No. 14-FM-___

(Superior Court No. CP____-14)

IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS

LM ,

APPELLANT

v.

CB ,

APPELLEE

Appeal from the Superior Court of the District of Columbia
Domestic Violence Unit
(Hon. Fern Flanagan Saddler, Trial Judge)

BRIEF FOR APPELLANT

MATTHEW B. KAPLAN
D.C. Bar No. 484760
509 N Jefferson St
Arlington, VA 22205
(703) 665-9529
mbkaplan@thekaplanlawfirm.com
Attorney for Appellant

STATEMENT OF INTERESTED PARTIES

Appellant LM and Appellee CB are the only parties to this appeal. CB was represented in the Superior Court and is represented in this appeal by attorney Governor E. Jackson, III. LM was represented at trial by attorney Steven A. Krieger and is represented in this Appeal by Attorney Matthew B. Kaplan.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant LM presents the following issues for review:

- Whether to vacate the trial court's determination that LM 's speech constituted the crime of stalking where the trial court based its determination on statutory language repealed at the time of the supposed crime.
- Whether the criminal stalking statute, as applied by the trial court to LM , constituted a content-based restriction on speech inconsistent with the First Amendment.
- Whether LM 's speech was protected by the First Amendment regardless of whether it dealt with matters of public interest.
- Whether LM 's speech was protected by the First Amendment because it dealt with matters of public interest.
- Whether to vacate the trial court's *sua sponte* entry of a protective order against LM 's wife, a non-party not found to have engaged in any misconduct.

STATEMENT OF THE CASE

Appellant LM 's wife, KW, had a brief sexual affair with Appellee CB . LM truthfully told others that CB had had an affair with his wife. At CB 's request a Superior Court judge determined that these statements by LM

were criminal violations of the District of Columbia's prohibition on stalking and issued a protective order against both LM and KW , a non-party. LM now appeals, contending that neither he nor his wife committed any crime and that the protective order was wrongly issued.

The Affair

CB and KW both worked at for Avalere Health, a Washington, D.C. based healthcare consulting company. CB was a company vice president, tr. 4-23-14 at 14,[1] and "one of the leaders in the firm," tr. 5-7-14 at 31, while KW was an intern. *Id.* at 18. On the evening of May 3, 2013 CB and KW attended a company happy hour, *id.* at 15-16, later leaving together to go to another bar and then going to CB 's home, where, according to CB 's uncontradicted testimony, they had sexual relations. Tr. 4-23-14 at 18. At the time KW was married, but CB believed she was only engaged to LM . Tr. 4-23-14 at 19; tr. 5-6-14 at 83-84. KW and CB had two more sexual encounters, the last being on approximately May 7, 2013. Tr. 4-23-14 at 19. CB told the court that, during this final encounter, KW told him that she was

[1] Citations in the form tr. [date] at [page] refer to transcripts of trial court proceedings that are in the Record. Parallel citations to the Appendix in the form App. at [page] are also provided if the cited portion of the transcript is included in the Appendix. Citations to the Supplemental Record are in the form Supp. Rec. at [page].

married. *Id.* at 19. Upon learning this CB explained that "I was just in a state of shock and disbelief to be honest and then I told her that I couldn't … knowingly do a[n] extramarital affair." *Id.* at 20. CB then had "one last sexual encounter with KW ." Tr. 5-7-14 at 49.

LM learned of the affair on May 8, 2013. Tr. 5-8-14 at 56. KW told LM that the affair was over but, until about mid-July 2013, KW and CB continued to secretly communicate via email. Tr. 5-7-14 at 57; tr. 5-8-14 at 46. LM subsequently discovered this secret correspondence. Tr. 5-8-14 at 46.

The Email to Avalere

On July 24, 2013 LM sent an email to three senior Avalere officials, with a CC to CB 's personal and work email address. It said the following:

> This e-mail is to bring a matter to your attention that may be a violation of your Company's Code of Conduct and/or other policies, procedures, business ethics and character or standard of the Company. CB and my wife, ……. KW , are involved in an extramarital affair that took place, primarily, in the workplace. Aside from the potential sexual harassment claims this situation presents, it also involves the inappropriate use of company resources and assets. CB and ……. KW have used company time and company resources to further their affair.

Supp. Rec. at 54-55. Attached to the email was some of the covert correspondence between CB and KW after the affair supposedly ended.[2] *Id.* at 55-58; tr. 4-23-14 at 30.

CB testified that, upon receiving the CC of this email, he felt "violated and threatened and it was, in some regards … embarrassing … because you now have introduced a whole new segment of individuals who had no involvement in this personal matter." Tr. 4-23-14 at 31. He felt threatened because sending the email to others at his place of work "was unreasonable behavior." *Id.* at 32. CB responded to the email by emailing LM , suggesting that they meet in person to discuss their differences. Supp. Rec. at 54. LM did not respond.

On cross-examination, CB clarified that LM 's email to Avalere did not actually make him "fearful:"

> At the point when I sent this e-mail [to LM , responding to LM 's email to Avalere], I was just being direct in telling this gentleman to please do not engage my profession into a personal matter. And, so, was I fearful at the point when I sent this e-mail, no I wasn't.

Tr. 5-6-14 at 29.

[2] For reasons of relevancy, the trial court limited evidence as to whether CB 's conduct violated any company policies. Tr. 5-8-14 at 32.

The Facebook Emails

In October 2013 CB learned that LM had sent Facebook emails to several persons connected to CB on Facebook. CB was not a direct recipient of the emails, which were apparently identical, but persons who received them forwarded them to him. CB described the emails, which did not contain threats, as "very similar" to the email that had been sent to Avalere in July.[3] Tr. 4-23-14 at 37.

When CB learned of these Facebook emails he testified that

> basically I felt the same way I did the first time it happened [with the July email to Avalere]. In many ways violated, threatened. I wasn't sure. I was very confused as to how their contact information even, how he would even know who they were…. [I]n many cases you start to feel like your security is threatened because you wonder how someone has such access to … your personal contacts … you start to feel for their safety as well…

[3] In the Facebook emails, LM identified himself by name and wrote that

> you should know the kind of person CB really is. had a sexual affair with my wife… We believe that not only should you know about his morally reprehensible behavior, … but his friends and family should also know of his behavior. While my moral compass may seem antiquated by todays [sic] societal standards, I believe that a man upon knowing of a woman's relationship status … has a moral obligation to respect her relationship status and boundaries. Call me old fashioned, but morality, fidelity, honor and strength of character are words and a way of life that defines a man of integrity. Due to 's lack of integrity and respect for himself, he failed to respect the boundaries of a married woman.

Supp. Rec. 20. The complete text is at Supp. Rec. 20-21.

Tr. 4-23-14 at 43.

CB was concerned that someone might have illegally accessed his electronic data. *Id.* at 47-48; tr. 5-7-14 at 19. LM subsequently testified, however, that he had sent this email to persons who had "liked" CB 's Facebook cover photo and that CB 's security settings were such that both his cover photos and information on persons who had liked the photo were publicly available. Tr. 5-8-14 at 78-81. LM said he sent the email (he recalled sending it to nine persons) using a Facebook feature that allowed any user to pay a small fee (a dollar per recipient) to email anyone who had liked another user's public cover photo. *Id.* LM supported his testimony with Facebook payment receipts and CB did not dispute this explanation. Supp. Rec. at 22-51.

The Blog

In March 2014 CB learned that LM had created a blog entitled "The Power of Light and Truth," which discussed dealing with affairs. Tr. 4-23-14 at 53-56. In a February 2014 post LM had written that CB , who he named, had had an affair with his wife. Supp. Rec. at 10-11. In this and other posts LM also discussed the impact of the affair on his life, his research on dealing with a partner's affair, recommended two books on responding to an affair, criticized a movie about an affair and described other blogs in which others whose partner had

had an affair discussed their situations. *Id.* at 10-18, 62-88. He also explained one of the blog's purposes:

> My goal - is that this blog reaches all four corners of this world. That every person on this planet would know of this affair and the role the A[ffair] P[artner] played in it. And if one person decides to get their fierce face on and take steps to eliminating infidelity from their marriage - then this blog has served its purpose. A lofty goal? Yup. But you have to aim to the sky if you ever hope to hit one star.

Id. at 14. In LM 's view public disclosure of an affair would assure that it ended: "It's amazing what a little light and publicity can do against things that strive, brew and grow in darkness." *Id.* at 17.

In addition to naming CB , LM linked to or posted some information about him, all of it apparently publicly available, having been placed on the web by CB or his employer.[4] In fact, LM noted in a post that "as always – information that is not in the public domain has been redacted." Supp. Rec. at 17. CB acknowledged that none of LM 's posts contained his personal email address, his

[4] At trial CB 's complaint was that the website

> had several links to social media sites or even my work biography site where much of my … personal and professional contact information is listed. It [the blog post] also had at the time five different pictures that were pulled from either my work, my firm's website, my homepage of my LinkedIn profile, and several other websites that were out there.

Tr. 4-23-14 at 56. The photos and information about CB are largely illegible in the trial exhibits.

work email address, his mobile phone number or his social security number. Tr. 5-7-14 at 38-40. Although LM blogged that CB was "sneaky and spineless," he wrote nothing that suggested he would take any action against CB beyond criticizing his character. Supp. Rec. at 17. Indeed, LM 's post said that he did not want to engage in bullying and that "[m]y goal here isn't to rip CB apart nor shame him." *Id.*

According to CB , upon discovering LM 's blog, he was "taken aback" and decided he needed to notify Avalere "because if anybody wanted to Google the firm's name then this site would come up as well [and] … that could negatively impact some of our business." Tr. 4-23-14 at 57. CB testified that Avalere's "leadership team," of which he was apparently a member, was concerned that LM "seemed very unreasonable and … a bit unstable." *Id.* at 57-58. Consequently,

> we then implemented many security protocols, i.e. putting up pictures of [LM] and his wife. We also implemented panic buttons at all our secure doors…in my apartment building it was a very similar approach. A picture was put down at the concierge. Individuals were notified that there is an individual who is demonstrating irate you know just unstable emotional behavior.

Id. at 58. CB also filed a police report. *Id.* at 90.

CB explained at trial that

> once I actually you know initiated the process of filing the police reports and the protective order and … getting that criminal investigation kicked off. Then I have to go into image repair mode as far as what I look like to the external world …

> so, I hired a reputation PR firm to address some of those issues and they … have been doing some things to help restore my image … at least for my clients….

Id. at 93. CB also said that he started seeing a therapist "to address the trauma and the emotional distress," *id.* at 93, but he presented no testimony from the therapist or any other mental health expert.

On April 20, 2014 LM made a brief post on his blog about the then ongoing trial of this case, writing that "I have a pending legal suit with the affair partner that I cannot comment [on] at this moment, but it will be resolved on Tuesday." Tr. 5-6-14 at 9. CB testified that, upon reading this, he "felt threatened." *Id.* at 10.

The Trial Court Litigation

On March 5, 2014 CB filed a petition for a protective order with the Superior Court Domestic Violence Unit. He asked the court to order LM (who lives in Connecticut) "not to abuse threaten or harass" him or his "family and friends," to stay away from his home, his business and his person and to not contact him, including through LM 's "website." Petit. and Aff. for Civil Protective Order, dkt. 1. He also asked the court to "order[] respondent to cease and desist with harassment through internet websites. He is attempting to sabotage my personal and professional credibility." *Id.*

Proceedings in the Superior Court on the issue of whether a permanent protective order should issue took place over eight court days, from April 2, 2014 through July 11, 2014. At the start of the case the trial court, asserting that a factual record was needed, denied a motion to dismiss by LM which argued that his conduct was protected by the First Amendment. The Parties then presented three witnesses— CB , LM and KW —and introduced into evidence copies of the relevant emails and blog posts.

After the completion of testimony CB argued (through counsel) that the court should issue a protective order because LM had used the "internet to wreak havoc and defame the professional character of Mr. CB and invade his privacy with at best a deliberate indifference to the negative affect on Mr. CB ." Tr. 6-16-14 at 23. He also asserted that LM 's statements "ma[de] him feel threatened."[5] Tr. 6-16-14. Moreover, according to CB , LM 's statements were not constitutionally protected because they were defamatory. *Id.* at 41-42. CB 's attorney emphasized that LM 's statements

> injure[d] [CB 's] standing in the professional community….
> [H]is career is made and derived off of his activities online….
> [T]hat is why Mr. CB had to go out and pay $7500 to a brand restoration firm because his brand, his professional brand and his professional character is so interweaved with his activities at

[5] CB also claimed that, based on an ambiguous statement in LM 's blog, he "was under the impression" that LM had hired a private investigator, but there was no testimony that LM had done so. *Id.* at 33.

> Avalere … that if his reputation is injured online, he is basically taken out of the marketplace.

Id. at 41-43.

LM argued that his statements were protected by the First Amendment, that CB had not proven the elements required to show a violation of the stalking law, that CB 's petition "was filed as a tactic to protect the petitioner's image," and that there was no credible evidence that CB ever feared for his safety. *Id.* at 49-55, 56-57.

The Trial Court's Ruling

The trial judge ruled from the bench on July 11, 2014.[6] After noting that "there's not a lot of dispute about" the relevant facts, tr. 7-11-14 at 16, App. at 29, she applied those facts to the law and found, by a preponderance of the evidence, that LM had committed the crime of stalking and entered a permanent protective order.

The trial court rejected LM 's First Amendment argument, explaining

> that one of the primary factors Courts should consider in determining whether speech is constitutionally protected or not is whether the speech was made regarding matters of public or private concern…. matters of public concern is usually deemed constitutionally protected while speech regarding matters of purely private concerns is less protected if protected at all.

[6] The relevant transcript is reproduced in the Appendix.

Tr. 7-11-14 at 21; App. at 34. Moreover, according to the court, LM 's argument that all of his statements were factually correct was irrelevant because "there are times where you are telling the truth, but what you are saying can constitute harassment." *Id.* at 34; App. at 47.

Turning to the email sent to Avalere the court noted that "there's nothing in the trial record that suggests that either respondent, his wife or petitioner was required to disclose this information to Petitioner's human resources department…. It was not constitutionally protected speech." *Id.* at 23; App. at 36. Furthermore, in CCing the email to CB "respondent intended to cause petitioner to be alarmed, seriously alarmed, annoyed, frightened or tormented by the e-mail … discussing very personal matters such as an extramarital affair." *Id.* at 24; App. at 37. The court also found that a reasonable person "would be alarmed, annoyed, frightened and/or tormented" by LM 's statements and that LM should have known this. *Id.* at 24-25; App. 37-38.

Addressing the Facebook emails, the trial court found that these messages "are not constitutionally protected speech" because, like the email to Avalere, "they involve matters of purely private rather than public concern." *Id.* at 26; App. at 39. Moreover, even though they were not sent to CB , they were "an indirect act of communication with the petitioner" because "a reasonable person should know that if they contacted another's family and friends that person would be

likely to learn of the contact." *Id.* at 27; App. at 40. The court held "that respondent intended to cause petitioner to be alarmed, annoyed, frightened or tormented by sending [the] Facebook messages," that LM 's statements would have such an impact on a reasonable person and that LM should have known that such statements would have such an impact on a reasonable person. *Id.* at 28-29; App. at 41-42.

Moving on to the blog posts, the trial court found that "some of the blog postings are constitutionally protected speech," and "credit[ed]" LM 's testimony that one of his reasons for making his blog posts was that he "felt compelled to help other people who were dealing with the affair of their partners." *Id.* at 15, 32; App. at 28, 45. Specifically, "the blog posts discussing the institution of marriage as well as the general condition of being cheated on … fall under the protection of the first amendment as they are matters of public concern." *Id.* at 32; App. at 45. Some of the blog posts, however,

> were not constitutionally protected speech because they did involve matters of purely private rather than public concern. For example, the ones that specifically mention petitioner by name…. That is, if the petitioner's name was searched on Google, the search would produce a result that linked petitioner's name to respondent's website blog.

Id. The Court concluded that those blog posts that "specifically reference petitioner by name or include other personal information or details about petitioner were harassment." *Id.* at 33; App. at 46. According to the court, LM intended

"to cause petitioner to be seriously alarmed, annoyed, frightened, or tormented," a reasonable person would have been so impacted by these statements and LM should have known that a reasonable person would have been so impacted. *Id.* at 34-35; App. at 47-48.

The Protective Order and Damages

The trial court *sua sponte* added KW , LM 's wife, to the protective order, over LM 's objections. *Id.* at 51-52; App. at 57-58. KW was not a party to the case, was not represented by counsel or given the opportunity to obtain counsel and there were no findings that she had violated any law. The court explained that "if there's a reasonable basis for doing that, I can do that." *Id.* at 52; App. at 57.

The protective order required LM and KW not to "assault threaten, harass or stalk petitioner" or to "destroy" his property. App. at 63 (Protective Order). They were also required to stay a specified distance from CB 's person, home, workplace and vehicle and to not contact CB "either directly or indirectly." *Id.* at 63. LM was required to "enroll in and complete a counseling program for … domestic violence." *Id.*

The court also ordered LM to pay $1,800 for CB 's psychiatric treatment. Tr. 7-11-14 at 55; App. at 61. However, it rejected CB 's additional demand for $7,500 to reimburse expenses for "internet brand restoration" which

CB had contracted for to "alleviate the effect of … the creation of the website and the effect that that has when a Google search is done and so forth." *Id.* at 43, 49-50.

The Attempted Criminal Prosecution

On September 24, 2014 CB filed a Motion to Adjudicate Criminal/Civil Contempt asking that LM be held in contempt for supposedly creating a new website that "lists [CB 's] name (repeatedly) and puts picture on the website," contending that this internet posting was an improper communication in violation of the Protective Order. Dkt. 70. CB offered no evidence that LM , as opposed to some other person with access to the internet, was responsible for the website. LM was required to appear twice (through counsel) at criminal contempt arraignments, but both the U.S. Attorney and the District of Columbia Attorney General declined to prosecute. Dkts. 78, 84.

ARGUMENT

The trial court's decision to issue a protective order against LM should be reversed because it was based on statutory language no longer in force at the time of the conduct at issue and because it was inconsistent with the First Amendment's guarantee of freedom of speech. The trial court's application of the protective order to LM 's wife should also be reversed as there was no legal basis for it to take such an action.

I. THE TRIAL COURT APPLIED SUPERSEDED LAW

In deciding that LM had committed the criminal offense of stalking, the trial court wrongly applied the definition of stalking that was in place in the District of Columbia prior to late 2009 rather than the current, materially different definition.

A. The Lower Court Relied on Pre-2010 Law

In the District of Columbia "[a] petitioner," in this case CB , "may file a petition for civil protection in the Domestic Violence Unit [of the Superior Court] against a respondent," here LM , "who has allegedly committed or threatened to commit one or more criminal offenses against the petitioner." D.C. Code § 16-1003(a).

The offense LM allegedly committed was stalking. D.C.'s current stalking statute provides that

> (a) It is unlawful for a person to purposefully engage in a course of conduct directed at a specific individual:
> (1) With the intent to cause that individual to:
> (A) Fear for his or her safety or the safety of another person;
> (B) Feel seriously alarmed, disturbed, or frightened; or
> (C) Suffer emotional distress;
> (2) That the person knows would cause that individual reasonably to:
> (A) Fear for his or her safety or the safety of another person;
> (B) Feel seriously alarmed, disturbed, or frightened; or

(C) Suffer emotional distress; or

(3) That the person should have known would cause a reasonable person in the individual's circumstances to:

(A) Fear for his or her safety or the safety of another person;

(B) Feel seriously alarmed, disturbed, or frightened; or

(C) Suffer emotional distress.

(b) This section does not apply to constitutionally protected activity.

D.C. Code § 22-3133. For purposes of this section, "'[e]motional distress' means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." D.C. Code § 22-3132(4). The current stalking statute was adopted in 2009 as part of the Omnibus Public Safety and Justice Amendment Act of 2009, 56 D.C.R. 7413 (Sept. 11, 2009) §§ 501-505 (text of stalking legislation); *id.* § 302 (repeal of prior anti-stalking law); *see also* 57 D.C.R. 10 (Jan. 1, 2010) (announcing effective date of Act as Dec. 10, 2009).

Prior D.C. law had provided that stalking occurred when a person

> on more than one occasion engages in conduct with the intent to cause emotional distress to another person or places another person in reasonable fear of death or bodily injury by willfully, maliciously, and repeatedly following or harassing that person, or who, without a legal purpose, willfully, maliciously, and repeatedly follows or harasses another person.

D.C. Code § 22-404(b) (D.C. Code 2008 Lexis database) (repealed). Harassing was defined to mean "engaging in a course of conduct … directed at a specific

person, which seriously alarms, annoys, frightens, or torments the person, or engaging in a course of conduct … which would cause a reasonable person to be seriously alarmed, annoyed, frightened, or tormented." *Id.* § 22-404(c).

Although in closing argument LM 's counsel had quoted the relevant language of the current anti-stalking statute, tr. 6-16-14 at 56-57, in each of the three instances in which the court found criminal violations it applied the prior, repealed language. *See, e.g.,* Tr. 7-11-14 at 24; App. at 37 ("The Court finds that respondent intended to cause petitioner to be alarmed, seriously alarmed, annoyed, frightened or tormented by the e-mail that respondent sent directly to the H.R. department"); *id.* at 28; App. at 41 ("This Court also finds that respondent intended to cause petitioner to be alarmed, annoyed, frightened or tormented by sending Facebook messages directly to petitioner's family and friends."); *id.* at 34; App. at 47 ("This court finds that respondent intended to cause petitioner to be seriously alarmed, annoyed, frightened, or tormented by the website blog that specifically mentioned petitioner by name or included personal information or details about petitioner.").

In other words, while the current statute requires conduct that is intended to make, is expected to make or should reasonably be expected to make a person "[f]eel seriously alarmed, disturbed, or frightened," the trial court applied the prior statutory language, which permits a finding that a crime has been committed by

conduct that causes another person to "be seriously alarmed, annoyed, frightened, or tormented" even though, by the time of the conduct at issue, the D.C. Council had eliminated the words "annoyed" and "tormented" from the definition of the criminal offense.[7]

B. The Reliance on the Wrong Statute Mandates Reversal

The trial court's erroneous application of the materially different repealed statutory language to the facts of this case merits reversal. The court erred even though LM had quoted the correct language to the court. Tr. 6-16-14 at 56-57. Having done so LM was not required to, and could not reasonably be expected to, interrupt the court as it ruled to again indicate the correct language.

Moreover, even if LM 's failure to again bring the correct law to the Court's attention mandates plain error review, LM has established plain error. An appellant alleging plain error "must show (1) error, (2) that is plain, and (3) that

[7] "Annoyed" was eliminated at the request of the U.S. Attorney's Office, the D.C. Attorney General's Office and the D.C. Public Defender Service. Laura E. Hankins, D.C. Public Defender Service, June 2, 2009 letter to Councilmember Phil Mendelson at 3-4 (attachment to Council of The District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-151 ["Committee Report"] (June 29, 2009)), available at http://dcclims1.dccouncil.us/images/00001/20090827154724.pdf. The Public Defender Service "objected to the term 'annoyed' as vague and as less serious than the other possible feelings." *Id.* The Council also eliminated the word "tormented," which it had originally proposed retaining, after the D.C. Association of Criminal Defense Attorneys expressed concern "that the word has no easily understood definition." "Final" Statement of The District of Columbia Association of Criminal Defense Lawyers Concerning: Bill 18-138, at 3, attachment to Committee Report.

affected his substantial rights"—in other words, that the defendant was prejudiced—and that "(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Fortune v. United States*, 59 A.3d 949, 954 (D.C. 2013) (citations, brackets and quotations omitted).

In *Vaughn v. United States*, 93 A.3d 1237 (D.C. 2014), this court found plain error where the finder of fact was, as is the case here, applying a materially incorrect legal standard. *Vaughn* involved an unobjected to jury instruction which wrongly stated the *mens rea* required for conviction. In that case the court found, as it should with respect to the trial court's understanding of the law in this case, that a jury instruction that misstated established law as to what the facts must show to permit a conviction was error and that the error was plain. *Id.* at 1267. The third and fourth prongs of plain error were also established in *Vaughn*: there was "a reasonable probability of a different outcome" if the proper law had been applied to the facts, meaning that the defendant was prejudiced, *id.* at 1268, and allowing a conviction based on a materially wrong application of the law to the facts would undermine the fairness, integrity or public perception of the judicial system. *Id.* at 1270. The same concerns are present in this case— LM was found to have committed a crime based on a materially inaccurate understanding of the relevant law and it would undermine the fairness, integrity or public perception of the judicial system to allow such a determination to stand.

C. The Court Should Address LM 's First Amendment Arguments

Although the trial court's verdict must be vacated in light of this significant error, this court should not remand this matter for application of the proper standard without addressing the First Amendment issues discussed below. In LM 's view, proper application of First Amendment law to this case requires dismissal without further trial court proceedings.

II. LM 'S STATEMENTS WERE PROTECTED BY THE FIRST AMENDMENT

Because LM 's statements were protected by the First Amendment, they cannot constitute criminal conduct, and consequently, there was no basis for the trial court to issue the Protective Order that LM now challenges.[8]

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech, or of the press." U.S. Const. Amend. 1. This guarantee of free expression reflects a "transcendent value to all [our] society." *Lewis v. New Orleans*, 415 U.S. 130, 134 (1974). Whether particular speech is constitutionally protected is an issue "of law, not fact," *Connick v. Myers*, 461 U.S.

[8] Because, by its terms, the stalking statute "does not apply to constitutionally protected activity," D.C. Code § 22-3133(b), this court can arguably reverse the trial court as a matter of statutory interpretation, without finding that the lower court's ruling constituted a constitutional violation. But this statutory language merely states a truism—no statute can restrict constitutionally protected speech. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("an act of the legislature, repugnant to the constitution, is void.").

138, 148 n.7 (1983), meaning that this court reviews de novo the trial court's decision that LM 's speech was not protected by the First Amendment. *Davis v. United States*, 564 A.2d 31, 35 (D.C. 1989) (*en banc*) (questions of law reviewed de novo).

As this court has explained, "the First Amendment generally 'bars the government from dictating what we see or read or speak or hear.'" *In re S.W.*, 45 A.3d 151, 156 (D.C. 2012) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002)). To this end, the Supreme Court has repeatedly held that, except for "true threats" and other very limited circumstances, content based restrictions on speech are almost never constitutional. In this case the trial court looked to the content of LM 's speech to find that he had violated the law. Essentially, it found that LM 's words were unlawful because they upset CB . But speech cannot be criminalized merely because it displeases or annoys another. The trial court did not find—and could not have found on the evidence—that LM threatened CB .

Nevertheless, according to the trial court, most of the statements by LM that CB complained of were not First Amendment protected because, supposedly, they were not about matters of public interest. But the trial court's view that the First Amendment does not apply to speech about topics not of public interest is wrong. Moreover, LM 's statements were, in fact, about matters of public concern: he sought to use his personal experiences to illustrate, among other

things, his views about accountability, infidelity, morality and how to best repair relationships damaged by an affair.

A. Content Based Restrictions on Speech Are Subject to Strict Scrutiny

As the Supreme Court recently explained in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), because of the First Amendment

> a government … has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Content-based laws--those that target speech based on its communicative content--are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.
>
> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys.

Id. at 2226-27 (citations omitted).

In *Reed* a town code for signs distinguished between "Temporary Directional Signs," which gave directions to certain classes of events, and other signs, imposing restrictions on the directional signs not imposed on other signs. *Id.* at 2224-25. Although there was no suggestion that the code intentionally targeted any particular group or point of view, the Court held that "[t]he Town's Sign Code is content based on its face" because the rules "that apply to any given sign … depend entirely on the communicative content of the sign." *Id.* at 2227. It rejected

the Town's argument that "'content based' [speech]," as used in the Court's earlier decisions, "is a term of art that 'should be applied flexibly' with the goal of protecting 'viewpoints and ideas from government censorship or favoritism.'" *Id.* at 2229-30.

Instead, the Court held that, if a restriction on speech is content based, it is necessarily "subject to strict scrutiny." *Id.* at 2227. This is so "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 429, (1993)). Consequently, if a regulation of speech contains provisions that are content based, "those provisions can stand only if 'the Government … [can] prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.* at 2231 (quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011)) (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010))). The Supreme Court's precedents suggest that a statute subject to such strict scrutiny faces "almost certain legal condemnation." *Id.* at 2234 (Breyer, J., concurring in judgment). And, indeed, the *Reed* Court found that the town's sign code did not survive strict scrutiny and was unconstitutional. *Id.* at 2231-32.

B. The Content Based Restrictions Applied in this Case Do Not Survive Strict Scrutiny

Like the sign code in *Reed*, the statutory language that was the basis of the protective order against LM imposes content based speech restrictions—a violation occurs only if a person says something negative or hurtful to another. If LM had praised CB instead of criticizing him he would not have violated the stalking law. Consequently, the provisions of the statute applied to LM are constitutional only if they survive strict scrutiny.

"It is settled that the Constitution does not protect true threats." *Elonis v. United States*, 135 S. Ct. 2001 at 2016 (2015) (Alito, J. concurring in part and dissenting in part) (citing *Virginia v. Black*, 538 U. S. 343, 359-360 (2003); *R.A.V. v. St. Paul*, 505 U. S. 377, 388 (1992) and *Watts v. United States*, 394 U. S. 705, 707-708 (1969)). Consequently, there is likely no constitutional infirmity to the language in the statute that prohibits conduct that puts a person in "[f]ear for his or her safety or the safety of another person." D.C. Code § 22-3133(a) (1)(A), (a)(2)(A), (a)(3)(A). In this case, however, none of LM 's statements could reasonably have caused CB to fear for his safety and the trial court did not make any such finding.[9]

[9] Trial court's ruling was in the disjunctive—it found that LM made statements that he knew and should have known would reasonably cause CB "to be alarmed, annoyed, frightened ***or*** tormented." *See, e.g.* tr. 7-11-14 at 24; App. at 37

Even if the evidence were sufficient to support a finding that LM 's statements "alarmed," "disturbed" or "annoyed" CB , the government does not have a compelling interest in preventing speech that alarms, disturbs or annoys, at least when, as was the case here, that speech is not a threat and poses no danger of causing violence. Indeed, the Supreme Court has repeatedly emphasized that the First Amendment protects one person's right to offend another: "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V.*, 505 U.S. at 414; *see also Lewis*, 415 U.S. at 134 ("vulgar or offensive" speech protected by First Amendment); *Coates v. Cincinnati*, 402 U.S. 611, 611, 616 (1971) (statute criminalizing speech "annoying to persons passing by" facially unconstitutional); *Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[s]peech is often provocative and challenging," but is protected even if it causes "public inconvenience, annoyance, or unrest"); *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (even speech meant to "inflict great pain" may be constitutionally protected); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *see also People v. Marquan M.*, 19 N.E.3d 480, 487 (N.Y. 2014) ("the First Amendment protects annoying and embarrassing speech"); *Gray v.*

(emphasis added). While the trial court may have believed that these statements caused CB to be "annoyed" or, perhaps, "alarmed" or "tormented," nothing LM said would have made a reasonable person fear for his safety.

Sobin, No. 2013 CPO 3690, 2014 D.C. Super. LEXIS 1, at *24 (D.C. Super. Feb. 14, 2014) (Edelman, J.) ("the *First Amendment* protects even offensive and inflammatory speech," rejecting claim for protective order under stalking statute).

The government simply lacks the power to ban truthful speech because it causes hurt feelings. Moreover, in the First Amendment context, "criminal statutes must be scrutinized with particular care,'" *Houston v. Hill*, 482 U.S. 451, 459 (1987) (citation omitted), "because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Lewis*, 415 U.S. at 134.

C. LM 's Speech was Protected Even if It Was Not About Matters of Public Interest

Contrary to the trial court's view, strict scrutiny is applied to content-based restrictions regardless of the subject matter the challenged speech. While it may be that "'speech on 'matters of public concern' … is 'at the heart of the First Amendment's protection,'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-60 (1985) (plurality opinion), the trial judge's determination that private speech is not protected is wrong.[10]

[10] The *Dun & Bradstreet* plurality did not hold that private speech was unprotected, but that, in a defamation case involving a private company providing false information about another private company on a matter not of general public

Although, "the First Amendment has permitted restrictions upon the content of speech in a few limited areas … [of] historic and traditional categories" that include certain "well-defined and narrowly limited classes of speech," "including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct," these categories of restrictable speech cannot be added to merely because a government thinks it would be good public policy to do so.[11] *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (citations and quotations omitted). In *Stevens* the Court rejected the government's argument that "[w]hether a given category of speech enjoys *First Amendment* protection depends upon a categorical balancing of the value of the speech against its societal costs" and that, consequently, "depictions of animal cruelty" should be added to the list of supposedly unprotected categories of speech and "regulated as *unprotected*

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concern, the plaintiff did not have to prove that the false statements were made with "'actual malice,' that is, knowledge of falsity or reckless disregard for the truth" as the Court had required of defamation plaintiffs in cases involving public figures and on matters of public concern in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. 472 U.S. at 761-63.

[11] Although it is sometimes said that "the 'protection of the First Amendment does not extend'" to certain types of speech, such as pornography or defamation, this is not "literally true." *R.A.V.*, 505 U.S. at 384. What such statements "mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) -- not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content." *Id.* at 384-85. For example, a city council could not "enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government." *Id.* at 384.

speech" because such depictions "necessarily 'lack expressive value.'" *Id.* at 445-46. The Court labeled the government's argument in favor of such a balancing test as "startling and dangerous," emphasizing that legislators do not have "freewheeling authority to declare new categories of speech" to be subject to regulation. *Id.* at 444-46.

Speech about private matters is not among those "well-defined and narrowly limited classes of speech" whose contents may be regulated.[12] Indeed, those courts which have addressed the issue have found speech on private subjects to be protected. In *Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3d Cir. 2004), for example, "[t]he District Court entered summary judgment against the [plaintiffs] … on the ground that… the speech in question related to private matters, rather than matters of public concern, and, therefore, was unprotected by the First Amendment." *Id.* at 282. The Third Circuit reversed, explaining that "except for certain narrow categories deemed unworthy of full First Amendment protection … all speech is protected by the First Amendment. ***That protection includes private expression not related to matters of public concern."*** *Id.* at 282-83 (emphasis added) ((citing *R.A.V.*, 505 U.S. at 382-90; *Capitol Square Review & Advisory Bd.*

[12] CB argued that LM 's speech was unprotected because it was defamatory. The trial court did not accept this reasoning, which is clearly wrong— LM 's statements were true and true statements cannot be defamatory. *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005) (defamation plaintiff must "prove" that "defendant made a false … statement concerning the plaintiff").

v. Pinette, 515 U.S. 753, 760 (1995); *Connick*, 461 U.S. at 147 and *United Mine Workers of Am. Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 223 (1967)). "[W]hile speech on topics of public concern may stand on the 'highest rung' on the ladder of the First Amendment, private speech (unless obscene or fighting words or the like) is still protected on the First Amendment ladder." *Id.* at 284. Similarly, in *Klen v. City of Loveland*, 661 F.3d 498 (10th Cir. 2011), the Tenth Circuit rejected the argument of defendant government officials that they were "entitled to qualified immunity, because 'it was not clearly established in 2004-2005 that speech … addressing a private matter is protected by the First Amendment" because, the court held, this aspect of constitutional law had indeed been "clearly established" by that time. *Id.* at 511. The Seventh Circuit reached the same conclusion in *Bridges v. Gilbert*, 557 F.3d 541 (7th Cir. 2009), reversing the dismissal of a prisoner's First Amendment action on grounds that the speech at issue was not on a "a matter of public issue or concern" because "a prisoner's speech can be protected even when it does not involve a matter of public concern." *Id.* at 546, 551.

D. LM 's Statements Were About Matters of Public Interest

In any event, the trial court's view that most of LM 's statements were on matters of purely private interest is wrong. "[S]peech is 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 general interest and of value and concern to the public. A statement's arguably inappropriate or controversial character is irrelevant to the question whether it deals with a matter of public concern." *Snyder*, 131 S. Ct. at 1216 (citations, quotations and ellipsis omitted).

LM discussed adultery—an extramarital sexual relationship by a married person. Adultery was a crime in the District of Columbia until 2004, *see* D.C. Law 15-154, § 3(b), 50 D.C.R. 10996 (Apr. 29, 2004) (repealing crime of adultery) and it still is in other jurisdictions. *See, e.g.,* Va. Code § 18.2-365 ("[a]ny person, being married, who voluntarily shall have sexual intercourse with any person not his or her spouse" is guilty of misdemeanor of adultery). Consequently, adultery is not a topic of purely private interest. And LM cannot be required to speak only of adultery in general, and not of specific instances of adultery. *See Snyder*, 131 S. Ct. at 1217 (while some of demonstrators' signs may have contained purely personal messages, "that would not change the fact that the overall thrust and dominant theme of [the] demonstration spoke to broader public issues"); *c.f. Ostergren v. Cuccinelli*, 615 F.3d 263, 272 n.8 (4th Cir. 2010) (website could not be compelled to redact private individuals' social security numbers, their publication illustrated argument that state did not sufficiently protect such numbers).

Moreover, LM 's discussion of public issues goes well beyond adultery—a fair reading of the statements introduced at trial indicates that he was focusing not merely on a specific relationship, but on the morality of sexual affairs, the damage they can cause to relationships and how best to repair such relationships. These are topics of public interest and concern.

III. THE PROTECTIVE ORDER SHOULD BE VACATED AGAINST LM 'S WIFE

The trial court lacked the power to issue a protective order that applied to LM 's wife and its decision to do so should be reversed.

The trial court never clearly explained its *sua sponte* decision to include language in the protective order that purported to bind LM 's wife, KW , who was not a party and who was not alleged to or found to have violated any law. It is, however, clear that the court lacked the authority to do so because "[a] court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions," *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 (2011), none of which apply here. *See also Taylor v. Sturgell*, 553 U.S. 880, 893 (2008) (discussing limited circumstances when judgment may bind non-party); *accord Franco v. District of Columbia*, 3 A.3d 300, 304 (D.C. 2010). "In general, a party to litigation is one by or against whom a lawsuit is brought, or one who becomes a

party by intervention, substitution, or third-party practice." *Smith*, 131 S. Ct. at 2379 (alterations, quotations and citations omitted).

Furthermore, under the facts of this case LM has standing to seek relief which will also benefit KW . The trial court appears to have believed that its jurisdiction to issue an order binding KW was derivative of its jurisdiction over LM and LM contemporaneously objected to the court's unexpected inclusion of KW . Moreover, as a practical matter, it is not clear that KW can herself appeal a decision in a case in which she was not a party. *See, e.g., Marino v. Ortiz*, 484 U.S. 301, 304 (1988) ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled."); *In re Orshansky*, 804 A.2d 1077, 1090 (D.C. 2002) (the "general rule [is] that one must have been a party to the trial court proceeding in order to appeal the trial court's ruling").

CONCLUSION

For the foregoing reasons, this court should vacate the protective order entered by the trial court, including the requirement that LM pay compensation to CB .

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Respectfully submitted,

/s/Matthew B. Kaplan
Matthew B. Kaplan
D.C. Bar No. 484760
The Kaplan Law Firm
509 N. Jefferson St.
Arlington, VA 22205
Telephone: (703) 665-9529
Fax: (888) 958-1366
Email: mbkaplan@thekaplanlawfirm.com
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below the foregoing (including any appendix or other accompanying documents) was served on all parties by mailing copies thereof, first class postage prepaid, to the following:

Governor E. Jackson, III
Law Office of Governor Jackson III LLC
1420 N. Capitol Street, NW
3rd Floor
Washington, DC 20002
Counsel for Appellee

Todd Kim
Solicitor General
Office of the Attorney General
One Judiciary Square
441 4th Street, N.W.
Suite 600 South
Washington, D.C. 20001

/s/Matthew B. Kaplan
Matthew B. Kaplan

Date: July 25, 2015