorney doe cases."

6. 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**

³ 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).

N.W.2d at 511. (emphasis added).

7. 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).
8. Even if this presented a case where the First Amendment protection is presumed in a criminal matter, the defendant's resistance 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 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.
9. "The line is to be drawn when the publicity ceases to be the giving [**38] 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).
10. 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).
11. This court did not weigh the balance of harms as it pertains to pending clients and

the plaintiffs due process rights.

12. The court did not 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.
13. Plaintiff seeks an urgent and immediate temporary injunction to preserve the status quo and prevent the intended violation of the protective order, irreparable damage to the plaintiff and to the plaintiff's multiple clients during pending litigation where the article will harm the plaintiff's clients' constitutional rights to due process under the Iowa and Federal constitution.

WHEREFORE, Plaintiff prays the court will amend its order and enter an immediate temporary injunction prohibiting the defendants story on the plaintiff to preserve the status quo and prevent irreparable harm to the plaintiff's constitutional right to privacy.

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

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