

IN THE IOWA SUPREME COURT

JAYSEN MCCLEARY,

Petitioner,

vs.

CLARK KAUFFMAN,
DES MOINES REGISTER

Respondents.

CASE NO. 17-1982

THREE JUDGE REVIEW

COMES NOW the petitioner who files this motion for three judge review to grant his combined application for interlocutory appeal and writ of certiorari:

1. The MEDIA defendants clearly have power that scares the Supreme Court of Iowa given the last time the Court led the nation in making appropriate law three justices lost their job.
2. It's unique where a defendant can argue his case through the court's local paper.
3. The protective order was contested and found for good cause and it should be enforced. The petitioner has a constitutional right to privacy and this case fits the narrow exception where the court should have the courage and intellectual honesty to do what is fair and equitable and uphold the constitutional and legal rights of the petitioner.

4. The underlying case was filed in equity with obvious state and federal constitutional issues to be reviewed de novo by the Iowa Supreme Court. The record is straight forward and clear for a change and this is an excellent case for the Iowa Supreme Court to use to establish what constitutional right to privacy does the Iowa Constitution afford its citizens and what inherent power do Iowa Courts have to enforce protective orders that are found for good cause.
5. McCleary is a private figure not a public figure and has a constitutional right to privacy where the Iowa Constitution and the United States constitution justifies treating a private figure with protection from a media defendant as the Supreme Court delineated regarding damages in defamation against a media defendant by a private party in Gertz¹.
6. Defendants imply that anything McCleary files in a public record is somehow a public concern. The defendant's contention is not

¹ First Amendment should treat private figure plaintiffs different than public figure plaintiffs because "(1) the remedy of self-help is usually more easily available to public persons who enjoy significantly greater access to the communications media than private individuals, who are therefore more vulnerable to injury; and (2) while public persons invite public attention and have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them, no such assumption is justified with respect to a private individual, who, consequently, is not only more vulnerable to injury than public persons but also more deserving of recovery. Gertz v. Robert Welch, 94 S. Ct. 2997 **, 418 U.S. 323, 41 L. Ed. 2d 789, 1974 U.S. LEXIS 88, 1 Media L. Rep. 1633.

supported by the record or any case law where it was basically rejected by the Supreme Court² in Gertz.

7. The expert reports were pursuant to Court Rules requiring the reports and an Iowa court should be able to protect, seal, and order the reports destroyed by the parties or any third party who obtains them, which is exactly what happened in this case. Otherwise parties to a protective order can simply give them to a reporter if they want to circumvent the protective order; thus, eviscerating the court's authority and the citizen's constitutional right to privacy.
8. Prior to February 23, 2017 the City refused to stipulate to a protective order covering McCleary's medical and financial information. Counsel for McCleary indicated to the court that she had never represented a

² Notwithstanding our refusal to extend the New York Times privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the New York Times rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it. Gertz v. Robert Welch, 94 S. Ct. 2997 **, 418 U.S. 323, 41 L. Ed. 2d 789, 1974 U.S. LEXIS 88, 1 Media L. Rep. 1633.

party where a protective order was not readily stipulated to by the parties.

9. On February 23, 2017 the district court found “[f]or good cause including, without limitation, the proprietary or confidential nature of information likely to be disclosed” deserved a protective order. This was found after the City resisted the protective order.
10. McCleary’s expert reports, now in possession of the defendant, were subject to the original contested protective order filed on February 23, 2017:
 - a. In paragraph 5 the protective order states: “Inadvertent failure to make a “Confidential” designation prior to production will not prevent a subsequent confidentiality designation being made orally and/or in writing.”
 - b. In paragraph 7, “Protected Materials may not be disclosed in any matter, directly or indirectly, to any person other than Qualified Persons as defined in Paragraph 8 of this Order.”
 - c. McCleary contends the City told Mr. Kauffman where the expert reports were inadvertently filed after McCleary refused to consent to Kauffman’s repeated harassing questioning about McCleary’s specific injuries.

11. On October 26, 2017 Mr. Kauffman first contacted McCleary claiming he saw the “Hildreth case” transfer to Federal Court and it inspired him to “look into McCleary’s litigation” where he intended to do a story on McCleary’s “manner” of prosecuting cases.
12. The Hildreth case was about the violation of the Hildreth’s family civil rights when the City of Des Moines killed their dog on the evening of February 23, 2015, 4 days before trial to have the dog returned alive and before the Court could rule on the Hildreth’s emergency stay motion. The City then made a motion to dismiss claiming the case was moot (to return the dog alive) given the dog was dead. The district court and the Iowa Court of Appeals shockingly held the mootness doctrine applied despite the obvious ability to repeat the behavior, further review was denied.
13. Kauffman indicated he was not interested in the merits of the Hildreth case³ nor the “manner” the city was defending the animal welfare and

³ The Register curiously failed to follow up their first story about the Hildreth’s plight once they heard the City killed the dog before trial. McCleary contends there may be a working relationship based on the Picasso program of Gannett where the paper partners with local businesses to create revenue and advertising opportunities for the paper. <https://www.desmoinesregister.com/story/news/local/des-moines/2014/10/16/dog-deemed-dangerous-could-be-euthanized-after-attacking-two-kids-in-des-moines/17375997/>

civil rights cases. In fact there are several cases where McCleary saved innocent dogs that the Register repeatedly refuses to report on and a pending appeal that was recently dismissed (in error) where the City suppressed exculpatory evidence that the injury was not caused by the dog and they intend to kill the homeless man's service dog despite the ordinance does not allow it after illegally detaining the dog for the past two years in isolation at the Animal Rescue League of Iowa (ARL).

14. Kauffman initially indicated he needed to get the story out about McCleary the following week and could not wait for McCleary's lawyer, Nick Rowley, to sit down for an interview on November 9, 2017 the day before McCleary's scheduled deposition. The timing and content of Kauffman's article was specious at best given the personal injury case was in the middle of settlement negotiations.
15. During the first discussion Mr. Kauffman repeatedly asked McCleary to tell him specific medical consequences of the injury sustained by the City. When McCleary refused to tell Kauffman the specifics of the injuries, **Kauffman threatened to make McCleary look bad in the paper. Kauffman later admitted to recording McCleary surreptitiously without giving McCleary any notice** despite

knowing McCleary was in Montana at the time of the conversation, a two-party consent state for recording conversations unlike Iowa.

16. This was a highly offensive invasion of McCleary's privacy where Kauffman secretly recorded McCleary as he questioned McCleary about his personal medical records.
17. Kauffman's threats of making McCleary look bad in the paper initially caused, McCleary to consent to giving Kauffman some details about the consequences of the specific injuries. Later, however, McCleary became upset about being bullied and extorted into telling Kauffman about his personal medical information and he withdrew his consent.
18. To assist Kauffman and circumvent the protective order, the City then told Kauffman where McCleary's attorneys mistakenly filed expert medical reports in July. This was in a case where Mr. Kauffman initially claimed he wasn't even aware of the deposition that was scheduled the week after he wanted his report to come out.
19. After obtaining the records Kauffman alerted McCleary by surprise during a conversation he was recording as he questioned McCleary about specific medical records he found in the reports as he had more medical questions about McCleary's injuries. This caused McCleary to have his attorneys to move to seal the expert reports and to have the

district court clarify that the existing protective order to required third parties to immediately destroy the records now that the case against the City was concluded.

20. Kauffman was emailed this order by McCleary's attorneys on November 16, 2017 and Kauffman acknowledged that he was aware of the Protective Order in February and the new order on November 16 clearly ordering "any third parties" to immediately destroy the documents. See a redacted version of the email below:

From: "Kauffman, Clark" <ckauffma@registermedia.com>

Date: Thursday, November 16, 2017 at 2:31 PM

To: [REDACTED]

Subject: RE: Jaysen McCleary

Hi, [REDACTED]

I was aware of the Protective Order. [REDACTED]

As I told your client, I am not interested in the documents as such,...

21. Kauffman and the Register were also personally served copies of the November Order and proofs of service were filed with the district court. Despite not being interested in the documents (because they are obviously not a matter of public concern) Kauffman willfully disobeyed a court order and refused to destroy the documents and suddenly claims he should be able to wrap himself up in the American flag and

have First Amendment protections simply because he is a reporter for the Des Moines Register.

22. Kauffman had sent McCleary the nature of his story which read like a defense argument for the City in the personal injury case seeking to mention numerous issues violating McCleary's privacy and portraying 30 years of McCleary's life in the most negative light possible with an utter and reckless disregard for the truth. This caused McCleary's lawyers to immediately settle the case for fear of not being able to obtain a fair trial if the defamatory article was published.
23. After causing the case to settle which defrauded McCleary out of the damages he was owed, Kauffman curiously no longer had any sort of deadline. McCleary pointed this out to Kauffman in an email how curious it was and Kauffman suddenly forgot his prior deadline and went so far as to email on November 24, 2017, "*I never implied, suggested or stated that I was under any sort of urgent deadline.*"
24. When McCleary repeatedly demanded that Kauffman destroy the documents per the court order and indicated he would pursue his legal remedies if he was forced to, Kauffman told McCleary to stop rattling his legal saber.

25. Kauffman attempted to litigate this case in his article on December 15, focusing only on arguments that favored him and the Register, only citing facts that support his position, and only quoting organizations and people on his side. He repeatedly characterized the restraint as the court blocking "use of court records" without explaining they were subject to a contested protective order; what could be more slanted and inaccurate as this?
26. As an "objective" or "ethical" investigative reporter Kauffman curiously overlooked some basic facts in his recent article which clearly tried to isolate Justice Wiggins and pressure the Supreme Court of Iowa. This is a unique ability to litigate your position to the public and the judges via the same court's daily newspaper and highlights the imbalance of power a private figure has against an all-powerful media defendant.
27. It's interesting one defendant in this case would allow the other defendant to publish an article about this case without bothering to ask McCleary for a comment for his story where basic facts were strangely omitted as discussed above but also that neither defendant despite being personally served a court order that clearly applied to them, neither of them challenged the order, but as weeks went by they utterly disregarded the order as if they were above the law in this little

community of Des Moines and the local courts allowed this. Fortunately, the Supreme Court of Iowa noticed there was a problem with this behavior.

28. McCleary asserts that the court and anyone who reads this case should ask themselves, why would a reporter do a hit piece on a pro bono attorney who helps people who have nowhere else to turn? People who are disabled and homeless trying to save their service dogs from being killed illegally by the City and the ARL of Iowa.
29. Kauffman was so focused on discrediting McCleary for the City and the ARL that when he was talking with one of McCleary's clients who kept saying good things about McCleary, he told the client he didn't believe he was conversing with him and their conversation was over despite the client immediately sending a copy of his driver's license.
30. McCleary contends that it is also unclear if Kauffman or the Register are entitled to raise a constitutional defense after willfully violating a court order.
31. The district court did not address nor consider McCleary's claim for an injunction under Title III.

WHEREFORE, McCleary prays the court will grant his combined applications and expand the stay order as requested above.

CERTIFICATE OF SERVICE

I certify that on December 18, 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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