

STATE OF MICHIGAN
IN THE COURT OF APPEALS

In re Milan Kapp, a Protected Individual,

Court of Appeals Case No.

Oakland County Probate Court Civil
Action Nos. 2016-373277-CA,
2016-373276-GA

AND

Hon. Daniel A. O'Brien

In re Janet Kapp, a Protected Individual

Oakland County Probate Court Civil
Action Nos. 2009-326971-GA,
2016-373275-CA

**EMERGENCY APPLICATION
FOR LEAVE TO APPEAL**

**ACTION NEEDED BEFORE
OCTOBER 30, 2017 TRIAL**

James E. Stewart, (P23254)
Leonard M. Niehoff, (P36695)
Andrew M. Pauwels, (P79167)
Honigman Miller Schwartz and Cohn LLP
315 East Eisenhower Parkway
Suite 100
Ann Arbor, MI 48108-3330
(734) 418-4256
*Attorneys for Scripps Media, Inc. d/b/a WXYZ-
TV and Heather Catallo*

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

EMERGENCY APPLICATION FOR LEAVE TO APPEAL..... 1

STATEMENT OF JURISDICTION.....3

STATEMENT OF ORDER APPEALED.....4

STATEMENT REGARDING TRANSCRIPT.....6

STATEMENT OF QUESTION PRESENTED7

STATEMENT OF HARM IF REQUIRED TO AWAIT FINAL JUDGMENT.....8

I. ALLEGATIONS OF ERROR AND RELIEF SOUGHT.....9

II. STATEMENT OF FACTS11

III. STANDARD OF REVIEW14

IV. ARGUMENT14

V. REQUEST FOR RELIEF18

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bartnicki v Vopper</i> , 532 US 514; 121 S Ct 1753; 149 L Ed 2d 787 (2001).....	17
<i>Elrod v Burns</i> , 427 US 347; 96 S Ct 2673; 49 L Ed 2d 547 (1976).....	8, 18
<i>Near v Minnesota</i> , 283 US 697; 51 S Ct 625; 75 L Ed 1357 (1931).....	9, 14
<i>Nebraska Press Ass’n v Stuart</i> , 427 US 539; 96 S Ct 2791; 49 L Ed 2d 683 (1976).....	9, 14, 18
<i>NY Times v Sullivan</i> , 403 US 713; 91 S Ct 2140; 29 L Ed 2d 822 (1971).....	9, 10, 15, 16
<i>Organization for Better Austin v Keefe</i> , 402 US 415; 91 S Ct 1575; 29 L Ed 2d 1 (1971).....	15
<i>People v Custer</i> , 465 Mich 319; 630 NW2d 870 (2001).....	14
<i>People v Sledge</i> , 312 Mich App 516; 879 NW2d 884 (2015).....	10, 16, 17
<i>Procter & Gamble Co v Bankers Trust Co</i> , 78 F3d 219 (CA6, 1996)	10
<i>Reno v American Civil Liberties Union</i> , 521 U S 844; 117 S Ct 2329; 138 L Ed 2d 874 (1997).....	15
<i>Sable Communications of Cal, Inc v FCC</i> , 492 US 115; 109 S Ct 2829; 106 L Ed 2d 93 (1989).....	15
OTHER AUTHORITIES	
MCR 5.801(B)	3
MCR 7.205.....	3, 6

EMERGENCY APPLICATION FOR LEAVE TO APPEAL

October 12, 2017, WXYZ and Ms. Catallo received notice that the Probate Court had issued an *Ex-Parte* Temporary Restraining Order ordering that WXYZ and Ms. Catallo:

are immediately enjoined and restrained, directly or indirectly, whether alone or in concert with others, including any officer, agent, servant, employee, or attorney, from displaying photographs and/or videos of either Janet Kapp and/or Milan Kapp during their projected broadcast scheduled for October 12, 2017 at 11:00 p.m.

Ex Parte Temporary Restraining Order at 2. The order further compelled “All parties and counsel . . . to appear at a hearing scheduled for October 17, 2017 at 10:00 a.m. to show cause as to why they should not be held in contempt of court for violating this Court’s November 23, 2016 Visitation Order.” *Id.*

To avoid further unwarranted sanction, and to respect the Court’s Order despite its presumptive unconstitutionality, WXYZ pulled promotional materials for the news report and broadcast a version of the news report that did not include images of either Janet Kapp or Milan Kapp. On Monday, October 16, 2017, WXYZ and Ms. Catallo submitted a Response to the Court’s Ex Parte Temporary Restraining Order and Order to Show Cause, requesting that the *Ex Parte* Temporary Restraining Order be dissolved. Appellants pointed out to the Probate Court, as they do here, that the Order was a plainly unconstitutional prior restraint.

On October 17, 2017, the Probate Court held a hearing on the issue of whether the *Ex Parte* Temporary Restraining Order should be converted into a Preliminary Injunction and continued indefinitely. Following oral argument, the Probate Court acknowledged the First Amendment prohibition against prior restraints but determined that “common sense” dictates that some exceptions to the rule must exist. Based on the argument of counsel, the Probate Court determined that Janet and Milan Kapp made “absolutely clear” that they did not want their pictures in the media. The Probate Court ruled that safeguarding the mental and emotional health of cognitively

compromised individuals constituted a compelling government interest sufficient to overcome the First Amendment's prohibition. Accordingly, the Probate Court converted its TRO into a Preliminary Injunction and ordered that WXYZ and Ms. Catallo be enjoined from airing any videos or photographs of Janet and Milan Kapp in any broadcast. In so ruling, the Probate Court acknowledged that the order constituted "a prior restraint." This prior restraint on speech clearly violates established First Amendment precedent and should be reversed and dissolved immediately.

STATEMENT OF JURISDICTION

Appellants file this Application for leave to Appeal in accordance with MCR 7.205. This Court has jurisdiction to grant leave to appeal pursuant to MCR 5.801(B), which states that “All orders of the probate court not listed in subrule (A) are appealable to the Court of Appeals by leave of that court.”

STATEMENT OF ORDER APPEALED

The Probate Court ruled on the record on October 17, 2017, entering the prior restraint in the form of a preliminary injunction enjoining WXYZ and Ms. Catallo from showing any video or photograph of Janet and Milan Kapp in any broadcast but did not issue a written order at that time. On the following day, the Probate Court through its clerk directed counsel for appellants to file a written order. Counsel for Appellants attempted to submit an order with the stipulation as to form by all parties pursuant to MCR 2.602(B)(2). Counsel for Lorrie and Sandy Kapp, the movants below, and counsel for Janet and Milan Kapp, the persons whose alleged privacy interests are at issue here, agreed to the entry of the order. However, counsel did not receive a timely response from the remaining parties and, given the exigencies, Appellants submitted an order, attached hereto as **Exhibit 1**, under the 7 day rule. *See* MCR 2.602(B)(3). Given the exigencies involved in this Emergency Application for Leave to Appeal, WXYZ and Ms. Catallo submit this Application without a written order. Counsel expects that the remaining parties will not object to the order and that the order can be filed promptly. There is no dispute that the Court entered an order on the record as described herein, continuing its temporary restraining order and enjoining WXYZ and Ms. Catallo from displaying photographs and video of Milan and Janet Kapp. WXYZ and Ms. Catallo will supplement the record and submit a written order as soon as one is entered by the Court, but respectfully request that this Court rule without a written order.

Appellants WXYZ and Ms. Catallo are non-parties to the underlying dispute and have only been involved for the purposes of responding to the *Ex Parte* Restraining Order and Order to Show Cause. It is Appellants understanding that there are four cases that, though not formally consolidated, are handled as consolidated cases. The case numbers are as follows: 2016-373277-CA; 2016-373276-GA; 2009-326971-GA; and 2016-373275-CA. At the hearing on October 17, 2017, the Probate Court called all four case numbers for oral argument and issued a single order

on the record enjoining WXYZ and Ms. Catallo. Appellants respectfully seek the immediate reversal and vacation of the order in each related and/or consolidated case. Appellants, in an abundance of caution, have filed separate appeals regarding each underlying case number.

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STATEMENT REGARDING TRANSCRIPT

In compliance with MCR 7.205(B)(4)(g), the undersigned counsel certifies that the transcript of the October 17, 2017 hearing was ordered on October 18, 2017, and a request was made that the transcript be expedited as quickly as possible.

STATEMENT OF QUESTION PRESENTED

Did the Probate Court’s preliminary injunction prohibiting WXYZ and Ms. Catallo from displaying any photographs or videos of Milan and Janet Kapp constitute a prior restraint of speech in violation of the First Amendment where it fails strict scrutiny because it is not based on a compelling government interest and, even if it were, it is not narrowly tailored to serve such an interest?

Appellants answer: Yes

Appellees Lorrie Kapp and Sandy Kapp would answer: No

The Probate Court would answer: No

STATEMENT OF HARM IF REQUIRED TO AWAIT FINAL JUDGMENT

WXYZ and Ms. Catallo are non-parties to the underlying dispute, dragged into the Probate Court only to contest the unconstitutional prior restraint issued on the use of certain photographs and video in ongoing news coverage. The underlying dispute proceeds toward resolution, including a trial on the merits on at least one claim on October 30, 2017, yet WXYZ and Ms. Catallo have no other opportunity to challenge the preliminary injunction before the conclusion of this matter. Accordingly, WXYZ and Ms. Catallo's First Amendment rights are being violated every day this restriction on speech continues. *See Elrod v Burns*, 427 US 347, 373; 96 S Ct 2673; 49 L Ed 2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

I. ALLEGATIONS OF ERROR AND RELIEF SOUGHT

Longstanding and controlling authority from the Supreme Court of the United States holds that prior restraints on speech bear a heavy presumption of unconstitutionality. The Court has repeatedly declared that such restraints—the very essence of what the First Amendment forbids—are unconstitutional except in the most extreme circumstances, where a compelling governmental interest is at stake, and where a prior restraint is the least restrictive means for protecting that interest. In this case, the Probate Court below issued what it candidly described as a “prior restraint” against speech against a nonparty television station which is reporting on matters of intense public concern. It did so, even though this is *not* such an extreme case, there is *no* compelling governmental interest supporting such an order, and the Probate Court had numerous *other means* to address its concerns. The Supreme Court has held that such unconstitutional prior restraints cause ongoing and irreparable harm to those who wish to exercise the rights the First Amendment affords them. The Probate Court’s prior restraint should therefore be vacated swiftly and immediately.

The United States Supreme Court, in 1931, articulated what has become a bedrock principle of First Amendment jurisprudence: “It has been generally, *if not universally*, considered that it is the chief purpose of the guaranty [of the freedom of the press] to prevent previous restraints upon publication.” *Near v Minnesota*, 283 US 697, 713; 51 S Ct 625; 75 L Ed 1357 (1931) (emphasis added). As such, prior restraints “are the most serious and least tolerable infringement on First Amendment Rights and have been historically viewed as “presumptively unconstitutional.” *Nebraska Press Ass’n v Stuart*, 427 US 539, 559; 96 S Ct 2791; 49 L Ed 2d 683 (1976); *NY Times v Sullivan*, 403 US 713, 714; 91 S Ct 2140; 29 L Ed 2d 822 (1971). In fact, controlling United States Supreme Court cases suggest that such restraints are subject to strict scrutiny and only permissible in the most extreme of circumstances, such as disclosing secret troop

movements during wartime. *See NY Times*, 403 US at 714 (refusing to enjoin publication of a classified study of United States involvement in the Vietnam War and holding that, despite ongoing war effort, the government failed to carry the “heavy burden of showing justification for the imposition of such a restraint”); *see also People v Sledge*, 312 Mich App 516, 530-531; 879 NW2d 884 (2015) (applying strict scrutiny standard to strike down gag order and emphasizing presumptive unconstitutionality of prior restraints on speech).

Despite being presented with this overwhelming controlling authority, the Probate Court in this matter—an emotionally charged familial dispute involving the guardianship and conservatorship of Milan and Janet Kapp that sheds light into the significant issues involving the adult guardianship process in the State of Michigan—issued an *Ex Parte* Temporary Restraining Order and then a preliminary injunction prohibiting Scripps Median, Inc. d/b/a WXYZ-TV (“WXYZ”) and Heather Catallo (“Ms. Catallo”) from showing *any* videos or photos of Milan and Janet Kapp in *any broadcast*.

In attempting to justify this prior restraint, the Probate Court cited as a “compelling state interest” the protection of the mental and emotional health of cognitively compromised individuals. Appellants are certainly sympathetic with the desire to protect elderly people who are vulnerable to victimization; indeed (and ironically), that was the subject matter of the broadcast in question here. But that interest is simply not of the type or magnitude that courts have held justifies the extreme and presumptively unconstitutional measure of a prior restraint. As the Sixth Circuit has held, “a publication must threaten an interest *more fundamental than the First Amendment itself*” to justify the issuance of a prior restraint. *Procter & Gamble Co v Bankers Trust Co*, 78 F3d 219, 227 (CA6, 1996) (emphasis added). The Probate Court erred in finding that such an

interest was present in this case, an interfamilial dispute involving the sort of allegations and counter-allegations that are, unfortunately, the everyday stuff of probate courts.

Furthermore, even if the interest identified by the Probate Court qualified as the sort of extreme and compelling one that justifies a prior restraint (which it does not), the court below made no effort to narrowly tailor its order to address its concerns. Every day across the country, probate courts enter orders intended to protect compromised individuals from victimization or exploitation by family members and others. They manage to do so without issuing broadly framed and presumptively unconstitutional gag orders against the media.

A single statement at the conclusion of the Probate Court's oral opinion on the record says it all. Describing the preliminary injunction, the lower court stated: "it is a prior restraint." The Probate Court admitted that the preliminary injunction constituted a presumptively unconstitutional order, and yet issued the order regardless. The issue before this Court is simple: should this prior restraint of speech be permitted to stand despite clear and overwhelming binding precedent holding that such prior restraints are unconstitutional? The Probate Court's order plainly violates the First Amendment, and it should be immediately reversed and vacated to permit continued, unrestricted media coverage of this ongoing litigation.

II. STATEMENT OF FACTS

For an extended period, WXYZ and Ms. Catallo have been reporting on issues related to probate court proceedings in Michigan. These reports have focused on matters of substantial public interest, such as the potential for abuse of the conservatorship and guardianship system. The news report in question addressed this subject.¹

¹ See generally Heather Catallo, *Metro Detroit woman says probate guardianship case is tearing family apart*, WXYZ.com, <http://www.wxyz.com/news/local-news/investigations/metro-detroit-woman-says-probate-guardianship-case-is-tearing-family-apart> (last updated Oct 12, 2017, 11:28

The case before the Probate Court that is at issue here was described by Lorrie and Sandy Kapp in their *Ex-Parte* Motion for Temporary Restraining Order below as a “contentious dispute” between family members that involves conservatorships and guardianships for Janet and Milan Kapp. Although Lorrie and Sandy declined to speak with Ms. Catallo, she did interview another of the daughters, Mila Kapusta, to help frame the issues. In the morning of October 12, 2017, WXYZ then promoted the report by posting a short summary of it and brief clips from news broadcast it planned for the 11:00 p.m. news that day. The clips include old family photographs of Janet and Milan Kapp when they were in good health, which family members provided to Ms. Catallo. In short, Appellants planned to do nothing more than the completely benign act of showing harmless family photographs in the course of a report on a matter of significant public concern.

In the late afternoon of that same day, October 12, 2017, WXYZ and Ms. Catallo received notice that the Probate Court had issued an *Ex-Parte* Temporary Restraining Order ordering that WXYZ and Ms. Catallo:

are immediately enjoined and restrained, directly or indirectly, whether alone or in concert with others, including any officer, agent, servant, employee, or attorney, from displaying photographs and/or videos of either Janet Kapp and/or Milan Kapp during their projected broadcast scheduled for October 12, 2017 at 11:00 p.m.

Exhibit 2, Ex Parte Temporary Restraining Order at 2. The order further compelled “All parties and counsel . . . to appear at a hearing scheduled for October 17, 2017 at 10:00 a.m. to show cause as to why they should not be held in contempt of court for violating this Court’s November 23, 2016 Visitation Order.” *Id.*

pm). Indeed this issue of guardianship proceedings involving aged citizens is subject of national concern. *See, e.g.,* Debra Cassens Weiss, *Cases raise questions about adult guardianship and lawyer-hospital relationships*, ABA JOURNAL (October 10, 2017), available at <http://www.abajournal.com/authors/4/>; Rachel Aviv, *How the Elderly Lose Their Rights*, THE NEW YORKER (October 9, 2017), available at <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>.

To avoid further unwarranted sanction, and to respect the Court's Order despite its presumptive unconstitutionality, WXYZ pulled promotional materials for the news report and broadcast a version of the news report that did not include images of either Janet Kapp or Milan Kapp. The story as it aired may be viewed at <http://www.wxyz.com/news/local-news/investigations/metro-detroit-woman-says-probate-guardianship-case-is-tearing-family-apart>. On Monday, October 16, 2017, WXYZ and Ms. Catallo submitted a Response to the Court's Ex Parte Temporary Restraining Order and Order to Show Cause, requesting that the *Ex Parte* Temporary Restraining Order be dissolved. Appellants pointed out to the Probate Court, as they do here, that the Order was a plainly unconstitutional prior restraint.

On October 17, 2017, the Probate Court held a hearing on the issue of whether the *Ex Parte* Temporary Restraining Order should be converted into a Preliminary Injunction and continued indefinitely. Following oral argument, the Probate Court acknowledged the First Amendment prohibition against prior restraints but determined that "common sense" dictates that some exceptions to the rule must exist. Based on the argument of counsel, the Probate Court determined that Janet and Milan Kapp made "absolutely clear" that they did not want their pictures in the media. The Probate Court ruled that safeguarding the mental and emotional health of cognitively compromised individuals constituted a compelling government interest sufficient to overcome the First Amendment's prohibition. Accordingly, the Probate Court converted its TRO into a Preliminary Injunction and ordered that WXYZ and Ms. Catallo be enjoined from airing any videos or photographs of Janet and Milan Kapp in any broadcast.² In so ruling, the Probate Court

² As stated in the Statement of Order Appealed, Appellants WXYZ and Ms. Catallo are non-parties to the underlying dispute and have only been involved for the purposes of responding to the *Ex Parte* Restraining Order and Order to Show Cause. It is Appellants understanding that there are four cases that, though not formally consolidated, are handled as consolidated cases. The case numbers are as follows: 2016-373277-CA; 2016-373276-GA; 2009-326971-GA; and 2016-

acknowledged that the order constituted “a prior restraint.” This prior restraint on speech clearly violates established First Amendment precedent and should be reversed and dissolved immediately.

III. STANDARD OF REVIEW

The Court reviews de novo the trial court’s application of constitutional standards. *See People v Custer*, 465 Mich 319, 325-326; 630 NW2d 870 (2001).

IV. ARGUMENT

Peremptory reversal is warranted here because the Probate Court clearly and inarguably violated one of the fundamental principles of First Amendment law: that a prior restraint on speech is presumptively unconstitutional and may only issue in an extremely narrow class of cases. The preliminary injunction issued here constitutes an unconstitutional restraint on speech that dictates to a citizen what it may or may not do in reporting on a matter of ongoing public concern. It should be reversed and vacated immediately.

In 1931, the United States Supreme Court clearly articulated what has come to be one of the fundamental principles of the First Amendment: “It has been generally, *if not universally*, considered that it is the chief purpose of the guaranty [of freedom of the press] to prevent previous restraints upon publication.” *Near v Minnesota*, 283 US 697, 713; 51 S Ct 625; 75 L Ed 1357 (1931) (emphasis added). Prior restraints “are the most serious and the least tolerable infringement on First Amendment rights,” and as such have been historically viewed as “presumptively unconstitutional.” *Nebraska Press Ass’n v Stuart*, 427 US 539, 559 (1976). “If it can be said that

373275-CA. At the hearing on October 17, 2017, the Probate Court called all four case numbers for oral argument and issued a single order on the record enjoining WXYZ and Ms. Catallo. Appellants respectfully seek the immediate reversal and vacation of the order in each related and/or consolidated case. In abundance of caution, WXYZ and Ms. Catallo have filed separate appeals in each dispute.

a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.” *Id.* Accordingly, a party seeking a prior restraint must overcome a “heavy presumption against its constitutional validity.” *Organization for Better Austin v Keefe*, 402 US 415, 419; 91 S Ct 1575; 29 L Ed 2d 1 (1971) (internal quotation marks omitted). To satisfy strict scrutiny, a restriction on speech must be narrowly tailored to serve a compelling state interest. *See Sable Communications of Cal, Inc v FCC*, 492 US 115, 126; 109 S Ct 2829; 106 L Ed 2d 93 (1989). If a less restrictive alternative exists, the alternative must be used and the restriction fails strict scrutiny. *See Reno v American Civil Liberties Union*, 521 U S 844, 874; 117 S Ct 2329; 138 L Ed 2d 874 (1997).

In fact, Supreme Court jurisprudence has “indicated that there is a **single, extremely** narrow class of cases in which the First Amendment’s ban on prior judicial restraint may be overridden.” *NY Times*, 403 US at 726 (Brennan, J. concurring). As articulated in *NY Times*, a case considering a prior restraint on the publication of the “Pentagon Papers,” a classified study of the Vietnam war, “Such cases may arise **only when the Nation is at war**, during which times no one would question but that a government might prevent **actual obstruction to its recruiting service** or the publication of **the sailing dates of transports or the number and location of troops**. *Id.* (emphasis added) (internal quotations and citations omitted). “Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of **an event kindred to imperiling the safety of a transport already at sea** can support even the issuance of an interim restraining order.” *Id.* at 726-727. Applying these principles, the Supreme Court in *NY Times* held that the publication of these classified documents, even in a time of war, did not arise to the level necessary to justify the extraordinary remedy of a prior restraint.

A panel of this Court recently reaffirmed these principles in *People v Sledge*, 312 Mich App 516; 879 NW2d 884 (2015). There, this Court struck down a gag order, on parties to a criminal case challenged by the Detroit Free Press, a non-party to the underlying dispute. The trial court justified the gag order on an assertion that press coverage would interfere with a criminal defendant’s right to a fair trial, as protected by the Sixth Amendment. Even in the face of potentially competing constitutional principles, this Court determined that the gag order constituted a prior restraint and in strong terms emphasized the heightened burden that must be satisfied to justify a prior restraint and struck down the gag order as unconstitutional. This Court stated that “a prior restraint on speech is subject to the closest scrutiny, and there is a heavy presumption that a prior restraint on speech is unconstitutional” and that “prior restraints constitute the most serious and the least tolerable of First Amendment rights.” *Id.* at 528.

The Probate Court’s preliminary injunction fails both aspects of strict scrutiny. Most obviously, the interests at issue here—while not unimportant—do not rise to the level of the kind of interests identified in *NY Times* and elsewhere as sufficient to justify the issuance of a prior restraint. The Probate Court described this interest as one in safeguarding the mental and emotional health of Janet and Milan Kapp. In a series of rulings that quickly devolved into the wildest kind of speculation, the Court found that Janet and Milan Kapp³ had expressed to their attorney that they do not wish to have their pictures in the media, that the fact that their daughters had started this underlying case upset them as did the fact that the litigation was being reported on by the media. The Court then literally jumped to the speculative conclusion that such emotional stress could lead to negative physical health effects and even death. Appellants obviously care

³ It bears emphasizing that Janet and Milan Kapp are legally incapacitated and did not testify at the hearing as to their wishes or otherwise.

about the well-being of the Kapps—indeed, whether the guardianship / conservatorship system was doing anything good for their well-being was the focus of the broadcast. But to “find” that the showing a benign old family photograph of the Kapps in good health might kill them is to lose all track of the “common sense” that the Probate Court said informed its decision.

Further, even if the Probate Court is correct that the protection of Milan and Janet Kapp’s emotional and mental health constitutes a compelling interest sufficient to justify a prior restraint—it does not—the Probate Court’s order fails strict scrutiny because it is not narrowly tailored. A law is not narrowly tailored if there are less speech-restrictive means available that would serve the compelling interest. Here, the Probate Court failed to consider on the record *any* alternatives to the broad, prior restraint it issued. But such alternatives are readily apparent. Most notably, the Probate Court could restrict the parties—as it has already done—from actively making or taking photographs or video recordings of Janet and Milan Kapp without their consent, and the Probate Court could enforce such an order with the contempt power.⁴ In fact, not only is the order not narrowly tailored but it is incredibly broad: it prohibits the display of any photograph or video of the Kapps ever taken. Such a broad order clearly fails the narrow tailoring requirement of strict scrutiny.

In a case that did not involve an unconstitutional prior restraint, it might be appropriate for this court to remand this case to allow the Probate Court to flesh out its findings. In this case, however, summary reversal is required for several reasons: First, it is clear as a matter of law that

⁴Whether such a gag order on the parties would survive scrutiny under *People v. Sledge*, is far from clear and beyond the scope of this brief. In any event, such an order could not be used to restrict WXYZ or Ms. Catallo from publishing photographs, even if obtained from a third party who violated the order. See *Bartnicki v Vopper*, 532 US 514, 535; 121 S Ct 1753; 149 L Ed 2d 787 (2001) (holding that if a media entity obtains material from a third party who had obtained that material through some illegal method, the First Amendment nevertheless protects the media publication of that material).

the Probate Court has not and cannot articulate a compelling interest that rises to the level the Supreme Court has identified as necessary to justify a prior restraint. Second, it is clear as a matter of law that less restrictive means exist to protect the Kapps than issuing a gag order against the media.⁵ And, finally, it is clear as a matter of law that prior restraints result in immediate and irreparable harm to the First Amendment rights of those who are gagged by them and that allowing them to stand for any sustained period is a grave constitutional offense. *See Elrod v Burns*, 427 US 347, 373; 96 S Ct 2673; 49 L Ed 2d 547 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

V. REQUEST FOR RELIEF

WHEREFORE, WXYZ and Ms. Catallo respectfully request that the Court immediately:

- (a) Grant their Emergency Application for Leave to Appeal;
- (b) Grant their Motion for Immediate Consideration;
- (c) Grant their Emergency Motion for Peremptory Reversal of and to Vacate the

Unconstitutional Prior Restraint on Speech and order that the preliminary injunction be dissolved; and

- (d) Award such other relief as the Court deems proper and just.

⁵ Indeed the Supreme Court has also emphasized the danger of judges deciding what a news organization may publish or not publish. “[T]he press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges.” *Nebraska Press Ass’n v Stuart*, 427 US 539, 613 (1976) (Brennan, J., concurring)

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP
Attorneys for Scripps Media, Inc. d/b/a WXYZ-TV and
Heather Catallo

By: /s/ James E. Stewart
James E. Stewart, (P23254)
Leonard M. Niehoff, (P36695)
Andrew M. Pauwels, (P79167)
315 East Eisenhower Parkway
Suite 100
Ann Arbor, MI 48108-3330
(734) 418-4256

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