DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: March 30, 2017 3:36 PM CASE NUMBER: 2014CV34753
JERENE DILDINE, Plaintiff v. SEAN G. SAXON, Defendant	▲ **COURT USE ONLY** ▲ Case Number: 2014CV34753 Courtroom: 215

ORDER ON PLAINTIFF'S AND DEFENDANT'S MOTIONS IN LIMINE RE: PUBLICATION OF PLAINTIFF'S CRIMINAL ACTIVITIES

THIS MATTER comes before the Court on Plaintiff Jerene Dildine's ("Plaintiff") Motion in Limine ("Motion"), filed February 13, 2017. Defendant Sean Saxon ("Defendant") filed what is in effect a cross Motion in Limine to Exclude Evidence Regarding the Publication of Plaintiff's Criminal Activities on March 6, 2017. Plaintiff filed a response on March 21, 2017. Defendant replied on March 27, 2017. The Court, having reviewed the related pleadings and relevant portions of the Court's file, consolidates the two motions, and FINDS and ORDERS as follows:

BACKGROUND

This case has its origins in a personal relationship between Defendant and Plaintiff that began in November 2013 and persisted intermittently through April 2014. As the relationship deteriorated, Defendant allegedly engaged in abusive and manipulative behavior. Plaintiff retained counsel and filed claims against the Defendant for intentional infliction of emotional distress, outrageous conduct, and invasion of privacy. Defendant filed counterclaims against both Plaintiff and her counsel, which counterclaims were dismissed by order of this Court, entered on November 22, 2016. Defendant also asserted as a defense to the claims that "Plaintiff's claims are barred by the First Amendment to [the] United States Constitution and by the Colorado Constitution, Article II, Section 10." Answer, Counterclaim, and Jury Demand, p. 4, ¶ 8. Plaintiff now asks this court to bar Defendant from arguing or implying to the jury that

his actions are protected by the First Amendment to the United States Constitution and the Colorado Constitution, Article II, Section 10, and Defendant asks that the Plaintiff be prohibited from producing evidence regarding the letters sent by Defendant to Plaintiff's family and classmates.

LEGAL STANDARD

The underlying power of a trial court to pass on the admissibility of evidence is inherent. *Good v. A.B. Chance Co.*, 565 P.2d 217, 221 (Colo. App. 1977), *superseded on other grounds.* Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Colorado Rules of Evidence ("CRE") 403.

Article II, Sec. 10 of the Colorado Constitution provides greater protection of free speech than does the First Amendment. *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991). The right of privacy may potentially clash with the rights of free speech and free press guaranteed by the United States and Colorado Constitutions. *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 378 (Colo. 1997). As such, the right of the individual to keep information private must be balanced against the right to disseminate newsworthy information to the public. *Id.*, citing *Gilbert v. Medical Econs. Co.*, 665 F.2d 305, 307 (10th Cir. 1981). To properly maintain this balance, every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest. *Borquez*, 940 P.2d at 378, quoting *Gilbert*, 665 F.2d at 308.

The term "newsworthy" is defined as "any information disseminated 'for purposes of education, amusement, or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.'" *Borquez*, 940 P.2d at 378. In determining whether a subject is of legitimate public interest, 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." *Id.*, quoting Restatement (Second) of Torts § 652D cmt. h (1976). The question whether speech relates to a matter of public interest or concern is a question of law. *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450, 459 (Colo. 1975), *overruled on other grounds* by *Diversified Management, Inc. v Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982).

ANALYSIS

Plaintiff, in her Motion in Limine, argues that evidence regarding a First Amendment privilege should be excluded under CRE 403 as such evidence would confuse the jury and

unfairly prejudice Plaintiff. Motion, p. 3. Defendant argues that because the nature of the communications at issue related to criminal conduct, they are matters of public concern and therefore cannot serve as the basis for liability under state tort law. Response to Plaintiff's Motion, p. 1; Defendant's Cross-Motion, pp. 2-3. Furthermore, Defendant argues that Plaintiff qualifies as an "involuntary public figure" by way of her criminal conduct. Response to Plaintiff's Motion, p. 2; Reply to Defendant's Cross-Motion, p. 3. Defendant argues that his status as an individual, as opposed to a media institution, is irrelevant. Defendant's Cross-Motion, p. 6. Finally, Defendant argues that he "cannot imagine why the jury should be prohibited from considering whether his speech is protected under the First Amendment." Response to Plaintiff's Motion, pp. 2-3.

I. The Speech at Issue Did Not Concern a Matter of Public Interest

Defendant's first argument, that communications relating to criminal conduct are matters of public concern, is unavailing. Defendant cites to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and *Snyder v. Phelps*, 562 U.S. 443 (2011), among others, in support of his argument. Because context is important in resolving this issue, it is worth spending some time discussing the factual background of both *Cox Broadcasting* and *Snyder*.

In *Cox Broadcasting*, the Plaintiff/Appellee claimed that the press infringed on his right to privacy by broadcasting the fact that his daughter was the victim of a rape. 420 U.S. at 492. The Supreme Court of the United States rejected this argument, noting that "the commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions … are without question events of legitimate concern to the public." *Id*. The Court there further noted that "the developing law surrounding the tort of invasion of privacy recognizes a privilege in the press to report the events of judicial proceedings," such that "the publication of truthful information available on the public record contains none of the indicia of those limited categories of expression … which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Id*. at 493, 495, quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). There are several crucial circumstances present in *Cox Broadcasting* which are absent in the case before the Court. First, those who published the information at issue in *Cox Broadcasting* were members of the press.[1] *Id.* at 469. Second, the information published was a matter of public record, as the Appellant reporter based his broadcast on notes taken during the court proceedings and from the indictments provided to him

[1] Defendant argues that his status as an individual, as opposed to a member of the press, is irrelevant. The Court agrees that his status doesn't alter the constitutional protections afford to him, but it is not wholly irrelevant to the analysis for reasons explained later in this order.

at his request. *Id*. These circumstances led the Supreme Court of the United States to hold that "*under these circumstances*, the protection of *freedom of the press* … bars the State of Georgia from making appellants' broadcast the basis of civil liability." *Id.* at 496-497 (emphasis added).

In *Snyder*, the father of a deceased Lance Corporal, killed in the line of duty, filed suit against Fred Phelps and his infamous Westboro Baptist Church for picketing his son's funeral with offensive and distasteful signage. *Snyder*, 562 U.S. at 448-449. Claims of intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy went to trial, whereupon the jury returned verdicts for Plaintiff in the amount of $10.9 million. The Supreme Court of the United States held that the jury verdicts must be set aside, as the picketing was protected speech. *Id*. at 459. In so doing, the Supreme Court of the United States observed that "deciding whether speech is of public of private concern requires us to examine the 'content, form, and context' of that speech," and that, "in considering the content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said. *Id*. at 453-454. The Supreme Court of the United States determined that the content, form, and context of the protestors' speech entitled it to protection. Regarding content, the Supreme Court found that it "plainly relates to broad issues of interest to society at large, rather than matter of 'purely private concern.'" *Id*. at 454 (internal citation omitted). This was because "the issues [the placards] highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import." *Id*. Regarding the form of the speech, the Supreme Court found that the signs conveyed their opinion on these issues in a manner designed to reach as broad an audience as possible. *Id*. Finally, regarding the context of the speech, the Supreme Court found that the fact that the picketers were protesting outside a funeral was insufficient to transform the nature of their speech. *Id*. Essentially, even though the setting was a private event, the nature of the speech spoke to issues that could be fairly characterized as matters of public concern. *Id*. at 455.

Defendant further cites to *Joe Dickerson & Associates, LLC v. Dittmar*, 34 P.3d 995 (Colo. 2001) for the proposition that details about crime are matters of public concern. Reply to Defendant's Cross-Motion, p. 2. Defendant states "The Colorado Supreme Court has likewise made plain that '<u>there can be no question</u>' that '<u>details about the plaintiff's crime and convictions are matters of legitimate public concern</u>.'" *Id*. Defendant conveniently leaves out an operative term from that quote. The full quote reads: "There can be no question that ***<u>these</u>*** details about the plaintiff's crime and conviction are matters of legitimate public concern." *Dittmar*, 34 P.3d at 1004 (emphasis added). "These details" include "how the plaintiff, who worked as a secretary at a brokerage firm, stole a customer's bearer bonds from her place of employment and cashed them for personal use. In addition, the article described the defendant's investigation of the plaintiff, the fact that the jury convicted the plaintiff of theft, and how the court ordered her to

pay restitution to the theft victim." *Id*. In other words, the speech at issue in *Dittmar* described the means by which a criminal carried out her crime and subsequent court proceedings, as well as a little self-promotion (the defendant in that case operated a private investigation firm and used the plaintiff's crimes as a means of promoting his business). This is consistent with *Borquez* and the Restatement.[2] The information given in *Dittmar* provided information to which the public was entitled. It did not indulge in a morbid disclosure of sensational and salacious details. It was educational, as it made the public aware of how a financial crime could be carried out, even in contexts thought safe, such as a brokerage firm, and also the details of the subsequent court proceeding, a matter of public record. Thus, the information was "newsworthy," as it concerned "information disseminated 'for purposes of education, amusement, or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.'" *Borquez*, 940 P.2d at 378.

In the case before the Court, the content, form, and context of the speech at issue are quite unlike the speech in *Snyder*, *Cox Broadcasting*, and *Dittmar*. Though no findings of fact have been entered in this case, for the purposes of this motion, and this motion only, the Court observes that the following appears to be supported by substantial evidence, considered by the Court with respect to various motions.

The speech at issue in this case consists of a letter addressed to "Jerene's Family," which discloses, in lurid detail, activity engaged in by the Plaintiff relating to her escort services as well as explicit photographs, in addition to an email sent to an administrator of Plaintiff's school and her classmates, containing much of the same material. Unlike the speech in *Snyder*, which plainly related to broad issues of interest to society at large, the speech here was concentrated on the behavior of a single individual. The speech was not an attempt to start or further a conversation on the political or moral propriety of prostitution, or do the same with regard to a conversation about public health. The Court will not quote the exact language of the speech here, as it sees no need to; suffice to say that the speech was plainly *not* related to broad issues of interest to society at large. The form of the speech in this case was not designed to reach as broad an audience as possible[3]; it was published to specific persons, namely Plaintiff's family and classmates (which is to say, in this case, potential future professional colleagues). These targeted audiences were those to whom the disclosure would cause the Plaintiff the most shame

[2] In determining whether a subject is of legitimate public interest, 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."). *Borquez*, 940 P.2d at 378, quoting Restatement (Second) of Torts § 652D cmt. h (1976).

[3] This should not be regarded as a determination that the disclosure was not public for the purposes of the invasion of privacy claim.

and harm. The Defendant did not publish this information on a blog, or write a letter to the editor, or employ any other comparable means of dissemination. Finally, the context of the speech does not alter the nature of the speech and transform it into a matter of public concern, and in some ways reaffirms the Court's decision. Though the context, in one sense, was concerning the Plaintiff's criminal activity, this alone is fails to tip the balance in Defendant's favor. Furthermore, the fact that this speech was disseminated after the breakdown of Plaintiff and Defendant's relationship is a contextual clue that the information was not a matter of legitimate public concern, but was rather a matter of private concern. The speech was graphic and humiliating, and targeted to specific audiences which were calculated to have a significant impact on Plaintiff. The speech was not an attempt to educate the public on criminal activity taking place in their community. It was not educational, amusing, or enlightening. It was a vindictive act, intended as retaliation and designed to harm.

Comparing the facts of the case at bar to the facts of *Cox Broadcasting*, *Snyder*, and *Dittmar* compels this Court to conclude that the speech at issue here is not at all like the speech afforded protection by the Supreme Court of the United States and the Colorado Supreme Court in those cases, and that as such, is not the type of speech that those cases determined was protected under the First Amendment. The speech here is much closer to that class of unprotected speech that is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. Again, Defendant's speech was not designed to convey information, it was designed to injure.

Defendant cites to cases from federal and foreign state jurisdictions in an effort bolster his claim that the content of his speech concerned a matter of public interest. These cases include: *Anderson v. Suiters*, 499 F.3d 1228 (10th Cir. 2007); *Miller v. Davis*, 653 Fed. Appx. 448 (6th Cir. 2016); *Best v. Berard*, 776 F. Supp. 2d 752 (N.D. Ill. 2011); *Armstrong v. NBC Universal, Inc.*, No. 1:11CV-P67-M, 2012 WL 4098984, (W.D. Ky. Sept. 17, 2012), *aff'd* (Oct. 31, 2013); *Lowe v. Hearst Communs., Inc.*, 487 F.3d 246 (5th Cir. 2007); *Hobbs v. Pasdar*, 682 F. Supp. 2d 909 (E.D. Ark. 2009). The Court will address each of these cases in turn.

The speech in *Anderson*, excerpts from a video detailing an alleged rape, was "substantially relevant to a matter of legitimate public interest: the prosecution of Anderson's husband, a local attorney, for rape, as well as for other sexual assault charges involving multiple victims." 499 F.3d at 1236. "By airing the videotape, the media defendants heightened the report's impact and credibility by demonstrating that the allegations rested on a firm evidentiary foundation and that the reporter had access to reliable information." *Id*. Furthermore, the airing of the videotape was apparently "limited to a view of the perpetrator's face and was 'tasteful.'" *Id*. at 1231. The speech in *Anderson* was quite different, contextually and factually, than the

speech in the case at bar in that it related to a criminal *proceeding* against a local attorney, served a purpose by substantiating a report on alleged crimes (*i.e.* it was educational and/or enlightening), and, perhaps most divergent from the speech in the case at bar, was "limited" and "tasteful."

The speech in *Miller* was a press release in recognition of World Elder Abuse Awareness Day and was "designed to 'bring awareness to the community about crimes committed against the older population in Delaware County,'" and published photos of the Plaintiffs' mugshots and described their pending charges. 653 Fed. Appx. at 452. Again, the context is quite different. There, the "publicized information was undoubtedly of public concern" because, although the Millers' financial and informational relationships may have once been private matters, "they became public upon issuance of the indictment." *Id*. at 460. In the case at bar, there has been no indictment (or indeed a conviction, as far as the Court is aware). The disclosure here was not limited to mugshots and a description of pending charges. The disclosure was also not educational or enlightening, whereas the information in *Miller* was related to an awareness campaign designed to inform the public about a class of crime perpetrated against a vulnerable population that often goes unnoticed.

The District Court in *Best* noted that "speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." 776 F. Supp. 2d at 757. And, of course, to make this determination, a court must "examine the content, form, and context of the speech, as revealed by the whole record." *Id*., quoting *Snyder*, 562 U.S. at 453. The content, form, and context of the speech in question in the case at bar goes well beyond any matter of political, social, or other concern to the community; it was not the subject of legitimate news interest, as it was not a subject of general interest and of value and concern to the public. The speech was, as has been previously mentioned, a morbid indulgence into salacious details, going well beyond reasonable limits of what could be considered "newsworthy."

The speech in *Anderson* was a videotape of a sting operation, part of NBC's *Dateline* series "To Catch a Predator." 2012 WL 4098984 at 1. Plaintiff agreed to meet with what he thought was an underage female for a sexual encounter. The District Court stated, in broad terms, "the information published by NBC was a matter of 'legitimate public concern' because it concerned a criminal and his actions. No invasion of privacy occurs when one publishes information about criminals and their crimes." *Id*. at 4. The District Court then cites to the Restatement (Second) of Torts § 652D, cmt. f., which analysis will be taken up below. The Court is not persuaded to grant Defendant's Cross-Motion based on this case, primarily because of the factual context of *Anderson*, but also because the District Court in *Anderson* gave this

issue a cursory analysis, as multiple other issues were ripe for determination. In *Anderson*, the speech in question was a video of a police raid, arrest, and search, and details about the plaintiff's online conversation with the decoy underage girl. The speech in question in the case at bar involved graphic and salacious details of sexual encounters. *Anderson* and the case at bar would be more comparable, factually, if the plaintiff in *Anderson* had actually succeeded in consummating a sexual encounter with an underage female, and then graphic details relating to the sexual encounter were publicized to his family and professional colleagues, and only them.

In *Lowe*, the Fifth Circuit held that "given the broad interpretation of newsworthiness, particularly with regards to alleged criminal activity, an article describing the use of the legal system by prominent local lawyers in a way that could be described as blackmail is a matter of public concern." 487 F.3d at 251. The Fifth Circuit went on to say "the newsworthiness of the story was enhanced by a discussion regarding the legal ethics of [one of the local lawyer's] actions, as well as by commentary from the prosecutor's office about its proposed response." *Id*. The "broad interpretation" previously mentioned refers to a previous Fifth Circuit case which held that the test for construing newsworthiness "is to be construed broadly, extending beyond 'the dissemination of news either in the sense of current events or commentary upon public affairs' to include 'information concerning interesting phases of human activity and embrac[ing] all issues about which information is appropriate so that individuals may cope with the exigencies of their period.'" *Id*. at 250, quoting *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980). This story can be said to educate or enlighten the public, quite unlike the speech in the case at bar. The speech disseminated by the Defendant here went beyond issues about which "information is appropriate so that individuals may cope with the exigencies of their period." *Id*.

The speech in *Hobbs* was a letter published by the musical group The Dixie Chicks on their website and blog and speech spoken at a rally. 682 F. Supp. 2d at 911. The letter accused the plaintiff of committing a triple-homicide, for which three young men (the "West Memphis Three" or "WM3") were convicted and imprisoned. The crime had gripped the Memphis community, and become national news, receiving coverage in the *New York Times* and the *Los Angeles Times*, among many others, as well as being the subject of two full-length documentaries. *Id*. at 915. The murders were, to say the least, matters of legitimate public interest. The District Court noted "the record is replete with evidence of media coverage regarding the WM3, the murders, the trials, the convictions of the WM3, the WM3's post-conviction relief efforts, the victims, the victims' families, whether the WM3 were wrongfully convicted, and if so, who the real killer(s) is/are. Furthermore, it is undisputed that films, books and music concerning these events have been widely distributed." *Id*. at 928. The murders were a cultural phenomenon, unlike Plaintiff's crimes. The circumstances in *Hobbs* are significantly different than the instant case.

Finally, Defendant cites to two Colorado cases, *Shoen v. Shoen*, 292 P.3d 1224 (Colo. App. 2012), and *Bowers v. Loveland Pub. Co.*, 773 P.2d 595 (Colo. App. 1988), which he contends support his position. The speech in *Shoen* involved a family dispute that gained national attention and also involved a double-homicide of equal notoriety. The Shoen patriarch, L.S. Shoen, who founded U-Haul International, Inc., had twelve children, including Sam and Mark Shoen. 292 P.3d at 1225. Sam and Mark were the defendant and plaintiff in the *Shoen* case, respectively. *Id*. The Shoen family "split" into two factions, where L.S. and Sam were part of the "outsiders," and Mark was part of the "insiders." *Id.* The ensuing litigation was covered by "multiple media reports, including a July 1990 *Wall Street Journal* front page story." *Id*. at 1225-26. Later, Sam's wife, Eva, was murdered in their home in Telluride. After the murder, at Mark's direction, U-Haul sent its attorneys and private investigators to the scene, attempted to work alongside the Telluride Sherriff's Department in the investigation (which was rejected), conducted surveillance on Sam, and passed "inaccurate or unsubstantiated information about Sam to the Sherriff's Department." *Id*. In 1993, the Sherriff's Department set up an episode about the investigation on *Unsolved Mysteries*, and as a result, received a tip off that led to a confession. *Id*. Many years later, in 2007, Sam was contacted to provide an interview for an episode about Eva's murder on the show *Dominick Dunne's Power, Privilege, and Justice*. *Id*. The episode was aired nationwide. *Id*. Mark's defamation suit followed this interview. *Id*. During the interview, Sam made many statements "in which—among other things—he criticized the quality and completeness of the Sherriff's investigation." *Id*. at 1229. Not only had the Shoen's family's internal intrigue, as well as the murder, captured public attention nationwide, "Sam's statements related to a matter of public concern because they addressed his views about the adequacy of the investigation by public law enforcement officers when unanswered questions remained." *Id*. at 1230. Even though the case had been solved at the time of the interview, "legitimate public concerns remained about the completeness of the original criminal investigation." *Id*. at 1231. The focus, then, in this case, was on the fact that the family and the murder were cultural phenomena, and that Sam continued to discuss things of which the public had a right to be concerned (*i.e.* criminal investigation and the competency of law enforcement). Those circumstances are not present in the case at bar.

Finally, in *Bowers v. Loveland Pub. Co.*, is primarily focused on another issue that is related, but not entirely on-point. The Colorado Court of Appeals does quote *Cox Broadcasting* for the proposition that "the commission of a crime, prosecutions resulting from it, and judicial proceedings arising from the prosecution are without questions events of legitimate concern to the public." 773 P.2d at 596. "Consequently," the Court of Appeals concluded, "police reports themselves are matters of public concern. Therefore, news items which relay the contents of such reports deserve constitutional protection." *Id*. This has been definitively established in prior cases. In the case at bar, Defendant did not publish the contents of a police report, and so

Bowers does no more to help Defendant's case than does *Cox Broadcasting*, which has already been analyzed.

To summarize the multitude of aforementioned cases, they all contain certain key circumstantial elements that are absent in the case at bar. Those cases had high-profile parties and/or crimes, publications on national or local news outlets, publications which served to educate or enlighten the public on an issue, or publications which served to criticize the operation and execution of government functions. The speech in the aforementioned cases and the speech in the case at bar all dealt with crime, broadly speaking. However, analysis of the issue requires a court to examine the content, form, and context of the speech. In other words, it requires an examination of the details. Once one examines closely the details in the aforementioned cases, it is clear that the speech in the case at bar is a different creature entirely. The speech in the aforementioned cases all served to educate, examine, or further a dialogue on issues or events that the public either was already concerned with, or had a right to be concerned with. None of the speech in the aforementioned question was designed to inflict targeted and specific harm as an act of retaliation against an individual, as is the case here. None of the speech in the aforementioned went into gross and unnecessarily offensive detail. The cases cited by Defendant do not persuade this Court that the speech at issue here is protected by the United States and Colorado Constitutions, even if the speech can be said to be related to criminal activity, in the broadest possible sense.

Defendant's second argument, that Plaintiff is an "involuntary public figure," is similarly unavailing. In many ways, this argument overlaps with the first, and much of the analysis is similar. Defendant cites to Restatement (Second) of Torts § 652D, cmt. f., in support of his argument, which provision was cited with approval in *Borquez*. That comment states, in relevant part:

> There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become "news." Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public attention.

Restatement (Second) of Torts § 652D, cmt. f.

Before undertaking an analysis of the above, the Court notes that Defendant correctly observes that his status as an individual, as opposed to a member of the press, does not afford

him lesser constitutional protections. Defendant cites to *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), in support. Specifically, Defendant quotes a statement in Mr. Justices Brennan, Marshall, Blackmun, and Steven's dissent, which reads, "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Id*. at 784 (emphasis added). The qualifier "engaged in the same activities" is critical. In today's day and age, the public is increasingly getting its news from non-traditional sources, propagated by the internet. An individual can break a story that gains national traction the same as a national publication can. Of course, it is both logical and proper to conclude that such individuals are equally protected. However, Defendant cannot be said to have been "engaged in the same activities" as the institutional media. The institutional media, traditional or otherwise, does not publish excessively salacious and graphic details abought sexual encounters to limited audiences for the purposes of exposing, humiliating, and harming specific individuals. To the extent that the media does publish like material, it does so to further a dialogue, raise questions, or expose activities to which the public has a legitimate concern, such as activities of law enforcement and officers of the courts. This was not Defendant's objective. Furthermore, although Defendant's status does not afford him lesser protections, it *does* qualify as part of the context of the speech. As the public concern analysis requires a court to investigate the content, form, and context of the speech, the status of the speaker and the means by which the message is disseminated are all relevant circumstances in evaluating the form and context of the speech. As such, Defendant's status as an individual, as opposed to a member of the press, does have some bearing on the outcome of the case, although it does not alter the extent of protections afforded by the First Amendment and the Colorado Constitution.

Returning to the Restatement, the comment is followed by five illustrations which are meant to help illuminate and provide context. All five of the illustrations involve publications by newspapers or broadcasting companies. As previously mentioned, Defendant is not a newspaper, broadcasting company, or member of the press, and the speech at issue was not disseminated in a manner consistent with the typical publications of the press. Furthermore, the speech was not an attempt to educate the public, but was an attempt to exact a vendetta. Defendant's interpretation of the comment requires selective reading, and the complete disregard of the comment's context, illustrations, and, in some cases, plain words (*e.g.* "They have, in other words, become 'news.'"). Reading the comment as a whole, with its attendant illustrations, makes clear that not every person who commits a crime becomes a *per se* involuntary public figure, with all semblance of privacy rights obliterated. Were that the case, an overwhelming majority of people would qualify as such. Rather, a balance needs to be struck between the privacy rights of the individual and the public's interest in accessing newsworthy information. Plaintiff cannot be understood as "newsworthy" in the context of the Restatement or applicable

case law. The examples provided in the Restatement comment and illustrations all demonstrate situations where circumstances or events that are matters of public concern, such as high-profile criminal trials and crimes, public disasters or catastrophes, and unusual and bizarre stories, are published by the press. Here, Plaintiff is not the subject of public interest, regardless of any criminal activity she may have been engaged in. She simply is not news. Nor can the graphic details of her criminal activity be appropriately understood as matters of public concern. Furthermore, Defendant is not a member of the press, and his speech in no way resembled any sort of publication that one would associate with press outlets, traditional or otherwise. It is clear Plaintiff was not the sort of involuntary public figure contemplated by the Restatement comment. The outcome of this Motion might well have been different if the content of Defendant's speech had been different. However, Defendant's speech can only be understood as "a morbid and sensational prying into private lives for its own sake." *Borquez*, 940 P.2d at 378. Defendant's status as a jilted ex-boyfriend further bolsters the conclusion that the speech is nothing like what could be described as a news publication. The targeted audience and graphic nature of the speech further pulls it away from the realm of legitimate matters of public concern.

The Court's conclusion is further bolstered by another comment to the same section of the Restatement. That comment reads, in relevant part:

> Every individual has some phases of his life and his activities … that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters … when these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of privacy, unless the matter is one of legitimate public interest.

Restatement (Second) of Torts § 652D, cmt. b.

Plaintiff's criminal activity was something that she kept private. The fact that much of the content contained in the letters was pulled from a Twitter account and other online websites does not save Defendant's argument. Plaintiff made efforts to protect her real identity. To an observer, a woman named Jessica Kent provided escort services, not Jerene Dildine. Defendant revealed that Jessica Kent was an alias, a fact which Plaintiff kept to herself and, presumably, people like the Defendant, with whom she shared a close emotional connection at one point. It is the revealing of this connection, exposing Plaintiff to her family and classmates without her consent and in graphic detail, which Plaintiff alleges as the basis for her invasion of privacy claim. The graphic nature of the revelations would be highly offensive to the ordinary reasonable person. And, as previously mentioned, the speech at issue did not reveal activity that was of legitimate public interest.

In summation, under the Colorado and United States Constitutions, the rights of free speech and free press protect the public's access to information on matters of legitimate public concern. *Borquez*, 940 P.2d at 378. However, the privacy rights of individuals must be balanced against the right to disseminate newsworthy information to the public. *Id*. To properly maintain this balance, "every private fact disclosed in an otherwise truthful, newsworthy publication must have some substantial relevance to a matter of legitimate public interest." *Id*. In determining what is newsworthy, 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. *Id*.; Restatement (Second) of Torts, § 652D, cmt. h. (1976). Here, the speech at issue was replete with graphic, private facts, which can only be described as "morbid." The information was not newsworthy, or a matter of public concern, nor was the speech made in a style that could be understood as anything close to a traditional news publication. The speech at issue was a plain attempt to humiliate, embarrass, or otherwise shame the Plaintiff by exposing her iniquities to her family and classmates in an obscene manner. The unsolicited and excessively graphic nature of the speech affirms this conclusion. The fact that the letters were sent after the breakdown of Plaintiff and Defendant's relationship indicate that they were an effort to inflict harm upon the Plaintiff, and not educate the public.

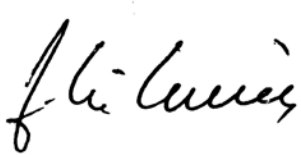
Plaintiff argues that Defendant should be prohibited from pursuing this argument during trial under CRE 403, or that the Court should defer a decision until after the presentation of the evidence. The more appropriate avenue is to determine, as a matter of law, that the speech at issue is not protected speech under the First Amendment or Article II, Sec. 10 of the Colorado Constitution. Defendant used his speech as a weapon; it was a means of inflicting harm upon the Plaintiff. For Defendant to argue that his speech is constitutionally protected as an effort to inform the public on a matter of public interest is not supported by the law. Defendant is therefore barred from arguing as a defense during trial that his speech is constitutionally protected.

CONCLUSION

For the reasons discussed above, Plaintiff's Motion in Limine is GRANTED. Defendant's Motion in Limine to Exclude Evidence Regarding the Publication of Plaintiff's Criminal Activities is DENIED.

SO ORDERED this March 30, 2017.

BY THE COURT:



J. Eric Elliff
District Court Judge